

CONSULTATION

The Blacklisting of Trade
Unionists: Consultation on
Revised Draft Regulations

JULY 2009

THE BLACKLISTING OF TRADE UNIONISTS : CONSULTATION ON
REVISED DRAFT REGULATIONS

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Foreword



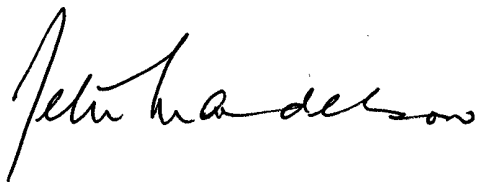
Trade unions remain one of the main voluntary organisations in this country. By becoming actively involved in union affairs, many thousands of individuals regularly help their fellow employees and they can contribute to the success of the organisations which employ them.

It is a matter of principle for the Government that individuals who step forward into these responsible, and sometimes difficult, roles should not be punished or victimised as a result. The blacklisting of trade unionists is a pernicious activity which should have no place in a modern system of employment relations. It is a covert activity, and its aim is to encourage employers systemically to discriminate against trade union members and activists.

Earlier this year, the Information Commissioner uncovered disturbing, but compelling, new evidence that such blacklisting was occurring in parts of the construction industry. In response, the Government is acting quickly to ensure that this unacceptable activity never re-appears again.

This consultation document presents regulations which prohibit the compilation, dissemination and use of trade union blacklists. It is informed by an earlier consultation we undertook in 2003. We intend to introduce these regulations, amended in the light of the comments we receive, at the earliest opportunity.

The regulations have been carefully drafted. They would permit employers and others to vet potential recruits on the legitimate grounds of, say, security or competence, whilst rooting out the totally unacceptable practice of blacklisting.



Lord Mandelson, Secretary of State for Business, Innovation and Skills

EXECUTIVE SUMMARY

1. The Government believes that trade unions, and those who belong to them and participate in their activities, play a legitimate role in any democratic society. It believes that the blacklisting of trade unionists should have no place in the conduct of employment relations in this country. In light of the activities undertaken by The Consulting Association, the Government proposes to implement regulations outlawing the compilation, dissemination and use of trade union blacklists¹ at the earliest opportunity. Draft regulations are enclosed at Annex 1, and a consultation-stage Impact Assessment examining them is provided at Annex 2.

2. The main effects of the draft regulations are as follows :

- to define a blacklist of trade unionists and to prohibit the compilation, dissemination and use of such blacklists ;
- to make it unlawful for organisations to refuse employment, to dismiss an employee or otherwise cause detriment to a worker for a reason related to a blacklist ;
- to make it unlawful for an employment agency to refuse a service to a worker for a reason related to a blacklist ;
- to provide for the employment tribunal to hear complaints about alleged breaches and award remedies based on existing trade union law ; and
- as an alternative, to provide for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a prohibited blacklisting activity.

3. The regulations will apply in Great Britain only. They are particularly relevant to organisations which use trade union information or which draw up lists identifying individuals as trade union members. In most cases, such listing will occur in organisations which recognise trade unions for collective bargaining purposes or which work in those parts of the economy where trade union membership is strong. Other organisations such as the providers of postal services and information technology, whose services may be used to distribute or access unlawful lists, or the providers of vetting services, should also have a particular interest in these regulations. As this consultation concerns the law, legal organisations may also have a particular interest.

How to respond

4. This consultation begins on 7 July 2009. Responses should be received by 18 August 2009. Departmental Ministers have agreed to a reduced consultation period on this occasion for the reasons explained below.

¹ The term “blacklist” is found in legislation, and is commonly used in this context.

5. When the Government consulted on an earlier set of draft regulations in 2003, a full 12 week consultation took place. The revised draft regulations, which are the subject of this consultation, build on the 2003 version. In some regulations, the wording is identical. Because nearly six years have passed since the first consultation and because new facts about the nature of potential blacklisting have since come to light, the Government considers it prudent to open a further round of consultation. Given the pressing nature of the issue and the Government's stated intention in 2003 to act quickly, should evidence of blacklisting arise, the Government believes in this instance that a shorter consultation period is fully justified. This will then enable the Government to assess responses, and amend the regulations accordingly, in time for them to be submitted to Parliament for adoption soon after the summer recess.

6. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

7. A copy of the Consultation Response Form is enclosed at Annex 3 or can be downloaded at www.berr.gov.uk/files/file52141.doc.

8. A response can be submitted by letter, fax or email to:

Bernard Carter
Labour Law and Dispute Resolution Branch
Employment Relations Directorate
Department for Business, Innovation and Skills.
1 Victoria Street
London SW1H 0ET

Fax: 020 7215 6414

Email blacklisting.response@bis.gsi.gov.uk

9. A list of those organisations and individuals to whom we have sent this consultation document is at Annex 4. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

10. You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845 015 0010
Fax: 0845 015 0020

Minicom: 0845 015 0030

www.berr.gov.uk/publications

An electronic version of the consultation document, including the Consultation Response Form, can be found at www.berr.gov.uk/files/file51729.pdf.

Confidentiality & Data Protection

11. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

12 In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department

Help with queries

13 Questions about the policy issues raised in the document can be addressed to:

Bernard Carter
Labour Law and Dispute Resolution Branch
Employment Relations Directorate
Department for Business, Innovation and Skills
Bay 462
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 2760

Email: Bernard.Carter@bis.gsi.gov.uk

14. If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Tunde Idowu, Consultation Co-ordinator
Department for Business, Innovation and Skills
Better Regulation Team
1 Victoria Street
London SW1H 0ET

E-mail: Babatunde.idowu@bis.gsi.gov.uk
Tel: 020 7215 0412
Fax: 020 7215 0235

A copy of the Code of Practice on Consultation is at [Annex 5](#).

Consultation Questions

Question 1 We propose that, in light of the activities undertaken by The Consulting Association, suitably drafted regulations under Section 3 of the Employment Relations Act 1999 should now be implemented ? Do you agree with this approach ?

Question 2 Do you have other evidence of trade union blacklisting ?

Question 3 Do the regulations adequately cover all the possible ways, including use of the internet and other electronic media, whereby blacklisting could be undertaken ? If not, how could they be improved ?

Question 4 Do the regulations adequately deal with blacklists maintained and hosted abroad ? If not, how should they be revised ?

Question 5 Do you support the way the regulations clarify the meaning of a prohibited list ? If not, how should a prohibited list be defined ?

Question 6 Do you support the drafting of the exemptions and should others be created ? Where applicable, please explain why you consider the drafting to be defective.

Question 7 Do you support the Government's view that enforcement should take place via the civil law ? If not, what approach would you favour ?

Question 8 Do you agree with the approach taken by the regulations regarding the burden of proof ? If not, what approach would you favour ?

Question 9 Do you agree with the approach taken in the regulations regarding the time limits for making applications to the employment tribunal ? If not, what approach would you favour ?

Question 10 Do you agree with the approach taken by regulations regarding remedies ? If not, what approach would you favour ?

Question 11 Do you have any other views on the way the regulations have been drafted ? Please submit any drafting suggestions if you have them.

Question 12 Do you have any comments on the Impact Assessment at Annex 2 ?

CHAPTER 1 – BACKGROUND

The Employment Relations Act 1999

1.1. Section 3 of the Employment Relations Act 1999 (the "1999 Act") provides a power for the Secretary of State to introduce regulations to outlaw the blacklisting of trade unionists. The outlawed behaviour is defined by Section 3 as follows :

"1. The Secretary of State may make regulations prohibiting the compilation of lists which -

(a) contain details of members of trade unions or persons who have taken part in the activities of trade unions, and

(b) are compiled with a view to being used by employers or employment agencies for the purpose of discrimination in relation to recruitment or in relation to the treatment of workers.

2. The Secretary of State may make regulations prohibiting -

(a) the use of lists to which subsection (1) applies;

(b) the sale or supply of lists to which subsection (1) applies.

...

5. In this section -

*"list" includes any index or other set of items either recorded electronically or by any other means, and
"worker" has the meaning given by section 13.*

6. Subject to subsection 5, expressions used in this section and in the Trade Union and Labour Relations (Consolidation) Act 1992 have the same meaning in this section as in that Act. "

In summary, the power enables the Secretary of State to outlaw the compilation, dissemination and use of trade union blacklists. Subsections 4 and 5 of Section 3 deal mostly with the remedies and enforcement aspects of the power.

1.2. No regulations have yet been brought into force under this power.

The 2003 Consultation

1.3. In 2002 and 2003, the Government undertook a review examining the operation of the Employment Relations Act 1999. In February 2003, the Government issued a consultation document for the review. The consultation document discussed the blacklisting issue in the following terms :

" 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 line with good regulatory practice, the Government considers it inappropriate to introduce regulation where there is no evidence that a problem has existed for over a decade. "

1.4. In the consultation document, the Government also stated that it would act quickly to outlaw blacklisting if there were evidence that blacklisting was re-surfacing. In line with that commitment, the Government issued a companion consultation document in February 2003 which contained draft regulations under the Section 3 power. Both consultations ended in May 2003.

1.5. In response, 19 organisations, including the Trades Union Congress (TUC), the Confederation of British Industry (CBI), the Law Society and the Employment Lawyers Association, sent observations to the Government about the blacklisting aspects of these consultation documents. About ten respondents supplied detailed comments on the draft regulations themselves. Respondents did not supply any evidence that blacklisting was taking place or that demand for blacklisting services existed. At the end of these consultations, the Government re-affirmed its view that it would not seek to implement regulations until evidence was available that a problem existed. It also repeated its commitment to act quickly, if such an eventuality arose.

Evidence of Blacklisting uncovered by the Information Commissioner

1.6. Since June 2008, the Information Commissioner (IC), the independent regulator of the Data Protection Act 1998, has been undertaking an investigation into the activities of an organisation called The Consulting Association (TCA). The initial findings of this investigation were announced on 6 March this year. These showed that the TCA had for many years provided a service to around 40 construction companies, many of them major players in the sector, appraising the suitability for employment of individuals. TCA held records on about 3,300 people, over half of which contained little data other than their names. However, in over 1,600 cases, more detailed information was held in a card-index system. The IC concluded that this vetting service, operated on covert lines, seriously breached aspects of the Data Protection Act 1998. Mr Ian Kerr, who ran the TCA, has been prosecuted by the IC for failing to register the TCA as a data controller. That case was heard on 27 May, when Mr Kerr pleaded guilty to the offence.

1.7. The IC also seized materials from the TCA 's offices, including the data records on individuals. When the seized original materials were returned to the TCA the IC served an enforcement notice on Mr Kerr which in effect required him to stop using this information to vet workers. Mr Kerr has since ceased trading.

1.8. BERR (now the Department for Business, Innovation and Skills) has worked with the IC's office during this investigation. The Department has also inspected copies of the records he has seized from the TCA. The vetting system operated by the TCA appears to have run in most cases along the following lines :

- the TCA collected information on the 1,600 individuals in the card index system from a variety of sources. In some cases this was taken from national or local newspapers, the trade press or trade union journals. In addition, information was passed to TCA by construction companies who were members of the TCA.
- the names and national insurance numbers of new or potential recruits (employed directly or supplied by employment agencies) would be faxed by a member construction company to the TCA. This would be done by a relatively junior person who did not know the identity of the TCA or the detail of the vetting undertaken.
- the TCA would then check the names against its records. The TCA would telephone a designated person or persons within the construction company to report the results. In most cases, the designated persons appear to be relatively senior figures within the companies involved, though their responsibilities might have been restricted to a branch or subsidiary of the main company. These same persons also appear to be the conduits for passing information on individuals to the TCA.
- from the records, the TCA does not appear to have made recommendations as to whether persons should be employed or not : that was a matter left to the designated person or perhaps others in the construction company. It is evident from the TCA's records that some individuals were not recruited as a result of receiving the TCA's information.
- decisions taken by the designated persons would then be conveyed to other individuals within the company who actually undertook the hiring. To preserve the covert nature of the system, detailed reasons why a person was not recruited were probably not given to those individuals.

1.9. The TCA began its vetting activity in 1994 when it acquired information about individuals from a source unknown to the IC. Judged by the age of the information held by the TCA, it appears that a system of this kind has operated for at least 30 years. Whilst the system may have been used more intensively in the past, it was by no means dormant. Around 40,000 checks on individuals were undertaken by the TCA during 2008 at the request of member companies. New material on individuals has also been added to the data base in recent years.

1.10. The TCA is a membership-based body, and when it folded earlier this year, about 25 companies were members, some of which seem to have used the TCA to a small extent only. These members made various payments to the TCA, including an annual fee of £3,000 and in most cases they also paid a

fee of £2.20 for each check on an individual. Member companies appear to have been actively involved in governing the TCA's activities, and their designated persons were invited to annual and quarterly meetings convened by the TCA. The TCA was chaired by a representative of the member companies. At the time of issuing this consultation document, the IC's office is undertaking further enquiries into the relationship between TCA and its member companies. So, further information which may clarify the relationship between members and the TCA may emerge in due course.

1.11. It appears that the overall purpose of the records held by the TCA was to assist members in identifying people who **from their viewpoint** might be classified as troublemakers and who might therefore affect the delivery of construction work on schedule. Some records refer exclusively to poor work performance, including bad health and safety practices and violence against colleagues. However, these are the minority. Most - about 75 per cent of the 1,600 records held by TCA - concern trade unionists and, more precisely, activities associated with trade unions, including acting as a representative or involvement in industrial action. However, it was clearly not the case that every trade union member or every trade union representative had a TCA record.

1.12. The TCA's approach was systematic but not sophisticated: for example, the internet, computers or other IT equipment were not apparently used to store, uncover or manipulate data. Much of the material the TCA held was very old. Some was based on hearsay or gossip, and it sometimes contained apparently irrelevant information about the private lives of individuals. Nonetheless, people seem to have been denied employment as a result.

1.13. The IC is providing a facility for construction workers or others to check whether they were listed by the TCA and, if so, to access their records. The IC intends to provide this facility until 31 March 2010. For further information, individuals should contact the IC's helpline on 08450 30 60 60.

Other Relevant Law

1.14. There are at least two sets of existing legal entitlements which are relevant when considering the blacklisting issue. These are outlined in the following paragraphs

(a) The Trade Union and Labour Relations (Consolidation) Act 1992

1.15. The blacklisting of trade unionists is principally designed to identify individuals who may then be discriminated against by employers or employment agencies. If such discriminatory acts by employers or agencies actually occur, then it is possible their behaviours would breach the law against discrimination on grounds of trade union membership and activities. These protections are found in the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"). Most are long-standing provisions, though they were extended by provisions within the 1999 Act and the

Employment Relations Act 2004. In brief, these protections include the following elements :

- It is unlawful for an employer to refuse a person employment on grounds of trade union membership (section 137 of the 1992 Act) ;
- It is unlawful for an employment agency to refuse its services to a person on the grounds of his or her trade union membership (section 138 of the 1992 Act);
- it is unlawful for an employer to penalise a worker (short of dismissing an employee) on grounds of his or her trade union membership or trade union activities, provided those activities take place at an appropriate time (section 146 of the 1992 Act) ; and
- it is unlawful for an employer to dismiss an employee on grounds of his or her trade union membership or trade union activities, provided those activities take place at an appropriate time (section 152 of the 1992 Act).

1.16. These rights are all enforced under civil law through the employment tribunal. The main remedies involve compensation for loss, though an unfairly dismissed employee may also seek re-instatement or re-engagement. There are no criminal offences involved, and no role for a public authority to investigate allegations of discrimination.

1.17. It should be noted that there are other protections against the victimisation of trade union representatives, For example, the Employment Rights Act 1996 provides protection against dismissal or detriment on the grounds that a person is, or has acted, as a union safety representative and the 1999 Act provides similar protections for representatives who act as a companion to a worker at a disciplinary or grievance hearing.

(b) The Data Protection Act 1998

1.18. Blacklisting involves the processing of data on individuals. Often, that use will be covert. As has been demonstrated in the TCA case, such behaviour can breach provisions within the Data Protection Act 1998 (the "1998 Act"). Also, the Information Commissioner has important legal powers under the 1998 Act to investigate possible breaches and to enforce compliance.

1.19. In overall terms, the 1998 Act gives individuals the right to know what information is held about them and it seeks to ensure that personal information is handled properly. It establishes eight principles by which lawful data processing must be conducted, to make sure that personal information is

- fairly and lawfully processed ;
- processed for limited purposes ;

- adequate, relevant and not excessive ;
- accurate and up to date ;
- not kept for longer than necessary ;
- processed in line with the data subject's rights ;
- secure ; and
- not transferred to other countries without adequate protection.

Under the Act, information about individuals can be classified as “personal data” or “sensitive personal data”. In general terms, there are more requirements and tighter constraints on data controllers and data processors when collecting and using sensitive personal data. For example, it may be necessary to gain the explicit consent of the individual before processing sensitive personal data. Trade union membership is classified as “sensitive personal data” under the Act.

1.20. The following rights for individuals in the 1998 Act are particularly relevant to the blacklisting issue :

(i) individuals have rights to access the data on them which a data controller holds ;

(ii) individuals may apply to the court to order a data controller to correct, remove or destroy personal details which are inaccurate or which contain opinions based on inaccurate information ;

(iii) there is a limited right for Individuals to prevent the processing of their information if it is causing unwarranted or substantial damage or distress ;

(iv) individuals may sue a data controller at a county court for damages and distress resultant on any failure by the data controller to apply the provisions of the 1998 Act. The amount of any award is unlimited.

1.21. The following legal provisions relating to the powers of the IC were relevant to the TCA case :

(i) there is a requirement on data controllers to register their data processing with the IC. The registration must, inter alia, identify the name and address of the data controller, together with a summary description of the nature and purposes of the processing. A failure to register is an offence under criminal law which could be subject to a maximum fine of £5,000 if tried at a magistrate's court or a higher fine if tried at a higher court. The IC can prosecute failures to register ;

(ii) the IC is empowered to issue enforcement notices in order to ensure that organisations comply with the 1998 Act and its principles by taking (or refraining from taking) specified steps. A breach of an enforcement notice is a criminal offence subject to the fines and enforcement mechanism as in (i) above ;

(iii) the IC may serve information notices requiring organisations to provide him with specified information within a specified period. The response time for an information notice or an enforcement notice is 28 days, but, where compliance with a notice is required as a matter of urgency, this can be reduced to seven days ;

(iv) the IC may apply to the Crown court, in certain circumstances, for a warrant to enter premises without notice where he believes that a data controller has contravened or is contravening the data protection principles, or committing an offence under the 1998 Act.

1.22. The 1998 Act therefore contains a mix of administrative penalties, civil remedies and criminal sanctions to ensure compliance. It provides a powerful investigative role for the IC.

The Government View

1.23. The Government has consistently taken the view that the blacklisting of trade unionists should have no place in a fair system of employment relations. It is a practice which facilitates and encourages unlawful discrimination against trade unionists.

1.24. Until recently, the last known instances of blacklisting took place in the 80s and early 90s when the Economic League operated. That infamous organisation folded but it appears some vestiges of its approach have survived it. The events at the TCA show that there remains a demand in some quarters for vetting services which systematically penalise certain types of trade unionist, including those who are prepared to speak up about potential abuse at the workplace.

1.25. The Government acknowledges that there already exist important legal protections in this area, as has been demonstrated by the determined and professional work of the IC in rooting out the practices at the TCA. However, the Government takes the view that recent events justify giving a clear signal about the unacceptability of blacklisting. **The Government is therefore minded to introduce regulations under the power in Section 3 of the 1999 Act at the earliest opportunity to outlaw the compilation, dissemination and use of trade union blacklists.**

1.26. The Government considers that good employers have nothing to fear from this approach. If employers need to vet prospective employees about their capabilities or fitness for employment, that should be done in the normal way through testimonials and systems which openly, lawfully and fairly check the records of job applicants.

Question 1 We propose that, in light of the activities undertaken by The Consulting Association, suitably drafted regulations under section 3 of the Employment Relations Act 1999 should now be implemented. Do you agree with this approach ?

Question 2 Do you have other evidence of trade union blacklisting ?

CHAPTER 2 - THE PROPOSALS AND ISSUES ARISING

Summary of the Revised Draft Regulations

2.1. Revised draft regulations to prohibit the blacklisting of trade unionists are enclosed at Annex 1. In summary, the regulations achieve the following effects :

Interpretation (Regulation 2)

2.2. This Regulation provides definitions for some terms used in the regulations, including the definition of a prohibited list, which is based closely on the provisions found in Section 3 of the 1999 Act.

Prohibition of Blacklists (Regulation 3)

2.3. This Regulation makes it unlawful for persons to compile, sell, supply or use a prohibited list (that is, a trade union blacklist).

Exceptions from the Prohibition (Regulation 4)

2.4. Regulation 4 provides some important exemptions to ensure that certain activities by a trade union, a list distributor (e.g. the Royal Mail) or a journalist are not caught by the overall prohibition.

Refusal of Employment or Refusal of an Employment Agency Service (Regulations 5, 6, 7, 8 and 12)

2.5. Regulations 5 and 6 make it unlawful for an employer to refuse a person employment (or for an employment agency to refuse a service to a person) because the decision to refuse involved, directly or indirectly, the use of a prohibited list. They also provide new jurisdictions for the employment tribunal to hear complaints about breaches of Regulations 5 or 6. Regulation 7 specifies the time limits for bringing such complaints, and Regulation 8 provides the remedies in the event of a breach. Regulation 12 provides for those particular circumstances where a complaint could be made against both the employer and the employment agency on the same facts.

2.6. These regulations are broadly analogous to provisions within the 1992 Act (sections 137 - 141) concerning the refusal of employment or an employment agency service on the grounds of a person's membership or non-membership of a trade union.

Detriment (Regulations 9, 10 and 11) and Dismissal (Regulation 17 and the Schedule)

2.7. The Schedule (introduced by Regulation 17) amends the Employment Rights Act 1996 by making it automatically unfair for employees to be dismissed by their employer where the employer uses, directly or indirectly, a prohibited list in making that decision. It does so by inserting new section

104E into the 1996 Act. The Schedule also makes a number of consequential changes to other parts of primary legislation.

2.8. Regulation 9 makes it unlawful for a worker's employer to impose some other form of detriment because a prohibited list was, directly or indirectly, used. Complaints about breaches of these provisions are heard by the employment tribunal. Regulation 10 deals with the time limits for making complaints about detriment to the employment tribunal and Regulation 11 specifies the remedies where detriment has occurred.

2.9. These regulations are based on the corresponding provisions within the 1992 Act (sections 146, 147, 149 and 152) concerning dismissal and action short of dismissal on the grounds of a person's trade union membership or non-membership or on the grounds of a person's trade union activities.

Awards against Third Parties such as the Compilers and Distributors of Blacklists (Regulation 13)

2.10. Regulations 3 to 12, and the Schedule, provide a right of redress against those who use prohibited lists (or the information in such lists) when making employment decisions. Regulation 13 provides for others involved in the prohibited blacklisting - namely, the compilers and distributors of those lists - to be joined to proceedings before the employment tribunal, by either the respondent or the complainant. It also provides for them to pay all or some of any compensation which the tribunal may award.

Restrictions on Contracting Out (Regulation 14)

2.11. Section 288 of the 1992 Act restricts the ability of a worker to contract out of the statutory rights introduced by that Act, including rights relating to trade union membership and activities. Regulation 14 extends that restriction to rights introduced by the blacklisting regulations.

Applications to the Court (Regulations 15 and 16)

2.12. Regulation 15 enables a person (including either individuals or a trade union) who has suffered or may suffer loss due to blacklisting to bring civil proceedings before a county court about alleged breaches of Regulation 3. The court may award damages for loss and injury to feelings. It may also take other actions, including the granting of interlocutory relief, to prevent further loss from taking place. This means that the court could order lists to be destroyed. Regulation 16 deals with situations where a person could make a complaint based on the same facts both to the employment tribunal and to the court.

Issues Arising

2.13. The Government invites comments on any aspect of its approach to the drafting of the regulations. However, the following issues, some of which

were raised in response to the 2003 consultation, are of particular importance and the Government seeks views on them in particular.

Electronic Listing and Remote Access to Blacklists

2.14. The 2003 draft regulations mainly deal with the situation where lists are drawn up centrally and then sent to each user, enabling the user to check names against the list. This was not the approach used in the TCA case, where the list was never distributed to users ; instead, the compilation of the lists and the checking of names against the list was done centrally. The regulations have therefore been revised to ensure they fully cover the approach used by the TCA. In revising the regulations, the Government aims to capture other potential methods of carrying out blacklisting. The TCA did not use the internet, or indeed computers, to any appreciable degree. Future blacklisters are likely to focus on the use of electronic means of communication. They may also encrypt data or use codes to identify individuals, rather than use names. The draft regulations have therefore been revised to enable them to apply flexibly to as wide a range of situations as possible within the limits laid down by section 3 of the Employment Relations Act 1999.

Question 3 Do the Regulations adequately cover all the possible ways, including use of the internet and other electronic media, whereby blacklisting could be undertaken ? If not, how could they be improved ?

Foreign Compilers and Distributors of Blacklists

2.15. The regulations apply to Great Britain only. The Northern Ireland Assembly will consider the need for similar proposals. The regulations do not therefore apply to other countries or territories. This is the normal approach to trade union and employment law, and it should capture most potential instances of future blacklisting affecting workers in this country. British-based organisations which use blacklists would also normally contribute at least some of the information to the blacklist, and in that sense they would be compilers, even if the main compiler is not British-based, and they will be caught by the legislation. Also, British-based organisations would remain the main end-users of the lists, even if the lists themselves were offshored, and as such they ought to be captured by the regulations. However, the territorial limitation of domestic law-making may create opportunities for unscrupulous organisations or individuals to exploit. For example, the main compiler of a blacklist - the equivalent of the TCA - could be based abroad. Also, the compiler could host the list on a website located outside Great Britain, allowing dissemination and selling to be based abroad, outside the scope of the regulations. The Government recognises that such compilation and dissemination of lists will not be punishable under the regulations. However, Great Britain users will still be captured by the regulations because a list remains prohibited regardless of its geographical location. The regulations should therefore still choke off the demand for the blacklisting of British nationals.

2.16. Another potential difficulty concerns the situation where British-based organisations may never access the list directly, choosing to use foreign-based intermediaries to "use" the lists on their behalf. The Government recognises that it will often be more difficult for complainants to prove whether lists were involved in their treatment by British-based employers, where one or more intermediaries were involved in the process. However, the regulations have been drafted in a way which covers both direct and indirect use of the lists. For example, Regulation 5 makes it unlawful for an employer (who did not directly use a prohibited list) to refuse a person employment where they relied on information provided by another person - for example, a vetting organisation - who had compiled or accessed a prohibited list. Similar wording is found in Regulations 6 and 9, and in new section 104E of the Employment Rights Act 1996, which the Schedule inserts. The Government recognises it may be difficult on some occasions for employers to know if the intermediaries they hire have actually accessed a prohibited list when giving their advice. These provisions therefore make it unlawful for the employer to refuse employment in these situations only where the employer knows or should reasonably have known that a prohibited list was involved.

Question 4 Do the regulations adequately deal with blacklists maintained and hosted abroad ?

The Meaning of a "Prohibited List"

2.17. The definition of a prohibited list is a key issue. The Government wishes to ensure that it effectively targets the problem area. Equally, it is important to ensure that the definition does not inadvertently capture any other lawful and proper listing or vetting activity.

2.18. The basic definition of a prohibited list is provided by Regulation 2. That definition cannot go beyond the definition of a prohibited list which is used in section 3 of the 1999 Act. However, to assist interpretation and to clarify the meaning of the terms used in that definition, various clarifications are also provided in Regulation 2. These include definitions of the following :

(a) "Trade union" - Regulation 2 makes sure that the meaning of a trade union includes both the branches and sections of unions. This makes it clear that the prohibition covers discrimination which is restricted to belonging to a particular part of a trade union. It could also be argued that the definition of a "trade union" should be limited just to those trade unions which are "independent". However, the basic rights to trade union membership found in the 1992 Act, on which these regulations are modelled, do not make that distinction, and the Government believes it would be unhelpful to introduce a distinction within the regulations.

(b) "Compiled with a view... " - The definition of a prohibited list contains a necessary purposive component to ensure it covers just those lists which are designed to enable employers or employment agencies to discriminate, positively or negatively, in relation to the recruitment or treatment of workers. This should ensure that the benign or irrelevant listing of trade unionists is not

classed as a prohibited activity. Some clarification of the meaning of this wording is needed, however. For example, a definition of "discrimination" is provided in Regulation 2, which limits it to "treating a person less favourably than another on grounds of union membership or union activities". This ensures that some forms of differential treatment between trade unionists and non-trade unionists - including that which is fully justified such as the deduction of union subscriptions from the pay of union members with their consent - would not be construed as "discrimination" because it does not result in any unfavourable treatment. Importantly, this definition also ensures that lists which contain the names of individuals who incidentally might be members of trade unions are not by accident defined as prohibited lists, as long as the purpose of those lists is not to discriminate against them for their trade union membership or activities. This should ensure that necessary security or anti-fraud vetting is unaffected because any persons on those lists who happen to be union members should be listed for reasons totally unconnected with their union membership or activities.

It was pointed out during the 2003 consultation that the purpose of a compiled list may change over time. Initially, a list may be compiled for a non-prohibited purpose such as deducting union subscriptions from pay, but it may later be used for a prohibited purpose. In virtually all cases, this should not be a practical problem because blacklists, once they start using a previously lawful list, will almost certainly compile a new list by amending, updating, or otherwise manipulating the data they receive. The Government believes that the courts would almost certainly conclude that their listing activity would be unlawful. The Government does not therefore propose adding any additional wording on this point. In any event, it would be difficult to do so and keep within the definition of a prohibited list provided by section 3 of the 1999 Act.

(c) "Use" – This term is clarified to ensure it covers both use of the list itself and use of information taken from the list. This definition therefore helps cover some situations where an employer indirectly uses a list.

2.19. There is no definition of "trade union activities" given in the 1992 Act, where the term is frequently used, always in conjunction with the words "at an appropriate time". It was suggested in the 2003 consultation that the term should be defined in the regulations to ensure that participation in unofficial industrial action and criminal activities in the name of the trade union were not covered. The Government considers it is very unlikely such behaviours would ever be categorised as trade union activities for these purposes. For example, because unofficial industrial action by definition is not authorised by the trade union, it is difficult to see how such activity would be categorised as a trade union activity. In contrast, all forms of official industrial action are likely to qualify because the qualifying phrase "at an appropriate time" is deliberately not used in this context. Case law suggests that the courts would not seek to designate any criminal activity as a legitimate trade union activity. The Government does not therefore intend to supply any clarification of this term's meaning in the regulations.

2.20. The Government considers the term “details”, when referring to the data held about trade unionists on prohibited lists, is sufficiently wide to encompass encoded information as well transparent and readable data. The revised regulations do not therefore give any further clarification on the point.

Question 5 Do you support the way the regulations clarify the meaning of a prohibited list ? If not, how should a prohibited list be defined ?

Exempted Listing Activities

2.21. The Government recognises that there may be categories of benign or innocent listing activity which might be inadvertently captured by the basic definition of a prohibited list. Regulation 4 contains the following exemptions to ensure such activity is not adversely affected or mistakenly penalised.

(i) Distributors of Lists : The Regulation makes it unlawful to supply or sell a list. Some distributors - for example, the Royal Mail, other providers of postal services or Internet Service Providers - cannot be reasonably expected to know everything which they are delivering or helping to distribute. There therefore needs to be an exemption to ensure that such distribution is not categorised as an unlawful activity. That is achieved by ensuring that those distributors who "could not reasonably be expected to know" they were supplying a prohibited list are not committing an unlawful act. The Government does not consider that the same exclusion should apply to those who sell a prohibited list, because sellers should always be aware of the substance of their commercial transactions. Creating similar exemptions for sellers, or indeed users, would complicate the regulations, and potentially make it excessively difficult for complainants to prove their case before a tribunal or court.

(ii) Reporting breaches of the regulations in the public interest : The TCA case came to light in part because of investigative reporting for a national newspaper. Such reporting serves a public interest, and in many cases it necessarily involves using the lists and publicising their existence and, perhaps, contents. Regulation 4 therefore exempts such conduct, provided journalists do not publicise the names of listed individuals without their permission.

(iii) The employment of trade union experts : Trade union knowledge and experience may be an important factor when recruiting individuals to certain posts. Such posts would most frequently be found in trade unions themselves. However, they could be located in other parts of the labour market where employers deal frequently with trade unions. Lists may be compiled and used during such recruitment processes. Regulation 4 therefore contains an explicit exemption for this kind of activity. Regulation 4 also contains explicit wording which excludes most recruitment of the officers by trade unions, replicating similar wording found in section 137 of the 1992 Act. However, the Government believes it is unwise to introduce a blanket exemption for trade unions from the scope of the regulations. Whilst it is unlikely to occur in today's employment relations climate, it is conceivable that

in future a maverick trade union could compile or use blacklists for commercial reasons or because of inter-union rivalry.

(iv) Legal processes and legal requirements : Regulation 4 exempts those who compile, use, sell or distribute prohibited lists because of a legal requirement or as part of legal processes; the latter would most obviously include legal actions processed under these regulations. The Government does not consider there needs to be a general exemption for central government or the security services to compile, distribute, sell or use a prohibited list.

Question 6 Do you support the drafting of the exemptions and should others be created ? Where applicable, please explain why you consider the drafting to be defective.

Enforcement and Sanctions

2.22. Blacklisting is a very serious matter and Government believes that individuals should be adequately protected under the law by a robust enforcement regime. For these reasons, section 3 of the 1999 Act provides for criminal offences to be created, if necessary, within these regulations. However, enforcement of these regulations should be viewed in conjunction with the enforcement of related legal requirements. Trade union blacklists will generally breach both these regulations and the 1998 Act, because blacklists must generally operate on covert lines to be effective. As the TCA case has illustrated, the IC has strong powers both to investigate breaches of the 1998 Act and to undertake criminal prosecutions. If blacklisting occurs in the future, it may well be uncovered via an investigation of the IC, and lead to prosecutions under the 1998 Act. The Government does not therefore see a need, and it would be a wasteful use of scarce public resource, to establish a new investigative role for a public authority to uncover breaches of these regulations.

2.23. Instead, enforcement should take the form of civil action through the employment tribunal or the court. The involvement of the employment tribunal should keep the legal costs of both complainants and respondents under control, and should provide an easier method to seek compensation for loss than the court, which is the only route available under the 1998 Act. Unions can in certain circumstances themselves take enforcement action. It is possible for a trade union to take action against a compiler of a blacklist at the county court, whilst supporting applications to the employment tribunal by its members against employers for using the same blacklist.

2.24. Most of the legal actions, especially those taken at the employment tribunal, focus on the employers who use prohibited lists. This might suggest that the regulations are light in enabling enforcement actions against the compilers or distributors of lists. However, the regulations seek to redress any imbalance by permitting either the responding employer or the applicant worker to join the compiler or distributor to a tribunal case.

Question 7 Do you support the Government's view that enforcement should take place via the civil law ? If not, what approach would you favour ?

2.25. The Government recognises that individuals may face difficulties in proving their case, given the covert nature of blacklisting and the desire of blacklisters to conceal their actions. For example, it may be very difficult for an individual to demonstrate whether a blacklist was actually consulted by the employer before refusing employment or before taking some other detrimental decision against the individual concerned. For these reasons, Regulations 5, 6, 9 and the new section 104E all contain an initial obligation on the complainant to establish a prima facie case that a blacklist was used. That could be done for example by establishing that the employer had subscribed to a blacklisting service on which the complainant was listed. The burden of proof would then shift to the respondent to show that he had not used a prohibited list or relied on information in it. This approach is based on wording used in the Equality Bill and most current law on discrimination.

Question 8 Do you agree with the approach taken by the regulations regarding the burden of proof ? If not, what approach would you favour ?

2.26. The discovery of a blacklist's existence, perhaps as a result of an investigation by the IC, may occur a long time after discriminatory decisions against listed individuals were taken by employers. Normally, the time limits for bringing a tribunal claim is three months after the employer's decision was effected, though the tribunal may chose a longer period if it were not reasonably practicable for the complainant to do so within the three month period. The Government believes that tribunals should be encouraged to use this discretion as far as possible in cases where the existence of the blacklist was not known at the time the decision was effected. Regulations 7 and 10, and new section 104E, therefore refer to this factor explicitly. The tribunal will still need to consider whether it is practicable to accept applications about events which may have occurred many years before.

2.27. Changes to employment law or other law rarely have retrospective effect. So, the Government has no intention to apply these regulations retrospectively to events which occurred before they came into effect. This does not close off all access to justice to individuals who suffered loss from blacklisting in earlier periods. In particular, individuals can claim compensation under the 1998 Act, and that Act came into effect over a decade before these regulations.

Question 9 Do you agree with the approach taken in the regulations regarding the time limits for making applications to the employment tribunal ? If not, what approach would you favour ?

Remedies

2.28. The remedies available to the employment tribunal are designed to replicate the corresponding remedies available to the employment tribunal when considering applications under existing trade union law for refusing employment or otherwise penalising individuals on trade union grounds. This means that the limits on compensation are the same and the limited ability of the tribunal to issue orders is the same. As a result, individuals cannot use the employment tribunal route to obtain an order requiring the closure of a blacklist or an order to restrain a user from accessing such a list. Those types of order, including interlocutory orders, are available to individuals who apply to the court for a remedy under Regulation 15. It is also worth noting that the IC can issue enforcement notices requiring blacklists and users of blacklists to desist, where data protection law has been simultaneously infringed, as would often be the case.

Question 10 Do you agree with the approach taken by regulations regarding remedies ? If not, what approach would you favour ?

Other Issues

2.29. The TCA case took place in an industry where employment patterns are diverse and where self-employment is common and where many individuals are recruited by sub-contractors. The regulations are designed to provide some redress to individuals in those circumstances. For example, if a self-employed person were still categorised as a worker under the 1992 Act, then they could still make applications to the employment tribunal for detriment and refusal of employment. Where they are not workers, they could still apply to the court for compensation under Regulation 15. As regards sub-contractors, they too would be captured by the Regulations, even if the main contractor actually accessed the list, and instructed them not to recruit a listed person. (See paragraph 2.18. (b) and (c) above).

2.30. The information identifying individuals on lists may be inaccurate or incomplete. It is therefore possible that an individual may be wrongly identified as a person on the list and may be discriminated against as a result. The regulations have been drafted in a way which allows such individuals to obtain compensation for loss on the same basis as individuals who have been correctly identified as belonging to the list.

Question 11 Do you have any other views on the way the regulations have been drafted ? Please submit any drafting suggestions if you have them.

Impact Assessment

2.31. Annex 2 provides a consultation-stage Impact Assessment (IA) of the regulations. It concludes that the regulations should affect those parts of the economy where unionisation is more prevalent. Private services and small employers are therefore less affected. The IA notes that compliance costs

will be extremely low, not least because many of the behaviours outlawed by these regulations are already unlawful in other pieces of legislation. Most costs concern the need for some employers to read the regulations, or a digest of them, in order to become aware of their effects and their possible impact on workplace practices and record-keeping.

2.32 It is a requirement on Government Departments to produce a Privacy Impact Assessment (PIA) when formulating new policies that involve the processing of personal data. The aim of the PIA process is to ensure that data protection and privacy risks are properly identified and addressed, wherever possible. The revised regulations are designed to ensure that personal data is not abused and it is not envisaged that they will present any major concerns from a data protection perspective. A PIA is currently being undertaken and it is intended to publish it in due course.

Question 12 Do you have any comments on the Impact Assessment at Annex 2 ?

ANNEX 1 - REVISED DRAFT REGULATIONS

STATUTORY INSTRUMENTS

2009 No. xxxx

TERMS AND CONDITIONS OF EMPLOYMENT

Employment Relations Act 1999 (Blacklists) Regulations 2009

Made - - - - [date]

Coming into force - - [date]

The Secretary of State for Business, Innovation and Skills makes the following Regulations in exercise of the powers conferred by section 3 of the Employment Relations Act 1999 ⁽²⁾.

In accordance with section 42 of that Act, a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement [1]

1. These Regulations may be cited as the Employment Relations Act 1999 (Blacklists) Regulations 2009 and shall come into force on [date].

Interpretation [2]

2.—(1) In these Regulations—

“court” means the High Court, Court of Session, county court or sheriff court,

“discrimination” means treating a person less favourably than another on grounds of trade union membership or trade union activities,

“employment agency” means a person who, for profit or not, provides services for the purposes of finding employment for workers or supplying employers with workers, and does not include a trade union by reason only of the services a trade union provides only for and in relation to its members.

“office”, in relation to a trade union, means any position by virtue of which the holder is an official of the trade union or to which Chapter 4 of Part 1 of the 1992 Act (duty to hold elections) applies (and “official” has the meaning given by section 119 of that Act),

“the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992⁽³⁾

“the 1996 Act” means the Employment Relations Act 1996⁽⁴⁾

⁽²⁾ 1999 c. 26.

⁽³⁾ 1992 c. 52.

⁽⁴⁾ 1996 c. 18.

“prohibited list” means a list which—

- (a) contains details of members of trade unions or persons who have taken part in the activities of trade unions, and
- (b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers

“services”, in relation to an employment agency, means services for the purposes of finding employment for workers or supplying employers with workers, and

“use” in relation to a prohibited list includes use of information contained in the list

(2) In these Regulations, references to members of trade unions include references—

- (a) to members of a particular branch or section of a trade union, and
- (b) to members of one of a number of particular branches or sections of a trade union,

and references to taking part in the activities of trade unions shall be construed in accordance with this paragraph.

(3) References in these regulations to information supplied by a person who contravenes regulation 3 include information supplied by a person who would contravene that regulation if that person’s actions took place in Great Britain.

General prohibition on use etc. of blacklists [3]

3. Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.

General prohibition: exceptions [3]

4.—(1) A person does not contravene regulation 3 if any of paragraphs (2) to (5) applies.

(2) This paragraph applies where—

- (a) a person supplies a prohibited list,
- (b) does not know they are supplying a prohibited list, and
- (c) could not reasonably be expected to know they are supplying a prohibited list.

(3) This paragraph applies where—

- (a) a person compiles, uses or supplies a prohibited list,
- (b) in doing so, that person’s sole or principal purpose is to make known a contravention of regulation 3 or the possibility of such a contravention,
- (c) the persons whose details are included in the prohibited list consent to the use or supply in question, and
- (d) in all the circumstances using or supplying the prohibited list is justified in the public interest.

(4) This paragraph applies where—

- (a) a person compiles, uses, sells or supplies a prohibited list,
- (b) in doing so, that person’s sole or principal purpose is to apply a requirement either—
 - (i) that a person may not be considered for appointment to an office or for employment unless that person has experience of knowledge of trade union matters, or
 - (ii) that a person may not be considered for appointment or election to an office in a trade union unless he is a member of the trade union, and
- (c) in all the circumstances it is reasonable to apply such a requirement.

(5) This paragraph applies to anything done which is required or authorised under an enactment or by any rule of law or by order of the court.

Complaint to employment tribunal: refusal of employment [4]

5.—(1) A person (P) has a right of complaint to an employment tribunal against another (R) if R refuses to employ P for a reason which relates to a prohibited list, and either—

- (a) R contravenes regulation 3 in relation to that list; or
- (b) R—
 - (i) relies on information supplied by a person who contravenes that regulation in relation to that list; and
 - (ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

(2) R shall be taken to refuse to employ P if P seeks employment of any description with R and R—

- (a) refuses or deliberately omits to entertain and process P's application or enquiry,
- (b) causes P to withdraw or cease to pursue P's application or enquiry,.
- (c) refuses or deliberately omits to offer P employment of that description,
- (d) makes P an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or
- (e) makes P an offer of such employment but withdraws it or causes P not to accept it.

(3) For the purposes of this regulation, if there are facts from which the tribunal could decide, in the absence of any other explanation, that R contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must hold that such a contravention or reliance on information occurred unless R shows that it did not.

Complaint to employment tribunal: refusal of employment agency services [5]

6.—(1) A person (P) has a right of complaint to an employment tribunal against an employment agency (E) if E refuses P any of its services for a reason which relates to a prohibited list, and either—

- (a) E contravenes regulation 3 in relation to that list; or
- (b) E—
 - (i) relies on information supplied by a person who contravenes that regulation in relation to that list; and
 - (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) E shall be taken to refuse P a service if P seeks to make use of the service and E—

- (a) refuses or deliberately omits to make the service available to P,
- (b) causes P not to make use of the service or to cease to make use of it,
- (c) does not provide P the same service, on the same terms, as is provided to others.

(3) For the purposes of this regulation, if there are facts from which the tribunal could decide, in the absence of any other explanation, that E contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must hold that such a contravention or reliance on information occurred unless E shows that it did not.

Time limit for proceedings under regulations 5 and 6 [7]

7.—(1) An employment tribunal shall not consider a complaint under regulations 5 or 6 unless it is presented to the tribunal—

- (a) before the end of the period of three months beginning with the date of the conduct to which the complaint relates, or

- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the tribunal considers reasonable.

(2) In considering under paragraph (1)(b) when it was reasonably practicable for a complaint to be presented, the tribunal shall in particular have regard to when the facts to which the complaint relates came to the attention of the complainant.

(3) The date of the conduct to which a complaint under regulation 5 relates shall be taken to be—

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission—
 - (i) to entertain and process P's application or enquiry, or
 - (ii) to offer employment,the end of the period within which it was reasonable to expect R to act;
- (c) in the case of conduct causing P to withdraw or cease to pursue P's application or enquiry, the date of that conduct;
- (d) in a case where R made but withdrew an offer, the date R withdrew the offer;
- (e) in any other case where R made an offer which was not accepted, the date on which R made the offer.

(4) The date of the conduct to which a complaint under regulation 6 relates shall be taken to be—

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission to make a service available, the end of the period within which it was reasonable to expect E to act;
- (c) in the case of conduct causing P not make use of a service or to cease to make use of it, the date of that conduct;
- (d) in the case of failure to provide the same service, on the same terms, as is provided to others, the date or last date on which the service in fact was provided.

Proceedings under regulations 5 and 6: remedies [9]

8.—(1) Where an employment tribunal finds that a complaint under regulation 5 or 6 is well-founded, it shall make a declaration to that effect and may make such of the following as it considers just and equitable—

- (a) an order requiring the respondent to pay compensation
- (b) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.

(2) If the respondent fails without reasonable justification to comply with a recommendation under paragraph (1)(b), the tribunal may increase its award of compensation or, if it has not made such an award, make one.

(3) Compensation shall be assessed on the same basis as damages for breach of statutory duty and may include injury to feelings.

(4) The total amount of compensation shall not exceed the limit for the time being imposed by section 124(1) of the 1996 Act.

Complaint to employment tribunal: detriment [6]

9.—(1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—

- (a) D contravenes regulation 3 in relation to that list; or
- (b) D—
 - (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
 - (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) For the purposes of this regulation, if there are facts from which the tribunal could decide, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must hold that such a contravention or reliance on information occurred unless D shows that it did not.

(3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the 1996 Act.

Time limit for proceedings under regulation 9 [8]

10.—(1) An employment tribunal shall not consider a complaint under regulation 8 unless it is presented—

- (a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or
- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

(2) In considering under paragraph (1)(b) when it was reasonably practicable for a complaint to be presented, the tribunal shall in particular have regard to when the facts to which the complaint relates came to the attention of the complainant.

(3) For the purposes of paragraph (1)—

- (a) where an act extends over a period, the reference to the date of the act is a reference to the last day of the period;
- (b) a failure to act shall be treated as done when it was decided on.

(4) For the purposes of paragraph (3), in the absence of evidence establishing the contrary D shall be taken to decide on a failure to act—

- (a) when D does an act which is inconsistent with doing the failed act, or
- (b) if D has done no such inconsistent act, when the period expires within which D might reasonably have been expected to do the failed act if it was done.

Proceedings under regulation 9: remedies [10]

11.—(1) Where the employment tribunal finds that a complaint under regulation 9 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by D to P in respect of the act or failure complained of.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by P which is attributable to D's act or failure.

(3) The loss shall be taken to include—

- (a) any expenses P reasonably incurred in consequence of the act or failure complained of, and
- (b) loss of any benefit which P might reasonably be expected to have had but for that act or failure.

(4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or Scotland.

(5) In determining the amount of compensation to be awarded no account shall be taken of any pressure exercised on D by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the act or failure complained of was to any extent caused or contributed to by action of P, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(7) Where the detriment to which a worker is subjected is the termination of that worker's contract, but that contract is not a contract of employment, any compensation awarded under this regulation must not exceed the limit specified in paragraph (8).

(8) The limit specified in this paragraph is the total of-

- (a) the sum which would be the basic award for unfair dismissal, calculated in accordance with section 119 of the 1996 Act, if the worker had been an employee and the contract terminated had been a contract of employment; and
- (b) the sum for the time being specified in section 124(1) of the 1996 Act which is the limit for a compensatory award to a person calculated with section 123 of the 1996 Act.

Complaint against employer and employment agency [11]

12.-(1) Where P has a right of complaint under regulations 5 and 6 against R and E arising out of the same facts, P may present a complaint against either R or E against R and E jointly.

(2) If P presents a complaint against only one party, that party or P may request the tribunal to join or sist the other as a party to the proceedings and the tribunal shall grant the request if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made after the tribunal has made its decision as to whether the complaint is well-founded.

(3) Where P brings a complaint against R and E jointly, or where P brings a complaint against one of them and the other is joined or sisted as a party to the proceedings, and the tribunal-

- (a) finds that the complaint is well-founded as against R and E, and
- (b) awards compensation,

the tribunal may order that the compensation shall be paid by R, by E, or partly by B and partly by E, as the tribunal shall consider just and equitable in all the circumstances.

Awards against third parties [13]

13.-(1) If in proceedings on a complaint under regulation 5, 6 or 9 or under section 104E of the 1996 Act, either the respondent or complainant claims that another person contravened regulation 3 in respect of the prohibited list to which the complaint relates, the complainant or respondent may request the tribunal to direct that other person be joined or sisted as a party to the proceedings.

(2) The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made if it is made after the tribunal has made a decision as to whether the complaint is well-founded.

(3) Where a person has been so joined or sisted as a party to the proceedings and the tribunal-

- (a) finds that the complaint is well-founded,
- (b) awards compensation, and
- (c) finds the claim in paragraph (1) is well-founded,

the tribunal shall make a declaration to that effect and may award such of the remedies mentioned in paragraph (4) as it considers just and equitable.

- (4) The remedies the tribunal may award are-
- (a) an order that compensation shall be paid by the person joined (or sisted) instead of by the respondent,
 - (b) an order that compensation is paid partly by the person joined (or sisted) and partly by the respondent,
 - (c) a recommendation that within a specified period the person joined (or sisted) takes action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.
- (5) If the person joined (or sisted) fails without reasonable justification to comply with a recommendation to take action, the tribunal may increase its award of compensation or, if it has not made such an award, make one.

Restrictions on contracting out [14]

14. Section 288 of the 1992 Act (restrictions on contracting out) shall apply in relation to regulations 5, 6 and 9 as if they were contained in that Act.

Civil remedy for contravening the general prohibition: application to the Court [15]

15.(1) A person who has suffered or may suffer loss due to an actual or apprehended contravention of regulation 3 may bring a claim in civil proceedings.

(2) Without prejudice to any of its other powers the Court may, on an application under this regulation-

- (a) award damages for (among other things) any financial loss resulting from any contravention of regulation 3 by the defendant including compensation for injured feelings]; and
- (b) grant such interlocutory relief (or, in Scotland, such interim order) as it considers appropriate for the purposes of restraining or preventing the defendant from pursuing any conduct in contravention of regulation 3.

Applications to both the Court and the Employment Tribunal

16.(1) A person who applies to the employment tribunal under regulation 5, 6 or 9 or under Part 10 of the 1996 Act as it applies by virtue of these Regulations, in relation to conduct which also consists of using a prohibited list can in relation to such use only apply to the Court for interlocutory relief (or, in Scotland, interim order) for the purposes of restraining or preventing any conduct by the defendant to the application.

(2) Subject to paragraph (3), if-

- (a) a person applies to the Court in relation to alleged use of a prohibited list, and
- (b) the alleged use also consists of conduct which could give rise to a complaint under regulation 5, 6 or 9 or under Part 10 of the 1996 Act as it applies by virtue of these Regulations,

that person may not apply to the Employment Tribunal in relation to that use of a prohibited list.

(3) Paragraph (2) shall not prevent an application to the Employment Tribunal where the application to the Court is only for interlocutory relief (or, in Scotland, interim order) for the purposes of restraining or preventing conduct by the defendant to the application.

Consequential amendments

17. The Schedule to these Regulations shall have effect.

SCHEDULE

Consequential Amendments

- 1.—(1) The Employment Tribunals Act 1996⁽⁵⁾ is amended as follows.
- (2) In section 10(1)—
- (a) at the end of sub-paragraph (a), the word “or” is omitted, and
 - (b) after paragraph (b) there is inserted—
“or
 - (c) regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2009.”
- (3) In section 16(1)—
- (a) at the end of paragraph (c), the word “or” is omitted, and
 - (b) after paragraph (d), there is inserted—
“or
 - (e) payments by employers to employees under regulations 4, 5 or 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2009.”
- (4) In section 18(1)—
- (a) at the end of paragraph (s), the word “or” is omitted, and
 - (b) after paragraph (t), there is inserted—
“or
 - (u) under regulations 5, 6 and 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2009.”
- (5) In section 21(1)—
- (a) at the end of paragraph (t), the word “or” is omitted, and
 - (b) after paragraph (u), there is inserted—
“or
 - (v) the Employment Relations Act 1999 (Blacklists) Regulations 2009.”

2.—(1) The 1996 Act is amended as follows.

(2) After section 104D, there is inserted—

“Blacklists

104E.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal relates to a prohibited list; and either—

- (a) the employer contravenes regulation 3 of the 2009 Regulations in relation to that prohibited list; or
- (b) the employer—
 - (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
 - (ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

(2) For the purposes of this section, if there are facts from which the tribunal could decide, in the absence of any other explanation, that the employer contravened regulation 3 of the 2009 Regulations or relied on information supplied in contravention of that regulation, the tribunal

⁽⁵⁾ 1996 c. 17.

must hold that such a contravention or reliance on information occurred, unless the employer shows that it did not.

(3) In this section—

“the 2009 Regulations” means the Employment Relations Act (Blacklists) Regulations 2009⁽⁶⁾, and

“prohibited list” has the meaning given in those Regulations.

(4) In considering under section 111(2)(b) when it was reasonably practicable for a complaint of dismissal which is unfair by reason of this section to be presented, the tribunal shall in particular have regard to when the facts to which the complaint relates came to the attention of the complainant.

(3) In section 105-

(a) in subsection (1)(c) for “(7K)” there is inserted “(7L)”, and

(b) after subsection (7K), there is inserted-

“(7L) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in section 104E(1).”

(4) In section 108(3)-

(a) the word “or” at the end of paragraph (o) is omitted, and

(b) after paragraph (p), there is inserted-

“or,

(q) section 104E(1) applies.”.

(5) In section 128(1)(b), for “103 or 103A”, there is substituted “103, 103A or 104E”.

⁽⁶⁾ S.I. 2009/xxxx.

ANNEX 2 – CONSULTATION-STAGE IMPACT ASSESSMENT

Summary: Intervention and Options		
Department/agency: BIS	Title: Impact Assessment of the Blacklisting of Trade Unionists – Revised Draft Regulations	
Stage: Consultation	Version: final	Date: 22 June 2009
Related publications: The Blacklisting of Trade Unionists: Consultation on Revised Draft Regulations		
Available to view or download at:		
Contact for enquiries: Bernard Carter/Tim Harrison Telephone:0207 2152760		
<p>What is the problem under consideration? Why is government intervention necessary? Blacklisting facilitates and encourages unlawful discrimination against trade unionists and compromises a fair system of employment relations. Government stated, following a consultation on this issue in 2003, that it would act quickly to outlaw blacklisting if evidence of this practice came to light. A related investigation by the Information Commissioner concluded in 2009 that blacklisting was resurfacing and Government intervention is now necessary to outlaw this.</p>		
<p>What are the policy objectives and the intended effects? The Government proposed to introduce regulations under the Employment Relations Act 1999 at the earliest opportunity to outlaw the compilation, dissemination and use of trade union blacklists. Following the 2009 investigation and the risks blacklisting poses to equity and fairness in employment relations, the Government believes this will give a clear signal about the unacceptability of blacklisting and that regulation is necessary to stamp out this practice.</p>		
<p>What policy objectives have been considered? Please justify any preferred option The main alternative option is to rely on the existing provisions of trade union and data protection law to stamp out this practice. There is ample guidance on both trade union and data protection law to explain the law and to dissuade them from this kind of activity. However, the TCA example shows this was insufficient, and the parties, which were mostly large and well-resourced organisations, did not seem to act in ignorance of the law. Against this background, the provision of additional guidance or other non-regulatory approaches is unlikely to be effective.</p>		
<p>When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Blacklisting is an unusual, and uncommon, activity. There are no plans to undertake a specific review of this legislation. However, any case law will be monitored by the Department and, given the linkages with data protection law, the Department intends to continue sharing experience with the Information Commissioner.</p>		
<p>Ministerial sign-off for consultation stage Impact Assessment I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options</p> <p>Signed by: Pat McFadden, Minister of State for Employment Relations and Postal Affairs Date: 22 June, 2009</p>		

Summary: Analysis & Evidence	
Policy option 2	Description: Introduce regulations to outlaw the compilation, dissemination and use of trade union blacklists

Costs		
ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'. One-off familiarisation costs for employers, employment agencies, employee vetting organisations (£0.501m) and trade unions (£0.025m).
One-off (transition)	Yrs	
£ 0.526m	1	
Average annual cost (excluding one-off)		
£ 0		Total cost (PV) £ 0.526m
Other key non monetised costs by 'main affected groups' There may be costs to business for failure to comply but with 100% compliance these costs would not arise. Similarly in such cases there would be enforcement costs for the Exchequer.		

Benefits		
ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups': Benefits are envisaged from an improvement in mutual trust between the workforce and management. This should impact positively on commitment and productivity but it is not possible to quantify these here.
One-off	Yr	
£ 0	1	
Average annual cost (excluding one-off)		
£ Not quantified		Total Benefit (PV) £ Not quantified
Other key non monetised benefits by 'main affected groups' Main beneficiaries would be employees adversely affected by blacklisting activities, but again assuming 100% compliance such cases should not arise.		

Key assumptions/sensitivities/risks:

Price base year: 2009	Time period (years) 10	Net benefit range (NPV) £ -0.526m	Net Benefit (NPV best estimate) £-0.526m
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What is the geographic coverage of the policy/option?	GB			
On what date will the policy be implemented?	As soon as possible after Parliamentary approval in autumn 2009			
Which organisation(s) will enforce the policy?	Tribunals Service/County and High Courts			
What is the total annual cost of enforcement for these	£ tbd			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	N/A	N/A

Evidence Base (for summary sheets)

A: Strategic Overview

1. The Government consulted on the issue of blacklisting in 2002 and 2003 as part of its consultation on the Employment Relations Act 1999. In the absence of evidence that blacklisting was taking place, the Government re-affirmed its view that it would not seek to implement regulations until such evidence became available. However, the Government also stated that it would act quickly to outlaw blacklisting if there was evidence that blacklisting was re-surfacing.
2. In 2009 an investigation by the Information Commissioner found evidence of the operation of a blacklisting service in the construction sector. As a result the Government proposes to implement regulations outlawing the compilation, dissemination and use of trade union blacklists at the earliest opportunity.
3. The proposed changes will not result in any additional administrative burdens for business.

B: The Issue

4. It is currently unlawful for employers to discriminate against individuals on grounds of their trade union membership and activities. However, it is not unlawful for blacklisters to encourage employers to discriminate in this way by supplying them with information identifying trade unionists.
5. The consultation document describes in greater detail The Consulting Association (TCA) case that has unearthed evidence of blacklisting activity and therefore only a summary is given here.

Recent evidence of blacklisting activities

6. Since June 2008, the Information Commissioner (IC) has been undertaking an investigation under his powers in the Data Protection Act 1998 into the activities of an organisation called The Consulting Association (TCA). The initial findings announced earlier this year showed that TCA had for many years provided a service to construction companies appraising the suitability for employment of individuals.
7. TCA held records on about 3,300 people, over half of which contained little data other than their names. However, in over 1,600 cases, more detailed information was held in a card-index system. The IC concluded that this vetting service, operated on covert lines, seriously breached aspects of data protection law.
8. It appears that the overall purpose of the records held by TCA was to assist member companies in identifying people who from their viewpoint might be classified as troublemakers and who might therefore affect the delivery of construction work on schedule. Some records refer exclusively to poor work performance, including bad health and safety practices and violence against

colleagues. However, most - about 75 per cent of the 1,600 records held by TCA - concern trade unionists and, more precisely, activities associated with trade unions, including acting as a representative or involvement in industrial action. However, it was clearly not the case that every trade union member or every trade union representative had a TCA record.

- **Consultation**

Within government

9. The Department for Business Innovation and Skills (BIS) has consulted the Information Commissioner, the Ministry of Justice and the Better Regulation Executive.

Public consultation

10. This Impact Assessment accompanies a public consultation on revised draft regulations to be introduced under section 3 of the Employment Relations Act 1999 to prohibit the blacklisting of trade unionists.

C: Objectives

11. The Government has consistently taken the view that the blacklisting of trade unionists should have no place in a fair system of employment relations. It is a practice which facilitates and encourages unlawful discrimination against trade unionists.

12. Although important legal protections already exist in this area, the recent TCA case has prompted the Government to give a clear signal about the unacceptability of blacklisting and is therefore minded to introduce regulations to outlaw this.

D: Options identification

The options being considered by the Government are:

- **Option 1 Do nothing**
- **Option 2 Introduce regulations to outlaw the compilation, dissemination and use of trade union blacklists.**

Option 1

13. The TCA case has highlighted the risk that blacklisting may be re-surfacing and the Government has stated in the past that it would act quickly to outlaw this practice. As blacklisting is a practice which facilitates and encourages unlawful discrimination against trade unionists, failure to act would compromise the fair system of employment relations in Great Britain.

Option 2

14. The Government's preferred option is to introduce regulations to outlaw the compilation, dissemination and use of trade union blacklists.

15. The consultation document provides greater detail behind this option but the main points are summarised below. The Government is therefore consulting on:

- The need to regulate
- Whether the regulations adequately cover all possible ways of undertaking blacklisting
- Whether the regulations adequately deal with blacklists maintained and hosted abroad
- The definition of a prohibited list
- Exemptions
- Enforcement
- Approach to burden of proof
- Time limits for making applications to employment tribunals
- Remedies

16. For the purposes of this Impact Assessment the majority of the issues above do not involve any or much financial impact and therefore the cost-benefit analysis below focuses on the broader effects of the proposed changes.

E: Analysis of options

Costs and Benefits

17. The estimated costs and benefits associated with the Government's preferred option (Option 2) are presented and discussed below.

Assumptions

18. Costs are likely to arise from two sources. First, organisations will need to familiarise themselves with – and, if necessary, implement changes resulting from – the revised regulations. These costs are fully accounted for in this Impact Assessment.

19. Secondly, there may also be costs associated with enforcement and sanctions. This relates to both businesses who fail to comply with the regulations and to the Exchequer in terms of providing resources for

enforcement. It should be noted that these costs are **avoidable under full compliance with the legislation** and are therefore not included in the final cost-benefit estimates for this Impact Assessment.

20. Similarly, any benefits accruing to individuals as a result of these changes are not included either. Again, under full compliance there should be no effects on an individual's access to work or their earnings potential.

Evidence of blacklisting

21. Beyond the TCA case described above there are no firm data to suggest that blacklisting is widespread.

Sectors and groups affected

22. The regulations are most likely to affect only those parts of the economy where unionisation is more prevalent. Labour Force Survey (LFS) data from 2008 suggest the sectors with the highest union density are *public administration and defence; education; electricity, gas and water, health and social work; and transport, storage and communication* – all of which have trade union density of around 40 per cent or higher⁷. These were all well above the UK average of 27.4 per cent.

23. Data on union density for all sectors and nations within the UK are presented in Table 1 below. The proposed regulations will apply to Great Britain only and the data at national level indicate that the overall trends for the UK are also broadly consistent for England, Wales and Scotland.

Table 1. Trade Union Density – By Sector, Q4 2008

(% employees by sector)	UK	England	Wales	Scotland	Northern Ireland
Public administration and defence	55.8	53.0	66.9	67.6	64.3
Education	54.1	52.4	61.2	64.3	64.4
Electricity, gas and water	41.7	40.9	na	50.6	na
Health and social work	40.7	38.8	49.3	48.0	52.3
Transport, storage and communication	39.2	38.6	50.5	39.3	40.7
Financial intermediation	20.8	18.7	29.4	33.2	na
Manufacturing	20.4	19.6	28.6	22.9	25.7
Other services	18.9	17.7	31.9	26.5	na
Mining and quarrying	18.6	19.3	na	na	na
Construction	14.5	13.6	na	22.2	na
Wholesale, retail and motor trade	11.9	11.6	19.0	10.1	13.0
Real estate and business services	10.0	9.6	16.4	9.7	na
Agriculture, forestry and fishing	7.0	7.6	na	na	na
Hotels and restaurants	5.3	5.1	na	na	na
All sectors	27.4	26.1	37.4	32.9	35.6

Source: Tables 3.4 and A1-A4, Trade Union Membership 2008, BERR; NB: Data from Labour Force Survey Q4, 2008 not seasonally adjusted

⁷ Trade Union Membership 2008, BERR; <http://stats.berr.gov.uk/UKSA/tu/tum2008.pdf>

24. Furthermore we assume that private services and small employers are less likely to be affected. More detail is given in the small firms' impact test in the annex to this impact assessment and this indicates that trade union density is far lower in both the private sector as a whole as well as in smaller organisations.

25. Using the latest data from the Small and Medium Enterprise statistics⁸ and estimating for Great Britain only, we calculate that public and private sector organisations in the sectors identified above with 250 or more employees would be most affected. This amounts to around 3,200 organisations.

Table 2. Organisations most affected by proposed changes

	UK (whole economy)	Of which: Public sector	Of which: private Sector	Private sector of which heavily unionised
All employers	1,298,,195	79,475	1,218,720	207,890
1-4 employees	858,245	46,545	811,700	126,760
5-9 employees	221,600	14,005	207,595	37,455
10-19 employees	119,495	8,330	111,165	23,590
20-49 employees	60,505	4,850	55,655	13,800
50-99 employees	18,990	1,845	17,145	3,550
100-199 employees	9,305	1,355	7,950	1,355
200-249 employees	1,915	320	1,595	275
250-499 employees	3,715	715	3,000	550
500 or more employees	4,425	1,505	2,920	560
Estimated total UK organisations affected	3,330	2,220	na	1,110
<i>Minus estimated Northern Ireland organisations</i>	<i>124</i>	<i>79</i>	<i>na</i>	<i>45</i>
Estimated total GB organisations affected	3,206	2,141	na	965

Source: SME Statistics, 2007, BERR

26. The regulations will also apply to employment agencies and employee vetting organisations. The effects on these are discussed below.

Administrative burdens

27. There are no new administrative burden obligations arising from the proposed changes.

⁸ Latest data available are for 2007; <http://stats.berr.gov.uk/ed/sme/>

Costs

One-off costs

28. Employers, employment agencies, employee vetting organisations and trade unions will all incur one-off familiarisation costs ensuring they comply with the new regulations. These are estimated separately below.

Costs to Business

(i) Employers

29. We estimated above that around 3,200 public and private sector employers would be directly affected by these regulations.

30. We assume that in most cases the checks needed to be carried out in these organisations should be minimal and amount to an hour of management time. In other cases, assumed to be 10 per cent of the time, the checks may be more complex and we assume a day or management time to complete this.

31. The total cost of familiarisation for all affected organisations is estimated to be **£375,000**⁹.

(ii) employment agencies

32. BIS estimates¹⁰ there are around 16,000 employment agencies across the UK. In theory all should need to familiarise themselves with the new regulations, but again this is only likely to be the case with the provision of personnel to highly unionised sectors.

33. We therefore assume half of employment agencies will need to undergo familiarisation and assume this takes an hour of an agency employee's time. The total one-off cost of this is estimated at around **£96,000**¹¹.

(iii) employee vetting organisations

34. Similarly those organisations involved in employee vetting will need to familiarise themselves with the new regulations and ensure their procedures are compliant.

35. There are no directly available data on the number of organisations involved in this area. However, data from the Annual Business Inquiry (ABI) indicate that in 2007¹² there were around 6,170 enterprises involved in *investigation and security activities*. Not all of these will be involved in

⁹ We use median hourly and weekly wage for Personnel, training and industrial relations managers (SOC 1135) and uprate this to 2009 prices and include 21 per cent mark-up for non-wage labour costs.

¹⁰ Agency Working in the UK: A review of the evidence, BERR Employment Relations Research Series No. 93, October 2008; <http://www.berr.gov.uk/files/file48720.pdf>

¹¹ Median hourly wage excluding overtime for Activities of employment placement agencies (SIC 2007) category 781. This has been uprated to 2009 prices (3.5 per cent) and includes non-wage labour costs of 21 per cent. Equals £9.62 x 1.035 x 1.21 x 8,000

¹² Data is presented under SIC(2003) category 74.6: Investigation and security activities; http://www.statistics.gov.uk/abi/downloads/section_k.xls

employee vetting, but we assume here that half of this number are, hence around 3,085.

36. Assuming again that on average this requires an hour of time by an employee in these organisations, this amounts to a total cost of around **£30,000**¹³.

Trade unions

37. Trade unions would need to check that their lists and how they are used do not inadvertently break the law. The costs associated with this may be greater for larger unions who may have more thorough records of their members.

38. We assume this will require one day's work for one union official and one clerk for each union. This amounts to an average daily cost of around £135¹⁴. In the UK there were 185 certified trade unions as of end March 2008¹⁵. The overall one-off cost to trade unions is therefore estimated at **£25,000**.

39. A summary of estimated one-off costs is given in table 3 below.

Table 3. Summary of one-off familiarisation costs (£m).

	One-off costs (Year 1 only)
Business (Total): of which	£0.501
<i>Employers</i>	<i>£0.375</i>
<i>Employment Agencies</i>	<i>£0.096</i>
<i>Employee Vetting Organisations</i>	<i>£0.030</i>
Trade Unions	£0.025

Source: BERR estimates

Ongoing costs

Business

40. As noted above any costs associated with employers or other businesses failing to comply with the revised regulations are not recorded as part of this impact assessment as these are considered to be avoidable.

The Exchequer

41. The Government believes individuals should be adequately protected under the law by a robust enforcement regime. However, as stated in the consultation document, the Government does not see a need to establish new and separate investigative role for a public authority to uncover breaches of

¹³ SIC code 80 – security and investigation activities – median hourly earnings excluding overtime; http://www.statistics.gov.uk/downloads/theme_labour/ASHE_2008/2008_ind4_sic07.pdf

¹⁴ We have assumed here the median employee weekly wage excluding overtime (£372) plus the median employee wage for administrative and secretarial occupations (£304.10). Cost equals (£372 x 0.2) + (£304.1 x 0.2) = £135.22.

¹⁵ Certification Office Annual Report 2007-08; <http://www.certoffice.org/annualReport/pdf/Chapter%201A.pdf>

the regulations. Therefore it is proposed that enforcement should take the form of civil action through the employment tribunal or court.

(i) Employment tribunals

42. The Employment tribunal should be the most cost-effective route for complainants and respondents and provide the easiest method to seek compensation for loss. It is estimated that there are around 70 trade union related employment tribunal claims each year and a large number of these are brought under multiple jurisdictions. Therefore the potential number of claims brought under the new jurisdictions arising from the revised regulations is likely to be small. We assume this is likely to be 10-20 cases per year. With average Exchequer costs of an employment tribunal estimated at £1,000 the Exchequer would incur additional costs of £10,000 - £20,000 per year. However, once again, if all parties were fully compliant with the regulations then no costs would be incurred.

(ii) County/High Courts

43. Trade unions may also take action against a compiler of a blacklist at the county court. Although this will result in additional costs for both claimant and respondent, these costs would be avoidable under full compliance with the regulations and hence are not quantified here.

Benefits

Individuals

44. The main beneficiaries would be the workers adversely affected by blacklisting activities, but again assuming 100 per cent compliance such cases should not arise. These individuals should find suitable employment more easily.

45. More generally, employment relations in sectors such as construction where employees feared that blacklisting was practised should see an improvement in mutual trust between the workforce and management. This should positively impact on commitment and productivity. It should also ensure that trade union representatives, including safety representatives, are easier to recruit and they undertake their duties more freely. This in turn should produce benefits for the workforce, trade unions and to employers (insofar as modern workplace representatives make an important contribution to the operation of safe and productive workplaces).

F: Risks

46. The main risks in these regulations concern their effectiveness in dealing with covert listing behaviour which uses ICT and other new technologies, and which may be operated abroad. Other risks include the possibility that the regulations may inadvertently affect acceptable vetting behaviour. It is also a risk that the regulations may be difficult for individuals to enforce.

G: Enforcement

47. The Government is consulting on enforcement and sanctions as part of the current consultation.

48. Blacklisting is a very serious matter and Government believes that individuals should be adequately protected under the law by a robust enforcement regime. Enforcement of these regulations should be viewed in conjunction with the enforcement of related legal requirements. Trade union blacklists will generally breach both these regulations and the 1998 Act, because blacklists must generally operate on covert lines to be effective. As the TCA case has illustrated, the Information Commissioner (IC) has strong powers both to investigate breaches of the 1998 Act and to undertake criminal prosecutions. If blacklisting occurs in the future, it may well be uncovered via an investigation of the IC, and lead to prosecutions under the 1998 Act. The Government does not therefore see a need, and it would be a wasteful use of scarce public resource, to establish a new investigative role for a public authority to uncover breaches of these regulations.

49. The Government believes enforcement should take the form of civil action through the employment tribunal or the court. The involvement of the employment tribunal should keep the legal costs of both complainants and respondents under control, and should provide an easier method to seek compensation for loss than the court, which is the only route available under the 1998 Act. Unions can in certain circumstances themselves take enforcement action. It is possible for a trade union to take action against a compiler of a blacklist at the county court, whilst supporting applications to the employment tribunal by its members against employers for using the same blacklist. If a dispute is not resolved in the workplace, an employee may make a claim to an employment tribunal as with the existing dispute resolution system. Employment tribunals are specialist judicial bodies that are part of the Tribunals Service.

H: Recommendation and Summary Table of Costs and Benefits for the options

50. Overall estimated costs and benefits by main group affected are given in Table 4 below.

51. Total costs are estimated at £0.526m and all is this is one-off familiarisation cost.

52. Benefits are envisaged from an improvement in mutual trust between the workforce and management. This should impact positively on commitment and productivity but it is not possible to quantify these benefits here.

Table 4. Summary of costs and benefits (£m).

	One-off (Year 1 only)		Ongoing (All years)	
	Costs	Benefits	Costs	Benefits
Exchequer	None	None	None	Not quantified
Employers*	£0.501	None	None	Not quantified
Trade Unions	£0.025	None	None	Not quantified
Employees	none	None	None	Not quantified

Source: BERR estimates; * NB: includes employers, employment agencies and employee vetting organisations

I: Implementation

53. The Government is minded to introduce regulations under the power of section 3 of the 1999 Employment Relations Act at the earliest opportunity.

J: Monitoring and evaluation

54. Blacklisting is an unusual, and uncommon, activity. There are no plans to undertake a specific review of this legislation. However, any case law will be monitored by the Department and, given the linkages with data protection law, the Department intends to continue sharing experience with the Information Commissioner.

Specific Impact Tests: checklist

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	No
Rural Proofing	No	No

Annex 1:

Competition Assessment

The initial analysis of the competition filter is that a detailed competition assessment is not considered necessary (see table A1 below). The proposed legislation will apply to all firms and is unlikely to affect the competitiveness of any particular sector.

Although we have considered above that organisations will incur costs associated with familiarisation of the revised regulations, these costs are estimated to be very small and therefore do not pose a threat to the competitiveness of any individual firm or sector.

Table A1. Competition assessment.

Question: <i>In any affected market, would the proposal..</i>	Answer
..directly limit the number or range of suppliers?	No
..indirectly limit the number or range of suppliers?	No
..limit the ability of suppliers to compete?	No
..reduce suppliers' incentives to compete vigorously?	No

Source: BERR

Small Firms Impact Test

It has been set out above how we believe these changes would mainly affect larger organisations in sectors with higher union density. Therefore we anticipate that the impact on small firms will be negligible.

Labour Force Survey data for Q4 2008 (see Table A2 below) shows that trade union density is much lower – by almost 20 percentage points – in organisations with fewer than 50 employees.

Similarly union density is relatively low – generally less than 20 per cent – in the private sector, whereas in the public sector over half of employees are trade union members. This rises to around two-thirds in Wales and Scotland. Union density is also higher in Northern Ireland, but the current proposals refer to Great Britain only.

Table A2. Trade Union Density – Workplace Size and Sector, Q4 2008					
(%)	UK	England	Wales	Scotland	Northern Ireland
<i><u>Workplace size: Total</u></i>	27.4%	26.1%	37.4%	32.9%	35.6%
Less than 50 employees	18.0%	16.5%	28.1%	22.9%	28.1%
50 employees or more	36.3%	34.9%	46.9%	42.7%	46.0%
<i><u>Sector</u></i>					
Private sector	15.5%	15.0%	21.0%	17.5%	18.7%
Public sector	57.1%	55.0%	67.3%	65.6%	66.6%

Source: Table A1, Trade Union Membership 2008, BERR; NB: Data from Labour Force Survey Q4, 2008 not seasonally adjusted

Equality Impact Assessment

As stated in the main impact assessment above, beyond the TCA case there are no robust data on the scale of blacklisting. However, we anticipate that this is not a widespread practice and as such relatively few employees in Great Britain are currently affected. We believe any blacklisting activity would be mostly concentrated in larger organisations within heavily unionised sectors of the economy.

Further work will be carried out to directly map the impact of the proposed regulatory changes on gender, race and disability equality for those working in these sectors. For now, we present an initial assessment of the impact on equality using data from the Labour Force Survey. In terms of the equality strands the broad results from this indicate that union density is higher:

- overall among female employees
- among black and black British groups, again particularly among female employees
- among disabled employees and especially those with a DDA disability¹⁶. Once again, within this group union density is higher among female employees.

The data are presented in tables A3 and A4 below.

A broad level assessment would suggest these groups are most at risk of blacklisting activities and therefore the proposed changes should be particularly beneficial. As stated above, further investigation is required to determine the impact on equality within the larger organisations and sectors of the economy most likely to be affected by the regulations.

¹⁶ The Disability Discrimination Act 2005 defines a person as having a disability for the purposes of the DDA where they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

See <http://research.dwp.gov.uk/aboutus/provisions-dda.pdf>

Table A3. Trade Union Density – Individual Characteristics, Q4 2008: UK Employees

(% by group)	All	Male	Female
All Employees	27.4%	25.6%	29.2%
<u>Ethnicity</u>			
White	27.8%	26.2%	29.5%
Black or Black British	30.3%	26.2%	33.9%
Asian or Asian British	22.9%	19.3%	27.7%
Mixed	20.4%	21.7%	19.3%
Chinese or other ethnic groups	16.3%	15.8%	16.7%
<u>Disability</u>			
DDA disabled and work-limiting disabled	31.9%	30.0%	33.6%
- <i>DDA disabled</i>	33.4%	31.7%	35.0%
- <i>Work-limiting disabled</i>	28.6%	28.0%	29.3%
Not disabled	26.7%	25.0%	28.6%

Source: Table 4.3, Trade Union Membership 2008, BERR; NB: Data from Labour Force Survey Q4, 2008 not seasonally adjusted

Table A4. Characteristics of Union Members and Non-union Members, Q4 2008: UK Employees

(% by group)	Union members	Non-union members	All employees
Male	47.2%	51.7%	50.9%
Female	52.8%	48.3%	49.1%
<u>Ethnicity</u>			
White	92.7%	90.8%	90.7%
Black or Black British	2.3%	2.0%	2.2%
Asian or Asian British	3.4%	2.0%	4.4%
Mixed	0.6%	0.8%	0.8%
Chinese or other ethnic groups	1.0%	2.0%	1.9%
<u>Disability</u>			
DDA disabled and work-limiting disabled	5.9%	4.7%	4.9%
- <i>DDA disabled</i>	6.8%	5.1%	5.4%
- <i>Work-limiting disabled</i>	2.7%	2.6%	2.6%
Not disabled	84.6%	87.6%	87.1%

Source: Table 6.2, Trade Union Membership 2008, BERR; NB: Data from Labour Force Survey Q4, 2008 not seasonally adjusted

ANNEX 3 - CONSULTATION RESPONSE FORM

This response form can be completed and returned to

Bernard Carter
Labour Law and Dispute Resolution Branch
Employment Relations Directorate
Department for Business, Innovation and Skills
Bay 462
1 Victoria Street
London SW1H 0ET

Fax: 020 7215 6414

Email blacklisting.response@bis.gsi.gov.uk

Name

Organisation (if applicable)

Address

Trade Union or Staff Association	<input type="checkbox"/>
Small Business (0-49 staff)	<input type="checkbox"/>
Medium Business (50-249 staff)	<input type="checkbox"/>
Large Business (250 or more staff)	<input type="checkbox"/>
Business Representative Organisation/ Trade Body	<input type="checkbox"/>
Legal Profession	<input type="checkbox"/>
Central Government	<input type="checkbox"/>
Local Government	<input type="checkbox"/>
Individual	<input type="checkbox"/>
Charity or Social Enterprise	<input type="checkbox"/>
Other (please describe)	<input type="checkbox"/>

Question 1

We propose that, in light of the activities undertaken by The Consulting Association, suitably drafted regulations under Section 3 of the Employment Relations Act 1999 should now be implemented ? Do you agree with this approach ?

Yes

No

Comment:

Question 2

Do you have other evidence of trade union blacklisting ?

Yes

No

Comment:

Question 3

Do the regulations adequately cover all the possible ways, including use of the internet and other electronic media, whereby blacklisting could be undertaken ? If not, how could they be improved ?

Yes

No

Comment:

Question 4

Do the regulations adequately deal with blacklists maintained and hosted abroad ? If not, how should they be revised ?

Yes

No

Comment:

Question 5

Do you support the way the regulations clarify the meaning of a prohibited list ? If not, how should a prohibited list be defined ?

Yes

No

Comment:

Question 6

Do you support the drafting of the exemptions and should others be created ? Where applicable, please explain why you consider the drafting to be defective.

Yes

No

Comment:

Question 7

Do you support the Government's view that enforcement should take place via the civil law ? If not, what approach would you favour ?

Yes

No

Comment:

Question 8

Do you agree with the approach taken by the regulations regarding the burden of proof ? If not, what approach would you favour?

Yes

No

Comment:

Question 9

Do you agree with the approach taken in the regulations regarding the time limits for making applications to the employment tribunal ? If not, what approach would you favour ?

Yes

No

Comment:

Question 10

Do you agree with the approach taken by regulations regarding remedies? If not, what approach would you favour ?

Yes

No

Comment:

Question 11

Do you have any other views on the way the regulations have been drafted? Please submit any drafting suggestions if you have them (please continue on a separate sheet if necessary).

Comment:

Question 12

Do you have any comments on the Impact Assessment at Annex 2 ?

Comment:

ANNEX 4 - LIST OF CONSULTEES

21st Century Aircrew
Michael Anderson
AA Democratic Union
Acas
Accord
Advance
AEGIS The Aegon UK Staff Association
Alliance for Finance
AMEC Plc
ASLEF
ASPECT
Associated Train Crew Union
Association of British Insurers
Association of College Management
Association of Directors of Children's Services
Association of Educational Psychologist
Association of Flight Attendants (Council 07)
Association of Headteachers & Deputes in Scotland
Association of Licensed Aircraft Engineers (1981)
Association of Local Authority Chief Executives
Association of Management and Professional Staffs
Association of Plumbing and Heating Contractors
Association of Principal Fire Officers
Association of Professional Ambulance Personnel
Association of Revenue & Customs
Association of School & College Leaders
Association of Teachers and Lecturers
Bakers Food and Allied Workers Union
Balfour Beatty Group Staff Association
Better Regulation Commission
Bevans Solicitors
Birmingham Law Society
Boots Pharmacists Association
Britannia Staff Union
British Air Line Pilots Association
British Association of Dental Nurses
British Association of Journalists
British Association of Occupational Therapists Ltd
British Bankers Association
British Chambers of Commerce
British Dental Association
British Dietetic Association
British Dietetic Association
British Medical Association
British Printing Industries Federation
British Retail Consortium
Broadcasting Entertainment Cinematograph and Theatre Union
Cabinet Office
Central Arbitration Committee
Certification Officer
Chartered Institute of Personnel and Development
Chemical Industries Association
Cheshire Building Society Staff Association
City Screen Staff Forum
Civil Engineering Contractors Association
Communication Workers Union
Community
Community & District Nursing Association
Confederation of British Industry
Confederation of Shipbuilding & Engineering Unions
Connect
Construction Confederation
Construction Employers Federation Ltd
Construction Industry Council
Council of Civil Service Unions
Department of Employment and Learning Northern Ireland
Derbyshire Group Staff Union
Diageo Staff Association
Distribution Staff Association
Dunfermline Building Society Staff Association
Educational Institute of Scotland
Electrical Contractors Association
Employment Appeal Tribunals
Employment Law Bar Association
Employment Lawyers Association
Employment Tribunals Service
Engineering Construction Industry Association
Engineering Employers' Federation (EEF)
Engineering Officers Technical Association
Equality and Human Rights Commission
Equity
European Study Group
Eversheds Solicitors
FDA
Federation of Entertainment Unions
Federation of Master Builders (FMB)
Federation of Professional Railway Staff
Federation of Small Business
Fil Brown
Financial Services Authority
Fire Brigades Union
Forum of Private Business
G4S Justice Services Staff Association
Gallaher Sales Staff Association
General Federation of Trade Unions
GMB
Guild of Professional Teachers of Dancing
Hammonds Solicitors
Harrods Staff Union

Headmasters' & Headmistresses' Conference
 Health and Safety Executive
 Heating & Ventilating Contractors' Association
 Hospital Consultants & Specialists Association
 Ice Hockey Players Association (Great Britain)
 Immigration Service Union
 Independent Academies Association
 Independent Democratic Union
 Independent Federation of Nursing in Scotland
 Independent Pilots Federation
 Industrial Workers of the World (IWW)
 Institute of Directors
 Institute of Football Management & Administration
 Institute of Journalists (Trade Union)
 International Federation of Actors
 International Federation of Airline Pilots Assoc.
 International Labour Office
 International Transport Workers Federation
 IPA
 Irish Bank Officials Association
 Joint Committee of Light Metal Trades Unions (1992)
 Joint Industry Board for The Electrical Contracting Industry
 KPMG Forensic
 Law Society
 Lawson Mardon Star Ltd Managerial Staff Asso.
 Leeds Building Society Staff Association
 Leek United Building Society Staff Association
 Leicestershire Overmen, Deputies & Shotfirers Association
 Lloyds TSB Group Union
 Local Government Association
 Manpower
 Maureen Adamson
 Michael Clapham MP
 Middlesex University
 Musicians Union
 NAPO
 National Assembly for Wales
 National Association of Colliery Overmen and Deputies and Shotfirers
 National Association of Colliery Overmen and Deputies and Shotfirers (Scottish Area)
 National Association of Colliery Overmen and Deputies and Shotfirers South Wales
 National Association of Co-operative Officials
 National Association of Independent Schools and Non-Maintained Special Schools
 National Association of School Business Management
 National Association of Schoolmasters Union of Women Teachers
 National Association of Stable Staff
 National Association of Teachers of Wales
 National Association of Women in Construction (NAWIC)
 National Day Nurseries Association
 National Farmers' Union
 National Farmers' Union Staff Association
 National Federation of Builders
 National House Building Council Staff Association
 National Society for Education in Art & Design
 National Specialist Contractors Council
 National Union Journalists
 National Union of Journalists
 National Union of Mineworkers
 National Union of Mineworkers (North Wales Area)
 National Union of Mineworkers (Scotland Area)
 National Union of Mineworkers (South Wales Area)
 National Union of Rail, Maritime & Transport Workers
 National Union of Teachers
 Nationwide Group Staff Union
 Nautilus Ltd
 NHS Employers
 NISA
 North of England Zoological Society Staff Association
 Offshore Industry Liaison Committee
 Ofsted
 PCS
 POA
 Prison Governors Association
 Prison Service Union
 Prison Staff Association
 Professional Association of Cabin Crew Employees
 Professional Cricketers Association
 Professional Footballers' Association
 Professional Rugby Players Association
 Prospect
 Public and Commercial Services Union
 Retail Book, Stationery & Allied Trades Employees Asso.
 Retained Firefighters Union
 Retired Officers Association
 Royal College of Midwives
 Royal College of Nursing of the UK
 Scarborough Building Society Staff Association (SOCASS)

Scottish Artist Union
Scottish Building Employers' Federation
Scottish Building Federation
Scottish Carpet Workers Union
Scottish Executive
Scottish Secondary Teachers Association
Scottish TUC
Shield Guarding Staff Association
Skipton Staff Association
Society of Chiropodists and Podiatrists
Society of Local Council Clerks
Society of Registration Offices (Birth, Deaths and Marriages)
Society of Union Employees (Unison)
Solidarity
Staff Association of Bank of Baroda (UK Region)
Staff Union West Bromwich Building Society
The Association for Clinical Biochemistry
The Association of Somerset Inseminators
The Association of Teachers & Lecturers
The Bar Council
The British Association of Colliery Management
The British Chambers of Commerce
The British Orthoptic Society
The British Safety Council
The Chartered Institute of Building
The Chartered Society of Physiotherapy
The Federation of Managerial and Professional Staff Associations
The Fire Brigades Union
The General Dental Practitioners Association
The General Federation of Trade Unions
The Information Commissioner's Office
The Law Society Scotland
The Lecturers' Employment Advice & Action Fellowship
The Locum Doctors Association
The National Association of Head Teachers

The National Association of NFU Group Secretaries
The National Federation of Sub-Postmasters
The Newspaper Society
The RSPB Staff Association
The Society of Authors Ltd
The Society of Radiographers
The Work Foundation
Thompsons Solicitors
Trades Union Congress
Trades Union Congress
Transport Salaried Staff Association
Transport Salaried Staffs' Association
UBAC
UDW
UFS
UK Contractors Group
Union of Construction, Allied Trades & Technicians
Union of Country Sports Workers
Union of Democratic Mineworkers
Union of General & Volunteer Workers
Union of Shop Distributive & Allied Workers
UNISON: The Public Service Union
Unite the Union (Amicus Section)
Unite the Union (T&GWU Section)
United and Independent Union
United Road Transport Union
UNITY
Universities and Colleges Employers Association
Universities UK
University & College Union
University and College Union
Voice
Wales TUC
Warwick International Staff Association
Welsh Rugby Players Association
Whatman Staff Association
Working Lives Research Institute
Writers' Guild of Great Britain
Yorkshire Independent Staff Association

ANNEX 5 - CONSULTATION CODE OF PRACTICE CRITERIA

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

The complete code is available on the Better Regulation Executive's web site, address <http://bre.berr.gov.uk/regulation/consultation/code/>

Department for Business, Innovation and Skills www.bis.gov.uk
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