
Red tape in the workplace
The re-regulation of the labour market II
- the sequel
IoD Policy Paper

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1 Introduction and summary

1.1 Introduction

In a paper on the “Work-Life Balance”¹, we looked at some aspects of the increasing burden of employment regulation and legislation facing business. In that paper (which was released in April 2001) we were particularly concerned about the “urban myths” and the ill-informed propaganda about the workplace, which appeared to be major drivers of the Government’s employment policy. And we still are. Little has changed over the last two years – except that things have got worse.

The Work-Life Balance paper was concerned with urban myths and other fantasies:

- “Long hours culture” is endemic, imposed and resented and the UK is full of overworked, workaholics. There is little evidence for this; it is an urban myth. Moreover, “we work the longest hours in the EU” – not even this is true according to Eurostat’s data. An urban myth.
- The “long hours culture” and other aspects of the workplace cause misery, dissatisfaction, stress and illness. There is also little evidence for this; another urban myth.
- The current inflexibilities and demands of the workplace mean that some employees (especially mothers with children) find it very difficult to achieve a satisfactory balance between their “work” and their “lives” (as if work is not part of people’s lives). This situation is, moreover, “unacceptable”. This is not so much an urban myth as a sentimentalised retreat from reality.
- Job “insecurity” is endemic in our “hire and fire” culture. This is an urban myth.

We promised in 2001 to produce a follow-up paper on the changes to the employment legislation since 1997. However, we decided to postpone the paper to take in the 2002 Employment Act. And here it is.

1.2 The re-regulation of the labour market: overview (see chapter 2)

On this fundamental issue, which is central to this paper, we draw the following conclusions:

- This country has to make a choice between (1) free and lightly regulated labour markets, economic dynamism and strong job creation and (2) intrusive and heavily regulated labour markets, economic stagnation and weak job creation. There is, in reality, no Third Way. Heavy regulation destroys dynamism. Heavy regulation kills enterprise. (See 2.1.)

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- The increase in the burden on business of the extra employment regulations since 1997 has been very significant and the changes in the burden seem to be accelerating. The extra regulations are promoted and imposed by the current administration in order to, specifically, improve “minimum employment standards” and, more generally, deliver its “social justice” programme. But good employers know that they must offer decent terms and conditions if they want to recruit and keep good staff and bad employers will ignore the Government’s pleas to live in a “fairer and more just society”. (See 2.2.)
 - Heavy regulation distracts businesspeople from running their businesses well, damages business and increases costs. Our latest estimate (2002) of the increased costs was nearly £6bn a year since 1997. This is not trivial. (See 2.3.)
 - Increased employment regulations will damage economic dynamism, competitiveness, job creation and productivity, as will the higher taxes. The combination of “tax ‘n’ red tape” policy and “tax ‘n’ spend” policy will undermine growth. (See 2.4.)
 - We recognise that the Government has introduced initiatives intended to cut down on the red tape burden. We wish them well and support their endeavours. But in the meantime the increased regulations flood in. Some of them are from Brussels and some from the Government’s own policies. (See 2.5.)

1.3 Employment regulations: developments since 1997 (see chapter 3)

There has been a significant expansion in employment regulations since 1997, as we have already said in section 1.2. More specifically, we conclude in chapter 3 that:

- The NMW was introduced in 1999 at very modest levels and at a time when the economy and private sector job creation were strong. As a consequence the effects on the jobs market have been containable. This early “prudence” now seems to be ditched. The latest proposals for the adult rate (£4.50 from October 2003 and £4.85 from October 2004) are “unwise”, given the weaker economic circumstances. (See 3.2.2.)
- The Employment Relations Act (ERA, 1999) was a very substantial piece of legislation on employee rights. It increased collective rights (including the compulsory recognition of trade unions) and individual rights and introduced various family friendly policies including the Parental Leave Directive. (See 3.3.)
- The Employment Act (EA, 2002) was another very substantial piece of legislation on employee rights. It enabled the enactment of the EU’s Fixed-term Work Directive, introduced equal pay questionnaires, introduced statutory procedures for internal grievance procedures which will form part of all employment contracts (with a view to cutting back the number of employment tribunal cases) and significantly extended “family friendly” policies (including expanded maternity rights, paternity pay, adoption pay and leave, the right to request flexible working for parents of young children). (See 3.4.)
- The influence on the workplace of EU Directives has been very significant and set to continue. The signing of the Social Chapter in 1997 has been behind many of them (see chapter 5). The range of issues dealt with by EU Directives is substantial including equal opportunities, employment protection and working conditions, health and safety at work, employee relations and data protection. (See 3.5.)

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- The Government's Working Families' Tax Credit has been a costly burden on business and shown to be remarkably ineffective at increasing work incentives (as, no doubt, its successor the Working Tax Credit will be). (See 3.6.)

Footnote: trade unions

Concerning trade unions, our main conclusions are:

- Trade union membership has fallen significantly since the early 1980s, reflecting the decline of employment in heavily unionised sectors such as manufacturing and mining. The rate of decline has, however, slowed and numbers even picked up in 1999 and 2000. But they slipped back in 2001. The public sector is significantly more heavily unionised than the private. (See 3.8.2.)
- Industrial strife was rife in the 1970s and the 1980s (to a lesser extent) but it was brought under control by a combination of the 1980s and early 1990s trade union legislation and a "new realism" by unions in the wake of the early 1980s and early 1990s (to a lesser extent) recessions. Industrial disputes are rising again and 2002 was the worst year for stoppages since 1990. But the most badly affected sectors are in the public sector. (See 3.8.3.)
- Following on from the previous point, there is undoubtedly a "swing to the left" in the composition of union leaders and there is rising union militancy. And some of the unions give the impression "it's pay off time". In particular, they oppose the all-too-necessary modernisation of the public services because they know modernisation is partly about involving the less-heavily unionised private sector. And that is a threat to their power and influence. (See 3.8.4.)

1.4 Discrimination and equality issues (see chapter 4)

Concerning the discrimination and equality issues covered in chapter 4 we would make the following points:

- We are totally and unequivocally opposed to discriminating against people on grounds of gender, race, disability or any other personal attribute (4.2).
- We are not opposed to anti-discrimination legislation in principle. The legislation that has been developed over the last 30 years on equal pay and sex, race and disability discrimination has been, on balance, positive. But the current developments are quite unnecessary. They will be costly for employers, they risk increased resentment and, partly because they are so vague, they risk further litigation. The voluntary approach is far to be preferred. (4.2 and later sections.)
- The EU's Directives on discrimination (covering sex, race, age and disability and sexual orientation and religion and belief) carry the risk that the burden of proof for employers could be increased (see 3.5.2 (ii)).
- Men and women behave differently in the labour market, this is particularly true when a woman has children. Unpalatable though this may be to hard-line feminists, men and women are different. The so-called gender pay gap reflects this. There is little evidence for wholesale discrimination against women by employers (though the recent extensions to "family friendly" policies are likely to be quite counter-productive here). But the

Government (especially the DTI, the “department for business”) behaves as if there were evidence - doubtless influenced by the EOC. (Sections 4.3 to 4.6.)

- Ethnic minorities do not make a homogenous group. Certain ethnic minority groups, including the Indians and the Chinese, are outstripping the Whites. It is time to stop seeing ethnic minority groups as “special cases”. They are increasingly well integrated into British work-life. They are British. And that is how it should be. But we are, of course, wholly supportive of any voluntary activities to improve race relations and prospects for ethnic minorities in the workplace. (Section 4.7.)
- We recognise that disability is a barrier to employment and we support the activities of the Disability Rights Commission (DRC). But there are problems and costs for employers, especially small employers, in complying with all the disability legislation. (Section 4.8.)
- Market forces will probably drive people to working for longer. But the impending legislation on anti-ageism could be worryingly vague and will probably lead to more litigation. (Section 4.9.)
- The prospective legislation on sexual orientation will probably lead to some changes in the workplace, but we are relatively relaxed about it (see section 4.10).
- We are much more concerned about the vague wording concerning the new rights over religion and “belief”. This is a potential “employment tribunal” minefield. (Section 4.10.)
- We fully understand the reasons for the Government deciding to replace the current discrimination bodies (EOC, CRE, DRC) with one body, which will also handle age, sexual orientation and religion and belief. (Section 4.11.)

1.5 The EU’s social agenda (see chapter 5)

These are the main conclusions of chapter 5 on the influence of the EU’s social agenda on UK employment law:

- The influence of the EU on UK employment is now very considerable. Moreover, there are no signs that the flow will be tempered (section 5.1).
- The core EU economies are over-regulated, inflexible and at a competitive disadvantage with the USA and much of the Far East (excluding Japan) and their growth rates reflect this. The heavily taxed and heavily regulated “Social Europe” model is discredited but there are no signs that this is recognised by the EU’s policy makers. Unless the EU is radically reformed on free market lines, it will be an economic area in inexorable relative decline (5.2.1).
- Heavy labour market regulation leads to relatively poorly performing labour markets. There is nothing “fair” about this. Greater flexibility, in the end, is a better guarantor of job security. The EU’s social policy should be determined by reference to economic competitiveness rather outdated concepts of labour market protectionism (5.2.2).
- We are not supporters of the “Social Europe” or the “Social Partnership” model, preferring the “Enterprise” model, where employers are free to build up direct individual relationships with their employees (section 5.3).
- Social harmonisation is meant to prevent “unfair competition”, but regulations kill competitiveness. It hits the competitiveness of all EU countries, but the UK in particular (section 5.3).
- The EU has a long, if not illustrious, history of social policy-making (5.4.1).

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- In the beginning there was the Rome Treaty, but the agenda really took off with the first Social Action Programme (1974). (5.4.2.)
 - The next great boost was the Single European Act (agreed 1986), which extended Qualified Majority Voting, permitting QMV for health and safety Directives. Then the Social Charter (1989, which the UK opted out of) led to a five-year Social Action Programme. The number of Directives increased, not least putative “health and safety” ones (5.4.3).
 - The 1990s was a decade of great “progress” or not, as the case may be. It was certainly a decade of high unemployment and there were certainly considerable “social” developments. The Maastricht Treaty (agreed 1991) led to the “Social Chapter” (which was appended to the Treaty, with the UK not agreeing to it). The Social Chapter led directly to six major Directives. The UK Government agreed to the Social Chapter at the Amsterdam Summit leading to a “single framework for social policy” and a new impetus for more social regulation (5.4.4).
 - The 21st century has brought further integrationist and interventionist zeal. The Social Policy Agenda (SPA) was unveiled at Lisbon (March 2000) and agreed at Nice (December 2000). It was part of a package of economic and social renewal (“reform”). The SPA will lead to more regulation and the economic reform agenda seems to be faltering. The Charter of Fundamental Rights was also agreed at Nice and is included in the Convention on the Future of Europe’s draft Constitutional Treaty. The latter spells the end for a self-governed, democratic and independent UK. (5.4.5.)
 - The impact of the EU on UK employment law is considerable; over 50 Directives have been adopted in the field of social and employment policy (up to 2000). (5.5.1 and 5.5.2.)
 - It is possible that there may be as many as 200,000 EU regulations that the British are subject to. But the number is not known, not least of all by the Government. (5.3.3.)

1.6 Employment tribunals and the “compensation culture” (see chapter 6)

The background to chapter 6 is the explosion of employment tribunal cases over the last 15-20 years. They are costly, they detract employers from running their businesses, they destroy trust between employer and employee and they discourage job creation. And the main conclusions on these issues are as follows:

- Industrial tribunals were set up in 1964 with very limited powers. Employment tribunals (as they have been known since 1998) have jurisdiction over more than 80 types of complaint. This is one reason, along with badly drafted and/or ambiguous legislation, for the explosion in cases. (Section 6.5.)
- According to data from the Employment Tribunal Service (ETS) whereas there were 35,964 applications to tribunals in 1985/96 this had risen to 130,408 by 2000/01. (These data are calculated using the ETS’s old-style method of calculation, based on main jurisdiction; the equivalent figure using the new-style method of calculation, based on each and every jurisdiction, is 218,101.) The most frequent complaint is still about unfair dismissal. (Section 6.6)
- Using ACAS data 42% of completed cases were settled before tribunal, 33% were withdrawn (a complete waste of time for the employer) and only 25% went onto tribunal. Of those cases going onto tribunal just over half succeeded in 2000/01 (55%) whilst 45% failed (another complete waste of time for the employer). (6.6.)

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- Discrimination applications are more common among the relatively well-paid people in large firms, and public sector and voluntary organisations. (6.7.)
 - The cost of the employment tribunals system is considerable in terms of management time, legal costs, compliance costs and administrative costs. One estimate exceeds £1bn (for 2000/01), with the majority of the costs falling on the employer. (6.8.1.)
 - The “unquantifiable indirect” costs to the employer are also considerable in terms of increased staff stress, the possible threat to the employer’s reputation (this is a major reason for the “pay-off culture”, along with saving valuable management time) and damaged workplace relations. (6.8.2.)
 - The reasons for explosion in tribunal cases include (section 6.9):
 - The equally dramatic explosion in employment legislation.
 - Increased compensation amounts and well-publicised jackpots.
 - The rise of the “compensation culture”.
 - Whilst there have been some Government attempts at stemming the flow of tribunal cases, we do not believe they will be especially effective. At the very least (6.10):
 - The flood of legislation must stop.
 - Claimants should pay a modest up-front fee.
 - Exonerated employers should have their legal costs reimbursed.
 - The rampant “compensation culture” is a product of our age. There’s no more stiff upper lip, no more forgiveness (“an apology will do”) but an insistence on financial compensation if slighted, stressed or hurt. The reasons are several (as they affect employers) (section 6.11):
 - Changing social attitudes towards claiming for compensation when people have a grievance.
 - The pathologisation (medicalisation) of stress and anxiety/depression that, in earlier more robust times, would have been seen as part of the normal vicissitudes of life. (And we understand fully how serious and devastating clinical depression can be.) Stress and anxiety/depression cases are now recognised as fully-fledged work-related diseases and they are increasing rapidly.
 - The “rights culture” and the increasing tendency for duty-less rights that impose obligations on others. The Human Rights Act (1998) was part of this development. All too often the duty-less rights mean more obligations for employers.
 - Increasing employment legislation.
 - Well-publicised jackpots.
 - The introduction of the “no-win no-fee” system intended to make it easier for litigants to bring cases.
 - The costs of the “compensation culture” are now estimated to be £10bn (1% of GDP) and rising by 15% each year. These are hugely worrying figures. One of the more specific knock-on effects of the spiralling costs of the compensation culture is the huge rise in the premiums for employers’ liability insurance. Small firms find the rocketing premiums increasingly unaffordable. (6.11.5.)

1.7 Spin, propaganda...and all that

“Consider the Lilies of the field, how they grow; they toil not neither do they spin. And yet I say unto you, that even Solomon in all his glory was not arrayed like one of these.”

Matthew chapter 6/verse 28.

“Out ye whores, to work, to work, ye whores, go spin. ”

William Herbert, 1st Earl of Pembroke (c1501-70).

“But I must say to the Muse of fiction, as the Earl of Pembroke said to the ejected nuns of Wilton, ‘Go spin, you jades, go spin!’”

Sir Walter Scott (1771-1832).

“Among the calamities of war may be jointly numbered the diminution of the love of truth, by the falsehoods which interest dictates and credulity encourages.”

Samuel Johnson: The Idler no 30 (11 November 1758).

“Falsehood and delusion are allowed in no case whatsoever. But as in the exercise of all the virtues, there is an economy with the truth.”

Edmund Burke: “Two letters on proposals for peace” (1796).

“It contains a misleading impression, not a lie. It was being economical with the truth.”

Sir Robert Armstrong (Baron Armstrong), referring to a letter during the “Spycatcher” trial (Supreme Court, New South Wales, 1986).

“The true object of propaganda is neither to convince nor to persuade, but to produce a uniform pattern of public utterance in which the first trace of unorthodox thought reveals itself as a jarring dissonance.”

Leonard Schapiro, writing of Stalin.

Propaganda: “the art of persuading others what one does not believe oneself.”

(Abba Eban, former Israeli foreign minister).

“The propagandist’s purpose is to make one set of people forget that certain other sets of people are human.”

(Aldous Huxley, 1894-1963).

“But ‘glory’ doesn’t mean a ‘nice knock-down argument,’” Alice objected. “When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Lewis Carroll: “Through the looking glass” (1872).

“ ‘Doublethink’ means the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”

George Orwell: “Nineteen Eighty-Four” (1948).

“Don’t you see that the whole aim of Newspeak is to narrow the range of thought? In the end we shall make thoughtcrime literally impossible, because there will be no words in which to express it”.

George Orwell: “Nineteen Eighty-Four” (1948).

“War is peace. Freedom is slavery. Ignorance is strength.”

George Orwell: “Nineteen Eighty-Four” (1948).

“Power is not a means, it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship.”

George Orwell: “Nineteen Eighty-Four” (1948).

“Ours is the age of substitutes: instead of language, we have jargon; instead of principles, slogans; and, instead of genuine ideas, Bright Ideas.”

Eric Bentley (born 1916), New Republic (29 Dec 1952).

“You can fool all the people some of the time, and some of the people all of the time, but you cannot fool all the people all of the time.”

Abraham Lincoln, 1858.

We believe that the debate surrounding the relentless imposition of extra employment legislation has been characterised by spinning (box 1), “economy with the truth” (box 2),² propaganda (box 3), manipulation of language (boxes 4&5),³ sloganising (box 6) and “fooling the people” (box 7). There seems little more to add at this stage. Though as this paper progresses we will make further observations.⁴

References

1. Lea: “The Work-Life Balance...and all that. The re-regulation of the labour market” (IoD, 2001).
2. Selbourne: “Moral evasion” (CPS, 1988) has a go at cynicism and amorality, fatalism, the “no blame” culture, the abuse of language and the “lie direct” (which are “metropolitan falsehoods”). He identifies eleven types of moral evasion: (1) there is nothing you can do about it or not very much (fatalistic), (2) it has never been any different, (3) there is no quick fix to this problem, (4) this is the price of a free society, (5) everything is changing & you must move with the times, (6) it is no use turning the clock back, (7) this problem is much more complex than you think, (8) this problem is beyond the reach of the law, (9), you are focusing on the wrong issue or the wrong target, (10) people in glass houses...[shouldn’t throw stones] and (11) everyone does it (or most people do). He concludes that the effort to erect a “culture of rights” and to discredit the moral culture, institutions and bonds upon which a civic society rests can only be sustained by lies. With evasion and falsehood widely employed to give the slip to the very idea that common rules can and should exist, or that the term the “moral order” has any but an oppressive meaning (or any meaning at all), we have thus arrived at a distinctive situation. There is then a drastic combination of (1) a culture of rights (about which there is no doubt) and (2) a cynicism about the distinctions between right & wrong (about which there is every doubt). This is relevant to our analysis of the “rights culture” (see chapter 6.)
3. Rankin: “The politics of the forked tongue: authoritarian liberalism” (New European Publications, 2003). This book claims “over the past 30 years, a shift has taken place in liberal thought and practice – from the belief in individual freedom to the enforcement of “group rights”. The new, authoritarian liberalism is forked-tongued because it uses the language of freedom but seeks to extend control over yet more areas of an individual’s life. Central to this

process is the rise of strident and usually unrepresentative pressure groups. The result is an increasingly uncivil society.” “The politics of the forked tongue” traces the rise of authoritarian liberalism to the decline of socialist economics and the left’s compensating obsession with cultural issues.

4. Around the introduction of the new “family friendly” rights (6th April 2003) there was a DTI advertising campaign that said “A third of mothers do not return to work after maternity leave. Each vacancy costs business an average £3,500 to fill. From the 6th April 2003 working laws will change to help parents better balance their home and working life. Mothers will be entitled to 6 months paid maternity leave and another 6 months unpaid if they want it. And parents of children under 6 and parents with disabled children under 18 will now have the legal right to get their employer to consider flexible ways of working. Everyone benefits. Employers get a happier, more motivated and more loyal workforce. And new mothers get to spend more time being Mum.” Comment: this advertisement was a disgraceful piece of propaganda. It’s very unlikely that “everyone” will benefit. Many employers (especially small ones) will find the extra laws difficult and costly to administer. And many employees will find themselves covering for absent colleagues. The assertion that “employers get a happier, more motivated and more loyal workforce” is unproven to say the least. (See chapter 3.)

2 The re-regulation of the labour market: overview

“By working faithfully 8 hours a day you may eventually get to be the boss and work 12 hours a day”

Robert Frost (1875-1963).

“Guidelines for bureaucrats: (1) when in charge, ponder. (2) When in trouble, delegate. (3) When in doubt, mumble.”

James H. Boren (1925-), American bureaucrat.

2.1 Introduction

The balance between employee rights and employer rights is a crucial one. We accept the need for employee rights and we promote employer rights. Much is said about the former (especially since the change of Government in 1997), all too little is said about the latter. There is no doubt in our view that the balance between employee rights and employer rights is now decisively tilted against the employer and towards the employee who, presumably as a sentient adult, accepted the job from and is paid for his/her labour by the employer. And surely we can all accept that mature decision-making by adults can often involve hard choices, something that is all-too-frequently ignored by the siren voices which demand more employee rights. Employers simply do not get a fair deal.

But it's not just a matter of “fairness”. The ever-increasing employment red tape will damage businesses, damage the economy and damage job creation. It beggars belief that our current set of legislators (and their equivalents in the EU) choose to close their eyes to developments in the core Eurozone, where there is heavy-handed and strangulating regulation of the labour markets. This regulation is undoubtedly contributing to the economic problems that the core Eurozone is now experiencing. In Germany, France and Italy unemployment rates have been running around 10% in recent years, job growth has been relatively modest and activity rates have tended to be lower than in many other developed economies. (See chapter 5 for further discussion.)

This country has to make a choice between (1) free and lightly regulated labour markets, economic dynamism and strong job creation and (2) intrusive and heavily regulated labour markets, economic stagnation and weak job creation. There is, in reality, no Third Way. Heavy regulation destroys dynamism. Heavy regulation kills enterprise.

This chapter is an overview of the costs and burdens of extra regulation, in other words, the costs and burdens of re-regulating the labour market. Section 2.2 basically lists the extra regulations that have been imposed on business since 1997, when the rapid ratcheting up of regulation started.¹ (And this isn't to say things were perfect with the previous administration but they were significantly better.) Regulations in the pipeline are also mentioned. Individual regulations are discussed in more detail in chapter 3. Many of the new regulations are about the increasing state control of business so that the state can deliver, partly through the businesses, its utopian and socially engineered "social justice" programme.

Section 2.3 considers the financial and non-financial costs to business of the increased regulations. They are more than considerable. Section 2.4 looks at the economic fall-out from over-regulation. Section 2.5 looks at the Government's, doubtless sincere, attempts to relieve the regulatory burden on business. But whilst they (and their EU equivalents) insist on bringing in more employee rights and job protection policies, these "initiatives" are ultimately doomed to failure. Surely this is understood. Section 2.6 draws some conclusions from the rest of the chapter.

2.2 Employment regulations: developments since 1997

Table 2 of annex 1A lists the major measures since 1997 in chronological order. Some measures are inspired by domestic agendas (more trade union rights, minimum wage and "family friendly" policies) and, increasingly, some are inspired by the European Commission's social policies for more job protection (see chapter 5). By any standards there has been a very marked acceleration through recent years. And there is no end to the torrent.²

The table below, rather than just repeating chronological table 2 of annex 1A, lists the major employment legislation/regulations. (See also annex 2, table 2/1 for an alternative presentation.) They are individually discussed in chapter 3.

Major employment legislation since 1997

Acts and (grouped) EU Directives	Covering:
National Minimum Wage Act (1998)	
Employment Relations Act (ERA) (1999)	(i) Collective rights including compulsory recognition of unions or collective bargaining purposes and changes to protection against dismissal during official action
	(ii) Individual rights: changes to unfair dismissal eligibility and maximum compensation
	(iii) Family friendly rights comprising the Parental Leave Directive, paternity leave, extensions to maternity leave, time off for family emergencies
Employment Act (EA) (2002)	(i) Fixed-term Work Directive
	(ii) Equal Pay questionnaires
	(iii) Trade union learning representatives
	(iv) Statutory procedures for internal dispute resolution, and employment tribunal measures
	(v) Family friendly rights comprising the right to request flexible working, extensions to maternity rights, adoption rights, paternity pay
EU Directives: equal opportunities	(i) Parental Leave Directive (implemented under ERA, 1999)
	(ii) Burden of Proof in Sex Discrimination Cases Directive (implemented 2001)
	(iii) Equal Treatment (Racial or Ethnic Origin) Directive (concerning discrimination) (implemented July 2003)
	(iv) "General Framework" for the Equal Treatment in Employment & Occupation Directive (concerning discrimination), implemented: (a) December 2003 concerning sexual orientation and religion and belief; (b) December 2006 concerning age and disability
	(v) Equal Treatment (Amendment) Directive (sex) (implemented 2005)
EU Directives: employment protection and working conditions	(i) Posted Workers Directive (implemented 1999)
	(ii) Part-time Workers Directive (implemented 2000)
	(iii) Fixed-term Work Directive (implemented under EA, 2000)
	(iv) Temporary Agency Work (TAW) Directive (TBC)
	(v) Amended Transfer of Undertakings (Protection of Employment) (TUPE) regulations or Acquired Rights Directive (implemented during 2003)

Continued overleaf....

EU Directives: Health and Safety at Work	(i) Working Time Directive (WTD), implemented: (a) 1998; (b) August 2003 (August 2004 for junior doctors) for the extension of Working Time Regulations (WTR) to cover excluded sectors (under the Excluded Sectors Directive)
	(ii) Young Workers Directive (The Employment of Young Workers Directive), implemented: (a) 1998 under WTR; (b) 2003, the non-renewal of exemptions for 16-17 year olds.
EU Directives: employee relations	European Works Councils (EWCs) (implemented 1999)
	Compulsory Information and Consultation Procedures Directive. Due to be implemented in 3 stages: (a) March 2005 – businesses with 150+ employees. (b) March 2007 – businesses with 100+ employees. (c) March 2008 – businesses with 50+ employees.
EU Directives: data protection	Data Protection Directive (implemented under 1998 Data Protection Act)
Tax credits	(a) Working Families' Tax Credit et al (implemented 1999) (b) Working Tax Credit (implemented April 2003)

Notes:

(1) There is some “double-counting” in the table.

(2) Even though the tax credits are not strictly about employment legislation, they are included in this table because they add to employment “red tape”.

In addition, there have been/will be other demands on employers' time. They include:

- The Teaching and Higher Education Act (1998) provided time off work for study.
- The Public Interest Disclosure Act (1998) provided protection of whistle-blowers (the IoD was a vigorous supporter of this legislation).
- The Human Rights Act (2000) incorporated the (non-EU) European Convention of Human Right, which has implications for the workplace. The IoD opposed this legislation (see chapter 6 for more).
- The scope of the Disability Discrimination Act (1995) is being broadened in 2004. The small firms exemptions will go and the DDA will be extended to access to premises. See chapter 4 for more.
- Administering stakeholder pensions (introduced in October 2001).
- Administering student loan repayments (introduced April 2000).
- Compulsory time off for training to be allowed for 16-17 year olds (introduced September 1999).
- Increased bureaucracy concerning National Insurance on benefits in kind (April 2000).
- In addition, according to PricewaterhouseCoopers (PwC) the accountants, the corporate sector has on average footed the bill for 80% of tax increases since 1997.³ Moreover, in financial year 2003/04 businesses can expect to pay £7.5bn more in tax than they would have done under the 1996/97 tax regime. They estimated that this represented 89% of the total rise in taxes for 2003/04. (Table 2/2 in annex 2 provides the breakdown.)

We fully appreciate that the DTI sees the increase in employee rights as a positive development by “improving minimum employment standards”.⁴ But legal minimum employment standards were quite adequate (some would say more than adequate) in 1997 and, in any case, in a buoyant labour market employers have to offer decent conditions otherwise they simply do not get the right staff. Moreover, where there is genuine exploitation of employees, and there is, these “minimum employment standards” will be laughed off.

Table 2/3 (in annex 2) lists the Government’s record on “minimum employment standards” as they see it. It is, in reality, a shocking and cynical indictment of their indifference to the business community. Quite frankly, if the current administration were genuinely “business friendly” they would not trumpet the business burdens they have introduced in the name of “improving minimum employment standards” as they do.

2.3 The business costs of heavy regulation

The costs of regulation on business arise from the following:

- The assimilation and implementation of the new regulations, including the non-administrative costs of introducing a regulation (eg the NMW), can be very expensive financially. Labour market regulations of whatever form are a form of “stealth taxation” on employment, which impacts on the economy as a whole.
- This is especially the case where the law is complicated and the official advice is perceived to be poor and/or over-bureaucratic.⁵ The DTI’s guide book for the NMW was, for example, 112 pages long and yet still could not offer “definitive advice”. Similarly the DTI’s guide book on the Working Time Regulations said “The booklet gives only general guidance and should not be regarded as a complete or authoritative statement of the law. Readers should be aware that there are likely to be developments in employment case law that affect the rights described”. At least it’s good for employment lawyers.
- Red tape can be a time-consuming distraction and a diversion of an employer’s time from running his/her business.
- The rocketing employment legislation increases the risk of employers having to face an employment tribunal, not least of all because new regulations may not be fully understood. (We discuss tribunals in chapter 6.)

These costs are particularly burdensome and costly for small businesses, which are the vast majority in the UK.⁶ (Tables 2/4 and 2/5 in annex 2 give some details on small businesses.) This fact is used to justify small firms exemptions and we support this. But small firms exemptions have drawbacks. They can, for example, act as a brake on growth as firms endeavour to remain below the exemption limits. And they can distort other business decisions depending on how the exemptions are defined.

There are various approaches to assessing the costs on business:

- Surveys asking employers how they rate the increase in red tape. An IoD survey in 2002 showed that 84% members felt that payroll red tape had got worse or much worse since 1997 and 93% members felt that employment regulations red tape had got worse or much worse since 1997.⁷

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- Surveys asking employers how long it takes to deal with the red tape. An IoD survey showed that members with small businesses spent an average of 6 hours a week on red tape.⁸ (In addition some members have reported that they have taken on extra staff to cope with the extra paperwork.)
 - Calculating the total costs from Government and/or other sources. The IoD's latest main calculations were completed in 2002⁹ They concluded that the extra cost of regulation was then nearly £6bn a year, most of which was non-administrative. The most expensive regulations related to the Working Time Directive (£2.3bn) and the National Minimum Wage (£2.7bn). The details are in annex 2 (table 2/6). The IoD intends to update this table in the light of the recently implemented and proposed changes.
 - The BCC has been assiduous in its calculations of its "burdens barometer" and we support this exercise.^{10, 11} The latest barometer suggested that the total costs of regulations introduced on business since 1998 is £20.6bn (including measures introduced in 2002, but costs up to June 2003). Some of the regulations are not employment regulations (we estimate the costs associated with employment were about £15.7bn, see table 2/7 in annex 2), but the non-administrative costs of the NMW (£10.2bn to May 2003) were excluded.^{12, 13} The biggest cost to business (excluding the minimum wage) was the Working Time Directive, with a cumulative cost so far of £8.65bn, followed by data protection (£3.9bn). We believe that all the extra costs of the NMW should be included – after all business is paying the bill.
 - Peninsula, the influential employment law firm, has also made some assessments of both financial costs and hours consumed by the legislation.¹⁴ Their survey, of nearly 3,000 businesses, found that the average cost of dealing with new laws had risen by almost half to £26,762 in 6 years. This amounted, grossed up, to an extra £22bn of costs. In 2002 employers spent an average of 9 hours a week dealing with new legislation, compared with only 3 hours in 1997. The biggest bugbears were the Working Time Directive, the NMW, the part-time workers' regulations, the fixed-term workers regulations and the Employment Relations Act (1999). Three quarters of firms surveyed said that the rules restricted growth and they could be run more profitably without the amount of red tape that came with them.

Following on from this, the business consequences of heavy regulation are:

- Business growth is stifled.¹⁵
- Job creation is stifled¹⁶ as social on-costs and regulations increase, not least of all because as labour costs rise employers switch to more capital methods of production. (The relative prices of the factors of production swing in favour of capital.) This helps to explain the more capital-intensive methods of production in countries such as France ("super-automation"), Germany and Belgium (where there is more capital per worker). Ironically, such capital-intensive methods of production can raise labour productivity, but not necessarily total factor productivity (TFP) (see annex 1B for definitions).
- Labour market "flexibility" can be reduced. There are about six approaches to flexible labour markets and they need to be clearly identified They are: (1) numerical flexibility (that is all too often, erroneously, associated with job insecurity), (2) flexible working patterns, (3) wage flexibility, (4) skills flexibility, (5) functional flexibility (where employees can adjust to different roles) and (6) geographical flexibility.¹⁷ For a business to be able to respond quickly to changing economic circumstances it needs all of these types of flexibility (especially the first, the third, the fourth and the fifth): it needs deregulated and liberalised labour markets. Regulations can significantly damage, in particular, the first and the third types of flexibility. The current Government talks

approvingly about flexibility but in reality seems indifferent to the damage it is doing, choosing instead to concentrate on the second (flexible working for employees) and the fourth.¹⁸

- A growing resentment that businesspeople are being used to act as the Government's administrators (eg the WFTC) in order to deliver the Government's social engineering ("social justice") programme, when they're not being reimbursed.
- Competitiveness suffers. The international competitiveness indicators from both the Institute of Management Development (IMD) and the World Economic Forum (WEF) have worsened for the UK since 1997.¹⁹
- Many of the regulations are sledgehammers to crack nuts, catching good employers with petty regulation. Meanwhile the bad employers are unlikely to change their ways and the black/informal economy can only thrive as regulations (and higher taxes) strangle businesses in the formal economy.
- Heavy regulation can make matters worse, not better. For example (though not an employment regulation), it can be argued that the heavy regulations on small slaughterhouses caused some closures. Animals, therefore, had to travel further and this extensive travelling was one of the reasons behind the spread of foot and mouth disease in the 2001 outbreak. Also the increasingly heavy regulations intended to help women may end up hindering them as more employers feel reluctant to take young women on. (This is discussed further in chapter 4.)

In order to prosper business needs a light regulatory touch and a business-friendly tax regime.²⁰ Both are deteriorating and at a seemingly accelerating rate. It's now a matter of "tax 'n' red tape."

2.4 The economic costs of heavy regulation

The economic costs follow on from the business costs and indeed have already been touched on. They are, briefly:

- The economy's labour market flexibility is being undermined (see above) and, as we have discussed elsewhere,²¹ heavily regulated labour markets damage employment and increase long-term unemployment.²²
- International competitiveness: as already stated the international competitiveness indicators from both the Institute of Management Development (IMD) and the World Economic Forum (WEF) have worsened for the UK since 1997. According to the World Economic Forum (WEF) the UK slipped from 4th in the league table of competitive countries in 1998 to 8th (1999) to 9th (2000) and to 12th (2001). And according to the Institute of Management Development (IMD) the UK slipped from 11th (1997) to 12th (1998), 15th (1999), 16th (2000) and 19th (2001). On some measures there was a marginal improvement in 2002 mainly because some other competitor countries were doing so badly. ("Two wrongs do not make a right.") There is little doubt that there are two main reasons for this deterioration: more regulations and higher taxes. Given the "super" competitiveness of China and the opening up of countries in Central and Eastern Europe, piling regulations on British business has to be regarded as an own goal.
- The overall performance of the economy is likely to increasingly "underperform" as the burgeoning public sector, financed by ever-higher taxes, "squeezes" out, or "crowds" out, the more productive, dynamic and competitive private sector.²³ (The public sector

faces woefully little competition and has, therefore, few market incentives to be competitive. Centralised Government targets are no substitute.) This is likely to lower the UK's productivity performance relative to its competitors, rather than raise it. And the implications for GDP growth and prosperity of poorer productivity cannot be ignored - even though we have cautioned and continue to caution against the simplistic interpretation of international labour productivity league tables.^{24, 25, 26}

- This potential deterioration in productivity performance is of great significance, especially as one of the Government's main objectives is to raise productivity.^{27, 28} But Britain's recent productivity growth performance has been disappointing.²⁹
- We have expressed our concerns about the damage to the economic performance of the Government's "tax 'n' red tape" approach to business on many occasions. Alas, the situation is getting worse.
- As a final word, we would hope that the Government might take heed from an OECD working paper report on productivity.³⁰ This recent study said that existing productivity can improve in 3 main ways: (1) the productivity of existing companies might rise, (2) the share of high-productivity producers might grow at the expense of low productivity ones, (3) new firms might enter the market and old ones might exit (assuming the new were more productive than the dying). This OECD study reckoned that the smaller initial size of new US firms and their faster growth reflected the US's more liberal product and labour³¹ market regulation. There was strong evidence to show heavy product and labour market regulation reduced productivity in Europe. Reflecting the more heavily regulated markets, Europe had more problems concerning barriers to entry than in the US and, even more so, more problems concerning barriers to expansion. Furthermore, this was especially the case in high-tech firms (and Europe lagged America in both the development of high-tech industries and the pace of investment in IT). Lower start-up costs and less strict worker protection made it easier for innovative entrepreneurs in America to experiment on a small scale (hence the smaller size of new firms), to test the markets and to expand. In times of rapid technological change, greater experimentation allowed new ideas to be tried out more swiftly in the US than in the heavier regulated Europe.

2.5 Tackling red tape: Government initiatives

There are indubitably signs that the Government recognises that there are problems for businesses, especially for small businesses, with all the extra red tape. And it has introduced various initiatives in order to lessen the load. But whilst the regulatory agenda pushes on, driven by the Government's own social policy agendas (such as "make work pay", "family friendly" and "equal pay" policies) as well as the lemming-like Brussels, we simply cannot see how the situation can improve. But if some of these initiatives make a little progress, then we must be thankful for small mercies. In this section we will briefly touch on some of the main initiatives. We have written of regulatory matters at great length and we would refer the reader to these documents.³²

(i) The Better Regulation Task Force (BRTF)

The Better Regulation Task Force (BRTF) was established in 1997. It is an independent body, sponsored by the Cabinet Office, that advises the Government on action to ensure that regulation, and its enforcement, accords with “the five Principles of Good Regulation”.³³

These “Principles” are:

- Proportionality: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
- Accountability: regulators must be able to justify decisions, and be subject to public scrutiny.
- Consistency: Government rules and standards must be joined up and implemented fairly.
- Transparency: regulators should be open, and keep regulations simple and user-friendly.
- Targeting: regulations should be focused on the problem, and minimise side effects.

In addition to the Principles, the BRTF has laid out “tests of good regulation, and pitfalls to be avoided”. Regulations must:

- Be balanced and avoid knee-jerk reactions.
- Seek to reconcile contradictory policy objectives.
- Balance risks, costs and benefits.
- Avoid unintended consequences.
- Be easy to understand.
- Have broad public support.
- Be enforceable.
- Identify accountability.
- Be relevant to current conditions.

The BRTF also includes in its Principles leaflet,³⁴ some alternatives to regulation. They are:

- Do nothing.
- Advertising campaigns and education.
- Using the market.
- Financial incentives.
- Self-regulation and voluntary codes of practice.
- Prescriptive “regulation”.

We have listed all these aspects of the BRTF’s “Principles” in order to show there is some helpful thought being given to the problems. And we fervently hope they will bear fruit.

In addition the current chairman of the BRTF (business-friendly David Arculus) has written:³⁵

- “Better regulation is crucial to UK productivity, competitiveness and innovation, and there are three areas where significant improvement is required: (1) Regulatory Impact Assessments (RIAs) (see below) are an essential tool for ensuring that Government chooses the best option to achieve its policy goals, and that the impact on those being regulated is proportionate. The BRTF wants to help make RIAs work even better; (2) Consultation is crucial to evidence-based policy making, and more could be done to make consultation a benefit, not a burden for stakeholders; (3) Alternative means of

achieving policy objectives may be more successful and less burdensome to stakeholders than traditional regulation, and merit greater consideration by the Government.” We are in total agreement.

The BRTF has brought out some useful reports.³⁶ It has also not been afraid to criticise the Government.^{37, 38}

(ii) Regulatory Impact Assessments (RIAs)

Building on the requirement by the previous Government to estimate the compliance costs of new regulations, the current administration mandated Regulatory Impact Assessments (RIAs) in August 1998. An RIA is a document published with regulatory proposals and new legislation. It covers the issue that has given rise to the regulation and compares various possible options for dealing with that issue. It replaces the previous Compliance Cost Assessment (CCA) and Regulatory Appraisal systems and is concerned with the potential costs and benefits of the regulation

The objective became “better” as distinct from less regulation (“better regulation” replaced “de-regulation”), and with the quantification of costs and benefits and consultation as major constituents. “Better” means more professionally crafted and easier to implement regulation; it can thus mean more burdensome. The RIA guidelines have been extensively developed and enhanced over the last five years, by the Cabinet Office’s Regulatory Impact Unit (RIU). Relevant departments have their own RIUs – Departmental Regulatory Impact Units (DRIUs). In principle there is much to be said for RIAs, though we would prefer a return to the simple de-regulatory days.

A study for the BCC by Ambler et al^{39, 40} found that the RIA was not working as well as it should. They failed to reduce the number of regulations and, even allowing for this failing, they worked better in principle than in practice. But rather than abolishing the RIAs, they should be allowed to work better. Ambler et al were more critical of the RIAs than a report by the NAO that had been quite favourable.^{41, 42}

(iii) Final word

We are certainly supportive of the work of the BRTF and the RIU (and the DRUIs), but their impact (and the impact of other initiatives) on the flood of regulations has been, so far, embarrassingly modest.⁴³ The Chancellor announced another initiative in his April 2003 budget and, involved as we are, wish it well.⁴⁴

This is all the more important, as we believe that we are becoming one of the more heavily regulated economies in the world. We simply do not take the view that we are now relatively lightly regulated (as the OECD does). Arguably the “rules” may still look less onerous than for some other countries (especially in parts of continental Europe) but when enforcement, gold-plating and British businesspeople’s law-abiding nature are taken into account, we must, surely, be one of the more heavily regulated.⁴⁵

2.6 Conclusions

These are the conclusions of this chapter:

- This country has to make a choice between (1) free and lightly regulated labour markets, economic dynamism and strong job creation and (2) intrusive and heavily regulated labour markets, economic stagnation and weak job creation. There is, in reality, no Third Way. Heavy regulation destroys dynamism. Heavy regulation kills enterprise. (See 2.1.)
- The increase in the burden on business of the extra employment regulations since 1997 has been very significant and the changes in the burden seem to be accelerating. The extra regulations are promoted and imposed by the current administration in order to, specifically, improve “minimum employment standards” and, more generally, deliver its “social justice” programme. But good employers know that they must offer decent terms and conditions if they want to recruit and keep good staff and bad employers will ignore the Government’s pleas to live in a “fairer and more just society”. (See 2.2.)
- Heavy regulation distracts businesspeople from running their businesses well, damages business and increases costs. Our latest estimate (2002) of the increased costs was nearly £6bn a year since 1997. This is not trivial. (See 2.3.)
- Increased employment regulations will damage economic dynamism, competitiveness, job creation and productivity, as will the higher taxes. The combination of “tax ‘n’ red tape” policy and “tax ‘n’ spend” policy will undermine growth. (See 2.4.)
- We recognise that the Government has introduced initiatives intended to cut down on the red tape burden. We wish them well and support their endeavours. But in the meantime the increased regulations flood in. Some of them are from Brussels and some from the Government’s own policies. (See 2.5.)

References

1. Some would say the current Government (and their EU equivalents) are regulation “junkies”, who believe that regulation will, somehow, achieve a new socially engineered “utopia” in which we will all be happy and free. But note that such utopias are potentially very dangerous as they inhibit individual autonomy and freedom. Isaiah Berlin made the distinction between “positive liberty” (yes, you will be free, as determined by the state) and “negative liberty” (which is the liberty of the autonomous, self-responsible and mature individual in a pluralist society). Socially engineered, quasi-totalitarian, “utopia states” (“nanny states”) are about “positive freedom”. In these states infantilising rights and regulations elbow out decisions made by autonomous and mature adults.
2. Lea: “Employment regulations: no end to the tide” (IoD Policy, September 2002). Otherwise the author has lost track of the number of articles she has written on red tape.
3. Paterson: “Companies “bearing brunt of tax rises”” (Times, 8 March 2003).
4. DTI: “Full and fulfilling employment: creating the labour market of the future” (DTI, 2002), said that its aim was “economic progress with social justice”, the Third Way. But, whilst they are not irreconcilable, the path that has been taken of heavy regulation will damage the economy which, at the end of the day, will mean less social justice rather than more.
5. IRS employment review: “HR managers decry “burdensome” new laws” (5 August 2002), quoted the “Employment law survey 2002” (CIPD, July 2002). The survey concluded that “too much employment law lacks clarity and gets in the way of business and HR strategy.” The problems arising from employment law changes included the cost of compliance (answered by 49% of respondents), lack of guidance (48%) and lack of clarity in legislation (74%).
6. (1) The Sunday Times reported (16 September 1999) that “last year (1998) compliance costs per worker were £228 per annum for firms with between 1 to 4 employees, compared with just £5 per

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- annum per worker for those employing over 5000 staff.” (2) Armitstead: “Labour laws take biggest toll on small businesses” (Sunday Times, 6 October 2002), quoted a Peninsula survey pointing to the disproportionate costs on small firms.
7. Richard Baron: “The red tape menace” (IoD, 2002).
 8. Baron: “Reg Alert” (IoD, October 2000).
 9. Baron: RegAlert (IoD, Regulation Comment, April 2002).
 10. The BCC calculated (in May 2000) that the new red tape (since May 1997) was costing business was £10bn (and that excluded the recurring financial cost per year of the NMW of £2.4bn).
 11. Swann: “Red tape ‘has cost businesses more than £15bn’” (FT, 18 March 2002), said that the BCC’s burdens barometer (of implementing government regulations) had cost businesses more than £15bn since 1997.
 12. Ambler (LBS), Chittenden (MBS) & Schamutkova (MBS), BCC: “Do regulators play by the rules?: an audit of UK Regulatory Impact Assessments” (February 2003) gave the latest BCC burdens barometer data.
 13. Smith: “Red tape costs rocket to £20bn” (Sunday Times 16 February 2003), quoted the latest BCC data and added that 40% of the laws came from Brussels and 60% came from the Government’s own policies.
 14. Muktarsingh: “£22bn red tape bill threatens UK businesses” (Mail on Sunday, 26 January 2003).
 15. Baron: “The red tape menace” (IoD, 2002), concluded that business growth was being impeded.
 16. Minford and Haldenby: “The price of fairness: the costs of the proposed labour market reforms” (CPS, 1999), warned of the potential loss of jobs of the extra regulations.
 17. Lea: “The Work-Life Balance... and all that. The re-regulation of the labour market” (IoD, April 2001), discusses flexible labour markets.
 18. Heath: “Why Brown is not a flexible friend to the poor and needy” (The Business, 16 March 2003). Heath wrote “Brown makes a plea for flexibility – but he is merely justifying the current system with the increasingly complex tax and benefit system. For Brown “flexibility” is not synonymous with “deregulation” and “liberalisation”. He believes a labour market can be flexible if it combines the UK’s increasingly heavy-handed employment rules with “active labour market policies” where the state micro-manages the market via targeted subsidies and training programmes for workers. Rather than calling for markets, his vision is...the US-style emphasis on hard work, geographical mobility and non-traditional working patterns grafted in to a reformed social-democratic economic model”. This should be kept in mind when the Chancellor refers to “flexibility in labour markets” as part of his 2nd test for the euro.
 19. Baron: “The red tape menace” (IoD, 2002), concluded that, according to some of our members, “other countries are becoming more attractive than the UK”.
 20. Lea: “What does business need to prosper?” (The Scotsman, Feb 2001).
 21. Lea: “The Work-Life Balance... and all that. The re-regulation of the labour market” (IoD, April 2001), quotes data from sources including the OECD.
 22. Becket: “Rules ‘are stifling UK economy’” (Daily Telegraph, 28 October 2002), wrote that “while rating Britain’s business performance highly, an OECD report says the restrictions posed a danger. Our flexibility has been steadily eroded by ever-increasing regulation.”
 23. See Leach: “We’re going the wrong way – tax and spend fiscal policy” (IoD, 2002), discusses how the increasing tax share (and increasing public spending share) of GDP is likely to reduce GDP growth rates. (“Tax ‘n’ spend.”)
 24. The debate on improving productivity is full of fallacies, the two most common are: (1) maximising labour productivity is necessarily a “good thing”. Countries with high labour costs and heavy regulations (less labour market flexibility, higher protection, excessively short hours, low levels of employment as in, say, Germany and France), and concomitantly highly capital-intensive methods of production, tend to have higher labour productivity than countries where labour is cheaper and less heavily regulated, and concomitantly production methods are more labour-intensive. The former can have high labour productivity at the expense of high unemployment rates; (2) businesses somehow wish to “maximise productivity”. No, the maximisation of “productivity” (however defined) is not a business objective. Businesses aim to maximise returns to capital and decide how to employ the different factors of production in order

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- to achieve this objective. Any “productivity” numbers following on these business decisions are a consequence and not an objective.
25. Leach: “Lies, damned lies and productivity statistics” (IoD, 1998) concluded that the UK’s measured gap in terms of TFP (total factor productivity) had been shrinking. Moreover, the TFP gap was not as great as labour productivity gap and UK capital productivity was better than in France and Germany but not as good as the USA. There was also the problem of unreliable GDP (and other) data.
 26. Davies: “GDP league tables, productivity & investment” (IoD, 1998), emphasised the difficulties in making international comparisons. Moreover, investment just for its own sake is not necessarily the right thing to do – it diverts economic resource away from consumption (which is the main objective of an economy). (We caution against investment for its “own sake” which can be a misallocation of resources.)
 27. The Treasury: “Enterprise and the Productivity challenge” (June 2001). Improving productivity is the Government’s chief economic objective of this Parliament; macroeconomic stability and the independence of the Bank of England was the main objective of the first Parliament. (The, rather lightweight, Enterprise Bill followed.)
 28. The DTI commissioned a report on productivity by Michael Porter in 2002. Even though the full report has not yet been released, Porter has already been commenting on Britain’s productivity performance. Crooks and Skapinker: “Why coasting on past gains will leave us washed up” (FT, 23 January 2003) reported that Porter had said that the UK’s gains of the past 20 years of reform were running out: companies and managers needed to be more innovative. And the three most obvious problems for Government were the transport infrastructure, workplace skills and the support for science and technology. (Nothing new there!) He had also commented that the Government should “back off and be less paternalistic” and the regulation coming out of Europe threatened to undermine Britain’s strengths. We agree.
 29. Economist: “Worse and worse” (31 August 2002), reported that Britain’s productivity growth continued to disappoint and labour productivity growth had actually slowed down. In the two decades to 2000 it had averaged 2% pa but in the year to 2002Q1 it was only 0.4% higher on a year earlier (in manufacturing it was down by 2%). One of the main reasons was the poor performance of the ICT (information & communications technology) sector; the new economy had failed to raise productivity growth in the UK. ICT investment was poor and there was a lack of skills to maximise the new technology. “More than ever, improving the quality of human capital is important for labour productivity growth” it concluded.
 30. Scarpetta, Hemmings, Tressel and Woo: “The role of policy and institutions for productivity and firm dynamics: evidence from micro and industry data” (OECD WP 329, 2002), written up in the Economist: “The white heat of technology” (25 May 2002). The Economist wrote (under the sub-heading “regulation, the dynamics of firms and lagging productivity growth in Europe) that “the OECD has preached for years about the urgent need for Europe to pursue labour and product reforms, so as to lift productivity growth & create jobs. Indeed it has.
 31. In the sense of “hire and fire” (numerical flexibility). But an employer will hire if he/she can fire when the going gets tough. Conversely, employers will be reluctant to hire if they can’t fire (or there are inordinate costs of and delays in doing so).
 32. See the IoD Quarterly Regulation Comments “RegAlert” authored until last year by Richard Baron. They are now authored by James Walsh.
 33. Better Regulation Task Force: “Principles of Good Regulation” (BRTF, Cabinet Office, 2003).
 34. Better Regulation Task Force: “Principles of Good Regulation” (BRTF, Cabinet Office, 2003).
 35. The Chairman’s covering letter to the BRTF’s “Champions of better regulation” (BRTF, Cabinet Office, February 2003).

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36. BRTF: "Employment Regulation: striking the balance" (BRTF, Cabinet Office, May 2002). Its recommendations were (1) the promotion of alternatives to state regulation; (2) have common commencement dates for employment policy – where possible group together commencement dates of employment policy changes starting with the DTI; (3) encourage understanding of small business; (4) on the impact of employment legislation, the DTI should review its understanding of the impacts of regulation on large, medium and small firms; (5) a "stress test" regulations by sector and size should be done; (6) there should be demand led guidance and all guidance for small firms should follow the SBS guidelines; (7) have a CD Rom on employment rights; (8) have a simple law factsheet; (9) there should be advice visits to employers; (10) there should be shared HR resource(s); (11) there should be access to mediation – ACAS should pilot a mediation service for businesses with fewer than 50 employees; (12) there should be earlier access to arbitration – ACAS should pilot an arbitration service for businesses with fewer than 50 employees.
 37. Becket: "Small firms lost in the blizzard of rules" (Daily Telegraph, 20 May 2002), reported that the Better Regulation Task Force May 2002 report had emphasised, yet again, that small businesses were intolerably burdened with red tape and, in addition, the number of rules continued to multiply.
 38. Roberts: "Red tape watchdog savages officials" (FT, 25 February 2003), reported that the BRTF had said that seven Government departments had underestimated the true costs to business of new regulation.
 39. BCC: Ambler (LBS), Chittenden (MBS) and Schamutkova (MBS): "Do regulators play by the rules?: an audit of UK Regulatory Impact Assessments" (February 2003). They wrote that, in general, most respondents were negative about RIAs even though they saw some benefits in fine-tuning compliance. Interestingly they liked the principle of the RIA system more than the practice. This report also included the updated burdens barometer.
 40. Frost (DG of the BCC): "Regulations getting rubber-stamped" (Daily Telegraph, 17 February 2003) wrote that the BCC "red tape burden" was £10bn a year (2000), £15bn (2001) and £21bn (2002). The BCC had commissioned a survey of the RIAs (by Ambler et al, see above), which found that, even though RIAs are meant to consider alternatives to regulation (in other words, they are meant to promote the achievement of policy objectives through non-legislative means), this was not happening. "The political will to explore the options is not there". According to the NAO both the benefits and the costs must be considered, but there seemed to be little point if the regulation was going to be introduced in any case. (Author's paraphrasing.) For example, the DTI's assessment of the regulation giving employees the right to request flexible working was £90m in benefits (a better WLB and a higher supply of labour) and £296m in costs for the employers. But it still went ahead.
 41. See (1) Becket: "Red tape 'costs industry £22bn'" (Daily Telegraph 24 February 2003) claimed that the BCC report was "dismissive of NAO 2001 report". Also see (2) Becket: "Whitehall battles to defend red tape" (Daily Telegraph, 3 March 2003), reported that the BCC wondered if the [RIA] studies were thorough - the RIU then challenged the BCC data. Ambler et al also had challenged the "favourable" NAO report (2001).
 42. National Audit Office (NAO): "Better Regulation: making good use of the Regulatory Impact Assessments" (HC329, 15 November 2001).
 43. FT leader: "Red Tape choker" (FT, 24 September 2002), wrote that there had been several initiatives to alleviate the burdens of red tape including the Better Regulation Task Force (after the May 1997 election) and the Regulatory Impact Unit (Cabinet Office). In addition, the 2001 Regulatory Reform Act was passed to tackle unnecessarily burdensome regulation but progress has been agonisingly slow – only 6 regulatory reform orders have come to force since April 2001 and most increased the complexity of the legislation rather than sweeping it away. The leader also referred to the problems of "gold-plating".
 44. It is very early days for this initiative. But our agenda is about introducing sunset clauses, minimising gold-plating and encouraging departments, at the very least, to appreciate just what burdens they place on business, collating the stock of regulations sector by sector.

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45. (1) Becket: “Red tape ‘costs industry £22bn” (Daily Telegraph 24 February 2003), reported that a study by the BRTF claimed that the UK had a much lighter regulatory load than most/some other countries. But Ambler et al (of the BCC report quoted above) challenged this. They analysed the relevant OECD data and concluded that the UK was not the least regulated country in the OECD, when both rules and enforcement were considered. Gold-plating and the fact that businesspeople paid more attention to the law than was “universally the case” added to the burden. (2) Becket: “Whitehall battles to defend red tape” (Daily Telegraph, 3 March 2003) reported that Ambler et al had challenged an OECD report which said that the UK was lightly regulated.

3 Employment regulations: developments since 1997

3.1 Introduction

In this chapter we look at the major pieces of legislation that have been introduced since 1997. We start with pay issues including the National Minimum Wage (3.2), then look at the very substantial piece of legislation that was the 1999 Employment Relations Act (ERA, section 3.3) and then go on to another substantial piece of legislation – the 2002 Employment Act (EA, section 3.4). Section 3.5 discusses EU Directives (we return to the theme of the EU in chapter 5) and 3.6 touches on some aspects of the Government’s enthusiasm for Active Labour Market Policies (the tax credits). Section 3.7 draws some conclusions. A footnote (section 3.8) discusses some trade union matters.

3.2.1 Pay issues

“He becometh poor that dealeth with a slack hand: but the hand of the diligent maketh rich”

Proverbs Chapter 10/verse 4.

“And in the same house remain, eating and drinking such things as they give: for the labourer is worthy of his hire.”

Luke Chapter 10/verse 7.

“From each according to his abilities, to each according to his needs”

Karl Marx: “Critique of the Gotha Programme” (written 1875).

We are unashamed supporters of free markets and the minimum of regulation. And this applies to one of any economy’s most crucial markets – the labour market. We are constantly amazed by the oft-repeated and sentimentalist view that because labour markets are about “people” then labour markets in which employers “demand” labour (a factor of production) and employees “supply” it and the price that is eventually settled on is the “clearing price” at which the demand for a particular type of labour equals the supply is regarded as “immoral”. One of the reasons, apparently, is that somehow this demeans people and another reason is that it results in income inequality because some people’s skills, attitudes and commitment are valued more highly in a labour market than other people’s skills et al.

Well, we challenge this. Markets are strictly amoral not immoral. And they are, moreover, without doubt the best way of matching the right people with the right jobs and encouraging people to up-skill themselves in order to gain better employment. The incentive of a better-paid job (or better working conditions) is a great motivator. (Mind you, when people do work hard, work long hours and show great commitment, they are then, somewhat patronisingly, accused of getting swept into the, largely mythical, “long hours culture” and getting their work-life balance “wrong”. And it’s all the employer’s fault, of course.¹)

But, whilst we support markets, we emphasise that this does not mean that justice, fairness and morality are irrelevant. Far from it. It is right and proper that employees should be aware of the underlying philosophy behind pay-determination. There are broadly two views of pay-determination:²

- The first view may be called **commutative justice**, where it is held that each person should receive income in proportion of the value of their labour and the capital they have contributed to the productive process. This view underlines the ideology of the free market economy and the market determines the pay received by any individual. As already suggested, even now many people find it difficult, if not distasteful, that “just and fair” pay should be determined by the market preferring the second view of justice (see below). This first approach to pay justice can also be referred to as the **reward system**: to each according to their contributions rather than their needs. In other words, pay is linked to performance. In this system, it is not one of business’s functions to provide every citizen with his/her needs – that’s the state’s responsibility. In this market-based system, it is up to individual companies to develop remuneration schemes that recruit, retain and reward staff. May we suggest that the two quotes from the bible support the reward system.
- The second view may be called **distributive justice**, where it is believed that people should receive income according to need. Given that people’s needs are, arguably, much the same, distributive justice implies approximate equality in income distribution. This view underlines the ideology of socialism and one of its great proponents was, Karl Marx. Suffice to say, many of the economic systems that purported to be Marxist were, firstly, very unequal (it was useful to be a party apparatchik) and, secondly, have collapsed under their own inefficiencies.³

It will come as no surprise that the IoD is an unequivocal supporter of the reward system and cynically dismissive when it comes to the second. But the reward system means just that and any discrimination on grounds of gender, race, disability or any other personal attribute is utterly and totally to be condemned under this system. (We return to discrimination in chapter 4.) You should pay people for the work they do (“performance”) – not whether you like or dislike the colour of their skin. To act otherwise is to act unjustly and immorally.

3.2.2 The National Minimum Wage (NMW)

(i) Introduction

The Government introduced a NMW in April 1999 (the enabling Act was passed in 1998), despite considerable opposition from business representative bodies (including the CBI⁴ and the IoD⁵) and scepticism from free market economists⁶.

Our objections were broadly as follows:

- Depending on the rate of the NMW, it would price “marginal” workers out of jobs, assuming that the demand for labour is elastic (ie varies with the price of labour and that the higher the price of labour the more would be priced out of a job).⁷
- This “pricing out of jobs” would work against the aims and objectives of the government’s active labour market policies (especially the New Deal⁸) for encouraging “marginal” workers into jobs. In other words, there was a conflict of policies.
- As a related point, the higher labour costs are, the more employers will look to labour saving, “mechanised”, methods of operating. This may lead to higher investment (which should not necessarily be regarded as a “good thing” in itself, other things being equal) and higher labour productivity (ditto) but also higher unemployment and lower activity rates. To a great extent this has occurred on the Continent, with disastrous consequences for unemployment.
- Higher wage costs may lead to cut-backs in training costs.
- As the NMW rises, there is less incentive for employees to upgrade and up-skill themselves. Wage differentials are a great incentive to up-skilling.
- Wage differentials would be (at least initially) compressed by a NMW and would undermine any incentives to acquire skills. If wage differentials were to be restored (and they are hotly fought for), then there could be a general push on wage inflation.
- Employers are faced by higher National Insurance Contributions (NICs, 12.8% from April 2003) as wages rise. Not only would the NMW add to employers’ wage bill directly but it would also add to the NICs bill.
- The NMW would add to red tape.^{9,10}
- A NMW would be more damaging for some parts of the country than others – with London and the rest of the South East, for example, much less likely to be affected than say Wales. The regions most likely to be affected by the NMW tended to be those with relatively high unemployment.
- There were certain “vulnerable” sectors that were especially likely to be affected directly including: certain private industries including long term care, security, hotels and catering (the hospitality sector) and textiles etc; the voluntary sector (if paid anything); Government procurement (eg cleaning in hospitals).
- Even though the NMW was introduced as a “welfare” measure, the NMW would do little to help poverty as much poverty is related to unemployment (which would be made worse by the NMW) or being retired.¹¹
- There is also the point that people pay income tax and employees’ NICs on low incomes. The threshold for both income taxation and employees’ NICs is low. Employees start paying tax and NICs at £4,615 (annual limit, frozen for tax year starting in April 2003).¹² The rate of employees’ NICs is 11% (from April 2003) and the basic rate of income tax is 22%.¹³ So if people work 20 hours a week at the NMW of £4.50, they will start paying income tax and NICs.
- The more the costs and regulations are increased on businesses in the formal economy, the more are the incentives to go into the “informal” economy (where the true abuses exist and rogues get off scot-free).
- Last but not least, once a NMW is introduced, there is a huge risk that the rates will be ratcheted up for “political” reasons (either for the “poverty” lobby, the unions, or the electorate).

(ii) NMW rates: checklist

As part of the apparatus of government, the “independent” Low Pay Commission was set up to make recommendations about the rates of the NMW and other issues as well as see how the NMW was functioning and see what its effects were. Up to 2001, three reports were produced^{14, 15, 16} and the Government (the Chancellor) broadly agreed with the LPC’s recommendations on NMW rates (which were specifically dealt with in the first and third reports). The fourth report¹⁷ recommended NMW rates for 2003 and for 2004 – and the Government has accepted them (though provisionally in the case of 2004, and subject to confirmation in early 2004).¹⁸

NMW: hourly rates (£ph)

	April 1999	June 2000	October 2001	October 2002	October 2003	October 2004
Adult rate (22+)*	3.60	3.70	4.10	4.20	4.50	4.85
Youth development rate (18-21)**	3.00	3.20	3.50	3.60	3.80	4.10
Adult development rate (22+)***	3.20	3.30	3.50	3.60	3.80	4.10

* The LPC originally recommended an adult rate of 21+, the Chancellor modified this to 22+ (no doubt in the interests of “third way, pro-business spin”). In addition, the LPC’s original recommendation that the adult NMW rate should go up to £3.70 in June 2000 was delayed to October 2000.

** The LPC’s original recommendations were also slightly watered down: they recommended £3.20 in April 1999 rising to £3.30 in June 2000 (as for the adult development rate). The Chancellor imposed £3.00 in April 1999 rising to £3.20 in June 2000. There is no NMW for 16-17 year-olds.

*** Accredited “adult” (22 year olds plus) trainees in the first 6 months of a new job with a new employer.

(iii) Impact of the NMW so far

The impact of the NMW so far on the labour market (up to late spring 2003) has been modest, for two main reasons:

- The rates recommended by the LPC and accepted by the Government up to October 2002 were commendably modest – this is all set to change.
- The economy has been performing well – this is now changing but employment is being inflated by the rapid expansion of public sector jobs (“Guardian” jobs, i.e. jobs advertised in the Guardian), financed by the taxpayer.

Nevertheless, business costs have risen (about £2 ½bn of annual recurring costs, see chapter 2, and set to rise) and some sectors have undoubtedly been adversely affected by the introduction of the NMW. In particular, care homes¹⁹ have been affected (along with absurd new regulations) and the costs of the hospitality sector have increased significantly.²⁰ The increase in October 2001’s rates (from £3.70 to £4.10 for adult workers, over 10%) was undoubtedly behind much of these effects. The rise in October 2002 was relatively modest (£4.10 to £4.20).

(iv) The NMW: developments

We are very concerned about the increases that have been announced for October 2003 (£4.20 to £4.50, an increase of 7%) and October 2004 (£4.50 to £4.85, an increase of nearly 8%). These increases are well above the “going rate” of 3% for pay settlements and will undoubtedly cause “differentials problems”. The full costs will be considerable (and we would remind the reader that employers’ NICs of nearly 13% should be added in). This is happening at a time when businesses are under great financial pressures. It is economically most unwise and yet another nail in the coffin of businesses operating at the margins of viability.²¹ We believe that our original fears of rates being ratcheted up for “political” expediency have been well and truly vindicated and we fear that these increases really will lead to a loss of (private sector) employment. So far, the Government’s policies on the labour market appear to have “succeeded” and do not appear to have damaged employment growth. But this, along with their once-successful fiscal policy, cannot be taken for granted.²²

Whilst we appreciate that people should be paid “fairly” (see section 3.1), we would ask the Government to think through the consequences of their decision. By international standards the UK’s NMW is quite generous²³ and, if the Government really felt the NMW is so low (“poverty wages”), why start to tax people at £89 a week?

3.3.1 Employment Relations Act (ERA, 1999): introduction

The Employment Relations Act (ERA) was a very sizeable piece of legislation. It had three main parts:

- Changes to collective rights including the introduction of compulsory collective bargaining (see 3.3.2);
- Changes to individual rights (see 3.3.3);
- Family Friendly policies including the incorporation of the Parental Leave Directive into British (English and Scottish) law (see 3.3.4).

The consultation procedures were described as being about “Fairness at Work”²⁴. But they were patently about employee rights, with little consideration for the consequences for the employer, for business, for competitiveness, for efficiency and ultimately for the economy and employment. We considered the balance between employer and employee rights about “right” in 1997 and we have always accepted that both employers and employees should have certain rights enshrined in the law. But following ERA and subsequent employment legislation, the balance has tipped substantially in the employee’s favour – even though the employer foots the bill.

3.3.2 ERA: collective rights

The extensions of collective rights, which were included in ERA, have inevitably strengthened the power of the unions. They did not, however, significantly unravel the very extensive trade union legislation of the 1980s and 1990s. They included:

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- The prohibition of blacklisting because of union activity;
 - The employees' right to be accompanied by a union official at a disciplinary or "serious" grievance hearing;
 - The protection against dismissal for any employees taking part in "official" strike action within the first 8 weeks of the strike action. It is now automatically unfair for an employer to dismiss an employee within the first 8 weeks of strike action. (Prior to ERA, the law already banned selective dismissal, but non-selective dismissal was lawful.)
 - The introduction of compulsory recognition of trade unions for collective bargaining purposes (see below).

Compulsory recognition of trade unions for collective bargaining purposes

This was the most hotly contested and contentious part of ERA. We took (and still take) the view that the notion of industrial democracy and compulsory recognition of unions was fundamentally flawed.

In 1998 we wrote that: ²⁵

- "Businesses are not democracies. Directors and managers are appointed to run companies for and are accountable to the shareholders; and they all have the responsibilities this entails. If they have the responsibility for running the company, they should have control. And they should not be burdened, distracted and delayed by any manifestations of compulsory "industrial democracy". This is why we oppose compulsory employee consultation and the compulsory recognition of trade unions."

And in the same year we also wrote: ²⁶

- "Union recognition should be left to management. Companies are not democracies and their leaders are not democratically accountable to their employees. They are accountable to their shareholders and they're responsible for running the company. If they are accountable they should have control. We know of few people who believe that those who have the responsibility for running events shouldn't have fair control over how they run those events. But there is a strange denial, in some quarters at least, of the validity of this law of natural justice when it comes to the issue of the compulsory recognition of trade unions. The concept of industrial democracy is thoroughly flawed."

And also in the same year a survey of IoD members showed that 80% were opposed to compulsory recognition for collective bargaining purposes, considering voluntary recognition the correct way of proceeding.²⁷ Alas, with compulsory recognition of unions, the introduction of European Works' Councils (an EU Directive) and the forthcoming introduction of compulsory information and consultation procedures (an EU Directive, see below and also chapter 5) industrial democracy is now well and truly part of the British business scene. This may have been the traditional approach in Germany (with its "co-determination" system of industrial relations, see annex 1 for definition), but it fits uncomfortably with British industrial relations traditions. (See annex 3, table 1 for more on types and levels of employee involvement.)

Unions have the legal right to be recognised for collective bargaining by employers with at least 21 workers (we consider this to be too low a threshold, our members' modal response was 100²⁸) if the following conditions are satisfied:²⁹

- Union members make up at least 10% of workers in the bargaining unit, and
- The union wins majority support for recognition in a secret ballot of all workers in the bargaining unit (the majority constitutes at least 40% of those entitled to vote – not 40% of those who actually vote), or
- A majority (50% plus one) of eligible workers in the bargaining unit belong to the union (“automatic recognition”).

If employers still do not recognise unions the Central Arbitration Committee (CAC) can compel an employer to recognise unions for collective bargaining purposes.

According to TUC figures, there have been over 1,000 new recognition agreements signed since 1999 (when ERA came into force). In 2002, some 300 were agreed, with nearly all of these deals for full recognition (ie for negotiations over pay, hours and holidays) with an increasing number also covering pensions, training and information and consultation.³⁰ There are, however, signs that the rate of increase of recognition deals is slowing down as most of the “easier businesses” (ie those with high union membership levels in the 1980s and 1990s) have been targeted and unions are having to move on to more difficult targets. There were fewer deals in 2002 than in 2001.³¹

3.3.3 ERA: individual rights

The extensions of individual rights concerned unfair dismissal and comprised:

- The maximum claim for an unfair dismissal case was raised from £12,000 to £50,000 and annual indexing was introduced;
- The eligibility for being unfairly dismissed was reduced from 2 years' employment to 1 year's employment (from 1 June 1999).

There is little doubt that these changes have contributed to the rise in employment tribunal cases and the costs to employers of these cases. (See chapter 6 for more on employment tribunals.)

3.3.4 ERA: “family friendly” rights

ERA's “family friendly” rights comprised:

- Extensions to maternity benefits: ordinary maternity leave (OML) was increased from 14 to 18 weeks, which brought leave into line with maternity pay and was sensible, and the reduction in the qualifying period for extended maternity leave or additional maternity leave (AML, up to 40 weeks) from two years to one year.
- Introduction of the EU's Parental Leave Directive: the Directive stipulated up to three months unpaid leave for an employee after one year of employment (up to the child's 8th birthday), including those who adopt a child.
- The right to take time off for urgent family reasons in the event of sickness or accident (“family emergencies”).
- New paternity leave provisions: two weeks of unpaid leave.

We will return to the issue of “family friendly” policies in chapter 4.

3.3.5 ERA: the review

In mid-2002 the Government announced that it was going to review the Employment Relations Act and there were expectations that it would be radically changed and modified.³²

³³ Radical changes were, however, ruled out. There will, however, be a series of smaller reforms.^{34,35,36} Even though we welcomed this decision as a sensible decision we are not complacent. Radical changes can still be introduced to the legislation enshrined in ERA through different channels and different legislation. And, no doubt, they will.

3.4.1 Employment Act (EA, 2002): introduction

The Employment Act³⁷ was another very sizeable piece of legislation. It was mainly concerned with:

- The power to extend the European Directive on fixed-term work to include provisions on pay and pensions to ensure equal treatment of fixed-term contract employees.³⁸ We regarded this as a potentially time-consuming and costly piece of legislation which could well end up, ironically, discriminating against fixed-term workers.
- The introduction of a formal questionnaire procedure for use in equal pay tribunal cases, with time limits for an employer response – “equal pay questionnaires”.³⁹ In other words, employees bringing equal pay claims will have the right to serve a questionnaire on their employees seeking information relevant to their claim, or potential claim. This brings equal pay law into line with sex, race and disability discrimination cases and, as such, we broadly accepted it although we believe that the discrimination against women in pay matters is grossly politicised and exaggerated (see chapter 4 for more).
- The placing of trade union learning representatives (TULRs) on a statutory footing with a right to a reasonable amount of paid time off work to pursue their activities. Whilst accepting the logic of this measure, there is a risk that the position will be abused and, of course, it all adds to employers’ costs.
- Statutory procedures for dispute resolution and employment particulars (including powers to introduce a statutory requirement for all employers to have minimum internal dismissal, disciplinary and grievance procedural standards for dealing with individual disputes in the workplace). (See 3.4.2.)
- The introduction of new “family friendly policies”, including statutory paternity pay, changes to maternity leave and pay, and adoption leave and pay; and the right to request flexible working and guidance on how appeals against refusal should be heard. (See 3.4.3.)

3.4.2 EA: dispute resolution

The Employment Act legislated for “model” statutory internal grievance procedures, which will form part of all employment contracts, binding on employees and employers, irrespective of workforce size. Moreover, there will be new employment tribunal procedures

on time limits, compensation, costs awards, bars to certain complaints not heard internally and rules on fair proceedings.

The new legislation is an attempt to decrease the number of tribunal cases by increasing the internal settlements of grievances. As such we gave a broad welcome to the proposals as we have expressed our concerns about the rocketing number of tribunal cases on many occasions. (See chapter 6 for discussion.) In recent years there has been a tendency for the majority of cases to go to tribunal without prior meetings to try to resolve the disagreement. In 2001 in 64% of the applications made to the Employment Tribunal Service there was no meeting beforehand between the employer and the employee to try to resolve the disagreement.

We broadly supported the proposal that employers should provide a written statement of terms and conditions to their employees, even though there are costs and possible problems of compliance for employers (especially for small employers), but if the proposals succeed in cutting back the number of tribunal cases, then the situation is an improved one for both employers and employees.

We do have our reservations, however. Given the continuing flood of employment legislation and the increasingly litigious society, we would be surprised if the number of tribunals does significantly moderate. And we were also very disappointed by the Government's abandoning the proposal to levy fees of up to £100 on all tribunal applicants to curb mischievous and frivolous claims. The proposal had been fiercely opposed by the unions.⁴⁰

3.4.3 EA: “family friendly” rights

The extension of “family friendly” rights, which were introduced in April 2003, was very extensive and broadly comprises^{41,42}:

- Employees with 26 weeks' continuous service at the qualifying week are entitled to 2 weeks' **paid paternity leave** in respect of birth and adopted children.⁴³
- Employees with 26 weeks' continuous service at the qualifying week who are **adopting** a child are entitled to ordinary adoption leave (OAL) of 26 weeks, paid at a flat rate, and additional (unpaid) adoption leave of a further 26 weeks, giving a total leave period of one year.
- **Maternity leave** periods are increased and simplified. Ordinary maternity leave (OML) increases from 18 to 26 weeks (as does the availability of statutory maternity pay). Employees with 26 weeks' continuous service at the qualifying week are entitled to additional maternity leave (AML, “extended” maternity leave), which is for a further 26 weeks (unpaid), giving a total leave period of up to one year.
- The Act introduces a new right for employees with 26 weeks' continuous service, who are parents of children under 6, or of disabled children up to the age of 18, to **request a flexible working arrangement**. The Act sets out a detailed procedure with timescales which employers must follow up upon receipt of the application. An employee whose request for flexible working is refused may present a complaint to an employment tribunal that the employer has either failed to comply with the statutory procedure or based its decision to reject the request on incorrect facts. The tribunal does not have

power to order the implementation of a flexible working arrangement but may order that the application be reconsidered, or award compensation.

(i) General observations

The extra “family friendly” policies (sometimes also referred to as “work-life” balance policies⁴⁴) sound exceptionally seductive but we have some severe reservations:

- They will inevitably add to business’s administration and financial costs.
- As the “family friendly” policies are mainly addressed to people with young children, resentment can arise with other employees who are not qualified for the rights. The policies are heavily discriminatory. In the case of paternity leave, many employees could take the view that a new father could use his annual leave around the birth of a child.
- The generous extensions to maternity leave could well add to employers’ reluctance to take on young women employees. There is a real problem of asymmetry of rights with maternity rights. When a woman takes maternity leave she has no obligation to return, but the employer has to keep the job open. Under the new legislation a woman may only work for 6 months, take the best part of a year off and not return. We regard this as unfair. This is further discussed in chapter 4.

(ii) The right to request flexible working

We regard this right as a particularly egregious piece of legislation.⁴⁵ There seems to be an underlying assumption that employers have all the responsibilities of accommodating employees, but the employees do not need to make hard choices between work and home-life. Again, we regard this as quite unfair. Life is full of hard choices and it is irresponsible for the Government to suggest that somehow it isn’t (at least for the employee!). If employees wish to have flexible working then they should choose jobs where this is possible and not expect the employer to be “obliged” to change the terms and conditions of a job when the employees’ family responsibilities change.

On the whole, many employees, overwhelmingly women, are (or up to now have been) very realistic, mature and responsible about such matters with many choosing jobs that can be worked flexibly.⁴⁶ And many employers accept this situation and are very happy to offer flexible work. Flexible work can benefit businesses by improving motivation, reducing turnover and cutting recruitment costs. The UK had one of the most flexible workforces in the world,⁴⁷ not that adequate credit is given for this. (This really is an unnecessary piece of legislation!) Incidentally, many of these flexible jobs tend to be lower paid and this accounts for part of the difference between men’s average pay and women’s average pay. (See chapter 4 on equal pay issues.)

We fear that this particular piece of legislation is only the start for legislation “along these lines”. The right to request flexible working could be extended to other groups and “the right to request flexible working” could become the “right to flexible working”. Indeed employees may well understand the current legislation to be about the right to flexible working and feel resentful if/when agreement to flexible working is refused. This agenda is potentially disastrous for business.

Concerning the details of the right to request flexible working an eligible employee may apply to their employer for a change in terms and conditions of employment if the change relates to any of the following⁴⁸:

- The hours the employee is required to work.
- The times when they are required to work.
- Where, as between home and a place of business of the employer, the employee is required to work or
- “Such other aspect of his terms and conditions of employment as the secretary of state may specify by regulations”.

The DTI’s guidance⁴⁹ covers a very wide range of flexible working arrangements that are covered by the new right. These include annualised hours, compressed hours (allows individuals to work their total number of agreed hours over a shorter period), flexitime, homeworking, jobsharing, shiftworking, staggered hours and term-time working. The grounds for refusal are wide.⁵⁰ Employers can refuse because it would add to costs, because it would impair productivity and product quality, because the employee’s preferred working hours would not meet the requirements of the business, and because a request could have a detrimental impact on other staff. This may give the impression that employers will necessarily find the new law easy to deal with. But if they get a step a wrong, they could end up in a tribunal and be found against even if they have a good business case for declining the request for flexible working.

The costs to business of the new legislation are not inconsiderable.⁵¹ Indeed they could be as high as £250m annually.⁵² According to recent survey by Peninsula (the UK’s biggest employment law firm), seven out of ten small firms said that flexible working rules would damage their businesses and that they may have to cut staff in order to cope.⁵³

3.5.1 EU Directives: introduction

The influence of EU Commission’s Employment Directives on British employment law has been very considerable and, moreover, this seems set to continue. (Bureaucracies have to do something or they are abolished.) This is profoundly bad news for organisations that believe businesses should have the ability to make decisions flexibly and quickly, as the IoD does, because the EU Commission does not. Actually, it is worse than this. They don’t even understand why flexible and quick decision-making is important to a successful business. The EU Commission believes in regulation and control. And regulation and control inevitably destroy the ability of people to make quick (and sometimes very necessary) decisions.

In this section we consider briefly the most important EU Directives as already translated (or scheduled to be translated) into British law. In chapter 5 we discuss the EU in more detail. The section is broken up into the following sub-sections:

- Equal opportunities (see 3.5.2).
- Employment protection and working conditions (see 3.5.3).
- Health & Safety at Work (see 3.5.4).
- Employee relations (see 3.5.5).
- Data Protection Directive (see 3.5.6).

The table below lists the Directives (with amendments to Directives mainly omitted).

EU Employment Directives

Reference	Directive	When enacted
Equal opportunities (3.5.2)	(i) Parental Leave Directive	1999 (under ERA)
	(ii) Burden of Proof in Sex Discrimination Cases Directive	2001
	(iii) Equal Treatment (Racial or Ethnic Origin) Directive	19 July 2003
	(iv) "General Framework" for the Equal Treatment in Employment & Occupation Directive	(a) 2 December 2003: concerning discrimination on sexual orientation grounds or religion and belief grounds. (b) December 2006: concerning age and disability.
	(v) Equal Treatment (Amendment) Directive (sex)	By 5 October 2005
Employment protection and working conditions (3.5.3)	(i) Posted Workers Directive	1999
	(ii) Part-time Workers Directive	2000
	(iii) Fixed-term Work Directive	2002 (under EA)
	(iv) Temporary Agency Work (TAW) Directive	TBC
	(v) Amended Transfer of Undertakings (Protection of Employment) (TUPE) regulations or Acquired Rights Directive	During 2003
Health and Safety at Work (3.5.4)	(i) Working Time Directive (WTD)	(a) 1998. (b) 1 August 2003 (1 August 2004 for junior doctors): extension of Working Time Regulations to cover excluded sectors (under the Excluded Sectors Directive).
	(ii) Young Workers Directive (The Employment of Young Workers Directive)	(a) 1998 (with WTD). (b) 2003; non-renewal of exemptions for 16-17 year olds.
Employee relations (3.5.5)	(i) European Works Councils (EWCs)	1999
	(ii) Compulsory Information & Consultation Procedures Directive	Due to be implemented in 3 stages: (a) March 2005 – businesses with 150+ employees. (b) March 2007 – businesses with 100+ employees. (c) March 2008 – businesses with 50+ employees.
Data Protection (3.5.6)	Data Protection Directive	1998 (Data Protection Act)

3.5.2 EU Directives: equal opportunities

(i) Parental Leave Directive

See section 3.3.4 (above).

(ii) Burden of Proof in Sex Discrimination Cases Directive

The Burden of Proof in Sex Discrimination Cases Directive was the first of three anti-discrimination Directives in which the burden of proof could, potentially, be reversed. The other two are the Equal Treatment (Racial or Ethnic Origin) Directive (see below) and the “General Framework” for the Equal Treatment in Employment and Occupation Directive (also see below). It has been a basic principle of English (and Scottish) law that a person is innocent until proved guilty. But there is a risk that this may not be the case with these Directives, in which the employer could be assumed to be guilty if a “prima facie” case of discrimination were to be brought against him/her unless he/she can prove that no discrimination occurred. In other words, once a complainant has established a “prima facie” case of presumed direct or indirect discrimination, it is up to the respondent to prove that no discrimination has taken place. However, in a recent case the Appeal Court took the view that the complainant still had to prove the facts from which the tribunal could conclude that he/she had been unlawfully discriminated against “in the absence of an adequate explanation” from the employer. And it seemed “tolerably clear” that the introduction of the “Burden of Proof” regulations in 2001 had codified rather than altered the pre-existing position established by case law.⁵⁴ We trust that this continues to be the case.

The DfEE’s consultation document⁵⁵ described the “sharing” of the burden of proof as:

- “the purpose [of the Directive] is to promote fairness between the parties in sex discrimination...we therefore wish to amend parts of the Sex Discrimination Act which relate to employment and vocational training. In cases where the claimant has made a prima facie case which has fulfilled their part of the burden of proof, it will be up to the respondent, who is normally the employer, to **disprove the claim**. This means that when there is a case for the employer to answer the burden of proof is ‘shared’ between employer and employee.”

The regulations in connection with this Directive came into force in 2001.^{56,57}

(iii) Equal Treatment (racial or ethnic origin)

The Equal Treatment (racial or ethnic origin) Directive is the first measure to be adopted under the new powers to combat discrimination under Article 13 of the Amsterdam Treaty.⁵⁸ (We discuss the Amsterdam Treaty in chapter 5.) The Directive lays down a framework for combating discrimination on the grounds of racial or ethnic origin with the aim of implementing the principle of equal treatment in all EU member states.⁵⁹ As with sex discrimination (see above), there is a risk that it could increase the burden of proof for employers.⁶⁰

(iv) General Framework for the Equal Treatment in Employment & Occupation Directive

In November 2000, the EU Council of Ministers adopted a new framework Directive prohibiting discrimination based on religion, belief, disability, age and sexual orientation.^{61,62} Discrimination was defined to include harassment. (This may cause employers problems because they might find it difficult to change “entrenched” views among their staff and, as harassment will be covered by the new laws, companies will be held liable for humiliating, bullying or insulting behaviour by their workers.)

We have considerable misgivings about this Directive for three main reasons:⁶³

- It could increase the burden of proof for employers as with sex discrimination (see above).
- Recruitment, training and other employment policies that are liable to adversely affect the groups mentioned in the Directive could be decreed to be indirectly discriminatory and hence illegal.
- The costs could amount to £68m (in the 1st year) and £51m a year recurring.

There is also the problem of defining belief⁶⁴ in a society that is increasingly diverse and muddled and uncertain about its core values. One person may regard someone’s beliefs as quite legitimate, but other groups (not least of the all the politically correct fascists) may hold these beliefs as wholly “unacceptable” (key “PC” word). This is all the more worrying as we live in a cultural climate that is fast eroding freedom of thought itself.

In chapter 4 we discuss age discrimination and the issue of whether retirement ages should be permitted. At this point it suffices to say that the Directive allows for the retention of retirement ages and has left the decision to the individual member states.

(v) Equal treatment (amendment) directive

The Equal Treatment (Amendment) Directive, which came into force in October 2002, requires that sex discrimination legislation will require amendment by 5 October 2005.⁶⁵ In particular:

- The new Directive introduces a new requirement on member states to “mainstream” the objective of equality (now made an explicit objective of the EU) into their decision-making activities.
- Sexual harassment is given a new statutory definition which incorporates both “sex-related” and “sexual” harassment, and is outlawed as discriminatory.⁶⁶
- Positive action measures may now be taken in order to ensure full equality in practice between men and women.
- There are new definitions of direct and indirect discrimination and a definition of Genuine Occupation Qualifications (GOQs) (see annex 1 for definitions).

3.5.3 EU Directives: employment protection and working conditions

(i) Posted Workers Directive

The Posted Workers Directive aims to ensure fair competition and provide minimum standards of employment for workers temporarily moved to another EU member state. It was implemented in the UK in 1999. “Posted workers” to other EU member states have rights on issues including pay, non-discrimination and health and safety. A posted worker who has a complaint can use the legal mechanisms in the country to which he/she has been posted. Employers may therefore find themselves defending actions in other member states.⁶⁷

(ii) Part-time Workers Directive

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (2000) enacted the Part-time Workers Directive, introducing new rights for part-timers that covered pay, pensions, training and holidays.⁶⁸ Part-time workers must now have the same employee rights as full-time workers. It was IoD policy that part-timers should have the same terms and conditions as full-timers before the legislation was introduced.

(iii) Fixed-term Work Directive

See 3.4.1 (above).

(iv) Temporary Agency Work (TAW) Directive

The objective of the Temporary Agency Workers (TAW) Directive is to give agency workers the same rights as full-time workers. The Directive will apply to all agency temps, including those working part-time. In all cases (excluding a few exemptions), the agencies will be required to ensure that their temps “receive at least as favourable treatment in terms of basic working and employment conditions” as a “comparable worker” in the user organisation where the temps are currently working. It also aims to improve the “quality” of their work.^{69, 70, 71}

TAW is proving very controversial in the UK (and Ireland) where there is a more significant temps market than in the Continental EU,⁷² though other member states will be affected. There is little doubt that the Directive would increase the costs (both financial and administrative) of hiring temps. Moreover, the Directive clearly conflicts against the EU’s oft-stated aim of having more flexible labour markets (as indeed most Directives do). The European Commission’s contention that there are many vulnerable and exploited temporary workers that need this extra protection shows a total failing of the understanding about tight and competitive labour markets. But then they are social engineering regulators who do not like, understand or trust markets. There is currently (May 2003) still a possibility that there may be a 6-week exemption period (and the DTI is fighting for a longer exemption period). But we would not be surprised to see the exemption go.⁷³

(v) Transfer of Undertakings (Protection of Employment) (TUPE)

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE, 1981) followed on from the Acquired Rights Directive (or Transfer of Undertakings (Protection of Employment) Directive) of 1977. Under TUPE, if a business is taken over or merges with another business, the employees affected are entitled to be treated as stock in trade and move to the new employer with their contractual rights safeguarded. The Acquired Rights Amendment Directive (1998) contains a new definition of the “transfer of an undertaking” and provides EU member states with various options for reform of the legislation, including extending protection to occupational pension rights. The DTI published a consultation paper in 2001 and is expected to confirm its proposals for implementation in 2003. The DTI does not believe that new legislation is required. (This was written in spring 2003.)

3.5.4 EU Directives: Health and Safety at Work including the Working Time Directive

(i) Working Time Directive

The Working Time Directive was agreed, through the Health and Safety route (thus circumventing the UK’s opt-out of the Social Chapter) in 1993, but the then Conservative Government delayed its implementation. The incoming Labour Government introduced the Working Time Regulations in 1998 – they came into force in October 1998, implementing the EU Working Time Directive. The Working Time Directive has proved expensive for certain sectors to implement (see chapter 2) and we opposed its introduction.⁷⁴

The aim of the Working Time Directive (WTD) is to regulate working time in order to protect the health and safety of workers. We discussed the tenuous link between hours and health in a previous paper that dealt with some of the “urban myths” about the UK’s “workaholic” labour markets⁷⁵ and regarded the introduction of the Working Time Directive as quite unnecessary. (And see table 3/2 in annex 3.) The WTD’s main consequences for employers were restrictions on the hours that employees may work and, for the first time, a legal entitlement to paid holiday.

The main provisions are:⁷⁶

- A maximum weekly working time of 48 hours (including overtime) over a 7-day period averaged over 4 months.
- A rest break after 6 hours’ continuous work.
- A minimum daily rest period of 11 consecutive hours in each 24-hour period.
- A minimum weekly rest period of 24 consecutive hours, plus the 11 referred to above, in each 7-day period.
- An average night shift length of 8 hours in any 24-hour period (with a maximum shift length of 8 hours for hazardous work).
- A minimum of 3 weeks’ paid annual leave that rose to 4 weeks in 1999 that cannot be cashed in – the “holiday entitlement”. (The exemption for contracts of less than 13 weeks for the holiday entitlement was overturned by the ECJ in June 2001.⁷⁷)

There were some exemptions:

- The exemptions included doctors in training, transport industry employees and “autonomous decision makers”.
- The provision on the 48-hour maximum working week could also be overridden if the employee voluntarily agreed to work longer hours. (Subsequent to the original regulations the DTI amended the regulations by (1) allowing workers to work voluntarily beyond their contractual hours without the extra hours counting towards the 48-hour limit and (2) removing the obligation on employers to keep a detailed record of the hours of those workers who have opted out from the 48-hour statutory limit.)

There are several developments to the WTD, which include:

- The 2000 Working Time Amendment (Excluded Sectors) Directive will extend the original WTD to cover previously excluded sectors (including road, rail, air, sea, inland waterway and lake transport, offshore work and junior doctors). Most of the changes will be introduced in 2003 (including mobile workers), with junior doctors in 2004.⁷⁸
- Note that in November 2004 the European Commission is to review the current 48-hour opt-out provision of the Directive. It’s likely that the opt-out will be declared unlawful.

(ii) Young Workers Directive

The Young Workers Directive was agreed in 1993. It placed restrictions on the hours young people could work. It was implemented in the UK under the Working Time regulations in 1998. The Government, at that time, opted out of the provisions in the Directive specifically relating to hours of work for “adolescents” (16-17 year olds). The opt-outs covered restricting 16-17 year olds from working more than 40 hours a week, limiting them from working more than 8 hours a day and prohibiting them from working at night. The Government decided not to renew the opt-outs (exemptions) and these restrictions were introduced in April 2003.

Footnote

We are not dealing with any other of the EU’s extensive health and safety Directives in this paper and, as already implied, the WTD (and, incidentally, the Young Workers Directive) should really have gone through the Social Chapter route rather than the health and safety route. But we cannot resist mention of the (draft) Physical Agents (Vibration) Directive that, in order to cut down on whole body vibration, places punitive restrictions on workers including farm workers and lorry drivers. Common sense seems to be gone through the window. The EEF has estimated that it will cost £400m a year.⁷⁹

3.5.5 EU Directives: employee relations

(i) European Works Councils

In section 3.3.2 (above) we expressed our concerns about industrial democracy and our opposition to it. We are, therefore, opposed to the compulsory introduction of works councils. They can be costly, cumbersome and hold up necessary decision-making. And we opposed the introduction of the European Works Councils (EWCs) Directive (of 1994),

which was enacted in the UK under the snappy title of “The Trans-national Information and Consultation of Employees Regulations” in 1999.⁸⁰ The Directive insisted that organisations with at least 1,000 employees in the EU and at least 150 employees in two or more member states are required to establish an EWC under the European Works Councils Directive.

(ii) Compulsory Information & Consultation Procedures Directive

We are even more opposed to the introduction of the Compulsory Information and Consultation Procedures Directive, because it will bring yet more compulsory red tape to the workplace in some very modestly sized businesses.^{81, 82}

The “information and consultation” Directive will give staff a right to information and consultation on economic, financial and employment matters.⁸³ The measure will have most impact on corporate industrial relations in the UK and Ireland, which both opposed its introduction. They fought the proposals on the grounds that continental European systems of formalised consultation were not appropriate to their more voluntarist systems. And lost.⁸⁴ The new measures are quite alien to British workplace practices.

The “information and consultation” Directive is being introduced in three stages:

- March 2005: businesses with 150+ employees.
- March 2007: businesses with 100+ employees.
- March 2008: businesses with 50+ employees.

Footnote

We have little doubt that the developments in industrial democracy are far from finished. In the EU’s Convention on the Constitutional Treaty, the EU is preparing to adopt controversial provisions that would oblige policy makers to consult trade unions on a wide range of decisions.⁸⁵ And it should also be noted that there would probably be an official constitutional commitment to “social justice and peace”, a “high degree of social protection” and “full employment”. These are, of course, quite inconsistent objectives, but whatever happens more social protection seems very likely. We discuss the Convention’s Constitutional Treaty further in chapter 5.

3.5.6 EU Directives: data protection

The use of the e-mail and the internet is subject to a complicated web of UK regulations, most of which is listed in the next table.

Legislation affecting e-mail and internet use

1998	Data Protection Act
2000	The Freedom of Information Act
1998	Public Interest Disclosure Act
1990	Computer Misuse Act
1988	Copyright, Designs & Patents Act (as amended by the Copyright (Computer Programs) Regulations, 1992)
2000	Electronic Communications Act
1984	Telecommunications Act
1959	Obscene Publications Act
1978	Protection of Children Act
1988	Criminal Justice Act
1997	Protection from Harassment Act
1975	Sex Discrimination Act
1976	Race Relations Act
1995	Disability Discrimination Act
1998	Human Rights Act

This is not the place to go into details but we would extract the following main points:

- The Data Protection Act (DPA, 1998)'s objective is to protect individuals from the consequences of improperly obtained or processed information. It implemented the EU Data Protection Directive and updated the 1994 Act.
- The Code of Practice (the Employment Practices Data Protection Code of Practice) contains useful checklists and benchmarks that assist compliance with the Data Protection Act. The long-awaited Code of Practice has four parts (but at the time of writing not all have been released). They are:
 - Recruitment and retention: about job applications and pre-employment vetting;
 - Employment records: about collecting, maintaining and using records about workers;
 - Monitoring at work: about monitoring workers' use of telephone or e-mail systems and vehicles – a privacy issue. This part has proved to be especially highly contentious and has held up the production of the Code. There has also been confusion and conflicts between the different sources of advice on monitoring (see below for more). There is a shortened version for small businesses^{86, 87};
 - Medical information: about occupational health, medical testing and, drug (including alcohol) and genetic screening. This part is also highly contentious and controversial.

On the monitoring of telephone calls and e-mails, there has been some confusion not least of all because:

- There was a conflict between the draft Data Protection Code (issued by the Data Protection Commissioner in October 2000) and the DTI's "surveillance rules" that came into effect on 24 October 2000. The DTI's surveillance rules gave employers largely a free hand to monitor. However, the draft Code was markedly more restrictive and emphasised the privacy and the right of the individual and respect for their private and family life, their home and their correspondence.^{88, 89}

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- The Regulation of Investigatory Powers Act (2000, RIPA) (which repealed the Interception of Communications Act, 1985) took private business under the scope of the interception laws for the first time and, as originally proposed, its measures would have made it illegal to monitor employees without their consent, though the DTI was more relaxed.^{90,91}
 - The Human Rights Act (1998), apparently, gave employees the right to keep personal correspondence at work, including e-mails, private. This lack of access (to e-mail & voicemail) by employers is quite unacceptable.⁹²

Let us hope these conflicts and confusions will be fully resolved when the Employment Practices Data Protection Code of Practice is finally made available and it is fully clear when and in what circumstances employers can monitor their employees' telephone calls and e-mails. The IoD line all along through this sad saga of muddle and mayhem is that employers must be able to monitor their employees' telephone calls and e-mails, but the employee should be told.

3.6.1 Active Labour Market Policies: introduction

In our recent education and training paper⁹³ we discussed Active Labour Market Policies (ALMP) or measures. They can be defined as measures designed to give positive encouragement to the unemployed (and inactive) to get off welfare and seek work ("welfare to work").

Such policies include:

- Activation through incentives ("carrots"), "making work pay" eg the Chancellor's Working Families' Tax Credit (now Working Tax Credit).⁹⁴
- Activation through sanctions ("sticks") eg New Deal for Young People (which is compulsory, and which we discussed at some length in the education paper).
- Help through training and improving vocational skills.
- Help through job search support/counselling and improved job matching.
- Help through subsidies, including subsidised placements.

In the next sections we will discuss both the Working Families' Tax Credit (WFTC) and its successor the Working Tax Credit (WTC) even though they are not "employment regulations" as such. But they do impose major payroll red tape burdens on some employers.

3.6.2 Working Families' Tax Credit

The Working Families' Tax Credit (WFTC) was implemented by the 1999 Tax Credits Act. It replaced family credit (a benefit) in October 1999, it was means-tested and it was paid through the pay packet (from April 2000).⁹⁵ It had three elements: (i) an adult/income/employment element, (ii) a childcare element and (iii) a "child" element. The Disabled Persons Tax Credit (DPTC, replacing the Disability Working Allowance (DWA)) operated in a similar way to the WFTC and was for disabled people. It also began in 1999.

There have been several objections to the WFTC including:

- It has been a bureaucratic burden on businesses.^{96, 97} Businesses have essentially been doing the DSS's and/or the Inland Revenue's work for them. The Inland Revenue should administer the scheme or the employer should have some financial support for administering the Government's policies.
- There have been payroll problems. Because the WFTC was not a true tax credit, it was not been possible to distribute it through existing PAYE systems. (The WFTC was fixed for 6 months (26 weeks), whereas PAYE codes operate cumulatively.⁹⁸)
- It has been costly. By April 2003 (when the WFTC was replaced by the WTC) the total cost to employers of administering the benefit has been almost £0.4bn, even on the Government's figures. This has fallen disproportionately on small businesses.⁹⁹
- Family groups have objected because the child support was going to the "pay packet" rather than the "purse". Evidence from the Policy Studies Institute (PSI) has found most people prefer not to have their benefits paid through their pay packet.¹⁰⁰
- The psychological effects of getting the WFTC through the pay packet ("making work pay") have probably been exaggerated.
- The overall impact on the labour market has been very modest, even though it has been so costly for the taxpayer (an estimated extra £6bn over family credit).^{101,102,103}
- There has been a risk that employers will use the WFTC to keep down pay rates. (Whereas in 1997, DSS research found no evidence to suggest that employers or employees systematically exploited family credit.) And there has been a risk of fraud.
- Most of the additional money spent on the WFTC has gone to those on moderate and higher incomes and this has reduced its impact on poverty.¹⁰⁴

All in all, therefore, the WFTC appears to be costly burden on business, is having a marginal impact on the labour market and is costing the taxpayer dear. And in April 2003 it was replaced by the Working Tax Credit.

3.6.3 Working Tax Credit

From 6th April 2003, the tax credits were reorganised^{105, 106}:

- The new integrated Child Tax Credit (CTC) and the Working Tax Credit (WTC) replaced the WFTC, the DPTC and the Children's Tax Credit. Up to 6m families will benefit from WTC and CTC together.
- The WTC, designed to provide a targeted top-up to wages for those in lower paid jobs and ensure "work pays more than welfare", incorporated the adult elements of WFTC and the DPTC as well as the Employment Credit element of the New Deal for those aged 50 or more.
- The CTC incorporated the child elements of WFTC (but not the childcare elements), DPTC and the Children's Tax Credit into one system. 9 out of 10 families will be eligible for CTC. From 2004, it will also incorporate elements for Income Support and the Job Seeker's Allowance (JSA) bringing all income-related support for children into one seamless tax credit system.
- The WTC (excluding the childcare element, yes and there still is one) is generally being paid through the pay packet for employees - and it will be another costly administrative burden for business - and directly for the self-employed.

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- The CTC and the childcare element of WTC are being paid direct to the main carer and employers will not be involved in the delivery. According to the Inland Revenue, the Child Tax Credit will create a “seamless” system of income-related support for all families whether or not they are working.

We would make the following additional points:

- The WTC is different from the WFTC in several respects.¹⁰⁷ It will go to different people from the WFTC and different (and more) employers will be affected. And as the WTC differs from the WFTC in crucial ways (including the assessment period), employers will have to change their payroll systems. All this adds to costs.
- As we have already said, the WFTC’s effect on work incentives has probably been weak and there’s no reason to believe the WTC will be any more effective. And, insofar as the WTC will ensure that people are better off in work than on the dole, it will play the same role as Family Income Supplement (FIS) in 1971, family credit in 1988, and WFTC in 1999. Moreover, the new credits will have significant additional exchequer costs (an annual minimum of £2bn according to the Institute for Fiscal Studies (IFS)) for little obvious gain.^{108, 109}

3.7. Conclusions

These are the main conclusions from this chapter:

- The NMW was introduced in 1999 at very modest levels and at a time when the economy and private sector job creation were strong. As a consequence the effects on the jobs market have been containable. This early “prudence” now seems to be ditched. The latest proposals for the adult rate (£4.50 from October 2003 and £4.85 from October 2004) are “unwise”, given the weaker economic circumstances. (See 3.2.2.)
- The Employment Relations Act (ERA, 1999) was a very substantial piece of legislation on employee rights. It increased collective rights (including the compulsory recognition of trade unions) and individual rights and introduced various family friendly policies including the Parental Leave Directive. (See 3.3.)
- The Employment Act (EA, 2002) was another very substantial piece of legislation on employee rights. It enabled the enactment of the EU’s Fixed-term Work Directive, introduced equal pay questionnaires, introduced statutory procedures for internal grievance procedures which will form part of all employment contracts (with a view to cutting back the number of employment tribunal cases) and significantly extended “family friendly” policies (including expanded maternity rights, paternity pay, adoption pay and leave, the right to request flexible working for parents of young children). (See 3.4.)
- The influence on the workplace of EU Directives has been very significant and set to continue. The signing of the Social Chapter in 1997 has been behind many of them (see chapter 5). The range of issues dealt with by EU Directives is substantial including equal opportunities, employment protection and working conditions, health and safety at work, employee relations and data protection. (See 3.5.)
- The Government’s Working Families’ Tax Credit has been a costly burden on business and shown to be remarkably ineffective at increasing work incentives (as, no doubt, its successor the Working Tax Credit will be). (See 3.6.)

3.8 Trade unions

3.8.1 Trade unions: introduction

We are not anti-union and we recognise that they can provide useful functions for their members – not just in negotiating their members’ terms and conditions¹¹⁰, but also providing advice and help on such matters as health insurance and finance.¹¹¹

Moreover, we have welcomed the improved industrial relations climate of recent years, when compared with the difficulties of the 1970s (when industrial disputes were known as the “English disease”). Much of the improvement can be attributed to the legislation of the 1980s and early 1990s, but a large part of the improvement can be attributed to the greater realism of the unions themselves in the wake of the early 1980s and (to a lesser extent) the early 1990s recessions. Pay is usually the main reason for industrial action, but other motives include job preservation and opposition to modernisation (frequently “disguised” as concerns about health and safety).

Nevertheless there are some developments we are concerned about. We objected to the compulsory recognition of trade unions and the other extensions of collective rights introduced through ERA (see 3.3 above). And there does seem to be some increased militancy that augurs badly.

In this section we discuss the following issues:

- Trends (see 3.8.2).
- Industrial relations (see 3.8.3).
- Some recent and current developments (see 3.8.4).
- And draw some conclusions (see 3.8.5).

3.8.2 Trade unions: trends

Since the early 1980s trade union membership has dropped significantly, reflecting the decline of employment in heavily unionised sectors such as manufacturing and mining.

According to the latest available data¹¹² there has undoubtedly been a slowdown in the rate of decline and, indeed, membership actually picked up in 1999 and 2000 (though fell back again in 2001 but still was a little higher than in 1999) as the table below shows. Trade union density has also fallen significantly between 1991 and 2002. (The fall in density has been faster for men than for women. In GB, union density for men was 42% in 1991 and 29% in 2001; for women it was 32% in 1991 and 28% in 2001.)

Trade Union membership: GB and UK (1991-2001)

	GB			UK	
	Number of members (thousands)	% change in membership since previous year	Union density for employees (%)	Number of members (thousands)	Union density for employees (%)
1991	8,602	-2.6	37.5		
1992	7,956	-7.5	35.8		
1993	7,767	-2.4	35.1		
1994	7,530	-3.0	33.6		
1995	7,309	-2.9	32.1	7,532	32.3
1996	7,244	-0.9	31.2	7,472	31.5
1997	7,154	-1.2	30.2	7,372	30.4
1998	7,155	0	29.6	7,396	29.9
1999	7,277	1.7	29.5	7,498	29.6
2000	7,351	0.9	29.4	7,580	29.5
2001	7,295	-0.8	28.8	7,550	29.1
Change since 1991	-1,307				

Source: Brook: "Trade union membership: an analysis of data from the autumn 2001 LFS (Labour Force Survey)" (ONS, Labour Market Trends, July 2002).

Trade union membership tends to depend not just on gender, but also by age (younger employees tend to be less unionised), ethnic origin (white more unionised than non-white, though this may be explained by different age profiles), qualifications (the higher the qualifications, the more unionised), length of service (longer the length of service, the more densely unionised), status (permanent more densely unionised than temporary), occupational group (with the professional groups the most densely unionised), size of workplace (the larger workplaces are more densely unionised), region (the SE is one of the least densely unionised, Northern Ireland is the most densely unionised), full-time or part-time (full-time workers are more densely unionised than part-time workers), the sector, and whether public or private sector (with the public sector more heavily unionised than the private sector). See the next two tables. For some slightly earlier data see annex 3, tables 3/3 and 3/4.

Union density by individual characteristics (%): UK, autumn 2001

	All	Men	Women
Age group:			
Under 20	5	6	4
20-29	19	18	20
30-39	30	30	30
40-49	38	39	36
Over 50	35	37	32
Ethnic origin:			
White	29	30	28
Non-white	26	24	28
Of which:			
Mixed	25	22	27
Asian or Asian British	25	25	26
Black or Black British	30	27	33
Chinese & other ethnic groups	22	20	24
Highest qualification:			
Degree or equivalent	37	31	44
Other HE	44	33	52
A-level or equivalent	28	31	21
GCSE or equivalent	23	26	21
Other	25	29	21
No qualifications	24	29	20
All employees	29	30	28

Source: Brook: "Trade union membership: an analysis of data from the autumn 2001 LFS (Labour Force Survey)" (ONS, Labour Market Trends, July 2002).

Union density by industry sector and private versus public sector, UK, autumn 2001 (%)

	All	Private sector	Public sector
Industry (SIC92)			
Agriculture, forestry & fishing	9	6	*
Mining & quarrying	25	25	*
Manufacturing	27	27	61
Energy & water	53	53	*
Construction	19	14	69
Wholesale & retail trade	12	12	*
Hotels & restaurants	5	4	32
Transport & communication	42	37	75
Financial intermediation	27	27	*
Real estate & business services	11	8	54
Public administration	59	33	61
Education	53	29	57
Health	45	16	62
Other activities	22	11	49
All	29	19	59

Source: Brook: "Trade union membership: an analysis of data from the autumn 2001 LFS (Labour Force Survey)" (ONS, Labour Market Trends, July 2002). * Sample too small for a reliable estimate

3.8.3 Trade unions: industrial relations.

The ONS's Labour Market Trends (LMT) publishes data on labour disputes on a very regular basis.¹¹³ The latest year for which there is a full analysis is 2001.¹¹⁴ The 2001 total of 525,000 working days lost through labour disputes was the highest calendar total since 1996. It was slightly higher than the figure for 2000, but still 20% lower than the average number of working days lost per year in the 1990s (660,000), and still considerably lower than the average for both the 1980s (7.2m) and 1970s (12.9m). It is little wonder that industrial disputes were referred to as the "English disease" in the 1970s. The country was strike prone and virtually ungovernable and the decade's industrial relations "mess" culminated in the 1978-79 "winter of discontent".

The table below shows the run of data from 1981 to 2001. 1984 was the year of the NUM dispute.

Number of stoppages & working days lost (UK, 1981-2001)

	Working days lost (000s)	Working days lost per 1000 employees	Workers involved (000s)	Stoppages	Stoppages involving the loss of 100,000 working days or more
1981	4,266	184	1,513	1,344	7
1982	5,313	234	2,103	1,538	7
1983	3,754	168	574	1,364	6
1984	27,135	1,207	1,464	1,221	11
1985	6,402	282	791	903	4
1986	1,920	85	720	1,074	2
1987	3,456	155	887	1,016	3
1988	3,702	157	790	781	8
1989	4,128	172	727	701	6
1990	1,903	78	298	630	3
1991	761	32	176	369	1
1992	528	23	148	253	0
1993	649	28	385	211	2
1994	278	12	107	205	0
1995	415	18	174	235	0
1996	1,303	55	364	244	2
1997	235	10	130	216	0
1998	282	11	93	166	0
1999	242	10	141	205	0
2000	499	20	183	212	1
2001	525	20	180	194	1

Source: Davies: "Labour disputes in 2001" (ONS, LMT, November 2002).

The next table shows the numbers of stoppages and working days lost by industry in 2001. A very clear pattern emerges: most of the stoppages were in public administration, transport (railways) and communication, health and social work, education and parts of manufacturing.

Numbers of stoppages and working days lost by industry (UK, 2001)

	Working days lost (000s)	Workers involved (000s)	Stoppages	Working days lost per 1,000 employees
All industries & services	525.1	179.9	194	20
Agriculture, hunting, forestry & fishing	0	0	0	0
Mining & quarrying	15.1	0.3	1	201(1)
Manufacturing	42.8 (5)	16.8 (4)	32	11
<i>Of which: transport equipment</i>	<i>13.3</i>	<i>11.0</i>	<i>8</i>	<i>34</i>
Electricity, gas & water supply	10.2	2.2	2	98 (3)
Construction	9.8	2.9	9	8
Wholesale & retail trade, repair of motor vehicles, motorcycles & personal & household goods	0.5	0.1	2	0
Hotels & restaurants	3.6	0.8	5	2
Transport, storage & communication	107.0 (2)	69.1 (1)	94	69 (4)
Financial intermediation	0.2	0.2	1	0
Real estate, renting & business activities	0.2	0.2	1	0
Public administration & defence, compulsory social security	215.9 (1)	46.2 (2)	22	153 (2)
Education	42.9 (4)	33.7 (3)	16	20 (6)
Health & social work	72.6 (3)	6.3 (5)	12	26 (5)
Other community, social & personal service activities, private households with employed persons, extra-territorial organisations & bodies	4.3	1.2	10	3

Source: Davies: "Labour disputes in 2001" (ONS, LMT, November 2002).

The table below shows the number of stoppages, workers involved and working days lost for 2000 and 2001. Even though the number of workers involved in stoppages actually slightly dropped in 2001, the number of working days lost through stoppages rose.

Number of stoppages, workers involved & working days lost for 2000 and 2001 (UK)

	2000	2001
Working days lost through stoppages:		
In progress in year	498,800	525,100
Beginning in year	492,700	438,300
Workers involved in stoppages: in progress in year:	183,200	179,900
Directly involved	182,000	178,600
Indirectly involved	1,200	1,300
Workers involved in stoppages: beginning in year:	180,700	165,000
Directly involved	197,500	163,700
Indirectly involved	1,200	1,300
Stoppages:		
In progress in year	212	194
Beginning in year	207	187

Source: Davies: "Labour disputes in 2001" (ONS, LMT, November 2002).

There is already some preliminary data for the year 2002 and it shows a significant and very disappointing deterioration.^{115, 116} The number of working days lost because of stoppages was 1.322m, a 12-year high, more than twice as many as in 2001 and greater than the average number of working days lost per year in the 1990s (660,000), but still considerably lower than the average for both the 1980s (7.2m) and 1970s (12.9m). The most strike prone sectors were mainly in the public sector, including the firemen and railway (semi-public) and underground employees.

Numbers of stoppages and working days lost by industry (UK, 2002)

	Working days lost (000s)	Workers involved (000s)	Stoppages
All industries & services	1,322.5	943.3	140
Agriculture, hunting, forestry & fishing	0	0	0
Mining & quarrying	0	0	1
Manufacturing	9.4	20.2	29
<i>Of which: transport equipment</i>	<i>5.2</i>	<i>12.6</i>	<i>9</i>
Electricity, gas & water supply	0.3	0.2	1
Construction	16.7	16.7	2
Wholesale & retail trade, repair of motor vehicles, motorcycles & personal & household goods	0.2	0.8	3
Hotels & restaurants	73.9 (5)	61.1 (6)	6
Transport, storage & communication	34.5 (6)	98.0 (5)	52
Financial intermediation	0	0	0
Real estate, renting & business activities	1.6	6.3	4
Public administration & defence, compulsory social security	170.8 (2)	488.0 (1)	20
Education	388.2 (1)	376.3 (2)	17
Health & social work	144.3 (2)	148.3 (3)	15
Other community, social & personal service activities, private households with employed persons, extra-territorial organisations & bodies	103.4 (4)	106.7 (4)	12

Source: ONS, Labour Market Trends, March 2003: table H12.

There is undoubtedly a feeling that industrial and union militancy is increasing in the business community. This is partly because of a new generation of militant union leaders (see next section). Employers are increasingly concerned about strike action¹¹⁷ and “no-strike deals” are being ditched.¹¹⁸

3.8.4 Trade unions: some recent developments

There is no doubt that there has been a swing towards the left in union leaders¹¹⁹ and increasing union militancy over the last 2-3 years¹²⁰. (The two events are, of course,

interconnected.) Increasingly these union leaders are uttering noises of dissent for reasons including the following:

- They want more employee rights, despite the fact that the current Government has agreed to the NMW (see 3.2.2 above) and extra collective rights (see 3.3.2 above). After all they part-fund the party that currently forms the Government and “it’s pay-off time”.
- They are unreservedly opposed to modernisation and private sector involvement in the public services, including the Private Finance Initiative (the PFI). The Luddites look “modernisers” by comparison.
- They are rather suspicious of some of Prime Minister Tony Blair’s connections, not least of all his connections with right-wing international politicians (eg Italian Prime Minister Silvio Berlusconi).

The Government is sensitive to this increasingly vocal trade union dissent, especially on the “private sector involvement in public services” issue. One example includes the Government’s recent granting to union leaders most of their demands on pay and conditions for (private sector) workers providing local (public) services.¹²¹

3.8.5 Trade unions: conclusions

Our main conclusions are:

- Trade union membership has fallen significantly since the early 1980s, reflecting the decline of employment in heavily unionised sectors such as manufacturing and mining. The rate of decline has, however, slowed and numbers even picked up in 1999 and 2000. But they slipped back in 2001. The public sector is significantly more heavily unionised than the private. (See 3.8.2.)
- Industrial strife was rife in the 1970s and the 1980s (to a lesser extent) but it was brought under control by a combination of the 1980s and early 1990s trade union legislation and a “new realism” by unions in the wake of the early 1980s and early 1990s (to a lesser extent) recessions. Industrial disputes are rising again and 2002 was the worst year for stoppages since 1990. But the most badly affected sectors are in the public sector. (See 3.8.3.)
- Following on from the previous point, there is undoubtedly a “swing to the left” in the composition of union leaders and there is rising union militancy. And some of the unions give the impression “it’s pay off time”. In particular, they oppose the all-too-necessary modernisation of the public services because they know modernisation is partly about involving the less-heavily unionised private sector. And that is a threat to their power and influence. (See 3.8.4.)

References

1. Lea: “The work-life balance and all that: the re-regulation of the labour market” (IoD, 2001).
2. Lea: “Business Matters” (IoD, 1998).
3. Churchill said “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time” (Speech in the House of Commons, Hansard, 11 November 1947.) A similar observation could be made about market based, capitalist economies.

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4. CBI: "A National Minimum Wage" (1995). This was mainly concerned with the level at which the NMW would be set. It pointed out that a NMW wouldn't necessarily solve poverty issues, which was largely a problem for the unemployed and pensioners.
 5. (1) Lea: "Flexible labour markets: Social Europe and the Minimum Wage" (IoD, 1996), concluded that "the overwhelming argument against both the European social and employment legislation and the National Minimum Wage is that they will exacerbate the problem that economic policy makers ought to doing everything they can to solve, namely the persistently high rate of unemployment." IoD surveys in 1995 and 1996 showed a clear majority of IoD members opposed the NMW. (2) Davies: "The minimum wage: no case for complacency" (IoD, 1996), discussed the model which assumed employers to be monopsonists (ie having considerable market power) and which concluded that, if employers were faced with higher wages, then they would employ more workers. Davies, however, pointed out that there was little evidence for monopsony.
 6. Lal: "The minimum wage: no way to help the poor" (IEA, 1995). Lal also discussed the monopsony argument and concluded that there was no evidence produced that monopsony was widespread. He also said that "dynamic monopsony" (where workers have imperfect information about job opportunities) was said to be a circumstance in which setting the minimum wage could increase efficiency. However, the label monopsony was misapplied.
 7. It should be noted that relatively high youth minimum wages have contributed to high youth unemployment in France.
 8. See Lea: "Education and training: a business blueprint for reform" (IoD, 2002) for further information on the New Deal.
 9. Webster: "Byers cuts red tape on minimum wage" (Times, 16 February 1999), reported that Stephen Byers (the then SoS for Trade and Industry) spared employers the duty to keep special records to show that they are observing the NMW. He also scrapped plans for details of the NMW to accompany every payslip, saving companies some £200m per annum. Much of the red tape surrounding the NMW was, therefore, axed in early 1999.
 10. A DTI guide published at the time of the NMW, had around 100 pages – but pointed out that it was not a definitive guide.
 11. Work by the IFS in 1997 on the distributional effects of the NMW also suggested that there would be little help for the low paid.
 12. Employees' pay 11% NICs on earnings of £4,615 to £30,940 (from April 2003, raised from £30,420) and a 1% "excess" on earnings over £30,940.
 13. A 10% starting rate was announced in the March 1999 budget, when the 20% rate was scrapped. The starting rate applied to the first £1,920 of taxable income in financial year 2002/03.
 14. LPC: "The National Minimum Wage" (1st report of the LPC, TSO, 1999), recommended the rates for the introduction of the NMW.
 15. LPC: "The National Minimum Wage: the story so far" (2nd report of the LPC, TSO, 2000).
 16. LPC: "The NMW: making a difference" (3rd report of the LPC, TSO, 2001), made recommendations for October 2001 and October 2002.
 17. IDS Employment report: "National Minimum Wage: Low Pay Commission raises minimum wage by 15% over two years" (IDS, report 879, April 2003) discussed the 4th report of the LPC (which was released on 19 March 2003).
 18. Elliott & Maguire: "Minimum wage rises to £4.50 as sop to party" (Guardian, 18 March 2003), reported that, in spring 2002, 1.8m workers in Britain were earning less than £4.50 an hour, 1.35m women. They claimed that the increases in the NMW were done for political reasons.
 19. See (1) Pratley: "Nursing homes in crisis" (Sunday Business, 10 October 1999), who reported that "nursing homes' plight has been worsened by the minimum wage, which hiked care assistants' pay". (2) Sherman: "Care homes will be forced to shut" (Times, 6 March 2001), reported that "the National Care Homes Association and the IHA claimed that more than 1000 homes had already had to close because owners could not cover running costs. And the 10% rise in the NMW [due in October 2001] would lead to further closures."

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20. IDS Report: Pay settlement analysis (845, November 2001), reported that the NMW was partly behind the 8% increase in the paybill for the hospitality and fast food sectors [in the wake of the October 2001 increase].
 21. The IoD press release (18 March 2003), said of the government's recent announcement on the NMW rates: "the proposal to raise the adult minimum wage to £4.50 this October and to £4.85 in October 2004 is most unwise given the economic difficulties business faces. Many businesses, especially outside London and the South East, will find it increasingly uneconomic to take marginal employees on at these rates. This will undoubtedly jeopardise employment prospects or the low skilled – especially in the regions. We ask the govt to consider the difficulties already experienced by business and urge them to exercise restraint in sanctioning further cost increases and imposing yet further burdens on business.
 22. There is little doubt that from 1997-2002, the government's fiscal policy looked impressive. Since April 2002's budget, that has changed.
 23. IRS Employment Review: "UK comes 6th in minimum wage league" (IRS, 722, 21 March 2003), reported that a survey of European statutory minimum wage rates by the Federation of European Employers (FedEE) places the UK in 6th place".
 24. DTI: "Fairness at work" (TSO, Cm 3969, 1998).
 25. Lea: "Business matters" (IoD, 1998).
 26. Lea: "Let firms stay free to decide on recognition" (Times, 5 May 1998).
 27. Malthouse and Wilson: "Fairness at work" (IoD, May 1998).
 28. Malthouse and Wilson: "Fairness at work" (IoD, May 1998).
 29. IDS: "Union membership and recognition" (IDS report 863, August 2002).
 30. IDS report: "Union recognition" (IDS Report 877, March 2003). This report also said that according to non-TUC estimates a higher figure of over 2000 recognition agreements had been made.
 31. See (1) IDS report: "Union recognition" (IDS Report 877, March 2003) and (2) IRS Employment Review: "No more easy wins?" (IRS, 21 March 2003), which talked about the 2nd year of success in gaining recognitions agreements.
 32. Buckley: "Ministers to woo unions with workers' rights Bill" (Times, 11 June 2002). Buckley wrote that with the review of ERA, the SoS for Trade and Industry Patricia Hewitt "will hope the move will enhance her 'credentials' with the left". In other words, the review, when announced, appeared to be very "political".
 33. TUC: "Modern rights for the modern workplace report" (July 2002). This report was part of the TUC Employment Rights campaign and pressed heavily for more employee "rights" (possibly through the review of ERA). The title, emphasising the word "modern" when the report makes the Jurassic age look state of the art, has to be a tongue-in-cheek joke. You've got to give these boys credit for chutzpah. They've got a sense of humour.
 34. DTI: "ERA working well, says review" (DTI press release, 27 February 2003). The release reported that the key findings of the review were that (1) the Act's recognition procedure had operated smoothly and (2) as intended, the Act had encouraged the voluntary settlement of recognition claims since 1998 - employers and unions had reached over 1,000 voluntary recognition agreements.
 35. IRS Employment Trends: "Government says no to new ERA" (IRS Employment Review, 773, 4 April 2003). This article reported that "to the delight of employers and the dismay of trade unions, ministers have decided against major changes to the law. But there will be a series of smaller reforms". See also IRS Employment Law: "Employment Relations Act 'working well' says DTI" (IRS, Employment Review 774, 18 April 2003).
 36. Buckley: "Recognition boost for unions" (Times, 22 February 2003). This article reported that "unions are to receive automatic rights to recognition in workplaces if employers fail to negotiate properly, under planned new legislation. But unions will not face any penalties if they break the code of conduct. But the Government will reject any substantial changes to ERA."
 37. See (1) IRS Employment review (19 August 2002): The Employment Act (2002) and (2) Wilson and Harris: "Employment Bill" (IoD, 2001).

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38. IRS Employment review: "The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002" (762, 21 October 2002).
 39. Sherwood: "Employers could pay high price or award of bonuses" (FT, 16 December 2002). This reported that the new equal pay questionnaires could be difficult for the City were transparency has never been an issue.
 40. Adams and Eaglesham: "CBI furious as fee plan for tribunals is dropped" (FT, 6 September 2001).
 41. IRS Employment review (19 August 2002): The Employment Act (2002).
 42. See also Lea: "6th April: a black day for business" (IoD, Employment Comment, April 2003). On 6th April 2003 there was a "triple whammy" for business. Not only were all the new rights for working parents introduced, but there were also changes to working tax credits and the increases in National Insurance Contributions.
 43. Becket: "CBI hits at paternity "burden"" (Daily Telegraph, 15 January 2003) reported that the Government planned to extend parental leave still further, granting rights beyond the regulations coming in April 2003. A joint HMT/DTI document published (14 January 2003) suggested longer paid paternity leave, the right of fathers to attend ante-natal care, plus the introduction of additional unpaid leave for fathers.
 44. Lea: "The work-life balance...and all that. The re-regulation of the labour market" (IoD, 2001). The "work-life balance" phrase is a particularly loaded and tendentious phrase suggesting that work is the opposite of life – a Manichean view of dark and light opposites. It is all part of the campaign to demonise work and blame employers and the workplace for many of life's ills. It's almost as if employees are the innocent victims of terrible and nasty Dickensian employers. It is, of course, nonsense but very few people are prepared to say so in our PC and pusillanimous age. At the very least the phrase should be amended to "work-home life" balance.
 45. Around the introduction of the new "family friendly" rights (6th April 2003) there was a DTI advertising campaign that said "A third of mothers do not return to work after maternity leave. Each vacancy costs business an average £3,500 to fill. From the 6th April 2003 working laws will change to help parents better balance their home and working life. Mothers will be entitled to 6 months paid maternity leave and another 6 months unpaid if they want it. And parents of children under 6 and parents with disabled children under 18 will now have the legal right to get their employer to consider flexible ways of working. Everyone benefits. Employers get a happier, more motivated and more loyal workforce. And new mothers get to spend more time being Mum." Comment: this advertisement was a disgraceful piece of propaganda. It's very unlikely that "everyone" will benefit. Many employers (especially small ones) will find the extra laws difficult and costly to administer. And many employees will find themselves covering for absent colleagues. The assertion that "employers get a happier, more motivated and more loyal workforce" is unproven to say the least. And recent research (discussed in chapter 4), shows that many women do not return to work after having a baby because they don't want to. So much for discredited 1970s feminist ideology.
 46. When people accept jobs they must be sure that they are able to fulfil the terms and conditions of the contract and accept the consequences if they can't. They can't expect just rip up the contract with their employers. This is to behave in a mature, adult way. It's mature to accept that there are hard choices in life and immature and sentimentalist to feel that there are no hard choices in life.
 47. Lea: "The work-life balance...and all that. The re-regulation of the labour market" (IoD, 2001).
 48. IRS Employment Review: "Dealing with requests for flexible working" (IRS, 21 March 2003).
 49. DTI: "Flexible working: the right to request and the duty to consider: a guide for employers and employees (PL 520), 56 pages (A4 size) and forms. And this doesn't add to red tape?
 50. Wheatcroft: "Flexible work law is close to farce" (Times, 8 April 2003).
 51. Bennett: "Parents will be entitled to request flexible employment" (FT, 20 November 2001), reported that "the DTI had estimates the cost of dealing with a request at £150 per request. Officials estimate the labour supply could increase by 55,000 a year and companies cut recruitment costs of £102m a year as a result of the new rules. Ministers will signal that they expect companies to agree to most demands, with a target consent rate of 82%. If the target is not met, then they will reconsider the policy". In other words, there is the threat of compulsion.

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52. Eaglesham: "Business anger at costs of workplace legislation (FT 21 December 2002) reported that in a "high take-up scenario" 433,000 might ask to work flexible hours, adding £249m to the annual costs.
 53. O'Donnell: "Small firms reject flexible hours" (Sunday Times, 5 January 2003).
 54. Law reports: "Employee has to establish sex discrimination through pay" (Times, 2 May 2003).
 55. DfEE: "Towards Equal Pay for Women [speed and simplicity in tribunal cases] and the Burden of Proof Directive (DfEE, 2000). This consultation document also dealt with the equal pay questionnaires discussed in 3.4.1 (above).
 56. IRS: "The sex discrimination (indirect discrimination and burden of proof) regulations 2001" (IRS bulletin 672, Sep 2001).
 57. Martin and Baldwinson: "Be sure you are equal to new laws" (FT, 10 September 2001), wrote that "it will soon be harder to disprove sex discrimination".
 58. IDS Employment Europe: "Social policy committee agrees anti-racism Directive" (IDS, 463, July 2000).
 59. IDS Employment Europe: "EU Ministers adopt anti-racism directive" (465, Sept 2000).
 60. Evans-Pritchard: "Firms forced to prove they are not racist" (Daily Telegraph, 19 May 2000), wrote that Anna Diamantopoulou (EU Social Affairs Commissioner) had said the claimant still had to come up with a solid case.
 61. IDS Employment Europe: "New directive prohibits a wide range of job discrimination" (471, March 2001).
 62. Burns: "Employers hit out at tougher EU anti-discrimination rules" (FT, 12 October 2000).
 63. IoD press release: "Anti-discrimination Directive could be damaging for business" (IoD, 18 October 2000).
 64. Eaglesham: "Minister unveils "belief" discrimination rules" (FT, 23 October 2002) reported that minister Barbara Roche had said that it was very difficult to define religion and belief. The employment tribunals would have to decide if a failure to accommodate working practices for Rastafarians or Jehovah's Witnesses would breach the new ban.
 65. IRS Employment Review: "The new Equal Treatment Directive" (IRS, 763, 11 November 2002).
 66. Evans-Pritchard: "EU sex law puts firms in the dock" (Daily Telegraph, 19 April 2002) reported that "companies accused of tolerating sexual harassment will have to prove their innocence and could face unlimited sanctions if found guilty."
 67. Gee's "Essential Facts: Employment" (a quarterly publication, latest quarter).
 68. IRS: "Part-Time Workers regulations extended to protect broad category of workers" (Law bulletin 641, May 2000).
 69. IRS: "Europe lays down law on temporary workers" (Employment review 750 (29 April 2002).
 70. IDS Employment Europe: "Temporary agency work draft Directive issued" (IDS Employment Europe, 486, June 2002).
 71. IRS: "Proposed Directive on agency workers" (Employment review 758, 19 August 2002).
 72. Recruitment and Employment Confederation: "The Agency Workers Directive" fact sheet (2002). The REC is very concerned about TAW. They estimate that a third of agency workers in the EU are in the UK (some estimates are nearer to two thirds), there are 1.3m on agency books on any given week and industry turnover is worth £12bn annually.
 73. Parker: "EU vote on temporary workers a blow to UK" (FT, 22 November 2002). This was written when the 6-week exemption was removed. It has since been reinstated.
 74. Malthouse and Howard: "Fierce opposition to the WTD" (IoD, March 1997), covered the results of a survey of 700 IoD members.
 75. Lea: "The work-life balance...and all that. The re-regulation of the labour market" (IoD, 2001).
 76. IDS: "The Working Time Directive" (Report number 710, April 1996).
 77. Becket: "Europe's holiday ruling 'will cost £30m'" (Daily Telegraph, 15 October 2001), reported that "the ECJ ruling has over-ruled the Government's interpretation of the WTD and has removed the 13-week qualifying period for workers entitled to paid holiday."
 78. IDS Employment Europe: "Commission to regulate hours in excluded sectors" (Employment Europe, 429, September 1997).

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79. Becket: "Getting those not-so-good vibrations" (Daily Telegraph, 15 October 2001).
 80. Eaglesham: "Workplace consultation becomes a reality" (FT, 13 June 2001).
 81. Wilson: "National Works Councils" (IoD, June 1999) made the case against works councils as following: economic enterprises are not political bodies like the state and so the requirements of the democratic process do not apply. Concomitantly, the notions of economic and industrial democracy, upon which the case for Works Councils rests, are inappropriate.
 82. Economist: "Inform, consult, impose" (16 June 2001), wrote that "a new EU directive has unions cheering and company bosses fuming.
 83. IDS Employment Europe: "EU agrees information and consultation Directive" (Employment Europe 475, July 2001).
 84. FT leader: "A rule too far" (FT, 13 June 2001), wrote that "the UK and Ireland have lost the battle". But Eaglesham: "Blair rejects union calls for works councils" (FT, 19 April 2003) wrote that "Tony Blair has decided to reject trade union demands for European-style works councils...the law will be drafted in a that will not force employers to give workers a genuine say in the running of the business".
 85. Heath: "EU to urge more union consultation" (The Business, 9 February 2003).
 86. Sherwood: "Employers demand simplified code on 'snooping'" (FT 9 January 2003). This reported that the CBI had welcomed the introduction of a shortened version of the data protection code on staff monitoring for small businesses. But the CBI said all employers should be bound by the shortened code. (The code sets out how the DPA regulates employers' use of e-mail and internet monitoring, CCTV cameras and covert surveillance to keep an eye on their staff. Employers have warned that they risk breaking the law by snooping on staff because the full code is overly bureaucratic and unworkable.)
 87. See also IRS: "Getting e-mail under control" (IRS, 7 March 2003).
 88. Eaglesham: "Dismay at 'conflicting' e-mail snooping rules" (FT, 23 October 2000), reported that "there is no joined-up thinking from the DTI's surveillance rules (in which employers largely a free hand to snoop, but employees must be told) and the Data Protection Commissioner (who was more restrictive). This two-tier approach means that employers who meet the law set by the DTI could nevertheless find themselves open to enforcement action, including potentially unlimited fines, from the Commission.
 89. Gee: "The Corporate Governance Handbook" (latest version).
 90. Eaglesham et al: "Business lobbies against e-mail intercept plans" (FT, 5 June 2000) reported "RIPA could leave City (especially) firms liable to civil suits for damages resulting from the interception of documents".
 91. Gee: "The Corporate Governance Handbook" (latest version) states that "the DTI, however, has made it clear to businesses that they are able monitor communications such as colleagues' accounts to discover whether there are business messages that need to be dealt with in their absence. However, employees would have to be informed that monitoring might occur."
 92. Gee: "The Corporate Governance Handbook" (latest version).
 93. Lea: "Education and training: a business blueprint for reform" (IoD, 2002).
 94. DTI: "Work and parents: competitiveness and choice Green Paper (TSO, 2000) stated that the WFTC was "at the heart of the government's reforms to help make work pay and provide improved support for children".
 95. IDS: "More details announced of WFTC scheme" (IDS report 773, November 1998).
 96. Baron: "More bureaucracy" (Taxation, 16-23 December 1999), said that the WFTC would be a heavy administrative burden for the employer.
 97. Inland Revenue: "Working Families' Tax Credit and Disabled Person's Tax Credit" (IR, December 1998) said that "whether or not employers have a computerised payroll, they will have to be able to: calculate the tax credits for the pay period from a daily rate; add the tax credit amount to net pay; enter this amount on the employee's payslip; record the total tax credits paid in a tax year; enter the total tax credits in the year for the employee on the P14 & P60; enter the total tax credits for all employees in the year on the P35, together with the total amount of IR funding in that year; and produce Certificates of Payments for leavers." [Please note that

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- employers were able to set tax credits paid to their employees against PAYE tax & NICs, deducted from their whole workforce, which they were due to pay to the IR.]
98. Willetts and Hillman: "Tax Credits: do they add up?" (Politeia, 2002).
 99. Willetts and Hillman: "Tax Credits: do they add up?" (Politeia, 2002).
 100. Willetts and Hillman: "Tax Credits: do they add up?" (Politeia, 2002).
 101. Blundell, Duncan, McCrae and Meghir: "The labour market impact of the WFTC" (IFS, 2000). Their model suggested that participation rates among single mothers would increase by around 2.2%, while for married women participation rates are modelled to fall. Our simulation results indicate a small increase in overall participation rates of around 30,000 individuals.
 102. Smith: Why the New Deal isn't working (Sunday Times, 16 April 2000) extracted from "Welfare, Work and Poverty" (edited by Smith, Institute for the Study of Civil Society, 2000). Smith said that more significant than the New Deal was the WFTC. The WFTC will cost £6bn pa more than the Family Credit it replaced, when fully up and running.
 103. Timmins: "Tax credit for the low paid 'in danger of backfiring'" (FT, 27 February 2001). According to the National Association of Citizens' Advice Bureaux (NACAB), the WFTC was resulting in a few workers being sacked and others having their hours cut as employers tried to avoid the red tape of paying the credit through the pay packet.
 104. Willetts and Hillman: "Tax Credits: do they add up?" (Politeia, 2002).
 105. Inland Revenue: "New Tax Credits: Child Tax Credit and Working Tax Credit" (IR Fact Sheet).
 106. Lea: "6th April: a black day for business" (IoD, March 2003), wrote that there was a triple whammy for business on 6th April: employers' NICs rose, the Tax Credits system was overhauled and a raft of "family friendly" policies were introduced.
 107. Willetts and Hillman: "Tax Credits: do they add up?" (Politeia, 2002).
 108. FT leader: "No credit for tax soap opera" (FT, 11 April 2002) said that "the comings and goings of Mr Brown's tax credits read like a poor soap opera script: the characters may change but the plot is always familiar".
 109. Collins: "After 47 pages of notes it's hard to see the benefit" (Daily Telegraph, 17 September 2002) provided a trenchant criticism of the general bureaucracy attached to the tax credits.
 110. Doughty: "Why being in a union can be bad for your salary" (Daily Mail, 27 June 2001), reported that a study by the Joseph Rowntree Foundation had found that union members were not paid as well as other employees.
 111. Malthouse and Boyle: "Employment, industrial relations and Europe" (IoD, June 1997) wrote that "the IoD believes in free trade unions with the right to represent their members and to pursue their legitimate interests. We support the role of trade unions in health and safety work, education and training of members, and all the new related services for members developed by members as part of the new agenda (including financial services, health insurance). [But] we challenge that it is "fair" for trade unions to be involved in running companies; that is the job for management. Trade unions should represent the interests of their members and industrial relations can often involve a conflict of interests. The social partnership model, in pretending that this is not the case, is bogus.
 112. Brook: "Trade union membership: an analysis of data from the autumn 2001 LFS (Labour Force Survey)" (ONS, Labour Market Trends, July 2002).
 113. See (a) Davies: "Labour disputes in 1999" (ONS, LMT, June 2000), (b) Davies: "Labour disputes in 2000" (ONS, LMT, June 2001) and (c) Davies: "Labour disputes in 2001" (ONS, LMT, November 2002).
 114. Davies: "Labour disputes in 2001" (ONS, LMT, November 2002).
 115. Daily Mail: "Strikes hit a 12-year high" (13 February 2003), reported that in 2002 there were 1.32 million days lost, the worst since 1990. More than 940,000 workers were involved in action including the firemen and rail and underground employees.
 116. Turner and Guthrie: "Days lost to industrial action hit 12-year high" (FT, 16 February 2003)
 117. Buckley: half of employers fear strike vote" (Times, 4 September 2002) reported that "nearly 1 in 2 employers expect staff to hold a strike ballot over coming months".
 118. Buckley: "New militancy as union ends no-strike deal" (Times, 4 October 2002) reported that "a key no-strike ("sweetheart") deal at Honda has been ditched by Derek Simpson (of Amicus).

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- The scrapping of the peace agreement is expected to spread to other large Japanese car companies in the UK and many other employers, and herald an era of tougher employment relations in industry. Honda had resisted recognising a union until the AEEU last year (2001) forced it to a ballot under recent statutory recognition legislation”.
119. The union leaders who may be regarded as “on the left” (many of whom are “new”) include the leaders of the RMT (Bob Crow), Unison (Dave Prentis), Aslef (Mick Rix), Amicus (AEEU/MSF) (Derek Simpson, who replaced the “Knight of the Right” and pro-euro Sir Ken Jackson), CWU (Billy Hayes), FBU (the anti-Queen Mother Andy Gilchrist) and PCS (the Public and Commercial Services Union, Mark Serwotka). The left-wing Tony Woodley may well take over at the T&G. Low’s carthorse is back in town.
 120. Taylor: “New breed of leaders join the fight over privatisation” (FT, 27 June 2001) reported that “members of the hard left are willing to use tried and tested tactics to confront Blair’s reform programme”.
 121. Turner: “Blair U-turn angers employers” (FT, 14 February 2003) reported that PM Blair had granted union leaders most of their demands on pay and conditions for (private sector) workers providing local (public) services. Turner also reported that trade unions had been demanding that private sector workers providing public services should have the same pay and conditions as those in the public sector.

4 Discrimination and equality issues

4.1 Introduction

In this chapter we look at some of the main regulations and issues surrounding discrimination and equality. This is a large, and rapidly expanding, area not least of all because of the comprehensive EU anti-discrimination Directives. Section 2 looks at some of the fundamental issues regarding discrimination and equality.

Sections 3 to 6 discuss the issue of sex discrimination and equality that is, arguably, one of the most developed areas of the anti-discrimination law. We regard several of the current initiatives as unnecessary and counter-productive. Section 7 discusses race (and ethnic) issues, section 8 discusses disability issues and section 9 discusses age discrimination. Section 10 looks at further issues: discrimination on grounds of sexual orientation and discrimination on grounds of religion and belief. Finally we look at the proposals for a single Commission for equality matters (11) and then draw some conclusions (section 12).

It should be noted that “harassment” is formally treated as discriminatory under the General Framework for the Equal Treatment in Employment and Occupation Directive and the Equal Treatment (Amendment) Directive. See chapter 3, sub-section 3.5.2 for more.

A final thought, if you’re a white, straight, fairly young, able-bodied male with moderate religious (Christian) views, there’s no anti-discrimination legislation for you. That’s discrimination. The whole thing is frankly way over the top. And how is any employer going to be able to sort it out? Welcome to the world of robots.

4.2 Discrimination and equality: fundamental issues

The IoD is totally opposed to discrimination against people on grounds of gender, race, disability or any other personal attribute. As we said in chapter 3, the reward system of pay is, in our view, the ethical approach to pay. Employers should pay according to an employee’s contribution to the business and on no other basis. Other approaches necessarily involve discriminating in favour of some people (and/or against others) because of their personal attributes and/or circumstances.

In 1997 we undertook a survey of IoD members.¹ The results showed that members were radically opposed to discrimination. Members expressed themselves, unsurprisingly, as firmly in support of fairness and good practice at work, and were resolutely opposed to unfair discrimination in all forms. They appointed people on merit alone. Interestingly, they did

not rely only on the “business case” for ethical behaviour that is so much urged upon the business sector. Rather, there was a strong feeling that non-discriminatory behaviour was a moral precept and one to which they willingly subscribed without reservation.

Nevertheless, 73% felt that legislation had become excessive and, specifically, a particular burden on small businesses. There was little enthusiasm for further legislation but, of course, since 1997 there has already been extra legislation and there is more in the pipeline. (See chapter 3 and below for more information.)

Some of the comments made by IoD members were illuminating and their general tenor should be borne in mind by over-enthusiastic regulators and legislators:

- “Nationally political correctness has become a knee-jerk reaction and no one knows quite how to cope with it”.
- “Positive discrimination can sometimes alienate the majority whilst doing little for those it is intended to help”.

The second comment is one that we have made on many occasions concerning special rights for “favoured” groups including, for example, the recent “new” rights for working parents including the right to request flexible working (see chapter 3). We are not alone in our concerns.

Richard Epstein² is of the view that the current human rights laws, especially anti-discrimination statutes, have created more injustices than they have solved and he has called for the abolition of the anti-discrimination bodies (including the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission). The topic of discrimination in the law of employment is one of “the growth industries of our time”. With the possible exception of age discrimination, he believes that open, competitive labour markets and the enforcement of employment contracts are the best way of ensuring fairness and maximising opportunity in the workplace. In short, these markets penalise discrimination. If an employer discriminates unfairly he/she will not be hiring the best people and, moreover, will be reducing employment opportunity. He has written:

- “If you wish to create opportunity the best rule is: don’t worry about equal opportunity if that quest will reduce overall opportunity. It will make it harder in some cases for members of protected classes to be hired, because it is harder to fire them once on the job. Concentrate on eliminating barriers in order to create opportunity for all.”

We have some, in fact quite a lot of, sympathy with this view but, speaking as a woman who can remember differential pay rates for men and women before the introduction of the 1970 Equal Pay Act, we do not agree with it. Markets are not always perfect. Prejudice is not unknown. Not every employer believes in “diversity” in the workplace, however “right on” the concept happens to be.³ There is a role for legislation – but for considerably less than is now the case and, even more so, will be the case over the next few years.

4.3 Sex discrimination: introduction

The main legislation concerning sex discrimination comprises:

- The Equal Pay Act (EqPA, 1970), which required men and women to be paid the same for equal work. It was amended in 1983.

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- The Sex Discrimination Act (SDA, 1975), which made discrimination on grounds of sex illegal and set up the Equal Opportunities Commission (EOC). It has since been amended, not least of all by the 1986 Sex Discrimination Act.
 - The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (2001), which enacted the EU Burden of Proof in Sex Discrimination Cases Directive. (See chapter 3 for more.)

If the reader wishes to pursue any of this legislation in detail (or indeed to any of the legislation referred to elsewhere in the chapter), may we refer them to specialist employment guides.⁴

Over the past 30 years there has been a marked change to women's position in the workplace (the author has personally experienced it) but, nevertheless, there are still significant differences between the positions of men and women. Moreover, not all of it can be explained by still having people in the workforce who started their careers in the 1960s and 1970s when, arguably, the situation for women was openly discriminatory. In section 4.4 we look at some aspects of the differences.

In section 4.5, we analyse some of the policy responses of the Equal Opportunity Commission (EOC) and the DTI to the persistent differences between men and women in the workplace. All too quickly, we feel, they attribute difference to employers' discriminating against women whilst underplaying some of the well documented evidence which shows that men and women are different and have different agendas. Yes, we repeat that. Men and women are different and we feel that the apparent insistence that everyone should be paid the same (and if they are not then women are being discriminated against) is the product of discredited 1970s feminist ideology.

Finally, section 4.6 looks at some of the family friendly policies which impact particularly on women with children.

4.4.1 Men's and women's employment patterns: introduction

In this section we will be looking at the different performances of men and women in the workforce. They differ because:

- Men work longer hours than women, they choose less "flexible" work patterns and have higher activity rates. (4.4.2)
- Men are paid more on average than women. (4.4.3)
- Men have different attitudes to money, work and home-life and have different occupational choices from women. (4.4.4)

Men are different from women. And die-hard feminists do few people (especially women) any favours by asserting that if women do not achieve men's average pay, then they are effectively victims of (male-dominated) employer discrimination. (The author has heard this described as the world of the "infantilised victimocracy" – the rule by self-perceived victims who don't expect to have to make hard "adult" choices and expect others to accommodate their every request ("infantalism").) Meanwhile the hapless employer is blamed for

discrimination against women and, doubtless, the destruction of esteem of the female victim as well. It is, of course, plainly nonsense and patronising to most women (including the author). But, alas, it appears to be influencing Government policy (see 4.6). In sub-section 4.4.5 we sum up the genuine reasons why women get paid less (on average) than men, with genuine employer discrimination against women barely featuring.

4.4.2 Hours, flexible working patterns and activity rates

(i) Hours

There is little doubt that men work longer hours than women. If the view is taken that hours are a crude indicator of employee “commitment” then, on this view, men show more “commitment” to the workplace than women (on average). In an earlier IoD paper⁵ we included the following two tables, which shows a very marked difference between the sexes. Men not only worked longer hours than women, they were much more likely to be “long hours” (over 48 hours a week) workers.

Actual average weekly hours worked for full-time and part-time workers, seasonally adjusted*

Spring quarters (March to May)	1992	1995	1999
All ^a	33.0	33.5	33.3
Full-time workers ^b	37.9	38.7	38.5
Part-time workers ^b	14.7	15.1	15.4
2 nd jobs	10.6	9.2	9.1
Men ^a	38.6	39.2	38.5
Full-time workers ^b	39.9	40.9	40.4
Part-time workers ^b	14.3	14.6	15.1
2 nd jobs	11.9	9.9	9.6
Women ^a	26.1	26.5	26.7
Full-time workers ^b	34.1	34.5	34.8
Part-time workers ^b	14.7	15.2	15.4
2 nd jobs	9.3	8.6	8.6

* Source: Labour Market Trends table B.21 (TSO, January 2001)

^a = main and 2nd jobs

^b = main job only

People working more than 48 hours a week by occupation and by gender (%)

	Total	Men	Women
Professional	23	58	42
Managers and administrators	22	80	20
Craft	19	94	6
Plant & machinery operatives	11	95	5
Associate professional & technical	8	59	41
Personal & protective services	8	53	47
Sales	4	74	26
Clerical/secretarial	3	43	57
Other occupation	-	1	-

Source: IPD: "Living to work?" (IPD survey report, 1999).

(ii) Flexible working patterns

Moreover, women are much more likely than men to take up flexible working patterns. The most easily quantifiable "flexible" pattern relates to part-time work, which is shown in the following table.

Incidence and composition of part-time (PT) employment (%), 1998 data

OECD country	PT employment as a % of total employment			Women's share of PT employment
	Men	Women	Total	
France	5.8	25.0	14.8	79.3
Germany	4.6	32.4	16.6	84.1
Italy	5.5	22.7	11.8	70.4
Japan	12.9	39.0	23.6	67.5
Netherlands	12.4	54.8	30.0	75.8
Spain	2.9	16.6	7.7	75.9
Sweden	5.6	22.0	13.5	79.3
UK	8.2	41.2	23.0	80.4
US	8.2	19.1	13.4	68.0
OECD Europe	5.6	26.1	14.4	79.8
EU	5.9	28.1	16.0	81.8
Total OECD	7.0	24.0	14.3	73.6

Source: OECD: "Employment Outlook" (OECD, July 1999), annex table E. Part-time employment refers to people who usually work less than 30 hours per week in their main job.⁶

There are, in addition, several other approaches to flexible working patterns including flexi-time, term-time working and job-sharing. Women are far more likely to be involved in these patterns than men, especially when they have dependent children, as is shown in the table below. The difference between men and women without dependent children is far less marked. (For further information on flexible working patterns see tables 4/1 and 4/2 in annex 4.)

Employees with flexible working patterns, by gender, Spring 2000 (%)

	All	Men	Women	Women with dependent children	Women without dependent children
Employees with flexible work arrangement	21.2	17.1	25.7	30.7	23.9
Type of flexible arrangement					
Flexible working hours (flexi-time)	9.9	8.7	11.1	11.7	11.2
Term-time working	4.6	1.4	8.1	12.1	6.3
Annualised working hours	4.0	4.0	4.1	4.4	4.2
4 ½ day week	1.5	2.1	0.9	0.6	1.2
Job sharing	0.9	0.1	1.8	2.9	1.2
Zero hours contract	0.8	0.8	0.8	0.8	0.8
9-day fortnight	0.3	0.4	0.4	*	0.2
Employees without flexible work arrangement	78.8	82.9	74.3	69.3	76.1

* Sample size too small for reliable estimate

Source: Labour Market Trends (November 2000, data from the LFS).

(iii) Activity rates

Finally, activity (participation) rates⁷ are still higher for men than for women as the following table shows. (And, in 2002, formed 54% of all employment according to the ONS.) Please note that the falls in male activity rates between 1990 and 2001 reflect a significant decrease in the 16-24 age range (reflecting the expansion of tertiary education) and smaller decreases in the 25-54 and 55-64 age ranges. Women's activity rates for the 16-24 age range also fell, but they rose for both the 25-54 and (especially) 55-64 age ranges. Activity rates are noticeably higher for both sexes who have higher qualifications, but especially for women.

Activity rates, UK, selected dates (%)

	Both sexes	Men	Women
For all people aged 16-64 years:			
1990	77.8	88.3	67.3
2000	76.6	84.3	68.9
2001	74.9	82.2	67.6
For all people aged 25-64 years (2000):			
Less than upper secondary education	58.9	68.0	51.6
Upper secondary education	82.8	88.7	76.8
Tertiary education	89.8	92.4	86.5

Source: OECD: "Employment Outlook" (July 2002).

4.4.3 Pay: the data

“There are three kinds of lies: lies, damned lies and statistics.”

Benjamin Disraeli (1804-80)

“He uses statistics as a drunken man uses lamp-posts – for support rather than illumination”.

Andrew Lang (1844-1912).

The most recent data about men’s and women’s pay comes from the New Earnings Survey (NES) for 2002. In 2002, the average hourly earnings (excluding overtime) for full-time female employees were 81.2% of the equivalent male earnings figure.^{8,9}

In 2001 this figure (one definition of “the gender pay gap”) was 81.5%. In other words, under this measure the “gender pay gap” widened by 0.3% in 2002. This was attributed to large increases going to the highest-earning men. (The “high earner” effect.) But it should be noted that over the last 30 years, women have caught up quite significantly.¹⁰

There are several measures of the “gender pay gap” and the relevant data are shown in the table below. For full-time employees the gender pay gap widens from hour to week and from week to year, reflecting the longer hours full-time men work. For part-time employees, the gender gap narrows from hour to week, reflecting the longer hours women work as part-timers. Finally, the widest gender pay gap in the table below is the weekly rate for all employees reflecting the facts that more men work full-time than women and they work, on average, longer hours.

Measures of gender pay gap (2002)

	Full-time employees			Part-time employees		All employees
	£ per hour	£ per week	£ per annum	£ per hour	£ per week	£ per week
Female average earnings	10.22	383.4	19,811	7.40	143.84	283.48
Male average earnings	12.59	513.8	27,437	8.73	165.28	484.05
Gender pay gap	81.2%	74.6%	72.2%	84.8%	86.8%	58.6%

Source: IDS: “The gender pay gap” (IDS report 873, January 2003).

4.4.4 Occupational choice

Linked with pay is the whole issue of occupational choice. Men and women can still make very different occupational choices. And to ignore this fact helps neither sex. Men, on the whole (and we are aware we are making generalisations here), prefer to be the breadwinner in a family and see this role as of paramount importance.^{11, 12} Moreover, they don’t want the situation to change radically – and neither do many women.^{13, 14}

Various researches show that women opt for jobs where flexible working patterns are more likely to be available and where they can move in and out of jobs so that they can more

easily accommodate running a family.¹⁵ This is rational behaviour. Indeed it is when the children arrive that women's pay really begins to fall behind men's.¹⁶ Moreover, women (for a variety of reasons) seem less motivated by pay, are more interested in socially "useful" jobs, opt for subjects that are related to well paid but not necessarily very highly paid jobs, are more likely to be employed by the public sector and don't always wish to work competitively in "masculine" environments.¹⁷ And women don't tend to opt for risky jobs (in, for example, the City), where the financial rewards can be very lucrative.

A recent piece of research into women's occupational choice has been conducted by the LSE.¹⁸ It supports many of the comments we have already made and concluded women chose jobs that paid less because they wanted more flexible and more socially useful careers.

The research tracked 10,000 students from 30 universities and colleges. It found that women earned 12% less than men after (only) 3 years' experience with the difference better explained by choice than workplace discrimination. Women chose the degree courses that allowed them to combine work and motherhood, including nursing and teaching. Moreover, female students chose education and the arts, whilst men chose engineering, maths and computing. (Men's subject choices led to jobs with, on average, higher earnings.) In addition, women were more likely to work for smaller firms, the public sector (which is rightly seen as more secure than the private sector) or on temporary contracts (where there is simply not the same degree of commitment to the business as with permanent jobs).

The research found that women also had different attitudes to work. Just over half of women stressed the importance of a socially useful job, but only 32% of men thought it was important. 25% of men thought that financial rewards were "very important" compared with 14% of women. The LSE research mirrored a survey of 47,000 employees for the 2002 "The Sunday Times 100 Best Companies To Work For" exercise. This concluded that women were less well off but were happier at work - they had different attitudes from men concerning what made them happy.¹⁹

Some feminists (including some men) seem to deny differences between men and women.²⁰ Moreover, they seem to deny that women themselves can be very different and have very different objectives.^{21, 22} Some women are very career-oriented, others are not. Some women wish to be full-time mothers, others do not. Women in the workplace are a heterogeneous group. Surely these feminists should stop denying women their right to choose their lifestyles and stop telling them they should be changing their "stereotyped" attitudes (as sometimes patronisingly occurs).

So there are very good reasons for men and women having different occupational choices. The following table shows the top ten occupations for women (data from the NES).²³

Top ten occupations for women (which account for 36% of the female workforce)

	Numbers in employment (thousands)
Sales and retail assistants	902
Cleaners, domestics	534
General office assistants, clerks	521
Care assistants, home carers	501
Accounts, wages clerks, bookkeepers	460
Nurses	437
Personal assistants, secretaries	390
Kitchen and catering assistants	310
Primary and nursery educational professionals	292
Educational assistants	272

Moreover, men tend to dominate the highest earning occupations and women the lowest earning occupations as the following table shows.²⁴

Proportion of men and women employed in highest and lowest earning occupations

	Proportion of men & women employed in occupation		Average full-time earnings
	Men (%)	Women (%)	£ per week
All employees	54.9	45.1	464.7
Top 5 earning non-manual occupations			
General managers, large companies and organisations	79.8	20.2	2,079.0
Treasurers and company financial managers	66.4	33.6	1,234.7
Medical practitioners	58.7	41.3	1,159.6
Management consultants, business analysts	75.3	24.7	933.2
Underwriters, claims assessors	75.1	24.9	923.6
Top 5 earning manual occupations*			
Rail signal operatives and crossing-keepers	97.1	2.9	599.4
Rail engine drivers and assistants	97.1	2.9	595.9
Cable jointers, lines repairers	100.0	0	515.2
Electricians, electrical maintenance fitters	99.2	0.8	473.5
Rail construction and maintenance	100.0	0	469.1
Bottom 5 earning non-manual occupations			
Civil Service administrative officers and assistants	29.8	70.2	265.4
Dental nurses	0	100.0	252.5
Receptionists	0	100.0	246.1
Sales assistants	27.9	72.1	245.2
Retail cash desk and check-out workers	20.4	79.6	205.4
Bottom 5 earning manual occupations			
Bar staff	38.9	61.1	217.0
Petrol pump forecourt attendants	20.4	79.6	211.5
Waiters, waitresses	30.3	69.7	211.4
Kitchen porters, hands	26.2	73.8	209.8
Launderers, dry cleaners, pressers	33.3	66.7	207.2

* Welcome to the world of the brothers!

4.4.5 Men's and women's job choice and pay: conclusions

As we have said on many occasions, we deplore discrimination against any group. And we deplore discrimination against women. But the main reasons for women's average pay being lower than men's average pay are fairly clear and perfectly fair and they do not include discrimination.²⁵

They include:

- Men work longer hours and are more likely to be “long hours” workers. Insofar as hours worked are a measure of commitment to a job and to a career, then men show higher work commitment than do women (on average).
- Women with children tend to take career breaks and/or work flexibly so they can combine family and work to a far greater extent than men with children. Many more women with children than men with children still see their main role as nurturer and, concomitantly, many more men with children than women with children still see their main role as provider. These role differences reflect people's choices and have a significant bearing on the occupations men and women choose.
- Women also appear to be less driven by financial reward, opting for lower risk and more secure jobs than men in, for example, teaching and/or nursing. It is noticeable that, for example, the highly paid, high-risk and highly competitive jobs in the City are dominated by men. Women also show a preference for more “socially useful” jobs.
- Moreover, women make different choices in the subjects they study, tending to opt for arts subjects whilst men tend to opt for subjects such as maths, engineering and computing where the financial rewards tend to be higher.
- Many of these differences between men and women result in men's domination in the higher paid jobs and women's domination in lower paid jobs. Some analysts would claim that the types of lower paid jobs dominated by women are, in fact, lower paid because they are dominated by women.²⁶ This may well have been true in the past, but with today's freer and more open labour markets, it becomes less tenable. After all women can go for the high paying jobs if they wish. But as women tend to go for less risky, more socially enjoyable and more flexible jobs then they are going for those jobs that will almost inevitably be less well financially rewarded by a rational labour market than higher risk, less pleasant and less flexible jobs.

The above paragraph deals with “average” men and “average” women, but, of course, this is not the whole story by any means. As we have already indicated, women in the workforce are a particularly heterogeneous group. But there are other factors.

Shackleton and Urwin²⁷ compared men's and women's earnings and found that even when allowance is made for age, qualifications and years of work experience there is still an unexplained gap.²⁸ They found that a major part of the difference was explained by personal choices to marry and have children. For example, if the earnings of single men and single women with equivalent qualifications were compared, they were found to be similar. Moreover, married men earned more than single men, partly because the additional responsibilities borne by married men seem to encourage them to work harder. When single women were compared with married women the gradient was reversed, almost certainly because married women had decided to give priority to their children at the expense of

work. In conclusion, the pay gap between men and childless women (whether married or single) was much smaller than that between men and women with children.

In addition, and as we have already written, these authors found that many women chose occupations which allowed them to take time off while their children were young and then to return to the workforce when they were older, such as secretarial and clerical work.

Moreover, Shackleton and Urwin emphasised an issue that is simply ignored by feminists. And that is that men had disadvantages. Unemployment was higher for men than for women, they were more at risk of redundancy (they went for more risky jobs), they experienced more injuries at work because they are over-represented in dangerous occupations, and they, the authors argued, received a lower return on their pension contributions. The authors also emphasised that, as a stable relationship with a partner and children was an important factor in men's earning power, the fact that some young men were increasingly not attached in stable relationships would adversely affect their earning power. In some communities this is a more important factor than others. For example, a larger proportion of young Caribbean men are unattached than any other group and their earnings seem to reflect this - women are paid more than men on average.

Mean real hourly wages by ethnic group in 1997

	White	Black	Indian	Pakistani and Bangladeshi	Mixed and other
Men	8.67	6.74	8.49	5.73	8.51
Women	6.34	7.32	6.01	5.18	7.05
All	7.54	7.03	7.41	5.59	7.81

Source: Shackleton and Urwin: "Men and the labour market" in Pizzey, Shackleton and Urwin: "Women or men – who are the victims?" (Civitas, 2000), taken from the "Employment Audit" (1998).

4.5.1 Responses to the gender pay gap: introduction

The overall response of the Equal Opportunities Commission (EOC) and, in some cases, parts of Government (including parts of the DTI and the Cabinet Office) to the gender pay gap seems to be one of "unequal pay is unjust pay" and, by implication, that much of the gap is because employers discriminate against women. The gap, in other words, has little to do with the choices and attributes of women employees themselves.

The black American academic Thomas Sowell²⁹ writes succinctly and brilliantly as to why this is a totally fallacious interpretation. And, even though much of his analysis concerns income (and other achievement indicators) of different racial groups in the USA, he does comment on gender differences and, in any case, his comments on racial differences are highly applicable to gender differences. For this reason we include a summary of some of his main points in table 4/6 in annex 4.

In short, we do not believe that the EOC and/or official responses are fair and they are not fair for the following reasons:

- The data chosen to show the gender pay gap tend to be the “worst” and, moreover, presented, apparently, with few caveats. For example, the DTI’s Women and Equality Unit reported that “women’s incomes were less than half of those of men”.³⁰ Well, maybe, maybe not depending on the set of statistics chosen. (“There are lies, damned lies and statistics”.) But a more helpful statistic on the pay gap is the one on the average hourly earnings (excluding overtime) for full-time employees (see 4.4.3).
- There is little recognition that most, if not all, of the differences between men and women have perfectly sound explanations.³¹ And there is little recognition that men have disadvantages in the labour market.
- The language used is redolent of 1970s feminist ideology.
 - EOC, for example, talks about “occupational segregation, where women predominate in low-paid jobs”³². As we have explained, women tend to be concentrated in certain types of jobs because this suits them. They are not forcibly segregated, by others, into low paid groups. Sometimes this “occupational segregation issue” is expressed in a way that says women’s choices are “more constrained” than men’s. But, for the most part, this is simply not true.
 - EOC also talks about “the continuing unequal impact of family responsibilities on women” as if this isn’t fair on women. Well, as we show above, many women choose this lifestyle.³³ They want to live their lives this way – in a family, with a male partner who is the main breadwinner and look after their children.
- As we have hinted above (4.4.5), there is the assertion that the types of lower paid jobs, dominated by women are, in fact, lower paid because they are dominated by women. In other words “the relative pay for a particular occupation may not be independent of the changing sex composition of the workforce (for example, a rise in the proportion of women in an occupation may be associated with a decline in relative pay)”.³⁴ As we said earlier, we find this hard to believe given the open nature of the labour markets.

A variation on the theme of quoting statistics on differential pay rates without adequate explanation, is to compare men’s and women’s earnings over their lifetimes and, by implication, suggest the results are showing something very wrong (and, of course, the employer’s fault). We simply do not see the point of this type of exercise – unless it is to stir up outrage against employers as a prelude to bringing in more regulation to socially engineer a feminist utopia (without male breadwinners on which women “depend”, of course). For example, the Cabinet Office³⁵ has produced the following table.

Lifetime earnings of men, childless women and women with 2 children

	Man	Childless woman*	Woman with 2 children**
High-skilled (degree level qualifications)	£1,333,000	£1,190,000 (£143,000)	£1,171,000 (£19,000)
Mid-skilled (GCSE level qualifications)	£891,000	£650,000 (£241,000)	£510,000 (£140,000)
Low-skilled (no qualifications)	£731,000	£534,000 (£197,000)	£249,000 (£285,000)

* Figures in brackets refer to the “gender gap”, the difference between men’s and childless women’s earnings.

** Figures in brackets refer to the “mother gap”, the difference between childless women’s and 2-children women’s earnings.

Source: Rake (ed): Women’s incomes over the lifetime” (Women’s Unit, Cabinet Office, March 2000).

The following table ^{36, 37} concentrates on the gender gap (“the cost of being female”), the mother gap (“the impact on a woman’s lifetime earnings of having 2 children”) and the parent gap (“the difference in earnings between a mother of two and a father of two”). The data are based on Government research.

Women’s lifetime earnings

Skills level	Gender Gap	Mother Gap	Parent Gap
Low skilled (no qualifications)	£197,000	£285,000	£482,000
Mid skilled (qualifications to GCSE level)	£241,000	£140,000	£381,000
High skilled (graduate)	£143,000	£19,000	£161,000

Source: DTI: “Work and parents: competitiveness and choice” Green Paper (TSO, December 2000).

4.5.2 Government policies on the gender pay gap

As we have already explained, there is little evidence that there is extensive discrimination in the workplace against women and we do not accept that the Government has made a good case that there is. In fact, short of bold assertions about pay gaps, we do not believe that it has even tried to make the case. So, for us, there is no case to answer and no need for further Government activity and/or intervention on this issue. But there has been activity.

Following on from the early 2001 Equal Pay Task Force report ^{38, 39}, which recommended that equal (gender) pay audits should be mandatory, the Kingsmill Review was set up in April 2001. ⁴⁰

The Kingsmill report (of end 2001) ^{41, 42} made the following recommendations (which were accepted by Government):

- Companies should be encouraged to conduct and complete voluntary equal pay reviews.
- The public sector should be required to undertake pay and employment reviews.
- That information on “human capital management issues” should be part of the mandatory requirements for disclosure in company annual reports.
- Individuals should have the right to pay information in order to make it easier for women to establish whether their employer has an equal pay problem.

Though these policies do not look draconian, they represent another potentially time-consuming activity for business. Moreover, we are concerned that these voluntary exhortations may yet turn into mandatory regulations – especially as evidence suggests little enthusiasm by business for carrying out equal pay audits. ^{43, 44}

4.6.1 “Family friendly” policies

We discussed our concerns about “family friendly” in some detail in a previous paper (April 2001)⁴⁵ and we will not repeat all the arguments here. But since then, there have been the changes (introduced in April 2003).

They are (and see chapter 3 for details)^{46,47}:

- Paid paternity leave.
- Adoption leave and adoption pay.
- Maternity rights periods were extended.^{48, 49} The main problem with maternity leave is that of asymmetric rights: the employer has to leave the job open but the employee has no obligation to return.
- The right to request a flexible working arrangement.

These changes were largely trailed in the DTI’s Green Paper on rights for working parents (2001)⁵⁰.

We would, however, like to make the following points about our concerns:

- This chapter is concerned with discrimination but we fear that these generous extra rights for parents, especially women, could be quite counterproductive.⁵¹ A survey of IoD members conducted in 1998 showed that 45% of respondents found women of prime child-bearing age less attractive to recruit than other groups because of the maternity rights. A similar survey conducted early in 2001 suggested some 62% of respondents regarded women of prime child-bearing age less attractive to recruit than other age groups. The figure rose to 67% if the proposed measures in the DTI’s Green Paper “Work and Parents: competitiveness and choice” (early 2001) were to be introduced.⁵² Most of the Green Paper measures were introduced in April 2003.
- We are concerned that the Government’s emphasis on employers’ accommodation of employees’ rights has swung too far against the employer. The employer is now expected to be so accommodative that employees do not themselves have to make hard choices that adults have to make.⁵³
- There is now so much emphasis on regulation that the voluntary principle, in which employers decide on what is right for the overall competitiveness and long-term viability of their businesses, is being downgraded. This is bad news, ultimately, for employees. Government policy should be about encouraging flexibility, but legislation imposes inflexibilities and rigidities, whereas voluntary “good practice” does not.
- Special rights for some groups can lead to resentments in other groups that are essentially being discriminated against.

4.6.2 Family friendly policies: childcare

We appreciate that many parents with young children (especially mothers) can have problems with childcare. And that the childcare issue contributes, albeit indirectly, to the gender pay gap.

So by way of a footnote to this section on “family friendly” policies we would just like to make the following points about childcare:

-
- There is evidence to show that childcare (both the availability and the cost) can be a significant problem for working women with young children.⁵⁴
 - Many businesses provide childcare assistance, not least of all because providing childcare assistance helped with staff retention and was an incentive to recruitment.⁵⁵
 - There are tax incentives for providing childcare⁵⁶:
 - Employees who pay for childcare receive no tax relief except for the lower paid who receive the childcare tax credit, for up to 70% of eligible childcare costs, as part of the Working Tax Credit (WTC). (The WTC seems to replicate the WFTC provisions).
 - Employers providing childcare in, for example, an on-site nursery (not always convenient for parents) are eligible for tax relief on the cost. It is a non-taxable benefit for the employee and no NICs are paid. There is no limit to the value of childcare which can be exempted from tax.
 - If the employer provides a childcare voucher for the employee to spend in any nursery then this is tax deductible for the employer but it is a taxable benefit for the employee (though NICs are not paid by the employee). Consideration should be given to making this type of employer-provided childcare into a non-taxable benefit. This would then mean consistent treatment for all employer-provided childcare.

4.7.1 Race discrimination and equality: introduction

The main legislation dealing with race (or ethnic) discrimination and equality is:

- The Race Relations Act (RRA, 1976), which made discrimination on grounds of race illegal and set up the Commission for Racial Equality (CRE). It has since been amended, not least of all by the 1994 Race Relations (Remedies) Act.
- Equal Treatment (Racial or Ethnic Origin) Directive, which is due to be implemented in July 2003 and may alter the way the burden of proof is shared between employer and employee.

Again we would refer readers to specialist employment guides⁵⁷ for details of this legislation.

4.7.2 Race equality: the business case

Before considering the racial inequalities in the labour market, we would strongly like to endorse some of the research that has convincingly shown us that there are genuine business benefits of race equality in the workplace. So race equality at work is not just a matter of the law and ethical considerations, but also a matter of sound business commonsense. Britain has become a multi-ethnic and diverse society (we avoid the term multicultural see annex 1B) and an increasing proportion of the labour force and consumers will be from ethnic minorities.

Metcalf and Forth⁵⁸ looked at the research of both the CRE and the CBI and concluded that both bodies had come to very similar conclusions. The CBI⁵⁹ identified the following:

- Access to diverse and more highly skilled labour.
- Improved selection and promotion decisions.
- Reduced staff turnover and absence costs.

-
- Increased labour flexibility.
 - Avoiding costs of discrimination claims.
 - Performance gains: (1) enhancement of teamwork; (2) better problem-solving and decision-making; (3) improved employee relations, morale and work environment.
 - Improved community, consumer and investor relations.
 - Stimulation of new business ideas and markets.

Metcalf and Forth's research found that all companies could derive business benefits from race equality actions. The benefits, which could be substantial, were:

- Improvements to staffing: including the alleviation of recruitment shortages, improvement in the quality of staff, improved morale, reduction in turnover, easier deployment of staff.
- Improved management and employee relations: including reduction in disputes, improved management systems and ideas.
- Improved service to customers: including through improved understanding of cultural differences, ability to converse in the customers' first language.
- Increased sales and improved marketing: through the use of the ideas and specialised knowledge of ethnic minority staff, through compliance with customer organisations that require a race equality policy (ie contract compliance) and through a public image which attracts ethnic minority customers.
- Improved relations with public bodies: affecting, for example, the granting of planning permission and the receipt of grants.
- Avoidance of tribunal costs.

Bringing all the research on the business benefits of effective race equality policies together gives the following:

- **Human resourcing:** enhancing and improving recruitment, increasing both the quantity and quality of applicants, lower staff turnover, improvement in HR practices and management.
- **Morale and productivity:** improved general atmosphere at work and morale.
- **Industrial relations and communications:** improving confidence by ethnic minority employees in their treatment reduced race-related disputes, grievances and industrial action.
- **Improving sales and custom:** an ethnically diverse workforce is better able to recognise the needs of an ethnically diverse customer base, both in the UK and abroad.
- **Image:** improved image may result in business benefits through increasing sales, enhancing recruitment and improving morale, better acceptance in the local community and improved service to customers.
- **Avoiding the diverse costs of discrimination cases.**
- **Improved systems and administration.**

Metcalf and Forth also made the point that the labour force demographics would change in favour of ethnic minorities over the decade 1999-2009 (given the recent rise in immigration, these figures could well now be outdated). As the ethnic labour force increased, then the business benefits of having effective race equality policies in place would increase. Their projections showed that there would be:

- A rise in the ethnic minority labour force of 20% compared with an increase of 1% in the white labour force.

-
- An increase of 310,000 in the ethnic minority labour force, greater than the 220,000 increase in the white labour force.
 - The percentage of the labour force from ethnic minorities would increase from 5.7% to 6.7%.

4.7.3 Race equality policies

We support the Race Relations Act and have supported the Commission for Racial Equality,^{60,61} not least of all because it has been a supporter of extending voluntary “good practice” in the workplace rather than extra legislation (well in the private sector⁶²). And, as there are still considerable attainment differences between ethnic groups in the workplace (which we discuss below), we promote the idea of having race equality policies.

Metcalf and Forth⁶³ suggested that there were three approaches to ensuring race equality, which we endorse:

- **The personnel approach:** focuses on equity in personnel practices and/or meeting legal requirements.
- **The human resourcing approach:** falls between the two others and where race equality is not just seen as an issue of equity and the law, but also as a business issue through its effect on human resources.
- **The diversity approach:** starts with the recognition that we live in a diverse society and that business will be more successful if it exploits diversity. This belief permeates the whole business from customer base to staff.

More specifically we support voluntary “positive action” activities to counter (possible) negative discrimination. Such activities could include monitoring, or even targets, provided such activities are not reduced to box-ticking or, worse, “positive discrimination” (“affirmative action”) with quotas effectively being introduced. Work quotas are illegal and rightly so – they can cause resentments and the employers could well find themselves promoting certain employees in order to fill the quotas rather than promoting on merit.

There are, however, legal developments we regard with concern. In particular is the implementation (by July 2003) of the Equal Treatment (Racial or Ethnic Origin) Directive, which could increase the burden of proof on employers as in the case of sex discrimination cases (see 3.5.2 (ii)). In addition, the General Framework on the grounds of religion and belief is due by December 2003, and this could make the whole issue of dealing with problems of discrimination in the workplace all the more difficult. (We discuss the General Framework below.)

4.7.4 Employment patterns: by ethnic group

The phrase “ethnic minorities” can be very misleading if interpreted as if it were relating to a homogeneous group. One thing is sure. Ethnic minorities are a very heterogeneous group. And this applies to activity, employment and unemployment rates or chosen occupations and earnings.

(i) Activity, employment and unemployment rates

As the following table shows, in 2000 the overall activity rate for White people was around 80%, for Black people and Indians it was 74%, for “other” it was 65%. It was 62% for Chinese and only 55% for Pakistanis/Bangladeshis. Male rates were higher than female rates in all groups, the gender difference being particularly marked for the Pakistani/Bangladeshi group. White people also had the highest employment rate and the lowest unemployment rate. Indians were the group with the second highest employment rate (and second lowest unemployment rate), followed by “other”, then Black people and then Pakistanis/Bangladeshi. (The data on the Chinese is incomplete.)

The variations between ethnic groups tended to be greater than those between Whites and the closest ethnic minority groups. These variations were greatest among women. The ethnic minority unemployment rate has been more than twice that of Whites throughout the economic recovery since 1993.⁶⁴ For more details on activity rates and unemployment rates, also broken down by age see tables 4/6 and 4/7 in annex 4.

Economic activity by ethnic group: GB, winter 2000 (not seasonally adjusted) (%)

	Economic activity rate: 16-59/64	Employment rate: 16-59/64	ILO unemployment rate: all 16+
All			
White	80.7	76.6	5.0
All ethnic minority groups	68	60	13
• Black ¹	74	63	15
• Indian	74	69	8
• Pakistani-Bangladeshi	55	45	18
• Chinese	62	57	*
• Other origins ²	65	56	13
Men (16-64)			
White	85.7	81.0	5.4
All ethnic minority groups	78	68	13
• Black ¹	81	68	16
• Indian	82	75	8
• Pakistani-Bangladeshi	76	63	17
• Chinese	68	59	*
• Other origins ²	74	65	13
Women (16-59)			
White	75.1	71.6	4.5
All ethnic minority groups	58	51	11
• Black ¹	68	59	13
• Indian	66	62	7
• Pakistani-Bangladeshi	32	25	19
• Chinese	56	55	*
• Other origins ²	55	48	13

* sample size too small for reliable estimate

¹ includes black mixed, black Caribbean, black Africans

² includes those who did not state ethnic origin

Source: Labour Market Trends (December 2000, data from the Labour Force Survey, LFS).

The Labour Force Survey provides other information including⁶⁵:

- The largest percentages of men who are self-employed occurred in the Pakistani (25%), Chinese (21%) and Indian (19%) ethnic groups. 15% of Whites were self-employed, 17% of all ethnic groups, 12% of Black ethnic groups.
- An important influence on the participation of women in the labour market was their partnership status. Black Caribbean women had the highest rate (75%, with Whites at 74%). Pakistani and Bangladeshi women are more likely to be active if they are single or cohabiting.

(ii) Occupations and earnings

The following table shows, classified by very broad socio-economic classes, the employment patterns of the main ethnic groups.⁶⁶ 38% of Whites and 38% of all ethnics were in socio-economic classes I and II, but within the ethnic groups there was a significant variation. “Other”, Chinese and Indians all had higher percentages than Whites. In socio-economic classes V and VI Chinese and “other” had a lower percentage presence than Whites, whilst Pakistanis/Bangladeshis and Black Africans and Black Caribbeans had a higher percentage presence.

Employees and self-employed by ethnic origin and social class, GB, average 1998-2000 (average of spring quarters), not seasonally adjusted, men and women

(Percentage of total in brackets)	Professional, managerial & technical (I & II)	Skilled manual & skilled non-manual (III & IV)	Partly skilled & unskilled (V & VI)
White (95.0%)	38	42	20
All ethnic minority groups (5.0%)	38	43	20
Black: ¹ (1.6%)			
Black Caribbean (0.8%)	32	42	26
Black African (0.5%)	38	34	28
Other Black ¹ (0.3%)	31	50	20
South Asian: (2.4%)			
Indian (1.6%)	41	39	20
Pakistani (0.6%)	30	45	24
Bangladeshi (0.2%)	24	49	27
All other groups: (1.1%)			
Chinese (0.25%)	44	43	13
Other ethnic groups (0.85%)	45	38	17
All ethnic groups ² (100%)	38	42	20

¹ includes black mixed

² includes those who did not state ethnic origin

Source: Labour Market Trends, January 2001.

As above with activity rates, the LFS carries much more detailed information on ethnic minorities in the workplace. Two of the DfEE's conclusions were: ⁶⁷

- Ethnic minority men were over-represented in the service sector.
- Men from ethnic minority groups as a whole were less likely than Whites to be employed as managers and administrators. However, the average obscured the very low percentages of Black Caribbean, Black African and Bangladeshi men (10%, 13%, 16% respectively).
- In addition, 38% of Indians and nearly half of mixed race (and other including the Chinese) were in management and administration compared with 36% of Whites. ⁶⁷

Turning to earnings, in 1995, average hourly earnings of full-time employees for the ethnic minorities were about 92% of those for White employees. Most of this difference was due to different pay rates for White and ethnic minority men. Women from ethnic minorities earned, on average, roughly the same as White women. The main exceptions were Pakistani and Bangladeshi women, who earned, respectively, 68% and 81% of the hourly earnings of their White counterparts. ⁶⁸

The next three tables show the relative disadvantage of certain ethnic minorities, especially the Pakistani/Bangladeshi. (The first table was quoted above in 4.4.)

Mean real hourly wages by ethnic group in 1997

	White	Black	Indian	Pakistani and Bangladeshi	Mixed and other
Men	8.67	6.74	8.49	5.73	8.51
Women	6.34	7.32	6.01	5.18	7.05
All	7.54	7.03	7.41	5.59	7.81

Source: Shackleton and Urwin: "Men and the labour market" in Pizzey, Shackleton and Urwin: "Women or men – who are the victims?" (Civitas, 2000), taken from the "Employment Audit" (1998).

Distribution of equivalised disposable income (%): by ethnic group (1995-96), GB

	Bottom quintile (20%)	Top four quintiles	All
Pakistani/Bangladeshi	66	34	100
Black	30	71	100
Indian	26	74	100
White	19	81	100
Other ethnic groups	27	73	100
All ethnic groups	20	80	100

Source: ONS: "Social Trends" (TSO, 1998 edition), data from the DSS.

People in households below 60 per cent median income (%): by economic status and ethnic group, (1996-98), GB

	White	Black	Indian	P/B	Other	All
All above pensionable age	24	Na	Na	Na	Na	24
Other households:						
No members in work	47	52	55	75	40	49
At least one member in work	9	Na	20	56	23	10
All households	17	28	27	64	29	18

Source: ONS: “Social Trends” (TSO, 2000 edition), data from the DSS.

There are, of course, several reasons for the different occupational and earnings outcomes of the different ethnic minorities, on the one hand, and the differences between Whites as a group and ethnic minorities as a group, on the other. (Though we do question the purpose of the latter comparison because of the significant variations between ethnic minority groups.) As we said about the gender gap, the mere existence of pay gaps between groups should not just be put down to negative discrimination as a knee jerk reaction, without looking into other reasons for differences. And, if anything, the situation is more complicated for ethnic groups than it is for gender.

We would not pretend we have done a comprehensive analysis in this section, but the following, interrelated, explanations can be suggested:

- Class background is clearly a major factor, with more Indians, Chinese and “other” in socio-economic classes I and II than Whites.
- Career choice and lifestyle choice, which can work positively or negatively for different minority ethnic groups.
- Language problems, which should largely be overcome in later generations of immigrants. (So this is likely to be a generational issue).
- Generational factors, with 2nd and 3rd generation immigrants performing better than 1st generation immigrants.
- Educational attainment is another factor. Again there are very significant variations between the groups. In our recent paper on education⁶⁹ we included that data on GCSE pass rates that showed Indians, of all the major ethnic minorities were in pole position, ahead of the Whites. The Chinese, as a “minor” ethnic minority, also did very well. The Pakistanis, Bangladeshis and Blacks did less well. There is some evidence to show ethnic minorities are more likely to attend HEIs than Whites (see table 4/9, annex 4), but caution should also be used when interpreting data on HEIs as they are so variable in quality and relevance to employability.⁷⁰

4.8 Disability

The main legislation concerning disability comprises:

- The Disability Discrimination Act (DDA, 1995),⁷¹ which:
 - Made it an offence to discriminate unjustifiably against anyone who is disabled both in (1) employment and (2) the access to the provision of goods and services.
 - (1) Employers have to make “reasonable adjustments” to their workplaces to help disabled employees (introduced in 1996, the small firms exemption limit was lowered from under 20 employees to under 15 employees in 1998, and is due to be removed by 2004) and (2) businesses providing goods and services have to make “reasonable adjustments” to provide access for disabled persons (by October 2004, no small firms exemptions).
 - Set up the National Disability Council (NDC), an independent body to monitor the DDA. The Disability Rights Commission (DRC) replaced the NDC in April 2000.
- The General Framework Directive (which applies to sexual orientation, religion and belief and age as well as disability (see chapter 3)) is due to be implemented for disability in December 2006.

We support the DDA and the work of the DRC, even though we have expressed our concerns the subjectivity of “reasonable adjustments” and the costs and difficulties for small firms of complying with the Act.^{72,73} We also recognise that disability is a barrier to employment, as the table below on economic activity status shows.⁷⁴ According to this table, nearly 6 million people of working age considered they were disabled. (The term disability includes psychiatric problems including stress and depression⁷⁵.)

Economic activity status of disabled people* (%), by gender, spring 1999, UK

	Males	Females	All
In employment:			
Working full-time	47	23	34
Working part-time	6	21	14
All in employment	52	44	48
Unemployed	7	4	6
Economically inactive	40	52	46
All disabled (=100%) (millions)	2.8	3.1	5.9

* People aged 16-59 with current long-term or work-limiting disability. Disability is defined in the LFS on the basis of the question: “Do you have any health problems or disabilities that you expect will last more than a year?”

Source: ONS: “Social Trends” (TSO, 2000 edition), data from the LFS, ONS.

Footnote: DWP Benefits

Definitions of disability vary.⁷⁶ But in this footnote we shall confine our comments to some observations on the benefit system.

As the table below shows there is little doubt that, as the number of people on unemployment benefits has declined in recent years, the number receiving incapacity benefits has increased. This has given rise to speculation by the Labour-dominated House of Commons Committee on Work and Pensions that “a substantial number” of the 2.7m incapacity benefits claimants “do represent ‘hidden unemployment’”. Since 1979 the number of people claiming incapacity benefit has more than trebled to 2.7m.⁷⁷ For further data and definitions on benefits see tables 4/10 and 4/11, annex 10.

Claimants of working age of key benefits by statistical group: May 1999 to May 2002 (thousands & percentages)

	May 1999		May 2000		May 2001		May 2002	
	All	% of population*	All	% of population	All	% of population	All	% of population
All	5,235	Na	5,049	Na	4,982	14.2	4,923	14.0
Unemployed	1,208	Na	1,024	Na	925	2.6	880	2.5
Sick/disabled	2,865	Na	2,902	Na	2,984	8.5	3,011	8.6
Lone parents	917	Na	891	Na	868	2.5	836	2.4
Others	246	Na	232	Na	205	0.6	196	0.6

* Population of working age

Source: ONS: “Work and Pension Statistics: 2002” (National Statistics, 2002).

4.9.1 Age: introduction

There is currently no specific age discrimination legislation, though clearly older workers all have general employee rights. This will change in 2006:

- The General Framework (which also covers disability, sexual orientation, religion and belief) includes a section on age and the age requirements are due to be implemented in December 2006. We will discuss the problems with the potential legislation below.

It is difficult to know just how much age discrimination⁷⁸ occurs in the British workplace, but we do not challenge those who claim it exists in our youth-obsessed society.

In 2000 the IoD undertook a major survey of its members on employing older people.⁷⁹ The majority of respondents did not have a negative attitude towards older workers. For example, 70% of respondents disagreed or disagreed strongly with the statement: “younger employees are more productive than older employees”, whilst over half those polled said that they would employ more older people if they could get Government help towards the costs of training. 5% of respondents actually said that they would be more inclined to hire older workers than younger ones on the grounds of stability and maturity. 53% of respondents stated that they should be able to specify the age of the person that they would like to hire when advertising.

We prefer voluntary initiatives by employers to legislation in order to ensure that there is no genuine discrimination in the workplace (ie the workplace is “age-neutral”⁸⁰) and we have cautioned against draconian mandatory requirements viewing them as yet more, and possibly counter-productive, red tape.⁸¹ Legislation should be the last resort.

In our 2000 IoD paper we suggested the following measures to promote the employment of older people:⁸²

- The Government must maintain a stable macroeconomic environment that is conducive to a steady expansion of employment.
- The Government must keep the cost of labour low.
- The new Small Business Service must be properly equipped to provide older people with the necessary advice to start their own business.
- The Government should also make it a priority to retrain and re-educate older workers who suffer from skill deficiencies.
- The Government should promote the Code of Practice for Age Diversity in Employment (DfEE, 1999).^{83, 84} The Code delineates the advantages of a mixed age workforce for employers. 76% of respondents to our survey said that they were willing to use the Code of Practice. (This Code of Practice was followed by the “age positive” campaign that the IoD endorsed.)

4.9.2 Older people in the labour market

There is little doubt that activity and employment fall away for the 55+ cohort as the following table demonstrates. However, it is interesting to note that the unemployment rates for the over 55s are low. This may be because workers become discouraged and, therefore, drop out of the labour market or they may have jobs but not the sort of jobs they particularly prize. But more likely it is because they simply wish to retire and feel they can afford to.

Employment/population ratios, activity and unemployment rates (%), UK, 2001

	16 to 24	25 to 54	55 to 64
Both sexes:			
Unemployment rates	10.9	3.9	3.3
Labour force participation rates	61.1	83.9	54.0
Employment/population rates	54.7	80.7	32.9
Males:			
Unemployment rates	12.0	4.1	4.4
Labour force participation rates	65.0	91.3	64.4
Employment/population rates	57.2	87.6	61.6
Females:			
Unemployment rates	8.7	3.6	1.8
Labour force participation rates	57.2	76.4	44.0
Employment/population rates	52.2	73.6	43.2

Source: OECD: “Employment Outlook” (July 2002).

4.9.3 Age: developments

There is little doubt that the inter-related issues of hiring older workers, employees working longer and age discrimination are rising up the agenda. There are two main reasons for this: (1) market forces and (2) the General Framework.

(i) Market forces

There is no doubt that the population will age and that dependency ratios are set to rise as people live longer and fertility rates fall. Though it should be noted that these trends should not be exaggerated⁸⁵ and the UK is in a better position than some continental EU countries. But an ageing population, along with the parlous state of many occupational pension schemes and many people's under-provision for their retirement^{86, 87}, probably mean that sheer market forces (both supply and demand factors) will mean people will work for more years.⁸⁸

(ii) The General Framework

The new anti age discrimination legislation is a potential concern, though we will wait to see how the Government intends to proceed with it. One of the potential problems with age discrimination is that it involves a continuum, rather than a clear distinction between black/white, male/female, gay/straight. How old is old? And who are the young? Moreover, the problem with such potentially vague legislation, which could also be introduced in the absence of a clear definition of what is "fair", is that employment tribunals could be left to determine what conduct is lawful, "after the event". This could place an unreasonable financial burden on the employers and encourage litigation. Litigation, of course, means conflict, and that will often exacerbate rather than resolve problems in the workplace.⁸⁹ (We discuss employment tribunals in chapter 6.) The new legislation, even without major litigation, could prove costly for employers.⁹⁰ We await the Government's consultation procedures on the General Framework in relation to age with interest.

We also have serious concerns about the almost inevitable abolition of the employers' contractual retirement age (CRA),⁹¹ though we understand that the Government will still allow employers to be able to treat people differently where there is a "genuine determining occupational requirement".⁹² This is right for health and safety reasons, but there could still be problems with badly motivated older staff "working their time to retirement and unwilling to learn new skills".

We also note that the Government is proposing a mandatory retirement age of 70 (a new development) as part of their response to the EU Directive.^{93, 94, 95} We understand their response. And, on the whole, we are quite relaxed about employers being faced with the prospect of an ageing workforce. We only hope that the older parts of the ageing workforce understand why this has to be. It's not just about the law, it's about market forces and pensions (see above).

4.10 Sexual orientation, and religion and belief

There is currently no specific discrimination legislation for either sexual orientation or religion and belief, though clearly such people all have general employee rights. This will change later this year:

- The General Framework (which also covers disability and age) includes sections on sexual orientation and religion and belief and the relevant requirements are due to be implemented in December 2003.

We would dearly like these issues to be left to best practice but, alas, this will not be the case.

Concerning the **sexual orientation** discrimination legislation, this could, for example, effectively extend pension and benefits rights to same-sex partners. But at least it should be reasonably straightforward to establish a straight/gay distinction. But if it came to monitoring, some employees may simply not wish to disclose sensitive information about what they rightly regard as their private life. And if they refused the information there could be embarrassment.

We are decidedly less relaxed about the anti-discrimination legislation on the grounds of **religion and belief**. Problem one is the regulations' elastic definition of "religion or belief" as "any religion, religious belief or similar philosophical belief."⁹⁶ Unveiling the plans in 2002, Barbara Roche said it was "really difficult" to define belief and so the legislation would give protection to those belonging to religious movements that were not formally recognised, including humanists. But this vagueness is storing up trouble for the tribunals (who will have to sort it out) and costly for employers.⁹⁷ There are other potential problems too. There could be, for example, conflicts between sex and religious discrimination allegations if a strict Muslim man objects to having a female boss.

4.11 A single equality Commission

With the explosion of anti-discrimination legislation coming through ("you ain't seen nothing yet"), there will be essentially six different types of "client":

- Women (currently represented by the EOC).
- Ethnic minorities (currently represented by the CRE).
- Disabled people (currently represented by the DRC).
- "Older" people (currently no specific legislation).
- Minorities vis-à-vis sexual orientation, presumably homosexuals and bisexuals (currently no specific legislation).
- People who have religious views or generalised "beliefs" (currently no specific legislation).

As we said at the top of this chapter, it's tough if you're a white, straight, fairly young, able-bodied male with moderate religious (Christian) views.

The Government has taken the view that there should be one body to enforce the rapidly expanding body of anti-discrimination laws.⁹⁸ They are intending to merge the EOC, the

CRE and the DRC into one body, which would also address the issues of age, sexual orientation and religion/belief. Even though we recognise that discrimination on grounds of disability can be very different from discrimination on grounds of race, say, we sympathise with the Government position.

4.12 Conclusions

These are the conclusions of this chapter on discrimination legislation:

- We are totally and unequivocally opposed to discriminating against people on grounds of gender, race, disability or any other personal attribute (4.2).
- We are not opposed to anti-discrimination legislation in principle. The legislation that has been developed over the last 30 years on equal pay and sex, race and disability discrimination has been, on balance, positive. But the current developments are quite unnecessary. They will be costly for employers, they risk increased resentment and, partly because they are so vague, they risk further litigation. The voluntary approach is far to be preferred. (4.2 and later sections.)
- The EU's Directives on discrimination (covering sex, race, age and disability and sexual orientation and religion and belief) carry the risk that the burden of proof for employers could be increased (see 3.5.2 (ii)).
- Men and women behave differently in the labour market, this is particularly true when a woman has children. Unpalatable though this may be to hard-line feminists, men and women are different. The so-called gender pay gap reflects this. There is little evidence for wholesale discrimination against women by employers (though the recent extensions to "family friendly" policies are likely to be quite counter-productive here). But the Government (especially the DTI, the "department for business") behaves as if there were evidence - doubtless influenced by the EOC. (Sections 4.3 to 4.6.)
- Ethnic minorities do not make a homogenous group. Certain ethnic minority groups, including the Indians and the Chinese, are outstripping the Whites. It is time to stop seeing ethnic minority groups as "special cases". They are increasingly well integrated into British work-life. They are British. And that is how it should be. But we are, of course, wholly supportive of any voluntary activities to improve race relations and prospects for ethnic minorities in the workplace. (Section 4.7.)
- We recognise that disability is a barrier to employment and we support the activities of the Disability Rights Commission (DRC). But there are problems and costs for employers, especially small employers, in complying with all the disability legislation. (Section 4.8.)
- Market forces will probably drive people to working for longer. But the impending legislation on anti-ageism could be worryingly vague and will probably lead to more litigation. (Section 4.9.)
- The prospective legislation on sexual orientation will probably lead to some changes in the workplace, but we are relatively relaxed about it (see section 4.10).
- We are much more concerned about the vague wording concerning the new rights over religion and "belief". This is a potential "employment tribunal" minefield. (Section 4.10.)
- We fully understand the reasons for the Government deciding to replace the current discrimination bodies (EOC, CRE, DRC) with one body, which will also handle age, sexual orientation and religion and belief. (Section 4.11.)

References

1. Boyle: "Discrimination: a business view" (IoD, February 1997).
2. Epstein: "Equal opportunity or more opportunity?" (Civitas, 2002).
3. DTI: "Equality and Diversity: the way ahead" (DTI consultation document, 2003), which, incidentally, is quite fair and non-contentious.
4. For example, Gee's "Essential Facts: Employment". It is updated quarterly and successfully keeps up with the flood of new regulations.
5. Lea: "The 'Work-Life Balance'...and all that. The re-regulation of the labour market" (IoD, 2001).
6. More detailed figures are available in OECD Employment Outlook (July 2002), which contains an extensive article "Women at work: who are they and how are they faring?"
7. The activity (or participation or economic activity) rate is the number of people who are in employment or unemployed as a % of the total population aged 16 or over (usually).
8. IDS: "The gender pay gap" (IDS report 873, January 2003). This article said that the NES had found that FT men worked an average 40.9 hours a week, compared with 37.5 hours for women and 30% of men worked overtime compared with 16% of women. See also Duncan: "Pay gap widens between sexes as earnings of top men swell" (Times, 2 January 2003).
9. Grimshaw and Rubery: "The gender pay gap: a research review" (EOC, 2001). They reported that the gender pay gap had remained relatively unchanged recently. In 1999, women in full-time work earned 82% of the average hourly pay of male full-time employees (including overtime) and women in PT work earned, on average, 60% of the average hourly pay of male FT employees.
10. Shackleton and Urwin: "Men and the labour market" (in Pizzey, Shackleton and Urwin: "Women or men – who are the victims?" (Civitas, 2000, introduced by Green)). They found that, nevertheless, women's position in the labour market had improved in recent decades. Women earned on average 75% of men's earnings in 1998, but 25 years ago it was only 62%. For full-time employees the proportion had risen from 60% in the mid 1970s to 80% in 1998. In the early 1970s, only 8% of women earned more than their (working) partner, but currently this is about a quarter (and for full-time employees, the figure is nearly 30%).
11. Phillips: "The sex-change society" (SMF, 1999) and Phillips: "Death of masculinity" (SMF review, December 1999), wrote that fathers classically express their feelings for their families not by talking, weeping and emoting but through the practical deeds of working and providing. That is why the unisex attack on male breadwinning is so devastating for men; it is nothing less than an attack on the distinctive way their sex expresses some of its deepest feelings.
12. Doughty: "Do so many men really want to work long hours?" (Daily Mail, 28 March 2003), reported that large numbers of men resented the idea that they should ease off at work in order to give more time to their family life, according to a survey by Management Today and the Work Foundation. "Management Today" wrote "men still derive an immense amount of satisfaction from their jobs and in quite a traditional way continue to define their sense of accomplishment through their work.
13. Reeves: "Mothers versus men: why women lose at work" (Industrial Society, 2000) concluded "we have a choice. Either we break down the roles attached to motherhood and fatherhood or live with the consequences. We should be shattering maternal and paternal stereotypes. We should be allowing men and women to freely choose their roles." He also called for paternity leave to match maternity leave. Suffice to say we don't agree with this analysis. It flies in the face of what men and women actually appear to want. And it's patronising to suggest that their "attitudes need to be educated and/or altered", as we have seen written elsewhere.
14. Elliott: "Young mothers say they want to stay at home" (Sunday Times, 9 March 2003), wrote about a report called "Winners and Losers", funded by the ESRC. It concluded that two-thirds of women under 35 would rather stay at home when they become mothers or they would prefer to work part-time. Over a half of young women expressed "traditional" attitudes toward work and family. Most accepted that women with young children should not work full-time. [We would agree with this. Women should be able to make the choice to make their young children their

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- priority and putting career second without feeling guilty and old-fashioned. Of course, if women wish to drive forward with a high-flying career and have children they should be supported.]
15. Pizzey, Shackleton and Urwin: "Women or men – who are the victims?" (Civitas, 2000, introduced by Green).
 16. Turner: "Women in their 30s miss out on parity of earnings growth" (FT, 2 January 2002)
 17. Hardy: Small step or giant leap?: towards gender equality at work" (The Industrial Society, 2001), mentioned the fact that some women feel they can't work within work environments they regard as "masculine".
 18. Elliott and Chittenden: "Women 'choose to have lower pay than men'" (Sunday Times, 6 April 2003).
 19. Elliott and Chittenden: "Women 'choose to have lower pay than men'" (Sunday Times, 6 April 2003).
 20. Catherine Hakim: "Five feminist myths about women's employment" (British Journal of Sociology, September 1995). See table 4/3 (annex 4) for an abstract.
 21. Catherine Hakim: "The sexual division of labour and women's heterogeneity" (British Journal of Sociology, March 1996). See table 4/4 (annex 4) for an abstract.
 22. Kingsley Browne: "Divided labours: an evolutionary view of women at work" (Darwinism Today: Weidenfeld & Nicolson, 1998). See table 4/5 (annex 4) for an abstract.
 23. (1) IDS: "The gender pay gap" (IDS report 873, January 2003). See also (2) IDS: "The gender pay gap" (IDS report 838, August 2001), on the Equal Pay Task Force's 2001 report to EOC. This reported that "more than 60% of women's employment is concentrated in just 10 out of the 77 occupations (as measured at minor group level in the current Standard Occupational Classification). For example, 1 in 10 women work as sales assistants, 6% as teaching professionals, 6% as secretaries and 5% as nurses."
 24. IDS: "The gender pay gap" (IDS report 873, January 2003).
 25. IDS: "Most women managers feel they are "treated the same" as men at their level" (March 2001), reported that, according to a joint study from Wall Street Journal and Arthur Andersen ("Women in business"), 82% of UK women said that they were treated the same way as men at their level.
 26. See Grimshaw and Rubery: "The gender pay gap: a research review" (EOC, 2001), seems to assume that unequal pay is unjust pay. Moreover, quotes feminist authors who claim that there is "evidence of the gendered valuation of skills" and "the under-valuation of jobs performed by women which provides further 'proof' of the inefficient biases inherent in the labour market".
 27. Shackleton and Urwin: "Men and the labour market" in Pizzey, Shackleton and Urwin: "Women or men – who are the victims?" (Civitas, 2000, introduced by Green).
 28. As the Civitas paper (above) writes "in true 'victicrat' strategy anything unexplained is attributable to discrimination – women must be defined as the victims of oppression by "male" employers".
 29. Sowell: "Civil rights: rhetoric or reality?" (William Morrow, 1984).
 30. IDS: "gender differentials laid bare" (IRS Employment Review, 761, 7 October 2002), reported that women's incomes were less than half those of men, according to a report from the DTI's Women and Equality Unit ("Individual income 1996/97 to 2000/01"). The DTI report showed that the total weekly median income (gross income plus tax credits) for women in 2000/01 was £133, compared with £271 for men. Presumably these figures refer to both full-time and part-time workers.
 31. IRS: "Chasing progress on equal pay" (IRS Employment review, 774, 18 April 2003), reported on the Equal Pay Task Force's 2001 report that was entitled "Just Pay: a report to the EOC". EOC claimed that, between 25% and 50% of the pay gap was attributable to pay discrimination by employers. [The IoD contributed to the Equal Pay Task Force's exercise, which culminated in their report: "Just pay: a report to the EOC" (February 2001). Suffice to say, the IoD's influence was minimal.]
 32. IRS: "Chasing progress on equal pay" (IRS Employment review, 774, 18 April 2003).

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33. It really is time that EOC, for example, accepts that people make their own choices for their own reasons. And sometimes these involve hard choices, but this is what adult behaviour is all about. Otherwise we are just being “infantilised”.
 34. IDS: “The gender pay gap” (IDS report 838, August 2001), on the Equal Pay Task Force’s 2001 report to EOC.
 35. Rake (ed): Women’s incomes over the lifetime” (Women’s Unit, Cabinet Office, March 2000).
 36. DTI: “Work and parents: competitiveness and choice” Green Paper (TSO, December 2000).
 37. DfEE: “Towards Equal Pay for Women – speed and simplicity in tribunal cases and the Burden of Proof Directive” (DfEE, 2000), also quoted the data.
 38. Equal Pay Task Force: “Just Pay: a report to the EOC” (February 2001).
 39. Wheatcroft: “Come on girls, show some spirit” (Times, 28 February 2001), wrote that the recommended compulsory pay reviews and the identification of gender gaps would impose costs and cause resentment.
 40. Shrimley: “Employers face equal pay queries” (FT, 3 December 2001) reported that the (Denise) Kingsmill report on equal pay was due to be presented to Patricia Hewitt in December 2001.
 41. IDS: “Kingsmill recommends package of measures to address the gender pay gap” (IDS Report 848, January 2002).
 42. IDS Employment Europe: “UK addresses the gender pay gap” (IDS, report 482, February 2002).
 43. IRS Employment Review: “Firms resist calls for equal pay audits” (IRS Review, 748, 25 March 2002).
 44. IDS: Employment report: “Lack of progress on equal pay may make gender pay audits mandatory” (Report 879, April 2003), reported that new research from the EOC has revealed that the majority of employers have no plans to carry out an equal pay audit. (The EOC’s Equal Pay Taskforce recommended (in 2001) that employers should be legally required to audit their pay systems to check for discrimination; the Kingsmill Review recommended a voluntary approach to equal pay audits.)
 45. Lea: “The ‘Work-Life Balance’...and all that. The re-regulation of the labour market” (IoD, 2001).
 46. The DTI sent us 6 booklets in March 2003) to cover the new laws (and some of pre-April 2003 family friendly policies). They were: (1) Maternity rights for babies due on or after 6 April 2003: a guide for employers and employees, (PL 957 (Rev 8)), 96 pages (A5), (2) Adoptive parents, rights to leave and pay: a basic summary (PL 515 (Rev 1)), 18 pages (less than A5 size), (3) Working fathers, rights to paternity leave and pay: a guide for employers and employees (PL 517), 48 pages (A5), (4) Flexible working: the right to request & the duty to consider: a guide for employers and employees (PL 520), 56 pages (A4 size) and forms (red tape), (5) Parental leave: a guide for employers and employees (PL 509), 40 pages (A5), (6) Time off for dependants: a guide for employers and employees (URN 99/1186), (A5). All happy bedtime reading that will be the despair of, in particular, small businesses.
 47. Lea: “6th April: a black day for business” (IoD, March 2003). This note covered the changes to family friendly policies, the changes to the tax credits and the rises in employers’ NICs.
 48. Malthouse: “Maternity” (IoD, May 1998), reporting on an IoD survey showed many employers then were more generous about maternity leave and pay than required by statute. So it wasn’t a matter of employers exploiting their women employees. They enhanced benefits voluntarily because it fitted in with the needs of the business. And see the next reference.
 49. IRS: “Survey finds that most employers go beyond legal minimum (IRS Employment trends, 713, October 2000), reported that “over half the employers surveyed have enhanced (or intend to enhance) provision of parental leave beyond the legal minimum.”
 50. DTI: “Work and Parents: competitiveness and choice” Green Paper (TSO, December 2000).
 51. Lea: “Maternity rights in the workplace” (IoD, August 1999).
 52. Lea: “Women’s employment rights and implications for employability” (IoD, March 2002).
 53. Phillips: “Farce of the working women who have too many rights” (Sunday Times, 17 September 2000), wrote “women have now stopped being fair. Increasingly they are refusing to make [such] choices and insisting that they must have it all, loading the consequences onto the employers

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- instead. The government is encouraging this selfish and irresponsible attitude. Constantly exhorting employers to produce “family friendly” working, it cavalierly brushes aside the impact on job performance of working fewer hours and expects employers to make good any deficiencies.”
54. Paul and Taylor: “Mothers’ employment and childcare use in Britain” (IFS, March 2002), wrote that the vast majority of non-working mothers reported that they were prevented from seeking work by having to look after children, but a much smaller fraction (about a quarter) claimed that they would also like to have a regular paid job. But, they added, although lower provision of childcare places was associated with lower employment rates, this could not be interpreted as evidence of childcare constraints.
 55. IRS: “All work and no play?” (IRS Employment Review, 747, 11 March 2002), reported that, whether providing a workplace nursery or play scheme, a cash allowance or advice, nearly half the organisations surveyed by IRS assisted their employees with their childcare arrangements, and most agreed that there were real business benefits. Providing childcare assistance helped with staff retention and was an incentive to recruitment.
 56. Lea: “Women’s employment rights and implications for employability” (IoD, March 2002).
 57. For example, Gee’s “Essential Facts: Employment”. It is updated quarterly and successfully keeps up with the flood of new regulations.
 58. Metcalf and Forth: “Business benefits of race equality at work” (Race research for the future, Research Report RR177, DfEE 1999).
 59. CBI: “A winning strategy: the business case for equal opportunities” (CBI, 1996).
 60. The IoD has supported the CRE’s leadership challenge.
 61. Johnston: “Tough new race laws ‘will cost millions’” (Daily Telegraph, 3 December 2001) reported that “the biggest expansion of the Race Relations laws in 25 years takes effect today when thousands of public bodies employing millions of people face new statutory duties to deliver racial equality. Organisations ranging from the police to the Armed Forces to local councils, schools and the BBC will be under a legal obligation to publish race equality schemes and carry out ethnic monitoring of their workforce.”
 62. We appreciate that the CRE has had its critics for its support of “multiculturalism”, which, in the author’s view, effectively undermines the unity of British society. See, for example, (1) Phillips: “We should shut down the race industry” (Sunday Times, 20 December 1998), wrote that Herman Ouseley (the then chairman of the CRE) had said that “black children needed to be taught black culture, yet this approach would spell disaster for black children”. She added “like the EOC the CRE is an architect of the grievance culture, which produces racial strife”. (2) Cracknell: “Phillips attacks Straw in racism row” (Sunday Telegraph, 15 October 2000), reported that Trevor Phillips (of the CRE) had said that Britain should be declared a multicultural society, “a community of communities”, and its history rewritten to be more inclusive. This second reference was straight reporting.
 63. Metcalf and Forth: “Business benefits of race equality at work” (Race research for the future, Research Report RR177, DfEE 1999).
 64. Sly et al: “Trends in labour market participation of ethnic groups” (LMT, December 1999).
 65. “Patterns of labour market participation in ethnic minority groups” (Labour Market Trends, November 2000). The LMT article summarised the key labour market findings from a DfEE research report “Minority ethnic participation and achievements in education, training and the labour market”. A further article on ethnics and the workplace appeared in LMT January 2001.
 66. Towney: “Labour market participation of ethnic groups” (LMT, January 2001).
 67. CRE factsheets: “Employment & unemployment” (CRE, 1997).
 68. CRE factsheets: “Employment & unemployment” (CRE, 1997).
 69. Lea: “Education and training: a business blueprint for reform” (IoD, 2002).
 70. Bennett: “Ethnic minorities lose out on promotion despite their qualifications, study finds” (FT, 20 February 2002), reported on an interim report from the Performance and Innovation Unit (PIU), which said that Britons of Indian extraction were paid less and found it harder to win promotion than their white colleagues. There was a bleaker picture for people of African,

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- Caribbean, Pakistani and Bangladeshi extraction. However, there was a big improvement in employment prospects for all second-generation members of ethnic minorities.
71. Employers' Forum on Disability: "A brief introduction to the DDA" (c2000). The Employers' Forum on Disability provides excellent information on, for example, welcoming disabled customers; and meeting, interviewing and working with disabled people.
 72. Harris: "The Disability Discrimination Act 1995" (IoD, January 2000). The DfEE estimated the costs for service providers of making "reasonable adjustments" for access for phase (2) at £187-234m in non-recurring cost and £62-283m in recurring cost, and for phase (3) at £606-1,238m in non-recurring cost. The DfEE estimated costs of £10m pa for employers making "reasonable adjustments" to their premises (assuming the small firms exemption of 15, which will be abolished in 2004).
 73. Wilson and Harris: "Business and the DDA" (IoD, September 2000), concluded that small firms will need help to comply with DDA.
 74. In-work tax credits are discussed in chapter 3.
 75. We discussed some of the problems surrounding the "medicalisation" of stress and depression in (1) Lea: "Healthcare in the UK: the need for reform" (IoD, 2000), (2) Lea: "The Work-Life Balance...and all that: the re-regulation of the labour market" (IoD, 2001).
 76. The Employers' Forum on Disability have used data that show there are more than 6 million disabled people in the UK (1 in 10), but only 2.4m are of working age (again there are differences to the definition of working age). The DRC in "Disability equality: making it happen: the first review of the DDA" (DRC, April 2003) claimed that there were 8.5 million disabled people in Britain, one in seven of the population. The figure included "people with epilepsy, cancer, schizophrenia, Down's syndrome and many other types of impairment."
 77. Turner: "fears over 'hidden unemployment'" (FT, 12 April 2003).
 78. Epstein: "Equal opportunity or more opportunity?" (Civitas, 2002), interestingly enough, even though heavily against discrimination, made a special case for age discrimination. Younger workers, he wrote, learn faster, will be around longer (making training worthwhile), are healthier, and if you don't retire people off then you disrupt the orderly transition between generations. He added, talking of the US experience, that "we can now see that statutes banning mandatory retirement suffer from two major disadvantages: (1) they adversely affect how a firm deals with individual employees and (2) they change the distribution of age, the transmission of information, and the transmission of control inside the firm in ways that could threaten its very stability". Then there's the problem of deterioration of performance ahead of retirement. But there were three rays of hope: (1) workers sometimes wish to retire early, (2) in some countries there are exemptions for senior employees and (3) you can buy off employees by paying their pensions twice.
 79. Wilson: "The rise in unemployment among older people: causes and solutions" (IoD, March, 2000).
 80. Rutter: "Older workers gain ground" (Director: January 2003), talked about "getting age-neutral".
 81. IoD press release: "Advertising curb no solution to ageism, says IoD" (IoD February 1996), said that "age discrimination should be addressed on a voluntary basis and according to best practice. The spokesperson was quoted as saying "those who discriminate on the basis of a person's age miss out on a vast repository of experience and knowledge, but legislation is not the way to deal with ageism".
 82. Wilson: "The rise in unemployment among older people: causes and solutions" (IoD, March, 2000).
 83. (1) DfEE: "Age diversity in employment: guidance and case studies" (DfEE, 1999). The Code of Practice on Age Diversity in Employment called upon employers to tackle age discrimination. The Code set out a series of principles for tackling age discrimination and promoting age diversity in the workplace. It covered six different aspects of the employment cycle: recruitment, selection, promotion, training and development, redundancy and retirement. We were broadly supportive. (2) The "Age Positive", Government, campaign followed on from, and included, the Code of Practice. See DWP: "Age Diversity at Work: a practical guide for business" (DWP, 2002).

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84. IRS Employment Trends: "Government sets out its stall on tackling age discrimination" (report 666, October 1998), discussed the forthcoming voluntary Code of Practice on age discrimination in employment. The article said it was clear that age discrimination did exist against older workers.
 85. Browne: "Do we need mass immigration?" (Civitas, 2002). The author effectively challenged the notion that Britain's population (especially working population) is about to go into "freefall". He concluded: Britain doesn't have a declining population (GAD's projections show no decline until 2030, even without immigration), Britain doesn't have a declining workforce (again GAD's projections show no decline in people of working age until 2030, even without immigration, Britain isn't suffering from a demographic time bomb and Britain isn't suffering from generalised labour shortages and there are, arguably, 4 million unemployed people. Moreover, as recognised by GAD, HO, OECD et al, immigration is no "fix" for an ageing population because immigrants grow old. So we will have to adjust to an ageing population. Browne successfully challenges the claim that we need mass immigration in order to maintain prosperity.
 86. Brownlee: "Crisis? What crisis? Pension policy in the UK: The response of the Institute of Directors to the Government's consultations on pensions" (IoD, 2003).
 87. Lea "Is this the end for final-salary schemes?" (House Magazine, October 2002).
 88. Wheatcroft: "Market forces point to later retirement" (Times, 18 April 2003).
 89. Wheeler: "When some are more equal than others" (Daily Telegraph, 24 April 2003) wrote "badly drafted legislation that extends protection against discrimination at work risks becoming a charter for litigation". She also wrote: "will age discrimination laws really help? In some jobs, physical fitness is essential (pilots) and employers will not accept the increased risks from age. When the US banned mandatory retirement, employers increasingly dismissed older workers on grounds of performance."
 90. Adams: "Staff may have right to work into their 90s" (FT, 14 December 2001), reported that a DTI paper said that the law might have to be changed to prevent employers setting Compulsory Retirement Ages (CRAs), to comply with EU anti-discrimination rules. The DTI paper put the one-off cost of the directive to business at £220m.
 91. Taylor: "CBI criticises plans to abolish retirement age" (FT, 14 February 2001), reported that the CBI had criticised Government plans to abolish the contractual retirement ages of men and women.
 92. Adams: "Staff may have right to work into their 90s" (FT, 14 December 2001).
 93. Judge: "Retirement at 70 is closer for UK" (Times, 18 April 2003), reported that plans to be published this summer will impose a mandatory retirement age on Britain's workers for the first time. Companies were currently able to set their own retirement age. People on company schemes will have to work until 70 or lose their right to claim their full pension.
 94. Clarke & Behar: "Millions face working to 70 for a company pension" (Daily Mail, 19 April 2003), reported that the Government's proposals are partly about helping to solve the pensions crisis. Firms, in future, would have to base their calculations on a retirement age of 70, and those retiring earlier would be penalised.
 95. Sherwood: "A tricky question of faith in work" (FT, 21 April 2003), reported that the new age discrimination laws would have a dramatic effect on the way employers managed their workforce. They would change how they managed their pensions and how they handled people working longer.
 96. Wheeler: "When some are more equal than others" (Daily Telegraph, 24 April 2003).
 97. Sherwood: "A tricky question of faith in work" (FT, 21 April 2003).
 98. Kite: "Minority groups oppose single equality overlord" (Times, 15 May 2003), reported that certain minority groups were concerned about a single equality commission to champion women, gay people, ethnic minorities, the elderly and disabled people. The reported also wrote that Barbara Roche had said "there have been three ages of equality: the equality movement, positive action and mainstreaming." Well, this may have been the case in the world of jargonised fantasyland. Down on earth there have also been three stages: legislation, more legislation and even more legislation.

5 The EU's social agenda

5.1 Introduction

The EU's influence on UK employment legislation is very considerable. It probably now accounts for about 40% of all UK legislation.¹ Moreover, there is no sign that the Commission or any of the other organs of the EU have any intention of stopping the flow. The dominant motivation seems to be to create a "social" Europe with heavy job protection irrespective of the consequences of poorly performing sclerotic labour markets and high unemployment. This seems to us to be contrary if not downright dangerous.

In this chapter we start with the economic consequences of heavy regulation and the performance of EU labour markets (section 5.2). Sections 5.3 and 5.4 discuss the EU's social agenda (5.4 gives a chronological overview up to and including the Convention on the Future of Europe and the draft Constitutional Treaty). Section 5.5, assesses the overall impact of the EU's social agenda on the UK. Finally, we draw some conclusions (5.6).

We use the words "social" and "employment" interchangeably in this chapter, as this is the EU's practice. This, in itself, is indicative of the EU's social democratic anti-free markets mindset² despite its wish to become the most "competitive and dynamic economy in the world by 2010".^{3,4}

5.2.1 Employment regulations: economic consequences

We have already discussed the consequences of heavy regulations on economic and business performance in the UK context (chapter 2). In this section we consider the EU context.

There is little doubt that the core EU countries have under-performed vis-à-vis the USA over the past decade. Moreover, even though the USA currently has economic difficulties (May 2003), we are confident that it will overcome these problems whilst Germany's problems, in particular, seem to be far more intractable not least of all because of heavy regulations. The table below shows the total increase in the GDP between 1993 (=100) and up to 2002.

GDP cumulative growth for major EU economies and the USA: 1993-2002

Country	GDP (1993=100)
France	122.3
Germany	115.0
Italy	117.8
Eurozone	123.4
UK	128.5
US	133.4

Source: OECD: “Economic Outlook” (December 2002), including the OECD’s GDP growth estimate for 2002.

Marsden⁵, writing after the Lisbon Summit’s mission statement that the EU should be “the most competitive and dynamic knowledge-based economy in the world”, compared Asia with the EU and, to put it mildly, questioned whether the EU would achieve its goal. He listed several major issues where the EU was at a definite competitive disadvantage with Asia (excluding Japan, which has its own economic policy paralysis). The EU’s problems included higher taxes and bigger budgets, lower savings and investment, less innovation, slower productivity growth, ageing populations, high costs and a declining export market share, as shown in the following table.

Why Asia climbs up the world rankings and Europe slides down

	Price index US=100	Manufacturer’s share of world exports (%)		Government expenditure (% GDP)	Average annual growth (%)		
		2001 (extra-EU)	1990 (extra-EU)		Investment	Productivity (labour)	GDP
EU	93	17.0 (extra-EU)	18.1 (extra-EU)	45	2.3 (Eurozone)	1.7	2.4
Asia (excluding Japan)	25	19.6	12.9	16 (Central Government only)	7.3	5.2	7.2
World	70	100.0	100.0	25 (Central Government only)	3.3	1.6	3.4

Source: Marsden: “Why the EU is sliding down the world economic league” (The European Journal, February 2003).

So economically, unless there is a minor miracle and conversion from the heavily regulated and heavily taxed “Social Europe” model (which is surely discredited) to free market (“Anglo-Saxon”) deregulatory ways,⁶ it seems almost inevitable that the EU will continue its relative economic decline vis-à-vis the US and the Far East. The EU is over-regulated and increasingly uncompetitive with the rest of the world. The notion that the EU will be the “most dynamic and competitive economy in the world by 2010” simply beggars belief. We

wonder if the EU's policy makers are aware of what is happening in the rest of the world and, if they are, we wonder if they care.

5.2.2 The EU's labour markets

The greatest impact of heavy labour market regulation is on the labour markets themselves. Labour market regulations in EU's main continental economies are hugely onerous (with the possible exceptions of the Netherlands and Denmark) and, along with the high social on-costs, undoubtedly discourage job creation. And, as we have discussed in a previous paper,⁷ there is little doubt that more flexible,^{8,9} less heavily regulated labour markets (with lower social on-costs) are associated with better performing labour markets: higher employment ratios, more job creation, higher activity rates and lower unemployment rates.¹⁰

Key employment data: main EU countries, USA and Japan

	Employment rates (as a % of the working age population)		Labour force participation rates (%)		Unemployment rates (% of labour force)		
	2002E	2003P	2002E	2003P	2001	2002E	2003P
France	63.3	63.1	69.6	69.7	8.7	9.0	9.4
Germany	69.6	69.6	75.5	75.7	7.3	7.8	8.1
Italy	56.0	56.6	61.6	62.3	9.6	9.2	9.2
Netherlands	65.3	65.4	67.1	67.7	2.0	2.7	3.5
Spain	59.8	60.4	67.3	68.0	10.5	11.2	11.2
Eurozone	63.7	63.9	69.4	69.8	8.0	8.3	8.5
UK	72.0	71.9	76.0	75.8	5.1	5.2	5.2
EU	65.4	65.5	70.7	71.0	7.3	7.6	7.8
USA	71.3 (2001)	Na	74.9 (2001)	Na	4.8	5.8	6.0
Japan	73.4	73.4	77.6	77.7	5.0	5.5	5.6

Source: OECD: "Economic Outlook" (December 2002). Please note that the unemployment rates in the above table are the "commonly used" definitions.

We believe that job creation is encouraged by minimising the regulatory and cost burdens of taking on employees, and this is the most effective way of ensuring job security is to have a dynamic, job-creating and competitive economy.¹¹ The EU Commission seems to believe the opposite.

We agree with Marsden¹², who wrote:

- The evidence presented [in this paper], therefore, shows that it is "wrong" to say that Franco-German policies provide "social protection". In particular, there can be little "fair" about pricing people out of work by increasing work-related regulations on employers. (In other words, it is not "fair" on people who want jobs to find the jobs have been regulated out of existence.) It is the Anglo-Saxon model that provides greater social protection. The successful way to combine "fairness" and

“flexibility” is to create a more flexible labour market that leads to a higher level of employment.

- In a major study of chronic unemployment in the EU, the IMF concluded that “an essential condition for successful reform is that any social system provide incentives toward market participation and remove institutions and regulations that hamper market-based reallocation of resources that enhance productivity and growth... The experience of countries that have undertaken reforms has been that the benefits take a considerable time to materialise. This was the case in the UK and the Netherlands, eg, where reforms that began in the early 1980s succeeded in lowering unemployment only gradually... And job creation across the advanced economies has been strongest in the new, dynamic sectors such as IT, where flexibility is the norm.”¹³

The EU’s social policy should be determined by reference to economic competitiveness rather than outdated concepts of labour market protectionism.¹⁴

5.3 The EU’s social agenda: introduction

“The proverbial level playing field that was part of M Delors’ flat earth economics” Dr Pedro Schwartz, Spanish economist, October 1996.

(i) “Social Europe”

At the heart of the EU’s social agenda is the concept of the “Social Europe” model (or the European social model) or the “Social Partnership” model (with formal stakeholder involvement). A broad definition of “Social Europe” or “European Social Policy”, covers all EU policies relating to employment, industrial relations and social affairs.

As we explained in our evidence to the House of Lords Select Committee on the European Union on the EU Social Policy Agenda,¹⁵ the IoD is unsympathetic to the European Social Policy (including the Social Policy Agenda) which reflects the traditional Continental “Social Europe” model for economic management and which is quite alien to the UK. The model, of course, involves “Social Partners” (including employer federations and trade unions) which have formal rights to decide how businesses should be run at all levels whether national, regional or company. In this model there is a great emphasis on the Government’s role in “creating jobs” and “ensuring job security” and, concomitantly, a suspicion of market forces that “justifies” Government intervention and heavy regulation. It is also a model that imposes unnecessary (in our view) costs on business.¹⁶

The IoD has always been a strong supporter of the UK’s “Enterprise” model,¹⁷ which developed through the 1980s and early 1990s and which is now being partly reversed. In this model employers are free to build up direct individual relationships with their employees. It is up to employers, in agreed relationships with their employees, to decide how their businesses are to be run and the economy is largely left to market forces. In this model the business sector looks to Government to keep tax and regulation to an acceptable minimum (we are by no means against regulations per se) and, thus, enable business to remain competitive, thrive and create jobs. (The Government has a role, of course, in funding basic

health, education and social security services.) The IoD, therefore, believes that it should be left to individual businesspeople to run their own businesses. Only this way can companies react sufficiently quickly in the face of competitive challenges in a fiercely competitive global economy. And it is worth emphasising that British business doesn't just have to cope with competitive pressures from other EU countries, but also from other countries – not least of all, the dynamic powerhouse that is the US.

(ii) Social harmonisation

“Social” regulations are, in part, intended to impose “social harmonisation” and “level playing fields” on all EU Member States, which may be attempting to maintain their international competitiveness by promoting business friendly regulation. But such initiatives, intended to help a country to compete internationally, tend to be dismissed by the Brussels bureaucratic mindset as “unfair labour market competition” and/or “social dumping”. (There is a strong whiff of protectionism as well.) These regulations may be intended to prevent “social dumping” and “unfair labour market competition” - but they are more likely to restrict any competition however fair or unfair. This is especially the case as the harmonisation tends to be “upwards”, in other words, towards the most heavily regulated regime. (They are analogous to the concept of “fiscal harmonisation” in the tax field to prevent “fiscal dumping” or “unfair tax competition”.)¹⁸

The Directives aimed at “harmonisation” are, moreover, disproportionately damaging for the UK's competitive position because of our relatively lightly regulated labour market (or at least it was, but our competitive advantage in this respect has certainly been eroded over the past three years). They are a way of ensuring the UK has as much of the regulation as our EU partners. But EU labour market harmonisation does not just damage British competitiveness vis-à-vis the rest of the EU; it damages it with the rest of the world. The British economy is global.^{19,20}

The Rome Treaty (1957), which was when the EU's interest in social legislation started, touched on the concept of social “harmonisation”. But it was not until the mid 1970s that it really started to take off.²¹

5.4.1 A chronological overview: introduction

We have written extensively on the complexities of the EU's social agenda and will discuss them here in four chronological blocks:

- The 1950s, 1960s and 1970s (5.4.2).
- The 1980s (5.4.3).
- The 1990s (5.4.4).
- The 2000s (5.4.5).

5.4.2 The 1950s, 1960s and 1970s: the Rome Treaty and the Social Action Programme

Key events: the 1950s, 1960s and 1970s

Date	Event
1951	The Treaty of Paris signed (which established the European Coal and Steel Community (ECSC)) stated that one of the objectives of the ECSC was “to promote improved living and working conditions...for the workers”. Came into force in 1952.
1957	The Treaty of Rome signed (which set up the European Economic Community (EEC) and the European Atomic Energy Authority (EURATOM)) made provisions for the constant improvements in working conditions and employment. Articles 117 (dialogue between workers and management), 118 (118a, 118b are about cooperation on a wide range of employment issues), 119 (on equal pay) and 100 (on social directives) have clear implications for employment law. Came into force in 1958.
1960	The first European Social Fund (ESF) was set up “to improve employment opportunities for workers in the EEC and to contribute, thereby, to raising the standard of living”.
1972	The Paris Summit communiqué asserted that “as much importance was attached to vigorous action in the social field as to the achievement of economic and monetary union.” This led to a general upgrading of EC social policy.
1974	The Commission set up the Social Action Programme (SAP) with the following major objectives: (1) attainment of full and better employment, (2) improvement and upward harmonisation of living and working conditions, (3) increased involvement of management and labour in the EC and of workers in the life of their firms, (4) implementation of a common vocational training policy.
1975	Equal Pay Directive.
1975	Collective Redundancies Directive.
1976	Equal Treatment Directive.
1977	Transfers of Undertakings Directive (to protect the continuity of the worker’s employment & conditions of employment) (TUPE). Also known as the Acquired (employee) Rights Directive.
1979	Equal Treatment (State Social Security) Directive.

(i) The Rome Treaty (1957)

There is little doubt that right from the start of, what is now the EU, it was to be much more than a free trade area. Not merely did it talk about the “ever closer union of the peoples of Europe”, but it also has a “social” element. It included references to social policies (including labour law and industrial relations). It also touched on the concept of the “harmonisation” of working conditions - as well as standards of living and social systems.

(ii) The Social Action Programme (SAP) (1974)

The Commission adopted its first Social Action Programme (SAP) in 1974, which included provisions concerning the improvement and upward harmonisation of working conditions, even though the treaty basis for social legislation was very narrow.²² Several similar programmes, which attempted to widen the regulation of employment practices, followed the SAP. So it was with the SAP that EU-wide social “harmonisation” really took off in the mid 1970s.²³ Four very major Directives, on Equal Pay, Collective Redundancies, Equal Treatment and TUPE, followed.

5.4.3 The 1980s: the Single European Act and the Social Charter

Key events: the 1980s

Date	Event
1980	Insolvencies Directive (of employer).
1980	The Commission submitted to the Council the Vredeling Directive (named after the Commissioner for labour and social affairs) on worker participation, involving multinationals and inspired by the German model of co-determination.
1985	Commission President Jacques Delors held the first meeting at Val Duchesse (Belgium) concerning the promotion of social dialogue between workers and employers. The main participants were the European Trade Union Confederation (ETUC), the Union of Industries of the European Communities (UNICE, the European Employers' Federation) and the European Centre for Public Enterprises: the “social partners”.
1986	Equal Treatment (Occupational Social Security) Directive.
1986	Equal Treatment (Self-Employed) Directive.
1986	The Single European Act (SEA) included: (1) Article 118a on health and safety, (2) Articles 130a-130e on economic and social cohesion. The SEA extended Qualified Majority Voting (QMV). Came into force in 1987.
1987	Insolvency (Spanish Accession) Directive.
1989	The European Social Charter was adopted by 11 of the 12 EC member states (excluding the UK) at the Madrid Summit. It covered the following 12 policy areas: (1) freedom of movement, (2) fair wages, (3) improvement of living & working conditions (working hours), (4) social protection, (5) freedom of association & collective bargaining, (6) vocational training, (7) equal opportunities, (8) worker consultation (information, consultation & participation by workers), (9) health, protection & safety in the workplace, (10) protection of children, (11) elderly persons, (12) disabled persons. There was a 5-year Social Charter Action Programme to implement the Charter throughout the EC.
1989	Health and Safety (Framework) Directive (which led to “daughter” Directives aimed at implementing, in specific areas, the provisions in the Framework Directive).

(i) The Single European Act (1986)

Further Directives during the 1980s (see above), but the major event of the mid 1980s was the introduction of the Single European Act (SEA) in 1986; it provided the next major boost for social harmonisation. The extension of Qualified Majority Voting (QMV) under the 1986 SEA made it easier to pass social legislation. The SEA included initiatives for extending the regulation of employment practices and permitted qualified majority voting for health and safety directives.

(ii) The Social Charter (1989)

The Social Charter (Community Charter of Fundamental Social Rights for Workers), which was a declaration of principle rather than a legislative programme, followed the SEA and provided further impetus to the social agenda. The Charter was adopted in 1989, the UK dissenting, and emphasised new employee “rights” and “freedoms”. The Commission then devised a five-year Social Action Programme (1990-95) to implement the Charter throughout the EC. After the “Social Charter” was proclaimed, legislative proposals “came thick and fast”, some making “creative use” of health and safety criteria.²⁴

5.4.4 The 1990s: Maastricht and the Social Chapter, and Amsterdam

Key events: the 1990s

Date	Event
1991	Proof of Employment Relationship Contract.
1991	Temporary Workers Directive.
1991	Health and Safety (Fixed-term and Temporary Workers) Directive.
1991	Maastricht Treaty (Treaty on European Union, TEU) agreed. It included the Protocol on Social Policy (The Social Chapter, the Agreement on Social Policy) signed by all EU members excluding the UK. The Social Chapter was designed to facilitate the implementation of the Social Action Programme of the 1989 Social Charter. The Maastricht Treaty emphasised: (1) Health & Safety at work, (2) working conditions, (3) consultation of workers, (4) equality, (5) social security provision for workers, (6) protection against termination of employment, (7) conditions for third-country nationals legally residing in EU territory, (8) EU financial support or the promotion of employment and job creation. Signed in 1992 and came into force in 1993.
1992	Pregnancy and Maternity Directive: Protection of Pregnant women at Work Directive.
1992	1975 Collective Redundancies Directive (amended).
1993	Working Time Directive.
1994	Young Workers Directive.
1994	European Works Councils (SC).
1994	“Growth, Competitiveness, Employment: the challenges and ways forward into the 21 st century” White Paper (European Commission).
1995	Data Protection Directive.

1996	Parental Leave Directive (SC).
1996	Posted Workers Directive.
1996	Directive amending the Equal Treatment (Occupational Social Security) Directive.
1997	Burden of Proof in Sex Discrimination Cases (SC).
1997	Part-time Workers Directive (SC).
1997	Amsterdam Summit agreed and signed. The UK signs the Social Chapter. As a result of the Treaty of Amsterdam new competencies were created in the areas of race, age, disability and sexual orientation discrimination legislation. (Article 13). Came into force in 1999.
1997	European Works Councils (UK Extension) Directive.
1997	Parental Leave (UK Extension) Directive.
1998	Burden of Proof in Sex Discrimination Cases (UK Extension) Directive.
1998	Part-time Workers (UK Extension) Directive.
1998	Occupational Pension Mobility Directive.
1998	Amended Transfer of Undertakings (Protection of Employment) (TUPE) regulations (Acquired Rights).
1999	Fixed-Term Work Directive (began under SC).
1999	Working Time (Extension to Seafarers) Directive.

Please note: SC stands for Social Chapter.

(i) The Maastricht Treaty (1991) and the Social Chapter

The Maastricht Treaty was a major integrationist step in Europe. Indeed it is also known as the Treaty on the European Union, as it established the European Union. (The EU, however, still did not have its own legal personality and derived its powers from the Member States. This would change under the draft Constitutional Treaty – see 5.4.5.)

It established three “pillars”:

- The Community dimension, comprising the arrangements set out in the European Community (EC), European Coal and Steel Community (ECSC) and Euratom Treaties (including Economic and Monetary Union (EMU)).
- Common Foreign and Security Policy (CSFP).
- Police and judicial cooperation in criminal matters - Justice and Home Affairs (JHA).

The Protocol on Social Policy and Agreement on Social Policy (the “**Social Chapter**”), was appended to the Maastricht Treaty and was yet another boost to yet more EU regulation. Again the UK dissented. It had originally been intended as part of the Treaty on EU but was removed because John Major, quite rightly, refused to agree to it.^{25,26,27,28} By the time of the Amsterdam Treaty, there were six Directives either passed or being negotiated. They were:

- European Works Councils (1994).
- Parental Leave (1996).
- Burden of Proof in Sex Discrimination Cases (1997), Part-time Workers (1997).
- Fixed-Term Work (1999).
- Compulsory Information and Consultation Procedures (National Works Councils) (2002).

(ii) EU concern about unemployment (mid 1990s)

The severe recession of 1993 led to some rethinking of employment policy by the Commission and more especially by the Directorate-General for Employment, Industrial Relations and Social Affairs (DG5).²⁹ There was an emphasis on jobs and a change of tone,^{30, 31} and also an aim to create 15 million jobs by the end of the century (up to 1999), which was undershot. Nevertheless, there was job growth between 1994 and 1999 as the table below shows. The fast growing periphery countries (Ireland, Portugal, Spain, Finland, Austria) and the Netherlands all showed above average growth – especially Ireland, the “Celtic tiger”. (Some of the growth in Spanish jobs probably reflected the switch in jobs from the black economy to the formal economy.) Denmark, the UK and Germany (partly reflecting population movements after the unification of Germany and partly reflecting the increase in work programme “jobs”), had creditable growth rates, though Germany’s unemployment has remained relatively high. The laggards were France, Sweden and, especially, Italy. It is of note that three countries (Germany, the UK and Spain) contributed 60% of the total EU increase. Employment growth in the EU was similar to that of the US during this specific period. Japan’s employment levels stagnated.

Employment levels: EU, Japan and US

	1994, level (000s)	1999, level (000s)	1994-1999 Change in level (000s)	1999 (1994=100)
Austria	3,452	4,011	552	116.2
Belgium	3,686	3,906	220	106.0
Denmark	2,471	2,708	237	109.6
Finland	2,024	2,287	263	113.0
France	22,295	23,222	927	104.2
Germany	34,957	37,942	2,985	108.5
Greece	3,790	3,893	103	102.7
Ireland	1,225	1,616	391	131.9
Italy	20,120	20,492	372	101.8
Luxembourg	165	178	13	107.9
Netherlands	5,920	6,805	885	114.9
Portugal	4,218	4,791	573	113.6
Spain	11,730	13,817	2,087	117.8
Sweden	3,926	4,067	141	103.6
UK	25,567	27,649	2,082	108.1
EU	145,546	157,385	11,839	108.1
Japan	64,536	64,620	84	100.1
US	123,065	133,501	10,436	108.5

Sources: OECD: “Employment Outlooks” (OECD, 1996 edition (for 1994 data) and 2001 editions (for 1999 data)).

(iii) The Amsterdam Treaty (1997)

One of the key events of the Amsterdam Summit (June 1997) was the British Government's ending of the UK's "opt-out" from the Social Chapter, which allowed the Social Protocol to be reincorporated, under the Treaty of Amsterdam, into the Treaty of Rome. There was, therefore, a "single framework for social policy" for all the EU Member States following the Amsterdam Treaty.³² Since the UK signed up to the Social Chapter the activities of the social agenda seem to have accelerated, leading to more Directives (and amendments to Directives), that are increasingly criticised by business. The brake seems to have been taken off.³³

In 1997 and 1998, there were four "UK Extension" Directives, in order to apply to the UK the Social Chapter initiatives that had already been agreed: European Works Councils, Parental Leave, Burden of Proof in Sex Discrimination Cases and Part-Time Workers. The other two Social Chapter initiatives were agreed later: Fixed-Term Work (1999) and Compulsory Information and Consultation Procedures (National Works Councils) (2002). As the "Social Chapter" has now been absorbed into the main Treaties, there are no more specifically "Social Chapter" initiatives.

Apart from our general concerns about the increase in regulations coming from extra Directives, there has been an increase in anti-discrimination Directives, where there is the effective reversal of the burden of proof (as with sex discrimination), following Amsterdam. The Amsterdam Treaty contained new competencies, which were created in the areas of race, age, disability and sexual orientation discrimination legislation (Article 13). In 2000 the Equal Treatment (Racial or Ethnic Origin) Directive and "General Framework" for the Equal Treatment in Employment and Occupation Directive (for religion and belief, sexual orientation, age and disability) were agreed. We discussed these developments in both chapters 3 and 4.

As we have written on previous occasions,³⁴ signing the Social Chapter was a disastrous mistake and our continued commitment to the EU's social agenda will lead to further erosions of our competitive position. As we commented above, the EU is an economic zone in relative decline – and shows no understanding of what to do about this. It seems quite prepared to allow the relative decline to go on – and it is little short of a tragedy that the UK should allow itself to be dragged down with it. The European Commission's social agenda is a guaranteed recipe for decline.

5.4.5 The 2000s: the Social Policy Agenda, the Charter of Fundamental Rights and the Convention

Key events: the 2000s

Date	Event
2000	First 6 months: Portuguese Presidency.
2000	Second 6 months: French Presidency.
2000	The Social Policy Agenda (SPA) was introduced in March (at the Lisbon Summit, during the Portuguese Presidency).
2000	The Nice Summit (in December, during the French Presidency, Nice Treaty, signed February 2001): (1) agreed the SPA, (2) agreed the Charter of Fundamental Rights . Nice Treaty agreed, signed in 2001, came into force in 2003.
2000	Equal Treatment (Racial or Ethnic Origin) Directive (under Article 13 of the Amsterdam Treaty) agreed.
2000	“General Framework” for the Equal Treatment in Employment and Occupation Directive (under Article 13 of the Amsterdam Treaty) agreed.
2001	First 6 months: Swedish Presidency (the Stockholm Summit was in March).
2001	Second 6 months: Belgian Presidency.
2001	The December Laeken Summit agreed to set up a Convention for the Future of Europe , which was charged with charting a course for the enlarged EU.
2002	First 6 months: Spanish Presidency.
2002	Second 6 months: Danish Presidency.
2002	Compulsory Information and Consultation Procedures (National Works Councils) Directive (began under SC).
2002	Working Time Amendment (Excluded Sectors) Directive.
2002	Equal Treatment Amendment Directive (2002).
2003	First 6 months: Greek Presidency. Athens Summit (March) agrees to 10 more countries joining the EU.
2003	Second 6 months: Italian Presidency, the likely start of the Inter-Governmental Conference (IGC) on the Convention’s draft Constitutional Treaty (which includes the Charter of Fundamental Rights).
2004	First 6 months: Irish Presidency, likely agreement to the Convention’s draft Constitutional Treaty.
2004	1 May: agreed joining date for the 10 new members: Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus, Malta.
2004	Second 6 months: Dutch Presidency.
TBC	Temporary Agency Work (TAW) Directive.
2007	Expected year of joining for Bulgaria and Romania.

Since the Amsterdam summit, the EU has devised the Social Policy Agenda (SPA) and a Charter of Fundamental Rights. Both these developments, which were agreed at last December’s Nice Summit, have major implications for employment law and practices.

(i) The Social Policy Agenda (SPA)

The Social Policy Agenda's main objective is for the EU to "become the most competitive & dynamic knowledge-based economy, capable of sustainable economic growth with more and better jobs and greater social cohesion."

Quote from the Social Policy Agenda (SPA) (Lisbon summit, 2000).

The Social Policy Agenda was originally unveiled at the Lisbon Summit in March 2000 and was published by the Commission on 28 June. It formed part of the integrated European approach towards achieving economic and social renewal ("reform") as outlined in Lisbon. It was full of meaningless phrases such as like "building on the past, preparing for the future".^{35, 36} The objectives were listed under 5 main headings: full employment and quality of work, quality of social policy, promoting quality in industrial relations, preparing for enlargement and promoting international cooperation. (More information is in table 5/1 in annex 5.)

When the SPA was approved at the Nice Summit (December 2000) for the next five years, the SPA had identified six priority areas for action:³⁷

- More and better jobs: including gender equality and a better Work-Life Balance.
- Change, balancing flexibility and security: including worker consultation.
- Combating poverty and social exclusion.
- Modernising social protection: social protection systems "must underpin the transformation to the knowledge economy".
- Promoting gender equality.
- Social policy in the international arena.

The SPA, rather like the Social Charter, is not a legislative programme as such, but lays out a wide range of objectives including strengthening gender equality, improving social protection and social inclusion, reinforcing fundamental rights and combating discrimination. The SPA also outlined actions to create more and better jobs, exploit the potential of the knowledge-based economy and encourage dynamic entrepreneurial activity. These are, of course, noble aspirations but more legislation is sure to follow. And the added legislation can only hinder rather than help the progress of some of the SPA's other main objectives – specifically, to encourage dynamic entrepreneurial behaviour and to exploit the potential of the knowledge-based economy. More red tape and the encouragement of enterprise, we suggest, are totally incompatible. The thinking is a mixture of the naive and the dangerous.³⁸

Quite frankly, the EU would be a finer and more internationally competitive place, if the SPA and its predecessors were consigned to history. The SPA augurs badly for any economy that has any aspirations to flexibility and dynamism. The SPA talked about the EU being "the most dynamic and competitive knowledge based economy in the world by 2010". But the extra regulations will mean less flexibility and less dynamism.^{39, 40}

Fast-forwarding to the Barcelona European Council (March 2002), it called for a reinforced Employment Strategy and increased social cohesion. It concluded that a revised Employment Strategy "should focus on raising the employment rate by promoting employability and by removing obstacles and disincentives to take up or remain in a job, while preserving high protection standards of the European social model". Barcelona

reaffirmed Europe's commitment to a goal of full employment, but not at the expense of social justice.^{41,42,43} It's all so obvious.

"Reform" has been a particularly key-word since Lisbon and the Lisbon reform agenda, not just for employment policies but also for freeing up markets such as the energy and financial markets. But, by the beginning of 2003, any such reforms seem to be faltering. According to a scathing Brussels report (released 14 January 2003), "Europe has reacted to the economic downturn by backtracking on vital reforms and waiting for the US to lead it to recovery. Germany, France and Italy are among those accused of dragging their feet in pushing through reforms".^{44,45} For further details see table 5/2 in annex 5.)

(ii) The Charter of Fundamental Rights (the "Charter")

The Charter of Fundamental Rights (the "Charter") was agreed at the Nice Summit (December 2000). The "Charter" is very widely drawn and contains an extensive list of social and economic rights. When these become subject to the jurisdiction of the European Court of Justice (ECJ), there will be a new mechanism for the consolidating power at Union level. The Charter will, for example, inevitably influence the ECJ's adjudications on employment law. This could mark a significant transfer of power from elected national politicians to the unelected judges who sit in the ECJ in Luxembourg.

The "Charter" could have a far-reaching impact on British business. Under Chapter IV "Solidarity" there are the following articles:⁴⁶

- Article 27: workers' right to information and consultation within the undertaking.
- Article 28: right of collective bargaining (including the right to take collective action to defend their interests, including strike action).
- Article 29: right of access to placement services.
- Article 30: protection in the event of unjustified dismissal.
- Article 31: fair and just working conditions (covering health and safety, restrictions on hours worked etc).
- Article 32: prohibition of child labour and protection of young people at work.
- Article 33: Family and professional life (including maternity and paternity employment rights).
- Article 34: social security and social assistance.
- Article 35: health care.
- Article 36: access to services of general economic interest.
- Article 37: environmental protection.
- Article 38: consumer protection.

Chapter III "Equality" includes Article 23: equality between men and women must be ensured in all areas, including employment, work and pay.

The "Charter's" provisions that deal with the labour market are so vague that they have the potential to be expanded to an almost unlimited extent. For instance, providing "fair and just" working conditions that "protect dignity" would allow "activist" courts to impose almost any amount of obligations on employers. The Charter also says that workers, trade unions and big business will have "the right to negotiate and conclude collective agreements at the appropriate levels and, in the cases of conflicts of interest, to take collective action to

defend their interests, including strike action". The ECJ could well use this right and make adjudications that would be against British business interests. Again much would depend on how "activist" the ECJ was prepared to be.⁴⁷

When the Charter was being discussed during the second half of 2000 we issued two press releases (one on the Charter itself⁴⁸ and one on Nice⁴⁹) and we made the following points about the Charter:

- Article 14, the right to education and have access to vocational and continuing training, could be interpreted as instituting an unqualified right to continuing training which could be disruptive in the workplace.
- Article 27, which concerns workers' rights to information and consultation within an undertaking, amounts to giving co-decision to the unions in business management along the lines of the German works councils. Inevitably, this would lead to costly and time-consuming restrictions on employers' ability to react to competitive pressures speedily and flexibly.
- Article 28, the right to collective bargaining and action, includes the right to take collective action to defend collective interests, including strike action (the "right to strike"). The guarantee of collective action "at all levels" raises the possibility of cross-border picketing and actions against subsidiaries of multinationals. (And note that secondary picketing has been illegal in the UK since the 1980s.) The "right to strike" would prove to be a major change to British law. (No such law now exists in the UK.) There are clearly major implications for, eg, dismissing workers in breach of their employment contracts when they were on strike and seizing trade unions' assets in cases of industrial action.
- Article 31, on fair and just working conditions, may lead to a further tightening up of the Working Time regulations that have already proved difficult for some businesses.

As the Charter is incorporated in the draft Constitutional Treaty (see next section), the reality of its impact may soon be upon us.

(iii) The future: the Convention on the Future of Europe and the Constitutional Treaty

"O dark, dark, dark, amid the blaze of the noon,
Irrecoverably dark, total eclipse
Without all hope of day!"

John Milton: "Samson Agonistes" (1671).

This is, without doubt, an appropriate quotation for the end of the UK as an independent, self-governing and democratic country.

"The Union stands at the crossroads, a defining moment in its existence. The unification of Europe is near. At long last, Europe is on its way to becoming one big family".

Laeken Declaration setting up the Convention on the Future of Europe (December 2001).

There is no doubt that the EU is due to change dramatically over the next few years. Next year ten countries (the Czech Republic, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Poland, Hungary, Malta and Cyprus) are expected to join the EU and they will raise the

number of member states from 15 to 25, and by 2007 Bulgaria and Romania are expected to be members as well. Turkey would dearly like to join as well – but there is strong opposition from some member states. With 25 plus countries, it has been widely accepted that the current institutional mechanisms would become too cumbersome and at the Laeken Summit (December 2001)⁵⁰ it was decided to set up a Convention for the Future of Europe, which was charged with charting a course for the enlarged EU. The Convention has 108 members with Valéry Giscard d'Estaing as chairman and Giuliano Amato and Jean-Luc Dehaene as vice-chairmen. The UK's Government representative is Peter Hain and the two British Parliamentary representatives are David Heathcoat-Amory⁵¹ and Gisela Stuart. (This is correct in May 2003.)

The Convention's first stab at a "draft Constitutional Treaty" was published in late October 2002 and the final "draft" product is planned to be ready for discussion at the June summit of the European Council.⁵² It will then go onto the next Inter-Governmental Conference (IGC) for further work on the draft and for the final decision on the Treaty – either later this year or, more probably, early next year. Even though there will undoubtedly be changes to the current draft, it is highly unlikely that the broad thrust and the major proposals will be changed. And it is worth noting that some protagonists believe that there should be even more integration rather than less, so any expectations that the Treaty will end up significantly less integrationist than the current draft are almost certainly to be dashed.

The draft Constitutional Treaty is a radical document with huge implications for national sovereignty.^{53, 54, 55} The proposed constitution will create a new Union, separate from member states and with its own legal personality and status. The Union will derive its powers not from member states, but from its own constitution and its law will have primacy over the law of member states. Moreover, the intergovernmental method of decision-making will disappear. It should also be noted that the law-making powers of all the EU institutions are to be substantially increased. The proposed powers, or "competences", of the Union have been published⁵⁶ and they represent a huge extension of the Union's power. The powers are, moreover, effectively limitless.

The Treaty's key points:⁵⁷

- Common Foreign and Security Policy (CFSP): would be an EU competence and no longer agreed on an intergovernmental basis.⁵⁸
- Eurojust: this body would be set up to coordinate the member states' prosecuting bodies.
- "Exclusive" competences including:
 - The ability to negotiate and sign all international agreements.
 - Common commercial policy.
 - Monetary policy for the Eurozone.
 - The conservation of marine biological resources under the CFP.
- "Shared" competences including, Article 12 (note the draft Treaty says that "The Member States shall exercise their competence only if and to the extent that the Union has not exercised its"):
 - The internal market.
 - Agriculture and fisheries.
 - Transport.
 - Trans-European networks.
 - Energy.

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- Social policy.
 - Economic and social cohesion.
 - Environment.
 - Public health.
 - Consumer protection.
 - The area of freedom, security and justice,
 - The incorporation of the EU Charter of Fundamental Rights: the “Charter” is very widely drawn and contains an extensive list of social and economic rights. When these become subject to the jurisdiction of the European Court of Justice (ECJ), there will be a new mechanism for the consolidating power at Union level. The Charter will, for example, inevitably influence the ECJ’s adjudications on employment law.
 - Dual citizenship: “every national of a Member State shall be a citizen of the Union”.
 - The coordination of EU economic policies: whether in or out of the euro.

The Convention has clear and worrying implications for the British economy and British business. They are worrying mainly because the Constitution will almost inevitably extend the regulatory reach of the EU and the EU seems wedded to the discredited and over-regulated anti-enterprise European economic model. The EU’s competence to “coordinate” economic policies (and possibly introduce further “approximations” or “harmonisations” of indirect and company taxation) should also cause concern. We have already discussed the implications of the “Charter” (above).^{59,60}

This Treaty is of far greater significance for the political future of the UK than the euro and has the potential to be as economically damaging. But at least we’re promised a referendum on the euro! Alas, there seems to be no such referendum for the Constitutional Treaty, which will inevitably and fundamentally change the country.⁶¹

There should be a referendum.

5.5.1 The impact of the EU on UK employment law: introduction

There is no doubt that the impact of the EU on employment law is considerable and growing and costly.⁶² In some areas of Human Resources (HR) practice EU policy is dominant. And, as successive EU employment Directives have been adopted at EU level and then “very thoroughly” implemented into UK law, businesses (and their HR department if there is one) have had to introduce significant change to existing HR custom and practice in almost all cases.⁶³

The next sub-section carries a table of selected Directives - it is far from being comprehensive. According to the Chartered Institute of Personnel and Development (CIPD)⁶⁴ there have been over 50 Directives that have been adopted in the field of social and employment policy (up to 2000). As can be seen from the table below, the growth of EU influence on nearly all areas of the employment relationship has accelerated since the mid 1990s.

Moreover, as can also be seen from the table, the range and extent of EU-originating legislation is considerable. It can broadly be classified into four groups. The first group is extensive and relates to equal opportunities. It includes Equal Pay, Parental Leave and the anti-discrimination Directives. (As a result of the Treaty of Amsterdam new competencies were created in the areas of race, age, disability and sexual orientation discrimination legislation.) Apart from the general increase in regulations, there has been a very disturbing development in the recent anti-discrimination Directives. In all three (sex, race and the “General Framework”) the reversal of the burden of proof will operate. If a case is brought against an employer, he/she will have to prove his/her innocence. This is grotesquely unfair. (We discuss this further in chapters 3 and 4.)

The second group, also extensive, relates to employment protection and working conditions and includes collective redundancies, TUPE, posted workers, part-time work, fixed-term work and temporary work. The third group includes the, very bureaucratic, Working Time Directive and general Health and Safety at Work Directives. The final group covers employee consultation and comprises the European Works Councils and the proposed “information and consultation” Directives. Both of these Directives could severely impair the ability of business to make speedy competitive-sustaining and enhancing decisions. And, moreover, they are quite alien to British business custom.

5.5.2 The main Directives

The main Directives form a substantial library. For those entering British law after 1997, see chapter 3. Annex 1B touches on other, earlier, important Directives.

EU Major social/employment Directives

Reference group	Date of Directive	Directive
Equal opportunities	1975	Equal Pay Directive
	1976	Equal Treatment Directive
	1979	Equal Treatment (Social Security) Directive
	1986	Equal Treatment (Occupational Social Security) Directive
	1986	Equal Treatment (Self-Employed) Directive
	1996	Parental Leave Directive (SC)*
	1996	Directive amending the Equal Treatment (Occupational Social Security) Directive
	1997	Parental Leave (UK Extension) Directive
	1997	Burden of Proof in Sex Discrimination Cases Directive (SC)*
	1998	Burden of Proof in Sex Discrimination Cases (UK Extension) Directive
	2000	Equal Treatment (Racial or Ethnic Origin) (Article 13 of the Amsterdam Treaty)
	2000	“General Framework” for the Equal Treatment in Employment and Occupation Directive (Article 13)
	2002	Equal Treatment Amendment Directive (2002)

Employment protection and working conditions	1975	Collective Redundancies Directive
	1977	Transfer of Undertakings (Protection of Employment) (TUPE) or Acquired Rights Directive
	1980	Insolvency Directive
	1987	Insolvency (Spanish Accession) Directive
	1991	Proof of Employment Relationship Contract
	1991	Temporary Workers Directive
	1992	Directive amending Collective Redundancies Directive
	1996	Posted Workers Directive - Posting of Workers Directive (to ensure that a member state's core regulations should apply to workers posted from elsewhere to work in that member state)
	1997	Part-time Workers Directive ("Atypical" Workers) (SC)*
	1998	Part-Time Work (UK Extension) Directive
	1998	Amended Transfer of Undertakings (Protection of Employment) (TUPE) regulations (Acquired Rights)
	1999	Fixed-term Work Directive (began under SC)*
	TBC	Temporary Agency Work (TAW) Directive
Health and Safety at Work	1989	Health and Safety (Framework) Directive (which led to "daughter" Directives aimed at implementing, in specific areas, the provisions in the Framework Directive)
	1991	Health and Safety (Fixed-Term and Temporary Workers) Directive
	1992	Pregnant Workers Directive (Protection at Work)
	1993	Working Time Directive (WTD)
	1994	Young Workers Directive (The Employment of Young Workers Directive)
	1999	Working Time (Extension to Seafarers) Directive
	2002	Working Time Amendment (Excluded Sectors) Directive
Employee relations	1994	European Works Council Directive (SC)*
	1997	European Works Council (UK Extension) Directive
	2002	Compulsory Information and Consultation Procedures (National Works Councils) Directive (began under SC)*

NB The six-asterisked Directives were implemented and/or initiated under the Social Chapter.

The evidence is there for all to see. The impact on British business of EU employment law is very considerable. But, alas, there is absolutely no sign of EU "initiative fatigue". Not only do new treaties such as Maastricht and Amsterdam introduce new areas of competency within which the EU can legislate, but the EU process itself creates a steady stream of legislative action requiring implementation at member state level. The tide shows no sign of being reversed and with each initiative and each Directive there comes more red tape. It is red tape which can only distract businesspeople from running their businesses properly, creating wealth and, yes, creating jobs. "Small" businesspeople find the never-ending avalanche of regulations particularly irksome as they struggle with the paperwork. Red Tape kills enterprise.⁶⁵

5.5.3 A plethora of regulations

According to Eurofacts⁶⁶ the total number of EU regulations to which the British are subject may exceed 200,000. Baroness Symons (Minister of State, FCO and DTI) had been asked a question in the House of Lords (13 January 2003) about the number of regulations and her reply revealed the following:

- The total number of regulations enacted between 1973 and August 2002 “as far as the Government has been able to verify” is 101,811 (although the wording of her reply suggests that the Government is not entirely sure).
- In some years the number of regulations enacted has exceeded 4,000.
- Over the past 5 years the number of regulations has averaged around 2,700 and looks set to remain roughly at that level in the near future.
- The Government doesn’t even know the total number of regulations enacted as a result of Britain’s membership (ie 101,811 and those accepted at the time of accession).

Such is the volume of regulation, Baroness Symons explained that it would cost too much even to place in the Lords library the reference number, names and year for each of the regulations enacted. It would also involve “disproportionate cost” to identify the number of regulations enacted at the time of accession. Eurofacts concluded that the number of regulations to which British citizens are subject to as the result of EU membership is not known, though probably in excess of 200,000, as already stated.

Even though this paper is almost entirely about social and/or employment regulation, there are, for example, many EU regulations hitting specific sectors and there are all the environmental regulations. But that is another story for another day. In table 5/3, annex 5 we list some Directives which affect the City⁶⁷ and in annex 5/footnote (1), we look at the EU’s overall influence on the UK’s policy.⁶⁸ The influence of the EU, with its anti-competitive policies, on British business is quite simply huge. And it will get bigger.

5.6 Conclusions

These are the main conclusions of this chapter of the influence of the EU’s social agenda on UK employment law:

- The influence of the EU on UK employment is now very considerable. Moreover, there are no signs that the flow will be tempered (5.1).
- The core EU economies are over-regulated, inflexible and at a competitive disadvantage with the USA and much of the Far East (excluding Japan) and their growth rates reflect this. The heavily taxed and heavily regulated “Social Europe” model is discredited but there are no signs that this is recognised by the EU’s policy makers. Unless the EU is radically reformed on free market lines, it will be an economic area in inexorable relative decline (5.2.1).
- Heavy labour market regulation leads to relatively poorly performing labour markets. There is nothing “fair” about this. Greater flexibility, in the end, is a better guarantor of job security. The EU’s social policy should be determined by reference to economic competitiveness rather outdated concepts of labour market protectionism (5.2.2).

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- We are not supporters of the “Social Europe” or the “Social Partnership” model, preferring the “Enterprise” model, where employers are free to build up direct individual relationships with their employees (5.3).
 - Social harmonisation is meant to prevent “unfair competition”, but regulations kill competitiveness. It hits the competitiveness of all EU countries, but the UK in particular (5.3).
 - The EU has a long, if not illustrious, history of social policy-making (5.4.1).
 - In the beginning there was the Rome Treaty, but the agenda really took off with the first Social Action Programme (1974). (5.4.2.)
 - The next great boost was the Single European Act (agreed 1986), which extended Qualified Majority Voting, permitting QMV for health and safety Directives. Then the Social Charter (1989, which the UK opted out of) led to a five-year Social Action Programme. The number of Directives increased, not least putative “health and safety” ones (5.4.3).
 - The 1990s was a decade of great “progress” or not, as the case may be. It was certainly a decade of high unemployment and there were certainly considerable “social” developments. The Maastricht Treaty (agreed 1991) led to the “Social Chapter” (which was appended to the Treaty, with the UK not agreeing to it). The Social Chapter led directly to six major Directives. The UK Government agreed to the Social Chapter at the Amsterdam Summit leading to a “single framework for social policy” and a new impetus for more social regulation (5.4.4).
 - The 21st century has brought further integrationist and interventionist zeal. The Social Policy Agenda (SPA) was unveiled at Lisbon (March 2000) and agreed at Nice (December 2000). It was part of a package of economic and social renewal (“reform”). The SPA will lead to more regulation and the economic reform agenda seems to be faltering. The Charter of Fundamental Rights was also agreed at Nice and is included in the Convention on the Future of Europe’s draft Constitutional Treaty. The latter spells the end for a self-governed, democratic and independent UK. (5.4.5.)
 - The impact of the EU on UK employment law is considerable; over 50 Directives have been adopted in the field of social and employment policy (up to 2000). (5.5.1 and 5.5.2.)
 - It is possible that there may be as many as 200,000 EU regulations that the British are subject to. But the number is not known, not least of all by the Government. (5.3.3)

References

1. From a private conversation with the current Chairman of the Better Regulation Task Force.
2. Well certainly socialist, if not quasi communist. With the emphasis on “workers’ rights” rather than “employees’ rights” (as if employers are not workers), it is redolent of Karl Marx. See Karl Marx: “The Communist Manifesto” (1848): “The proletarians have nothing to lose but their chains. They have a world to win, working men of all countries, unite!”
3. The SPA’s main objective is for the EU to “become the most competitive and dynamic knowledge-based economy, capable of sustainable economic growth with more and better jobs and greater social cohesion” (quote from the SPA (Lisbon, 2000)). The SPA also referred to more job protection - so there it is, more regulation creates jobs and makes economies more dynamic. This is economic illiteracy of the first order. Even a primitive understanding of the laws of supply and demand seems to have passed these social and political pioneers by. Not only are they creating a European State of subordinate regions by stealth, they are also ignoring the economic laws of gravity.

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4. Some of the inconsistencies in thought coming from the EU are beyond parody. Fortunately there are other matters that can be successfully parodied. There was an earthy primitive school of regional fiction popular at the beginning of the 20th century (eg the novels of DH Lawrence), which was brilliantly parodied by Stella Gibbons' "Cold Comfort Farm" (1932). May we refer to just two quotations: "Every year, in the fullness o' summer, when the sukebind hangs heavy from the wains... 'tes the same. And when the spring comes her hour is upon her again. 'T'es the hand of Nature and we women cannot escape it" and, more famously, "Something nasty in the woodshed". Various nursery rhymes, Lewis Carroll and Edward Lear's nonsense poetry are also useful antidotes to terminal depression. We must maintain our sense of humour.
 5. Marsden: "Why the EU is sliding down the world economic league" (The European Journal, February 2003).
 6. See Lea: "Business Matters" (IoD, 1998) for a discussion of the Rhineland, social market model of capitalism, with its emphasis on partnership, protection and social return, and the Anglo-Saxon model of capitalism.
 7. Lea: "The Work-Life Balance...and all that: the re-regulation of the labour market" (IoD, 2001).
 8. CBI: "Creating a Europe that works: a study of labour market flexibility" (1999), identified 6 types of flexible labour markets: (1) numerical flexibility (that is all too often, erroneously, associated with job insecurity), (2) flexible working patterns, (3) wage flexibility, (4) skills flexibility, (5) functional flexibility (where employees can adjust to different roles) and (6) geographical flexibility. For a business to be able to respond quickly to changing economic circumstances it needs all of these types of flexibility (especially the first, the third, the fourth and the fifth): it needs deregulated and liberalised labour markets. Regulations can significantly damage, in particular, the first and the third types of flexibility.
 9. OECD: "The OECD Jobs Study" (OECD, 1994), talked sensibly about increasing working-time flexibility and wage and labour flexibility.
 10. Addison and Siebert: "Regulating European labour markets: more costs than benefits?" (IEA, 1999), concluded that "empirical studies generally show that the net effect of employment protection, and similar rules is...lower employment, greater and longer unemployment for some and, implicitly, a decline in the speed with which labour relocates from declining to growing sectors of the economy". They also said that not all employment regulations would have the same effect. But the "upward harmonisation sought by the Commission" had potentially serious costs in terms of "disemployment and reduced employment growth". Moreover, the Commission had failed to meet its obligation to evaluate the possible effects of its social proposals on the labour market. Its efforts had been amateurish and have taken place in an "analytical vacuum. Its proposals should in future be subject to independent efficiency audit, not to prevent the development of social policy but to provide information on the employment and other consequences of new mandates.
 11. This was one of the main points we made in our response to the House of Lords Select Committee on the European Union on the EU Social Policy Agenda (IoD, October, 2000). The specific document being commented on was "The Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Social Policy Agenda" (COM (2000) 379). It was published in June 2000, at the end of the Portuguese Presidency. The SPA was agreed at Nice in December 2000.
 12. Marsden: "Handicap, not trump card. The Franco-German model isn't working" (CPS, 1999).
 13. IMF: "World Economic Outlook" (IMF, May 1999).
 14. Lea: "Red tape kills enterprise" in Rosenbaum (editor): "Britain and Europe: The choices we face" (OUP, 2001).
 15. IoD response to the House of Lords Select Committee on the European Union on the EU Social Policy Agenda (IoD, October, 2000).
 16. Leach: "EU membership: what's the bottom line?" (IoD, 2000) calculated that the EU's Social Model cost the UK about 1% of GDP (£8-9bn a year) in extra costs and regulations.
 17. DTI: "The Social Chapter: the British and Continental approaches" (1996), explained that "the approach of other European countries, as reflected in the Social Chapter, would...lead to higher costs, more restrictions and higher unemployment". This is exactly right.

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18. Lea: "A competitive Britain in a competitive Europe: Manifesto for Business for the 1999 European Elections" (IoD, 1999).
 19. Lea: "Red tape kills enterprise" in Rosenbaum (editor): "Britain and Europe: The choices we face" (OUP, 2001).Lea: "The Social Chapter: the UK should have kept the opt-out" (Global Britain, January 2001).
 20. Lea: "Social Europe: the Social Chapter opt-out must stay" (IoD, April 1996, updated April 1997).
 21. Addison and Siebert: "Regulating European labour markets: more costs than benefits?" (IEA, 1999).
 22. Lea "The Social Chapter: the UK should have kept the opt-out" (Global Britain, January 2001).
 23. Addison and Siebert: "Regulating European labour markets: more costs than benefits?" (IEA, 1999).
 24. (1) Lea: "Social Europe: the Social Chapter opt-out must stay" (IoD, April 1996, updated April 1997). This short paper also contained the IoD's policy stance on the euro. (2) Lea: "The Social Chapter: the UK should have kept the opt-out" (Global Britain, January 2001).
 25. Lea: "Flexible labour markets: Social Europe and the minimum wage" (IoD, 1996), contained a survey of IoD members (1996). There was a clear rejection of the Social Chapter: 78% said that UK should keep its opt-out, whilst only 19% said the UK should opt-in. 70% rejected the Parental leave Directive. [Incidentally, a survey completed in 1995, said 60% of members rejected the NMW. The 1996 survey also rejected NMW: there was widespread concern that the NMW would mean increased costs, loss of competitiveness, loss of jobs and another regulatory burden.]
 26. Cansfield: "The Single Market" (IoD, March 1997), reported that a telephone survey (of 500 directors) showed that only 30% of respondents supported the Social Chapter.
 27. Lea and Howard: "The Working Time Directive and the Social Chapter" (IoD, 1997), reported on the results of a questionnaire to all IoD members. There were nearly 1400 replies and much hostility. One IoD member said "it is tough running a business. It's tough to get a job. Why make it tougher?"
 28. Hanson: "Social Europe: the implications of current European social policy" (IoD, February 1996), wrote there was a Green Paper, two White Papers, and two Communications..
 29. Green Paper: Consultative Document (Mr Flynn, D-G for Employment, Industrial Relations and Social Affairs, DG5, 1993), wrote "the Community is fully committed to ensuring that economic and social progress go together. It questioned whether there was a route back to full employment. This Green Paper led to the early 1994 White Paper.
 30. "EC: Growth, competitiveness, employment: the challenges and ways forward into the 21st century" (EC, 1994, White Paper from the Commission, when Jacques Delors was Commission President). The reason for the White Paper was the high unemployment rates in the EU.
 31. Addison and Siebert: "Regulating European labour markets: more costs than benefits?" (IEA, 1999), wrote that the 1997 Amsterdam Treaty not only contained the provisions of the earlier Agreement on Social Policy (the Social Chapter) but included an employment chapter which "...opens up scope for considerable Commission activism in the future" and is a "...central plank of social policy".
 32. Walker: "Failure of Red Tape initiatives" (European Journal, May 2002), reported that it was widely felt that the EU had held back on Social Chapter legislation whilst the UK had the opt-out, because to do otherwise would have been to give the UK a competitive advantage.Lea: "The Social Chapter: the UK should have kept the opt-out" (Global Britain, January 2001).
 33. European Commission: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Social Policy Agenda (DG for Employment, Industrial Relations and Social Affairs: draft, September 2000, into the French Presidency, original draft 28 June 2000).
 34. Lisbon (March 2000) and the subsequent Council of Stockholm (2001, first half) agreed the following employment targets: (1) an employment rate of 70% by 2010, (2) a female employment rate of 60% by 2010, (3) an employment rate of 50% for those aged between 55 and state retirement age by 2010. Another case of "more targetry and more nonsense".

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35. IDS Employment Europe: “The social dimension of the EU Nice summit” (report 469, January 2001).
 36. EC: “The social situation in the EU 2000” (EC, 2001), discussed a rather quaint “virtuous circle” of economic and social progress with 3 policies: (1) Social policy: social quality/social cohesion; (2) Economic policy: competitiveness/dynamism; (3) Employment policy: full employment/quality of work. These are not so much policies as sound bites.
 37. The IoD’s response to the House of Lords Select Committee on the European Union (October 2000) on the EU Social Policy Agenda - The Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions (Social Policy Agenda, COM (2000) 379).
 38. “IoD says competitiveness will be damaged by the EU’s Social Policy Agenda” (press release: October, 2000). This press release said that the IoD, in its written evidence to the House of Lords Select Committee on the European Union, had said that the EU’s Social Policy Agenda’s proposals would damage business’s competitiveness if they were to be implemented.
 39. DTI: “Full and fulfilling employment: creating the labour market of the future” (DTI, 2002), commenting on the Barcelona European Council (March 2002).
 40. Commission of the European Communities: The Lisbon strategy – making change happen” (January 2002, during the Spanish Presidency), identified just three priority areas: (1) the further development of employment policies, with particular focus on active labour market reforms. This would help the EU to move closer, even in the current climate, to its goal of full employment, (2) connecting Europe and connecting markets. This could be done through further reforms and completing missing links in key network industries and accelerating financial market integration by delivering the right regulatory regime, (3) increasing investment in knowledge to ensure future competitiveness and jobs. The EU must step up the effort in the areas of research, innovation, education and training, and increase its impact by pursuing a more integrated approach and place these policies under a common banner: a European area of knowledge.
 41. HM Treasury: “Realising Europe’s Potential: economic reform in Europe, White Paper” (TSO, Feb 2002), was the Treasury’s contribution to the debate. The White Paper said that “this White Paper is about jobs. The European Council (the EU Heads of Government) should focus on the right priorities at the forthcoming Barcelona summit (March 2002): (1) reform Europe’s labour markets, (2) cut unnecessary and expensive regulation [my, how we laughed, author’s comment - as if the European Council would ever do this], (3) develop more integrated financial services market, (4) open energy markets, (5) improve lifelong learning, (6) exploit research expertise more effectively.
 42. Parker & Buck: “Brussels accuses Europe of backtracking on reforms” (FT, 15 January 2003).
 43. Guerrero: “Europe sees progress falter in face of red tape and protectionism” (FT, 14 January 2003), reported that the Commission had said that “Today, we are only halfway to single market; on many issues we still have 15 national markets”. The hurdles ahead included service providers, professional qualifications, legal requirements, financial regulations and prices (the prices of general supermarket goods across the EU can differ significantly).
 44. The Charter of Fundamental Rights of the European Union (Final draft October 2000, agreed at the Nice Summit in December 2000). This list was taken from a draft of 28 September 2000.
 45. Lea: “The Convention on the Future of Europe and the Constitutional Treaty” (IoD Business Comment, April 2003).
 46. IoD press release: “IoD dismayed about the EU Charter of Human Rights” (13 October 2000). Please note the Human Rights Act (2000) incorporated the European Convention of Human Rights (of the non-EU European Court of Human Rights, which is an adjunct of the non-EU Council of Europe).
 47. IoD press release: “IoD voices concern about Nice agenda” (5 December 2000).
 48. The Laeken Declaration setting up the Convention on the Future of Europe was explicitly integrationist: “The Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near. At long last, Europe is on its way to becoming one big family”.
 49. D Heathcote-Amory: “Let the people decide by whom they wish to be governed” (Eurofacts, 14 March 2003), wrote that “the European Constitution will create a new Union, separate from

Member States and with its own legal personality. The Union will derive its powers not from Member States, but from the constitution. Indeed the powers of the Member States will, at least in part, also derive from the constitution. The Union will gain “exclusive competence” to negotiate and sign all international agreements, even those covering domestic policy areas like criminal justice. Other areas are declared to be “shared competences” (these include social policy, public health, “economic & social cohesion”, transport and energy). Here Member States will only be able to legislate where the Union has decided not to do so. It is also stated that “the Union shall coordinate the economic policies of the Member States”. All this is a huge extension of Union power. Nor is there any real limit on that power. The only check on Union power is whereby the Union is supposed to act only if it can attain an objective better than Member States acting alone. This is a subjective judgement and has been a poor check on the extension of EU powers so far, particularly as the final decision is in the hands of the ECJ, which is not a neutral referee. The EU Charter of Fundamental Rights will also be incorporated in the Constitution. We face a wholly new constitutional order and the creation of a Union with all the attributes of a state. The future of Britain as a free and self-governing country is at stake.

50. The “European Council” is the name given to the regular meetings (“summits”) of the heads of state or of government of the EU member states and the president of the European Commission. The European Council is sometimes confused with (1) the Council of Ministers (or “Council” or “Council of the EU”), the presidency of which changes every 6 months and/or (2) the Council of Europe (a non-EU organization set up in 1949).
51. Rosemary Righter wrote in the Times (25 February 2003) “the draft is so frankly and robustly integrationist that, unless it is radically amended, its effect will be to strip national self-government of all but residual meaning.” In other words, it would spell the end of independent, sovereign and democratic nation states. The Constitutional Treaty is creating a state and the member states will be effectively reduced to having “sub-national” status. For the UK, this would mark the end of a thousand years of history as a free and self-governing nation.
52. (1) Jenkins: “The last days of Britain: the final betrayal” (Orange State Press, 2001), wrote about the creeping takeover of the UK by the EU. (2) Nirj Deva’s paper “Who really governs Britain?” (The European Journal, July/August 2001) is on a similar theme (see annex 5/footnote 1).
53. Phillips: “You are guilty until proved innocent by Brussels” (Sunday Times, 4 June 2000) wrote that “...this is why the argument over the euro is almost peripheral. The real issue is the EU’s threat to the power of nations to govern themselves, in a cultural climate that is fast eroding freedom of thought itself.” A highly prescient remark.
54. An excellent introduction to the Treaty is Norman Blackwell’s “A defining moment?” (CPS, February 2003). It includes: (1) the preliminary draft constitutional treaty (presented by the President of the European Convention, 25 October 2002) and (2) the draft text of the articles of the treaty establishing a constitution for Europe (as at 6 February 2003). It is a review of the issues and options for Britain arising from the Convention on the Future of Europe.
55. Watson: “CBI presses for UK powers to be preserved in EU constitution” (Times, early 2003), wrote the Treaty was to define the EU’s powers in 2 parts: (1) the first section (some 50 articles) will set out the main principles and structure of the EU, (2) the second section will consist of some 300 articles fleshing out the principles, policy areas & institutional structure in considerable detail. The first 16 articles were: Articles 1-4: the definition, objectives and values of the EU; Articles 5-7: the fundamental rights and citizenship of the EU; Articles 8-16: the EU’s powers and demarcation of policy responsibilities between EU institutions and member states.
56. The three “pillars” of the Maastricht Treaty would disappear. It established three “pillars”: (1) the Community dimension, (2) Common Foreign and Security Policy (CSFP), (3) cooperation in the fields of Justice and Home Affairs (JHA).
57. Watson: “CBI presses for UK powers to be preserved in EU constitution” (Times, early 2003), reported that CBI was concerned about the EU overriding British law on collective bargaining and the right to strike (see the “Charter”).

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58. The Business: “A poor constitution for Europe” (The Business leader, 9 February 2003). We quote this at length, as it echoes all the points and concerns we have about the Constitution and the Charter:
- “While most commentary has focused on how the Constitution will lead to greater political unification and federalism, it also contains retrograde provisions that will pave the way for the greatest drive to regulate Europe’s labour markets since the social chapter was signed in the early 1990s. Trade unions as well as a range of yet undefined pressure groups will be given a formal constitutional role; there will be a renewed emphasis in 1970s-style corporatist bargaining between employers’ groups and organised labour; and workers will be granted a new range of “social rights” which may overrule much existing national legislation and undo years of painful reforms in one fell swoop. It will take years and many decisions by the ECJ for the full implications of the new constitution’s social provisions to emerge. But it is already clear that companies and policymakers will have to consult trade unions on a wide range of decisions.”
- “For countries such as Britain, which have enjoyed a relatively liberal labour market since the 1980s and thus higher employment, the change will be especially severe. For France and Germany, where businesses and trade unions already work closely together, the new constitution will make little difference though it will kill any chance of significant reform and give added impetus to their economic decline.
- The report of the working group on “Social Europe” makes grim reading; it will be made even worse by the inclusion in the constitution of the Charter (Europe’s answer to the US Bill of Rights); unsurprisingly, it bears more resemblance to the manifesto of a traditional European social democratic party. The provisions of the charter that deal with the labour market are so vague they have the potential to be expanded to an almost unlimited extent. The EU’s decision to continue down the road to increased government intervention comes at a time when more evidence keeps emerging that economic freedom leads to public prosperity, indices entrepreneurship, creates jobs and generates wealth. By contrast, highly-regulated labour markets hurts those it seeks to help. The sclerotic labour markets of the euro zone have also led to scandalously high youth unemployment levels; the provisions of the constitution will ensure that this remains the case.
- For the sake of Europe, we hope the EU’s incomparably worse new constitution does not last long – or else it will be almost impossible ever to implement the reforms required to reverse the EU’s long-term relative economic and social decline.”
59. Lea: “The Convention on the Future of Europe and the Constitutional Treaty” (IoD Business Comment, April 2003).
60. Economist: “Time is money” (14 September 2000), reported that the new regulations from Brussels “weigh heavily on British businesses”. The most onerous of them all was the WTD. Employee rights sounded “fine” but they were costly not just to employers but to the wider community.
61. Lea: “Red tape kills enterprise” in Rosenbaum (editor): “Britain and Europe: The choices we face” (OUP, 2001).
62. CIPD: Europe: Personnel and Development (December 2000).
63. Lea: “Red tape kills enterprise” in Rosenbaum (editor): “Britain and Europe: The choices we face” (OUP, 2001).
64. Eurofacts: “So many regulations that there is not even library space for them” (14 February 2003).
65. Jenkins: “The last days of Britain: the final betrayal” (Orange State Press, 2001).
66. Deva: “Who really governs Britain?” (The European Journal, July/August 2001).

6 Employment tribunals and the "compensation culture"

"The lady doth protest too much, methinks."

Shakespeare: "Hamlet" (1601).

"To err is human; to forgive, divine."

Alexander Pope: "An essay on criticism" (1711).

"Don't go into Mr McGregor's garden: your father had an accident there, he was put into a pie by Mrs McGregor."

Beatrix Potter: "The Tale of Peter Rabbit" (1902).

"The rhetorician would deceive his neighbours, the sentimentalist himself; while art is but a vision of reality."

WB Yeats (1865-1939) "Ego Dominus Tuus" (1917).

6.1 Introduction

There has been an explosion of employment tribunal cases in recent years and, as a result, employers are increasingly faced with extra costs and extra distractions. This chapter is mainly concerned with the workings of employment tribunals.

In this chapter we start by discussing, as background, methods of dispute resolution and administrative tribunals, in general, (sections 6.2 and 6.3). In section 6.4 the specific subject of employment tribunals is introduced and in sections 6.5 to 6.7 we consider their legislative coverage and activities. We then look at the costs (6.8), the reasons for the explosion in cases in recent years (6.9) and reform (6.10).

In 6.11 we analyse the development of the "compensation culture", as it affects employers, including discussion of the relevance of the human rights legislation. We consider the social reasons for the increase in tribunal cases (and increased litigiousness more generally), including extra legislation, increased compensation packages, changing social attitudes and the emphasis on "rights" rather than obligations. Many of these developments mark the end of robustness and fortitude; qualities that make people adult. Finally, we draw some conclusions (6.12).

6.2 Methods of dispute resolution

Civil claims arise when an individual or a business believes that their rights have been infringed in some way. Some of the main areas are contract law, the law of tort (a civil wrong independent of contract that arises from the duties and obligations placed on us by society. Examples of tort include negligence, nuisance and defamation), family law, employment law and company law. There are five main methods of resolving disputes.¹

Methods of dispute resolution

Method	Brief description of procedures
Negotiation	Parties themselves try to negotiate a resolution of the dispute.
Mediation	Parties try to negotiate a resolution, with help of neutral third party.
Conciliation	Parties try to negotiate a resolution, with help of neutral third party who plays an active role in suggesting a solution.
Arbitration	Parties agree to let third party make a binding decision. There are two different processes.
Litigation	Parties go to a civil court and a judge decides the decision.

Source: Martin: "The English Legal System" (Hodder and Stoughton, 2000).

Negotiation, mediation, conciliation and arbitration are collectively known as methods of "Alternate Dispute Resolution" (ADR) as they are alternative methods to litigation (using the courts).

Employment law has long been an area of law where alternative dispute resolution has been used - in the shape of ACAS (Advisory, Conciliation and Advisory Service). When any claim is filed at an employment tribunal, a copy of that claim is sent to ACAS who will then contact the two parties involved and offer an attempt to resolve the dispute without the need for the matter to go to a tribunal. ACAS has specially trained conciliation officers who have a great deal of experience of employment disputes.² ACAS has a statutory duty to promote settlements of a wide range of employment rights and complaints which have been, or could be made to, an employment tribunal.^{3, 4} It was set up under the Employment Protection Act (1975).

6.3 Tribunals

Tribunals operate alongside the courts, instead of court proceedings. Unlike ADR where the parties decide not to use the courts, the parties in tribunal cases cannot go to court to resolve their dispute. The tribunal must be used instead of court proceedings. Administrative tribunals are tribunals that have been created by statute to enforce rights which have been granted through social, employment and welfare legislation. The main types of tribunal are social security tribunals, rent tribunals, immigration tribunals, the Mental Health Review Tribunal and employment tribunals. See table 6/1 in annex 6 for some further information on tribunals.

6.4 Employment tribunals: introduction

A large part of this chapter is devoted to employment tribunals. We discuss various aspects of employment tribunals under the following sections:

- What they are, their main function and the relevant employment legislation (6.5).
- The numbers of applications to employment tribunals and their outcomes, and the explosion of cases in recent years (6.6).
- Who applies to tribunals (6.7).
- The costs, both direct and indirect to business, including the “pay-off” culture; and other costs (6.8).
- The reasons for the explosion in employment tribunal cases (6.9).
- Proposed reforms to the employment tribunal system (6.10).

6.5 Employment tribunals and legislation

Employment tribunals are the main official means of resolving disputes relating to individual employment rights in the UK. They were originally called industrial tribunals and were first set up under the Industrial Training Act (ITA, 1964), but with only limited powers (their main original purpose was to hear employer appeals against training levies imposed by the ITA). However, their responsibilities have been significantly extended and they now have jurisdiction over more than 80 types of complaint, including unfair dismissal, redundancy, discrimination on grounds of race, sex and disability, equal pay and breach of contract.⁵ The decline of trade unionism from the late 1970s saw a movement away from “collective” to “individual” rights, accentuated by changes in the composition of the workforce and legislation both from the UK and EU directives.

Industrial tribunals were renamed employment tribunals in 1998. The Employment Appeal Tribunal (EAT) is a statutory body established to hear appeals from employment tribunals. A party may appeal to the Court of Appeal (Civil Division) from a decision of the EAT, but only with the leave of the EAT or the Court of Appeal.

The list of employment legislation (and regulations) that employment tribunals deal with is awesome as the table below demonstrates. Moreover, it is clear that the pace of change has accelerated since 1997.

The growth of tribunal powers: main relevant legislation and regulations

Date	Legislation
1964	Industrial Training Act (established industrial tribunals)
1965	Redundancy Payments Act (made tribunals available to redundant employees)
1968	Race Relations Act
1970	Equal Pay Act
1971	Industrial Relations Act (created the concept of unfair dismissal)
1974	Health & Safety at Work Act
1975	Sex Discrimination Act (amended 1986)
1976	Race Relations Act (introduced the concept of indirect discrimination)
1982	Employment Act
1983	Equal Pay (Amendment) Act
1984	Data Protection Act
1989	Employment Act
1992	Trade Unions & Labour Relations (Consolidation) Act
1992	Social Security Contributions and Benefits Acts
1993	Trade Union Reform and Employment Rights Act
1994	Statutory Sick Pay
1995	Disability Discrimination Act (disability includes stress and depression)
1996	Employment Rights Act. Employment Tribunals Act
1998	Employment Rights (Dispute Resolution) Act
1998	Working Time Regulations
1998	Data Protection Act (had implications for recruitment procedures)
1998	Teaching and Higher Education Act (provided time off work for study)
1998	Public Interest Disclosure Act (protected whistle-blowers)
1999	Employment Relations Act (included union recognition and Parental Leave Regulations)
1999	Tax Credits Act
1999	Collective Redundancies and Transfer of Undertakings (Amendment) Regulations
2000	Part-time Workers (Prevention of Less Favourable Treatment) Regulations
2001	Sex Discrimination (Indirect Discrimination & Burden of Proof) Regulations
2002	Employment Act

Source: Shackleton: “Employment tribunals: their growth and the case for radical reform” (IEA, 2002) (amended by the IoD).

There is, moreover, little sign that the pace of legislation is slowing down as we have already discussed (especially in chapter 3).

This situation is exacerbated by the possibility of badly drafted and/or ambiguous legislation. Concerning the new age discrimination legislation (see chapter 4), for example, there is a risk that the legislation could be “vague” about what an “older” worker is. Taking another example concerning the new legislation on “religion and belief” (again see chapter 4), problems could arise because of the regulations’ elastic definition of “religion or belief” as “any religion, religious belief or similar philosophical belief.” The overall problem with such vague legislation (possibly introduced in the absence of what is regarded as “fair”) is that employment tribunals will be left to determine what conduct is lawful after the event. This could cause all sorts of problems, quite wrong and could place an unreasonable financial burden on the employers by encouraging litigation. Litigation, of course, means conflict – and that will often exacerbate rather than resolve problems in the workplace.

Badly drafted legislation that extends protection against discrimination at work risks becoming a charter for litigation.⁶

6.6 Employment tribunals: applications and outcomes

There is little doubt that the number of cases handled by employment tribunals has exploded over the last twenty years. (These figures, of course, underestimate the total number of disputes because many disputes never reach the application stage.) This has significantly increased the time and other resources that employers have had to spend on them. Whereas there were 35,964 applications in 1985/86, this had risen to 130,408 by 2000/01, according to the old –style Employment Tribunal Service (ETS) data,⁷ that were based on the “main jurisdiction” of activity. In the mid 1980s, nearly three quarters of the cases were for unfair dismissal with redundancy accounting for about 12% of the cases and 8% accounting for all discrimination cases. By 2000/01, reflecting the vastly increased jurisdiction of employment tribunals, the proportion accounted for by unfair dismissal and redundancy had fallen – though the actual numbers of these cases had risen.⁸

The ETS have quite recently altered the way in which they calculate their data (which adds to the confusion!). They now calculate them on the basis of each and every jurisdiction of activity, which allows for the fact that there are, in many cases, multiple applications. A woman, for example, may take her employer to a tribunal for both unfair dismissal (the main issue) and sex discrimination (a secondary issue). Under the ETS’s old-style method of calculation this would probably have counted as one application, under the new-style method it counts for two. It is, therefore, unsurprising that the new-style ETS data are considerably higher than the old-style data. On the new methodology, the tribunal cases for 2000/01 rocket to 218,101 (falling back to 194,120 in 2001/02). (See also table 6/2 in annex 6 for further data.)

According to the detailed ACAS data (and please note that there are still differences between ACAS data and ETS data even though ACAS calculates on the basis of each and every jurisdiction⁹), even though there had been a rapid increase in the number of cases received during the last decade of the 20th century, there has been some levelling off in the last two years. This is shown in the table below for the total number of cases and for unfair dismissal, which is the most frequent complaint.

ACAS: cases received actual and potential claims to employment tribunals, total number and for unfair dismissal

Year	Total number of cases	Unfair dismissal cases
2001/02	165,093	52,000
2000/01	167,186	50,065
1999/00	164,525	52,791
1998/99	124,256	42,826
1998	113,636	40,153
1997	106,912	42,771
1996	100,399	46,566
5-year average to 1996	90,678	44,566

Notes: (1) There are no individual 5-year averages for Breach of Contract and Disability Discrimination Act (DDA) cases for 5 years to 1996 as the jurisdictions were introduced in mid-1994 and December 1996 respectively. However, for the purposes of this table the number of cases received under these jurisdictions has been included in the Total 5-year averages. (2) Total comprises Unfair Dismissal (by far the largest category), Equal Pay Act, Sex Discrimination, Race Relations, Protection of wages, Breach of Contract, Disability Discrimination Act (DDA) and “other” cases. Sources: ACAS Annual Reports for 1997, 1998, 1999/2000 and 2001/02.

Even though unfair dismissal complaints are the most frequent, there are also significant numbers of complaints concerning protection of wages, breach of contract and discrimination, as shown in the table below. See table 6/3 in annex 6 for more data on this issue.

ACAS: cases received of actual and potential claims to employment tribunals, by type of complaint

	1999/00	2000/01	2001/02
Unfair dismissal	52,791	50,065	52,000
Equal Pay Act	2,786	4,933	2,614
Sex Discrimination Act	7,038	9,082	7,525
Race Relations Act	3,922	4,153	3,825
Disability Discrimination Act	3,583	4,422	5,057
Total discrimination	14,543	17,657	16,407
Protection of wages	36,837	39,464	37,591
Breach of contract	29,053	29,390	28,804
Other*	28,515	25,677	27,677
Total	164,525	167,186	165,093

* For example, part-time work, Working Time Regulations.
Source: ACAS: “Working together” (Annual report, 2001/02, July 2002).

As we have already commented, when any claim is filed at an employment tribunal, a copy of that claim is sent to ACAS who will then contact the two parties involved and offer an attempt to resolve the dispute without the need for the matter to go to a tribunal. A specially trained conciliation officer will be appointed and will contact the parties, offering help to achieve a settlement. ACAS conciliation is a vital feature of the “tribunal” process. In

2001/02, according to ACAS data, over 40% of completed cases were settled in this way without coming before a formal tribunal.

But there is a twist in this. And that is that employers (the respondents) are frequently encouraged to settle a tribunal case, on legal advice, even though they believe they are in the right. In other words, many of these “settled” cases are believed to be fundamentally unsound by employers, but settling them is seen as the easy way out (the “pay-off culture”). Data are unavailable as to the number of unsound and vexatious cases (to our knowledge).

There are also a large number of cases which are withdrawn (33% in 2001/02). Perhaps some are withdrawn for perfectly legitimate reasons (there may be genuine misunderstandings and some are privately settled), but many are withdrawn, possibly after much hassle for the employer (the “respondent”), when the employee (the “applicant”) accepts that he/she does not have a case.

The proportion of cases that are settled varies from 33% (equal pay) to 49% (unfair dismissal). The equivalent data for withdrawn cases varies from 27% (unfair dismissal) to 52% (equal pay) and the equivalent data for those cases going onto tribunal varies from 14% (equal pay) to 29% (protection of pay). Data for settled and withdrawn cases are shown in the table below. (There are more data in table 6/4 in annex 6.)

ACAS: settled and withdrawn cases or the year 2001/02 (% of cases completed in brackets)

	Conciliated settlement	Withdrawn	To Tribunal	Cases completed
Unfair dismissal	22,835 (49%)	12,676 (27%)	10,852 (23%)	46,363
Equal Pay Act	619 (33%)	969 (52%)	264 (14%)	1,852
Sex Discrimination Act	2,993 (47%)	2,191 (35%)	1,161 (18%)	6,345
Race Relations Act	1,455 (39%)	1,253 (34%)	989 (27%)	3,697
Protection of wages	13,151 (36%)	12,657 (35%)	10,397 (29%)	36,205
Breach of contract	10,769 (41%)	8,468 (32%)	7,183 (27%)	26,420
Disability Discrimination Act	1,957 (48%)	1,317 (32%)	791 (19%)	4,065
Other	3,881 (31%)	5,311 (42%)	3,361 (28%)	12,553
Total	57,660 (42%)	44,842 (33%)	34,998 (25%)	137,500

Source: ACAS: “Working together” (Annual report, 2001/02, July 2002).

If ACAS conciliation procedures fail and if the application is not withdrawn, then the applicant goes to a tribunal. (See table 6/5 in annex 6 for a comparison of ACAS arbitration and employment tribunal procedures.)

As can be seen from the table above, about a quarter of cases went on to tribunal in 2001/02, according to ACAS data. Even though this exact percentage changes from year-to-year and depends on whether ETS data or ACAS data is used, over the last decade it has been broadly in the 25-30% range (and has been tending to fall). According to ETS data the proportion in 2000/01 was 27%, of whom 55% succeeded and 45% failed. The table below provides a list of outcomes for 2000/01.

Outcome of tribunal applications (2000/01)

Outcome	% of applications
ACAS conciliated settlements	37
Withdrawn	29
Successful at tribunal hearing	15
Dismissed at tribunal hearing	12
Otherwise disposed of, for example by private hearing	7

Source: Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002). Data from the Employment Tribunals Service Annual Report.

6.7 Employment tribunals: types of applicants

Analysis of tribunal applications suggests that some individuals are better placed to use tribunals than others. The size of the employing firm is one factor. For example, large firms may be regarded as having more resources to deal with redundancy payments cases. Then there is the issue that in small businesses (and they represent the overwhelming majority of businesses) there may be little or no separation between the owner or manager adjudicating on grievances and the person to whom a complaint is made, so disputes may be resolved more easily "in-house".

The following table shows the extent to which large firms are disproportionately likely to be faced with tribunal cases than smaller firms.

Tribunal applications by size of workplace (column %)

	All jurisdictions	Unfair dismissal	Breach of contract	Pay deductions	Sex/race discrimination	Redundancy payments
Fewer than 10 employees	29	24	36	37	14	48
10-24	22	20	23	29	25	12
25-99	25	26	24	19	25	29
100-199	10	12	8	5	16	1
200-999	9	10	8	7	9	5
1000+	6	7	2	3	11	5

Source: DTI: "Routes to resolution: improving dispute resolution in Britain" (DTI, July 2001), quoted in Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).

Discrimination applications are more common among relatively well-paid, educated people working in large firms, public sector or voluntary organisations, despite being more likely to have explicit equal opportunities policies.¹⁰

6.8.1 Costs of employment tribunals: introduction

There are several approaches to assessing the costs of the current tribunal system:

- The direct and indirect costs to taxpayers: they are mainly the costs of the Employment Tribunals Service and ACAS (and there is legal aid for Employment Appeals Tribunal cases¹¹).
- The direct business costs: the time and other resources, including legal costs, spent by employers addressing employment tribunal claims (including the “pay-off culture”) and the awarded compensation payments paid by employers (see 6.8.2).
- The more indirect business costs: such as uncertainty, stress and erosion of trust in the workplace (see 6.8.2).
- The time and other resources spent by the employees in making applications to employment tribunals. We fully accept that employees can have perfectly legitimate reasons for going to a tribunal, sometimes very reluctantly because such actions can damage job prospects.
- The discouragement of job creation, especially for those groups that have special discrimination legislation (see chapter 4), leading to higher unemployment and the consequent damage to the economy.

Shackleton’s¹² assessment of the direct resource costs, excluding the very considerable compensation payments, is shown in the table below. The compensation payments bill is a very considerable bill indeed.¹³ According to official figures, employers had to pay, as a result of tribunal decisions, £25m in 2000/01, whilst compensation paid in pre-tribunal settlements could amount to a further £20m.¹⁴

Estimates of the direct resource costs of the tribunal system (2000/01)

	Cost (£m)
Employment Tribunals Service	52
ACAS conciliation of individual disputes	30
Management time and legal costs	292
Extra recruitment costs	341
Cost of applicants bringing a case	10
Other institutions’ costs	30
Employers’ compliance costs	250
Total	1005

6.8.2 Costs of employment tribunals: further business issues

According to the CBI,¹⁵ 13% of workplaces have had at least one claim made against them over the past decade (up to 2000). In the majority of cases the risk and costs of tribunal

claims falls most heavily on employers.^{16,17} Where an application is made, employers bear the risk of a substantial pay-out should the case be lost, but potential damage to the company's reputation even where the case is won. The EEF¹⁸ had found that tribunal cases handled by the EEF were 50% higher in 2000 than in 1998 and as the number of cases rose, so did the costs.

On the specific issue of "indirect costs" a DTI¹⁹ survey identified the costs incurred by employers in tribunal cases as shown in the table below. The table shows the % of respondents to the survey who claimed to have incurred various "less quantifiable" costs as a result of tribunal cases.

Indirect costs incurred by employers in tribunal cases

	Unfair dismissal	Breach of contract	Wages Act	Sex/race discrimination	Redundancy payments
Increased staff stress	14	13	12	27	8
Adverse reputation as an employer	7	6	9	12	2
Damaged workplace relations	5	6	5	15	0
Lower output	3	5	5	9	1

Source: DTI: "Routes to resolution: improving dispute resolution in Britain" (DTI, July 2001), quoted in Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).

We have already indicated that employers will often "pay-off" an employee (or ex-employee) rather than risk a tribunal. Indeed the "pay-off culture" can be described as the situation where employers pay-off employees rather than face the cost and disruption of contesting a case at a tribunal. In 2002 the IoD²⁰ conducted a survey into this phenomenon. The main results were as follows:

- 37% of respondents to our survey thought the pay-off culture was a serious problem, whilst 45% thought it a problem – giving a total of 82%.
- Of those that thought it was a problem, 93% were convinced it was getting worse.
- 64% had paid off an employee who might have taken them to an employment tribunal, even though they were confident of their case. The biggest problems were unfair dismissal (77%), constructive dismissal (40%), sex discrimination (19%) and race discrimination (10%). (Respondents could give more than one answer.)
- 81% of employers had agreed to pay off an employee to avoid losing time, 68% to avoid the monetary costs, whilst 33% paid off to avoid the publicity. The fear of damage to a firm's reputation was a major reason for so many employers settling claims in advance of tribunal hearings.
- 69% had been advised by lawyers to settle rather than contest a case.
- The pay-off culture had made 45% respondents more cautious in appointing and promoting people, 75% were more cautious about offering jobs and 23% said it deterred them from creating new jobs or filling new vacancies. (Moreover, it can be costly to recruit people.)

This survey also asked IoD members of their experiences of employment tribunals. The main results were:

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- 29% of the respondents had had claimants deciding to withdraw cases at the last minute, whilst 16% had had claimants failing to turn up. Yet none had managed to recover all the costs they had incurred.
 - Of those who had successfully defended a claim the costs averaged £7,399, but on average recovered a mere 2% of their costs.

It is clear from these results the rapid rise in employment tribunal cases over the last 20 years and the associated phenomenon of the “pay-off culture” damages business, damages job creation and damages the economy.

6.9 Employment tribunal cases: reasons for the “explosion”

We have already hinted at the main reasons for the explosion in the number of tribunal cases. Putting them together, and they are inter-related, they are:

- The rapid and seemingly accelerating pace of new employment legislation, with major emphasis on employees’ rights.^{21,22,23} (But there’s barely a squeak about employers’ rights.²⁴) The increasing complexity of the law can lead to inadvertent infringement of the law,^{25,26} especially for small businesses where there is unlikely to be a dedicated HR department.
- The increases in compensation amounts.²⁷ Media stories about “jackpots”. The “have-a-go” culture.
- The rise of the “compensation culture” (ie the greater willingness by individuals to seek redress for their grievances, to blame someone else and retreat from their own adult responsibilities) along with the rise of the “positive rights culture” and the rise of “stress and depression” as diseases affecting business. (See section 6.11 below.)

6.10 Employment tribunals: reform

There have been attempts by Government over the last 5 years to stem the flow of employment tribunal cases:

- There were measures to streamline the resolution of employment rights disputes under the 1998 Employment Rights (Dispute Resolution) Act.²⁸ It promoted a new ACAS “fast track” arbitration scheme for cases involving unfair dismissal only. Its impact seems to have been modest.^{29,30}
- The Employment Act (EA, 2002) legislated for “model” statutory internal grievance procedures, which will form part of all employment contracts, binding on employees and employers, irrespective of workforce size. Moreover, there will be new employment tribunal procedures on time limits, compensation, costs awards, bars to certain complaints not heard internally and rules on fair proceedings. (See chapter 3.) The Act followed on from a DTI Consultation Document.^{31, 32} The Employment Act shirked the DTI’s original proposal to ask claimants at employment tribunals to pay a small up-front fee. We regarded this shirking as unfortunate. We do, however, trust that the EA will encourage people to use methods of dispute resolution other than tribunals. But we are not overly hopeful that it will mean a significant reduction in tribunal cases, given the relentless march of extra employment rights legislation.

The current working of employment tribunals is a significant and growing burden on business. What should be done?

- First and foremost the flood of employment regulation must stop and, preferably, reversed.^{33,34}
- The idea of claimants at tribunals paying a modest up-front fee should be implemented.
- The Government should ensure that, if an employment tribunal exonerates an employer, his/her legal expenses will be paid for.³⁵

6.11.1 The “compensation culture”: introduction

The “compensation culture” can be defined as the increasing tendency for people with grievances (“victims”) to claim for “compensation” (whether, more strictly, compensation from tribunals or damages from courts). Their claims are against the person/people who is/are allegedly “responsible” (can be “blamed”) for causing their grievance. It is the “name ‘n’ shame”, “blame ‘n’ claim” “have-a-go” culture. It reflects a retreat from adult, individual responsibility into “infantilism” and the sentimentalist retreat from reality. And it reflects the shirking of having to make hard choices and take the consequences if/when things go wrong. What is taken, in some circles, to be normal litigious behaviour now would have been considered embarrassing and infantile fifty years ago. Meanwhile businesses, particularly small businesses, struggle to meet the mandatory employers’ liability cover.

The “compensation culture” is inextricably bound up with an abandonment of the stiff upper lip, fortitude, self-control and a stoical and a robust response in the face of adversity. Instead there is a world where the everyday ups and downs of life are “pathologised” or “medicalised” into illnesses such as “stress and depression”. (We fully accept the seriousness of clinical depression and understand only too well how devastating an illness this can be.) And whereas fifty years ago people would have relied on friends and family to help with problems they now need, in our increasingly atomised and self-aware world, armies of counsellors. So not only are the ups and downs of life turned into illnesses, then people, knowing our “rights”, must seek compensation from the people alleged to have made them ill. All too often, it’s the hapless employer.

The increased demand for monetary compensation for grievances (real or imagined) is also inextricably bound up with the rise of the “rights” culture. Even though life is basically a messy affair and inevitably ends in death we all have these wonderful rights (as enshrined in the Human Rights Act, for example) to which people are all entitled. And, even though for the most part life cannot deliver Nirvana, if the employer is found not to be perfect they can, and do, sue. After all, work is now as much about self-actualisation, self esteem and even therapy (work must be “rewarding”) as about earning an honest crust (a “living”). (It’s amazing how often people seem to forget that the employer is actually paying his/her employees for their endeavours.) People, as victims, can blame their employers.

Even though we accept that some claims against employers are perfectly legitimate, employers are an “easy target” for compensation. After all, it is easier for someone to have a go at his/her employer than, say, his/her family, who really may be making his/her life very difficult indeed. And this is all the more likely given the burgeoning and enabling employment “rights” legislation that is promoted and implemented by the current Government and the impression sometimes given by Government that if a person is not

happy with his/her Work-Life Balance,³⁶ then it's the employer's fault. And it's up to the employer to put things right. It's hardly ever the person's fault.

The reasons for the rise in the "compensation culture", particularly as it affects employers, are many and various and they overlap and interlink. They also overlap with the reasons for the rise in employment tribunals that we have already mentioned. But we would identify them, as they affect employers, as follows³⁷:

- Changing social attitudes towards claiming for compensation when people have a grievance. (6.11.2.)
- The increase in stress and anxiety/depression cases and the pathologisation of these phenomena. (6.11.3.)
- Human rights legislation, including the 1998 Human Rights Act. The "rights culture". (6.11.4.)
- Increasing employment legislation, as acknowledged by ACAS, and discussed already.
- Well-publicised cases in which the compensation amounts seemed absurdly generous, veritable jackpots, as already mentioned.
- Lord Woolf's reforms to civil justice. 1995 saw the introduction of the Conditional Fee Arrangements Order, the conditional fee system that has expanded to create a restricted version of the US "no-win, no-fee" system. It was intended to make it easier for litigants to bring cases. In 1999, we understand, the system was extended further.³⁸ The "no-win, no-fee" system is now widely advertised in personal injury cases by law firms and adds another major boost to the culture of litigation explosion. In "no-win, no-fee" litigation, lawyers can take a large proportion of any compensation/damages in exchange for handling the case free of charge.

The final sub-section on the "compensation culture" is about its very considerable costs. The explosion of litigation has a formidable momentum (and ditto the numbers of lawyers!). (6.11.5.)

Footnote: tort law

When a claimant takes a defendant to, say, a County Court for, say, negligence, the legal framework in question is a part of tort law. A tort is a civil wrong independent of contract. Liability in tort arises from breach of a duty primarily fixed by law which is towards others generally, breach for which is redressable by an action for unliquidated damages (ie fixed by the court), affording compensation. There are other types of tort including nuisance, trespass to the person (including assault and battery) and defamation (see table 6/6, annex 6).

The tort of negligence assumes that members of a society owe one another a "duty of care", outside and in addition to contractual liabilities, depending on the principles of proximity and foreseeability. This means that each of us owes a duty of care to those with whom, in the eyes of the law, we have a proximate relationship and where it is reasonably foreseeable that a person could be harmed by our actions or failure to act.³⁹

If there has been a breach of duty of care resulting in personal injury, then the injured person (the would-be claimant) can take the person/body who has breached the duty of care (the would-be defendant) to court. Personal injuries can be either physical (for example, RSI, asbestosis, pneumoconiosis, bronchitis or damage after tripping over a badly-laid paving

stone) or mental (including for hurt feelings, stress, trauma and loss of confidence and self-esteem).

Furedi⁴⁰ focuses on the tort of negligence in his paper on “the growth of a culture of litigation in Britain”. And he writes:

- “In the past, it was a system of compensation based on fault liability. However, fault liability has little meaning when virtually everyone can be found at fault. Negligence used to embody a doctrine of personal responsibility on the parts of both defendant and plaintiff. In recent years, we have witnessed the incredible expansion of the ambit of personal responsibility for the defendant, and its concomitant decline for the plaintiff (claimant), as issues of responsibility and blame have become more plaintiff (claimant) friendly.”

6.11.2 Compensation for grievances

As we have already suggested one of the major factors behind the rise of the compensation culture is the increased willingness for people to claim for compensation when they believe they have a grievance. Rather than just brush it on one side and be satisfied with an apology,⁴¹ they prefer to pursue the hapless “other party” through the courts (or through an employment tribunal), hoping for financial gain. They are “victims” wanting redress.^{42, 43, 44}

Tana Wells, in her polemic “Fear of living”,⁴⁵ writes brilliantly about the state of affairs in the US, where the tendency to sue is (still) more a way of life than in the UK.⁴⁶ She wrote (we have summarised some of her booklet in table 6/7 in annex 6):

- “ “Fear of living” is the idea that every person’s life should be completely risk free and discomfort free and that no-one should bear responsibility for his/her own actions. There is a childish sense of entitlement. Gone is the notion of individual responsibility for one’s own actions; it is someone else’s fault. Outgrowths of the “fear of living” (the rise of risk aversion, “political correctness”, victimisation and the distortion of tort law) are all part of the same trend that seeks to undermine us all as autonomous, thinking individuals who retain the responsibility for determining how to live out and truly enjoy our lives. This is the age of the “self-tort cry baby”, to whom some disappointment is sufficient occasion to claim huge monetary reward, and the “all-purpose victim”.”

So the new-style infantilised “victims” retreat from the reality of taking hard choices for themselves and taking responsibility for themselves.⁴⁷ And they pursue their claims against the person/people who is/are allegedly “responsible” (can be “blamed”) for causing their grievance. As already said, it is the “name ‘n’ shame”, “blame ‘n’ claim” “have-a-go” culture.⁴⁸ Moreover, this is a culture that is weakening people and weakening society. And, according to Furedi,⁴⁹ a most damaging consequence of the culture of compensation is its impact on human relations. It promotes suspicion and conflict, and directly undermines relations of trust as well as the sense of personal responsibility.

It also frequently has a contrary effect on the “guilty party”. Fear of being sued, and the strictures of insurers, lead to a reluctance to apologise where, in the past, that would probably have satisfied the “victim”. (And may even satisfy the victim now.)

6.11.3 Stress and depression: the “pathologisation” of life

We define the “pathologisation” of human behaviour as the growing tendency to define a range of quite normal human behaviour, including dealing with the usual ups and downs of life, as pathologies or diseases.⁵⁰ Stress and depression are two aspects of this that spring to mind and, with the rise of “work-related stress”, they are of particular significance for employers.⁵¹ They are, moreover, behind the “diseasing of the workplace” phenomenon that claims that workplaces make people ill (not least of all with stress).^{52,53}

As we have discussed elsewhere,⁵⁴ we believe that a clear distinction should be made between “pressure” (which can be positive or negative and which most certainly is not an illness) and “stress” (which is people’s natural reaction to excessive pressure, but this isn’t a disease either). Another way of defining stress is “stress occurs when pressure exceeds your perceived ability to cope.” But if stress is excessive, and goes on for some time, it can lead to mental breakdown, clinical depression and physical symptoms and ill health (eg high blood pressure and heart disease). Stress can be caused by an imbalance between expectations on a person, self-imposed or from others, and that person’s ability to meet those expectations. Within the workplace, stress should be regarded primarily as a management issue and not as a disease. Stress is often a response when a person has the responsibility to do a job, but not the means. Very often “stress” can be little more than “medicalised dissatisfaction” and, even though some employees would claim that “work-related” stress is exclusively “caused” by work, one suspects that, in many cases, home influences are just as important, if not more so.

Pathologisation is one identifying feature of Nolan’s⁵⁵ “therapeutic society”, which has, for its other identifying features:

- The emancipated self: the culture must be dominated by impulses, the self must be liberated from society and the self is to be esteemed, actualised, affirmed and unfettered.
- An emphasis on emotions.
- And a new priestly class, where the authority of religious leaders and parents has been replaced by psychiatrists, psychologists, counsellors, therapists and social workers.

Concerning counselling (or more specifically confessional counselling), again we have discussed this activity before and in less than flattering terms. On this previous occasion, we concluded that it could well do more harm than good.^{56, 57, 58} By its very nature, it could well undermine people’s natural robustness in the face of adversity. Moreover, as therapists continually seek to reassure their patients with the words “don’t blame yourself”, the prevalence of counselling is another boost to the compensation culture.⁵⁹

There are three routes for an employee with stress or anxiety/depression to try and gain compensation (these are not necessarily mutually exclusive):

- Through an employment tribunal under the Disability Discrimination Act.
- Through the civil courts, using the tort law of negligence (as discussed above).
- Through the Health and Safety at Work (HSWA) route in the criminal courts.

The Health and Safety at Work Act (HSWA, 1974) is the main piece of UK legislation affecting the health and safety of employees at work. A breach of the HSWA is a criminal offence and can result in prosecution in the magistrates' courts (and higher criminal courts). But this does not remove the possibility of claims being made by employees (frequently backed by some very active trade unions) in the civil courts where they consider that the employer has failed to comply with the necessary standard of care or has breached the statute in some way.⁶⁰

Since the decision of the High Court in *Walker v. Northumberland County Council*,⁶¹ employers have to be very careful to ensure that full attention is paid to the possibility of work-related stress among their employees.^{62, 63} But in February 2002, the Court of Appeal overturned three stress awards and gave guidelines on how future claims should be decided.^{64, 65} The key points were that:

- No occupations should be seen as inherently dangerous to mental health.
- Employers are entitled to assume that staff can put up with the normal pressures of work, unless there is evidence to the contrary.
- If there was no alternative to a stressful job, it was up to the employee to choose whether to stay in the job or leave.
- Employers who offer access to confidential counselling services are unlikely to be found to have shown negligence.⁶⁶

There is little doubt that stress and anxiety/depression cases are major problems for employers.⁶⁷ Indeed despite the decline of heavy industry, cases of work-related ill-health appear to be rising inexorably and it is in the areas of stress and depression where they are increasing. Last year the Health and Safety Commission (HSC) released data which showed that stress cases had tripled between 1996 and 2001.⁶⁸ The three worst categories for employees claiming stress were all in the public sector; they were the civil service and defence, education, and health and social work.

6.11.4 The “rights culture”

There is little doubt that people today feel far more prepared to assert what they believe to be their “rights” than their ancestors would have done in more deferential and distant ages. They are far more aware of their rights. And this is partly behind the rise of the “compensation culture”.⁶⁹ Moreover, it is this assertiveness, along with easier access to the courts and the vastly expanded legislation that confers “rights”, which partly explains the rise of the “rights culture”.

But there are two other influences:

- The modern day concept of rights, that imposes obligations on other people but are divorced from duties and/or responsibilities on the part of the person asserting them. As Epstein⁷⁰ has written “classical jurisprudence always insisted that human rights in some people came attached to human duties imposed on others. Rights were never free goods, but were paired with correlative duties.” This is now changing with the development of statutes incorporating human rights without human duties.⁷¹ Two problems with all these “positive” rights are, firstly, the language is confusing, and, secondly, they can conflict.⁷² The traditional English system of “rights” was fundamentally one where

people were told what they couldn't do (so they lived under agreed constraints) and then the rest was left to them.

- The baleful influence of Europe, the legal system of which derives from fundamentally different traditions from English law,^{73,74} and which extends the concept of human rights without corresponding duties. The Human Rights Act 1998 (HRA) was implemented in October 2000 (earlier in Scotland) and incorporated the European Convention of Human Rights. In addition, the EU's Charter of Fundamental Rights is being incorporated in the Convention's draft Constitutional Treaty. (See chapter 5.)

Apart from fuelling the "compensation culture" generally, we would like to make some more specific points about the likely impact on employment law of the Human Rights Act. The significance of the HRA on employment law is that, even if litigants do not raise human rights issues in courts and employment tribunals, the courts and tribunals must consider them. The HRA represents a shift in power towards the judiciary.

In 2000 we identified the following possible problems⁷⁵:

- Employers who dismiss employees for observing religious events on days when an employee is contracted to work will find an employment tribunal will have to take into account article 9 (the right to freedom of thought, conscience and religion) when assessing the circumstances of the dismissal.
- Employers who dismiss employees for holding beliefs that conflict with the duties under an employee's contract may fall foul of Article 10 (the right to freedom of expression). A similar situation could arise with employees who refuse to observe a compulsory dress code.
- In addition Article 6 (the right to a fair trial) could have implications for the employment tribunal system. At present, appeals against the decisions of ET's are restricted to points of law and instances of bias. It is not possible to appeal on more substantive grounds. Possibly, the courts might interpret Article 6 in such a way as to expand the right of appeal in employment tribunal cases.

Also:

- Article 8 (the right to privacy) has implications for employers who monitor employees' e-mails and telephone calls (see chapter 3) and companies who use hidden CCTV cameras for catching petty pilfering and carrying out random searches on employees.
- Article 11 (the right to freedom of peaceful assembly and association) is likely to bolster the rights of unions, pickets and protestors.
- Article 12 (the right to marry and found a family) could be interpreted to expand so-called family friendly employment rights and regulations.

The impact of the HRA on employment law seems to have been modest so far (it has had a much bigger impact on asylum and immigration law). But it was a quite unnecessary addition to the country's stock of legislation. (See table 6/8, annex 6 for a list of rights.)

6.11.5 The "compensation culture": costs

The purely financial costs of the compensation culture are very considerable and appear to be rising inexorably. There are also non-financial costs: for example, doctors and surgeons

practising defensive medicine,^{76,77} in order to avoid litigation, which is arguably driving up, for example, caesarean rates. For us the compensation culture has gone too far.⁷⁸

There are some estimates of the “compensation culture” for the whole economy. According to the Institute of Actuaries it now costs more than £10bn (1% of GDP), but this is still less than half that (proportionately) than in the USA (where costs are falling after some legal reforms to curb excessive awards).^{79, 80, 81,82} Costs are rising in the UK by 15% annually. They are spiralling out of control. We should be concerned about these figures. The rising costs of compensation claims are frequently met by insurance companies, which then incur the wrath of customers when they charge higher premiums. A more litigious society could impoverish everyone except lawyers. The data showed that the public sector was worst hit,⁸³ resulting in litigation-avoiding defensive behaviour.

One of the more specific knock-on effects of the spiralling costs of the compensation culture is the huge rise in the premiums for employers’ liability insurance. (See the reference on the Employers’ Liability (Compulsory Insurance) Act (1969).⁸⁴) The increasing premiums are increasingly unaffordable for many small businesses. According to the Axa insurance company 13% of small businesses don’t have the mandatory employers’ liability cover.⁸⁵

According to the CBI the average rise in insurance premiums was 50% in 2002.^{86, 87, 88} Small firms and “high hazard” industries faced particular difficulties. The CBI blamed the more litigious society, compensation claims having gone up by 100% in the past 5 years, and the increasing range of industrial “diseases”. They recommended that claimants should pay a greater share of the costs if they lose a case and there should be the introduction of pre-trial arbitration. We basically agree with these suggestions. And in our response to the Government’s Review of Employers’ Liability Compulsory Insurance (ECLI),⁸⁹ we said “there is much to be said for a system of no-fault compensation for claimants, with identified levels of reimbursement of costs and of compensation. These would be likely to be set at levels lower than the highest awards of damages, but would have the benefit of certainty, rather than putting all parties to the stress of court proceedings”.

6.12 Conclusions

The background to this chapter is the explosion of employment tribunal cases over the last 15-20 years. They are costly, they detract employers from running their businesses, they destroy trust between employer and employee and they discourage job creation. The main conclusions to this chapter are as follows:

- Industrial tribunals were set up in 1964 with very limited powers. Employment tribunals (as they have been known since 1998) have jurisdiction over more than 80 types of complaint. This is one reason, along with badly drafted and/or ambiguous legislation, for the explosion in cases. (6.5.)
- According to data from the Employment Tribunal Service (ETS) whereas there were 35,964 applications to tribunals in 1985/96 this had risen to 130,408 by 2000/01. (These data are calculated using the ETS’s old-style method of calculation, based on main jurisdiction; the equivalent figure using the new-style method of calculation, based on each and every jurisdiction, is 218,101.) The most frequent complaint is still about unfair dismissal. (6.6)

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- Using ACAS data 42% of completed cases were settled before tribunal, 33% were withdrawn (a complete waste of time for the employer) and only 25% went onto tribunal. Of those cases going onto tribunal just over half succeeded in 2000/01 (55%) whilst 45% failed (another complete waste of time for the employer). (6.6.)
 - Discrimination applications are more common among the relatively well-paid people in large firms, and public sector and voluntary organisations. (6.7.)
 - The cost of the employment tribunals system is considerable in terms of management time, legal costs, compliance costs and administrative costs. One estimate exceeds £1bn (for 2000/01), with the majority of the costs falling on the employer. (6.8.1.)
 - The “unquantifiable indirect” costs to the employer are also considerable in terms of increased staff stress, the possible threat to the employer’s reputation (this is a major reason for the “pay-off culture”, along with saving valuable management time) and damaged workplace relations. (6.8.2.)
 - The reasons for explosion in tribunal cases include (6.9):
 - The equally dramatic explosion in employment legislation.
 - Increased compensation amounts and well-publicised jackpots.
 - The rise of the “compensation culture”.
 - Whilst there have been some Government attempts at stemming the flow of tribunal cases, we do not believe they will be especially effective. At the very least (6.10):
 - The flood of legislation must stop.
 - Claimants should pay a modest up-front fee.
 - Exonerated employers should have their legal costs reimbursed.
 - The rampant “compensation culture” is a product of our age. There’s no more stiff upper lip, no more forgiveness (“an apology will do”) but an insistence on financial compensation if slighted, stressed or hurt. The reasons are several (as they affect employers) (6.11):
 - Changing social attitudes towards claiming for compensation when people have a grievance.
 - The pathologisation (medicalisation) of stress and anxiety/depression that, in earlier more robust times, would have been seen as part of the normal vicissitudes of life. (And we understand fully how serious and devastating clinical depression can be.) Stress and anxiety/depression cases are now recognised as fully-fledged work-related diseases and they are increasing rapidly.
 - The “rights culture” and the increasing tendency for duty-less rights that impose obligations on others. The Human Rights Act (1998) was part of this development. All too often the duty-less rights mean more obligations for employers.
 - Increasing employment legislation.
 - Well-publicised jackpots.
 - The introduction of the “no-win no-fee” system intended to make it easier for litigants to bring cases.
 - The costs of the “compensation culture” are now estimated to be £10bn (1% of GDP) and rising by 15% each year. These are hugely worrying figures. One of the more specific knock-on effects of the spiralling costs of the compensation culture is the huge rise in the premiums for employers’ liability insurance. Small firms find the rocketing premiums increasingly unaffordable. (6.11.5.)

References

1. Martin: "The English Legal System" (Hodder and Stoughton, 2000).
2. Martin: "The English Legal System" (Hodder and Stoughton, 2000).
3. ACAS: "Working together: the ACAS standard" (ACAS, current, as at ay 2003, version).
4. ACAS annual report 1999/2000 (ACAS, 2000).
5. Source: Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002), writes that the average of jurisdictions per applicant has risen from about 1.4 (during the years of 1996/97 and 1997/98) to 1.7 (during 2000/01) [an increasing number of cases cover two (or more) complaints]. For a complete list of powers of employment tribunals see Gee's "Essential Facts: Employment" (latest edition, updated quarterly).
6. Wheeler: "When some are more equal than others" (Daily Telegraph, 24 April 2003).
7. Wilson: "The pay-off culture" (IoD, November 2002), quoting House of Lords Hansard, written answers (27 March 2002). These data are from Employment Tribunal Reports; they are different from ACAS data. They are old-style ETS data based on the number of cases by main jurisdiction and not by each and every jurisdiction.
8. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).
9. The ACAS data and the ETS data are difficult to reconcile even though they are now both based on financial years (ACAS data used to be based on calendar years). Moreover, they both classify (and record) activities by each and every jurisdiction now - in other words, they record the total number of applications, allowing for "multiple applications", for all jurisdictions. Whilst the ACAS traditionally used this method, the ETS used to classify (and record) activities for the MAIN jurisdiction of application only (apparently with a few add-ons) and that was one reason why the ETS data undershot the ACAS data. There are, however, still coverage differences. They include: (1) the ACAS data also include cases where no tribunal applications are actually made but where it was claimed potential claims existed ("non-IT1" cases). (Most non-IT1 cases are related to claims of unfair dismissal.) In 1998 there were, for example, 1,707 such cases (ACAS annual report, 1998). (2) the ACAS data only includes the cases where they conciliate, whereas the ETS covers all cases (and this is the main reason why the new-style ETS data are higher than the ACAS data).
10. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).
11. Martin: "The English Legal System" (Hodder and Stoughton, 2000).
12. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).
13. IRS Employment review: "Costing tribunal cases" (IRS Employment review 748, 25 March 2002), quoted a DTI study ("Findings from the 1998 survey of ET applications") which had found that employers spent an average £2,000 on employment tribunal legal costs (which has almost certainly gone up since then) and the average time spent on employment tribunal cases was a shocking 43 hours.
14. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002). Compensation payments were just £14m in 1999 (see Buckley: "Employment tribunals award record compensation" (Times, 29 December 1999)).
15. CBI: "Managing the compensation culture: improving case management in the employment tribunal system" (May 2000).
16. Gibb: "Tribunal door closes to borderline cases" (Times, 5 December 2000), wrote that "if you have a grievance against your boss, it is not hard to mount a claim for unfair dismissal. If it fails, there will only be your own costs to pay. And there is a fair chance that the employers, to avoid bad publicity, will settle - with the usual confidentiality agreements." We would add that employers are an "easy target" for people to go for if they have grievances in their lives. You can take your employer to a tribunal, you can't take your "friends and family".
17. Employers, even if successful, are very unlikely to get any of their legal costs reimbursed. We believe that employers should be able to claim their costs from claimants where there has been a vexatious or frivolous claim.
18. Hibberd: "'Litigious' workers a burden to business" (Daily Telegraph, 28 February 2001).
19. Source: DTI: "Routes to resolution: improving dispute resolution in Britain" (DTI, July 2001), quoted in Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).

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20. Wilson: "The pay-off culture" (IoD, Nov 2002).
 21. For example in ACAS's annual report or 1999/2000 (ACAS, 2000) they said that there were 7,000 complaints under the new Working Time Regulations and NMW provisions, and an estimated 6,700 additional unfair dismissal complaints arising from the lowering of the qualifying period from 2 years to 1 year.
 22. Oldfield: "Small firms fear tribunals threat" (Sunday Times, 18 April 1999) wrote that owner-managers feared an increase in the number of disputes ending up at employment tribunals as a result of the Government's new labour laws.
 23. ACAS's 1998 annual report said that the expansion [of the number of claims] is a direct consequence of the extension of individual employment rights over the period and a growing number of cases involving multiple jurisdictions. Other factors include changes in the economic climate and an increased willingness of people to seek redress for their grievances.
 24. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002), writes that there are very few restrictions placed on employees' freedom to quit jobs, and the movement to a better-paid job is seen as natural and even to be recommended. On the other side things are very different. There is an element of market failure, which justifies some Government interference with complete freedom of contract. (Examples of market failure in the formation of employment contracts might include information imperfections and asymmetries that arise in the work environment.) Other economic rationalisations for legal intervention in labour markets include the possibility of positive externalities resulting from, eg, parental leave, "second-best" arguments for severance pay (in the absence of private unemployment insurance markets where moral hazard problems arise) or action to offset excessive market power exercised by employers (eg monopsonistic employers) or groups of employees (powerful professional bodies may restrict entry). But this, writes Shackleton, can't explain the rise of Government intervention to the degree that is now the case. The DTI is delivering social engineering (and undermining competitiveness). NB Trade Unions are very active players in employment tribunals.
 25. McCurry: "Trial, America style"(Director, October 1999), reported that a survey by Manchester based law firm Peninsula had found 98% of owner-managed businesses had said that employment law was one of their greatest anxieties. All too often, small firms were unaware of the law.
 26. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002), concluded that "one major problem is the continuing level of uncertainty as a result of frequent changes in the law and its interpretation. This leads to speculative applications and inadvertent breaches of the law by employers". (Employers have to weigh up the balance of the costs of compliance with the costs of non-compliance.)
 27. Gee's "Essential Facts: Employment". The maximum award for unfair dismissal was increased from £12,000 to £50,000 in the Employment Relations Act. It now (May 2003) stands at £52,600. There is no lid on compensation awards in sex, race or disability discrimination cases.
 28. Bolger: "New law streamlines unfair dismissal disputes" (FT, 14 July 1998).
 29. Eaglesham: "Employment arbitration scheme fails to take off" (FT, 11 December 2001).
 30. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002).
 31. DTI: "Routes to resolution: improving dispute resolution in Britain" (DTI, 2001), proposed that (1) organisations which do not have dispute resolution procedures in place (or do not use them when workplace disagreements arise) should have arrangements for managing such disagreements and (2) a new, modest charging regime for use of the employment tribunal system in order to reduce the cost burden on the taxpayer (exemptions would apply to those on benefits and in cases of genuine need). The second proposal was dropped. It was a very good idea.
 32. In 2001 there was also the Leggatt Review, chaired by Sir Andrew Leggatt: "Tribunals for users: one system, one service: report of the Review of Tribunals".
 33. Malthouse: "Industrial tribunals" (IoD, February 1997).
 34. Shackleton: "Employment tribunals: their growth and the case for radical reform" (IEA, 2002), wrote that the only way to fundamentally stem the growth of tribunal applications was to call a halt to further regulation and instead to move towards a greater freedom of contract in labour markets. There was currently no enthusiasm in the UK – neither in the EU. But things could change. If the EU economies fell into recession, this might remind people forcefully that employers who created jobs were more likely to be public benefactors in the long run than those

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- who sought to restrict ever more narrowly the conditions under which employment contracts could be formed.
35. Wilson: "Employment tribunals" (IoD, February 1999).
 36. Lea: "Work-Life Balance...and all that: the re-regulation of the labour market" (IoD, 2001). We touched on the compensation culture in this paper.
 37. Lea: "The burgeoning compensation culture" (IoD News, September 2000).
 38. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999). Lee (editor): "Compensation crazy: Do we blame and claim too much?" (Institute of Ideas, 2002).
 39. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999). He also added that "the compensation culture that we are investigating also extends to the growth in quasi-legal claims, growth of arbitration and administrative tribunals as against court hearings, and increasing off-the-record activity. In the "Shadow legal world", the extension of fault liability meets with fewer challenges than in the courts, and it's here that we see the strengthening roots of a litigation crisis".
 40. Jenkins: "These damages must be wrong" (Times, 14 December 1996) wrote "in our culture of compensation, real men sue. Have we forgotten how to forgive? To err is human, to forgive divine – but forgiveness is for wimps, real men sue. The rampant advance of punitive damages rots the trust that a client places in the advice of a professional & rots the integrity the professional offers in return. It makes everyone risk-averse & defensive. Teachers, doctors etc can make mistakes, which can cause harm. Where there is gross negligence & the harm is quantifiable, compensation is reasonable, where the harm is grief or a sense of loss, I cannot see the point in expressing it financially." He went onto to say that there were other, preferable, forms of redress, including restitution, sincere apology or the disciplining of those guilty of fault.
 41. Jenkins: "Kicking accidents into touch" (Times, 20 April 1996) wrote "when a referee can be sued, it is a sad day for rugby – and for personal liberty. Like the current craze for judicial review of public administration, negligence litigation may have its roots in legitimate grievance, but it risks polluting public & private life. A common thread through my file of lunacy is a yearning to deny bad luck. The Government or the insurer picks up the tab. Individuals should be left with some responsibility for their actions, for the risks involved in the business of living".
 42. Nolan: "The therapeutic state" (New York University Press, 1998). Nolan argued that "victimisation" was the tendency for individuals and groups to understand themselves as "victims" "of their abusive pasts or of the oppressive social environment that surrounds them. It appeared to be on the rise. One can be a victim in several ways: (1) one can be a victim of one's own disease, (2) one can be a victim of discrimination because of one's disease, (3) one can be a victim of discrimination because of a number of other character traits, regardless of whether or not one is "sick". In pre-modern moral orders, pain, suffering and injury were viewed as a part of life. They were understood to contribute towards the refining process that helped the individual to surrender self and grow in "virtuous character". A misfortune was not regarded as the fault of another, but as a consequence of fate or divine allowance. The basic understanding of pain and suffering lay within classical and Judeo-Christian traditions. With the devaluing of these older moral values and with the greater emphasis on self and individual rights, more people were likely to blame someone or something else for their misfortunes. (We have put the definition of the "therapeutic state" in annex 1B.)
 43. Hume: "The genuine victims are forgotten in a flood of phoney racism claims" (Times, 29 May 2000) wrote that "after all, everybody can now play the blame game, choosing from a full set of off-the-peg victim identities to suit every occasion. Things going badly at work? Play the "victim of stress" card. Trouble at school? Get out the "bullying victim" joker. Just remember, as the fashionable mantra goes, that "we are all responsible" for society's problems. Which means that none of us needs actually take responsibility for anything".
 44. Wells: "Fear of living" (Agora, 1994).
 45. The author fears that this country could end up with a lethal combination of US-style litigiousness and EU-style regulation. Britain imported the David and Goliath conception of litigation from the US in the 1980s, in the context of victims' rights and increasing hostility to large corporations. The attitude to litigation has changed significantly over the last 15-20 years.

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46. Lloyd: the compensation culture: a new legal paternalism? (in Lee (ed): "Compensation crazy: Do we blame & claim too much?", Institute of Ideas, 2002). Lloyd argued that we should worry about the compensation culture. The law was acting paternalistically towards the public by undermining personal responsibility. He also discussed defensive medicine.
 47. Tracey Brown: "Name, blame, shame and claim" (Last Magazine, 2000) wrote that there was now "the development of litigation avoidance strategies. Litigation does restrict behaviour, but in the worst possible way. Litigation, and its implied liability for others, is often quite arbitrary in whom it punishes & awards, & the consequences for behaviour are very damaging. Legal liability does not simply restrict the excesses; it actually limits the responsibility that we are prepared to take for each other".
 48. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999).
 49. Lea: "Healthcare in the UK: the need for reform" (IoD, 2000). In this paper we discussed the issues of stress and depression as well as the insidious tendency to "medicalise" people, including the dishonest screening programmes for women, and reduce their autonomy in the name of their "health". We also discussed the screening programmes in Lea: "Women's cancer screening: time for some honesty" (British Journal of Healthcare Management" (August 2001).
 50. Stress and depression are also covered by the Disability Discrimination Act.
 51. Furedi: "Diseasing the workplace" (Occupational health review, December 1999).
 52. Times leader: "Cuppa nonsense" (29 October 1999) wrote that "according to the HSE's latest figures, stress, depression and anxiety account for 6.5m days off each year. This was more than a third of the total from all causes of absences and led to half a million leaving their jobs. In a recent survey, 1 in 3 people said their jobs were bad for their health. But if they are asked questions that invite the affirmative (for example, "have you recently felt under strain?"), then of course they respond in the affirmative. As Frank Furedi's refreshingly sceptical analysis of this 1990s epidemic puts it "work has been recast as a threatening experience" (see above). What is new is not job insecurity but the "medicalisation of these responses". The trade unions have moved with the times providing counselling services and workshops coping with "trauma"; and stress tops the list of union-backed court cases against employers. Many employers offer stress counselling as well."
 53. Lea: "Work-Life Balance...and all that: the re-regulation of the labour market" (IoD, 2001).
 54. Nolan: "The therapeutic state: justifying government at century's end" (New York University Press, 1998).
 55. Lea: "Healthcare in the UK: the need for reform" (IoD, 2000).
 56. Rogers: "How tragedy changed lives for the better" (Sunday Times, 16 March 2003). This article quoted a Sunday Times report (of 2 March 2003) about research published by the Cochrane organisation. The Cochrane organisation had concluded that the "stiff upper lip beats stress counselling" and some counsellors dwell too much on the negative
 57. Economist: "Mind how you go" (Economist, 8 March 2003) wrote that "trauma counselling can be bad for you, yet some firms make it mandatory. Brain researchers think that the human mind recovers naturally from psychological traumas by replaying events and constructing new memories. Unnecessary counselling may increase the likelihood of Post Traumatic Stress Disorder (PTSD) in some cases by making people fear that they may be mentally ill. The ailment is now fashionable with those who have mildly upset feelings. Repression works."
 58. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999).
 59. Gee's "Essential Facts: Employment" (latest update).
 60. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999), reported the important legal precedent set by John Walker, a senior social worker who received £175,000 (April 1996), for "psychiatric damage to a normally robust personality". The High Court had ruled that an "impossible workload" caused a nervous breakdown.
 61. Gee's "Essential Facts: Employment" (latest update).
 62. There is an HSE guidance booklet "Tackling work-related stress: a manager's guide to improving and maintaining employee health and well-being" (HS(G)218).
 63. Gee's "Essential Facts: Employment" (latest update).
 64. Tait: "Appeal court overturns stress-at-work payouts" (FT, 6 February 2002).
 65. For example, the Employee Assistance Programme (EAP), which is offered by some employers to advise on issues such as stress and provide, for example, counselling. But see Tracey Brown: "The

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- social costs of a compensation culture” (in Lee (editor): “Compensation crazy: Do we blame and claim too much?” (Institute of Ideas, 2002).) She wrote “no amount of stress counselling in the workplace can prevent employers from finding themselves called to tribunals. On the contrary, the institutionalised accommodations to victims’ claims that are the bedrock of these strategies...largely serve to encourage their advance. In their efforts to show that they take claims for redress seriously, institutions are helping to spread the vocabulary of compensation & the psychology of personal damage. In fact, our touchy-feely, customer-friendly, client-oriented, victim-sensitive society breeds far more claims for compensation than the bullish, hard-nosed business approach ever did.”
66. IRS: “Penalties for health and safety offences still ‘disappointing’” (IRS, December 2000), showed that the vast majority of work-related ill-health cases were either for “anxiety/depression” or for “other work-related stress” (ie excluding PTSD). And they were rising whilst other components were fairly steady.
 67. Roberts and Sherwood: “Stressed workers give their employers a headache” (FT, 11 December 2002). Or the author assumes the year for the latest data was 2001. It didn’t appear to be clear in the article.
 68. Walker: “The case for compensation” (in Lee (editor): “Compensation crazy: Do we blame and claim too much?” (Institute of Ideas, 2002)). Walker wrote that “a propensity to sue is symptomatic of a population “more conscious of our legal and moral rights” and the effect of litigation is to hold employers, big businesses and public services to account.” Well, maybe, on the latter point.
 69. Epstein: “Equal opportunity or more opportunity?” (Civitas, 2002).
 70. When we hear talk of “fairness” and “rights”, it strikes us that is for the employee and never the employer. This is ironic. Usually when people receive money (recipient) they have the obligations and the payer has the rights. But when employees receive money (recipient) they have the rights and the employer/payer has the obligations.
 71. Minette Marrin: “There’s menace behind the mercy of assisted suicide” (Sunday Times, 26 January 2003), wrote “I hate the language of human rights anyway; it is confused and confusing and it is used almost routinely to justify ever more state intrusion into our lives. And, philosophically, the idea of human rights seems to me to be full of holes. Who is to grant them? Who is to uphold them? What if they clash, as they frequently do? It seems much more useful to me to think of human wrongs; it is usually much simpler to.”
 72. Broadly in English law rights grew out of obligations whereas in continental law obligations grew out of rights.
 73. A barrister friend of the author has written: in English law there is a distinction between the “law” and “rights” and it was what actually separated English and Continental jurisprudence. The English word “law” means just that and nothing else. The German “Recht”, the French “droit” and the Italian “dimitto” all have the double meaning of both “right” and “law”. In England it was traditionally only in the old Courts of Chancery that rights in “equity” stood alongside the “law”.
 74. IoD Press release: “IoD warns about HRA” (October 2000).
 75. Tracey Brown: “The social costs of a compensation culture” (in Lee (editor): “Compensation crazy: Do we blame and claim too much?” (Institute of Ideas, 2002).) wrote “some people – particularly personal injury lawyers – think the growth of the compensation culture is a good thing and that what we are seeing is a liability revolution in the name of “social justice”. It is argued that the threat of legal action, direct or implied, leads to greater corporate responsibility and increased professional care and diligence. But there are counter-effects. The rise in compensation claiming has encouraged a desire to avoid responsibility and therefore liability. And this leads to a rise in defensive behaviour (especially in medical procedures) to avoid the risks of litigation. Far from increasing accountability, the threat of litigation appears to have reduced the amount of openness and information sharing. It affects interpersonal behaviour.” And we can add that it destroys trust and puts people in the hands of the ever-expanding legal profession. So much for individual empowerment!
 76. Furedi: “The litigation bug brings Britain down in a fever of greed” (Times, 17 January 2000).
 77. Lea and Hendy debate: “Has the compensation culture gone to far?” (Guardian, 15 January 2000). I argued that it had, Hendy being the good barrister argued that it hadn’t. Compensation claims can be very lucrative. About 40% of compensation payouts can go in legal fees.
 78. Sherwood: “Growing compensation culture costs £10bn a year” (FT, 17 December 2002).
 79. FT leader: “Claims culture” (FT, 21 December 2002).

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80. Furedi: "Courting mistrust: the hidden growth of a culture of litigation in Britain" (CPS, 1999), estimated the costs of around £3.3bn to £6.2bn for 1999 (?). Tracey Brown: "The social costs of a compensation culture" (Lee (editor): "Compensation crazy: Do we blame and claim too much?" (Institute of Ideas, 2002), points out that "there is undeniably a litigation boom, but the significant development is in out-of-court settlements. Only 5% of compensation claims are settled in court."
 81. Economist: "Blame culture" (Economist, 12 December 2002) wrote that shuffling costs on to insurers meant everybody paid more in the end. Many of the costs were incurred in the public sector (eg army paying out £100m), often for injuries (including stress) that in a more robust age would have been seen as part of the job.
 82. The Employers' Liability (Compulsory Insurance) Act (1969) requires (apart from some exemptions) that employers must take out insurance against claims for compensation in accidents at work pursued by employees in civil actions. From 1 January 1999, employers need cover of at least £5m. (Source: Gee's "Essential Facts: Employment".)
 83. Becket: "Casualties of the compensation culture: small businesses blame the Government as liability premiums rise by as much as 2000%." (Daily Telegraph, 17 March 2003). He wrote that small construction businesses had been hit disproportionately hard by the rising costs of liability claims and premiums. The cost of the average employers' liability claims had increased threefold between 1996 and 2002. In addition, lower interest rates had reduce investment income and falling equity values had hurt insurance company funding and these factors, along with the higher pay-outs, had led to the rocketing insurance premiums.
 84. Bream: "Business hit by rise in claims for work accidents" (FT, 3 March 2003).
 85. The Forum for Private Business (FPB) has written that "SMEs have faced punitive rises in their liability premiums in the last few years, and this trend shows little signs of slowing. Many firms have seen liability insurance premium rises of between 200 and 500%, some firms have been unable to get liability insurance at any price".
 86. Because of the crisis the All Parliamentary Small Business Group has undertaken a considerable amount of work on the subject of liability insurance and SMEs. The paper is called, straightforwardly, "Liability Insurance and SMEs".
 87. Patricia Peter: "Government Review of Employers Liability Insurance" (IoD, February 2003).