BIS | Department for Business Innovation & Skills

RESOLVING WORKPLACE DISPUTES

Final Impact Assessment

NOVEMBER 2011

Title:

Resolving Workplace Disputes

Lead department or agency:

BIS

Other departments or agencies:

MoJ, HMCTS, Acas

Impact Assessment (IA)

IA No: BIS0202

Date: 01/10/2011

Stage: Final

Source of intervention: Domestic

Type of measure: Primary legislation

Contact for enquiries:
Amy Newland 020 7215 6714/ Gail Davis 020 7215 3859

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

There are significant volumes of claims to the employment tribunal. These claims are costly to employers, claimants and the exchequer. At the same time, it is apparent that the costs and risks faced by employers from employment tribunal claims can affect their hiring behaviour. There is evidence that demonstrates that if disputes are resolved in the workplace this is far less costly to both parties, delivers more positive results in terms of continued employment, and saves money for the Government by reducing demand on HM Courts & Tribunals Service (HMCTS).

What are the policy objectives and the intended effects?

The intention of these proposals considered together is to improve business confidence in hiring staff, and in particular to:

- Support and encourage parties to resolve disputes earlier, and where possible in the workplace, thereby reducing the number of claims which reach an employment tribunal.
- Ensure that where parties do need to go to the employment tribunal, cases are dealt with more swiftly and efficiently to reduce the costs borne by all parties.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Five different policy options are being pursued following the Resolving Workplace Disputes consultation. These are: 1) requiring all claims to be submitted to Acas in the first instance to receive early conciliation; 2) proposals to improve the cost-efficiency of the employment tribunal, including more cases where judges sit alone, witness statements taken as read, removal of expenses payments to parties and witnesses and Costs/Deposit order limits; 3) increasing the qualifying period for unfair dismissal from one to two years; 4) introducing financial penalties for employers; and 5) proposing an alternative method for calculating limits for statutory redundancy payments and tribunal awards. Each proposal is assessed against a do-nothing option and in some cases, other options. Preferred options are explained and justified within individual assessments in this document.

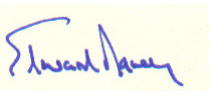
Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 6/2016

What is the basis for this review? PIR. **If applicable, set sunset clause date:** Month/Year

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review? Yes

SELECT SIGNATORY Sign-off For final proposal stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister: 

Date : 16 November 2011

Summary: Analysis and Evidence

Overarching

Description:

Overarching assessment - summary of costs and benefits

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 466

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		1		
High				
Best Estimate	7		45	**319**

Description and scale of key monetised costs by 'main affected groups'

Costs to employers from: engaging in early conciliation (proposal 1), payment of penalties (proposal 4), familiarisation costs from changes to unfair dismissal rules (proposal 3).
Costs to employees from engaging in early conciliation, reduced awards (proposal 3), reduced redundancy payments (proposal 5) and reduced receipt of expenses (proposal 2D, approx £0.2m). Costs to the exchequer for provision of early conciliation service.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		0		
High				
Best Estimate			104	**784**

Description and scale of key monetised benefits by 'main affected groups'

Benefits to employers, claimants and the exchequer from fewer cases resulting in full employment tribunal hearings. For claimants and employers this is in reduced time spent and reduced payments on legal representation.

Other key non-monetised benefits by 'main affected groups'

Benefits of early dispute resolution for employer/employee relations, workplace productivity and reduced stress.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Figures given here reflect interaction across proposals. A number of assumptions are made and risks set out in the assessments of the individual proposals. For consistency, all proposals are assessed with a present value base year of 2011, although with various implementation dates this means assessments often cover one or more years with zero impact.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: 0.4	**Benefits:** 10.6	**Net:** 10.1	Yes	OUT

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options		
From what date will the policy be implemented?			01/01/2012		
Which organisation(s) will enforce the policy?			HMCTS, ACAS		
What is the annual change in enforcement cost (£m)?			-£23m		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 85%	**Benefits:** 85%	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	tbc
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	No	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 1

Description:

Require all employment tribunal claims to be submitted to Acas in the first instance and offered early conciliation

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 391

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		1		
High				
Best Estimate	2		40[1]	**230**

Description and scale of key monetised costs by 'main affected groups'

There are costs to the Exchequer for offering early conciliation, estimated at £16.2m per annum, with some one-off costs to developing this from Acas' current pre-claim conciliation offer of £2m. Employers will face costs of engaging with early conciliation (time, advice) estimated at £21.1m per annum, whilst claimants are expected to face costs of engaging with early conciliation of £2.8m.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		109	**621**

Description and scale of key monetised benefits by 'main affected groups'

Savings to the exchequer, employers and claimants from reduced employment tribunal claims. Benefit estimates are based on likely volume of claims reduction, and the costs avoided by each group. This yields £35.7m per annum exchequer benefit, £19.4m per annum claimant benefit and £53.6m per annum employer benefit.

Other key non-monetised benefits by 'main affected groups'

Reduced stress to claimants and employers resulting from fewer employment tribunal hearings.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Analysis of costs and benefits based on recent history of tribunal claims volumes and evaluation evidence of current pre-claim conciliation service offered by Acas. Assumes that performance of the current PCC service will be seen in the wider early conciliation offer. Analysis assumes that in the absence of this intervention, 50 per cent of individuals completing a statement of intent form would have gone on to lodge an employment tribunal claim, and that the policy effect is a reduction in employment tribunal claims lodged of 25 per cent. Sensitivity analysis is carried out in this impact assessment's evidence base.

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	**Benefits:** 0	**Net:** 0	Yes	IN

[1] Average Annual Costs and Benefits stated here refer average annual recurring costs and benefits once the policy is in effect.

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2014		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			-£20m		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 100	**Benefits:** 100	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[2] Statutory Equality Duties Impact Test guidance	No	116
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	No	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[2] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 2A

Description:

Proposal A - Extend category of ET proceedings in which an Employment Judge can sit without lay members to include unfair dismissal complaints, subject to having due regard to the statutory criteria.

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0.7

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

There are no quantified direct costs to any group in society.

Other key non-monetised costs by 'main affected groups'

There are no unquantified direct costs to any group in society.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate	0		0.1	**0.7**

Description and scale of key monetised benefits by 'main affected groups'

HMCTS, and hence the taxpayer, benefit from reducing the annual cost of paying for the use of lay members in the employment tribunal (a sum that amounted to about £10m in 2009/10 at nominal prices). Given the counterfactual that the other BIS proposals and the proposed tribunal fee-charging regime have already taken effect, it is estimated that the minimum annual benefit may be in the order of £0.1m per year from 2013/14 onwards (though implementation takes place the year before).

Other key non-monetised benefits by 'main affected groups'

There are no unquantified direct benefits to any group in society.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Given the existence of judicial discretion on whether to sit with lay members when hearing jurisdictional complaints of unfair dismissal, it is expected that this policy proposal will not affect the outcomes of cases heard in the employment tribunal or the likelihood that judgements will later be appealed.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: 0	**Benefits:** 0	**Net:** 0	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			-£0.1m		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/A	**< 20** N/A	**Small** N/A	**Medium** N/A	**Large** N/A
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	126
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	Yes	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 2B

Description:

Proposal 2B - Require judges to hear all appeals in the EAT whilst sitting alone, unless they consider it appropriate to sit with lay members to determine any appeal.

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0.6

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

There are no quantified direct costs to any group in society.

Other key non-monetised costs by 'main affected groups'

There are no unquantified direct costs to any group in society

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate	0		0.1	**0.6**

Description and scale of key monetised benefits by 'main affected groups'

HMCTS, and hence the taxpayer, benefits from reducing the annual cost of paying for the use of lay members in the employment appeals tribunal (a sum that amounted to about £0.3m in 2009/10 at nominal prices). Given the counterfactual that the other BIS proposals and the proposed tribunal fee-charging regime have already taken effect, it is estimated that the annual benefit may be in the order of £0.1m per year from 2014/15 onwards.

Other key non-monetised benefits by 'main affected groups'

There are no unquantified benefits to any group in society.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Given the existence of judicial discretion on whether to sit with lay members when hearing appeals on employment tribunal decisions, it is expected that this policy proposal will not affect the outcomes of appeals heard or the likelihood that judgements will themselves subequently be appealed.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: 0	**Benefits:** 0	**Net:** 0	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2014		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			-£0.1m		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** All	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/A	**< 20** N/A	**Small** N/A	**Medium** N/A	**Large** N/A
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	126
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	Yes	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 2C

Description:

Proposal 2C - Witness statements in the employment tribunal (part of HMCTS) to be "taken as read" instead of being read aloud at hearings, subject to judicial discretion.

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 4.6

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

There are no quantified direct costs to any group in society.

Other key non-monetised costs by 'main affected groups'

There are no unquantified direct costs to any group in society.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate	0		0.7	**4.6**

Description and scale of key monetised benefits by 'main affected groups'

The productivity of HMCTS improves in that employment tribunal hearings will tend to be shorter as time is saved from no longer having witness statements formally read aloud. Given the counterfactual that the other BIS proposals and the proposed tribunal fee-charging regime have already taken effect, it is estimated that this benefit amounts to around £0.7m per year from 2013/14 (though implementation is the year before). Benefit to parties is estimated to be less than £0.05m per year in total.

Other key non-monetised benefits by 'main affected groups'

Witnesses spend less time at a hearing on average because they no longer have to read their statements aloud, except where the judge considers that there is a particular benefit to this element.
Claimants and respondents gain to the extent that their tribunal hearings (where these occur) take place sooner than otherwise.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Using the evidence contained in consultation responses, it is assumed that the average tribunal hearing time falls by 10%, which is equivalent to around a 20 minute typical saving. Based on the latest Annual Survey of Hours and Earnings and adjusting for non-wage labour costs, the value of this time saving is estimated to be some £5 per party per case heard at today's prices. It has not been possible to disaggregate the total time saving estimate by claimant/respondent groups.
Given the existence of judicial discretion on whether witness statements should still be read aloud, it is expected that this policy proposal will not affect the outcomes of cases heard in the employment tribunal or the likelihood that judgements will later be appealed.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs:	**Benefits:** Neg.	**Net:** Approx 0	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			£0		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			Yes		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/Q	**< 20** N/Q	**Small** N/Q	**Medium** N/Q	**Large** N/Q
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	126
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	Yes	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 2D

Description:

Proposal 2D - Withdraw the State-funded payment of expenses to ET parties and their witnesses; and give the tribunal a power to require parties to pay and/or reimburse such witness expenses.

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	0		0.2	**1.3**

Description and scale of key monetised costs by 'main affected groups'

Those claimants, respondents and witnesses in the employment tribunal who would otherwise claim hearing-related expenses will no longer be able to do so. Given the counterfactual that the other BIS proposals and the proposed tribunal fee-charging regime have already taken effect, it is estimated that this cost amounts to around £0.2m per year in total from 2013/14 onwards (though implementation would take place the year before).

Other key non-monetised costs by 'main affected groups'

There are no unquantified direct costs to any group in society.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate	0		0.2	**1.3**

Description and scale of key monetised benefits by 'main affected groups'

HMCTS, and hence the taxpayer, will no longer have to pay hearing-related expenses to parties and their witnesses. Given the counterfactual that the other BIS proposals and the proposed tribunal fee-charging regime have already taken effect, it is estimated that this benefit amounts to around £0.2m per year in total from 2013/14 onwards (though implementation would take place the year before).

Other key non-monetised benefits by 'main affected groups'

There are no unquantified direct benefits to any group in society.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Data are not collected on the number of witnesses who attend tribunal hearings or on the proportion of parties or witnesses who then claim expenses, although anecdotal evidence based on operational experience suggests that it is a minority. It is assumed that the removal of expense payments does not affect the number of parties or witnesses who would otherwise attend a hearing. It is therefore assumed that the number or outcomes of cases that reach a hearing are not affected by this policy proposal.
It has not been possible to disaggrate the cost impact with respect to claimants, respondents and witnesses, not least because of the impact of the discretionary judicial power to order unsuccessful parties to pay the witness expenses of the unsuccessful party.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: N/Q	**Benefits:** N/Q	**Net:** N/Q	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			-£0.2m		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			Yes		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			Yes/No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/Q	**< 20** N/Q	**Small** N/Q	**Medium** N/Q	**Large** N/Q
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	126
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	Yes	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 2E

Description:

Proposal 2E - Increase Costs and Deposit order limits in the employment tribunal

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

There are no quantified direct costs to any group in society.

Other key non-monetised costs by 'main affected groups'

There are no unquantified direct costs to any group in society.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

There are no quantified direct benefits to any group in society.

Other key non-monetised benefits by 'main affected groups'

Modest benefit to HMCTS regarding Costs orders between £10,000 and £20,000 as they would no longer have to be dealt with by a different court; the tribunal could make these orders instead. The parties in a small number of cases would no longer have to prepare for and attend separate proceedings.
Modest benefit to HMCTS regarding Deposit orders in terms of the greater flexibility for Employment Judges to apply proportionate case management tools more flexibly.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

Given the low proportion of Costs/Deposit orders currently imposed at the respective maximum limits and given the relatively small number of Costs/Deposit orders handed down by the employment tribunal every year, it is not expected that the behaviour of judges, claimants or respondents will be significantly affected by the policy proposal.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: 0	**Benefits:** 0	**Net:** 0	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			£0		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			Yes		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/Q	**< 20** N/Q	**Small** N/Q	**Medium** N/Q	**Large** N/Q
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	126
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	Yes	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 3

Description:

Proposal 3: Extend qualifying period for unfair dismissal from one to two years

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: £70m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low		1	0.85	
High			1.3	
Best Estimate	4.9		1.1	**13**

Description and scale of key monetised costs by 'main affected groups'

Employers face one-off familiarisation costs of £4.9m. Claimants will receive fewer awards, a reduction of between £0.85m - £1.3m.

Other key non-monetised costs by 'main affected groups'

Claimants who have between one and two year's service will no longer be able to make a claim to the employment tribunal for unfair dismissal. Much of this impact is captured in monetary terms in a reduction in awards received.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	Optional		8.7	**Optional**
High	Optional		12.4	**Optional**
Best Estimate	0		10.9	**83**

Description and scale of key monetised benefits by 'main affected groups'

Cost savings to employers from time spent on the case and advice and representation (£5.8m to £8.9m per annum) and reductions in awards paid (equivalent to awards no longer received by claimants at £0.85 - £1.3m per annum). Cost savings to the exchequer in the region of £2.0 - £3.0m).

Other key non-monetised benefits by 'main affected groups'

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

On the basis of consultation responses the estimate of reduction in tribunal claims as a result of this measure was reduced to between 1,600 and 2,400, which represents a reduction in unfair dismissal claims of between 3 and 5 per cent.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: 0.4	**Benefits:** 5.2	**Net:** 4.7	Yes	OUT

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			United Kingdom		
From what date will the policy be implemented?			01/04/2012		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			£2-3m reduction		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 0	**Benefits:** 0	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	117
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	No	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 4A

Description:

Proposal 4 (a) Introduce financial penalties where an award is made in employment tribunals

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low: **-£5m**	High: **0**	Best Estimate: -£5m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low			0	**0**
High			11.7	**89**
Best Estimate	0		11.7	**89**

Description and scale of key monetised costs by 'main affected groups'

If employers comply with the law they will not incur the fine payments, 100 per cent compliance would mean 0 cost. However, there is a body of evidence, for example in results of employment tribunal cases, that suggests below 100% compliance, and therefore employers are estimated to face £11m in financial penalties, which represents a transfer from employers to the exchequer. The administrative costs to the exchequer of running a penalty regime are estimated at £0-£570k per annum.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	Optional		0	**0**
High	Optional		11.1	**84**
Best Estimate	0		11.1	**84**

Description and scale of key monetised benefits by 'main affected groups'

The exchequer receives the penalty reveune, so there will be benefits to the exchequer equivalent to costs to the employer.

Other key non-monetised benefits by 'main affected groups'

There are likely to be benefits to employees over the long term as penalties should influence employers' compliance behaviour. There is not sufficient evidence to quantify this impact but the introduction of penalties will be monitored closely.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

The analysis assumes 50% of employers will pay penalties within 21 days to receive a 50% reduction in penalty. This also assumes the number of cases in which awards are made remains stable, although some reduction in this might be expected in the medium term as fewer cases enter the tribunal system with other changes in this overall package. As this relates to fines and penalties it is out of scope for OIOO.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs:	**Benefits:**	**Net:**	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Great Britain		
From what date will the policy be implemented?			01/04/2014		
Which organisation(s) will enforce the policy?			HMRC		
What is the annual change in enforcement cost (£m)?			£570k		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** 0	**Non-traded:** 0	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:**	**Benefits:**	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	124
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	145
Human rights Human Rights Impact Test guidance	No	145
Justice system Justice Impact Test guidance	No	145
Rural proofing Rural Proofing Impact Test guidance	No	145
Sustainable development Sustainable Development Impact Test guidance	No	145

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 4B

Description:

Proposal 4 (b) Impose financial penalties in employment tribunals where an award is made subject to judicial discretion

Price Base Year **2011**	PV Base Year **2011**	Time Period Years **10**	Net Benefit (Present Value (PV)) (£m)		
			Low: -£1m	High: 0	Best Estimate: -£1m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low			0	**0**
High			2.9	**22**
Best Estimate	0		2.9	**22**

Description and scale of key monetised costs by 'main affected groups'

If employers comply with the law they will not incur the fine payments. Howerver, there is a body of evidence, for example in results of employment tribunal cases, that suggests below 100 per cent compliance. If judges impose penalties in 25% of cases then employers are estimated to face £2.8m in financial penalties, which represents a transfer from employers to the exchequer. The administrative costs to the exchequer of running a penalty regime are estimated at around £143k per annum.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	Optional		0	**0**
High	Optional		2.8	**21**
Best Estimate			2.8	**21**

Description and scale of key monetised benefits by 'main affected groups'

Penalty revenue to the exchequer is equivalent to the costs to employers.

Other key non-monetised benefits by 'main affected groups'

There are likely to be benefits to employees over the long term as penalties should influence employers' compliance behaviour. There is not sufficient evidence to quantify this impact but the introduction of penalties will be monitored closely. It is likely that the compliance effect would still operate despite the introduction of judicial discretion because penalties would be imposed in cases where there has been an unreasonable breach e.g. where there has been negligence or malice.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

This analysis assumes that judges impose penalties in 25 per cent of cases and that the distribution of award amounts across this group is the same as across all cases. This is a necessary simplifying assumption but it is possible that the distribution of award amounts may skew more towards higher awards for these cases. An increase in this percentage would increase the costs faced by employers and the revenue received by the exchequer proportionately.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs:	**Benefits:**	**Net:**	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options		
From what date will the policy be implemented?			01/04/2014		
Which organisation(s) will enforce the policy?			HMRC		
What is the annual change in enforcement cost (£m)?			£143k		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**	**Non-traded:**	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:**	**Benefits:**	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	124
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	No	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Proposal 5

Description:

Proposal 5: Review the formula for calculation of statutory redundancy limits and some tribunal awards

Price Base Year 2011	PV Base Year 2011	Time Period Years 5	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: £0m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		0		
High				
Best Estimate			13	**52**

Description and scale of key monetised costs by 'main affected groups'

Reduction in redundancy pay received by former employees of between million over the period 2012 - 2016 (current prices). Indirect effect is a reduction in associated compensation payments made in employment tribunal cases of about £13 million over this time period.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional			
High	Optional			
Best Estimate			13	**52**

Description and scale of key monetised benefits by 'main affected groups'

Benefit to employers from paying a lower redundancy payment over the period than would have been the case if the current rounding up to the nearest £10 was kept. Benefit to the exchequer because between 20 - 30 per cent of payments (we take 25 per cent in these estimates) would be made under the national insurance fund (for insolvent companies).

Other key non-monetised benefits by 'main affected groups'

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

The analysis of impacts of this measure is carried out over five years. This is because it relies on OBR forecasts of RPI inflation which go up to 2016. The analysis compares the profile of payments that would be made keeping to the current uprating formula with a revised formula rounding to the nearest £1 instead of up to the nearest £10, taking the OBR forecast for RPI inflation. The analysis excludes those former employees who would not be entitled to receive the statutory limit (as their weekly pay falls below it) and adjusts for the fact that up to 25 per cent of the rest of employers would choose to pay above the statutory limit and are therefore not directly affected by this measure.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: 0	**Benefits:** 5.4	**Net:** 5.4	Yes	OUT

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			United Kingdom		
From what date will the policy be implemented?			01/02/2013		
Which organisation(s) will enforce the policy?			HMCTS		
What is the annual change in enforcement cost (£m)?			N/A		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A	**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	124
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	145
Small firms Small Firms Impact Test guidance	No	145
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	145
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	145
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	146
Human rights Human Rights Impact Test guidance	No	146
Justice system Justice Impact Test guidance	No	146
Rural proofing Rural Proofing Impact Test guidance	No	146
Sustainable development Sustainable Development Impact Test guidance	No	146

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Resolving Workplace Disputes consultation (http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation.pdf)
2	Draft Impact Assessment supporting RWD consultation (http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-512-resolving-workplace-disputes-impact-assessment.pdf)
3	Employment Tribunals Act 1996 (c.17) (as amended)
4	Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) (as amended)
5	Employment Appeal Tribunals Rules 1993 (SI 1993/2854) (as amended)
6	Tribunals Service Employment Tribunal and Employment Appeal Tribunal Statistics 2009-10 (http://www.justice.gov.uk/publications/statistics-and-data/tribunals/employment-tribunal-and-eat-statistics-gb.htm)
7	Tribunals Service Employment Tribunal and Employment Appeal Tribunal Statistics 2009-10 (http://www.justice.gov.uk/publications/statistics-and-data/tribunals/employment-tribunal-and-eat-statistics-gb.htm)
8	Historical Tribunals Service statistics on employment tribunals and the EAT, 1999/2000 to 2008-9 (http://webarchive.nationalarchives.gov.uk/20110207134805/http://www.employmenttribunals.gov.uk/Publications/annualReports.htm)
9	Tribunals Service/HMCTS Quarterly Tribunals Statistics for the 2010-11 financial year (http://www.justice.gov.uk/publications/statistics-and-data/tribunals/quarterly.htm)
10	Survey of Employment Tribunal Applicants (2008) http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs	0	5	0	2	0	0	0	0	0	0
Annual recurring cost	0	4	12	57	57	63	44	44	44	44
Total annual costs		9	12	59	57	63	44	44	44	44
Transition benefits										
Annual recurring benefits		15	23	137	136	142	124	124	124	124
Total annual benefits		15	23	137	136	142	124	124	124	124

* For non-monetised benefits please see summary pages and main evidence base section

Resolving Workplace Disputes Government Response: Overarching IA Evidence Base

Problem under consideration

1. Employers are worried about the prospect of employment tribunal claims being brought against them, and the costs involved in preparing for, and attending, an employment tribunal whether they are successful or not. BIS understands from a number of business organisations that this is sometimes to the extent that the potential risk of claims against them can affect their decision to take on staff. Employment tribunal claimants also face significant cost and stress, whilst the exchequer cost of administering and running the employment tribunals system, which includes Acas conciliation work, is also significant. Efficiency and value for taxpayer's money is important for the end-to-end dispute resolution system.

2. There is a body of evidence[1] that demonstrates that if disputes are resolved in the workplace this is far less costly to both parties, delivers more positive results in terms of continued employment and business productivity, and saves money for the Government by reducing demand on Her Majesty's Courts and Tribunals Service (HMCTS).

3. The average costs to employers, claimants and the exchequer of going through employment tribunals are illustrated in Table A1. These costs are explained in the full assessment of proposal one and in Annex 5, but show how costly the process can be.

Table A1: Summary of costs incurred throughout employment tribunal process, by outcome

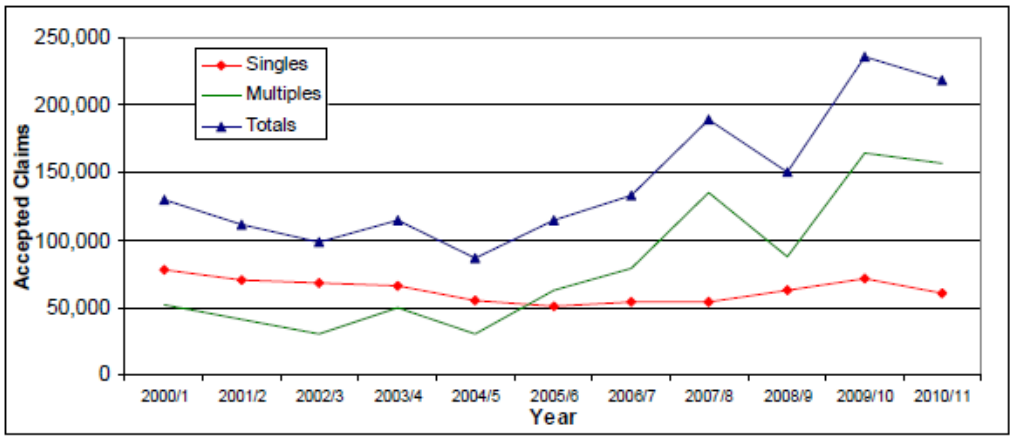
	Employment Tribunal Hearing	Individual Conciliation	Average across ET claim outcome
Employer	£4,200	£3,300	£3,700
Claimant	£1,500	£1,100	£1,300
Exchequer	£4,450	£640	

Source: BIS estimates from Acas, HMCTS, SETA and ASHE data in 2011 prices. Figures are rounded.

4. In the financial year 2010-11 there were a total of 218,100 employment tribunal claims accepted, of which 60,600 were single claims (one claimant) and 157,500 were multiple claims (a number of claims against the same employer). The number of multiple claims has risen from 63,100 in 2005-06 to 157,500 in the last financial year. It is important to note that the level of multiple claims can vary significantly year on year due to the varying nature of claims.

[1] For example, Latreille, P "Mediation at Work: Of Success, Failure and Fragility", Acas Research Paper 2010, found at: http://www.acas.org.uk/CHttpHandler.ashx?id=2890&p=0

Chart A1: Volumes of Accepted Employment Tribunal Claims Over Time



Note: Figures for 2007-08 are estimated Source: ET Reports

5. The reforms flowing from the independent report by Michael Gibbons published in 2007 sought to refocus the dispute resolution process on resolving the problem rather than simply ensuring that the then statutory 3 steps had been completed, and providing increased access to advice and early conciliation. But there are further reforms which could be made.

6. Business representatives (particularly for SMEs) have been active in calling for a rebalancing of the employment tribunal system. Business groups, including the British Chambers of Commerce, Institute of Directors (IoD), Confederation of British Industry (CBI) and others, have said there should be more clarity and transparency in the system, as well as a reduction in the cost and time it takes for cases to be heard.

Rationale for Intervention

Information

7. An employment dispute between an employer and employee is, in many cases, essentially a disagreement on facts and requirements of law. Two parties may elect to proceed to an employment tribunal based on a number of different factors, key of which may be the absence of accurate information about what the process involves, likely outcomes etc. Providing both parties with access to impartial advice and information from a reliable source is the most direct way to tackle the information gap and could help parties decide whether pursuing the matter through tribunal is appropriate, or whether the matter can be resolved by other means. The effects of reliable information are to help encourage resolution of disputes and, ultimately, prevent employment tribunal claims which impose large costs on all parties.

Efficiency

8. The question of how to minimise the costs, to all parties, of employment disputes is a key part of how the case for government intervention can be framed. The employment tribunal system is itself an existing Government intervention which acts as a last resort for the resolution of disputes but is highly costly to all three parties involved in the transaction (employer, employee and the Exchequer). If there is a way by which disputes could be resolved at a lower cost and without compromising justice then all three parties stand to gain.

Consultation

9. The Department for Business, Innovation & Skills has developed these proposals in partnership with The Ministry of Justice and HMCTS, working with colleagues in Acas and Government Equalities Office.

10. The Resolving Workplace Disputes consultation closed on 20 April 2011. There were over 400 responses from a diverse range of stakeholders. Evidence and views put forward by stakeholders in the consultation exercise are reflected in the assessment of individual proposals throughout this impact assessment.

11. Consultation responses reflected a balance of views. Many respondents accepted the need for reform in the employment tribunal system, but views on how to deliver effective reforms varied widely. Business groups were broadly supportive of our package, whereas employee representatives articulated opposition to specific proposals. There was wide support from all cohorts for our intention to drive up the use of early dispute resolution to resolve problems in the workplace, rather than presenting matters to employment tribunal for judicial determination.

Policy objective

12. The intention of these proposals considered together is to ensure businesses feel more confident about employing people and to improve the efficiency of the end-to-end system. In achieving this, the proposals' objectives are to:
    - Support and encourage parties to resolve disputes earlier, and where possible in the workplace, thereby reducing the number of claims that reach an employment tribunal.
    - Ensure that where parties do need to go to employment tribunal, cases are dealt with more swiftly and efficiently to reduce the costs borne by all parties.

13. More needs to be done to support and encourage parties to resolve disputes earlier – where possible, in the workplace, to try and preserve the working relationship between employer and employee, keeping the employee in their job and enabling the employer to continue to benefit from the investment they have made in the individual. But, where the relationship is broken, we want to enable parties to bring matters to a close as effectively as possible; where that is through an employment tribunal, we want cases to move more swiftly to conclusion, so as to contain costs for employers, employees and HMCTS while preserving individuals' access to justice.

14. We want to give more time for employers and employees to build and develop the employment relationship and, where there are concerns or problems, to resolve these rather than end the relationship. This will, we expect, lead to a modest reduction in the number of claims that go to employment tribunal.

Description of proposals being considered

15. In total 13 proposals were initially consulted upon to meet these policy objectives. Those proposals were broadly focused on (a) helping to resolve workplace disputes earlier; (b) streamlining and modernising the tribunals themselves so that the tribunal system is as effective and efficient as possible; and (c) to help give business greater confidence taking on staff and meeting obligations.

16. In addition, HMCTS and Ministry of Justice (MoJ) announced an intention to consult separately on the introduction of fees for employment tribunal cases and appeals. This consultation paper will be published shortly.

17. This impact assessment considers five proposals that the Government is taking forward following consultation. The Government intends to carry forward proposals addressing earlier resolution of workplace disputes and increasing business confidence. In relation to the Tribunals-focused proposals, the Government has accepted that a thorough review of employment tribunal practice and procedure is necessary having taken on board consultation responses. The Government will therefore commission an independently chaired fundamental review of the relevant procedural rules, and will ask the judiciary and other stakeholders to play a full part in that review process.

18. There is therefore little to be gained by introducing major rule amendments now that may shortly be undone or altered as a result of the fundamental review. Further, reform at this stage should seek to avoid any risk of introducing more inflexibility and prescription when that is what the fundamental review is designed to strip away. However, after an assessment of the evidence submitted in response to the consultation, the Government believes that a more limited set of reforms can be implemented without awaiting the review's recommendations because they would contribute to achieving the consultation's overarching aims, particularly in relation to improved cost efficiency and creation of a swift, user-friendly tribunal process. In other words, tribunals-related proposals considered in this impact assessment support the intention to deliver the fair and just consideration of claims at a lower cost to the British taxpayer and to employers. The effect of these and other proposals should be enhanced once the fundamental review of wider tribunal rules has concluded.

19. The costs and benefits of each proposal are measured against a 'do-nothing' baseline. Some proposals are designed to reduce the number of conflicts that result in ET claims by influencing the behaviour of claimants ultimately in order to ensure early resolution of disputes; or to reduce the resources that ET hearings currently consume to make these hearings more efficient.

20. A more detailed description of each policy can be found in Table A2. Each proposal has its own assessment of impact, but taking into account the other proposals being taken forward.

Table A2. Summary description of the policy proposals

Description of policy proposal
1. Early conciliation - require all claims to be submitted to Acas in the first instance, rather than HMCTS. This would allow Acas a specified period (up to 1 month) to offer early conciliation in all cases. Currently, only a relatively small number of those with workplace problems likely to result in a potential claim contact Acas. Of those that are referred into PCC, less than 30% go on to become tribunal claims. Effectively extending PCC to all potential claimants could offer significant savings to business through early resolution. There is the potential for considerable savings to Government too, with fewer claims proceeding to ET (as Acas is a cheaper, less formal and time-consuming route than litigation through tribunals).
2 A. Employment Judges sitting alone in a wider range of ET cases – extending the list of proceedings in which an Employment Judge can sit alone (i.e. without "wing members") to include unfair dismissal proceedings. An Employment Judge could, however, exercise discretion to sit with a full panel to hear any unfair dismissal claims(s).
2 B. Judges sitting alone in the Employment Appeals Tribunal (EAT) – creating a presumption that appeals should always be heard by a lone judge unless the judge directs otherwise.

2 C. Witness statements to be taken as read in all hearings, creating a default position that a witness statement (if disclosed prior to the hearing) should be accepted as the witness's testimony, with no requirement to read the contents of the statement aloud. However, an Employment Judge or panel would have the discretion to vary this default position as and where considered appropriate.

2 D. Withdraw the payment of expenses to ET parties and witnesses – ceasing to offer payment to parties and witnesses attending employment tribunal hearings. Instead, parties and witnesses should be required to bear their own costs. Where an Employment Judge directs any witness to attend a hearing, the judge could also require the party calling the witness to offer or pay reasonable expenses.

2 E. Increasing Cost and deposit order limits – increasing to £20,000 and £1,000 respectively, the maximum levels and employment tribunal can award or order in respect of costs and deposits.

3. Increase qualification periods for unfair dismissal from one to two years**,** which would result in some 1,600 – 2,400 fewer claims being made to employment tribunal.

4. Introduce financial penalties for employers found to have breached rights to encourage greater compliance. This will result in an immediate benefit to the Exchequer (subject to level of fines compared with collection costs) while, in the longer term, should encourage greater compliance and therefore a reduction in the number of claims to tribunal, leading to reduced costs to business and the system.

5. Review calculation of employment tribunal awards and redundancy payments considering changes to the way statutory redundancy limits and some awards are calculated annually as the current uprating formula has led to growth in excess of the cost of living.

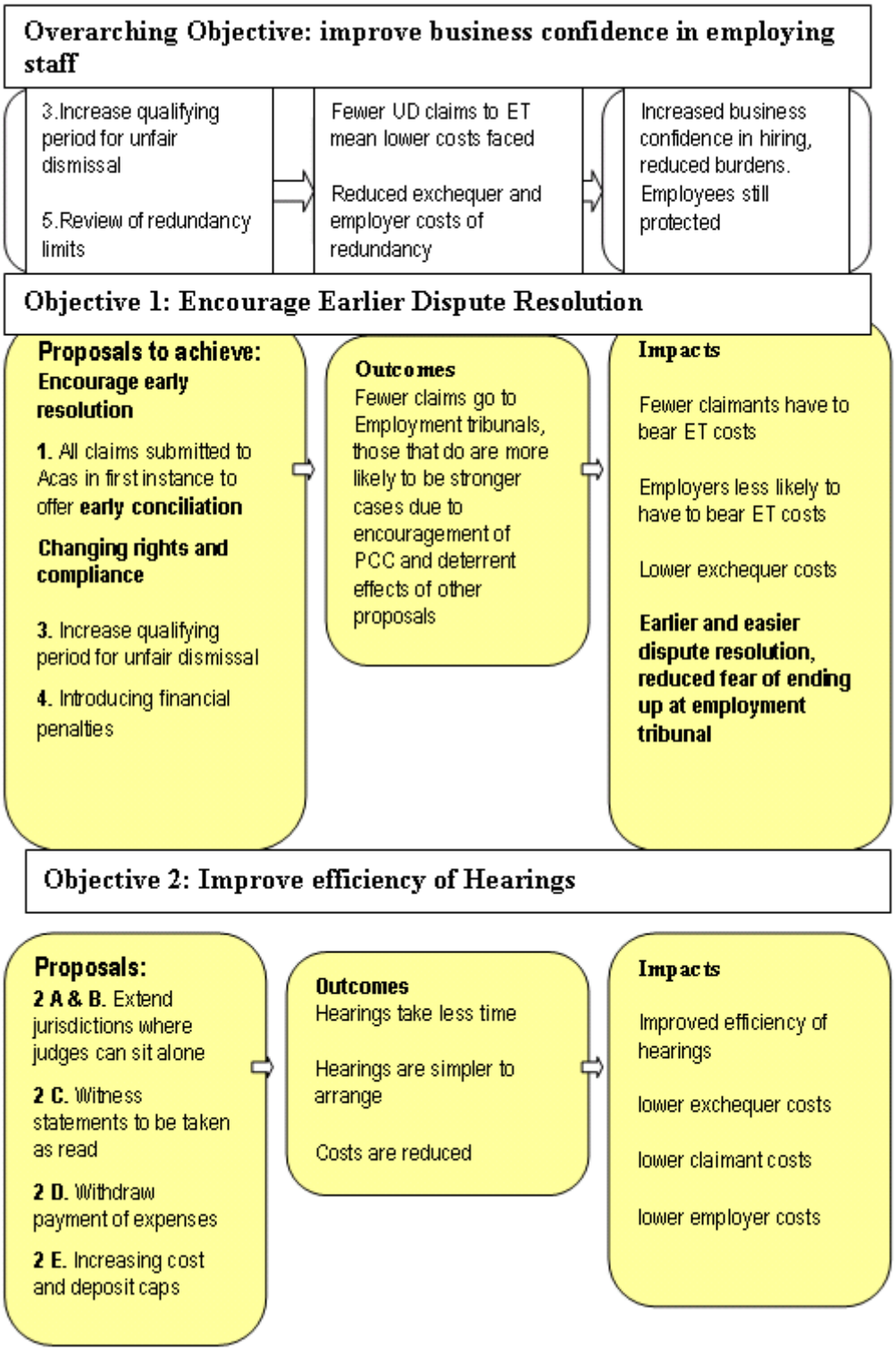
Source: BIS

Interactions between proposals

21. Figure A1 gives a simplified representation of how the proposals considered are likely to have an impact and how they work together. In practice there will be additional impacts, which are discussed in individual impact assessments.

22. Figure A1 shows that there is a group of proposals (which includes all claims being submitted for early conciliation and increasing the qualifying period for unfair dismissal) that would work to reduce the number of claims coming forward to full employment tribunals. There are in turn a group of proposals that aim to improve the efficiency of the employment tribunal system. In practice some of these proposals will affect both outcomes.

Figure A1: Policy Proposals, their key outcomes and interactions relative to do nothing



Source: BIS

Familiarisation Costs

23. All but one of the proposals considered relates to procedures once there is an employment dispute. Each time parties go through a dispute they will be familiarising themselves with the process anyway, and captured within assessments of costs to all parties of employment tribunal claims are assessments of time taken to understand the process (for

example, advice and representation). These proposals will not alter marginal costs incurred by employers involved in a dispute.

24. However, proposal 3 is a change to employment rights, which if implemented, increases the qualifying period for unfair dismissal from one to two years. Although a simple change, all employers will need to familiarise themselves with it, something which could give a one-off cost of approximately £4.9 million to employers.

Summary of costs and benefits

25. Table A3 highlights the quantified impacts of the proposals against a do nothing scenario. However, for proposals other than proposal 1, the introduction of early conciliation, the effect of this proposal in reducing employment tribunal claims is factored-in where it is relevant. This means that adding up the proposals' impacts to give an overall assessment of impact is meaningful. More detail on these quantified and the non-quantified impacts of the proposals is given in the individual impact assessments.

26. The proposal to introduce fee charging to employment tribunals is the subject of a separate consultation, but its impacts are considered in relation to the proposals discussed in this impact assessment. It has, however, only been possible to consider the impact in general terms as the level of fees to be introduced is a matter of public consultation, the outcome of which will not be known for some time yet.

27. All of the proposals considered here affect one or more of three main outcomes:

- Reducing the number of disputes that result in an employment tribunal claim
- Improving the efficiency of employment tribunals
- Improving business confidence to take-on staff

28. Those proposals that improve the efficiency of employment tribunals will have a small impact on the unit costs faced by the Exchequer, employers and claimants where they enter the employment tribunal system. As these changes are proportionally very small, these are not reflected in other proposals' quantification.

29. In assessing costs and benefits the key data sources have been management information from Acas and HMCTS, together with data from the Survey of Employment Tribunal Applications (2008) and the Labour Force Survey. Operational differences between Acas and HMCTS mean that often there are differences in data that might appear as if it should measure the same thing. This includes for example, treatment of multiple claims, distribution of cases by track and others. The best available data for each situation has been taken. However, as the first proposal involves linking the two organisations closer together, further work will be undertaken to understand and address data differences.

Table A3. Summary of Recurring Annual costs and benefits (quantified direct impacts)				
Proposal	**Annual cost (£m)**	**Annual benefit (£m)**	**Annual net benefit (£m)**	**Net Present Value (£m)**
Proposal 1- Early conciliation	40	109	69	391
Proposal 2/A – Lay members in ET	0	0.1	0.1	1
Proposal 2/B – Lay members in EAT	0	0.1	0.1	1
Proposal 2/C – ET witness statements	0	0.7	0.7	5
Proposal 2/D – Expense payments	0.2	0.2	0.0	0
Proposal 2/E – Cost & Deposit limits	0	0	0.0	0
Proposal 3 – extending qualifying period for unfair dismissal	1.1	10.9	9.8	70
Proposal 4 - Introducing penalties for non-compliance	2.9	2.8	-0.1	-1
Proposal 5* – changing calculation of statutory redundancy payment uprating	13.0	13.0	0	0
Total	57	137	80	466
Source:BIS, MoJ and HMCTS estimates, rounded and in 2011 prices – see individual proposal assessments for full details. *Note this proposal involves increasing cost/benefit over time, this figure is an average annual benefit				

One In One Out

30. The measures contained within this IA affect firms and therefore are included in the one in one out rule whereby no new regulation can be brought in without other regulation being removed. This IA represents a regulatory out, therefore these proposals are not dependent on seeking a regulatory saving.

31. Table A4 shows the direct impact to firms based on best estimates. Proposals three and five represent changes in the impact of regulation felt by businesses and are in scope of OIOO. The equivalent annual costs to firms will be £0.4 million and the equivalent annual benefit is £10.6 million. Therefore, the net annual direct benefit to employers is £10.1 million (note rounding to £100,000). These proposals will come into force at different times. In all cases, net present values are established with a base year of 2011 and calculated over a ten year period. However, in the first year (and first three years in the case of

proposal one) there are no impacts. These assessments adjust to remove the impact on public sector employers.

Table A4. Summary of Equivalent annual costs and benefits (direct impact on business)

Proposal	Equivalent annual cost (£m)	Equivalent annual benefit (£m)	Equivalent net benefit (£m)
Proposal 3 – extending qualifying period for unfair dismissal	0.4	5.2	4.7
Proposal 5– changing calculation of statutory redundancy payment uprating		5.4	5.4
Total Net Effect for Businesses	0.4	10.6	10.1

Source:BIS estimates (rounded – so note totals may not sum)– see individual proposal assessments for full details

Conclusion

32. This Impact Assessment considers a number of proposals to meet policy objectives of encouraging earlier dispute resolution and ensuring a more efficient employment tribunals system. Individual impact assessments explain the Government's proposals in more detail, covering their expected impacts.

Proposal 1. Require all claims to be submitted to Acas in the first instance/ Early Conciliation

Background

33. If employees experience a problem at work there are a number of routes to resolution. These include discussing the matter internally (including using internal discipline & grievance procedures), mediation, external advice (such as from Acas or Citizen's Advice Bureaux) and, ultimately, taking the matter to an employment tribunal.

34. If an employee makes a claim to an employment tribunal (ET) they must complete and submit an ET1 form. This form is sent to the employer – the respondent – who then completes and submits an ET3 form in response. An ET claim is first referred to Acas for individual conciliation. There are then a number of possible outcomes. These outcomes and the approximate proportion of cases they apply to are illustrated in Table 1.1 and more information on the employment tribunal process is given in proposal two.

Table 1.1: Outcomes of ET Jurisdictions Disposed during 2009-10

Outcome of ET Jurisdiction	%
Withdrawn	32
Acas conciliated settlement (COT 3)	31
Struck out	9
Successful at Tribunal	13
Dismissed at a preliminary hearing	2
Unsuccessful at hearing	6
Default judgement	7

Source: Employment Tribunal and EAT Statistics 2009-10. Note claims, cases and jurisdictions are not equivalent, so this is only a rough indication of distribution of *case* outcomes.

A default judgement is made when the employer fails to respond to the ET1.

35. Many employees who are considering a claim to the employment tribunal call the Acas Helpline before doing so. Some of them obtain information from the Helpline which leads them to decide not to pursue a claim. In 2009 Acas began offering pre-claim conciliation (PCC) to callers to its helpline for those who had a justicable case and who appeared intent on pursuing a claim to tribunal. Where Acas considers that the circumstances are appropriate (for example, the employer is not insolvent), and if claimants and respondents agree, then Acas will provide a conciliation service by telephone. If the parties engage in PCC, and the conciliator brokers a formal agreement to settle the dispute (a COT3 settlement), the claimant then waives the right to pursue the matter in the employment tribunal. Conciliators also receive direct approaches, requesting PCC, mainly from potential respondents or from representatives. The limit for this service was initially 10,000 cases per year but was raised to 20,000 cases for financial year 2010/11. In both years the service handled slightly under this cases limits.

36. However, claimants are under no obligation to call the Acas Helpline, or engage in PCC, before they make an ET claim. Acas are, though, under a statutory duty to offer post-claim

conciliation. After the ET claim has been lodged, Acas will, in virtually all cases, contact both parties (or their representatives) to offer the opportunity to engage in individual conciliation (IC) with a view to seeking an agreed resolution. If IC is unsuccessful, or if either side elects not to take part, the claimant can choose either to withdraw their claim or to have it determined in an employment tribunal hearing. IC is available to parties from the lodging of a claim up to the point the claim is determined by the Tribunal.

37. In Acas and the Employment Tribunal service, cases are assigned to a "track" – fast, standard and open, Fast track cases refer to those with jurisdictions that are relatively simple, usually breaches of contract or unauthorised deductions from wages. Standard track cases are more complex mainly involving unfair dismissal jurisdictions and open track is assigned to cases which include the most complex jurisdictions such as discrimination or equal pay. Track serves solely as an indicator of the nature and complexity of the case.

Table 1.2. Track Distribution	**Fast**	**Standard**	**Open**
Proportion of cases by track	28%	45%	28%

Source: Acas 2010/11 data. Note that this distribution varies across Acas and HMCTS who will handle claims and cases slightly differently in their operations.

38. Evaluation evidence on how the Acas pre-claim conciliation service has operated since its introduction suggests that making it a requirement for all claims to be submitted to Acas in the first instance so that early (pre-claim) conciliation can be offered could significantly reduce the number of claims that go to employment tribunals. The proposal to extend pre-claim conciliation is the subject of this impact assessment.

Problem under consideration

39. A range of survey evidence and management information demonstrates that it is costly to claimants, employers and the Exchequer to go through an employment tribunal process. Following 2009 reforms, Acas began to offer a pre-claim conciliation service for a limited volume of cases. However, the ability of Acas to access a greater number of potential claimants is affected by the fact that a significant majority of claimants do not contact Acas for advice before they lodge a claim. This is despite Acas widely promoting their services, and achieving high brand recognition. Evaluation evidence[2] shows that where both parties enter into pre-claim conciliation this reduces the likelihood of an employment tribunal claim being submitted.

Costs of employment tribunals to all parties

40. Using a variety of sources, which include the Survey of Employment Tribunal Applications (SETA 2008) and wage data from the Annual Survey of Hours and Earnings (ASHE 2010) it is possible to construct typical costs to claimants, employers and the exchequer of going through the employment tribunal process. Given the nature of SETA it is not possible to split these costs out by each stage in the process, but it is possible to show how total costs faced vary by outcome of the claim.

41. In most cases, median values are used in the construction of the unit costs taken from SETA and ASHE. This is because mean values include a few large numbers (e.g. high wages and high tribunal hearing durations) giving a skewed data distribution, leaving mean

[2] Acas, Evaluation of the first year of Acas' Pre-Claim Conciliation Service 2010

values significantly higher than medians. The median values are therefore most representative.

42. Two of the unit costs used are the costs of the employer and the claimant's time. These unit costs are calculated by multiplying the median number of hours spent on the case by the median hourly wage of the manager, director or claimant. In earlier stages of the dispute resolution system, it would typically be the case that a manager will participate on behalf of the respondent (employer). However, if the case proceeds to IC or an employment tribunal hearing, a director may also become involved in the case. Costs to the employer at the later stages of the dispute resolution system therefore may reflect the cost of time spent on the case by both managers and directors.

43. Other unit costs include the cost of advice and representation for the claimant and the employer and the costs of travel and communication incurred by the claimant. Many claimants and respondents will not have legal representation and the estimates presented adjust for those that do not pay and therefore represent an average across claimants and across employees. The unit costs to Acas of PCC and individual conciliation include overheads.

44. Table 1.3 illustrates these rounded cost estimates for employers, claimants and the exchequer. As discussed above the estimates cover all costs faced and are displayed by claim outcome. More detail on how these are constructed is outlined in Annex 5.

Table 1.3: Summary of costs incurred throughout employment tribunal process, by outcome

	Employment Tribunal Hearing	Individual Conciliation	Average across ET claim outcome
Employer	£4,200	£3,300	£3,700
Claimant	£1,500	£1,100	£1,300
Exchequer	£4,450	£640	

Source: BIS estimates from Acas, HMCTS, SETA and ASHE data in 2011 prices. Figures are rounded.

Non-monetised costs

45. Going through the employment tribunal process can cause emotional stress to both parties. Consultation responses highlighted the fear felt by those facing the prospect of having to go through an employment tribunal. For employers, there is also the wider impact that a dispute can have on the business – even where an employee remains with the organisation, there can be an impact on their productivity and on those around them. Where an employee leaves, there is the cost of recruiting and training a replacement.

Knowledge of and availability of alternatives

46. There are currently many claimants who either do not know about the existing PCC service or decide to lodge a claim without using it. There is also a limit on the number of PCC cases that Acas has the capacity to undertake. From April 2009 to April 2010 this limit was **10,000** cases. In April 2010, the limit was increased to **20,000** cases. This is a small number relative to overall ET claim volumes and indeed the number (typically around 1 million) of calls dealt with by the Acas helpline.

Rationale for intervention

47. The Government intervenes in the labour market to set individual employment rights for a variety of efficiency and equity reasons. Enforcement of individual employment rights is mostly via recourse to an employment tribunal.

48. Evidence suggests parties have unrealistic expectations of the Tribunal outcome. For example an Institute of Employment Studies literature review for BIS[3] points out that there seems to be a difference between the perceived chances of success and actual outcomes at employment tribunals. There is evidence of "optimistic overconfidence" on the part of claimants. It is also the case that high costs to all suggest the dispute resolution system is not as efficient as it could be.

49. There is a need to improve information provision and provide objective ways to resolve disputes before they enter the tribunal system. There is therefore a rationale for Acas as a public provider to carry out this service to improve information to all. Overall this should reduce the costs of the dispute resolution system but also requires some re-allocation of resources within existing public provision from HMCTS to Acas.

Policy objective

50. The policy objective is to encourage early resolution of disputes and minimise the costs involved for all parties by reducing the number of claims going to an employment tribunal.

[3] Lucy, D and Broughton, A, Understanding the behaviour and decision making of employees in conflicts and disputes at work, February 2011. Found at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/u/11-918-understanding-behaviour-employees-conflicts-at-work

Options

51. The option to introduce early conciliation received strong support through public consultation. Of the 410 respondents to the consultation, 339 contributed to some extent to the questions around early conciliation (EC). Of those who expressed an opinion on whether EC was likely to be an effective way of resolving more disputes before they reach an ET, 65 per cent agreed (9 per cent of those were subject to qualification), while 31 per cent disagreed. The only sector where those disagreeing outnumbered those in support was Charities and Social Enterprises. In other respondent categories - with the exception of legal/Judicial respondents, where the gap between those in support and those against was 8 per cent - the introduction of EC was supported by a majority of at least two to one. It does appear that a number of those who disagreed with the introduction of EC did so based on a misunderstanding of what was proposed (ie that parties would be forced to conciliate). No adjustment was made to the figures to allow for such misunderstandings, but we consider that had the proposal been more clearly articulated, the numbers in support would have been greater.

52. In terms of how and when EC should be used i.e. whether it was more appropriate for particular jurisdictions, there was no consensus of opinion. While some respondents to the consultation argued that it was only likely to be effective in low-value, straightforward and factual claims (for example, wages, holiday pay), others suggested that it could be effective in discrimination and unfair dismissal. However, 32 per cent of those who offered views argued that EC should be available in all jurisdictions. Given that there was no consistent view as to which jurisdictions would be more or less appropriate, we propose to offer EC in all jurisdictions other than those where statutory time limits apply that preclude the use of EC i.e. interim relief.

53. With regard to the use of EC in large multiples, there was a significant majority (76 per cent) who felt that it was less likely to be effective in such cases, not least because of the difficulties inherent in trying to reach settlement with a number of potential claimants. However, Acas are effectively already successfully providing pre-claim conciliation in many large multi-party disputes, particularly equal pay, and argue that there is no evidence to suggest that these cases are less susceptible to EC. In the absence of a persuasive argument to the contrary, and given the potential benefits to the system of successful EC in large multiples, we propose that EC should be offered in all multiples, regardless of size.

54. In terms of how long Acas should have to engage in early conciliation if parties agree, the majority (60 per cent) of those who responded to the question considered that one month was a sufficient period. There was a recognition, however, that this might not prove sufficient in every case and there was clear support for a period that was capable of being extended where the conciliator considered there was a reasonable prospect of settlement being achieved. We, – in common with respondents- recognise however that the conciliation period cannot be allowed to continue indefinitely and we will therefore modify the proposal to allow Acas conciliators to extend the conciliation period by a further 2 weeks where they believe there is a reasonable prospect of settlement, and where both parties agree to this extension.

55. Concerns were expressed by a number of respondents about how the "stop-the-clock" mechanism, whereby the time taken for conciliation does not count towards the time limits for bringing a claim, would work. This was of particular concern in relation to those claims that enter EC close to the end of the statutory limitation period i.e. where, in the event EC is unsuccessful, the claimant will only have a matter of days in which to prepare and submit their ET1. We recognise this is a valid concern and will make provision to take account of such cases.

56. The consultation responses highlighted how important the operational and delivery details of the proposals will be to ensuring its success.

1. Do Nothing

57. Keep the current system whereby those who contact the Acas helpline with an employment rights problem may be referred for pre-claim conciliation if the problem looks likely to become an employment tribunal claim, but the volume of cases remains at the current level of 20,000. Note that HMCTS and MoJ are consulting on how fees will be introduced to the employment tribunal system. Therefore there will in future be a cost for claimants in pursuing an employment tribunal claim.

2. All prospective ET claims to be submitted to Acas in the first instance and offered early conciliation

58. We propose to require details of all potential ET claims to be submitted to Acas in the first instance to allow Acas to offer early (i.e. pre-claim) conciliation in all cases. This would remove the current 20,000 case limit by making early conciliation a step for all potential employment tribunal cases. This will allow Acas the opportunity to offer Early Conciliation to those who might otherwise not have contacted them for advice ahead of lodging a claim, and will also provide an early opportunity for claimants to gain an appreciation of the issues involved in their potential claim and obtain information on other relevant factors such as the way awards are calculated in the jurisdiction concerned. There will be savings to business as they will not be required to complete an ET3 response form unless they decline to participate in early conciliation (EC), or it fails (ie settlement cannot be achieved) and the claim is formally submitted to HMCTS.

59. The proposal will require claimants to submit key details of their dispute (using a short form) to Acas within the relevant statutory time limit for submitting an ET claim (ie 3 or 6 months, depending on the nature of their claim). Acas will have no role in determining whether the claim is in time or not: merely to record receipt and issue an acknowledgement. This will effectively date stamp the case to allow the ET to decide whether to accept or reject the claim on these grounds if the matter is not resolved in EC and a claim is subsequently lodged. The clock for the time limit applicable will therefore be

stopped at the point the form is received by Acas. Acas will have up to one calendar month after receipt of the claim to attempt to conciliate the dispute. The conciliator will contact the claimant to establish whether they wish to attempt to settle the dispute and, if they do, they will then contact the respondent to see if they are also willing to engage in discussions. EC will not be mandatory and either party will be free to decline or subsequently withdraw from the process. In the event that EC is declined or fails, Acas will end the process at that point, whether or not the one month conciliation period has ended. Acas will write to the claimant certifying that the EC stage has been completed thereby allowing a claim to be lodged with HMCTS if the claimant so wishes. The claimant will need to provide HMCTS with a copy of the certification for their claim to be accepted.

60. If EC is successful, a legally binding settlement (a COT3) would be signed by both parties, or an informal agreement reached, and no claim would then be brought. Where the end of the EC period is approaching, and the conciliator has a reasonable belief that the matter can be settled, the conciliator will have the ability to extend the one month period by up to a further 2 weeks. In recognition of concerns expressed in relation to cases that are received by Acas close to the end of the statutory time limit, where there will be little time available to the claimant to lodge an ET claim in the event that EC is unsuccessful, we will introduce provision to allow a further period for their claim to be lodged. It is proposed that EC would be free at the point of use to claimants.

61. In the course of EC, whether or not it is accepted, or is successful, Acas conciliators will have the opportunity to explain to employees what the law says in respect of employment rights and to assist them to identify issues relating to their eligibility to claim (e.g. qualifying service, employee status, time limits etc). They will also have the opportunity to explain what powers the tribunal have to make awards (for example, they can order reinstatement or financial remedy, but not an apology), and how awards are calculated, as well as to provide information on the length of time the process may take. As a result of access to this information, some employees can be expected to decide not to pursue their potential claims once they appreciate how these issues apply to their circumstances. However Acas will have no role to vet claims for acceptance / rejection, and it is therefore likely that some jurisdictional issues will still need to be addressed by the Tribunals.

Benefits

62. The main quantifiable impact of introducing early conciliation is to reduce the number of disputes that end up as employment tribunal claims, thus reducing costs to employers, claimants and the exchequer. Employers and claimants face costs in time spent on employment tribunal cases, as well as direct costs of employing legal representation.

63. There are also non-quantifiable costs associated with claims to employment tribunals, including emotional and stress costs.

Likely reduction in Employment Tribunal Claims Volumes

64. There is considerable management and evaluation data available on the outcomes of Acas' current pre-claim conciliation service. The main outcome of interest is the employment tribunal rate of those cases going through pre-claim conciliation. In other words, what proportion of these cases will end up at an employment tribunal. By comparing this to the employment tribunal rate of those not subject to PCC we can deduce a likely percentage reduction in employment tribunal claims as a direct result of PCC.

65. This is still very difficult to analyse. There is no data on the employment tribunal rate of those not going through PCC, but we have a proxy given by the employment tribunal rate of those that were offered but did not go through PCC. This rate is adjusted up slightly to

account for the fact that the employment tribunal claim rate for those who do not come into contact with the Acas helpline or PCC at all (and hence get less information about the Tribunal process) is likely to be higher.

66. The methodology for establishing the marginal effect of early conciliation is described in more detail in Box 1.1 and suggests under central assumptions a fall in claims of 25.4% might be expected. This is subject to sensitivity analysis later in this impact assessment.

67. Once the likely percentage reduction is calculated, we need to apply this to a baseline number of employment tribunal claims to establish the likely reduction in volume of claims. The structural drivers of ET claims are not well understood at present. In the absence of reliable longer-term forecasts about the future number of ET claims under the status quo, the first step in defining a suitable base case is to estimate a notional equilibrium – or 'steady state' – for the annual number of cases that claimants may bring to the ET. According to data published by the former Tribunals Service, the average number of claims over the last five years is 164,720, as Table 1.4 below shows. This five year period does include a period of recession, in which claims for unfair dismissal rose. However, more recent trends have included a large number of multiple cases. In terms of costs incurred it is then necessary to establish the average claims per multiple case and reduce the multiple claims figure to a cases basis.

68. To do this, we estimate a median of 4.7 claims per case based on Acas management data from 2007/08 to 2009/10. This is also in line with the MoJ estimate of a median of 4 claims per case in their forthcoming consultation on the introduction of fees for employment tribunals. However, this is not a stable estimate and is subject to significant change, especially at the current time where there are an increasing number of large multiple claims. Furthermore, the way Acas and HMCTS classify multiple claims differs slightly and slightly more claimants per case may be recorded under HMCTS definitions. For some analyses it is appropriate to use the mean number of claims per case, but for the purposes of this assessment we use the median, as the mean is skewed by a number of very large multiple claims currently in the tribunal system.

Table 1.4. Employment Tribunal claims accepted by financial year*

Year	Single	Multiple	Total
2005/06	51,300	63,100	**114,400**
2006/07	54,100	78,600	**132,700**
2007/08	54,500	134,800	**189,300**
2008/09	62,400	88,700	**151,100**
2009/10	71,300	164,800	**236,100**
Average	58,720	106,000	**164,720**

Source: Employment Tribunal Service. * Great Britain, not seasonally adjusted.

69. The baseline is then average single claims as given in Table 1.4 added to average multiple claims that are divided by the median number of claims per case (4.7). This yields 81,239, but needs to be further refined by removing the existing volume of PCC cases (by subtracting a further 20,000 cases that Acas currently deals with). This means that the marginal effect of introducing early conciliation in terms of the number of ET claims saved is applied to 81,239 cases, less 20,000 giving **61,239 additional claims entering early conciliation.** A 25 per cent reduction on this figure implies about **14,500** fewer ET claims as a result of this early conciliation option. Given a take-up rate of 75 per cent (as set out in Box 1.1 below) this would mean the provision of early conciliation to 44,000 additional cases.

Box 1.1: The counterfactual and estimated policy effect

To estimate the marginal impact of early conciliation, it is necessary to understand the proportion of employment tribunal applications that would have occurred in the absence of any early conciliation intervention. To do this we use management data and evaluation information from the current Acas PCC service. We have chosen to use data from 2010/11 as the first year of PCC in 2009/10 is likely to be quite different to subsequent years; with lower take-up, for example. Acas tracks how many ET claims follow on from cases that went through PCC. Acas also record outcomes according to whether a case was unprogressed (PCC was offered but not taken up), resolved or there was an impasse (PCC was taken-up but the problem was not resolved).

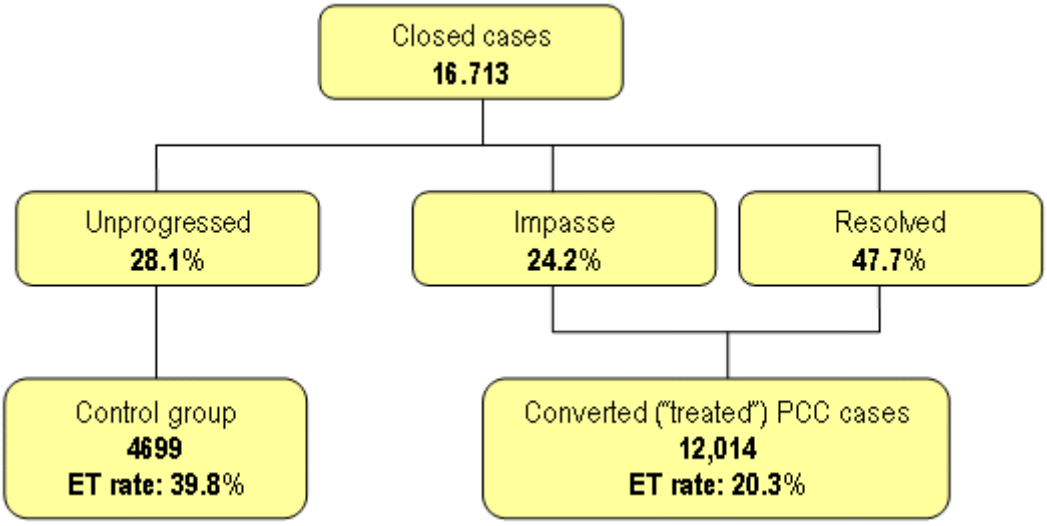
Acas management information for 2010/11 showed that **20.3 per cent** of closed PCC cases for which the offer of PCC was taken up resulted in an employment tribunal claim being lodged under the same employment dispute within three months of the conclusion of PCC. Where the offer of PCC was not taken up, **39.8 per cent** of cases subsequently became an ET case. Around **78 per cent** of those offered PCC agreed to take part. However, in our modelling here we consider a lower take-up rate for early conciliation to take account of the fact that it will be offered to all potential claimants, rather than just those who have indicated that they might be interested in conciliation. We do have a proxy estimate of take-up from the evaluation of Acas' post-claim individual conciliation service – which is offered to all ET parties - which shows a take-up rate of **75 per cent**. As a result, 75 per cent is used in this modelling.

The above reflects the observed outcome of existing policy. To estimate the effect of the policy we must subtract from this the counterfactual. As it is not possible to observe the counterfactual once a policy intervention takes place, we must estimate the counterfactual as follows.

According to Acas MI data of PCC case outcomes in 2010/11, **28.1 per cent** were 'unprogressed' either because the claimant or employer was unwilling to participate in PCC, the case was inappropriate or was unprogressed for other reasons. We use this group of claimants to form a 'control group' who did not take part in PCC. For this control group, Acas MI data shows that **39.8 per cent** of cases resulted in an ET claim being lodged within three months. We adjust this figure upwards to **50 per cent** to take account of the partial treatment of this group as outlined below under limitations.

Figure 1 below sets out statistics on case volumes.

Figure 1: Case volumes of PCC covering April 2010 – March 2011



Source: Acas

The ET rate for all PCC cases is given by:

(Take-up rate of PCC **75%** * ET rate for PCC cases **20.3%**) + ((1-take-up rate of PCC **25%**)* ET rate for control group **39.8%**)

This equates to **25.2 per cent**. The difference between the 'ET rate' for all PCC cases (25.2 per cent) and the ET rate for the control group (50 per cent) provides an estimate of the policy effect of PCC. This suggests that the impact of early conciliation relative to the counterfactual is a **24.8 per cent** reduction in ET claims.

Limitations of methodology: the control and treatment groups were not assigned randomly and there may be some self selection issues which potentially bias the results. Most importantly, a high proportion of the control group will in fact have had some "treatment" in the PCC process in the form of initial discussion about their case with a conciliator. As a result of this partial treatment, some of the individuals concerned may decide, for example, to not pursue their claim any further. For this reason the counterfactual figure is increased to **50 per cent** to account for some 'partial treatment' of the control group. This is a conservative adjustment and is subject to sensitivity analysis later in this impact assessment.

Benefits to Claimants

70. The average unit cost faced by a claimant as a result of an employment tribunal claim is £1,300 as set out in Table 1.3. Multiplying this figure by the anticipated reduction in claims (14,500) suggests a benefit to claimants of £19.5 million.

Benefits to Employers

71. The average unit cost faced by an employer as a result of responding to an employment tribunal claim is £3,700 as set out in Table 1.3. Multiplying this figure by the anticipated reduction in claims suggests a benefit to employers of £53.6 million.

Benefits to the Exchequer

72. To estimate the benefits to the exchequer from this reduction in cases we need to look closely at the costs incurred at different stages in the Tribunal process together with the percentages of cases likely to end up with this outcome to estimate the costs that would have been incurred had those 14,500 cases still entered the ET system.

Table 1.5: Unit costs (£) of stages in the employment tribunal process

Track	Short	Standard	Open
Receipt and allocation	450	410	420
Hearing	1570	4120	6170
Mediation		2610	
Default Judgements	360	360	360
Dismissal after settlement	180	240	210
Written Reasons	470	1050	1380
Review	770	1550	1830

Source: HMCTS/MoJ, expressed in 2011 prices

73. The above table shows estimates (in 2011 prices but based on analysis of 2009/10 financial data) of the unit costs involved in various stages of the employment tribunal process. For example, a standard track case hearing costs the exchequer £4,120.

74. We have estimated above that the reduction in ET claims will be in the region of 14,500. Of these, about 75% would have taken up the opportunity of individual conciliation (IC). In other words there would have been Acas conciliation on these cases. Unit costs to the exchequer of IC are summarised in Table 1.6 below and are provided by Acas. Multiplying these unit costs by potential saved cases yields savings as a result of fewer IC cases.

75. Following individual conciliation, a case may be settled or withdrawn and therefore no longer be in the system. The settled and withdrawn rates (again provided by Acas) are given in Table 1.6.

76. Those cases that would have progressed through the system would have involved either default judgement costs or hearing costs. The total savings through the system are illustrated below.

Table 1.6: Summary of Exchequer Benefits

	Short	Standard	Open	Total
Total reduction in claims	3,763	6,568	4,188	14,518
Total ET1 receipt and allocation savings	£1,693,200	£2,679,565	£1,775,521	£6,148,287
Total reduction in Individual Conciliation cases	2,822	4,926	3,141	10,888
Unit costs of IC cases	£109	£204	£326	
Total IC savings	£308,416	£1,003,556	£1,024,484	£2,336,457
IC settled/withdrawn rates	0.50	0.67	0.75	
Total reduction in hearings	2,346	3,282	1,819	7,448
…of which are default judgements	466	128	19	
Total default judgement savings	£167,161	£45,976	£6,765	219,902
Total hearing savings	£2,955,977	£12,985,314	£11,102,788	£27,044,078
Grand total Exchequer savings	**£5,120,000**	**£16,715,000**	**£13,910,000**	**£35,750,000**

Costs

77. The costs imposed as a result of introducing early conciliation are those incurred in engaging with early conciliation. Claimants and employers will face time costs of engaging with the process, whilst there are Exchequer costs in administering the process and providing the conciliation service.

Costs to Claimants

78. Acas' evaluation of pre-claim conciliation in 2010 gives survey evidence which suggests claimants spend an average of 5.7 hours (median) on the case. Taking the median hourly wage rate from ASHE 2010 of £11.09 and multiplying this by the hours spent on the case gives a unit cost of £63.21. Multiplying this by the anticipated number of early conciliation cases of 44,000 gives a total annual cost to claimants of £2.8m.

Costs to Employers

79. Acas' evaluation of pre-claim conciliation in 2010 gives survey evidence which suggests that employers spend a median of 8 hours on a case, whilst they pay £266.67 in advice and representation costs.

80. Multiplying 8 hours by the wage rate for personnel, training and industrial relations managers (given by ASHE 2010 as £21.66) plus non-wage labour costs of 24% (giving total hourly rate of £26.86) gives a total time cost of £214.88.

81. This suggests a cost per case to employers of £481.55, aggregated across the anticipated number of early conciliation cases of 44,000 (over and above existing cases) gives a total annual cost of £21.1m.

Costs to the Exchequer

82. The best indication of the costs to the exchequer of early conciliation are given by the current costs of the pre-claim conciliation service, as the service offered by Acas conciliators will be the same. Acas have estimated the unit cost of a completed case as £357. The additional costs in offering early conciliation over and above those currently incurred to run PCC are therefore best estimated by multiplying this unit cost by the anticipated volume of additional cases (over and above the existing 20,000) that enter the system and take-up the opportunity of early conciliation. This represents an additional exchequer cost of £15.7m.

83. However, Acas will also need to process statement of intent forms to kick-start the process. These will be very short forms and so are not intended to take more than 30 minutes of staff time per claim. Given the anticipated volume of cases entering the system (this is 61,239 as we exclude 20,000 existing PCC cases), we multiply these claims by half an hour of staff time at median wage with 24 per cent non-wage labour costs added on. This yields a cost of processing statement of intent forms of just over £400,000. Therefore the total exchequer costs are estimated at £16.2m.

84. There will be some one-off costs. Exact estimates of these are not possible at this stage as details of the system are still to be worked out. However, initial estimates suggest one-off costs to Acas of around £2 million for recruiting, training and equipping staff. There may also be additional one-off IT costs.

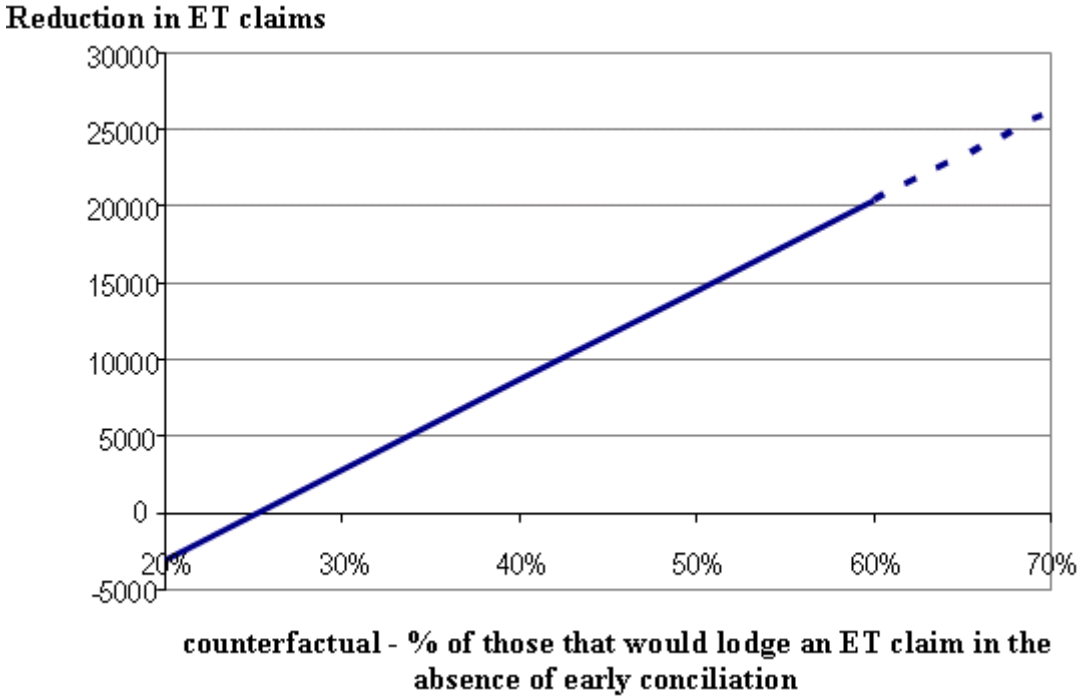
Sensitivity analysis

85. As discussed earlier there is great uncertainty around the counterfactual (currently taken as an employment tribunal rate of 50 per cent for those claims that currently do not go through pre-claim conciliation). Chart 1.1 shows that the cost-benefit modelling depicts a linear relationship between the counterfactual and estimated reduction in claims lodged.

86. This sensitivity analysis shows that if the true employment tribunal rate of those not going through pre-claim conciliation were to fall to less than 25 per cent, employment tribunal

claims would in fact increase in response to the introduction of early conciliation (this is a tipping point). Given that the employment tribunal rate for those that go through the current pre-claim conciliation service is 20.3 per cent (source: Acas), a 25 per cent employment tribunal rate for all is highly unlikely so we can be quite confident that this is not a likely outcome and the process will lead to reduced claims.

Chart 1.1. Reduction in claims against the counterfactual



Source: BIS estimates

87. A further source of uncertainty is how the results of pre-claim conciliation will translate into a service offered to all potential ET claimants. In addition there are likely to be fees introduced for making applications to employment tribunals which could affect claimant and respondent behaviour.

88. Therefore the modelling also considers how sensitive the results are to different levels of take-up of early conciliation. In other words, what happens if take-up of the service is lower than the levels currently seen with PCC?

89. Take-up of early conciliation may be lower as it applies to all cases instead of those self-selected. We might also expect changes in the rate due to the introduction of employment tribunal fees (this is discussed further in risks and assumptions). Results of take-up sensitivity analysis suggest a take-up rate of 60 per cent (rather than current assumption of 75 per cent) would reduce the total net benefits of the policy by 8.5 per cent.

90. The results of the analysis are also sensitive to assumptions around the appropriate baseline for employment tribunal claims. If there were fewer multiple cases (because the ratio of claims to cases was higher) then the net benefits would fall. The central estimates are based on a ratio of 4.7 claims to cases, which is derived from three years' historic claims data and is a median value. If this were closer to seven, we would expect a fall in total net benefits of around £9m.

Risks, assumptions and wider impacts

91. The modelling of this impact assessment assumes that the effectiveness of the current PCC service in reducing the number of claims lodged remains unchanged if early conciliation is implemented. There is a risk that early conciliation becomes less effective than the current PCC service if less time is spent on each case due to the large increase in the number of PCC cases after front-loading PCC. This is a risk associated with the funding that PCC receives – if adequate funding for the case values received is in place then this should be mitigated. However, if the risk were realised, there would be a reduction in the benefits of savings made from fewer cases resulting in formal disputes.

92. HMCTS are consulting on how to introduce fee charging for employment tribunals. The level of fees charged is expected to have an impact on the number of claims submitted to employment tribunals. However, as fee charging is only being consulted upon at the moment, it is unclear what the level of fees will be, and it is impossible to predict exactly how it may change claim. In addition, as there will not be a fee charged at the point where Acas offers early conciliation this may not translate to a reduction in expected cases considered for early conciliation. On the other hand, the availability of an accessible service like this, could encourage more claims than current levels of employment tribunal claims.

93. The assumption made in this assessment is that fees for employment tribunals do not affect the demand for early conciliation. The behaviour of parties in early conciliation may also change as a result of employment tribunal fees. Claimants may be more likely to engage in early conciliation and make more efforts to resolve the situation given that they may be liable for fees (though they may have a full or partial remission from fees depending on their individual circumstances). This could lead take-up of early conciliation to rise above current expectations.

94. However, the respondent (employer) may be less likely to engage in early conciliation if they do not believe the claimant will pay the ET fee. It is not possible to predict how this would change the overall take-up rate of early conciliation and we believe at this point in time a take-up rate assumption based on the current take-up of post-claim conciliation (IC) is the best approach to take (this is 75 per cent).

Interaction with other policy changes

95. The requirement that all ET claims be submitted to Acas in the first instance to allow Acas to offer EC in all cases is one of eight policy changes to the dispute resolution system assessed in this impact assessment. There are likely to be interaction effects with the other proposals.

96. Early conciliation is a proposal that is designed to encourage early dispute resolution.

97. Proposals 2 (A – E) are designed to reduce the cost of employment tribunal hearings. Implementing these in addition to early conciliation mean that the benefits of early conciliation are slightly lower (in other words, the costs avoided by those no longer pursuing employment tribunal claims are lower than they would otherwise have been. Proposals aimed at reducing the cost of hearings will have no impact on the cost of early conciliation and so it is expected that the total net benefits of this impact assessment would also decrease. However, these proposals' combined monetary impact is very small, and so this interaction effect is not assessed.

98. One of the outcomes of the proposal to increase the unfair dismissal qualifying period is a reduction in employment tribunal claims. Where this option is assessed the tribunal claim reduction estimate is further reduced to reflect the likely impacts of early conciliation.

99. Any interactions between front-loading early conciliation and the other policy changes will of course depend on whether these policy changes actually have their intended effects once implemented. It is important to note that not all employers and claimants behave in a way that is easily predictable. Certain combinations of proposals may have unintended effects. Monitoring and evaluating changes to the dispute resolution system will be very important.

Summary of Costs and Benefits

100. Table 1.7 below summarises the costs and benefits to key groups. Given the high net benefit of option two relative to do nothing, the Government is proposing to proceed with this option.

Table 1.7 Costs & Benefits	**Exchequer**	**Employer**	**Claimant**	**Total**
Costs	£16,150,173	£21,120,956	£2,772,545	£40,043,674
Benefits	£35,748,724	£53,628,675	£19,482,859	£108,860,258
Net Benefits	**£19,598,551**	**£32,507,719**	**£16,710,314**	**£68,816,584**
Annual Net Benefits (rounded to the nearest £m)	**£20,000,000**	**£33,000,000**	**£17,000,000**	**£69,000,000**
Net present Value £m (base year 2011, but impacts begin in 2014)				**£391m**

Source: BIS estimates, Acas, Tribunals Service, SETA 2008, ASHE 2010 estimates in 2011 prices

Proposal 2 – Amendments to Employment Tribunal Process

Background

101. Industrial Tribunals in Great Britain were first established by the Industrial Training Act 1964 to consider appeals by employers against training levies imposed under that Act.[4] Since then their scope, procedures and powers have changed and expanded considerably. The Employment Tribunal (ET) currently exists and operates under the Employment Tribunals Act 1996. Their procedures and constitution are currently governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.[5]

102. The Employment Appeal Tribunal (EAT) hears appeals against decisions of the ET on points of law. Since 1 April 2011, the administration of these tribunals has been provided by Her Majesty's Courts & Tribunals Service (HMCTS).

103. The ET is a civil court in that the cases involve disputes between private parties.[6] They differ from criminal courts where cases are brought on behalf of the State by the Crown Prosecution Service in England and Wales or by the Crown Office and Procurator Fiscal Service in Scotland.

104. The ET was originally intended to be a last resort mechanism to resolve disputes between employers and employees. However, concerns have arisen among business groups that ET claims are increasingly being made without first using other less formal methods of dispute resolution. Partly as a response to this, the Department for Business, Innovation & Skills (BIS) and the former Tribunals Service published a joint consultation document in January 2011 entitled, "Resolving Workplace Disputes", which set out proposals for reforming the system of workplace dispute resolution.[7]

105. As part of the reforms, it was also announced that the Government would consult on using powers contained in the Tribunals, Courts and Enforcement Act 2007 to introduce fee-charging into the ET and EAT.

Jurisdictions

106. An individual may submit a claim to the ET in one or more "jurisdictions" – i.e., the specific grounds of the employee's complaint against the employer. The main areas are:

- Unfair dismissal
- Unauthorised deductions (formerly Wages Act)
- Breach of contract
- Sex discrimination
- Race discrimination
- Disability discrimination
- Religious belief discrimination
- Sexual orientation discrimination
- Age discrimination
- Working Time Directive

[4] ETs and the Employment Appeal Tribunal consider claims and appeals from England, Wales and Scotland. Northern Ireland has a separate system of employment law.

[5] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

[6] One of the parties may be a public sector organisation but in this capacity are acting as an employer rather than Government agency.

[7] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation.pdf

- Redundancy pay
- Equal pay
- National minimum wage

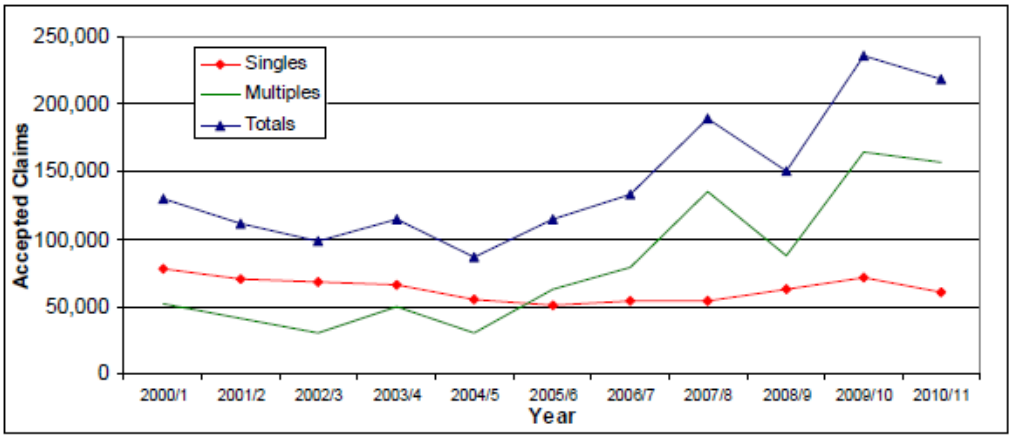
107. Claims can be brought under a single jurisdictional complaint (e.g., unfair dismissal alone) or under a number of jurisdictional complaints (e.g., unfair dismissal and sex discrimination). Claims can also be amended or clarified during the course of the ET's proceedings.

Volume of claims

108. ET claims can be classified into two broad categories:
    - singles – a complaint brought by a single employee against one employer; or
    - multiples – complaints brought by a group of at least two employees typically against one employer on the same or very similar grounds such that a multiple claim is processed together.

109. The annual number of claims lodged at the ET has more than doubled since 2004/05, driven largely by an increase in the number of multiple claims submitted, as can be seen in Chart 2.1 below.

Chart 2.1. Volumes of Accepted Employment Tribunal Claims Over Time



Note: Figures for 2007-08 are estimated Source: ET Reports

110. Some of the reasons underlying this upward trend are known. For example, the number of claims alleging unfair dismissal appears to be related, with a time lag, positively to inflows into unemployment.[8] Equally, changes in Britain's employment law also have a direct influence on the number of claims received by ETs. For instance, the number of age discrimination claims has risen from 972 in 2006/07 to 5,200 in 2009/10 following the creation of new statutory rights.[9]

ET claim process

111. A party making a claim has to present a valid claim form – known as an "ET1 form" – within a specified period of time of the alleged event. The time limit is generally 3 months, but this

[8] The "Employment Tribunal and EAT Statistics 2009/10" publication (http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/tribs-et-eat-annual-stats-april09-march10.pdf) states that: " There were 126,300 jurisdictional claims associated with unfair dismissal, breach of contract and redundancy, which is 17% higher than for 2008/09 and 62% higher than in 2007/08, and likely to be a result of the economic recession."

[9] The Employment Equality (Age) Regulations 2006 took effect in October 2006.

112. A party defending a claim, called the respondent, has to present a response form – known as an "ET3" – within 28 days of receiving the form. If a respondent fails to present a valid ET3 form within that time limit, a default judgment may be issued. This means that an Employment Judge can issue a decision without the claimant having to attend a hearing.

113. Once a claim has entered the system, it is allocated to an ET "track". This is an internal process that assists both administrators and the judiciary to assess the length of time needed for a final hearing and the amount of case management likely to be required in order to ready the case for final hearing. The complexity of the employment dispute will therefore determine to which track the claim is allocated.

114. The possible outcomes of the claim are:
- the claimant withdraws the application – this may follow contact with Acas or advice from a legal representative;
- the claim is dismissed because it is not within the scope of employment law or because at a Pre-Hearing Review it was found that there was insufficient evidence to progress the case or for some other material reason;
- the parties reach a conciliated settlement, where Acas is involved in ratifying the final settlement;
- the parties reach a private settlement outside Acas, either on the basis of a legally binding Compromise Agreement or an "informal agreement";
- the case is disposed of by way of a Default Judgment (DJ); or
- there is a full ET hearing, whereupon the various elements of the claim are upheld or dismissed.

Cost of ET

115. The following table sets out the most recent outturn estimates (2009/10 figures[10]) of the cost per case by ET track. The core stages in the ET process are "receipt & allocation" and "hearing", whereas the other elements are optional in that there is no obligation, for instance, to undergo mediation or to obtain written reasons.

Table 2.1

Track	Receipt & allocation	Hearing*	Mediation	Revoke/Review DJs	Dismissal after settlement	Written reasons	Review
Short	£450	£1,570		£360	£180	£470	£770
Standard	£410	£4,120		£360	£240	£1,050	£1,550
Open	£420	£6,170	£2,610	£360	£210	£1,380	£1,830
Variable	41%	82%	100%	70%	46%	87%	92%

* includes interlocutory hearings

116. The table also shows the approximate proportions of the estimated average total cost per case by ET stage that is variable – i.e., the element of cost that will vary as the number of cases varies. For example, the cost of mediation (which only takes place in the open track) is a pure variable cost because it solely involves judicial time. Overall, it is currently estimated that variable costs accounted for 67% of the total ET cost in 2009/10.

117. Historically, the ET and EAT have not produced management information-based estimates of costs per case by stage. The cost estimates have therefore been produced using a new cost model that was developed specifically to support the development and analysis of the

[10] Uprated to 2011/12 prices using the UK GDP deflators published on HM Treasury's website and rounded to the nearest £10.

proposed fee-charging regime. Going forward, the current cost estimates will be updated and reviewed – e.g., to provide representative costs of administering single claims and multiple claims in 2010/11, instead of the weighted averages of all claims that are set out in the preceding table.

ET outcomes

118. Since 2005/06 the number of ET claims disposed has averaged about 95,000 per year and fluctuated between 80,000 and 115,000. Over this five year period to 2009/10, on average 23% of jurisdictional complaints were resolved at a hearing – over half of which in favour of the claimant. Of all jurisdictional outcomes, an average of 33% were withdrawn by the claimant, 29% were conciliated by Acas, 14% were struck out before a hearing and the remaining 4% were Default Judgements.

119. It is important to reiterate, however, that a (single or multiple) claim can contain a number of separate jurisdictional complaints. In recent years there has been an average of around 1.9 complaints disposed for every ET claim disposed.

Employment Appeal Tribunal (EAT)

120. The EAT hears appeals on a point of law regarding any decision made by the ET. An appeal can be made against any decision of a tribunal at any time during the course of the claim through the ET, though most appeals relate to the final judgment of the ET. An appeal must generally be made to the EAT within 42 days of the ET decision in question.

121. Either party in an ET claim can appeal to the EAT. The party that appeals is called the appellant and the other party to the case is the respondent. The appellant can therefore be either the employer or the employee.

122. On receipt of a notice of appeal, the registrar or judge will review it to check that it is properly completed and provides the required supporting evidence. Unlike an ET claim at present, the appeal can be rejected at the outset on the grounds that there is no reasonable prospect of success, although this decision can also be appealed.

123. Since 2005/06 the number of appeals disposed has averaged about 1,900 per year and fluctuated between around 1,800 and 2,000. Over this five year period, on average 28% of appeals were resolved at a hearing – almost half of which in favour of the appellant (either upheld or upheld and remitted back to the ET), while the other half were dismissed at a preliminary or full hearing. Of all appeals disposed, an average of 55% were rejected for being out of time or having no prospect of success, 17% were withdrawn by the appellant and 1% were struck out.[11]

124. EAT decisions can themselves be appealed to higher courts – namely, to the Court of Appeal in England and Wales or to the Court of Session in Scotland. Ultimately, an appeal can in principle be heard at the UK Supreme Court.

Cost of EAT

125. Appellants are not currently charged for making use of the EAT, which is entirely funded by the taxpayer. The following table sets out the most recent estimates (2009/10 figures[12]) of the cost per appeal published by HMCTS, by EAT stage.

[11] Among the reasons for "strike out" in the EAT may be that a claim/response has not been actively pursued or that there has been non-compliance with an order or practice direction.

[12] Uprated to 2011/12 prices using the UK GDP deflators published on HM Treasury's website and rounded to the nearest £10.

Table 2.2

Stage	Receipt & registration	Hearing*
Cost	£300	£4,140
Variable	94%	95%

* includes interlocutory + pre-hearing

126. The table also shows that most of the average total cost of appeals by stage is variable. Overall, it is estimated that variable costs accounted for 95% of the total EAT cost in 2009/10. These estimates will be updated and reviewed going forward.

Policy objectives

127. In the "Resolving Workplace Disputes" (RWD) consultation, the Government considered a broad range of proposals on reforming the ET and EAT so as to improve cost-efficiency. A particular focus was the case management powers[13] available to judges and tribunals.

128. Responses to the consultation indicated that, over and above the targeted measures proposed, a review of the complete set of rules is now necessary. There was considerable agreement that the existing rules of procedure have become too elaborate, inflexible, voluminous and technical for both claimants and respondents – as well as for the administrators and decision makers (judges and lay members) within the tribunals themselves.

129. Consequently, the Government has decided to commission a judiciary-led fundamental review of the ET rules of procedure on how claims are handled.[14] That review, involving other users, will bring forward recommendations for streamlining tribunal procedure which will help to meet the underlying objectives to improve the efficiency and effectiveness of the ET and EAT.

130. There is therefore little to be gained by introducing major rule amendments now that may shortly be undone or altered as a result of the fundamental review. However, a more limited set of reforms can be implemented without awaiting the review's recommendations because they would contribute to achieving the consultation's overarching aims.

131. After considering the RWD consultation responses, the Government has concluded that certain proposals would improve cost-efficiency in the service that is already provided by the ET and EAT. The proposals considered in this Impact Assessment are therefore designed to help facilitate the overarching objective of ensuring a swift, user-friendly and efficient tribunal process. In other words, the intention is to deliver the fair and just consideration of claims at a lower cost to the UK taxpayer and where possible in advance of the fundamental review, to parties too.

132. Other strands of work, both under the fundamental review, and in relation to the proposals considered in respect of reforming early conciliation services provided by Acas and changes to unfair dismissal qualifying periods, will be considered separately.

Main Affected Groups

133. The principal groups that would be affected by the policy proposals here are:

[13] Case management powers are those powers available to employment tribunals and Employment Judges to manage proceedings from the point they are commenced to their ultimate conclusion. The powers are drawn from the Employment Tribunal Rules and are intended to allow the tribunal to oversee the running of cases as efficiently and effectively as possible. Examples of case management powers include: marshalling of witnesses and other evidence in order to ready a case for hearing; the summary determination of particular cases or issues within cases because they are, for example, straightforward; and directions as to the timetabling of final hearings.

[14] Specifically, Schedule 1 of the Constitution and Rules Regulations 2004 (SI 2004/1861). http://www.legislation.gov.uk/uksi/2004/1861/schedule/1/made

- HMCTS – the organisation that administers the ET and EAT;
- Taxpayers – even after the proposed introduction of fees, taxpayers will still finance the majority of the costs of the ET and EAT;
- Claimants – typically at least one employee or ex-employee[15];
- Respondents – typically the employer[16];
- Appellants – employees or employers who choose to appeal an ET decision via the EAT; and
- Witnesses – individuals who give evidence on behalf of the claimant or respondent at a hearing in the ET.

Description of Final Proposals

134. The IA considers the specific proposals under the 'Modernising Our Tribunals' chapter of the RWD package of reforms. An overarching IA has been prepared by BIS that draws together these and other related strands of work.

Base Case ("Option 0")

135. The cost of running the ET and EAT is currently met by part of the allocation of funds provided to HMCTS through the MoJ resource budget, which is itself ultimately paid by the UK taxpayer. The implications of not reforming the ET and EAT is the value for money delivered to taxpayers would not be as high as it could be and that parties are subject to unnecessary costs.

136. Because the do-nothing option is compared against itself, its additional costs and benefits are necessarily zero, as is its Net Present Value (NPV).[17]

137. Against that backdrop, it is necessary to establish a suitable counterfactual or base case. Based on a recent five year average of the single and multiple claims accepted[18], it is currently estimated that, in the absence of the BIS proposals to introduce early conciliation and to increase the Unfair Dismissal qualifying period and the forthcoming MoJ consultation on fee-charging, there is a notional equilibrium of some 65,500 annual cases in the ET during the 2010s, as shown in the following table.

138. It has also been estimated that early conciliation would reduce this notional annual equilibrium by 25 per cent and that the subsequent reduction in the number of unfair dismissal cases would be in the order of 2,000 per year.

139. The precise impact of the proposed introduction of user fees is uncertain, but is currently estimated to further reduce the equilibrium number of ET cases to around 44,500 – 46,500 per year and the number of appeals to around 1,300 – 1,400, depending on the demand response scenario, although the detailed proposals will be the subject of an MoJ consultation that will be published shortly.

[15] This is an employer in a small minority of cases, e.g., some statutory appeals brought under certain Health & Safety provisions.

[16] This is the employee in the minority of cases where an employer chooses to make a counterclaim (which would only happen in breach of contract complaints).

[17] The Net Present Value (NPV) shows the total net value of a project over a specific time period. The NPV is expressed in real terms and takes into account the fact that society tends to attach a decreasing weight to costs and benefits the further into the future they occur.

[18] To take account of roughly one whole business cycle in the UK economy.

140. The “low” and “high” demand response estimates set out below are collectively used as the counterfactual for the measures outlined in proposal 2. This approach reflects the uncertainty attached to these policy impacts. In other words, the following policy proposals are assessed against a base case in which the main BIS and ET/EAT fee-charging proposals have already taken effect.

Table 2.3

Type	Singles	Multiples	Total
Claims	62,624	102,176	164,800
Cases	62,624	3,005	65,629

Table 2.4

Reform	No. cases
Early conciliation (-25%)	-16,407
UD time increase	-2,000
Remaining ET cases	**47,222**

Remaining ET cases	47,222
Number of appeals	1,417

Table 2.5

Accepted ET cases

Fee level	Low response		High response	
	Singles	Multiples	Singles	Multiples
Level 1	28,679	1,385	27,463	1363
Level 2	6,923	335	6,540	328
Level 3	8,908	432	8,309	420
Total	**44,510**	**2,152**	**42,312**	**2,111**
	46,662		**44,423**	

Appeals received

Low response	1,400
High response	1,333

141. Given that Parliament has yet to enact and implement any of the relevant legislation, it is assumed here for modelling purposes that the BIS proposals and fee-charging have been implemented by the start of 2013/14. The final timetable has yet to be confirmed.

Use of data

142. In assessing costs and benefits of all the RWD proposals being taken forward, the key data sources have been management information from Acas and HMCTS, together with data from the 2008 Survey of Employment Tribunal Applications and the Labour Force Survey. Operational differences between Acas and HMCTS mean that often there are differences in the available data. This includes, for example, treatment of multiple claims and distribution of cases by track. The best available data for each situation has been used where appropriate when analysing the various policy proposals. However, further work will be undertaken to understand and address data differences.

Proposal A – Use of lay members in the ET

143. As a general rule, proceedings before an ET are currently heard by a panel of an Employment Judge and two other 'lay' members.[19] Lay members are individuals who have experience in dealing with employment disputes from the point of view of employers or employees.

144. However, there are particular jurisdictions in which an Employment Judge can sit alone (see Annex 6)[20], although the judge still has the discretion to sit with lay members if considered appropriate, for example in the interests of conducting a fair and effective hearing. Legislation sets out the criteria to which a judge should have regard when deciding whether to sit with lay members.[21]

145. Under proposal A the categories of jurisdiction in which an Employment Judge can sit alone would be extended to include unfair dismissal proceedings. The current judicial discretion to opt to sit with lay members be exercised on the basis of the same criteria applied to those jurisdictions where judges can already sit alone. These criteria are set out in Section 4(5) of the Employment Tribunals Act 1996 – notably, the likelihood of an issue of law arising, of a dispute around the facts of the case and the views of any of the parties. However, no one criterion listed in Section 4(5) of the 1996 Act necessarily takes precedence over any other.

146. In making their determination, judges would have regard to the wishes of the parties and to the other statutory criteria set out in the 1996 Act. Ultimately, judges would make their determination so as to further the overriding objective (enshrined in legislation) of dealing with cases justly – which includes an assessment of how best to deal with cases proportionately and fairly.

147. Under Proposal A, the existing discretion to sit alone in the ET would be extended to jurisdictional complaints of Unfair Dismissal in April 2012, subject to the necessary secondary legislation being enacted and implemented.

148. Some cases are multi-jurisdictional, i.e., the case involves particular allegations that involve more than one area of complaint. For example, an employee may bring a claim which involves allegations of Unfair Dismissal and sex discrimination – namely, two separate jurisdictions. Where a claim involves several jurisdictional complaints that are capable of being heard by a judge sitting alone, the fact that the claim is multi-jurisdictional makes no difference. A judge can hear the matter alone as would happen in a claim that involves just one jurisdictional complaint. Alternatively, the judge may exercise his discretion to sit with lay members when hearing the claim.

149. But where a multi-jurisdictional claim involves a mix of complaints that an Employment Judge can hear alone and of complaints that a full panel would hear, three routes are possible:

- all the jurisdictional complaints can be heard together by a full panel;
- the 'judge alone' elements can be heard without a panel and, separately, a full panel would hear the remaining complaints; or
- if the parties agree, a judge can hear all of the proceedings sitting alone.

[19] Section 4(1) of the Employment Tribunals Act 1996.

[20] Sections 4(2) and (3) of the Employment Tribunals Act 1996.

[21] As set out in Section 4(5) of the Employment Tribunals Act 1996, the criteria in which this would happen include the likelihood of a dispute around the facts of the case or a point of law arising.

150. In practice, the first scenario is common. This is because it is more practical in terms of case management to hear all of the evidence and jurisdictional complaints together so that parties, witnesses and any representatives do not have to prepare for and attend different hearings. It also means that the tribunal can ensure the best use of hearing rooms and other facilities.

151. Accordingly, in a multi-jurisdictional claim involving a sub-set of complaints that would require the use of lay members at a hearing, it is expected that all of the proceedings that are resolved at the hearing would take place before a full panel of the judge and lay members.

152. Of the 227 consultees responding to the consultation question about judges sitting alone in unfair dismissal cases, 33% supported the proposal and 65% were opposed.

153. The focus for many consultees was on the extent to which jurisdictional complaints of Unfair Dismissal, as opposed to other types of "judge only" complaints, had a proper policy rationale for being identified as suitable for ET judges to sit alone. This is because complaints of Unfair Dismissal are often questions of fact rather than any complex legal point as might be found in an equal pay case, for example.

154. The Government accepts – as it accepted in the RWD consultation itself – that some Unfair Dismissal cases can be 'fact heavy' and that the input of lay members can be beneficial. But evidence from consultation responses (including from some judges and lawyers/law firms, and in particular from business) suggested that Employment Judges are competent to deal with an assessment of the evidence against established legal tests and criteria.

155. The object of proposal A is not to remove lay members from cases in which, on balance, they should participate. Instead, it is to give Employment Judges the flexibility to determine which cases require that input. This flexibility would help the ET to operate more cost-efficiently because the expense of running a full panel can be avoided when a judge considers it to be unnecessary or disproportionate. The Government has concluded that Employment Judges are best placed to assess the need for lay member involvement with respect to unfair dismissal claims, on a case-by-case basis against clear statutory criteria that includes, but are not limited to, the wishes of the parties involved.

Costs of proposal A

Transition costs

156. No transitional costs have been identified.

Ongoing costs

Costs to HMCTS

157. It is not expected that there would be a greater probability of appeals to the EAT or higher courts on the grounds that a tribunal decision taken without lay members is no more likely to be appealed than at present.

158. First, if parties feel their dispute should be addressed by a full panel, they will be able to request this and to argue the merits before the judge. Moreover, a judge would in any event be able to choose to use lay members even without a formal request by either the claimant or respondent.

159. Second, anecdotal evidence from judges and administrators suggests that, as between appeals against decisions made by a judge alone and those made by a full panel, there is no significant difference between lodgement or success rates, which would indicate that there is no substantive difference between hearing outcomes. HMCTS is collating administrative management information on this aspect, and the data will be scrutinized as part of the Post Implementation Review.

160. HMCTS would not incur any costs from reducing the use of lay members, in relation to redundancy or other contract termination issues, because members are not employees of HMCTS and so do not attract these rights.

Costs to parties

161. Claimants and respondents would not incur any additional costs from this proposal. If either the claimant or respondent feels that it would be in their interests for the case to be heard by a panel of Judge and lay members, then they would be able to express this view to the tribunal and the judge could agree, after considering all relevant criteria, to conduct a hearing as at present.

Benefits of proposal A

Transition benefits

162. There are potential savings to HMCTS from not having to undertake, or not having to undertake so quickly, a new member recruitment campaign. The last campaign was run in 2009/10 and a campaign of a similar size is anticipated to be required by 2012/13 if the demand for lay member involvement in cases remains broadly at current levels. That 2009/10 campaign cost approximately £0.5 million in nominal prices. The maximum potential transitional saving to HMCTS would therefore be of that order of magnitude.

163. However, no decision has yet been taken on when such a campaign would be required. That said, a reduction in the demand for lay members would mean that any necessary campaign could be delayed and/or reduced in size and scope. But, for the purposes of this IA and because potential savings are not clear, no transitional savings are assumed here.

Ongoing benefits

Benefits to HMCTS

164. Estimating the annual benefit to HMCTS – and thus to taxpayers – is not straightforward. For instance, since April 2009 HMCTS pays each lay member £174 per attendance that lasts at least 3 hours, excluding employer's National Insurance Contributions and related expenses. If attendance lasts less than 3 hours, then the fee is £87. A "cancellation fee" of £87 is also paid to lay members under certain circumstances. This fee structure and data limitations make reliable estimation very difficult, so a high level approach is used below to derive an indicative lower bound of the avoided cost.

165. In 2009/10 lay members were paid a total of £9.78 million at nominal prices, of which 82% represented fee income, 12% was National Insurance Contributions and the remaining 6% related to expenses.

166. Given that around 112,800 ET claims were disposed that year, the average cost to HMCTS of using lay members was therefore £90 per disposed claim at today's prices (rounded to the nearest £10).[22]

167. As shown in the following table[23] based on ET management information, over recent years the annual number of (single and multiple) claims resolved at a hearing that only involved jurisdictional complaints of Unfair Dismissal has averaged around 4,600.

Table 2.6

UD only jurisidictional claims

Year	Singles	Multiples	TOTAL
2005/06	4,200	470	4,670
2006/07	4,200	540	4,740
2007/08	3,900	490	4,390
2008/09	3,700	400	4,100
2009/10	4,700	460	5,160
2010/11	4,300	370	4,670
Average	**4,167**	**455**	**4,622**

168. Reducing this figure to take account of the main BIS proposals, the introduction of ET fee-charging and the existence of judicial discretion to continue using lay members where considered necessary (which when so exercising, judges would be required to balance the statutory criteria, including the wishes of the parties, but also the legal and factual complexity of the case), it is assumed that between 1,000 and 1,500 claims may conclude each year in which lay members would no longer be used under proposal A.

169. Given the preceding estimates and assumptions, the following table suggests that the minimum annual saving to HMCTS may be around £90k-140k.[24]

Table 2.7

2011/12 £k	Saving
Low response	£90
High response	£135

Benefits to parties

170. The policy proposal would not result in any new recurring benefits to claimants or respondents.

Risks & assumptions

171. By its very nature, judicial discretion cannot be predicted. One cannot forecast the proportion of Unfair Dismissal jurisdictional complaints heard annually in which Employment Judges will decide that it is appropriate to continue using lay members.

172. Many ET claims are multi-jurisdictional – namely, they can be brought on several grounds. Judges can only sit alone when hearing claims that relate to particular jurisdictional complaints. HMCTS does not currently collect sufficient data to ascertain the number of multi-jurisdictional claims in which an Employment Judge sits alone at present, so an illustrative lower bound has been estimated using historic data on Unfair Dismissal jurisdictional complaints only.

[22] Not all claims were disposed at a hearing at which lay members sat alongside a Judge. The £90 ratio effectively assumes that it is not significantly affected by the BIS proposals or the introduction of fee-charging.

[23] Annual figures are rounded to the nearest 100 claims.

[24] The use of the £90 average total cost per claim disposed is intentionally conservative. This is because the actual average cost of lay members per claim disposed at a hearing would tend to be greater, but it has not been possible to estimate this latter ratio due to data limitations. More generally, the uncertainty involved in estimating the cumulative effects of the other BIS proposals and the introduction of fee-charging both support a deliberately conservative approach.

Net benefit of proposal A

173. The minimum net benefit to society of adding Unfair Dismissal to the list of jurisdictions in which a Judge would normally sit alone is estimated to be in the order of £0.1 million per year at today's prices. The existence of judicial discretion in deciding whether to use lay members in hearing such claims means that this measure is unlikely to have a significant impact on claim outcomes generally.

174. Although lay members as a group would forego income as a result of proposal A, such an impact is not captured by this IA because they are not employees of HMCTS and can access employment elsewhere.[25]

Proposal B – Use of lay members in the EAT

175. The EAT is the appellate tier of the employment tribunal framework. Hearings take place before a panel that usually consists of a judge and two lay members, though four lay members are sometimes involved. Where parties agree, a judge may sit with either one or three lay members.[26] But it is important to note that in recent years around 70% of appeals were resolved without a hearing.

176. An EAT judge sits alone where the case relates to interlocutory matters[27] or to an ET decision where that Judge sat alone, unless the EAT judge chooses otherwise.[28] There is no statutory guidance for EAT judges on when to exercise their discretion not to sit alone.

177. Proposal B would amend the Employment Tribunals Act 1996 so as to provide that, unless an EAT judge directs otherwise, the appeal would be heard by a judge sitting alone. In directing that a particular set of proceedings should be heard using lay members, a judge is likely to use the same criteria that Judges currently have in ET proceedings that are normally heard without lay members. This policy proposal would take effect in April 2014, subject to the necessary primary legislation being enacted and implemented.

178. Of 194 consultees who answered the consultation question about judges sitting alone in the EAT, 60% were clearly in favour and 28% were against. The opposition focused mainly on the perception of legitimacy that may arise if the EAT were solely a "judge alone" court. The majority of consultees therefore accepted that the argument for lay member involvement at the EAT is not strong, particularly given the composition of similar appellate tribunals.

179. Consequently, the Government has decided to seek a change in primary legislation to implement this change.

Costs of proposal B

Transition costs

180. No transitional costs have been identified.

Ongoing costs

[25] In formal cost-benefit analysis, the lay members are a "secondary market", i.e., they are indirectly affected by the policy proposal. Consequently, the standard treatment in cost-benefit analysis is to exclude any second-order impacts.

[26] Section 28(3) of the Employment Tribunals Act 1996.

[27] Section 30(1)(f) of the 1996 Act and Rule 3(7) of the EAT Rules 1993.

[28] Section 28(4) of the Employment Tribunals Act 1996.

Costs to HMCTS

181. It is unlikely that there will be a significant increase in the number of EAT decisions that are themselves appealed to higher courts, compared to the base case. This is because judges would be afforded discretion as to whether individual cases would be heard more appropriately with lay members.

Costs to parties

182. There are no financial costs to either appellants or their respondents as a result of this proposal. As appeals are made on a point of law and not on continuing disputes about the facts of the original case, it is unlikely that a judge sitting alone at a hearing would impact on the outcome of the appeal.

183. However, if the parties believe that that the appeal would more appropriately be heard by an EAT judge and lay members, then they would be able to express this view to the tribunal and the judge would decide whether to allow it. The judge would still be able to decide whether to use lay members even in the absence of such a request by either the appellant or respondent.

Benefits of proposal B

Transition benefits

184. No transitional benefits have been identified.

Ongoing benefits

Benefits to HMCTS

185. In 2009/10 HMCTS spent around £300k in nominal prices on lay members – i.e., fees, National Insurance contributions plus expenses. That year around 460 appeals were resolved at hearing in the EAT – or 25% of all appeals resolved. This represents an average of £680 per hearing at 2011/12 prices (rounded to the nearest £10).

186. Giving discretion to judges on whether to use lay members in appeal hearings means that they would not sit alone in all EAT hearings. In other words, no savings would be made when a judge decides to sit with lay members under proposal B.

187. In the absence of a reliable forecast of the annual proportion of EAT hearings that would still take place using lay members, it is assumed for modelling purposes that this proportion is 50%.

188. Between 2005/06 and 2009/10 an average of around 530 appeals concluded at an EAT hearing every year, which represented 28% of all appeals disposed over the period. The following table sets out the estimated number of appeals received and heard under the base case during a notional year and what would therefore be saved if 50% of these appeal hearings no longer use lay members, assuming that the total average cost of lay members remains at £680 per hearing in real terms.

Table 2.8

Appeals

Scenario	Received	Heard	Cost (£k)	Saving (£k)
Low response	1,400	386	£262	£131
High response	1,333	367	£250	£125

189. It follows that the annual saving to HMCTS – and hence to taxpayers – would be around £120k-130k per year at today's prices.

Benefits to parties

190. The policy proposal would not result in any new benefits to appellants or their respondents.

Risks & assumptions

191. It is not possible to forecast the proportion of appeals in which EAT judges will decide whether it is appropriate to use lay members. The assumptions of 50% and £680 per hearing may therefore prove to be higher or lower than the rates that would outturn in any given year.

192. The number of appeals received and heard is also a function of the rate of appeal from the ET and the hearing rate. These rates are based on historic averages that are assumed not to be significantly influenced by the implementation of the BIS or fee-charging proposals.

Net benefit of proposal B

193. The net benefit to society of making all appeals heard in the EAT "judge sit alone", except where the use of lay members is considered necessary by a Judge, is estimated to be in the order of £0.1m per year at today's prices.

194. Although lay members as a group would forego income as a result of proposal B, such an impact is not captured by this IA because they are not employees of HMCTS.[29]

Proposal C - Witness statements "taken as read"

195. The ET has developed along broadly similar lines to the civil courts in that, where witnesses give evidence, the tribunal hears:

- **Evidence-in-chief** – the evidence of the witnesses in their own words, which is set before the tribunal on behalf of the party calling the witnesses. Usually, they are guided through their evidence in chief by the claimant or respondent (or their representative, where they have one).
- **Cross examination** – questioning the witnesses about the evidence-in-chief presented to the tribunal. This is conducted by the opposing party or their representative.
- **Re-examination** – an opportunity for the party calling the witness to ask further questions, clarifying any issues arising during the cross examination.
- **Questioning from the tribunal itself** – this questioning can take place at any point, wherever the tribunal bench wants to clarify an issue.

196. In England and Wales, the testimony that tends to form the basis of witness evidence is drafted in a written statement. That "witness statement" is disclosed to the opposing party before the final hearing. The statements are prepared and exchanged prior to the hearing. Historically in most ET offices, the witness has read the contents of that statement aloud during the hearing so as to place the evidence-in-chief formally on the record. There follows the standard cross examination and re-examination, plus any questioning from the tribunal itself.

[29] In formal cost-benefit analysis, the lay members are a "secondary market", i.e., they are indirectly affected by the policy proposal. Consequently, the standard treatment in cost-benefit analysis is to exclude any second-order impacts.

197. In Scotland, following its particular legal tradition, witness statements are not widely used, though Employment Judges have the same powers to require the preparation and exchange of witness statements.

198. Insofar as England and Wales is concerned, two things are important to explain about the general position outlined above. First, in the Bristol region, local judicial practice has arisen that a witness's statement is admitted as his/her evidence-in-chief, which means that the statement is "taken as read". In effect, the ET accepts the witness's written evidence thereby allowing cross examination and re-examination immediately, unless the tribunal rules that some purpose is served by having the witness to read or summarise all or part of that statement first. This is already what happens in the civil courts of England and Wales.

199. Second, in a recent case the EAT determined that, notwithstanding the lack of any specific provision in the ET rules, a similar approach to the civil courts should be implied as covering the Employment Tribunal. The case in question was Mehta v. Child Support Agency.[30] But the Mehta case is not the same as a formal statutory rule, binding on the ET to take witness statements "as read" and anecdotal evidence suggests that (without a formal rule in place) judicial discretion is still exercised inconsistently across different tribunal offices and regions.

200. Proposal C would therefore amend the ET rules of procedure so that witness statements are consistently "taken as read", unless the tribunal directs otherwise.[31] The basis for this direction would be, unless further specific guidance is issued by the employment judiciary, the guidance already issued in the case of Mehta. The policy proposal would take effect in April 2012, subject to the necessary secondary legislation being enacted and implemented.

201. In terms of overall RWD consultation responses, 210 consultees provided views on whether hearings were unnecessarily prolonged by witnesses having to read statements aloud: 56% agreed and 39% disagreed. Businesses, employer representatives and lawyers were more likely to believe that hearings are unnecessarily prolonged, while claimant representatives were more likely to believe the opposite.

202. With regard to support for a new default rule, which can be varied in "exceptional circumstances", there were 275 responses of which roughly equal numbers expressed views for and against. Given the lack of clear support for the "only varied in exceptional circumstances" route, the Government has decided to take forward the model adopted in Mehta, but ensuring consistency by having a formal rule in place.

Costs of proposal C

Transition costs

203. There would be little or no familiarisation and training costs incurred by Employment Judges and panel members. The case of Mehta has already set down clear guidance and the ET would require little else beyond the standard update guidance that is issued regularly to bring judges and members up to date with recent developments in law, practice and procedure.

204. Guidance to staff would be updated as part of the already ongoing exercise to issue Standard Operating Procedures across all ET offices. This work, independent and unrelated to the RWD consultation, is already resourced from existing HMCTS budgets and the additional work required in response to this specific proposal will be negligible.

[30] *Mehta* v. *Child Support Agency* [2010] UKEAT/0127/10/CEA (http://www.employmentappeals.gov.uk/Public/Upload/10_0127fhwwSBCEA.doc). See in particular paragraph 16 of the judgement.

[31] It is not anticipated that the judicial practice in Scotland will alter as a result of this proposal, so witness statements will not tend to be directed or exchanged in that jurisdiction. The effect of proposal C will, therefore, primarily be felt in England and Wales.

205. Parties face familiarisation costs when using the ET anyway, and this change is not expected to affect such costs materially. Any repeat or regular users (typically professional representatives such as lawyers) will already be familiar with the guidance issued by the EAT in the case of Mehta, so again they are unlikely to face any costs beyond the routine updates on all legal and procedural matters that are necessary given the evolving employment law field.

Ongoing costs

Costs to HMCTS

206. The policy proposal would not result in any new recurring costs to HMCTS.

Costs to parties

207. The policy proposal would not result in any new recurring costs to claimants or respondents.

Costs to witnesses

208. The policy proposal would not result in any new recurring costs to witnesses.

Benefits of proposal C

Transition benefits

209. No transitional benefits have been identified.

Ongoing benefits

Benefits to HMCTS

210. Taking witness statements as read would result in a shorter average hearing length of ET cases, compared to the status quo, and therefore reduce the use of HMCTS resources in cases that reach a hearing.

211. It was stated above that the Bristol area has adopted the statement “as read” practice. However, adequate data do not exist with which to compare the average duration of ET hearing times in Bristol to the duration elsewhere in Britain. For instance, one would want to control for the jurisdictional mix of hearings in Bristol in case it is substantially and persistently different from other areas of the country, but this is not possible given the available data.

212. Mehta and RWD consultation responses from some judges, lawyers and businesses suggested that hearing times could be reduced by up to a third. In order to be conservative, however, it is assumed for modelling purposes that the reduction would be around 10%.

213. The following table is based on ET internal management information. It shows, in minutes, the median of the average hearing times of all single and multiple claims.

Table 2.9

Minutes	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11
Single claims	261	221	243	256	221	230
Multiple claims	237	231	246	250	263	231
Mid-point	**249**	**226**	**245**	**253**	**242**	**230**

214. Consequently, a 10% reduction implies that the typical hearing time would fall by some 20 minutes. The actual reduction in any given hearing would depend on the mixture of jurisdictional complaints and the complexity of the case.

215. The cost to HMCTS of a hearing in 2009/10 (the most recent year for which figures exist) ranged from around £1,500 to over £6,000 per case at today's prices, depending on the track to which the case was allocated. This was equivalent to a weighted average cost of £3,840 per case (rounded to the nearest £10).

216. Given that the typical duration of a hearing that year was around 4 hours, this weighted average cost per case equated to a total hearing cost of around £950 per hour. The variable hearing cost was therefore estimated to be about £780 per hour (approximately 80% of the total average cost). A 20 minute reduction in the total hearing time therefore lowers the total weighted cost of an ET hearing by some £260 (one-third of £780) to £3,580 per case heard at today's prices.

217. The following table sets out the estimated number of cases resolved at hearing and the associated benefit to HMCTS each year, assuming that the benefit remains constant at £260 per case heard and that judges exercise their discretion to have witness statements read aloud in 50% of cases that reach a hearing.[32]

Table 2.10

Cases heard

Claim type	Low response	Benefit (£k)	High response	Benefit (£k)
Singles	5,306	£690	4,494	£584
Multiples	272	£35	249	£32
TOTAL	5,578	£725	4,743	£617

218. The table suggests that the time saving to HMCTS, and hence to the taxpayer, would be in the order of £600k-700k per year at today's prices. But it should be emphasised that this does not represent a financial saving as the benefit would take the form of a productivity gain in the ET. This is because hearings would conclude more quickly than otherwise and thus resources (e.g., judicial time, hearing rooms, etc.) would be redeployed to deal with other casework.

Benefits to parties

219. There are no estimates regarding the hourly cost to either claimants or respondents once their cases reach a hearing in the ET (itself a subset of all cases since many are resolved before hearing).

220. So as to provide an illustrative figure of the potential gain to claimants and respondents, the following high level approach is used.

221. Based on data from the 2010 Annual Survey of Hours and Earnings[33], the gross hourly pay (including non-wage labour costs) of all employees in the UK was approximately £15 at 2011/12 prices. A 20 minute reduction in average hearing times would therefore represent roughly £5 per case heard for, respectively, the claimant and the respondent. In other words, the total gain would be in the region of £10 per case for both claimants and respondents.

[32] Although the table strictly refers to Great Britain and it is not expected that judicial practice in Scotland would change substantially, the number of Scottish ET claims form a relatively small proportion of the total number of annual claims, so the differential impact of Scotland in the table can reasonably be ignored.

[33] http://www.statistics.gov.uk/statbase/Product.asp?vlnk=1951

222. The next table sets out the indicative annual benefit to each group of claimants and group of respondents whose cases reach a hearing, assuming that the time saving in each group remains constant at £5 per case heard and that 50% of them no longer involve witness statements being read aloud.

Table 2.11

Cases heard

Claim type	Low response	Benefit (£k)	High response	Benefit (£k)
Singles	5,306	£13	4,494	£11
Multiples	272	£1	249	£1
TOTAL	5,578	£14	4,743	£12

223. The table suggests that claimants collectively gain some £10-15k per year in time saved and that respondents also gain £10-15k per year.[34] The total illustrative gain to parties would therefore be in the region of £20-30k per year at today's prices.

224. There is an additional and unquantified gain to both claimants and respondents whose cases reach a hearing. ETs often operate 'floating lists', where cases are assigned hearing dates on the assumption that some listed cases will settle before the hearing takes place. Although this ensures tribunal rooms never stand empty, it means that, if not enough cases fall out, there are too many listed cases and so some need to be adjourned prematurely.

225. If hearings are dealt with more quickly, then some cases that are listed on a floating list may be less likely to stand adjourned at the end of each day. This would speed up the ET process for parties, representatives and witnesses who can be heard on their original date, reducing the time and inconvenience costs to all parties and witnesses from having to come back when the ET can hear their case. However, it has not been possible to quantify this gain.

Benefits to witnesses

226. Witnesses would benefit in that the amount of time they spend participating in a hearing would be less than otherwise. However, HMCTS does not collect data on the number of witnesses who attend hearings or how long they typically spend reading their witness statements aloud, so it has not been possible to quantify or monetise this particular benefit.

Risks & assumptions

227. There are a number of factors that drive hearing lengths such as the complexity of case involved. The experience of ET cases in Bristol indicates that, other things being equal, hearing lengths are shorter than elsewhere. The estimated 20 minute time saving is intended to be a typical figure; in reality, the actual time saving in any particular hearing elsewhere in England and Wales may be significantly different in any given future year.

228. The gains to claimants and to respondents are based on median pay estimates taken from the latest Annual Survey of Hours and Earnings, adjusted for non-wage labour costs, but do not take into account intrinsic differences between the two groups.

Net impact of proposal C

[34] In reality, the gain to respondents would tend to be greater given that the time of more senior staff tends to be more costly than that of workers generally.

229. The following table summarises all of the estimated annual net benefit from routinely taking witness statements "as read" in the ET, except where judges choose to hear the statements read aloud, as generally happens at present.

Table 2.12

2011/12 £k	Low response	High response
Total net gain	£753	£640

230. Compared to the base case, the table shows that the total net benefit would be in the order of £0.7 million per year at today's prices, although this is the estimated value of the time saved and does not represent a financial saving.

Proposal D - Payment of expenses to parties and witnesses

231. The Secretary of State is currently empowered[35] to pay claimants, respondents and witnesses for their attendance at ET hearings.[36]

232. This payment is to reimburse certain travel costs to/from hearings for loss of earnings and for certain other costs directly associated with attendance – see Annex 7 for a summary of the allowances that presently exist. Certain other "expert" costs can also be paid by the tribunal such as interpreters, medical expert and equal pay assessors.[37] Expense payments do not exist in the EAT. Nor are they made in any civil court of England and Wales, nor in any other tribunal that deals with disputes between private parties.

233. A witness may appear at an ET hearing voluntarily, but may have to be cited to attend under a witness order if he/she is unwilling to appear voluntarily. The Employment Judge then appoints the time at which the witness's attendance is required. Any person who without good reason fails to comply with the requirement set out in a witness order is liable on summary conviction to a fine. The maximum amount of the fine is currently £1,000.

234. As part of the RWD consultation, the Government invited views on the proposal to remove the payment of expenses to ET parties and witnesses. The proposal was made on the basis that (i) it was right that users, rather than solely taxpayers, should bear more of the costs of administering claims; and (ii) it was appropriate to treat courts and ET users more consistently.

235. There were 197 responses on this question: 51% were supportive and 47% opposed. The most supportive sector was individual businesses and the most critical was employee representatives. However, of the 202 consultees responding to the question about whether something akin to an exceptional funding regime should apply, 39% considered the withdrawal should be universal and 52% thought there should be some exceptional funding.

236. Consistent with the practice in civil courts, proposal D will therefore remove the payment of expenses to claimants, respondents and their witnesses in the ET from April 2012, subject to the consequential secondary legislation being enacted and implemented.

---

[35] Section 5(3) of the Employment Tribunals Act 1996.

[36] The payment of expenses can be withheld if a party is deemed to have "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably".

[37] Full guidance is available at http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/guidance-booklets/ExpensesAllowances.pdf. Parties' representatives – including members of Citizens Advice Bureaux and Free Representation Unit and the Bar Pro Bono Unit – are also entitled to claim expenses. But the following are not entitled to claim: counsel; solicitors; full time trade union officials; officials of employers' organisations; and any other paid or unpaid professional persons or organisations who represent parties.

237. But following consideration of consultation responses, it is accepted that the disproportionate number of disability discrimination claims in the ET relative to civil courts means that medical experts required by the tribunal (usually in those discrimination cases) should continue to have their expenses paid.

238. As a consequence of ending the State-funded offer of payments to parties and witnesses, proposal D will also provide new powers for the ET where appropriate to require parties seeking an order to compel a witness's attendance to offer or pay that witness:

- a sum sufficient to cover the expenses of the witness travelling to and from the hearing; and/or
- a sum by way of compensation for loss of time.

239. In addition, proposal D will allow an Employment Judge to order the unsuccessful party in a hearing to pay the reasonable expenses incurred by the successful party's witnesses.

240. Unless an order is made, therefore, the default position will be that each claimant, respondent and witness in a hearing would bear the cost of all of his/her own expenses.

241. HMCTS guidance, which is being reviewed in any event, will help parties and witnesses to understand what sufficient and reasonable sums may fall due in any instances that an Employment Judge did direct a witness to attend and did also direct a party to offer and pay such sums. That guidance would be in line with such guidance that is issued from time to time in the wider courts and tribunals system.

Costs of proposal D

Transition costs

242. HMCTS is now committed to reviewing and updating ET user guidance, as a result of feedback received during the RWD consultation. This project will include necessary revision caused by reforms, including the availability of expenses. Costs associated with developing such guidance material will form part of an existing project, therefore, and any additional developmental costs associated with this particular proposal will be negligible.

243. HMCTS no longer manages a print run of hard copy guidance or leaflets for ET users. All guidance material is published electronically, but is printed out on request, as and where necessary for users. There will therefore be no additional costs of preparing, printing or distributing the revised guidance.[38]

244. Employment Judges and staff will receive new guidance on the changes as part of regular updates on statutory and other revisions affecting the jurisdiction. As such updates are given routinely, no additional familiarisation cost is assumed, given the ongoing and routine nature of the communications.

Ongoing costs

Costs to HMCTS

245. The policy proposal would not result in any new recurring costs to HMCTS.

Costs to parties & witnesses

[38] Certain costs for translation of guidance material into other languages may be incurred, but given such costs would be incurred in any event, there is significant no additional cost from this policy proposal.

246. Where directed by the Judge, all claimants and respondents would themselves have to bear the costs of their own and their witnesses' expenses that can currently be claimed for when attending an ET hearing. Witnesses would otherwise pay all of their own expenses.

247. HMCTS does not collect data on the number of witnesses who attend hearings every year or what proportion of total annual expenses are paid specifically to ET claimants, respondents and their witnesses. Anecdotal evidence based on operational experience suggests that a majority of parties and witnesses already pay their own hearing-related expenses, so these individuals would not be affected by proposal D.

248. In 2009/10, the payment of expenses to claimants, respondents and their witnesses amounted to around £280k in nominal prices. Given that there were around 72,000 cases accepted by the ET that year in total, this equates to an average payment of around £4 per case at 2011/12 prices.[39]

249. Assuming that this ratio is not affected by the BIS proposals and the proposed introduction of fee-charging, the next table shows the annual cost that would collectively be borne by parties and their witnesses would be in the order of £180k-190k at today's prices, given the base case.

Table 2.13

2011/12 £k	ET cases	Cost
Low response	46,662	£187
High response	44,423	£178

250. If a party pays witness expenses and is subsequently successful at a hearing, the Employment Judge would have the discretionary power to order the unsuccessful party to reimburse the successful party's witness expenses, although judicial practice is to take into account the ability of the party to pay the award.

251. It has not been possible to disaggregate the estimated cost of around £0.2 million with respect to claimants, respondents and their witnesses – not least because both claimants and respondents as groups would be subject to the aforementioned discretionary judicial power to pay the successful party. Such payments that take place would flow in both directions between the two groups during any given year, so they would tend to offset in each other in aggregate.

Benefits of proposal D

Transition benefits

252. No transitional benefits have been identified.

Ongoing benefits

Benefits to HMCTS

253. HMCTS, and hence taxpayers, would benefit from no longer paying any expenses to claimants, respondents and their witnesses.

254. In line with the estimate set out in the previous table, HMCTS would receive a total benefit of some £0.2 million per year at today's prices.

[39] The payment per case that is resolved at hearing would be higher, but it has not been possible to estimate this ratio due to data limitations.

Benefits to parties & witnesses

255. The policy proposal would not result in any new benefits to claimants, respondents or their witnesses. Consultation responses did not suggest that consultees believed this policy proposal would result in shorter hearings generally.

Risks & assumptions

256. Anecdotal evidence suggests that only a minority of parties and witnesses involved in hearings claim expenses at present. It has been assumed that the removal of expenses to parties and their witnesses does not impact on the number of parties who bring a case to hearing, other things being equal. It has also been assumed that there is no impact on the number of witnesses who would otherwise attend an ET hearing in future or on the quality of their evidence.

Net impact of proposal D

257. The overall net benefit of the withdrawal of expense payments is essentially zero. This is because the cost of those expenses paid to claimants, respondents and their witnesses would shift from HMCTS (and thus the taxpayer) to parties and their witnesses who originally incur these expenses. For the avoidance of doubt, the State-funded payment of Independent Experts in equal pay cases will continue.

Proposal E - Costs and Deposit order limits

258. As part of the case management powers available to the ET, orders can be made with respect to:

- Costs – a tribunal can direct one party to pay another party for expenditure incurred by the latter; and
- Deposits – sums of money paid to the tribunal as a condition of being allowed to continue to take part in the proceedings and/or to pursue any matter within those proceedings.

(a) Costs orders

259. Orders relating to Costs (called “Expenses” in Scotland) in the ET can broadly be categorised into three groups:

- **Costs awards** covering the “fees, charges, disbursements or expenses incurred by or on behalf of a party, in relation to the proceedings.” A Costs order can only be made in favour of a party who was legally represented at the hearing or, if the proceedings are determined without a hearing, was legally represented at the time the proceedings were determined.
- **Preparation time orders** which can be made in favour of a party who has not been legally represented at a hearing or, where there has been no hearing, when the case was determined.
- **Wasted costs orders** which can be made against a representative as a result of the representative’s conduct. In making a Wasted costs order, an ET may order a party’s representative to meet the whole or part of any wasted costs of any party (including costs already paid to the representative by the client).

260. Unlike in the civil courts, Costs in the ET tend to be awarded infrequently and can only be awarded on the basis of statutory criteria (e.g., a party is found to have conducted their

case unreasonably[40]). The general rule in the ET is, therefore, that each party bears his/her own Costs.

261. The ET has powers to assess and award Costs, subject to the relevant criteria being satisfied, up to a maximum level of £10,000. If Costs are likely to exceed that level, the case can be transferred to a civil court that makes an assessment and orders the appropriate (uncapped) award. So in practice Costs awards can be applied for and made above £10,000, but where the award is likely to exceed that 'cap', that matter must be transferred to another court – a county court in England and Wales or a Sheriff Court in Scotland. The present ET 'cap' has not been increased in nominal prices since 2004.

262. Of the 227 respondents commenting on whether the Costs limit should double to £20,000, 56% agreed and 43% were opposed. The vast majority of individual employers, most employer representatives and over half of the judicial and legal community were in favour; employee representatives and over half of the individuals responding were against.

263. There are no plans to alter the criteria against which Costs awards may be made.

(b) Deposit orders

264. Deposit orders are a case management tool that be used when the ET is seeking to ensure its time is only taken up with cases or issues of merit.

265. Under the present ET Rules, the criteria for the making of Deposit orders are that a judge, after considering the circumstances of the case, must consider that the issue has "little reasonable prospect of success". The requirement to pay the Deposit therefore serves as a warning to the party that continuing to pursue the issue could result in the forfeit of some or all of that Deposit in the event that they are unsuccessful.

266. The maximum sum that an Employment Judge can direct a party in a Deposit order is £500. That limit is a strict cap, though it can be applied to any matter within proceedings that are deemed to be relevant, so it is possible to have more than one Deposit order made against a party in a single case.

267. As a result of employer and other concerns about the number of 'weak' cases in the ET system, the RDW consultation sought views on a range of procedural reforms to the Deposit regime. The vast majority of those proposals will now be for the fundamental review of ET Rules to consider.

268. In response to the RWD consultation, 237 consultees answered the question about doubling the current £500 cap on Deposit orders: 54% were in favour and 41% against. Employers, their representative groups and lawyers were clearly in favour; employee representatives and individuals were largely opposed.

Proposal E

269. Proposal E would increase the current Deposit and Costs limits in the ET from £500 and £10,000, respectively, to £1,000 and £20,000 in April 2012, subject to the necessary secondary legislation being enacted and implemented.

270. If a claimant or respondent wishes to appeal a Costs or Deposit order, then the relevant party would still be able to request that the ET review its original decision. Beyond that, the party can appeal the decision to the EAT.

[40] According to the rules of procedure, a party can only recover its legal costs if it can show that the opposing party behaved "vexatiously, abusively, disruptively or otherwise unreasonably" or that bringing the case was "misconceived".

271. All other proposed reforms around the Costs and Deposit regimes, including considering of the statutory tests to be applied and the criteria a judge/panel should consider when making orders, will be considered as part of the proposed fundamental review.

Costs of proposal E

Transition costs

272. There will be limited transitional costs that stem from informing Employment Judges and staff of the proposed changes to the rules. The underlying procedures will remain the same. The only change will be to the monetary levels of the existing Costs and Deposit orders. HMCTS will update leaflets and guidance for ET users – material that is currently available online. The small changes necessary to reflect the new limits in the ET would be minimal.

273. There would also be limited familiarisation costs to other stakeholders, including the legal profession, advice agencies, trade unions and employer representatives, and other repeat users (who are more likely to be respondent businesses, rather than individual claimants).

Ongoing costs

Costs to HMCTS

274. It is not expected that increasing the limits of Costs and Deposit orders would cause Employment Judges to use these powers significantly differently from now, expect in the (currently relatively rare) instances where the current limits are engaged.

275. According to published ET statistics, in 2009/10 84% of Costs awards were for less than £4,000, 92% for under £8,000 and the median award was around £1,000. In 2009/10, only 1 case appears to have been transferred from the ET to a court for an award in excess of £10,000; and in 2008/09, that figure was 5. In this small number of instances, HMCTS must still respond to applications above £10,000, but a different judge would assess the issues and make the award.

276. Under proposal E, only those cases where Costs awards would exceed £20,000 would still need to transfer out of the ET to another court. One can see that this proposal would only tend to affect at most a handful of cases in any year, but the additional flexibility to manage such cases more efficiently (e.g., avoiding a transfer to a different venue, and asking a new judge to look over the proceedings afresh) would help to streamline the decision-making process within the ET. The limited nature of this improvement is too small to be quantified meaningfully, however.

277. Analysis of internal management information suggests that between 2007 and 2010 the average Deposit order was around £250. The average number of occasions on which a maximum Deposit of £500 was ordered over that period was 79 per year – i.e., in 20% of instances over that period.

278. In other words, increasing the limit above the present £500 level would only tend to affect a minority of all Deposit orders handed out in any given year. Given the overall average level of Deposit orders made at present (around 350 annually), there is no evidence to suggest that Employment Judges would use the increased cap to make higher orders across the board.

Costs to parties

279. The effect on claimants and respondents as a group is expected to be very small because the number of cases likely to be affected is low. In any event, the judge making the decision will be able (and required in the case of Deposit orders) to assess the paying party's ability to meet the terms of the order made.

280. As indicated in the table below, the average Deposit order was significantly below the current £500 limit during recent years. Over the period 2007 to 2010, there was an average of almost 80 Deposit orders per year made at the £500 limit. The new limit would increase to £1,000, but it is not expected that the average value of deposit orders would rise significantly since only around 20% are imposed at the current maximum.

Table 2.14

Year	All	Claimants	Respondents	Average value
2007	491	418	73	£220
2008	353	311	42	£255
2009	416	365	51	£250
2010	335	315	20	£255

Source: ETHOS, Employment Tribunal database (nominal prices)

281. In terms of Costs awards, unsuccessful claimants or respondents who are ordered to pay more would face costs wherever an Employment Judge exercises those new powers against them. In the ET itself, claimants/respondents could be ordered to pay up to £20,000 in Costs, compared to the current level of £10,000. If the successful party incurs Costs over £10,000, the losing party could face an additional cost of reimbursing the losing party.

282. However, it is already possible that more than £10,000 can be awarded in Costs, though these would have to be awarded by a civil court rather than the ET/EAT. Therefore it is not expected that this proposal would cause a significant increase in the volume or average value of Costs awards.

Table 2.15

	2008/09		2009/10	
	Volume	Average value	Volume	Average value
Costs awards	382	£2,446	436	£2,430
Preparation time orders	46	£609	57	£1,174
Wasted costs orders	31	£1,889	49	£3,721
TOTAL	**459**	**£2,224**	**542**	**£2,415**

Source: ETHOS, Employment Tribunal database (nominal prices)

Benefits of proposal E

Transition benefits

283. No transitional benefits have been identified.

Ongoing benefits

Benefits to HMCTS

284. HMCTS would stand to benefit in the small number of Costs assessment applications, between £10,000 and £20,000 in value, which would presently have to be transferred from the ET to a civil court. In such instances, there would be no need to engage a new judge or to involve new administrative processes around the transfer. This means that existing resources can be used more effectively, although this benefit is expected to be small and is unlikely be represent a financial saving.

Benefits to parties

285. There would be some benefits to the parties involved in Costs proceedings where the value of those proceedings stood between £10,000 and £20,000 in that they would not need to prepare for and attend separate assessment proceedings in a civil court. Instead, all such proceedings could be conducted before the ET. These parties would no longer face the time and financial costs involved in going to the civil courts (legal expenses and court fees).

286. It is not expected that enabling an ET to award these Costs would significantly increase the volume of awards over £10,000 and so the corresponding benefit to claimants and respondents is small.

Risks & assumptions

287. Even though the volume of Costs and Deposit orders relative to the annual number of ET claims disposed is small and even though Costs orders above £10,000 are currently possible, some claimants may still be deterred by the higher limits, compared to the base case.

288. Costs and Deposit orders are case management powers that are available for use at the Employment Judge's discretion, so it is not possible to forecast whether this proposal would increase the annual volume of Costs awards or Deposit orders made. Indeed, one cannot predict if the average value of Costs and Deposit orders made would rise if the respective ET limits are doubled.

289. With regard to Costs orders, it may be reasonable to expect their average value to reflect the average value of legal expenses and other time costs involved in an ET case. But these figures, estimated by BIS as around £3,700 per respondent and £1,300 per claimant on average, are already below the current thresholds.

290. In relation to both case management powers, since their introduction in 2004, there has been no increase in these limits in real terms. There is therefore no historical evidence as to the impact of higher limits on the volume and value of Costs and Deposit orders or the impact on the overall number of cases brought before the ET.

Net impact of proposal E

291. Given the small volumes of Costs and Deposit orders annually and given that a minority of them take place at the existing limits, it is expected that the net benefit of this Proposal would be negligible.

Summary of proposal 2 net impacts

292. The Government accepts the case for wholesale review and reform of the Employment Tribunal practice and procedure. To that end, it has commissioned the fundamental review of rules, which will be led by the judiciary.

293. The tribunals-specific proposals considered in this Impact Assessment represent the first step in that wider package of reforms. The Government believes that, while it is right that an independent and evidence-based review should proceed as expeditiously as possible and that the review body should have maximum scope to recommend change, the five proposals considered here need not await the outcome of that review process.

294. The objective of the reforms, contributing to the overarching objective of ensuring a swift, user-friendly and efficient process, is to maximise flexibility for Employment Judges to deal with cases fairly and cost-efficiently, according to their own individual circumstances. Unduly prescriptive or limiting rules act as a barrier to that effective treatment. The employment judiciary can exercise discretion in individual cases, based on clear and transparent criteria to ensure as much consistency as possible, to ensure that cases are dealt with justly, which includes focus on fairness and proportionality.

295. The impact of the five tribunals-focused reforms is to increase the flexibility that judges and panels have to manage cases. The combined effect of the package, including those anticipated reforms to flow from the fundamental review, will be to increase flexibility and therefore to increase efficiency and effectiveness in the ET and EAT.

296. The following table summaries the annual economic costs and benefits of each of the five policy proposals (rounded to the nearest £0.1m).

Table 2.16

2011/12 £m	Costs	Benefits	Net benefit
Proposal A - lay members in ET	0.0	0.1	0.1
Proposal B - lay members in EAT	0.0	0.1	0.1
Proposal C - witness statements	0.0	0.7	0.7
Proposal D - expense payments	0.2	0.2	0.0
Proposal E - Costs & Deposit limits	0.0	0.0	0.0
TOTAL	0.2	1.1	0.9

297. Only the withdrawal of expenses payments is expected to create material new costs for any group (claimants, respondents and their witnesses in this instance). Most of the proposals' likely benefits accrue to HMCTS – and hence the taxpayer – although parties benefit as well.

298. Given the base case, the estimated total net benefit of around £1 million per year at today's prices would arise when all of the BIS and fee-charging proposals have fully taken effect.

Proposal 3 - Increase qualifying periods for unfair dismissal

A: Strategic overview

299. An employee's right not to be unfairly dismissed by his employer is an established part of the employment law framework of this country. It was introduced in 1971. In order to qualify for protection an employee must have been working for his employer for a prescribed minimum period. The length of the qualifying period has been changed several times, ranging from a period of 6 months to two years. The qualifying period currently stands at one year.

B: The issue

What is the problem under consideration? Why is government intervention necessary?

300. The proposals in the Resolving Workplace Disputes consultation paper were aimed at helping businesses feel more confident about hiring people and reducing the number of claims reaching employment tribunal.

301. It is difficult to quantify the likely impact of extending the qualifying period on employers' confidence to hire. However, the consultation has provided some evidence to support our view that extending the qualifying period will have a positive impact on employers' confidence to recruit and retain staff. Business representative groups and a range of businesses of all sizes agreed that this measure would improve confidence to recruit.

302. The Institute of Directors (IoD) consultation response included a survey of 1,100 of their members. 51 per cent of respondents to the survey said that the one year qualifying period for unfair dismissal was a 'significant' or 'very significant' factor in considering whether to take on an additional employee. Although this nature of data has its limitations, it does suggest that there are a significant number of employers for whom this is a factor.

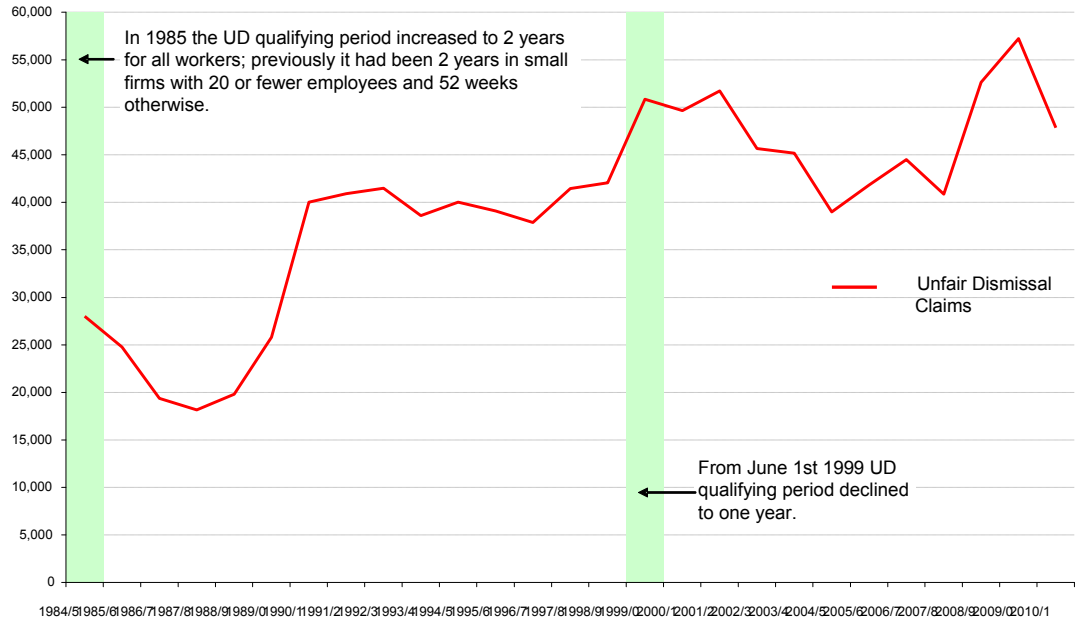
303. Furthermore, the Government believes that in limited circumstances the current qualifying period has an adverse affect on retention of staff. We recognise that, in many cases, a 12 month period is likely to be sufficient to assess a newly recruited employee's performance. However, a number of respondents suggested that, for some businesses, the current qualifying period is not long enough to fully assess the employee's performance and to resolve any problems that may be encountered. This is particularly the case where the training requirements of a job are high and it may not be clear to the employer whether an employee in training will reach a satisfactory level of performance. In this case the qualifying period may have the unintended consequence of acting as an incentive to dismiss the worker earlier than is in everyone's best interest. No respondents suggested a period longer than two years was needed.

Trends in unfair dismissal claims

304. A significant number of employment tribunal claims relate to unfair dismissal. The number of unfair dismissal claims has been on an upward trend since 1984/5 as shown by Chart 3.1 below. The recession which began in 2008/09 is clearly shown on the chart as the number of unfair dismissal claims increased by 29 per cent (11800 claims) from 2007/08.

305. To note, to construct the time series we have used two separate data sources.

Chart 3.1: Number of Unfair Dismissal employment tribunal claims from 1984/5 to 2010/1



Source: Employment Relations Research Series No.10, EXPLAINING THE GROWTH IN THE NUMBER OF APPLICATIONS TO INDUSTRIAL TRIBUNALS, 1972-1997. Data from 1998 onwards from Tribunal Service.

306. We are unable to infer the causality between Unfair Dismissal (UD) claims and changes in the qualifying period. There are a wide range of variables other than unfair dismissal qualifying period that will impact on the number of unfair dismissal claims such as claimant count inflow. In periods of recession when more workers are dismissed, unfair dismissal claims rise.

Rationale for Intervention

307. We set out below why there is a rationale for a qualifying period before employees have the right to claim unfair dismissal. The Government believes that, for some employers, the current 12 month qualifying period adversely affects their confidence to recruit and retain staff. The accrual of the right to unfair dismissal brings with it an additional risk of a tribunal claim. This risk (including the perceptions of some employers that employment law is weighted against them) is great enough in some instances to deter firms from employing an extra person and is therefore a potential barrier to growth and employment.

308. Labour is an experience good. An experience good is one where the characteristics of the product cannot be observed in advance. Firms are unable to ascertain the skills and contribution the potential employee will bring to the firm until they actually hire the individual. Also, although the firm and employee usually go through a recruitment process, there remains imperfect information in the market. This results in firms not being able to know perfectly the productivity of the potential employee before they employ them.

309. Experience goods and imperfect information in the market place reduce firms' confidence when hiring individuals. To overcome this hurdle, firms need to be confident that if the employee has unsatisfactory performance they are able to terminate their contract quickly and efficiently.

310. The unfair dismissal qualifying period supplies reassurance to firms that if a newly recruited employee has unsatisfactory performance they are able to terminate the contract. The length of that qualifying period needs to balance the needs of employees (and their

protection through unfair dismissal legislation) and employers. The qualifying period previously stood at two years, but was reduced to one in the late 1990s. It has been expressed by some businesses and respondents to consultation that the current one year qualifying period does not give them sufficient time to 'experience' the worker i.e. to assess workers performance and if necessary resolve any problems they encounter. Extending the qualifying period to two years allows more time for firms and will thereby, increase business confidence in relation to recruitment.

311. The measure also contributes to the Government's policy objective, alongside the other proposals in the consultation paper, of reducing the number of disputes reaching the employment tribunal as fewer people will be entitled to claim unfair dismissal.

C: Objectives

312. The objective of any change made to qualifying periods is to help businesses feel more confident about hiring people and to reduce the number of claims reaching employment tribunal.

D: Options identification

Option 1: do nothing.

313. Keep the current unfair dismissal qualifying period of one year. The subsequent analysis of costs and benefits is of options two and three against a baseline of "do nothing".

314. We do not believe doing nothing is appropriate as the current qualifying period places an unnecessary burden on some firms and may act as a deterrent to recruiting and retaining staff. During consultation, individual businesses argued that a longer qualifying period would allow more opportunity to assess individuals and reduce the level of pressure on deciding whether to retain an employee in training before a year elapses, particularly where there are significant training requirements for a post. Furthermore, this option would not help to achieve the objective of reducing the number of employment tribunal claims.

Option 2: extend the Unfair Dismissal qualifying period to 2 years for all business sizes

315. This is the preferred option. We believe this will relieve the burden on businesses and also promote employment. During the consultation the CBI suggested that "the extension of the qualifying period will have a positive impact on marginal hiring decisions, particularly in smaller firms'. The two year qualifying period existed previously and in considering this policy there were no reasons to suggest any longer period would better meet the needs of business while also providing adequate protection to employees.

Option 3: extend the Unfair Dismissal qualifying period to 2 years for businesses employing less than 50 staff.

316. The Survey of Employment Tribunal Applications (SETA) 2008 estimated that 34 per cent of employers that were respondents in employment tribunal claims for unfair dismissal employ 1-49 staff, whereas 37% of businesses employ 1-49 staff. This suggests that unfair dismissal claims affect small businesses in a roughly proportionate manner. Consultation responses in favour of the proposal were received from businesses of all sizes and business groups representing a variety of business sectors. The Government therefore considers that limiting the extension to small businesses would not achieve our aim of increasing confidence to recruit and retain staff more widely.

317. In addition, this option could also have the unintended consequence of giving firms the incentive to limit themselves to 49 employees, thereby limiting the potential benefits of the policy.

318. **Micro-business exemption:** although this policy aims to reduce burdens on business, it does impose some one-off familiarisation costs. As a result we should consider whether micro-businesses should be exempt from the extension of qualifying period. On balance, as the benefits to employers outweigh the one-off costs we believe all businesses should be covered and therefore seek a micro-exemption waiver. Furthermore, micro-businesses are often started by new entrepreneurs who may be less knowledgeable and confident about employing people. Therefore, it would not make sense to exclude them from the benefits of this change. In SETA 2008, 13 per cent of employers in the employer survey were micro-businesses. If we apply this percentage it means that the impacts (reduction in employment tribunal claims and associated costs) discussed in this assessment would be approximately 13 per cent lower.

319. The options do not include raising the qualifying period above two years. Those respondents to consultation who expressed the view that a one year qualification period was insufficient were generally content that a two year qualifying period was sufficient, and indeed it is felt that a longer period would not reflect a fair balance between business and employee interests.

Assessing the impact of raising the qualifying period

Option 2: extending the qualifying period for employees in all sizes of business

320. The intended impacts of extending the qualifying period are increased business confidence in recruiting and retaining employees and reduced claims to employment tribunal.

321. Responses to consultation from business representative groups and a range of businesses of all sizes support our view that extending the qualifying period will have a positive impact on employers' confidence to recruit and retain staff. However, it is not possible to directly quantify the likely impact on business confidence and in turn on hiring behaviour. Research has been carried out on Australian unfair dismissal laws, which looks both at the evidence and theory surrounding these regulations. For example, Harding (2005)[41] looks at what such changes should do to labour supply and demand. If businesses perceive that this reduces the cost of hiring then they may increase their labour demand. However, there is no empirical work which links these effects; indeed given the number of more significant determinants of employment, detecting any effect is challenging.

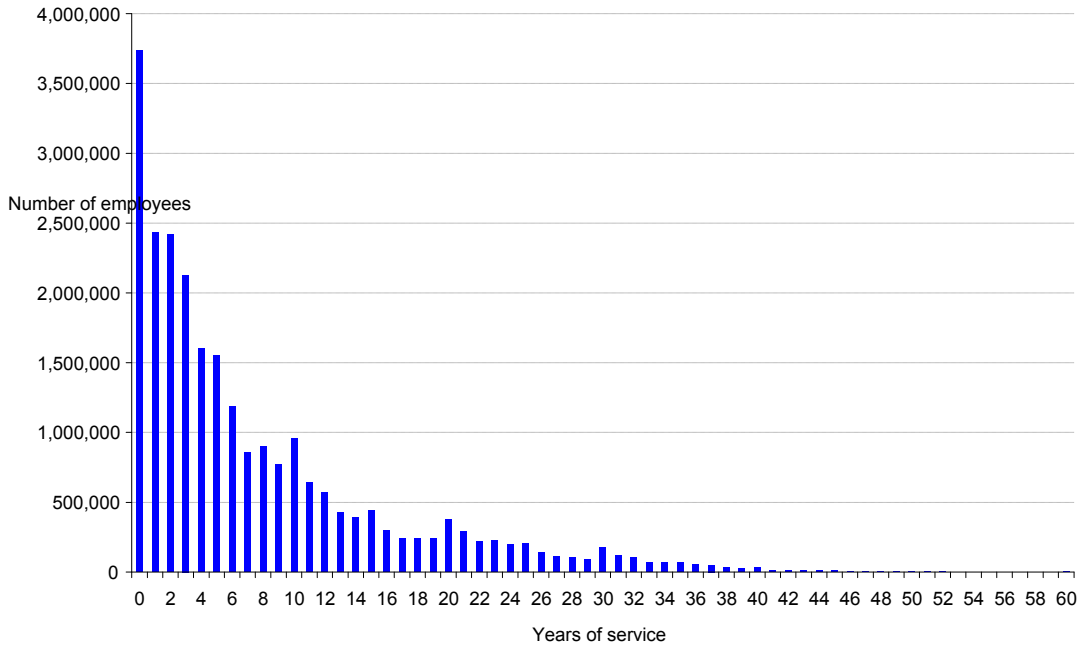
322. It is possible to look at the number of people that may be affected by the change in qualifying period and then to look at the likely reduction in employment tribunal claims. We then look at the costs incurred by employers, claimants and the exchequer in going through employment tribunals to infer a monetary impact.

Length of service distribution

323. Chart 3.2 below shows the most recent distribution of length of service in years for the UK population. Length of service is measured as the amount of time in continuous employment with the same employer. As might be expected, the distribution is heavily

[41] **Harding, D (2005) Identifying and measuring the economic effects of unfair dismissal laws.** Link to the paper http://mpra.ub.uni-muenchen.de/3700/1/MPRA_paper_3700.pdf

Chart 3.2. Years of continuous service distribution, UK Q4 2010

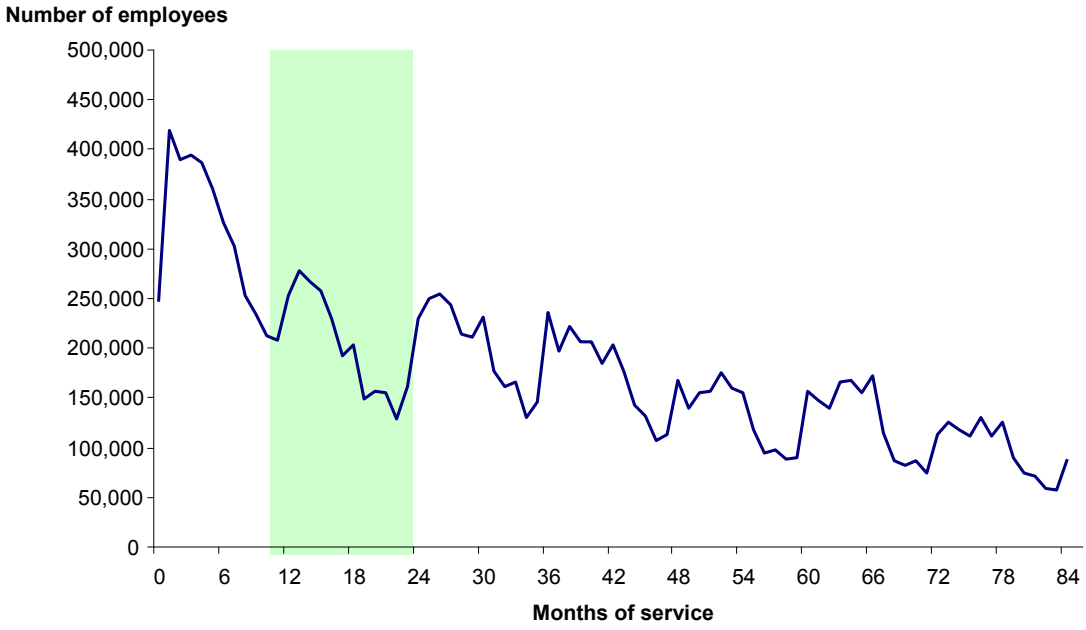


Source: BIS analysis of Labour Force Survey

324. This distribution can be used to estimate the number of existing workers who would be affected (i.e. lose access to a particular means of recourse) by a change in the minimum qualifying period for the right to bring certain claims to Tribunal. Lengthening the qualifying period will reduce the pool of those who are eligible to bring certain claims and therefore potentially reduce the total number of disputes progressing to Tribunal.

325. Looking at monthly length of service in Chart 3.3, the total number of people who would be affected by an increase in any qualifying period from 12 to 24 months is represented by the area under the graph in the green shaded area. The effect of a large increase in qualifying period is generally subject to diminishing returns, i.e. increasing the period by a year at a time yields a gradually smaller effect.

Chart 3.3. Monthly distribution of continuous employment, UK Q4 2010



Source: BIS analysis of Labour Force Survey (non-seasonally adjusted)

326. Table 3.1 below quantifies the size of this area by showing how increasing the minimum qualifying period by various amounts would reduce the eligible population. The effect on the 2007 length of service distribution is also included to provide a pre-recession comparator[42].

Table 3.1 Effect of lengthening qualifying period on eligible population based on 2007 - 2010 Quarter four data.

Lengthening qualifying period from 12 months to:	2010 Q4 % reduction in eligible population	2009 Q4 % reduction in eligible population	2008 Q4 % reduction in eligible population	2007 Q4 % reduction in eligible population
18 months	7.0%	8.3%	8.8%	8.8%
24 months	11.5%	13.9%	14.6%	14.5%
30 months	18.2%	21.3%	21.2%	21.2%
36 months	23.0%	25.9%	25.6%	25.7%
42 months	28.9%	31.2%	30.8%	31.1%
48 months	33.0%	34.7%	34.6%	34.8%

Source: BIS analysis of Labour Force Survey

Quantifying the effect on unfair dismissal claims

327. The link between reducing the pool of eligible workers and reducing the number of claims brought is not straightforward. The exact distribution of the length of service *for those who bring claims* is not known. However the LFS data, as above, or the Survey of Employment Tribunal Applications (SETA) can shed some light on how reducing the numbers of those eligible could translate to fewer claims brought.

[42] The 2007 distribution is more highly skewed towards lower length of service than 2009. This might not be the intuitive result given the economic recession.

Data sources

328. Although SETA aims to be a representative survey of ET applications, looking solely at unfair dismissal applicants reduces the sample size significantly. Once the data is banded into 12 month periods, there are never more than 90 individuals within one year, which increases the margin of error associated with any estimates. Because of the nature of responses to the survey, SETA cannot be used for investigating the effects of changes that do not involve a full year (such as extending to 18 months).

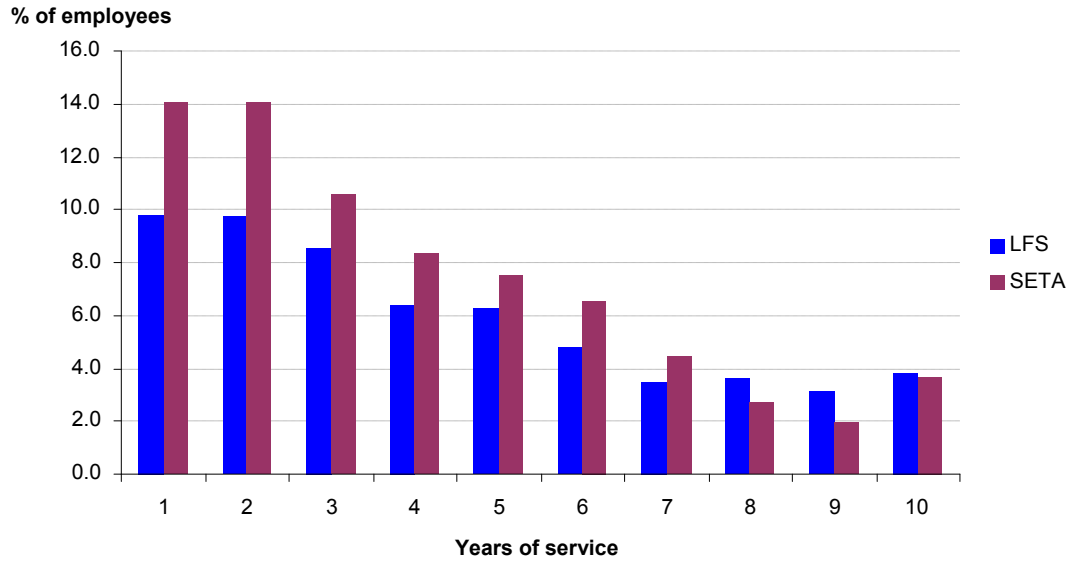
329. The LFS is the best source for investigating the characteristics of the eligible population who would be able to bring forward an unfair dismissal claim but, by its nature, is not focused on those people who are most likely to bring claims. In addition, the survey only asks questions on length of service to those currently employed and not to those who have lost their job. Therefore, unless dismissals are completely unrelated to length of service, the LFS distribution may not be representative of the population of interest.

330. With uncertainties surrounding both sources (sample sizes for SETA and how representative the LFS is on this issue) a range encompassing the two is appropriate, although the fact SETA uses actual claimant data may mean it should be the preferred estimate if available.

Comparison of data

331. The chart below compares the distribution of length of service (up to 10 years) from the LFS Q4 2010[43] and SETA 2008. It excludes those with less than a year of service in one job as this population would not yet have served the unfair dismissal qualifying period. Most importantly, it is clear that the SETA unfair dismissal respondent distribution is similarly shaped to the underlying population. But the data from SETA is more skewed towards lower lengths of service – i.e. a higher percentage of unfair dismissal cases involve individuals with just a few years service than the LFS would imply. This may reflect a natural bias of dismissals – crucially the LFS surveys those still in work whilst the SETA measure essentially covers a subset of those who have lost their job.

Chart 3.4. Length of service distributions, of current employees in Q4 2010 (LFS) and unfair dismissal claimants in 2008 (SETA 2008)



Source: BIS analysis of Labour Force Survey and SETA 2008

[43] Earlier quarters do not affect the implications

Calculating the effect on ET claims

332. The figures in the chart above may mean that, if one was to use SETA as the basis for the estimates for a given increase in the qualifying period, the estimated reduction in unfair dismissal claims would be proportionally larger than the reduction in the eligible population. For instance an increase in the qualifying period from 1 to 2 years would reduce the eligible population by 11.9% but make 14.1% of current Tribunal claims ineligible.

333. These calculations, however, assume away any dynamic change. In reality applicants are able to lodge ET claims under several jurisdictions simultaneously without listing a main jurisdiction. This may result in contradicting effects of the policy. Those who currently lodge unfair dismissal claims may pursue other jurisdictions instead (such as breach of contract). In this scenario, the unit fall in the number of unfair dismissal claims would be reduced, as an ET process (with all of its associated costs) is still lodged, just not in the unfair dismissal jurisdiction. Alternatively, those who can no longer bring unfair dismissal claims may withdraw their case from other jurisdictions as well.

334. Historical data from the ETS & Tribunals Service (Employment) case management database can help estimate the 'true' reduction in ET cases as a result of a lengthening of qualifying periods for unfair dismissal. From 2001 to 2006, 44 per cent of unfair dismissal cases were submitted as single claims - i.e. no other jurisdictions were listed. The remaining 56 per cent were also lodged under breach of contract, various pay or various discrimination jurisdictions.

335. In the absence of further evidence, BIS estimated at consultation stage that all of the single-jurisdiction claims under the proposed new qualifying period would not occur and half of the remaining multi-jurisdiction claims would not be lodged. However, a range of consultation respondents commented that this was likely to underestimate switching to other jurisdictions. For example, both the BCC and Federation of Small Businesses, as well as a number of legal practitioners and organisations, argued that this assumption was likely to overstate the impact of extending the qualifying period to two years. As a result, the assumption is now made that all single jurisdiction claims would no longer occur, but for all multi-jurisdictional claims the claimant would just switch to another jurisdiction.

336. This is a simplification but represents the best estimate of likely effect given the consultation responses received (and is a 44 per cent reduction in the claims that would have occurred amongst people with between one and two year's service). In reality, there will be some multi-jurisdictional claims that do not progress in the absence of the ability to claim unfair dismissal. On the other hand, it may be that some claims that would have been an unfair dismissal claim can be brought under another jurisdiction. Our broad expectation is that these two factors will cancel each other out, particularly as other elements of the Resolving Workplace Disputes package seek to encourage earlier resolution of disputes.

Table 3.2. Estimated reduction in unfair dismissal claims from increasing qualifying period from one to two years

Average number of unfair dismissal claims per year: **48, 625***

	Low estimate (using LFS data)	High estimate (SETA)
% of claims within 12 and 24 months	9.8%	14.9%
Number of claims	4,765	7,245
44% of number of claims	2,097	3,188
44% of number of claims (rounded)	**2,100**	**3,200**
Estimated reduction in UD claims, interacted with early conciliation proposal	1,564	2,378
Estimated reduction in UD claims interacted with Early Conciliation proposal (rounded).	**1,600**	**2,400**

Source: BIS estimates based on data from HMCTS, LFS and SETA 2008 data. *ETS annual data 2006/07 to 2010/11

337. The annual reduction in claims for lengthening the qualifying period by one year is estimated to lie between 2,100 and 3,200. The upper estimate using SETA may be considered the most representative (with the proviso that there is some uncertainty) as it uses actual claimant data. However, given the early conciliation proposal considered in this IA, we expect to see a 25.4 per cent reduction in claims – this is applied to the above claims range to give 1,600 to 2,400. Relative to the five year average of unfair dismissal claims per year of 48,625, this represents a 3 – 5 per cent reduction in claims.

338. The LFS can be used to estimate the size of the eligible population according to different protected groups to identify any possible disproportionate effects of a policy. Generally, extending the qualifying period for unfair dismissal has a greater effect on young workers and, to a lesser extent, non-whites and females. SETA data can only look at the gender discrepancy and confirms a slightly larger proportionate effect would be seen amongst females than males. Behavioural effects between the two groups may of course differ. More information is available in the equalities impact assessment.

Monetised Benefits

339. The estimated reduction in claims can be multiplied by the unit cost of unfair dismissal claims to result in a monetary value of the policy. These calculations have been undertaken separately for employers and HMCTS. Further details on how the unit costs for employers were estimated can be found in Annex 5. The unit costs for HMCTS are for standard track cases (which unfair dismissal cases are most likely to be). To get a good estimate of what these costs will be we look at the likely outcomes of unfair dismissal claims from employment tribunal statistics on jurisdictions disposed.

340. This data refers to jurisdictions, not cases, but we use it as an indication for what is happening with cases. We apply the receipt and allocation unit cost for all standard track ET1 cases of £410. In addition, we apply a hearing unit cost for the percentage of cases that would have ended up in a tribunal hearing, and a cost for Acas conciliation. In practice, these estimates will represent an underestimate of the costs avoided, because in many more cases individual conciliation will occur, as well as other steps in the employment tribunal process that would involve cost. Tables 3.4 and 3.5 set out these calculations for the lower and upper bound estimates of reduction in ET claims.

Table 3.3 Summary of Unit costs

Group affected	Average cost of going through employment tribunal
Costs to employers	£3,700
Costs to claimants	£1,300
Costs to HMCTS	£410 (receipt and allocation) £4,100 (hearing) £211 (individual conciliation)

Source: BIS estimates in 2011 prices. Figures have been rounded. See Annex 5 for full explanation

Table 3.4: Reduction in Exchequer costs from a 1,600 reduction in UD claims

Employment tribunal disposal outcome	% of cases	Number of cases	Unit cost of stage	Unit cost of receipt and allocation	Cost savings by outcome
Withdrawn	25%	400		410	164000
Acas conciliated	41%	656	211	410	407376
Struck out	11%	176		410	72160
Hearing (successful or unsuccessful)	18%	288	4120	410	1304640
Dismissed at preliminary hearing	3%	48		410	19680
Default judgement	2%	32		410	13120
Total Exchequer costs saved					1,980,976

Source: Employment tribunal statistics 09/10 and HMCTS/MoJ estimates of unit costs

Table 3.5: Reduction in Exchequer costs from a 2,400 reduction in UD claims

Employment tribunal disposal outcome	% of cases	Number of cases	Unit cost of stage	Unit cost of receipt and allocation	Cost savings by outcome
Withdrawn	25%	600		410	246000
Acas conciliated	41%	984	211	410	611064
Struck out	11%	264		410	108240
Hearing (successful or unsuccessful)	18%	432	4120	410	1956960
Dismissed at preliminary hearing	3%	72		410	29520
Default judgement	2%	48		410	19680
Total Exchequer costs saved					2,971,464

Source: Employment tribunal statistics 09/10 and HMCTS/MoJ estimates of unit costs

341. The table below multiplies the estimated reduction in disputes by the above indicative unit costs for employers, and presents the rounded estimates of exchequer savings derived from Tables 3.4 and 3.5. Cost savings are presented in Table 3.6.

Table 3.6. Summary of cost savings (benefits) to employers and HMCTS per annum

Group affected	Low cost estimate	High cost estimate
Cost savings to employers	£5.8m	£8.9m
Cost savings to HMCTS	£2.0m	£3.0m

Source: BIS estimates. Figures have been rounded.

Costs to claimants

342. Claimants who have been in a job for between one and two years will no longer be able to make a claim to an employment tribunal on the grounds of unfair dismissal. This involves some detriment to these individuals in not having a case heard (although these individuals will still be able to make claims to employment tribunal if they have other grounds, such as discrimination). This effect is captured in the likely reduction in awards received by claimants at tribunal, as these awards are meant to reflect the detriment employees have suffered. The reduction in awards received (which is matched by a reduction in award payments by employers) are calculated by applying the estimated percentage reduction in unfair dismissal claims to the total award revenue (£26.3m) for unfair dismissal during 2009/10 (given in 2009/10 Employment Tribunal and EAT statistics). This is set out in Table 3.7, which shows a reduction in awards of between £0.85m and £1.3m.

343. A reduction in employment tribunal cases means a reduction in the related costs borne by claimants. However, these are obviously not factored into the analysis as claimants' choice to bring a claim is removed. There may be broader impacts surrounding claimants' reduction in perceived access to justice, although this should be limited given the low anticipated reduction in claims (of around 3 to 5 per cent).

Table 3.7. Summary of costs to claimants per annum

Group affected	Low cost estimate £m	High cost estimate £m
Claimants (fewer awards received)	0.85	1.3

Source: BIS estimates. Figures have been rounded.

Familiarisation Costs

344. Employers will incur limited familiarisation costs as a result of this change. It is likely that the time spent will be similar across business sizes, though this does mean that this small cost is felt disproportionately by smaller firms. Given how simple this change is, it is expected this will take employers about 10 minutes to assess. In larger organisations this will be carried out by a HR manager. The Annual Survey of Hours and Earnings 2010 tells us that the median wage will be £26.86 per hour (this figure includes non-wage labour costs of 24 per cent added to the ASHE median). There are just over 1.1 million firms employing staff according to BIS SME statistics from 2007. Multiplying the time by the wage and in turn by the number of employers gives us estimated familiarisation costs of £4.9 million.

Option 3: extending the qualifying period only to those that work in small businesses

345. This option would just extend the qualifying period for small businesses. 37 per cent of employment is in businesses with 49 or fewer employees (BIS SME statistics). SETA (2008) notes that 34 per cent of unfair dismissal claims related to small businesses. As a

result we would expect that the saving in claims and in turn in money terms would be between 34 and 37 per cent of the level described for option 1 above.

346. This implies a reduction in claims of between 540 and 890 (applying 34 per cent to our lower bound estimate of reduced claims in option 2 and 37 per cent to our upper bound estimate of option 2 yields this range for option 3).

Table 3.8. Summary of cost savings (benefits) to employers and HMCTS per annum for option 3

Group affected	Low cost estimate	High cost estimate
Cost savings to employers	£2.0m	£3.3m
Cost savings to HMCTS	£0.67m	£1.1m

Source: BIS estimates. Figures have been rounded.

347. Similarly, familiarisation costs will be 34 per cent of the level described in option 2, giving estimated costs of £1.7 million.

Risks and Assumptions

348. As detailed above the analysis necessarily makes assumptions around claimant behaviour. It is not possible to accurately predict switching behaviour. Following detailed consultation responses the final IA now assumes that, as a result of this change to the qualifying period, all claims currently under multiple jurisdictions, where this includes unfair dismissal, will still be brought under an alternative jurisdiction. However, we do not believe there will be a widespread and outright 'substitution' effect with former single jurisdiction unfair dismissal claims being made under other heads of claim with no qualifying period. This is for two reasons. First, where there is a genuine alternative claim it is likely that under present arrangements such an alternative claim would already be made in any case. And, as described above, we are now assuming that all current multiple claims will go ahead under the alternative jurisdiction.

349. Second, the change to the unfair dismissal qualifying period is being made in the context of the overall Resolving Workplace Disputes policy package. This includes measures to promote early conciliation and changes to employment tribunal procedures which are designed to resolve disputes at an earlier stage and to improve the management of weaker tribunal claims. In this context, we consider it unlikely that there will be outright substitution of unfair dismissal claims to other jurisdictions.

350. The equality impact assessment for this policy explores any possible implications to minority groups, but concludes that as the overall impact on claims is very small we do not expect there to be a considerable disparity of impact on any particular group and, if there is, we believe the impact is proportionate to achieving the legitimate aim of improving business confidence to recruit and retain staff. We discuss this issue further in the Equality Impact Assessment.

351. Option 3 potentially involves unintended consequences in business behaviour where an organisation's number of employees is close to 49. At the extreme, this could mean employers who have just over this number of employees are incentivised to reduce their employee count, which could run counter to the pro-growth aims of the policy. Similarly those businesses for which additional staff would take them above this number may be disincentivised from growing further (or seek to add labour through self-employment routes).

One-in-one Out

352. Employers face one-off familiarisation costs of £4.9 million, and ongoing annual benefits of £7.3 million (taking the best estimate as the mid-point of the employer benefit range). In equivalent annual net benefit terms, this represents a regulatory out of **£5.9 million** (based on a ten year period, with base year as 2011 and no impact at this point). Reduction in awards paid is not part of this calculation. However, employers cover both the private and public sector, and for one-in, one-out purposes only the impact to the private sector is captured. The Survey of Employment Tribunal Applicants (2008) shows that 80% of employees making claims to employment tribunals are in the private sector or non-profit sector, and therefore our estimates of equivalent annual net costs and equivalent annual net benefits are reduced by 20 per cent. This yields a net regulatory out of **£4.7 million**.

Conclusion and Summary of Impact

353. The preferred option is option 2, applying an extension in qualifying period to all businesses. BIS estimate an indicative cost saving to employers of **£5.8 - £8.9** million per annum. The best estimate will represent the mid point of this range, **£7.34** million per annum. However, they will face familiarisation costs of **£4.9 million** in the first year. Awards received by claimants will fall by **£0.79 - £1.3 million** per annum. HMCTS is estimated to save around **£2.0 - £3.0** million in costs.

Proposal 4: Introduce financial penalties for employers

Problem Under Consideration

354. There are over 29 million people in employment in the UK. In 2009-10 the Employment Tribunal Service (now Her Majesty's Courts and Tribunal Service, HMCTS) disposed of 112,400 separate claims or 227,000 different jurisdictions (a claim often involves issues against more than one jurisdiction).

355. Of these, 13% (28,500 jurisdictions) involved a Tribunal hearing where the claimant was successful and therefore the employer was found to have breached an aspect of employment law. Whilst this represents a small percentage of the working population, the absolute numbers show that proven non-compliance with employment law is still a problem.

356. Furthermore, evidence from the Fair Treatment at Work Survey (2008)[44] showed that 29 per cent of people had experienced an employment rights problem at work in the last five years. Of these, only 3 per cent pursued the issue all the way to Employment Tribunal.

357. Currently, awards can be made to claimants in some cases where the claimant is successful at hearing. This is paid by the respondent (usually the employer) but the employer does not pay penalties at present.

358. The proposals under consideration give power for employment tribunals where the ET is acting at first instance to impose financial penalties on employers who are found to have breached employment law. These proposed penalties will increase the expected cost for employers from breaching employment law if at employment tribunal judges' rule against the employer.

359. The penalties are payable to the Exchequer, not the claimant and would therefore generate revenue for the Exchequer. This represents a transfer payment from employers to the Exchequer.

360. In the long run we would expect some behavioural change from employers with an increase in compliance with employment law and potentially fewer disputes entering the employment tribunal system.

Economic rationale

361. The policy aim is to deter non-compliance with employment law. This will be achieved via the proposed penalty as it increases the expected cost for employers from breaching employment law if at employment tribunal, judges rule against the employer.

362. It has been assumed that the introduction of the proposed penalty will influence compliance behaviour. However, finding evidence to support this assumption is difficult as there is not a vast amount of evidence linking penalties with employment law since penalties are not currently widely used. Therefore, we have conducted a review of the impact of penalties on health and safety regulation and will apply the key findings into the labour market.

[44] Fair Treatment at Work: Findings from the 2008 Survey

363. In a research report regarding compliance with health and safety law a survey on employer's attitudes towards health and safety was conducted. The survey reported that "47 per cent of respondents are worried by the cost of financial penalties and think enforcement would force health and safety up their list of priorities or do something they otherwise would not do."[45] Applying this to the labour market would seem to show that as the penalty proposal is implemented employers will change their behaviour to ensure they are not breaching employment law thereby avoiding the financial penalty. Thus, the level of non-compliance should fall as sought after.

364. A literature review[46] regarding the determinants of compliance with laws and regulations with special reference to health and safety quoted a paper by Scholz and Gray (1990). This paper identified that the imposition of a penalty can affect behaviour regardless of the extent of the penalty itself. Whilst other evidence suggests the level of the penalty does matter.

365. If the labour market reacts in a similar way to penalties as the market for health and safety does then the policy aim of deterring non-compliance is feasible. This dynamic change has not been quantified, but it is an important part of monitoring and evaluating any policy change.

Objectives

366. To introduce a power for employment tribunals to impose financial penalties on those employers found to have breached an individual's rights. The overriding objective is to avoid workplace disputes and hence potential employment tribunal claims by encouraging compliance with employment law.

Options

367. During the consultation, a number of concerns were raised about adverse consequences of introducing financial penalties in the form originally proposed. Such comments include that it is not automatically the case that if an employer has been found to be in the wrong on a matter of employment law that they should be subject to an automatic punitive sanction. For example it may be a case of genuine mistake without negligence or malice. It was therefore felt by many respondents that employers should not be automatically penalised for unintended or accidental shortcomings. As a result a number of other options were considered including removing the automatic nature of the penalty and allowing judicial discretion where there has been an unreasonable breach, as set out in option 3 below.

368. A number of other variants on these options were considered in light of consultation responses. These included only penalising repeat offenders; having an administrative level fee rather than the original penalty range proposed; or only penalising in cases where there had been no Acas Code adjustment. These options were rejected on the grounds that they would pose considerable administrative difficulties to applying them fairly; or set up costs would be too high; and/or it was considered that there would be little impact on compliance.

1. Do Nothing

[45] An evidence based evaluation of how best to secure compliance with health and safety law prepared by Greenstreet Berman Ltd 2005.

[46] The determinants of compliance with laws and regulations with special reference to health and safety prepared by the London School of Economics and Political Science 2008.

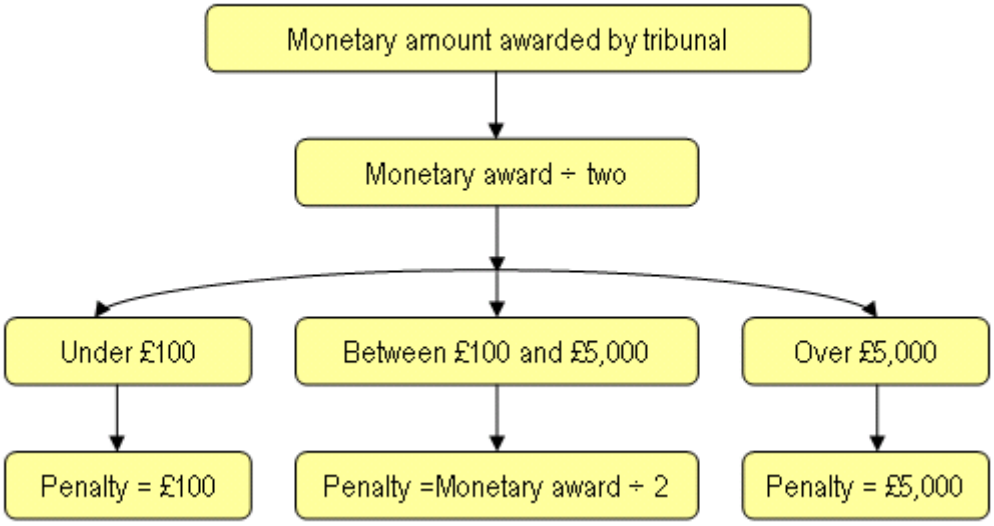
369. Keep the current system, whereby awards can be made if an employment tribunal decision is that the employer is in breach. Costs can also be awarded to parties, but there are no financial penalties.

2. Impose automatic penalties where an award is made by the employment tribunal (consultation option)

370. The system of penalties proposed at consultation stage was that the penalty should be half the amount of the award made by the employment tribunal so that the level of the penalty is proportionate to the award. The penalty will have a minimum threshold of £100 and an upper ceiling of £5,000. The intention is that where a non-financial award is made a tribunal can ascribe a monetary value and so the appropriate financial penalty can be made.

Figure 4.1 illustrates how the proposed penalty will be calculated.

Figure 4.1. The calculation of the proposed penalty.



Box 4.1 gives examples of how the penalty would be calculated and how the level of the penalty changes in different circumstances.

Box 4.1: Illustrative examples of how the penalty will be calculated

Example 1
Sarah has been awarded £100 for a successful claim regarding sex discrimination against her employer. Half of the award is £50, which is below the minimum penalty. Therefore, her employer will have the minimum financial penalty of £100 imposed.

Example 2
Craig has been awarded £8,000 for a successful claim regarding unfair dismissal against his employer. Half of the award is £4,000 which is within the penalty range. Therefore his employer will have a penalty of £4,000.

Example 3
Jane has been awarded £14,000 for a successful claim regarding disability discrimination. Half of the award is £7,000 which is above the maximum penalty. Therefore, her employer will pay the maximum penalty of £5,000.

371. It is important that there should be an incentive for non-compliant employers to pay the penalty quickly. Therefore it is also proposed that the penalty should be reduced if there is prompt payment. The reduction should be set at 50% if the reduced amount of the penalty is paid within 21 days.

3. Penalties subject to judicial discretion

372. This option would involve the same penalty mechanism, but it would not be automatic. A judge would have discretion over whether to impose a penalty where there has been an unreasonable breach, so that employers would not be penalised for unintended or accidental shortcomings. It is likely that judicial discretion would take into account the issues surrounding micro-businesses, including that without dedicated HR function, breaches may often be genuine mistakes.

373. For both options it is proposed that the penalties regime would be administered by HMRC on a similar basis to the enforcement of the National Minimum Wage.

Costs and Benefits

374. The objective of this policy is to change employer behaviour and encourage compliance with employment law. However, these effects cannot be monetised. The impact of introducing this measure will need to be monitored and reviewed.

375. This section first estimates the costs to employers and the monetary benefit to the exchequer of option 2 (in other words the payment and receipt of penalties) relative to do-nothing where no penalties are imposed.

Option 2: Estimated costs to employers and revenue to the exchequer

376. The estimated revenue to the Exchequer is around £11.1million per annum assuming that 50% of employers take advantage of the early payment incentive in which the penalty reduces by 50% if the reduced amount of penalty is paid within 21 days. This estimate has not accounted for behavioural change from employers resulting in increased compliance and possible avoidance of employment tribunal proceedings, nor administrative costs.

377. Excluding possible dynamic effects from employers increasing compliance in the long-term it is possible to estimate potential levels of revenue for the Exchequer from the introduction of penalties. Where financial penalties are paid this is a pure transfer from employers to the Exchequer. In the situation where there is full compliance with employment legislation, employers would not face financial penalties and the exchequer would not receive the revenue.

378. Using data showing compensation awarded by tribunals per jurisdiction and applying this to historic levels of employment tribunal hearings where the claimant was successful and awarded money; it is possible to estimate total financial penalties per jurisdiction.

379. For a more accurate result a five year average, where possible, from the Tribunals Service Employment Tribunal Statistics publication 2008/09 has been used to estimate the number of claims for each jurisdiction. As some jurisdictions have not existed for 5 years we have used the all the available data to calculate an average. As a claim may cover more than one employment jurisdiction this figure has been deflated by a factor of 1.8[47] (based on the five year average number of jurisdictions per claim).

380. The number of successful claims then needs to be adjusted to account for the amount of successful claims that are awarded money. This is estimated at 89% by the Survey of Employment Tribunal Applications (SETA)[48] 2008. It is possible that financial penalties could be awarded despite a non-monetary award being made, but this would be discretionary and we anticipate this rarely being used, hence the analysis proceeds with the above adjustment to cover those cases where awards were made.

381. Using data on the compensation awarded by tribunals per jurisdiction from Employment Tribunal and EAT Statistics (GB) the proportion of claims awarded money can be allocated between the bands allowing the calculation of penalties. Where this information was not available the median amount awarded for each jurisdiction was used instead of SETA 2008. In the case of working time and equal pay this was not available and so the median of all cases was used to estimate the level of penalties.

382. The proportion of employers who will take advantage of the early payment incentive also needs to be estimated. It is advantageous to use the National Minimum Wage (NMW) penalties for underpayment as a case study. In the NMW if the penalty is paid within 14 days it is subject to a 50 per cent discount. In 2009/10 penalties were imposed on 480 cases of which 236 paid within 14 days. This is just under 50 per cent.

383. Although the proposed penalty differs from the NMW penalty in that it allows employers 21 days to pay the employee, it can still provide us with a very rough approximation of how many employers are likely to take advantage of the incentive. For this proposal we assume 50% of employers will pay the remaining amount of the penalty (after the 50% reduction) within 21 days. We do not assume that the probability of repaying within 21 days is affected by the amount of the award or the penalty when calculating our estimates.

384. Table 4.1 shows the estimated total penalties for employment tribunal cases that were successful at tribunal (in favour of claimant) and were awarded money. An arbitrary reduction was applied to the working time jurisdiction fine payments (a reduction of 25 per cent) to account for large multiples paying proportionally less). No assumptions are made about non-financial awards.

[47] 1.8 = 162,876(5 year average of all jurisdictions disposed) / 92,050 (5 year average total claims disposed)

[48] Findings from the survey of employment tribunal applications 2008

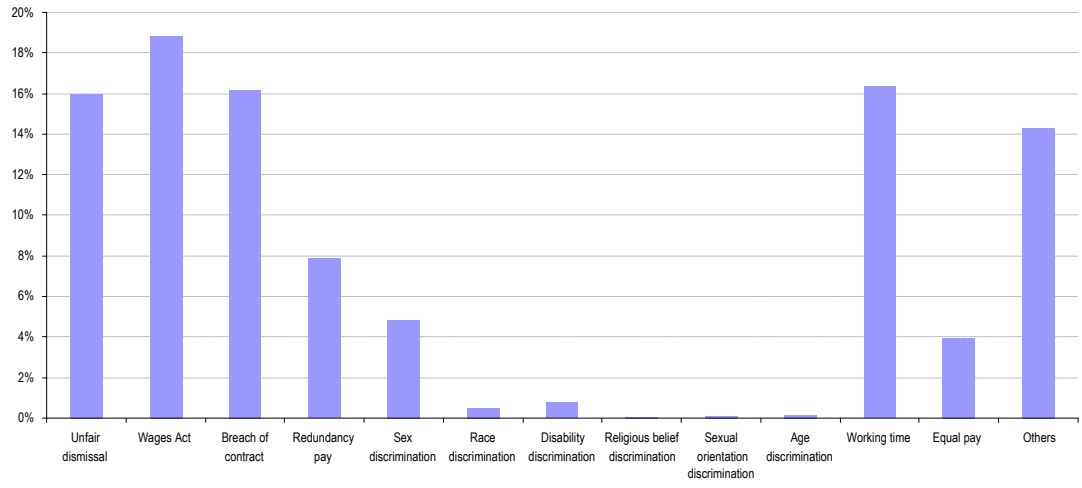
Table 4.1. Employment tribunal cases disposed that were successful at tribunal (in favour of claimant) and were awarded money by jurisdiction 5 year average

Nature of claim	Successful at tribunal and money awarded	Total penalties assuming all payments made after 21 days	Average penalty per successful tribunal assuming all payments made after 21 days	Total penalties assuming 50% payments made before 21 days	Average penalty per successful tribunal assuming 50% payments made before 21 days
Unfair dismissal	1,831	£4,650,000	£2,500	£3,490,000	£1,900
Wages Act	2,156	£920,000	£400	£690,000	£300
Breach of contract	1,853	£2,460,000	£1,300	£1,850,000	£1,000
Redundancy pay	901	£720,000	£800	£540,000	£600
Sex discrimination	558	£1,910,000	£3,400	£1,430,000	£2,600
Race discrimination	57	£170,000	£3,000	£130,000	£2,300
Disability discrimination	90	£300,000	£3,300	£230,000	£2,500
Religious belief discrimination	7	£20,000	£3,000	£20,000	£3,000
Sexual orientation discrimination	10	£30,000	£3,200	£20,000	£2,100
Age discrimination	18	£40,000	£2,200	£30,000	£1,700
Working time	1,873	£1,522,500	£800	£1,140,000	£600
Equal pay	453	£490,000	£1,100	£370,000	£800
Others	1,640	£1,480,000	£900	£1,110,000	£700
All	11,447	£14,712,500	£1,300	**£11,050,000**	£1,000

Source: Tribunals Service. http://www.employmenttribunals.gov.uk/Documents/Publications/ET_EAT_Stats_0809_FINAL.pdf Table 2. BIS Estimates. Some figures have been rounded. Total may not sum to individual parts due to rounding. To calculate total financial penalties we have used where available the distribution of compensation awarded for that particular jurisdiction. In cases where this was not available the median of the amount awarded by tribunal was used. For working time and equal pay the median amount awarded by tribunal in all cases was used.

385. The chart below shows the share of each jurisdiction as a proportion of the total using the figures presented in Table 4.1.

Chart 4.1. Share of cases that were disposed by Tribunals Service, successful at tribunal (in favour of claimant) and awarded money by jurisdiction 5 year average



Source: BIS estimates based on Tribunals service data (see Table 1 above)

386. Table 4.1 shows that when assuming 50% of the remaining penalties are paid within 21 days the estimated upper bound extra revenue to the Exchequer and cost to employers is approximately £11.1 million. This gives an average penalty of £1,000 across all jurisdictions.

387. If no employers take advantage of the early payment incentive (so all pay after 21 days) the estimated total penalties is approximately £14.7 million per annum. This gives an average penalty across all jurisdictions of £1,300.

388. However, these estimates regardless of whether employers have paid within 21 days have not factored in behavioural change from employers resulting in increased compliance and possible avoidance of employment tribunal proceedings. This will cause an overestimate of the extra revenue that the Exchequer will receive.

389. In summary, the estimated range of costs faced by employers/ revenue expected by the Exchequer as a result of the introduction of financial penalties under option 2 is £0 - £11.1m. The reason for this range is that if there were full compliance with employment law, penalties paid would be zero. £11.1 million is an estimate based on current levels of tribunal cases where employers have been found to be in breach of employment law and so is taken as our best estimate.

Option 3

390. Under option 3 the main difference to option 2 is that whether or not a penalty is imposed following an award being made at employment tribunal is subject to judicial discretion. This means that penalties will be imposed in fewer cases, but should mean that they are imposed in those cases where a judge determines there has been an unreasonable breach, for example where there has been negligence or malice involved. It is these cases for which deterrence effects are more important.

391. It is not possible to predict how often judges would impose penalties ahead of introduction. We can indicate the likely reduction in penalties paid or revenue raised by considering the outcome if penalties were imposed in 25 per cent of cases where awards are made, then the revenue (or penalties paid by employers) would be 25 per cent of that described in option 2, which is £0 - £2.8m. This range is based on the fact that if there were full compliance with employment law, no penalties would be imposed. £2.8 million is based on current numbers of tribunal cases where employers are found to be in breach of employment law.

Exchequer Costs

392. HMRC have estimated what it might cost to run a penalty regime like this, based on their experience of national minimum wage enforcement. Initial HMRC estimates suggest around £30 administration cost per case, with around £64 per case where the case needs further enforcement activity. Total administrative costs for a case load of around 11,500 would therefore be £570,000 per annum (for option 2). In option 3, if penalties are imposed in 25 per cent of cases then the administrative costs would reduce by around 75 per cent. Variable costs make up the majority of these costs.

Risks, assumptions and Wider Impacts

393. There are a number of risks associated with estimating the potential impact of the proposed penalties.

394. The evidence available suggests that there is reason to believe that the imposition of a financial penalty will affect compliance behaviour. However, this may not occur. This is because the penalty may not have been set at the correct level ensuring it acts as a strong deterrent. A literature review regarding the determinants of compliance with laws and

regulations commented "one counterproductive effect (of enforcement on compliance) may be that of imposing penalties insufficiently large to deter the offending behaviour. Alternatively, imposing too great penalties can result in an inability of firms to pay and have damaging wider consequences."[49]

395. If the £5,000 upper ceiling does not act as a strong deterrent firms will not change their behaviour and hence the penalty is not serving its purpose of decreasing non-compliance. If the £5,000 is upper ceiling is too high some firms may struggle to pay the penalty which could have damaging consequences to the business. Allowing judicial discretion as option three does, should prevent (or at least considerably limit) these potential damaging consequences.

396. The estimated monetary benefits to the Exchequer have not taken into account the long term change in employer's behaviour. If the proposed penalty has a significant impact on non-compliance and the majority of non-compliant employers change their behaviour to comply with employment law the amount of penalty money paid will have been overestimated.

397. When calculating the monetary benefit to the Exchequer we have assumed that 50 per cent of firms will pay the penalty within 21 days thereby reducing the penalty amount by 50 per cent. We have not taken into account that there may be a bias on the penalties which are most likely to be paid back within 21 days. Firms may be more likely to pay back larger penalties than smaller penalties. Therefore, if this was the case where more of the larger penalties were being paid back within 21 days than smaller penalties this would lead to an overestimate in the approximated monetary benefit to the Exchequer.

398. The introduction of judicial discretion over imposing penalties, as happens in option three, involves some different risks. Although this should limit damaging consequences to business, the operation of this option will depend a lot on how judicial discretion is used. We have shown what might happen to penalty revenue where penalties to be imposed in 25 per cent of cases. Until this has been operating for a while it will be unclear what percentage of cases, and indeed what nature of cases are seeing the imposition of penalties. There are further risks, possibly including longer hearings, and increased satellite litigation (although the financial penalty will only be imposed where there has been an unreasonable breach, so this should be limited).

399. The other proposals in this impact assessment should work to reduce the number of employment tribunal claims (especially as a result of proposals one and three). The introduction of early conciliation is expected to reduce claims entering the system by about 25 per cent. This is also likely to reduce the number of tribunal hearings, and hence the number of awards made. However, the impact on numbers of cases successful at tribunal is not currently clear. We may therefore see a proportionate decrease in the penalty revenue, but those cases that proceed may be more complex so the effect on penalty revenue is currently ambiguous.

One in One Out

400. As the preferred proposal relates to the imposition of fines on employers, the proposal is out of scope for one-in-one-out.

[49] The determinants of compliance with laws and regulations with special reference to health and safety prepared by the London School of Economics and Political Science 2008

Summary of Costs and Benefits

Table 4.2: Summary of costs and benefits

Option	Exchequer revenue/employer cost	Dynamic Effects	Other Issues
1. Do Nothing	-	-	-
2. Penalties imposed automatically where a financial or non-financial award made.	£0 - £11.1m	Deterrence effect should reduce penalties paid over time	Imposing automatically could be unfair where there are genuine mistakes made.
3. Penalties imposed subject to judicial discretion where there has been an unreasonable breach	£0 - £2.8m	Deterrence effect should reduce penalties paid over time	Penalties would need to be awarded in a certain number of cases to ensure penalties can act as a deterrent

401. The net quantifiable effect of these options is a cost equal to the administration costs. However, any improvement in compliance would add benefits to this figure. The preferred option is option 3, financial penalties are applied in cases where awards are made, but with judicial discretion.

Proposal 5: Changing the Calculation of Statutory Redundancy Limits and Associated Employment Tribunal Award Payments

Problem under consideration

402. Government introduced statutory redundancy pay in 1965 as a response to an investigation from the Dunnett Committee. The intention at the time was in the words of the Dunnett Committee "to encourage greater efficiency in industry and contribute to economic growth". This was a measure designed to encourage workers to move from one industry or part of the economy to another. Employees with redundancy protection were reluctant to move to other sectors without that protection.

403. The redundancy scheme provides a better safety net for employees if made redundant. If left to private markets only, 'unemployment insurance' type schemes are subject to problems of moral hazard – which will result in under provision as employees' may have perverse incentives.

404. The previous Government took an enabling power[50] to make a one-off increase to the statutory redundancy pay (SRP) limit and to suspend the annual uprating exercise in the Work and Families Act 2006, these powers can only be applied once. In the 2009 Budget, the then Government announced that it would be increasing the level of statutory redundancy payments by £30 from £350 to £380.

405. Current legislation requires that the limits are rounded up to the nearest 10p, £10 or £100 in relation to various limits. In recent years this has produced increases in the limits significantly above RPI inflation and increases in wages. To curb future above-inflation increases in statutory redundancy payments, the Government believes the rounding element of the formula for uprating statutory redundancy and employment tribunal limits needs to be amended.

406. Under the statutory redundancy scheme, employees with two or more years' service are entitled to a redundancy payment from their employer, based on their age, length of service (up to a 20-year cap) and earnings capped to the weekly limit. Statutory redundancy pay is calculated in the following way:

Number of years service (max 20 years) x multipliers x week's pay
(actual pay is used if the employee earns below the limit; otherwise the weekly limit is used)

407. The multipliers used in the payment calculation are:

- 1.5 weeks' pay for each full year of service, where age during the year was not below age of 41;
- 1.0 week's pay for each full year of service, where age during the year was not below age of 22;
- 0.5 week's pay for each full year of service, not falling in the categories above.

408. The statutory redundancy limit is in essence a statutory minimum, which a firm must pay in redundancy if their employees are earning above the limit and equal to their actual pay if they are earning below the limit. Firms have the option to go beyond the minimum. However, anecdotal evidence from informal consultation suggests that less than half of firms do so. There is no formal data source which allows us to know the proportion of firms paying above this limit with more certainty.

[50] An enabling power in this context, refers to S14 of the Work and Families Act 2006 which gave the Secretary of State the power to make a one-off increase to the limit via secondary legislation.

Box 5.1: Illustrative examples of how statutory redundancy pay is calculated

Example 1

Rose is an employee with 5 full years' length of service with the same employer and started work at 17 years old. Rose is entitled to redundancy payments as she has more than 2 years' length of service with the same employer. Rose is entitled to 0.5 weeks pay for each year of full service, when her age was less than 22 (0.5 x 5 = 2.5). Rose's total redundancy payments will be paid at her weekly wage of £305 (as this is below the currently weekly limit of £400). Hence total redundancy payments = 2.5 x £305 = £762.5.

Example 2

Steve is an employee with 20 years' service and started work with his current employer at 22 years old. He is currently aged 42 and has a weekly wage of £421. Steve is entitled to redundancy payments as he has more than 2 years' length of service with the same employer. He is entitled to 1.0 week's pay for each year of full service, when his age during the year was 22 or above but less than 41 (1.0 x 19 = 19), plus 1.5 week's pay for each full year of service, where his age during the year was 41 or above (1.5 x 1 = 1.5). Adding these multiples together - sums to 20.5. His total redundancy payments will be paid at the weekly limit of £400 (as Steve earns above the weekly limit). Hence total redundancy payments = 20.5 x £400 = £8,200.

Example 3

Anthony is aged 24 and only has one full year's length of service with his current employer and is not entitled to any statutory redundancy payments.

Note that the highest level of statutory redundancy payments is £12,000 (= £400 x 20 x 1.5). Firms can however exceed the statutory minimum.

The redundancy payments calculator can be found at: http://www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Redundancy/DG_174330

409. In 1999, the then Government introduced an annual uprating formula, which provides for the weekly limit to be uprated each February in line with the retail price index (RPI), rounded up to the nearest £10. Employees earning below the weekly limit receive a redundancy payment calculated using their actual wage, while those earning above the limit have their pay capped to the limit. The current weekly limit is £400.

410. Under the Employment Rights Act 1996, the figure for the weekly redundancy limit is also used for a wide range of other compensation payments:

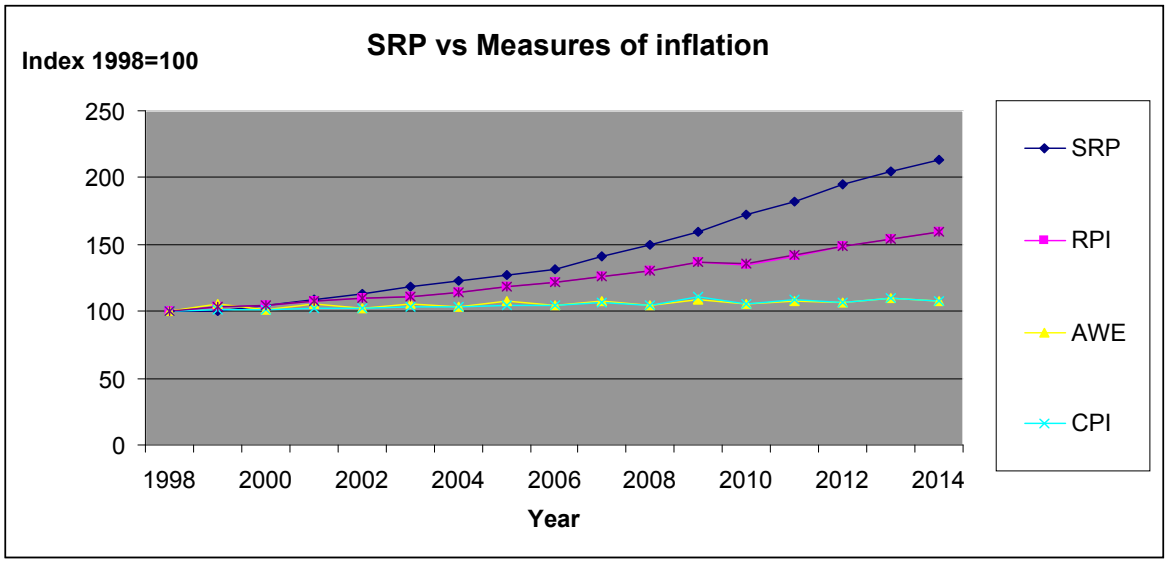
- non-compliance with flexible working procedures;
- the basic and additional awards for unfair dismissal;
- compensation where an individual has been unjustifiably disciplined by a trade union;
- compensation where an employer has failed to consult with a collective bargaining unit;

- compensation in relation to a right not to be excluded or expelled from a union;
- compensation for failure by an employer to allow an employee to be accompanied to a disciplinary or grievance hearing;
- compensation for failure by an employer to give a statement of employment particulars;
- failure of employer to comply with duty to notify employee of date on which he intends employee to retire or of right to make request not to retire on the intended date); and
- various payments due in the event of insolvency (redundancy pay, arrears of pay, pay in lieu of notice, holiday pay, unpaid compensation for unfair dismissal).

411. The compensation payments listed above mainly fall on employers except when a firm becomes insolvent and the Exchequer pays redundancy pay, arrears of pay, pay in lieu of notice, holiday pay and the basic element of an unpaid award for unfair dismissal from the National Insurance Fund (NIF).

412. In recent years, with the RPI at relatively low levels, the formula for uprating limits has produced increases significantly above RPI. For example, in 2006, the limit on a week's pay used to calculate statutory redundancy pay was £290 and inflation was 3.6%. The RPI increase gave a figure of £300.44 which then had to be rounded up to £310, almost doubling the level of increase. In recent years the limit has gone up by 6-7% each year more than the average earnings or RPI. As the value of each £10 band gets progressively smaller in percentage terms, 'double increases' closer to £20 and £200 are more likely.

Chart 5.1



Source: BIS analysis using ONS and OBR forecasts (for years later than 2011)

413. Chart 5.1 shows the growth profile of SRP, relative to other measures of inflation, since 1998. By 2010 the gap between SRP growth and RPI inflation had widened, as a result of the rounding element of the current uprating formula.

Table 5.1: Weekly statutory redundancy pay by year

Year	SRP - current formula	SRP - rounded to the nearest £1
1998	220	220
1999	220	227
2000	230	229
2001	240	237
2002	250	241
2003	260	245
2004	270	252
2005	280	260
2006	290	267
2007	310	277
2008	330	288
2009	350	302
2010*	380	380
2011	400	400
2012	430	421
2013	450	435
2014	470	450
2015	490	466
2016	510	484

Source: BIS analysis *In 2010 the statutory redundancy payment was raised in a one-off move.

414. In 2011 the difference in RPI and SRP growth profiles has resulted in SRP payment of £400 against what would have been £312, under a rounding, up or down, to the nearest £1 calculation. Given RPI forecasts from the OBR, the current uprating formula is projected to be £26 higher than a rounding to the nearest £1 formula by 2016. This trend would have led to a much wider difference (£119) if the one-off increase to £380 per week in 2010 was taken out of the consideration. Left unchecked, this leads to above-inflation increases in costs for both employers and the Exchequer.

Rationale for intervention

415. There is already Government intervention to regulate redundancy payments, as if left to the market, moral hazard would result and individuals would not be adequately protected in the event of redundancy. However, it has become clear, as set out above, that this intervention represents an imbalance between employers and employees and an accelerating level of cost. As the current scheme leads to statutory redundancy pay weekly limits rising beyond the rise in cost of living (represented by growth in RPI), employers, and in some cases the exchequer are paying more than necessary to secure the aims of the scheme.

Consultation:

416. There were 184 responses to consultation on the uprating formulae. Broadly speaking, there was strong support for retaining an automatic formula rather than, say, making increases at the Secretary of State's discretion. However, there were relatively few (30) responses on the question of rounding. Within those responses, the majority favoured retaining the status quo, although there were a variety of alternative suggestions. Nevertheless, to avoid further above inflation increases (and associated costs to business) the Government believes there is a strong policy imperative to reduce the rounding element. On indexation, 45 respondents favoured retaining an RPI link, 34 favoured moving to CPI, and a small number favoured a link to average earnings.

Policy Objective

417. To avoid continually escalating costs to business and Government there is a need to avoid this inbuilt and un-intended above-inflation effect.

Options

Option 1: Do nothing – maintain the current RPI indexing formula, rounding up to the nearest £10.

Option 2: Amend the statutory redundancy payments formula by rounding to the nearest £1.

418. The Government's preferred option is option 2, bringing SRP payments back in line with RPI inflation strikes the right balance between helping individuals who are made redundant and maintaining the value of payments for the working age population without placing undue burdens on business. As detailed above, there has been some consideration of whether the formula should have alternative indexation. The Government will therefore keep the indexation of the formula under review in light of the mixed responses to consultation and economic and other circumstances.

Costs and Benefits

419. The cost and benefits of option 2 have been measured against option 1, the 'do nothing' baseline. The assessment of costs and benefits is only carried out over four years, as Office for Budget Responsibility forecasts do not extend beyond this point. If the analysis was extended to the usual ten year period, the annual effect of reduced employer payments and reduced redundancy payments received would increase. However, the net present value would always be zero as this is a transfer.

Option 2: Business sectors affected

420. This proposed policy amendment will affect all sectors of the Great Britain economy, however some sectors will be affected more than others. This depends on the economic climate going forward and the structural difference between and within sectors. However, low paying sectors such as distribution, hotels and restaurants are likely to have fewer individuals who earn £400 per week or above and are made redundant. Therefore they would be less affected by this policy change compared to a higher paying sector such as banking and finance. Table 1 shows the distribution of redundancies by sectors in 2008. Over this period, manufacturing, construction and banking, finance and insurance were all hit hard by the global slowdown in economic growth. We have then assumed that the distribution of redundancies would be the same in the future as in 2008 for two scenarios:

A) Assume around 398,000 redundancies eligible for SRP. This figure is based on scaling down Labour Force Survey (LFS) figures for redundancies in 2010 (around 570,000 redundancies) to remove employees made redundant with less than two years' service.

B) Assume around 516,000 redundancies eligible for SRP. This is based on assuming a total of 740,000[51] redundancies and scaling this figure down to strip out those with less than two years' service. We do not know the exact length of service of those made redundant but assume that the distribution is the same as all employees in the labour market.

F. Benefits

Option 2: Amend the RPI indexed formula by rounding, up or down, to the nearest £1.

Direct cost to business and the Exchequer from amending the RPI indexed formula by rounding, up or down, to the nearest £1.

421. The primary duty to pay any redundancy entitlement falls onto employers. However where an employer has become insolvent, the National Insurance Fund (NIF)[52] pays redundancy and other compensation payments. Tables 2 and 3 show a summary of the total costs and breakdown of costs between business and the Exchequer under two different scenarios. Tables 2 and 3 assume around 398,000 and 516,000 redundancies eligible for SRP respectively. Note that the estimates presented in this impact assessment assume that firms meet the statutory minimum only. In reality, anecdotal evidence suggests some of those businesses that would be bound by paying the statutory minimum, actually pay above this. For this reason, we adjust down the benefit to employers and reduction in payment to employees made redundant by 75 per cent (further detail is given in the Risks, Assumptions and Wider Impacts section).

422. The share of the total cost incurred by the Exchequer is derived from the amount of redundancy payments the Insolvency Service has to pay out from the NIF. The technical note table B1 shows that NIF payments have ranged between £191m and £293m between 2001 and 2006, figures after this period have spiked as a result of higher bankruptcies during the recession. Given the fluctuation in NIF payments a range of between 20-30 percent of the total cost of redundancies will be paid out from the NIF. We take 25 per cent as the assumption for the proportion of redundancy payments that would be paid out by the Exchequer from the NIF.

Summary of direct benefits

423. Tables 5.2 and 5.3 below summarise the direct benefits to employers and the exchequer relative to the continuation of the current uprating formula for two scenarios of numbers of redundancies. It uses the assumption that 25 per cent of payments would be by the Exchequer, and adjusts the business benefits down by 25 per cent to account for the fact that some employers will pay above the statutory minimum.

51 Our central estimates are based on a total annual redundancy figure of 570,000, based on the most recent four quarters of LFS data (Q2-2010 to Q1-201). Given that most forecasts suggest a labour market improvement in the next few years this seems a reasonable estimate and is in line with redundancy levels of the pre-recession period. Eligible redundancies are estimated by scaling this figure down to strip out those with less than two years' service. We do not know the exact length of service of those made redundant but assume that the distribution is the same as all employees. For sensitivity analysis an upper bound of 740,000 redundancies has been used, this is was the highest level of redundancies in the pre-recession period since 2000.

52 Under the Social Security Administration Act 1992 benefits due under the National Insurance Scheme, including statutory redundancy pay, are payable out of the National Insurance Fund. The funds are mainly provided from National Insurance contributions payable by employed earners, employers and others.

Table 5.2 Summary of annual benefits (£m) – Scenario one 398,000 eligible redundancies

Year	Marginal Savings (Total)	Marginal Exchequer Saving	Marginal Business Saving	Marginal Business saving adjusted for employers paying above statutory minimum
2012	0	0	0	0
2013	9.3	2.3	7.0	5.2
2014	16.5	4.1	12.4	9.3
2015	15.4	3.9	11.6	8.7
2016	24.9	6.2	18.7	14.0
Total	66.1	16.5	49.6	37.2

Note: Assumed 570,000 redundancies, which equates to 398,000 eligible redundancies

Source: BIS estimates based on the Labour Force Survey and the Annual Survey of Hours and Earnings 2008

Table 5.3 Summary of annual benefits (£m) – Scenario two 516,000 eligible redundancies

Year	Marginal Savings (Total)	Marginal Exchequer Saving	Marginal Business Saving	Marginal Business saving adjusted for employers paying above statutory minimum
2012	0	0	0	0
2013	11.3	2.8	8.5	6.4
2014	19.4	4.9	14.6	10.9
2015	19.7	4.9	14.8	11.1
2016	29.1	7.3	21.8	16.4
Total	79.5	19.9	59.6	44.7

Note: Assumed 740,00 redundancies, which equates to 516,000 eligible redundancies
Source: BIS estimates based on the Labour Force Survey and the Annual Survey of Hours and Earnings 2008

424. The methodology used for estimating the direct benefits and costs of changing the method for uprating is given in a technical note below.

425. Over the period 2013-2016, the direct marginal benefit of amending the uprating formula will be in the range **£66m - £79m.** The direct marginal benefit to the Exchequer will be between and **£16.5 – 20m**. The direct marginal benefit to employers will be between **£50m**

and £60m[53] according to the analysis above, but is then adjusted down by 25 per cent to account for some employers paying above the limit anyway (our assumption is that 75 per cent of employers pay at the statutory level), so it stands between **£37m - £45m**. These benefits will represent transfers from employees to employers or the employees to the Exchequer hence the net effect will be zero. These benefits are reflected in lower payments received by those made redundant.

Box 5.2: Forecast of RPI and CPI in September 2010

The annual uprating exercise of the statutory redundancy weekly limit is based on the value of the RPI in September. The annual growth in the RPI (year ending September) is then used in the uprating formula.

In order to extrapolate a forecasted value the SRP limit the RPI forecast is applied to the previous year's SRP limit, so that SRP limit for February 2012 is calculated as 1.052*400=420.80. This calculation is then rounded up to the nearest £10, giving a figure of £430.

Table 5.4 RPI and SRP limit projections

	SRP - Do Nothing	SRP- Option 2	RPI OBR Forecasts(%)
2011	400	400	5.2
2012	430	430	3.4
2013	450	445	3.5
2014	470	461	3.6
2015	490	478	3.8
2016	510	496	

Source: BIS estimates based on Office for Budget Responsibility forecasts

Indirect benefit associated with raising SRP

426. Under the Employment Rights Act 1996, the figure for the weekly SRP limit is also used for a wide range of other compensation payments (as outlined above). This section of the impact assessment will attempt to estimate the expected indirect benefits from amending the current uprating formula to one which rounds to the nearest £1. These indirect benefits will result in a transfer of payments from employees to employers, and hence the net benefit (cost minus benefits) present value of this policy change will be zero.

Compensation payments (excluding insolvency payments)

427. The proposed amendment in this IA, amending the uprating formula by rounding to the nearest £1, will reduce costs for compensation payments. BIS estimated that the extra benefit will be **£4.6million** in the period 2012-2016. For a detailed breakdown of these costs estimates, refer to the technical note which follows this main assessment.

53 The upper and lower ranges above are taken from two key scenarios on a number of redundancies and hence the total do not sum up to the total range.

Insolvency payments

428. When an employer becomes insolvent, the Insolvency Service through the NIF pays arrears of pay, pay in lieu of notice, redundancy pay, the basic award element of unpaid compensation for unfair dismissal and other payments.

429. In 2008/09, the Insolvency Service paid out a total of £428 million to employees' working for insolvent employers. We take this figure as the more recent figure is historically very high. Once we remove redundancy pay this figure reduces to £186 million. BIS estimates as a result of the proposed amendments to the SRP limit formula, the reduction in Exchequer payments will be around **£8.6m** in the period 2012-2016[54].

Costs

430. The direct cost related to the increase in the weekly limit and indirect cost of compensation awards linked to the level of statutory redundancy pay represent transfers from either employees to employers or transfers from the employees to Exchequer. Employers will essentially benefit from lower payments and the net effect (costs minus benefits) will be zero. Currently there is annual uprating of the redundancy limits which comes into force in February of every year. This change to how limits are calculated will not affect this timing, and so there will be no additional costs to business.

Risks, Assumptions and Wider Impacts

431. This impact assessment is based on the best evidence base available and a set of assumptions. We have produced costings on an assumption that all firms pay the statutory minimum requirement for redundancy payments where they are employing staff that earn at or above the weekly limit. We then make an adjustment to the estimate of the reduction in business benefits to account for the fact that some businesses pay above the statutory limit. Business organisations have suggested to BIS that in the majority of cases, redundancy is paid at the statutory limit. We had one estimate based on a business organisation's advice activities to its members, that 90 – 95 per cent of businesses will pay at the statutory limit. However, as this is not robust evidence, we make the more cautious assumption that 75 per cent of businesses pay at this limit. Those that pay above the limit may still indirectly benefit from this change. In addition to this assumption there are three other key assumptions that have a significant influence on the cost benefit analysis.

432. Second, we assume 20-30 percent of redundancy payments fall on to the Exchequer. If during this economic recovery less firms become insolvent compared to our assumption this would mean that a greater proportion of the benefits (of reduced redundancy payments relative to our do-nothing counterfactual) would be felt by employers.

433. Third, we assume a range of 443,000 to 576,000 eligible redundancies will potentially be affected by a rise in SRP limit and associated compensation payments. The lower range is based on redundancy levels in 2008 and the upper range is based on historical redundancy data from the early 1990s. If the economy improves greatly over the next decade we may be overestimating the total number of redundancies eligible for SRP leading to an overestimation of costs and benefits.

434. Finally, in projecting the SRP limits we have used OBR forecasts of RPI. Consequently, given the margin for error in forecasting inflation, deviations of the actual SRP limit profile from the projections given will also lead to deviations in the costs and benefits presented in the previous section. As OBR forecasts only cover the next four years, this has been the time frame for analysis. Beyond this, levels of uncertainty on the future path for RPI increase, hence this assessment has not been made over a ten year time frame.

54 Please refer to technical note at the end of this assessment for full methodology.

This change in uprating should not lead to changes in firm behaviour surrounding timing and distribution of redundancies. Although it results in lower redundancy payments to employees relative to the current formula, these payments will still rise in line with the cost of living.

Summary table of costs and benefits

A summary of the costs and benefits of option 2 are presented below.

Table 5.5. Summary of costs and benefits for option 2

	Group affected	One-off or ongoing?	**Option 2 (Costs and benefits over the period 2012-16)**
Benefits			
Reduced statutory redundancy payments	Employers	On-going	**£ 37- 45m** (adjusted to reflect that up to 25% will not pay at the limit)
Reduced statutory redundancy payments	Exchequer	On-going	**£16.5 – 20 million**
Associated compensation payments (**indirect** benefits)	Employers	On-going	**£4.6 million** reduced compensation payments
Insolvency payments (**indirect** benefits)	Exchequer	On-going	**£8.6** million in reduced Insolvency payments
Costs			
Direct costs from receiving lower redundancy payments	Employees	On-going	**£16.5 - 20m** from lower payments in the case of insolvent employers**, £37 - 45m** in lower statutory redundancy payments from employers
Indirect costs from lower associated compensation payments	Employees	On-going	**£13.3** million in reduced associated compensation payments
Net benefit			**£0**

Source: BIS analysis

OIOO implications

435. This measure will not impose costs on business. However, it results in benefits to employers with an equivalent annual benefit of £7.7m, taking the mid point between the net present values of the lower and upper bound benefits to employers. However, some employers to whom this applies will be public sector. One-in, one-out applies to business impacts. According to analysis of the Labour Force Survey, 30 per cent of employees are working in the public sector (hence 70 per cent in the private sector). We therefore adjust down this equivalent annual benefit by 30 per cent and the regulatory out is **£5.4m**.

Conclusion

436. The Government proposes to take forward option two. Although this measure involves a zero net benefit, it re-balances between employers and employees who have been made redundant. Redundancy payments will still rise in line with the cost of living, so employees made redundant should not be at additional disadvantage, but employers will have to pay less than they do under the current uprating system.

Proposal 5 - Technical note to estimate benefits of amending the SRP uprating formula, by rounding to the nearest £1

Formula for calculating statutory redundancy payments

To qualify for payment an employee must have completed two years continuous service.

- 1.5 weeks' pay for each full year of service, where age during the year was not below age of 41;
- 1.0 week's pay for each full year of service, where age during the year was not below age of 22;
- 0.5 week's pay for each full year of service, not falling in the categories above;

There is a 20-year cap on the number of service years for which an employee is entitled to payment.

The amount of payment received depends upon the employee's weekly earnings and is subject to a cap set at the statutory weekly limit e.g. currently £400. An employee earning below the weekly limit will receive payments calculated using their current weekly earnings, and an employee earning above the weekly limit will receive the weekly limit.

Methodology used to estimate direct benefits

Step 1: Project SRP limit figures for both options for each in year in the period between 2013 and 2016. These figures are calculated using the example below. The figure for SRP in 2012 will go under the same formula as is currently used:

SRP(2013) = SRP(2012)*(1+RPI%(2012))

Step 2: Estimate the number of weeks' payment an employee is entitled to according to their age and length of service, using the formulas set out above.

Step 3: Estimate the number of employees eligible to receive payments. Estimates are taken from LFS data on the number of people made redundant with over two years' service. The LFS data does not tell us how many years service a person who has been made redundant in the last year had completed with their employer. We therefore had to make the assumption that employees who are made redundant have the same distribution with regards to age and length of service as other employees in the workforce i.e. length of service with an employer is not a deciding factor when making people redundant. The number of employees eligible is disaggregated according to their age and the number of service years with their employer in order to work out how many weeks payment they are entitled to.

Step 4: Calculate the total number of weeks for which redundancy payments are required according to segments by age and length of service. This is found using the information in steps 1 and 2.

Step 5: Examine average earnings by age. To calculate the cost of redundancies, we need to estimate the wage rate at which the number of week's payments due will be paid. This will vary according to each individual's salary. In order to cost this we use the average earnings from ASHE 2010 data taking the proportion earning below the set weekly limit and multiplying by the average earnings of these earners and the proportion earning above the weekly limit multiplied by the weekly limit. From this we get an estimate of the weekly wage rate at which the required number of week's statutory redundancy payments is paid.

Step 6: Final cost of redundancies by age under different weekly rates. This uses the information in steps 3 and 4. Step 3 establishes the total number of week's redundancy payment required for each age segment. Multiplying step 3 by the average weekly wage rate of the employees in the corresponding age segment from step 4 gives the cost of redundancies for each age segment. Summing across all age segments then gives the total cost under the different weekly limits.

Steps 2 to 6 are modelled, this modelling is essentially taking a number of expected redundancies in a given year and then removing from this number those that are not entitled to the statutory payments due to having length of service under two years. As the model also incorporates average earnings, it therefore also excludes those where weekly wages are below the statutory weekly limit. So this modelling establishes the total redundancy payments due under the "do nothing" option where the weekly limit rises with the current formula, and the total redundancy payments in option two where the formula is amended to round to the nearest pound.

Note that we assume up to this point in the analysis that all employers paying wages above the weekly limit (currently £400) do so at this limit. There is no robust evidence but reasoned responses from business organisations suggest up to 90 – 95 per cent of employers do pay at this level rather than above. Given the nature of this evidence, we adopt a more conservative assumption that 75 per cent of employers pay out at the statutory limit.

Step 7: This methodology is applied to cost both options for each year between 2012-2016, therefore annual costs and total costs are presented over this period. We look at the difference in total redundancy payments between these two options.

Table 5.6 Marginal Reduction in Redundancy Payments £m in Scenarios one and two

Year	**2012**	**2013**	**2014**	**2015**	**2016**
Weekly redundancy limit in option 2	430	445	461	478	496
Scenario one					
Payments under do-nothing (scenario 1)	1,417	1,455	1,492	1,520	1,558
Payments under scenario one	1,417	1,446	1,475	1,505	1,533
Scenario one marginal saving	0	9	17	15	25
Scenario two					
Payments under do-nothing	1,735	1,782	1,826	1,863	1,907
Payments under option 2	1,735	1,771	1,807	1,843	1,878
Scenario two marginal saving	0	11	19	20	29

Step 8: the Marginal savings of the proposed amendments are calculated by subtracting the figures under option 2 from the Do nothing option. The marginal savings are presented in Table 5.6.

Step 9: This range of marginal savings is split between the Exchequer and the employer using an assumption of 25 per cent of payments coming from the National Insurance Fund (based on the fact a reasonable range is 20 – 30 per cent). The employer portion of this saving is then adjusted down further to account for the fact that not all employers pay at the statutory limit (we assume 75 per cent do – see above).

Historic National Insurance Fund redundancy payments and receipts

Table 5.7 shows redundancy payments made out of the NIF by the Exchequer for redundancy payments when a firm becomes insolvent.

Table 5.7. NIF Redundancy Payments and Receipts

Financial Year	Payments	Receipts
2000-01	191,210	22,826
2001-02	230,365	21,097
2002-03	252,923	24,123
2003-04	237,893	26,991
2004-05	219,495	31,772
2005-06	293,174	37,553
2007-08	212,264	35,911
2008-09	427,622	38,645
2009-10	530,915	39,663

(NB: data in current prices)

Source: National Insurance Fund annual accounts

In this impact assessment we assume 20-30 percent of the total cost of redundancy payments falls to the Exchequer. We do not have actual cost data on total redundancy payments. For this impact assessment we have taken the historical NIF payments between 2000-2008, as the period after has spiked as a result of the recent recession, and divided through by our cost estimates for the current weekly limit of £400 – and this proportion averages to around 20 percent over 2000 to 2006. This will be underestimating the proportion falling on the NIF as historical NIF payments are based on current prices and the redundancy rates were lower in previous years. To factor this in we incorporate sensitivity by assuming 20-30 percent of redundancy payments will fall on to the Exchequer. This range takes into account our underestimation and allows for some buffer if a greater proportion of firms become insolvent in the future.

Methodology used to estimate indirect benefits: compensation payments associated with raising the SRP limit (excluding insolvency payments)

1) Estimate the number of accepted claims to HMCTS, which will be affected by the uprating of the statutory redundancy limit[55]. BIS estimates that there will be 55,000 claims per year between 2012-2014, we have projected another 55,000 claims occurring in 2014-2015 in order to estimate the impact of the amendments to the uprating formula.

55 The following compensation payments will be affected by uprating the statutory redundancy pay limit: non-compliance with flexible working procedures, the basic and additional awards for unfair dismissal, compensation where an individual has been unjustifiably disciplined by a trade union, compensation where an employer has failed to consult with a collective bargaining unit, compensation in relation to a right not to be excluded or expelled from a union, compensation for failure by employer to allow an employee to be accompanied to a disciplinary or grievance hearing, compensation for failure to give by employer to give statement of employment particulars, failure of employer to comply with duty to notify employee of date on which he intends employee to retire or of right to make request not to retire on the intended date.

2) BIS has assumed 8 per cent of accepted claims will be successful at Tribunal. This number has been estimated based on the average success rate at Tribunal for Unfair Dismissal (UD)[56] claims in the last five financial years (2005/6, 2006/07, 2007/08, 2008/09, 2009/10). The estimated numbers of successful claims at Tribunal in between 2011-15 are between 4,400 and 4,600.

3) BIS has estimated that the average payout for successful claims will be £8,358. This figure is an average payout for successful UD claims over the last five financial years (2005/6, 2006/07, 2007/08, 2008/09, 2009/10 and 2007/08).

4) For each financial year between we then multiply the number of successful claims at Tribunal by the average payout at Tribunal (e.g. 4,400 *£8,358). This gives the total cost for successful claims at Tribunal for the financial year 2009/10 (no uprating).

5) We inflate the expected total cost for successful claims (no uprating) at Tribunal by the projected SRP limits for the Do nothing option, providing us with a baseline to compare the preferred option against.

Therefore for 2011, the projected SRP limit (£430) and divide by the existing SRP limit (£400) we get the expected total cost for successful claims including the uprating (i.e. {430-400}/400 =7.5 percent). However, we then need to adjust for workers earning over £400, as not all employees will benefit from this uprating. The estimate that the total cost for successful claims to be about £39 million.

Table 5.8: Compensation Payments under both options (£)

Year	Total Cost -Do Nothing	total Cost	Marginal Saving
2012	40,179,369	39,595,383	583,986
2013	40,988,529	40,018,807	969,722
2014	41,729,790	40,377,917	1,351,873
2015	42,385,150	40,716,276	1,668,874
Total			4,574,455

The same methodology is applied for each year using the profile of SRP limits associated with the preferred option. The marginal benefit to employers from amending the uprating formula is estimated as £4.6 million.

Methodology used to estimate the marginal insolvency payments from raising the SRP limit

When a firm becomes insolvent the Exchequer pays out any arrears of pay, pay in lieu of notice, redundancy pay, unpaid compensation for unfair dismissal that is due to employees.

In 2008/09, the Insolvency Service paid out nearly £428 million in cash payments to employees from insolvent employers. In 2009-10 this was nearly £531 million. These payments included arrears of pay, pay in lieu of notice, redundancy pay, unpaid compensation for unfair dismissal and other payments. We have removed the cost of redundancy payments from our calculations

56 The majority of accepted claims will be UD claims, therefore UD data has been used as a proxy for determining if the claims will be successful and what the average level of payout will be.

to avoid double counting. However, we are using 2008-09 figures as recent data is significantly higher than historical trends. The cash payments over this period were based on 165,000 claims.

To project Insolvency Service payments under the do nothing option, the projected SRP limits are used and an example of how Insolvency Service payments are constructed is provided in Table 5.9. For 2012-2013 the SRP limit under the nothing option is expected to rise from £400 to £430. This represents an increase of 7.5 percent ({430 – 400}/400). In addition, this rise will only affect those earning over £400 as those earning below the SRP limit will receive their actual pay. From ASHE 2010, BIS has estimated that 46 percent of employees earn more than £400. Putting this information together BIS has estimated that the total cash payment (excluding SRP) made by the Insolvency Service in 2011/12 will be £192million.

Table 5.9: Payments due in event of insolvency

1	Total cash payments 2008-09	£427,622,263
2	Total cash payments 2008-09 excluding SRP	£185,651,421
10	Old limit	400
11	New limit	430
12	% rise in weekly limit	7.50%
13	55% of workers that earn more than £430	
15	Expected total payments in 2012-13 (£)	£441,898,718
16	Expected total payments (excluding SRP) in 2012/13 (£)	£191,530,249

The above method is used to estimated the expected total payments for each year under both options. The figures for option 2 are subtracted from the do nothing option (baseline), which provides the marginal savings arising from the preferred option.

Table 5.10

Total Cash Payments	Do nothing	Round-£1
	428,000,000	428,000,000
2012	441,898,718.36	438,020,043.68
2013	450,261,983.12	444,221,425.78
2014	457,647,559.72	450,439,843.19
2015	464,619,458.59	456,634,685.55
Minus SRP	Do nothing	Round-£1
2012	191,530,249	190,170,863
2013	194,851,421	192,696,884
2014	197,617,998	195,222,713

2015	200,506,172	197,733,758

	Marginal Saving
2012	1,359,387
2013	2,154,537
2014	2,395,285
2015	2,772,413
Total	8,681,622

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)];

Post implementation review

Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

The objective of the review is to look at the overall performance of the dispute resolution system, and to establish whether the objectives of reducing the volume of tribunal claims and the costs to parties of going through the system have been met.

Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

The review will collect a range of monitoring data (management information and survey data) as well as seeking stakeholder views to consider whether the policy objectives have been met.

Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]

Baseline employment tribunal claims will be given by 2011/12 employment tribunals claims data. SETA 2008 data allows us to estimate unit costs of going through tribunal for claimants and respondents. Whilst HMCTS reviews its unit cost data to understand typical costs per case. BIS is currently reviewing whether there is scope to conduct a further SETA in 2012, which would give a more accurate baseline picture.

Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

These interventions will have been a success if it can be shown that, at least in part they have caused a reduction in employment tribunal claims and/or earlier resolution of workplace disputes and/or a reduction in the costs to parties of going through employment tribunals.

Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]

There is a range of existing data on employment tribunal claims published by HMCTS. Acas also publish a range of management information and have a forward evaluation programme which will allow a look at success measures for early conciliation. Furthermore, BIS is looking at the feasibility of running surveys of employment tribunal applicants in 2012 to provide a stronger baseline, and again after all of the policies have been implemented and have bedded-in (likely to be around 2016).

Reasons for not planning a review: [If there is no plan to do a PIR please provide reasons here]

Post-Implementation Review plan of 'Modernising our Tribunals' proposals (2A-2E)

Basis of the review:

Post Implementation Review (non-statutory).

Review objective:

To ascertain whether each of the changes have met the objective of improving the cost-efficiency of the employment tribunal system

Review approach and rationale:

HMCTS plans to conduct ongoing monitoring of internal management information. Quantitative data will be obtained through existing and improved management information, published annual statistics and financial accounting data which will help to assess the impact of the changes made. The data likely to be monitored are unit costs, the number of judicial sitting days/hours, the number of receipts and disposals and the volume of Costs and Deposit orders made. Further reporting on appeal rates (and appeal success rates), broken down to distinguish between lone-judge and full panel decisions will also be sought.

Any relevant independent research that becomes available will also be used to evaluate the impact of these policy changes.

Baseline:

The impact of the changes will be measured against the baseline of 2010/11 using internal management information, published annual statistics and financial accounting data. Supplemental material from the SETA survey series can also be used. In this impact assessment we have used unit cost information from the financial year 2009/10. HMCTS are currently in the process of developing unit costs from the financial year 2010/11.

Success criteria:

HMCTS will evaluate these proposals against the following success criteria:

- reductions in the unit costs at the Employment Tribunal compared to 2010/11 outturns
- appeal rates and appeal success rates, compared to pre-implementation averages; and
- performance indicators such as timeliness targets and the number of disposals achieved during the course of a financial year.

Monitoring information arrangements:

Management information, annual statistics and financial accounting data arrangements are already in place across HMCTS. Unit costs for 2010/11 are currently being developed and will be monitored after these proposals take effect. Furthermore, BIS is looking at the feasibility of running surveys of the employment tribunal applicants in or around 2012 and/or 2016.

Reasons for not planning a PIR:

N/A

Annex 2: Equality impact assessment (BIS Proposals: 1,3,4 and 5)

The Department for Business, Innovation and Skills (BIS) is subject to the public sector duties set out in the Equality Act 2010. Equality Impact Assessments are an important mechanism for ensuring that we gather data to enable us to identify the likely positive and negative impacts that policy proposals may have on certain groups and to estimate whether such impacts disproportionately affect such groups. This Equality Impact Assessment takes a summary view of the equality impact of all four proposals being taken forward by BIS on resolving workplace disputes.

The package of measures has the overall aim of improving business confidence in employing staff, and within this to encourage the earlier resolution of workplace disputes to the benefit of all parties.

The proposals being taken forward are:

- Proposal 1: all claims submitted to Acas in the first instance to offer early conciliation. This builds on the existing pre-claim conciliation (PCC) service that Acas has offered to up to 20,000 cases in the last financial year.
- Proposal 2 (A-E): changes to employment tribunals processes to make them more efficient. Note, as responsibility for these measures lies with HMCTS, a separate equality impact assessment for these measures is at Annex 3.
- Proposal 3: Increase the qualifying period for unfair dismissal from one to two years.
- Proposal 4: Introducing financial penalties for employers where a Tribunal determines they have breached an individual's employment rights.
- Proposal 5: Review of redundancy limits so that statutory redundancy payments are annually uprated by a formula that rounds to the nearest pound, rather than up to the nearest ten pounds.

During consultation, those responses that identified equalities issues largely reflected much of the feedback we received during our stakeholder engagement. Broad views from the business and employee lobby were polarised, the former largely supporting our proposals and the later being largely opposed. This was particularly the case on proposal six to extend the qualifying period for unfair dismissal, which generated the largest volume of equalities focused responses.

However, many respondents were encouraged by the renewed emphasis we placed on early dispute resolution and access to accurate information about the tribunal process. Respondents highlighted the benefits proposal one could have for vulnerable groups, particularly in terms of ensuring they have access to impartial advice and have a clearer understanding of their employment rights. The combined effect of proposal one and the publication of information regarding the median value of awards and average length of time it takes to complete the tribunal process will empower vulnerable groups to make informed judgements on the value of pursuing their claim.

Background

The 2008 Survey of Employment Tribunal Applications (SETA) collects information on the personal characteristics of claimants. Results from SETA can be compared against the Labour Force Survey (LFS) for employees to see how the characteristics of claimants differ to the general population of employees. However, we cannot know the characteristics of those with workplace disputes that are resolved in different ways (i.e. do not enter the employment tribunal system).

Gender

BIS has published SETA in 2003 and more recently in 2008. In 2008 three-fifths (60 per cent) of claimants were men. This is similar to the proportion found in 2003 (61 per cent) and somewhat higher than the proportion of the employed workforce as a whole (51 per cent), as given in the LFS. Men brought the majority of employment claims across most jurisdictions; however, 82 per cent of sex discrimination cases were brought by women. This pattern closely resembles that found in 2003, where men also brought the majority of employment claims across most jurisdictions. However in 2003, an even higher proportion of sex discrimination cases were brought by women (91 per cent).

Ethnicity

According to SETA 2008 86 per cent of claimants were white, a slightly lower proportion than in 2003 (90 per cent) and lower than the workforce in general (91 per cent). However, the proportion was much lower in race discrimination cases, where only 8 out of the 57 claimants (15 per cent) were white, with 20 black (34 per cent) and 20 Asian (34 per cent). This is a similar pattern to that found in 2003.

Disability

In SETA 2008 22 per cent of claimants had a long-standing illness, disability or infirmity at the time of their employment claim, which is the same as the proportion among employees in general (22 per cent) and is a slightly higher proportion than in 2003 (18 per cent). 15 per cent had a long-standing illness, disability or infirmity that limited their activities in some way, a higher proportion compared with the workforce as a whole (10 per cent) and in 2003 (10 per cent).

As in 2003, the proportion of claimants who had a long-term disability or limiting long-term disability was, as would be expected, considerably higher in Disability Discrimination Act (DDA) cases (84 per cent and 74 per cent respectively). Looking at primary jurisdictions the proportion of claimants who had a long-term disability was highest in discrimination cases (45 per cent) and lowest in Wages Act cases (10 per cent) and redundancy payment cases (8 per cent).

Age

47% of respondents on the SETA (2008) claimant survey were 45+, compared to 38% of respondents to the Labour Force Survey. This varied by jurisdiction. The highest proportion of people of 45 and over was in Breach of Contract cases (74%) and the lowest was wages act jurisdiction claimants (35%).

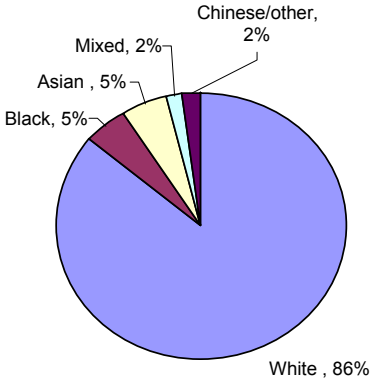
Religion/belief

SETA 2008 results showed that 46 per cent of claimants regarded themselves as belonging to a religion which is in line with the findings from 2003. 40 per cent of all claimants regarded themselves as Christian. 6 per cent of all claimants regarded themselves as belonging to a religion other than Christianity (Muslim 2.4%, Hindu 1.2%, Sikh, Jewish, Buddhist and other answers were all under 1%). This figure was higher among those involved in discrimination cases generally (12%), and higher still (39%, although note that this is from a small sample size of just 57) among those involved in race discrimination cases. Comparisons with LFS cannot be made because of the difference in phrasing of the questions about religion/religious beliefs between the two surveys.

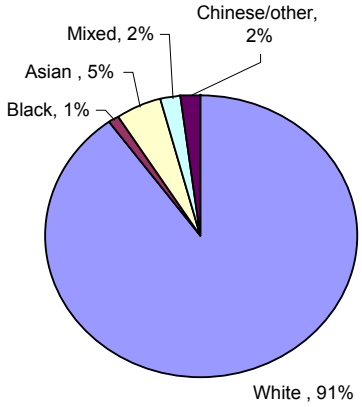
It is not possible to look at employment tribunal claimant characteristics in terms of gender reassignment, marriage and civil partnership, pregnancy and maternity, and sexual orientation.

Chart A2.1. Ethnicity of claimants, compared with employees in GB

SETA 2008



LFS, Q1 2008



Source: SETA 2008 and LFS, Q1 2008

Detailed assessment of individual proposals 1,3,4 and 5

During consultation the wider impacts of all proposals was considered further and findings are reflected in this final impact assessment.

The majority of consultation responses addressing equalities issues did so in relation to proposal six on the unfair dismissal qualifying period, whilst some respondents felt this would have a positive impact on business confidence, others felt it would have a disproportionately negative impact on vulnerable groups.

Most respondents to the consultation were in favour of proposal one, but a small number identified access risks to early conciliation services for vulnerable groups. Importantly, many of these respondents accepted that providing reasonable adjustments were made these risks could be effectively mitigated against. More positively, in relation to equalities, respondents in favour of financial penalties (proposal seven), felt it would encourage greater compliance with equalities legislation.

Proposal 1 - Require all claims to be submitted to Acas in the first instance for early conciliation

Currently, Acas provide pre-claim conciliation (PCC) for up to 20,000 cases per year. This proposal would extend that so that all employment tribunal claims would first go to Acas to be offered early conciliation. This should encourage early dispute resolution, but also ensure that those entering the employment tribunal system are more aware of what is entailed. Early conciliation will be offered to all, regardless of characteristics.

Acas conducted a survey of Pre-Claim Conciliation (PCC) users to cover its first year of operation from April 2009. The research included a main quantitative fieldwork stage consisting of 1,187 interviews lasting 20 minutes on average with a random sample of PCC service users.

The service users describe employee demographics as:

- mostly white (91 per cent), 3 per cent were Black, 2 per cent Asian, and 1 per cent Mixed ethnic group. The profile is similar to the UK workforce as a whole (LFS), but a higher proportion of service users were white than in employment tribunal applications (86 per cent as reported in SETA 2008);
- Thirteen per cent had a long-standing illness, disability or infirmity at the time of Acas assistance, which is lower than the proportion recorded in SETA or LFS (both 22 per cent);
- Mostly male (59 per cent), therefore, 41 per cent were female. This is similar to the profile of employment tribunal applications (60 per cent male; 40 per cent female reported in SETA) and somewhat higher than the proportion of the whole UK workforce given in the LFS (51 per cent male; 49 per cent female).

The main issue raised during policy development and consulation is whether the provision of early conciliation by telephone disadvantages any particular groups. Acas have existing guidance in place (common for both ET1 and PCC cases) for conciliators dealing with parties and/or their representatives who have disabilities (including hearing disabilities, which could be a barrier to a telephone-only service). In their initial contact with parties they include the message "if you have a disability, please let us know if we need to make any special arrangements for you when dealing with your case".

In respect to hearing disabilities, if this may be a factor in the delivery of their existing PCC service, they would communicate with the individual concerned to establish (and seek to agree) what form communications between the conciliator and the individual should take. Acas staff are currently guided to offer face-to-face meetings as a reasonable adjustment if parties require it in PCC. The same would be true in the expanded early conciliation option.

There could potentially be a mix of methods including:-

- e mail
- written communication
- Type Talk
- BSL signer - and Acas would pay for this provision should that be a reasonable adjustment

Acas are also currently undertaking an EIA (covering all protected characteristics) of their individual conciliation service. As part of that they will be reviewing current guidance and the arrangements that are in place in order to seek to reduce or remove any barriers to access that currently exist.

Proposal 3 - Increase qualifying periods for unfair dismissal

This proposal is to increase the qualifying period for unfair dismissal from one to two years with the aim of helping business confidence in hiring staff, and making a small reduction in claims brought before employment tribunals.

The population that will be affected by the proposal will be employees with 1 – 2 years of continuous service with their current employer. The equality impact assessment will be examining the characteristics of those who under the proposal will be no longer be able to claim unfair dismissal. The main text of the IA predicts the proposal will result in around a 1,600 - 2,400 reduction in claims, representing 3% – 5% of all unfair dismissal claims which is proportionately small. Despite not having this particular right to unfair dismissal, in all cases employees have certain day one rights, in particular regarding discrimination.

As mentioned in the main text of the IA there are two possible data sources which we can use to estimate the characteristics of the affected population. However, each source has its own limitations.

Although the Survey of Employment Tribunal Applications 2008 (SETA) has personal characteristics by primary jurisdiction the sample sizes are small, thereby increasing the margin of error. Also the characteristics are calculated on unfair dismissals as a whole and not broken down for unfair dismissals by length of service.

The Labour Force Survey (LFS) allows us to estimate the characteristics of the eligible population affected by the change in the qualifying period and not those who are most likely to bring an unfair dismissal claim. Using the LFS to estimate the length of continuous service only captures those currently employed and not those who have lost their job. Thus, if unfair dismissal claims are unrelated to length of service the LFS distribution may not be representative of the population of interest.

Overall we believe that using the LFS will provide us with a more robust estimation of the characteristics of the affected population. The effect of the 2008/09 recession seems to be apparent in the data in the form of a smaller fraction of employees in the 0-1 year length of

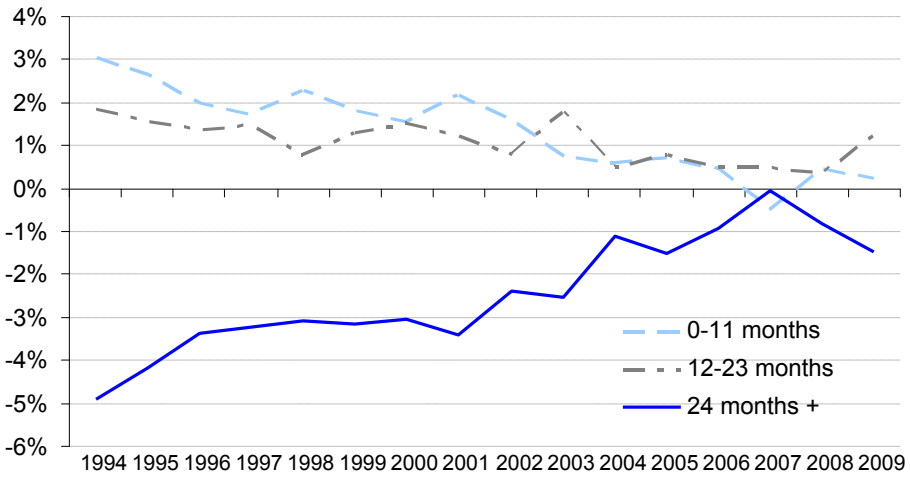
service group. Although there are limits to the equality impact assessment we believe that it will provide a broad overview of the minority groups affected.

It should be noted that claims on the grounds of discrimination are completely unaffected by this measure and where employees may be making claims on multiple grounds, discrimination usually takes precedence.

Gender

The number and proportion of males and females with less than 1 year's service, between 1 and 2 years, and over 2 years is broadly similar. A slightly higher proportion of females are concentrated in the first two groups but the difference has been reducing over time.

Chart A2.2 Percentage point difference between proportion of females and the proportion of males with different lengths of service.



Source: BIS estimates based on the Labour Force Survey.

Chart A2.2 shows that in the 1990s the proportion of females in the 0-11 months group was consistently around 2 percentage points higher than males but in recent years a gap between the sexes has not been apparent. The proportion of females in the 12-23 months group has roughly been around 1 percentage point higher than males in recent years, again a reduction from 1990s data. Consequently the gap in the proportion of males and females in the 2 years and over group has closed to below 2 percentage points in the past 5 years.

Looking at the same data the other way (the proportion of people in the three length of service categories who are male or female) the same picture is evident – slightly more of the 2 years and over category is male but the gap is small and the trend is generally towards equality.

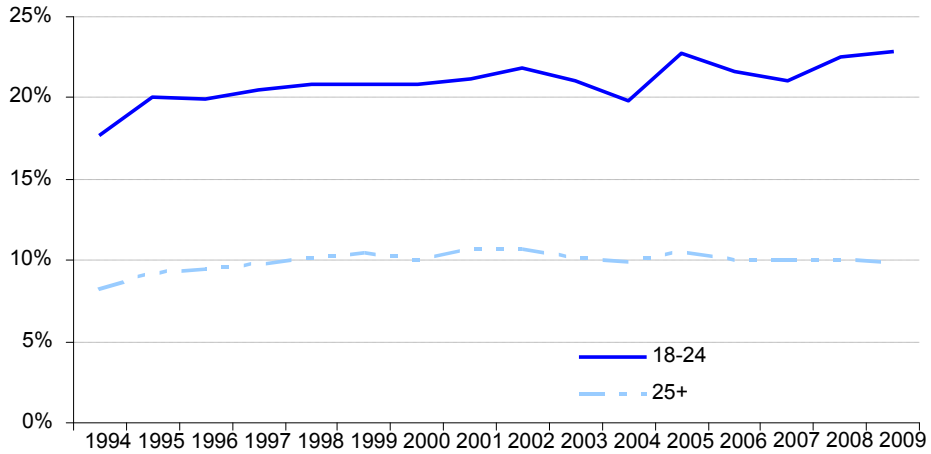
The category that will be affected by the proposal will be males and females with 1 – 2 years of continuous service with their current employer. As the data shows the proportion of males and females with 1 to 2 year of continuous service with their current employer is broadly similar. The Government therefore does not believe an extension of the unfair dismissal qualifying period would have a considerable disparity of impact on females.

Age

Age discrimination is somewhat different to other forms of discrimination. Age is a spectrum and continuum along which we all pass and age and length of service requirements are widespread and well established features of employment law - in the UK, EU and beyond.

As Chart A2.3 shows a significantly lower proportion of 25 + year olds have a length of continuous service with their current employer of 12-23 months compared to 18-24 year olds. In 2009 9.9 per cent of 25+ year olds had a length of continuous service with their current employer of 12-23 months compared to 22.9 per cent of 18 – 24 year olds. This suggests a disproportionate number of young workers will be affected by the measure.

Chart A2.3. Proportion of 18 - 24 year olds and 25+ year olds with a length of continuous service with their current employer of 12 - 23 months.



Source: BIS estimates based on the Labour Force Survey.

However, the difference here essentially reflects the fact that younger people have generally had less opportunity to build up length of service - this is simply a fact of life. We consider that the difference here is essentially a factor of time and that an extension of the unfair dismissal qualifying period would not have a considerable disparity of impact on younger workers.

We note that other accepted labour market practices have age or length of service requirements. UK law has different age bands for the national minimum wage, age and length of service qualifications for redundancy payments, and length of service requirements are allowed for other benefits (blanket exception up to five years) such as pay scales.

In the event that the difference was considered to be a considerable disparate impact, the Government considers that it is justified as a proportionate means of achieving a legitimate aim.

Extending the qualifying period of unfair dismissal to two years should be seen in the context of a wider labour market framework which seeks to minimise burdens on the employment of inexperienced workers and facilitate entry to the labour market whilst allowing for greater experience (and loyalty) to be awarded.

A two-year qualifying period is consistent with the qualifying period for redundancy pay. The rationale here is similar in that this is an entitlement which recognises a minimum amount of experience which requires compensation in the event of redundancy. It could be argued that consistency here makes sense - i.e. entitlement to claim unfair dismissal would now reflect the same level of experience recognised by an employee's ability to claim statutory redundancy entitlements.

A general feature of these practices is to minimise the regulatory cost of employing younger workers and allow employers to reward loyalty and experience. Similarly, in extending the qualifying period for unfair dismissal, the Government is seeking to increase employer's confidence in recruiting and retaining staff.

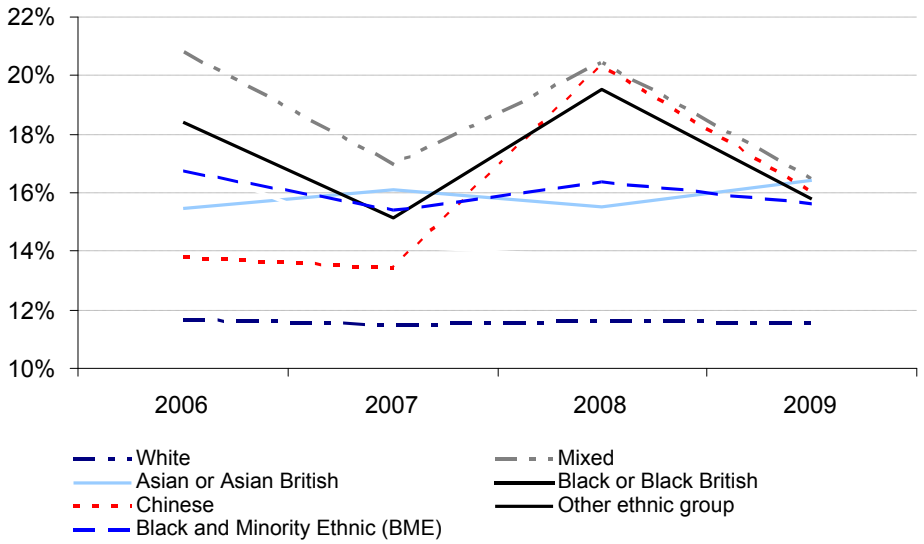
Furthermore, employees will still retain their day one right of bringing a discrimination claim to an employment tribunal.

Ethnicity

A higher proportion of Black and Minority Ethnic (BME) groups have been continuously employed for 0-1 or 1-2 years compared to whites. The magnitude of the difference varies amongst ethnic minority groups but is largest amongst the mixed race ethnic group and is consistent in the years of data available.

Over the period 2006 to 2009 the proportion of BME groups with 0-1 year service was on average just over 5 percentage points higher and for 1-2 years service was on average 4.5 percentage points higher as shown by chart A2.4 below.

Chart A2.4. Proportion of ethnic minority groups with a length of continuous service with their current employer of 12 - 23 months.



Source: BIS estimates based on the Labour Force Survey.

Much of this may be driven by the fact that BME groups are on average younger than white groups. As Table A2.1 below shows this is particularly true of the mixed race ethnic group as they have a significantly greater proportion aged 18 - 24 years old and since the largest effect is seen for this group then the lower average age helps confirm this hypothesis.

Table A2.1: Proportion of ethnic minority groups with different age groups

	Age	
	18 to 24	25 +
White	13.4%	84.7%
Mixed	24.7%	70.7%
Asian or Asian British	13.8%	85.6%
Black or Black British	10.1%	89.4%
Chinese	13.4%	86.2%
Other	11.9%	87.7%
Black and Minority Ethnic (BME)	13.5%	85.7%

Source:BIS estimates on the Labour Force survey. Results average of Q4 2007, 2008, 2009. Proportions do not sum, to 100% as they are expressed as percentages of entire population.

The Government does not believe an extension of the unfair dismissal qualifying period would have a considerable disparity of impact on particular racial groups. Furthermore, employees will retain their day one right of bringing a discrimination claim to an employment tribunal.

Work limiting Disability

As Table A2.2 below shows, employees with a long-term disability are noticeably more likely have a length of continuous service with their current employer of two years and above - the proportion has been around 6 percentage points higher over the past three years. Employees with a long-term disability are less likely to have a length of continuous service with their current employer of 12 to 23 months –around 3 percentage points lower. Therefore it is unlikely the proposal will have a disproportionate impact on employees with a long-term disability. However, employees will still retain their day one right of bringing a discrimination claim to an employment tribunal.

Table A2.2: Proportion of workers with a disability with 12 to 23 months length of continuous service with their current employer

	Year		
0 to 11 months service			
	2008 Q4	2009 Q4	2010 Q4
Disabled	13.9%	11.2%	12.3%
Not disabled	17.6%	14.5%	15.5%
12 to 23 months service			
	2008 Q4	2009 Q4	2010 Q4
Disabled	9.3%	9.9%	7.8%
Not disabled	12.5%	12.2%	10.1%
24 months and over service			
	2008 Q4	2009 Q4	2010 Q4
Disabled	76.8%	79.0%	80.0%
Not Disabled	69.9%	73.3%	74.4%

Source: BIS estimates based on the Labour Force Survey. May not sum to 100% due to rounding.

Religion

Table A2.3 shows the average proportion of employees reporting different religions with different lengths of continuous service with their current employer for quarter four 2008, 2009 and 2010.

Employees who report their religion as Muslim are the most likely to have 12 to 23 months continuous service with their current employer; 5.6 percentage points above employees who report a religion as a whole.

Table A2.3: Proportion of workers of different religions with different length of continuous service with their current employer

	Length of Service		
	0 to 11 months	12 to 23 months	24 months and over
Christian	14.4%	10.6%	75.0%
Buddhist	18.3%	13.4%	68.3%
Hindu	18.6%	13.7%	67.6%
Jewish	15.7%	13.8%	70.5%
Muslim	20.6%	16.5%	62.9%
Sikh	17.2%	11.2%	71.6%
Any other religion	16.6%	12.9%	70.5%
No religion at all	18.2%	12.5%	69.3%
All religions	15.5%	11.3%	73.2%

Source: BIS estimates of Labour Force survey. Proportions averaged from 2008 Q4, 2009 Q4 and 2010 Q4. May not sum to 100% due to rounding.

Employees who report their religion as Muslim are also least likely to have 24 months and over length of service with their current employer; just over 11 percentage points lower than employees reporting a religion as a whole.

A key driver may be the age profiles of employees reporting different religions. As Table A2.4 below shows employees who report their religion as Muslim are significantly more likely to be in the age group 18 to 24 years old; 4.5 percentage points greater than employees who report a religion as a whole. Employees who report their religion as Muslim are significantly less likely to be in the age group 25 + years old; 3.4 percentage points below employees who report a religion as a whole.

Table A2.4: Proportion of workers of different religions with different age groups

	Age	
	18 to 24	25+
Christian	11.8%	86.5%
Buddhist	9.9%	89.0%
Hindu	9.5%	90.2%
Muslim	16.4%	83.1%
Sikh	13.7%	86.0%
Any other religion	11.2%	87.9%
No religion at all	17.2%	81.1%
All religions	11.9%	86.5%

Source: BIS estimates of Labour Force survey. Proportions averaged from 2008 Q4, 2009 Q4 and 2010 Q4. Jewish is not included in this table as the sample size was too small and therefore statistically unreliable. Proportions do not sum, to 100% as they are expressed as percentages of entire population.

The Government does not believe that extending the qualifying period will have a considerable disparity of impact on particular religious groups. Furthermore, employees will retain their day one right of bringing a discrimination claim to an employment tribunal.

Sexual orientation

We are unable to estimate length of service for employees reporting different sexual orientations. However, data from the Integrated Household Survey April 2009 to March 2010 showed respondents reporting a sexual orientation of Gay/Lesbian/Bisexual had an employment rate of 70.8 per cent compared to 68.6 per cent for respondents reporting a sexual orientation of heterosexual/straight. Also respondents who reported their sexual orientation as Gay/Lesbian/Bisexual were significantly more likely to be in managerial and professional occupations 41.5 per cent compared to 29.7 per cent of respondents reporting their sexual orientation as heterosexual/straight. There is no reason to believe the proposal will have a disproportionate impact on employees reporting different sexual orientations. However, employees still retain their day one right of bringing a discrimination claim to an employment tribunal.

Gender reassignment

There is insufficient information to estimate the length of service of employees reporting gender reassignment. However, the proposed changes reflect a broad policy and are designed to have an impact on all employees. Thus, the proposed changes are unlikely to have a disproportionate impact on employees reporting gender reassignment. However, employees still retain their day one right of bringing a discrimination claim to an employment tribunal.

Marriage and civil partnership

We are unable to deduce from available data the proportion of employees of different marital status with 1 – 2 year length of continuous service with their current employer. We would expect employees who report their marital status as married or in a legally-recognised civil partnership or separated or widowed to have an older age profile. Thus, they may have an average or above average length of service. There is no reason to believe the proposal will have a disproportionate impact on employees reporting different marital status. However, employees still retain their day one right of bringing a discrimination claim to an employment tribunal.

Pregnancy and maternity

Data is unavailable in the level of detailed needed. We are unable to estimate the proportion of pregnant workers and workers on maternity leave with different lengths of continuous service for their current employer. However, there is no reason to believe the proposal will have a disproportionate impact on pregnant workers or workers on maternity leave. However, employees still retain their day one right of bringing a discrimination claim to an employment tribunal.

Equality impact assessment conclusion - removal of barriers which hinder equality

The proposed changes reflect a broad policy and are designed to have an impact on all employees regardless of their gender, race, disability, age, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion and belief, or sexual orientation. Therefore, the proposed changes are unlikely to create any barriers to equality in terms of gender, race,

disability, age, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion and belief, or sexual orientation.

Overall, the Government does not consider that an extension of the unfair dismissal qualifying period would cause a considerable disparity of impact on any particular group. Furthermore, we believe that extending the qualifying period is a proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff

Proposal 4 – introduce penalties for non-compliance with employment legislation

The direct impact of this will be on non-compliant employers, so this will not have a disproportionate effect on any particular group. If financial penalties act to deter non-compliance with employment law then this should be to the benefit of all employees.

Proposal 5 – review calculation of limits for statutory redundancy pay

This proposal still ensures that statutory limits for redundancy pay are uprated in line with the cost of living. It has been found that the existing system for uprating has led to increases far above increases in inflation. Those who currently earn below the weekly limit (currently £400) receive redundancy pay equivalent to their current weekly salary and this will continue to be the case. Equally employers can choose to pay above these statutory limits.

Data is available to show how redundancy rates (a measure of redundancies relative to the number of employees in the particular group) vary by gender and by age. Chart A2.5 shows variation by gender, although this period covers the recent recession where redundancies disproportionately affected men. As the chart shows, in recent quarters, this gender gap has narrowed. There is some concern that redundancies in the public sector will affect women more. As far as this proposal is concerned it is hard to determine the gender proportions of those likely to be in receipt of statutory redundancy payments in future, but as those payments are not falling, and will still rise in line with the cost of living, a significant impact is not anticipated.

Chart A2.5

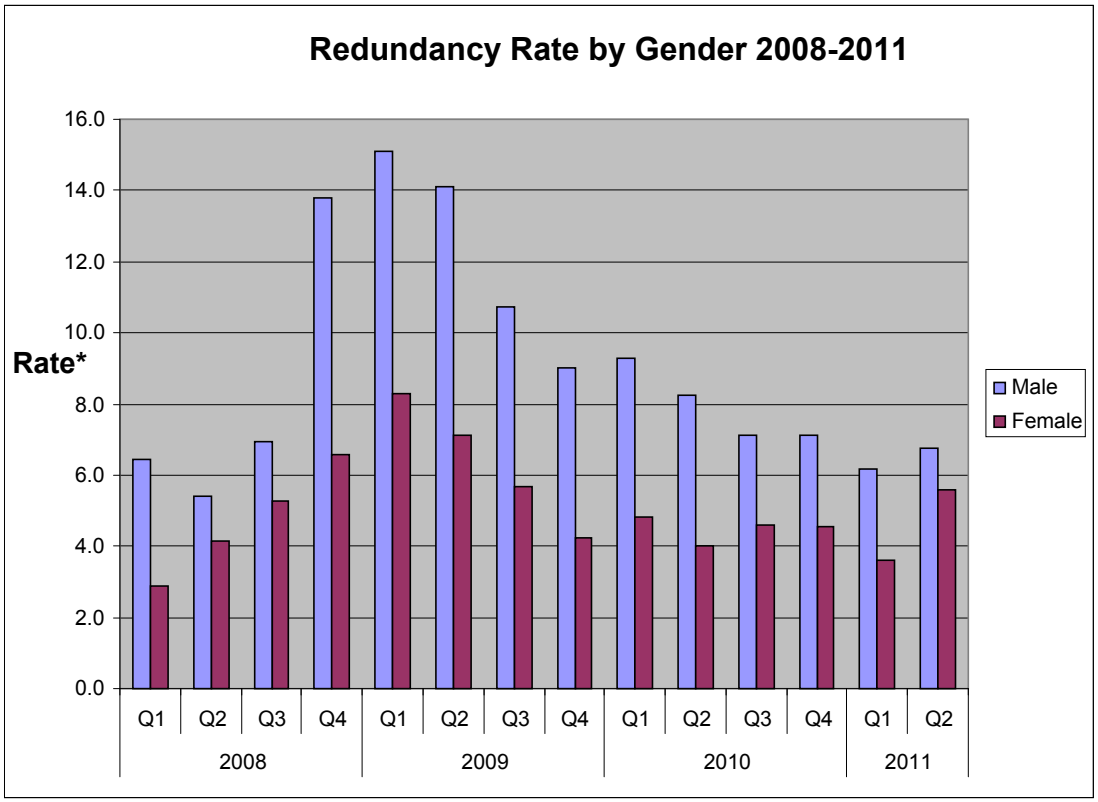
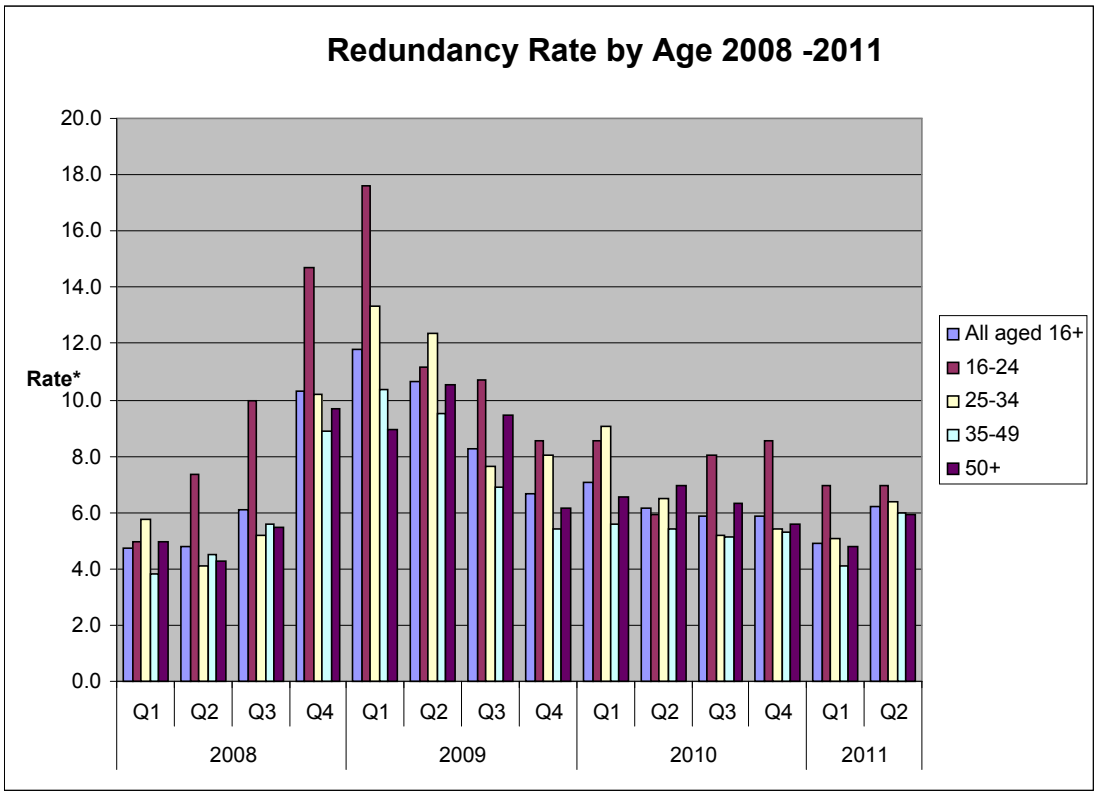


Chart A2.6 shows redundancy rates by age. This shows that often the redundancy rate of 16 – 24 year olds is higher than the average across the working population. However, this does not mean this group will be disproportionately affected by this measure, as this age group is much more likely to have been in a job less than two years, and therefore not qualify for statutory redundancy pay. Within this group it is also more likely that wages would fall below the statutory limit.

Chart A2.6



There are no data available on the proportion of redundancies by ethnicity and as these payments are not falling, and will still rise in line with the cost of living, a significant impact on any particular group is not anticipated.

Annex 3: Equality Impact Assessment (HMCTS Proposals 2A – E)

Introduction

In January 2011 the Department for Business Innovations & Skills (BIS) published a consultation paper, *Resolving Workplace Disputes*[1] (RWD). That document was published alongside an Impact Assessment[2], which included a draft Equality Impact Assessment.

Given the focus of the proposals contained in the consultation paper, many of which would affect employment tribunals which are administered by the Tribunals Service (now HM Courts & Tribunals Service, or HMCTS), the Ministry of Justice (MoJ) worked in partnership with BIS to develop the proposals, and analyse their potential impacts.

The consultation exercise ran from January 2011 to April 2011. On its publication, the consultation paper was sent to 116 stakeholder organisations and individuals, as well as being published on the BIS website. The list of stakeholders to whom the consultation paper was sent was included at Annex D of that consultation paper. It included a broad mix of organisations and individuals, ranging from trade unions, advice agencies, law firms, representative groups for the legal profession and the judiciary, and businesses and their representative bodies. The list also included certain groups focused wholly or mainly on equalities issues[3].

As well as the list of stakeholder to whom a copy of the consultation document was sent, the Government publicised widely the consultation's launch and sought representations from as wide a range of people and organisations as possible.

In addition to inviting written submissions to that consultation paper, BIS and MoJ managed a series of stakeholder seminars and meetings, designed to test the detail of the proposals with experts and others with an interest. BIS further sought to engage interested parties via a range of digital media.

A total of 410 written responses were received[4].

Equality impacts

Following an analysis of the evidence received during the consultation exercise, this document seeks to continue the Equality Impact Assessment (EIA) process through to certain employment tribunal-focused reforms contained in the *Modernising our Tribunals* section of the RWD consultation.

The proposals considered in this document will affect people seeking to resolve their employment dispute through an employment tribunal. This EIA considers how we believe the proposed reforms affect those groups with the 'protected characteristics' defined by the Equality Act 2010, namely:

- age;
- disability;
- gender reassignment;

[1] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation.pdf

[2] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-512-resolving-workplace-disputes-impact-assessment.pdf

[3] Equalities groups to which the consultation paper was sent included the British Dyslexia Association; Employers Forum on Age; Equality & Human Rights Commission; Ethnic Minorities Law Centre; Leonard Cheshire Disability; Low Pay Commission; MIND; Royal Association for Disability Rights; Royal National Institute for the Deaf/Action on Hearing Loss; Royal National Institute for the Blind; Scope; Stonewall; and Stonewall Scotland.

[4] Various equalities-related submissions were made by consultees, notably from advice agencies and representative organisations for employees and workers. More focused written submissions were received from the EHRC, Equality & Diversity Forum, Stonewall, Disability Law Service, Age UK, MIND, and RNIB.

- marriage and civil partnerships;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation.

The purpose of this document is to consider the evidence of the tribunals customer diversity data, together with analysis of the consultation responses and other evidence received to reach an assessment of these proposals in relation to the protected characteristics listed above.

Background

Employment tribunals are administered by HMCTS, an executive agency of the MoJ. Although a consultation on charging fees to tribunals users has been announced, the cost of administering the tribunals currently falls wholly on British taxpayers, through the monies allocated to MoJ and, in turn, HMCTS.

The cost to taxpayers of the employment tribunals system has increased over recent years. Parties (employers and claimants) also bear costs as a result of using the system and (in particular in the case of employers) have recently argued for the system to be streamlined to avoid undue expense. In this context, it is important to ensure that the system can be administered, and that it runs, as efficiently and cost-effectively as possible.

With specific regard to the public sector duty regarding socio-economic inequalities, applicable under section 1 of the Equality Act 2010, it is also important that statutory rules enable the employment tribunals to run as effectively and efficiently as possible. This is in particular because the system manages and (where necessary) determines discrimination and other claims, all of which are of central importance to the individual parties, which involve people with protected characteristics. Maximising efficiency and flexibility will help to ensure that the system is allotting to individual cases an appropriate share of the tribunal's resources, while taking into account the need to allot resources to other cases. Reform, therefore, designed to facilitate the efficient management of all cases (including those dealing with aspects of discrimination) through the system is proposed having due regard to helping to reduce the inequalities of outcome which result from socio-economic disadvantage.

An introduction to employment tribunals, information on the number of claims received and disposed of together with a summary of the administration and hearing process can be found in Appendix A of this document.

The RWD consultation

The RWD consultation had three overarching aims, summarised as:

- to achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides;
- to ensure that, where parties do need to come to an employment tribunal, the process is as swift, user friendly and efficient as possible; and
- to help business feel more confident about hiring people.

As part of the consultation, the Government considered a broad range of proposals on reforming the employment tribunals (ETs) and Employment Appeals Tribunal (EAT). A particular focus was the

case management powers[5] available to judges and tribunals. Responses to the consultation indicated that, over and above the targeted measures proposed, a review of the complete set of rules is now necessary.

Evidence gained through the consultation demonstrated a broad consensus that the existing rules of procedure have become too elaborate, inflexible, voluminous, technical and generally unhelpful for both claimants and respondents – as well as for the administrators and decision makers (judges and lay members) within the tribunals themselves.

In response, the Government will commission a fundamental review of the ET rules of procedure on how claims can be handled.[6] That review, to be led by the judiciary and which will involve other users, will bring forward recommendations for streamlining the tribunal which will help to meet the underlying objectives to improve the efficiency and effectiveness of the ET and EAT. That process will be supported separately by impact assessments and equality impact assessments on any matters of detail proposed. The increased efficiency anticipated will help the system to meet its Equality Act duty, positively promoting the effective resolution/determination of all cases (including those concerned with discrimination) through the system.

In the context of the RWD consultation, there is little to be gained by introducing major rule amendments now that may shortly be undone or altered as a result of the fundamental review. Further, reform at this stage should seek to avoid any risk of introducing more inflexibility and prescription when that is what the fundamental review is designed to strip away. So the majority of the specific proposals included in the RWD consultation, insofar as they impact specifically on the tribunals' constitution, practice and/or procedures, will be deferred and considered in the wider review of rules. But a more limited set of reforms can be implemented without awaiting the review's recommendations because they would contribute to achieving the consultation's overarching aims.

After considering the consultation responses, the Government has concluded that certain proposals would improve cost-efficiency, albeit only as one part of the wider exercise to be delivered under the fundamental review of rules. The limited proposals considered in this document are therefore designed to help facilitate the overarching objective of ensuring a swift, user-friendly and efficient tribunal process. In other words, the intention is to deliver the fair and just consideration of claims at a lower cost to the British taxpayer and to employers.

Other strands of work, both under the fundamental review, and in relation to the proposals considered in respect of reforming early conciliation services provided by Acas and changes to unfair dismissal qualifying periods, will be considered separately. This immediate set of reforms, however, do sit as part of that wider package.

Aims/objectives

In respect of this EIA, therefore, the central objective of the proposals considered is to reduce the cost of administering and running the tribunals and to ensure resources are applied most effectively for the efficient consideration and disposal of claims within the system.

Accordingly, the following proposals are analysed and assessed in this document:

- legislation to enable judges sitting alone (i.e. without wing members) to hear unfair dismissal cases;

[5] Case management powers are those powers available to employment tribunals and Employment Judges to manage proceedings from the point they are commenced to their ultimate conclusion. The powers are drawn from the Employment Tribunal Rules and are intended to allow the tribunal to oversee the running of cases as efficiently and effectively as possible. Examples of case management powers include: marshalling of witnesses and other evidence in order to ready a case for hearing; the summary determination of particular cases or issues within cases because they are, for example, straightforward; and directions as to the timetabling of final hearings.

[6] Specifically, Schedule 1 of the Constitution and Rules Regulations 2004 (SI 2004/1861). http://www.legislation.gov.uk/uksi/2004/1861/schedule/1/made

- legislation to create a presumption that the EAT will be constituted by judges sitting alone, unless a judge directs otherwise;
- a new rule to require witness statements to be taken as read;
- the payment of expenses to parties and witnesses for attending hearings should be withdrawn; and
- increases in the level of costs and deposits that tribunals can order.

Other tribunals-focused proposals will be considered as part of the anticipated 'fundamental review' of employment tribunal rules to be carried forward from the remainder of the RWD consultation by the Department for Business Innovation and Skills.

Equality demographics

HMCTS does not collate and store general diversity data in relation to its individual and identifiable customers and users on its electronic case management systems. Instead, all data collected through returns to diversity monitoring questionnaires appended to tribunal forms is anonymised, which (a) seeks to ensure a higher proportion of individuals respond giving accurate information; and (b) mitigates the risk of data being linked to particular case files and therefore either being disclosed inadvertently or being perceived to have had some degree of influence over any decisions taken on the administration of a case. It is possible to use this data, or samples of it (for example selecting all returns for one month across all local offices) to assess the demographics of the ET user base[7].

In addition, the former Tribunals Services (which HMCTS has replaced) did gather information on diversity data as part of its annual customer satisfaction survey. Together, this represents the best available evidence we have at this time for undertaking our equality impact assessment.

That data is however not without its limitations. For example, response rates are not 100% and there is no proportionate way of quality assuring the data received. For these reasons we have cross-checked our dataset with information from other sources, in particular the Survey of Employment Tribunal Applicants (SETA) series data, published by BIS. This information is compared to statistics available for the wider employment market, in particular through the data from the Labour Force Survey (LFS) series, to assess how representative ET users are relative to the wider British workforce.

Race

Analysis of self-completed diversity monitoring forms received in employment tribunal offices in the month of February 2011 shows that, of the 1,197 forms received, 86% gave their ethnic origin as "white"; 2% as "mixed"; 5% as "Asian" 6% as "Black" and 1% as "Chinese or other". This is very similar to the findings Survey of Employment Tribunals Applicants (SETA)[8] research undertaken by BIS in 2008, and to the Customer Survey data.

The 2008 SETA Survey found that of the 2,020 claimants participating in the survey, 86% gave their ethnic origin as "white"; a slightly lower proportion than in 2003 (90 per cent) and lower than the workforce in general (91 per cent – according to the Labour Force Survey). However, the proportion

[7] An e-Case Management System was being developed to support the administration of ET offices, called CaseFlow. That system was run in pilot form in certain offices from 2009, and it was designed to read and collate data including anonymised diversity questionnaire returns. Following the pilot, that system has now ceased and a reversion has taken place to the former ETHOS e-system. ETHOS is unable to store anonymised diversity returns and so it is only possible to collate diversity data received manually. Rather than having national annual statistics, therefore, smaller representative samples represent the best information practically available.

[8] SETA - The Survey of Employment Tribunal Applications 2008 (http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008.pdf)

was much lower in race discrimination cases, where only eight out of the 57 claimants (15 per cent) were white, with 20 black (34 per cent) and 20 Asian (34 per cent). This is a similar pattern to that found in 2003. The 2008 results also showed 2% of users as "mixed" race; 5% as "Asian" 5% as "Black" and 2% as "Chinese or other".

When asked to describe their ethnic origin 82% of the employment tribunals' general public customers in the Customer Survey (2010) described their ethnic origin as "white"; 4% as "mixed"; 5% as "Asian"; 5% as "Black" 2% as "Chinese"; and 2% as other.

On the basis of these findings, BME users form an estimated 10-18% of the entire ET user-base (with most data indicating that the accurate estimate is 14%[9]), while Labour Force Survey results suggest BME workers/employees make up around 9% of the workforce. Of course, the ET user-base includes claimants in race discrimination cases who are very likely (85%) to come from BME backgrounds[10].

Gender

Customer Survey Results (2010) indicated that 57% of employment tribunal claimants were male, and 43% were female.

BIS has published SETA in 2003 and more recently in 2008. In 2008 three-fifths (60 per cent) of claimants were men. This is similar to the proportion found in 2003 (61 per cent) and somewhat higher than the proportion of the employed workforce as a whole (51 per cent), as given in the Labour Force Survey.

According to SETA (2008), men brought the majority of employment claims across most jurisdictions; however, 82 per cent of sex discrimination cases were brought by women. This pattern closely resembles that found in 2003, where men also brought the majority of employment claims across most jurisdictions. However in 2003, an even higher proportion of sex discrimination cases were brought by women (91 per cent).

Age

The Customer Survey results (2010) indicated that employment tribunal claimants fall within the following age profile: 16-24 (7%); 25-34 (14%); 35-44 (25%); 45-54 (32%); 55-59 (10%); 60-64 (9%); 65-74 (2%); and 75+ (<1%). 53-54% of claimants were therefore aged 45 or over.

47% of respondents on the SETA (2008) claimant survey were 45+, compared to 38% of respondents to the Labour Force Survey. This varied by jurisdiction. The highest proportion of people of 45 and over was in Breach of Contract cases (74%) and the lowest was Wages Act jurisdiction (i.e. unlawful deduction from wages) claimants (35%).

Disability

SETA 2008 results showed that twenty-two per cent of claimants had a long-standing illness, disability or infirmity at the time of their employment claim, which is the same as the proportion among employees in general (22 per cent) and is a slightly higher proportion than in 2003 (18 per cent). Fifteen per cent had a long-standing illness, disability or infirmity that limited their activities in some way, a higher proportion compared with the workforce as a whole (10 per cent) and in 2003 (10 per cent).

[9] Diversity monitoring forms (February 2011) and SETA 2008 suggest 86% of ET users are white, and 14% are BME.

[10] SETA 2008 suggests 85% of race discrimination claimants are BME.

As in 2003, the proportion of claimants who had a long-term disability or limiting long-term disability was, as would be expected, considerably higher in Disability Discrimination Act (DDA) cases (84 per cent and 74 per cent respectively). Looking at primary jurisdiction the proportion of claimants who had a long-term disability was highest in discrimination cases (45 per cent) and lowest in Wages Act cases (10 per cent) and redundancy payment cases (eight per cent).

Religion and belief

SETA 2008 results showed that 46 per cent of claimants regarded themselves as belonging to a religion which is in line with the findings from 2003. Forty per cent of all claimants regarded themselves as Christian. Six per cent of all claimants regarded themselves as belonging to a religion other than Christianity (Muslim 2.4%, Hindu 1.2%, Sikh, Jewish, Buddhist and other answers were all under 1%). This figure was higher among those involved in discrimination cases generally (12%), and higher still (39 per cent, although note that this is from a small sample size of just 57) among those involved in race discrimination cases. Comparisons with the Labour Force Survey cannot be made because of the difference in phrasing of the questions about religion/religious beliefs between the two surveys

Other data

Table A3.4 in the Evidence Base – Statistical Analysis (on page 146 below), provides claimant appeal types and volumes of claims made to employment tribunals in the years 2007 – 2010. This provides information in relation to race, sexual orientation, age, disability and religion and belief discrimination claims accepted, and further underpins our assessments in this document.

In summary, in the last three financial years (2008/9 to 2010/11), the discrimination claims as a sub-set of total jurisdictional complaints made to employment tribunals has ranged between 10% and 13% (or 19% and 30% when equal pay claims are included). Over the financial years 2007/8 to 2009/10, which are recorded in the tables, the volume of claims received by ETs in the discrimination jurisdictions has risen steadily in respect of disability, religion, sexual orientation, age and race, although it has fallen for sex discrimination (not including equal pay).

Discrimination claims are, therefore, a significant proportion of the caseload of employment tribunals, but they amount to a minority when judged against the overall volume of cases coming into the system[11]. Not only discrimination cases involve parties with protected characteristics, as the earlier summary of user demographics shows.

Given the available data, it is not possible to look at employment tribunal claimant characteristics in terms of gender reassignment, marriage and civil partnership, pregnancy and maternity, and sexual orientation.

Summary of general feedback from consultees

An overall summary of consultation responses in relation to the specific proposals considered in this EIA are set out in the main Impact Assessment to which this document is annexed. In this EIA, we will focus on the equalities-specific observations submitted in response to the questions asked, and the evidence offered through wider engagement with equalities-focused stakeholder groups.

Various consultees focused on equality and diversity implications of the proposals generally, although relatively few focused in any detail on the tribunal practice and procedure proposals

[11] There is no comparable data available for the civil courts to assess the extent to which they deal with discrimination-based claims. It is likely, however, that employment tribunals do deal with a larger proportion of such cases relative to their overall caseload.

specifically. Indeed, none of the dedicated equality-focused organisations[12] responded to any of the targeted questions on the five proposals now being taken forward outside the ambit of the proposed fundamental review. Where specific comments are made, those submissions are summarised in relation to the equality impact assessment of those respective proposals.

Some consultees and stakeholders did, however, touch on the tribunal-related proposals, under the 'any other comments' box on the e-questionnaire, or during seminars and meetings held. Those and other general points made included:

- a questioning of the premise on which the need for reform was made. The consultation paper talked about concerns over the number of claims in the system, and in particular the number of weak and vexatious claims. But many consultees, including some of the more equalities-focused organisations, suggested the evidence of such cases being a problem was untested, and they suggested that the Government should be slow to seek to remedy a problem that did not exist. That said, there was no consensus against the need for the system to run efficiently and cost-effectively, and the proposals now being taken forward are being taken forward on that basis;

- some of the equalities groups expressed concern over the use of "blanket" provisions or rules, for example around the imposition of case management sanctions. The basis of the proposals made in this package of reforms, however, rests on judicial discretion being exercised in individual cases according to the facts and circumstances found (including the characteristics of the parties involved). In employment tribunal proceedings, that discretion must ultimately be exercised in accordance with the overriding objective of dealing with cases justly; and

- consultees raised concerns about the effect of proposals to reduce the scope of legal aid in employment (but not in discrimination) matters, combined with an approach that sees greater alignment with procedural practices of the courts in terms of case management powers and sanctions. Consultees suggested that the tribunals were created to provide informal recourse to justice, and that undue formality (together with reduced legal aid support) would damage access to justice. The Government considers that active case management is a necessary feature of any judicial system. With live caseloads increasing, steps must be taken to ensure that all claims brought before the system can be managed to resolution or determination as efficiently and effectively as possible. But employment tribunal proceedings must be conducted in furtherance of the overriding objective, namely of dealing with cases justly. That includes ensuring that parties are on an equal footing; that issues are dealt with in a proportionate, expeditious and fair way; and that expense must be saved. So long as judicial discretion is exercised in furtherance of these principles when case management decisions are made, the Government is satisfied that no unfairness should result, particularly given the right to seek a review or appeal of any decisions made.

Assessment of equalities impacts

(a) Legislation to enable judges sitting alone (i.e. without wing members) to hear unfair dismissal cases;

If an ET case proceeds to a full hearing, the matter will normally be heard by a tribunal of three people: a legally-qualified Employment Judge, and two lay members[13]. The lay members, who are drawn from all areas of the local community, use their employment experience in judging the facts. The three members have an equal voice in all decisions to be made.

[12] See footnote 4, above.

[13] The lay members are appointed by the Secretary of State after consultation with organisations of employees and employers through open competition – Regulation 8(3)(b) and (c) of the Employment Tribunal Rules of Procedure. The members have knowledge and experience in commerce and industry and bring this practical experience to bear in their quasi-judicial role.

In certain circumstances an Employment Judge can sit alone – i.e. without the lay members. Cases about (for example) unpaid wages, holiday or redundancy payments, and interim relief applications, can be heard by an Employment Judge alone, without the need for a full panel. Cases in other jurisdictions, where all parties consent to the judge sitting alone, are also permitted to run in that way.

The provisions which allow an employment judge to sit alone, as and where appropriate, is advantageous as it reduces the cost of running the hearing, allowing the case to be dealt with fairly and at proportionate cost.

There was some anecdotal evidence, tested during the consultation, that lone-judge hearings, compared with those before tripartite panels, resulted in shorter hearings (on the premise that taking a single judge through evidence would be less time consuming than taking a full panel through that evidence); and easier listing arrangements (on the premise that one person's calendar arrangements would be easier to manage than a panel of threes'). However, little evidence obtained during the consultation suggested that these benefits would be significant.

The RWD consultation proposed that Employment Judges should be permitted to sit alone in a wider number of cases, so helping to reduce the cost of administering and running the system; and/or to facilitate the more effective targeting of resources to deal with individual cases with that system. In particular the consultation document proposed that Employment Judges should be permitted to sit alone in cases concerning unfair dismissal.

That is not to say that all unfair dismissal cases would be dealt with by a judge sitting alone. It will be appropriate that in some cases the unfair dismissal claim is dealt with by a full tribunal - for example where the issues are complex, there is a lot of factual evidence to sift, or the parties express a clear desire for a full tribunal.

The existing regulations enable an Employment Judge to direct that a claim which would normally be heard by a judge sitting alone to be heard by a full tribunal and that discretion will continue to be applied if an Employment Judge thinks it is necessary.

Anticipated Equality Impacts

We anticipate that there will be no adverse impact on any of the protected characteristic groups as a result of this proposal.

The proposal to allow judges to sit alone is twinned with a discretion to allow a judge to direct that the hearing should be listed before a fully constituted panel. Therefore, if unfairness may result in any individual case (whether in respect of protected characteristics or otherwise), that unfairness can be avoided once the relevant circumstances have been assessed. The judiciary would be the safeguard in this context. And any judicial decisions made would be subject to any review or appeal.

Although some consultation evidence suggested that ET users with protected characteristics were disproportionately more likely to come from lower income groups, no evidence was found during the consultation exercise to the effect that this proposal would (in particular with the judicial discretion afforded) have a disproportionate impact on some or all of the protected groups. While there was some opposition to the proposal more widely (63% of consultees were opposed to the proposal; while 33% were supportive), the value for money and proportionality case appeared to the Government to be strong.

There is clear evidence that legally qualified judges are able to deal with the factual and legal issues typically found in some or many unfair dismissal proceedings. Unfair dismissal actions often hinge on an assessment of reasonableness – or more accurately on whether the actions of one party could be

said to fall within the band of reasonable responses open to them. Such cases may have some unique characteristics – including around the particular importance they will have for the parties involved. But judges up and down the country hearing civil cases are able to hear – whilst sitting alone – factual evidence and make determinations on the reasonableness or otherwise of the parties' actions. Employment Judges have similar skills and training in this regard.

While some unfair dismissal claims could be more appropriate for determination before a full panel – in particular where there is a significant amount of factual evidence to hear, which the parties involved may feel more confident in the abilities of 'industrial experts' to assess, rather than a lone judge – the discretion to be afforded to Employment Judges to direct a full panel would allow that to happen as and where appropriate.

Accordingly, while the Government accepts that some cases may still require consideration by tripartite panels, it does not accept that all unfair dismissal proceedings necessarily require such treatment. For reasons of systemic flexibility – and with the central aim of removing undue cost from the system – the Government has concluded that it will proceed with this proposal.

The Government also considers that there may be consequential benefits associated with freeing-up lay members to sit on discrimination cases, if there is less demand for them to sit in unfair dismissal proceedings. Tangentially, this may increase the specialisation of members in discrimination matters, and so improve still further the quality of decision making in those cases. This may represent a positive equality impact, although further monitoring of the system, post implementation, will be necessary to understand the extent to which such benefits may flow.

(b) Legislation to create a presumption that the EAT will be constituted by judges sitting alone, unless a judge directs otherwise;

Currently appeals heard in the EAT are dealt with by a tribunal with a composition identical to that of the employment tribunal from which the appeal has come. In other words, an appeal against a judgment or order of an Employment Judge sitting alone will be heard in the EAT by a judge sitting alone; and an appeal heard in the tribunal by a full panel will be heard in the EAT in the same manner.

However, unlike employment tribunals, the EAT has no fact finding remit and deals with appeals on points of law. Indeed, the EAT can *only* deal with appeals that raise a point of law[14].

Judges are the experts in matters of law. The rationale for using members in the employment tribunals – where issues of fact are considered and decided upon – cannot therefore wholly be carried across to the EAT.

The consultation sought views on whether, as a matter of course, cases should be heard in the EAT by a judge sitting alone unless the judge directed otherwise. The majority of consultees supported the proposal, given that appeals are decided on legal rather than factual criteria and judges are competent to deal with questions of law without 'lay' input.

Anticipated Equality Impact

We anticipate that there will be no adverse impact on any of the protected characteristic groups as a result of this proposal. No evidence to the contrary was found during the consultation. However, the

[14] Proceedings before courts and tribunals typically involve questions of *fact* and questions of *law*. Questions of fact relate to ascertaining what actually happened between the parties to the dispute – for example, who said what to whom, and when, and how; or was a particular act committed or not? Questions of law tend to involve the application of specific legal principles to the facts that have been found. In a typical criminal trial, questions of fact would be for the jury, while questions of law would be for the judge. In a civil court, a judge sits alone and determines questions of fact and law. In a tripartite tribunal, the decisions on fact and law are for all three members (judge and lay members) equally – although the value of lay members is often understood as contributing mainly towards the analysis of questions of fact; and judges are expert in answering questions of law, as well as questions of fact.

discretion afforded to judges to sit with panels where they deem it appropriate will ensure that any unintended consequences can be avoided in individual cases.

(c) A new rule to require witness statements to be taken as read;

A feature of most employment tribunal cases, and certainly the vast majority of those that get determined at a hearing, is that evidence needs to be taken and heard from witnesses. This witness 'testimony' helps the tribunal to understand the facts in the case, and ultimately to draw its conclusions about what actually happened between the parties.

In England and Wales, the testimony to be given by witnesses in employment tribunal proceedings is usually written down in a witness statement. This statement sets out the witness's version of events relevant to the case. In Scotland, witness statements are not used, unless (which is rare) directed by an Employment Judge. This follows the wider practice of the Scottish courts.

In England and Wales, copies of the statements are often exchanged between the parties at a relatively early stage of the tribunal process. This helps each party to understand their opponent's case, and to prepare their own. Copies of witness statements are also sent to the tribunal in advance of hearings. At the final hearing of the case the testimony in those witness statements becomes part of the evidence presented by the respective parties before the tribunal.

In the civil courts in England and Wales, the written statements are accepted as the evidence of the witness making the statement – which is called their "evidence in chief". In other words, the statement is "taken as read". The witness can then be asked questions about the statement by the other party (or their own representative).

Historically, in most employment tribunals in England and Wales, the written statements are not treated in this way. Instead, witnesses are asked to read the content of their statement out loud, so that the tribunal can see and hear the evidence presented orally. Cross examination can then follow. In some cases it can take the tribunal many hours to hear the evidence. This can add considerably to the costs of a hearing, not only for the taxpayer, but for the parties involved, especially where they are legally represented.

The consultation document proposed to introduce a rule in the employment tribunals in England and Wales that, unless an Employment Judge directs otherwise, a witness statement would stand as the evidence in chief of the witness concerned and would no longer be read out in its entirety. Under this new rule, an Employment Judge will be able to ask a witness to read all or part of his or her witness statement in circumstances where, for example, he or she thinks that:

- a party or witness would benefit from reading some or all of their statement in advance of being cross examined to settle them into the formality of the hearing; or to enable an unrepresented party to clarify what he or she has said in their witness statement;

- the evidence in chief should be read out to assess the weight and merit of the evidence being given; and/or

- it would assist the tribunal for the witness to give a brief summary of the witness statement

This would reflect the guidance already issued by the EAT, in a formal judgment in the case of *Mehta* v. *Child Support Agency* (2010)[15]. And the practice is already embedded in certain

[15] Mehta v. Child Support Agency (2010) UKEAT/0127/10/CEA – http://www.employmentappeals.gov.uk/Public/Upload/10_0127fhwwSBCEA.doc (see paragraph 16 in particular).

employment tribunal regions. Therefore the new rule proposed would be one designed to ensure consistency, in line with judicial guidance already given, rather than any innovation.

Consultation responses were broadly in favour of the proposal, with just under six out of ten supporting the proposal and just under four in ten opposing it.

Anticipated Equality Impacts

We anticipate that there will be no adverse impact on any of the protected characteristic groups as a result of this proposal.

As was recognised by equalities-focused stakeholders and consultees, the judicial discretion allowed will mitigate or avoid any unfair consequences in any individual cases. This proposal also has the potential to promote equality of opportunity for certain types of disability – for example, witnesses or parties with communication, language and/or reading impairments (like but not limited to dyslexia) would not be put under the stress of having to read a document aloud in a public and formal setting. While Employment Judges and tribunal panels currently have discretion to allow this, the greater consistency the new rule is designed to achieve will mean that such benefits can be accrued more routinely. As such, the process should be less daunting where potential such witnesses are looking at what attending a hearing to give evidence, because of the default nature of the new rule.

One equality-focused consultee did express concern at the lack of any proposed guidance or rules specifically in relation to parties with protected characteristics. While the consultee accepted that judicial discretion would, as it does now, pervade, the concern was about how that discretion would in practice be exercised.

As the wider calls for a fundamental review of employment tribunal rules shows, there is already a perception that the current procedural code governing ET proceedings is unduly elaborate and inflexible. Prescriptive rules (which are designed to protect some, but which all need to negotiate and learn if using the system) are not seen as the answer. However, the judiciary already acknowledges the point about the need to take into account protected characteristics when exercising discretion, across the justice system and in particular in the employment jurisdictions.

Certain guidance on such matters to the courts and tribunals judiciary is already published[16], so as to ensure as great transparency as possible. And specific, targeted training for all judges and members looks at issues including awareness of equality and diversity/protected characteristics (singularly as well as combined). Structures are in place to ensure that decisions made in ETs (as well as all other courts and tribunals) are fair in all the circumstances of the case. In any event, review and appeal mechanisms are available, if any party feels that injustice has resulted.

(d) Withdrawing the State-funded payment of <u>expenses to parties and witnesses</u> for attending hearings

Under the framework legislation, Secretary of State is currently empowered to make payments to various people as a consequence of running employment tribunals. As well as making payments to Employment Judges and to lay members by way of remuneration, the Secretary of State is also permitted (although not obliged) to make payments to parties and/or witnesses, for example for their attendance at ETs[17]. In practice, such payments are made by HMCTS to reimburse certain travel costs to and from hearings, for loss of earnings and for certain other costs directly associated with attendance (e.g. child care).

[16] See the guidance published by the Judicial College at: http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Fairness-in-Courts-and-Tribunals

[17] Section 5(3) of the Employment Tribunals Act 1996. Full guidance in respect of the allowances and expenses that can currently be paid are available at http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/guidance-booklets/ExpensesAllowances.pdf.

Certain other "expert" costs can also be paid by the tribunal such as interpreters, medical expert and equal pay assessors. These payments do not exist in the EAT. Nor are they made in any civil court, nor in most other tribunals (and no 'party versus party' tribunals, i.e. tribunals other than those which consider the lawfulness of State decisions).

As part of the RWD consultation, the Government consulted on the proposal to abandon the payment of expenses to ET parties and witnesses. The proposal was made on the basis that (1) it was right that users, rather than solely taxpayers, should start to bear more of the costs of administering the system; and (2) it was fair to treat courts and tribunals users consistently, and there being no other party v. party jurisdiction where State-funded expenses were offered, the employment tribunal should for reasons of fairness adopt that common position.

However, it is accepted that a disproportionate number of users in ETs making disability discrimination claims, relative to the number of employees in the wider labour force with a disability, means that medical experts required by the tribunal (most usually in those discrimination cases) should continue to have their expenses paid. It is also accepted that Independent Experts in equal pay cases should continue to be paid by HMCTS for broadly the same reasons.

More widely, and consistent with the practice in civil courts across Great Britain, parties and witnesses would be expected to bear their own expenses in connection with attending ET hearings. However, again consistent with the civil courts system, if a formal witness summons (or equivalent) is issued, the party requesting an order to compel the attendance of a witness must undertake to offer or pay the reasonable expenses of the witness to appear at a hearing[18].

As a consequence of ending the State-funded offer of payments to parties and witnesses, new rules would therefore provide powers for ETs to require parties seeking an order to compel a witness's attendance to offer or pay that witness:

- a sum sufficient to cover the expenses of the witness travelling to and from the hearing; and/or
- a sum by way of compensation for loss of time.

Unless an order was made in that regard, the witness concerned should bear his/her own expenses. But no sanctions exist insofar as any witness (i.e. not a party) is concerned for failure to attend the tribunal unless expenses are paid.

HMCTS guidance would help parties and witnesses to understand what sufficient and reasonable sums may fall due in any instances that an Employment Judge did direct a witness to attend and did also direct a party to offer and pay such sums. That guidance would be in line with such guidance that is issued from time to time in the wider courts and tribunals system.

Anticipated Equality Impacts

Some equalities-focused consultees and stakeholders highlighted that users (parties or witnesses) with protected characteristics are more likely to be less well off, and therefore more reliant on the contributions currently made by the State to expenses incurred.

To consider impacts, and equality impacts, it is necessary to put this proposal in perspective. In 2009/10, the payment of expenses to claimants, respondents and their witnesses amounted to almost £280k in nominal prices. No data on the number of witnesses called by parties is recorded

[18] In the English and Welsh courts context, this is provided for under Part 34(7) of the Civil Procedure Rules 1997 (http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part34.htm#IDA0GSIC).

by tribunals[19]. However, we know that over the last three complete financial years there have been around 3.5k applications from parties and witnesses annually for contributions towards their expenses[20]; and that there have around 25k cases disposed of at a final hearing[21]. We therefore estimate a maximum of 10-15% of hearings are likely to be affected – i.e. the vast majority of claimants, respondents and witnesses do not claim any expenses as things currently stand.

Parties affected would be new parties (i.e. those bringing new proceedings, after implementation of this change and who have previously not benefited from such payments). Such parties, consistent with similar courts and tribunal users, would have to bear the costs of any travel expenses for themselves and, as and where required by an Employment Judge, any witnesses they call to give evidence.

Although affecting only a small number of parties, these financial costs could be significant for some parties. This reflects the cost of providing the service, which is currently borne by the taxpayer, not the user. Some parties, especially those representing themselves, could experience a substantial increase in costs as a result of this proposal being implemented. And although the ET user community is broadly in line with the demographics of the wider labour force for most protected groups, as consultation responses suggests, disproportionate impact on the less well off could amount to disproportionate impacts on groups with protected characteristics.

This is why the proposal affords an Employment Judge the discretion to require witness costs to be borne by the party calling the witness, and to award such costs against the eventual losing party.

If a party pays witness expenses and subsequently wins the case, the Employment Judge would have the discretionary power to order that the losing party should reimburse the winning party any witness expenses paid. Such a power to award costs against a party is exercised by an Employment Judge or tribunal, who/which may (and in practice invariably does) take into account the ability of the party to pay the award[22].

The Government concludes that the decision to withdraw the payment of expenses to parties and witnesses attending employment hearings does not directly impact upon any equality group disproportionately:

- first, the impact here is on a relatively small number of users, who are broadly representative of the wider labour force; and

- second, those who would be asked to bear their own costs or to pay the costs of their witnesses would only be so directed if a judge or tribunal (including after being given the opportunity to assess ability to pay) ruled that it was appropriate.

In reaching this conclusion, the Government considered the fact that future parties and witnesses in employment tribunal cases will be treated consistently, relative to users in other courts and similar

[19] Some of the basic case data HMCTS receive is entered on to the electronic case management system – 'Ethos' – by administrative staff. Ethos is used to progress cases through the tribunal process. It is also the system utilised to extract statistical data. As a general rule, HMCTS enter information onto the Ethos system where there is a business benefit in doing so (e.g. there is a need to monitor a particular aspect of the tribunals' workload). To do otherwise would be inefficient: data entry is an administrative burden which should only be undertaken where the business (or its customers) will benefit. There has been no previous business benefit in recording the number of witnesses who attend ET hearings.

[20] According to internal management information, in 2008/9 there were 3336 applications for expenses; in 2009/10 there were 3460 applications ; and in 2010/11 there were 3500 applications.

[21] According to published statistics, the number of jurisdictional complaints disposed of by way of final (judicial) hearing was 37,162 in 2008/9, 42,800 in 2009/10, and 49,300 in 2010/11. Applying the jurisdictional mix ratios for each given year (i.e. the average number of jurisdictional complaints per ET case – 1.7, 1.8 and 1.75 respectively), we estimate that the number of cases that came to final hearing was 20,600 (08/09), 25,200 (09/10) and 28,200 (10/11).

[22] See in particular Rule 41(2) which permits regard to be had to the paying party's ability to pay when considering whether to make a costs order, and/or how much that order should be.

tribunals – many of whom also have sensitive issues needing to be resolved in those fora and who possess similar characteristics as users in this jurisdiction.

Although there would be no sanction if a witness was not paid expenses and did not attend the Tribunal, some witnesses may attend the hearing to give evidence without receiving any compensation from the party that called them. This is what happens in the majority of instances now, when a witness is called to give evidence and does not claim expenses from HMCTS.

(e) Increases in the level of costs and deposits that tribunals can order;

(1) Costs

In the employment tribunals, applications for costs (in Scotland, expenses) can be made at any time during the proceedings. There are three types of award – a costs award, a preparation time order and a wasted costs order:

- a **costs award** covers the "fees, charges, disbursements or expenses incurred by or on behalf of a party, in relation to the proceedings." A costs order can only be made in favour of a party who was legally represented at the hearing or, if the proceedings are determined without a hearing, was legally represented at the time the proceedings were determined;

- a **preparation time order** can be made in favour of a party who has not been legally represented at a hearing or, where there has been no hearing, when the case was determined; and

- a **wasted costs order** can be made against a representative as a result of the representative's conduct. In making a wasted costs order, a tribunal or employment judge, may order a party's representative to meet the whole or part of any wasted costs of any *party* (although not the *tribunal* itself) including costs already paid to the representative by his or her own client.

The maximum sum that tribunals have the power to award under the first two types of order is currently £10,000. There is currently no cap in respect of wasted costs orders.

Where costs are likely to exceed that cap, and an employment tribunal wants to ensure such costs are awarded, it is currently necessary to transfer the matter to a civil court for consideration. Such transfers add a procedural step, requiring a new judge in a new court to assess the issues afresh. This costs the system, and the parties who have to engage with it, time and money.

It is accepted that some 'cap' on the employment tribunals' own powers is appropriate. When costs awards grow in size, the complexity of the underlying legal principles needing to be applied also tends to increase – so a specialist costs judge (or a judge more experienced at dealing with larger costs claims) becomes more important if the claim is to be dealt with efficiently and fairly. But the £10,000 level currently in place is considered to be too low. Employment Judges have experience of dealing with complex litigation and have powers to make sizable awards. It was also thought that there was no reason to justify why Employment Judges would be incompetent in the assessment of costs between £10k and £20k. So, while no proposal sought to remove a cap altogether, the BIS consultation did propose to double the current cap on costs awards made in employment tribunals themselves (i.e. instead of requiring transfer to the civil courts) from £10,000 to £20,000.

(2) Deposit Orders

If a judge considers that the contentions put forward by any party in relation to a relevant matter have little reasonable prospect of success he or she may make an order requiring the party to pay

a deposit of an amount not exceeding £500 as a condition of continuing to take part in the proceedings. Before making such an order, a judge must take reasonable steps to ascertain the ability of the party against whom the order would be made to comply with it and, in determining the size of any deposit, a judge is obliged to take into account any information ascertained about the party's ability to pay. Currently, a deposit order can only be made at a Pre-Hearing Review (PHR).

The deposit paid by a party is fully refundable at the end of the substantive hearing except where the tribunal goes on to decide against that party at a full hearing. If the tribunal makes no other award of costs against him or her, it must go on to consider whether to award costs or expenses on the basis that the party conducting the proceedings acted unreasonably in persisting in having the matter determined by a tribunal. It can only do so where it is of the opinion that the reasons that caused it to find against the party at the full hearing were substantially the same as the Employment Judge's reasons for taking the view at the PHR that the party had little reasonable prospect of success.

The BIS consultation initially proposed various reforms in respect of the tribunals' powers to order deposits. Most of the detail behind the proposals will be considered as part of the fundamental review of procedural rules. They will not be taken forward here. However, the consultation also proposed that the maximum level of the deposit order that can be made, be increased from £500 to £1000.

Analysis

Consultation responses broadly supported these two 'cap' measures: with 54% in favour (41% opposed) in respect of deposit orders and 56% in favour (43% opposed) in respect of costs.

Although the fundamental review is anticipated to meet the consultation's overarching objectives more fully, this more limited (combined) proposal is unlikely to affect a large number of tribunal users; and those that it does affect will have been found by a judge (who has considered all the circumstances of the case, including ability to pay and access to justice) to have merited the order/award. That said, the increase in the caps increases the flexibility within the system for judges and tribunals to manage cases and as such, if only in a small number of cases, there is benefit to be gained.

In terms of impacts for users, we assess the impact on claimants and respondents to be very low. The number of cases likely to be affected is small. There is no evidence to suggest that tribunals/judges will exercise their powers any differently in cases more widely. And in any event, the tribunal/judge making the decision will be able (indeed, required in the case of Deposit orders) to assess the paying party's ability to meet the terms of the order made. That safeguard will protect parties against orders that would otherwise inhibit access to justice.

As indicated in the table below, the average deposit awards were below the current £500 limit. Over the period 2007 to 2010, there was an average of circa 80 deposit orders at the £500 limit. The new limit would increase to £1,000, but we do not expect that the average value of deposit orders would rise, except to the extent that the circa 80 deposit orders annually made at the current £500 level may (in some or all instances) rise to anything up to £1000.

Table A3.1				
	Total number of deposits ordered at pre-hearing review			
Year	All	Claimants	Respondents	Average value
2007	491	418	73	£220
2008	353	311	42	£255
2009	416	365	51	£250
2010	335	315	20	£255
Source: ETHOS, Employment Tribunal database (nominal prices)				

Insofar as costs awards are concerned, losing parties (claimants or respondents) who are ordered to pay more in costs would face costs wherever Employment judges exercise those new powers against them. In the employment tribunal itself, claimants/respondents could be ordered to pay up to £20,000 in costs, compared to the current level of £10,000. If the winning party incurs costs over £10,000, the losing party could face an additional cost of reimbursing the losing party. However, it is currently possible that more than £10,000 can be awarded in costs, though these costs would have to be awarded by a civil court rather than an ET/EAT. Therefore we do not consider that this proposal would cause a significant increase in the volume of costs awards however the average cost award may rise as the ET or EAT will be able to award up to £20,000 instead of the current £10,000 limit.

Table A3.2				
	2008/09		2009/10	
	Volume	Average value	Volume	Average value
Costs awards	382	£2,446	436	£2,430
Preparation time orders	46	£609	57	£1,174
Wasted costs orders	31	£1,889	49	£3,721
TOTAL	**459**	**£2,224**	**542**	**£2,415**
Source: ETHOS, Employment Tribunal database (nominal prices)				

As an additional safeguard, over and above those set out above, claimants and/or respondents may make appeals and/or Review applications. In doing so, those parties would incur cost in preparing and pursuing those applications. But given the number of parties likely to be affected, such costs will be small when looking at the sector overall. And given the safeguards in place, and the costs of the system more generally, it is not considered that such costs would be disproportionate for those small number of parties affected

Anticipated Equality Impacts

We anticipate that there will be no adverse impact on any of the protected characteristic groups as a result of this proposal, given the judicial discretion inherent in the powers. No evidence to the contrary was found during the consultation – although certain equalities-focused consultees did express concern that those with some protected characteristics could be impacted disproportionately. However, the power to order deposits or award costs will rest with Employment Judges and tribunal panels, who will have to assess ability to pay (among other things) in advance of making orders. This will ensure that any unintended consequences can be avoided in individual cases.

Evidence Base – Statistical analysis

Table A3.3							
		2007/08		**2008/09**		**2009/10**	
Total claims disposed		81,600		92,000		112,400	
JURISDICTION MIX OF TOTAL CLAIMS DISPOSED Apr 09 to Mar 10							
Nature of claim	Jurisdictions disposed	Withdrawn		ACAS conciliated settlements		Struck out (not at a hearing)	
	No.	No.	%	No.	%	No.	%
Unfair dismissal	50,900	12,200	24	22,400	44	3,900	8
Wages Act	35,200	11,100	31	9,300	26	3,200	9
Breach of contract	32,100	7,100	22	10,400	32	2,200	7
Redundancy pay	12,400	2,700	22	2,300	19	930	8
Sex discrimination	17,500	10,100	57	3,600	20	2,700	15
Race discrimination	4,500	1,400	30	1,700	38	330	7
Disability discrimination	6,100	2,000	32	2,800	45	430	7
Religious belief discrimination	760	250	32	250	33	83	11
Sexual orientation discrimination	540	160	30	210	40	49	9
Age discrimination	3,900	1,500	39	1,500	39	270	7
Working time	20,500	4,500	22	6,700	33	1,300	6
Equal pay	20,100	14,300	71	2,300	11	3,100	16
National minimum wage	410	100	25	160	37	25	6
Others	21,900	5,600	25	6,900	31	1,500	7
All	**227,000**	**73,000**	**32**	**70,600**	**31**	**20,100**	**9**

Table A3.4: Employment tribunal cases disposed of and outcomes by jurisdiction in 2009-2010

Nature of claim	Successful at tribunal		Dismissed at a preliminary hearing		Unsuccessful at hearing		Default judgment	
	No.	%	No.	%	No.	%	No.	%
Unfair dismissal	5,200	10	1,200	2	4,500	9	1,500	3
Wages Act	5,000	14	860	2	1,900	5	3,800	11
Breach of contract	5,800	18	520	2	2,300	7	3,700	12
Redundancy pay	3,000	24	140	1	690	6	2,600	21
Sex	340	2	180	1	560	3	110	1

discrimination								
Race discrimination	130	3	240	5	700	15	60	1
Disability discrimination	170	3	170	3	530	9	60	1
Religious belief discrimination	19	2	64	8	89	12	9	1
Sexual orientation discrimination	27	5	26	5	47	9	10	2
Age discrimination	95	2	110	3	330	9	31	1
Working time	3,600	18	300	1	1,200	6	2,900	14
Equal pay	200	1	110	1	77	0	10	0
National minimum wage	49	12	10	2	47	11	26	6
Others	4,900	22	670	3	1,300	6	1,100	5
	28,500	**13**	**4,600**	**2**	**14,300**	**6**	**16,000**	**7**

The table below shows how the manner of disposal of 1848 appeals disposed of by the EAT in 2009-10.

Table A3.5		
Nature of disposal	**Numbers of cases**	**% of claims disposed**
Rejected as having no reasonable prospect of success	839	45%
Disposed of at hearing	459	25%
Withdrawn	284	15%
Rejected as being out of time	244	13%
Struck out because of failure to comply with orders	22	1%

Table A3.6: Claims Accepted by employment tribunals from April 2007 to March 2010[23]

	2007-08	2008-09	2009-10
Total Claims Accepted [1]	189,300	151,000	236,100
Singles	..	62,400	71,300
Multiples	..	88,700	164,800
NATURE OF CLAIM	2007-08	2008-09	2009-10
Unfair dismissal	40,900	52,700	57,400
Unauthorised deductions (Formerly Wages Act)	34,600	33,800	75,500
Breach of contract	25,100	32,800	42,400
Sex discrimination	26,900	18,600	18,200
Working Time Directive [2]	55,700	24,000	95,200
Redundancy pay	7,300	10,800	19,000
Disability discrimination	5,800	6,600	7,500
Redundancy – failure to inform and consult	4,500	11,400	7,500
Equal pay	62,700	45,700	37,400
Race discrimination	4,100	5,000	5,700
Written statement of terms and conditions	5,000	3,900	4,700
Written statement of reasons for dismissal	1,100	1,100	1,100
Written pay statement	1100	1,100	1,400
Transfer of an undertaking - failure to inform and consult	1,400	1,300	1,800
Suffer a detriment / unfair dismissal - pregnancy[6]	1,600	1,800	1,900
Part Time Workers Regulations	600	660	530
National minimum wage	430	600	500
Discrimination on grounds of Religion or Belief	710	830	1000
Discrimination on grounds of Sexual Orientation	580	600	710
Age Discrimination	2900	3,800	5,200
Others	13,900	9,300	8,100
Total	297,000	266,500	392,800

[23] The “Employment Tribunal and EAT Statistics 2009/10” publication (http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/tribs-et-eat-annual-stats-april09-march10.pdf)

Annex 4: Specific Impact Tests

Competition Assessment

We have fully considered the questions posed in The Office of Fair Trading competition assessment test[24] and concluded that none of the proposals outlined in this impact assessment are likely to hinder the number or range of suppliers or the ability and incentive for businesses to compete.

An issue was raised about whether Acas's public provision of early conciliation (proposal one) affected the market for mediation. However, this proposal will mostly shift existing employment tribunal claims into being resolved earlier. In addition, much of the work of workplace mediators addresses cases that would not result in employment tribunal cases anyway.

Table A4.1. Competition assessment.

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

Source: BIS

Small firms impact test

Any enterprise with employees could potentially have a dispute with one of its employees and end up at an employment tribunal. The proposals set out in the consultation document should benefit employers by streamlining and simplifying the employment tribunal system and so will apply to all enterprises that employ staff.

The SETA (2008) employers' survey notes that 36 per cent of cases related to organisations with less than 50 employees. BIS SME statistics show that across the whole economy, 37 per cent of employment is in enterprises with less than 50 employees. However, the costs and implications to the business of having to respond to an employment tribunal case are harder to bear for smaller businesses.

The proposals should therefore disproportionately benefit small businesses as they are less likely to have to respond to an employment tribunal claim. Micro-businesses will benefit even more, given how damaging an employment tribunal claim would be to them.

Proposal seven, increasing the length of the unfair dismissal qualifying period, imposes minimal familiarisation costs on all businesses, and therefore also on micro-businesses. However, as the measure means a net reduction in burdens to micro-businesses, we are seeking a micro-business exemption waiver.

Environmental Impacts

These proposals considered together will not have a significant impact on the greenhouse gas emissions or the environment more widely as they relate to resolution of disputes between employees and employers via Acas and employment tribunals.

[24] http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft876.pdf

Social Impacts

Health and well-being: These proposals may have a minor effect on health and well-being by reducing the stress involved with pursuing a claim relating to a workplace dispute as fewer individuals are likely to resolve their dispute this way.

Human rights: The proposals taken forward have been considered against the human rights act and we believe they are compatible.

Justice System: These proposals taken together are expected to reduce the level of business for HMCTS by reducing the level of employment tribunal claims. The main way that this would be achieved is by encouraging earlier dispute resolution, and offering early conciliation in all cases before they enter the tribunal system. The proposals involve some rule changes to employment tribunal processes but have been developed jointly between HMCTS, Ministry of Justice and BIS.

Rural Proofing: We do not consider that these proposals will have any specific impact on rural communities.

Sustainable Development

These proposals support the principles of sustainable development by improving the resolution of workplace disputes whilst reducing the overall costs of the system to all parties.

Annex 5: estimating costs of employment tribunals to the parties involved

This annex sets out in more detail how unit cost estimates for the claimant, employer and exchequer are calculated. Table A5.1 summarises these costs.

Table A5.1: Summary of costs incurred throughout employment tribunal process, by outcome

	Employment Tribunal Hearing	Individual Conciliation	Average across ET claim outcome
Employer	£4,200	£3,300	£3,700
Claimant	£1,500	£1,100	£1,300
Exchequer	c£4,000	£640	

Source: BIS estimates from Acas, HMCTS, SETA and ASHE data in 2011 prices. Figures are rounded.

These costs represent the total costs incurred by the employer, claimant or exchequer through the whole process. The first column shows these unit costs where the claim ends at an employment tribunal, the second where it ends with individual conciliation and the third is an average across all ET outcomes.

Claimant

Claimant costs incurred from completing an employment tribunal application form onwards consist of:

- Communication costs (for example telephone calls, correspondence)
- Travel (to hearings or to meet with advisers)
- Loss of earnings
- Advice and representation

SETA (2008) asked employment tribunal claimants whether they had incurred these costs. Table A5.2 shows the proportion of respondents that incurred these costs, with Table A5.3 demonstrating this for legal advice and representation costs.

Table A5.2. Proportions of people that incur travel and communication costs and suffer a loss of earnings

Communication costs	37%
Loss of earnings	31%
Travel costs	26%

Source: BIS estimates based on SETA 2008 Table 10.1

Table A5.3. Claimants' and Employers' survey: Free advice and representation

	Claimant	Employer	All
Whether paid for advice			
Paid for all	26%	69%	49%
Paid for some	7%	8%	8%
Paid (paid for all + paid for some)	33%	77%	57%
All free	66%	21%	42%
Don't know	1%	3%	2%
Didn't pay (all free + don't know)	67%	23%	44%

Source: BIS estimates based on SETA 2008 **Table 5.20**

For those that do pay, SETA yields estimates for the amount paid which are summarised within SETA Table 10.2. In constructing unit cost estimates, these amounts are adjusted to account for those that do not pay, and hence to provide a figure averaged across all claimants. Furthermore, these figures are adjusted to account for RPI inflation between the survey (2008) and 2011.

Table A5.4 Summary of Costs to a claimant from an employment tribunal

	Tribunal application successful / reached tribunal	All	Acas Settled
Time spent on case	£633	£638	£570
Costs for advice and representation post ET1	£857	£685	£501
Costs incurred for travel, communication	£13	£18	£18
Total cost	£1,503	£1,342	£1,090
Total cost rounded to nearest £100	£1,500	£1,300	£1,100

Time spent is multiplied by the median wage for all employees. Table A5.5 below sets out the relevant wages. For later consideration of employer costs non-wage labour costs are added at 24 per cent so these are demonstrated here but not incorporated into claimant costs.

Table A5.5 Hourly pay (excluding overtime) in the UK, 2010

	SOC Code	Median	Median, including non-wage labour costs at 24%
All employees		£11.09	£13.75
Personnel, training and industrial relations managers	1135	£21.66	£26.86
Corporate managers and senior officials	111	£37.63	£46.66
Directors	1,112	£48.85	£60.57

Source: ASHE 2010 **Table 14.6a**

Employer

Employers face costs in terms of time spent by a variety of staff in an organisation on a case. They also face advice and representation costs. Table A5.3 illustrates using SETA findings the proportion of employers who paid advice and representation costs in responding to an employment tribunal claim.

SETA (2008) also establishes the median amounts spent on advice and representation (SETA table 5.24) and the median time spent by different staff members (SETA tables 10.5 and 10.6). The estimates below multiply time spent (this is given in days, but SETA assumes 8 working hours in the day) by the wage rate of the relevant staff (given in Table A5.5). In constructing unit cost estimates, these amounts are adjusted to account for those that do not pay for advice and representation, and hence to provide a figure averaged across all employers. Furthermore, these figures are adjusted to account for RPI inflation between the survey (2008) and 2011.

Table A5.6 Summary of Costs to an employer from an employment tribunal application

	Tribunal application sucessful / reached tribunal	All	Acas Settled
Time spent on case Directors and senior staff	£1,535	£1,151	£1,151
Time spent on case (other staff)	£442	£442	£442
Costs for advice and representation post ET1	£2,182	£2,101	£1,681
Total cost	£4,158	£3,694	£3,274
Total cost rounded to nearest £100	£4,200	£3,700	£3,300

Exchequer

In the current system, costs are incurred by Acas in offering individual conciliation, and by HM Courts and Tribunals Service when claims are received and for the different stages within the process.

Table A5.7 below displays HMCTS estimates of unit costs for various stages of the employment tribunal process.

Table A5.7: Unit costs (£) of stages in the employment tribunal process

Track	Short	Standard	Open
Receipt and allocation	450	410	420
Hearing	1570	4120	6170
Mediation		2610	
Default Judgements	360	360	360
Dismissal after settlement	180	240	210
Written Reasons	470	1050	1380
Review	770	1550	1830

Source: HMCTS/MoJ, expressed in 2011 prices

To look at an average unit cost for a case which goes to a hearing we sum the receipt and allocation costs for each track, and then taking the distribution of tracks construct a weighted average of these costs, giving a unit cost of £4,450, but given differences in track distributions between HMCTS and Acas data we record this as around £4,000 as illustrated in Table A5.8 below.

Table A5.8. Employment Tribunal Unit Costs

	Receipt and allocation	**Hearing**	**Total**	**% of cases in each track**	**Average receipt and allocation cost across track**	**Average total cost across track**
Short	£450	£1,572	£2,022	28%		
Standard	£408	£4,117	£4,525	45%	£428	c£4,000
Open	£424	£6,166	£6,590	28%		

Source: HMCTS/MoJ based on 2009/10 data but expressed as 2011 prices. Track distribution represents Acas figures, hence approximate average total is given

For cases that go to individual conciliation, there are additional costs to consider in the provision of conciliation. During 10/11, 93,849 gross ET1 conciliation cases were cleared by Acas, excluding LA equal pay claims. The unit cost per cleared ET1 conciliation case was (

£19,835,201/ 93,849) = **£211.35.** Adding this unit cost to that faced by HMCTS for receipt and allocation of a claim (£428) gives a unit cost of **£639.35 rounded to £640.**

Annex 6: List of jurisdictions in which an Employment Judge can sit alone at present

- Claim of an employee for breach of contract of employment. Employer's counter-claim
- Application by an employee that an employer has failed to pay a protected award as ordered by a tribunal
- Failure to provide a written statement of terms and conditions and any subsequent changes to those terms
- Failure to provide a guarantee payment
- Failure to pay remuneration whilst suspended for medical reasons
- Failure of an employer to comply with an award by a tribunal following a finding that the employer had previously failed to consult about a proposed transfer of an undertaking
- Failure to provide a written pay statement or an adequate pay statement
- Application for interim relief
- Failure by the BIS Secretary of State to make an insolvency payment in lieu of wages and/or redundancy
- Appeal against an enforcement or penalty notice issued by HM Revenue & Customs
- Suffer a detriment and/or dismissal related to failure to pay the minimum wage or allow access to records (EJ sits alone only if claim relates to access to records)
- Failure of the employer to comply with a certificate of exemption or to deduct funds from employees pay in order to contribute to a trade union political fund
- Failure of the employer to prevent unauthorised or excessive deductions in the form of union subscriptions
- Failure of the BIS Secretary of State to pay unpaid contributions to a pensions scheme following an application for payment to be made
- Failure to pay a redundancy payment
- Failure of the Secretary of State to pay a redundancy payment following an application to the National Insurance fund
- Failure of employer to pay or unauthorised deductions have been made
- Complaint by a worker that employer has failed to allow them to take or to pay them for statutory annual leave entitlement

Annex 7: Summary of allowances payable to parties and witnesses at present

Table A7.1	
Type of Allowance	*Rate*
Motor Mileage Allowance: All cars and motorcycles	 15p per mile
Overnight expenses (bed, breakfast and evening meal): (a) inner London (b) elsewhere (c) with relatives/friends	 £81* £71* £21**
Reimbursement for loss of earnings: Maximum daily rate	 £45
Registered child/adult carer fees: Maximum hourly rate	 £5.35
Professional Interpreter fees: Foreign language interpreters Hourly rate	 £25-£30
Medical Professionals: Maximum rate	 No limit***

* Upper limit on production of receipts
** Flat rate
*** Indicative rates exist as a guide to reasonable charges

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 11/1381