GOVERNMENT RESPONSE TO THE PUBLIC CONSULTATION

The Blacklisting of Trade Unionists: Revised Draft Regulations

DECEMBER 2009

The Blacklisting of Trade Unionists: Revised Draft Regulations

GOVERNMENT RESPONSE TO THE PUBLIC CONSULTATION

Executive Summary

The Government is grateful to the fifty-two respondents for their contribution to this consultation. Whilst there were significant differences of view on the content of the draft regulations, there was a common understanding across all interest groups that the blacklisting of trade unionists was a reprehensible activity which had no place in modern employment relations.

In general, employer respondents supported the case, albeit with some reservations, for the introduction of regulations to outlaw blacklisting. They had relatively few comments on the content of the regulations themselves, and most of their detailed observations concerned the need to ensure that the necessary vetting of workers was not inadvertently captured by the regulations. To that end, they proposed various new exemptions from the scope of the prohibition on blacklisting which the regulations defined.

Trade unions and most individual respondents wanted regulations to be introduced, and thought they should have been in place many years ago. However, they were critical of the content of the draft regulations which they thought were insufficiently robust to deter blacklisting and failed to recognise the seriousness of blacklisting and the damage the practice had inflicted on many individuals. They also viewed blacklisting as a breach of the human rights of trade unionists.

Trade unions and individuals, often supported by the legal organisations who responded to the consultation, put forward various proposals to amend the regulations. Many focused on the system of remedies and the enforcement of the regulations, which they thought were insufficiently dissuasive and failed adequately to deal with the covert nature of blacklisting. Their proposals included:

- the creation of criminal offences for blacklisting;
- the assignment of a new role for a public authority to investigate allegations of blacklisting;
- the relaxation of time limits for individuals to complain to the employment tribunal about breaches of the regulations;
- extended rights for trade unions to take legal action against blacklisters on their own behalf and on behalf of their members;
- larger remedies, including the removal of caps on compensation and the establishment of minimum amounts of compensation;
- wider order-making powers for the employment tribunal to ensure blacklists are destroyed or confiscated;

- a wider definition of the prohibition on blacklisting to ensure it captured the holding of a blacklist and the supply of information to the compiler of a blacklist;

- additional measures to prevent international blacklisting;

- exempting all lists drawn up by independent trade unions from the scope of the regulations; and

- introducing a scheme to ensure that construction workers who have already suffered from being blacklisted are fully compensated.

The Government has closely examined these comments and proposals. Its overall conclusion is that the draft regulations are workable, necessary and fair. They should be brought into force as soon as possible. In response to the consultation, the Government has decided to amend the draft regulations in the following areas by:

- making it clear that former trade union members are fully protected;

- revising the exemption for journalists and whistleblowers so that consent from blacklisted individuals is required only where their personal information is to be published;

- revising the exemption relating to trade unions, to ensure the wording of the exception (at Regulation 4(4)(b)(ii)) is aligned with corresponding language used in existing trade union law (at section 137(7) of the Trade Union and Labour Relations (Consolidation) Act 1992);

- creating a new exemption for lawyers to enable them to provide advice on compliance with the regulations;

- providing a "just and equitable" test for tribunals to apply when determining whether the time limits for making complaints should be extended;

- establishing in each tribunal jurisdiction a minimum amount of compensation, initially set at £5,000. These minima would be subject to reductions where it is just and equitable;

- applying the dispute resolution procedures to the new detriment jurisdiction which the regulations create; and

- introducing an Order in Council, soon after the blacklisting regulations come into force, which will have the effect of extending the regulations to offshore oil installations.

Next steps

The Government's intention is to implement the regulations as soon as possible. The Government plans to table the regulations for Parliament to consider at the earliest opportunity. As the regulations are subject to the affirmative resolution procedure, they will need to be debated and approved by each House before they can be implemented. Provided Parliament gives its approval, the regulations could be brought into effect early in 2010.

A final Impact Assessment will accompany the regulations when they are laid in Parliament.

The Department for Business, Innovation and Skills (BIS) intends to draft guidance for employers, workers and trade unions, explaining the essential provisions of the regulations and the prohibition on blacklisting they introduce. That guidance will be posted on the websites of Business Link, Direct.gov and BIS.

Chapter One – Introduction

1.1 Under Section 3 of the Employment Relations Act 1999, the Secretary of State may issue regulations to outlaw the blacklisting of trade unionists. In February 2003, the Government issued a consultation document containing an initial set of draft regulations under the Section 3 power. In response to that first consultation, the Government announced that it would not bring into force any regulations in this area because the evidence suggested that this type of listing activity had been eradicated in the early 90s.

1.2 In March 2009, the Information Commissioner (IC) announced that he had uncovered a vetting service operated covertly by The Consulting Association (TCA) for companies in the British construction sector. He proceeded to prosecute Mr Ian Kerr, who ran the TCA, for breaching a provision of the Data Protection Act 1998. The TCA held records on about 3,300 people. The Government noted that the TCA had collected information on the trade union membership and activities of many of those individuals and such information had been used in effect to blacklist them.

1.3 Following this important revelation, the Government announced its plans to implement regulations to outlaw the blacklisting of trade unionists. On July 7, the Department for Business, Innovation and Skills (BIS) issued a consultation document seeking views on a revised set of draft regulations. The regulations had been revised to take account of the 2003 consultation and the circumstances of the TCA case.

1.4 The consultation ended on 18 August. This document summarises the views received during the consultation and sets out the Government's response to the issues raised.

Responses to the consultation

1.5 The consultation document was sent to all trade unions and employers' organisations listed by the Certification Officer. It was also sent to a range of other bodies including legal organisations and non-departmental public bodies. The document was posted on the BIS website.

1.6 A total of fifty-two responses were received, and they are classified in the table below.

Category	Number of responses
Trade Unions and Union Federations	26
Lawyers and Lawyers' Organisations	4
Employers and Employers' Organisations	7
Individuals	10
Other Organisations	5
Total	**52**

Note: Two unions - Connect and Prospect - made a joint response. They are counted as one trade union response for these purposes.

1.7 A list of those respondents who were willing to have their names and responses disclosed can be found at **Annex A**. The Government would like to thank all respondents for their contributions.

Understanding this document

1.8 The consultation document presented twelve questions for consultees to address. Chapter 2 addresses the first two questions about the Government's decision to legislate in this area and evidence of other instances of blacklisting. Chapter 3 deals with those nine questions about the detailed provisions within the revised draft regulations. Chapter 4 discusses the final question concerning the consultation-stage Impact Assessment.

1.9 Each chapter presents a summary of the views expressed by respondents in response to each question. Not every respondent is cited in each case, not least because some submissions repeated the views expressed by others. There then follows a section in which the Government's response to those views is presented. The Government's main conclusions and recommendations are set out in bold lettering.

Chapter Two – Government Response to the TCA case

2.1 The consultation document detailed the vetting activities undertaken by the TCA and described those features of existing data protection and trade union law which protected, to some degree, individuals who had been blacklisted on trade union grounds. It reported the Government's conclusion that the TCA had undertaken blacklisting activity which section 3 of the Employment Relations Act 1999 was designed to outlaw. As a consequence, the Government proposed to implement regulations under the Section 3 power as soon as possible. Respondents were asked to give their views on this overall approach. They were also asked to provide any other evidence that trade union blacklisting had taken place in recent times.

2.2 Since the consultation document was published, there have been further developments in the TCA case. The Crown Court has since imposed a fine on Mr Kerr of £5,000 for his breach of the Data Protection Act (DPA). The IC has also issued enforcement notices against fourteen of those companies which had used the TCA's services. Those notices prevent the companies from using the personal data supplied to them by Mr Kerr. They also require the companies to ensure that, if they obtain personal information about job applicants from third parties in the future, they are completely open with those applicants about the process. The companies could face prosecution if they fail to adhere to the terms of the notices.

Views of Respondents

The Case for Implementing Regulations

2.3 Thirty-seven respondents agreed with the Government's view that regulations should now be introduced, whilst two organisations opposed the idea. Other respondents offered no opinion.

2.4 Trade unions were strongly in favour of implementing the regulations. As well as arguing that blacklisting is an offensive practice, the TUC, Union of Construction, Allied Trades and Technicians (UCATT) and others believed that blacklisting represented a breach of the human rights of the workers involved. Most trade unions considered that the protections under existing

trade union and data protection law, though helpful, failed to deal adequately with blacklisting. They pointed out that the prosecution of Mr Kerr under the DPA was for his failure to register with the IC as a data controller. This was viewed by the Rail, Maritime and Transport Union (RMT), the Scottish Trades Union Congress (STUC) and others as being a technical breach, and it was pointed out that the users of the TCA's services had not been prosecuted. Amberhawk Training and others raised issues about the need to reform the Data Protection Act to ensure that breaches of its data protection principles were made unlawful.

2.5 Many trade unions, including Connect/Prospect and Public and Commercial Services union (PCS) suggested that the regulations should have been introduced sooner. They pointed out that the TCA had operated for a very long time, and many construction workers had suffered over this period. UNISON and many other unions criticised the Government's decision in 2003 not to introduce the blacklisting regulations, as this would have provided some scope for individuals to obtain compensation for the victimisation they had experienced over the last six years. Both the TCA and their member companies had failed to disclose the existence of the lists and had not therefore chosen to correct the Government's mistaken conclusion that listing activity of this kind had been eradicated in the UK. This led many unions including UCATT, Unite and the National Union of Teachers (NUT) to propose that the Government should introduce a scheme to compensate blacklisted workers for their loss. The scheme should be financed by a levy on those companies which had subscribed to TCA's services. If necessary, the Government should introduce primary legislation to pave the way for such a compensation scheme to be introduced.

2.6 The Federation of Master Builders strongly supported the Government's proposals. They, along with other employer organisations such as the CBI, the Civil Engineering Contractors Association (CECA) and Amec, stated their opposition to the blacklisting of trade unionists. Employer respondents, such as the Heating and Ventilating Contractors' Association (HVCA), also stated that the vetting of prospective employees was necessary

to weed out trouble-makers, criminal elements or other undesirable people. In their view it was important for the regulations to be designed in a way that permitted such vetting to continue. Amec, the HVCA and the University and Colleges Employers Association favoured the implementation of regulations under the section 3 power. The CECA and the UK Contractors Group were content in principle for regulations to be implemented, though they thought it regrettable that this step was necessary because of just one case. The CBI opposed implementation on the grounds that only one case of blacklisting had been uncovered and it was unlikely that any other blacklisting took place.

Further Evidence of Blacklisting

2.7 The TUC, Connect/Prospect, other trade unions and some individuals pointed out that, because blacklisting was a covert activity, it was intrinsically difficult to provide hard evidence that it was taking place elsewhere in construction or in other sectors. However, the STUC, Unite and many unions felt that it may well be occurring, perhaps on an informal basis where managers were swapping information without establishing data bases or similar arrangements. The Broadcasting, Entertainment, Cinematograph and Technical Union (BECTU) and an individual respondent who worked in broadcasting thought that blacklisting took place in their sectors, and some union activists found it significantly more difficult than similarly-qualified colleagues to obtain work. Such patterns of serial refusals of employment were also highlighted by individual respondents, most of whom were construction workers, as evidence that blacklisting was occurring. The STUC, some other trade unions and the Health and Safety Executive (HSE) believed that blacklisting had occurred in the UK's offshore oil and gas industry via the "not required back" system. However, Unite pointed out that the sector had made progress in recent years to improve its recruitment and employment practices. The Associated Society of Locomotive Engineers and Firemen (ASLEF) considered that blacklisting occurred in the rail industry.

2.8 The Union of Shop, Distributive and Allied Workers (USDAW) did not believe that the blacklisting of trade unionists was happening in its sectors, though it pointed out other lists – for example, the National Staff Dismissal

Register – were used in the retail sector to discriminate against workers. USDAW opposed such systems, and suggested that employers should alternatively use the Criminal Records Bureau to identify unsafe individuals. USDAW's point was echoed by PCS and other trade unions which argued that any blacklisting – even if there was no connection to trade union membership or activities – should be prohibited.

Government Response

2.9 The Government reiterates its view – shared by virtually all respondents – that the blacklisting of trade unionists is a reprehensible activity. In 2003, the Government stated it would bring regulations into force if evidence of blacklisting surfaced. Indisputably, that test has now been met. Whilst there is no firm evidence that blacklisting is occurring outside the construction sector, the possibility that it is taking place cannot be totally discounted. It certainly cannot be guaranteed that blacklisting would never take place in the future. **The Government therefore concludes, in line with the views of the large majority of respondents across all interests, that regulations should be brought into force as soon as possible**. This consultation did not directly address the law on data protection. It is not therefore the intention to use this exercise to change other areas of the law.

2.10 The Government does not wish to deter employers from vetting prospective employees, provided such vetting is proportionate and complies with employment law and data protection principles. The regulations have been designed to target just that listing activity which involves trade union membership and activities, and which is designed to enable discrimination on those grounds to occur. This tight focus should ensure that virtually all vetting activity, which should normally have nothing to do with trade union matters, is left unaffected.

2.11 The Government notes that individuals who have suffered loss as a result of the TCA's activities can seek compensation for damage and distress under the DPA. Indeed, it understands that some litigation of this type is in progress. The blacklisting regulations, in line with well-established policy, will not have retrospective effect. It would be inconsistent with that approach if

the Government were to introduce a levy on employers to enable compensation to be paid by employers for their past behaviours. It would also require primary legislation to establish such a levy. **The Government will not therefore introduce the compensation scheme which some unions have requested**.

2.12 The regulations will apply to Great Britain only. The Government notes that they do not apply to the UK part of the continental shelf or other offshore waters where oil and gas installations are based. Some parts of GB employment law have been extended to these waters by Order in Council. Whilst most recruitment by UK employers to these offshore waters takes place within Great Britain and is therefore covered by the regulations, the installations themselves, and the managements located there, are excluded. The Government considers there is a good case to ensure that the blacklisting regulations are extended to these waters in due course. **It is therefore minded to introduce an Order in Council, soon after the blacklisting regulations come into force, which will have the effect of extending their coverage to offshore installations in these waters.**

Chapter Three – Detail of the Draft Regulations

3.1 The consultation document presented a set of draft regulations. It asked nine specific questions about the drafting of individual regulations, and it also asked for any other views on the way the regulations had been worded. This section summarises, and responds to, the comments received to each question. Some matters – for example, the systems of enforcement and remedies – aroused much more interest among respondents than others. However, for consistency, issues are discussed in the same order they were addressed in the consultation document.

A. Electronic Listing and Remote Access to Blacklists

3.2 Blacklisting can be undertaken by using many different media and methods. The draft regulations had been drafted to take account of these variations. The consultation document asks respondents to assess whether the draft regulations adequately covered all the ways, including use of the internet and electronic data, whereby blacklisting could be undertaken.

Views of Respondents

3.3 Twenty-six respondents thought that the regulations were sufficiently adaptable in these terms, but nine other respondents thought they were not.

3.4 The TUC and most trade unions believed that the regulations covered the ways in which blacklisting could be undertaken through use of known electronic media. This view was also shared by employer bodies and others including the Law Society of Scotland and similar legal organisations who responded. Questions were raised by the Employment Lawyers Association (ELA) and Unite as to whether the regulations would adequately cover social networking sites, chat rooms or blogs, which were self-compiled by contributors. Unite also considered that the wording did not adequately cover word of mouth systems for exchanging information. Connect/Prospect recognised that the draft regulations referred to the use of information taken from a prohibited list, and this helpfully supplemented references to the direct use of the list itself. However, it thought the regulations could be improved

further if the general prohibition could be widened to make it unlawful to "extract" information from a prohibited list.

Government Response

3.5 Whether blogs and social networking sites would be covered by the regulations is a matter which would depend on the facts. Just because people are mentioned in a blog, it does not mean that their details are being "listed". However, these blogs or sites might become a prohibited list over time if they systematically organised information about trade unionists or linked those names to a search engine. Whether such listing was unlawful under the regulations would depend on what was its purpose. So, if the activity were undertaken in order to discriminate against trade unionists in employment, then it would be unlawful. The application of the regulations to such scenarios is very much a matter of fact and evidence. Of course, if the regulations expressly excluded such sites from the scope of the regulations, this would encourage future blacklisters to design systems to benefit from that exclusion.

3.6 The Government recognises that employers may share assessments of individuals. Sometimes, this is done formally and openly by obtaining references. On other occasions, it may be done informally through off-the-record conversations. In isolation, such arrangements, whether they are beneficial or not, are difficult to categorise as the kind of formal and systematic listing activity which the Section 3 power is designed to eradicate. Of course, conversations can be a method of conveying listed information, as happened in the TCA case. The regulations are framed in a way which captures such activities because they constitute the use of a list or the supply of information from such a list. Again, this is a matter of fact and evidence.

3.7 The Connect/Prospect point relates to the general prohibition. Respondents made various other suggestions to change the general prohibition and these are discussed in section C below.

3.8 **The Government does not of course know how future technologies will develop and how information storage or data transmission will be undertaken. However, on the basis of what is**

currently known, the Government is content that the regulations are adaptable enough to deal with the various ways in which lists can be established and run. It does not plan to make further amendments to the regulations on this account.

B. Foreign Compilers and Distributors of Blacklists

3.9 The consultation document noted that the regulations would apply to Great Britain only. It was possible that blacklisting could have an international dimension, if compilers or websites hosting blacklists were located in other countries. The draft regulations, within the jurisdictional limits set for all employment law, contain provisions which could cope with international blacklisting activities. In particular, at Regulation 2(3), they would make it unlawful for employers in Great Britain to rely on information supplied by a foreign-based person, who would contravene the general prohibition if that person's actions had taken place in this country. The consultation document therefore asked whether the draft regulations adequately dealt with blacklists maintained and hosted abroad.

Views of Respondents

3.10 As a summary of their position, twenty-eight respondents considered that the regulations adequately addressed this issue whilst four respondents thought they did not.

3.11 The Association of School and College Leaders (ASCL), the Alliance for Finance and most trade unions, as well as the CBI and some employer respondents, thought that the regulations had done as much as could be achieved to capture the potential international dimension of blacklisting. The provisions of Regulation 2(3) were generally supported though Unite and the ELA thought that the provisions should be broadened out to cover other actions by overseas persons rather than just the supply of information. The Law Society and Connect/Prospect were concerned about the use of overseas contractors, intermediaries and employment agencies.

Government Response

3.12 There are inevitable limits on the extent to which GB law can apply, and be enforced, in other countries and jurisdictions. Since the consultation document was issued, the Department for Employment and Learning in Northern Ireland has affirmed its intention to undertake a similar consultation on draft blacklisting regulations which will be closely based on the GB regulations. Other countries in Europe and elsewhere should have their own laws or constitutional arrangements to protect trade union rights and freedom of association. Those laws could be invoked to ensure that employment agencies and employers based in those countries do not compile or otherwise become involved in blacklisting activities. **The Government shares the view of most respondents that, when judged against this background, the regulations as drafted deal adequately with international blacklisting.** GB users of prohibited information provided by overseas persons are punishable under the regulations. **The Government therefore has no plans to change the regulations to deal with this issue.**

C. The Definition of a "Prohibited List" and the General Prohibition

3.13 The draft regulations establish a general prohibition against the compilation, use, sale or supply of a "prohibited list" (i.e. a blacklist). They also define what constitutes a prohibited list. The wording used in these areas of the regulations is closely based on the corresponding wording found in Section 3 of the 1999 Act. Respondents were asked if they supported these basic definitional aspects of the regulations.

Views of Respondents

3.14 This question generated much comment, and many separate issues were raised under it. Of those organisations which indicated clearly an overall view on the question posed, nine were in favour of the Government's approach whereas twenty-eight were against.

The general prohibition

3.15 Regulation 3 of the draft regulations sets out the general prohibition. Many trade union respondents, including the GMB and USDAW, supported by some legal organisations such as Thompsons Solicitors and individuals, argued that the general prohibition should be re-expressed to cover other potential involvement by users or others with blacklists. In particular, these respondents considered that the possession, storage or keeping of a prohibited list (even if it were never used) should be made unlawful, as should the maintenance of a prohibited list. In addition, they proposed that the purchasing of prohibited lists should be made unlawful, as should the supply of information to list compilers.

3.16 Amec and other employers also put forward proposals which in effect would refine the general prohibition. The HVCA, focusing on the circumstances of the TCA case, believed that the prohibition should be limited to listing which was undertaken "on a commercial basis" or "for the benefit of others". The UK Contractors Group and the CECA wanted to ensure that the definition of unlawful behaviour concentrates on the use of a prohibited list. The compilation or dissemination of lists which were not compiled with a view to being used in an unlawful way should not fall within the general prohibition.

Definition of a trade union

3.17 The ELA proposed that the regulations should provide a definition of a "trade union". Some trade union respondents, including the TUC, argued that the protections and definitions of prohibited listing should be restricted to independent trade unions only. They pointed out that many existing trade union rights were restricted to membership of independent trade unions and the regulations should follow the same model.

Definition of trade union membership

3.18 The Law Society, the TUC and several other trade unions referred to the position of former trade union membership. They questioned whether the definition of a prohibited list provided by draft Regulation 2 extended to former trade union members and they proposed that the definition should be amended to ensure this group were covered in the same way as former trade

union activists. Questions were also raised by Unite and the Law Society about the protections which the regulations afforded to those who were included on lists but were mistakenly suspected of being trade union members or activists. It was argued that these individuals should receive the same protections as those who had been accurately identified as a trade unionist.

Definition of trade union activities

3.19 Respondents noted that neither the draft regulations nor the Trade Union and Labour Relations (Consolidation) Act 1992 contained a definition of trade union activities. Thompsons, UCATT and others contested the Government's view that the term "trade union activities" would cover a person's involvement in official industrial action but not unofficial industrial action. UNISON pointed out that it was often difficult to distinguish between official and unofficial action in practice, and the matter could give rise to legal dispute. Thompsons wanted the regulations to make clear that both forms of industrial action were included within the meaning of the term. UCATT, the TUC and other unions favoured the approach of amending the regulations to ensure the protection applied to those who had engaged in activities "associated" with trade unions. They considered that this approach would ensure that all forms of industrial action would potentially be classified as a trade union activity. Several unions including UCATT also contested the Government's view that the definition should not cover certain criminal activities undertaken by trade union members on behalf of their union. Their concern would also be addressed by the referring to union activities as activities "associated" with trade unions.

The purpose of listing

3.20 Many trade union respondents such as the NUT and Unite, supported by Thompsons, the Law Society and the ELA, expressed concern that the definition of a prohibited list, which focused on the initial purpose of its compilation, would not cover lists whose purpose subsequently changed and was then compiled with trade union blacklisting in mind. Many of these respondents contested the Government's view in the consultation document that this would not pose a problem in practice. They therefore proposed that

the regulations should be amended to ensure that changes to a list's purpose would be covered. For example, the ELA proposed that this issue could be satisfactorily addressed if the phrase "or is used" is placed after the words "with a view to being used" which appear in the definition of prohibited list at Regulation 2.

Definition of a list

3.21 The TUC, many trade unions, the Law Society and others drew attention to records which contained information on just one person. They thought that such records might not qualify as a "list" on the basis of the wording used in the draft regulations. This was potentially a loophole in the regulations which blacklisters could exploit. They therefore proposed that the definition of a list should be provided in a form which ensured that single person records were included.

3.22 The Information Commissioner and other respondents noted that information could be assembled, stored or processed in many ways. Questions were therefore raised about the need to provide a full definition of a list or, alternatively, to specify types of information or data handling which would be covered. The ELA suggested that the wording used in Section 3(5) of the 1999 Act, relating to lists held in electronic form, should be repeated within the regulations. The Blacklist Support Group queried whether information in the form of photographs or other images would constitute a "list containing details". The Information Commissioner also commented that a definition of a list should be provided.

Government Response

3.23 Most of the trade union proposals regarding the general prohibition carry the danger of extending the prohibition beyond the vires provided by Section 3 of the 1999 Act. Where this is not the case, it is likely that the activity concerned would be covered by the prohibition anyway, or is closely associated with other activity which is covered by the prohibition. For example, the supplying of information to a compiler may in its own way constitute "compilation". The purchase of a list by an employer is almost certainly likely to result in its subsequent use by the employer. Also, the mere

"possession" of a list could include employers who did not know they held such a list, especially if it were old or inherited from a company which the employer acquired. The Government agrees with employer respondents who suggest that the regulations should focus primarily on the employer's "use" of a prohibited list, and by and large, the regulations produce that effect. Some of the other suggestions by employers would lead to obvious ways to evade the regulations. For example, as a membership-based organisation, the TCA did not arguably operate on a commercial basis. **The Government therefore considers that the general prohibition, rooted firmly within section 3, should not be changed.**

3.24 **The Government does not accept the union proposal to protect just the members of independent trade unions.** If blacklisting is totally unacceptable in respect of those belonging to independent trade unions, then it is just as bad for the members of other unions, usually smaller ones, which do not possess a certificate of independence, sometimes because they cannot afford it. Some similar protections under existing trade union law (for example, the protection against refusal of employment on trade union grounds) apply to the members of all trade unions.

3.25 Section 3 provides that the definitions used in the 1992 Act apply to the blacklisting regulations, unless the regulations state otherwise. The definition of a trade union is clearly provided at the beginning of the 1992 Act. That definition is well understood. **The Government does not therefore consider there is a need to repeat the same, quite lengthy, definition within the regulations.**

3.26 In practical terms, the concern about the treatment of former trade union members is probably misplaced. Everyone on a prohibited list is protected. So, if a list contains the details of any current members or former activists, then everybody on the list would be protected. Moreover, the phrase "details of trade union members" does not specify that it relates to current members only. Furthermore, former members are likely to be persons who have taken part in trade union activities. So, the phrase should, as Parliament and Government policy intended, already cover former members.

However, the Government is however content to clarify the provision to put the issue beyond doubt. **The Government therefore intends to revise the regulations to make it clear that former trade union members, including those who were not active within their trade union, are fully protected.**

3.27 The term “trade union activities” is used quite extensively in existing law, but it has not yet been defined in statute. Case law is also quite thin in this area. This suggests that the regulations are probably not the place to try to reach an all-encompassing definition, because any clarification in the regulations (which does not appear in existing trade union law) might throw into question the meaning of the term in other provisions. The Government wants to avoid such unintended consequences. The wording suggested by certain trade unions appears designed to include any union involvement with the organisation and taking of unofficial industrial action. The Government believes such industrial action is especially disruptive and injurious to orderly industrial relations because, by definition, the trade union has not endorsed and controlled it.

3.28 The Government repeats its view that the term "trade union activities" almost certainly covers involvement in official industrial action. The absence of the qualifying phrase "at an appropriate time" helps ensure that this is the effect. Section 170 of the 1992 Act specifically excludes industrial action from the meaning of "activities of the union" for the purposes of that section, which therefore must mean that involvement in industrial action would normally be covered by the term. **The Government will not therefore introduce a definition of "trade union activities" for the purpose of the blacklisting regulations.**

3.29 The Government is sympathetic to the points raised by trade unions about the purpose of a list changing over time. Indeed, the consultation document drew attention to the matter. Having reviewed the issue, the Government concludes that the vires provided by Section 3 is quite narrow and prevents the regulations from addressing this issue along the lines proposed by the ELA and others. Moreover, the Government repeats the view expressed in the consultation document that in practice this should not

represent a problem. For example, in most cases, blacklisting organisations who inherit data from an established lawful list will re-process it and then add further data to keep it updated. By so doing, they will be compiling a fresh list, and their listing behaviour would become unlawful. **The Government will therefore not amend the regulations to cover the changing purpose of a list. However, it will keep the issue under review and consider widening the Section 3 power if the issue presents problems for the practical operation of the regulations.**

3.30 One person lists, if they were genuinely limited to one person, would not be covered by the regulations, as they are unlikely to constitute a "list". It should however be noted that such a person would of course benefit from the protections about refusal of employment and detriment under existing trade union law. The blacklisting of single persons must be extremely rare. That said, the Government understands the concern that compilers may claim that they do not hold a blacklist but maintain various unrelated one-person records, which do not constitute a list. However, it is probable a tribunal would not be convinced of such an argument and would likely treat those records as a single list unified by a single purpose.

3.31 The Government understands the various concerns expressed over coverage and the apparent lack of a definition of a list in the regulations. There is of course a definition of a list in Section 3 of the 1999 Act which is automatically read into the regulations. It is the Government's view that this definition is sufficient to cover most of the concerns raised by respondents. For example, it is likely a database which may be dispersed on a functional or geographical basis would constitute a "set of items" in the definition of a list. There would of course be dangers in supplying a further definition in the regulations, if it were not sufficiently robust or resulted in unintentionally prohibiting benign lists. **The Government therefore does not intend to draft a definition of a list in the regulations. However, the Government intends to provide illustrative examples of what would constitute a list in the guidance on the regulations which BIS will produce.**

D. Exempted Listing Activities

3.32 The consultation document noted that there may be categories of benign listing activity which might be inadvertently captured by the basic definition of a prohibited list. So, the regulations framed exemptions to ensure that the general prohibition did not apply in those cases. Respondents were asked whether they supported the way the exemptions have been drafted and whether others should be created.

Views of Respondents

3.33 Opinion was quite evenly split on this question. Whereas sixteen respondents stated that they were broadly content, eighteen took a contrary view.

3.34 The Royal College of Midwives and other trade unions argued that exemptions should be few and tightly worded so that they would not create loopholes for blacklisters. It was common ground among respondents that the exemption for postal service providers made sense. Some employer organisations, including AMEC, wanted to extend this exemption to cover the inadvertent use of lists.

3.35 There was also general support for the proposed exemption concerning a person's compilation or use of a blacklist in the public interest in order to draw attention to existence of such a blacklist. This exception is designed to assist journalists and whistleblowers in exposing this covert practice. However, for this exception to apply, all persons on the list in question must give their consent to its use. This extra condition is there to ensure that sensitive personal data, which could potentially disadvantage an individual, is not used without permission. The TUC, the National Association of Schoolmaster Union of Women Teachers (NASUWT) and others thought the prior consent condition was too tight, and might impose excessive restrictions on journalists and others, especially where the list was long or where one person could not be tracked or did not give consent. They therefore suggested that the condition should be re-phrased to ensure that information on individuals was not published without prior consent.

3.36 The regulations recognise that some jobs or positions require knowledge of trade union affairs, and therefore those recruiting need the opportunity to draw up short-lists of trade unionists as part of a fair recruitment process. Regulation 4 therefore contained an exception which allows employers to compile, supply or use a list in connection with such specialist employment. This exception would particularly help trade unions but it would also apply in some limited cases where, say, a job requires industrial relations expertise. The TUC, ASLEF and other trade unions objected to this exception on several grounds. First, they thought that trade unions should have a blanket exemption from the regulations. They reject the idea that maverick unions would ever become involved in future blacklisting (which the consultation document mentioned as a justification for not giving a blanket exception). Second, they thought that the potential use of this exception by non-union employers was unjustified and could create a loophole. Third, they raised an objection to the wording relating to the appointment of unions officers because it did not replicate corresponding wording found in closely-related parts of existing trade union law.

3.37 Some respondents suggested that entire new categories of exemption should be created in the regulations. For example, Amec suggested that a new exception should be created for lists whose purpose related to health and safety matters. Some listing practices in the construction industry may seek to identify individuals who are safe to work on building sites. Such lists may discriminate in favour of the safety representatives of trade unions, because such individuals receive specialist safety training from their trade unions. Amec was therefore concerned that such lists might be captured by the regulations. The UK Contractors Group and some other employer respondents also suggested that check off lists (lists of individuals whose trade union subscriptions are deducted by the employer at source) should be given an explicit exception. Such lists are common among those employers which recognise trade unions, and an explicit exemption would ensure that their check off practices could not be challenged.

3.38 There is already an exception in Regulation 4 that provides for persons to use or compile lists if that is a statutory requirement or necessary to comply with a court rule or order. Legal organisations, including the ELA, pointed out that it would be necessary for lawyers to advise clients on their compliance with the regulations. They therefore suggested that an exception should be created to permit a client to supply a prohibited list to a legal adviser for the purpose of receiving legal advice about compliance with the regulations and to permit those advisers to use the lists to provide legal advice.

Government Response

3.39 The Government acknowledges that the consent condition in the whistleblower exemption is undoubtedly onerous and would make it very difficult for journalists to use large lists lawfully. The change proposed meets the policy need: no public disclosure without consent. **The Government will therefore ensure that the exemption for journalists and whistleblowers is re-phrased so that consent from blacklisted individuals is required only where information concerning them is to be publicised.**

3.40 As regards a blanket exemption for trade unions, the Government had rejected this option because of the possibility that inter-union rivalry, sometimes driven by ideological considerations, might lead a union to engage with employers in operating blacklisting systems against members of other unions. The Government is aware that some of those listed by the TCA, who now have seen their redacted records, believe that such collusion once occurred in the construction sector. It is therefore unsafe to assume that collusion would never happen in future. On the use of this exception by non-union employers, the regulations are written to prevent opening up a loophole because they state that it must be reasonable to apply a requirement relating to trade union experience or knowledge to the recruitment in question. Few jobs fall into this category, and the Government is content that the tribunals will be able to determine where employers raise bogus claims that such a background should be a condition for appointment. The Government considers that the wording of the exemption could be improved to align it more fully to language used in exiting trade union law. **Therefore the Government**

intends to retain the current approach to drafting the exemption relating to trade unions, though some technical adjustments to the wording of the exception (at Regulation 4(4)(b)(ii)) should be made to align it more fully to corresponding language used in existing trade union law (at Section 137(7) of the Trade Union and Labour Relations (Consolidation) Act 1992).

3.41 The Government is generally disinclined to create new exemptions to avoid complicating the regulations. Noting that the HSE did not raise this point in their response, the Government does not consider that a safety exemption should be created. It is clearly important to ensure that individuals can be vetted as safe to work on construction sites or other potentially hazardous workplaces. However, it is very unlikely that lists created for those purposes would be captured by the regulations, because any list would be compiled for the purpose of discriminating on grounds of safety proficiency (for which being a safety representative is a proxy) rather than on grounds of trade union membership or activities. Creating a new exception would complicate the regulations and, because safety issues apply to all employment, it is possible that a large loophole in the regulations may be created as a result.

3.42 Likewise, the Government is confident that the regulations would not bite on check off lists. Such lists are not normally used by employers to treat employees either more or less favourably. These are merely lists which record which employees' pay need deductions for union subscriptions. Any favourable treatment of employees, such as the receipt of union services, derives not from the list but from their union subscription. The use of a check off list in this way is unlikely to be caught by the regulations.

3.43 The Government acknowledges that lawyers should have some legroom to access and examine prohibited lists when advising their clients of their responsibilities under these regulations. This would be sensible and improve compliance among employers. Under the Data Protection Act, there are similar provisions regarding the use of personal data for the purposes of obtaining legal advice. If a narrow exception is created to ensure that the

purpose of supplying or using a prohibited list is for the purposes of providing legal advice about compliance with the regulations, then it should not create a loophole which unprincipled solicitors or others could exploit to set up a vetting service. **The Government therefore intends to create a new exemption for lawyers to assist them in providing advice on compliance with the regulations, but it does not intend to pursue the other proposals for new exemptions.**

E. Enforcement and Sanctions

3.44 The draft regulations provide three new jurisdictions for the employment tribunal, enabling individuals to complain if they were refused employment, dismissed or suffered other detriment for a reason relating to a prohibited list. These jurisdictions are closely based on corresponding provisions in existing trade union law. The regulations also establish a new jurisdiction for the court to award damages or grant interlocutory relief in cases where a person suffered or may suffer loss due to a contravention of the general prohibition. The draft regulations do not provide any criminal offences, and they do not establish any new role for a public authority to investigate alleged breaches. Respondents were asked whether they supported the Government's approach on enforcing the regulations through the civil route only.

Views of Respondents

3.45 As noted above, this question produced a large number of comments. Few stated that they unequivocally supported all the Government's proposals in this area. However, twenty respondents indicated that, on balance, they broadly supported the Government's approach. Nineteen respondents opposed the overall approach.

3.46 The NASUWT noted that "enforcement is the key issue", a view shared by most trade union respondents and others. They argued that the seriousness of the issue required criminal sanctions, in addition to the proposed route of civil proceedings. RMT viewed blacklisting as an organised crime, which needs strong criminal sanctions, including custodial sentences,

as a deterrent. Trade unions pointed out that the power under Section 3 of the Employment Relations Act 1999 makes specific mention of the possibility that criminal offences and sanctions could be created in the regulations. They (and other respondents including the IC) also pointed out that the criminal offences specified under the Data Protection Act (DPA) were limited and resulted, in the TCA case, in low fines.

3.47 The draft regulations do not assign any extra enforcement or investigatory duties to any other authority. Trade unions, including BECTU, and some others including Mr. Kinnersly and the Blacklist Support Group, thought this was inadequate, because blacklisting is covert and insidious. It was therefore unrealistic to believe that individuals could uncover and take legal action unaided. There therefore needed to be a much tougher and well-resourced enforcement and investigatory regime. They suggested that either BIS or, more typically, the IC should be given extra powers to prosecute and investigate braches of the regulations. The Law Society, amongst others, linked this to proposals requiring or enabling the tribunals and courts to pass evidence about blacklisting, which came to light in any case, to the IC or such other enforcement body. That body should then investigate the issue and, if it identified a prohibited list, inform everyone on the list about their inclusion and options for legal redress.

3.48 Under the draft regulations, unions cannot make complaints to tribunals, either to seek compensation for their own institutional loss (e.g. loss of membership) or to seek compensation on behalf of their members. Of course, the regulations did not prevent trade unions from supporting their members in making complaints by meeting their legal costs or by providing representation. However, unions can apply to the courts to seek compensation for their own loss and/or an injunction. Trade union respondents welcomed the provisions relating to their rights to complain to the court. However, they wanted the regulations to go further, giving them a more central role in making complaints on behalf of their members, arguing that individuals would be reluctant to do so in their own names because it would give wide publicity to the fact that they were blacklisted (thereby perhaps

encouraging others to victimise them). They drew attention to the law on consultation on collective redundancies and business transfers where trade unions may make complaints.

3.49. The ELA and Unite favoured the idea that, in helping persons decide whether they should take legal action under the regulations, employers should disclose information about their behaviours through the use of a standardised "questionnaire", the contents of which the Secretary of State would specify. This approach is found in sex discrimination law and in other discrimination jurisdictions. This would help establish facts, especially about behaviours which might otherwise be obscure or concealed.

3.50 Construction unions, such as UCATT, and other respondents made the point that the protections should apply to the self-employed, and other categories of non-employee workers. They would therefore need adequate arrangements to enforce these protections.

3.51 Employers were broadly content with the proposed enforcement provisions. The HCVA did not want to enable complainants to go direct to the tribunal, preferring a system where the courts would first determine whether a blacklist had been used. They argued that this would dovetail more neatly with the approach of data protection law.

Government Response

3.52 The enabling power in Section 3 of the ERA 1999 is drawn wide enough to enable criminal offences to be created and small fines to be imposed. However, that wording was merely a contingency, should criminal offences be required, and there was no presumption during the Act's parliamentary passage that this option would be pursued. The Government notes that criminal offences are unusual in employment law, and it considers the package of measures in the draft regulations provide adequate protection. The blacklisting regulations need to be read alongside the provisions of the DPA, where there are some criminal sanctions (for example, for failure by data controllers to register with the IC, for failures to comply with enforcement notices and for deliberately obtaining and disclosing personal data without the

consent of the data controller. Those sanctions may well come into play where blacklisting occurs in future. As the IC pointed out in his response, there is an order-making power under the Criminal Justice and Immigration Act 2008, which could enable the IC to fine data controllers for serious breaches of data protection principles. This power will provide the IC with the ability to impose a civil monetary penalty notice on any data controller who commits a serious contravention of the data protection principles of a kind which is likely to cause substantial damage or substantial distress. The Government considers that financial penalties for non-compliance provide a powerful deterrent for data controllers who may otherwise ignore their responsibilities under the DPA. The Government launched a consultation on 9 November this year, seeking views on its proposal to introduce a maximum civil monetary penalty of £500,000. This reflects the importance the Government places on safeguarding personal data effectively and processing it responsibly and lawfully. **With these considerations in mind, t**he **Government maintains its view that the blacklisting regulations should not be enforced by criminal law.** It follows that there is no need to assign a new role to a public authority to prosecute individuals for committing a criminal offence.

3.53 **The Government does not see a convincing case for assigning new powers to BIS or another agency to help enforce the rights under the regulations by investigating complaints.** The IC already has important powers to investigate breaches of the DPA (as happened in the TCA case). In his consultation response, the IC pointed out that the Coroners and Justice Bill, then before Parliament, made provision for private sector organisations, in circumstances which will be defined by secondary legislation, to be subject to an assessment by the IC without the consent of the data controller. The Bill has recently received Royal Assent to become the Coroners and Justice Act 2009. The assessment notices provided for by the Act permit the Information Commissioner to assess a data controller's compliance with the data protection principles contained in the DPA without that data controller's consent. Initially, this will apply only to Government departments, but the Act contains an order-making power which allows the Secretary of State to

designate certain descriptions of private sector data controllers as being liable for the assessment notices. Under the Act, it is for the Information Commissioner to make recommendations to the Secretary of State as to which descriptions of private sector data controller should be made liable to assessment notices. Both the IC and the Secretary of State would need to be satisfied that designation was necessary, taking into account the nature and quantity of data processed by the sector in question, as well as the damage or distress which may result from a breach of the data protection principles within that category.

3.54 The Government agrees with the IC that assessment notices will be a valuable tool to raise compliance levels and educate those bodies that will be assessed. But it should be remembered that they are not a new investigatory or enforcement tool and are not meant to be used to investigate contraventions of the data protection principles or to initiate enforcement action. Indeed, the IC already has a number of tools available to him to assess whether private sector data controllers are complying with the data protection principles. These include issuing an information notice or applying for a search warrant under Schedule 9 to the DPA. He may also carry out a Good Practice Assessment under Section 51(7) of the DPA, provided he has the data controller's consent.

3.55 As regards empowering the tribunals and courts to refer cases to the IC, it is also worth noting that Section 42 of the DPA enables persons, or their representatives, to request the IC to make an assessment of circumstances where alleged data processing is in breach of the DPA. This means that a person involved in a blacklisting case, or their union on their behalf, could ask the IC to investigate the DPA aspects of the issue. There is therefore no need to give additional powers to the court or tribunal to refer cases to the IC.

3.56 The regulations already provide some scope for trade unions to become involved in blacklisting issues that affect their members, because they can apply to the court for injunctions against blacklisters which would benefit both them as organisations and their members. It would be a departure from standard practice in tribunal cases to allow trade unions to

bring cases on behalf of their members. The analogy with consultation rights in the law on collective redundancies and TUPE is not relevant, because such rights involve consultation with the union and the loss for failing to consult is identical for all members. **The Government does not therefore propose to change the regulations to give trade unions a wider role in taking legal action on behalf of their members.**

3.57 It is not clear to the Government what would be the role of a statutory questionnaire under the regulations. Existing protections against discrimination on grounds of trade union membership do not contain such provisions. Nor is it obvious what standard questions could usefully be posed. In discrimination law, the questions can relate to standard factual information about the numbers recruited by gender or race or the average pay by gender or race. In the case of blacklisting, it is difficult to construct similar and general factual questions which can have a bearing on subsequent tribunal applications. This is especially so in the case of trade union data where the employer may not know (and indeed should not know in some cases) whether his employees or potential recruits are union members. **The Government does not therefore propose creating a power for the Secretary of State to draw up a statutory questionnaire for use in tribunal cases under the regulations.**

3.58 **The Government does not support the proposal to create a two-stage enforcement system where a court has first to determine whether a blacklist has been used before a claim can be made in employment tribunals.** That would result in complicated procedures and high legal costs, and It would slow down the determination of cases. It also disagrees that tribunals, which regularly address recruitment-related issues, would find it difficult to assess whether blacklists were used during recruitment processes.

F. Burden of Proof

3.59 The Government recognises that individuals may face particular difficulties in proving their case before a tribunal, given the covert nature of blacklisting. The three tribunal jurisdictions therefore all contain provisions

which establish a need for the complainant to establish a prime facie case, after which the burden of proof would shift to the employer to demonstrate that he or she had not used a prohibited list or relied on information taken from a list. This approach is similar to that found in discrimination law. Respondents were asked whether they supported this approach towards allocating the burden of proof.

Views of Respondents

3.60 Thirty-two respondents favoured the Government's approach. In contrast, just two opposed it.

3.61 Most respondents, including the Professional Footballers' Association (PFA) and the British Medical Association (BMA), saw the proposal as a reasonable means to cater for the circumstances of blacklisting cases, where a complainant might have limited access to evidence to prove their case. The Blacklisting Support Group favoured an automatic presumption that an employer had acted unlawfully if they had refused employment to a person on a blacklist or inflicted some other detriment.

Government Response

3.62 The Government considers its proposal is proportionate and commands widespread support. **It therefore intends to assign the burden of proof as set out in the draft regulations.**

G. Time Limits

3.63 Normally, the time limit for bringing complaints to the tribunal is three months after the damage in question was inflicted (for example, three months after a dismissal had taken place). In most jurisdictions tribunals have the discretion to extend this time limit if it is not "reasonably practicable" to submit the application within the normal period. The Government recognises that a blacklist's existence may be discovered many years after it was first established and used to discriminate against trade unionists in employment. It therefore wishes to ensure that the tribunals use their discretion to extend time limits for bringing cases where blacklists had been concealed. The draft

regulations therefore draw attention to this issue and encourage the tribunals to use their discretion sympathetically where the blacklist was not known to exist at the time the damage took place. Respondents were explicitly asked whether they supported this approach.

Views of Respondents

3.64 The balance of opinion was against the Government's approach. Fifteen respondents supported it whereas twenty were opposed, many of whom were strongly against the approach taken.

3.65 In general, employers were generally content with the suggested approach though the CECA was concerned that some legal action may be based on events that took place long before. Amec mentioned the same issue and noted that the arrangements regarding burden of proof (which it supported) meant that the employer might need to provide evidence about far-distant events. They therefore suggested that a limit of six years should be placed between the dates of the alleged detrimental conduct and the tribunal complaint. The Welsh Assembly suggested a year.

3.66 The TUC, other trade unions, legal organisations and some individuals were very critical of the proposed approach. They considered that the "reasonably practicable" test, even with the additional provisions directing tribunals to consider when the facts came the attention of the complainant, were not generous enough. There were also concerns that tribunals would rarely extend the three month deadline. The ELA and others suggested that the issue would often be disputed at tribunals and would create additional "satellite" litigation. Extra provision needed to be made to take account of the fact that the existence of secret blacklists, as in the TCA case, took many years to surface. They therefore proposed using either (a) a test based on the "just and equitable" formula found in discrimination legislation and / or (b) wording used in Section 2ZA of the Equal Pay Act 1970 which set longer time periods where key evidence or information had been concealed by the employer. Others suggested that provisions found in the Limitation Act 1980 could also be used as a basis for formulating a time limit within the regulations.

Government Response

3.67 In general, the courts will consider complaints within six years of the alleged damage occurring. So, complaints under Regulation 15 will be considered within those time limits. However, the Government recognises that in the case of blacklisting it may be difficult for individuals to make complaints to tribunals (the more popular route) within the stipulated three months of the alleged discriminatory act. It cannot be known how tribunals would interpret the extra wording in the draft regulations. Whilst it is possible they will be more sympathetic to the position of applicants in future blacklisting cases than trade unions believe, the Government is sympathetic to their concerns and consider that the "just and equitable" formulation is fairer to complainants given the covert nature of blacklisting. This would give tribunals a wider discretion to extend the standard time limit. In the discrimination arena, it has encouraged tribunals to grant reasonable extensions to the time limits, but without doing so to such a degree that the ability to determine cases, due to the age of the evidence, is prejudiced. **The Government therefore proposes to amend the draft regulations by providing a "just and equitable" test for tribunals to apply when determining whether the time limits should be extended.**

H. Remedies

3.68 The remedies available under the regulations are very closely based on those provided by existing trade union law. In two of the three tribunal jurisdictions, a cap is placed on the amount of compensation which could be awarded. There are no minimum compensation payments and the order-making powers of the tribunals are restricted. The remedies available under the court jurisdiction are wider. Respondents were asked whether they supported the proposed system of remedies.

Views of Respondents

3.69 This was again an issue on which many comments were received. Twenty respondents opposed the approach taken by the regulations and fifteen were in favour.

3.70 Employer organisations were generally content with the proposed remedies. The CBI noted that the protections (and therefore the remedies available) applied to all those on prohibited lists. This meant that individuals who were placed on the lists for non-union reasons were treated in the same way as trade unionists. The CBI therefore questioned whether this was justifiable and whether the remedies should be available to listed trade unionists only.

3.71 The remedy provisions were criticised on several grounds by trade unions, individuals and some legal organisations. The central criticism was that the penalties and remedies were not large enough to deter blacklisters and did not reflect the serious human rights abuses which were involved in the practice. There was no punitive element. UCATT pointed out that the regulations in effect replicated the protections and penalties in existing trade union law. It was therefore difficult to see what additional dissuasive effect they would achieve, especially in those cases where a trade unionist could in any event bring a claim for, say, refusal of employment under the existing law.

3.72 One issue raised by many respondents in these groups, including the NASUWT, was the failure to provide any remedy where the blacklisted individual had not suffered a financial loss. For example, under the draft regulations, the tribunals (in cases relating to refusal of employment) and the courts may make awards of compensation for a breach of the regulations which may include an element for injury to feelings. In all cases, no award may be made unless the complainant has also suffered a financial loss. In other words, no compensation may be awarded unless there has been some financial loss to compensate for. The STUC and other trade unions claimed this is too restrictive. They proposed that any person on a list may in effect sue for compensation for the very fact of appearing on a list. They argued that being blacklisted is an infringement of a person's human rights and

undoubtedly causes offence. Individuals should therefore be able to be compensated regardless of any financial loss.

3.73 Trade unions and others, including the Blacklist Support Group, argued that blacklisting deserved stiffer penalties to dissuade organisations from undertaking such activity and to ensure that individuals were adequately compensated. A minimum amount of compensation would help those who might otherwise find it difficult to quantify their loss or to prove an injury to their feelings. They pointed out that there were precedents for this approach as minima already applied to some jurisdictions in trade union law. They similarly argued that the caps on maximum awards should also be removed.

3.74 The detriment provisions of the draft regulations provide for the tribunal to adjust the compensation awarded if the complainant's behaviour contributed to the damage inflicted, and if complainants did not take steps to mitigate their loss. The TUC, BECTU, Unite and others objected strongly to these proposals because individuals' behaviour or actions could not in their judgment have contributed to having their names listed. That was a matter which employers and blacklisters unilaterally determined in secret, using unlawful criteria. Their objections to the mitigation element were rooted in the idea that there should be a simple system of compensation for such a serious offence, and employers should not be given scope to complicate cases by raising legal arguments about the level of the award.

3.75 The draft regulations allow either the complainant or the respondent to join others to a case. In most cases this would allow the worker or the employer to join a third party (for example, the compiler) to a case. This aspect of the draft regulations was welcomed by unions and employers alike. It means that compilers can be ordered to pay compensation by the tribunal if blacklisting occurs, to the extent they were culpable. The employer would consequently pay less. The compiler could also be placed "in the dock" as a result. Some trade unions including the TUC wanted to go one step further by making both the employer and any third party (probably the compiler) "jointly and severally" liable for the unlawful conduct and therefore for the loss suffered. This change would have the effect of ensuring that the awards

against the employer and the compiler could not be evaded by, say, the compiler not having the funds to make the payment. The employer in this situation would be liable to pay the share of the award which the complier did not pay, because of their joint liability. Trade unions, including the GMB, argued that this may be important because, as in the TCA case, the compiler may be a small operator with limited funds who may choose to go out of business to avoid paying an award. Unions also pointed out that compilers and the employers who use their services are inextricably linked, as again was the case with the TCA and its member companies. So, it made sense to treat them as one from a legal viewpoint. Unions also noted that joint and several liability is not a new concept for employment law because it applies to the transferee and transferor employer in parts of the TUPE regulations.

3.76 The draft regulations provide no order-making powers to the tribunals to require blacklisters or users of blacklists to stop blacklisting or otherwise behave in a particular fashion to avoid further damage. In contrast, the courts could grant temporary injunctions ordering parties to stop certain behaviours, at least until the full case was heard. Employers had no comments on these provisions, but trade unions, including the Lancashire Association of Trade Union Councils, and others felt that wider order-making powers should be given to the tribunals and the courts to stop blacklisting activity immediately. In particular, Mr. Holder and others felt that they should be able to order the destruction or forfeit of blacklists.

Government Response

3.77 The Government recognises that the draft regulations offer protection to all those individuals who are identified on prohibited lists, including those non-trade unionists on those lists. The TCA listed individuals for a variety of apparent reasons and a significant minority were not trade unionists. It would be a mistake in the Government's view to complicate the regulations further to carving out separate treatment for those listed for reasons unconnected with trade unionism. Employers simply should not use covert lists to vet workers, and they expose themselves to punishment even where they use the list to disadvantage non-trade unionists. In some cases, it may also be unclear why

a person was listed and, if a two-tier system were created, greater scope for legal dispute would arise. It would therefore be mistaken to exclude non-trade unionists from the scope of the protections in the regulations. However, each of the jurisdictions provides considerable discretion to the tribunal or court in deciding the amount of compensation that would be paid, often using "just and equitable" tests in so doing. It is likely that tribunals would use such provisions to avoid compensating listed individuals, such as those listed for violent conduct at work, who were undeserving. The regulations are therefore flexible enough to ensure that awards are not made to blatant wrongdoers.

3.78 The Government considers there is some strength in respondents' arguments that the draft regulations do not have a sufficient deterrent effect. It recognises that, other things being equal, individuals would receive exactly the same amount of compensation for being refused employment for trade union reasons where the employer had, or had not, used a blacklist. In the Government's view, the use of a blacklist is a significant aggravating factor which requires an additional penalty. It considers that this would best be achieved by setting a minimum award of compensation in each of the tribunal jurisdictions created by the regulations. As respondents pointed out, there are precedents in trade union law where minima are set. The Government considers that £5,000 would be a suitable level for a minimum award under the tribunal jurisdictions created by the regulations. This is close to the minimum basic award of £4,700 which applies where employers unfairly dismiss an employee on the grounds of their trade union membership or activities. It is also the amount which Mr Kerr was fined. The Government wants to provide some discretion to the tribunal and the court when deciding whether the minimum amount should be awarded. Such discretion needs to be provided to ensure that undeserving cases such as those listed for criminal reasons do not receive the minimum. The Government considers that the tribunal should be given the discretion to reduce the minimum award where the conduct of the complainant is such that it would be just and equitable test to do so. **The Government therefore concludes that in each tribunal jurisdiction, there should be a minimum amount of compensation and**

proposes it is set at £5,000. The tribunals would be able to reduce the minimum award where it is just and equitable to do so.

3.79 **The Government does not propose to adopt any of the other ideas which respondents put forward to stiffen the remedies**. The caps on compensation are set at a high enough level that they are unlikely to restrain compensation in blacklisting cases. Also, the regulations already provide scope for individuals to apply to the courts for damages, where no caps apply. So, the regulations already provide an adequate alternative in those rare cases where individuals believe they have suffered a very large loss as a result of blacklisting. The Government is not persuaded by the arguments that individuals should be compensated for injury to feelings alone, where they suffered no financial or material loss. There are no precedents for this approach in trade union or wider employment law, and it is unnecessary in view of the proposed minimum compensation provision.

3.80 Some limits on compensation in existing employment law are re-rated annually to reflect changes in the Retail Prices Index. Whilst it would be desirable to extend this approach to the limits established by the blacklisting regulations, this cannot be achieved because the power in Section 3 of the Employment Relations Act 1999 is insufficient. This means the new limits will be fixed for the foreseeable future. The Government will nonetheless keep the compensation limits under review to monitor the extent to which their real value may change over time and the extent to which actual awards might be affected

3.81 On contributory fault, the Government considers that the criticisms are misplaced. It is not a matter of individuals' actions contributing to their blacklisting per se. Rather, it is the actions of the individuals which may have contributed to the detriment which they subsequently experienced. Decisions relating to detriment may be taken for several reasons, and only one of which may relate to a blacklist. Where this occurs, the individuals' actions may have contributed to the decisions concerned. Of course, if a decision were straightforward, and only involved blacklisting, then the contributory fault would be zero. As regards mitigation, the issue usually focuses on the extent

to which the loss suffered by the individuals concerned could have been reduced had they behaved differently after the discriminatory act is committed. Provisions relating to mitigation are common in employment law. There is no reason, in the Government's judgment, to justify treating the consequences of blacklisting differently. A minimum award is a better approach to punish blacklisters. It should also be remembered that, if the loss cannot possibly be mitigated, then there would be no reduction of the award on these grounds.

3.82 It is undoubtedly true in the TCA case that the compiler and its member companies were very close. That factor is likely to affect the way tribunals would apportion awards, where compilers are joined, if similar cases arose in future under the blacklisting regulations. The tribunal, or the court, would take account of the relative culpability between the parties when apportioning awards between compilers and employers. However, it needs to be borne in mind that the using employers, and the compilers and middle men they employ, would normally be distinct entities. It would be a major step, not seen in other parts of trade union law, to equate them legally through joint and several liability provisions in order to have debts recovered from the other party. This situation is very different from the approach in the TUPE regulations where, in order to preserve the continuity of employment for transferred employees, the transferee and transferor employers have joint liability. The analogy with TUPE is not appropriate and the Government considers that existing debt recovery law should be sufficient.

3.83 Under the draft regulations, tribunals could make recommendations to the parties to behave in a certain fashion to avoid further damage, and they could award compensation if their recommendations were ignored. However, the Government notes that tribunals do not exercise in any jurisdiction the sort of wide order-making power which some respondents propose. It would therefore represent a departure from normal practice if they were assigned an essentially regulatory role. Moreover, there is no need to do so because the courts can make stop-it orders and the IC can also make similar orders where blacklisting contravenes, as it often would, his relevant powers under the DPA. It is also questionable whether any court or tribunal should order the

destruction of the lists as this may limit the ability of others on the lists to bring future legal cases. The Government also considers that the power to confiscate property should not be given lightly.

I. Other Issues

3.84 The consultation document asked respondents to raise any other issues.

Views of Respondents

3.85 Twenty-three respondents had other comments to make about the regulations and the context within which they would operate. The following issues were raised in that context.

Intermediaries

3.86 Recruitment or other employment decisions can involve many parties, and the employer who ultimately uses a list may not have seen or otherwise accessed a blacklist, but relied on others to do so on its behalf. There is therefore a concern that such employers might not be covered by the regulations because they did not "use" the blacklist directly. The draft regulations deal with intermediaries in various ways. First, the intermediaries themselves would breach the regulations because they "used" or in some cases "supplied" a blacklist. Second, the employer does not evade the regulations because they make it unlawful to discriminate against a person if, in so doing, the employer relied on information provided by someone who breached the regulations, and the employer knew or should have known that the information was in effect tainted.

3.87 Respondents supported the provisions in the draft regulations which deal with the involvement of intermediaries. However, Unite and others considered that they would work only where one intermediary was involved. They felt the regulations did not therefore deal with the situation where several intermediaries were involved because the employer would evade liability if the last intermediary in the chain (who supplied the blacklisting information to them) did not itself breach the regulations though others further up the chain

clearly had. Unions therefore suggest that the Government should address this potential loophole.

Non-employees

3.88 The protections in the draft regulations apply to non-employee workers at various points. For example, the detriment provisions apply to "workers". Also, Regulation 15 (the court jurisdiction) enables any "person" to apply for compensation if he or she suffered a loss related to a breach of the prohibition on blacklists. This allows the self-employed and others who work on contracts for services to seek and gain legal redress. Trade unions and others want all the protections (for example, unfair dismissal) to apply to all workers including the self-employed and independent contractors.

Seafarers

3.89 Nautilus International raised the issue of seafarers. They proposed that the regulations should cover all crews on all British-flagged vessels wherever they are in the world.

Dispute resolution procedures

3.90 Thompsons asked whether the tribunals should be given scope to vary tribunal awards under the dispute resolution procedures set up by the Employment Act 2008. This provides for awards to be adjusted upwards or downwards if either the complainant or respondent had failed to comply with guidance given by the Acas Code of Practice on dispute resolution matters.

Compromise agreements

3.91 The regulations provide for tribunal claims against employers to be resolved bilaterally where the parties agree a settlement set out in a so-called "compromise agreement". This is a common feature of many jurisdictions under employment law and complainants must always receive independent legal advice before they sign such agreements.

3.92 Thompsons pointed out that confidentiality clauses are common features of these agreements and therefore complainants could be prevented from disclosing the existence of a blacklist if a confidentiality clause specified that it should not be mentioned. A failure to disclose a list's existence would

possibly disadvantage other persons who were blacklisted but in ignorance of its existence. So, Thompsons proposed that the law on compromise agreements should be amended to ensure that they cannot prevent the disclosure of information about the existence of blacklists.

Regulation 5(2)(d)

3.93 Regulation 5(2) sets out various circumstances where an employer can be deemed to have refused employment to a person. Regulation 5(2)(d) provides that a refusal has taken place if an offer of employment is made on terms such as "no reasonable employer" filling the post would offer. The Law Society and Thompsons were critical of the reasonableness test in Regulation 5(2)(d), which they thought was difficult to interpret and implement. The Law Society argued that a better comparator would be the offer by an employer who had not relied on a prohibited list.

Section 3 revision

3.94 Connect/Prospect argued that the powers in Section 3 should be widened to ensure they dealt adequately with the blacklisting of trade unionists. ASLEF and the Welsh Assembly argued in favour of an EU-wide initiative to tackle this kind of blacklisting. Mr Holder and the HSE pointed out that individuals may be blacklisted on other grounds and considered that they too should be protected.

Typographical errors

3.95 Thompsons, the ELA and Unite pointed out several areas in the draft regulations which appeared to contain typographical errors.

Government Response

3.96 The Government notes the partial welcome given to those provisions dealing with intermediaries. It believes that the regulations deal adequately where one or many intermediaries are involved. The issue centres on the employer's use of information supplied by a person contravening the regulations. The regulations do not state that the information must be supplied directly to the employer by the party breaching the regulations. It therefore follows that the employer would still be acting unlawfully if the supply

of information on which he ultimately relied occurred further up the decision-making chain, and the employer knew or ought to have known what was happening.

3.97 The concern about non-employees is already addressed through Regulation 15. It will therefore be possible for the self-employed and independent contractors to receive damages if they suffer a loss because the general prohibition was breached. It would not be appropriate, or logically consistent, to widen the tribunal jurisdictions to enable these groups to make applications to the tribunal.

3.98 The Government recognises that the position of seafarers under GB employment law is a complex and difficult issue. Nautilus International appears to want the blacklisting regulations to apply to seafarers in ways which other aspects of GB employment law do not. As it is not the general practice to extend GB employment law in this way, the Government is not minded to make an exception for the blacklisting regulations. In any event, it is far from certain whether the Government has the vires to do as Nautilus International requests.

3.99 As regards the dispute resolution procedures, two of the relevant jurisdictions under trade union law (namely, detriment and dismissal on grounds of trade union membership or activities) are covered by the arrangements set up in the Employment Act 2008. The refusal of employment provision is not covered because the complainant has no ongoing relations with the employer So, it is intrinsically difficult to insist that the complainant then establishes dealings with the employer to discuss his grievances. The Government has a general preference as far as possible to align the blacklisting regulations with corresponding provisions in existing trade union law (i.e. those relating to detriment and dismissal). It considers that allegations of blacklisting may be as susceptible to resolution through workplace dialogue just as any other serious grievance against an employer. Indeed, the regulations already apply the dispute resolution arrangements to the unfair dismissal rights which the draft regulations would establish. **The Government therefore intends to amend the regulations to ensure that**

the dispute resolution procedures apply to the new detriment jurisdiction which the regulations create.

3.100 It is arguable whether it is lawful to insist that gagging clauses preventing the disclosure of the existence of a blacklist can be lawfully included in compromise agreements. Much would depend on the circumstances of the case and the wording proposed by the employer. That the complainant must be legally advised before signing is a protection which can guard against an agreement overstepping the legitimate boundaries.

3.101 The Government notes that the wording used in Regulation 5(2)(d) is already found in existing trade union law (in Section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992). These tests of a refusal of employment have functioned adequately and there is no reason to believe they will work less well in the context of blacklisting. The Government is therefore minded to retain the existing wording for the reasonableness test in this Regulation.

3.102 **The Government has no plans to amend Section 3 itself, as it has not yet been tested.** The Government will monitor the operation of the blacklisting regulations and future developments in case law. If in practice the regulations fail to achieve the desired effect, then the case for reframing Section 3 could be re-examined.

3.103 Section 3 provides the current vires to outlaw blacklisting. That power focuses on the blacklisting of trade unionists and, as has been discussed above, non-trade unionists who are included in trade union blacklists are in fact protected to the same extent. The Government does not have the power to use these regulations to make other blacklists unlawful, though where such listing activity involves personal data, the DPA protections come into play.

3.104 Blacklisting may have an international dimension, and there may be advantages in encouraging international co-operation between authorities to assemble evidence on cross-border blacklisting. However, trade union law is not an area where the EU has competence. The Government would therefore not support any EU legislative initiatives in this field.

3.105 Respondents have identified several typographical errors in the draft regulations. The Government is therefore grateful to them for pointing them out. It intends to make the necessary corrections to the final regulations.

Chapter Four – Impact Assessment

4.1 The consultation document contained a consultation-stage Impact Assessment. It concluded that some employers, mainly larger ones , may face one-off costs in familiarising themselves with the regulations and perhaps reviewing their listing practices. However, ongoing costs would be very low.

4.2 The consultation document asks whether respondents agreed with the assessment and had any comments on it.

Views of Respondents

4.3 Only seven organisations responded to this invitation. Five of them disagreed with the Impact Assessment, whereas two approved it. Most critics were employer bodies.

4.4 The CBI, HVCA and other employers argued that the estimated compliance costs were too low because the regulations would in their view give rise to a larger number of complaints, many of which would be specious or speculative, than the Impact Assessment had assumed.

The Government Response

4.5 The Government notes that blacklisting is an unusual practice. It is therefore unlikely whether events would occur in future which would give rise to formal widespread complaints that the regulations have been breached.

4.6 The Government would point out that the blacklisting regulations are very similar to existing laws preventing employers from discriminating on grounds of trade union membership and activities. Those long-established protections generate few applications each year to tribunals. The Government therefore believes it is safe to conclude that the regulations will have the same effect. The costs to business of finally eradicating the wholly unacceptable practice of blacklisting would therefore be low.

4.7 **The Government will produce a final Impact Assessment to accompany the regulations when they are laid before Parliament for approval. As indicated in the consultation document, a Privacy Impact**

Assessment, will also be published as an appendix to the final Impact Assessment, which will look at the data protection aspects of the regulations.

Annex A – List of Respondents

Alliance for Finance
Amberhawk Training
Amec
Association of School and College Leaders (ASCL)
Associated Society of Locomotive Engineers and Firemen (ASLEF)
Broadcasting, Entertainment, Cinematograph and Technical Union (BECTU)
Blacklist Support Group
British Medical Association (BMA)
British Standards Institute (BSI)
Confederation of British Industry (CBI)
Civil Engineering Contractors Association (CECA)
Connect
Derek Maylor
Employment Lawyers Association (ELA)
Federation of Master Builders (FMB)
Federation of Professional and Managerial Staff Associations (MPA)
General Municipal Boilermakers (GMB)
Health & Safety Executive (HSE)
Heating and Ventilating Contractors' Association (HVCA)
Information Commissioner's Office
Jack Preston
John Low
Lancashire Association of Trade Union Councils (LATUC)
Leeds Building Society Staff Association
Malcolm Coles
Mick Holder
National Association of Schoolmasters Union of Women Teachers (NASUWT)
National Union of Teachers (NUT)
Nautilus International
Patrick Kinnersly
Public and Commercial Services Union (PCS)
Professional Footballers' Association (PFA)
Rail, Maritime and Transport Union (RMT)
Richard Kidner
Royal College of Midwives (RCM)
Scottish Trades Union Congress (STUC)
The Law Society
The Law Society of Scotland
Thompsons Solicitors
Tony Jones
Trades Union Congress (TUC)
Transport Salaried Staffs Association (TSSA)
UK Contractors Group (UKCG)
Union of Construction, Allied Trades and Technicians (UCATT)
Union of Shop, Distributive and Allied Workers (USDAW)
UNISON
Unite the Union

Universities and Colleges Employers Association (UCEA)
Voice
Welsh Assembly Government

plus two respondents who wished to remain anonymous

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

URN 09/1536