EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RELATIONS ACT 1999 (BLACKLISTS) REGULATIONS 2010

2010 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills (BIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This SI prohibits the compilation, distribution and use of lists ("blacklists"), the purpose of which is to facilitate discrimination against trade union members and activists by employers and employment agencies.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 There are provisions in existing trade union law (principally found in section 137, 138, 146 and 152 of the Trade Union and Labour Relations (Consolidation) Act 1992) which protect individuals against discrimination in employment on grounds of their trade union membership and activities. The blacklisting of trade unionists is a practice which facilitates anti-union discrimination. Section 3 of the Employment Relations Act 1999 therefore provides a power for the Secretary of State to introduce regulations, subject to the affirmative resolution procedure, to outlaw such blacklisting. This is the first time that regulations under this power have been introduced. It has been introduced because, in March 2009, the Information Commissioner uncovered evidence that covert blacklisting of this form had recently occurred in the British construction industry.

Listing of this type must involve the processing of personal data and sensitive personal data such as information about trade union membership. The Data Protection Act 1998, which among other things provides protections for data subjects and duties on data processors, is therefore relevant to the understanding of the regulations' effects.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 The Minister for Employment Relations and Postal Affairs, Lord Young of Norwood Green, has made the following statement regarding Human Rights:

"In my view, the provisions of the Employment Relations Act 1999 (Blacklists) Regulations 2010 are compatible with the Convention rights."

7. Policy background

- ***What is being done and why***

7.1 The blacklisting of trade unionists involves the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade unions. These vetting systems are principally used to decide whether an individual should be employed or otherwise engaged. They can also be used to decide whether a person who is currently employed, perhaps through a recent recruitment, should be retained. It is conceivable they could be used to discriminate against individuals in other ways by, say, denying them promotion or opportunities to work overtime.

Throughout much of the last century, when the country's industrial relations were often adversarial in character, blacklisting was thought to operate. However, the practice was widely believed to have been eradicated in the early 1990s when the Economic League, which had provided this service, folded. Section 3 of the Employment Relations Act 1999 was introduced with the aim of making blacklisting unlawful, should the practice, which is widely regarded as reprehensible and incompatible with good employment relations, ever re-surface.

In March 2009, the Information Commissioner (IC) announced the findings of an investigation under his powers in the Data Protection Act 1998 into the activities of an organisation called The Consulting Association (TCA). He found that the TCA had for many years provided a service to around forty construction companies, many of them major participants in the sector, appraising the suitability for employment of individuals. TCA held records on about 3,300 people. In over 1600 of these cases, the TCA held detailed information, much of which related to trade union activism, on the individuals concerned. The IC concluded that this vetting service, operated on covert lines, seriously breached aspects of data protection law. Mr Ian Kerr, who ran the TCA, was prosecuted by the IC for failing to register the TCA as a data controller. That case was heard on 27 May 2009, when Mr Kerr pleaded guilty of the offence. He was later fined £5,000.

These findings were widely reported in the media, and trade unions expressed their deep concern that such practices had occurred and had seriously damaged the livelihoods of their members. In a written Ministerial statement to Parliament on 11 May 2009, the then Minister for Employment Relations and Postal affairs, Pat McFadden, announced that, following enquiries with the IC's office about the TCA investigation, the Government was minded to introduce regulations as a matter of priority under Section 3 of the 1999 Act.

The Government's policy aims are to dissuade persons from compiling, disseminating and using blacklists and, where such lists exist, to ensure that those trade unionists and others listed on them are fully protected .

Among other things, the regulations :
- define a prohibited list (i.e. a blacklist) and prohibit the compilation, dissemination and use of prohibited lists ;
- make it unlawful for organisations to refuse employment, to dismiss an employee or otherwise cause detriment to a worker for a reason related to a prohibited list ;
- make it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list ;

- provide for the employment tribunal to hear complaints about alleged breaches of the regulations ; and
- as an alternative, provide for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a breach of the regulations.

8. Consultation outcome

8.1 There have been two public consultations on draft blacklisting regulations. The first took place in a twelve week period between February 2003 and May 2003. At that time, there was no firm evidence that blacklisting was being practised in this country and, consequently, the Government concluded that it would not bring the regulations into force. The second consultation took place over a six week period between 7 July and 18 August 2009. This consultation presented revised draft regulations, which took account of the responses to the first consultation and the specific circumstances of the blacklisting practices employed by the construction industry. The Government chose a shorter consultation in 2009 because of the earlier consultation, the pressing nature of the issue and the stated intention in 2003 to act quickly to prohibit blacklisting if evidence ever arose that it was occurring.

Both consultative documents were circulated widely and consultees included all trade unions and employers' organisations listed by the Certification Officer. The first consultation produced nineteen responses, whereas fifty two organisations responded on the second occasion. About half of respondents in both cases were trade unions.

On 2 December, BIS published a response document, a copy of which is enclosed, summarising the outcome of the second consultation. An electronic version of this document can be found at http://www.berr.gov.uk/files/file53734.pdf. In brief, the second consultation showed there was a common understanding across all interest groups that the blacklisting of trade unionists was a reprehensible activity which had no place in a 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 other forms of the necessary vetting of workers were not inadvertently captured by the regulations. Trade unions and most individual respondents wanted regulations to be introduced, and thought they should have been in place many years ago. They thought the draft regulations were insufficiently robust to deter blacklisting and failed to recognise the seriousness of blacklisting and the damage the practice had inflicted on many individuals.

9. Guidance

9.1 BIS is drafting guidance on the regulations for posting on the web sites of Business link, Direct.gov and the Department.

10. Impact

10.1 The regulations contain a general prohibition that no person should compile, use, sell or supply a prohibited list. They therefore apply to apply to all businesses, charities or voluntary bodies. In general, they will be most pertinent to organisations and sectors with a higher trade union density. The definition of a "prohibited list" is tightly drawn to ensure it does not capture other lists which employers may use. The regulations also provide exceptions for certain uses or involvements with a "prohibited

list". For example, it ensures that the providers of postal or distribution services who unknowingly supply "a prohibited list" are not contravening the law.

10.2 The regulations also apply to the public sector.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business. The organisation which compiled the blacklist used in the construction industry employed a few people.

11.2 To minimise the impact of businesses employing up to 20 people, guidance will be produced, and posted on the Business link website, to explain the new provisions.

11.3 Organisations representing small businesses were sent copies of both consultation documents.

12. Monitoring & review

12.1 Blacklisting is an uncommon practice and few legal actions are therefore likely to arise. The Department nonetheless intends to monitor any cases closely.

Some of the compensation limits in the regulations are fixed, and do not vary in line with the Retail Prices Index. The Government intends to monitor the value of these limits, relative to general movements in prices.

13. Contact

Bernard Carter at the Department for Business, Innovation and Skills (tel: 020 7215 2760 or email: bernard.carter@bis.gsi.gov.uk) can answer any queries regarding the instrument.



FINAL IMPACT ASSESSMENT

Regulations prohibiting the Blacklisting of Trade Unionists

JANUARY 2010

Summary: Intervention and Options

Department/agency: BIS	Title: Final Impact Assessment on Regulations prohibiting the Blacklisting of Trade Unionists	
Stage: Final	Version: Final	Date: January 2010

Related publications: Government response to the public consultation: The Blacklisting of Trade Unionists: Revised Draft Regulations, November 2009
Available to view or download at: http://www.berr.gov.uk/files/file53734.pdf
Contact for enquiries: Bernard Carter/Asad Ghani Telephone:0207 2152760

What is the problem under consideration? Why is government intervention necessary? Blacklisting facilitates and encourages unlawful discrimination against trade unionists and compromises a fair system of employment relations. Government stated, following a consultation on this issue in 2003, that it would act quickly to outlaw blacklisting if evidence of this practice came to light. A related investigation by the Information Commissioner concluded in 2009 that blacklisting was resurfacing and Government intervention is now necessary to outlaw this.

What are the policy objectives and the intended effects? The Government proposed to introduce regulations under the Employment Relations Act 1999 at the earliest opportunity to outlaw the compilation, dissemination and use of trade union blacklists. Following the 2009 investigation and the risks blacklisting poses to equity and fairness in employment relations, the Government believes this will give a clear signal about the unacceptability of blacklisting and that regulation is necessary to stamp out this practice.

What policy objectives have been considered? Please justify any preferred option. The main alternative option is to rely on the existing provisions of trade union and data protection law to stamp out this practice. There is ample guidance on both trade union and data protection law to explain the law and to dissuade this kind of activity. However, the TCA example shows this was insufficient, and the offenders, which were mostly large and well-resourced organisations, did not seem to act in ignorance of the law as evidenced by the covert nature of their activities. Against this background, the provision of additional guidance or other non-regulatory approaches is unlikely to be effective.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Blacklisting is an unusual, and uncommon, activity. There are no plans to undertake a specific review of this legislation. However, any case law will be monitored by the Department and, given the linkages with data protection law, the Department intends to continue sharing experience with the Information Commissioner.

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

Signed by: Lord Young of Norwood Green, Minister for Employment Relations and Postal Affairs Date:5/1/2010

Summary: Analysis & Evidence

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

Costs

ANNUAL COSTS		Description and scale of **key monetised costs by** 'main affected groups'. One-off familiarisation costs for employers, employment agencies, employee vetting organisations (£0.260m) and trade unions (£0.025m).
One-off (transition)	**Yrs**	
£ **0.285m**	1	

Average annual cost (excluding one-off)		
£ 0	**Total cost** (PV)	**£ 0.285m**
Other **key non monetised costs** by 'main affected groups' There may be costs to business for failure to comply but with 100% compliance these costs would not arise. Similarly in such cases there would be enforcement costs for the Exchequer.		

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

Key assumptions/sensitivities/risks:

Price base year:	Time period (years)	Net benefit range (NPV)	Net Benefit (NPV best estimate)
2009	10	**£ -0.526m**	**£-0.526m**

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

Evidence Base (for summary sheets)

A: Strategic Overview

1. The Government consulted on the issue of blacklisting in 2003 as part of its wider review of the operation of the Employment Relations Act 1999. In the absence of evidence that blacklisting was taking place, the Government re-affirmed its view that it would not seek to implement regulations until such evidence became available. However, the Government also stated that it would act quickly to outlaw blacklisting if there was evidence that blacklisting was re-surfacing.

2. In 2009 an investigation by the Information Commissioner found evidence of the operation of a blacklisting service in the construction sector. As a result the Government proposes to implement regulations outlawing the compilation, dissemination and use of trade union blacklists at the earliest opportunity.

3. The proposed changes will not result in any additional administrative burdens for business.

B: The Issue

4. It is currently unlawful for employers to discriminate against individuals on grounds of their trade union membership and activities. However, it is not unlawful for blacklisters to encourage employers to discriminate in this way by supplying them with information identifying trade unionists.

5. The consultation document published in July 2009[1] describes in greater detail The Consulting Association (TCA) case that has unearthed evidence of blacklisting activity and therefore only a summary is given here.

Recent evidence of blacklisting activities

6. Since June 2008, the Information Commissioner (IC) has been undertaking an investigation under his powers in the Data Protection Act 1998 into the activities of an organisation called The Consulting Association (TCA). The initial findings announced earlier this year showed that the TCA had for many years provided a service to construction companies appraising the suitability for employment of individuals.

7. TCA held records on about 3,300 people, over half of which contained little data other than their names. However, in over 1,600 cases, more detailed information was held in a card-index system. The IC concluded that this vetting service, operated on covert lines, seriously breached aspects of data protection law.

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

- ***Consultation***

Within government

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

Public consultation

10. This Impact Assessment accompanies a Government response to the public consultation on revised draft regulations to be introduced under section 3 of the Employment Relations Act 1999 to prohibit the blacklisting of trade unionists. A summary of the consultation responses can be found in the Government response.

[1] http://www.berr.gov.uk/files/file51729.pdf

C: Objectives

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

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

D: Options identification

The options being considered by the Government are:

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

Option 1

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

Option 2

14. The Government's preferred option is to introduce regulations to outlaw the compilation, dissemination and use of trade union blacklists. The Government response provides more details on option 2.

15. For the purposes of this Impact Assessment the cost-benefit analysis below focuses on the broader effects of the proposed changes.

E: Analysis of options

Costs and Benefits

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

Assumptions

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

18. Secondly, there may also be costs associated with enforcement and sanctions. This relates to both businesses who fail to comply with the regulations and to the Exchequer in terms of providing resources for enforcement. It should be noted that these costs are **avoidable under full compliance with the legislation** and are therefore not included in the final cost-benefit estimates for this Impact Assessment.

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

Evidence of blacklisting

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

Sectors and groups affected

21. The regulations apply to all sectors of the economy, but they are most likely to affect only those parts of the economy where unionisation is more prevalent Labour Force Survey (LFS) data from 2008

suggest the sectors with the highest union density are *public administration and defence*; *education*; *electricity, gas and water*; *health and social work*; and *transport, storage and communication* – all of which have trade union density of around 40 per cent or higher[2]. These were all well above the UK average of 27.4 per cent.

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

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

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

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

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

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

Table 2. Organisations most affected by proposed changes

	UK (whole economy)	Of which: Public sector	Of which: private Sector	Private sector of which heavily unionised
All employers	1,298,195	79,475	1,218,720	*207,890*
1-4 employees	858,245	46,545	811,700	*126,760*
5-9 employees	221,600	14,005	207,595	*37,455*
10-19 employees	119,495	8,330	111,165	*23,590*
20-49 employees	60,505	4,850	55,655	*13,800*
50-99 employees	18,990	1,845	17,145	*3,550*
100-199 employees	9,305	1,355	7,950	*1,355*
200-249 employees	1,915	320	1,595	*275*

[2] Trade Union Membership 2008, BERR; http://stats.berr.gov.uk/UKSA/tu/tum2008.pdf
[3] Latest data available are for 2007; http://stats.berr.gov.uk/ed/sme/

250-499 employees	3,715	715	3,000	*550*
500 or more employees	4,425	1,505	2,920	*560*
Estimated total UK organisations affected	3,330	2,220	NA	*1,110*
Minus estimated Northern Ireland organisations	*124*	*79*	*NA*	*45*
Estimated total GB organisations affected	3,206	2,141	NA	*965*

Source: SME Statistics, 2007, BERR

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

Administrative burdens

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

Costs

One-off costs

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

Costs to business

(i) employers

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

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

30. The total cost of familiarisation for all affected organisations is estimated to be **£134,000**[4].

(ii) employment agencies

31. BIS estimates[5] there are around 16,000 employment agencies across the UK. In theory all should need to familiarise themselves with the new regulations, but again this is only likely to be the case with the provision of personnel to highly unionised sectors.

32. We therefore assume half of employment agencies will need to undergo familiarisation and assume this takes an hour of an agency employee's time. The total one-off cost of this is estimated at around **£96,000**[6].

(iii) employee vetting organisations

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

34. There are no directly available data on the number of organisations involved in this area. However, data from the Annual Business Inquiry (ABI) indicate that in 2007[7] there were around 6,170 enterprises involved in *investigation and security activities*. Not all of these will be involved in employee vetting, but we assume here that half of this number are, hence around 3,085.

35. Assuming again that on average this requires an hour of time by an employee in these organisations, this amounts to a total cost of around **£30,000**[8].

Trade unions

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

37. We assume this will require one day's work for one union official and one clerk for each union. This amounts to an average daily cost of around £135[9]. In the UK there were 185 certified trade unions as of end March 2008[10]. The overall one-off cost to trade unions is therefore estimated at **£25,000**[11].

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

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

	One-off costs (Year 1 only)
Business (Total): of which	**£0.260**
Employers	*£0.134*
Employment Agencies	*£0.096*

[4] We use median hourly and weekly wage for Personnel, training and industrial relations managers (SOC 1135) and uprate this to 2009 prices and include 21 per cent mark-up for non-wage labour costs. Equals (3205 x 0.9 x £20.53 x 1.035 x 1.21) + (3205 x 0.1 x £149.9 x 1.035 x 1.21)

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

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

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

[8] SIC code 80 – security and investigation activities – median hourly earnings excluding overtime is £7.82; http://www.statistics.gov.uk/downloads/theme_labour/ASHE_2008/2008_ind4_sic07.pdf This has been uprate to 2009 prices (3.5 per cent) and include non wage labour costs of 21 per cent. Equals £7.82 x 1.035 x 1.21 x 3085

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

[10] Certification Office Annual Report 2007-08; http://www.certoffice.org/annualReport/pdf/Chapter%201A.pdf

[11] Equals £135 x 185

Employee Vetting Organisations	*£0.030*
Trade Unions	**£0.025**

Source: BIS estimates;

Ongoing costs

Business

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

The Exchequer

40. The Government believes individuals should be adequately protected under the law by a robust enforcement regime. However, as stated in the consultation document, the Government does not see a need to establish new and separate investigative role for a public authority to uncover breaches of the regulations. Therefore it is proposed that enforcement should take the form of civil action by individuals through the employment tribunal or court.

(i) Employment tribunals

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

(ii) County/High Courts

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

Benefits

Individuals

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

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

F: Risks

45. The main risks in these regulations concern their effectiveness in dealing with covert listing behaviour which uses ICT and other new technologies, and which may be operated abroad. Other risks include the possibility that the regulations may inadvertently affect acceptable vetting behaviour, the regulations may be difficult for individuals to enforce and BIS may have underestimated the number the number of employment tribunal claims.

G: Enforcement

46. Blacklisting is a very serious matter and Government believes that individuals should be adequately protected under the law by a robust enforcement regime. Enforcement of these regulations should be viewed in conjunction with the enforcement of related legal requirements. Trade union blacklists will generally breach both these regulations and the 1998 Act, because blacklists must

generally operate on covert lines to be effective. As the TCA case has illustrated, the IC has strong powers both to investigate breaches of the 1998 Act and to undertake criminal prosecutions. If blacklisting occurs in the future, it may well be uncovered via an investigation of the IC, and lead to prosecutions under the Data Protection Act 1998. The Government does not therefore see a need, and it would be a wasteful use of scarce public resource, to establish a new investigative role for a public authority to uncover breaches of these regulations.

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

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

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

49. Total costs are estimated at £0.285m and all is this is one-off familiarisation cost.

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

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

	One-off (Year 1 only)		Ongoing (All years)	
	Costs	**Benefits**	**Costs**	**Benefits**
Exchequer	None	None	None	Not quantified
Employers*	£0.260	None	None	Not quantified
Trade Unions	£0.025	None	None	Not quantified
Employees	None	None	None	Not quantified

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

I: Implementation

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

J: Monitoring and evaluation

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

Specific Impact Tests: checklist

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

Annex 1:

Competition Assessment

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

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

Table A1. Competition assessment.

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

Source: BIS

Small Firms Impact Test

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

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

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

Table A2. Trade Union Density – Workplace Size and Sector, Q4 2008

(% by sector)	UK	England	Wales	Scotland	Northern Ireland
Workplace size: Total	27.4%	26.1%	37.4%	32.9%	35.6%
Less than 50 employees	18.0%	16.5%	28.1%	22.9%	28.1%
50 employees or more	36.3%	34.9%	46.9%	42.7%	46.0%
Sector					
Private sector	15.5%	15.0%	21.0%	17.5%	18.7%
Public sector	57.1%	55.0%	67.3%	65.6%	66.6%

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

Equality Impact Assessment

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

It is possible to assess the impact on equality by using data from the Labour Force Survey. In terms of the equality strands the broad results from this indicate that union density is higher:

- Overall among female employees.
- Among black and black British groups, again particularly among female employees.
- Among disabled employees and especially those with a DDA disability[12]. Once again, within this group union density is higher among female employees.

The data are presented in tables A3 and A4 below.

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

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

(% by group)	All	Male	Female
All Employees	27.4%	25.6%	29.2%
Ethnicity			
White	27.8%	26.2%	29.5%
Black or Black British	30.3%	26.2%	33.9%
Asian or Asian British	22.9%	19.3%	27.7%

[12] The Disability Discrimination Act 2005 defines a person as having a disability for the purposes of the DDA where they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
See research.dwp.gov.uk/aboutus/provisions-dda.pdf

Mixed	20.4%	21.7%	19.3%
Chinese or other ethnic groups	16.3%	15.8%	16.7%
Disability			
DDA disabled and work-limiting disabled	31.9%	30.0%	33.6%
- DDA disabled	*33.4%*	*31.7%*	*35.0%*
- Work-limiting disabled	*28.6%*	*28.0%*	*29.3%*
Not disabled	26.7%	25.0%	28.6%

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

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

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

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

Privacy Impact Assessment

Background

In summer 2008, the Information Commissioner's Office ("the ICO"), who is the independent regulator of the Data Protection Act 1998 ("the DPA") began investigating allegations that the personal data of construction workers were not being processed in accordance with that Act. Part of the investigation focused on the activities of The Consulting Association ("TCA"), which provided a vetting service to a number of companies in the construction industry. TCA was run by Mr Ian Kerr. Staff from the ICO searched TCA's premises in February 2009 and seized various materials. These included materials comprising a database of individuals who were mostly, but not exclusively, members of trade unions or otherwise involved in trade union activities. Mr Kerr was subsequently prosecuted for failing to register as a data controller, and fined £5,000 plus costs. Other enforcement action was taken against TCA and against some construction companies who had been involved in TCA.

Employment Regulations Act 1999

Section 3 of the Employment Relations Act 1999 ("the 1999 Act") grants the Secretary of State the power to make regulations outlawing the compilation, sale, and use of lists of trade unionists for the purposes of discrimination in employment and recruiting. Such practices are colloquially referred to as "blacklisting". Having examined the material collected by the ICO from TCA, the Department for Business, Innovation and Skills (BIS) concluded that the system had been used to penalise certain trade union activists and comprised the kind of blacklisting activity which Section 3 was designed to address. Consequently, BIS decided to introduce regulations under the Section 3 power. BIS published a consultation document on 7 July, containing draft regulations.

The Proposed Regulations

In summary, the regulations:

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

Data Protection issues arising

The proposed regulations do not create any new entitlements or requirements for employers or others to collect, retain or process personal data or sensitive personal data. Nor do they create new investigative powers for a public authority to discover information about individuals. The regulations do not therefore introduce new measures which could limit or adversely affect the privacy of individuals.

In contrast, the regulations introduce new remedies to penalise those who misuse sensitive personal data (information on whether an individual is a member of a trade union is classed as sensitive personal data). In the Government's view, the regulations should encourage employers to re-examine whether their data and vetting practices when recruiting are consistent with the law and respect the privacy of

individuals. The net effect of the regulations is to reinforce existing statutory protections which safeguard privacy.

The regulations have been designed to dovetail with existing protections, most notably the DPA. In no way do they adversely affect those protections. Indeed, the Government expects that the existing investigative powers of the ICO under the DPA, which were so evident in the TCA case, might in future be instrumental in uncovering key evidence which could lead to legal action by individuals under the regulations.

Parties consulted during the formulation of this policy

BIS officials have engaged with the ICO from the beginning of the investigation, and have consulted them extensively during the process of drafting the consultation document and the regulations they contain.

During the public consultation on the draft regulations, BIS sent the consultation document to over 250 organisations such as the Trades Union Congress, the Confederation of British Industry, the Welsh Assembly, the Scottish Parliament, the Information Commissioner, and the Employment Lawyers' Association, and placed it prominently on the BIS website. The Department received over 50 responses, including a number from individuals, the majority of which supported the introduction of draft regulations.

Meetings have also been held with various organisations in order to solicit their opinions on the draft regulations. These included the Trades Union Congress, certain TUC affiliates including the construction union UCATT, the Confederation of British Industry and the Employment Lawyers Association.

Conclusion

The Government considers that the proposed regulations will have a wholly positive effect in safeguarding sensitive personal information on trade unionists which will ensure that this information is not misused.

Department for Business, Innovation and Skills
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