



Fair Play in the Workplace

Good employment practice in Jersey

Discussion document issued by the Employment and Social Security Committee

Proposals to help create a fairer society and maintain the Island's prosperity

Includes a questionnaire to help employers and employees say what they want from future employment legislation

November 1998

EMPLOYMENT & SOCIAL SECURITY



President's Forward

The Committee firmly believes that fair play in the workplace is enhanced by a partnership approach underpinned by a legal safety net of rights, responsibilities and protections. Jersey cannot justify remaining one of the few states which denies its citizens such basic rights as protection from unfair dismissal and freedom from discrimination. At the same time we should not become as heavily regulated as some other states within Europe and elsewhere. A sensible balance needs to be struck.

The purpose of the consultation process, therefore, is to reach consensus in our society on a legal framework which will provide standards of decency and fairness in the workplace but not undermine the social and economic benefit that we have from a healthy economy and full employment.

I hope you will contribute your views in writing, by phone, fax or e-mail. You may use the enclosed questionnaire if it is more helpful. There will also be a number of public meetings at which you can meet the Committee and express your views in person. We need guidance from you.

I look forward to hearing from you.

Deputy Terry Le Sueur

Controller's Foreword

Jersey's existing employment laws are out of date, fragmented and ineffective. There is a pressing need for a workable legislative framework which will reflect the Island's particular circumstances and introduce rights and responsibilities both for employers and employees. Any new legislation must have regard to best practice throughout the world, particularly that found to be successful in smaller jurisdictions.

The reader will see in the report that the employment relationship is now highly regulated and becoming more so, particularly in Europe. This poses a problem for small jurisdictions like Jersey which do not have the infrastructure required to support such legislation.

Some may argue that there is no need for much regulation because full employment puts employees in a stronger position in Jersey than in those other countries where high unemployment is a key element in the labour market. There is not the same imbalance in the employment relationship here and many employers in fact complain that the balance is too much on the local employees' side at present. Others, however, may say that it is only those people with the skills and expertise currently in demand who have the bargaining powers and that there are still many who are being treated unfairly. Regardless, we must plan for future changes brought about by global trading trends.

Whatever your views, let us know how you feel so that we can develop the right legal framework for Jersey. To assist you, we have highlighted key points at the beginning of the main technical sections in this report.

Ann Esterson

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1.The Changing Workplace

- 1.1 The workplace everywhere has undergone considerable change over the last decade, including -
- the impact of technology;
 - new patterns of working;
 - increased competition within the global marketplace;
 - the move away from command/control management style;
 - higher female participation rates;
 - the power of the customer in demanding quality, service and value.
- 1.2 Central to these changes is the message that organisations succeed only to the extent that they secure the willing contribution of the people who work for them at all levels - people who can adapt quickly to change. The old concept of the master and servant relationship between employer and employee no longer has any place in today's workplace nor do adversarial relationships, particularly those based on protecting the status quo.
- 1.3 We have already seen a fundamental shift in how organisations work and this will probably continue to evolve well into the next century. We have also seen how quickly the labourforce has to adapt to changes in the market place.

"Competition is increasing between workforces as we move further into global competition, it is the ability of managers to develop, motivate and create real opportunity for people to contribute their talent, initiative, continuous learning and innovation, that makes the winning difference managing becomes a process that everyone contributes to what no one can afford is a return to adversarial relationships based on resistance to change".¹

¹Geoff Armstrong - Director-General of the Institute of Personnel and Development.

2. The New Partnership Approach

- 2.1 Many organisations are already working within a relationship where trust, co-operation and mutual respect are the fundamental values. So what can Government do to create the right environment in which these organisations can continue to flourish and grow but which also encourages others who have not adopted a similar approach? The Committee believes it requires a number of different approaches to achieve organisational effectiveness and fairness in the workplace. The Committee has already embarked on:
- an employment and training strategy which is aimed at improving business practices and the skills of the workforce. In the modern world, employers need to be much smarter at running their businesses and employees need to be more flexible, competent and productive;
 - Social Security reforms which will modernise the scheme to reflect social and employment trends;
 - a minimum pay policy which will establish the lowest wage that the Island is prepared to tolerate.
- 2.2 This consultative document is the result of the Committee's review of employment practices in the Island. Although most of this document will concentrate on the proposed legal infrastructure, the overall ethos is one of promoting a new culture of co-operation and partnership in the workplace so that Jersey people can *"remain employed in a changing labour market assisted by responsible working practices"*. In its Strategic Review and Action Plan (1997 - 1999), the Committee also said it would do this *"by providing a framework to help employers and employees work together for their mutual benefit and the good of the Island"*.
- 2.3 The Committee firmly believes that fair play in the workplace is enhanced by a partnership approach underpinned by a legal safety net of rights, responsibilities and protections. Jersey cannot justify remaining one of the few states which denies its citizens such basic rights as protection from unfair dismissal and freedom from discrimination but the Committee believes there is a balance to be struck and that Jersey should not become as heavily regulated as some other states within Europe and elsewhere. The purpose of the consultation process is to reach consensus in our society on a legal framework which will provide standards of decency and fairness in the workplace but not undermine the social and economic benefit that we have from a healthy economy and full employment.
- 2.4 The Committee is very keen to receive the views of employers and employees during the consultation process, particularly on priorities and, from the employers' perspective, what they believe can be afforded and absorbed by business (and over what timescale). The Committee acknowledges that all the issues addressed and proposals made in this report cannot be achieved overnight but it aims to reach a consensus with all parties on the overall framework and the timescale for implementation.

- 2.5 The Committee is well aware that businesses need time to prepare for change, particularly if additional costs are likely to be incurred. It is also important to bear in mind that the States have approved the implementation of a minimum wage and maternity provision in the Island. The combined effect of all the initiatives contained in this report may be to push Jersey in a more European direction in our labour market policies (minimum wage, more job protection, higher cost of employing people, etc.) and the Island should not underestimate the impact that this could have.
- 2.6 The Committee truly believes that it is important to find an intermediate position in its labour market policies if Jersey is to avoid the problems found in many European countries - high unemployment and limited opportunities for less skilled workers and those on the margins of the labour market. The right balance for Jersey must be found having weighed together the need for social protection and the impact on a small island economy where over-regulation could result in inflexibility leading to problems in an increasingly competitive marketplace.
- 2.7 Equally, however, it is fundamental that workers are treated fairly. There is no room in the modern marketplace for bad employers who not only diminish their own reputation but also that of the Island.

3. European & World Influences

- 3.1 In carrying out detailed research for this paper, the Committee looked at employment legislation and legal systems in developed countries around the world. Members were particularly interested to know the position in other smaller jurisdictions, recognising that it would be difficult for people and businesses in a small Island like Jersey to handle large amounts of complex employment legislation. The Committee was not able to find a workable legislative framework on which to base one for an Island of this size, also bearing in mind Jersey's particular economic status, labour market and proximity to Europe.
- 3.2 With the exception of Bermuda², employment legislation, of varying degrees of sophistication has evolved in almost all jurisdictions. Such legislation has been based on the common law of contract and adapted to meet specific social needs. The common law has been supplemented by specific employment legislation within an evolutionary process and many jurisdictions have been tidying up their legislation through a consolidation process.
- 3.3 There is an opportunity to start from scratch in Jersey, although the Committee believes that the ability to do this will be severely restricted because Jersey has many UK (and European/World-wide) businesses operating here who follow UK legislation and EC directives. In essence, we have to provide what are now generally regarded in all developed countries as basic human rights.
- 3.4 The countries of mainland Europe have generally adopted common approaches to employee relations, despite their differing legislative frameworks and employment relations practices. EC law has covered the UK since 1973, when it became a member, but the UK government consistently tried to resist many European initiatives until relatively recently.
- 3.5 It is common to find within EU countries -
- a commitment to consultation with employee representatives through company councils of different types;
 - a concept of social partnership with a formalised role for trade unions and employers' associations;
 - adherence to the Social Protocol of the Maastricht Treaty with an unequivocal commitment to implementation of European directives on employment.
- 3.6 The globalisation of business in general, and closer integration of operations within Europe in particular, will continue to have a profound effect in the employment field. Common areas of concern for the social partners in Europe stem from labour market change - the increased use of the flexible workforce, the later entry of young people into the labour market, the increased participation of women and concerns about unemployment.
- 3.7 Whilst the UK shares many of these problems with its European partners, it could be said that, for a very long time, it had adopted an intermediate position between the United States and European labour market models in its approach. Despite consistent attempts by the UK to resist European influence in employment matters, major changes have been forced through. The present UK Government has taken a more positive approach towards Europe and time alone will tell how much more European influence will spread to the UK. However, the current situation is that the UK Government has formally reversed the opt-out of the Social Chapter and that various Directives have been and will be introduced - including the Working Time Directive, the Proof of Employment Relationship Directive and the Part-Time Workers Directive.

² Bermuda's position is very similar to that of Jersey at present. It has little legislation, only codes of practice which are not legally enforceable. The Government of Bermuda is currently embarking on a similar exercise to that which is being undertaken in Jersey concerning the introduction of a framework of employment rights. They have expressed an interest in sharing Jersey's findings.

3.8 Jersey currently has very little employment legislation and, in this respect, it is unique within Europe. Jersey also seems to be a little behind other smaller jurisdictions with the exception of Bermuda, as mentioned earlier, though none of these jurisdictions seem to have achieved a perfect model. It is inevitable that Jersey will feel the pressure from external sources in Europe and the UK and will be obliged to follow their practices in due course. The aim should be to adopt these principles in a form that is modified for a small community like Jersey.

4.0 Guiding Principles

4.1 The Employment and Social Security Committee believes it is important not to underestimate the complexity of employment legislation issues. In most countries many experts, lawyers and others have become involved in advising and dealing with disputes and various aspects of employment related legislation. It is for this reason that the Committee has set itself some guiding principles centred on the need for legislation that:

- is easily understood;
- is effective in tackling the real problems;
- supports cohesion in the workforce;
- lays down clear standards of decency;
- supports a competitive economy;
- is affordable.

4.2 In the following chapters, the Committee examines all the issues and makes extensive references to the principles contained in UK and European legislation and directives. The Committee is not proposing that the Island should follow them slavishly. Indeed, the references highlight the many complexities involved. Although the principles are generally straightforward, translating them to cover all the different labour market practices is more difficult.

5. Employment Legislation Currently in Force in Jersey

Key Points

- Both the English and Jersey common law are based on the concept of a master and servant relationship in the workplace. Nevertheless, much of the ethos behind Jersey customary law³ still holds true today.
- Current employment law in Jersey is basically similar to that which existed in the UK prior to the introduction of specific employment legislation starting with the Equal Pay Act 1970. It is important to note that the UK legislation did not overturn the common law principles. It reinforced them and created new rights. Many of these rights sprung from United Nations Conventions, International Labour Organisation Conventions and European Directives.
- The Committee believes that the overall ethos in the workplace should be one of trust, co-operation and mutual respect - employers and employees working together for their mutual benefit and the good of the Island. The very basic rights and duties of both parties could be described as:

Employers' Rights (and Employees' Duties)

- Employees should be honest, conscientious and loyal and should not act against employers' interests.
- Employees should be competent at their job and efficient.
- They should not disclose confidential information about their employers' business to others.
- They should take care of their employers' property and their own health and safety in the workplace.

Employers' Duties (and Employees' Rights)

- Employers should behave reasonably in employment matters at all times.
- They should ensure that employees are properly skilled and trained to do their jobs.
- They should practice good employee relations, ensuring that their employees know what is expected of them and what they can expect in return.
- They should have clear disciplinary and grievance procedures.
- They should pay their employees the agreed amount at proper intervals.
- They should take reasonable care to ensure the safety and health of their employees.

³ Customary law in Jersey equates to common law in the UK.

- 5.1 Prior to the formation of the Industrial Relations Committee in 1969, no Committee had specific responsibility for employment or industrial relations matters. For a variety of reasons, including lack of resources, successive Industrial Relations Committees did not adopt a co-ordinated approach towards employment legislation and, as a result, such legislation is largely fragmented, outdated and ineffective.
- 5.2 The legislation comprises -
- **Industrial Disputes (Jersey) Law 1956**, as amended, which sets out to make provision for the settlement of industrial disputes and for regulating conditions of employment. The shortcomings of this Law were recognised formally as early as 1969 when a new Industrial Relations Committee was charged with responsibility for preparing legislation to replace it. This has not yet been done.
 - **Payment of Wages (Jersey) Law 1962**, as amended, supplemented by the **Payment of Wages (Jersey) Regulations 1977**, which set out to ensure that workers receive the full benefit of their wages, to protect them from certain abuses and to provide for related matters. The Law Officers have offered the opinion that it may be desirable to carry out a proper review of the 1962 Law in the light of legislation on the same subject in England and other European countries, with a view to updating or replacing the 1962 Law.
 - **Termination of Employment - Minimum Periods of Notice (Jersey) Law 1974 and Regulations 1994**, which require minimum periods of notice to be given to terminate employment and also provide for related wage payments. There is no specific remedy provided within the Law or Regulations for infractions and any breaches would amount to a breach of contract. The mechanisms currently available to deal with alleged breaches are the Royal Court and the Petty Debts Court.
 - **Terms of Employment (Jersey) Regulations 1998**, designed to ensure that workers are made aware of their terms of employment (in writing). These triennial Regulations were introduced in 1992, renewed in 1995, amended in 1996 and renewed in 1998. Resources have never been provided to police this Law. The individual can only seek enforcement through the Terms of Employment Officer and, in theory, the Magistrate's Court. In 1995, a penalty of £500 was introduced for offences. There have been no prosecutions and it is known that a significant number of employers do not comply⁴ (and appear to have little intention of complying) with the Regulations.
- 5.3 The former Industrial Relations Committee produced a code of practice, updated in 1996, entitled Good Employment Practice. The Jersey Chamber of Commerce produced a Guide to Good Employment Practice For Jersey Employers, updated in 1995.

⁴ There is evidence for this from the Industrial Relations Advisory Service and the Employers' Survey carried out by the former Industrial Relations Committee in 1996/97.

5.4 As regards Jersey Customary Law, the Law Officers have commented⁵ that:

"The relationship between employer and employee is essentially part of the ordinary law of contract. Whilst the essentials of the Jersey law of contract may be said to have more in common with French than with English law, nonetheless, for practical purposes the resulting relationship between employer and employee is not dissimilar to that which prevailed at English common law before the evolution over a period of many years in that jurisdiction of a framework of statutory rights and obligations.

In Jersey, the parties are free essentially to make their own contract. In accordance with the maxim 'la convention fait la loi des parties', they will be bound by any contract which is not otherwise void or unlawful. Implicit in any contract of employment is a duty on the employee to give his personal service (i.e. not to delegate the performance of his duties to another person), to obey all lawful orders given to him by his employer, to act with loyalty and good faith towards his employer and to exercise reasonable care in his work. Also implicit are certain duties upon the employer. He must pay the agreed remuneration. He must take reasonable care for the safety of his employees. This involves amongst other things the provision of a safe system of work and the exercise of reasonable care in the provision and maintenance of plant, tools and equipment".

⁵ In a memorandum from the Law Officers dated 18th April 1997.

6. The Proposed New Employment Legislative Framework

Key Points

- The Employment and Social Security Committee's vision, which is endorsed by the 1997 Strategic Review, is that a partnership approach to the employment relationship is preferable to the continuation of the traditional master and servant concept. However, experience in relation to the existing legislation, together with experience in other jurisdictions, has shown that an appropriate legal framework, supported by professional advice and conciliation and an effective mechanism to resolve disputes and settle legal claims is essential if a partnership approach is to be successful.
- The Employment and Social Security is seeking views on the content of the legal framework for Jersey.

6.1 The Committee is of the view that, taking the basic principles of the customary law discussed in the previous section and adding in the partnership concept⁶, the following points emerge -

- before any form of partnership can succeed, there must be a framework of acceptable behaviour within which all the parties are expected to work;
- the basis of every employment relationship is a contract in which an employer offers someone a job on agreed terms for which payment will be made. The contract is complete when that person accepts the offer;
- the common law in the UK and customary law in Jersey govern the basic elements of the contract of employment which primarily ensures that the agreed terms and conditions are followed by both parties. It also ensures that some implied terms which might not be expressly made in the contract are honoured.

6.2. The problem is that the common (customary) law did not envisage all the complex situations that arise within individual contracts of employment. Consequently, statutory individual employment rights have grown in all jurisdictions to cover such issues as -

- unfair dismissal;
- discrimination;
- equal pay;
- payment of wages;
- redundancy;
- periods of notice.

6.3 Special courts and tribunals have developed throughout the world to enforce these rights. It became clear, however, that reference to these alone was unsatisfactory. In many cases, the parties to a complaint themselves can reach an agreed settlement with some independent help. Thus ACAS was set up in the UK, as were equivalent organisations in most developed countries.

⁶ See Section 2 of this report.

- 6.4 The Committee is proposing specific measures to protect individual employers and employees:
- a new EMPLOYMENT LAW to consolidate or replace existing legislation and provide additional rights and obligations;
 - a JERSEY ARBITRATION AND CONCILIATION SERVICE (JACS) to prevent and resolve problems in the workplace;
 - an EMPLOYMENT TRIBUNAL to enforce the Law when advice and discussion fail to produce a resolution to a problem.
- 6.5 It is envisaged that the main Law will contain the core provisions with Regulations covering the details of application and of processes etc. Approved Codes of Practice will be used where possible to support the legislation. The Committee is concerned to achieve political and social consensus on the content of the Law.
- 6.6 The following chapters deal with the main aspects to be considered under the following categories:
- terms and conditions of employment;
 - equality of opportunity and treatment;
 - maternity arrangements;
 - payment of wages and salaries;
 - termination of employment;
 - flexible working practices;
 - statutory minimum wage;
 - advice, conciliation and enforcement;
 - trade unions and collective employment rights;
 - partnership in the review and development of employment and law policy.

7. Terms and Conditions of Employment

Key Points

Written Particulars of Employment

- The contract of employment is the basis of the employment relationship - it is the main means by which 'fair dealing' can be achieved by both the employer and employee.
- The provisions of the Terms of Employment (Jersey) Regulations 1998 need to be consolidated into a new Law and be enforced effectively.
- The Committee believes that the Law should also ensure that employers are responsible for providing, and employees have a right to receive, an itemised pay statement including details of any fixed deductions from wages. This need not be too onerous or complex as **Annex A** illustrates.

Transfer of Undertakings

- The legislation in the EU and UK is designed to ensure that the legal rights of employees and representatives are protected when ownership of the organisation in which they work is transferred - that is:
 - their rights remain as if they were still employed by the former employer;
 - there is protection against dismissal arising through the transfer of the undertaking;
 - there are statutory procedures concerning the provision of information to and consultation with employees affected by transfers.
- The growing trend throughout the world towards mergers, outsourcing etc. has made this an important issue. Jersey has been, and will continue to be, affected by these trends, particularly with a States population policy actively encouraging outsourcing.
- Whilst the Committee believes that the proposed new Jersey law should require employers to give consideration to the impact on their employees of any transfer of ownership of a business or trade, it appreciates that legislation concerning this in the UK is complex. The Committee is therefore seeking views on the principles discussed in this report.

Sunday Working

- In Jersey, as in the UK some years ago, there have been proposals to rationalise the present muddled situation concerning Sunday trading. There is divided opinion about the proposals and there is clearly concern in some quarters that employees could suffer some form of detriment if Sunday trading is "opened up" and staff object, for any reason, to having to work on Sundays.

- Although the Committee supports the principle that employees should not be required to work on Sundays if they do not want to (and it is not within the scope of their contracts), the Committee would like to hear the readers' views. Equally, it would like to consider, and hear views on, the wider implications of protection for employees who may be pressurised into working outside their contractual working arrangements - e.g. on rest days.

Time off Work

- Individuals in Jersey are encouraged, in many cases, to take on certain public duties. The Committee is not aware of any problems in Jersey with regard to time off work for various reasons but would like to know whether consideration needs to be given to introducing legislation or a code of practice to provide individual employees, in specified circumstances, with a right to reasonable paid time off work.

Written Particulars of Employment : The Contract

- 7.1 The Terms of Employment (Jersey) Regulations 1998 provide that an employer must give the employee a written statement containing specific terms of employment within four weeks of starting work. They also provide that changes to those terms must be notified in writing.
- 7.2 An employer who contravenes the Regulations commits an offence and is liable on conviction to a fine not exceeding £500.
- 7.3 The contract of employment, or statement of main terms in support of a contract, need not be very complicated but must contain the information specified in the Terms of Employment Regulations. It is important to get it right if both parties are to be clear about their responsibilities as well as their rights. A summary of the main issues to be covered in a contract or statement of main terms is given at **Annex B**. An employee handbook is useful in supporting the written terms of employment. A sample of the contents of such a handbook is provided at **Annex C**.

Transfer of Undertakings

- 7.4 In the UK, provisions relating to employment rights on the transfer of an undertaking are contained in regulations often collectively referred to as **TUPE** (Transfer of Undertakings (Protection of Employment) Regulations).
- 7.5 Basically, these Regulations preserve employees' terms and conditions when a business or undertaking, or part of one, is transferred to a new employer.
- 7.6 The new employer takes over -
 - the contracts of all employees who were employed in the undertaking immediately before the transfer. An employer cannot just pick and choose which employees to take on;
 - all rights and obligations arising from the contracts of employment or from the employment relationship between the previous employer and the employees, except criminal liabilities and employees' occupational pension rights. The new employer is not obliged to continue an occupational pension scheme;

- any collective agreements made on behalf of the employees and in force immediately before the transfer; and
 - the recognition of any independent trade union.
- 7.7 The new or previous employer cannot fairly dismiss an employee because of the transfer or a reason connected with it unless the dismissal is necessary for an economic, technical or organisational reason entailing changes in the workforce. If there is such a reason, and it is the cause or the main cause of the dismissal, the dismissal will be fair provided that an employment tribunal decides that the employer acted reasonably in the circumstances. If there is a redundancy situation, the usual redundancy procedures will apply.
- 7.8 The new employer is not permitted to worsen the terms and conditions of employment of any transferred employee.
- 7.9 The previous and new employers must inform and consult representatives of the employees. They must tell the representatives:
- that the transfer is going to take place, approximately when and why;
 - the legal, economic and social implications of the transfer for the affected employees;
 - whether the employer intends to take any action (reorganisation for example) in connection with the transfer which will affect the employees and, if so, what action is proposed.
- 7.10 If action is proposed that will affect the employees, the employer must normally consult the representatives of the employees affected by that action with a view to seeking agreement. The employer must consider and respond to any representations made by the representatives. If the employer rejects these representations, he/she must state reasons. There are specific rights relating to representatives concerning the carrying out of their duties.

The Position in Jersey

- 7.11 The only legislation in Jersey covering the rights of employees where the undertaking is transferred is Article 4 of the Termination of Employment - Minimum Periods of Notice (Jersey) Law 1974. The effect of this Article is that a transfer of a business or undertaking does not break the continuity of employment of the employee for the purpose of calculating the minimum period of notice required.

Sunday Working

7.12 Present Situation in Jersey and UK

On 6th October 1998, the States debated a proposition (and an amendment) to change the Sunday trading legislation, including protection of the rights of existing and future employees in relation to Sunday working. The amendment was withdrawn and the proposition was defeated. For the moment at least, the present muddled Sunday trading situation in Jersey remains unchanged. Nevertheless, there are currently many people working on Sundays in Jersey. In the UK, the Employment Rights Act 1996 consolidated the provisions of a number of earlier statutes, each of which had been developed for specific reasons. The protection of employment rights of shop and betting workers was an essential ingredient within the wider issue of Sunday trading.

Time off Work

7.13 The contract of employment should give details of leave entitlement. Employees in the UK, however, have additional rights to time off work in the following circumstances -

- trade union duties;
- specified public duties;
- other specific circumstances - e.g. antenatal care, redundancy.

7.14 There is no equivalent legislation in Jersey and it is not known whether there is a problem with regard to time off work in these circumstances. Jersey has traditionally relied upon and encouraged voluntary and honorary participation in a wide variety of organisations and duties, including the Honorary Police, Fire Service and the States. The Committee would therefore like to hear from those involved as to whether there is a need to formalise employee rights in this respect.

8. Equality of Opportunity and Treatment

Key Points

- The States have decided that there should be equality of opportunity and freedom from discrimination.

Equal Pay

- The United Nations Declaration of Human Rights states - *"Everyone, without discrimination, has the right to equal pay for equal work"*. Article 119 of the Treaty of Rome says - *"Men and women should receive equal pay for equal work"*.
- A woman or a man employed at an establishment in the UK whose contract of employment does not include (directly or by reference to a collective agreement) an equality clause is deemed to include one.
- The principle of equality of pay is widely accepted throughout the developed world but is not currently provided for in Jersey.
- The Committee believes in the general principles of equal pay for equal work and needs to hear your views on this issue, in particular:
 - where a woman is employed on like work with a man in the same employment (and vice versa);
 - where a woman is employed on work rated as equivalent to that of a man in the same employment (and vice versa).
- In view of the complexities associated with such legislation, the Committee believes that it may be appropriate initially to introduce a Code of Practice. The Committee seeks views on this approach.

Sex Discrimination in Employment

- The European Commission is seeking to ensure that all forms of sex discrimination are outlawed. The UK already has comprehensive legislation on sex discrimination but the EU proposals are even broader. The Isle of Man has decided to join the UK in ratifying the Convention.
- Jersey and Guernsey, not being Member States of the EU, are probably standing alone in Europe in not having taken steps to ensure that they have adequate sex discrimination legislation. Indeed, the situation in Jersey is that there is no legislation whatsoever to protect individuals against any form of sex discrimination. Individual employees might well have some form of protection built into their contracts of employment, but this is likely to be of limited application.
- The States (in 1991) *"endorsed the principle that all forms of discrimination, whether against women or men, should be removed"* and the Special Committee on Sex Discrimination, in 1992, published a leaflet concerning sexual harassment in the workplace.
- The Policy and Resources Committee considers that Senator Stein's approach in 1991 remains the correct perspective for the Island - i.e. *"not necessary for Jersey to enact the endless legislation as stipulated in the Convention"* and it hopes that the Island will be able to *"find a way of dealing with these matters which is appropriate to a community of our size"*.

- The Committee would be interested to hear views on the extent of sex discrimination in the workplace as well as comments concerning the introduction of legislation to prohibit such discrimination.

Race Discrimination

- The EC has been far more active in the field of sex discrimination than that of race discrimination, although the latter issue is now gaining momentum.
- The States, in approving the Legislation Programme for 1998-2000, have agreed that a Race Relations Law should be given drafting time in 2000 - *"to allow the Island to meet its obligations with regard to racial discrimination"*.

Disability Discrimination in Employment

- The Disability Discrimination Act 1995 breaks new ground in the UK as it makes extensive use of Codes of Practice (not unlike Jersey's Health and Safety Law) Jersey has recently seen an employers' forum set up - Jersey Employers Network on Disability (JEND) - which is successfully placing people with disabilities in open employment. The Employment and Social Security Committee also helps financially in several ways,
 - pump priming work schemes and work placements for the disabled;
 - training support;
 - grants to employers for adjustments to the working environment and special equipment.
- The Committee welcomes views on legislation/codes of practice in this area.

All Aspects of Discrimination

- In the UK, there are three Laws [Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995] which are all based on the same fundamental principles. The Disability Discrimination Act 1995 is similar to the other two Discrimination Acts, except that the employment provisions do not (currently) apply to employers with fewer than 20 employees and it carries a modified definition of discrimination.
- The UK Home Secretary has announced that the Government is considering the introduction of a new law to protect individuals on the grounds of religious belief resulting from proposals of the Commission For Racial Equality.
- Following a campaign over several years to prevent age discrimination in the workplace, which has met with limited success, the UK Government has recently decided not to support a Private Member's Bill - the Employment (Age Discrimination in Advertisements) Bill. The Government instead favours an attempt at a Code of Practice initially.
- It would seem sensible for Jersey to consider the whole issue of discrimination together and it may be appropriate, therefore, to ask the States to supplement their decision on race discrimination with legislation covering sex and disability discrimination, and possibly age and religious discrimination, in all matters.
- The Committee favours an all embracing Discrimination Law with the broad framework included in the main law being supplemented by Regulations and Codes of Practice. Views are sought on this and, in particular, the most appropriate way of covering discrimination, in all its forms, in the workplace.

- 8.1 The States, in accepting the 1995 Strategic Policy Review, have already approved policies providing equality of opportunity and freedom from discrimination. Consequently, the Committee has only given consideration to these policies within the context of the employment relationship.
- 8.2 This section concentrates on two aspects of equality of opportunity and treatment in the workplace, together with associated protection from detriment -
- equal pay;
 - discrimination in employment.
- 8.3 There are however wider issues for the Island to consider and two important points should be noted -
- discrimination laws generally cover a wider range of rights, obligations and activities than those associated with employment alone; and
 - the Equal Opportunities Commission in the UK is currently calling for a new "super law" to bring together equality legislation within a single statute.

Equal Pay

- 8.4 In the UK, the Equal Pay Act 1970, the Sex Discrimination Acts 1975 and 1986 and the Equal Pay (Amendment) Regulations 1983 were all enacted to try to prevent discrimination against women. Behind the legislation lies Article 119 of the Treaty of Rome, which says "*Men and women should receive equal pay for equal work*".
- 8.5 The Equal Pay Act requires that every term in a woman's (or man's) contract of employment must not be less favourable than that in a man's (or woman's) contract. This is achieved by writing an equality clause into every contract.
- 8.6 It is generally considered that the concept of **equal pay for equal work (same job)** is easily justified and understood. However, the concept of **equal pay for work of equal value** is a far more complicated problem that has resulted in complex attempts throughout Europe to produce effective procedures.
- 8.7 The UK Equal Opportunities Commission, in May 1997, published a Code of Practice on Equal Pay. Its declared purpose is to provide practical guidance and to recommend good practice to those with responsibility for or interest in the pay arrangements within a particular organisation. The guidance in the code is based on decisions from the UK courts and the European Court of Justice, along with good practice known to the Equal Opportunities Commission. The Code is admissible in evidence in any proceedings under the Sex Discrimination Act 1975 or the Equal Pay Act 1970, (each as amended), before an Employment Tribunal.

Sex Discrimination in Employment

- 8.8 The States decided in 1995 that the Policy & Resources Committee should bring forward a report on the case for and against the extension to the Island of joining in HM Government's ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.
- 8.9 The report concluded that Jersey should not join in HM Government's ratification of the Convention and states that Senator Stein's proposition of 1991 remains the correct perspective for the Island - i.e. it is "*not necessary for Jersey to enact the endless legislation as stipulated in the Convention*" and it was hoped the Island would be able to "*find a way of dealing with these matters which was appropriate to a community of our size*".

- 8.10 The Employment and Social Security Committee's main concern in this report is with the aspects of sex discrimination that apply to the employment relationship.

The Effect of European Law on Sex Discrimination

- 8.11 The Equal Treatment Directive is concerned with the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion and working conditions. As a member of the EU, the UK is required to bring into effect appropriate legislation to fulfil the terms of EC Directives.
- 8.12 The EC has adopted a Recommendation and Code of Practice on the "*protection of the dignity of women and men at work*". These are not legally binding but the ECJ has ruled that national courts should take the Recommendations into account. Among its many recommendations, the Code states that management, after consultation, should issue a policy statement making it plain that sexual harassment at work will not be permitted or condoned.

The Position in the UK

- 8.13 The UK Sex Discrimination Act 1975 covers aspects of discrimination, both direct and indirect, against women and men. The main provisions relating to the employment relationship are :

- **Job Advertising**

The intention of the Law is to deter employers and others concerned with recruitment from indicating in an advertisement that applicants of only one sex need apply, or that married people need not apply, or that the job is likely to be given to a person of one sex or the other. Enforcement is by the Equal Opportunities Commission.

- **Employment Applications**

It is unlawful to discriminate against job applicants (women or men). This extends to job advertisements, instructions to employment agencies or recruitment consultants, job descriptions, selection tests, instructions or policies on short-listing, prescribed interviewing techniques or anything else that could be regarded as part of the machinery of recruitment. Discrimination can be blunt and crude - "*we will not employ a woman*" - or subtle, where the employer himself may be unaware of discrimination in his selection procedures.

Where simply being a man or a woman is a genuine occupational qualification for the job, discrimination is not deemed unlawful. However, this applies only in strictly specified circumstances.

- **Discrimination During the Course of Employment**

Various provisions make it unlawful to discriminate in respect of access to opportunities for promotion, transfers and training or any other benefits, facilities or services.

- **Dismissal on Grounds of Sex**

Dismissal on the grounds of direct sex discrimination is unlawful. Dismissal through indirect discrimination is unlawful unless the employer can show that the requirement imposed is justifiable regardless of sex.

- **Sexual Harassment**

Whilst the Sex Discrimination Act does not specifically outlaw sexual harassment, it has become established that an employee who suffers such harassment may claim direct discrimination where he or she can show that the harassment constitutes a detriment. A successful claim may also arise where an employee is dismissed in consequence of harassment - for example, where he or she is dismissed for refusing sexual advances. Alternatively, victims of harassment may be able to leave and claim unfair constructive dismissal on the grounds that the terms of mutual trust and confidence have been breached⁷. Sexual harassment ranges from suggestive remarks, displaying pornographic material and leering to more extreme examples such as groping or assault.

Race Discrimination

- 8.14 The Policy and Resources Committee lodged a proposition (P.213/96) in November 1996 entitled "*RACIAL DISCRIMINATION-REPORT AND RECOMMENDATIONS*", which was approved by the States on 13th May 1997. The report set out to identify the extent of racism and racial discrimination in the Island community and the remedies that presently exist against such conduct.
- 8.15 The States, in approving this proposition, have charged the Policy & Resources Committee to take the necessary steps to enable legislation to be assessed for priority for inclusion in the States legislation programme "*to render racial discrimination unlawful*".

The Position in the UK

- 8.16 In the UK, the Race Relations Act defines direct and indirect discrimination and, although it is primarily intended to protect racial and ethnic minorities, the definition applies to any discrimination by one party against another on racial grounds. Segregation (making separate arrangements or requirements for persons of different racial groups) is expressly stated in the Act to be treating those persons who are segregated less favourably and is therefore direct discrimination. Religious discrimination is not expressly included in the definition of racial discrimination but such discrimination may be unlawful as indirect discrimination.
- 8.17 Broadly speaking, the law in relation to race discrimination is the same as that relating to sex discrimination, including those provisions covering the employment relationship.

⁷There is also the Protection from Harassment Act 1997 in the UK which creates an offence attracting a prison sentence of up to 6 months and/or a fine.

Disability Discrimination in Employment

The Position in the UK

8.18 In the UK, the **Disability Discrimination Act 1995 [DDA]** has introduced important rights for people with disabilities not to be discriminated against in employment and in other areas such as education and access to goods and services. The main provisions relating to employment are:

- Employers are liable for discrimination against “disabled persons” in connection with recruitment, promotion, training, working conditions and dismissal.
- It is possible for employers to justify less favourable treatment of a disabled person by showing that the reason for such treatment is material to the circumstances of the particular case and substantial.
- An employer’s defence is subject to a duty to make reasonable adjustments to working conditions or to the physical working environment, where that would help overcome the practical effects of a disability.
- Employment tribunals hear complaints of discrimination and are able to award unlimited compensation.
- The National Disability Council currently has an advisory, as opposed to enforcement, role.
- Employers with fewer than 20 employees are not currently subject to the provisions of the Act.
- Codes of practice and guidance papers exist which, whilst not directly legally binding, must be considered by tribunals and courts as evidence of best practice.

8.19 All Aspects of Discrimination

Discrimination is a broad legal concept which includes equal opportunities issues. Although this paper concentrates on discrimination as it affects employment, the Committee believes there is a need to consider all aspects of discrimination together in order to avoid an incremental approach which could result in different pieces of legislation.

9. Maternity Arrangements

KEY POINTS

- The basis of the recent States' decision on the introduction of maternity rights is "*social justice*". In the UK, statutory maternity rights form a minimum standard of protection established by Parliament to help women in reconciling their work and family responsibilities; women and employers remain free to negotiate and agree more favourable arrangements on a voluntary or contractual basis. In the EU, the issue is special protection for working women who become mothers.
- Maternity rights may be summarised as four basic principles -
 - time off for antenatal care;
 - the right to return to work following maternity leave and maternity absence;
 - the right to maternity payment/benefit; and
 - protection from unfair dismissal on maternity-related grounds.
- In Jersey, the schemes applicable to public employees contain provisions relating to the first three of the above principles. They do not provide protection from dismissal by reason of pregnancy or childbirth. These provisions fall short of the minima in the UK and are still further behind those provisions that will follow under EU law.
- The States have decided that maternity benefit (rights) should be introduced as soon as possible. Inherent in this decision should be a requirement to provide employees with protection from detriment short of dismissal and from dismissal for reasons connected with pregnancy and childbirth.
- Any comparison between Jersey and the UK on the question of statutory maternity pay should take into account the relatively low level of basic Social Security maternity allowance and grants in the UK. Also, the Employment and Social Security Committee has not traditionally become involved in arrangements between employers and employees to supplement States benefits and pensions (employer sick pay, maternity pay or occupational pensions).
- The Committee is particularly mindful of the impact on small businesses not just in covering the cost of maternity pay but also in paying for another person to cover the period of maternity leave.
- The Committee will be interested to hear views on the implications of this States decision from all concerned during the consultative period.

Equality & Protection within the European Social Charter.

- 9.1 The Human Rights Social Charter (Monograph No.2,) entitled "*Women in the Working World*" [1995] contains a study which deals extensively with "*special protection for working women who become mothers*".
- 9.2 The right of working women to protection is contained in Article 8 of the Charter. The first three paragraphs relate to the protection granted in the event of maternity, namely: maternity leave (at least 12 weeks) with appropriate payments, prohibition of dismissal during a set period and time off for nursing mothers.

Maternity Rights in the UK

9.3 The main statutory maternity rights in the UK are -

- time off for antenatal care;
- no detrimental treatment on grounds of pregnancy or childbirth;
- no unfair dismissal on grounds of pregnancy or childbirth;
- a written statement of reasons for dismissal;
- maternity leave and maternity absence;
- statutory maternity pay;
- Maternity Allowance;
- health and safety considerations; and
- protection from sex discrimination.

9.4 Complaints about infringement of these rights are to the Employment Tribunal.

Jersey Position

9.5 In 1993, the States approved Senator Stein's report and proposition - "*Maternity Entitlement in Employment: Code of Good Practice*" and the Industrial Relations Committee subsequently published a summary called "*Guide to Maternity Entitlement in Employment*" in 1994. However, other than the benefits paid by Social Security, and also those that might exist within an individual's contract of employment or where an individual is covered by a collective agreement, maternity rights are not provided by law. Neither is there any form of legal protection against discrimination, detriment or unfair dismissal to pregnant employees or new mothers.

9.6 The only requirement in Jersey law at present - under the **Terms of Employment Regulations** - is that an employer is required to state in writing at the start of employment, or within 4 weeks of the start, whether or not there are terms relating to maternity and, if so, what those terms are.

9.7 In 1996, the States approved a report from the Employment and Social Security Committee following a review of the Social Security system which included policy on Social Security Maternity Benefits. The report (P132/1996) stated:

"As far as existing maternity provision is concerned, the Committee was pleased to see the success of current social security benefits - maternity allowances and maternity grants - which are being paid in respect of nearly all births in Jersey. Indeed, most women thought that maternity allowances were reasonable and the grants were a great help with all the early expenses.

As maternity allowance is paid to the majority of expectant mothers at the same rate as sickness and other benefits and pension, the Committee is of the view that it would not be equitable to raise the level of maternity allowance to include an "earnings related" component if it could not be done for other benefits.

The Committee has already commented that the Island is unlikely to be able to afford an earnings related scheme, and on this basis, believes that States benefits for maternity leave should continue to be made on the same basis as other benefits in the social security scheme - a platform on which people can build."

- 9.8 The States, on 4th November 1997, approved an amendment proposed by Senator Shenton to Paragraph 1.1 (iv) of the Strategic Policy Review & Action Plan 1997 to the effect that a statutory minimum wage and **a maternity benefit equal to that enjoyed by States employees be introduced as soon as possible**. The States' decision refers to "*maternity benefit*" but does not define this term other than to say that it should be "*equal to that enjoyed by States employees*".
- 9.9 Taking this decision literally, the way ahead would appear at first glance to be straightforward. Legislation should be produced which gives to all employees the same rights as those which apply in the public sector. Some difficulties are presented, however, in that the various public sector schemes differed in some important respects when the States took that decision. **(See Annex D)**.
- 9.10 Since the debate took place in November 1997, the Establishment Committee has consolidated all the different States maternity provisions - maternity pay has been set at 90% of salary for 12 weeks from 1st June, 1998.

Associated Legal Implications

- 9.11 Employment law, in whatever jurisdiction, is very much like a jigsaw puzzle in which the component parts interlock to form a complete picture. Each employment right relates in some way to another and this is particularly relevant to maternity rights. There is a clear inherent danger in attempting to take any course of action that would result in the provision of maternity rights in Jersey which did not include protection from unfair dismissal and other forms of detriment. If it were not made unlawful for employers to dismiss employees for pregnancy or childbirth reasons, then employers could simply dismiss pregnant employees in order to avoid having to comply with their legal obligations. Similarly, if sex discrimination was not unlawful, then employers could choose not to recruit women of child bearing age. In other words, maternity benefits and rights granted in isolation could very well be detrimental to the very persons they are intended to protect.

10. Payment of Wages and Salaries

Key Points

- Payment of wages provisions must be at the heart of any Employment Law.
- Wages and remuneration systems have become more complex over the years, often including non cash benefits.
- Pay statements will become very important in the enforcement of a minimum wage system in Jersey.
- The Client Advisers of the Employment & Social Security Department attempt to use the present Jersey Law to negotiate the settlement of disputes between employer and employee. However, in the opinion of the Law Officers, it is unlikely that this is an effective deterrent in practice and, therefore, there is no real protection for workers.
- The Committee believes that the Payment of Wages (Jersey) Law 1962 and Payment of Wages (Jersey) Regulations 1977 should therefore be updated in line with the advice of the Law Officers, and incorporated into the new law, including provisions relating to -
 - an employee's right not to suffer unauthorised deductions, with appropriate exceptions;
 - an employee's right not to have to make payments to an employer unless specifically agreed;
 - employers rights concerning cash shortages and stock deficiencies in retail employment;
 - an employee's right, in defined circumstances, to receive a "guarantee payment" where the employee would normally be required to work in accordance with his contract of employment but is not provided with work by his employer;
 - enforcement through the Employment Tribunal.
- Views are sought by the Committee on the above proposals.

Jersey Position

- 10.1 The purpose of the Payment of Wages (Jersey) Law 1962 is to ensure that workers receive the full benefit of their wages, to protect them from certain abuses and to provide for related matters. An employer who contravenes any of the provisions of this Law, or any Regulations made under the Law, is liable to a fine up to £250 for each offence.
- 10.2 Although the Law states that contravention amounts to a criminal offence, it does not make specific provision for enforcement. The Employment & Social Security Department has traditionally provided an advisory and arbitration service in this respect. In practice, where agreement cannot be reached voluntarily, the individual's only recourse is to the Petty Debts Court. Clearly, it is unsatisfactory that the Law makes contravention a criminal offence (there appear to have been no successful prosecutions in the past under the Law). This Law therefore needs revision or replacement.

The Position in the UK

10.3 The UK Law is comprehensive - there are so many ways that employers can pay their employees. It includes aspects relating to:

Itemised Pay Statements

10.4 The Employment Rights Act (ERA) 1996 defines the obligations of an employer to give particulars of payment of wages or salary when it is made. Equally, most employees have a statutory right to receive individually from their employers a detailed written pay statement at or before the time of payment.

10.5 The itemised pay statement must contain the following particulars -

- the gross amount of the wages or salary;
- the amounts of any fixed deductions and the purposes for which they are made (e.g. trade union subscriptions and National Savings Scheme contributions) or the total figure for fixed deductions when a separate standing statement of details has been provided;
- the amounts of any variable deductions and the purposes for which they are made;
- the net amount of wages and salary payable;
- the amount and method of each part-payment when different parts of the net amount are paid in different ways - e.g. the separate figures of a cash payment and a balance credited to a bank account; and, in future
- the minimum wage legislation will require minimum wage rates to be included.

Guarantee Payments

10.6 An employee in the UK who is not provided with work throughout a day during which he would normally be required to work under his contract of employment is entitled to be paid a guarantee payment by his employer if -

- there is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do; or
- there is any other occurrence which affects the normal working of the business in relation to this type of work.

10.7 However, the entitlement is also subject to the following provisos -

- guarantee payments can be made only in respect of a complete working day lost - not in the case of a day in which some work is provided, even if that work is provided outside normal working hours;
- an employee must comply with any reasonable requirements imposed by an employer to ensure that his services are available;
- an employee must not unreasonably refuse an offer from an employer of suitable alternative work - which need not be work he is employed to perform under his contract of employment;
- there is no entitlement if the failure to provide an employee with work is a result of a strike, lock-out or other industrial action involving any employee of his employer or of an associated employer.

- 10.8 These provisions do not affect the question of whether or not an employer is entitled to put an employee on short-time or temporary lay-off which is unpaid or at lower than average levels of pay. Such entitlement is determined by individual contracts of employment.

Deduction from Wages

- 10.9 The UK Law also contains provisions governing the employer's right to make deductions from wages or salaries and they apply to all who work under a contract of service or apprenticeship as well as certain non-employees.
- 10.10 Deduction or payment might also be authorised by a term of the contract of employment - this must have been notified in writing to the employee.

Deductions from Pay in Retail Employment

- 10.11 The Employment Rights Act in the UK also lays down special rules in respect of those workers in "retail employment". It is common for contracts of employment in retailing to contain the requirement for reimbursement of stock losses or money shortages. The most important of these special rules is that the deduction made on any pay day must not exceed one tenth of the gross wages on that day, even where the cash or stock deficiencies are greater. The balance may, however, be recovered on subsequent pay days. Any deduction of this sort must be made, or a series of deductions commenced, not later than the end of 12 months beginning with the date when the employer established the existence of the shortage or deficiency.

11. Termination of Employment

Key Points

Unfair Dismissal

- Protection against unfair dismissal is a cornerstone of any employment legislation.
- Significant support has already been expressed both from inside and outside the Island for the introduction of legislation to protect employees from unfair dismissal.
- The legal principles involved in unfair dismissal are fairly straightforward but it can be difficult to establish the true facts of each case and to resolve complaints.
- In the UK, approximately 50% of all complaints to the Employment Tribunal are related to unfair dismissal⁸.
- The Committee believes that employers should not dismiss employees in an arbitrary way and that this obligation should be included in the proposed new Law. The Law should also provide effective means to prevent frivolous claims that could impair the processing of genuine complaints and impose unnecessary costs on business. The aim, therefore, would be to resolve the vast majority of complaints through the proposed new Jersey Advisory and Conciliation Service.
- The Committee seeks views on the content of unfair dismissal provisions.

Redundancy

- Redundancy is rarely fair in practice, but it is a harsh reality. Employees are dismissed through no fault of their own and, in Jersey, have no protection, no representation, no right to consultation and no right to payment other than that which is provided under the Termination of Employment - Minimum Periods of Notice Law, unless their individual contracts of employment specify otherwise.
- The UK law provides for a minimum redundancy payment which is not overly generous. Most organisations with redundancy agreements provide far higher payments. The UK's law stems from a European Directive and all Member States have redundancy legislation that must conform to this directive.
- There is widespread acceptance in the UK, EU and elsewhere that employees who are made redundant should receive redundancy payment and that there should be proper consultation.
- There was some debate in the States about redundancy during the Strategic Policy debate of 1997.
- Many organisations in Jersey include redundancy provisions within their contract of employment which are more generous than the minima specified within the Employment Rights Act in the UK. However, other organisations in Jersey do not provide any redundancy rights to their employees. Furthermore, it is known that some UK and internationally-based organisations have excluded redundancy provisions from their local contracts of employment.

- Redundancy is not usually a serious problem when the economy is buoyant. However, if there is a downturn in the economy, or where organisations undergo rationalisation processes, then redundancy could once again become a serious problem. It should nevertheless be borne in mind that many successful organisations have to face up to redundancy situations - for example where the nature of the business changes, where there is improved productivity requiring fewer staff etc.

Insolvency

- There were attempts during the 1990s in Jersey to introduce protection for employees whose employer becomes insolvent but nothing concrete has been achieved despite acknowledgement of the principle that the States should set up an Insolvency Redundancy Fund.
- The Committee believes that, in principle, there should be an obligation on an employer to pay a redundancy payment to any employee of his if the employee is dismissed by reason of redundancy. However, the Committee recognises that there is likely to be considerable impact on the small business sector and complications over the setting up and funding of a Redundancy Fund to ensure payment where the business becomes insolvent. The Committee is also aware of the complexity of this type of legislation as the UK situation described in this report clearly illustrates.
- The Committee is seeking views on these issues.

Minimum Periods of Notice

- 11.1 The Termination of Employment - Minimum Periods of Notice (Jersey) Law 1974 and Regulations of 1994 contain provisions similar to those in the UK's legislation, except that, in Jersey -
- there is currently no requirement for an employer to provide written reasons for dismissal;
 - there is no specific remedy;
 - there is no specific court or tribunal to hear complaints.
- 11.2 The Law Draftsman has prepared a draft Termination of Employment (Reasons For Dismissal) (Jersey) Law but it has not been progressed because of the absence of a practical means of enforcement through an appropriate court or tribunal. As neither the 1974 Law nor the 1994 Regulations provide specific remedies or means of enforcement, the Law and Regulations have not been particularly effective.
- 11.3 It would seem sensible to consolidate the present Law and Regulations (together with the amendment that is in the pipeline) into the proposed new law that will also provide specific remedies and create a means of enforcement.

Unfair Dismissal

- 11.4 Dismissal⁹ is a fundamental issue within the employment relationship. Laws in the UK and elsewhere have been developed to protect an employee, as far as possible, from unfair dismissal. These Laws do not take away the rights of employers to dismiss an employee where there are good grounds.

⁹ There is a difference between 'unfair dismissal' and 'wrongful dismissal'. Long before the unfair dismissal concept was introduced in the UK, employees dismissed without proper notice were able to seek compensation for wrongful dismissal in the civil courts. Wrongful dismissal is the name given to the common law action for breach of an employment contract and is often confused with unfair dismissal, which applies in a wider variety of situations.

- 11.5 There is no protection against "unfair" dismissal for employees in Jersey. An employer can lawfully terminate a contract of employment at any time provided that he complies with the notice requirements of the contract within the provisions of the Termination of Employment - Minimum Periods of Notice (Jersey) Law. Furthermore, an individual employee who disputes the validity of the dismissal has no recourse to the procedure under the Industrial Disputes (Jersey) Law and would presumably be faced with initiating a civil action for breach of contract in the Royal Court - but only where it is alleged that a term of the contract has actually been breached.
- 11.6 The former Industrial Relations Committee set up a working party on unfair dismissal which made a number of recommendations to improve the situation. These recommendations, however, fell short of the introduction of legislation specifically designed to protect employees from unfair dismissal.

The Position in the UK

- 11.7 Since 1971, various pieces of legislation in the UK have provided protection for employees against unfair dismissal, the most recent being the Employment Rights Act 1996.

The Reason(s) For Dismissal

- 11.8 In order that an Employment Tribunal in the UK may determine whether the dismissal of an employee is fair or unfair, the employer must demonstrate -
- the reason or principal reason for dismissal;
 - that it was one of the potentially fair reasons for dismissal; and
 - that dismissal was actually reasonable in all the specific circumstances.

The potentially fair reasons are -

- relating to the capability or qualifications of the employee for performing the work of the kind which he/she was employed by the employer to do;
 - relating to the conduct of the employee;
 - that the employee was redundant;
 - that the employee could not continue to work in the position that he held without contravention (either on his/her part or that of the employer) of a duty or restriction imposed by or under an enactment (e.g. someone employed as a driver who is disqualified from driving); or
 - some other substantial reason of a kind which would justify the dismissal of an employee holding the position which that employee held.
- 11.9 The onus is on the employer to prove the reason for dismissal. If he is unable to do so, or if the Tribunal does not believe that the reason given was the real reason or the principal reason, the dismissal is unfair. The Tribunal must also be satisfied that the employer has acted reasonably in the circumstances.

Automatically Unfair Reasons

- 11.10 Reasons automatically regarded as unfair in the UK include¹⁰ dismissal -
- for a conviction which is "spent" under the Rehabilitation of Offenders Act 1974, unless the employee is excluded from the scope of the Act;
 - of a woman for a reason connected with her pregnancy, subject to the rules specified in general maternity legislation;

¹⁰ Legislation is being introduced in the UK to protect 'whistleblowers'.

- on the grounds of trade union membership or activity or for non-membership of a trade union;
- connected with the transfer of an undertaking or part of an undertaking ;
- of a shop worker or betting worker (in the specified circumstances) for refusing to work on Sundays;
- of an employee who is a trustee of a relevant occupational pension scheme for reasons connected with the carrying out of trustee functions;
- where an employee exercises certain health and safety rights;
- for asserting a statutory right;
- through unfair selection for redundancy;
- resulting from discrimination on grounds of sex, race or disability .

Unfair Dismissal Remedies

11.11 Where a Tribunal finds in favour of the complainant, orders of re-instatement and re-engagement can be made. The complainant must be asked whether he wishes the tribunal to make the order. If no order is made, then an award of compensation must be made. In practice, re-engagement and re-instatement are frequently not possible for obvious practical reasons.

11.12 Where an award of compensation is made, it consists of a basic award and a compensatory award. The basic award is calculated on a sliding scale according to length of service related to age. The compensatory award is what the Tribunal feels to be fair and equitable in the circumstances. It includes expenses incurred in consequence of the dismissal and loss of any benefit reasonably expected by the employee. The current maximum compensatory award is £12,000¹¹. The general purpose of the compensatory award is to return the unfairly dismissed employee to the position he or she would have been in had there been no dismissal - insofar as monetary compensation is capable of achieving this end.

Redundancy and Insolvency

11.13 In March 1993, Senator Shenton lodged a report and proposition concerning the introduction of a minimum wage and also redundancy payments where employers were declared insolvent. The former Industrial Relations Committee considered this issue and presented a discussion paper to the States on 9th November 1993 proposing the setting up of a redundancy fund. It seems that there was general agreement that legislation should be introduced but there were concerns about resources. In the event, legislation was not pursued.

11.14 The only reference to redundancy in local employment legislation is in Regulation 2 (2) (v) of the Terms of Employment (Jersey) Regulations 1995 which says that a statement of the main terms of employment must contain particulars of terms relating to redundancy. This means that, if an employer operates a redundancy policy, its terms must be specified in the contract of employment or the statement of terms. There is nothing to compel an employer in Jersey to have a redundancy policy.

11.15 The serious problems arising from redundancy should not be underestimated, particularly during times of recession, mergers and outsourcing.

¹¹ The Government intends to remove this limit altogether.

11.16 There is no redundancy law in Jersey and many businesses do not have redundancy schemes. Some large organisations here operate a redundancy policy similar to that which their parent companies use in the UK but it is also known that some organisations from outside Jersey exclude the terms of their normal redundancy policy from the contract of local employees. The recession of the 1990s resulted in a relatively large number of local redundancies, many of which involved no redundancy payment. However, in a more recent case where a local business rationalised work, the firm voluntarily made redundancy payments which far exceeded the level required by UK law.

The Meaning of "Redundancy"

11.17 There are still many misconceptions about the meaning of redundancy. Essentially, redundancy arises in the circumstances where -

- the whole business closes down, or is expected to close down;
- the business closes down in a particular place, or is expected to close down;
- the requirements of the business for employees to carry out work of a particular kind cease or diminish because the requirements diminish because -
 - the business diminishes;
 - productivity increases;
 - the work is done in a different way.

The Position in the UK

11.18 The basic right of an employee under UK law is to receive a redundancy payment. This right may be lost because, for example, an employee unreasonably refuses an offer of suitable employment. An employer making a redundancy payment must give the employee a written statement showing the calculation.

Trial Periods

11.19 The UK Law enables an employee to accept an offer of alternative employment with the employer (or an associated employer) on a trial basis of up to four weeks without automatically forfeiting the right to redundancy payment. Provided the rules are complied with, if the job proves unsatisfactory for the employee, he/she can leave and not lose the right to a payment provided, of course, that the job was not in fact suitable and provided that the refusal to accept was not unreasonable. There is clearly scope for interpretation here.

Lay-off and Short Time Working

11.20 The UK Law also provides a means whereby an employee may become entitled to a redundancy payment if he/she is laid off or put on short-time working. The conditions attached to this are necessarily comprehensive.

Calculation of Redundancy Payments

11.21 The amount of a lump sum redundancy payment depends on continuous length of service, how that service is spread within various age bands and the level of weekly pay. The maximum current redundancy payment allowed by law is £6600 for someone aged 61.

11.22 The Redundancy Payments Pensions Regulations 1965 provide for the reduction of redundancy payment where the employee being made redundant is, or becomes, entitled to an occupational pension. In certain circumstances, employers may if they choose offset pension and lump sum payments against statutory redundancy payments, or they can apply a partial offset.

Tribunal Claims

11.23 Any question as to the right of an employee to receive a redundancy payment, or as to the amount, must be referred to and determined by an Employment Tribunal. The claim must be submitted within six months.

Notification and Consultation

11.24 There are comprehensive requirements for consultation with the employees and their representatives, together with an obligation to notify the Secretary of State of proposed redundancies.

Time off

11.25 An employee in the UK who is being made redundant has the right to paid time off to look for new employment and to make arrangements for training for future employment.

Insolvency

11.26 Senator Shenton's proposition of 1993 referred to redundancy payments where an employer becomes insolvent. It seems to have been generally agreed in principle at the time that appropriate legislation should be introduced in Jersey but, in the event, this was not pursued.

11.27 Under UK law, certain debts are 'guaranteed'. An employee whose employer becomes insolvent is entitled to payment of the debts, on application to the Secretary of State, provided that the Secretary of State is satisfied that the employee was entitled to the whole or part of the debt and that it is a debt to which the sections apply. Payment is made through the National Insurance (NI) System.

11.28 The guaranteed debts include those specified by the Insolvency Act and also eight weeks' arrears of pay, amounts which were due to the employees in respect of the notice period and holiday pay and the basic award for unfair dismissal compensation.

11.29 Where a debt is referable to a period of time, the maximum amount payable by the Fund is £220 a week at present. Where an employer becomes insolvent and ceases trading, employees are generally entitled to redundancy payments if they fulfil the conditions for such payments. In appropriate circumstances, payment may come from the NI Fund.

12. Flexible Working Practices

Key Points

- The Employment and Social Security Committee has set out to develop an overall strategy which supports a flexible workforce. The Committee is keen to promote employee-friendly practices which also increase the competitiveness of companies.
- Research has consistently shown that if employees feel secure and are protected against abuse, they will be more confident about co-operating with their employer (the 'psychological contract'). The Committee believes that it is important, therefore, to ensure that flexible working practices are not abused by employers as a means of circumventing good employment practices.
- There is no doubt that the sorts of flexible working arrangements outlined in this section are becoming increasingly popular everywhere. The whole of the EU will soon have in place policies and legislation designed to encourage the use of part-time workers and protect their rights.
- Whilst some of the flexible arrangements discussed here can probably be implemented under present customary law in Jersey, as supplemented by local legislation, other issues such as part-time worker encouragement and protection would need to be legislated for if Jersey were to follow the EU policies.
- The Committee seeks views on the approach Jersey should take. Is there a need for legislation or would a Code of Practice be more suitable for such a wide ranging and complex subject?
- Should maximum working hours be regulated in Jersey along the lines of the Working Time Directive?

12.1 At one time, flexible working was taken to mean a contractual obligation to work overtime on reasonable notice. More recently, different ways of working have evolved which are essentially outside the traditional '9 to 5' arrangements of past years. Modern flexibility is not generally defined in terms of longer working hours.

12.2 The advantages for employers are clear. Many businesses have seasonal peaks and troughs and such flexibility avoids unproductive time in some periods and increased costs in terms of overtime and agency labour in others. Similarly, there can be considerable advantages to employees where different forms of working may suit the individual or family circumstances. There is no doubt that these arrangements have helped more women to reconcile family and working lives.

12.3 The paragraphs that follow describe the most common forms of flexible working practices and related contractual issues.

Homeworking and Teleworking

12.4 Homeworking and teleworking share a common foundation in that the employee is taken away from the office base. This has been called 'location independence'. However, the terms have a subtle difference in practice. Homeworking was traditionally seen as people working at home on a piecemeal basis but has now broadened out to include all those workers who are based or work at home for one or more employer. Teleworking usually means a situation in which a worker systematically works at a distance from the employer, whether from home or at a

'telecentre' established for the purpose. Teleworkers communicate by means of e-mail, fax, telephone, mobile phone etc. in order to carry out their duties.

- 12.5 The nature of home/teleworking means that specific considerations need to be taken into account within the employment contract and certain standard terms will be inappropriate. One specific problem is whether such workers are independent contractors (such as freelancers) or actual employees. Certain factors become important to establish - such as the apportionment of costs and benefits between employer and employee in relation to the equipment required for the home/teleworking arrangements to succeed. Detailed relevant conditions have to be specified in the contract of employment in the UK. A related issue is one of insurance of such equipment. Another consideration is the reimbursement of expenses such as telephone and electricity bills.

Zero Hours Contracts

- 12.6 This is a relatively recent concept and there are some doubts on the enforceability and nature of such contracts in the UK and elsewhere. Essentially, they provide for a situation where an employer is under no obligation to provide any working hours and the employee is under no obligation to accept any work when requested, although some contracts state that employees must be available to work when required. There is debate as to whether the zero hours contract creates an employer/employee relationship but it is felt that a relationship does exist where a mutuality of obligation exists.
- 12.7 The present Labour Government in the UK is opposed to zero hours contracts in principle, saying that they amount to an abuse of employment law. There is currently a debate about requiring employers to guarantee a minimum number of hours a week in the written particulars of employment, or perhaps legislation to require an employer to provide a minimum number of hours work each week so that employees will be entitled to pay regardless of whether he or she spends time actually working.
- 12.8 Some employers and employees would be sorry to lose the flexibility provided by zero hours contracts. Such contracts allow some employers to maintain costs at a lower level and provide work when the demand exists. Whilst employees do not receive a guaranteed wage and may not be entitled to many of the fringe benefits received by permanent workers, many are willing to accept this in return for job flexibility and a less stressful environment.

Job Sharing

- 12.9 Job sharing is essentially two part-time workers agreeing to do the job of one full-time worker. It is useful to those who want to work on a part-time basis in a job that has the requisites of full-time employment. This arrangement has proved especially attractive to professional women who wish to return to work after the birth of a child but who do not want full-time employment.
- 12.10 In the UK, various issues need to be covered in a job sharer's contract. Each employee must have a separate contract of employment and employers must ensure that such employees are treated in the same way as full-time employees. This is especially so following the Employment Protection (Part-time Employment) Regulations 1995 (now contained in the ERA 1996) which makes no distinction between part-time and full-time employees.
- 12.11 The first important inclusion in the job share contract is the division of work. In the UK, this must be clearly set out so that each employee is aware of the hours he or she must work. The contract must also deal with how pay and benefits will be

divided. The question of additional hours worked by one or both of the job sharers also needs to be covered, as must holiday entitlement.

12.12 The above points can be dealt with relatively easily through consultation with the job share employees. However, the question of termination is more difficult. To a large extent, the job sharers' work is interdependent and so, if one leaves, the work of the other may suffer. There are various ways of coping with this - from including a contractual condition that the remaining job sharer must be offered the full time job to a condition that the remaining job sharer's contract will be terminated also. However, this latter course of action must be a last resort or a person in the UK could claim for breach of contract or unfair dismissal.

Term-time Working

12.13 Working only during term-time is particularly popular with women in Jersey who have family responsibilities. There are, however, clear problems for the employer in covering the school holidays. There has been talk about changing the number of terms during the school year and this could help employers and employees if the holidays were spread more evenly throughout the year.

12.14 In the UK, term-timers' contracts are basically the same as those for full-timers. The Law gives them full statutory rights. Time off for school holidays does not affect continuity of service. Particular issues that need to be covered in the UK contract of employment include:

- the dates of the term-time start and finish;
- the status of school holiday leave - i.e. whether it is all to be unpaid or a mixture of unpaid and annual leave. This latter point is covered by the Working Time Directive which demands at least three weeks' (four weeks' from 1999) paid leave each year.

Fixed-term Contracts

12.15 Fixed-term contracts are becoming more common in Jersey. This is an arrangement where an employee is employed for a fixed period of time, after which the contract will expire automatically. The contract may terminate before the expiry date by notice if there is express provision for this (i.e. a break clause). The issue of whether a break clause should be included is becoming more important in the UK, especially in executive contracts. The key point is that if the employer fails to renew the contract on expiry of the term, there will be a dismissal and therefore possible exposure to an unfair dismissal claim. Under the UK Law, therefore, the employer and employee are entitled to agree in the fixed-term contract that the employee will not pursue a claim for unfair dismissal when the contract expires. In order to take advantage of the ERA's waiver provisions, the term must be for a year or more and employees can only agree not to pursue an unfair dismissal claim if the contract is not renewed. They cannot agree not to pursue such a claim for any other reason - e.g. termination before the date of expiry.

Non-permanent Workers

12.16 This is a generic term covering a number of categories of atypical workers. Workers under zero hours and fixed-term contracts are non-permanent. Other examples are temps, seasonal and casual workers.

12.17 Temporary workers are those whose contracts are for a limited and uncertain period of time. They are often drafted in to cover for permanent staff who are on holiday, sick, on maternity leave etc. They could simply be employed because of a peak of

workload. Many temporary contracts specify that they will come to an end on the occurrence of a particular event - e.g. when the person for whom cover is being provided returns to work.

- 12.18 Seasonal workers are typically used in industries which need staff for certain parts of the year, such as the tourism and agriculture industries in Jersey. The seasonal contract is usually a form of fixed-term contract which expires when the purpose of the contract is fulfilled. The contract expires automatically on completion of the task. In the UK, the statutory minimum notice does not apply in the case of a contract made for the performance of a specific task which is not expected to last more than three months. However, there have been cases in the UK where seasonal workers, who are regularly employed on a casual basis year after year during the period when the employer wanted them, have acquired rights and have been successful in bringing unfair dismissal claims.
- 12.19 Casual workers tend to be employed for one-off short tasks (e.g. stock-taking). As with zero hour contracts, there is no obligation on the part of the employer to offer work and no obligation on the worker to accept. Casual work can also be useful to individuals who do not want to commit themselves to one employer or work the full year. The question arises once again whether the worker is in fact an employee and mutuality of obligation is once again the test under UK law.

Annualised Hours

- 12.20 Annualised hours contracts refer to the total working hours for the full year, taking account of paid holiday entitlement. Where business demands can be predicted with some certainty, there is room for working schedules to be allocated for some time ahead to reflect seasonal or other fluctuations. Otherwise, the usual starting point is to agree a basic shift pattern for the employee and to expressly provide that the employee may be required to work more or fewer hours or shifts in any one week, depending on business requirements. The employee is then notified during the current roster period (usually a period of a month or four weeks) of the hours they will be required to work in the next period. There is usually a right for the employer to alter the hours at shorter notice in certain circumstances.
- 12.21 Once an annualised contract of this nature is agreed, a breach of a contractual obligation in the UK in the absence of a good reason will generally amount to a disciplinary offence. This effect, however, must be reconciled with the concept of mutual flexibility.
- 12.22 Various practical considerations need to be dealt with in introducing annualised hours, including -
- rights and obligations of employees who leave during the year;
 - calculation of pay.
- 12.23 There is a variation to annualised hours called 'banked hours'. The concept is that employees receive a flat rate of pay based on the notional average of four shifts, regardless of the actual hours worked. A running debit/credit system is operated. If an employee works fewer than the notional average of four shifts in the week, a shift debit will be recorded. An additional shift in another week will score a shift credit. These are set off against each other as the year progresses. At specified points during the year, outstanding shift credits can then be paid at the appropriate rate.
- 12.24 The Working Time Directive could well have an impact on annualised hours contracts and the UK is currently monitoring this.

Part-time Work

- 12.25 There is a European Council Directive (97/81/EC) which sets out to ensure that workers engaged in various forms of flexible working receive comparable treatment to full-time staff on open-ended contracts. Its purpose is to eliminate discrimination against part-time workers and to improve the quality of part-time work. It also aims to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner that takes into account the needs of employers and employees.
- 12.26 The Directive defines 'part-time' as an employee whose normal hours of work, calculated on a weekly basis or as an average of employment over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker. In turn, a 'comparable full-time worker' is an employee in the same establishment having the same type of employment contract or relationship who is engaged in the same or similar work/occupation. In respect of employment conditions, part-time workers must not be treated in a less favourable manner than comparable full-time workers solely because they work part-time, unless different treatment is justified on objective grounds.
- 12.27 Wherever possible, employers are required to provide timely information on the availability of part-time and full-time jobs and should give consideration to requests by workers to transfer from full-time to part-time work that becomes available in the establishment (and vice versa).
- 12.28 Of course, the Directive allows Member States and/or Social Partners to maintain or introduce more favourable provisions than it sets out. Member States, including the UK, must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by December 1999.

Working Time Directive (WTD)

- 12.29 Reference has been made on several occasions to the WTD. In order to comply with this Directive, the UK has produced the Working Time Regulations which took effect from 1st October 1998. The Regulations aim to provide fair minimum standards for workers, whilst allowing flexibility for workers and employers to make arrangements that suit them.
- 12.30 The basic rights and protections that the Regulations provide are -
- a limit of an average of 48 hours a week - workers can choose to work more if they want to;
 - nightworkers can be required to work a limit of an average of 8 hours' work in 24;
 - night workers must be offered free health assessments;
 - a right to 11 hours' rest a day;
 - a right to a day off every week;
 - a right to an in-work rest break if the working day is longer than six hours;
 - a right to three weeks' paid leave in a year, rising to four weeks in 1999;
 - for adolescent workers, a right to -
 - free health and capacities assessments for night work;
 - 12 hours' rest a day;
 - two days off each week;
 - an in-work rest break if the working day is longer than four and a half hours.

13. Statutory Minimum Wage

Key Points

- The UK National Minimum Wage Bill includes provision for all the necessary enforcement aspects including conciliation by ACAS and appeals.
- Research on the minimum wage in Jersey identified that a large proportion of employers would ignore it unless properly enforced.
- The Committee is recommending to the States that the framework proposed by this Report be introduced at the same time as a Jersey Minimum Wage Law.

13.1 The States have decided that a statutory minimum wage should be introduced in Jersey as soon as possible and a separate report and proposition is being submitted to the States on a minimum wage in Jersey, which stresses that a minimum wage would not be effectively implemented and enforced in Jersey without:

- protection against unfair dismissal;
- enforcement of rights by an Employment Tribunal; and
- the use of conciliation in cases where a complaint has been made to the Employment Tribunal in an attempt to promote a settlement of the proceedings without it having to be determined by the Tribunal.

14. Advice, Conciliation and Enforcement

Key Points

The Committee is strongly recommending that:

- Employment legislation should be enforced by an Employment Tribunal comprising a legally qualified Chairman sitting with two members, one drawn from a panel of people representing employees and one from a panel representing employers.
- There should be a professional, independent and impartial Jersey Advisory and Conciliation Service (JACS). The legislation should specify that all complaints to the Employment Tribunal should be referred in the first instance to a Conciliation Officer from JACS with the intention of promoting a settlement between the parties without having to proceed to a Tribunal hearing.
- The legislation relating to the Employment Tribunal and JACS should replace the current Industrial Disputes (Jersey) Law 1956.

14.1 In Jersey, at present, arbitration, conciliation and enforcement are covered by the provisions of the Industrial Disputes Law 1956. It has been noted earlier in this report (Section 5.2) that this Law has many shortcomings. One of the more serious of these shortcomings is that the procedure set out in the Law for the resolution of disputes does not apply to individual employees who are in dispute with their employer. The Law provides for an Industrial Disputes Officer, and a Deputy (both States Members), who administer the complaints process and the referral on to the Industrial Disputes Tribunal. The Tribunal comprises a legally qualified Chairman sitting with two representatives drawn from each of three panels representing employers, employees and 'neutrals'. The Tribunal has met infrequently.

14.2 Section 5 of this report also highlights the shortcomings in the enforcement of the other local legislation.

14.3 There is an Industrial Relations Advisory Officer who, although reporting to the Employment and Social Security Committee, is appointed by the States and is independent in terms of his case work. Although this officer provides a valuable service, the absence of a proper legal framework of employment rights and a tribunal to consider individual complaints limits the effectiveness of the service.

14.4 In the UK, ACAS is generally acknowledged to be a very effective service by all concerned, including representatives both of employers and employees. It should be straightforward to set up a similar, equally effective but smaller organisation locally. A fundamental principle is that the service must be clearly independent of any political influence and of influence from employers and employees. For this reason, it is considered that a Jersey Advisory and Conciliation Service (JACS) should be set up as an independent agency which has no direct links to the political system, but which is funded from Government revenues.

JACS' Proposed Statutory Duty

14.5 Before providing assistance, it is considered that JACS would encourage parties to make full use of any agreed procedures they may have for negotiation and the settlement of disputes. Its main duty would be to assist in building harmonious relationships between employers and employees, collectively and individually, where required and in particular to -

- prevent and resolve industrial disputes;
- resolve individuals' disputes over employment rights;
- provide information and advice about employment matters and practice;
- promote fairness and good practice in the conduct of employment relationships.

The aim of JACS would be to offer to assist both parties involved in a dispute to reach a voluntary settlement without the need to go to an Employment Tribunal hearing.

Enforcement - The Employment Tribunal

14.6 Ultimately, there has to be a mechanism -

- to resolve disputes or differences between employer(s) and employee(s) concerning matters relating to employment or non-employment and terms and conditions of employment where voluntary agreement cannot be reached, with or without a third party; and
- to enforce employment rights and obligations provided by relevant legislation, both current and future.

14.7 The current Industrial Disputes Tribunal in Jersey has three panels of members. It is suggested that this should be replaced by an Employment Tribunal with powers to make declarations and enforce awards.

15. Trade Unions and Collective Employment Rights

Key Points

- Jersey has no legislation to recognise or define Trade Unions or their activities and it follows that there is no legislation to regulate those activities.
- The provisions of the Industrial Disputes Law 1956 have been of little assistance in the past in respect of collective problems in Jersey.
- There has been no proper source of independent and impartial advice and conciliation to employers, employees or government - this should be provided by the creation of JACS, as proposed in this report.
- If the Committee's overall proposals are approved they should help to change the face of employment relationships in Jersey. For the first time, there will be effective mechanisms for heading off potential problems in the workplace and for dealing with those that do arise. This alone should help avoid the sort of collective problems that have arisen in recent years.
- The trade unions can play a full part in the review and development of employment relations in the Island if they enter fully into partnership with employers and government and, as a first stage, it would be helpful for representatives from all the interested parties to agree on some basic rules, perhaps published in a Code of Practice.
- The Committee seeks views on the extent of any provisions to be included in the proposed new Employment Law, including:
 - giving legal status to trade unions;
 - giving rights to workers to join unions or form representative bodies and be consulted on appropriate issues;
 - imposing rules on the calling of industrial action including holding secret ballots;
 - prohibiting the closed shop and secondary industrial action.

15.1 There is no legislation in Jersey specifically covering trade union activity. This is not the general situation elsewhere. In the UK, for example, there is a long history of statutory intervention in the operation of trade unions since they were first given legal status in 1871.

15.2 The legal regulation of trade unions has had a considerable effect on collectivism in the UK. Since 1980, unions there have lost two of their principal traditional weapons - the closed shop and the right to organise secondary industrial action. Also, in order to avoid legal action, unions must now hold ballots and comply with complex rules before calling industrial action. The financial assistance that used to be provided to unions to conduct ballots is no longer available by virtue of the Trade Union Reform and Employment Rights Act 1993 (TURERA). TURERA has also increased individual members' rights against their unions and introduced a provision whereby third parties who are not a part of the relationship between employer and trade union can restrain unlawful industrial action.

- 15.3 A further illustration of the attempt to dilute the role of the unions in the UK in the realm of employment relations is through the introduction of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 1995 (the 1995 Regulations). These removed the automatic right for trade unions to be consulted by employers over redundancies and business transfers by providing that employers can now choose how they wish to consult with the workforce. This can be through the traditional consultation with trade unions or through consultation with representatives elected by the employees. It could be argued that the 1995 Regulations have introduced collectivism into employment relationships where none existed previously.
- 15.4 One of the effects of increased legal regulation and wider use of more flexible working practices has been the decline of collective bargaining in industrial relations and the increasing importance of 'personal contracts'. Furthermore, it is now possible for employers to vary or cease collective bargaining by offering financial inducements to those employees who accept personal contracts. This no longer amounts to an act of discrimination by the employer taken for the purpose of deterring or compelling trade union membership.
- 15.5 The UK government has declared its intentions for the future, in its recent White Paper 'Fairness at Work'. The proposal is to strengthen the rights of individuals in several areas including a reduction in the qualifying period for unfair dismissal claims and the removal of the maximum limit on awards for unfair dismissal. Statutory maternity leave will be increased from 14 to 18 weeks, there will be parental and adoptive leave entitlement and a right to time off for family emergencies. However, in announcing its intentions concerning collective rights, the UK Government has indicated that these will be the last of its collective reforms. The proposals are to -
- enable employees to have a trade union recognised by their employer where the majority of the relevant workforce wishes it. Statutory procedures for both recognition and derecognition will be introduced;
 - change the law in line with its belief that in general those dismissed for taking part in lawfully organised official industrial action should have the right to complain to a tribunal for unfair dismissal;
 - make it unlawful to discriminate by omission on grounds of trade union membership, non-membership or activities;
 - prohibit blacklisting of trade unionists;
 - amend the law on industrial action ballots and notice to make it clear that, while the union's notice to the employer should still identify as accurately as reasonably practicable the group or category of employees concerned, it need not give names;
 - create a legal right for employees to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures;
 - abolish the post of Commissioner for the Rights of Trade Union Members (CRTUM) and the Commissioner for Protection Against Unlawful Industrial Action and give new powers to the Certification Officer to hear complaints involving most aspects of the law where CRTUM is currently empowered to provide assistance;
 - make funds available to contribute to the training of managers and employee representatives in order to assist and develop partnerships at work.

The Way Ahead for Jersey

- 15.6 Trade unions in Jersey are branches of UK Unions. However, in the absence of the sort of legislation that exists in the UK and elsewhere, the legal status and powers of trade unions in Jersey are uncertain.
- 15.7 Trade unions in Jersey have fulfilled two basic roles - protecting workers from abuses in the workplace and representing them when bargaining for improved pay and conditions. The move in the UK and elsewhere is away from the traditional confrontational style of employment relations to a culture of co-operation and partnership. There is a growing realisation that organisations cannot survive without the people who work in them. It follows that workers who are generally happy in their work are often better motivated and more productive. There is no longer any room for serious conflict. There is a mutual need to ensure that individual employment relationships fit within the overall structure of organisations and that these relationships are successful.
- 15.8 Partnership in the workplace is the theme that runs through all the Employment and Social Security Committee's proposals. In its simplest form, this partnership is between the employer and each individual employee. In practice, this often means that a relationship must be cultivated between employer and trade unions as well as with individual employees.
- 15.9 There is every reason to be optimistic about the future of collective employment relations in Jersey. Any future employment law should provide a sound basis for good employment practice. An Employment Tribunal should be available as a last resort to resolve individual and collective disagreements and complaints. JACS would be a source of independent, impartial and professional advice and conciliation available to all parties to prevent disputes from arising and to assist in resolving those that do arise.
- 15.10 The question is whether this will be enough to satisfy employers, employees and unions generally. Unions may want to have their position formally defined in law. Employees may want to have some rights to join or form representative bodies in the workplace and be consulted. Employers may demand the introduction of laws similar to those of the UK to outlaw the closed shop and secondary industrial action and also to impose rules on calling industrial action and holding ballots.

16. Partnership in the Review and Development of Employment Policy and Law

Key Points

- The Committee proposes that an Employment Relations Consultation Forum be set up to review and advise the Committee on Employment Legislation (and possibly future Minimum Pay rates).
- The forum could comprise representation from the Committee, employers, employees, their representative bodies (including unions), and possibly some independent people.
- The Committee would be interested to hear views on the composition and constitution of such a body.

16.1 There is a clear need for the workings of any Law to be monitored and for any future policy changes to be discussed within a wider forum. The former Industrial Relations Committee set up a Consultative Group with this in mind and this Group has been very helpful. However, it is considered that a more effective, specifically designed consultative structure should be introduced.

16.2 The prime aim would be to ensure that there is an effective partnership between the 'key players', including government, employers, employees and their representatives. It is proposed that an 'Employment Relations Consultative Forum' should be set up on a formal basis.

17. Summary of Aspects Discussed in this Report

The following principles apply in some form in most jurisdictions worldwide. However, there are differences in the way they are applied. For example, in some countries, the unfair dismissal right only applies after a specified length of continuous employment¹². In some countries, there are various exemptions for small businesses, although these are defined in different ways.

Points covered in the Report

1. Discrimination on grounds of sex, race, religion, age, disability or trade union membership when recruiting to a job.
2. Provision of a written statement of the main terms and conditions of employment within four weeks.
3. Employees expected to -
 - be honest, conscientious and loyal, and not act against employers' interests;
 - be competent at their jobs and efficient;
 - not disclose confidential information about their employers' business to others;
 - take care of their employers' property and their own health and safety in the workplace.
4. Employers expected to -
 - behave reasonably in employment matters at all times;
 - ensure that employees are properly skilled and trained to do their jobs;
 - practice good employee relations, ensuring that their employees know what is expected of them and what they can expect in return;
 - have clear disciplinary and grievance procedures;
 - pay their employees the agreed amount at proper intervals;
 - take reasonable care to ensure the safety and health of their employees.
5. Requirement to provide an itemised pay statement with pay.
6. Protection from unfair dismissal.
7. Protection from dismissal because of pregnancy.
8. Provision of paid time off for ante-natal care.
9. Provision of maternity leave.
10. Provision for maternity pay.
11. Taking back an employee in the same, or equivalent, job following maternity leave, unless original job or alternative job not available.
12. Consultation over redundancy and payment of redundancy money.
13. Granting of paid time off work to look for work in redundancy.
14. Granting of paid time off work for certain trades union or public duties

¹² The UK is currently reducing this period from 2 years to 1 year.

15. Right to equal pay for men and women.
16. Protection throughout the period of employment from discrimination on the grounds of sex, race, religion, age, disability or trade union membership (for example, promotion, training, pay and working conditions).
17. Protection from harassment in the workplace.
18. Provision of equal rights for part-time and full-time workers.
19. Right to join trade unions or representative bodies which themselves should be working within a code of good practice.
20. Reconciliation of disputes using the Jersey Advisory and Conciliation Service if unable to do so in house.
21. Adjudication by the Employment Tribunal in unresolved disputes relating to matters covered by the Law.

Comments would be welcomed on all the above points, whether and how they should be applied in Jersey, who should qualify and when and whether any exemptions should apply.

Example of Pay Statement

This example includes reference to the proposed minimum wage

<p>A COMPANY LTD.</p>				<p>You should keep this pay advice in a safe place for future reference.</p>			
<p>EMPLOYEE NAME</p>				<p>Pay-Roll</p>	<p>Employee Ref:</p>		
<p>PAY AND ALLOWANCES</p>				<p>PAY AND DEDUCTIONS</p>			
<p>DESCRIPTION</p>	<p>HOURS</p>	<p>RATE</p>	<p>AMOUNT</p>	<p>DEDUCTIONS</p>	<p>TO DATE TOTALS</p>		
			<p>(R=REFUND)</p>	<p>SOC. SEC.</p>	<p>EARNINGS</p>	<p>TAXABLE PAY:</p>	
				<p>COMPANY PENSION</p>	<p>TAXABLE PAY</p>	<p>NON TAXABLE PAY:</p>	
				<p>OTHER</p>	<p>NON TAXABLE PAY</p>	<p>DEDUCTIONS;</p>	
					<p>SOC. SEC.</p>		
					<p>COMPANY PENSION</p>		
					<p>OTHER</p>		
<p>TOTAL GROSS PAY:</p>				<p>TOTAL DEDUCTIONS</p>		<p>NET PAY:</p>	
<p>The statutory minimum wage, which your employer must pay you by law is £X.XX per hour. You should seek advice if you are unsure that you are receiving this sum.</p>				<p>DATE:</p>	<p>BANK DETAILS:</p>		
				<p>PAYMENT PERIOD:</p>			
				<p>SOCIAL SECURITY NO:</p>			
				<p>PAY METHOD:</p>			

Specimen Statement of Main Terms and Conditions of Employment

Name and address of employer

Name and address of employee

Starting date of employment

Job title

Period of notice of termination to be given by employer

Period of notice of termination to be given by employee

Date of termination of contract (if fixed term)

Current rate of pay

Pay day and frequency of payment

Normal working hours and overtime conditions.....

.....

Annual holiday entitlement

Public holiday entitlement

Sickness or injury terms

Maternity leave entitlement

Pension terms

Redundancy terms.....

Disciplinary and grievance procedures

Any other special employment conditions

Other documents giving detailed conditions of employment (e.g. staff handbook)

Employer's signature **Date**

I acknowledge receipt of a copy of this statement:

Employee's signature **Date**

Notes:

(i) Written contracts or statements of main terms must contain the details specified in the Terms of Employment (Jersey) Regulations 1998.

(ii) The contract of employment could be supported by an Employee Handbook which would make the employer/employee relationship even more explicit (see Annex C).

An Employee Handbook

To supplement the written statement of terms and conditions in the contract, many employers produce a simple handbook to ensure that a consistent message about employment matters is given to all employees. This often covers all or some of the following issues:

Background information on the business, products, services

- business name and address
- message of welcome from the proprietor or managing director
- company history
- description of products, services, activities, markets, employers
- organisation chart
- other locations
- directors and senior management, heads of department, associated businesses

Amenities and services

- map or floor plan
- staff restaurant and meals on duty
- medical facilities
- social and sports facilities
- staff notice boards
- transport facilities (company and public)
- parking facilities
- live-in accommodation and policy for live-in staff

Procedures and policies

- health and safety policy
- equal opportunities policy (sex, race, religion, disability, older workers)
- communications policy
- sickness absence procedure - details of procedure to be followed by employees including requirements for self-certification and medical certification - reporting of absence and lateness
- discipline/grievance procedure - brief outline of procedure
- job evaluation procedure
- overtime policy
- training policy, including induction
- employee appraisal policy
- retirement policy
- service awards
- promotions policy

Employment matters

- job descriptions
- payment - method, interval, deductions, bank holiday pay, pay slips, income tax, social security, notice periods
- bonus or merit payments
- holidays - calculation of holiday entitlement, when holidays can be taken, statutory and customary holiday arrangements
- pensions - outline of company arrangements (if any)
- life assurance
- sickness and accident benefits
- time recording
- time off
- maternity leave
- disciplinary procedure (or reference to the full procedure)
- rules on attendance, absence, change of address, lateness
- rules in the event of an accident
- grievance procedure (details)
- rules on security
- staff lockers
- rules on safety
- rules on hygiene
- rules on dress and provision of uniforms and cleaning
- employee benefits - special loan arrangements, payments and time-off for education, special leave arrangements (bereavements, domestic problems, tending sick relatives), staff purchases, share options, etc.

Public Sector Maternity Provisions

The main features of the public sector schemes in force at the time of the States' decision were:

- the employee must have been employed on a permanent basis for at least one year, including a satisfactory probation period;
- employees with less than one year's service could be considered, at the discretion of the Chief Officer, who could take account of successful completion of a probationary period and the skills/expertise of the employee;
- employees on fixed term contracts had to have at least one year remaining on the contract;
- the employee had to notify the Chief Officer at least three months in advance of the expected date of confinement and also state her intention to return to work for the same number of hours as she worked prior to taking maternity leave. There was provision for return part-time by agreement with managers;
- a period of 18 weeks was allowed for maternity leave, which could be extended to 26 weeks in exceptional circumstances at the discretion of the Chief Officer¹ ;
- the employee could decide when to start maternity leave but was expected to take medical advice;
- the employee was paid 90% of normal pensionable pay for the first 6 weeks (42 days)². (The employer retained half that amount until the employee had returned to work for three months continuously³. If the employee failed to complete three months, the retained money was not paid and she was required to pay back the money already paid to her);
- health and social security contributions continued to be deducted while maternity payments were being made;
- the standard rate of Social Security Maternity Allowance was offset against maternity payments regardless of whether the employee was receiving the allowance⁴;
- the full period of maternity leave counted as pensionable service under the Public Employees Contributory Retirement Scheme only if the employee was a member of the scheme and opted to continue her contributions as if her pay had not been interrupted. The employer continued to pay its percentage of contributions in this case. The whole period of maternity leave then counted as pensionable service;
- the six weeks paid maternity leave attracted annual leave;
- expectant mothers were given time off to attend ante-natal appointments, with certain provisos;
- where the employee was unable to return to her former post, every effort was made to appoint her to another post in the same grade in the same department - otherwise employment was at the same grade elsewhere in the service;
- unpaid maternity leave could be extended on production of a medical certificate.

1. Nurses and prison officers had different additional entitlements

2. Nurses were entitled to 4 weeks at full pay and 14 weeks at half pay

3. In the case of employees covered by the Manual Workers Joint Council Agreement, the period was 6 months

4. Except in the case of those covered by the Manual Workers Joint Council Agreement

Fair Play in the Workplace Good Employment Practice in Jersey

The Employment and Social Security Committee has carried out a comprehensive examination of employment policy and legislation.

Drawing on the Island's Customary Law and updating it to reflect a partnership approach, the Committee believes that the overall ethos in the workplace should be one of trust, co-operation and mutual respect - employers and employees (and their representative bodies) working together flexibly for their mutual benefit and the good of the Island.

The very basic rights and duties of both parties could be described as:

Employees' Duties (and Employers' Rights)

- Employees should be honest, conscientious and loyal and should not act against employers' interests.
- Employees should be competent at their jobs and efficient.
- They should not disclose confidential information about their employers' business to others.
- They should take care of their employers' property and their own health and safety in the workplace.

Employers' Duties (and Employees' Rights)

- Employers should behave reasonably in employment matters at all times.
- They should ensure that employees are properly skilled and trained to do their jobs.
- They should practice good employee relations, ensuring that their employees know what is expected of them and what they can expect in return.
- They should have clear disciplinary and grievance procedures.
- They should pay their employees the agreed amount at proper intervals.
- They should take reasonable care to ensure the safety and health of their employees.

The Committee is very keen to consult all interested parties in order to develop a new legislative framework. Please submit your comments and views by regular mail, e-mail, fax or phone. You can use this questionnaire if it helps - please include additional comments on extra sheets of paper if there is not enough room.

The closing date for receipt of comments is 28th February 1999 as the Committee intends to take a report to the States in Spring.

Firstly, are you:

- male female
- an employer an employee other

And in what sector do you work? _____

It has been suggested that Jersey's existing employment laws are out of date, fragmented and ineffective.

Do you believe that Jersey needs a new employment law to consolidate or replace existing legislation and introduce additional rights and obligations so that employers and employees are clear about their responsibilities?

- Yes
- No
- Don't know

Do you agree that an independent Advisory and Conciliation Service should be introduced to prevent and resolve problems in the workplace?

- Yes
- No
- Don't know

Do you believe that an Employment Tribunal should be established to enforce the law when advice and discussion fail?

- Yes
- No
- Don't know

It is the Committee's view that every employer and employee should have basic duties and rights in any employment relationship. Do you agree with those listed on the first page of this questionnaire?

- Yes
- No
- Don't know

Should there be a right to protection from unfair dismissal?

- Yes
- No
- Don't know

Should there be a right to an itemised pay statement

- Yes
- No
- Don't know

Should there be a right to protection if employees are pressurised into working outside normal contractual agreements e.g. Sundays or on rest days?

- Yes
- No
- Don't know

Following the States' decision on the introduction of maternity rights, do you agree that there should be:

A legal right to time off work for antenatal care?

- Yes
- No
- Don't know

A legal right to maternity leave and return to the same or equivalent job?

- Yes
- No
- Don't know

A legal right to maternity pay during part of the maternity leave?

- Yes
- No
- Don't know

Legal protection from unfair dismissal on maternity grounds?

- Yes
- No
- Don't know

The States, in accepting the 1995 Strategic Policy Review, have already approved policies providing equality of opportunity and freedom from discrimination. Thinking of the workplace do you believe the following apply in Jersey:

Is sex discrimination a problem?

- Yes
- No
- Don't know

Is disability discrimination a problem?

- Yes
- No
- Don't know

Is ageism a problem?

- Yes
- No
- Don't know

Is race discrimination a problem?

- Yes
- No
- Don't know

Are there other forms of discrimination?

- Yes
- No
- Don't know

Do you believe that the States should be considering the whole issue of discrimination in an all embracing Discrimination Law?

- Yes
- No
- Don't know

Do you agree that men and women should receive equal pay for equal work?

- Yes
- No
- Don't know

Jersey has traditionally relied upon and encouraged voluntary and honorary participation in a variety of organisations and duties. It has been suggested, therefore, that there are few problems about staff being given time-off work for various reasons.

Do you agree with this statement

- Yes
- No
- Don't know

If employees were to be given a legal right to reasonable time-off work, do you believe it should be in the following circumstances:

Trade Union duties

- Yes
- No
- Don't know

Specified public duties

- Yes
- No
- Don't know

Redundancy (to look for a new job)

- Yes
- No
- Don't know

The Committee believes that the Payment of Wages (Jersey) Law 1962 and the Payment of Wages (Jersey) Regulations 1977 should be updated in line with the advice of the Law Officers and incorporated into a new law. Do you believe that this new law should include protection concerning:

Unauthorised deductions / payments from wages

- Yes
- No
- Don't know

Cash shortages / stock deficiencies in retail employment

- Yes
- No
- Don't know

The provision of guarantee payments where the employee would normally be required to work according to the contract but is not provided work by the employer?

- Yes
- No
- Don't know

Given the changing nature of the workplace and the alternative employment practices now in place do you believe that:

Part-time employees should be given the same rights (pro rata) as full-timers?

- Yes
- No
- Don't know

Redundancy, insolvency and transfer of undertakings are complex issues but-

Do you believe that employees' rights should be protected following the transfer of ownership of an undertaking?

- Yes
- No
- Don't know

Do you believe that workers should have the right to redundancy payments?

- Yes
- No
- Don't know

Do you believe that there should be an Insolvency Redundancy Fund?

- Yes
- No
- Don't know

Although trade unions are well established in Jersey, there is no legislation specifically covering their activities. The Committee believes that this situation needs to be addressed. Do you believe that legislation should be introduced:

Giving trade unions legal status?

- Yes
- No
- Don't know

Providing employees with rights to join trade unions or representative bodies and consequent consultation rights?

- Yes
- No
- Don't know

Imposing rules on calling industrial action - e.g. secret ballots?

- Yes
- No
- Don't know

Prohibiting the closed shop and secondary industrial action?

- Yes
- No
- Don't know

The principles described above are applied in different ways in other countries. For example, some apply after a specified length of continuous employment and there are certain exemptions for small businesses.

Should any exemptions be applied in Jersey? (If answer is yes, please describe on next page)

- Yes
- No
- Don't know



