HOUSE OF LORDS

Merits of Statutory Instruments Committee

9th Report of Session 2009-10

Draft Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 and three associated instruments

Draft National Employment Savings Trust Order 2010 and five associated instruments

Draft CRC Energy Efficiency Scheme Order 2010

Ordered to be printed 2 February and published 4 February 2010

London : The Stationery Office Limited
£price

HL Paper 50

The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE
The Baroness Deech DBE
The Lord Hart of Chilton
The Lord James of Blackheath CBE
The Lord Lucas
The Lord Methuen
The Baroness Morris of Yardley
The Lord Norton of Louth
The Lord Rosser (*Chairman*)
The Lord Scott of Foscote
The Baroness Thomas of Winchester

Registered interests

Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Ninth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Draft Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 and three related instruments[1]

Summary: This draft affirmative instrument sets up the provisions for the automatic enrolment of workers into an occupational pension scheme as set out in the Pensions Act 2008. This was proposed as a response to findings that around 7 million people are currently not saving enough to deliver the pension income they are likely to want in retirement with an estimated 44% of working age employees not contributing to a private pension. Supporting regulations set out further details to allow the phasing in of the scheme over the period 2012-17 and to prevent circumvention or abuse of the requirements.

These instruments are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

1. The Department of Work and Pensions (DWP) has laid these instruments under provisions of the Pension Schemes Act 1993, and Pensions Acts 1995 & 2008, along with an Explanatory Memorandum (EM) and an Impact Assessment (IA).

Background

2. The Government's pensions proposals were outlined in response to a report by Lord Turner, the Chairman of the Pensions Commission, which said that around 7 million people are currently not saving enough to deliver the pension income they are likely to want in retirement, with an estimated 44% of working age employees not contributing to a private pension.[2] Following the Commission's recommendations, the Government responded in the White Paper *Security in retirement: towards a new pension system*, published in May 2006, which set out a programme of State and workplace pension reforms with the objective of increasing an individual's income in retirement.[3]

3. The first part of this reform package was implemented through the Pensions Act 2007 which focused on changes to state pensions, and established the Personal Accounts Delivery Authority (PADA). The Pensions Act 2008 concentrated on workplace pension reforms and included new duties on all

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[1] Employers' Duties (Implementation) Regulations 2010 (SI 2010/4); Employers' Duties (Registration and Compliance) Regulations 2010 (SI 2010/5) and Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2010 (SI 2010/7)

[2] First report of the Pensions Commission – 'Pensions: Challenges and Choices', Chapter 4, Section 5 http://www.webarchive.org.uk/wayback/archive/20070801230000/http:/www.pensionscommission.org.uk/index.html

[3] White paper – Security in Retirement - http://www.dwp.go.uk/docs/white-paper-complete.pdf

employers to automatically enrol eligible jobholders into a pension scheme and pay a minimum contribution. It also established a compliance regime that will be delivered by the Pensions Regulator and provided for a new low cost simple pension scheme.

4. These Regulations and the three related negative instruments make provision about employers' duties and workplace enrolment. The National Employment Savings Trust Order and five associated instruments, mentioned below, set up arrangements for the low cost pension scheme.

- *Draft Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010* set out the practical arrangements employers must make to automatically enrol eligible jobholders into a workplace pension scheme, as required by the Pensions Act 2008, including the set minimum contributions.[4] Individuals who do not want to participate in pension saving have the right to opt out. The instrument also provides those people not eligible for automatic enrolment with the ability to opt into pension saving voluntarily. Where an employer operates a higher quality scheme, the Act enables the employer to postpone automatic enrolment for a period of time. This affirmative instrument sets out the practical arrangements underpinning the scheme including the process and time limits for employers to achieve active membership for jobholders and the information flows required between employers, pension schemes and jobholders.
- This suite of regulations also extends the due date by which an employer must pay over employee contributions deducted from earnings to a pension scheme. By allowing the employer to keep the contributions until after the opt out period has passed, the need for the scheme to refund contributions to the employer if the jobholder opts out will be minimised.
- *Employers' Duties (Implementation) Regulations 2010 (SI2010/4)* phase in the requirements on specific dates according to the description of the employer. The implementation approach has been designed to help small employers adjust to the costs of reform gradually and minimise costs to small employers during the implementation period:
  - Employers will be brought into the duties by size with large and medium-sized employers brought in first, followed by small and micro employers, giving small employers more time to smooth the costs of set-up;
  - Minimum contributions will be phased in to help employers adjust to the additional costs gradually;
  - To ensure that the compliance regime, communications approach and support for smaller employers works, a group of small employers will be required to automatically enrol their eligible jobholders into a pension scheme early on in the implementation process. Bringing them under the duties earlier will make sure that the needs of this group can be

[4] equal to 8% of gross earning between £5035 and £33,540 (2006/2007 terms)

understood, and the approach tailored accordingly, before the majority of the small and micro employers become subject to the duties.

- *Employers' Duties (Registration and Compliance) Regulations 2010 (SI2010/5)* set out safeguards to prevent an employer persuading or forcing a jobholder to opt out or leave pension saving and recruitment arrangements that are intended to screen out job applicants who want to save in a pension. This is perceived as necessary to enable the enforcement of these new obligations in order to protect individuals' access to pension saving and provide a level playing field for employers.

B. Draft National Employment Savings Trust Order 2010 and five associated instruments[5]

Summary: This affirmative instrument sets up the National Employment Savings Trust (NEST) pension scheme. The scheme is aimed at low to moderate earners so that employers who have no private pension provision can use the scheme to fulfil their duties outlined in the Automatic Enrolment Regulations. Supporting regulations set out that the role of member-nominated trustees will be fulfilled by a members' panel; ban transfers of cash equivalent sums built up under other pension arrangements into and out of that pension scheme in most circumstances; and set out the name of the trustee corporation that will run the scheme. A further affirmative order will wind up the Personal Accounts Delivery Authority which was set up on a time-limited basis to advise the Secretary of State on setting up the new pension scheme, from 5 July 2010 when the NEST corporation takes over. Additional information on how the costs of setting up the scheme are to be raised is set out in Appendix 1 although the position is not yet clear.

These instruments are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

5. The Department of Work and Pensions (DWP) has laid these instruments under provisions of the Pensions Acts 2008 along with an Explanatory Memorandum (EM) and an Impact Assessment (IA).

6. The Pensions Act 2008 imposes a duty on the Secretary of State to establish a pension scheme, treated as if established under a permanent trust (like many other occupational pension schemes) through legislation. The aim of the scheme is to address pension saving amongst moderate to low earners who do not have access to a quality workplace pension scheme and it includes a public service obligation to accept any employer who wishes to use the scheme to fulfil their duty under the automatic enrolment requirements.

- *Draft National Employment Savings Trust Order 2010* - This affirmative instrument establishes the first set of rules for the scheme. The Committee requested further information on how the costs of setting up the scheme are to be raised, and noted that the

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5 Transfer Values (Disapplication) Regulations 2010 (SI 2010/6), National Employment Savings Trust (Consequential Provisions) Order 2010 (SI 2010/9), Application of Pension Legislation to the National Employment Savings Trust Corporation Regulations 2010 (SI 2010/8), National Employment Savings Trust Corporation Naming and Financial Year Order 2010 (SI 2010/3) and Draft Personal Accounts Delivery Authority Winding Up Order 2010

early joiners may be charged more than those who join later (see Appendix 1). A number of key issues are still under discussion and the position is not yet clear. It should be noted that, like any other investment scheme, there is potential for the fund to go down as well as up: the level of eventual pension payments is not guaranteed.

- *Transfer Values (Disapplication) Regulations 2010 (SI 2010/6)* prohibit the transfer of pension funds out of the National Employment Savings Trust scheme, except in certain circumstances relating to pension sharing on divorce. This restriction on transfers, along with an annual contribution limit (the amount which can be paid in to the scheme each tax year), are specific measures in this legislative package to focus the scheme on the target market of moderate to low earners. However these rights may be re-applied where the member is (i) over the minimum pension age and satisfies certain conditions, or (ii) in cases of ill-health.
- *Application of Pension Legislation to The National Employment Savings Trust Corporation Regulations 2010 (SI 2010/8)* and the *National Employment Savings Trust (Consequential Provisions) Order 2010 (SI 2010/9)* provide that certain parts of trustee legislation relating to the trustees' knowledge of the scheme and the auditing requirements will apply to the National Employment Savings Trust scheme in a modified form. The scheme will be exempt from the Fraud Compensation Fund and levy (which relates to employer sponsored pension schemes) and from having member-nominated trustees (the members' panel will instead represent the scheme members).
- *National Employment Savings Trust Corporation Naming and Financial Year Order (SI2010/3)* names the body which will run the scheme, and the
- *Draft Personal Accounts Delivery Authority Winding Up Order 2010* winds up the Personal Accounts Delivery Authority and makes arrangements for the transfer of its property, rights and liabilities to either the National Employment Savings Trust Corporation (the NEST Corporation) or the Secretary of State. The Authority was set up on a time-limited basis to assist and advise the Secretary of State on setting up a new pension scheme and will cease to exist when NEST takes over on 5 July 2010.

C. Draft CRC[6] Energy Efficiency Scheme Order 2010

Summary: The purpose of this draft Order is to create the CRC Energy Efficiency Scheme (CRC), the aim of which is to reduce carbon emissions through improving energy efficiency in large public and private sector organisations. The mandatory scheme is part of the Government's strategy to meet its domestic and international greenhouse gas emission reduction targets. The specific policy aim is for the CRC to deliver emissions reductions of at least 4 million tonnes of carbon dioxide ($MtCO_2$) per annum by 2020. The scheme has been under development for a number of years, and the Explanatory Memorandum says there is generally strong agreement with the Government's proposals. Linked regulations made under the Finance Act 2008 will

[6] CRC means 'Carbon reduction commitment'

provide the scheme administrator with powers to sell allowances to CRC participants, an important aspect of the scheme. However, these Regulations will not be laid until the Spring, and DECC acknowledge that the timeline is subject to possible delays with the calling of the General Election amongst other things. The House may therefore wish to seek assurance from the Government that the Regulations will come into force by April 2011, as this is when the first allowances sale will be held.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

7. The purpose of this draft Order is to create a new energy efficiency scheme called the CRC Energy Efficiency Scheme (CRC). The aim of the scheme is to reduce carbon emissions through improving energy efficiency in large public and private sector organisations. The scheme is part of the Government's strategy to meet its domestic and international greenhouse gas emission reduction targets. The scheme will be mandatory and will be administered by the Environment Agency, the Scottish Environment Protection Agency and the Northern Ireland Chief Inspector.

8. The draft Order has been laid with an impact assessment, and the Department of Energy and Climate Change (DECC) has submitted further information to the Merits Committee (see Appendix 2). The Explanatory Memorandum (EM) says that emissions from the CRC's target sector are estimated to be approximately 53.2 million tonnes of carbon dioxide (MtCO2) per annum, and the policy aim for the CRC is to deliver emissions reductions of at least 4 MtCO2 per annum by 2020 (paragraph 7.2). The EM also says that the net financial benefits to participants of achieving this reduction will be approximately £1 billion per annum by 2020 (paragraph 7.2). The administrator of the scheme will publish a league table setting out how well each participant is improving its energy efficiency relative to other participants.

9. The EM shows that the scheme has been under development for a number of years, and there is generally strong agreement with the Government's proposals (paragraph 8). However, there has been concern expressed in the schools sector that local authorities will be financially accountable for the energy usage of schools but without having sufficient levers to influence their schools' behaviour. In response, DECC has provided a duty for schools to provide their local authorities with relevant information, and for local authorities to pass on the costs and benefits of CRC participation to their schools (see Appendix 2). The Merits Committee has also received written evidence from Freshwater Public Affairs on behalf of Forth Ports PLC (see Appendix 2). They raise a similar concern about the decision to make landlords (specifically in the case of ports), where they supply electricity to tenants, responsible for the carbon emissions of their tenants under the CRC. DECC has submitted further information addressing the points made by Forte Ports PLC (see Appendix 2). This exchange indicates some of the many complexities involved in the implementation of the scheme, and the House may wish to satisfy itself that the Government has drawn the line in the right place in relation to landlord/tenant responsibilities, and seek further information on the practicalities of implementation and evaluation of effectiveness.

10. Linked regulations made under the Finance Act 2008 will provide the administrator with the powers to sell allowances to CRC participants, an important aspect of the scheme. DECC anticipate publishing a draft of these Regulations by the end of February, and then laying them during the spring (see Appendix 2). DECC acknowledge that the timeline is subject to possible delays due to the scrutiny process, the budget and the calling of an election. The House may wish to seek assurance from the Government that the Regulations will come into force by April 2011, as this is when the first allowances sale will be held.

OTHER INSTRUMENTS OF INTEREST

Draft Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010

Draft Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010

11. Part 2 of the Housing and Regeneration Act 2008 establishes a new regulatory regime for English providers of social housing but originally excluded local authority providers. The Order is being made so that local authorities will be regulated under the same regime and to the same standards as private registered providers from the start. This fulfils a number of commitments made to Parliament during the passage of the Housing and Regeneration Bill, specifically at Report stage of the House of Lords (HL Deb 9 July 2008, column 752), and Third Reading in the House of Lords (HL Deb 17 July 2008, column 1342). The policy will affect 180 of the 326 local authorities in England i.e. those who have retained housing stock either managed in-house or via another management body. The principle of having a single regulator for all social housing has received consistent and widespread support from both the housing sector and tenants. The Draft Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 makes a number of changes to the legislation necessary to bring the new system into effect.

Draft Jobseeker's Allowance (Lone Parents) (Availability for Work) Regulations 2010

12. From November 2008 the original regulations introduced changes to the entitlement conditions for Income Support to require lone parents who are claiming benefit solely on the grounds of being a lone parent, and who are capable of work, to claim Jobseeker's Allowance when their youngest child is:

- aged 12 years or over from 24 November 2008
- aged 10 years or over from 26 October 2009; and
- aged 7 years or over from 25 October 2010

13. The Committee commented on the original regulations in its 30th Report of Session 2007-08 seeking clarification about the practicalities of how the system would operate and whether the proposed pace of implementation was feasible, particularly in how it relates to the roll-out of "wrap-around childcare". The current amending regulations clarify one of the practical

issues by giving a lone parent with a child under 13 the right to restrict their availability for work to the child's normal school hours, even if there is no reasonable prospect of them obtaining employment within that restriction.

Draft Social Security (Loss of Benefit) Amendment Regulations 2010

14. Existing loss of benefit legislation enables benefit to be withdrawn or reduced for a period of 13 weeks where a person is convicted of benefit fraud twice and the second offence was committed within 5 years of the date of conviction for the first offence. This sanction only impacts on the small number of people who commit benefit fraud on more than one occasion and are convicted of the offence in court.

15. These amending regulations support the new loss of benefit provision introduced by the Welfare Reform Act 2009 (amending the Social Security Fraud Act 2001). The new sanction will apply not only to cases which are prosecuted but also to those cases which result in an administrative penalty or a caution.[7] This means that from 1 April 2010, in all cases where there is sufficient evidence that benefit fraud has been committed, there would be:

- recovery of the overpayment;
- a fraud sanction (conviction, administrative penalty or caution);
- a four week benefit penalty.

16. DWP believe that this will act as a deterrent to the significant numbers of people who commit benefit fraud at least once; estimated at around 50,000 cases per year and will result in savings of £4-10m per year.

Code of Practice for the Welfare of Privately Kept Non-Human Primates

17. The Animal Welfare Act 2006 ("the 2006 Act") introduced a statutory duty of care on all owners and keepers of animals to provide for the welfare needs of those animals. This Code of Practice is the result of a ministerial commitment given during the passage of the 2006 Act (see Appendix 3), and provides more detail on how owners and keepers can meet this duty of care in relation to primates in private ownership. Although the Explanatory Memorandum says (paragraph 8) that most of those who responded to the consultation supported the proposal to introduce the Code, most wanted to see the Code supported by some form of regulation (e.g. licensing or registration). The Government's view is that without firm evidence that there is a widespread welfare problem, such a step is not in keeping with their Better Regulation agenda. The House may wish to satisfy itself that there is benefit in such a Code of practice in these circumstances.

Agency Workers Regulations 2010 (SI 2010/93)

18. This instrument implements an EU Directive on temporary agency work, the aim of which is to ensure the protection of temporary agency workers by applying the principle of equal treatment. The implementation will include a

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[7] Since 1999 DWP has offered cautions and administrative penalties for benefit fraud offences instead of prosecution for lower level offences. DWP's sanction policy is published at http://www.dwp.gov.uk/docs/sanction-policy-v3-feb09.pdf

provision based on agreement between the Confederation of British Industry (CBI) and the Trades Union Congress (TUC), that agency workers should receive equal treatment on basic working and employment conditions after 12 weeks in a given job. The Regulations will have a significant impact: the Explanatory Memorandum (EM) says that the agency sector includes about 5% of the UK workforce, supplied through about 16,000 agencies (paragraph 7.1), and estimates used by the Department for Business, Innovation and Skills[8] suggest approximately 45% of agency workers will reach the qualifying period. The Regulations include provisions aimed at preventing misuse of the qualifying period by employers. The annual costs to businesses will be up to £1,516 million (see EM paragraph 10.1). The Regulations will not come into force until 1 October 2011 to provide all concerned with time to prepare for the change, and the application of the Directive, including the operation of the 12 week qualifying period, will be reviewed by December 2013. The Committee received a letter from the British Medical Association making a number of points about the Regulations (see Appendix 4).

GLASGOW COMMONWEALTH GAMES ACT 2008 (GAMES ASSOCIATION RIGHT) ORDER 2009 (SI 2009/1969): FOLLOW-UP INFORMATION

19. In our 26th Report of Session 2008-2009 we published correspondence on this Order which establishes "brand" protection for the Games. In an overview paragraph we commented that guidance should be published to make clear to small businesses what they could (and could not) do. The Order came into force on the 20 January 2010 and the Glasgow 2014 Commonwealth Games Organising Committee (CGOC) has published interim guidance on their website.[9] The Scotland Office say this guidance is an interim measure until the 2014 Glasgow Commonwealth Games brand launch on the 8 March 2010 when fuller guidance will be issued to replace this version.

INSTRUMENTS NOT REPORTED

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Draft Access to the Countryside (Coastal Margin) (England) Order 2010

Draft Agency Workers Regulations 2010

Draft Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010

8 See page 13 of the Impact Assessment for detailed explanation of this estimate.

9 http://www.glasgow2014.com/NR/rdonlyres/7F4C7114-6465-45E4-9CE4-F85BEDD5D47/0/AssociationRightsGuidanceFinal.pdf

Draft Extradition Act 2003 (Amendment to Designations) Order 2010

Draft Health and Social Care Act 2008 (Consequential Amendments No. 2) Order 2010

Draft Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010

Draft Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010

Draft Immigration and Nationality (Fees) Regulations 2010

Draft Immigration (Leave to Enter and Remain) (Amendment) Order 2010

Draft Jobseeker's Allowance (Lone Parents) (Availability for Work) Regulations 2010

Draft Social Security (Loss of Benefit) Amendment Regulations 2010

Draft Serious Organised Crime and Police Act 2005 (Disclosure of Information by SOCA) Order 2010

Instruments requiring affirmative approval

SI 2010/86 Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2010

Draft Instruments subject to annulment

Draft Code of Practice for the Welfare of Privately Kept Non-Human Primates

Instruments subject to annulment

SI 2010/76 National Health Service (Functions of the First-tier Tribunal relating to Primary Medical, Dental and Ophthalmic Services) Regulations 2010 (JW)

SI 2010/89 Cross-Border Payments in Euro Regulations 2010

APPENDIX 1: DRAFT NATIONAL EMPLOYMENT SAVINGS TRUST ORDER 2010

Supplementary information from the Department for Work and Pensions

Auditing

Q1. *Paragraph 7.8 of the EM (second bullet) says that during the passage of the Bill Ministers announced that because of the potential size of the scheme it would not be subject to "traditional audit arrangements". Please specify what audit arrangements it will be subject to and how they differ from the norm.*

A1. The audit arrangements for occupational pension schemes which are in existing pensions legislation will apply to NEST. However, during the passage of the Pensions Act 2008, an amendment was tabled to provide that NEST should not be subject to the requirement to obtain an auditor's statement about employer contributions. This was because the size and scale of the scheme (there will be millions of members and hundreds of thousands of contributing employers) would make it impractical to audit employer contributions. This proposition was supported by the Institute of Chartered Accountants in England and Wales. Consequently, the Government gave an assurance that NEST would not have to comply with this requirement. This provision, therefore, exempts NEST from this requirement. However they will otherwise have to present audited accounts in the normal way.

NEST will have strong internal controls, including an internal audit function. The processes introduced to carry out checks on contributions will be overseen by this function and will be reviewed on a regular basis to confirm that they are effective. PADA is currently discussing with potential administration suppliers, the processes that can be put in place to check that the amounts of contributions received from employers are in line with the expected amounts required by an employer's Payments Schedule and regular payment patterns.

In addition, NEST will by way of online access to pension account information, provide a high level of transparency to members and employers in relation to the contributions it receives. Members will, therefore, be able to check contributions paid to their account on a regular basis. Members who identify shortfalls in the contributions paid to NEST on their behalf, will be able to contact their employer, NEST or the Pensions Regulator.

Funding of costs

Q2. *NEST regulation 27(i) says the Trustee must make deductions from member's pension accounts to contribute to general costs of set up and running. The Committee was concerned that the set up costs will be front loaded ie later joiners will get a better deal. They note that there are a number of provisions in reg 27(8) that aim at general equality but were not clear whether this aspect was covered.*

A2. During the passage of the Pensions Act 2008, the Government set out its intention that NEST should be self-financing over the long-term. This means that all of its set-up and operational costs will be met through the charges paid by its members. This is necessary to meet the Government's policy intention that the scheme is delivered at nil overall cost to taxpayers.

The provisions in article 27(8) are part of the scheme's public service obligation to serve all employees eligible to join it at the same level of charge, irrespective of certain characteristics of themselves and their employer e.g. size of firm or an employee's earnings. It does not, however, relate to the time period in which the member joins the scheme (ie all members in the scheme at any point in time will be charged on the same basis, but the level of charges can change over time).

The Government has made clear throughout the development of these reforms, including in its December 2006 White Paper, that because of the need for the scheme to meet its own set-up costs, it will need to levy a slightly higher level of charges in the short to medium term than over the longer-term. However, the scheme has been specifically designed to ensure that it will be sufficiently low cost that all cohorts of members, including those joining the scheme from its inception, will benefit from a substantial reduction in charges compared to what is currently available for those in the scheme's target group.

Q3. *The Committee also note that page 99 of the Impact Assessment at paragraph 6.6 (second indent) says costs for set up will need to be "subsidised" until sufficient membership charges build up – what is the likely scale and duration of this "subsidy"? Do you have a projection for when the scheme is expected to begin to be self-financing? That paragraph says that the source of this finance is still to be determined – can you please explain why this is not yet clear since it is possible the policy cannot be implemented if start up finance is not available.*

A3. During its early years, NEST will face a funding gap. Revenue from membership charges will not begin to flow into NEST until it launches in 2011 and will then take time to build up before it is sufficient to cover all of the scheme's costs. The scheme will need to obtain repayable finance to bridge this inevitable short-term funding gap.

The Department for Work and Pensions and the Personal Accounts Delivery Authority (PADA) are developing a funding strategy to find the best way to bridge this funding gap. This will meet the commitments the Government made to Parliament during the passage of the Pensions Act 2008 that it will need to be consistent with the aim of delivering low costs to members, enable the scheme to become self-financing in the long-run and that it will be affordable and be delivered at nil overall cost to taxpayers. It will also need to avoid providing the scheme with any unfair advantage relative to other pension providers and be compatible with European Competition law which is specifically designed to prevent this from happening.

We cannot at this stage provide the Committee with any further details of the scheme's cost and funding strategy. PADA are in the process of procuring the administration, fund management and other services that will underpin the scheme. Only once these procurements are complete will we have a full understanding of costs and be able to take final funding decisions. Furthermore, releasing our estimates of the scheme's cost at this stage could jeopardise PADA's commercial negotiations, limiting their ability to secure the best value for money for their members.

The Government is, however, confident that suitable arrangements can be put in place and has made clear its intention to put such information into the public domain once it is no longer commercially sensitive.

Security of the scheme

Q4. *Given that the scheme is based on investments is there the potential that the value of funds could go down as well as up? Is there the potential, however slight, that participants may eventually withdraw less than the value of their contributions?*

A4. The purpose of the Government's reform strategy is to enable individuals to make greater financial provision for their retirement. This includes making contributions to a defined contribution pension scheme which meets defined quality standards. A defined contribution pension scheme aims to earn a return on contributions by making appropriate investments. This inevitably involves making a judgement on the balance between the anticipated return from an investment and exposure to risk.

PADA is carrying out the initial work on the investment approach for NEST and will make recommendations to the NEST Corporation who will, as trustee of NEST, make all

investment decisions. PADA has spent the last 18 months extensively consulting with the pensions and investment industry, unions, employer representatives, consumer groups and academics in order to develop recommendations for investment that best meet the needs of NEST's likely membership of low to moderate earners.

PADA's emerging thinking following consultation suggests that the investment approach many UK defined contribution schemes take where members are invested predominantly in the stock market may not be appropriate for the membership of the scheme, who are likely to have a low appetite for risk. PADA is likely to recommend to the NEST Corporation a strategy that invests members' contributions in a range of asset classes, such as Government bonds, stocks and shares, cash and alternatives. This approach would be designed to reduce volatility (sharp falls or sharp rises in the fund value) and the risk that some individuals would get less than their contributions.

In any defined contribution pension there are, however, no guarantees as to what an individual's final pension will be. A variety of factors can influence pension income, such as future annuity rates, inflation and interest rates as well as returns on any investment. No single strategy is risk free.

DWP
January 2010

APPENDIX 2: DRAFT CRC ENERGY EFFICIENCY SCHEME ORDER 2010

Written evidence from Forth Ports PLC

Forth Ports PLC understands that the House of Lords Select Committee on the Merits of Statutory Instruments will be considering the Draft CRC Energy Efficiency Scheme Order 2010 in the near future. Forth Ports run a group of regionally based ports in the central belt of Scotland and Tayside. Grangemouth is Scotland's largest container port, serving both the Glasgow and Edinburgh Metropolitan Regions. The Port of Tilbury is London's major distribution hub for South East England. We also have a port terminal operation at Chatham in Kent operated under the Nordic banner. We provide marine services, controlling navigation in the Firths of Forth and Tay through the Forth and Tay Navigation Service as well as operating our own towage fleet. We have a Property Division that manages and develops our property assets, a recycling division (Nordic Recycling) and a joint venture renewable energy division (Forth Energy) with Scottish and Southern Energy.

In Forth Ports we are actively working to reduce our carbon footprint through resource efficiency measures. We have been developing these projects for some years, substantially reducing our energy usage with considerable attention at board level. Forth Ports support activities to reduce carbon, indeed the shipping routes calling at our ports substantially reduce the carbon budget of the UK and we strongly believe that more use of the shipping routes calling at our ports could make a significant impact on the UK's ability to meet its carbon targets. A recent study by the Edinburgh Centre for Carbon Management (part funded by the Carbon Trust) showed that just three of the many routes from our ports saved more than three times the Forth Ports Group carbon footprint (Scope 1, 2 & 3) when compared to road transport alternatives. Following further work we have identified that Forth Ports PLC has a carbon leverage in excess of 10:1; we save more than ten times the carbon we emit in conducting our business. Furthermore, (as the government is aware) we are working on a number of potential coastal shipping and barge transport options that will further demonstrate the carbon benefits that can be derived from growing port volumes by diversion from road. We therefore believe that by working in partnership with government and attracting more trade to travel by sea rather than by land we can reduce the UK's carbon footprint and substantially contribute to the 2050 80% target.

We supply electricity to a number of our tenants within our port estates. On average they use 4-5 times the electricity that we use ourselves. Under the current rules of the scheme, we are responsible for the CRC liabilities of our tenants (where we supply the electricity). This is an issue for us, as it makes our CRC liability disproportionately large. Furthermore, we have no control over the electricity usage of our tenants. Many tenants conduct industrial processes, mills, cement batching plants, processing factories, pipe coating, metal working and so on. Many of these tenants own their buildings, albeit on our land. They therefore have full control over their electricity usage, which makes the proposal that we are responsible for their electricity usage in the CRC a challenging one for us. Clearly we will have to recoup our CRC costs, but there is no logical or sensible clear method for us to do so. Many of our leases are for multi-decadal periods, making it impossible to re-write these to factor in a new scheme such as this.

Due to the nature of the scheme, all the tenants that we supply with electricity will be captured, even those with exceptionally small usage, far below the 6,000MW threshold of the scheme for participation. We believe this will result in some of our smaller and more mobile tenants leaving the ports, and therefore a net carbon dis-benefit through all of the additional transportation associated with port related services relocating out of our ports.

By far the majority of the tenants that we supply use less electricity on our site than the scheme participation threshold.10

A major vulnerability for Forth Ports is how to deal with new tenants entering the port, if we purchased a subsidiary, the scheme recognises this, and the group would not be penalised unfairly. However, if (as in 2009) a new tenant was signed up that used 6 million units a year, this would count as an absolute increase on emissions, regardless of the fact that it was new business. Similarly, we have one tenant, who is a major user who has a plant that is virtually dormant unless they have a contract. The plant could be dormant for a number of years and then operational for one or more years. If these companies were participants in their own right, the scheme may be able to manage this, but as the scheme stands there is no recognition of this issue and our league table position and resulting reputation and recycle payment is highly vulnerable.

This landlord/tenant issue is particularly acute in ports; clearly we will have to pass this cost on to our tenants. There is no obvious way to deal with issues like those outlined in the paragraph above, particularly if all of the other tenants have assisted in the reduction of carbon relative to their business activities. Yet we all lose our recycle payment. We can split a subsidiary company out of the overall Forth Ports Group – so that it reports on its own (where we clearly have control), but we cannot split our tenants out to report separately (when we have no control over them).

Mobile plant was specifically excluded from the CRC until the latest iteration from the Department of Energy and Climate Change. This u-turn doubles our own use CRC liability. This last minute change came as a surprise; given previous correspondence specifically stated that mobile plant was not included. Obviously, the Committee may feel that this particular issue needs further explanation by the Government. Finally, we have been recently informed that the final guidance for the scheme will not be available until April – which is when the scheme starts. We assume that the lack of final guidance will also be an issue that should concern the Committee

Forth Ports PLC is investing in a number of renewable energy projects. In the Port of Tilbury we have consent for four wind turbines, yet once constructed we will be unable to discount this on-site generated renewable energy from our CRC liabilities. In Scotland we are seeking consent for two wind projects and four renewable energy plants on our estates along through our joint venture with Scottish and Southern Energy: Forth Energy.11 Similarly, if consented, post construction we will not be able to discount this energy against our CRC liabilities. Beyond these projects, we have been working on resource efficiency for a number of years, having created substantial savings to date on energy use per tonne of cargo handled. This has been achieved through infrastructural investment as well as through behavioural initiatives: e.g. encouraging staff to switch off electrical equipment when idle. Last year we saved in excess of 10% across the Forth Ports group of companies relative to the tonnage handled. This is on top of the previous year, where a number of asset areas achieved astounding savings in excess of 30%.

Part of the work we have undertaken to date on carbon budgeting has shown us that, particularly with coastal shipping, there are opportunities for transport carbon footprints to be substantially reduced by modal shift from road (or rail) to sea. In many cases, moving goods by sea can emit one tenth of the carbon or road transport. This by far exceeds the government's aspiration of an 80% reduction by 2050, and it is an immediate saving.

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10 They may be part of a larger group and would qualify in their own right as a result, but as they are supplied by the port, they will not participate at our sites and we will be responsible for their emissions.

11 www.forthenergy.co.uk

Summary

The upfront payment nature of the scheme presents many companies with cash flow planning difficulties. But the biggest issue is the decision to make landlords (specifically in the case of ports), where they supply electricity to tenants, responsible for the carbon emissions of their tenants under the CRC. This is a particular vulnerability due to the inability of ports to control the energy use of their tenants, and in particular the often impossibility of forecasting the usage of certain tenants. This represents an enormous financial and reputational liability in its current format. Ports are keen to improve energy efficiency and have made great progress on this over recent years. The aim to improve energy efficiency is fully supported, but the implementation is overly complex and completely unfair where we are expected to carry the liability of tenant companies. We would propose that where there is a 'directed utility', the utility has the same duty to inform DECC of its energy on-sales as any power company. We hope that our comments are useful. We look forward to seeing the outcome of this Committee and working with the Governments of the UK and Scotland to reduce carbon budgets through the facilitation of modal shift from road to sea.

January 2010

Information from the Department for Energy and Climate Change

Thank you for your questions on the CRC Energy Efficiency Scheme Order 2010. Please see our responses below:

Q1. *When are the linked Treasury Regulations likely to be laid?*

A1. We are working with HMT to lay the associated Finance Regulations as quickly as possible. We anticipate publishing a draft on our website by the end of February, which will then be laid during the spring. This timeline is subject to possible delays due to scrutiny processes, the budget and the calling of an election. The regulations will make provision for the sale of CRC allowances, and as such it must come into force by April 2011 as this is when the first sale will be held.

Q2. *What exactly is the issue with maintained schools? Is there still dissatisfaction within the schools sector? If so, how widespread is this?*

A2. Generally there is (widespread) support for grouping maintained schools with their funding local authority and the opportunities this presents for their mutual benefit. This recognises the significant contribution that the schools' estate makes to local authorities emissions; contribution figures in the 50-70 percent range are commonplace.

The primary concern from the sector is that local authorities will be financially accountable for schools energy usage but without having sufficient levers to influence their schools' behaviour.

Our response has been to provide a reasonable assistance duty for schools to provide their local authority with relevant information to enable the local authority's compliance with the CRC's obligations, as well as providing local authorities with the powers to pass on the costs and benefits of CRC participation to their schools. We are proposing to work with the Local Government Association and relevant bodies to ensure this power is an effective lever and does not leave local authorities exposed. In addition DCSF will be working through its carbon budget commitments to reduce schools' energy use and therefore contributing to local authority energy reductions.

January 2010

Further information from the Department for Energy and Climate Change

DECC recognizes and applauds Forth Ports' efforts in increasing their energy efficiency to date. DECC Ministers and officials have discussed the CRC extensively with Forth Ports including a site visit by officials. Forth Ports have helpfully set out their situation clearly and comprehensively and with their help the Department has gained a full understanding of their concerns. In response to the five main arguments Forth Ports have set out in their letter to the Merits Committee we make the following response:

Landlords (in this case Forth Ports) have no control over their tenants' carbon emissions

One of the key barriers to emission reductions currently identified in the CRC sector is the split incentives between landlords and tenants. In many cases landlords have the contract with the energy supplier and pass on the costs to tenants, potentially profiting from the arrangement by increasing the price of the energy they sell on. In a brief that Forth Ports sent to us they state that 'it is worth remembering that electricity on-sales represent a substantial revenue stream'. By this we take it that Forth Ports mean this is a profit centre and the more electricity their tenants use the more revenue is generated for Forth Ports. This is exactly the kind of incentive CRC is seeking to reverse so that instead there is both a financial and reputational reward for those who use less energy. In their brief to us Forth Ports explain that there is often no requirement built into leases specifying the need for the Port to provide the tenant with energy at all. If ports want their tenants' to take responsibility for themselves they can connect them to the grid directly, thereby taking away any incentive the Port has to increase their energy use. We hope that the CRC will enable Forth Ports to share the rewards of greater energy efficiency with their tenants.

Landlords (in this case Forth Ports) have no way to share the costs and benefits associated with the CRC with tenants

We remain unconvinced that there is no way for Forth Ports to pass on the appropriate costs and benefits of the CRC to their tenants if they choose to remain responsible for their energy supply. On this issue there seems to be little difference between ports and other landlords that will be participating in CRC. Having engaged extensively with landlords from across the CRC sector we have come across landlords who are now developing innovative and, we expect, effective ways for costs and benefits to be shared such that they further incentivise energy efficiency.

If landlords do recoup their costs small mobile tenants may leave

If these small mobile tenants move to other UK ports there is a strong chance that they would be subject to the CRC in their new location. As the CRC will encourage cost-effective energy savings it will result in a net financial gain to participants so it should not, in general, lead to significant international competitive distortions.

If Forth Ports take on new tenants there would be no recognition of this growth and so they will lose out in the league table

It is not true to say that there is no recognition for growth in the CRC, as the CRC has both an absolute and a growth metric to account both for improvements in energy efficiency both in absolute (total tonnes of C02) and relative (tonnes of C02/ unit turnover) terms. It is however true that the CRC gives a higher weighting to the improvements in absolute terms. This is true for all organisations, not just landlords, and applies equally to those with a strong growth strategy and expectation. We have adopted this approach, because it is in line with the overall objectives of the scheme, and with the need to decouple economic growth from carbon emissions. Furthermore it is important to note that the previous Government consultation which sought views on this revealed widely divergent views as to how 'growth' should be measured. Because of the difficulties

in defining a fair and transparent growth metric across the CRC sector, we therefore believe that it is right that at this stage that the absolute metric has the higher weighting. Government is however committed to keeping the scheme under review.

Mobile plants were excluded, now they are included

This approach was announced in the Government response to the consultation in October last year. We had consulted on the definition of transport and took the view that the previous definition lacked the necessary clarity to allow either participants or the regulator to determine whether certain things were in or out of the CRC. We have therefore adopted an approach which is both robust in terms of definitions, and links to other licensing regimes. Thus, road going vehicles are subject to taxes which are in part designed to improve their overall energy efficiency and reduce their carbon emissions. Mobile plant are not subject to such incentives, and we have therefore included them in the CRC.

Once again, we appreciate Forth Ports efforts in setting out their situation so clearly. We are keen to ensure the key principles of the scheme - incentivising energy efficiency, fairness and transparency - are delivered and recognise that refinements to the CRC may be required over time in the light of experience. We are keen that we continue our dialogue with Forth Ports on the scheme design and operation as their experience of it grows.

We have made clear to Forth Ports and other participants in the CRC that we will keep the operation of the CRC under review and there is scope for making improvements to the Scheme before the second capped phase to ensure it delivers the correct incentives to all participants to improve energy efficiency.

February 2010

APPENDIX 3: CODE OF PRACTICE FOR THE WELFARE OF PRIVATELY KEPT NON-HUMAN PRIMATES

Information from the Department for Environment, Food and Rural Affairs

Q1. *Are there going to be any more of these Codes?*

A1. We are working on a Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes. No others are planned.

Q2. *Is there a list available of the primates requiring a licence under the 1976 Act and those which do not?*

A2. The Schedule to the Dangerous Wild Animals Act 1976 was recently amended and the list is now:

New-world monkeys (including capuchin, howler, saki, uacari, spider and woolly monkeys). Night monkeys (also known as owl monkeys), titi monkeys and squirrel monkeys are excepted. Old-world monkeys (including baboons, the drill, colobus monkeys, the gelada, guenons, langurs, leaf monkeys, macaques, the mandrill, mangabeys, the patas and proboscis monkeys and the talapoin). Anthropoid apes; chimpanzees, bonobos, orang-utans and gorillas. Gibbons and Siamangs. Leaping lemurs (including the indri and sifakas). The woolly lemur is excepted. Large lemurs. Bamboo or gentle lemurs are excepted.

Primates for which you do not need a DWAA licence are:

marmosets, tamarins, squirrel monkeys, night or owl monkeys, titi monkeys, woolly lemur, bamboo or gentle lemurs; plus loads of others available through the attached link:

http://www.unep-wcmc.org/isdb/Taxonomy/tax-order-result.cfm?country=&order=124&startrow=26&source=animals

Q3. *Have you any knowledge as to the make up of the private primate population? I assume that a small primate would have different welfare needs to one of the larger primates.*

A4. The most popular privately kept primates are: capuchins, marmosets, tamarins, squirrel monkeys, owl and titi monkeys. We have been told that there are very few if any great apes in private ownership (eg chimpanzees, gorillas, orang-utans). Different sorts of primates have different needs but the code aims to provide a general over-view of needs and prompt the owner to get further, more detailed advice, where necessary.

Q5. *Why does the Government see the Code as being necessary if there is no firm evidence that there is a widespread welfare problem (paragraph 8.2 of EM)?*

A5. MPs and Peers raised concerns about the availability of primates to non-specialists during the passage of the Animal Welfare Bill through Parliament. The Government agreed to look at the problem. The Government considered that there did not appear to be a large problem to warrant the introduction of a regulatory scheme. However the Government accepted that the de-listing of some primates from the Dangerous Wild Animals Act 1976 meant that there was no longer a need to ensure to local authority inspectors, under that legislation, that those particular primates were provided with their necessary welfare needs. It was also accepted by the Government that primates are complex animals (humans closest animals) that require specialist attention. The Code of Practice is therefore intended to inform owners (or prospective owners) what is required to look after a primate, whether it is on the DWAA list or not.

Q6. *Has the Government any plans to fill the knowledge gaps around the private primate population as a basis for deciding whether there is a regulatory gap?*

A6. The impact assessment concludes that there is little evidence to support a regulatory regime but accepts that primates are complex creatures that require specialist attention. The code would be light touch and points out what owners should already be doing under the Animal Welfare Act 2006 - ie, providing for the welfare needs of their animals. We will need to review the code within the next 5 years which will show how effective it has been.

Ministerial Commitment

I can confirm that the government commitment was for a code of practice.

Quote by the then Animal Welfare Minister, Ben Bradshaw, MP (Standing Committee, Animal Welfare Bill, 19th Jan 2006):

"I can tell the hon. Member for Lewes and my hon. Friends the Members for Stroud and for Llanelli (Nia Griffith) that, as a priority, the Government intend to develop a code for the keeping of primates."

This was repeated in the Lords at Grand Committee stage by Baroness Farringdon on 24th May 2006.

January 2010

APPENDIX 4: AGENCY WORKERS REGULATIONS 2010 (SI 2010/93)

Letter from the British Medical Association

The British Medical Association (BMA) is an independent trade union and voluntary professional association which represents doctors and medical students from all branches of medicine throughout the UK. It has a total membership of over 146,000, which continues to grow each year.

We understand that the main purpose of the Agency Worker Regulations is to ensure the appropriate protection of temporary agency workers through the application of the principle of equal treatment and to address unnecessary restrictions and prohibitions on the use of agency work. Under the Agency Worker Directive (2008/104/EC), 'equal treatment' relates only to basic working and employment conditions of temporary agency workers (e.g. pay and working time); the Directive does not affect the employment status of temporary workers.

Timeframe for implementation

The Government's autumn consultation document states that the new rights will not come into effect until October 2011. We understand that this is one of the latest possible dates for implementing the legislation as the final deadline for European Union member states to implement the consultation is 5 December 2011. While we understand that the Directive will involve potentially significant changes in practice for hirers and agencies we are concerned that agency workers are particularly vulnerable during times of recession. We would therefore urge the Government to consider the possibility of whether the Directive could be implemented sooner.

Scope of the Regulations

According to the NHS Confederation, of the estimated 1.3 million temporary agency workers employed in the UK around 10% are engaged in the healthcare sector1. It is important to clarify who in the health sector will be covered by the proposed definition of 'agency worker' in the consultation. The definition of who is covered by the Regulations is extremely complex and confusing. The way that the proposals are phrased theoretically could mean that some workers might not deemed to be 'agency workers' and thus are not covered by the proposals. The measures are applicable to workers who work 'under the direction of a hirer.' We seek clarification as to whether under the regulations, a locum doctor (whether working at General Practice or in a hospital) is regarded as working '…for and under the direction of the hirer…'. The BMA also seeks clarification of doctors on secondments are included in the Regulations.

Establishing equal treatment

The primary means by which the Regulations seek to improve the employment situation for agency workers is the provision of the right to 'equal treatment. An agency worker is entitled to the same 'basic working and employment conditions' as if they had been recruited directly by the hirer. These basic working and employment conditions include pay, the duration of working time, the length of night work, rest periods, rest breaks and annual leave. Establishing equal treatment necessitates a comparison.

We are concerned that the Regulations contain complex rules for determining whether an 'agency worker' has received equal treatment which could make it difficult for agency workers to enforce their rights. There are added complexities in the practical application of a comparator test in smaller organizations, such as GP practices, and further guidance on how this could be implementation would need to be developed.

Definition of pay

The BMA is committed to the elimination of unlawful discrimination and the removal of barriers to careers throughout the medical profession and equality in the provision of its services to its members and stakeholders. We are concerned that the definition of pay excludes a number of payments and rewards including maternity, paternity and adoption pay and payments relating to time off for dependents. This year the BMA published *The Pay Gap for Women in Medicine and Academic Medicine* which highlighted the current pay gap between women and men in the medical profession. This report is available on the BMA website at:

http://www.bma.org.uk/employmentandcontracts/equality_diversity/gender/paygapreport09.jsp.

We seek further clarification as to why the particular payments are being excluded given their importance to parents, carers and female workers and the Government's policy direction in regards to equalities.

We believe that the BMA, as a trade union and our individual members, plays a legitimate and important role in our democracy, health care and employment relations system. We are concerned that the definition of pay also excludes payments for statutory time-off such as for carrying out trade union duties and seek further clarification as to why they are not included. We seek further clarification on the approach taken in regards to establishing equal treatment.

Qualifying period/rotation of agency workers

Under draft Regulations an agency worker would need to complete a 12 week qualifying period before becoming entitled to equal treatment. The Regulations state that to complete the qualifying period an agency worker must undertake the same role with the same hirer for 12 continuous calendar weeks. We are concerned with the possibility that agency workers could be rotated from one role to another to prevent them meeting the 12-week qualifying period. The Regulations propose that a 6-week break for reasons other than holidays, maternity, paternity or sick leave would be sufficient to break continuity for the purpose of the 12-week qualifying period. For example, we are concerned that this may mean that doctors that are medical academics working on longer assignments would have their continuity broken during the summer vacation or as a result of being assigned to a different department or school. Under the Regulations, an unscrupulous hirer might shift workers to work via different subsidiary companies every 11 weeks in order to avoid the implication of the Regulations. It may be possible to mitigate the effect of such a loophole by amending the legislation so that the 12 weeks continues to run when the agency worker moves within a group of companies that are under the same effective control. We seek further clarification on how the qualifying period will work in practice.

Right to receive information in relation to rights and duties

We believe that the Regulations could be strengthened. The current proposal means that the worker has to specify what information they want, and then the temporary work agency will provide it. However, it is highly likely that many workers will not be legally advised and it would be simpler if the agency were under an obligation to provide prescribed information in response to a generic or non-specific request for information from the worker. By way of example, such a model is used in the Data Protection Act 1998 whereby a simple request that a lay person might make for '…all personal data you hold in respect of me…' (or similar words) is sufficient to trigger a statutorily defined disclosure of information; perhaps a request for '…any information that details how I am treated relative to permanent employees…' (or words with similar meaning) could be made to trigger a disclosure of prescribed information under these regulations.

It is not clear under the Regulations how broad the disclosure of information by the hirer needs to be. Is it just in respect of comparable employees (in which case this may create a

problem as the hirer will need to make an assessment as to whether there are any comparable employees, and if so who they are), or does it apply in respect of all employees (in which case one will need to consider how useful the disclosure of information is to the agency worker)? There may also be scope for the hirer to argue that there are not any comparable employees which may be contrary to the agency workers view. To the extent that such information is necessary for the agency worker to put together a legal claim, the agency worker may be hampered by such a dispute.

Practical advice guidance which will accompany the Regulations

The BMA was pleased that the Department for Business, Innovation and Skills sought views on the practical advice should be covered in the guidance which will accompany the Regulations. The BMA believes that the guidance should be in plain English and easy to understand. Where possible jargon and acronyms should be avoided and a glossary of key terms and definitions would be particularly useful. The Regulations apply to England, Scotland and Wales. Accompanying guidance will therefore need to be available in Welsh under the Welsh language scheme.

The BMA believes that the guidance should make clear who is affected by the Regulations, what is different or has changed because of the Regulations, the appropriate legal process for enforcing rights, and where further information can be obtained. It may be necessary to produce sector specific guidance, given the size of the NHS workforce.

January 2010