

HOUSE OF LORDS

Merits of Statutory Instruments Committee

12th Report of Session 2010-11

Drawing special attention to:

Draft National Minimum Wage (Amendment) (No2) Regulations 2010

Further information:

Draft Nuclear Decommissioning and Waste handling (Designated Technical Matters) Order 2010

Correspondence:

Statement of Changes in Immigration Rules

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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 Lord Methuen
The Lord Eames OM	Rt Hon. the Baroness Morris of Yardley
Rt Hon. the Lord Goodlad (<i>Chairman</i>)	The Lord Norton of Louth
The Baroness Hamwee	The Lord Plant of Highfield
The Lord Hart of Chilton	Rt Hon. the Lord Scott of Foscote
The Lord Lucas	

Registered interests

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Declared interests for this Report are in Appendix 4.

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.

Twelfth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.

Draft National Minimum Wage (Amendment) (No. 2) Regulations 2010

Summary: These draft Regulations amend the National Minimum Wage Regulations 1999 (“the NMW Regulations”) to provide that payments by an employer for travel expenses to a temporary workplace which are eligible for tax relief do not count as pay for National Minimum Wage (NMW) purposes. The Government is concerned that participation in these schemes may: adversely affect low paid workers’ access to earnings-related social security benefits; give rise to Exchequer loss; and distort the market as some businesses suffer a competitive disadvantage because they do not operate these schemes. The Government also believes that many of the schemes are exploitative. The consultation on the proposals produced divided opinions with the majority of responses from employment businesses being against the proposals, but with the regulatory bodies being supportive. The Committee has received a submission from the Cordant Group (“Cordant”) who have also brought a claim for judicial review against the Government’s decision to amend the NMW Regulations. The House will wish to note the points made by Cordant but should do so in the broader context of the consultation outcome.

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.

1. These draft Regulations amend the National Minimum Wage Regulations 1999 (“the NMW Regulations”) to provide that payments by an employer for travel expenses to a temporary workplace which are eligible for tax relief do not count as pay for National Minimum Wage (NMW) purposes. The draft Regulations will come into effect on 1 January 2011. The draft Regulations have been laid with an Explanatory Memorandum (EM) and an Impact Assessment (IA).

Background

2. As policy background, the EM says that many temporary workers, including those who are paid at or near the NMW, participate in travel and subsistence schemes operated by some employment businesses. The schemes take advantage of the tax relief and disregards that exist for National Insurance Contributions (NICs) in relation to travel from home to a temporary workplace; with workers agreeing that an amount of pay, which would otherwise be subject to tax and NICs, is replaced with expenses payments for travel to a temporary workplace (EM paragraph 7.2). The EM says that the Government estimates that around 90,000 low paid workers use a travel and subsistence scheme (EM paragraph 7.3).

3. The EM sets out the Government's reasoning behind the proposed changes to the NMW Regulations. The EM says that the Government is concerned that participation in these schemes may adversely affect low paid workers' access to earnings-related social security benefits, and that these schemes distort the market as some businesses do not wish, or are not able, to operate these schemes thereby suffering a competitive disadvantage (EM paragraph 7.3). The IA also says that the schemes give rise to Exchequer loss, and many are exploitative as the employer retains most of the financial benefits and the workers have little or no knowledge of how these schemes work (IA page 1). In order to help the House understand the proposed changes, the Department for Business, Innovation and Skills has provided examples of an employee **in** a travel scheme and an employee **not in** a travel scheme (see Appendix 1).

Divided opinions

4. The Government consulted on the proposed changes earlier this year. Opinion on the proposals is significantly divided with the IA saying that consultation responses were split into two groups – those very strongly in favour of action and those very strongly opposed (IA page 4)¹.
5. The IA says that the majority of responses from employment businesses were against any action being taken to prevent NMW workers being able to participate in these schemes. However, the EM says the regulatory bodies (Low Pay Commission, Equalities and Human Rights Commission and the Gangmasters Licensing Authority) are supportive of the changes (IA page 4 and EM paragraph 8.1).
6. The Committee has also received a written submission from *College Public Policy* on behalf of the *Cordant Group* (“*Cordant*”) making a number of points about the draft Regulations (see Appendix 1). These include: that lower paid mobile workers would be much worse off as a result of the changes; the market distortion is caused by unlawful HMRC inconsistency and would be resolved if HMRC adopted an open, consistent and lawful policy; and the Government has failed to undertake an adequate review of the current situation. *Cordant* have also applied for a judicial review against the decision to amend the NMW Regulations. The application has been listed for urgent hearing on 20 and 21 December 2010 (*Cordant* letter, paragraph 1.5).
7. The NMW is underpinned by an employer/employee relationship and it is therefore understandable that any proposals to change the scheme can produce differing views. The Committee notes that earlier changes to the NMW Regulations to provide that service charges etc would not count towards payment of the national minimum wage (when paid to a worker through the employer's payroll) produced a similarly varied reception amongst stakeholders². When debating this draft SI, the House will wish to note the points made by *Cordant*, but should do so in the broader context of the consultation outcome.

¹ A summary of responses can be found on the Treasury website at http://www.hm-treasury.gov.uk/consult_minimumwage_expenses.htm

² National Minimum Wage Regulations 1999 (Amendment) Regulations 2009 (MSIC 21st Report of Session 2008-09: 25 June 2009)

Scrutiny

8. In identifying the key issues affecting the proposed changes, there are a number of considerations which would seem to be important to the House's scrutiny of the draft Regulations. These include:
- The Low Pay Commission looked at salary sacrifice arrangements in 2006 and recommended that they should not count towards NMW pay (Summary of responses paragraph 4.2);
 - The Government accepts that by implementing this proposal, workers participating in these schemes could see a reduction in their take home pay (Summary of responses paragraph 5.12). Cordant draw on this in their submission to the Committee (Cordant letter, paragraph 2.2.1.2. and 2.2.1.3.);
 - The Government estimates that the changes will result in an Exchequer yield of £20 million in 2010-11 and £90 million for 2011 onwards (IA page 7);
 - The Labour Force Survey (LFS) estimates that around 29% of all agency workers at or near the NMW are migrant employees (IA page 9). Cordant has calculated that approximately 80% of NMW workers that are members of its travel scheme are migrant workers (Cordant letter, paragraph 1.5); and
 - Cordant point out that participation in these schemes is optional (Cordant letter, paragraph 2.2.1). However, the Government says that over the last five years HMRC compliance teams have interviewed an estimated 400 to 500 workers, the majority of whom were paid at or near the NMW, and virtually none of these workers understood in any meaningful way the contractual terms of their engagement (Summary of responses: paragraph 4.10).

OTHER INSTRUMENTS OF INTEREST

Tribunal Procedure (Amendment No3) Rules 2010 (SI 2010/2653)***First-Tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655)***

9. These two instruments make a number of minor and consequential changes to the Tribunal System. They also include provisions to implement changes made by the Constitutional Reform and Governance Act 2010 which created the post of the Compliance Officer for the Independent Parliamentary Standards Authority (IPSA). The 2010 Act also gave current or former Members of Parliament a right of appeal to the First-tier Tribunal, where these instruments state that it will be heard by the Tax Chamber, against certain decisions by the Compliance Officer:
- When the Compliance Officer endorses or alters a determination by IPSA to refuse or only pay part of an expenses claim, the MP may appeal against that decision.
 - Under section 9 of the Parliamentary Standards Act 2009, the Compliance Officer may conduct an investigation if there is reason to believe that an MP has been paid an amount under the expenses

scheme that should not have been paid and decide to issue a repayment direction to the MP concerned. The MP may appeal against the Compliance Officer's findings, the decision to issue a repayment direction, the amount to be repaid as specified in the repayment direction and/or any requirement to pay interest on the overpayment or to pay costs.

- An MP may ask the Compliance Officer to extend the repayment period specified in a repayment direction, and may appeal the Compliance Officer's decision.
- The MP may also appeal against the imposition of a penalty notice by the Compliance Officer during an investigation into a suspected overpayment of expenses.

DRAFT NUCLEAR DECOMMISSIONING AND WASTE HANDLING (DESIGNATED TECHNICAL MATTERS) ORDER 2010: REVISED IMPACT ASSESSMENT

10. This draft SI was drawn to the special attention of the House by this Committee on the ground that it gives rise to issues of public policy likely to be of interest to the House (10th Report of this Session, HL Paper 49). It was linked to two other affirmative SIs from the Department of Energy and Climate Change (DECC). DECC have now re-laid the Impact Assessment (IA) for the draft SI, having amended the analysis of the 'do nothing' option. The IA had originally said that costs for this option would fall to Government. The revised IA says that the 'do nothing' option is better described as 'base case' and that under this option the Government would seek to agree with the operator to recover reasonable costs incurred by the Secretary of State, even though they would not be able to compel them to agree such terms. DECC have provided further information explaining this change (see Appendix 2). In drawing this draft SI to the special attention of the House, the Committee suggested that the House may wish to test the figures in the IA against the Government's commitment that there will be no public subsidy for new nuclear power. The Committee wishes to reiterate this point in the light of the revision to the IA.

STATEMENT OF CHANGES IN IMMIGRATION RULES (CM 7944): CORRESPONDENCE

11. On 21 October the Committee wrote to the Minister of Immigration, regarding the omission of an important piece of information from the Explanatory Memorandum of the above instrument. The Committee received a response from the Department on 10 November. Both letters are printed at Appendix 3.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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.

Instruments subject to annulment

- SI 2010/2600 Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010
- SI 2010/2601 Upper Tribunal (Lands Chamber) Fees (Amendment) Order 2010
- SI 2010/2605 Seed Marketing Regulations 2010
- SI 2010/2609 Education (Publication of Proposals) (Sixth Form College Corporations) (England) Regulations 2010
- SI 2010/2615 Housing (Codes of Management Practice) (Student Accommodation) (England) Order 2010
- SI 2010/2616 Houses in Multiple Occupation (Specified Educational Establishments) (England) (No. 2) Regulations 2010
- SI 2010/2649 National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Amendment (No. 2) Regulations 2010
- SI 2010/2653 Tribunal Procedure (Amendment No. 3) Rules 2010
- SI 2010/2655 First-tier Tribunal and Upper Tribunal (Chambers) Order 2010
- SI 2010/2660 Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Provisions) Order 2010

**APPENDIX 1: DRAFT NATIONAL MINIMUM WAGE (AMENDMENT) (NO. 2)
REGULATIONS 2010: EVIDENCE**

Submission from the Department for Business, Innovation and Skills

Example of travel schemes

The way travel schemes work can be seen by comparing two employees working a 35-hour week at £6.50 per hour.

Example 1. Employee not in travel scheme		
Gross pay – 35 hours @ £6.50 per hour		£227.50
Salary sacrifice	£ 0.00	
Taxable pay		£227.50
PAYE		£ 20.40 -
NI		£ 12.92 -
Travel expenses	£ 0.00	
Net pay		£194.18

Example 2. Employee within travel scheme		
Gross pay - 35 hours @ £6.50 per hour		£227.50
Salary sacrifice	£ 95.00 -	
Taxable pay		£132.50
PAYE		£ 1.40 -
NI		£ 2.47 -
Travel expenses	£ 72.00 +	
Net pay		£200.63

The highlighted elements in Example 2 show how the schemes work. Salary is sacrificed to reduce the taxable pay and then a proportion is paid back as travel expenses.

Under National Minimum Wage (NMW) rules, payments of travel expenses relating to travel from home to a temporary workplace count as pay. Therefore if in Example 2 above the taxable pay + the travel expenses are equal to or greater than the NMW, the employer is compliant with NMW rules.

November 2010

Submission from College Public Policy on behalf of the Cordant Group

SUMMARY

The Cordant Group, a large employer of workers on the national minimum wage (“NMW”), believes that the above Statutory Instrument (“SI”) fails to achieve the Government’s stated policy objectives, and indeed runs counter to them. We would be grateful if you could draw this to the attention of the House.

The policy background section of the explanatory memorandum to the SI gives two reasons for the proposed amendment namely: the schemes may adversely affect low paid workers’ access to earnings related social security benefits; and the schemes distort the market as some businesses do not wish, or are not able to operate these schemes thereby suffering a competitive disadvantage. In fact:

The opposite is true. Low paid workers would be disadvantaged by the proposed change. The potential risk to those workers identified in the proposal is not real.

Higher paid workers would maintain the advantages that the lower paid were being denied.

Any market distortion has been caused solely by inconsistent, unhelpful and unlawful advice and action by HMRC.

The Government seems confused about its objectives, and has failed to undertake an adequate review of the current situation, leading to the production of a misleading Explanatory Memorandum and Impact Assessment, supporting a proposal which does not meet the stated policy objectives.

Although the 2010 Regulations have been laid before Parliament under the guise of protecting low paid workers, the reality is that they would achieve the opposite and reduce their take-home pay. The Institute of Chartered Accountants (“ICAEW”) pointed out that *“the proposal if enacted will have a negative financial impact on almost all the workers that the Government is seeking to protect”*³ as it would mean a *“cut in take-home pay, and reductions in working tax (“WTC”) and child tax credits (“CTC”) and other means-tested benefits.”*

If implemented, the 2010 Regulations will – and have been designed to – have the effect of making it impossible for practical purposes for employers to offer Travel Schemes to mobile workers being paid at or close to the NMW. This will exclude low paid workers from participating in legitimate Travel Schemes which a Government consultation in 2008 concluded were legitimate in principle, and which the Government accepts confer a concrete pecuniary benefit on workers, while continuing to make these same schemes and the consequent financial benefits available to higher earners. The Institute of Directors (“IoD”) described the proposal as *“totally misguided”*⁴ as it would *“take tax relief away from the low-paid, and leave it in place for the high-paid”*. The measure is without doubt regressive.

³

http://www.icaew.com/index.cfm/route/172294/icaew_ga/Faculties/Tax/Publications_and_technical_guidance/TA_X_REP_25_10/pdf, para 8

⁴ http://www.iod.com/intershoproot/eCS/Store/en/pdfs/policy_consultation_nmw_expenses.pdf at para 1

The Government's decision to amend the 1999 Regulations with effect from 1 January 2011 is presently the subject of a claim for judicial review⁵ (“**JR**”) and has been listed for an urgent hearing on the 20th and 21st December 2010. The proposed amendment is unlawful according to public law principles as it achieves the opposite of the desired effect of protecting workers paid at or near the NMW; the consultation process and impact assessment are totally inadequate; and the proposed amendment contravenes EU law prohibiting discrimination against migrant workers⁶. The Cordant Group has calculated that approximately 80% of NMW workers that are members of its travel scheme are migrant workers⁷.

THE DETAILED CASE AGAINST THE SI

The Policy Objectives Given Are Inconsistent

Inconsistently with the explanatory memorandum which gives 2 reasons, the policy objectives section of the impact assessment appended to the draft SI gives 4 reasons for the change namely (1) to prevent exploitation, (2) to allow full access to earnings related social security benefits, (3) to create a level playing field for businesses engaging temporary NMW workers, and (4) to protect the exchequer. Two of these four reasons, namely the prevention of exploitation and protection of the exchequer do not appear in the explanatory memorandum itself and thus seem to have been withdrawn.

Furthermore, the Secretary of State in his response⁸ to the Cordant Group pre-action letter gives 3 reasons for the Government's decision in the following order; (1) to preserve the integrity and simplicity of the NMW; (2) to create a level playing field for businesses engaging temporary NMW workers; and (3) the impact on the workers' access to earnings related contributory benefits. The first reason relating to the integrity and simplicity of the NMW appears in neither the explanatory memorandum nor the impact assessment. And again the two additional reasons given in the impact assessment relating to exploitation and protection of the exchequer have disappeared.

Hence the reasons given in the explanatory memorandum are not consistent with either the impact assessment or the position adopted in the JR proceedings.

Misleading Nature of the Two Reasons Given in the Explanatory Memorandum

The Potential Impact on Earnings Related Contributory Benefits: This suggestion is misleading because travel schemes are optional and indeed the advantages to the worker of participating in such a scheme vastly outweigh any potential disadvantages.

The Advantages

The benefits for NMW workers participating in Travel Schemes are significant.

First, there is an immediate increase in take home pay. Examples within the 2010 Consultation document on the proposals in the SI demonstrate that a NMW worker engaged in a Travel Scheme takes home an extra £29.45 per week in Example A (over £1500 p.a.) and an extra £6.45 per week in Example D (over £335 p.a.). These sums are plainly significant to a low paid worker.

Secondly, as a consequence of the reduction in gross earnings, the vast majority of workers also enjoy a significant increase in their entitlement to tax credits (both WTC and CTC), and also potentially Housing Benefit (“**HB**”) and Council Tax Benefit (“**CTB**”). In the

⁵ Explanatory Memorandum to the 2010 Regulations, para.8.2.

⁶ Article 39 of the EC Treaty and Article 7(2) of Regulation 1612/68 (freedom of movement of workers).

⁷ The calculation was based on 2912 NMW employees of PMP, a Cordant Group company, for the week ended 17 October 2010.

⁸ Letter from Duncan Brown of TSOL dated 19 October 2010 to Osborn Abas Hunt paras 15 to 28

examples quoted above, the worker's entitlement to WTC increases by over £1900 per annum in both cases (or by more than ⁹£2000 for the tax year 2011/12). The worker is also potentially entitled to an increase in HB and CTB of over £1100 per annum¹⁰. Thus in total the impact of the proposed change will be to remove over ¹¹£90 per week from the hands of many of the poorest families.

Thirdly, participants benefit from rights conferred because of the worker's status as an employee, which offers protection in respect of employment, health, safety and welfare. These rights accrue because of the requirement that a worker is engaged by the employment business on an employment contract in order to qualify for tax relief on travel expenses. If Travel Schemes were eliminated at the NMW by the proposed SI, employers would inevitably move NMW workers from expensive employment contracts to the cheaper alternative of contracts for service as there would be no incentive to offer a full employment contract in order to qualify for tax relief which would no longer be available.

The Potential Disadvantages

In order to achieve access to certain earnings-related contributory benefits a worker must achieve the Qualifying Earnings Factor ("QEF"), which is equivalent to 52 times the Lower Earnings Limit ("LEL") of £97.00 per week, or taxable/NIable earnings of £5044.00 per annum.

There is no economic incentive for employees to sacrifice their salary to a level anywhere near the LEL. This is because a travel scheme will not deliver tax savings by sacrificing pay to a level below the personal allowance which will be £7450 for the tax year 2011/12. Similarly, no NIC savings for either employee or employer will be delivered from a salary sacrifice below the lower of the primary threshold and secondary threshold for NICs, likely to be of the order of £7000 for the tax year 2011/12. Once this is explained to employers and employees, which is easy to do, this will guarantee a worker weekly taxable/NIable income of in excess of £135.

In addition, holiday pay cannot be sacrificed. In the case of a 40 hour week this equates to £28.63 per week (gross pay of 40 hours at £5.93 per hour or £237.20 multiplied by 12.07%).

Taking the above matters into account, an employee will necessarily earn a minimum income liable to tax and NICs of approximately £163.63 per week¹², which is well in excess of the LEL of £97.00 per week.

If HMRC has experience of Travel Schemes that depress the earnings of NMW workers to or close to the LEL (of which there is no evidence), these can be easily remedied by the provision of advice and/or information to employers. Hence there is a simple solution to the problem of the potential impact on earnings related contributory benefits which does not require any change to the NMW Regulations. This is presumably why the Secretary of State relegated this supposed justification for the amendment to the third of the three justifications identified in his response to the Cordant Group pre action letter¹³.

⁹ The tax credit withdrawal rate increases to 41% hence the increase equals 41% of £95 for 52.14 weeks per annum

¹⁰ HB increases by 18.90% of the salary sacrifice of £95 per week for 52.14 weeks per annum = £936. CTB increases by 4.05% of the salary sacrifice of £95 per week for 52.14 weeks per annum = £200 CTB

¹¹ 95.95% of the salary sacrifice of £95 per week

¹² £135 of basic income and approximately £28.63 of holiday pay totalling £163.63

¹³ Letter from Duncan Brown of TSOL dated 19 October 2010 to Osborn Abas Hunt paras 22 - 28

Competitive Advantage

The argued market distortion or competitive advantage for Employment Businesses using Travel Schemes is the only NMW specific issue. However the explanatory memorandum is wrong when it states that “these schemes distort the market as some businesses do not wish, or are not able, to operate these schemes thereby suffering a competitive disadvantage.”

On the contrary, any distortion is entirely due to the unlawful, inconsistent stance adopted by HMRC. As Lord Scarman¹⁴ said; “...I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims”.

The Association of Labour Providers (“ALP”) explains ‘It has been HM Revenue & Customs, as the authority which both issues dispensations and enforces NMW, that has been the cause of the unequal competitive trading situation that has arisen in recent years’.¹⁵

As the Secretary of State says in his response to the Cordant Pre Action letter, having decided following the 2008 consultation on all Travel Schemes not to change the law, HMRC received complaints from MPs, Employment Businesses and the Recruitment Employment Confederation (“REC”) that employers operating such schemes were able to undercut competitors. This is easily resolved by HMRC acting and advising consistently.

As the ALP and indeed the REC confirm, HMRC has itself unlawfully caused the distortion in the market place by refusing to grant a number of Employment Businesses employing workers on the NMW, dispensations similar to those granted to their competitors. HMRC achieved this in three ways:- (1) by unlawfully denying for over 5 years from ¹⁶July 2005 that travel and subsistence costs counted towards the NMW calculation; (2) by unlawfully insisting on onerous controls and procedures to support a dispensation that were impossible to operate in practice; and (3) by establishing a central team to deal with dispensation applications from the larger employment businesses that was less generous when agreeing scale rate payments for subsistence than those agreed by local inspectors with smaller employment businesses. It was this unlawful inconsistency which prevented a number of large Employment Businesses from competing with competitors who had managed to withstand the aggressive tactics of HMRC and secured dispensations.

This is confirmed by the REC who lobbied on the part of the aggrieved Employment Businesses and explained the problem in their response to the consultation¹⁷. *“The REC raised the lack of clarity about the interaction of salary sacrifices, commonly used when operating a travel and subsistence scheme and the National Minimum Wage (NMW) in our response to the consultation on these schemes in 2008. However no definitive position was given by the Government on the matter until the issuing of the current consultation document. Given that this lack of clarity resulted in severe market distortions, which the REC repeatedly raised in*

¹⁴ In *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, HL at 651

¹⁵ ‘Response by the Association of Labour Providers to HM Government Consultation’, Executive Summary p.2.

¹⁶ In July 2005 HMRC issued a compliance certificate to the Cordant Group confirming that its travel scheme, which counted travel and subsistence costs towards the NMW calculations, was fully compliant with all relevant regulations

¹⁷ <http://www.rec.uk.com/uploads/documents/TravelandsubsistenceschemesresponseMay10.pdf>, para 2.1

*conversations with officials and in letters to Ministers, REC is very disappointed that it has taken this long to provide this clarity. As HMRC is the authority which both grants dispensations and enforces the NMW rules we believe that a public position could have been taken much sooner.” “REC has seen some evidence from members that it is more difficult to get a **new** dispensation scheme in place”, “From discussions with members it is apparent that HMRC has granted very different rates of dispensation for travel and subsistence in the past, which has created competitive distortions.”*

If an open, consistent and lawful policy is adopted by HMRC, which reflects the stance taken in the Consultation document, the only issue relating to travel schemes at the NMW will be resolved without denying vulnerable low paid workers the benefits of a travel scheme that higher paid workers will continue to enjoy.

The Impact Assessment is Inadequate and Misleading

These crucial issues are not apparent from the Explanatory Memorandum and the Impact Assessment because of their inadequacy.

The Impact Assessment is totally inadequate and misleading. This is for numerous reasons. It does not look at benefits and costs for all groups, in particular the workers the government is allegedly trying to protect. It is not transparent since it does not factor in the number of workers that have been denied the benefit of travel expenses because of the approach of HMRC described above. It does not explain the numbers used properly, including that it uses an inappropriate average figure of hours worked per week of 27 which Cordant knows to be wrong for workers on the NMW in travel schemes. It does not include the impact on the many workers on the NMW in the business services sector including security officers, cleaners and catering staff. The Government acknowledge that the proposed change will have an impact on workers earning up to £8.50 per hour but have not amended the impact assessment to reflect this.

The Government have failed to conduct an Impact Assessment on the basis of socio-economic inequalities. Such a course was open to it and this was a context crying out for it. Such an assessment is of obvious importance given the subject area of the proposed Regulations, particularly in the context of the Government’s claimed basis for their introduction, namely to protect low paid workers and the basic standards of public law require such an impact assessment to have been conducted. This is not a novel idea; indeed the Equality Act 2010 means for the future that there is an express public sector duty regarding socio-economic inequalities. Here, the Government’s failure to conduct such an impact assessment in the exercise of an undoubted power to do so is inexplicable, indefensible and unlawful.

The Government admit in paragraph 5.23 of its Summary of Responses Document that other respondents also considered the Impact Assessment to be “flawed or insufficiently detailed” and that the Government had “not properly considered the impact on migrant workers, who make up a large proportion of temporary workers paid at or near NMW” and “that the proposals could be discriminatory because of their impact on migrant workers and the low paid in general”. The revised Impact Assessment annexed to the Summary of Responses Document, and now attached to the draft Regulations, is no better.

The Explanatory Memorandum Is Misleading When Describing The Consultation Outcome

Paragraph 8.1 of the explanatory memorandum is again misleading. It fails to mention that neither of the two key trade bodies involved, namely the ALP and the REC, supported the proposal to change the NMW Regulations to protect the NMW workers. Both organisations made it clear in their responses that the proposals were discriminatory against NMW workers.

The ALP stated in their response¹⁸ “On balance, the advantage for workers who receive the full financial benefit of their participation in a Travel and Subsistence Expenses Scheme appear[s] to outweigh the risk to receiving certain contributions based allowances” and “By impacting on lower paid workers, the solution would appear to disproportionately affect female and migrant workers.”. The REC state in their response¹⁹ “It will also cement an inequality in access to travel schemes, with only those earning above a certain wage being able to salary sacrifice and off set that sacrifice with tax free expenses”.

It also fails to mention that the 3 independent associations that responded were all against the proposals. As mentioned above the IoD described the proposal as “*totally misguided*”²⁰ as it would “*take tax relief away from the low-paid, and leave it in place for the high-paid*”. The ICAEW pointed out that “*the proposal if enacted will have a negative financial impact on almost all the workers that the Government is seeking to protect*”²¹ as it would mean a “*cut in take-home pay, and reductions in working tax and child tax credits and other means-tested benefits.*”

The Low Incomes Tax Reform Group (“**LITRG**”), which is a Charity, is an initiative of the Chartered Institute of Taxation (“**CIOT**”) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

LITRG is strongly against the proposed changes and states in its response²² “And, because of the anticipated response of employers to a change in NMW law, we fear that the forecast increase in revenue is likely to be borne to a significant degree by the low-income workers themselves.” and ²³“It is arguable that for those people on the lowest incomes that travel costs should be deductible from income for tax, National Insurance contributions (NIC), tax credits and other means-tested benefits. Workers would not then be so badly disadvantaged whenever they are offered short-term work far from where they live, as often they have little choice but to accept.” and “²⁴We cannot endorse the introduction of the proposed measure in a few months time without a proper evaluation of employer reaction. We would be concerned if that reaction were to trigger higher costs for employees so tipping the economic balance for them between work or reverting to benefits. “

The Consultation Process Was Inadequate

Unfortunately, for some reason the Government appear to be in a rush to implement the proposed changes without proper consultation. As early as 28 January 2010 the Cordant Group represented by Deloitte asked the consultation committee²⁵ to conduct a series of workshops to understand the true implications of the proposals as indeed BIS had conducted in the case of its NMW consultation on tips, but they refused. It is interesting

¹⁸ ‘Response by the Association of Labour Providers to HM Government Consultation’, Executive Summary at P2

¹⁹ <http://www.rec.uk.com/uploads/documents/TravelandsubsistenceschemesresponseMay10.pdf>, para 3.2

²⁰ http://www.iod.com/intershoproot/eCS/Store/en/pdfs/policy_consultation_nmw_expenses.pdf para 1

²¹

http://www.icaew.com/index.cfm/route/172294/icaew_ga/Faculties/Tax/Publications_and_technical_guidance/TA_X_REP_25_10/pdf para 8

²² <http://www.litrg.org.uk/submissions/2010/travel-expenses-nmw>, para 1.4

²³ <http://www.litrg.org.uk/submissions/2010/travel-expenses-nmw>, para 1.6

²⁴ <http://www.litrg.org.uk/submissions/2010/travel-expenses-nmw>, para 1.7

²⁵ Email from Brian White of Deloitte to Leslie Saddler of HMT on 28 January 2010 sent on behalf of the Cordant Group

to note that in October 2004²⁶ the Government asked the Low Pay Commission to respond within 3 months on the issue of the NMW and salary sacrifice schemes. The LPC refused and insisted on 15 months to conduct proper research. The Government agreed and the LPC reported back in March 2006, 18 months after the original request from the Government. The issues involved are complex and require careful analysis. As LITRG say in their response “*We therefore recommend that a working party of government, employer and employee representatives is urgently established to review the issues we have raised* “. Similarly, the ALP recommend²⁷ that the Government should “*conduct a more detailed Impact Assessment on the workers affected, review the legal basis for its interpretation of allocation of financial benefits; review its proposal and issue a further more factually based Consultation.*”

CONCLUSION

It is clear to us from the above that:

The stated policy objectives of the SI are not met by it.

In particular, lower paid mobile workers would be much worse off as a result of the changes proposed by the SI. The potential risk to those workers identified in the proposal is not real.

Higher paid workers would continue to enjoy the benefits of a Travel Scheme.

The market distortion is caused by unlawful HMRC inconsistency and would be resolved if HMRC adopted an open, consistent and lawful policy.

The Government seems confused about its objectives, and has failed to undertake an adequate review of the current situation, leading to the production of a misleading Explanatory Memorandum and Impact Assessment, supporting a proposal which does not meet the stated policy objectives.

We therefore believe that the SI should not be made and invite the Merits Committee to draw these failings to the attention of the House.

²⁶ http://www.lowpay.gov.uk/lowpay/report/pdf/2006_Min_Wage.pdf, para 4.2

²⁷ ‘Response by the Association of Labour Providers to HM Government Consultation’, Executive Summary P3

APPENDIX 2: DRAFT NUCLEAR DECOMMISSIONING AND WASTE HANDLING (DESIGNATED TECHNICAL MATTERS) ORDER 2010: FURTHER INFORMATION

Further information from the Department for Energy and Climate Change

In the Impact Assessment, it was stated at various points that “under the ‘do nothing’ option” the costs of verifying the information provided by operators in the Funded Decommissioning Programme (FDP) “would fall on Government”. This is not correct since it is the Government’s policy that there shall be no subsidy to new nuclear power and hence operators should pay all costs.

The correct base case (which is a more accurate description than ‘do nothing’) is one where we would seek to agree with the operator to recover reasonable costs incurred by the Secretary of State when verifying the information contained in their FDP. Although we would not be able to compel the operator to agree to such terms it would be likely to be in their interests and so we view it as quite likely that the costs of verification would not fall to the Government.

The costs and benefits calculated in the Impact Assessment are based on an assumption that Government would seek to recover, by agreement, reasonably incurred costs and as such the calculations do not need amending.

November 2010

APPENDIX 3: STATEMENT OF CHANGES IN IMMIGRATION RULES (CM 7944): CORRESPONDENCE

Letter from Lord Goodlad to Damian Green MP, Minister of State for Immigration, Home Office

The Committee considered the Statement earlier this week and identified it as an instrument of interest in our weekly report. The Committee agreed that I should write to you concerning the content of the Explanatory Memorandum (EM).

We are aware that one of the changes in the Statement is the result of the Supreme Court judgement of ZN (Afghanistan). However, the EM made no mention of the judgement despite its being an important piece of information which could have helped the House in its scrutiny of the Statement.

I would be very grateful if you could provide an explanation for the omission and remind your officials of the importance of EMs in providing the House with a full explanation of the policy development processes for instruments subject to parliamentary procedure.

21 October 2010

Letter from Damian Green MP to Lord Goodlad

Thank you for your letter of 21 October about the Explanatory Memorandum (EM) for this Statement of Changes.

You are correct to say that the changes set out in paragraphs 22-32 of the Statement of Changes were made in response to the Supreme Court judgment of ZN (Afghanistan).

I am sorry that the EM did not make this clear. The Memorandum does state that the Immigration Rules as they were drafted before the change was made did not deliver the Government's policy in the area concerned, but I accept that it would have been more helpful to the Committee if the EM had been explicit about the link to the judgment.

I agree that it is important that EMs provide Parliament with a full explanation of the relevant policy development process. We will therefore amend the guidance to officials responsible for statutory instruments and changes to the Immigration Rules to make it clear that the EM needs to refer explicitly to any legal judgment that has led to a decision to make the change.

10 November 2010

APPENDIX 4: INTERESTS AND ATTENDANCE

Committee 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.

For the meeting on 16 November 2010 Members declared no interests on any of the instruments of interest.

Attendance:

The meeting was attended by B. Butler-Sloss, L. Eames, L. Goodlad, B. Hamwee, L. Hart of Chilton, B. Morris of Yardley, L. Plant of Highfield and L. Scott of Foscote.