



## TUPE and Pensions

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Author: Djuna Thurley  
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The *Acquired Rights Directive* was adopted in 1977 and implemented in UK law by the *Transfer of Undertakings (Protection of Employment) Regulations 1981*, SI 1981/1794. These regulations were later revoked and replaced by the *Transfer of Undertakings (Protection of Employment) Regulations 2006 SI No.246* (TUPE). The purpose of the Directive was to “safeguard employees’ rights in the event of transfers of undertakings, businesses or parts of businesses”. The directive was amended in 1998 to give Member States the option of extending the protection to include occupational pensions. The Labour Government’s June 2003 Pensions White Paper proposed that transferee companies should be obliged to match employee contributions to a stakeholder pension scheme up to a level of 6% or offer an equivalent alternative. The [Pensions Act 2004](#) and the [Transfer of Employment \(Pension Protection\) Regulations 2005, SI 2005/649](#) contained the necessary legislation, with the provisions coming into effect in April 2005.

A greater degree of protection is afforded to staff compulsorily transferred from the public sector. Under “Fair Deal”, a non-statutory policy introduced in 1999, the new employer is required to ensure that there is “broadly comparable” pension provision for future service and that there are options for the handling of existing accrued benefits. In the case of transfers from local authorities, the requirements were given a legislative underpin.

As part of its reform of public service pensions, the Government said it would retain fair deal. However, instead of requiring new employers to provide “broadly comparable” pension arrangements, it would allow compulsorily transferred staff to retain membership of the public service pension scheme. This proposal was welcomed by trade unions. In November 2012, the Government launched a [consultation](#) on how the reformed Fair Deal policy should apply to staff that have been compulsorily transferred out of the public sector under the old Fair Deal. In its [response to consultation](#) in October 2013, the Government said that when existing contracts are retendered, there will be a presumption that staff covered by the fair deal policy should be offered access to a public service scheme.

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## Contents

<b>1</b>	<b>TUPE and the Acquired Rights Directive</b>	<b>2</b>
<b>2</b>	<b>The Labour Government's proposals</b>	<b>3</b>
2.1	DTI consultation document, September 2001	3
2.2	Pensions Green Paper, December 2002	6
2.3	Pensions White Paper, June 2003	8
	Comment	8
2.4	<i>Pensions Bill 2003-04</i>	10
2.5	<i>Pensions Act 2004</i>	11
<b>3</b>	<b>Early retirement and redundancy</b>	<b>12</b>
<b>4</b>	<b>Staff transfers in the public sector</b>	<b>12</b>
4.1	The Fair Deal Policy	12
4.2	Local authorities	17
	Admitted Body Status	19
4.3	Approach of the current Government	21
	Independent Public Service Pensions Commission	21
	HM Treasury consultation on Fair Deal	25
	Agreement to retain Fair Deal	27
	Consultation on employees already transferred-out	28
4.4	Application to individual schemes	30
	Civil service pension scheme	30
	NHS	30
	Teachers	34
	Local Government	35

## 1 TUPE and the Acquired Rights Directive

In its original form, the *EC Acquired Rights Directive 77/187/EC* permitted “old-age, invalidity and survivors’ benefits” to be excluded from the terms and conditions of employment which were protected on a change of employer. This had long been a source of concern to workers in good occupational pension schemes, for example those ex-public sector workers whose work has been contracted out to the private sector.

Regulation 7 of *Transfer of Undertakings (Protection of Employment) Regulations 1981* (TUPE) (SI 1981/1794), which implemented the *Acquired Rights Directive* provided that:

(1) Regulations 5 and 6 above shall not apply –

to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the *Social Security Pensions Act 1975* or the *Social Security Pensions (Northern Ireland) Order 1975*; or

to any rights, powers, duties or liabilities under or in connection with any such contract subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.<sup>1</sup>

Regulations 5 and 6 were the regulations preserving terms and conditions of employment (both individually and collectively agreed) on the transfer of a business.

Regulation 7 of TUPE was based on Article 3, paragraph 3, of the 1977 EC Directive, which said:

Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

A range of changes were made to the 1977 EC Directive in 1998.<sup>2</sup> One of these changes was to give Member States the option of including occupational pensions in the terms and conditions protected on a transfer. The new Article 3, para 4 (a) says:

Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Paragraphs 1 and 3 are the paragraphs preserving terms and conditions, both individually and collectively agreed, on the transfer of an undertaking. The original directive did not give Member States this option.

There is guidance on pension rights following a TUPE transfer in BIS, [Employment Rights on the Transfer of an Undertaking](#), January 2014, p17

## **2 The Labour Government's proposals**

### **2.1 DTI consultation document, September 2001**

The Department for Trade and Industry (DTI) published a consultation document on its proposals for implementing the amendments to the EC Directive and reforming TUPE in September 2001.<sup>3</sup> Accompanying this was a detailed background paper which considered the options on occupational pensions in some depth.<sup>4</sup> Section C of this background paper dealt with Occupational Pensions. The paper summarised the existing position:

36. Rights, powers, duties and liabilities in respect of continuing membership of occupational pension schemes were excluded from the coverage of the original

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<sup>1</sup> The 1981 regulations have now been replaced by the *Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 246*

<sup>2</sup> 98/50/EC

<sup>3</sup> Employment Relations Directorate, DTI, *Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). Government Proposals for Reform. Public Consultation Document*, September 2001

<sup>4</sup> Ibid

Acquired Rights Directive and do not transfer under TUPE. Accrued rights in an occupational pension scheme are however covered by the Directive and are protected in the UK under pensions regulations. Where TUPE applies, therefore, the only rights excluded from the otherwise automatic transfer of employees' terms and conditions are rights to continuing active membership of an occupational pension scheme, where such a right existed prior to the transfer.

It went on to describe the Government's policy for requiring "broadly comparable" pension provision when public sector employees are transferred to the private sector and referred to areas of legal uncertainty. It then proposed that the opportunity presented by the amended EC directive should be taken to clear up the legal uncertainty:

38. The Government considers that the uncertain legal position is unsatisfactory, and that in implementing the revised Directive – which, at Article 3.4, gives Member states a clear option in this regard – legal certainty should be achieved. There are a number of possible ways in which this could be done. One would be simply to provide that ongoing occupational pension rights are not transferred to the transferee, extinguishing any arguments along the lines discussed above. The Government is not attracted to this, however. Other possible approaches would be:

a) amending the TUPE Regulations so as to provide that ongoing occupational pension rights are not transferred to the transferee, but preserving the current public sector policy by way of separate legislative or administrative measures introduced by individual government departments specifically for the parts of the public sector for which they are responsible; or

b) amending the TUPE Regulations to provide a degree of protection for occupational pension rights on transfer, for public and private sector employees alike.

The Government would welcome views on this issue.

The paper argued that to require private sector employers to preserve pension terms in exactly the same way as they preserve pay and conditions on a transfer - or even to require "broad comparability" on the public sector model - would be too onerous and would deter them from operating occupational schemes altogether:

given the wide diversity in the nature of contribution levels and detailed benefit structures of occupational pension schemes – the majority of which are tailored to suit the priorities, needs and circumstances of particular businesses and have evolved over time – it would be impracticable for transferee employers to replicate exactly the pension schemes of transferor employers.

41. A requirement on the transferee to provide a pension scheme "broadly comparable" to that provided by the transferor would afford greater flexibility, but in practice could still mean that the transferee had to create a new pension scheme for transferred employees. The test of "broad comparability" applied by GAD in transfers out of central Government requires that the new employer's scheme should be not materially detrimental overall to any identifiable member of staff in terms of their accrual of future pension benefits. Consequently quite small differences in the structure of benefits, which commonly occur between different employers' schemes, can be enough to prevent two schemes being certified as "broadly comparable". A TUPE regime that effectively required employers involved in transfers to establish and maintain multiple occupational pension schemes for a single workforce, including separate schemes for quite small numbers of employees, would not, in the Government's view, be satisfactory.

The Government therefore proposed a less stringent test than that of “broad comparability” and identified four possible approaches:

*Option 1*

If the transferor offered either a contracted-out salary related scheme (COSR) or a contracted-out money purchase scheme (COMP), then the transferee would be required to offer a scheme of the same type. If the transferor offered a contracted-in scheme, the transferee would be required to offer some form of occupational pension scheme that was Revenue-approved.

*Option 1a*

A variation of option 1 which would require that the benefits offered in the transferee’s scheme should be no more than – say – 10% lower than those under the transferor’s scheme.

*Option 2*

If the transferor offered a contracted out scheme, the transferee would have to offer a contracted out scheme too, but it could be either a COSR or a COMP. The actuary might have to certify that the scheme would provide broadly equivalent benefits if it were of the opposite type.

*Option 2a*

A version of option 2 with a “safety net” as in option 1a.

*Option 3*

The transferee would be able to choose whether to offer a salary-related or a money purchase scheme, irrespective of the nature or level of benefits afforded by the transferor, provided the scheme met a prescribed benchmark. For salary-related schemes this might be the reference scheme test (RST). For money purchase schemes, this might be a minimum contribution level.

*Option 4*

There would be a requirement for the benefits under the transferee’s scheme to be of a similar value to those under the transferor’s scheme.

The section on Occupational Pensions concluded by asking for comments on these options and any further suggestions respondents may have. It also indicated that any changes to the pension provisions of TUPE would need a long lead in time:

58. The Government would welcome comments on:

- the relative merits of the various options discussed above; and (given that these are not exhaustive)
- any alternative approaches that might be taken, e.g. allowing for the transferee in some circumstances to make alternative arrangements – such as contributing to group personal pensions or stakeholder pensions – rather than provide an occupational pension scheme.

59. If provisions relating to the transfer of occupational pension rights were to be introduced, the Government would envisage bringing these into effect at a later date than the other reforms proposed in its consultation document (while still including them

within the same set of Regulations) as it considers that employers and others concerned would in this instance need a longer “period of grace” to prepare themselves to meet the new requirements.

The closing date for responses was 15 December 2001.

## 2.2 Pensions Green Paper, December 2002

The responses to the September 2001 consultation document revealed no consensus on a way forward. In the *Pensions Green Paper*, published in December 2002, the Government sought views on two further options:

### *Transfer of Undertakings (Protection of Employment)*

93. The *Transfer of Undertakings (Protection of Employment) Regulations*<sup>5</sup> (TUPE) are designed to safeguard employees’ rights when businesses transfer between employers but they exclude rights in respect of continuing active membership of an occupational pension scheme.<sup>6</sup> Therefore, simply as a result of transfer, an employee’s future pension rights can be significantly reduced; in particular, any employer contribution can be entirely withdrawn.

94. In September 2001 in the TUPE consultation paper Government Proposals for Reform we sought views on the provision of explicit legal protection for employees’ occupational pension rights on transfer, including within the private sector. We remain committed to the long-standing policy of protection on a ‘broadly comparable’ basis for public sector transfers both on initial transfer of a service to the private sector and on any subsequent transfers within the private sector.

95. In this Green Paper the Government is not proposing to set a general minimum level of employer contributions to pensions. Under TUPE, the pay of transferred employees cannot be lawfully changed by reason of a transfer. TUPE does not at present cover pensions. However, as a matter of policy the Government extends similar protection to pensions in the case of public to private transfers. Many private sector employers also provide a degree of continuity in occupational pension entitlement across a TUPE transfer.

96. The Government set out a range of options on extending TUPE protection on purely private sector transfers in a public consultation document<sup>7</sup> published by the Department of Trade and Industry in September 2001. It is clear from the responses to this consultation that there are a wide range of views. Were the Government to extend a degree of protection for occupational pension rights to purely private sector transfers, such protection would need to be simple, flexible and worthwhile. Two possible options for extended protection that might fulfil these criteria are set out below. Both would ensure that where the previous employer made a pension contribution, so too would the new employer. It is assumed that following a transfer, the employer would be at liberty to modify the provision should this become necessary for reasons unrelated to the transfer itself.

### **Figure 4.4: TUPE occupational pensions proposals: private-to-private business Transfers**

Type of pension
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<sup>5</sup> Transfer of Undertakings (Protection of Employment) Regulations 1981.

<sup>6</sup> Accrued rights, on the other hand, are clearly protected under pensions legislation, and this will remain the case.

<sup>7</sup> *Transfer of Undertakings (Protection of Employment) Regulations 1981 – Government Proposals for Reform – Consultation Document* (URN 01/1133).

<b>OLD EMPLOYER PROVIDES</b>	<b>NEW EMPLOYER PROVIDES MINIMUM</b>
DB (1)	Alternative DB; or  DC with a comparable (3) contribution to the old employer
DC (2)	DB (4); or  DC with a comparable (3) contribution to the old employer
<p><b>Notes:</b></p> <p>1 DB=defined benefit  2 DC=defined contribution  3 Adjusted if necessary for the loss of National Insurance rebate if contracted-in and where comparability is determined over the lifetime of the fund.  4 Under contracted-in schemes, members would also qualify for State Second Pension</p>	

**Figure 4.5: TUPE stakeholder/GPP1 proposals: private-to-private business transfers**

<b>Type of pension</b>	
<b>OLD EMPLOYER PROVIDES</b>	<b>NEW EMPLOYER PROVIDES MINIMUM</b>
DB or occupational DC	GPP with a contribution of at least X per cent; or Stakeholder with a contribution of X per cent
GPP or stakeholder with employer's contribution	GPP with a contribution of at least X per cent; or Stakeholder with a contribution of at least X per cent
<u>Note:</u> GPP=Group Personal Pension	

**97. We would welcome comments on this general issue and on these suggested proposals. In the context of Figure 4.5 we would welcome suggestions on the employers' contribution rates (including levels and age-related contributions) when the new employer provides a stakeholder or Group Personal Pension scheme.**

98. When considering suggestions, we will also take particular account of the following:

- support for business flexibility; and

- genuine and worthwhile protection for employees against the insecurity this creates on the transfer of an undertaking.<sup>8</sup>

The closing date for responses to the Green Paper was 28 March 2003.

### 2.3 Pensions White Paper, June 2003

The Pensions White Paper, *Action on occupational pensions*, published on 11 June 2003, announced that the Government had finally decided to require transferee companies to match employee contributions to a stakeholder pension up to a level of 6%:

#### **Extending Transfer of Undertakings (Protection of Employment) regulations to private sector transfers**

30. Over the last 18 months, the Government has been consulting on extending the Transfer of Undertakings (Protection of Employment) regulations (TUPE) to pensions. The Government's aim is to ensure that workers who already enjoy pensions contributions will not have them withdrawn by reason of a transfer, or because a company is taken over. In achieving this we want to make sure that we do not place an excessive burden on the new employer.

31. The Government proposes a flexible and worthwhile provision for a contribution to a stakeholder pension. We envisage that this will consist of an obligation to match employee contributions up to a level of 6 per cent. Moving forward with TUPE in this way will bolster confidence in pensions.

32. The responses to the Green Paper consultation suggest that this proposal will be welcomed both for the protection it will offer employees and because the majority of businesses which already offer workers pensions on transfer would gain from a level playing field.<sup>9</sup>

Andrew Smith, the then Secretary of State for Work and Pensions, made it clear in his statement on the White Paper that the requirement applied only in cases "where pension rights have been established" and that an "equivalent alternative" to the 6% stakeholder contribution would be acceptable:

In February, we tackled the challenge of two-tier work forces to extend protection of pension rights to new starts working in many previously public enterprises. However, it must be wrong that solely because of a takeover workers in any private company have their rights scrapped. That is why I can announce that we are extending the protection of pensions provided by TUPE—the Transfer of Undertakings (Protection of Employment) Regulations 1981—to private sector transfers. We will insist that where pension rights have been established, the new employer will need to match employee contributions up to 6 per cent to a stakeholder pension or offer an equivalent alternative. That is a fair adjustment. It builds confidence in pensions and reflects company best practice.<sup>10</sup>

#### **Comment**

As the consultation on extending TUPE to pensions progressed, so the degree of protection on offer from the Government reduced. One of the four options under the 2001 consultation document was that "if the transferor offered either a contracted-out salary related scheme (COSR) or a contracted-out money purchase scheme (COMP), then the transferee would be

<sup>8</sup> DWP, *Simplicity, security and choice: Working and saving for retirement*, December 2002, Cm 5677, paras 4.93-4.98

<sup>9</sup> Department for Work and Pensions, *Simplicity, security and choice: working and saving for retirement: action on occupational pensions*, June 2003, Cm 5835

<sup>10</sup> HC Deb 11 June 2003, c 681



required to offer a scheme of the same type". The stakeholder option was not even suggested as one of the four main options. One of the two options under the 2002 Green Paper was that, where the old employer offered a defined benefit (DB) or a defined contribution (DC) scheme, the new employer would have to offer either a DB scheme or a DC scheme with a comparable contribution to the old employer (option 1). The second option was for the new employer to provide either a group personal pension or a stakeholder pension with a minimum contribution.

In the event, the Government supported the simplest option which imposes the lowest costs on transferee employers. Many consumer representatives argued strongly for a more generous approach during the consultation. For example, in their response to the Green Paper, The Pensions Advisory Service said:

12.1 We would strongly support the proposal to include pension rights within the scope of TUPE. Pensions provision is an important element of the remuneration package and must be preserved on transfer.

12.2 We would want to see a basis used after the transfer that as closely as possible reflects the benefits being accrued prior to the transfer. To that end we prefer basis 1.

12.3 However, the transfer should not be used as an excuse to move from DB to DC. To discourage employers who might wish to do so, we would suggest that a transfer from DB to DC should carry a premium to compensate for the movement of risk from the employer to the employee, say 20%.

12.4 We do accept that the number of employees involved may be small and therefore it would not be practical or prudent in every situation to replace a DB scheme with a DC scheme. However, in such cases the premium should also apply.

12.5 We would also point out that a comparable contribution must reflect age. DB pension costs for older employees are more expensive than for younger employees. If such a switch were allowed on the basis of a uniform contribution rate, younger employees would be greatly advantaged whereas older employees would lose out substantially.

12.6 Another important factor is contingent benefits. We have recently seen the European Court, in the Beckmann case, confirm that enhanced pension benefits on redundancy were already covered by TUPE.

12.7 Any extension of TUPE should cover other contingent benefits such as ill health retirement, enhanced or non-discounted early retirement and death benefits.<sup>11</sup>

Similarly the TUC argued:

1.133 The TUC welcomed the government's success at securing an amendment to the Acquired Rights Directive to protect occupational pensions we are pleased that the government plan to include TUPE. However, we believe that the options in the Green Paper on private-to-private sector transfers fall short of full protection for employees'.

1.134 The Green Paper proposals on TUPE are vague, and we would welcome clarification on many points. On that basis our initial views on the proposals are that option two is unacceptable, and no employee should be transferred to a GPP or stakeholder pension if they had been members of a final salary scheme. Option one, would be our preferred option though again the information provided is insufficient to

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<sup>11</sup> OPAS press release, "Greater security for pension scheme members fundamental, says OPAS report", 1 April 2003,

make an informed decision on its adequacy to protect members in the case of a TUPE transfer.

1.135 We propose that the new employer provides a pension scheme of equal quality to the member's old employer. A business transfer must not be an excuse to reduce employee's pension rights.<sup>12</sup>

## **2.4 Pensions Bill 2003-04**

The Pensions White Paper proposals for transferees to offer a minimum 6% pension contribution, or equivalent, to employees transferring from an employer with an existing occupational scheme were incorporated in the *Pensions Bill 2003/04* and passed through Parliament with only a small clarifying Government amendment.<sup>13</sup> The provisions were debated on the following dates:

18 March 2004      Standing Committee B, cc 292-299

18 May 2004      Commons report stage, HC Deb 18 May 2004, cc 947-951

14 September 2004      Lords Grand Committee, HL Deb cc381-390

4 November 2004      Lords report stage, HL Deb cc 522-526

Labour backbenchers and peers sought to improve the protection by requiring transferee employers to provide "broadly comparable" pensions (following the public sector model),<sup>14</sup> while Conservative peers sought to reduce the maximum required employer contribution to 3%.<sup>15</sup> Baroness Hollis, the then Parliamentary Under Secretary of State for Work and Pensions, argued that research had shown that a 6% employer contribution was the norm for defined contribution schemes and that, taken with the state pension, it should produce a replacement ratio of nearly 70% in retirement:

We are saying that, during an employee's period of employment with the transferee employer, he will be able to have a pension scheme whose baseline involves a 6 per cent contribution from the employer if he makes a matching 6 per cent contribution. A worker who contributes that 6 per cent matched by the employer could have a replacement rate of between 40 and 60 per cent of his final salary on retirement from his private pension. If, on top of that, assuming a 4 per cent rate of return, we include the state retirement pension and, if he was not contracted out, the state second pension or, if he was contracted out, to the effect of that, the replacement ratio should then be nearer 70 per cent.

So the 6 per cent plus 6 per cent plus either S2P plus state pension or the NI rebates should produce a retirement income of 70 per cent. I think that that is perfectly adequate, I must say, and far exceeds what many people will currently be retiring from in their working life. We have worked this through. Someone will be more at risk where he is not under a TUPE but is changing jobs, possibly in DB schemes and not building up vested rights. That person may very well end up with a pension far short of that, but what TUPE should do, given the hedges that I have put around it in terms of other forms of financial support, such as the state second pension or state pension, will, at those rates of contribution, on quite moderate assumptions, produce a replacement

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<sup>12</sup> <http://www.tuc.org.uk/pensions/tuc-6478-f0.cfm>

<sup>13</sup> *Pensions Bill 2003-04*, Bill 57, clauses 203-204. The provisions were debated

<sup>14</sup> see, eg, SC Deb (B), 18 March 2004, cc 292-299

<sup>15</sup> HL Deb, 14 September 2004, c387

retirement income of about 70 per cent of earnings, which may be larger than people might have expected.<sup>16</sup>

She argued that setting the minimum employer contribution at 3% would only give a replacement rate of about 40%:

The noble Lord asked what I like to think was a rhetorical question—did the Government believe that they had got the balance right? Of course they do. We have certainly got it clear today: on the one hand my noble friend Lady Dean is asking us to ensure that the pension in a scheme of a transferee employer should be at least as good as the scheme from which the employee is transferring. We believe in some cases that that may be too high and onerous a responsibility.

Then, in moving his amendment, the noble Lord argued for 3 per cent. I suspect that the 3 per cent figure arose because of some sort of mental alignment with the information and advice rules. Certainly 3 per cent, even matched, would not float most recipients into an adequate standard of living—and certainly not a replacement income based on a private pension of more than about 30 to 40 per cent. That is unacceptable.

(...)

We believe that we have the balance right; we are reflecting not best practice but average practice in the industry, which allows us at the same time to protect the position of employees.<sup>17</sup>

## **2.5 Pensions Act 2004**

Sections 257 and 258 of the *Pensions Act 2004* and the *Transfer of Employment (Pension Protection) Regulations 2005, SI 2005/649*, provide the minimum level of protection for the occupational pensions of employees transferred from one employer to another under the *Transfer of Undertakings (Protection of Employment) Regulations (TUPE)*. The provisions apply to transfers occurring on or after 6 April 2005. The legislation covers:

- active members of the transferor's occupational pension scheme;
- people who are eligible to be members of the transferor's occupational pension scheme; or
- people who are in a waiting period before becoming eligible to be a member of the transferor employer's occupational pension scheme.

Transferee employers must offer transferred employees membership of:

- a defined benefit scheme which
  - meets the Reference Scheme Test (laid down for contracting out purposes)
  - provides benefits equal to or greater than 6% of a member's pensionable pay for each year of service, in addition to employee contributions. Employees are not required to contribute at a rate of more than 6%
  - provides for the employer to match employees contributions up to 6% of pensionable pay; or
- a defined contribution scheme which

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<sup>16</sup> HL Deb 14 September 2004, c 384

<sup>17</sup> HL Deb 14 September 2004, cc 388-389

- provides for the employer to match employee contributions up to 6% of pensionable pay; *or*
- a stakeholder pension scheme which
  - provides for the employer to match employee contributions up to 6% of pensionable pay as a condition of their contract of employment.<sup>18</sup>

The Act allows for variation of the contractual arrangements, but only by agreement between the transferee employer and the employee.<sup>19</sup>

The *Pensions Act 2004* and the regulations (SI 2005/649) apply to Great Britain. However, the same provisions have been applied to Northern Ireland by the *Pensions (Northern Ireland) Order 2005*, SI 2005/255 (N.I.1) (articles 234 and 235) and the *Transfer of Employment (Pension Protection) Regulations (Northern Ireland) 2005*, Statutory Rule 2005 No. 94

### 3 Early retirement and redundancy

As outlined in section 1 above, the *EC Acquired Rights Directive 77/187/EC* permitted “old-age, invalidity and survivors’ benefits” to be excluded from the terms and conditions of employment which are protected on a change of employer. However, two decisions of the European Court of Justice have drawn a distinction between “old age” benefits (which were excluded from the provisions of the 1981 regulations) and certain benefits paid by pension schemes, for example, on redundancy.<sup>20</sup> For example, *Tolley’s Pensions Law* says:

In the case of *Beckmann v Dynamcoe Whicheloe Macfarlane* [2002] IRLR 578 OPLR 267 a reference was made to the European Court of Justice (‘ECJ’), and the court stated that ‘early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age...are not ‘old age...benefits’ within the meaning of the pensions exemption’. Mrs Beckmann had been an employee of the NHS with a contractual entitlement to redundancy rights under the NHS pension scheme. She was transferred to a private company in 1995 and was made redundant by that company in 1997. She won her case for the right to a redundancy payment. Following *Martin v South Bank University* [2004] IRLR 74, [2003] OPLR 317, which was also referred to the ECJ, it is arguable that not only do redundancy benefits transfer under TUPE but other benefits payable before normal retirement date may also transfer.<sup>21</sup>

## 4 Staff transfers in the public sector

### 4.1 The Fair Deal Policy

More generous arrangements apply to staff compulsorily transferred from the public sector, under “Fair Deal”, a non-statutory policy, introduced in 1999. The policy was announced by Alan Milburn, the then Chief Secretary to the Treasury, on 14 June 1999:

#### Pension Transfers

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<sup>18</sup> DWP website, [http://www.dwp.gov.uk/lifeevent/penret/penreform/8\\_trans.asp#top](http://www.dwp.gov.uk/lifeevent/penret/penreform/8_trans.asp#top) (retrieved 22 May 2008)

<sup>19</sup> Section 258 (6), Pensions Act 2004, and Explanatory Notes, Pensions Act 2004, para 946

<sup>20</sup> IDS Pension Service, *Pensions, trustees and administration*, para 12.16

<sup>21</sup> Para H3.52; See also, IDS Pension Service, *Pension trustees and administration*, 2009, para 12.17-19

**Ms Lawrence:** To ask the Chancellor of the Exchequer what plans he has concerning the treatment of the pensions of public servants transferring to private sector employers. [87160]

**Mr. Milburn:** The key principles are that staff transferring to private sector employers under PFI and other PPP deals should continue to have access after the transfer to a good quality occupational pension scheme, under which they can continue to earn pension benefits through future service on a basis which overall is materially at least as good as they had in the public sector; and that they should have the option of transferring their accrued pension benefits to the new employer's pension scheme on terms which give them a full credit for their past service.

I am issuing new guidance to Departments and Agencies today which reinforces these principles and ensures that they will be applied consistently and openly to all transfers of Government staff.

The new guidance will be adopted immediately by Government Departments and Agencies. I hope that other employers in the public sector will also apply its principles to contracting arrangements where staff transfer to the private sector, and the Government will encourage and facilitate that outcome. This does not affect arrangements being made in respect of PFI and other PPPs which are already underway.

Copies of the new guidance, and the associated Statement of Practice by the Government Actuary, have been placed in the Library of the House.<sup>22</sup>

The detailed guidance is reproduced as an Annex to a Cabinet Office [Statement of Practice on Staff Transfers in the Public Sector](#), which was introduced in 1999. A short extract from Annex A, *A Fair Deal for Staff Pensions*, gives some background:

### **Background**

4. Pensions are often an important element in the overall remuneration of staff, particularly within the public services where there are occupational pension schemes offering a high quality of benefits. Sometimes public service schemes require very low employee contributions to earn pension benefits, such as in the Principal Civil Service Pension Scheme (PCSPS) where employee contributions are set at only 1½ % of pay, and in these cases employee pay is somewhat lower than it would otherwise be, to reflect the value of the pension scheme.

5. If appropriate arrangements were not made for staff pensions as part of business transfers, the result could be disadvantageous to public service staff who were transferring to the new employer. Not only are pension arrangements an important subject, but they are complex and likely to cause confusion and apprehension if not handled openly and consistently by the contracting authority. It is not in the interests of the contracting authority, or the new employer, or the taxpayer, for staff to be alarmed about the prospects for their pensions in a business transfer which depends upon staff motivation for delivery of good quality public services.

6. Occupational pensions are not covered by the *Transfer of Undertaking (Protection of Employment) Regulations 1981* (the TUPE regulations). The new EU Acquired Rights Directive gives Member States the option of including occupational pensions within the terms which are protected by national legislation when an undertaking transfers between employers, and the Government is reviewing whether and if so, how, to include pensions within new TUPE regulations.

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<sup>22</sup> HC Deb 14 June 1999, c 29-30W

7. Independently of the TUPE review, and without prejudice to its conclusions, this paper sets out the standard practices which the Government will follow when its own staff are transferred to other employers. Contracting authorities in other parts of the public sector will continue to make their own arrangements consistent with the law and good employment practice. It would be welcome if they adopted approaches comparable to those set out here. Separate consideration is being given to staff transfers from local government.

8. The principles which Government will apply as a contracting authority in relation to the pensions of transferring staff are:

- to treat staff fairly;
- to do so openly and transparently;
- to involve staff and their representatives fully in consultation about the process and its results; and
- to have clear accountability within Government for the results.

9. There are two separate but related aspects to treatment of pensions in a business transfer:

- first, staff should continue to have access after the transfer to a good quality occupational pension scheme under which they can continue to earn pension benefits through their **future service**;
- second, staff should be given options for the handling of the **accrued benefits** which they have already earned.

Each of these aspects is discussed, in turn, in the following sections.<sup>23</sup>

The policy was further clarified in an HM Treasury June 2004 guidance note, [Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues](#).

A recent Treasury consultation paper gave an overview of the current provisions:

#### **Future pension provision following transfer**

2.7 The Fair Deal policy requires that the new employer should offer transferring staff membership of a pension scheme which is “broadly comparable” to the public service pension scheme which they are leaving. Public service pension schemes generally offer defined benefits – where this is the case, broad comparability requires that a defined benefit scheme is provided for transferring staff.

2.8 However, the schemes do not need to be identical in all respects: a broadly comparable scheme is one where an actuary certifies (on principles set out in a statement of practice issued by the Government Actuary’s Department) that there are no identifiable employees or groups of employees who will suffer material detriment overall in their future pension accrual compared to the public service pension scheme.

2.9 The effects of this policy are that:

- transferring employees see no material reduction in the overall value of their pension provision as a result of the outsourcing arrangement; and

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<sup>23</sup> Cabinet Office, [Staff transfers in the public sector – statement of practice](#), January 2000; A revised version of [Staff transfers in the public sector – statement of practice \(January 2000\)](#) was issued in November 2007 to reflect the 2006 TUPE regulations. However, the substance as regards pensions is largely unchanged

- the independent provider needs to provide a specific type and level of pension. It will reflect the costs of the pension provision in the bid price it submits to the public sector contracting authority.

### **Treatment of accrued pension benefits on transfer**

2.10 In addition to requiring a broadly comparable pension for future accrual, the Fair Deal policy covers the treatment of previously accrued pension benefits. It requires a more generous approach to transfers than that generally provided by the statutory minimum Cash Equivalent Transfer Value (CETV). This is the value which individuals can take to another pension scheme instead of holding a deferred pension, as discussed further in Box 2.A.<sup>24</sup>

Given current levels of public service pension provision, the protection provided by this code is more generous than would be provided by the legislation applying to transfers generally (see section 2.5 above).<sup>25</sup>

For local government employees, a *Code of Practice on Workforce Matters in Local Authority Service Contracts*, published in March 2003, required local authorities to apply the principles of the Cabinet Office Statement to transfers to the private sector:

#### **Treatment of transferees**

4. In its contracting-out of services, the local authority will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. The service provider will be required to demonstrate its support for these principles and its willingness to work with the local authority fully to implement them.

5. The intention of the Statement is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied. The Government has now indicated an intention to legislate to make statutory within local government the provisions in the Cabinet Office Statement.

6. The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Staff must have ongoing access to the Local Government Pension Scheme or be offered an alternative good quality occupational pension scheme, as defined in the annex to the Cabinet Office Statement, under which they can continue to earn pension benefits through their future service. There must also be arrangements for handling the accrued benefits which staff have already earned.<sup>26</sup>

This Code also required the transferee in the private sector to offer new joiners membership of a pension scheme which meets certain minimum criteria – one of which was a six per cent contribution to a stakeholder pension:

#### **Pension arrangements for new joiners to an outsourced workforce**

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<sup>24</sup> HM Treasury, *Consultation on the Fair Deal Policy: treatment of pensions on compulsory transfer of staff from the public sector*, March 2011

<sup>25</sup> Independent Public Service Pensions Commission: *Interim Report*, 7 October 2010, Box 6C

<sup>26</sup> Office of the Deputy Prime Minister (ODPM) *Circular 03/2003*, 13 March 2003, *Local Government Act 1999: Part 1: Best Value and Performance Improvement*, Annex D

10. The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:

- membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions;
- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished;
- a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

On a retender of a contract to which this Code applies the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.<sup>27</sup>

In a bid to tackle the “two-tier workforce” developing in the public sector, the Prime Minister announced, on 18 March 2005, that the *Code of Practice on Workforce Matters* operating in local government would be extended to the wider public sector – including the Civil Service, NHS and maintained schools – with immediate effect:

The extension fulfils the Prime Minister’s commitment given last autumn and forms part of the Government’s wider commitment to fairness in the workplace. It will apply where a public sector organisation transfers employees to a private or voluntary sector partner as part of a service contract. There will be a limited number of exemptions. (See notes to editors.)

Under the code, new joiners will be offered terms and conditions that are, overall, no less favourable than those of transferred employees. This does not mean that the terms have to be the same. Flexibility is important, but this must not result in an outcome overall that is less favourable.

The code also makes sure that new joiners will be offered a reasonable pension, through membership of a good quality employer pension scheme or membership of a stakeholder pension scheme with an employer contribution.<sup>28</sup>

The revised *Code of Practice* now states:

#### **Pension arrangements for new joiners to an outsourced workforce**

10. The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:

- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished;
- a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

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<sup>27</sup> Ibid

<sup>28</sup> Cabinet Office press release, 18 March 2005, ‘Prime Minister announces roll-out of code to tackle two-tier workforce’



On a retender of a contract to which this Code applies the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.<sup>29</sup>

On 6 July 2006, the then Chief Secretary to the Treasury, Stephen Timms said that:

HM Treasury guidance: (Staff Transfers from Central Government: A Fair Deal for Staff Pensions) supplemented by further guidance issued in 2004 and Cabinet Office guidance: (Staff Transfers in the Public Sector Statement of Practice) remain in force. It is incumbent upon bodies or organisations transferring staff from the public sector to the private sector to be familiar with the guidance.<sup>30</sup>

Over time, concerns have been expressed by organisations in the private and voluntary sector about the pension liabilities they are required to take on when acting as contractors delivering government services.<sup>31</sup> In a response to the Labour Government's Review of the Third Sector in 2008, for example, the Charity Finance Director's Group and the Charities Consortium said:

Under TUPE, a receiving employer is required to provide a good quality pension provision where staffs coming to them have pre-existing pension rights - defined as being one where the employer contributes at least 6% (s.257 & 258 of Pensions Act 2004). However best practice guidance issued by the ODPM (Circular 03/2003) requires organisations taking staff from the public sector to provide a pension scheme with the same level of benefits as are currently enjoyed and which is fully transferable. This has a number of major consequences and charities (and those they contract with) are left with some pretty unpalatable options.<sup>32</sup>

## 4.2 Local authorities

As stated above, for local government employees, a *Code of Practice on Workforce Matters in Local Authority Service Contracts*, published in March 2003, required local authorities to apply the principles of the Cabinet Office Statement to transfers to the private sector and to offer new joiners membership of a pension scheme which met certain minimum criteria.<sup>33</sup> Sections 101 and 102 of the *Local Government Act 2003* provided a legislative underpin to this Code. The Explanatory Notes on the Act said:

### **Sections 101 and 102: Contracting-out: staff transfer matters, including pensions**

288. The sections confer new powers on the Secretary of State, the National Assembly for Wales and Scottish Ministers to require best value authorities in England, Wales or Scotland, when engaged in contracting-out exercises, to deal with staff matters in accordance with directions. Section 101 also requires authorities to have regard to guidance on staff matters issued by the Secretary of State, the National Assembly for Wales or Scottish Ministers. The background to this is the commitment made, as part of a package of workforce measures, following the review of Best Value, to legislate to make statutory within local government the provisions in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the Annex to it, A Fair Deal for Staff Pensions (this is available on the Cabinet Office website at:

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<sup>29</sup> Cabinet Office, '[Code of Practice on Workforce Matters in Public Sector Contracts](#)', March 2005

<sup>30</sup> HC Deb, 6 July 2006, c1264W

<sup>31</sup> Press Release, 27 March 2006, 'Pension Transfer Terms on PFI/PPP contracts a major source of inefficiency and extra cost to the public sector, according to research by Lane, Clark and Peacock'.

<sup>32</sup> Response by Charity Finance Directors Group and the Charities Consortium to the Government's Third Sector Review. October 2006, p15

<sup>33</sup> Office of the Deputy Prime Minister (ODPM) Circular 03/2003, 13 March 2003, [Local Government Act 1999: Part 1: Best Value and Performance Improvement](#), Annex D, p47

[www.cabinet-office.gov.uk/civilservice/2000/tupe/stafftransfers.pdf](http://www.cabinet-office.gov.uk/civilservice/2000/tupe/stafftransfers.pdf)). It is intended to use the direction making powers to ensure that contracting exercises are conducted either on the basis that TUPE will apply or, in circumstances where TUPE does not apply, that staff involved should be treated no less favourably than had the Regulations applied, unless there are exceptional circumstances, and that transferees will be offered either retention of the Local Government Pension Scheme (LGPS) or a broadly comparable scheme.

### **Section 101: Staff transfer matters: general**

289. This allows for the Secretary of State, or (in relation to authorities in Wales other than police and fire authorities) the National Assembly for Wales, or (in relation to relevant authorities in Scotland) the Scottish Ministers, to issue directions to require best value authorities, in contracting with other persons for the provision of services or in circumstances where a contracted-out service is brought back into the public sector on the termination of a contract, to deal with staff transfer matters (employment or pensions) in accordance with any directions made. The section also requires authorities to have regard to guidance on staff matters issued by the Secretary of State, the National Assembly for Wales or Scottish Ministers.

290. The duty of best value as set out in the Local Government Act 1999 or the Local Government in Scotland Act 2003 is subordinate to this requirement. Directions or guidance made under the power may relate to all best value authorities or to particular descriptions of best value authority.

### **Section 102: Staff transfer matters: pensions**

291. This provides that the Secretary of State, National Assembly for Wales and Scottish Ministers shall exercise their powers under section 101 to give directions so as to ensure that English, Welsh and Scottish local authorities, in contracting for the provision of services, secure specified pension benefits. These are, first, that the contractor is required to secure pension protection for employees of an authority who are transferring from the authority under TUPE or who, in a re-contracting case, transferred from the authority under TUPE when the services were first contracted out, have transferred under TUPE on each subsequent change in contractor and are again transferring under TUPE in connection with the contract with the contractor. Secondly, that the contractual terms for the securing of pension protection for a transferring employee are enforceable by the employee. Pension protection is secured where the employee's rights to acquire pension benefits are the same as, or broadly comparable to, those enjoyed by the employee before the transfer.

As stated above, the *Local Government Act 2003* gives Ministers the power to make directions so as to ensure that local authorities "in contracting for the provision of services, secure specified pension benefits." The [Best Value Authorities Staff Transfers \(Pensions\) Direction 2007](#) was published in June 2007. The accompanying letter to Chief Executives explained that:

Briefly, the Direction provides that:

- where an authority enters into a contract with a person for the provision of services and those services are, in the period immediately before the contract is entered into, provided by the authority and carried out by employees of the authority
- the contract between the authority and the contractor must require the contractor to secure pension protection for each transferring employee and provide that the provision of pension protection is enforceable by the employee; and,

- pension protection is secured if the transferring employee, after change in employer, has rights to acquire pension rights that are the same as or are broadly comparable to or better than those he had as an employee of the authority

The Direction also requires similar pension protection in relation to those former employees of an authority, who were transferred under TUPE to a contractor, in respect of any re-tendering of a contract for the provision of services.

In the case of employees who are members of the Local Government Pension Scheme, it will be possible for the new employer, if they wish, to seek admitted body status within the LGPS so that transferred staff continue to have access to that pension scheme for their future service. This would appear to satisfy the requirements contained in the Direction.<sup>34</sup>

The Local Government Employers' website has some [FAQs](#) on the Code of Practice on Workforce Matters. Although the code was withdrawn in March 2011, the legislative requirements referred to above, are still in place.

### **Admitted Body Status**

"Admitted Body Status" (ABS) was introduced into the LGPS in 1999 to:

allow contractors who took on local authority contracts to retain members of the Scheme in that arrangement, allowing them to continue to accumulate benefits under the one scheme whilst their employment is transferred between different contractors. It enables contractors to tender on a small scale where they could otherwise find setting up a broadly comparable scheme disproportionately expensive.<sup>35</sup>

A discussion document issued in August 2006 identified perceived problems with the current arrangements as:

- some authorities are apparently specifying ABS as a contractual condition, whereas it has only ever been intended to be a matter of contractor choice;
- contractors have no direct control over costs, which are often volatile with significant increases in contributions rates during the contract; they lack any input into investment strategy, actuarial assumptions, or deficit spreading;
- contractors are expected to bear all the risk, including asymmetric risk at end of the contract where they are liable for any shortfall but cannot benefit from any surplus; potential debt charges on exit may thus make broadly comparable schemes more attractive to contractors;
- contrary to policy intentions, contractors may inherit significant past service liabilities with asset variations or changes in actuarial assumptions during the contract therefore having a disproportionate effect;
- the effect of FRS17/IAS19 on contractors' balance sheets and the consequent impact on their ability to tender for new contracts.<sup>36</sup>

The paper commented that weaknesses appeared to include 'risks of fewer bidders, unnecessary elimination of good contractors, higher costs, poorer quality services, and, in

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<sup>34</sup> CLG, [Section 101 and 102 Local Government Act 2003 Staff Transfer \(Pensions\) Matters Letter](#), 27 June 2007

<sup>35</sup> para 4

<sup>36</sup> Ibid, para 11

extremis, contractor failure'.<sup>37</sup> The proposed solution was the development of 'pass-through' arrangements:

15. Pass-through would effectively remove pension risk from the equation. The contractor would pay contributions at a rate specified at the outset of the contracting process, with subsequent variations only for common factors (e.g. changes in mortality assumptions) or those within their control (e.g. abnormal pay movements), and the letting authority would retain and meet the actual cost of all the investment risk. Contractors would contribute only for membership accrued during the contract and would have no past service liabilities, nor ongoing liability at the end of the contract. The letting authority would effectively meet the actual cost of pensions rather than the cost inflated either by over-cautious risk assumptions or by the price of contractor failure in terms of quality delivery or financial performance. However, it would deprive authorities of the potential benefit of a lower bid, where the contractor has priced the pensions element at less than the true cost.<sup>38</sup>

A summary of responses was issued on 22 January 2007.<sup>39</sup> DCLG found:

A statistical breakdown of the limited number of comments received indicates that out of 23 respondents, broadly 61% supported pass-through arrangements, 35% did not and 4% were non-committal. Contractors and charities were largely supportive of pass-through but some concerns were expressed by a majority of the scheme employer and administering authority interests who responded. Some respondents commented that other options, such as cap and collar arrangements, are available and should be explored.<sup>40</sup>

An information consultation document published in January 2008<sup>41</sup> set out three approaches for analysis and discussion:

- **Retaining the current arrangements, but providing revised guidance re-emphasising the original intentions of ABS**, by setting out the purpose of the legislation, making clear the statutory and non statutory roles of all key stakeholders and setting out all the key steps involved for protecting the rights of pensions for staff transferring from a local authority to a contractor;
- **In addition to updating the guidance, consider making minor regulatory modifications to make the existing framework work better.** This approach included ideas around providing specific provisions to refund any pensions surplus at the end of a contract to remove asymmetric risk, requiring actuarial monitoring of contracts to check for employee or other related changes that could have an impact on the pensions position and/or requiring a contracting/letting authority to provide a statement, as part of the bidding process, about actuarial aspects of ABS and;
- **Consider the possibility of introducing some broader regulatory changes that enhance the options available at a local level.** For example, allowing for pass-through of pension costs, which means that contractors would contribute only for membership accrued during the contract and would have no past service liabilities. The letting authority would retain and meet the actual cost of all the investment risk and essentially meet the actual cost of pensions rather than, it is argued, have to

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<sup>37</sup> Ibid, para 14

<sup>38</sup> Ibid, para 15-17

<sup>39</sup> Review of ABS Provisions. 22 January 2007

<sup>40</sup> Ibid

<sup>41</sup> Department of Communities and Local Government, '[Review of admitted body status](#)' January 2008

meet the cost of a contract inflated either by over-cautious risk assumptions or by the price of contractor failure in terms of quality delivery or financial performance.

Stakeholders views were sought on whether it is lawful or desirable to require contractors to adopt mandatory open admission agreements as a standard for all outsourcing and contract re-tenders. This means that all new employees on a relevant contract can also become members of the LGPS, in contrast to closed agreements where only members of staff who originally transferred with the contract can be members of the LGPS.

Regulatory change may also include introducing cap and collar arrangements. This involves contracting authorities specifying in the contract an upper and lower limit on the pension contribution rate. The contractor pays the contribution rate certified by the actuary and the contracting authority meets the cost in excess of the agreed maximum, but the contractor does not get the benefit of contributions falling below the lower limit.<sup>42</sup>

A report on the consultation exercise, published in October 2008, said the vast majority of respondents thought the proposed approaches would address the concerns raised:

The vast majority of respondents think that the approaches set out within the informal consultation document would address concerns raised about ABS provisions. A third of respondents responding to question twenty-six think that a mixture of approaches would be needed, with almost twenty percent suggesting that the ideas set out within approach three would be most helpful.<sup>43</sup>

New guidance would be developed and there would be consultation on any necessary changes to regulation:

Communities and Local Government intends now to work alongside stakeholders to develop substantive guidance that reflects key issues outlined in this report. As part of a broader package aimed at ensuring ABS provisions best meet the needs of authorities, contractors, employees and taxpayers, Communities and Local Government will develop final proposals, subject to Ministers' agreement, incorporating any necessary regulatory amendments for future consultation.<sup>44</sup>

New guidance - *Admitted body status provisions in the Local Government Pension Scheme when services are transferred from a local authority or other scheme employer*- was published in December 2009. The main legislative provisions are in the *Local Government Pension Scheme (Administration) Regulations 2008 (SI 2008/239)*, as amended.

#### **4.3 Approach of the current Government**

##### ***Independent Public Service Pensions Commission***

In June 2010, the Government announced the establishment of the Independent Public Service Pensions Commission, to be chaired by former Labour Work and Pensions Secretary of State, Lord Hutton of Furness. The Commission would:

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<sup>42</sup> CLG, *Admitted body status provisions in the Local Government Pension Scheme when services are transferred from a local authority or other employer*, December 2009, page 5-6

<sup>43</sup> Ibid, page 7

<sup>44</sup> Ibid, page 48

... undertake a fundamental, structural review of public service pension provision by Budget 2011 and consider the case for short-term savings in the Spending Review period, by September 2010.<sup>45</sup>

Its terms of reference were to:

To conduct a fundamental structural review of public service pension provision and to make recommendations to the Chancellor and Chief Secretary on pension arrangements that are sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer and consistent with the fiscal challenges ahead, while protecting accrued rights.<sup>46</sup>

In its interim report, published in October 2010, the Commission said the evidence it had received had made it clear that:

current pension structures, combined with the requirement to provide comparable pensions ('Fair Deal') are a barrier to non-public service providers, potentially reducing the efficiencies and innovation in public service delivery that could be achieved.<sup>47</sup>

It argued that requirements, under the Fair Deal policy, to ensure "broadly comparable" pension provision for future service, could be more expensive and risky for private sector organisations than public sector employers:

This arrangement has maintained the level of pension provision for those compulsorily transferred out of the public sector. However, given current public service pension structures, this can make it harder for private sector and third sector organisations to provide public services because providing a 'broadly comparable' defined benefit pension scheme can be significantly more expensive and risky for private sector organisations than for public sector employers.<sup>48</sup>

There were two central reasons for this. The first related to the different bases for calculating accruing pension liabilities and contributions in the public and private sectors. The second related to the impact of having to take on the investment and demographic risks associated with Defined Benefit Pension Schemes:

For larger firms, these risks might be considered manageable, although evidence submitted to the Commission indicates their concerns. But evidence also suggests that smaller firms and charities in particular feel unable to take on risks that could seriously harm their organisations if investments do badly or if longevity increases unexpectedly. As a result, they can either withdraw from the outsourcing process or purchase a pension from a third party. These pensions can involve contribution rates of about 40 per cent of salary, more than double the average employer contribution in the non-uniformed public service pension schemes.<sup>49</sup>

Some stakeholders had suggested extending access to public service schemes to non-public service employees "as a way of helping to reduce the disadvantages faced by private sector and third sector organisations as a result of the Fair Deal." Such arrangements already exist:

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<sup>45</sup> HM Treasury, [Budget 2010](#), HC 61, June 2010

<sup>46</sup> [HM Treasury Press Release, 20 June 2010, Chancellor announces John Hutton to chair commission on public service pensions](#)

<sup>47</sup> [Independent Public Service Pensions Commission: Interim Report](#), 7 October 2010, Ex 21

<sup>48</sup> *Ibid*, para 6.21

<sup>49</sup> [Independent Public Service Pensions Commission: Interim Report](#), 7 October 2010, para 6.21-3

For instance, the NHS and teachers pension schemes have, for historic reasons, long had many private sector employees. In the case of the NHS, this is to cover General Practitioners working as private sector practices. In the teachers' schemes, it is principally to cover teachers in independent schools. The Local Government Pension Scheme has for the last decade offered admitted body status to facilitate pension arrangements for local authority workforces transferred to private sector contractors.<sup>50</sup>

However, the Commission thought there were important arguments against this. In particular:

Doing so would involve the Government bearing additional risks arising from pension liabilities accrued in the private sector. But the Government would have little control over the liabilities being accrued, since it would not set the wages of these employees.<sup>51</sup>

Furthermore, it might not provide a viable solution for some private sector and third sector organisations:

Evidence submitted to the Commission stated that smaller organisations are struggling with the exit charges levied by some parts of the Local Government Pension Scheme when contracts end. They can run the risk of becoming technically insolvent as they are required to recover any deficits under a shorter timescale than that allowed to public service local government employers.<sup>52</sup>

The Commission concluded that:

6.30 Ultimately, it is for the Government to consider carefully the best way of moving forward with Fair Deal in a way that delivers its wider objective of encouraging a broader range of public service providers while remaining consistent with good employment practices. For its part, the Commission will focus in its final report on addressing the issue of how long-term structural reform to public service pensions can support greater labour market mobility and improved productivity in a way that conforms to the general principles outlined in Chapter 3.<sup>53</sup>

In his final report, Lord Hutton said he believed that the Commission's proposed reforms to public service pensions generally should, over time, help to remove some of the barriers to plurality of service provision:

5.56 As mentioned above, since the publication of the Commission's interim report the Government has announced reviews of the Fair Deal policy and the discount rate, which are relevant to many of the issues discussed here. The Commission expects that the outcome of these reviews would, at least in part, help to facilitate the Government's aim for increased plurality of provision for public services.

5.57 A redefined public service pension scheme framework, as laid out in this report, including a move to schemes based on career average revalued earnings, should over time also help to remove some of the barriers to plurality of service provision.

5.58 It is ultimately for the Government to decide how much long-term pensions risk it is willing to bear in order to meet its wider policy objectives. However, it is clear that

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<sup>50</sup> Ibid, c625

<sup>51</sup> Ibid

<sup>52</sup> Ibid, para 6.28

<sup>53</sup> Ibid

enabling access to public service pension schemes for non-public service workers does increase the long-term risk government bears in relation to those schemes.<sup>54</sup>

In his speech to IPPR on 23 June, Lord Hutton spoke of the need to avoid a “new race to the bottom” in this area:

There is also the issue of Fair Deal. We need to tread carefully here and search for a creative solution that allows new providers to come into the public sector and generate innovation and improvements in value for money, but does not move us back to the bad old days when every outsourcing deal seemed to involve industrial action and allegations that low paid workers were seeing their wages and conditions cut even further. Moving to a new career average system across the public sector will certainly help remove much of the risk inherent in final salary schemes and which is now becoming an obstacle to new providers coming forward. New providers could still be asked to provide a comparable scheme to that currently on offer but switch to a career average scheme when this has been agreed in the present negotiations. We have to avoid a new race to the bottom here.<sup>55</sup>

### *Responses*

In its submission to the Independent Public Service Pensions Commission’s final report, the TUC argued that the retention of Fair Deal protections was “essential to prevent a race to the bottom in outsourced public services.” It argued for a positive solution to the problems faced by contractors in providing comparable provision:

The current arrangements, including open admission agreements under which private sector employers are allowed to participate in public service schemes in respect of both transferred employees and new employees, provide a relatively level playing field. If anything, in-house bids are disadvantaged as they factor in providing good quality pensions for subsequent hires, whereas the private sector can factor in a reduction in pension costs as new employees are given worse terms. Reducing the level of protection would have precisely the opposite effect. Bids would be awarded not on the efficiency of the provider but on cutting future pension rights, with wide-ranging consequences for public services, employees and future welfare costs.

The issue of maintaining decent pension provision in contracted-out public services is particularly relevant to the Commission’s aim of protecting the low paid. Many services that are characterised by low pay and a predominantly female workforce – such as cleaning and catering – have been widely outsourced.

Mechanisms for admitted body status (ABS) mean it is possible for all contractors and in-house providers to bid for service provision contracts on an equal basis. Unions and many of the leading contractors believe that there is potential to explore further extending ABS in the public service schemes. We understand that the CBI is supportive of measures along these lines, providing there is an appropriate allocation of cost and risk between the private sector employer and the scheme concerned.

Unions believe that concerns about ABS provisions in the LGPS have been overstated. Some of the issues about costs to contractors flow from a lack of awareness of pension issues and a lack of understanding by contractors for their own staff before taking on a public sector contract. The first of these can be addressed by improving procurement procedures, so that issues around the distribution of costs and risks can be negotiated during the tendering and contracting process. Again, this is consistent

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<sup>54</sup> [Independent Public Service Pensions Commission: Final Report](#), 10 March 2011

<sup>55</sup> [Lord Hutton, Pension reform in the public services, 23 June 2011](#)



with the approach advocated by the CBI in their response to the Commission's first call for evidence.

Finding a positive solution to the problems faced by contractors in providing comparable provision is a goal which would be supported by employees and most contracting employers. This would simplify pensions for both parties, provide a level playing field for contractors and some certainty for the workers affected.<sup>56</sup>

The CBI argued for a different approach:

We are also supportive of the Chancellor's announced Treasury review of the Fair Deal guidance. In our view, the way its application has evolved over the years has meant that the obligations on employers involved in public contracts have become steadily more tightly defined so that today, the Government Actuary's Department (GAD) assessments tend to insist that only mirror images of public sector schemes can be declared 'broadly comparable'. We believe that an approach based on a "reference scheme test" could return the guidance's effect to its original intention – i.e. that a good quality arrangement, based on decent levels of member and dependant's pensions, ill health and death benefits is offered to transferred staff. Such an approach could allow service providers to significantly reduce associated costs, while ensuring that transferred staff are still offered high-quality pensions and associated benefits.<sup>57</sup>

### ***HM Treasury consultation on Fair Deal***

HM Treasury launched its consultation on the Fair Deal policy on 3 March 2011, with responses requested by 15 June. The consultation explained that:

2.5 The Fair Deal policy builds on the requirements under a TUPE transfer for the occupational pension entitlements of these individuals, providing for a higher level of pension provision. It applies where:

- Public sector staff are compulsorily transferred to a new employer; and
- An outsourced public service where staff are transferred out under the Fair Deal policy in the past is re-tendered or returned to the public sector.<sup>58</sup>

The consultation noted that the policy covers both employees' future pension accrual and the treatment of their accrued benefits. In more detail:

#### **Future pension provision following transfer**

2.7 The Fair Deal policy requires that the new employer should offer transferring staff membership of a pension scheme which is "broadly comparable" to the public service pension scheme which they are leaving. Public service pension schemes generally offer defined benefits – where this is the case, broad comparability requires that a defined benefit scheme is provided for transferring staff.

2.8 However, the schemes do not need to be identical in all respects: a broadly comparable scheme is one where an actuary certifies (on principles set out in a statement of practice issued by the Government Actuary's Department) that there are no identifiable employees or groups of employees who will suffer material detriment overall in their future pension accrual compared to the public service pension scheme.

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<sup>56</sup> [TUC submission to Independent Public Service Pensions Commission's final report](#)

<sup>57</sup> [CBI submission to Independent Public Service Pensions Commission's final report](#)

<sup>58</sup> HM Treasury, *Fair Deal Policy: treatment of pensions on compulsory transfer of staff from the public sector*, 3 March 2011

2.9 The effects of this policy are that:

- transferring employees see no material reduction in the overall value of their pension provision as a result of the outsourcing arrangement; and
- the independent provider needs to provide a specific type and level of pension. It will reflect the costs of the pension provision in the bid price it submits to the public sector contracting authority.

#### **Treatment of accrued pension benefits on transfer**

2.10 In addition to requiring a broadly comparable pension for future accrual, the Fair Deal policy covers the treatment of previously accrued pension benefits. It requires a more generous approach to transfers than that generally provided by the statutory minimum Cash Equivalent Transfer Value (CETV). This is the value which individuals can take to another pension scheme instead of holding a deferred pension, as discussed further in Box 2.A.

The Government suggested a number of objectives that might guide future policy:

- **Delivering value for money** for the taxpayer, so that the highest quality public services are achieved within available resources. This is particularly important at the current time.
- **Providing an appropriate level of protection to public sector employees' pension provision** when the services they deliver are outsourced. Retaining workforce engagement will help to ensure the effective delivery of public services, which requires the maintenance of key skills within the workforce.
- **Removing barriers to plurality of public service provision.** Opening public services up to competition is a key component of the Government's plans to improve quality and value for money in public service delivery. As discussed in Chapter 1, the Independent Public Service Pension Commission's interim report has highlighted that the current Fair Deal requirements present barriers to alternative public service providers, particularly smaller ones.
- **Allocating the costs and risks of pension provision appropriately.** The Government must decide what costs and risks it is prepared to bear in the delivery of public services, which are ultimately borne by the taxpayer. One way of promoting plurality of public service provision without changes to the Fair Deal policy is to extend access to public service pension schemes to non-public service employees, as occurs in some parts of the public sector. The Government then bears the pension liabilities in these cases but without control of the cost drivers.

In his speech to IPPR on 17 June 2011, the Chief Secretary to the Treasury said he was aware that this consultation was a "major concern for Trades Unions."<sup>59</sup>

On 6 July, shadow Chief Secretary, Angela Eagle, was reported as saying that the decision to consult on Fair Deal as way to "soften up the public sector for privatisation":

"It means you don't get competition for the provision of public services on the basis of quality but on weakening the costs and at the cost of the public sector and the workforce", she said. "It would be at the cost of people's pay and conditions, not because the private sector may have a better way of doing it. The link between the

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<sup>59</sup> [Danny Alexander, Speech to IPPR, 17 June 2011](#)

pension changes and the public services white paper is not being properly talked about.”<sup>60</sup>

The Government’s *Open Public Services White Paper*, published on 11 July 2011, cited the review of Fair Deal as among its key policies aimed at “breaking down barriers to entry for potential providers of public services”.<sup>61</sup>

### ***Agreement to retain Fair Deal***

In December 2011, Chief Secretary to the Treasury, Danny Alexander said that, as part of the “heads of agreement” on reform of public service pension schemes, it would “retain the fair deal provision and extend access for transferring staff”:

In the course of the talks, unions have stressed the importance of ensuring that their members will continue to be able to receive the benefits of their scheme if it is outsourced. That is the purpose of the fair deal policy, the future of which we have been consulting on. Because we have agreed to establish new schemes on a career average basis, I can tell the House that we have agreed to retain the fair deal provision and extend access for transferring staff. The new pensions will be substantially more affordable to alternative providers, and it is right that we offer workers continued access to them. In addition, the Government will consider what practical options might be available to reform the terms of access to the NHS pension scheme, in particular for NHS staff who move to a non-NHS “any qualified provider” delivering NHS services.*[Interruption.]* That is something that the trade unions have suggested, so hon. Members should keep quiet and listen.*[Interruption.]*<sup>62</sup>

This was confirmed in a Written Statement on 4 July 2012:

I can also confirm that the Government have reviewed the fair deal policy and agreed to maintain the overall approach, but deliver this by offering access to public service pension schemes for transferring staff. When implemented, this means that all staff whose employment is compulsorily transferred from the public service under TUPE, including subsequent TUPE transfers, to independent providers of public services will retain membership of their current employer’s pension arrangements. These arrangements will replace the current broad comparability and bulk transfer approach under fair deal, which will then no longer apply. The Government will bring forward detailed proposals for implementing this in the autumn.<sup>63</sup>

### ***Responses***

These proposals have been welcomed by trade unions. UNISON, for example, said that allowing transferred staff to remain in the NHS Pension Scheme was an improvement on the existing arrangements, under which employers were required to provide “broadly comparable” pension benefits:

UNISON pushed very hard for this in the central negotiations with government. UNISON very much welcomes this provision as it is a clear improvement on what we feared and should provide real pension protection and access for NHS staff in an environment where the threat of being TUPE transferred is very real.<sup>64</sup>

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<sup>60</sup> Elizabeth Rigby and Brian Groom ‘Pension reforms linked to sell-off plans, claims Labour’, *Financial Times*, 6 July 2011

<sup>61</sup> HM Government, [Open Public Services White Paper](#), CM 8145, July 2011, para 6.22

<sup>62</sup> [HC Deb, 20 December 2011, c1202-3](#)

<sup>63</sup> [HC Deb, 4 July 2012, c54WS](#)

<sup>64</sup> UNISON, [What the proposed new NHS Pension Scheme in 2015 could mean for you](#), p12

The Fair Division Association (FDA) welcomed the additional protection for civil servants:

Civil servants are currently offered a “broadly comparable” pension scheme following transfer to another employer. The new employer can subsequently change the terms of the “broadly comparable” scheme or close it to prevent further accrual. This would be of particular concern in relation to any transfer to a private sector employer, given that around two-thirds of private sector employers no longer offer pension arrangements for new staff.<sup>65</sup>

The National Union of Teachers believes “Fair Deal is based on a sound principle”:

The NUT believes that Fair Deal is based on a sound principle. If the private sector wishes to compete with the public sector, it should do so on the basis of innovation and efficiency. It should not be allowed to “compete” simply on the basis of driving down employees’ terms and conditions. Equally, all publicly funded institutions should share certain fundamental obligations to their employees and should not be permitted to avoid them on the basis of technicalities in accounting practice or existing loopholes in existing arrangements.<sup>66</sup>

### ***Consultation on employees already transferred-out***

The Government published its response to the first consultation, including draft guidance on how the policy would apply, in November 2012. This set further questions for consultation, regarding how the policy should apply to those employees that have already been transferred-out under the existing Fair Deal policy.<sup>67</sup>

On 7 October 2013, the Government published its response to this consultation.<sup>68</sup> In a Written Statement, the Chief Secretary to the Treasury explained that:

When existing contracts are retendered, there will be a presumption that staff covered by the fair deal policy should be offered access to a public service scheme. However, we will provide flexibility for employers to provide a broadly comparable scheme where—but only where—legal requirements are a bar to providing access to a public service scheme. The Government expect that in the vast majority of cases, when a contract is retendered, previously transferred staff will be offered access to a public service pension scheme.<sup>69</sup>

The Government responded to concerns about when Fair Deal should apply as follows:

5.10 The Government has noted the concern of trades unions that the Fair Deal policy should apply in some circumstances in which the TUPE regulations are not engaged. The Government considers that staff non-voluntarily transferred to new models of public service delivery should continue to enjoy pension protection, even if the transfer of staff does not engage TUPE. For this reason, the Fair Deal policy will apply to both TUPE transfers and non-voluntary transfers of staff to public service mutuals or to other new models of public service delivery.

5.11 The new guidance makes clear that the Fair Deal policy applies directly to central government departments, agencies, the NHS, maintained schools (including academies) and any other parts of the public sector under the control of Government ministers, where staff are eligible to be members of a public service pension scheme.

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<sup>65</sup> FDA, [New Pension Scheme 2015- The Government’s final offer. Members’ ballot](#)

<sup>66</sup> NUT response to consultation on new Fair Deal policy, July 2013

<sup>67</sup> HM Treasury, [Consultation on the Fair Deal policy: response to the consultation](#), November 2012

<sup>68</sup> HM Treasury, [The Fair Deal policy: response to further consultation](#), October 2013,

<sup>69</sup> [HC Deb, 8 October 2013, c1-2WS](#)

Transfers from local authorities and other best value authorities are outside the scope of the Fair Deal guidance – alternative arrangements exist in respect of those bodies. The Department for Communities and Local Government is considering how the new Fair Deal principles can be implemented for local government and the implications for the Local Government Pension Scheme.

5.12 The Government acknowledges views that there may be circumstances other than the retender of an existing contract where consideration could be given to providing employees with access to a public service scheme. The Government believes that should such circumstances arise, decisions should be made on a case by case basis taking into consideration existing contractual arrangements and any requirements for consultation with those affected.

5.13 When contracts originally let prior to publication of the 1999 guidance are retendered the Government's preference is that, where the approach taken was equivalent to the Fair Deal policy, the new guidance should be used by contracting authorities when these contracts are retendered. Whether to apply the new guidance to these earlier contracts will continue to be a matter for the contracting authority and the authority responsible for the pension scheme.

5.14 All employers in the scheme will generally pay the same contribution rate with some provision for additional payments in particular circumstances. Individual public service pension schemes will provide more detail on specific arrangements for each scheme.

5.15 The new guidance sets out the circumstances in which staff, having transferred from the public sector to an external provider, will remain eligible for protection under the Fair Deal policy. More details will be set out in the guidance applicable to each individual scheme.<sup>70</sup>

New guidance on the operation of the Fair Deal policy was published alongside the consultation response. The Government explained that this would take immediate effect and would apply across a range of organisations in the public sector, although not to best value authorities (where different arrangements apply):

1.6 This new guidance comes into effect immediately and should be reflected in procurement practice as soon as is practicable without disruption to projects which are already at an advanced stage. However the earlier guidance remains in force and applies in the circumstances outlined below.

1.7 This guidance applies directly to central government departments, agencies, the NHS, maintained schools (including academies) and any other parts of the public sector under the control of Government ministers where staff are eligible to be members of a public service pension scheme. It does not apply to best value authorities (listed in section 1 of the *Local Government Act 1999*) but alternative arrangements exist in respect of those bodies. The *Local Government Act 2003* enables the Secretary of State to issue directions to best value authorities in England and Wales concerning how pension matters will be dealt with in the contracting out of services. In 2007 the *Best Value Authorities Staff Transfers (Pensions) Direction 2007* was issued to best value authorities in England and Welsh fire authorities. The Department for Communities and Local Government (DCLG) will consider what is

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<sup>70</sup> Ibid

needed in respect of directions or other arrangements to achieve the principles of new Fair Deal in local government.<sup>71</sup>

#### **4.4 Application to individual schemes**

Information about how Fair Deal might apply to individual schemes was included in proposed final agreements for reform published in March 2012. Detailed scheme-specific guidance is to be published in future.<sup>72</sup>

##### ***Civil service pension scheme***

The proposed final agreement for the Principal Civil Service Pension Scheme, published in March 2012, said:

##### **Fair Deal**

8. On the basis that this scheme design is agreed, the Government agrees to retain Fair Deal provision and extend access to public service pension schemes for transferring staff. This means that all staff whose employment is compulsorily transferred from the Civil Service under TUPE, including subsequent TUPE transfers, will still be able to retain membership of the Principal Civil Service Pension Scheme when transferred once the necessary amendments to primary legislation have been made. These arrangements will replace the current provisions for bulk transfers under Fair Deal, which will then no longer apply. Guidance on the operation of the future Fair Deal policy will be developed, in discussion with key stakeholders.

9. For staff transfers within the public sector, the Government will consider how best to achieve the continued objective to facilitate movement in the light of the revised Fair Deal policy. Existing COSOP guidance states that in circumstances where TUPE does not apply in strict legal terms to certain types of transfer between different parts of the public sector, the principles of TUPE should be followed (where possible using legislation to effect the transfer) and the staff involved should be treated no less favourably than had the Regulations applied. Any necessary amendment to the COSOP guidance will be made in discussion with key stakeholders.<sup>73</sup>

Amendments were made to the PCSPS on 9 October 2013 to enable the new Fair Deal policy to be implemented.<sup>74</sup>

##### **NHS**

In 2012, Monitor carried out a "Fair Playing Field Review" to look into any matters that may be affecting the ability of different types of organisations (including NHS Trusts, Foundation Trusts, social enterprises, voluntary and community sector providers and for-profit providers) to participate fully in providing clinical services funded by the NHS in England, and to report back with options for addressing such matters. The report, published in March 2013, looked at pensions and made the following recommendation:

21. The Government should rapidly extend access to the NHS Pension Scheme for all staff moving from a public provider to provide NHS-funded clinical services elsewhere. They should also continue work on the practicality of extending access to the NHS Pension to any employee providing NHS-funded clinical services. A decision should be

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<sup>71</sup> HM Treasury, [Fair Deal for staff pensions: staff transfer from central government](#), October 2013

<sup>72</sup> HM Treasury, [The Fair Deal policy: response to further consultation](#), October 2013, para 5.15

<sup>73</sup> Cabinet Office, [Civil Service Pension Scheme – Proposed Final Agreement](#), March 2012

<sup>74</sup> [THE PRINCIPAL CIVIL SERVICE PENSION SCHEME \(AMENDMENT NO.3\) SCHEME 2013](#) [Intranet access only]

announced by June 2013. Private and charitable providers should face the same employer contribution rate for the NHS Pension Scheme as public sector providers.<sup>75</sup>

In its proposed final agreement for reform of the NHS Pension Scheme in England and Wales, the Government said it was looking at allowing access to the scheme for staff moving to “any qualified provider” delivering NHS services:

The NHS Pension Scheme Heads of Agreement contained provision for continuation of the Fair Deal on Public Service Pensions by allowing staff transferring from the NHS under TUPE to retain membership of the NHS Pension Scheme. As part of the pension announcement made by Danny Alexander, the Chief Secretary in the House of Commons on the 20th December 2011, he stated that “the Government will consider what practical options might be available to reform the terms of access to the NHS pension scheme, in particular for NHS staff who move to a non-NHS Any Qualified Provider delivering NHS service.”

The Heads of Agreement included provision for a partnership review of the implementation of the (access under Fair Deal) provisions for staff working in “any qualified provider” (AQP) to be carried out. The background to the Chief Secretary’s announcement and the review was the recognition that the roll out of competition “in the market” through AQP would mean that in future NHS staff might potentially move to non NHS providers not through TUPE but through the effects of competition. Lack of access to the NHS pension scheme for non NHS AQPs may also act as a barrier to entry by making it difficult to recruit experienced staff.

Work is on-going between the Department of Health and HM Treasury to ensure the full implications of this are properly understood and could be effectively managed. The key HM Treasury concerns are that any extension of access should not increase risk to the taxpayer and a need to understand the possible implications for extending the Government’s balance sheet and the associated fiscal implications.<sup>76</sup>

A wider access review was set up to consider the terms of access to the scheme for non-NHS organisations:

The wider access review is NHS specific, developed in partnership with the Trade Unions, Independent Sector and NHS Employers and builds on the new Fair Deal. It covers the terms of access for non-NHS organisations providing NHS Clinical Services (IPs), where they delivering services under an APMS contract or a NHS Standard Contract - including services procured under ‘Any Qualified Provider’ and covers both clinical and non-clinical staff delivering the clinical service.

Under the proposed approach, IPs can choose from two levels of access or maintain the default position where they comply with the new Fair Deal only as outlined above:

*Level 1: Access for existing members:* IPs are required to auto-enrol into the NHS Pension Scheme:

- from the date of commencement as a NHS Pension Scheme employing authority, all existing eligible staff who were entitled to participate in the NHS Pension Scheme at any time in the previous 12 months, and
- from the date of recruitment, all new eligible staff who were entitled to participate in the NHS Pension Scheme at any time in the 12 months before joining the IP. Staff should be ‘wholly or mainly’ engaged in NHS work to retain access

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<sup>75</sup> Monitor, [A fair playing field for the benefit of NHS pensions, March 2013](#)

<sup>76</sup> Department of Health, [NHS Pension Scheme – Proposed Final Agreement, March 2012](#)

*Level 2: Access for all eligible staff: IPs are required to offer access to all staff who are eligible to join the NHS Pension Scheme and are 'wholly or mainly' engaged in NHS work.<sup>77</sup>*

A consultation on [the draft National Health Service Pension Scheme \(Amendment\) regulations 2014](#) ran from 2 December 2013 to 10 February 2014. The response to the consultation published in March 2014 explains that reforms to Fair Deal alone were considered insufficient to encourage the greater staff mobility required for a truly NHS market. For this reason, the proposed final agreement included a commitment to review access to the Scheme for new providers of NHS clinical services. The Government had accepted recommendations on access made by the NHS Staff Passport Group (which comprises representatives from the Department of Health, HM treasury, NHS and independent sector employers and NHS Trade Unions). The access proposals for independent providers (IPs) were summarised as follows:

4.7 From 1 April 2014, IPs who are not already Scheme employers and who meet relevant eligibility criteria (see paragraph 4.9 below) will be able to apply to the Scheme Administrator to become "NHS Scheme employing authorities" and auto-enrol their eligible employees in the Scheme.

4.8 Eligible IPs will be able to select the range of employees to be included in the Scheme from two options:

- "closed approval" basis – eligible employees who, within the 12 months before entering employment with the IP, were entitled to NHS Scheme membership, and
- "open approval" basis – all of an IPs eligible employees

*IP eligibility criteria*

4.9 IPs requiring access to the Scheme will need to:

- apply to the Scheme Administrator for IP employing authority status from a forward date
- hold one or more NHS Standard or Alternative Primary Medical Services (APMS) contracts, or a public health related Local Authority contract to provide NHS clinical services
- automatically join in the Scheme all eligible staff, according to their declared access option
- confirm that they are seeking Scheme access for employees who are primarily engaged in the delivery of NHS clinical services.
- confirm that staff enrolled under either access option are engaged in NHS clinical services for more than 50% of their time
- arrange, if required by the Scheme Administrator following a risk assessment, an "IP guarantee" (for example a 'bond') with selected banks and other institutions, to provide cover for their estimate of 3 months' employee and employer contributions, including a 10% margin for growth

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<sup>77</sup> [Social Partnership Forum website, The SPF Staff Passport Group – viewed 9 October 2013](#)



4.10 The IP's "open" or "closed" access selection will apply to all staff providing NHS contracts for clinical services for more than 50% of their time. The access level chosen will apply to all of the IP's NHS contracts. IPs will be able to change their access option, subject to certain criteria and notice periods.

4.11 Access to the NHS Scheme will cost IPs and their eligible staff members the same as it does for all other Scheme employers and members. From 1 April 2014 employer contributions are 14% of pensionable pay and member contributions range from 5% to 14.5%, according to earnings.

*Pension benefits built up by IP employees*

4.12 IP scheme members will become entitled to the same personal and dependents benefit package available to other Scheme members. This will include redundancy pensions for IPs who provide them for staff who are over minimum pension age. The IP will be required to pay the capitalised lump sum representing the cost of early payment before the benefits can be paid.

*Financial controls for new IPs*

4.13 In order to protect the taxpayer and existing NHS employers, the full cost of opening the Scheme to IP employers and their staff will be closely monitored, in particular at four-yearly Scheme Valuation points, in order to ensure that they bear an appropriate share of total costs.

4.14 Other routine controls will include:

- IPs will be allowed to pension up to, but normally no more than, 75% of their gross income from all their NHS clinical services contracts.
- IPs unable to justify excess pensionable pay over 75% will be required to pay an employer contribution surcharge on the excess income pensioned, of 12%
- The Scheme Administrator will be able to call for additional information from IPs and to make spot checks of pay and pension records if necessary.
- Evidence of an IPs non-compliance with regulations may lead to the adjustment of overall or individual pensionable pay figures and/or the termination of the IP's NHS Scheme employing authority status

4.15 The Secretary of State (normally the Scheme Administrator acting on behalf of) may withdraw access and terminate membership of staff if an IP fails in its duties and/or obligations under Scheme regulations.

4.15 The Secretary of State (normally the Scheme Administrator acting on behalf of) may withdraw access and terminate membership of staff if an IP fails in its duties and/or obligations under Scheme regulations.<sup>78</sup>

The Department had consulted on proposals that would require all IPs applying for NHS employer status to have in place a three months contribution guarantee, secured through approved banks and other institutions. However, having listened to concerns about this from IP providers, they would not be routinely required to provide this.<sup>79</sup>

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<sup>78</sup> DoH, [The National Health Service Pension Scheme \(Amendment\) Regulations 2014, Response to consultation, March 2014](#)

<sup>79</sup> Ibid, para 4.45-8

The Government said that the overwhelming majority of those who commented on the merit or otherwise of opening the NHS Scheme to IPs, were “in favour of the proposals and believed they represented a significant step forward in protecting the pension rights of staff moving around the wider healthcare sector.”<sup>80</sup> However, this was not universal. For example:

*“The NHSPS has always been identified as a beneficial tool for recruitment and retention of staff in the NHS. By extending the exclusivity of the NHSPS to IP’s it is weakening the NHS employer’s position.... There will be no security in the future of any IP - could be taken over, merged with another company or go into administration. No clear protection arrangements in place.”*

University Hospital of South Manchester NHS Foundation Trust

*“I do not support this. Whilst it may introduce a level playing field for independent providers, nothing is being done to address the constraints of NHS providers to make them on a level playing field therefore this widens the gap between NHS providers and independent providers further...”*

Non-Clinical Partner / Practice Manager, Whitecliff Group Practice<sup>81</sup>

The Health Service Journal commented that this “fundamental shift in scheme rules [would] take away the competitive advantage long enjoyed by NHD employers in competitive tender situations” and that it would encourage job mobility for employers in future.<sup>82</sup>

Regulations to implement the changes came into force at the beginning of April 2014.<sup>83</sup> The Department of Health issued guidance on [Fair Deal for staff pensions: staff transfers from central government](#) in March 2014.

### **Teachers**

The final agreement for reform of the Teachers’ Pension Scheme in England and Wales said:

8. On the basis that this scheme design is agreed, the Government agrees to retain Fair Deal provision and extend access to public service pension schemes for transferring staff. This means that all staff whose employment is compulsorily transferred from maintained schools (including academies), higher and further education institutions under TUPE, including subsequent TUPE transfers, will still be able to retain membership of the Teachers’ Pension Scheme when transferred. These arrangements will replace the current provisions for bulk transfers under Fair Deal, which will no longer apply. The Government’s decision on Fair Deal means that, subject to agreement on scheme reform, independent schools which already have access to the Teachers’ Pension Scheme will continue to do so (for existing and new teachers); and new teachers and independent schools will continue to be able to join the scheme under the existing qualifying criteria.<sup>84</sup>

In 2013, the Government consulted on whether Higher Education and Further Education institutions should be able to choose whether or not to apply the new Fair Deal when compulsorily transferring staff to another private sector employer. Teaching unions such as the NUT and the NASUWT argued that teachers in these institutions should “continue to

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<sup>80</sup> Ibid para 4.25

<sup>81</sup> Ibid, para 4.26

<sup>82</sup> Health Service Journal, ‘How will healthcare change in 2014?’ 7 March 2014

<sup>83</sup> [NHS Pension Scheme \(Amendment\) Regulations 2014 \(SI 2014/570\)](#)

<sup>84</sup> Department for Education, [Teachers’ Pension Scheme – Proposed Final Agreement](#), March 2012

have protection on their entitlement to a public service pension.”<sup>85</sup> However, the Government decided Fair Deal would not be mandatory in the HE/FE sector. It said:

26. The majority of responses were broadly supportive of the proposals to accommodate the New Fair Deal arrangements into the TPS. The areas of concern that were raised are around the extension of the policy to the HE/FE sector and opinions are polarised on this subject depending upon whether the respondent represented employees or employers.

27. The Department recognises that there are concerns regarding whether New Fair Deal will apply in the HE/FE sector. However, that issue has been the subject of a separate consultation by HMT and HMT’s guidance makes clear that these sectors are not required to apply NFD guidance, although they may do so, if they wish. The Department considers that the discussions and consultation that took place to develop this guidance fully explored this.

28. The position taken by HMT is reflected in the TPS arrangements as these will facilitate those policy decisions. New Fair Deal will not be mandatory in the HE/FE sector but employers will be able to elect to apply the arrangements. HMT have also suggested a review after two year to re-consider the issue against numbers of HE/FE institutions that have elected to participate.<sup>86</sup>

Appropriate arrangements were made to the Teachers Pensions Regulations 2010 to give the proposed changes legal effect on 1 April 2014.<sup>87</sup>

### **Local Government**

The [guidance on the Fair Deal policy](#) published in October 2013 does not apply to best value authorities (listed in section 1 of the *Local Government Act 1999*). Separate consideration was to be given to how to achieve the principles of new Fair Deal in local government. An announcement by GAD on 27 November 2013 explained that in the mean-time broad comparability assessments should continue to be made:

On 4 October 2013, HM Treasury (HMT) published new [guidance](#) setting out a reformed Fair Deal policy. HMT also confirmed that the Department for Communities and Local Government (DCLG) will consider what is needed in respect of directions or other arrangements to achieve the principles of new Fair Deal in local government.

[The Local Government Pension Scheme Regulations 2013 \(SI 2013/2356\)](#) were laid before parliament on 19 September 2013, which introduced a new local government pension scheme for England and Wales from 1 April 2014. Further regulations, *The Local Government Pension Scheme (Transitional Provisions and Savings) Regulations 2013 (the ‘2013 Transitional Regulations’)* are to be introduced to deal with transitional protection and other matters. Together these regulations constitute the 2014 reforms.

### **3. Effect on GAD’s assessment of the broad comparability requirement**

DCLG has not yet announced what is needed in respect of directions or other arrangements to achieve the principles of new Fair Deal in local government. Accordingly, for the time being, broad comparability assessments continue to be made

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<sup>85</sup> [NASUWT, HM Treasury Consultation on the new Fair Deal policy: Pension protection for staff employed by Higher Education and Further Education institutions who are eligible to be members of the Teachers’ Pension Scheme or the Local Government Pension Scheme, 2 August 2013](#)

<sup>86</sup> [DfE, Consultation on proposals for New Fair Deal and increases in contributions for members of the Teachers’ Pension Scheme \(TPS\) in 2014/15 – Government response, March 2014](#)

<sup>87</sup> [Teachers Pensions \(Amendment\) Regulations 2014 \(SI 2014/424\)](#)

in accordance with the requirements of the extant *Best Value Authorities Staff Transfers (Pensions Direction) 2007*. It should be noted, however, that the Treasury guidance on new Fair Deal brings certain maintained schools (including Academies) within its scope and will be taken into account for forthcoming staff transfers.

Under the [Statement of Practice by the Government Actuary](#), the assessment of broad comparability is made against those benefits provided as a right from the LGPS (E&W). Once the complete new regulations are on the statute book, the broad comparability assessment of the LGPS (E&W) will change from that based on the existing regulations. Existing broad comparability certificates will cease to be valid for transfers of employment on and after that date; and new certificates for such transfers will need to be on the basis of the new regulations.

**For this purpose, the benefits provided as of right will be those which take account of the 2014 reforms (i.e. both the 2013 LGPS regulations (SI 2013/2356) and the 2013 Transitional Regulations); and relevant date will be the date on which the 2013 Transitional Regulations are laid before parliament.<sup>88</sup>**

The current arrangements are discussed in more detail in section 4.2 above.

In March 2014, the LGA said that CLG had yet to publish its review of what was needed in respect of achieving the principles of Fair Deal in the LGPS.<sup>89</sup>

A new scheme, [LGPS 2014](#), was introduced in England and Wales on 1 April 2014. This scheme was made under the [Public Service Pensions Act 2013](#). The details are in the [Local Government Pension Scheme Regulations 2013 \(SI 2013/2356\)](#).

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<sup>88</sup> [GAD, Important announcement \(staff transfers\). Broad comparability work against the Local Government Pension Scheme in England and Wales, 27 November 2013](#)

<sup>89</sup> [LGPC Bulletin 113S – March 2014](#)