HM TREASURY

Consultation on the Fair Deal policy:

response to the consultation

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1 Introduction

1.1 The current code ‘A Fair Deal for Staff Pensions’ is a non-statutory policy applying to pension provision for public sector staff.[1] It requires that where staff are compulsorily transferred out of the public sector to an external provider, the new employer must provide a broadly comparable pension scheme for the transferred staff. The policy also requires accrued pension rights to be protected, meaning previous employers must provide bulk transfer arrangements for staff transferring their public service pension benefits.

1.2 The interim report of the Independent Public Service Pensions Commission (IPSPC) found that current pension structures, combined with Fair Deal requirements, are a barrier to plurality of public service provision. The Government announced at the Spending Review 2010 that it would accept the suggestion to review the Fair Deal policy.

1.3 The Government launched its initial consultation[2] on the Fair Deal in March 2011. The consultation closed on 15 June 2011. There were 104 responses received from a broad range of organisations, encompassing independent providers, representatives of employees and employers, local council pension funds, actuaries and finance and legal professionals. Two roundtable stakeholder events were held to further inform the consultation. The Government is grateful to all those who contributed and a full list of respondents is provided at Annex C.

1.4 The Government confirmed via a Written Ministerial Statement on 4 July 2012 that the overall approach to the Fair Deal would be retained, but that this would be delivered by offering access to the public service schemes for all transferring staff. This document sets out the Government’s position in more detail and summarises the responses to the consultation questions.

1.5 This document also consults further on the treatment of those that have already been compulsorily transferred out of the public sector under the previous Fair Deal, and whose contracts are retendered under the new Fair Deal policy. The further consultation questions are set out in Chapter 4 of this document. There is also draft guidance in Annex A which sets out in more detail how the Government’s preferred approach would work in practice.

[1] FAIR DEAL FOR STAFF PENSIONS: PROCUREMENT OF BULK TRANSFER AGREEMENTS AND RELATED ISSUES, *Guidance Note by HM Treasury, June 2004, is at* http://www.hm-treasury.gov.uk/d/pensions_bta_guidance_290604.pdf

[2] *Consultation on the Fair Deal policy: treatment of pensions on compulsory transfer of staff from the public sector*, HM Treasury, March 2011

2 The operation of the existing Fair Deal policy

2.1 The Government sought responses to the following questions in relation to the operation of the current Fair Deal policy:

Box 2.A: Question 1

The Government welcomes views on whether there are any people or organisations who may be affected by this consultation other than those listed in paragraph 1.7 (of the consultation document).

Box 2.B: Question 2

The Government welcomes views from respondents on how the Fair Deal policy operates in their experience, where this is considered relevant to future policy.

2.2 Most respondents acknowledged that the consultation document correctly set out the people and organisations that may be affected by the consultation. Some respondents gave suggestions for others that may be affected. These included representative groups such as trades unions, pension scheme providers and administrators, those working alongside transferred employees, and taxpayers as service users. In relation to the Local Government Pension Scheme, some respondents replied that commissioners, administering authorities, local government pension funds and investment vehicles used by local government pension funds may be affected by any change to the current policy.

2.4 A wide range of views were expressed on how the Fair Deal policy currently operates. The main advantage of the current policy identified by respondents was that it is an effective tool in retaining workforce cooperation on transfer and ensures that pensions are dealt with equitably. Some respondents who had experience with the Local Government Pension Scheme found Admitted Body Status[1] to be successful in removing the burden of providing a broadly comparable pension from the employer.

2.5 However some respondents found that the Fair Deal policy carries with it unnecessary risks and is an administratively onerous process. The costs and risks of the requirement to provide 'broadly comparable' pension provision and the offer of bulk transfers (both for inward and onward transfers) are seen to act as a deterrent to organisations bidding for contracts, especially amongst smaller firms.

2.6 A number of respondents found that, in their experience, the implementation of the policy is inconsistent and not well understood by the parties involved. This leads to complications, such as not covering for any full bulk transfer shortfall, when retendering contracts. Some

[1] Admitted Body Status allows staff transferring from local government to retain membership of the Local Government Pension Scheme, by allowing their new employer to participate in the scheme. Further information is available at http://www.communities.gov.uk/publications/localgovernment/abslocalgovpensions

respondents expressed views that Admitted Body Status was expensive and onerous and that there had often been difficulties for employers in funding the pension arrangements, especially on cessation of contracts if they are required to fund any deficit.

Government response

2.7 The Government thanks respondents for their views on who will be affected by the initial consultation. These have been taken into account when considering the responses for the other questions posed in the consultation and also when considering who is affected under this second consultation.

2.8 The Government recognises that, although the current Fair Deal policy does provide assurance to employees that their pension provision will be maintained, the operation of the policy is confusing and may be a deterrent to potential independent providers.

3 Reform of the Fair Deal policy

3.1 The Government sought responses to the following questions on reforming the current Fair Deal policy:

Box 3.A: Question 3

The Government welcomes views on whether there are any objectives which should be taken into account other than those set out in paragraph 3.2 (of the consultation document) when developing future policy.

Box 3.B: Question 4

Is there a case for changing the current Fair Deal policy?

Box 3.C: Question 5

If [there is a case for changing the current Fair Deal policy], what should the policy cover, including:

a) what (if any) stipulations should be made regarding the level and type of future pension provision following transfer to be provided for future accrual;

b) what should be the treatment of previously accrued benefits? For example should CETV's be the norm or should bulk transfer agreements continue to be used and, if so, in what form; and

c) what should the requirements be on subsequent compulsory transfer to an independent provider or return to the public sector?

Box 3.D: Question 6

In setting out a proposal for future policy, respondents are asked to set out:

a) how it would deliver against the objectives set out in Chapter 3 (of the consultation document) and any others considered relevant;

b) the impacts on those involved, including employers and employees;

c) if possible, how much the proposal would cost or save the taxpayer compared to the current Fair Deal arrangements; and

d) any past experience, whether in the public sector or otherwise, which informs these proposals.

3.2 To assist in the evaluation of options, the consultation document requested views on the following objectives of the Fair Deal 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.

- **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. These costs and risk are ultimately borne by the taxpayer.

3.3 It is recognised that there are tensions between these objectives, and that different approaches will satisfy each of them to a differing extent.

3.4 Most respondents were in broad support of some or all of the objectives put forward in the consultation document with many expressing the view that an appropriate balance would need to be struck between them.

3.5 Almost all respondents agreed that delivering value for money for the taxpayer was an important objective with many stressing that the quality of service should be preserved.

3.6 Some respondents considered providing an appropriate level of protection to public sector employee's pension provision to be the most important objective. Others argued this objective to be creditable but unaffordable and that protection of pension rights does not necessarily or automatically retain workforce engagement or skills.

3.7 A large number of respondents agreed that removing barriers to plurality of public service provision is important. Some argued that plurality should be achieved without removing protection of employees' pension provision.

3.8 There was broad agreement that the costs and risks of pension provision should be allocated appropriately, though there was no consistent view of what this meant in practice. Some considered that pension risks should remain with the Government upon transfer as the Government is best placed to bear those risks. Others considered that new employers should bear the pensions risks as part of the terms of delivering the service. Some respondents who were in favour of fundamental reform considered that more risk should be transferred to employees, as is the case for private sector employees transferred under TUPE.

3.9 In addition to the objectives highlighted in the consultation document, some respondents considered the following objectives to be relevant:

- **Transparency and simplicity.** Some respondents recommended clarifying the policy to aid contractors and employees' understanding of the implications, especially the costs and risks, of undertaking a transfer;
- **Ensuring the funding stability of pension schemes (particularly relevant for the LGPS).** A number of respondents raised the impact of falling membership levels on the stability of investment strategies of LGPS funds;
- **Encouraging high quality pension provision.** Some respondents suggested Fair Deal should promote good quality pension provision to be offered by organisations taking on delivery of public services; and
- **Equality of treatment for all employees providing a public service.** A number of respondents recommended that the Fair Deal policy should allow all employees carrying out a public service to receive the same pension provision, whether transferred or not.

3.10 A wide range of views were expressed around the best approach to reforming the Fair Deal policy which can be broadly grouped into the following categories:

- no or partial changes to the Fair Deal policy;
- fundamental reform of the Fair Deal policy; and
- abolishing the Fair Deal policy.

No or partial reform of the Fair Deal policy

3.11 Several respondents favoured no change or partial reform of the Fair Deal policy.

3.12 The principal reason cited in favour of this approach is that the Fair Deal policy provides an appropriate level of protection to public service employees' pension provision when the services they deliver are outsourced. A number of respondents disagreed, arguing that the Fair Deal policy currently provides too much protection to public servants in comparison to their private sector counterparts.

3.13 Some respondents argued that the Fair Deal delivers value for money by ensuring the orderly transfer of staff to new employers. However, those that consider the Fair Deal policy to be a barrier to plurality argued independent providers, which could otherwise deliver savings and efficiencies for the taxpayer, were unable to compete to provide services due to uncompetitive pension costs.

3.14 Some respondents recognised that new scheme designs for public service pensions will mean employers bearing a lower level of risk as future public service pensions will be based on career average rather than final salary. This could be beneficial for independent providers of services providing a broadly comparable pension.

3.15 A large number of respondents suggested that the Fair Deal policy should be simplified to introduce more clarity to the process. In particular, respondents felt that the bulk transfer arrangement is complicated to administer and understand.

Fundamental reform of the Fair Deal policy

3.16 A number of respondents suggested that the Fair Deal should set a minimum standard of provision but without specifying the type of pension scheme (e.g. defined benefit or defined contribution) to be provided. Respondents suggested the Government should set the contribution rate that employers should be required to pay into a defined contribution pension scheme, which should be equal to the contributions paid by public sector employers in respect of the public service pension schemes. They argued this would level the playing field in terms of short-term costs without requiring private sector companies to take on the risks associated with defined benefit pensions that they consider to be a barrier to plurality.

3.17 Those that favoured a defined contribution approach generally considered that the transfer of accrued rights to new schemes should be provided by the statutory minimum Cash Equivalent Transfer Value (CETV). They felt that this approach would simplify the outsourcing process as well as reducing the risk and cost of transfers. CETVs are the value which individuals can take to another pension scheme instead of holding a deferred pension. This will not allow members to benefit from maintaining the final salary link[1] as it is a transfer of cash to a defined contribution scheme. Some respondents argued this approach would not provide sufficient protection to pension scheme members.

3.18 A number of respondents, particularly trades unions, argued that the Government is better placed to hold the risk associated with pension provision. This is due to the very long-term nature of public service pension provision, which are usually defined benefit schemes, compared to other types of private sector pension liabilities. These respondents suggested retaining access to public service pensions when a member leaves as a way of leaving risk where it is better managed. Smaller providers were also especially keen on this option.

Abolishing the Fair Deal policy

3.19 A minority of respondents suggested the Government should abolish the Fair Deal policy. Some respondents argued that outsourcing programmes have been successful in the private sector where the Fair Deal does not apply and the minimum stipulated under TUPE is offered. Others who argued in favour of this option suggested that significant taxpayer savings could be made through reduced pension costs and by the removal of pensions as a barrier to the plurality of public service provision.

3.20 A small number of respondents suggested that Fair Deal gives extra protection to public sector employees not afforded to other employees subject to TUPE policy. These respondents believed that Fair Deal does not allow for fair competition, can discourage potential providers from delivering these services and risks the capability of third sector organisations taking on the risk of defined benefit pensions.

3.21 Those respondents that suggested abolishing Fair Deal proposed that any public sector employee transferring to an independent provider should be given membership to that provider's pension scheme. There should be no bulk transfer arrangement and the new provider should not have any regard for the employees' pension arrangements built up whilst working for the public sector employer. Respondents believe that these employees should be treated in the same way as if they had left employment. Any accrued rights would not be transferred and employees would become deferred members of the public service scheme.

[1] This allows accrued benefits to maintain the connection with an employees pay, even when benefits are transferred, so that all accrued pension can be calculated on final earnings defined by the pension scheme.

Government response

3.22 The Government continues to believe that all the objectives set out in paragraph 3.1 are relevant to the future of the Fair Deal policy. Delivering value for money for the taxpayer is essential. Removing barriers to plurality of public service provision can help to deliver value for money and improve the quality of public service delivery but only if workforce engagement and key skills are retained. The costs and risks of pension provision must be allocated appropriately to ensure value for money for the taxpayer is delivered in the short-term and the long-term.

3.23 The additional objectives provided by respondents have also been considered for the new Fair Deal policy. Ensuring that the new Fair Deal policy is transparent will allow all stakeholders involved to make informed decisions. The Government believes that good quality pension provision should be promoted and that public service pension schemes should set a benchmark for others to follow.

3.24 The Government thanks respondents for their views on changing the Fair Deal policy.

3.25 It is clear that respondents felt that employers did not want to bid for contracts that required them to take on defined benefit risk. They felt that this was a barrier to plurality and it was difficult for employers to bid for contracts with the commitment of taking on this risk.

3.26 Requiring employers to hold defined benefit risk creates a strong incentive amongst employers to move employees out of the scheme. Some respondents argued that practice of Fair Deal is not as secure as the principle and employees find it hard to avoid losing their defined benefit schemes.

3.27 After taking into account these views, the Government announced on 20 December 2011 that the overall approach to the Fair Deal would be maintained, but in future this should be delivered by offering access to public service pension schemes for compulsorily transferred staff. This means that all staff whose employment is compulsorily transferred from the public sector under TUPE 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 the Fair Deal, which will then no longer apply.

3.28 The Government believes that this option provides an appropriate balance between the objectives outlined in paragraph 3.2. Protection for transferred employees will be maintained, while the lower costs of providing defined benefit pensions via the public service schemes will provide better value for money for the taxpayer and reduce barriers to plurality in the provision of public services. The new scheme designs, which incorporate an employer cost cap, will ensure that risk is shared appropriately between employers, scheme members and taxpayers. Allowing transferred employees to remain in the public service schemes will also simplify the Fair Deal policy, in particular by removing the need for complex bulk transfers when contracts are retendered.

3.29 The Government is currently considering the specific mechanisms that will be needed to ensure that the new Fair Deal is implemented and administered effectively. The existing policy will continue to apply until the start date for the new policy is announced.

3.30 Further details of how this policy will apply can be found in the draft Fair Deal guidance in Annex A.

4 Employees whose contracts are retendered

4.1 The Government sought responses to the following questions on subsequent transfers after an initial Fair Deal transfer:

Box 4.A: Question 7

The Government welcomes views on what approach should be taken when previously transferred public services involving compulsory Fair Deal staff transfers are retendered. The Government also welcomes details of any past experience informing respondents' proposals.

Box 4.B: Question 8

The Government welcomes views on what approach should be taken for employees returning to the public sector having been transferred out in the past under the Fair Deal policy. The Government also welcomes details of any past experience informing respondents' proposals.

4.2 There were varied views on the best approach to applying the Fair Deal policy to staff who have already been compulsorily transferred out under the existing Fair Deal policy, and who are transferred to another independent provider or are brought back in to the public sector when contracts are retendered after the new Fair Deal policy comes into operation. The consultation document presented two options:

- **Maintain the current Fair Deal policy for employees that have already transferred out.** Under this option, any employee currently covered by Fair Deal would be entitled to a pension that is the same as, or similar to, the one they had when originally left the public sector. The new employer would need to continue to provide a scheme broadly comparable to the one the employee originally left – in many cases a final salary scheme[1]; and

- **Reform the Fair Deal policy so that future accrual is based on the public service pension scheme currently open to future accrual.** Under this option, any employee currently covered by the Fair Deal policy would be entitled to a pension which is broadly comparable to the current public service scheme open to new members. Any employee returning to the public sector would accrue further pension rights in the scheme that was open to new accruals – which would normally be a career average revalued earnings ('CARE') scheme. The Government's intention is that after 2015 these will be CARE rather than final salary schemes.

[1] Paragraph 21(1) of the 1999 HMT guidance on the Fair Deal http://www.hm-treasury.gov.uk/d/staff_transfers_145.pdf (Annex A) states that where a contract for services is terminated and the work is given to another contractor, the pension arrangements made for staff transferring from the first to the second contractor would be at least broadly comparably "with the public service pensions scheme which those staff were in originally".

4.3 Most respondents agreed that the Fair Deal should continue to apply in some form to those that are transferred after a contract is retendered. This was because they felt that, should there be no requirement for a future provider to fulfil the Fair Deal obligations, the original provider undertaking the first transfer will be at a disadvantage in bidding to keep the contract, resulting in unequal competition.

4.4 Respondents that wanted to maintain the current Fair Deal cited the reasons that are expressed in Chapter 3 of this document under 'No or partial reform of the Fair Deal policy'. They believed that the Fair Deal provides an appropriate level of protection for transferring staff and that continuing the existing Fair Deal would mean that retendered contracts would be awarded on quality rather than cost grounds.

4.5 An alternative solution posed by many respondents was that staff should return to an appropriate public service pension scheme. Reasons cited for this are that employers will not bid for contracts that require them to take on defined benefit risk, and that this risk would be better held by the Exchequer. Similarly, employers are increasingly divesting themselves of existing defined benefit risks. Therefore, keeping the Fair Deal in its current form is a real impediment to open public services, as it may deter other providers from bidding for contracts when they are retendered. It also creates a strong incentive amongst employers holding existing Fair Deal defined benefit risk to move employees out of their existing Fair Deal scheme.

4.6 There were a number of respondents that believed that where contracts are retendered, pension provision should be based on current provision in the public sector i.e. a scheme that is broadly comparable to schemes currently open to new members in the public sector. Reasons cited for this centred mainly on the fact that the benefit provision under contracts may be significantly out of step with the current benefit provision had the affected staff remained in the public sector. They believed that any change to the existing Fair Deal should apply across all future retenders.

4.7 For staff whose contracts are being retendered, another view expressed by some respondents was that any accrued pension should be deferred and the future pension provision should be set at the level offered to the equivalent employees of the organisation who do not benefit from the Fair Deal. These respondents felt that it was unfair for employees who benefit from the Fair Deal to have different benefits to other employees of the same organisation.

4.8 A small number of respondents suggested that the Fair Deal should only provide a temporary protection for employees transferring out to an independent provider that is limited to the initial length of the contract, say five or ten years. After that initial period, the independent providers could vary pension arrangements after normal consultation with employees.

Government response

4.9 The Government thanks respondents for their views on retendered and returning staff. These have been taken in to account in formulating and developing the detailed proposals outlined in the following chapter.

4.10 The Fair Deal policy currently requires that broad comparability of pension terms should apply in second and subsequent rounds of contracting. Therefore, under the current policy, staff who have been transferred out of the public sector and are members of a broadly comparable scheme, continue to receive a pension which is broadly comparable to the scheme they were in when they left the public sector (likely to be a final salary scheme). Their counterparts, who are subject to tender and then subsequent retendering under the new Fair Deal, will retain access to public service schemes. The Government's intention is that after 2015 these will be CARE rather than final salary schemes.

4.11 The Government believes that the existing policy makes retenders of contracts involving staff who already benefit from the existing Fair Deal less attractive to independent providers. This is due to the high costs independent providers face in offering a final salary pension. It could also mean that public service workers being transferred out and retendered under the new Fair Deal will be receiving different (i.e. CARE) pension benefits to public service workers retendered under existing current Fair Deal. This could be perceived as unfair.

4.12 Another alternative would be for employers themselves to offer CARE schemes. This would involve revising contracts to require employers to offer access to schemes which are in line with the public service pension offered at the time of retendering (subject to any past contractual obligations in place which will take precedence). This would mean that, for future service, employers would have to offer a broadly comparable CARE pension, including transitional protection for those close to their Normal Pension Age.[2] The move to CARE schemes could make this type of provision more affordable for independent providers and provide the same benefits to outsourced public service employees as those that are not outsourced, but would leave the pension risk with the provider.

4.13 Having considered respondents' views on the questions in this chapter and previous chapters, the Government believes that the policy objectives would be best delivered by allowing employers the option of providing broadly comparable CARE schemes or providing access to a public service pension scheme upon retender. Employees who move back to the public sector would have access to a public service pension scheme. While it is important to maintain protection for those who have been transferred out under the existing Fair Deal i.e. they should not be worse off as a result of having been compulsorily transferred out, it is also important to avoid the unfairness that would result if they were better off for being transferred out. However, under these proposals, their pension will be as good as it would have been if they had stayed in the public service.

4.14 On either option, any accrued rights transferred from the independent provider's pension will be protected. This will necessitate a bulk transfer into the new pension scheme arrangements (whether that is the new independent providers scheme or the public service pension scheme), unless the employee chooses to become a deferred member of the old scheme. Employees who transfer their rights, to a public service scheme or a broadly comparable CARE scheme, will be able to maintain their final salary link for any previous service accrued in the old final salary schemes. Employees who took the option of deferring their pension when they originally left the public service scheme will be treated in the same way as other deferred members when returning to the public service scheme. This means that they will not benefit from the final salary link upon taking their pension if they do not return to the public service scheme within five years of leaving.

4.15 The Government would welcome views on how this policy should be taken forward. Further consultation questions are set out in the next section of this document, and the government's proposed approach is set out in more detail in draft guidance in Annex A.

[2] Workers in the main public service pension schemes who, as of 1 April 2012, had 10 years or less until they reach their Normal Pension Age (NPA) will see no change in when they can retire, and no decrease in the amount of pension they receive at their current NPA. In addition to this transitional provision, tapering provides some protection to those who were between 10-14 years from their current NPA on 1 April 2012.

Further consultation

Box 4.C: Question 1

The Government welcomes views on the proposed application of the Fair Deal policy to staff previously transferred under the existing Fair Deal. In particular, the government would welcome views on:

a) whether organisations employing these staff should be able to continue to offer a broadly comparable pension scheme to staff already transferred out under Fair Deal or;

b) whether access to the relevant public service pension scheme should be a term of business for potential bidders for retendered contracts (including incumbent providers) and;

c) at what stage in the contracting process employers should be required to set out how they will offer pension provision for transferred staff – through access to the public service scheme or through offering a broadly comparable scheme.

4.16 The Government understands that where staff have been contracted out under the previous Fair Deal policy and contracts are subsequently retendered, a number of different situations may arise:

- employees stay with the existing independent provider;
- employees move to a new independent provider;
- employees are brought back into the same part of the public sector that they left; or
- employees are brought back into a different part of the public sector than that which they were originally in.

Box 4.D: Question 2

The Government welcomes views on whether there are any other situations that may arise when contracts covered by Fair Deal are retendered.

Box 4.E: Question 3

The Government welcomes views on which scheme employees returning before 2015 should be able to access. This could be the one they originally left, the contracting authority's currently open scheme, or the scheme most broadly comparable to the one they originally left.

Box 4.F: Question 4

The Government welcomes views on how bulk transfers for employees covered by the existing Fair Deal will work when those contracts are retendered under the new policy.

Equality impacts

4.17 The Government has considered the potential equality impacts of the proposed changes to the Fair Deal policy for employees who have already been transferred out of the public sector.

4.18 The proposed approach outlined above would mean that employees returning to a public service scheme may see a change to their future benefits. For most of these staff, this change will come about because they will join a CARE scheme from a final salary scheme.

4.19 The Government does not hold data on the protected characteristics of those people that have been transferred out of the public sector under the Fair Deal. However, the equalities impacts of the change from a final salary to a CARE scheme for the public sector workforce as a whole have been considered by HM Treasury in the 'Central Equalities Impact Analysis' published alongside the Public Service Pensions Bill on 13 September 2012.[3] This analysis found that pension scheme members will continue to receive a high quality pension, with a guaranteed payment in retirement protected from high inflation, regardless of their gender, race, age, disability, gender reassignment, pregnancy and maternity, religion or belief, sexual orientation or marital/civil partnership status. Given this, the Government does not consider that the proposed features of the new Fair Deal policy will result in any differential impact to persons with any of the protected characteristics. However, the Government would welcome further views on this matter.

Box 4.G: Question 5

The Government welcomes views on whether the proposed approach to the Fair Deal policy for employees that have already been transferred out of the public sector will have differential impacts on people with protected characteristics.

Fair Deal guidance

4.20 Annex A to this document sets out the draft guidance for the new Fair Deal based on the proposals outlined above.

Box 4.H: Question 6

The Government welcomes views on this draft guidance and suggestions for further areas that need to be covered.

[3] http://services.parliament.uk/bills/2012-13/publicservicepensions/documents.html

A Fair Deal draft guidance

Introduction

A.1 As announced in July 2012, the Government is implementing reforms to the main public service pension schemes, as set out in the Proposed Final Agreements for these schemes. In line with these agreements, the Fair Deal policy will be retained but will be delivered by allowing employees transferred out of the public sector the option to remain in the public service schemes.

A.2 The purpose of this draft guidance is to set out how the Government intends to take forward changes to the treatment of pension issues in compulsory transfers of public service staff to independent providers of public services. A final version of this guidance will be issued in advance of implementation of the new Fair Deal policy.

A.3 The guidance sets out how the new Fair Deal policy will operate in relation to the following groups of staff:

- staff transferred out of the public service for the first time;
- staff that are currently working for an independent provider and are subsequently transferred to another independent provider or back into the public sector; and
- staff that are currently working for an independent provider where a subsequent retendering leads to the incumbent retaining the contract.

A.4 The Government proposes to reform the Fair Deal policy by extending access to public service schemes to staff compulsorily transferred out of the public sector in the future. This draft guidance sets out how this policy will operate once implemented.

A.5 In addition, this draft guidance sets out the terms under which staff already transferred to independent providers after 1999 under the previous Fair Deal will be allowed renewed access to the public service pension schemes when contracts are retendered.

A.6 This guidance will not cover machinery of government transfers, where employees are moved between government entities. These transfers are dealt with separately in the context of the Cabinet Office Statement of Practice (COSOP) guidance. COSOP will be reviewed in the light of changes to the Fair Deal and the changes to pensions arising from the implementation of the pension reforms.

Previous Fair Deal policy

A.7 The Fair Deal, introduced in 1999, is a non-statutory published policy protecting the pension provisions of public service workers who have their employment compulsorily transferred out of the public sector. The original Fair Deal policy was intended to ensure that staff being compulsorily transferred out of the public sector were treated fairly, and to ensure that concerns around pension provision did not act as a barrier to gaining staff support for such transfers.[1]

A.8 The Fair Deal policy applies where public service staff are compulsorily transferred to a new employer outside of the public sector, and applies both to the future service and accrued rights of those staff. The 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, under which staff can continue to earn pension benefits for future service. Staff must also be given options for the handling of accrued benefits which they have already earned (either 'preserving' their accrued benefits in the pension scheme which they are leaving, or transferring them to the new employer's pension scheme via bulk transfer arrangements, without suffering the normal disadvantages which apply to early leavers of defined benefit pension schemes).

A.9 The new employer's scheme is 'broadly comparable' if it is certified by an actuary as being overall, materially, at least as good as the public service pension scheme which staff are leaving and the scheme meets a number of qualitative requirements. In the professional opinion of the actuary, there must be no identifiable group that will suffer material detriment overall in terms of their future accrual of pensions benefits under the new scheme as a result of the transfer.

A.10 This arrangement has maintained the level of pension provision for those compulsorily transferred out of the public sector. However, given current and future public service pension structures (compared with provision more generally in the private sector), this can make it harder for independent providers to deliver public services because providing a 'broadly comparable' defined benefit pension scheme can be significantly more expensive and have greater risk for independent providers.

New Fair Deal for newly transferred staff

A.11 When the new Fair Deal is implemented, all staff whose employment is compulsorily transferred from a public sector employer under TUPE, to independent providers of public services, will be able to retain membership of their current employer's pension arrangements. This will replace the current requirement to provide broadly comparable pension arrangements and offer bulk transfers under the existing Fair Deal, which will no longer apply. Staff will no longer be required to make a decision on whether to transfer their accrued public service pension benefits or leave them in deferment.

A.12 Scheme specific mechanisms for the implementation of the new Fair Deal policy – such as the process for determining employer contribution rates – will be decided by schemes, subject to HM Treasury consent. Further details of these mechanisms will be published in the final version of this guidance.

A.13 The new Fair Deal policy, and therefore this guidance, will apply in the same circumstances as the previous Fair Deal policy. Transfers from local government, and other best value authorities, will continue to be outside Fair Deal. The impact of the new Fair Deal will be considered by the Department for Communities and Local Government, and other Departments, in view of the extant Best Value Authorities Staff Transfers (Pensions) Direction 2007, together with Admitted Body Status in the Local Government Pension Scheme.

[1] *Staff Transfers in the Public Sector, Statement of Practice,* was published in January 2000. Annex A of this document is the 1999 HM Treasury Guidance Note *Staff Transfers From Central Government: A Fair Deal for Staff Pensions http://www.hm-treasury.gov.uk/d/staff_transfers_145.pdf*. A further HM Treasury Guidance Note, *Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues* http://www.hm-treasury.gov.uk/d/pensions_bta_guidance_290604.pdf, was published in June 2004.

Employer responsibilities

A.14 Under the new Fair Deal policy, independent employers will be required to make employer pension contributions to the public service scheme of which the TUPE transferred staff are members. These contributions will, generally, reflect the employer contribution rate paid by the public service employers whose staff are members of the scheme. This contribution rate may vary within the lifetime of the contract according to the result of periodic scheme valuations.

A.15 The scheme administrator/relevant contracting authority and/or scheme manager, will set out the circumstances in which transferred staff will stop receiving access to public service pension arrangements. Access will cease when staff stop working on the public service contract that they worked on at the point of transfer. As a condition of entry to the scheme, employers will be required to immediately inform schemes when staff are no longer eligible for Fair Deal protection. The Fair Deal will cease to apply if an employee voluntarily chooses to move to a different role with different terms and conditions. Accrued pension rights will be deferred in the same way as if that employee had left the public sector.

A.16 Employers will need to provide all information required by the scheme rules regarding payment of contributions and service and salary details, in order that benefits can be properly calculated and paid.

Employee responsibilities

A.17 Employees will continue to pay contributions to the public service pension scheme, and to fulfil any other obligations which apply to members of that scheme.

Scheme responsibilities

A.18 The relevant pension scheme administrators should keep records of employees that are transferred under Fair Deal and employees whose work is retendered. Schemes should work with employees, contracting authorities and employers to ensure that records are kept up to date and the correct contributions are paid. The contracting authority is responsible for interacting with the scheme manager and/or scheme administrators to ensure that records are up to date and to make sure that benefits are calculated correctly.

New Fair Deal for staff already transferred out under previous Fair Deal whose contracts are retendered

A.19 Employers bidding for a contract involving employees covered by the existing Fair Deal policy will have the option of providing those employees with access to a public service scheme, or continuing to provide a broadly comparable scheme. If an employer chooses to offer their own scheme, this will, in future, be required to be broadly comparable to the scheme currently available to comparable employees in the public sector. In line with the Government's planned reforms to public service pensions, after 2015 this is likely to be a CARE scheme, but employers will be required to provide transitional protection to employees who are closest to retirement.[2] An employer will not be able to offer the public service pension scheme to one employee and a comparable scheme to another employee; they will need to decide on one option.

A.20 When a contract is retendered, providers bidding for that contract will need to set out whether they intend to meet the obligations of Fair Deal by offering a broadly comparable

[2] Transitional protection will be offered to those public service workers who, as of 1 April 2012, had ten years or less until they reach their Normal Pension Age (NPA). They will see no change in when they can retire, and no decrease in the amount of pension they receive at their current NPA. In addition to this transitional provision tapering provide some protection to those who were between 10-14 years from their current NPA on 1 April 2012. For further details of transitional protection and tapering, see paragraph A.22.

pension scheme or allowing staff to return to the public service pension schemes, whether or not they are the incumbent holder of the contract. This will only apply to contracts to which the previous Fair Deal applied and have been retendered.

A.21 The new policy will only apply to staff that have not turned down their Fair Deal entitlement and are currently receiving a broadly comparable pension to the one that they left.

Future accrual in the public service schemes

A.22 It is the Government's objective that those public service workers that are given access, who have less than 10 years to their Normal Pension Age (NPA) on the 1 April 2012, will receive transitional protection and therefore see no change in when they can retire, and no decrease in the amount of pension they receive at their current Normal Pension Age. Staff that are 13.5 or 14 years to their NPA on 1 April 2012 will be subject to tapering protection and will be able to accrue rights in the scheme that they are transferred to for a determined period (depending on their age and scheme) before moving over to the new pension schemes that apply from 2015.

Staff without transitional protection

- Employees will join the public service pension scheme most appropriate to their employment.
- The most appropriate scheme will be determined by the scheme manager or by the contracting authority where the scheme manager has delegated that authority. When employees are being brought back into the public sector this may not be the same scheme that they left.

Staff eligible for transitional protection

- Employees will join the public service pension scheme most appropriate to their employment. For many employees, this will be the scheme that they left.
- Staff returning to a public service scheme may join a closed (i.e. final salary scheme) if they would have been eligible for transitional/tapered protection had they been a member of that scheme on 1 April 2012.
- Eligibility for transitional protection will be determined with reference to the scheme deemed appropriate to the employee's new employment, rather than the scheme they left.
- Employees eligible for tapered protection will move into the most appropriate open scheme when their period of tapered protection expires.

Treatment of accrued rights and operation of bulk transfers

A.23 Staff moving back into the public service schemes will have their accrued pension rights protected via a bulk transfer arrangement. As with other types of transfers, this will require a transfer payment to be made by the transferor to the receiving scheme which extinguishes its liability to the person leaving the scheme.

A.24 The relevant public service scheme should set the bulk transfer terms required for the scheme to accept the liability. Such an agreement should allow transferred staff to secure credit for their past service in the public service pension scheme on a day for day basis (or the actuarial equivalent if the differences between the schemes are significantly different). This should be agreed between the actuaries to the public service scheme and the actuaries for the transferring provider's scheme. It will be for the contracting authority to cover the costs of the work that the scheme actuary undertakes in carrying out the bulk transfer action on behalf of the public service pension scheme.

A.25 The 2004 Fair Deal guidance specified that all contracts covering employees protected by the Fair Deal should include clear provisions about how staff pensions should be handled at the end of the contract. All contracts should include an enforceable obligation on the independent provider to allow for an onward bulk transfer agreement on no less favourable terms than the initial bulk transfer into the providers broadly comparable scheme. Each contract ties the scheme receiving a bulk transfer into providing funds for an onward bulk transfer value sufficient, at least, to match the value which would be generated by replicating the terms of the agreement under which the scheme received the inward bulk transfer at the beginning of the contract.

A.26 However, there may be risk that this is insufficient to cover the new liabilities. Under the previous Fair Deal policy, the cost in compensating for any shortfall in the terms demanded by the receiving pension scheme falls on the contracting authority. This feature of the previous Fair Deal policy will be maintained for employees returning to the public service schemes.

Staff to whom this guidance does not apply

Staff transferred out prior to 1999

A.27 The guidance does not apply to staff transferred out of the public sector before the Fair Deal policy was in force – contracts signed prior to 1999 (and many signed before 2000) are not covered by Fair Deal.[3]

A.28 However, the Fair Deal should not be taken to prohibit a contracting authority from applying its provisions to a retendering where the contracting authority recognises the costs of doing so and has made a value for money case for meeting those costs. Compliance with the Fair Deal cannot be prayed in aid of a decision by a contracting authority to commit to costs of staff protection to the Fair Deal standard in circumstances to which the Fair Deal itself does not apply (such as subsequent generation contracts in pre-2000 contract streams). However, in all such cases, contracting authorities should carefully consider the interaction between the interests of staff and quality of service delivery and make their own judgement on the value for money which might be obtained by spending to ameliorate the impact on the pensions of former public service staff of a compulsory transfer of those staff to another contractor at the behest of the contracting authority.

Machinery of Government transfers

A.29 The Fair Deal guidance itself relates only to public sector employees transferred compulsorily to independent providers. It does not apply to transfers of staff within the public sector, such as machinery of government changes. However, the Cabinet Office Statement of Practice (COSOP) on Staff Transfers advises, amongst other things, that the Fair Deal standard for pension protection should be applied to transfers of staff from one public sector employer to another. Pension issues should therefore be regarded as central to early planning for machinery of government changes and other public service reorganisations.

A.30 The treatment of pension costs can raise significant issues, and resolving responsibilities at a late stage can be problematic. There may be issues about the assimilation of transferred staff onto the terms and conditions of the new employer's existing staff with implications for harmonisation of employee pension contribution rates which could have financial implications for employers. For all these reasons it is essential to work through pension issues in the early planning of machinery

[3] The Fair Deal was published by the Treasury in June 1999, and subsequently incorporated into the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector published in January 2000. Fair Deal came into effect immediately on its publication in 1999, but with the provision that contract procurements already underway would not be affected if incorporation of the new pension protections would require an advanced procurement to be aborted or delayed.

of government changes. COSOP will be reviewed in the light of changes to the Fair Deal and the changes to pensions arising from the implementation of the pension reforms.

Other staff not covered by the Fair Deal

A.31 The Fair Deal is not intended to apply to transfers between independent provider employers except in the specific case of staff originally transferred to the independent provider from the public sector under Fair Deal protection who have been continuously employed on delivery of the out-sourced public service since being transferred to the independent provider. The Fair Deal does not therefore cover staff who may be involved in second or subsequent generation contracts that were recruited by the independent provider after the primary transfer. The protection of these staff is not a function of Fair Deal.

A.32 Where contracting authorities judge it appropriate on value for money grounds to make some provision for protection of pensions for staff not covered by the Fair Deal in a re-let they are not prohibited from doing so by this guidance. It will be for them to determine how they will meet the minimum TUPE pension obligations, although access to the public service schemes will not generally be an option for employees that are not covered by the Fair Deal.

B The consultation process

How to respond

B.1 This consultation document is available on the Treasury website at www.hm-treasury.gov.uk. For hard copies, please use the contact details below.

B.2 Responses are requested by 11 February 2013. Please ensure that responses are sent in before the closing date. The Government will also engage directly with interested groups where possible.

B.3 Responses can be sent by email to: fairdealconsultation@hmtreasury.gsi.gov.uk.

Alternatively, they can be posted to:

Public Service Pensions – Fair Deal Consultation,
Workforce, Pay and Pensions Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

B.4 When responding, please state whether you are doing so as an individual or on behalf of an organisation.

Confidentiality

B.5 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

B.6 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be binding on HM Treasury.

B.7 HM Treasury will process your personal data in accordance with the DPA, and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The Government's Consultation Principles

B.8 This consultation is being conducted in accordance with the Cabinet Office's Consultation Principles, which are available at:
http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf.

C Consultation respondents

C.1 The Government is grateful to the following respondents for their contributions to the initial consultation process:

Addleshaw Goddard
Anglia Support Partnership
Amey
Avon Pensions Fund
Association of Teachers and Lecturers
Association of Chief Executives of Voluntary Organisations
Association of School and College Leaders
Assura Medical
Association of Consulting Actuaries
British Dental Association
British Medical Association
Birmingham City Council
Business Services Association
BBS consultants and actuaries
Babcock International Group
Brighter Futures
Business Services Association
Bristol City Council
Barnet Waddingham
Big Life Group
Bedford Borough Council
Confederation of British Industry
Cornerstone
Co-operative group
Centre for Policy Studies
Cornwall council
Charity Finance Directors Group
Chartered Society of Physiotherapy
Cheshire Pension Fund
Chartered Institute of Public Finance and Accountancy
Chartered Society of Physiotherapy
DLA Piper
Devonshire Police
Devonshire Solicitors
Emma O'Regan
Employment Lawyers Association
Essex County Council
Fujitsu
Field Fisher Waterhouse
Gloucestershire County Council
GMB
Greater Manchester Pension Fund
Home Group

Haringey UNISON
Harringey Council
Hackney Council
Hymans Robertson
Hertfordshire County Council
Kent Superannuation Fund
LGG
Liberata
Locality
Leicestershire County council
London Pension Fund Authority
Law Society of Scotland
Local Government Group
Merseyside Pension Fund
Mercer
National Housing Federation
National Association of Schoolmasters Union of Women Teachers
National Union of Teachers
North Yorkshire County Council
Northumberland County Council
Northern Ireland Public Service Alliance
NHS professionals
NHS pension scheme governance group
Oxfordshire county council
Prison Officers Association
Public and Commercial Services Union
Pensions Management Institute
Probation Association
Prospect
Prudential
Pricewaterhouse Cooper
Royal College of Nursing
The Society of Pension Consultants
Steria
Social Enterprise Coalition
Staffordshire County Council
Society of London Treasurers
Scottish Secondary Teacher Association
Southdown
Sacker and Partners
Suffolk County Council
Scottish Secondary Teachers Association
Stockton Council
Thompson Solicitors
Trades Union Congress
Tyne and Wear Pension Fund
Transport for London
The Practice plc
The Pensions Trust
UCATT
University and College Union
UNISON
Unite
Ventura
Voluntary Organisations Disability group
West Sussex county council

Wandsworth Council
Wiltshire Pension Fund
West Yorkshire Police
West Yorkshire Pension Fund
Yate Town Council

HM Treasury contacts

This document can be found in full on our website: http://www.hm-treasury.gov.uk

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

E-mail: public.enquiries@hm-treasury.gov.uk

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