

DELEGATED POWERS AND REGULATORY REFORM COMMITTEE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL

Supplementary Memorandum by the Department for Business, Innovation and Skills

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Innovation and Skills with input from the Department of Health.
2. It identifies a new delegated power in those Government amendments tabled in the House of Lords on 4 March 2015.

Part 11: Employment

New clause after clause 147: Protection for applicants for employment etc. in the health service

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

3. These provisions enable the Secretary of State to make regulations (under the affirmative procedure) which will prohibit a prescribed “NHS employer” from discriminating against a job applicant because it appears to the employer that the applicant has made a “protected disclosure” within the meaning given at section 43A of the Employment Rights Act 1996.
4. The amendment seeks to address a concern (highlighted by Sir Robert Francis QC’s review of whistleblowing in the NHS) that individuals are suffering serious detriments in seeking re-employment in the health service after making a “protected disclosure”. The current whistleblowing legislative framework is not applicable to job applicants. This amendment seeks to address this gap in respect of prospective health service employers in the public sector.
5. The clause provides the Secretary of State with a power to make regulations to prohibit discrimination against a job applicant by a prescribed NHS employer, because it appears to the NHS employer that the applicant has made a protected disclosure.
6. Section 43A of the Employment Rights Act 1996 defines a “protected disclosure” as a qualifying disclosure (which is itself defined under section 43B of the Employment Rights Act 1996, and which includes, for example, “that the health or safety of any individual has been, is being or is likely to be endangered”) which is made by a worker in accordance with any of sections 43C to 43H of the Employment Rights Act 1996. Sections 43C to 43H of the Employment Rights Act 1996 set out the circumstances of the disclosure.
7. The clause defines “NHS employer” as an “NHS public body prescribed by regulations under this section” and sets out a list of bodies that are an “NHS public body” for this purpose. An applicant is defined in the clause as someone applying for a contract of employment, a contract to do work personally or appointment to an office or post. The clause provides that an NHS employer discriminates against an applicant if the employer refuses the applicant’s application or

in some other way treats the applicant less favourably than it treats other applicants in relation to the same contract, office or post.

8. Regulations may: make provision as to circumstances in which discrimination by an employee or agent is to be treated as discrimination by the NHS employer; confer jurisdiction on a tribunal; make provision for or about the grant or enforcement of specified remedies by a court or tribunal; make provision for the making of awards of compensation calculated in accordance with the regulations; make different provision for different cases or circumstances; and make incidental or consequential provision.
9. The Secretary of State must consult the Welsh and Scottish ministers before making regulations prescribing Welsh and Scottish bodies for the purposes of the definition of “NHS employer”.

Justification for delegation

10. The Government considers the delegated power necessary as the detail required to make provision in relation to the matters listed in subsection (4), which are described in paragraph 8 above, is more suitable for secondary legislation. We are following a similar approach to the legislative scheme in section 3 of the Employment Relations Act 1999, which includes a delegated power so that detailed provision, also in relation to discrimination in recruitment practices, can be made by regulations.
11. Subsection 4(f) of the clause says that the Secretary of State may, by regulations, make incidental or consequential provision, changing either primary or secondary legislation, including power to amend Acts of the Scottish Parliament and Acts or Measures of the National Assembly for Wales. This power would be used to ensure that changes made to the law by this clause are reflected in other legislation as appropriate. For example, the regulations may confer a new jurisdiction on an employment tribunal to hear a discrimination claim brought by a job applicant; incidental and consequential amendment may be required to legislation providing for the jurisdiction of employment tribunals.

Justification for procedure selected

12. This power will be subject to the affirmative procedure. The Government considers this to be the appropriate level of parliamentary scrutiny given the nature of these proposals, and it respects Parliamentary involvement where an Act of Parliament is to be amended. It is consistent with the procedure applicable to an instrument made under section 43K(4) of the Employment Rights Act 1996, which also forms part of the whistleblowing legislative framework, and to regulations made under section 3 of the Employment Relations Act 1999, as mentioned above.

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