



**STAFF TRANSFERS IN THE
PUBLIC SECTOR
STATEMENT OF PRACTICE
JANUARY 2000
(Revised November 2007)**

STAFF TRANSFERS IN THE PUBLIC SECTOR STATEMENT OF PRACTICE

Guiding Principles

- The Government is committed to ensuring that the public sector is a good employer and model contractor and client. The people employed in the public sector, directly and indirectly, are its biggest asset and critical in developing modern, high quality, efficient, responsive, customer focused and environmentally friendly public services.
- The Government's approach to modernising public services is a pragmatic one, based on finding the best supplier who can deliver quality services and value for money for the taxpayer. This involves some services or functions being provided by, or in partnership with, the private or voluntary sector, or restructured and organised in a new way within the public sector. The involvement, commitment and motivation of staff are vital for achieving smooth and seamless transition during such organisational change.
- Public Private Partnerships and the process of modernisation through organisational change in the public sector will be best achieved by clarity and certainty about the treatment of staff involved. The Government is committed to ensuring that staff involved in all such transfers are treated fairly and consistently and their rights respected. This will encourage a co-operative, partnership approach to the modernisation of the public sector with consequential benefits for all citizens.

Introduction

1. In order to meet these guiding principles the Government believes that there must be a clear and consistent policy for the treatment of staff, founded upon the provisions of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE), which replaces the Transfer of Undertaking (Protection of Employment) Regulations 1981. This Statement of Practice¹ sets out the framework that the Government expects all public sector organisations to work within to achieve this aim (see paragraph 6 for the coverage of this Statement).

2. TUPE implements the 2001 European Council Acquired Rights Directive. In broad terms, TUPE protects employees' terms and conditions (except certain occupational pension arrangements) when the business or service in which they work is transferred from one employer to another. Employment with the new employer is treated as continuous from the date of the employee's start with the first employer. Terms and conditions cannot be changed where the operative reason for the change is the transfer although changes for other reasons may be negotiated, subject to certain conditions.

3. The Government takes a positive attitude towards TUPE, regarding it as an important aspect of employment rights legislation with the potential to promote a co-operative, partnership approach towards business restructuring and change in the public sector.

¹ Further copies of this Statement can be obtained from Phillip Jones tel. 020 7276 1519 or by email to Phillip.Jones@cabinet-office.x.gsi.gov.uk

4. The Government's strategy in revising this legislation is based on the principle that it must be made to work effectively for all those whose interests depend upon it. This mirrors the Government's approach to employment relations issues generally.

5. In the area of Public Private Partnerships and change in the public sector, the consultations that the Government has undertaken and the representations which have been made, have showed a strong consensus between private sector employers, the voluntary sector, employee representatives and public sector organisations for the application of TUPE to situations where a service or function is contracted out, then retendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector. In any event, the TUPE Regulations 2006 have expanded the previous definition of what constitutes a transfer. It is accepted that there will still be some genuinely exceptional circumstances where TUPE will not apply but it is anticipated that there will be fewer than under the 1981 Regulations. Attempts to orchestrate a non-TUPE situation in other circumstances should not be tolerated. The policy in this Statement of Practice is therefore based on the following principles:

- contracting-out exercises with the private sector and voluntary organisations and transfers between different parts of the public sector, will be conducted on the basis that staff will transfer and TUPE should apply, unless there are genuinely exceptional reasons not to do so. Further guidance in relation to transferring staff from the public sector to a service provider and any subsequent re-tendering is provided at Annex B, "Code of Practice on Workforce Matters in Public Sector Service Contracts" (issued in March 2003 and revised in March 2005);
- this includes second and subsequent round contracts that result in a new contractor and where a function is brought back into a public sector organisation where, in both cases, when the contract was first awarded staff transferred from the public sector;
- 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; and
- there should be appropriate arrangements to protect occupational pensions, redundancy and severance terms of staff in all these types of transfer. Attached at Annex A is HM Treasury's Statement of Practice on Staff Transfers from Central Government "A fair deal for Staff Pensions" which sets out the policy on staff pensions announced by the Chief Secretary on 14 June 1999 that must be followed by Central Government Departments and Agencies, and which Ministers expect to be adopted by other public sector employers. This has been supplemented by further guidance issued in June 2004 "Fair deal for Staff Pensions: Procurement of Bulk Transfer Agreements and related issues", also attached at Annex A.

Coverage

6. This Statement of Practice sets out a framework to be followed by public sector organisations to implement the Government's policy on the treatment of staff transfers where the public sector is the employer when contracting out or the client in a subsequent retendering situation. It applies directly to Central Government Departments and Agencies and to the NHS. The Government expects other public sector organisations to follow this Statement of Practice. Local government is subject to some different considerations particularly the current restrictions in legislation contained in Parts I and II of the Local Government Act 1988. However abolition of CCT from January 2000 and proposals to modify Section 17 of the 1988 Act, as part of the introduction of Best Value, will remove in part obstacles to local authorities following this Statement of Practice. However, in doing so, they must have regard to the need to comply with their best value duties. The Personnel and Human Resources panel of the Local Government Association support the principles set out in this Statement of Practice and have encouraged their adoption by individual local authorities.

7. The Statement of Practice covers the following types of situation that may involve transfers of staff:

- Public Private Partnerships (e.g. following Better Quality Service reviews). This includes contracting-out; market testing; PFI; privatisation and other outsourcing and contracting exercises, (paragraphs 10-16);
- Second and subsequent generation contracting where, when the contract was first awarded, staff transferred from the public sector, (paragraph 12);
- Reorganisations and transfers from one part of the public sector to another, (paragraphs 17-20); and
- Reorganisations and transfers within the Civil Service (where TUPE cannot apply because there is no change in employer but TUPE principles should be followed), (paragraphs 21 and 22).

8. This Statement deals only with the policy framework for the treatment of staff involved in such transfers. It does not offer policy advice or guidance on:

- assessing the options for a particular service or function;
- project appraisal or procurement (except on the application of TUPE);
- managing a contracting exercise;
- how to discharge the obligations when TUPE applies or not;
- or how to secure appropriate pension provision, redundancy or severance terms.

Nor does it remove the need to seek legal advice in each individual case.

9. Detailed guidance on these aspects is provided separately, often tailored for different parts of the public sector to reflect their different needs, and for different types of Public Private Partnership. A list of relevant guidance for these aspects is at Annex B.

Transfers as a Result of Public Private Partnerships

10. This section of the Statement deals with the policy that should be adopted for the transfer of staff from the public sector to a private sector employer or a voluntary sector body. This will be as a result of a Public Private Partnership where a service or function currently performed by the public sector will in future be carried out by a private sector organisation. This may, for example, be a result of a PFI initiative, strategic contracting out or market testing exercises. All will involve some sort of contracting exercise where the public sector organisation (not necessarily the one in which the staff are employed) is the contracting authority.

11. In such transfers the application of TUPE will always be a matter of law based on the individual circumstances of the particular transfer. However, the policy adopted in defining the terms of the contracting exercise can help ensure that staff should be protected by TUPE and that all parties have a clear understanding that TUPE should apply and will be followed. In such transfers, therefore, the public sector contracting authority should, except in genuinely exceptional circumstances (see paragraph 14), ensure that:

- at the earliest appropriate stage in the contracting exercise, it states that staff are to transfer and this should normally have the effect of causing TUPE to apply, although legal advice should always be taken to confirm the applicability of TUPE in individual cases;
- at the earliest appropriate stage staff and recognised unions (or, if none, other independent staff representatives) are informed in writing of the intention that staff will transfer (and where possible when the transfer will take place) and that TUPE should apply;
- potential bidders are then invited to tender, drawing their attention in the Invitation to Tender letter to the intention that staff will transfer and TUPE should apply. The public sector contracting authority should also be aware of the new requirement in the 2006 TUPE Regulations in relation to notification of employee liability information, and legal advice should be taken as necessary. Potential bidders should be also advised that they can, if they wish, submit bids on the basis that staff do not transfer and TUPE does not apply, but that these will only be accepted if they fall within the genuinely exceptional circumstances i.e. unless the bid falls within one of the exceptions at paragraph 14 it must comply with the condition that staff transfer and TUPE should apply;
- the contracting exercise is then operated on the basis that the intention is that staff will transfer and TUPE should apply. Public sector contracting authorities should however consider all bids received. If a tenderer considers that staff should not transfer, they should be asked to give their reasons for this. Tenderers should be reminded if they do not consider that staff should transfer and the contract does not fall within the exceptions in paragraph 14, the contracting authority reserves the right not to accept the tender;
- in a very few cases bids made on the basis staff will not transfer and TUPE not apply will fall within the genuinely exceptional circumstances set out in paragraph 14 and cause the authority to accept the bid. The costs of redeploying staff and redundancies costs to the public sector employer must be taken into account when assessing such a bid. In all other cases the bid

should not be accepted as it will not conform to the contracting authority's view that staff should transfer and TUPE apply; and

- where there is then a contractual requirement that staff should transfer, the requirements of TUPE should be scrupulously followed by the public sector contracting authority who should also ensure that it is satisfied that bidders' proposals fully meet the requirements of TUPE.

Second and subsequent transfers

12. This part of the Statement also extends to the retendering of contracts where, when the contract was first awarded staff transferred from the public sector (irrespective of whether TUPE applied at the time). Where a public contracting authority retenders such a contract then, except in exceptional circumstances (and where the incumbent contractor is successful), TUPE should apply and staff working on the contract should usually transfer. Views should be sought from the current contractor as to whether, from their point of view, there are any exceptional circumstances why staff should not transfer (by reference to paragraph 14). The retendering exercise should then be conducted as described above in paragraph 11.

Transfer of services or functions back into the public sector

13. There may also be circumstances that require a function contracted-out to a private sector contractor or voluntary sector body to be brought back into the public sector on the termination of the contract. If, when the contract was first awarded staff transferred from the public sector (irrespective of whether TUPE applied at the time), then the public sector organisation should ensure that staff working on the contract transfer (and TUPE should therefore apply) into its organisation unless there are genuinely exceptional reasons not to do so. Views should be sought from the current contractor as to whether, from their point of view, there are any exceptional circumstances why staff should not transfer (by reference to paragraph 14). For transfers into the Civil Service, where TUPE applies, then the recruitment provisions of the Civil Service Order in Council and Civil Service Commissioners Recruitment Code are not relevant². The Civil Service Nationality rules, which are statutorily based, will continue to apply.

Exceptions

14. There may be a small number of cases where the policy set out in paragraphs 11-13 may not be followed and TUPE may not apply. There must be genuinely exceptional reasons why this should be the case. Circumstances that may qualify for such exceptions are, broadly:

- where a contract is for the provision of both goods and services, but the provision of services is ancillary in purpose to the provision of the goods; or
- where the activity for which the public sector organisation is contracting is essentially new or a one off project; or
- where services or goods are essentially a commodity bought "off the shelf" and no grouping of staff are specifically and permanently assigned to a common task.

² Civil Service Management Code

15. Where a public sector organisation believes such genuinely exceptional circumstances exist then it should be prepared to justify this, and the departure from the Government's policy (paras 11-13), publicly, if challenged. In central government, the agreement of the relevant departmental Ministers may need to be obtained before such an exception is made.

16. In such exceptional cases where staff do not transfer and TUPE does not apply, the public sector organisation should, in the case of first generation contracts, seek to identify as soon as possible with the contractor any staff that will be taken on voluntarily by the contractor³; and then, where possible, to redeploy those members of staff remaining within the public sector organisation (the costs of such redeployments and possible resulting redundancy payments must be taken into account when evaluating the bid).

Transfers and Reorganisations within the public sector

17. TUPE can apply to the transfers of a function from one part of the public sector to another where there is a change of employer. This, for example, can include⁴:

- Transfers between local government and civil service Departments and agencies
- Transfers between local government and NDPBs
- Transfers between local government and the NHS
- Transfers between the NHS and Civil Service Departments and Agencies
- Transfers between the NHS and NDPBs
- Transfers between NDPBs and civil service departments and agencies

18. The application of TUPE will, again, always be a matter of law based on the individual circumstances of the particular transfer. The amended Acquired Rights Directive directly legislates the *Henke* judgement of the European Court of Justice that: an administrative reorganisation of public administrative authorities or the transfer of administrative function is not a transfer and, therefore, as a matter of law, does not fall within the Directive. This provision in the Directive has been incorporated into the 2006 TUPE Regulations at 3(5). Case law⁵ suggests that it excludes from the legislation's application only a relatively limited range of situations involving the transfer of entities pursuing non-economic objectives within the public sector. Nevertheless the issue has still to be tested fully in the tribunals and courts. The *Henke* exception has been thought to apply where: the reason for a transfer is only because there is a change of geographical boundaries and the type of public sector body carrying out the function does not change (e.g. the transfer of administrative staff as a result of changes to police authority boundaries); or where the main function is a judicial, quasi-judicial or quasi-judicial regulatory function (e.g.

³ Public Sector organisations should be aware that the transfer of a major part of the workforce, in terms of numbers or skills, may cause TUPE to apply.

⁴ This list is not exhaustive.

⁵ *Mayeur v Association Promotion de l'Information Messine*: C-175/99 2000 IRLR 783, ECJ and *Collino v Telecom Italia SpA*: C-343/98 2000 IRLR 788, ECJ. These cases limit the application of the *Henke* exception to cases involving simply a re-organisation of public administrative structures or the transfer of administrative functions between public administrative authorities.

the creation of the Financial Services Authority) and incapable of being performed other than by a public sector authority. Officeholders who are not workers are also excluded from the scope of the Directive.

19. However, transfers at the instigation and under the control of Central Government will usually be effected through legislation, in particular those involving Officeholders. Provision can then be made for staff to transfer on TUPE terms, irrespective of whether the transfer is excluded from the scope of the Directive implemented by TUPE. Departments must therefore ensure that legislation effecting transfers of functions between public sector bodies makes provision for staff to transfer and on a basis that follows the principles of TUPE along with appropriate arrangements to protect occupational pension, redundancy and severance terms.

20. Section 38 of the Employment Relations Act also includes a power that can be used to apply the requirements of TUPE specifically to transfers outside the scope of the Directive e.g. Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999 (SI 2511/1999). The DTI should be consulted about any proposal to exercise this power. Where, for whatever reason, this power or other legislation is not used there will be no legal requirement or obligation in such cases for staff to transfer to another part of the public sector where the function is to be performed (as to attempt to compel them would, in effect, constitute a unilateral change in their employment contract by imposing a change of employer). In such cases, as a matter of policy, public sector bodies should ensure that the principles underpinning TUPE are followed, so staff are offered the opportunity to transfer on terms that are, overall, no less favourable than had TUPE applied. They should also ensure appropriate pension provision and redundancy and severance terms. Staff who choose not to transfer should, where possible, be redeployed within the transferring public sector organisation.

Transfers and Reorganisations within the Civil Service

21. Reorganisation and transfers between Central Government Departments and agencies (i.e. within the Civil Service) do not involve a change in employer and TUPE therefore cannot apply. However, terms and conditions of employment do vary between different departments and many of the considerations addressed in the Statement for other types of transfer may also apply.

22. As a matter of policy, therefore, such reorganisations and transfers between Central Government Departments will be conducted on the basis that:

- as a general rule, when functions are transferred from one department to another staff will be transferred with the work;
- departments should, however, make every effort to provide an opportunity for those who wish to stay with or return to their original department to do so, having regard to ensuring consistent treatment of staff affected and the needs of the work;
- departments should ensure that wherever possible the principles of TUPE are followed. The existing terms and conditions of staff cannot be changed unilaterally, over time; the receiving department may aim to move, through negotiation with staff, towards fuller alignment of the terms of transferred staff to those of the main body of staff.

- staff and their recognised unions are informed at the earliest appropriate stage of the reorganisation and transfer.

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*H M Treasury June
1999*

**STAFF TRANSFERS FROM CENTRAL GOVERNMENT:
A FAIR DEAL FOR STAFF PENSIONS**

Guidance to Departments and Agencies

Introduction

1. This paper sets out in general terms how pensions issues are to be handled in future when staff from central government Departments and Agencies are transferred to a new employer as part of a business transfer. The new approach set out here builds upon earlier guidance, and extends and strengthens its application in order to ensure that staff are treated fairly. It is mainly concerned with transfers between the Government and the private sector when contracts are awarded under public-private partnership (PPP) deals.

2. *Better Quality Services* gives guidance on the treatment of staff pensions in PFI and PPP deals, and there are also policy statements and guidance issued by the Treasury Task Force covering, for instance, the Government's continuing commitment to dialogue with staff and other interested parties about the way in which PPP projects are managed.

3. This new guidance should be reflected in procurement practice as soon as is practicable without disruption to projects which are already at an advanced stage. Detailed guidance will be issued to contracting authorities later this year.

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 12 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.

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.

FUTURE SERVICE

10. The focus of this guidance is upon those cases, likely to be in the majority, where a business transfer means that staff have to be 'early leavers' of the occupational pension scheme associated with their former employment. The Government has no plans to seek amendment to the Superannuation Act 1972 to broaden the categories of employees eligible for membership of the PCSPS. Where Civil Servants transfer to private sector employment they will therefore cease to be eligible for PCSPS membership, and their ability to earn further occupational pension benefits through future service will depend upon the occupational pension arrangements offered by the new employer.

11. Not all private sector employers offer occupational pension schemes which are as valuable to employees as the public service schemes, and where good quality pension schemes are offered they typically differ in major respects: for instance, the age of normal retirement, the rate of accrual of pension entitlements, provision of a lump sum on retirement, the degree of indexation of pensions increases, and so on. If care were not taken over staff pensions, the unintended upshot of a business transfer might be a detriment to staff pension benefits.

12. The terms of the business transfer should specifically protect staff pensions. The arrangements made to achieve this need to be considered within the overall context of the business transfer negotiations between the contracting authority and prospective private sector partners and should not be so cumbersome or expensive to administer as to militate against finding a justifiable business solution.

13. To require that the new employer should offer transferring staff access to a pension scheme which is in all respects identical to the public service scheme which they are leaving would be unduly restrictive. It would add to administrative costs and it could hamper harmonisation of terms and conditions. In the case of the PCSPS it would be an unrealistic requirement, because a non-statutory scheme which was identical to the PCSPS would not qualify for tax exemption. A requirement for an identical scheme would also prevent employers from offering different benefit packages, more in line with private sector standards, which might overall be of greater value to many transferring employees.

14. The guiding principle should be that the new employer offers transferring staff membership of a pension scheme which though not identical is '**broadly comparable**' to the public service pension scheme which they are leaving. To satisfy the criteria for broad comparability there must be a rigorous scrutiny of the alternative pension arrangements by a professionally qualified actuary which compares the alternative scheme with the public service scheme in detail. A broadly comparable scheme will be one which, in the professional opinion of the actuary, satisfies the condition that there are no identifiable employees who will suffer material detriment overall in terms of their future accrual of pension benefits under the alternative scheme. The PCSPS takes actuarial advice from the Government Actuary's Department, as do a number of other public service pension schemes.

15. There may be cases where although there are no identifiable classes of employee who would be materially worse off overall, transfer to the new scheme might be materially detrimental to a few individuals. In such cases it will be a matter of judgement whether the new scheme should be adjusted, or whether it would be better simply to make appropriate compensation arrangements to protect the disadvantaged individual(s).

16. Each case should be considered on its merits. There may be exceptional circumstances where there are special reasons for not providing a broadly comparable pension scheme. The strength of those reasons should be tested rigorously and it would then be necessary for the terms of the business transfer to ensure appropriate compensation for all the staff. Actuarial advice should be taken by the contracting authority on the calculation of any compensation in these exceptional circumstances if

a broadly comparable scheme is not to be provided, or if there are identified individuals who would be materially worse off overall in the new scheme. In all cases the preference should be for the new employer to offer transferring staff membership of a broadly comparable scheme, and this should be a contract condition in the procurement. Only in exceptional circumstances should the combination of pension arrangements which are less than broadly comparable plus appropriate compensation for employees be accepted.

17. This principle is already being followed by the Government. Its practical application will now be strengthened, extended and made more open:-

- (i) for transfers of staff from Government Departments and Agencies it will continue to be a requirement for the Government Actuary's Department (GAD) to certify the broad comparability of specified alternative pension arrangements before any contractual commitment is made;
- (ii) if for exceptional reasons the requirement for broad comparability is to be waived, GAD advice on appropriate compensation to staff must be followed;
- (iii) GAD will follow a published Statement of Practice in certifying broad comparability (attached). This sets out clearly the principles which are already being followed. Publishing these principles in the form of this Statement for the first time will increase transparency and accountability;
- (iv) GAD will provide to the contracting authority an analysis of the key differences between the alternative pension scheme and the public service scheme, and the ways in which the differences balance out overall to satisfy the condition of no material detriment overall, by reference to the different groups of employees identified in the staff to be transferred;
- (v) the full GAD analysis will be made available to trades unions and staff representatives, and GAD will respond to any queries or observations which staff representatives have. A reasonable period will be allowed by the contracting authority for discussion, if requested, of any points arising from the GAD analysis;
- (vi) at the conclusion of this period, if any points of concern about the suitability of the proposed alternative pension arrangements remain which cannot be settled by discussion between staff representatives and the contracting authority, staff representatives may raise their concerns directly with a nominated Minister responsible for the affairs of the Department or Agency;
- (vii) no contractual commitments will be made whilst this process of review and consultation is underway, but a reasonable time limit may be set by the contracting authority;
- (viii) the contract for the business transfer must specifically require the implementation of the alternative pension arrangements which have been accepted.

18. In practice this will mean that in order to avoid delay or having to retrace steps, contracting authorities will need to be satisfied about the broad comparability of alternative pension arrangements well in advance of moving a procurement to selection of short-listed bidders or a preferred bidder. Bidders will need to provide GAD with detailed specifications of their proposed pension arrangements in good

time to allow the analysis required and, if necessary, subsequent discussion of it with staff representatives. Contracting authorities will have to reflect this in their procurement logistics. There can be no proper evaluation of options for public-private partnership without a full analysis of the future staff pension arrangements.

19. Ministers will not authorise a procurement contract, and contractual commitments should not be made under delegated powers, if the conditions set out in paragraph 17 (above) have not been satisfied. This provides a guarantee to staff that the process of identifying acceptable alternative pension arrangements will be fair and open and carried out in full consultation with their representatives.

Subsequent transfers of staff

20. Current practice restricts the contracting authority's concern about broad comparability to transfers from Government to another employer. Once staff have transferred to a new employer, they may be involved in subsequent business transfers. As a contracting authority, the Government will usually not be involved directly as a party to those arrangements. A contracting authority cannot take responsibility for the treatment of its former staff throughout the remainder of their working lives. But a contracting authority does take an interest in the conduct of business transfers which occur as the direct consequence of actions which it takes as a contracting authority.

21. Therefore:-

- (i) where a contract for services is terminated and the work is given to another contractor, the contracting authority will require that pension arrangements are made for staff transferring from the first contractor to the second contractor which would at least be broadly comparable with the public service pension scheme which those staff were in originally. The requirement will be limited to staff originally transferred from the contracting authority, although employers may find it convenient to harmonise terms and conditions in the workforce; and
- (ii) where a primary contractor under a Government contract transfers staff whose work is integral to performance of the contract to a sub-contractor in consequence of the terms of the primary contractor's obligations to the Government, it should be a condition of that subcontracting that broadly comparable pension arrangements are made for the transferring staff who were originally in the employ of the contracting authority.

ACCRUED BENEFITS

22. The treatment in procurement practice of the accrued pension benefits of transferring staff is more complex, but raises issues of equal importance. Regulations applicable to pension schemes require ‘early leavers’ to be given the option of ‘preserving’ their accrued benefits in the pension scheme which they are leaving, or transferring them to another pension arrangement. In the former case (preservation), the early leavers become ‘deferred pensioners’ of the scheme which they are leaving. The value of their benefits in that scheme will be uprated by price inflation until they come into payment at normal retirement age. This option may often be preferred by staff, especially those who are closer to retirement and do not expect significant future real earnings growth. In the latter case, where accrued benefits are transferred, the transferor scheme makes a transfer payment to the transferee scheme which extinguishes its liability to the early leaver; in return the new employer’s scheme awards a past service credit to the individual. (If the transfer were made to a personal pension plan instead, it would be invested in the normal way.)

23. Regulations stipulate a basis for calculating a minimum transfer value where accrued credits are transferred. Typically this will not result in individuals securing full credits in the new employer’s scheme in relation to the credits they are surrendering in the transferor scheme, unless there is a specific agreement between the two pension schemes that they should do so. Typically there is then a different basis for calculation of the transfer value involving the transferor scheme in making higher transfer payments. Such agreements between pension schemes are called ‘**bulk transfer agreements**’ (although they may in fact cover only a few members of staff, or just one). A bulk transfer agreement specifies the basis for calculating the transfer payment and the size of the transfer credits it will secure.

24. It is desirable where staff are obliged by a transfer of undertaking to be early leavers of a public service pension scheme for there to be bulk transfer agreements covering the award of past service credits by the new employer’s pension scheme. Current practice, as set out in *Better Quality Services* is to treat the absence of a bulk transfer agreement as a significant disadvantage of a bid. In practice this means that bids should be unlikely to succeed unless there is a very good prospect of a bulk transfer agreement being concluded to cover transferring staff. But it is still possible for the business transfer to become dissociated from negotiation of the bulk transfer agreement between the two pension schemes, leaving staff uncertain about the arrangements which will eventually be made.

25. The existing approach will therefore now be strengthened by making it a condition for the business transfer that there will be a bulk transfer agreement under which the pension scheme of the new employer will provide day for day past service credits (or an equivalent recommended by the Government Actuary’s Department as a suitable reflection of differences in benefit structures between the schemes) to staff choosing to transfer their accrued credits.

26. It will therefore be essential in future that negotiations between the public service pension scheme and the new employer’s pension scheme are settled at a sufficiently early stage in the procurement. The contracting authority should then be able to explain to staff and their representatives what the terms for award of past service

credits will be. Staff representatives will be able to discuss this with the contracting authority and GAD, and they will have a reasonable period in which to make any observations and, if necessary, to make representations directly to the Minister nominated as responsible for the project.

27. Only in exceptional circumstances should staff transfers be contemplated where the contract terms will not ensure appropriate bulk transfer terms. If there are exceptional circumstances justifying a waiver of this contract requirement, these should be explained and discussed with staff representatives at an early stage.

28. As in current practice, staff should normally be given a three month period following the issue to them of pension option forms in which to elect whether to preserve their accrued benefits or transfer them. Pension option forms should be issued as soon as practicable following the staff transfer.

29. Further guidance will be issued to contracting authorities concerning the mechanics of bulk transfer negotiations.

Subsequent transfers

30. Where a public service pension scheme associated with the public contracting authority is not a party to a bulk transfer agreement involving a further transfer of former public servants, the position is substantially more complicated. But appropriate bulk transfer terms should be sought for staff in transfers arising from second-round and subsequent contracting, and sub-contracting. Further guidance will be issued to contracting authorities concerning appropriate contractual safeguards covering availability of bulk transfer terms in subsequent TUPE transfers involving staff who in initial transfers from the Government were the subject of bulk transfer payments by a public service pension scheme.

31. Making these reforms to procurement arrangements will ensure fair treatment of staff pensions in public-private partnerships. It will continue to be important to look at each case on its merits, and to allow contractual mechanisms to continue to evolve towards better practice. The new approaches described above will guide current practice and new developments to ensure that staff are treated consistently on terms which are fair and predictable, and that there is in every case an opportunity for staff to understand fully the implications for their pensions and to make any representations they wish to the responsible Minister *well before* a Government contracting authority makes final arrangements for a business transfer involving the transfer of staff.

32. The Government will be ready to consider any further reforms which may be needed to cope with developments. In addition, for the longer term, it will review with representatives of employers and employees the scope for simplifying the administration of public – private partnerships, for instance by developing ‘model schemes’ or industry-wide multi-employer schemes which are broadly comparable with public service schemes and can facilitate transfers of staff between employers more easily as public - private partnership arrangements become more important to the delivery of public services.

Assessment of broad comparability of pension rights

Statement of Practice by the Government Actuary

The Government has issued a Code of Practice entitled “*Transfers of Government Staff: A Fair Deal for Pensions*”, describing the key steps which the Government is taking when staff are transferred within the public service, or from the public service to the private sector, with their work. Central to the process is the requirement for an assessment of whether pension arrangements being offered to employees by their new employer are “broadly comparable” to those provided by their existing employers. This requirement relates only to the period of employment after the change of employer. Exceptionally, if comparability is not available, there is a requirement for the valuation of any detriment on pensions to be offset by elements of the remuneration package outside the pension scheme.

This Statement of Practice sets out the principles on which the Government Actuary’s Department (GAD) undertakes its assessments of broad comparability.

Assessments may be commissioned by a public service employer, or by a contracting authority, on a one-off basis in relation to a specific group of staff. They may also be commissioned by a private sector employer with a view to obtaining a “passport” that his pension scheme is broadly comparable to a specific public service scheme for any group of employees who may transfer from that scheme to his employment over a given period. In either case, the principles are the same. For a passport, where a specific group of employees cannot be identified, the tests are conducted using a very large range of employee profiles containing different characteristics affecting the value of pension rights, for example age, gender, salary level and service length.

Benefits Against Which Assessment Is Made

The assessment will be made against those benefits provided as a right from the current employer’s pension scheme, for which the employees are eligible, and the contributions which employees pay towards that scheme. The assessment will not take account of any benefits which are payable solely as a result of a member being declared redundant, either compulsorily or voluntarily, where those exceed the normal benefits available to an individual who resigns from employment at that time.

The assessment excludes the injury benefits payable by public service employers which provide a minimum income guarantee as a result of injury or death while in the service of the employer.

It is recognised that there is uncertainty over the legal protection for benefits available on redundancy and injury within the Transfer of Undertakings (Protection of Employment) Regulations 1981. If so requested by a public service employer or contracting authority, an additional assessment of comparability of the arrangements being offered by the new employer against a base of those on offer with the existing public service employer will be undertaken.

General Principles

The general principles on which the assessment of broad comparability is made on transfers from the public service to the private sector are set out below. Corresponding principles apply on other transfers. It must be recognised that there is a very wide range of possible remuneration packages, including pensions, and that some flexibility may need to be applied in the practical implementation of these principles.

Value

- The overall value of the new scheme should be equal to or greater than that of the current scheme.
- In addition to the test of overall value, assessments of value will be made separately for different types of individual, e.g. for different pay levels, for different ages, and for any other characteristics which could reasonably be expected to have a material impact on the value of pension benefits.
- Value is assessed by calculating, on consistent assumptions and methods, the underlying employer costs, in excess of the employee's share of the cost, of providing the benefits under the scheme which will accrue over the remaining working life.
- Value is considered as that in the hands of the employee gross of any liability to tax.

Contributions

- Schemes with higher employee contributions will not be deemed broadly comparable because of the implied reduction in net pay (unless a compensating pay rise is proposed).

Benefits

- The range of benefits provided under the new schemes must at least match that provided by the current scheme.
- Benefits must be available from the new scheme in respect of the same events and at the same time as would have arisen in the existing scheme.
- In some cases, the amount of benefit may be lower on a particular contingency than under the current scheme, but this will need to be balanced by better benefits on other contingencies.
- Normal retirement age – at which full unreduced retirement benefits are available without employer consent and at which deferred benefits are payable – will be no greater than in current scheme.
- The initial rate of pension at normal retirement age should normally be no lower than that in the former scheme.
- Shortfalls in the level of pensions increases offered must be offset by better benefits elsewhere.
- In defined benefit schemes, benefits and contributions must be calculated on a definition of pensionable pay of at least the value of that applying in the current scheme.

- Under the arrangements for contracting-out of the State Earnings-Related Pension Scheme currently in place, schemes which are either contracted-out or not contracted-out will be considered for broad comparability.
- Time spent with the current employer which would have counted towards qualification for benefits in the existing scheme will count in the new employer's scheme as qualifying service, regardless of whether or not accrued rights are transferred to the new scheme.

Membership

- All those eligible to participate in the current scheme will automatically be admitted to the new scheme from the date of transfer of employment without medical examination. This would not interfere with an employee exercising his/her right to choose to opt out of scheme membership.

Security

- It is recognised that the security of a private sector scheme cannot be provided in the same form as that applying in the public service, but specific safeguards will be sought in the following areas:
 - member representation on trustee bodies
 - protection of accrued rights, on an on-going basis, on any rule change
 - changes inspired by the employer, including loss of the contract, involving joining another pension scheme will trigger the offer of a bulk transfer payment or enhancement of benefits within the scheme, to a level commensurate with existing benefits.

Type of Scheme

- Only defined benefit schemes will be certified as broadly comparable to defined benefit schemes; only defined contribution schemes will be certified as broadly comparable to defined contribution schemes.
- A test of adequacy of contribution (for a defined contribution scheme) or of benefit design where broad comparability cannot apply (for a defined benefit scheme) will be carried out with the aim, but not the certainty, of ensuring benefits of similar value are expected to emerge.
- When the transfer is between defined benefit and defined contribution schemes, (or vice versa), specific provision should be made for death benefits.

Certification

Pension proposals which satisfy my view of broad comparability will be certified as such. The onus, as set out in the certificate, will be on the current employer to ensure that the pension promises made by the prospective new employer are delivered for the staff concerned.

The certificate will detail the key design features of the proposed pension arrangement and any associated undertakings provided by the new employer. It will be written in plain English. It will be in a form which can be distributed to the employees and their representatives. Where a passport application is being considered an interim certificate will be issued if the formal documentation and approvals from regulatory bodies are not in place.

C D Daykin

Government Actuary, 26 May 1999

OVERVIEW

12 Guiding Principles in Using Market Testing and Contracting Out, Hansard, 4 November 1997, Col 94

Better Quality Services – a Handbook on creating Public/Private Partnerships through Market Testing and Contracting Out, The Stationery Office July 1998, ISBN 0-11-630964-4

Better Quality Services: Guidance for Senior Managers, The Stationery Office, July 1998 ISBN 0-11- 130152-2 A summary of the above handbook

Efficiency Plans – Guidance for Development and Use, Cabinet Office, November 1995, ISBN 07115 0305 2 and amendments, November 1996 – describes the various efficiency techniques

Appraisal and Evaluation in Central Government, the “Green Book”, HM Treasury, 1997

Keeping an Eye on the Government’s Own Costs, useful ideas on assessing and comparing performances, HM Treasury, 1997

Deregulation and Contracting Out Act 1994 – An Explanatory Guide, Cabinet Office (originally issued by the Department of Trade and Industry), 1994

Procurement Policy Guidance and Procurement Practice Guidance (CUP Guidance, as was), HM Treasury (various dates)

Guidance on Agency Reviews, Cabinet Office, 1995

Towards Best Practice: An evaluation of the Public Sector Benchmarking Project 1996-98, Cabinet Office, 1998

**Partnership for Prosperity: The Private Finance Initiative, HM Treasury, 1997
Selling Government Services into Wider Markets – policy and guidance notes, HM Treasury, 1998**

CUP Guidance Note: No 40

CUP Guidance Note: No 44

The Duties of an Accounting Officer, HM Treasury, 1994

A Guide to Quality Schemes for the Public Sector, Cabinet Office, 1999

Public Sector Benchmarking Project Brochure of Services Available, version 3, Cabinet Office, 1999

Assessing Excellence, Cabinet Office, 1999

HOW TO SUCCEED

Competing for Quality Policy Review, HMSO 1996, ISBN 0-11-430142-5

Service First – The New Charter Programme, Cabinet Office, 1998

CUP Guidance Note: No 40

CUP Guidance Note: No 46 Quality Assurance

CUP Guidance Note: No 53 Procurement Training

CUP Guidance Note: No 55

CUP Guidance Note: No 56

CUP Guidance Note: No 59

CUP Guidance Note: No 61

Code of Practice on Access to Government Information, 2nd Edition, 1997

Guidance on Interpretation of Code of Practice on Access to Government Information, 2nd Edition, 1997

“Dear Procurement Officer” Letter DPO (98) 2, of 13 January 1998

Consultants: How to Use Them, in the Pay and Grading Guidance Notes, Cabinet Office, 1996

Use of External Management Consultants, Efficiency Unit Scrutiny, Cabinet Office, 1995

Setting New Standards, Cm 2840

MANAGING STAFF

The Transfer of Undertakings (Protection of Employment) Regulations 1981, as amended

Code of Practice for TUPE Transfers in MOD Contracts, Ministry of Defence 1998

For Your Future Security – Your Pension Scheme Benefits Explained, 1996, published by the Civil Service Pensions Division, Cabinet Office, Office of Public Service

OPS Pay Delegation Guidance Note 32: Trade Union Recognition and Bargaining Arrangements, September 1994, amendment, November 1995

Guidance on Privatisations and Redundancy Guarantees: letter from HM Treasury to Principal Establishment and Finance Officers, 2 March 1994

Health and Safety Executive’s Infoline: tel 0541 545500

PREPARING THE GROUND – SCOPING AND ASSESSING FEASIBILITY

**Setting New Standards – A Strategy for Government Procurement Cm 2840 HMSO
May 1995, ISBN 0-10- 128402-0**

**Maximising Value from Public Sector Assets: Selling Services into Wider Markets, HM
Treasury**

Competing for Quality Policy Review, HMSO July 1996, ISBN 0-11-430142-5

CUP Guidance Note: No 40

CUP Guidance Note: No 51

**CUP Guidance Note: No 57 Strategic Partnering in Government, HM Treasury,
procurement Group**

**Towards Best Practice: An evaluation of the first two years of the Public Sector
Benchmarking project 1996-98, Cabinet Office, 1996**

**Partnerships for Prosperity: The Private Finance Initiative, HM Treasury Taskforce,
1997**

INVITING BIDS

CUP Guidance Note 27 Approved Suppliers (Vendors and Contractors) Lists

CUP Guidance Note 30, Specification Writing

CUP Guidance Note 40, the Competitive Tendering Process

CUP Guidance Note 44, Service Legal Agreements

**Trade Sales including Management Buy Outs, HM Treasury (1996 – new edition
expected)**

**Maximising Value from Public Sector Assets: Selling Services into Wider Markets, HM
Treasury**

Government Opportunities, Business Information Publications Ltd, Glasgow

CUP Guidance Note 51, Introduction to the EC Procurement Rules

**CUP Guidance Note 59: Supplier Appraisal Questionnaire; Invitation to Appraisal
Interview; Invitation to Tender**

CUP Guidance Notes: Nos 59A – 59D

CUP Guidance Note 60, Supplier Appraisal

RESPONDING TO INVITATIONS TO TENDER

Trade Sales including Management Buy Outs (MBOs), HM Treasury

Selling Government Services into Wider Markets – policy and guidance notes, HM Treasury, 1998

Market Testing Costing Guidance, HM Treasury, 1994

Fees and Charges Guide, HM Treasury

CUP Guidance Note: No 35, Life Cycle Costing

CUP Guidance Note: No 59C, Documentation: Model Invitation to Tender

Appraisal and Evaluation in Central Government, “The Green Book” HM Treasury, 1997

EVALUATING BIDS

CUP Guidance Note: No 40 The Competitive Tendering Process

CUP Guidance Note: No 48

CUP Guidance Note: No 55 Debriefing

CUP Guidance Note: No 56

CUP Guidance Note: No 60 Supplier Appraisal

Appraisal and Evaluation in Central Government: “The Green Book”, HM Treasury, 1997

Market Testing Costing Guidance, HM Treasury, 1994

CONTRACTS

Competing for Quality Policy Review, HMSO, 1996, ISBN 0-11-430142-5

CUP Guidance Note: No 1

CUP Guidance Note: No 19

CUP Guidance Note 30: Specification Writing

CUP Guidance Note 61: Contract Management

CUP Guidance Note 51: Disputes Resolution

CUP Guidance Note 58: Incentivisation

CUP Guidance Note 59D: Documentation: Model Conditions of Contract

CUP Guidance Note 61: Contract Management

RETENDERING

CUP Guidance Note 43: Project Evaluation

Civil Service Commissioners' Recruitment Code

Civil Service Management Code

LOCAL GOVERNMENT

DETR Circular 16/97 Local Government Act 1992: Competition in the Provision of Local Authority Services – Guidance on the Conduct of Compulsory Competitive Tendering (paras 29 to 33)

Department of Environment Issues Paper: Handling TUPE matters in relation to CCT (21 January 1994)

Handling of Pension Matters in Relation to TUPE (15 March 1995)

Handling of Pensions Matters in Relation to CCT (28 June 1995)

TREASURY TASKFORCE GUIDANCE

Partnerships for Prosperity (November 97)

A Step by step guide to the PFI procurement process (April 98)

Policy Statement No1: PFI and Public Expenditure Allocations (October 97)

Policy Statement No2: Public Sector Comparators and Value for Money (March 98)

Policy Statement No3: PFI and Public Expenditure Allocations for Non-departmental Public Bodies (August 98)

Policy Statement No 4: Disclosure of Information and Consultation with Staff and other Interested Parties (August 98)

Technical Note No 1: How to account for PFI Transactions (September 97) – update expected shortly

Technical Note No 2: How to follow EC Procurement Procedure and advertise in the OJEC (June 98)

Technical Note No 3: How to appoint and manage Advisers (August 98)

Case study material

Private Finance and IS/IT: case study – “TAFMIS ... and after” (Cabinet Office, March 98)

Colfox School Dorset – A Case Study on the first DBFO School Project (HM Treasury Taskforce, March 98)