EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS ACT 1996 (NHS RECRUITMENT – PROTECTED DISCLOSURE) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument prohibits certain NHS employers from discriminating against job applicants because it appears to the employer that the applicant has made certain disclosure of information ("whistleblowing"). For these purposes, an employer discriminates against an applicant if the employer refuses the applicant's job application or otherwise treats the applicant less favourably than other applicants.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

4.1 The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 ("the 1996 Act") to provide employment protection for a worker who has made certain disclosure of information. In particular section 47B of the 1996 Act protects workers against detrimental treatment on the ground that they have made a protected disclosure. Whilst 'worker' has a wide meaning in this context, it does not include job applicants.

4.2 The Small Business, Enterprise and Employment Act 2015 inserted new section 49B, into the 1996 Act, giving the Secretary of State a power, through regulations, to prohibit certain NHS employers in England, Scotland and Wales from discriminating against job applicants because it appears to the NHS employer that the applicant has made a whistleblowing disclosure in the public interest (a protected disclosure within the meaning given by section 43A of the 1996 Act).[1]

[1] Under section 43A a protected disclosure is a qualifying disclosure, as defined by section 43B, which is made by a worker in accordance with sections 43C to 43H of the 1996 Act. Under section 43B, a "qualifying disclosure" is a disclosure of information which is made in the public interest and which tends to show certain listed wrongdoings such as a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, an endangering of health or safety, damage to environment or deliberate concealment of information.

4.3 For the purposes of section 49B, an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post. An "applicant", in relation to an NHS employer, means an individual who applies to the NHS employer for a contract of employment, a contract to do work personally, or appointment to an office or post.

4.4 This is the first time that Regulations under this power have been introduced. The draft Regulations have been modelled on the Employment Relations Act 1999 (Blacklists) Regulations 2010.

4.5 Section 49B(6) of the 1996 Act defines "NHS employer" as an NHS public body[2] prescribed by regulations. Section 49B(7) defines "NHS public body" by reference to a list of bodies. The draft Regulations prescribe all the NHS public bodies referred to in section 49B(7).

4.6 Section 49B(8) and (9) of the 1996 Act requires the Secretary of State to consult Welsh Ministers and Scottish Ministers respectively before making Regulations prescribing Welsh and Scottish NHS public bodies for the purposes of the definition of "NHS employer." The Secretary of State has consulted Ministers in Wales and Scotland to fulfil this statutory requirement.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales and Scotland.

5.2 This instrument applies to England and Wales and Scotland.

6. European Convention on Human Rights

6.1 The Minister of State for Care, Caroline Dineage, has made the following statement regarding Human Rights:

"In my view the provisions of the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 are compatible with the Convention rights."

7. Policy background

7.1 On 11 February 2015, Sir Robert Francis QC published the report of his whistleblowing review ("Freedom to Speak Up"[3]) which considered how to build an open and honest reporting culture in the English NHS. The report set out concerns that the evidence he had seen indicated that individuals were suffering, or were at risk of suffering, serious detriments in seeking re-employment in the health service after making a protected disclosure (whistleblowing). The Freedom to Speak Up review included a recommendation that the Government should introduce protection from

[2] Each of the following is an "NHS public body" (which may therefore be prescribed): the National Health Service Commissioning Board; a clinical commissioning group; a Special Health Authority; an NHS trust; an NHS foundation trust; the Care Quality Commission; Health Education England; the Health Research Authority; the Health and Social Care Information Centre; the National Institute for Health and Care Excellence; Monitor; a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006; the Common Services Agency for the Scottish Health Service; Healthcare Improvement Scotland; a Health Board constituted under section 2 of the National Health Service Scotland Act 1978; a Special Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978.

[3] Report on the Freedom to Speak Up review - https://freedomtospeakup.org.uk/the-report/

discrimination for people seeking NHS employment on the basis that they had made a protected disclosure (‘blown the whistle’).[4]

7.2 If an individual is labelled as a whistleblower, it can be difficult for them to secure a position. Individuals who want to move to a new job in the NHS may find that they have been unfairly labelled as a troublemaker.

7.3 The Government’s policy aims are to prevent former whistleblowers suffering discrimination when they apply for jobs in the NHS and to make it clear that such individuals should be valued, supported and welcomed. These Regulations would help promote openness, transparency and fairness within the NHS, making NHS organisations potentially more attractive places to work as well as improving trust from the public, and would fulfil the commitment made by the Government in responding to the Freedom to Speak Up report.[5]

7.4 In summary, the draft Regulations:

- prohibit discrimination by certain NHS employers in relation to the recruitment of a job applicant (the meaning of which is at section 49B of the 1996 Act i.e. refusing the applicant’s application for a contract of employment, a contract to do work or appointment to an office or post, or otherwise treating them less favourably) because it appears to the NHS employer that the applicant has made a protected disclosure (i.e. “blown the whistle”) (regulation 3).

- give the applicant a right to complain to an employment tribunal, if they have been discriminated against on this basis (regulation 4).

- set out a timeframe of 3 months in which a complaint to the tribunal must be lodged (regulation 5). The three month period begins with the date of the conduct to which the complaint relates. This is consistent with the time limits for employment claims generally. In addition, the draft Regulations give the employment tribunal a discretion to consider a complaint out of time if, in all the circumstances, it considers it just and equitable to do so. The "just and equitable" test is comparatively easier to meet than the "not reasonably practicable" test which applies to existing whistleblowing claims brought under the 1996 Act, and the reasons for setting this test are outlined at paragraph 8.4. The draft Regulations also make provision as regards the date of particular types of conduct. This includes provision for situations when it might not be immediately apparent that discrimination has occurred, i.e. where discrimination involves an omission to do something such as to entertain a job application. In those circumstances, time starts to run from the end of the period within which it was reasonable for the employer to have acted.

- set out the remedies which the tribunal may or must award if a complaint is upheld (regulation 6). A declaration must be made, the employer may be ordered to pay compensation and the tribunal may recommend the employer to take specified steps.

[4] The report recommended that the Government should: ‘review the protection afforded to those who make protected disclosures, with a view to including discrimination in recruitment by employers (other than those to whom the disclosure relates) on the grounds of having made that disclosure as a breach of either the Employment Rights Act 1996 or the Equality Act 2010.’ Para 7.3

[5] https://www.gov.uk/government/publications/learning-not-blaming-response-to-3-reports-on-patient-safety

- make provision as to the amount of compensation which may be awarded, which must be such as the tribunal considers just and equitable in all the circumstances (regulation 7).

- provide for contravention of the prohibition on discrimination to be actionable as a breach of statutory duty (such a claim would lie in the civil courts). The intention is to give job applicants additional protection including the opportunity to apply to the court for the purpose of, amongst other things, restraining or preventing discriminatory conduct. Generally, the draft Regulations envisage dual proceedings in limited circumstances only as they state that an applicant cannot complain to an employment tribunal and bring an action for breach of statutory duty in respect of the same conduct except for the purpose of restraining or preventing the employer from contravening the prohibition on discrimination (regulation 8).

- treat discrimination of an applicant by a worker (in the course of employment) or agent (with the authority) of the prospective employer (NHS employer), as if it was discrimination by the NHS employer itself (regulation 9). By virtue of section 49B(4)(a) of the 1996 Act, "worker" would have the extended meaning given by section 43K. So it would include, not just an employee who has entered into a contract of employment or an individual who works under a contract to do work for a third party (as per the definition of "worker" in section 230), but, also, for example, an individual (A) who works for a person (B) where A was introduced by a third person (C), and the terms on which A was engaged were determined by B or C or both. The phrase "in the course of the worker's employment" would be construed accordingly, in accordance with section 43K(1). The draft Regulations state that it does not matter if the employer knows about or approves the worker's conduct. There is no similar provision in respect of the agent, as we cannot envisage a circumstance where an employer has authorised an agent's conduct, yet is not aware of it nor has approved it.

- make consequential amendments to primary legislation including an amendment to section 18 of the Employment Tribunals Act 1996 (regulation 10(4)) to ensure application of the early conciliation regime to employment tribunal proceedings under the Regulations. The early conciliation regime requires a prospective claimant to submit details of their claim to the Advisory, Conciliation and Arbitration Service (ACAS) so that the claim can be attempted to be conciliated before it can be lodged in the employment tribunal. The intention was to facilitate conciliation of disputes without the need for employment tribunal proceedings. The early conciliation regime applies to most claims to the employment tribunal. This should help ensure that only cases which cannot be resolved through other methods are brought to the employment tribunal.

Consolidation

7.5 None.

8. Consultation outcome

8.1 The Government consulted on the draft Regulations between 20 March and 12 May 2017. There were 45 responses to the consultation. Responses were mainly received from individuals, some of whom were whistleblowers and some students/universities, as well as Royal Colleges, NHS bodies and legal organisations. There was one

response from a Scottish Royal College and one response from a Welsh NHS organisation.

8.2 In summary, there was broad support for the draft Regulations with nearly three-quarters (71%) of responses being in agreement with the Regulations. Responses to the consultation are summarised at Annex A and the full consultation response has been published alongside these Regulations.[6]

8.3 The main concerns raised included the overlap between the statutory duty and any complaint to an employment tribunal which may involve significant cost – both to the employee and to the employer/government. However the Regulations state that an applicant cannot bring an action for breach of statutory duty and complain to an employment tribunal for the same conduct. The exception to this is where this is done for the purpose of restraining or preventing the NHS employer from discriminating. Thus the draft Regulations do not envisage dual proceedings except in limited circumstances. Further, employment tribunal fees have recently been abolished.

8.4 Another key concern of respondents was that the 3 month time limit for bringing a claim to the employment tribunal was too short. However, the 3-month time limit is in line with the time frame that applies to the vast majority of employment claims in the employment tribunal and is considered reasonable. In addition, the draft Regulations give the employment tribunal a discretion to consider a complaint out of time if, in all the circumstances, it considers it just and equitable to do so. A number of respondents questioned why the test for late discrimination claims was the "just and equitable" test rather than the "not reasonably practicable" test which applies to existing whistleblowing claims brought under the 1996 Act. The “just and equitable” test is comparatively easier to meet and was considered more appropriate bearing in mind the situation of former whistleblowers seeking employment, and the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing. This includes considerations which were mirrored in certain consultation responses such as the fact that it might be harder to establish that discrimination has occurred because of apparent whistleblowing.

8.5 About a third of respondents had concerns about providing the NHS employer with a defence in relation to liability for discrimination by its worker or agent (as set out in regulation 9) if it can show that it took all reasonable steps to prevent its worker or agent from doing the act in question. However, the statutory defence is considered reasonable. There is also precedent for providing a statutory defence within legislation on whistleblowing (section 47B of the 1996 Act makes similar provision in respect of an employer’s liability for detrimental treatment of a worker who has blown the whistle by another worker).

9. Guidance

9.1 DHSC will consider publishing guidance on the draft Regulations.

10. Impact

10.1 The impact on business, charities and voluntary bodies is minimal.

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[6] Consultation response can be found at: https://www.gov.uk/government/publications?departments%5B%5D=department-of-health-and-social-care&publication_filter_option=consultations

10.2 The impact on the public sector is expected to be minimal. We estimate that there may be around 20 cases per year which may bring a claim before the employment tribunal and a further 2 who might apply to the civil court for breach of statutory duty. Of the estimated 20 possible cases which could bring a claim before the employment tribunal, we would estimate 40% of these to be settled or withdrawn following the ACAS early conciliation scheme. The initial estimate of the impact to Her Majesty's Courts and Tribunal System would be around £60,000 per annum. Further details on the impact to the court system are at Annex C. The total costs of the policy are estimated to be between £160,000 and £220,000. This is considered to be an upper estimate of the costs.

10.3 The benefits would be from increased protection for whistleblowers which should help individuals to come forward, promote openness, transparency and fairness within the NHS, and improve staff retention, but these are not easily quantifiable.

10.4 A Regulatory Triage Assessment was prepared and assessed these Regulations to have minimal or no impact on business and the voluntary sector. (Annex B). Therefore a full Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 Discrimination against job applicants because they have made a protected disclosure is uncommon and few claims are therefore likely to arise. The Department will keep the Regulations under review.

13. Contact

13.1 Sheila Evans at the Department of Health and Social Care can answer any queries regarding the instrument. Telephone: 0207 210 2728 or email: Sheila.Evans@dh.gsi.gov.uk