



# Personal Medical Services Pilots under the NHS (Primary Care) Act 1997

The employment framework for PMS  
provider pilots

NHS Management Executive

## **PURPOSE OF THIS DOCUMENT**

The purpose of this guide is twofold. Firstly it highlights the employment issues that need to be considered by proposers and staff of a PMS pilot. Secondly, it provides the opportunity for recipients to comment on the guidance in draft so that full guidance due to be published in November can reflect the comments and views of interested parties.

Throughout this document any reference to Primary Care Act Pilots (PCAPS) refer only to the provision of PMS and not Personal Dental Services (PDS).

**Comments on any aspect of this employment framework are requested by 7 November and should be sent to: Susan Malcolm, Directorate of Primary Care, Room 29C/1 St Andrew's House, Edinburgh, EH1 3DG.**

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## **SECTION A: INTRODUCTION TO THE FRAMEWORK**

### **1. Background**

1.1 The NHS (Primary Care) Act 1997 provides for Health Boards to pilot different forms of local contracting for:

- the provision of General Medical Services as Personal Medical Services as a cash-limited Part I service (PMS only pilot), and
- the provision of Personal Medical Services and an extended range of medical services (PMS + pilot),
- the totality of PMS and HCHS medical services (through establishing a single unified purchasing and providing budget pilot). Ministers have announced that no unified budget pilots will be established until April 1999 at the earliest.

1.2 Potential pilot scheme providers have until 31 October to develop their plan into a formal request and submit it to a Health Board, who will then submit the proposal to the Secretary of State.

1.3 A Contractual Framework for PMS Provider Pilots was issued on 18 September 1997. This provided a framework of guidance to highlight the more significant issues that proposers of a PMS pilot, in conjunction with Health Boards, needed to address in order to translate expressions of interest into a formal application. It also provided an opportunity for the recipients to comment on the contents so that full guidance to be published in November could pick up on any issues raised. Section G of the framework guidance, relating to employment issues, gave notice that we would provide further detailed guidance on how staff may transfer into a pilot. This framework is intended to provide that guidance.

### **2. Which staff groups are involved?**

2.1 Primary Care Act pilot schemes will give an opportunity for primary care services to be provided in a variety of innovative ways. The transfer of staff into such pilots poses a number of important questions which need to be addressed. This guidance is aimed at both potential pilot employers, and employees, which may include:

- GPs who wish to enter a practice-based contract for PMS;
- GPs who wish to expand the service which their current practice provides and enter a "PMS+" contract:

- NHS Trusts who wish to become pilot providers employing salaried GPs;
- Trust or practice employees (members of the "NHS family") who wish to become pilot providers;
- Trust staff who wish to enter a pilot scheme as employees;
- practice staff who wish to enter a pilot scheme as employees;
- GPs who wish to become salaried employees of PMS pilots.

2.2 The information included in this framework addresses a number of important employment issues. It should assist both employers and employees and ensure that staffing issues are handled sensitively, fairly and legally. Each pilot will be established in a different set of circumstances so in some cases questions may arise which are not covered here. It is recommended, therefore, that those considering entering into a pilot scheme seek legal and financial advice as soon as possible.

### 3. **The transfer of staff into pilots**

3.1 The majority of Pilots will be set up in circumstances which will involve staff who are currently providing the existing services through either a Trust or a GP Practice. TUPE (see section 5) may apply to some transfers of services, but secondment of staff to pilots (see section 4) may also be appropriate.

3.2 Pilot providers may wish to take on the employment of staff to provide certain services (such as community nursing). Trusts will need to ensure that the arrangements fall within pilot providers' powers. In the first instance pilots will want to approach those staff who are currently providing the services which are to transfer to the pilot. They will want to discuss with the staff and their current employers the options available and agree the most suitable arrangement for all the parties. If these staff are unwilling to transfer it may be possible for the Trust to arrange a redeployment of staff, so that Trust employees with similar experience who do wish to enter the pilot may be found. If a pilot found that no staff from the Trust were willing to enter the pilot, it could then consider approaching another NHS Trust to find the staff required. Only if this route were also to fail would we recommend open recruitment. In approving such pilots the Secretary of State will take into account the way in which the staff have been, or are to be, recruited, and the impact of this on other local service providers. An important consideration

will be whether any recruitment or secondment from outside the original NHS Trust will cause redundancies there.

- 3.3 The preferred method of transfer for Trust staff is secondment. This will protect the staff's terms and conditions of employment, whilst providing the security pilot employees will want. In addition it provides protection to pilot providers who would otherwise be responsible for any redundancy costs in respect of these staff should the pilot end prematurely. NHS Trusts may benefit from any additional training and experience these staff gain during the pilot and patients will benefit from the continuity of service such an arrangement can provide. NHS Trusts will want to ensure, by taking their own legal advice, that the employment relationships they propose are intra vires their powers.
- 3.4 For practice staff whose current employing practice becomes a pilot to develop a practice-based contract, the transition should be fairly seamless. For GP practice staff transferring into a Trust-led pilot TUPE is likely to apply, protecting the terms and conditions of their employment. But where the practice is taken into a pilot run by a Trust there will be employment issues to resolve if staff do not wish to make this transfer. Practice staff who do not wish to transfer across under TUPE should discuss this with the project leader for the pilot.

#### 4. Secondment

- 4.1 NHS Trusts have specific powers to second staff for research and training purposes but these powers are unlikely to apply to most kinds of pilots. They also have general powers in connection with the discharge of their functions, one of which is to provide pilot services. It is thought to be within an NHS Trust's statutory powers to second staff to a pilot, provided that the Trust does not incur any costs in relation to the secondment. The secondment arrangements and any financial implications should be settled by prior agreement between the pilot and the Trust concerned and trusts will need to ensure that the secondment arrangements are within their powers.
- 4.2 If Trust staff transfer to a pilot scheme on secondment, the secondment agreement should provide for their existing terms and conditions of employment to be protected. This will provide pilot employees with the security they need to enter the scheme. The Trust will need to make forward plans for the possible return of its staff if the pilot or the period of secondment should end.

## **5. Transfer of Undertakings (Protection of Employment) Regulations (TUPE)**

- 5.1 There may be circumstances where an undertaking (eg, a Practice and its staff) is transferred into a pilot. In this case there would be a TUPE transfer i.e. the Transfer of Undertakings (Protection of Employment) Regulations become applicable. A summary of these regulations is at Annex A.
- 5.2 Employers will want to consider as soon as possible whether TUPE is likely to apply and take legal advice. Whether TUPE applies to individual cases must always be a question of fact in each case.
- 5.3 TUPE will apply if a body is transferring part of its business to another body. The part being transferred must retain its essential identity and must continue to provide the same kind of services it provided. In such circumstances, the pilot takes on the liability for the employment relationships of the previous employer. The employee retains his/her terms and conditions of employment unless and until the pilot wishes to make any alterations. This should be done in consultation and with the agreement of the employee and applies to employees on all types of contract (eg, part-time, fixed term, permanent etc).
- 5.4 If the pilot ends and the undertaking transfers back to that or another Trust, then TUPE would almost certainly apply again. The new employer would step into the shoes of the pilot in so far as its employment obligations are concerned in relation to all those staff in the transferring part of the business at the time of the transfer. Any changes to terms and conditions agreed during the time of the pilot would continue to be enjoyed by the staff unless, and until, the new employer wished to make any alterations permitted by the law. Again this should be done in consultation and with the agreement of the employee.
- 5.5 A TUPE transfer situation is most likely to apply to GP Practice staff but may also apply to a unit of Trust staff. In the case of the Trust staff, they may not necessarily have to transfer with the unit which is forming the pilot. The Trust may be able to retain their employees' services and second them as set out in section 4.

## **6. Employment of GPs**

- 6.1 One option available to pilot providers is the direct employment of GPs. Remuneration and terms and conditions will be a matter to be discussed between the pilot and the prospective salaried GP. A contract of employment will need to be drawn up to reflect this.



- 6.2 The GP grade is not one of the recognised grades as defined within the Hospital Medical and Dental Staff Terms and Conditions Handbook (Scotland), so GPs employed by a Trust will need to negotiate the terms and conditions of their employment locally.

## **7. Protecting the rights of employees**

- 7.1 The rights of pilot employees will be protected in a number of ways. In the first instance this is a matter for an individual's contract of employment, backed up by employment law which sets out a number of statutory rights. In addition pilots should be aware that considerable importance is attached to contract monitoring by HBs, including the pilot's role as an employer. If a pilot is unsatisfactory in any significant respect, including employment issues, the Secretary of State has the power to direct a Health Board to end the pilot.

## **8. Consultation, grievance and disciplinary procedures**

- 8.1 Pilots are expected to put in place their own local consultation machinery, grievance and disciplinary procedures (as described in Section G of the Contractual Framework Guidance). Given the expertise of the local Trust management and Staff Associations in this area, pilots would be well advised to seek their advice when arranging their consultation machinery, and grievance and disciplinary procedures.
- 8.2 In the event of a professional disagreement, pilots should consider the use of a professional adviser from the local Trust in the first instance.

## **9. Pilots which end**

- 9.1 Where staff are transferred on secondment by a Trust, and a pilot ends prematurely, the staff will return to the Trust under the terms of the secondment. If there has been a TUPE transfer of staff into a pilot, staff have no right of return to the original employer. The patient population will, however, continue to require services regardless of who is responsible for the provision. This means that the existing function will be transferred elsewhere, in all likelihood back to the original or another Trust. The existing staff could therefore, if they agree, be transferred to the new employer. It is likely that TUPE will apply again in the case of such a transfer.

## **SECTION B: QUESTIONS AND ANSWERS ON EMPLOYMENT ISSUES**

10. These questions and answers cover employment issues and are intended to help inform employees, GPs and NHS Trusts who might be considering taking part in Primary Care Act Pilots under the NHS Primary Care Act 1997. They are not exhaustive and are not intended to cover every eventuality. Those who are considering forming pilots should take their own legal advice.

### **11. Q&A FOR EMPLOYEES**

#### **11.1 How will staff join a Pilot?**

Staff may be transferred from their current employment in a Trust or practice under TUPE if there is a transfer of an undertaking (see Annex A) or they may be transferred under secondment if they are currently working in a Trust. In some circumstances they may be directly recruited to the pilot if they are not currently employed in the NHS.

#### **11.2 What is TUPE?**

Transfer of Undertakings (Protection of Employment) Regulations 1981 - TUPE is an employment protection measure. The Regulations preserve employees' terms and conditions of service, employment rights and continuity of service when a business or undertaking is transferred to a new employer.

#### **11.3 What is an undertaking?**

An undertaking is a discrete area of work or unit of work which, when considering a transfer to another organisation, can be identified as still continuing to provide a broadly similar service for the new organisation as it originally provided.

#### **11.4 What is a secondment?**

Secondment is a measure under which an employee may work or provide services to another employer whilst still being employed by his/her original employer. This way the employee's terms and conditions normally remain unchanged.

#### **11.5 Will TUPE or secondment apply to me?**

If you are currently working in a Trust and the functions you perform are transferring to a pilot then you will want to consider whether to join the pilot as a permanent

arrangement or whether to opt for secondment. In either case you should consider this carefully and discuss it with your current Trust employers, your prospective pilot employers and, where appropriate, your professional association (CPHVA, UNISON, CDNA, RCN, RCM, SHVA, PNA).

If you are currently working in a practice and the practice transfers into a pilot then secondment will not be an option as there will be no employing organisation left from which you can be seconded.

**11.6 What are the advantages of opting for secondment from my perspective?**

The secondment route will not only protect your current terms and conditions of employment (which would also be protected under a TUPE transfer) but will also provide job security against a pilot ending. In such circumstances you would return to the Trust and in all likelihood the services to patients would also return to the Trust.

**11.7 What protection is there if I am transferred under TUPE?**

If TUPE applies the pilot takes on the liability for your current employment relationship. You will retain your terms and conditions of employment unless, and until, the pilot wishes to make any alterations permitted by the law.

**11.8 Will I be approached if a pilot is being considered in my current area of work?**

Those hoping to set up pilots will want to approach staff currently performing the functions which they are intending to include in the pilot proposal and discuss their transfer into the pilot. They will want to discuss the options with the staff and their current employers to ensure that the most suitable arrangements are reached for all parties.

**11.9 What happens if individuals do not want to move voluntarily?**

If you currently work in a Trust but do not want to transfer across into a prospective pilot then your Trust will try to make other arrangements. It will canvas other employees performing the same kind of services to see if they want to take up the opportunity of working in the pilot. If a pilot found that no staff from the Trust were willing to join a pilot and the pilot was proposing to go to another NHS Trust or, finally, to open recruitment, then this would be a factor in the Secretary of State's decision on whether the pilot should be approved or not. If the pilot was approved, then depending on the staffing position in the Trust, there might be a redundancy situation in the Trust.

If you currently work in a practice and do not wish to transfer across under TUPE then you should discuss this with the project leader for the pilot. Again this would be a factor in the Secretary of State's consideration as to whether to approve the pilot.

#### **11.10 How will my employee rights be protected?**

Individual employment contracts and statutory employment law afford protection to employees in the first instance. Pilot schemes, including the pilot's performance as a new employer, will be carefully monitored. If a pilot is unsatisfactory in any respect, including employment issues, the Secretary of State has the power to direct a Health Board to bring the pilot scheme to an end.

Those staff transferring from NHS Trusts on secondment will continue to have Trust terms and conditions. Staff transferring from GP Practices may have their existing rights protected under TUPE.

#### **11.11 Who will deal with employee grievances?**

Grievances on matters relating to areas of professional responsibility will continue to be dealt with by the professional associations (CPHVA, UNISON, CDNA, RCN, RCM, SHVA, PNA). Pilots should consider the use of a professional adviser from a local Trust in the first instance.

For staff on secondment the original Trust employer and the pilot should agree how any grievances which occur in the pilot should be handled to ensure that secondees have access to the same standards and mechanisms as they would do in the Trust. You should ensure you understand and are content with these arrangements.

For other employed staff it is expected that each pilot will have a local grievance procedure, agreed where appropriate with staff associations. Disciplinary and grievance procedures need to be agreed locally before the pilot begins and in all cases you should ensure you understand the processes to which you will be subject.

#### **11.12 Will my pilot employer have to recognise staff membership of Trade Unions?**

Staff who transfer on secondment from NHS Trusts will continue to benefit from the terms and conditions in their contracts of employment. Other staff will have whatever rights are guaranteed under TUPE. In all other cases formal recognition agreements in pilots will be a matter to be settled between pilots and their staff. Pilots are encouraged to agree local arrangements proportionate to the size and scope of the pilot organisation.

**11.13 What if I pick up new skills whilst working in a pilot - will I be entitled to a higher rate of pay if I return from the pilot?**

If staff are seconded to a pilot, on their return there is no obligation for the Trust to pay increased wages or provide a better job. However, staff with transferable new skills may be more attractive to prospective employers and find that they have greater opportunity for improvement.

**11.14 What will happen to my pension rights, sickness leave, annual leave, maternity leave etc when I join the pilot?**

For staff who join on secondment, their existing terms and conditions will continue unless they, together with the pilot and Trust, have agreed on alternative arrangements.

For those who transfer under TUPE, the new employer must honour the terms on which the staff were transferred, until such time as any alternative terms are negotiated with staff. See Annex D for information on pensions.

**11.15 Can the Trust/Practice guarantee that jobs will still be available if the pilot ends and you wish to return to your original employer?**

For staff transferred on secondment, your Trust would have planned for your return and it will be responsible for re-integrating you back within the Trust at the end of your secondment. Details of the secondment should be agreed between the pilot, the Trust/Practice and the employee.

For staff who are transferred under TUPE there is no legal obligation on your previous employer to take you back.

**11.16 Should employees be given details of their contractual terms?**

The Employment Rights Act 1996 entitles an employee to a written statement of the major terms of his/her employment. Prior to joining a pilot all staff should know what the existing terms of their employment are. All employees of a pilot should be given a statement of their contractual terms - see Annex C for an example of what such a statement should contain.

**The following questions are more specifically aimed at salaried GPs:**

**11.17 What length of contract will I be offered by the pilot employer?**

The pilot is likely to offer a fixed term contract for the duration of the pilot, with an option to extend if the pilot is successful, but this will be subject to your negotiation with them.

**11.18 What will happen to my NHS pension rights?**

GPs intending to enter pilots as employees will wish to retain the practitioner benefits they currently accrue as independent contractors. Where a newly qualified GP enters a pilot on a salaried basis, pensions will be calculated on an officer basis. GPs may have up to ten years of officer benefits dynamised when they become independent contractors under current regulations. See Annex D for details on pensions.

**11.19 Will I be employed under the terms and conditions of employment outlined in the Hospital Medical and Dental Staff - Terms and Conditions of Service Handbook (Scotland)?**

The General Practitioner grade is not one of the recognised grades as defined within the Hospital Medical and Dental Staff Terms and Conditions Handbook (Scotland). The terms and conditions of a GP employed by a Trust do not form part of national terms and conditions, therefore, and will need to be negotiated locally.

**11.20 What remuneration and terms and conditions will a Trust be required to offer?**

The remuneration and terms and conditions of employment will be for individual GPs and pilot employers to negotiate locally.

**11.21 Should employees be given details of their contractual terms?**

The Employment Rights Act 1996 entitles an employee to a written statement of the major terms of his/her employment. Prior to joining a pilot all staff should know what the existing terms of their employment are. All employees of a pilot should be given a statement of their contractual terms - see Annex C for an example of what such a statement should contain.

## **12. Q&A FOR EMPLOYERS OF STAFF TRANSFERRING TO A PILOT**

### **12.1 How can staff transfer to a pilot?**

Where a prospective pilot is proposing to directly employ staff currently performing services, either for a Trust or a practice, the current employer will need to discuss the plans with the pilot and the staff. The employer should consider with the staff the options of secondment or transfer of employment under TUPE, to see which is applicable and which best suits all parties to the arrangement.

### **12.2 What is TUPE?**

Transfer of Undertakings (Protection of Employment) Regulations - TUPE is an employment protection measure. The Regulations preserve employees' terms and conditions of service, employment rights and continuity of service when a business or undertaking is transferred to a new employer.

### **12.3 What is an undertaking?**

An undertaking is a discrete area of work or unit of work which, when considering a transfer to another organisation, can be identified as still continuing to provide a broadly similar service for the new organisation as it originally provided.

### **12.4 What is a secondment?**

Secondment is a measure under which an employee may work or provide services to another employer whilst still being employed by his/her original employer. This way the employee's terms and conditions can remain unchanged.

### **12.5 Why is secondment the preferred option?**

Trust employees might transfer either under TUPE or secondment. Secondment for employees will protect their current terms and conditions of employment (which would also be protected under a TUPE transfer) but it will also provide job security against a pilot ending prematurely. In such circumstances staff would return to the Trust, and it is likely that the services to patients would also return to the Trust.

From the Trust's perspective, should the pilot end prematurely or not become permanent at the end of its pilot period, the staff will simply revert to Trust status and be able to continue the provision of the services as before. Under secondment this will involve the minimum of bureaucracy as the staff in question will not have formally left their employment. It is thought that an NHS Trust has the power to second staff to a pilot, provided that the trust does not incur any costs in relation to

the secondment. Trusts will need to take legal advice to ensure that the secondment arrangements they enter into are within their powers.

For practices secondment will not be an option for its employees if the practice itself is to become part of the new pilot. In effect there will be no organisation from which they can be seconded.

#### **12.6 What happens if staff do not want to move voluntarily?**

If staff currently working in a Trust do not want to transfer across into a prospective pilot with the services they are currently providing then Trusts will try to make other arrangements. They will canvas other employees performing the same kind of service to see if they want to take up the opportunity of working in the pilot on a secondment or TUPE basis. If the Trust finds that no staff are willing to transfer across to the pilot then this will need to be understood by the relevant HB in putting together the pilot proposal. That fact, and any possible ensuing redundancy issues, will be considered when the Secretary of State makes his decision on whether the pilot should be approved.

If practice staff do not wish to join a new pilot, the practice should make every effort to find them alternative work in other local practices. If staff do not wish to transfer across under TUPE, then they should discuss this with the project leader for the pilot.

#### **12.7 What will happen to Trust employees pension rights, sickness leave, annual leave maternity leave etc?**

For staff who join on secondment, their existing terms and conditions will continue unless they have been changed by agreement between the pilot, the Trust/ Practice and the employee.

If there is a TUPE transfer to the pilot the new employer must honour the terms on which the staff were transferred until such time as any alternative terms are offered and accepted (after consultation with the staff). Annex D gives details regarding pensions.

#### **12.8 What will happen to the terms and conditions of practice staff who transfer to a Trust-led pilot?**

Practice staff will normally be transferred under TUPE. They will retain their original practice terms and conditions which are protected until such time as the Trust decides to change them. This would be done with the agreement of the employee.

#### **12.9 How will employee rights be protected?**

Individual employment contracts and statutory employment law afford protection to employees in the first instance. Pilot schemes, including the pilot's performance as a



new employer, will be monitored and if a pilot was unsatisfactory in any respect, including employment issues, the Secretary of State has the power to direct a Health Board to bring a pilot scheme to an end.

**12.10 Who will deal with employee grievances?**

Grievances on matters relating to areas of professional responsibility will continue to be dealt with by the professional associations (CPHVA, UNISON, CDNA, RCN, RCM, SHVA, PNA). Pilots should consider the use of a professional adviser from a local Trust in the first instance.

For staff on secondment the original Trust employer and the pilot should agree how any grievances which occur in the pilot should be handled to ensure that secondees have access to the same standards and mechanisms as they would do in the Trust.

For other employed staff it is expected that each pilot will have a local grievance procedure, agreed where appropriate with staff associations. Disciplinary and grievance procedures need to be agreed locally before the pilot begins.

**12.11 What sort of contract can pilots offer a directly employed individual?**

A pilot is likely to offer a fixed term contract which would not exceed three years, with the option to extend if the pilot was a success. The Employment Rights Act 1996 requires that a contract of employment covers a range of particulars. See Annex C. Good employment practice requires that employers have policies in place which cover the areas listed in the framework guidance. It is recommended that this guidance is adhered to when a pilot employer draws up a contract of employment.

**12.12 How will pilot performance against good employment practice be monitored?**

Pilots are expected to adhere to good employment practices; see example Protocol at Annex B. All pilots will have a contract for services and will be carefully monitored. One aspect of the contract monitoring will be as employers of staff.

**12.13 What guarantees are there that jobs will still be available when the pilot ends?**

In real terms, if and when the pilot ends and does not become permanent, the demand for the work the pilot was providing would still exist and would need to be picked up by the original or another Trust. If staff are transferred on a secondment basis, the Trust would have planned for the secondees' return. Returning secondees should be found suitable alternatives to their current jobs on return.

- 12.14 If the Pilot ends and does not become a permanent arrangement, will staff be entitled to redundancy payments and on whom does the responsibility for meeting these payments fall?**

Seconded staff would simply return to their previous employer under the terms of the secondment agreement. Those staff transferred under TUPE would be entitled to the redundancy terms stated in their original contract of employment (unless altered during the course of the pilot).

- 12.15 Will any changes in a member of staff's terms and conditions agreed during the pilot have to be respected by the trusts when the staff return, either from secondment or if TUPE applies on services reverting to the Trust?**

Staff seconded by the Trust will simply return on their original terms and conditions, as modified by any changes effected to terms and conditions for that grade/professional group by the Trust during the secondment period.

For other staff, normal TUPE conditions will apply and any changes to contractual entitlements which have been made during their time at the pilot will be honoured. The law provides a remedy for the employee if they are not honoured, and equally the law enables an employer to change terms if it acts reasonably.

## **13. Q&A FOR PILOT EMPLOYERS**

### **13.1 How can staff transfer to a pilot?**

Where as a prospective pilot you are proposing to directly employ staff currently performing services either for a Trust or a practice you will need to discuss the plans with the staff and their current employers. You will wish to consider with them the options of secondment or transfer of employment under TUPE, to see which is applicable and which best suits all parties to the arrangement.

### **13.2 What is TUPE?**

Transfer of Undertakings (Protection of Employment) Regulations - TUPE is an employment protection measure. The Regulations preserve employees' terms and conditions of service, employment rights and continuity of service when a business or undertaking is transferred to a new employer. A summary of TUPE regulations is at Annex A.

### **13.3 What is an undertaking?**

An undertaking is discrete area of work or unit of work which, when considering a transfer to another organisation, can be identified as still continuing to provide a broadly similar service for the new organisation as it originally provided.

### **13.4 What is a secondment?**

Secondment is a measure under which an employee may work or provide services to another employer whilst still being employed by his/her original employer. This way the employee's terms and conditions can remain unchanged.

### **13.5 Is secondment the preferred option?**

Employees of Trusts might transfer either under TUPE or secondment. Employees of practices will not have the secondment route available to them because the practice itself, in becoming part of the new pilot, will cease to exist and therefore could not be a seconding organisation.

Where there is an option (i.e. in respect of Trust staff) there may be significant advantages for the pilot in having staff seconded to them. If for any reason the pilot was to end prematurely then under secondment arrangements the staff would return to their Trust. This would not involve any cost to the pilot. If they were transferred under TUPE, the pilot would be responsible for the later redundancy costs unless there was a TUPE transfer back. In terms of attracting staff to the pilot, the secondment option may provide the reassurance required for staff to join the pilot, knowing that they retain their Trust employment and could return if the pilot ended

prematurely. At the end of a successful pilot which was to be made permanent it would be hoped that the seconded staff, if the pilot had been a success in employment and professional development terms, would want to transfer with the new permanent organisation on permanent terms.

### **13.6 What happens if staff do not want to move voluntarily?**

If staff currently working in a trust do not want to transfer across into a prospective pilot with the services they are currently providing, then you will want to discuss with the Trust whether they have other, similarly experienced and suitable, staff who want to take up the opportunity of working in the pilot. If the Trust finds that no staff are willing to transfer across could approach a neighbouring Trust to see if they have such staff. If that is not successful you would need to consider going out to open recruitment.

The effect of such difficulties in attracting staff, and the potential impact on the Trust in respect of potential redundancy costs, is likely to feature in the HB recommendation on the pilot proposal. This will inform the Secretary of State's decision on approval of the pilot. Early agreement on transfers with both the relevant staff and the Trust is therefore highly desirable.

For practice staff this should be rather more straightforward and will be governed by whether TUPE applies or not. If it does the terms and conditions of the practice staff will be carried forward into their new employment unless, and until, any variation is agreed. If there are practice staff who do not wish to transfer across under TUPE then they should discuss this with the project leader for the pilot.

### **13.7 What will happen to the terms and conditions of practice staff who transfer to a Trust-led pilot?**

Practice staff are likely to be transferred under TUPE. They would retain their original practice terms and conditions which would be protected until such time as the Trust decides to change them. This should be done with the agreement of the employee.

### **13.8 How will employee rights be protected?**

Individual employment contracts and statutory employment law afford protection to employees in the first instance. Pilot schemes including the pilot's performance as a new employer will be carefully monitored and if a pilot is unsatisfactory in any respect, including employment issues, the Secretary of State has the power to direct a Health Board to bring a pilot scheme to an end.

### **13.9 Who will deal with employee grievances?**

Grievances on matters relating to areas of professional responsibility will continue to be dealt with by the professional associations (CPHVA, UNISON, CDNA, RCN, RCM, SHVA, PNA). Pilots should consider the use of a professional adviser from a local Trust in the first instance.

For staff on secondment the original Trust employer and the pilot should agree how any grievances which occur in the pilot should be handled to ensure that secondees have access to the same standards and mechanisms as they would do in the Trust.

For other employed staff it is expected that each pilot will have a local grievance procedure, agreed where appropriate with staff associations. Disciplinary and grievance procedures need to be agreed locally before the pilot begins.

### **13.10 What sort of contract can pilots offer a directly employed individual?**

A pilot is likely to offer a fixed term contract which would not exceed three years, with the option to extend if the pilot was a success. The Employment Rights Act 1996 requires that a contract of employment covers a range of particulars. See Annex C. Good employment practice requires that employers have policies in place which cover the areas listed in the Framework Guidance. It is recommended that this Guidance is adhered to when a pilot employer draws up a contract of employment.

### **13.11 How will pilot performance against good employment practice be monitored?**

Pilots are expected to adhere to good employment practices, see example Protocol at Annex B. All pilots will have a contract for services and will be carefully monitored. One aspect of the contract monitoring will be as employers of staff.

### **13.12 What guarantees are there that jobs will still be available when the pilot ends?**

In real terms, if and when the pilot ends and does not become permanent, the demand for the work the pilot was providing would still exist. If staff are transferred on a secondment basis, the previous employer would have planned for the secondees' return. Returning secondees should be found suitable alternatives to their current jobs on return.

### **13.13 If the Pilot ends and does not become a permanent arrangement, will staff be entitled to redundancy payments and on whom does the responsibility for meeting these payments fall?**

Secondees would simply return to their previous employer under the terms of the secondment agreement. Those staff transferred under TUPE would be entitled to

such redundancy terms as stated in their original contract of employment unless altered during the course of the pilot.

However if they were direct employees of the pilot, in accordance with statutory law and their terms and conditions of employment, they could be made redundant and the pilot would be responsible for making these payments. There is a two year minimum legal requirement before statutory redundancy is payable.

**13.14 Will any changes in a member of staff's terms and conditions agreed during the pilot have to be respected by the trusts when the staff return, either from secondment or if TUPE applies on services reverting to the Trust?**

Staff seconded by the Trust will simply return on their original terms and conditions, as modified by any changes effected to terms and conditions for that grade/professional group by the Trust during the secondment period.

For other staff, normal TUPE conditions will apply and any changes to contractual entitlements which have been made during their time at the pilot will be honoured. The law provides a remedy for the employee if they are not honoured, and equally the law enables an employer to change terms if it acts reasonably.

**13.15 Can a salaried GP be employed under the terms and conditions of employment outlined in the Hospital Medical and Dental Staff - Terms and Conditions of Service Handbook (Scotland)?**

The General Practitioner grade is not one of the recognised grades as defined within the Hospital Medical and Dental Staff Terms and Conditions Handbook (Scotland). The terms and conditions of employment will be for individual GPs and the pilot employers to negotiate locally.

## **ANNEX A: BRIEFING ON TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981**

### **What is TUPE?**

The TUPE regulations implement the European Community Acquired Rights Directive 1977 into Scots law.

TUPE is an employment protection measure. The Regulations preserve employees' terms and conditions of service and employment rights when a business or undertaking is transferred to a new employer. The TUPE regulations explicitly cover non-commercial as well as commercial activities.

### **TUPE requires - when an undertaking is transferred:-**

- The new employer takes over the **contracts of all employees** who were employed in the undertaking immediately before the transfer. Subsequent changes to the employment contract can be negotiated after the transfer where the employee agrees to the change or where changes are made by varying the contract.
- An employer takes over all rights and obligations arising from the contracts of employment except criminal liabilities and occupational pension rights.
- The new employer **takes over any collective agreements** made on behalf of the employees which were in force immediately before the transfer.
- Neither the new employer nor the previous one may **fairly dismiss** an employee because of the transfer or a reason connected with it unless the dismissal is necessary for an economic, technical or organisational reason entailing changes to the workforce.
- The new employer **may not unilaterally worsen the terms and conditions** of employment of any transferred employee.
- Prior to the transfer the employer must **inform and consult any staff and staff representatives with a view to reaching agreement to the proposals**.

## **BUSINESS MERGERS AND TRANSFERS**

### **(a) Transfer of Undertaking (Protection of Employment) Regulations 1981 as amended**

- (i) The regulations apply to transfer of all or part of an undertaking and to mergers, ie whenever the legal ownership of a business changes or when the employer changes. These are "relevant transfers" and where there is a merger the regulations apply to both employers. A relevant transfer may be effected by a series of two or more transactions and may take place whether or not any property is transferred.
- (ii) The regulations do not apply where there is merely a change of ownership through the sale of assets or the transfer of shares.
- (iii) In addition to the above, to determine whether there is a relevant transfer and thus in scope of the regulations, consideration will be given to what is actually taken over by the new owner, eg premises, machinery, goodwill, work in progress, debts, accounts receivable, orders etc. The European Court in the Dutch case of **Dr Sophie Redmond Stichting v Barol & Ors** held that National Courts must examine all the facts characterising the transfer in question including:-
  - the type of undertaking or business
  - whether or not the tangible assets such as buildings and moveable property are transferred
  - the value of its intangible assets
  - whether or not the majority of employees are transferred to the new employer
  - whether or not its customers are transferred
  - the degree of similarity (ie it is not necessary for it to be identical) between the activities carried on before and after the transfer
  - the transfer of the financing of the business.

### **(b) Employers' Golden Rules**

The Regulations are complex and case law under the amended rules will develop slowly. Accordingly both the old and new employer must approach the negotiation of a relevant transfer of undertaking with much caution. At the time of writing it would appear that several golden rules have been established in case law.

- (i) The old employer - the transferor - should consult and warn employees of the possibility of a transfer at the earliest possible moment. If possible and where appropriate this should be done with the new employer - the transferee.



- (ii) The transferor should establish at the earliest point and well before negotiations are finalised the numbers of employees the transferee may wish to keep on as a result of the transfer and where possible the employment terms to be offered.
- (iii) Subject to any need for financial secrecy, keep the workforce fully informed of developments - where Trade Unions are involved via the recognised Union.
- (iv) Where the transferee indicates he is not prepared to accept all the transferor's employees the transferor should look for alternatives to dismissal ie in parts of the business not subject to the transfer.
- (v) Where the transferor is required to dismiss employees before the transfer date and is satisfied that the dismissal is by reason of the transfer and is not for an economic, technical or organisational (ETO) reason entailing changes to the workforce, the liability for any unfair dismissal will fall upon the transferee. Accordingly the transferee may seek an indemnity from the transferor to compensate the transferee for any successful claims of unfair dismissal.
- (vi) Where the transferor is required to dismiss employees before the transfer date and is satisfied that the dismissal is by reason of the transfer but it is for an ETO reason, the liability remains with the transferor. However they must be for genuine reasons connected with the conduct of the business itself and not for any external reasons. For example, redundancies in order to improve the prospects of a sale will not be an ETO but redundancies necessitated by the state of the business would.
- (vii) Where the transferee is offering different terms of employment to employees he is taking over, he is advised to obtain the employees' written acceptance of the new terms ie that the terms of the old contract change by mutual consent to the new terms on the date of transfer.
- (viii) Where an employee of the transferor refuses to transfer to the new company, he should be warned that his employment will terminate on the date the transfer takes place and that such a termination will not make him eligible for redundancy pay or for unfair dismissal.
- (ix) Where the terms of contract on transfer are identical, neither transferor nor transferee need do anything. The employee passes over into the employment of the transferee automatically.
- (x) Where there is a transfer of a business or part of a business, the contracts of employment of employees, employed immediately before the transfer, will not terminate but they will automatically transfer with the business, unless the employee informs the transferor that he or she objects to becoming an

employee of the transferee. In such a situation the transfer itself will terminate the employee's contract of employment. Such a termination will not act as a dismissal - ie the employee will not be able to claim unfair dismissal or a redundancy payment.

In interpreting the words "immediately before a transfer" employees who have been dismissed shortly before the transfer of their employer's business and for a reason connected with that transfer are to be treated as having been employed "immediately before the transfer".

- (xi) Continuity of employment (both statutory and contractual rights) is guaranteed so that all the rights and duties under the contract transfer to the new employer. This does not apply to pension rights except where there are provisions in the pension scheme which do not relate to benefits for old age, invalidity or survivors.
- (xii) All terms of collective agreements negotiated with recognised Trade Unions also automatically transfer to the new employer.
- (xiii) If there are recognised Trade Unions, recognition of such Unions is maintained under the new ownership as long as the business remains a distinct entity.
- (xiv) Where employees are dismissed "arising out of or connected with the transfer", this will automatically be UNFAIR unless the employer can show an economic, technical or organisational reason, entailing changes to the workforce. Case law has determined that economic reasons, such as a desire to achieve a sale of the business do not fall within this definition. Employees transferred on less favourable terms than their existing contracts - see (v) above - may be able to claim constructive dismissal if they decide to resign their transferred employment.
- (xv) Both the transferor and transferee employer are required to give information to recognised Union officials who represent employees affected by the transfer or by measures taken in connection with the transfer. The information to be given is:
  - date of transfer
  - reasons for it
  - legal, economic and social implications for affected employees
  - measures to be taken in relation to affected employees.

The information must be sent in writing by post to the Trade Union's address.

- (xvi) Any employer who envisages he will be taking measures to transfer his business will be required to consult with Trade Union representatives of recognised Trade Unions. Such consultations must be undertaken with a view to seeking agreement on the measures to be undertaken. The time scale must be long enough before the transfer to enable genuine consultation to take place. The sanction for employers who fail to fulfil any of their obligations to consult is a maximum compensation award from an Industrial Tribunal of a sum not exceeding four weeks' pay for each employee in question.

## **ANNEX B: EXAMPLE PROTOCOL GOVERNING THE RELATIONSHIPS BETWEEN A PILOT EMPLOYER AND PILOT EMPLOYEES.**

1. It would be in the interests of all pilots to follow good employment practice guidance produced by the Management Executive.
2. Any alterations/amendments to a pilot employee's contract of employment should be made after consultation between the employee and the pilot provider.
3. Staff working in pilots should at all times observe their duty of care, the public interest, and professional codes governing the conduct of pilot staff. Nothing will be done, by action or omission, to undermine this commitment, to patient interests.
4. At all times, the pilot employer and the attached staff should ensure that no acts or omissions adversely affect the professional accountability, especially where matters of practice and judgement are concerned. Commercial considerations originating in any service contract between the Health Board and the pilot should not override that professional accountability.
5. Staff working in pilots should as professionals respect the professional opinions and contributions of each other. No behaviour regarded by any party as being of a bullying or harassing nature should be permitted. Any such action should be dealt with speedily and decisively through agreed procedures. This applies whether bullying and harassment relate to professional practice, sexual and racial harassment or any other form of harassment.
6. Disagreements on whether professional accountability is being placed at risk will rest initially with the appointed individual within the provider pilot grievance procedure and ultimately with the professional association (eg, CPHVA, UNISON, CDNA, RCN, RCM, SHVA, PNA).
7. The pilot must recognise the legitimate concerns of recognised professional associations and should have in place some form of consultation procedure.
8. The pilot should not seek the removal or suspension of attached staff on any grounds other than those provided for within the pilot's disciplinary and capability procedures or those laid down in the terms and conditions of secondees.
9. It is against the law to discriminate or harass sexually or racially, therefore it would be advisable for pilots to follow good employment and equal opportunity practice as contained in the Good Practice Guide on Recruitment and Selection issued by the Development Group in 1993.

10. All matters of concern about staff or by staff arising from the matters raised in the protocol should normally be dealt with through locally agreed procedures.

## **ANNEX C:**

### **EMPLOYMENT RIGHTS ACT 1996**

#### **PART 1 - EMPLOYMENT PARTICULARS**

##### **Right to statements of employment particulars**

###### **Statement of initial employment particulars**

1. Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.
2. The statement may be given in instalments and shall be given not later than two months after the beginning of the employment.
3. The statement shall contain particulars of:
  - a. the names of the employer and employee;
  - b. the date when the employment began, and
  - c. the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts toward that period).
4. The statement shall also contain particulars, as at a specified date not more than seven days before the statement is given, of:
  - a. the scale or rate of remuneration or the method of calculating remuneration;
  - b. the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals);
  - c. any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours;
  - d. any terms and conditions relating to any of the following:-
    - i. entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);
    - ii. incapacity for work due to sickness or injury, including any provision for sick pay, and
    - iii. pensions and pension schemes;

- e. the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;
  - f. the title of the job which the employee is employed to do or a brief description of the work for which he is employed;
  - g. where the employment is not intended to be permanent, the period for which it is expected to continue or if it is for a fixed term, the date when it is to end;
  - h. either the place of work of, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;
  - j. any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and
  - k. where the employee is required to work outside the United Kingdom for a period of more than one month:
    - i. the period for which he is to work outside the United Kingdom;
    - ii. the currency in which remuneration is to be paid while he is working outside the United Kingdom;
    - iii. any additional remuneration payable to him, and any benefits to be provided to or in respect of him by reason of his being required to work outside the United Kingdom, and
    - iv. any terms and conditions relating to his return to the United Kingdom.
5. Subsection 4(d)(iii) does not apply to an employee of a body or authority if:
- a. the employee's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
  - b. any such provision requires the body or authority to give to a new employee information concerning the employee's pension rights or the determination of questions affecting those rights.

## **ANNEX D: PENSION ARRANGEMENTS**

1. Pensions Regulations have been amended to allow access to the NHS Pension Scheme for GP practice staff from 1 September 1997 by making GPs employing authorities under the regulations. It is the intention to amend pensions regulations further to allow staff employed by GPs providing personal medical services to be included.
2. NHS Trusts are employing authorities within the meaning of the pensions regulations and will continue to be so as pilot providers. Anyone - medically or non-medically qualified - employed by a Trust and not already a member of the scheme will be entitled to join automatically. Staff employed by a GP who becomes employed by a Trust will retain their membership.
3. Nurses must be employees in order to be included or remain within the NHS pension scheme. Nurses who lead pilots must be employed, therefore, by an NHS trust or a limited company in order to qualify under the current arrangements. Ways to include self-employed nurses in the scheme are being considered. The staff of pilots which are nurse-led may be included, or remain, within the NHS pension scheme by direction of the Secretary of State.
4. GPs entering pilots as independent contractors will continue to accrue practitioner benefits. Income from the contract - whether PMS or PMS plus - will be pensionable. HBs will continue to pay the employer's contributions and will need to assess what GPs' pensionable earnings are.
5. GPs intending to enter pilots as employees will wish to retain the practitioner benefits they currently accrue as independent contractors. It is the intention to amend the regulations to make this possible for the duration of the pilots. This will allow doctors to move from GMS to PMS and back without any alteration to the way in which their pension is calculated (in other words, benefits will be dynamised for the time spent in pilots). Salaried GPs retaining practitioner benefits will not be eligible for officer benefits, such as redundancy pay and early retirement, in addition. Under the proposed arrangements, GPs salaried in pilots will begin to accrue benefits on an officer basis when the pilots become permanent. The effect of this on career flexibilities is being considered.
6. Regulations will be amended to allow a new PMS independent contractor to enter the NHS Pension Scheme on a practitioner basis. Where a newly qualified GP enters a pilot on a salaried basis, pensions will be calculated on an officer basis. GPs may have up to ten years of officer benefits dynamised when they become independent contractors under current regulations.
7. Where a limited company is formed solely and exclusively for the provision of services under a Primary Care Act pilot, it is the intention to include that company



as an employing authority for the purposes of the pensions regulations. This will allow employees of the company - medical and non-medical- to become or remain members of the NHS Pension Scheme.

8. Pilot arrangements which are not covered under any of the arrangements outlined above may still be included in the NHS Pension Scheme. The Secretary of State, by direction, may arrange for the inclusion of other categories of employing authority or potential members to the scheme, pursuant to Section 7(1) of the Superannuation (Miscellaneous Provisions) Act 1967.