ANNEX A

KEY THEMES IN THE RESPONSE TO THE CONSULTATION ON THE EMPLOYMENT RIGHTS ACT 1996 (NHS JOB APPLICANTS) REGULATIONS

1.1. Respondents were split, with a small majority (56%) in favour of the 3 month time limit for bringing an application to the employment tribunal. This is the same time-frame that applies to most employment claims in the employment tribunal. However, nearly half of respondents (44%) had concerns that the 3 month timeframe was not long enough and most of these preferred 6 months. There were concerns that:

- it might take claimants longer to be able to turn their minds to making a claim, given the stress they are under;
- it might take longer than three months before an applicant became aware that they had suffered discrimination, for example it could be a number of months before someone is informed they have not been appointed.

> *"We do not agree with the time limit of three months unless the three month period starts at the point when not only has the conduct taken place but the applicant has become aware of the relevant facts. The discrimination may well be covert and the applicant may not become aware of the relevant facts until a considerable time after the date of the conduct. Moreover, the applicant may be able to obtain information about the conduct only by use of time consuming procedures under the Data Protection Act." British Medical Association (BMA)*

1.2. A number of respondents queried whether applicants would be clear when the time limit starts to run from. Under the draft Regulations, the three month period begins with the date of the conduct to which the complaint relates. The proposed three month time limit in which to bring a claim to an employment tribunal is consistent with the time limits for the vast majority of employment claims. In addition, the 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 draft Regulations also make provision as regards the date of particular types of conduct.

1.3. 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.

1.4. We have amended the drafting of the Regulations to make clear that in the case of a decision by an NHS employer not to employ or appoint an applicant, the three month time limit starts from the date that decision was communicated to the applicant.

1.5. We therefore consider that the draft Regulations adequately deal with the types of concerns expressed.

1.6. 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 as set out above such as the fact that it might be harder to establish that discrimination has occurred because of apparent whistleblowing.

1.7. Our view is that the draft Regulations make appropriate provision as regards time limits in the context of claims to the employment tribunal from NHS job applicants.

Q5: Are there any types of cases that should be mentioned in Reg5 (3) as to the date of conduct for the purposes of calculating the 3 month time limit?

1.8. A small majority of people (52%) who responded on this question were content with the provision in regulation 5(3) as regards the point from which the three months will be calculated, depending on the conduct in question, and felt that these seem appropriate.

1.9. There were some suggestions to include other types of cases such as:

- failure to short-list or interview;
- not following the organisation's own policies and procedures on recruitment;
- zero-hours contracts; an employer appoints an individual (in order to avoid breaching these Regulations) but then declines to give them any work to do.

1.10. Our view is that some of these situations would already be covered. Thus we consider that a failure to short-list or interview would fall within an omission to "entertain and process an applicant's application". In the case of a failure to follow policies and procedures, it is the date of the accompanying discriminatory conduct which would be relevant, for example the date on which, in breach of policies and procedures, a job applicant was refused employment or was not invited for an interview.

1.11. A respondent expressed concern that the Regulations do not cover discrimination by employers who appoint an individual on a zero-hours contract but then fail to give them any work. However, in such cases, the individual might be able to bring a claim for detriment against their employer under existing protections for whistleblowers under the 1996 Act.

1.12. There were a number of comments that the draft Regulations are only aimed at the new employing organisation, whereas often the problem arises when a

previous employer provides a poor reference, or informally briefs against employing a whistleblower. The draft Regulations would be made under provisions in primary legislation which are aimed at the conduct of NHS employers to whom job applications are made. However, in cases where a previous employer has subjected a whistleblower to detriment on the grounds that they have made a protected disclosure, the individual might be able to bring a claim against their former employer under existing protections for whistleblowers under the 1996 Act.

Q6: Do you agree with the approach taken not to limit the amount of compensation so that these Regulations are comparable with existing whistleblowing cases?

1.13. There was very significant agreement (92.5%) with this from respondents.

> *"Yes, this is consistent with both whistleblowing and discrimination claims and acts as a strong deterrent to unlawful conduct. The prospect of high value claims encourages employers to ensure that those involved in the recruitment process receive comprehensive training on their obligations and maintain proper records in the event that their decision-making is scrutinised."*
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> *Employment Lawyers Association ELA)*

1.14. A respondent commented that it should be clear that an applicant who had no intention of taking a job should not be entitled to compensation. Regulation 7 provides that the amount of compensation which may be awarded must be such as the employment tribunal considers just and equitable in all the circumstances and that when considering the amount of compensation, the discriminatory conduct and any loss sustained must both be had regard to. We think these provisions sufficiently enable the employment tribunal to consider the situation where an applicant had no intention of taking a job.

Q7: Do you agree that the Regulations should provide for discrimination to be actionable as a breach of statutory duty?

Q8: Are there any practical problems arising from Regulation 8?

1.15. Regulation 8 enables the job applicant to bring an action for breach of statutory duty in respect of a breach of the prohibition on discrimination. Such a claim would be in the civil court. The intention is to give job applicants additional protection including the opportunity to apply to the courts to restrain or prevent discriminatory conduct by an employer.

> *"We agree that a provision to permit an applicant to seek an injunction from the county or high court to prevent discriminatory action against them is important. Regulation 8 will provide additional support for whistle blowers who currently have no legal protection to prevent employers from imposing a detriment upon them, or bringing any such detriment to an end. The absence of such 'protection' was highlighted in the Francis Freedom to Speak Up Review [paragraph 2.2.9] and the new breach of statutory duty regulation takes an important step in remedying the current lack of protection for NHS whistle blowers in this regard."*
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> NGO's office

1.16. There was strong support for this proposal (92% of those who responded). Comments mainly focused on questions about how it would work in practice and we have considered the main themes raised in turn:

- The overlap between bringing a claim for breach of statutory duty in the civil court and a claim of discrimination in the employment tribunal. Some respondents commented that there could be duplication of claims and two sets of proceedings, i.e. action for breach of statutory duty in a civil court alongside a complaint to the employment tribunal. However regulation 8(4) provides that an applicant cannot bring an action for breach of statutory duty to the court and complain to an employment tribunal for the same conduct. The only exception to this is where this is done for the purpose of restraining or preventing the NHS employer from discriminating. Therefore the Regulations envisage dual proceedings in limited circumstances.

- The dual process would involve significant cost – both to the employee and to the employer/government.
  Respondents felt that the costs for individuals of bringing actions in the civil court are higher than those incurred in bringing actions at an employment tribunal, as they include fees payable to the courts as well as the cost of paying for legal advice.
  Employment tribunal fees have recently been abolished so these concerns are allayed to some extent. In any event, the Regulations do not envisage dual proceedings except in limited circumstances.

- Legal organisations also mentioned:
  - prospects of success: the effect on an employer's ability to recruit while being restrained,(given current staff shortages and the need to recruit quickly);

  Under the draft Regulations, the court has discretion to make such order as it considers appropriate for the purpose of restraining or preventing the employer from contravening the prohibit on discretion. In deciding whether to make an order, we would expect a court to take into account all the circumstances of each case, including the urgency of the employer's need to recruit.

  - the risk of whistleblowers maliciously using regulations for personal gain.

  Our view is that such cases are likely to be rare and that unfounded complaints based on malice would have low prospect of success.

- Including an award for 'ill-feelings' was mentioned – we believe the respondent may have meant 'injury to feelings'.
  An employment tribunal may order compensation to be paid and the amount must be such as it considers just and equitable in all the circumstances. We consider that this could include an amount to reflect injury to feelings.

- A respondent commented that it seemed odd to make an award of compensation for something that may not have actually happened, i.e. where a potential breach is prevented.
  The draft Regulations enable an employment tribunal to order compensation to be paid where there has been actual breach of the prohibition on discrimination. Whilst in an action for breach of statutory duty a court would be able to decide that a breach of the prohibition on discrimination is likely to occur, and damages can be awarded in an action for breach of statutory duty, the power to award damages is discretionary - ultimately it is for the court to decide whether damages should be awarded. We would expect the court to take into account all relevant factors when deciding whether it is appropriate to award damages and to act fairly.

1.17. In summary, we do not consider that any practical problems will arise out of regulation 8 but will consider issuing guidance on how the Regulations are intended to apply.

Q6: Do you agree with the proposal that, for purposes of the Regulations, discrimination against an applicant by a worker or agent of an NHS body should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

1.18. Draft regulation 9 provides that discrimination by a worker or agent of an NHS employer is to be treated as discrimination by the NHS employer itself where this happens in the course of the worker's employment or, in the case of an agent, with the authority of the employer. This is similar to the position under section 47B of the 1996 Act in respect of vicarious liability of employers for acts subjecting whistleblowers to detriment.

1.19. There was significant support for the first part of this proposal which was welcomed by the majority of respondents (94%).

1.20. With regard to agents, there were some concerns about how the Regulations would affect agencies.

> *Employers within the NHS are responsible for ensuring external agencies they contract with meet the requisite employment law requirements. However any complaint an applicant has about the manner in which an agency has handled their application should not carry vicarious liability for a client of the agency where all reasonable steps have been taken to ensure the agency adheres to the standards required and there has been a deliberate act or omission on the part of the agency.*
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> National Clinical Assessment Service (NCAS), NHS Resolution

1.21. The second part of the question related to the defence set out in regulation 9 for the NHS employer if it can show in proceedings in respect of things alleged

to have been done by a worker or agent that it took all reasonable steps to prevent the worker or agent from doing that thing. About a third of respondents (31%) had concerns about providing the NHS employer with such a defence. However, the Government thinks the inclusion of the statutory defence in the Regulations is fair and reasonable. There is precedent for providing such a statutory defence within legislation on whistleblowing (see section 47B of the Employment Rights Act 1996). We will review practice but at this stage we do not consider that there is any need to amend the draft Regulations.

1.22. We consider that the draft Regulations adequately address this concern as they provide that it is a defence for the NHS employer to show that it took all reasonable steps to prevent the worker or agent from doing things alleged to have been done. We have [also] made a change to regulation 9(2) which originally provided that it did not matter whether the employer knew about or approved the conduct of the worker or agent. On reflection we cannot envisage a circumstance where an employer has authorised an agent's conduct, yet is not aware of it nor has approved it. Regulation 9(2) is now, therefore, limited to the worker's conduct such that it states that it does not matter whether the employer knows about or approves the conduct of the worker.

Q9: Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

1.23. Over four-fifths of those who responded on this question (86%) did not have any concerns about the impact of the draft regulations on people sharing protected characteristics. Particular concerns that were raised included:

- difficulties for those who speak English as a foreign language in dealing with the legal system;
- difficulties for staff recruited from overseas who leave the UK and have to litigate from abroad;
- the complexity of the law could be confusing and will impact particularly on people sharing protected characteristics.

> *"The NGO has concerns that the regulations will extend the complexity of the laws relating to NHS whistle blowers. As a consequence, the new regulations will place an even greater burden on individuals who are seeking to access their legal rights, which will be most felt by who those who may already be suffering detriment by virtue of their protected characteristics."*
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> National Guardian's Office (NGO)

1.24. 35% of respondents felt that the Department could do more advance equality of opportunity and to foster good relations between people sharing protected characteristics and others.

1.25. Respondents also mentioned the need to monitor the impact of the proposals on people sharing relevant protected characteristics. The ideas suggested were varied. For example individuals suggested that the Department should:

- carry out work to investigate, measure and monitor the impacts on protected groups and design interventions;
- ensure "Have a Voice" representatives are available;
- mandate unconscious bias training;
- have BME whistle-blowers on recruitment and disciplinary panels;
- improve education about whistle-blowers in the NHS;

1.26. The Department has considered the impact of the policy on groups sharing protected characteristics under the Equality Act 2010. It is our understanding that on balance the impact of the policy proposal will be fundamentally positive for all groups, including people sharing relevant protected characteristics under the Equality Act 2010.We will keep the impact under review.

Q10: - Do you have any concerns about the impact of any of the proposals on families and relationships?

1.27. 61% of those who responded on this question did not have any concerns about the impact of these proposals on families and relationships.

1.28. 39% of those who responded thought that the proposed Regulations would put a strain on family relationships, for example that the added stress and cost of having to go through a legal procedure could affect family relationships adversely.

1.29. We will keep the impact under review.

Other comments

1.30. There were a number of comments that these draft Regulations should not just apply to the NHS but to other employment sectors. However the Small Business, Enterprise and Employment Act 2015 only provides power for the Secretary of State to make regulations in respect of the health service. Sir Robert Francis made his recommendation about whistleblowers applying for roles in the NHS just as this legislation was passing through Parliament and the Government was keen to accept and implement the recommendation as soon as possible.

1.31. Protecting whistleblowers as job applicants involves additional regulation on employers who are recruiting. In the case of the NHS recruiting for work with vulnerable people, we expect high standards in any case. But the impact that measures like this have on employers across the economy would have to be considered carefully, weighing it up against the potential benefits.

> *"…as a matter of principle, such a remedy should also be available to whistleblowers in other industries. PIDA [the Public Interest Disclosure Act] 1998 applies to public and private employers so these regulations are a move away from uniform protection nationally towards sectoral/industry rights."*