



## **Transfer of Undertakings (Protection of Employment) Regulations 2006:**

### **Consultation on Proposed Changes to the Regulations**

#### **DrugScope response – April 2013**

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##### **Introduction**

1. DrugScope is the leading UK charity supporting professionals working in drug and alcohol treatment, drug education and prevention and criminal justice. It is the primary independent source of information on drugs and drug related issues.
2. DrugScope has around 450 members, primarily treatment providers working to support individuals in recovery from drug and / or alcohol use, local authorities and individuals. Its member agencies are amongst those providing support to over 200,000 people receiving community and residential treatment for drug addiction, plus harm prevention, advice, education and related recovery services to a wider number of adults, young people and children.

##### **The drug and alcohol sector and TUPE**

3. Whilst estimates vary, there are thought to be around 30,000 people working in specialist drug or alcohol related roles in the UK<sup>1</sup>, employed across a number of settings including community, residential, outreach, prisons and other elements of the criminal justice sector.
4. TUPE has been particularly relevant to the drug and alcohol sector, which has developed relatively recently from being largely comprised of small and local providers to being one where consolidation and merger have been more common. In addition to the transfer of services between providers from the voluntary and community sector (VCS), the movement of services from the public sector, principally from the National Health Service or local authorities has been a notable trend.
5. Recent and forthcoming changes to the way that drug and alcohol services are commissioned and funded have led to rounds of retendering, whilst the future landscape may be more complex for the drug and alcohol sector and the broader VCS. Current or anticipated changes including public health reforms, Police and Crime Commissioners, Community Budgets and payment by results initiatives including plans laid out in Transforming Rehabilitation may mean that commissioning is more cross-cutting and less thematic. Increased use of joint commissioning for

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<sup>1</sup> [http://www.fdap.org.uk/careers\\_guidance.php](http://www.fdap.org.uk/careers_guidance.php)

outcomes is not unwelcome but may lead to further change in the structure of services that support vulnerable individuals.

### **About this response**

6. This response has been developed in consultation with DrugScope's member agencies, including CRI, Westminster Drug Project and Equinox. There has not been complete unanimity across DrugScope's membership, so a consensual approach has been adopted. Several DrugScope members will be submitting individual responses which may differ in detail.
7. DrugScope's work is shaped by our core values and beliefs<sup>2</sup>; we involve our members in our policy work, but we are above all guided by the belief that strong and effective services should be available to all who need them.
8. DrugScope has chosen not to respond to every proposal but has focused on those that are of particular relevance to the drug and alcohol sector.
9. The boxed summaries of Government proposals have been developed by the National Council for Voluntary Organisations (NCVO) and their legal advisers and are included as a summary of the main proposals as we understand them.
10. In addition to this submission, DrugScope is working alongside NCVO and others as part of a broader voluntary and community sector submission.

### **Consultation proposals**

#### **Proposal 1+2: Repeal 2006 Amendments to Service Provision Change (SPC)**

(See [Transfer of Undertakings \(Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.7-7.23)

The 2006 TUPE Regulations broadened the circumstances where TUPE applies to cover 'service provision changes' (see [Article 3 of the 2006 Regulations](#)). As a result currently a 'service provision change' includes contracting-out exercises, changes of service provider and contracting-in exercises, with limited exceptions.

To qualify as a relevant transfer on a service provision change there must be an organised grouping of employees whose principal purpose is to work on the services being transferred.

#### **Proposed change**

Government proposes to repeal the 2006 amendments on 'service provision change'. The Government says that the 2006 amendments 'go further than the provisions of the Directive and are thus considered 'gold-plating'. This, it wishes to repeal.

This would mean cases where TUPE applies would rest on the 1981 Regulations and subsequent case law. It means TUPE would apply when service provision changes included a transfer of assets and the service maintains its identity after transfer.

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<sup>2</sup> <http://www.drugscope.org.uk/aboutus/values>

### **Implications for the voluntary sector**

This would reduce the circumstances where TUPE clearly applies. The purpose of the 2006 amendments was to greater legal certainty as to the definition of a 'service provision change' following EU case law. The 2006 amendments – which Government proposes to retract – were intended to end exposure to fluctuating case law, creating a more level playing field in the tendering process and reducing costs.

However there is already a lack of clarity. There are current examples of legal disputes between providers as to whether TUPE applies.

#### **11. Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision charges?**

12. On balance we do not support the proposal to repeal the 2006 amendments in their entirety but acknowledge that there may be some benefits from doing so; we would welcome a commitment to further explore alternatives. We support the intention to simplify this aspect, but are unconvinced that the proposed changes would achieve this. It is not clear that simply returning to pre-2006 definitions would necessarily reduce the burden on employers, which would presumably continue to evolve with and be defined primarily by developments in domestic and EU case law. We are concerned that repeal may merely lead to further uncertainty, for example around the notion of whether or not a service "retains its identity" and could potentially have serious and deleterious effects on services.

#### **13. Question 2: Do you believe that removing the provisions may cause potential problems?**

14. Whilst we acknowledge the need to provide services that represent value for money, we have concerns about measures that may facilitate aggressive cost-based competition and subsequently a potential reduction in service quality. DrugScope members have reported that maintaining morale in the event of frequent service transfers is crucial, and that their ability to offer a reasonably clear and secure career path with progression makes a vital contribution to their ability to recruit and retain skilled and motivated staff.

15. Consequently the need to consider the legitimate expectations of employees and above all the need to balance the quality and stability of services alongside cost considerations is of vital importance. Government should explore alternatives including retaining protection for services critical to the health, safety and wellbeing of the public.

16. Employment lawyers have also warned<sup>3</sup> of the potential financial risks that may be posed to the outgoing employer (the transferor) due an inability to rely on TUPE to relieve them of potentially large redundancy costs, a factor exacerbated by decreased certainty which may, in itself, require additional expenditure on legal advice to manage and understand.

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<sup>3</sup> <http://www.personneltoday.com/articles/11/02/2013/59180/all-change-for-tupe-a-world-without-the-service-provision-change.htm>

17. Finally and of particular relevance to the drug and alcohol sector, consideration should be given to transfers from the public sector to the VCS. This sort of transfer is one where different salaries and terms and conditions can be problematic and result in VCS organisations being unable to compete and commissioners being discouraged from exploring options for delivery.
18. This is primarily manifested in the form of Fair Deal pension liabilities which in real terms tend to significantly outweigh the burden of TUPE itself. If Government expects the ambitions of the Open Public Services White Papers to be realised, or the proposals outlined in Transforming Rehabilitation to succeed, consideration should be given to how pension liabilities in particular can be met by or mitigated for smaller organisations and the broader VCS, for example through financial support to the employee or transferee employer.

**Lead-in period.**

19. We believe that Government should explore alternatives to the 2006 amendments that may be more likely to provide clarity and might help to address the particular issue of pensions in public sector to VCS transfers. However, should Government proceed with the proposal, more than 1 year lead-in time would be required. Rapid introduction would pose significant problems to transferor organisations, who may have made reasonable assumptions that they would not be burdened by redundancy and related costs due to staff being covered by TUPE.

**Proposal 3: The Provision of Employee Liability Information**

(See [Transfer of Undertakings \(Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.24 – 7.35)

The transferor (outgoing employer) is obliged to provide the transferee (incoming employer) with information about the employees who are to transfer. This is known as ‘employee liability information’.

This information must be provided at least 14 days before the relevant transfer. The information must be provided in writing or in a readily accessible form - see [Article 11 of the 2006 Regulations](#).

**Proposed changes**

Government proposes the repeal of both the stipulated list of Employee Liability Information (ELI) to be provided and the 14 day specification. Instead they propose, ‘leaving the exchange of information to be resolved by the parties to transfers’.

They propose this de-regulation should rely upon, ‘an amendment [...] to make clear that the transferor should give information to the transferee as is necessary to assist the transferee and transferor in complying with their duties under that regulation’.

**Implications for the voluntary sector**

The poor quality of information and the lateness of its provision to the potential bidder or new employer is a common and significant problem, as evidenced by the VCSE in 2012. Late or incomplete information means organisations don’t know what liabilities they are bidding for in contracts – therefore cannot cost or evaluate risks when deciding whether to bid. Sometimes complete information is provided so late that winning bidders have to drop out of the contract as they can’t take on the unknown liabilities.

The voluntary sector has previously asked (see our 2012 response to the BIS Call for Evidence) for ELI disclosure to be enforced by commissioners at the point of issuing a tender. We suggested this should be enforced by clauses within the contract specifying when ELI should be shared.

One problem with this suggestion is that at tender stage the transferee is yet to be identified so this would mean that a transferor would have to provide employee liability information to persons other than the transferee. How would this category of persons be defined? In addition, if similar sanctions would apply the transferor would then be vulnerable to a number of claims for failing to provide information rather than just from a specified transferee. Is this reasonable? If not how could it be managed?

**20. Question 3: Do you agree that the employee liability information (ELI) requirements should be repealed?**

21. We do not believe that ELI requirements should be repealed and are not persuaded by the rationale in the consultation document.

**The impact of repealing the ELI list and timescale**

22. It seems unlikely that removing the current and arguably quite minimal requirements would do anything to ease the flow of information to the transferee. DrugScope members have reported varying experience with ELI ranging from the positive in cases where it happens as a matter of routine in some examples of tendering, to the negative when the process has been described as inaccurate and evasive.

23. It appears that current problems relate to the requirements being honoured to the letter rather than the spirit, and it is far from clear that the appropriate response to this would be to abandon the requirements entirely and rely on negotiation and good will between transferor and transferee.

**Alternatives and other considerations.**

24. The current provision for ELI can be a strong disincentive against taking part in procurement, and frequently results in wasted time and resources when commencing procurement only to discover much later that the contract is unattractive or unviable.

25. There is a strong case that ELI disclosure should as a matter of routine be enforced by commissioners at the point of issuing a tender, potentially at the Pre-Qualification Questionnaire stage. Where the procurement is “first generation”, the obligation should lie with the commissioning body or current employer themselves.

26. There would clearly be some concerns around confidentiality and compliance with data protection legislation, so some consideration could be given to providing guidance around information that can and should be disclosed in advance. DrugScope acknowledges that commercially sensitive information may be included in some aspects of ELI; consideration should

also be paid to this.

27. Finally, Government should give consideration to how this can be enforced and means of redress for organisations receiving inaccurate or late information, for example where costs are incurred as a result of wrong or delayed information, those costs should be recoverable from the party at fault.

**Proposal 4: Restrictions on changes to terms and conditions**

(See [Transfer of Undertakings \(Protection of Employment\) Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.36 – 7.47)

TUPE contains restrictions on changes to staff terms and conditions (T&C) following transfer. Under [Regulation 4\(4\)](#) an employee's terms and conditions cannot be varied if the variations are connected with the transfer – even if both parties agree to the change.

The only exception is where the changes are due to an economic, technical or organisational (ETO) reason entailing changes in the workforce i.e. changes that aren't caused by the transfer itself. Such changes which are not connected to the transfer are permitted in line with other UK employment law.

**Proposed changes**

Government believes that the restriction on T&C harmonisation is a 'significant problem' and intends to pull it back as far as the EU Directive allows. To make it easier to change T&C, they propose to narrow the prohibition from 'reasons connected with the transfer' to 'the transfer itself'.

**Implications for the voluntary sector**

The preservation of employment terms is a fundamental purpose of TUPE but can lead to administrative complexity for the transferee (incoming provider) and a 'two-tier' workforce with new staff brought in on different terms.

Again, as with many of these proposals, the risk of stripping away the TUPE 2006 Regulations in order to come into line with the original Directive and case law is that they might generate greater uncertainty.

In its 2012 [response to the BIS Call for Evidence](#), NCVO recommended that Government allow the harmonisation of terms after 12 months.

- 28. Question 4: Do you agree with the government's proposal to amend the restrictions in Regulation 4 on the changes to terms and conditions so that the restriction more closely reflects the wording of the Directive and the CJEU case law on the subject?**

29. We support this, but with caveats. Due to the tendency for mergers and consolidation amongst treatment providers and the frequent retendering and transfer of services, many providers now find themselves with workforces that are multiple tier rather than two tier<sup>4</sup>, although there have

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<sup>4</sup> Primarily organisations where several TUPE transfers have resulted in multiple sets of employment contracts and terms and conditions applying across the workforce, rather than the two referred to in the consultation document.

been differences of opinion about how burdensome or inconvenient this can be. Consequently, there appear to be grounds for implementing the proposed change, with the caveat that harmonisation should be carried out consensually in the same way that an organisational restructure should ideally be. We acknowledge that there will need to be consideration given to harmonisation of substantially different aspects of terms and conditions that may not readily be translatable into cash or benefit terms.

### **Alternatives and other considerations**

30. DrugScope members have questioned the value of the current exception for economic, technical or organisational (ETO) reasons as their experience has been that it is sometimes used aggressively as a means of implementing changes in terms and conditions. Government should consider ways of strengthening and clarifying this by means of guidance including examples, specifically aimed at enabling non-specialists to better understand their responsibilities and their ability to change terms and conditions.
31. In the absence of the above, it is not immediately clear that amending the restrictions in Regulation 4 will have achieved the aim of providing clarity; as indicated in the consultation document at 7.45, interpretation of the changed regulation will rely on current and emerging case law.

#### **Proposal 5: TUPE and Collective Agreements**

(See [Transfer of Undertakings \(Protection of Employment\) Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.48 – 7.52)

Currently the transferee (incoming provider) must indefinitely honour the terms and conditions (T&C) agreed as part of a collective agreement prior to the transfer. In the UK, such T&C only have legal weight when incorporated into individual contracts.

Examples of types of terms agreed in collective agreements include working time arrangements, sick pay, parental rights etc, and other aspects of staff policies.

#### **Proposed Changes**

The proposals intend to allow variation in T&C derived from collective agreements, one year after the date of transfer. Any variation would need to be agreed between employer and employees, and cannot be less favourable than the transferring employee's T&C at the point of transfer.

This would be possible whatever the reason for the variation (ie even if related to the transfer itself). The terms agreed between employer and employee could not be less favourable than the transferring employee's T&C at the point of transfer.

The Government cites article [3.3 of the EU Acquired Rights Directive](#) which does allow for variation

32. **Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less**

**favourable to the employee. Is this desirable in your view?**

33. For broadly the same reasons as above, we support this proposal which should facilitate harmonisation of terms and conditions and has merit.

**The impact of the proposed change.**

34. The current requirement to honour collective agreements indefinitely makes public to VCS transfers cost-prohibitive. Greater freedom to negotiate this would be welcome if it would serve to address this issue.

**Other considerations.**

35. DrugScope members have expressed differing opinions on whether retaining the stipulation that revised terms and conditions should not be less favourable adequately reflects the current economic and commissioning environment.
36. With regard to *Parkwood Leisure v Alemo-Herron*<sup>5</sup>, there is a consensus in favour of a static approach should that be compatible with any new case law stemming from the decision of the ECJ.

**Proposal 6: Protection against dismissal (regulation 7)**

(See [Transfer of Undertakings \(Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.53 – 7.57)

[TUPE Regulations \(7\)](#) prohibit dismissal of employees if the 'sole or principal reason' for that dismissal is 'the transfer itself' or 'a reason connected with the transfer that is not an economic, technical or organisational [ETO] reason entailing changes in the workforce<sup>3</sup>'.

**Proposed Changes**

Again, the Government is arguing for a reduction in definition from the 2006 TUPE Regulations (UK) back to the narrower provisions in the Directive.

The 2006 amendments state that a dismissal will be treated as unfair if the reason for dismissal is 'connected' to the transfer. The proposals want to narrow definition by removing the broader term 'connected with the transfer' to 'the transfer itself'.

**Implications for the voluntary sector**

As with proposal 4 which also deals with T&Cs, the risk is that this may create more uncertainty; but equally the Government is seeking to remove any unnecessary burdens on business e.g. where UK legislation goes beyond what is required by EU legislation.

37. **Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more**

<sup>5</sup> [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2010\\_0035\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0035_Judgment.pdf)



**closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?**

38. Yes, but again with caveats. Member agencies support the protection implied by “connected with the transfer” although they acknowledge the risks and costs that may arise as a result. Members have again drawn attention to use of ETO reasons that they perceive to have been possibly somewhat contrived in nature.

**The impact of the proposed change.**

39. More clarity about whether or not dismissals would be automatically unfair would be welcome. However, there is the possibility that the proposal to amend regulation 7 to “sole or principle reason” (other than for ETO reasons) may be open to exploitation or poor practice.

**Proposal 8: Dismissals arising from a change of location**

(See [Transfer of Undertakings \(Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.68 – 7.71)

Currently, if the incoming employer intends to carry on the business in a different location, but with the same number of staff overall, then any dismissals as a result of the change of location will be classed as automatically unfair.

**Proposed Changes**

Government argues that TUPE currently gives a narrower than the meaning of redundancy than that under the Employment Rights Act 1996; meaning that a dismissal because of change in location, which could be fair on the basis of redundancy under that Act, could be automatically unfair under TUPE.

Had there not been a transfer and the employer had sought to make the location change, then the dismissal would have been capable of being fair for unfair dismissal purposes. Government argues that,

‘this appears to be an anomaly which gives rise to potential unfairness for transferee employers, in that they could face claims for automatic unfair dismissal in genuine redundancy situations’ (proposals 7.69)

Government therefore proposes to bring amend TUPE regulations,

‘so that a change in the location of the workplace is within the meaning of 'entailing changes in the workforce' and therefore can be classed as an ETO.

**40. Question 8: Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?**

41. We agree with the proposal to extend ETO reasons to include changes in the location of the workforce. In the absence of a TUPE transfer this sort of dismissal would be capable of being fair and would be helpful to align with existing employment legislation. However, such changes of

location should be demonstrably done in good faith, and not as a means of avoiding legitimate employer obligations and expectations of reasonableness.

**The impact of the proposed change.**

42. This should allow providers to become more responsive to service need and delivery arrangements whilst no longer disadvantaging them against peers who have not been through the TUPE process.

**Alternatives and other considerations.**

43. An explicit requirement that changes of location be both substantive or significant and done in good faith would provide reassurance that the proposed change would not be open to abuse as a mechanism enabling employers to avoid responsibilities.

**Proposal 9: Dismissals based on future employee role**

(See [Transfer of Undertakings \(Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.72 – 7.81)

The transferor (outgoing employer) is prohibited from dismissing an employee for any reason related to the transfer. If they do so, this is automatically classed as unfair dismissal and the liability for this transfers to the incoming employer.

**Proposed changes**

Government is consulting on whether the transferor should be able to rely upon the transferee's ETO to dismiss staff prior to transfer; and also that fairness of the dismissal should be judged on its merits rather than automatically judged to be unfair.

Government argue that it is 'unduly restrictive' and 'in some cases, employment is continued for longer than the business requires even though there is an ETO'. They also argue that the current position is based upon domestic case law, rather than that of EU Law – the latter of which has said that both the transferor and the transferee can dismiss for ETO.

Government also point out that allowing the transferor to dismiss on the basis of a transferee's ETO might be welcome to some employees, who might prefer to be made redundant by their employer before any transfer, as this would enable them to proceed with seeking alternative employment.

**44. Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?**

45. There is merit to the idea that the fairness of any dismissal should be judged according to its own circumstances. However, viewed in conjunction with Proposal 10, this may form the basis of a suitable mechanism for the transferee and employees beginning discussions about future requirements at an earlier point, potentially to the benefit of both parties.

#### 46. **The impact of the proposed change.**

It is likely that the proposed changes will have relatively little impact other than potentially in the event of insolvency or rescue. There appear to be few other circumstances in which it would be beneficial to the outgoing employer to dismiss someone relying on the transferee's ETO, and there is a clear rationale for employment and staffing decisions being better made by the transferee in most situations.

#### **Proposal 10: Consultation requirements**

(See [Transfer of Undertakings \(Protection of Employment\) Regulations 2006: Consultation on Proposed Changes to the Regulations](#), January 2013. Paragraphs 7.84 – 7.91)

Whilst a TUPE transfer cannot itself constitute grounds for dismissal, redundancies connected to the transfer can occur (where there is an ETO reason). If redundancies do occur two duties consult may apply: 1) under TUPE in respect of affected employees prior to the transfer; and 2) under legislation related to collective redundancies.

#### **Proposed changes**

The Government proposes to amend legislation by making it clear that consultation by the incoming employer with representatives of the transferring employees fulfils requirements to consult on collective redundancies.

Government gives a number of reasons for this proposal, including:

- Simplification of processes, from two to one, for both employees and employers
- Business efficiency, enabling restructure to occur sooner

#### 47. **Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?**

48. To enable this change would be expedient, more efficient and would simplify the process for both transferee and employees.

49. However, there would need to be consideration to how this single duty to could be tested and demonstrated as having taken place, and guidance for all parties in the event of relationships and communication between transferee and transferor being irregular, as may be the case (for instance) when bidding unsuccessfully to retain a service contract.

#### **DrugScope contact details:**

Paul Anders  
Senior Policy Officer  
DrugScope

4<sup>th</sup> Floor Asra House,

1 Long Lane,

London SE1 4PG

[paul.anders@drugscope.org.uk](mailto:paul.anders@drugscope.org.uk)

<http://www.drugscope.org.uk/>