Technical changes to automatic enrolment

Public consultation on draft regulations and other proposed changes

Introduction

NEST[1] welcomes the recent Department for Work and Pensions (DWP) consultation on technical changes to automatic enrolment as evidence that the government is listening to industry concerns about the complexity of the current regime and is determined to take appropriate action to simplify the current rules.

Some of the proposals in this consultation have the potential to reduce administration for employers reaching their staging date on or after the proposed implementation date in April 2014. However, the government should balance this benefit against the impact on those employers who have already starting using automatic enrolment or who are in the later stages of planning for it. The proposals may mean that these employers, and the providers of services to these employers, may need to revise and rebuild systems and processes which have already been built at a significant cost of time and resource. We know from large employers already using NEST that this is of concern to them. One such employer has already listed the proposed changes as a formal risk under its own internal risk management programme because it has already built systems and processes that follow the current regulations. The DWP may want to have a more focused conversation with employers who are already meeting their duties to ensure that these concerns are not left unaddressed.

This additional cost could be avoided if those proposals which will require additional work are introduced as options or if formal transitional rules were applied to those changes, allowing an employer to choose which processes they would use when discharging their new duties.

Unfortunately, however, this does come with the disadvantage that introducing any amount of choice or dual running into these proposals will complicate rather than simplify the current regime at a time when the volumes of employers preparing for and coming into the new regime will be increasing significantly. These employers coming later to their duties will also tend to be those who are less familiar with pensions and have fewer resources available to dedicate away from core business needs to dealing with changes in pensions rules.

It's also likely that, as the set of changes being consulted is based on only six months of real operational experience by employers, further areas of simplification will be identified as more employers get engaged with automatic enrolment and apply it to their business processes. It's in no-one's interest for these changes to be introduced piecemeal over the next five years. However, the risk that further changes will be introduced means that employers and providers serving the employer market will be unable to plan effectively knowing that parts of the regime could soon be changed.

From NEST's perspective, we're concerned about the burden that the proposed changes and any associated dual running could create.

1 We use the term NEST to refer to the scheme's legal name, the National Employment Savings Trust. We sometimes also use it to refer to the scheme's trustee, the National Employment Savings Trust Corporation.

Given this, we believe that it may be more sensible to reduce the number of changes being made and introduce only those changes that will not require significant inconvenience or cost to employers who will stage or have staged under the current rules. The industry could then undertake a full, radical simplification at the end of the staging process. Similarly, any changes that may create substantial costs for providers should be carefully considered. In the meantime, we strongly suggest that The Pensions Regulator (TPR) be allowed to exercise discretion in assessing minor, procedural breaches of the regulations when assessing compliance and build up a fuller picture of the areas of the current regime which require amendment. If such an approach were formally adopted by TPR in its enforcement strategy it would be an alternative means to simplification that employers could then have confidence in. It would also signal strongly that insignificant infringements of administrative complexity by employers would be tolerated as if there had been no breach.

Delaying much of the simplification until the end of the staging process will ensure that employers who are already complying with their new duties are not disadvantaged and employers yet to reach their duty date can plan with greater certainty that elements of the regime will not change.

However if the changes as proposed are enacted then we would strongly suggest the following points for consideration in relation to the whole package of proposals.

- **Transition** – in addition to the costs incurred by employers and market participants, the proposed lead time in making these changes could be viewed as very short compared to what we understand is usual in the payroll industry and the advance planning timetable which TPR suggests is wise for employers. In order to ensure that market participants can make these changes in time for the proposed April 2014 start date, and to ensure that employers planning 12 months ahead can do so with certainty, the DWP will need to ensure that legislative certainty on these changes is available at the earliest possible opportunity. The proposed timescale for announcement of the government's response to the consultation - before the summer 2013 recess - should therefore not slip. Moreover, the announcement should append draft regulations and where necessary draft guidance from TPR, so that the impact of the legislative changes decided can be grasped in sufficient detail by all.
- **Member protection** – a number of the proposals make the use of contractual enrolment more attractive for employers. The proposals would allow contractual enrolment to operate outside of the automatic enrolment regime. As a result, the concept of protections against 'prohibited recruitment conduct' and 'inducement' would not apply. Therefore, any changes which facilitate the use of contractual enrolment instead of automatic enrolment will need to take account of this.

Assuming that the DWP goes ahead with these proposals, there are a number of other areas of confusion for employers where simplification would significantly help. We include a number of these in the penultimate section of this response to the DWP. The topic areas are derived from our discussions with employers and in particular they are those where there are common themes in the feedback we're receiving from a substantial number of employers. If changes are to be made to simplify the regime at this time, we hope that the DWP will take the opportunity to extend the current list to include consideration of these.

NEST's consultation response

We respond below to the specific questions as put. Nevertheless, as above, our strong preference is that changes of substance which have a potential detriment to employers who will stage or who have staged under the current rules should be deferred while a stronger evidence base for change is sought, and appropriate time is taken to consider the changes that need to be made.

Defining pay reference periods for assessing automatic enrolment duties

1. Does the existing approach to pay reference periods cause you any difficulties? If it does, can you explain how, if possible with specific examples?

Feedback from the employers using NEST indicates that the existing approach is often difficult for them to interpret, and consequently it's hard for them to build supporting processes and solutions.

If these employers, who are being advised by benefit consultants and legal advisers, are finding this area difficult there is a danger that smaller employers without that same level of support will have a greater chance of getting this wrong.

One area which is particularly troublesome under the original provisions and which does not appear to be addressed by the current proposals is processes for employers who use a 4/4/5 variant of a monthly payroll cycle. Based on the current regulations, we know that TPR expects the earnings thresholds for contribution calculation and assessment to be based on the size of the pay reference period in which pay is actually received, even if that pay was 'earned' over the prior pay reference period. But under the 4/4/5 payroll cycle some months there are four weeks' worth of timesheets paid in a five-weekly pay reference period, and in other months there are five weeks' worth of timesheets paid in a four-weekly pay reference period. The implication is then that four weeks' worth of pay is compared with an earnings threshold calculated on a five-weekly basis and vice versa. This introduces considerable complexity to the calculation of the pay reference period and contradictory outcomes for assessment and contribution calculations.

We would suggest instead that the DWP does more research with the payroll industry as to how this complexity can be avoided and how an approach better fitting with Her Majesty's Revenue & Customs (HMRC) rules for tax and National Insurance - which we understand is simpler - could be applied. Any options for change should then be checked to ensure that pension and payroll providers which have already built systems can work with the change.

Apart from this kind of issue, we believe that the proposals appear to solve many of the problems we've been made aware of. However, care will need to be taken to ensure that all payroll cycle options are supported in the final drafting.

2. Will adding the proposed alternative method of determining a pay reference period to align with tax and NICS periods make assessing jobholder status more straightforward?

We believe that familiarity with carrying out calculations based on tax periods and the ability of payroll software to deal simply with such payments will mean that the proposals will make such assessments more straightforward.

Given that the proposals for this change add to rather than replace the existing proposals, we believe that this change can be made without negatively impacting on market participants.

Transitional issues

3. Should the old and new definitions of a pay reference period remain in force? If so, for how long?

In common with many of these changes, we believe that employers who have already established, or started to design, business processes based on the existing provisions should be allowed to continue to use these processes if they wish. Failure to allow these processes to operate in parallel will mean additional cost impacts on those employers.

However, we also recognise that providing multiple tests by which an assessment can be made will introduce complexity into the regime and could mean individuals being treated differently depending on the approach favoured by their current employer. This could particularly impact on those individuals who frequently change jobs or have multiple employers, and will be difficult to explain.

As long as this complexity can be adequately explained, we would recommend that the two definitions of pay reference period be allowed to run in parallel in perpetuity.

4. If we allow a period where both the old and new definitions of a pay reference period are in force, would it be useful to bring the new requirements as soon as possible?

Experience suggests that employers will require a significant amount of time to plan their changes to these processes, as will payroll providers in developing payroll systems to operate on this basis. However, this should not be a barrier to bringing the dual running period into effect as early as possible. This will provide legislative certainty to allow market participants to develop their proposals and processes.

Defining pay reference periods for assessing scheme quality

5. Does adopting the revised definition of a pay reference period for assessing scheme quality remove any possible need for annual reconciliation for automatic enrolment compliance?

NEST believes that the revised definition will overcome many of the problems that employers and payroll systems have encountered in calculating minimum contributions. The new definition ensures that there's a much simpler process for assessing quality, which aligns to the current pay reference period process that payroll systems are using for the purpose of assessment. This avoids the need to deal with retrospective under- and overpayments of minimum contributions which we consider to be largely unworkable.

We've received questions regarding the existing annual reconciliation process from employers using and wishing to use NEST. The volume of these questions suggests that the processes set out in regulation are poorly understood. By changing the definition we believe that this uncertainty will be removed and commitment to this change should happen as soon as possible to give employers and providers policy certainty.

There's the possibility that a small percentage of jobholders who have a large one-off payment of earnings, such as a quarterly bonus, could be disadvantaged but the revised definition should go ahead. We believe that the benefits gained by simplifying this area outweigh the possible disadvantage to a minority of workers.

6. Are there any potential difficulties with the proposed change you wish to highlight?

We cannot see any fundamental difficulties in this proposal and believe it should be introduced as soon as possible to avoid unnecessary build to cater for annual pay reference periods to support annual reconciliation.

However, care needs to be taken in the drafting of these amendments. We understand that there's a legal view that the current regulations covering the pay reference period for the purpose of assessing automatic enrolment may be interpreted as excluding daily paid and irregularly paid workers from the scope of automatic enrolment. The new draft, however, appears to explicitly capture these workers and as such seems to meet the original policy intention for automatic enrolment eligibility, Employers will need certainty on this area going forward.

In addition, the draft amending regulations appear to only apply the revised definition of pay reference periods to workers who have an 'automatic enrolment date':

'(4) For the purposes of sections 20(1)(b) and (c) and 26(4)(b) and (5)(b)-

(a) The first pay reference period in relation to a person begins on the automatic enrolment date and ends on the last day of the pay reference period in which the automatic enrolment date falls;'

We recommend extending this provision to apply equally to all jobholders, rather than just those who qualify for automatic enrolment. This could be achieved by reverting to the wording in the current regulation 5(2)(a)(ii) of the Automatic Enrolment Regulations[2]:

'(2) In relation to any person-

(a) The person's first pay reference period is to begin-

(i) On the first day, on or after the staging date, that the person is both a jobholder and an active member of a qualifying scheme;'

Additionally, we note that the application of 'pay reference periods' has changed, and that the new draft regulation 4(3) applies a tax month pay reference period to a person paid by reference to a month and a tax week pay reference period to a person paid by reference to any other period. The current regulation 4(1) applies a monthly pay reference period to workers paid by reference to a month, and a weekly pay reference period to workers paid by reference to a week. As mentioned above, the draft regulation seems to extend to workers not paid by reference to a week or a month, for example daily or irregularly paid workers.

7. Is there any reason not to bring the revised definition of a payroll reference period for assessing scheme quality into force as soon as possible?

This proposal simplifies the current regime and addresses concerns raised by a number of our participating employers. We're not aware that any employers have yet designed processes to deal with this process because of the confusion around how it should be exercised. As such, we do not believe there is any reason why the revised definition should not be introduced as soon as possible.

Introducing consistency for contribution payment deadlines for all joiners

8. Does extending the deadline for passing over contributions make administration any easier?

In answering this point, it's instructive to examine why the extension of the deadline for the payment of the first contribution was extended for jobholders being automatically enrolled, or those who opted in, through the employer duties. These individuals are able to opt out of pension savings in the first month, and receive back a refund of their own contributions. The easement on payment of contributions was introduced to allow employers to manage refund payments - it was not introduced to simplify the payment of contributions, but

2 The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (2010/772).

to recognise and ease the burden of processing opt-outs within a tight regulatory time limit.

This new easement actually complicates the payment of contributions – employers using the latest payment date for new enrolees may now send two separate payments to their pension provider. There's one for those new enrolees whose payments are being delayed, and one for all of the other members of the pension scheme whose contributions are due within the standard statutory timescale.

Jobholders who are contractually enrolled have no right to an 'opt-out' as defined in the Pensions Act 2008. Consequently, they were not included in the easement on the first month of contributions. This means that employers who use contractual enrolment currently have a simpler contribution payment system – they need only run a single payment against a single due date for both new entrants and existing pension scheme members.

Extending the latest contribution date for the first two months of contributions to employers who use contractual enrolment does not provide a simplification. Extending this 'easement' actually complicates the payment of contributions under contractual enrolment. Likewise there seems little advantage in extending this to entitled workers.

Additionally, if the proposal to extend this easement to all contributions due in the two months following the 'relevant date' is brought in, then an additional complication can occur for automatic enrolment cases.

- An individual becomes 22 years old on 30 January and is automatically enrolled on that date.
- The new proposals mean that any contributions deducted prior to 30 March are due to be paid at the end of the second month following the month in which the relevant date falls.
- In this scenario, this would mean that any contributions deducted prior to 30 March, including any deducted on 29 March, would need to be paid by 31 March.
- Furthermore, if the proposal to extend the joining window to six weeks is agreed, the end of the opt-out period in this example could be as late as 13 April (or 24 April, if the opt-out window is extended to six weeks).
- This would mean that the original policy intent behind allowing the postponement of certain contributions – to avoid delays in processing opt-out refunds – is no longer being met.

9. Are there any risks associated with extending the deadline in this way?

In originally extending the payment date for contributions due in the opt-out period for dutied enrolments, two risks were mitigated:

- that funds would always be on hand within the statutory timeframe in order to process an opt-out refund
- that funds which would need to be refunded would not be subject to market movements during the opt-out period, potentially leaving an amount less than that which the employer was required to refund.

Neither of these risks exists for contractual enrolment or entitled workers and so neither are mitigated by extending the deadline for payment of the first month contributions. However, three risks would be introduced by such an extension:

- that the first two months' worth of contributions are not invested promptly
- that confusion is sown in members' minds by the fact that contributions for the first two months are allowed to be retained and paid to the pension provider after the contributions for the third month are due, although there's no good reason for doing so as there's no opt-out refund available
- that delaying contributions in this manner when there is no good policy reason to do so could be viewed as maladministration by the Pensions Ombudsman.

10. Is there any reason not to bring the change to contribution payment deadlines into force as soon as possible?

This change introduces additional complexity into pensions and would require market participants to adapt processes and systems for employers who want to take advantage of this flexibility. We do not support introducing an easement which would mean additional cost for industry, which does not benefit members, and which complicates administrative processes for employers.

Jobholders who opted out of pension saving before automatic enrolment

11. Should there be a prescribed period under section 3(4) of the Pensions Act 2008 to turn off the automatic enrolment duty? Please set out the reasons for your view.

NEST believes that this proposal will remove an unnecessary administrative burden for employers and avoid confusing workers who have decided to cease membership of a pension scheme shortly prior to their automatic enrolment date.

We see this as potentially applying in three different situations:

(i) where a worker ceases active membership or stops contributions before the employer's staging date within the prescribed period

(ii) where a worker ceases active membership or stops contributions before the automatic enrolment date but after the employer's staging date, including during a waiting period

(iii) where an employer is using a waiting period and the worker opts-in and subsequently opts-out within the waiting period.

However, it's not clear to us whether the draft regulations provide for the scenario in (iii). The consultation paper refers to both 'ceasing active membership' and 'opting-out' whereas section 3(4) of the Pensions Act 2008 specifically refers to ceasing active membership. The legislation creates the distinct concept of opt-out, where the member is treated as though they had never been in active membership.

It's our understanding that when a worker opts in and then opts out during the waiting period, the employer would have a duty to automatically enrol the worker if assessed as an eligible jobholder at the end of the waiting period. While this situation will occur infrequently, it's a matter that employers have identified as an issue that could cause them unnecessary administrative burden and that may frustrate workers. As such, it would seem appropriate for the exception to automatic enrolment under section 3(4) of the Pensions Act 2008 to apply in this situation also. We believe that the proposal may need to be reviewed to ensure that this is the case.

NEST is also concerned that section 3(4) does not explicitly link the cessation of active membership with the current employer. If a worker ceased active membership of a qualifying scheme within the previous 12 months while working for a different employer, the current employer could interpret that as a reason to not automatically enrol that worker. NEST considers that the easement in section 3(4) should apply in relation to the particular employment with that employer and that this should be made clear when exercising this power. This is consistent with how the legislation applies more generally.

NEST would, however, urge the DWP to consider whether the employer safeguards in Part 1 Chapter 3 of the Pensions Act 2008 will be sufficient to protect workers against any potential mischief on the part of employers seeking to circumvent their automatic enrolment duties through the use of this facility.

12. If so, how long should that period be?

NEST considers the DWP's proposal for the prescribed period under section 3(4) of the Pensions Act 2008 to be 12 months to be reasonable. This aligns with the exception to the re-enrolment duty in Regulation 14 of the 2010 Regulations which seems sensible.

13. Does the ongoing monitoring requirement limit how useful it would be as an easement?

Employers are in the best position to answer this question. However, based on our dealings with employers and payroll providers, we do not believe that this will detract from the utility of this provision as most employers with pension schemes will record this information anyway.

As outlined above, we believe that this will only work if the exception is related to the particular employment with the current employer.

Clarifying the form and content of the opt out notice

14. Do the proposed changes on the form of opt-out notices make it easier to design and use?

NEST welcomes this change. We've indicated in the past that the regulations need to allow flexibility over the form and content of the opt-out notice. This is especially important where schemes wish to use electronic means to support the opt-out process. This proposal will allow the flexibility required and avoid the need to display potentially confusing messages to a jobholder opting out via an electronic process.

15. Is there any reason not to bring the clarification on the form of the opt-out notices into force as soon as possible?

No.

The joining window

16. Do you think extending the deadline from one month to six weeks strikes the right balance between the needs of employer and jobholder?

Yes. However, thought should be given to consequential changes needed on the length of the period allowed for withholding contributions during the joining and opt-out windows. As a result, this will not automatically extend to synchronise with the joining window extension proposal unless a further supporting change is made.

17. An extended joining window could cut across the disclosure requirements that are currently linked to a one-month joining window. Would this cause administrative difficulties?

The provision of basic scheme information by the trustees to new members is covered under the Occupational Pension Schemes (Disclosure of Information) Regulations SI1996/1655 (as amended). When the scheme receives jobholder information from the employer, the scheme trustees have one month from receipt of that jobholder information to give the member the basic scheme information. As receipt of the jobholder information by the scheme is the trigger for the basic scheme information requirement, we cannot foresee any cut across from extending the length of the joining window.

Test scheme standard

We welcome any changes which provide genuine simplification to employers. However, we recognise that there are other respondents more able to provide experience-based commentary from the defined benefit scheme community on whether these proposals will meet that aim.

Automatic enrolment – other changes

Excluding certain categories of worker from the automatic enrolment duty

22. Are there categories or descriptions of worker for whom automatic enrolment is inappropriate? If yes, can you say who they are and why?

We believe that the categories of jobholder mentioned in paragraphs 80, 82 and 83 could reasonably be exempted from the employer duties. However, in the case of an individual with enhanced or fixed tax protection it should be made clear that it's only where this information has been supplied by the individual to the employer in advance of the duties. Likewise these individuals should be excluded from automatic re-enrolment. Further categories of worker that could reasonably be exempted from the duties include:

- **Schedule D tax payers** who are caught by the Pensions Act 2008 definition of 'worker'. These individuals are considered by HMRC as self-employed, but unlike other self-employed workers they are caught by the employer duties. TPR's guidance confirms that these individuals may still be classed as a worker under automatic enrolment legislation. As the individuals are treated as self-employed for tax purposes, this causes practical difficulties in determining whether a duty exists and in the payment of 'employer' minimum contributions in respect of them.
- **Workers approaching age 75**

  We believe any workers who are within one or two months of age 75 should be excluded from opting in. This is because of the complications of having to deal with the tax relief on the employee element of the minimum contribution which is dependent on the date of receipt of the contribution where the qualifying scheme uses the relief at source method.

  By the time the contribution has been deducted from payroll and passed across to the scheme, a period of a couple of months could have elapsed, with the scheme receiving the actual contribution after the worker has turned 75.

  Any employee contribution received by the scheme after an individual reaches age 75 does not qualify for tax relief under current tax rules and therefore could fail minimum contribution requirements. This will cause additional administrative problems for the employer and additional cost as they'll have to arrange for the shortfall to be collected and sent. It was not the original policy intent to not have tax relief available.

  This problem also exists for active members of a qualifying pension scheme approaching age 75 and likewise should be addressed.
- **Jobholders who die within the joining window**

  In the scenario where a jobholder dies within the joining window where there are qualifying earnings accrued in the current pay reference period, we understand there remains the duty to continue with that enrolment and pay contribution based on those earnings.

  We believe that it would be a pragmatic and proportionate easement to allow employers in this situation to cancel the enrolment process.

The consultation proposes to exclude certain groups of workers from automatic enrolment. However it seems reasonable that these groups of workers should also be excluded from other employer duties. For example, if the worker is a non-eligible jobholder or an entitled worker then there will be no requirement on the employer to advise them of their options or provide an opt-in process. If this extension is not included, it's not clear what communications would be required from employers to workers who are excluded from automatic enrolment. This will increase the burden on employers, rather than reducing it.

As with a number of other proposals, changes to groups of employees who need to be enrolled will mean that systems and processes which have been established to meet the existing regulations will need to be amended. In order to mitigate the cost impact of changing those processes, we recommend making it optional for an employer to exclude these groups from the automatic enrolment regime.

Other possible easements for employers providing good pension schemes

23. Would it be a good idea to allow employers contractually enrolling all workers into an automatic enrolment qualifying scheme to be certified or to self-certify that they are meeting the policy objectives and therefore are exempt from the explicit employer duties?

At a high level we agree with the proposal to provide an exemption for employers who contractually enrol all workers into a qualifying scheme that meets the quality requirements in the Pensions Act 2008. Our experience suggests that there are employers who wish to go above and beyond their legislative obligations by enrolling all of their workers into a pension scheme and making employer contributions. This may be because this is how they operated prior to automatic enrolment, because they wish to be paternalistic or because they want to avoid what they perceive as the administrative burdens associated with the employer duties. However, the current complex interaction between contractual enrolment and automatic enrolment rules makes it difficult for employers to do so.

We understand that TPR's current view is that, if contractual enrolment takes place either:

- before the employer's staging date
- before a new worker joins the employer
- during waiting periods.

then the employer has no duty to automatically enrol the worker if the worker is an active member of a qualifying scheme on the assessment date.

Based on our reading of the consultation document, the proposal is to provide for a more formal exemption from the employer duties where contractual enrolment has taken place through a certification process. We're not sure whether there is also an intention to expand the instances when contractual enrolment can be used to include any time after the staging date as opposed to only during the waiting period and before an employee joins. We interpret this as being an easement that applies to the employer rather than an easement that applies with respect to individual workers. As we understand it, this will have the effect of removing the requirements for the employer to:

- continue assessing the worker to determine when they reach jobholder status so that they can comply with their obligation to record the worker's automatic enrolment date[3]
- provide the worker with information about the scheme when they reach jobholder status.[4]

The existence of these requirements under the current regime can deter employers from using contractual enrolment as it means that the employer will need to continue assessing workers. The removal of these obligations would therefore significantly reduce the complexity associated with contractually enrolling workers.

However, NEST considers that more detail is required to demonstrate how this will work in practice. While there will inevitably be an interaction with the automatic enrolment regime, the full implications of this are not identified and analysed in the proposals. For example, it's unclear whether employers using the proposed certification process will be able to use a waiting period and if so whether postponement notices will be

3 Regulation 6(1)(f) of The Employers' Duties (Registration and Compliance) Regulations (SI 2010/5). See also TPR's guidance as per footnote 2 above.

4 Regulation 33 of The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (SI 2010/772).

required. The DWP should also consider whether any new information requirements should be imposed on employers using the process to ensure that all workers are adequately informed about the scheme they are being enrolled into and their rights. No assessment would be required as the information would be sent to all workers.

We consider that adopting an employer certification model rather than exemptions with respect to individual workers could cause issues in practice which we've outlined below.

In relation to the current workforce where workers have not already been contractually enrolled, the employer would need to vary the terms of the employment contract which would require the agreement of these workers. It's not clear how, under a certification-type process, the employer would deal with any workers who did not agree to the variation of contract. Furthermore, the proposals do not outline what the implications would be when a worker ceases membership of the scheme that they were contractually enrolled into. For example, would the automatic enrolment duties apply in respect of workers who cease active membership? Would a worker who has ceased active membership still have a right to opt into the scheme? The automatic enrolment regime implements re-enrolment to periodically nudge workers back into saving who may have opted out or ceased contributions. Consideration should be given as to whether, and if so how, this will apply where an employer contractually enrols their workers.

We also note that a member who ceases active membership of a scheme will only receive a refund if the rules of the scheme provide for this.

These issues also raise real concerns about the risk of regulatory arbitrage by employers acting to avoid their automatic enrolment duties. The detail of this proposal needs to be considered in light of this and proper protections will need to be implemented to ensure that employers do not induce their workers to cease membership after being enrolled.

NEST and contractual enrolment

This proposal recognises that some employers will want to offer pension provision above and beyond the minimum requirements of the automatic enrolment legislation. NEST supports this behaviour as it benefits workers.

However, the proposal does not recognise that a number of employers who wish to operate on this basis will not be economically attractive to the majority of pension providers in the pensions market. These will generally be smaller employers or those with a high staff turnover. This situation will also be exacerbated if the much predicted 'capacity crunch' in the pensions market hits during the process of staging.

Currently, NEST's Order and Rules do not give NEST the power to accept, as members, workers who are contractually enrolled after the employer's staging date.[5] Therefore, employers who wished to provide benefits in this way would not be able to use NEST as they would not be covered by NEST's public service obligation to accept all employers who want to use the scheme to meet their employer duties. This could lead to some employers possibly being forced to reduce the quality of benefits that they wish to provide, and being forced to reduce the number of workers to whom they wish to provide those benefits, in order to be able to provide a pension through NEST. This situation strikes us as contradictory.

In order to resolve this issue, NEST's Order and Rules would need to be amended to allow it to accept members enrolled in this way.

5 See Article 19(1) and Rule 8.2 of the NEST Order and Rules.

24. Is there anything employers might need to demonstrate, beyond contractual enrolment of all workers into an automatic enrolment qualifying scheme, in order to be certified or allowed to self-certify?

The proposals appear to allow contractual enrolment to operate outside of the automatic enrolment regime. As a result, the concept of protections against 'prohibited recruitment conduct' and 'inducement' would not apply. As outlined above, NEST strongly believes that there would need to be adequate worker protections in the same way that there are under the automatic enrolment regime.[6] Further consideration is also required in relation to any information requirements placed on the employer and how a contractual enrolment regime would interact with automatic enrolment.

We believe that TPR could also have a role in ensuring that the employer was acting in accordance with the certification and any legislative rules on an ongoing basis. For example, periodic reporting requirements could be imposed on employers using contractual enrolment to ensure compliance.

Consideration should also be given to ensuring that concepts such as periodic re-enrolment and the ability for a jobholder who had previously ceased participating to opt back into pension saving are included within these provisions.

Defined benefit (DB) quality requirement

25. For the purpose of automatic enrolment, is a quality requirement needed for DB schemes at all?

We believe that there's a need for a quality requirement for DB schemes. If this were removed it could encourage unintended behaviour to circumvent the automatic enrolment requirements. This could include establishing a DB scheme with very low rates of accrual or based on a low pensionable salary or amending the future accrual/salary definition in an existing DB scheme.

26. Is there a simpler way of determining whether a DB scheme is 'good enough' to be used for automatic enrolment?

We don't believe that DB pension scheme design lends itself easily to a 'one size fits all' approach to a quality requirement. This problem is likely to be exacerbated if a simple solution for DB schemes is extended to cover defined ambition schemes as well.

Other opportunities for change

The consultation proposes changes to secondary legislation but also discusses elements of change to the automatic enrolment regime that have been added to the current draft pensions bill.

We believe that if changes are being made to both primary and secondary legislation and the DWP wishes to minimise future changes there's a good opportunity to address items which are causing significant concerns to employers and participants across the industry. Some of the issues are set out below.

- **Definition of 'qualifying earnings'**

  Despite continued discussion around what elements of pay are included in the definition of 'qualifying earnings', we're still aware employers are experiencing serious problems trying to decide whether a particular pay item is part of qualifying earnings. We would recommend that action is taken to align the definition of qualifying earnings to the definition of earnings used for the national minimum wage, or better still, to align it with the definition of earnings used for income tax. These are both definitions that employers are used to assessing and would significantly simplify administration processes.

6 Chapter 3, Pensions Act 2008.

Definition of 'worker'

While the proposals for allowing certain groups to be excluded from automatic enrolment are sensible, a further proposal to align the definition of 'worker' with the definition of 'employee' under tax law would simplify administration for employers, who are currently faced with the difficulty of establishing whether they have a duty to a contractor, and for pension schemes in ensuring that these individuals are given the correct amount of tax relief.

Addressing the confusion around staging dates for complex corporate structures

While a decreasing issue now that the very largest employers are through staging, we're still talking to employers who are having trouble establishing their staging date due to complicated internal structures. Many of these employers have multiple subsidiaries and multiple PAYE references and any action to address this issue now would allow these employers certainty around their planning.

Certification

We believe that it's an anomaly that statutory guidance on certification falls to the DWP not to TPR. This has led to various problems including:

(1) employers who have questions in this complex area naturally go to TPR for a steer but, on matters which are not explicitly covered in the DWP guidance, TPR may be reluctant to give a view, since the guidance is not seen as their responsibility

(2) the DWP itself may not be resourced to deal with questions on its own guidance.

Employers often put questions to NEST about the operation of legislation, which we, as a provider, should not be answering. For example, does an employer using Tier 1 certification (basic pay) have a responsibility to maintain employer contributions for a member whose pay drops below the lower end of the qualifying earnings band? And where should employers go for clarity on such issues – to the DWP or TPR? We believe that the responsibility for providing guidance on this issue should rest with TPR.

Disclosure of information

While we welcome the recent consultation on amendments to the Disclosure of Information Regulations[7], and the proposed simplifications within that document, there are still a number of areas where the disclosure regime does not support the policy of 'member inertia' which underpins the automatic enrolment regime. We believe that a separate disclosure approach, tailored to the needs of the new employer duties, would better support the aims of the original policy and ensure that the right information is delivered to the right members at the right time.

Conclusion

We're pleased that the DWP has listened to industry concerns over the unanticipated difficulties around the employer duties. We welcome any proposals which simplify those processes, protect member outcomes and recognise that many employers and market participants have already spent significant time and money on meeting the current requirements of the automatic enrolment regime.

Many of these proposals meet those objectives, although some will require further work if they are to simplify the employer duties without affecting member protections, skewing the market or causing significant additional work for employers who have already met their duties and the providers serving them.

We look forward to working with the DWP to enable such changes to be introduced in a manner which aids all participants in this market and allows NEST and other pension providers to support employers in taking advantage of these proposals. On this point, we would reiterate that it may be sensible to delay making many of these changes until the end of the staging period to avoid unintentionally complicating the regime.

7 The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (SI 1996/1655).