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NATIONAL MINIMUM WAGE AND THE ACCOMMODATION OFFSET

RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS TO LOW PAY COMMISSION CONSULTATION

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Introduction

The ALP has for several years been arguing that the accommodation offset arrangements work to the disadvantage of workers by removing the option to have accommodation provided by an employer.

The current effect of the regulations is to make it very difficult, if not impossible, for most labour providers to provide accommodation for their workers. The effect of new interpretations and enforcement practices over the last few years has been that labour providers have generally ceased to provide accommodation. However, the workers still need accommodation. They now obtain these in the open market, in some cases through the informal economy. There is no evidence to suggest that workers are any more vulnerable to exploitation when services are provided by their employers, when at least they can be audited, rather than when they are provided by third parties.

This paper considers in more detail the implication of the accommodation offset arrangements. This was last considered by the Low Pay Commission for its report in 2006. The ALP submitted a detailed paper, dated 26 September 2005, for this review; much of this paper is still relevant so it is annexed. This paper concentrates on the developments over the last few years.

The Offset

Under the accommodation offset arrangements, employers who provide accommodation to their workers can count up to a specified amount (£33.11 a week after October 1 2011) as payment towards the minimum wage. The arrangements are complex, difficult to understand and capable of a number of different interpretations. These were spelled out in the Association's 2005 submission. Such was the uncertainty that the DTI had a formal consultation on new guidance on the accommodation offset arrangements.

At the least, there is now no doubt in the minds of employers as to the current position, which is that employers that provide accommodation directly or indirectly to workers who are on the minimum wage cannot charge more than £33.11 a week.

Provision of Accommodation by Labour Providers - Market Issues

It is necessary to put the issue into its context. The ALP's members predominantly provide workers for unskilled work in the agriculture and food packing and processing industries. Such are market pressures in this industry that the unskilled work is either at, or very close to, national minimum wage. Labour providers operate in a very competitive market largely resulting from the downward pressure on costs exerted by the supermarkets. It follows that margins are thin, although adequate to allow viable businesses to continue.

Very few British workers are willing to work at or near minimum wage in such roles. For this reason, for many years many of these irregular low-paid jobs in Britain have been undertaken by migrant workers, able to earn much more than they can in their home country.

Migrant workers coming to Britain for the first time face a number of challenges, of which finding work and accommodation are key priorities. Prior to the current interpretation on accommodation many ALP members provided a service to their workers to help them settle in the UK which included, in some cases, providing accommodation as an option. Labour providers generally would prefer not to provide accommodation but recognise that in some cases it is an added attraction for workers.

Labour providers are in no position to provide a subsidy to those of their workers occupying accommodation. Their margin does not allow them to do so.

It is impossible to provide accommodation in all but a very few parts of the country within the accommodation offset maximum of £33.11 a week. A cursory examination of the to-let columns of the local newspaper is sufficient to show this. In its submission on the new DTI guidance in September 2006, the ALP quoted figures from the local newspaper in Stamford where the lowest rent quoted was £77 a week for a one-bedroomed flat. It also noted that NHS Trusts offer accommodation to hospital staff at between £70 and £85 a week.

The context is therefore clear; the effect of the accommodation offset arrangements is that labour providers and many other employers cannot legally provide accommodation to their own workers at or near minimum wage.

The only exceptions to this within the agriculture and food packing and processing industries are:

- growers providing accommodation where there is a direct benefit from the worker being on or close to site.
- growers or labour providers who have invested in purpose built hostel style accommodation with six to eight workers to a room.
- employers or labour providers who house multiple workers in caravans or mobile homes.

The Effect of the New Interpretation

Following the promulgation of new guidance by DTI leading up to April 2007, almost all members of the ALP that did provide accommodation ceased to do so. This was entirely predictable, as was explained by the ALP at the time. Labour providers sold what property they owned, or where they had leased it they chose not to renew when the opportunity arose. Some labour providers may well have decided that there was more money to be made in providing accommodation than in providing labour and became landlords instead.

This does not mean that labour providers have stopped helping their workers find accommodation. Some labour providers have arrangements with commercial letting agents and other landlords whose details they provide to their workers, and provided the labour provider does provide details without taking a fee, this is within the accommodation offset arrangements.

It would be naive to believe that arrangements do not exist that go further than this, with labour providers referring workers to letting agents and receiving a commission, but in such a way that there is no chance of HMRC inspectors detecting it.

To the extent that labour providers are unofficially providing accommodation, the new arrangements are no longer transparent or auditable to an inspector, whether from the Gangmasters Licensing Authority (GLA), HMRC or anyone else. To this extent, some of the protection of workers has been removed.

Most labour providers now choose to do nothing, leaving workers to make their own arrangements. Often this works well. Typically, some workers take it upon themselves to become mini-landlords, either buying or renting a large fairly run-down property and making rooms, or even beds, available to their fellow workers. This is not unlike the arrangements which students traditionally have made. It needs to be remembered here that the majority of workers are single and mobile and many wish to maximise the amount they can send home or take home to their native country. They are therefore willing to save money on accommodation by sharing in many cases.

The Effect on Workers

As a result of the new guidance, the position of workers has worsened. Indeed, it is difficult to envisage that any worker has obtained any benefit at all. If the belief was that as a result of the guidance those labour providers providing accommodation would cut their rents by £20 or £30 a week, then this was naive.

Previously, many workers had a choice of being able to rent a property from their landlords in addition to being able to rent on the open market or living with friends. They now have one less option, in that they cannot rent from their employers.

It is relevant to note that through separate agency worker legislation (The Gangmasters (Licensing Conditions) Rules 2009 and The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007) workers supplied accommodation by the labour provider have an added protection. These pieces of legislation require that workers must be able to cancel or withdraw from any services provided at any time without incurring any detriment or penalty, subject to the worker giving a maximum of 10 working days' notice for services relating to providing accommodation. In other words the maximum notice period that can be built into a tenancy or service agreement between a labour provider and a worker is 10 working days. In the sector serviced by ALP members this is regulated by the Gangmasters Licensing Authority as part of licensing standard 7.1.

There has been a reported increase in exploitation of workers as a result, mainly by the fellow countrymen of the workers concerned and often going back to arrangements made in the home country. However, whilst an increase in this type of exploitation is a natural consequence of the new market opportunity that was created it is not suggested that this has changed significantly as a result of the new interpretation. However such exploitation is hard to detect and is one of the characteristics identified in a toolkit prepared by the ALP, "Uncovering Hidden Migrant Worker Maltreatment" which is attached to this response.

The Future

Labour providers can live with the present position whereby, in effect, they are banned from providing accommodation to their workers.

From the public policy perspective, however, they can see no justification for the current situation as it bears no relation to the marketplace in which they operate or to the interests and wishes of their workers.

The preferred position of the ALP is that the separate accommodation offset arrangements should be abolished except in the case of tied accommodation (for which they were originally intended).

The accommodation should be considered tied whether or not the accommodation is let by the employer or a third party if:

- the accommodation is provided in connection with the worker's contract of employment; or
- a worker's continued employment is dependent upon occupying particular accommodation; or
- a worker's occupation of accommodation is dependent upon remaining in a particular job

Where accommodation is provided by employers on an optional basis, workers should be free to agree voluntarily to deductions from their pay to meet the cost of accommodation.

Such an approach would:

- Be consistent with current government policy of lighter touch regulation.
- Open opportunities for employers to enter the rental accommodation sector and stimulate regeneration and growth.
- Provide workers with an additional option to source accommodation.
- Retain necessary protections for workers with regard to tied accommodation.
- Be auditable by HMRC, GLA and others.

Annexure

26 September 2005

ACCOMMODATION AND THE MINIMUM WAGE

Submission to the Low Pay Commission by the Association of Labour Providers

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Introduction
The Low Pay Commission has been asked by the government to review and make recommendations on the operation of the accommodation offset in the minimum wage arrangements. Broadly speaking, the accommodation offset is being interpreted to mean that where an employer provides accommodation to his workers then any rent payment in excess of £26.25 a week has to be deducted from pay in calculating whether the minimum wage is being paid. The Commission is seeking evidence from interested parties by 30 September 2005.

This paper sets out the views of the Association of Labour Providers (ALP). The Association was formed early in 2004 by 18 labour providers. It now has 131 members and is recognised as the representative voice for those labour providers that serve the agriculture and food industry. (Full information about the Association and its work is available on its website: www.labourproviders.org.uk.) Labour providers are particularly affected by the offset arrangements. For the most part, they bring workers to the UK who undertake low paid work. Because the workers are newly arrived in Britain they are not easily able to make their own accommodation arrangements and their income restricts the rent that they are able to pay on the open market. The issue is therefore very important to those labour providers that provide accommodation, almost all of whom are currently doing so contrary to the new interpretation of the legal position.

Executive summary
The legal position on the accommodation offset is set out in Statutory Instrument 1999 No. 584. The Regulations are complex both in respect of the calculation of the offset and also when it applies.

There is substantial legal uncertainty about the current arrangements. There have been different interpretations within and between DTI, Defra and HMRC. A number of official publications give a different view from the legal position that is now being put forward. Particular issues of uncertainty are defining when the labour provider is the accommodation provider, whether deducting rent payments from pay is relevant to determining whether the labour provider is the accommodation provider and whether it makes any difference if the worker has a choice as to whether to occupy the accommodation.

In its reports the Low Pay Commission has treated the accommodation offset in the context of the provision of tied accommodation. It sets the offset below the cost of providing the accommodation because of the benefits the employer has through workers living in tied accommodation.

The arrangements for the accommodation offset are difficult to justify theoretically as what is seen to be a concession to employers actually results in the opposite. It is difficult to see why employers alone should be restricted in what rent they can charge to workers on low pay.

Labour providers are particularly affected by the new interpretation because of the nature of the business they are in. They bring workers to the UK to do low paid jobs. Those workers need help with their accommodation arrangements.

Most labour providers do not provide accommodation; those that do generally charge between £40 and £60 a week. Workers benefit by having the option of obtaining accommodation quickly and easily.

If labour providers do not provide accommodation then workers may have difficulty in obtaining accommodation and will be paying substantially more than £26 a week unless they are prepared to accept overcrowding.

Current regulations do not significantly affect the amount that workers pay for their housing. To the extent that the re-interpretation has had any effect, it has been to discourage labour providers from providing accommodation, not to affect the rent paid by workers.

Enforcement activity seems poorly targeted – at those in the formal economy with records to inspect.

The preferred solution is that when workers have a choice as to whether they occupy accommodation provided by the employer, a labour provider should be in the same position as any other accommodation provider. This would be in line with guidance still given by Defra and the DTI.

Legislation

The legal position is set out in Statutory Instrument 1999 No. 584 - The National Minimum Wage Regulations 1999.

Regulation 30 provides that

> "The total of remuneration in a pay reference period shall be calculated by adding together" pay and a number of other items including –
> "(d) where the employer has provided the worker with living accommodation during the pay reference period, but in respect of that provision is neither entitled to make any deduction from the wages of the worker nor to receive any payment from him, the amount determined in accordance with regulation 36."

Regulation 31(i) sets out amounts that must be deducted in calculating the minimum wage –

> "(i) the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation by him to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 37, to the extent that it exceeds the amount determined in accordance with regulation 36."

Regulation 35 has some other relevant information on deductions –

> ***"Payments not to be subtracted under regulation 31(1)(h)***
> **35.** The payments excepted from the operation of regulation 34(1)(c) are-
> (a) any payment in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable;
> (b) any payment on account of an advance under an agreement for a loan or an advance of wages;
> (c) any payment made to refund the employer in respect of an accidental overpayment of wages made by the employer to the worker;
> (d) any payment in respect of the purchase by the worker of any shares, other securities or share option, or of any share in a partnership;
> (e) any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment."

Paragraphs 36 and 37 set out the substance of the regulations on the calculation of the accommodation deduction.

"Amount permitted to be taken into account where living accommodation is provided
36. - (1) The amount referred to in regulations 30(d) and 31(1)(i) is whichever is the lesser of the following-
(a) the amount resulting from multiplying the hours of work done in the pay reference period (determined in accordance with regulations 20 to 29) by 50p, and reducing that product by the proportion which the number of days (if any) in the pay reference period for which living accommodation was not provided bears to the total number of days in the pay reference period; or
(b) the amount resulting from multiplying the number of days in the pay reference period for which living accommodation was provided by £2.85.

(2) For the purposes of paragraph (1), living accommodation is provided for a day only if it is provided for the whole of a day from midnight to midnight.

Adjusted deductions and payments in respect of living accommodation
37. - (1) Where an employer is entitled to make deductions or receive payments in respect of the provision of living accommodation to a worker and in a pay reference period -
(a) a worker is absent from work for a day or more when, but for his absence, he would be expected to perform time work (for example because he is sick or taking a holiday),
(b) during that period of absence he is paid, for the hours of time work for which he is absent, an amount not less than the amount to which he would have been entitled under these Regulations, but for his absence,
(c) the hours of time work worked by the worker in the pay reference period are, by reason of his absence, less than they would be in a pay reference period containing the same number of working days in which the worker worked for the normal number of working hours (and for no additional hours), and
(d) the amount of the deduction the employer is entitled to make or payment he is entitled to receive in respect of the provision of living accommodation to the worker during the pay reference period does not increase by reason of the worker's absence from work, the provisions of paragraph (2) shall apply.

(2) For the purposes of regulation 31(1)(i), the amount of the deduction the employer is entitled to make or payment he is entitled to receive in respect of the provision of living accommodation shall be adjusted by multiplying that amount by the number of hours of time work actually worked by the worker in the pay reference period (as determined in accordance with regulation 20) and dividing the figure so obtained by the total number of hours of time work the worker would have worked in the pay reference period (including the hours of time work actually worked) but for his absence."

Legal uncertainty
These provisions are difficult, if not impossible, to understand; certainly the average person running a small business would not have a hope of getting to grips with them. It will be demonstrated in this section that government departments have differed, and continue to differ, in their interpretation of the provisions.

All that is certain is that there is something called the accommodation offset which is calculated on a daily basis but applied on a weekly basis and is currently a maximum of £26.25 a week (increasing to £27.30 from 1 October 2005). It is also accepted that where an employer is caught by the provisions then the amount that they charge for accommodation cannot take the employee below the minimum wage except by the amount of £26.25 a week.

The differences in interpretation relate to two expressions –

- "where the employer has provided the worker with living accommodation" (30.d). This in turn comes from section 54(4) of the National Minimum Wages Act 1998: "In this Act "employer" in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed."

- "the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation" (31.i).

The Association has taken the view that the accommodation offset is a concession to employers – the only "benefit in kind" that can be counted towards the minimum wage, is up to £26.25 a week. It will be demonstrated subsequently that the Low Pay Commission analysis of the minimum wage has been in terms of the provision of free or very cheap accommodation that is occupied as a condition of employment. Thus assuming a 40 hour week, the £26.25 figure is equal to £0.66 an hour, and therefore an employer providing free accommodation is meeting the minimum wage requirements if he pays £4.19 a week, rather than £4.85. If the employer makes a nominal charge of say £10 a week then it is entitled to pay £0.25 less than the minimum wage, that is £4.60 an hour.

The Association is reinforced in this view by 35(e): "any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment." This means that for any good or service other than housing a worker can agree separately from the contract of employment to purchase it from the employer with the cost not being deducted for a minimum wage purposes. It is counter-intuitive to then argue that a "concession" in respect of housing actually means more restrictive rules. If the special "concession" on housing was abolished there would be no problem for ALP members as housing could then be treated in the same way as other goods and services.

HMRC has rejected this interpretation. In a letter dated 14 February 2005, the Head of Operations, National Minimum Wage, said:

> "I do not agree with your interpretation of Regulation 35. It does not apply to payments with regard to the provision of accommodation. It can't be applied to accommodation because, as a matter of law, "goods and services" are not usually regarded as including land or buildings. Furthermore, a payment for accommodation by way of rent is not a "purchase".

As a matter of law this response is clearly wrong.

Furthermore, it is contradicted by the official guidance in *A detailed guide to the national minimum wage* which is still on the DTI website and therefore still applicable. Paragraphs 85 and 86 set out the general position in respect of payment for goods and services provided by the employer –

> "85. A worker may want to buy goods (shoes, clothing, hi-fi) or services (for example, meals) from his own employer. If he is completely free to choose whether to buy from this employer or from somewhere else, the amount of the purchase price is not taken away from the amount that counts towards minimum wage pay. The worker cannot subsequently claim that by having bought the items from his employer, he has not been paid the minimum wage.
>
> 86. The important point, though, is that he must not be *required* to buy from the employer. If he is *required* to buy goods or services from the employer, the amount that he pays has to be taken away from the amount that counts towards the minimum wage. In effect this would be a payment in kind rather than payment in wages".

The guidance then goes on to give a specific example relating to accommodation –

> "A hotel, youth hostel or holiday centre *requires* its workers to purchase accommodation with it. Anything that the worker pays for accommodation over and above the permitted offset will not count towards minimum wage pay.

It is therefore clear that not only is the HMRC view on this position legally untenable but it is not consistent with what has been and is still official guidance.

These views have also been generally held by Defra. In a letter to Sir George Young MP, dated 14 April 2005, the Minister for Employment Relations said the offset rules "included cases where an employer has effectively provided accommodation – where for example he has arranged

accommodation of behalf of his workforce, made deductions for the costs through his payroll and received commission from the landlord." He went on to say: "I am aware that Defra, who are responsible for enforcing the agricultural minimum wage, has adopted a slightly different approach. As a result of slight differences in the agricultural and national minimum wage legislative frameworks, Defra took the view that where accommodation is provided by the employer and the worker was free to choose whether to occupy the accommodation offered, the accommodation offset did not apply. Defra have now revised their approach and accept that their interpretation could lead to a worker being paid less than the national minimum wage. Defra will be revising their future approach to enforcement accordingly."

Interestingly, having reviewed their approach Defra then issued the following guidance, which is contrary to what is stated in the minister's letter, –

> **"Q 6Can an employee ask an employer to make deductions without affecting national minimum wage pay?**
> A 6 Yes. Where a deduction is requested by the worker that is for the worker's benefit, national minimum wage pay is not affected. Such deductions include employee pension contributions or rent collected and passed to a third party. An employer must derive no benefit from such deductions.
>
> Q 19. What is the position in respect of living accommodation provided to an agricultural worker by a third party?
>
> A 19. Neither the national or agricultural minimum wage legislation allows accommodation provided by a third party to count as part payment of a worker's minimum wage entitlement. However, a worker can authorise the deduction from pay of rent paid to a third party. There is no limit on the value of rent that can be deducted in this way. For this transaction to remain outside the control of the minimum wage legislation the employer must derive no benefit from the deduction made."

The DTI still has on its website information for migrant workers which gives information contrary to what is said in the Minister's letter – and despite this having been pointed out to the Department. Leaflets for Lithuanian and Polish workers include the following - : "Your employer may ask you to sign a separate agreement asking you to agree to pay more for your accommodation [than the offset amount] or other things such as transport. If you are not given any choice about where you live or what services you use such deductions may be illegal."

The implication of this is that if the worker is given a choice then it is not illegal, and indeed even if the worker is not given a choice it only "may" be illegal.

In a letter to the ALP on 14 March 2005, HMRC gave its interpretation of the position –

> "On the issue of choice, our legal advice is clear that if an employer provides accommodation to a worker, then the amount that may be taken into account for NMW purposes is limited to the amount specified in the legislation, currently a maximum of £26.25 a week. It makes no difference if the worker can choose whether or not to take the accommodation provided by the employer.
>
> Where a third party provides accommodation to the worker the amount that may be deducted for NMW purposes will depend on the facts of each individual case. At one extreme there would be the case of workers left to find their own accommodation on the open market. In such cases the accommodation offset restrictions would likely not be in point. Towards the other end of the spectrum would be cases where the employer arranges the accommodation, makes deductions through the payroll on behalf of a third party and charges commission for arranging the accommodation. Ultimately it would be for the Employment Tribunal to take a view on the application of the law to the particular facts

> of a case. But our firm view (informed by legal advice and decisions in Employment Tribunals) is that the accommodation offset restriction would apply to all cases toward this end of the spectrum."

The clear conclusion is that there is considerable legal uncertainty as to the relevance of the choice issue.

The second uncertainty is in respect of whether a labour provider is also the accommodation provider. The tests given by HMRC relate to mechanical (eg deduction from payroll) rather than substantive issues. Taking the three tests in the HMRC letter a labour provider arranging accommodation at arm's length with a commercial landlord could be caught if it receives commission and makes deductions from payroll, whereas a labour provider and a landlord that were in effect one and the same might not be caught if there were no deductions from payroll, the accommodation was arranged by a third party (for example the person introducing the workers to the labour provider) and there was no payment of commission.

Low Pay Commission

A study of Low Pay Commission reports indicates that the accommodation offset has been regarded as dealing with benefits in kind and the tied cottage position.

The First Report of the Low Pay Commission (1998) comments "in some sectors, particularly agriculture and hospitality, the provision of accommodation or lodging only as a benefit in kind is significant, and sometimes is covered by collective agreements." The Report went on in paragraph 4.30: "if we do not allow an accommodation offset to be made against the national minimum wage, employers may transfer the accommodation charge from a benefit in kind to a cash charge to the worker, which could be particularly disadvantageous to the low paid. Hence we recommend that an offset should be allowed where accommodation is provided as a benefit in kind." The Report went on to suggest the figure which has now become £26.25 a week.

In 1999, the Commission published a detailed report: *The National Minimum Wage Accommodation Offset*. The first chapter of the report begins with the words: "Few low paid workers are provided with benefits in kind, but the provision of accommodation or lodging is a significant feature of some sections, particularly hospitality." The report goes on to talk about "the provision of free accommodation or lodging". The merits of this are spelled out: "It is recognised and valued by employers and employees alike. For the employer, it is often advantageous to have staff living on or near the premises. For the worker it offers accommodation at very little cost, or in locations where alternative accommodation is not readily available." The Commission went on to acknowledge that in deciding the level of the accommodation offset: "We did not seek to reflect the actual cost of accommodation to the worker, or the cost to the employer. We believe that it would be inappropriate and impracticable to do so. Allowing a market rate would not have recognised the benefits to the employer of providing accommodation." The exact wording of the conclusion of the Commission merits quoting in full –

> "Consequently, we recommend that, where the employer provides accommodation or lodging free of charge to the employee, an amount of up to £20 a week may count towards the national minimum wage."

It is very clear from this that the Commission is talking about the provision of free accommodation and the concession allowed to the employer is that he can pay less than the minimum wage by the amount of the accommodation offset. This is nothing like the interpretation that is now being placed by parts of Government on the provisions.

Chapter 2 of the report refers to research providing information "about the use of tied accommodation throughout a range of industry sectors". Appendix 3 which gives official data is all about employees living in tied accommodation, either rented or rent free. There is nothing in the research about the sort of accommodation that labour providers are currently providing.

The Third Report of the Low Pay Commission (2001) also makes it clear that the offset relates to tied accommodation. Paragraph 5.21 says: "In our First Report we said that: "For employers, the advantage of providing accommodation is that it helps ensure workers are on the premises." The paragraph goes on to refer to the offset being allowed "where accommodation is provided as a benefit in kind". Paragraph 5.30 comments: "The largest numbers of employees living in tied accommodation are found in public administration and defence (eg caretakers and security staff) followed by health and social work (eg nurses)." Paragraph 5.32 refers to the "generally low (and declining) incidence of employer provided tied accommodation".

The Fourth Report of the Low Pay Commission (March 2003) has a section on the accommodation offset. It is clear from reading this that it applies to tied accommodation. Paragraph 3.98 states: "Where an employer provides accommodation for a worker, this benefit in kind may count towards national minimum wage pay up to a maximum of £22.75 a week. Amongst the low paying sectors which we examine, provision of tied accommodation is more common in the hospitality sector than in any other sector."

The current report (February 2005) is in line with previous reports: "We continue to receive evidence about the level of the accommodation offset. In previous reports we have commented that the offset is not intended to reflect the commercial value of a property or the full cost to the employer of providing accommodation. Rather it has been set so as to strike a balance between these costs, the advantages to the employer of housing workers close to the place of work, and the desire to ensure workers a minimum level of cash wages."

The accommodation offset – theoretical issues

The issue needs to be considered from both the theoretical and practical points of view. As the previous section explained, accommodation is the only exception to the general rule that the minimum wage must be paid in cash and not in kind. The offset is seen as being a concession to those employers who provide accommodation. However, far from being a concession it has proved to be precisely the opposite in that accommodation is now treated wholly differently from the provision of other goods and services. The general position is that an employer can offer workers goods and services and make deductions from pay to pay for them provided the employee agrees in writing. Such deductions have no influence on the calculation of the minimum wage. Thus, an employer can, for example, offer high quality meals charging a market price for them; he can offer transport to and from the place of work, and he can provide other goods and services such as the ability to purchase products, say from a farm, at reduced prices. Provided the worker consents and the deductions are made from pay, the overall result is that the cash wage payment is substantially below the minimum wage.

The second key point is that the current interpretation seems to assume that either that all workers on the minimum wage are housed by their employers or that if workers are not able to be housed by their employers then they can find accommodation in the market for a rent of under £26.25 a week. As a subsequent section will demonstrate, neither of these applies. It is unlikely that many, if any, employers provide accommodation at under £26.25 a week unless it is a tied accommodation situation. There is of course nothing in the general law to require accommodation providers to charge rents such that pay less rent does not fall below the minimum wage. There is a housing benefits system but public policy has not attempted to link this to the minimum wage and the system is not such that those paying for private rented accommodation achieve a sufficient rebate such that in practice they are not paying more than £26.25 a week.

A third theoretical point is that the figure is simply unrealistic. It is plucked out of the air and bears no resemblance to rents in the marketplace. The Low Pay Commission makes it clear that the figure is deliberately intended to be below the cost of providing accommodation. This is realistic only if the employer is able to compensate for the low rent. This can be done in a tied accommodation situation where the employer has the benefit of workers on site and does not, for example, have to contribute towards the costs of their transport to and from their place of work.

Finally, the figure does not distinguish in any way between areas or types of accommodation. Clearly, the cost of providing accommodation in Central London is very different from the cost of providing accommodation in other parts of the Country. Also, the £26.25 is a figure that applies equally to a worker sharing a room as to one occupying of his free choice a two or three bedroomed house. The only way that labour providers can work within the current figure is by forcing workers to share rooms even if they would prefer not to do so.

The special position of labour providers

Most businesses are unaffected by the accommodation offset as employers generally do not provide accommodation and those that do generally pay above the minimum wage so that the offset does not bite in practice. The sectors where employers do provide accommodation and where workers are on low pay are hospitality, catering, agriculture and food. The hospitality industry in particular is better able to deal with the problem given that hotels are in the accommodation business and often make direct provision for their employees on site.

Labour providers such as those represented by the ALP are more than any other affected by the current interpretation that the tax authorities and the DTI are giving to the Regulations. Many of the workers they provide are doing low paid work which British people are not generally prepared to do. The going rate for this work is around the minimum wage. Indeed, in many cases, the going rate is precisely the minimum wage and increases in line with the minimum wage each year.

British workers doing low paid work do not expect to be housed by their employer mainly because most of them are living with somebody else who is paying the rent or they may benefit from State funded rent subsidies.

Foreign workers do not come into this category. They come to Britain specifically to work and do not already have accommodation when they are looking for a job. Such workers find it difficult to seek private rented accommodation independently because –

- They have come from a country in which incomes are much lower than in Britain and therefore are unlikely to have accumulated the deposit (typically one month's rent) that landlords require.
- Because they have come from abroad they cannot provide references acceptable to landlords.
- They have difficulty establishing their identity because they have no utility bills, no bank account and their passport may well be somewhere in the Home Office system as they are obliged by law to register with the Workers' Registration Scheme if they are from the Accession States of the European Union.
- They may well not have a bank account which many landlords require because it is not easy for people coming to the country to satisfy the money laundering requirements in respect of bank accounts. Labour providers help their workers overcome this but it can take time.
- Their native language is not English.

In practice, few such workers will rent independently in the private rented sector. Many are provided with accommodation by their employers or their employers help them obtain accommodation through arrangements with landlords which, depending on the interpretation of the Regulations, may be caught by the offset arrangements.

Often workers will take advantage of their fellow nationals and an informal and sometimes expensive market exists for such accommodation.

HMRC has suggested that labour providers can deal with the issue by paying their workers more or charging them less rent. This is not feasible. A report prepared for Defra by Precision Prospecting (published in August 2005 on the Defra website) explains the economics of labour provider business. The report includes a survey of migrant workers which estimated that 64% were paid the minimum wage of £4.85 an hour. It is generally accepted that to meet all legal requirements (national insurance, holiday pay, sick pay and the cost of transport) a labour provider

needs to charge £6.30 an hour. To cover management costs and to make a reasonable profit requires between £6.70 and £6.90 an hour. The fact is that labour providers struggle to get these sorts of rates. There are enough labour providers who evade tax that labour users can often get away with paying under £6.30 an hour. If it assumed that a typical market rent is £50 a week and the labour provider is only able to charge £26.25 a week then in effect the labour provider has to meet £0.60 an hour. This is simply not doable in the marketplace. If labour providers are restricted to charging £26.25 a week then the effect will simply be that they will cease to provide accommodation (or provide very poor or overcrowded accommodation). The workers will not then enjoy a rent of £26.25 a week because no one else will provide such accommodation; rather they will be paying much the same as the labour provider charges them – but with the hassle of having to arrange their own accommodation.

Although labour providers are particularly affected by the offset rules they are not unique. The Health Service is also affected, and for the same reason that low paid workers need help with accommodation. Just taking one example, King's College Hospital NHS Trust is currently offering accommodation at between £72 and £83 a week. If this is what a public agency can offer it is difficult to see how a private business can be expected to do it for less. A significant number of NHS staff are living in accommodation provided by their employers who are receiving less than the minimum wage after rent in excess of £26.25 a week is deducted.

The operation of the offset in practice

It needs very little research to establish that it is not possible to provide accommodation at a market rate in a way which satisfies the official interpretation of the offset arrangements. The Commission can no doubt do its own research on this. However, to illustrate the point, the following information has been obtained from one of the largest residential letting agencies in Stamford, an area of low accommodation prices.

The lowest rent quoted in its current listing is £335 pcm, that is £77 a week, for a one-bedroomed flat. The cheapest two-bedroomed flat was £375 pcm, that is £86 a week or £43 if shared between two people. Most two-bedroomed accommodation was in the £400-£500 range, that is £92-£110 a week. The local newspaper, The Rutland and Stamford Mercury, in its edition of 6 August 2005, had advertisements from another agent in which the lowest rent was £350 pcm for a one-bedroomed cottage, with the lowest rent for a two-bedroomed property being £450. This figure was typical of other agents. The lowest rent quoted anywhere was £300 for a studio apartment. To comply with the minimum wage Regulations, the maximum rent that can be charged would be £114 a month and not a single property came anywhere near this, even allowing for multiple occupation.

Those labour providers that do provide accommodation do not do so at £26.25 a week. Typically, the rent they charge is £40-£50 a week. Very few have until recently been conscious that this is viewed by some as being illegal and they have few complaints from their workers who generally are paying a little less or no more than they would pay on the open market.

The comments made by two members of the ALP summarise the position well. A labour provider based in London commented –

> "Accommodation is provided for all overseas workers who do not have the means/contacts to accommodate themselves.
>
> For a candidate to organise their own accommodation through an agent/landlord the following is required:-
>
> - Deposit
> - Bank Account
> - Job Offer
> - Financial Resources
> - Employer references

[We] do not take a deposit in advance. Rent charged is inclusive of utilities and furnishings and ranges from £35.00 - £50.00 per week for two people sharing one room. Lounge and kitchen diner areas are communal.

Rents are shown on payslips and deducted from net pay.

Most workers are happy with their accommodation providing it is clean and tidy and any repairs required are actioned quickly. Even though contracts are translated into mother tongue workers do move in with friends without notice and accommodate their friends and family in rooms without landlords permission. Younger workers tend to have more parties, do not maintain gardens and therefore cause friction with neighbours.

The unscrupulous behaviour of some landlords/labour providers has not endeared our profession to letting agents and therefore finding accommodation in areas local to work is proving very difficult.

What letting agent will provide accommodation to an individual who does not have access to a bank account which in turn is difficult to get without a job offer from your employer and a utility bill.

On any new agreement the employer would need to act as a guarantee for the worker and deduct rent in the short term for the landlord while accounts are opened.

[We] would be delighted if it did not have to provide accommodation for workers, it is a legal and administration burden. Please provide me with an alternative."

A labour provider based on the south coast commented –

"We are a working holiday/leadership training provider with an employment business element. We provide accommodation on our organic farm in our caravan park for all our employees. Accommodation is shared with maximum two per bedroom, in a mixture of one to three bedroom static caravans.

Why we provide these services:

- The Southeast and other areas in UK have full employment, which creates a shortage of workers for local manufacturing; amenity; care work and drivers. We employ young people aged 18-30 from other countries to help to meet this need. We provide training for these young people to improve <u>their</u> management and life skills and to provide a better skilled placement to the industry Client.
- The Southeast and other areas in UK have a shortage of affordable accommodation.

The facilities provided for the weekly service charge of £55 include:

- Accommodation- food service of continental breakfast
- Recreation- trips and services; regular shopping trips to local towns
- Administration service- with bank account set up, NI number obtained, medical appointments arranged, assistance with visas.

Rent for a single room in a shared house ranges from £50 – 85 per week for room alone with energy costs additional to this.

The cost of accommodation is deducted from their weekly salary. If a worker has not earned enough to cover the rent we have a discretionary system in place to reduce the charge. (How many landlords would reduce the rent due to lack of funds!?)

The majority of workers would not be able to set themselves up with work and accommodation to allow them to stay for their work visa period/on arrival from a foreign country. They would be open to abuse from bad employers/landlords. Placements who join our programme and choose to move on often contact us to come back when they are

disappointed with work/accommodation they find for themselves. We have a waiting list to join the programme. We provide an accurate description of the programme to ensure they know what to expect, not 5 star but comfortable! "

There is now some harder evidence as a result of the research conducted for Defra by Precision Prospecting. Set out below is the relevant extract from its report *Temporary workers in UK agriculture and horticulture* -

"Accommodation

In the labour providers' survey sample, 18% of respondents said they provided accommodation. Under minimum wage legislation (both agricultural and national), employers are not generally able to count benefits as part of the minimum wage. For example, an employer cannot deduct say 30p an hour for meals, transport and insurance. The only exception is for accommodation. Here, however, there is a very strict maximum related to the number of hours worked with an overall maximum of £26.25 a week. That is, if an employer requires his staff to live in accommodation provided by him and assuming say a 50-hour week, then 52.5p an hour can be deducted from the wage actually paid as payment for the accommodation.

The view expressed by the labour providers was that a constantly shifting migrant workforce is in need of easily available and affordable accommodation that is up to standard. The problem for all migrant workers is that letting agencies and landlords require proof of identity and ability to pay, including a deposit. Proof required is usually in the form of a utility bill and a bank account. Workers in this sector of the economy, both UK nationals and foreign nationals, have difficulty meeting these criteria. It has been shown that accommodation is a key source of profits for criminal labour providers through charging excessive rents and taking advantage of workers' lack of choice. (Labour users expressed the same difficulties in providing accommodation in Section 4). Of the five labour providers interviewed, all had at some time provided accommodation. In one case a labour provider owned residential properties to house new arrivals let through a letting agency - not the business. New workers can rent the property without a deposit for a maximum of three months. If, at the end of this period, they have regularly paid their rent and utility bills and been good tenants, the letting agency will take them on and they move into permanent accommodation not owned by the labour provider. In general, labour providers saw providing accommodation as 'more trouble than it was worth'.

A second report by Precision Prospecting (S*econdary processing in food manufacture and use of gang labour*), also published in August 2005 on the Defra website, was more detailed and covered secondary processing. It included the results of a survey of 970 temporary workers. 23% of the workers said they used labour provider accommodation, 58% said they did not and 19% did not comment. The proportion using labour provider accommodation was highest in the sectors for poultry (57%), meat (36%), dairy industry (25%) and fruit and vegetables (23%).

Of the 224 workers who were provided with accommodation only 10% said they paid under £30 a week. 37% paid in the £50 - £60 range and 17% paid more than this. Interestingly 28% did not know what they paid. Of the 224 workers 27% said that rent was deducted from pay, 35% said it was not and 39% would not say. The report concluded that broadly speaking labour providers charge the market rent for the accommodation.

The research by Precision Prospecting for Defra has shown that most labour providers do not in fact provide accommodation. It is not clear from the research whether having arrangements with landlords constituted providing accommodation for the purposes of the particular question. Some labour providers do have arrangements with landlords which they negotiate on a case by case basis. In some cases, deductions from pay will be made with the payment going straight to the landlord. Ideally, labour providers prefer to avoid this as it can involve them in landlord/tenant disputes. However, a landlord might insist on it, particularly in the absence of a bank account. Sometimes the arrangements for deductions from pay may apply for a few months until the worker can be expected to have his own bank account.

Some labour providers recruit foreign workers who are already in Britain and hence generally have little need to provide accommodation. Others recruit through their existing employees who may be well settled in Britain and it is sometimes the workers themselves who help with accommodation either by simply making a room available for a limited period of time or in some cases by running accommodation businesses themselves.

The Association has not been in a position to conduct any detailed research on this. However it seems fairly clear that those workers who are not housed by their employers are not living in good quality accommodation paying £26.25 a week for their accommodation.

The following comment from a labour provider based in Scotland amply demonstrates this –

> "In July I received a phone call from a chap in England asking if I needed any workers as he had 4 Polish students looking for work. I replied that I had plenty of work but sadly no accommodation. Two days later he called back to say they would find their own accommodation and I told them to come. They duly arrived and I sent them to a job, but did not see them again for a couple of days when I met with them to get their details. When I asked them where they were staying they told me they were sleeping in their car (a fact made more incredible when you consider it was a Ford fiesta and they were well-built lads.) I then discovered an old tent we had so I offered this to them and they set it up on a local camp site for which they were charged £224 per week! Now for me to have arranged for them to rent a 2 bedroom flat locally would have cost approximately £160.00 per week inclusive of council Tax - £40 each or £13.80 above the maximum I would be allowed to charge. So staying in a tent costs them £16 a week more than it would have to stayed in a good flat which complied with HMO regulations. This summer Edinburgh has been totally saturated with young people from mostly Poland. They have no jobs to come to and end up staying in over crowded flats for which they are being totally ripped off. I know of one instance in Edinburgh where 20 people are living in a 4 bedroom flat which only has 1 WC and are charged £45 per head. We own a 5 bedroomed flat in central Edinburgh which is licensed for 9 people resulting in a total rental income of £943 per week. There is an identical flat upstairs rented out to 5 students for £1,700 per month. This means that I have an opportunity cost of over £7,500 per month. All of the above illustrates the fact that far from protecting workers the current rules are often driving them into the hands unscrupulous landlords who are only too willing to exploit them."

The overall effect

The overall effect of the current arrangements in the market place is probably minimal. Until recently, labour providers were not aware that they could be acting illegally in providing accommodation at a market rent. Enforcement activity was virtually non-existent as it is reliant on complaints and few workers are likely to complain about arrangements that are to their advantage. The issue came to light only because of very zealous enforcement activity by HMRC which prompted the ALP to raise the issue and for the review to be commissioned.

If it is the intention of the legislation that all workers should receive at least £4.85 a week after paying for their accommodation, less an allowance for that accommodation of £26.25 a week, then the policy is failing dismally. Very few workers will be in this situation. In the vast majority of cases, the workers are not provided with accommodation by their employer but rather have to find accommodation in the open market and this is simply not available anywhere for £26.25 a week unless an unreasonable amount of overcrowding is accepted.

Most labour providers consider that providing accommodation is more trouble than it is worth. The recent activity in respect of enforcement of the minimum wage Regulations has probably encouraged this view and to the extent that the regulations have had any effect it has been to reduce the willingness of employers to provide accommodation.

It is difficult to find any evidence, either practical or theoretical, that the operation of the accommodation offset has led to workers employed by labour providers who are on the minimum wage paying less for their accommodation than they would otherwise do.

A specific issue – variable pay

The Association would also like the rather technical point about the offset being calculated on a weekly basis to be addressed. This can lead to some quite absurd results of a worker earning say £500 a week one week and £100 the next week but then having a reduced rent in the second week without any allowance being made for what was earned in the first week.

This is well illustrated in a case which HMRC pursued against a labour provider with very detailed examination of their records. In successive weeks in 2003, a worker earned £391, £366, £376, £323 and £365. All these figures were well above the minimum wage. In the following week earnings fell to £142. This led HMRC to do a detailed calculation that the worker had paid £18.34 too much for their accommodation which accordingly had to be refunded to the worker. The same calculation was then done for the remainder of the year with in some weeks the worker earning well above the minimum wage level while in other weeks he earned below and was therefore entitled to a refund of part of his rent. In one week the total pay was just £0.50 below the calculated national minimum wage pay and therefore arrears of £0.50 had to be paid to the worker. If the whole of the period had been averaged out the worker would have been paid well above the national minimum wage even allowing for the actual rent paid.

This case led the ALP to advise its members that they could avoid such an absurd result by charging a nominally much higher rent but with provisions that the actual rent paid in each week would not be more than the amount allowed under the National Minimum Wage Regulations and that the average rent over say a 13 week period should be no more than the figure the labour provider began with. The worker would therefore be paying a variable rent according to his earnings. Instead of being expressed as "a rent of £50 a week" it would be expressed along the following lines: "The rent payable shall be £100 a week, except that in any week where this would result in less than the national minimum wage being paid the rent shall be reduced to the level sufficient to ensure that the national minimum wage is paid. At the end of each 13 week period any rent paid in excess of £650 shall be used to meet the rent payable in the following quarter." This is a complex and unnecessary device but was needed to deal with what seemed like an over zealous interpretation of the law.

Enforcement

The Association has little evidence on the nature of HMRC's enforcement activity and requests for a breakdown of how cases arise has not led to any response. It is to be hoped that the Commission will analyse the HMRC's enforcement workload in detail, in particular identifying how it plans its enforcement activities. In practice, it is understood that the process is entirely reactive and that there are only two ways in which an investigation will begin –

- A routine inspection of payroll.
- A complaint. The complaint does not have to be by a worker but can be by anyone. It is understood that in some cases the complaints have been from competitors.

Enforcement on the basis of complaints is no way to run any sort of regulatory system. This is particularly so for HMRC which is at its best going through masses of records and papers identifying technical breaches of legislation. It was noted earlier that HMRC regards deductions from pay as evidence that a labour provider is the employer and therefore subject to the offset arrangements. Perhaps the reason for this is that only if there are deductions from pay is HMRC able to deal with the case because all the information is neatly in front of it. The real abuse is not by people with detailed records that can be examined but rather by people with no records, no tax returns, no accounts, no fixed premises but rather a phone, a white van and a great deal of cash.

There is no doubt a great deal of abuse with workers being paid less than the minimum wage and in some cases being charged excessive amounts for accommodation, although generally not by a labour provider but rather by an agency in their country of origin.

The task of the enforcement authority should surely be to identify where there is the greatest detriment and then to deal with it rather than adopting a very reactive approach of waiting for cases to come in front it and then taking the easy ones where all the information is available.

The preferred way forward

The Association's preferred position accords with the advice which Defra has given and which is still in the official guidance on the minimum wage and in literature currently on the DTI website. That is, where an employer offers workers accommodation then the employer is at liberty to charge rent in the same way as any other accommodation provider. If the rent is deducted from pay then there must be written consent as this is already a separate requirement in employment legislation. If this is not the conclusion of the current review then the likely effect is that more labour providers will cease to provide accommodation as the perceived risk of enforcement action will be greater.

At the minimum it is essential to recognise the special position of those employers who bring people into the Country to work in low paid jobs from countries where living standards are very much lower. These workers are not in a position to provide their own accommodation and for employers to help in this respect should be regarded as evidence of being a good employer not something that should be classified as illegal. If the Association's preferred way forward is not accepted then it might be appropriate to provide an exemption in the case of workers who have been in Britain for, say, less than twelve months. This would produce its own problems at the end of the twelve month period when a labour provider might be forced to evict good workers who have been good tenants who might then find themselves paying more in the open market. Generally, however, the experience of labour providers already is that after several months those workers who wish to stay in Britain for a reasonable period of time would prefer to make their own accommodation arrangements and in other cases a few friends may get together to rent property in much the same way as students have done so for many years.

At the least, there must be clarification of when the employer is deemed also to be the accommodation provider. This cannot be left to individual HMRC officers making their decision and then simply telling the unfortunate labour provider that if they don't like it they have to bear the costs of going to a tribunal.

There is one point on which the Association would like absolute clarity and that is the current HMRC view that deductions from pay are evidence that the employer is providing accommodation even if the employer and the accommodation provider are totally different parties. There seems no rational or legal explanation for this view. Employers make deductions for all sorts of purposes paid to third parties, such as contributions to trades unions, contributions to pensions and even contributions to sports clubs. Perhaps HMRC has mistaken deductions from salary with deductions from salary that go straight into the pocket of the employer. The Defra interpretation on this seems appropriate, referring to situations in which the employer derives no benefit from the payment. Given the difficulty that workers now have in opening bank accounts, particularly if they are from abroad, it would be very useful for many labour providers who have arrangements with accommodation providers to have direct payment of rent, at least for a limited period of time.