

## **Restricting exit payments in the public sector: consultation on implementation of regulations**

### **Draft Solace (Wales) Response**

#### About Solace

Solace is a member-based organisation which supports public sector professionals across the UK. Solace represents the sector in conversations with government; shares best practice across the sector; forms effective partnerships with relevant organisations; and contributes to proactive policy thinking and development. Solace (Wales) represents the sector in Wales and works closely with the Welsh Local Government Association and Welsh Government in achieving its purpose.

Solace (Wales) welcomes the opportunity to respond to the consultation to the regulations relating to The Enterprise Act 2016 which received Royal Assent in May 2016. In compiling this response due consideration has been given to the responses from ALACE (The Association of Local Authority Chief Executives and Senior Managers) and the WLGA (The Welsh Local Government Association) and Solace (Wales) is in full support of the position taken by these organisations.

#### Summary

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Solace (Wales) is opposed to these regulations and supports the call for Government to accept that these regulations should not be progressed further due to the unfair and negative impact this will have on the local government workforce and the sector's ability to continue to effectively manage change down-sizing and re-structuring within the sector.

In summary our main points are:-

- a) The regulations will disproportionately impact on local government employees in Wales due to the LGPS being a funded scheme and the rules relating to the scheme. This means that the regulations will not only impact those in senior roles but also thousands of employees on lower salaries who have given long service within the sector;
- b) Pension strain should not count towards the cap, because it is not a payment to the employee as a lump sum, and because in LGPS the cost of pension strain can vary for reasons unconnected with the employees specific circumstances;
- c) However if the pension strain is to be included then a fairer method of calculating the cost should be adopted;
- d) The regulations should be amended so that the payment in lieu of notice should not count towards the cap;
- e) Notwithstanding our opposition to the cap and the regulations, as they are drafted, the value of any cap agreed should be raised to reflect the increase in cost of living since 2015 and the regulations should include annual reviews to ensure the cap remains in line with the cost of living;
- f) The regulations need to be amended to include a specific date when they will come into force, this will remove uncertainty for employees and organisations and to enable a managed transition to any new arrangements;

- g) The regulations, as drafted, need to change to reflect the principle of subsidiarity and autonomy of local authorities as directly-elected bodies and maintain their ability to make decisions about the workforce for the benefit of the community. In Wales local government already has robust arrangements to manage exit packages in excess of £100k, ensuring that these decisions are made transparently by full councils.
- h) There is a significant concern about the equality risks associated with the regulations and the lack of a robust Equality Impact Assessment, which could leave the Government and local authorities open to challenge;
- i) If the regulations come into force in Wales then employees impacted by any local government reorganisation, voluntary mergers or formation of new regional bodies should be exempt from the cap;

#### Why the regulations should not be progressed

If the regulations are enacted, it will make the process of change in the public sector more difficult than it already is. This is particularly the case in local government where councils have made significant progress over the last ten years in responding to the challenge of austerity and unprecedented reductions in funding, while sustaining essential services within communities. We urge strongly that the regulations should not be progressed, in order to support continued future change in local government and more widely in the public sector.

People have been losing their jobs in local government because of austerity and sometimes because of political changes. The ability to recruit and retain a high calibre workforce is increasingly challenging and those people who remain dedicated to public service deserve to be treated equally, regardless of their circumstances. These draft regulations would affect some staff more than others, and not affect some staff at all. The Government should not progress proposals which we argue below are fundamentally unfair and flawed in a number of respects – both in comparison with other parts of the public sector and even within local government.

It is of course right that councils need to ensure that public money is spent properly and should not support inappropriate and disproportionate payments to any employee. Our case is that there are already robust governance arrangements in place in Wales with any exit payments to Chief Officers in excess of £100k being reported to full council for approval. It is therefore our argument that the principle of local democracy and subsidiarity should be recognised and councils permitted to continue to make these decisions as the relevant directly elected and accountable body.

#### Disproportionate impact on local government employees

The original purpose of this legislation was intended to target the 'best paid public workers' however the drafting of the regulations, and the inclusion of not only redundancy payments but also any pension strain, means that thousands of lower paid employees in local government will be adversely affected. In Wales evidence (below) shows that employees on modest salaries would be in scope of the regulations. These employees are not senior managers but Social Workers, Engineers, Planners, Environmental Health Officers, Care Managers and those that supply vital day to day services to our communities. Solace (Wales) calls on these regulations not to be progressed because of the unfair nature they will have on these essential public sector workers.

Annual Salary	RCT Grade	Cost of Pension Strain	Statutory Redundancy Cost	Statutory Costs	Enhanced Redundancy element	Total Cost
25,463	8	70,810	13,627	<b>84,437</b>	22,702	<b>107,139</b>
30,756	10	74,187	13,448	<b>87,635</b>	22,403	<b>110,038</b>
34,106	11	92,170	13,716	<b>105,886</b>	22,851	<b>128,737</b>
37,107	12	86,547	13,716	<b>100,263</b>	22,851	<b>123,114</b>
39,961	13	104,632	13,716	<b>118,348</b>	22,851	<b>141,199</b>
44,697	15	128,480	13,203	<b>141,683</b>	21,996	<b>163,679</b>

Under the local government pension scheme regulations, it is mandatory for councils to pay the cost of pension strain where someone is aged 55 or over and made redundant and there is no choice for the employee – including on whether to defer receipt of pension if the cap is brought into force. This arises from the different rules governing public sector pension schemes and the fact that the local government pension scheme – uniquely – is a funded scheme.

Under the teachers' pension scheme, where an employee is made redundant over the age of 55 and the employer chooses to grant premature retirement benefits, the employer "will be legally obliged to pay Mandatory Compensation for the lifetime of that member". In other words, the employer of a teacher will pay an ongoing annual amount that represents the difference between the actual pension and the actuarially reduced pension, as well as a one off charge relating to the pension lump sum.

This difference between the two main pension schemes in local government suggests that the regulations are fundamentally flawed. First, it is not clear how regulation 6(1)(b) would operate in respect of the teachers' pension scheme. As the regulations must involve a "point in time" calculation about whether or not the cap has been exceeded, how can the value of future payments for a teacher be known when their value depends on how long the individual will live.

Second, the difference in treatment between teachers and local government staff is unjustifiable. This arises from the nature of the local government pension scheme as a funded scheme, where the rules of the scheme require that actuarial strain is paid by the employer to the fund as a lump sum.

In our view, unless the cost of actuarial strain or equivalent in all public sector schemes is calculated for the purposes of the draft regulations on the same basis for all schemes, the Government cannot demonstrate that the regulations treat individuals fairly and equitably. It may be too difficult to legislate for such a fair and equitable approach. It is also important to state that the cost of pension strain is not cash in an individual's pocket in the same way as a redundancy or compensation payment. Nor does it give anyone a pension that is higher than the entitlement they have earned.

If the pension strain cost remains in scope as proposed, the Local Government Pension Scheme Regulations will need to be amended further to allow a wider range of options – for example, to allow the employee to choose to defer access to pension so as to avoid or reduce their employer's pension strain costs; or to allow the employee to take a reduced pension so that the impact of the strain is reduced. Until these amendments are in place the exit pay cap should not be applied to local government.

#### Pension strain – another option

The power in section 153A(5) of the Small Business, Enterprise and Employment Act 2015 to specify which payments are included or excluded from counting towards the cap is a discretionary one (“The descriptions of payment which **may** be prescribed include...”: emphasis added). There is no requirement to include pension strain, or to include pension strain in the way that is proposed.

If exclusion of pension strain payments is not possible, the Government needs to explain why not and how it considers its approach to be fair and proportionate. We raise, above, many serious issues of inequality and lack of fairness.

It is accepted that not applying an actuarial reduction has a financial benefit to the former employee which he or she will enjoy over the period during which the pension is paid. If the Government maintains that this should count towards the cap, then it is essential to find a fair way in which to take account of the “cash value” of the actuarial reduction that has been avoided. If the Government insists that pension strain in respect of the local government pension scheme should be included, therefore at the very least its “cash value” to the individual should be assessed by applying an appropriate divisor. This is because the pension will be received over many years, not in a single lump sum. We would suggest a divisor of 20, the mirror of the multiplier of 20 used to test whether a pension exceeds the lifetime allowance.

#### Hypothetical worked example

An individual is made redundant at the age of 56 and earns £35k a year. Under the council’s policy on redundancy payments, the individual is entitled to 12 months’ pay as a redundancy payment. In addition, the cost to the employer of the mandatory pension which has to be paid on an unreduced basis (the pension strain) is £70k.

Under the Government’s approach, the cost of exit payments is £70k+£35k = £105k and therefore exceeds the cap. The Government’s proposals would require either the redundancy payment or pension to be reduced and the individual would be worse off.

Under a revised and fairer approach, the cost of exit payments is  $(£70k/20) + £35k = £38.5k$  and therefore the cap is not reached. The individual would not experience any change from what he or she would receive today.

This alternative approach would have the effect that at least some of the long-serving, lower paid staff who might be caught by the cap would be less likely to be affected. It would also “smooth out” the variation in pension strain costs that can arise for reasons unconnected with an employee’s age, sex, salary and length of service, although it would not remove it entirely.

Solace (Wales) has real concerns that continued inclusion of pension strain (in full) within the cap will have a detrimental impact on the local government workforce and exacerbate issues which already exist around recruitment and retention. Introduction of the regulations, as drafted, would result in a disproportionate loss of senior staff over the age of 55 in order to avoid the financial impact of the cap. It could also result in an increased likelihood of cases being challenged at Employment Tribunals and a general hindering of change and transformation within local authorities which relies on local negotiations and agreements with trade unions.

### Pay in lieu of notice

Regulation 7(g) is incorrectly drafted. This exempts a payment in lieu of notice from the cap but only three months' worth. Thus, if the notice period is any longer than three months, it would appear that the pay in lieu of notice has to be counted in full. This is the wrong approach and will result in perverse outcomes. There may be cases in the public sector that involve longer notice periods, placing employees at a further disadvantage. Unless the exemption in paragraph 7(g) is pitched correctly, staff could simply insist on working out their notice period and therefore no money would be saved, and implementation of change would be delayed. The regulations should be amended so that any payment in lieu of notice due under the contract of employment is not an exit payment. This would be consistent with recent changes to the tax and National Insurance treatment of payments in lieu of notice, to simplify the system. It would provide clarity and simplify calculations on exit.

### Value of the cap needs to increase

The Government has the power in section 153A(9) of the Small Business, Enterprise and Employment Act 2015 to change the value of the cap, to reflect the increase in cost of living since 2015. Inflation as measured by the consumer prices index has reached about 8% between April 2015 and April 2019. On that basis, we believe that the Government should increase the cap to £103k and commit to regular review of the figure so that the value of the cap does not reduce in real terms. The value of the cap should be increased annually, as is done with the lifetime allowance for pensions under the taxation regime and the uprating of figures to be used in statutory redundancy payments.

Without such a revaluation of the cap now and a commitment to regular reviews in the future, the Government is effectively eroding the value of exit payments that individuals might receive and therefore penalising yet further public workers who leave employment in future years, compared to those who have left very recently or who might leave shortly after the proposed regulations come into force. This will further limit the public sector's ability to recruit and retain a high quality workforce.

### Need for a clear implementation date

It has taken over three years since the 2016 Act received Royal Assent to reach this point. Against that background, it is disappointing that the regulations do not set out when the regulations should come into force. This creates further unnecessary uncertainty for employers and employees alike. We oppose the approach of the draft regulations not having a fixed future date for coming into force.

If the Government decides to proceed with the regulations following the consultation, we would suggest that there would be benefit in the Government announcing a clear future date when the regulations will come into force such as 1 April 2020. This will enable local government to achieve a managed transition to new arrangements.

### Subsidiarity of local authorities

Local authorities in Wales already operate with a framework of transparency and openness in the application of remuneration for all staff including those regarded as chief officers. The Localism Act 2011 required detailed pay policy statements and associated guidance requires **all** exits payments in excess of £100k to be reported to the full Council of the local authority for their approval. Accountability and transparency to the local electorate exists and there is no justification for removing the decision making from local government.

Local authorities are directly elected and accountable and should continue to have the flexibility and freedom to determine what and how its services are delivered to its community, this includes the development and deployment of the workforce that delivers those essential services. Local authorities should not be inhibited or constrained in seeking to meet the requirements of its communities. The exit payments regulations will restrict a local authorities' ability to transform its services for the benefit of its communities.

#### Potential discriminatory nature of the proposed regulations

The regulations have not been the subject of an updated Equality Impact Assessment and it is not appropriate for the Government to consult on detailed regulations without having first updated the equality impact assessment so that those responding to the consultation can comment on it. We are concerned that the Government cannot demonstrate compliance with the duty in section 149 of the Equality Act 2010 and that it has "had due regard to the need to:-

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it".

Under the proposals, an individual staff member's length of service and age could become determining factors in employers seeking to avoid the complication of the arbitrary cap. This may be discriminatory. Indeed we are concerned that these proposals will more generally be directly discriminatory on grounds of age, as the entitlement to payments tend to increase with age and service and thus the impact of the cap may be more severe for those who are older. Indeed, the disproportionate impact of an exit cap on older people was explicitly acknowledged in the Treasury's consultation on further limiting public sector exit payments.

There is also a concern that, across the public sector, the regulations may be indirectly discriminatory on grounds of sex. With the inclusion of pension strain in particular, it seems possible that men may be more significantly affected than women. This is the sort of issue that the Treasury should have explored in an updated equality impact assessment and consulted about it. Women make up the overwhelming majority of the local government workforce, and the proportion of women in management and senior roles has generally moved towards balance. However the gender pay gap data in favour of men across the public sector – which is greater in the NHS, for example, than in councils - suggests that men may hold a higher proportion of more senior roles. Men may have longer service, with fewer having taken career breaks for caring responsibilities; and it may also be the case that men are more likely to work full-time than women. These factors can lead to men accruing higher pension entitlements and therefore the pension strain cost or equivalent being higher for men than for women.

## Staff affected by local government re-organisation

If the regulations come into force in Wales then employees impacted by any local government reorganisation, voluntary mergers or formation of new regional bodies should be exempt from the cap. In Wales there is a commitment from both the Welsh Government and WLGA to move to a more collaborative and regional model of service delivery, which is being progressed through the Local Government Reform Group. However at this point it is not clear how that will be drafted within the Local Government Bill, due to come to the Welsh Assembly in the autumn of 2019. It is therefore appropriate to consider protection for employees impacted by any changes by waiving the cap.

## Response to the consultation questions

### **Does draft Schedule 1 to the Regulations capture the bodies intended (described in section 2.1 of the consultation paper)? If not, please provide details**

Yes – however we do not support the regulations being taken forward until the list has been made comprehensive. See our answer to the next question.

### **Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons**

No

The Enterprise Act 2016 received Royal Assent on 4 May 2016. The Treasury has had almost 3 years between then and April 2019 to bring forward an approach that applies across the public sector. It is unacceptable and unfair that the regulations might apply to many parts of the public sector before they are brought into force for other public bodies. The list should be completed before the regulations are submitted for Parliamentary approval.

### **Do you agree with the exemptions outlined? If not please provide evidence.**

No.

We do not believe that all exit payments in respect of the armed forces and the security service should be exempt. For very senior officers such as Generals, Admirals etc or senior officials such as the director of MI5 and GCHQ, it is normal to work until their mid 50s or beyond. Their salaries are relatively high and presumably their pension entitlements will also be high. We do not believe that there is a rationale for a blanket exemption for such posts.

### **Does the guidance adequately support employers and individuals to apply the draft Regulations as they stand? If not, please provide information on how the guidance could be enhanced.**

No.

The guidance has largely been written from the perspective of Government Departments as there are several references to what departments should do. Given the different nature of the Local Government Pension Scheme we would suggest that there should be a separate version that better meets their needs. The draft regulations cause great uncertainty because the Treasury has not specified a clear date when they will come into force.

### **Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the Regulations, especially in the case of whistleblowers?**

No.

We strongly object to the draft directions and therefore do not support the guidance on them. Local authorities are democratically elected bodies and their power to make exceptions should not be dependent on consent from the Treasury. There needs to be full recognition of

local government's unique democratic accountability among all of the non-central government parts of the public sector.

Local government already has some of the most transparent and onerous arrangements of any part of the public sector. Transparency, disclosure and positive decision-making already exists in respect of:-

- the publishing of policies on severance for chief officers
- the publishing of policies on discretionary compensation for relevant staff in the event of redundancy
- an authority's Full Council voting on all severance payments in excess of £100,000
- disclosure of details of severance payments to senior employees in their annual statement of accounts.

Regulation 11(b) of the draft regulations would require the full council to take any decision to relax the cap. This is the equivalent of the House of Commons taking decisions in respect of Government departments. Given that all elected councillors would be involved in decision-making, we believe that this should confer sufficient authority to the process without need for central government involvement.

We therefore call for the draft directions to be changed very significantly. First, they should give general discretion for full councils to waive the limit, respecting their autonomous status as democratically elected bodies; second to remove the defect in paragraph 4c which is explained below (there should be a mandatory exemption for any exit that is agreed before the date on which regulations come into force, so long as this is consistent with contractual periods of notice); and third to remove any requirement for Treasury consent. It should be enough in terms of democratic scrutiny and decision-making for any waiver decision to be taken by a full council meeting.

The Government repeatedly made clear in 2015 and 2016 that full councils would have the power to relax the cap. For example, the consultation paper in July 2015 proposed:

“the Full Council to take the decision whether to grant a waiver of the cap in cases involving Local Authorities and for local government bodies within their delegated powers”.

There was no mention of any need for further consent or approval. That was the effect of the draft regulations tabled during the progress of what became the Enterprise Act 2016: regulation 10(2) of “the Public Sector Exit Payment Regulations 2016” provided that the power under section 153C(1) is “exercisable...by the full council of a local authority, in relation to payments made by that local authority”. There was no requirement for Treasury consent in the 2016 regulations. The Treasury has not advanced any argument in the consultation document as to why local authorities' powers should be fettered as proposed in the draft direction or be subject to the consent of the Treasury.

The changes we propose would allow councils affected by reorganisations in Wales decided by the Government or set in legislation to be exempt – alternatively, an appropriate mandatory or discretionary exemption is required for reorganisations, as they cannot be described as “workforce reform”.



**Is there further information or explanation of how the Regulations should be applied which you consider should be included in the guidance? If so, please provide details.**

Yes.

As explained earlier, we do not support some of central provisions of the draft regulations and therefore we cannot support the current draft of the guidance. In particular, we disagree with whether and how pension strain should count towards the cap; and feel strongly that regulation 7(g) must be extended to exempt payments in lieu of notice in all circumstances, rather than providing an exemption only for payments which are 3 months or less.

**Are there other impacts not covered above which you would highlight in relation to the proposals covered in this consultation document? If yes, please provide details.**

Yes.

See response above about pension strain and our serious concerns about the absence of an updated equality impact assessment.

**Are you able to provide information and data in relation to the impacts set out above.**

Yes see detailed response.