ALACE

'Stronger Together'

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

About ALACE

The Association of Local Authority Chief Executives and Senior Managers (ALACE) is a registered trade union that represents only the most senior managers in local government. We have over 350 members at director and chief executive level, across Great Britain, the vast majority of whom could potentially be affected by these regulations if made as drafted. The Council of ALACE forms the staff side of the Joint Negotiating Committee for Chief Executives, the body responsible for the salary and terms and conditions of employment for chief executives. The Association also represents the interests of its members in responding to draft legislation and regulations which affect the role of the head of paid service and other senior officers, together with issues such as the reorganisation of local government.

Summary

ALACE welcomes the opportunity to respond to the consultation on these regulations. The Enterprise Act 2016 received Royal Assent in May 2016. In the three years since then, it is clear that the Treasury's thinking has developed in some respects from the outline draft regulations that were made available during the passage of the 2016 Act.

However ALACE is opposed to the principle and detail of these regulations. They are fundamentally unfair and flawed. We are concerned that they will make the process of change in the public sector more difficult than it already is. **Our strong and clear preference is for the Government to recognise that these regulations should not be progressed further.**

While some of the changes between the outline draft regulations of 2016 and the current draft regulations are helpful, we need to stress at the outset that there remain fundamental points which ALACE opposes and which it feels the Treasury has not properly addressed in the draft regulations or the consultation document.

In summary, our main points are:

a) **the Government should raise the value of the cap to reflect change in the value of money since 2015 and should commit to annual reviews thereafter;**
b) **pension strain should not count towards the cap because it is not a payment to an individual employee and because, in the local government pension scheme, the cost of pension strain can vary for**

reasons unconnected with the age, sex, service and salary of the employee;

c) **we are also concerned that the regulations may disproportionately impact on local government employees simply as a result of the local government pension scheme being a funded scheme and because of the rules relating to the scheme;**
d) **alternatively, if the Government nevertheless proceeds with its proposals to include pension strain, a fairer way to count pension strain should be adopted. Important changes would also be required to the local government pension scheme to give employees flexibility to cope with the impact of the cap;**
e) **the draft regulations inexplicably lack precision about when the Government intends them to come into force. The regulations will have adverse impacts on retention of staff and these are exacerbated by uncertainty about when the regulations are likely to come into force;**
f) **the draft direction requires significant changes before it will be acceptable to local government: full council meetings should have discretion about whether and how to exceed the cap, reflecting the autonomy of councils as directly-elected bodies and the Government's previous commitments on this issue;**
g) **regulation 7(g) should be amended so that any payment in lieu of the contractual period of notice would not count towards the cap;**
h) **staff affected by local government reorganisations, such as those in Buckinghamshire and Northamptonshire, should be exempt from the cap.**

We have seen the detailed analysis presented by the Local Government Association in its response, which demonstrates almost at every turn how the proposals as drafted are not workable in the context of the local government pension scheme. We support the concerns that the LGA and many other organisations have raised about the impact of the proposed regulations, including responses from UNISON and the Society of Local Authority Chief Executives and Senior Managers. We suggest that HM Treasury needs to reflect very carefully on the fact that representatives of both employers and employees are united in opposing the Government's proposals.

<u>The regulations should not be progressed</u>

If the regulations are enacted, they 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 fantastic progress over the last ten years in responding to the challenge of austerity and significant reductions in funding. There is a significant risk that these regulations will make local government more like the rest of the public sector where (we would suggest) change has been slower and indeed hard to evidence when costs and funding have continued to rise. We urge

strongly that the regulations should not be progressed, in order to support 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. We feel that all staff 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.

We also believe that the complexity of issues arising from the regulations, including the various exemptions and exceptions and questions about how, practically, the cap would operate in any given individual's case will provide a rich field for confusion, dispute and challenge. The current draft strikes us a "lawyers' charter to print money" and is best avoided.

The value of £95k

The monetary value of £95k has changed since 2015, when the figure first appeared on the face of the (then) Enterprise Bill nearly four years ago. 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. We consider that there is now a very strong case to do so. 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.

Indeed 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 as set out in, for example, the Employment Rights (Increase of Limits) Order 2019 No. 324. The 2019 Order lifted the weekly pay limit from £508 to £525, an increase of 3.35%.

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. Future reviews could be linked to average pay increases or to a suitable measure of inflation, such as the consumer prices index.

The regulations do not have to include pension strain

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.

We are exceptionally disappointed that the consultation paper does not even recognise that further consultation is appropriate on what payments are included in the cap and how they are included. The very brief consultation in 2015 cannot be relied upon as, at that time, the Treasury did not publish detailed draft regulations so that employers, staff or their trade unions could understand the full effect of what was being proposed. ALACE's stance is that it would be inappropriate to include pension strain for reasons we set out below.

We would draw attention to the sensible decision by Scottish Ministers not to include pension strain in their proposals for limiting exit payments in respect of devolved bodies in Scotland because "including employer pension costs....may unduly expose longer-serving and lower-paid employees to the cap". These are among the very issue that we raised in the following sections of our response, and which are echoed by many other respondents including the Local Government Association.

<u>Why pension strain should be omitted</u>

The decision to make an employee compulsorily redundant is the decision of an employer. So, as a matter of principle and in the interests of fairness, the employer rather than the employee should bear the costs. That should include the costs of pension strain for employees who are legally entitled by virtue of their age to draw their pension early.

What is more, in local government the inclusion of pension strain as an exit payment for the purposes of the cap would bring into play another source of unfairness, as its actual scale in a particular case is materially affected by the demographics of an area as longevity of pensioners is taken into account. Two individuals who have the same length of service, the same salary, and are made compulsorily redundant on the same day could be penalised by different amounts of pension strain, depending solely on the average lifespan in the people in the area where they work. And it should be noted that local government employees have no choice over which fund within the Local Government Pension Scheme (LGPS) they belong to.

Under the LGPS, the current pension regulations mean that certain employees are automatically entitled to early retirement without any reduction in pension. It is a statutory duty under the local government scheme that, in cases of redundancy over the age of 55, the employee is entitled to an unreduced pension at that point and the employer must make good any such actuarial reduction. This is not a matter over which the employer or employee has any choice. It has been a very long-standing feature of the local government pension scheme. Indeed, it was retained as part of the agreement reached between the Government, local government employers and unions on reforms to the pension scheme only in 2013, and appears in regulation 30(7) of the Local Government Pension Scheme Regulations 2013. These

arrangements were judged by the Government only just three years prior to the 2016 Act as being fair and affordable to the public purse. The economic situation of the country has not deteriorated since 2013 in a way that would warrant breaking the agreement reached in 2013. Indeed the (outgoing) Prime Minister announced in October 2018 that "a decade after the financial crash, people need to know that the austerity it led to is over and that their hard work has paid off" and "support for public services will go up".

Yet some prospective changes to the pension scheme regulations were made by paragraph 5 of Schedule 6 to the 2016 Act. We echo concerns expressed at the time that this made a nonsense of the 25 year "guarantee" of no more meddling with public sector pension scheme benefits following the reforms put in place during the 2010-2015 Parliament.

The amendments made by Schedule 6 suggest that where a "pension strain" payment would breach the cap the consequence will mean that either the actual pension in payment will be reduced or the former employee will have to find a lump sum to buy out that reduction. ALACE does not believe either of those options is acceptable. The former means less income in retirement and, in the latter case, employees will have to pay upfront costs to their pension scheme for losing their jobs.

Finally, we have to point out 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. We therefore feel strongly that pension strain should be omitted altogether.

We raise below our serious concerns about the impact of the current drafting – in particular in the context of the local government pension scheme - and propose an alternative way in which pension strain could fairly be counted if the Government is determined to include it.

Disproportionate impact on local government employees?

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. ALACE believes that the regulations as drafted would have an unjustifiable and disproportionate impact on local government employees compared to other public sector employees. This arises from the different rules governing public sector pension schemes and the fact that the local government pension scheme is one of very few funded schemes.

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. Similar arrangements apply in the Firefighters' Pension Scheme: where a Fire and Rescue Authority allows a firefighter above the age of 55 to retire with an unreduced pension, it is required to pay the difference between the unreduced and reduced pension into the notional pension fund for each year that the pension is in payment.

"Pension strain" is handled differently in the teachers' pension scheme

If a member is 55 or over, then you may decide to grant premature retirement benefits if you make the member redundant, although you're not obliged to do this and it is entirely at your discretion. If you do decide to grant a member premature retirement benefits you need to be aware that you will be legally obliged to pay Mandatory Compensation for the lifetime of that member. If the member has more than one employer, and the second employer has not agreed to make the member redundant, then you will cover the Mandatory Compensation for all of the member's service to their Normal Pension Age, including service with the other employers. This is assuming the member leaves pensionable service in their other employment, either by leaving that post or opting-out of their second employment.

The Scheme will pay the member Actuarially Adjusted Benefits (AAB) based on the service completed by the member. You'll be required to pay the difference between that and the service they could have completed, so that the member receives unreduced benefits.
https://www.teacherspensions.co.uk/employers/member-retirement/premature.aspx
(Accessed 3 June 2019)

ALACE has not researched the approach in all public sector schemes but these examples from the teachers' and firefighters' pension schemes suggest that the regulations are fundamentally flawed. First, it is not clear how regulation 6(1)(b) would operate in respect of the teachers' and firefighters' pension schemes. 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 or firefighter be known when their value depends on how long the individual will live? This should be apparent as part of the consultation on these regulations, and it is not sufficient that it should emerge in subsequent guidance. Different groups of staff need to be able to see that the proposed regulations treat them equally and fairly.

Second, the difference in treatment between teachers and firefighters on the one hand and local government staff on the other 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 - we highlight below another example below that relates to unjustifiable differences in impact that can arise within the local government pension scheme. **Therefore we would strongly urge the Government to adopt the simplest approach, which is to omit pension strain and equivalent costs altogether and focus instead on the cash value of one off payments by the employer to an individual on leaving office.**

Issues unique to the local government pension scheme

The problem with “one size fits all” approaches is that they cannot cater for differences in circumstances. In the case of these regulations, they do not cater for the unique circumstances of the local government pension scheme. We outline the issues below and believe that the regulations about the cap on exit payments should not be taken forward for implementation until the Ministry of Housing, Communities and Local Government has consulted on amending regulations for the pension scheme to deal with the points we are now raising. It is three years since the 2016 Act received Royal Assent and we are surprised that these issues have not already been addressed by preparation of such draft regulations.

There are some unique features of the Local Government Pension Scheme which mean that the impact of the draft regulations would differ even in cases where two individuals’ circumstances were identical (same age, sex, length of service, salary). This would be unfair and unacceptable. It is a classic example of a “postcode lottery”.The calculation pension strain takes account – for the individual employing body – of demographic features of its area, such as average lifespan. Thus the pension strain for two otherwise identical employees in, say, Surbiton and Sunderland could differ significantly. This is not an issue that arises in respect of unfunded pension schemes in the rest of the public sector. It is one of the reasons why we call for omission of pension strain altogether or, at the very least, that a divisor should be applied to minimise the impact of these variations.

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.

The cap would not affect only high earners

The 2015 Conservative Manifesto referred to the “best paid public workers”. In local government, inclusion of pension strain would affect many council staff who face redundancy above the age of 55, not just high earners.

The proposed cap would catch many middle and junior managers or other staff with a salary of £30k or above, depending on age and length of service.

Calculations done by local government employer groups and by employee representatives during the passage of the 2016 Act showed that many loyal longer serving employees (earning sums as modest as £30,000 per year) would be caught by these proposals. This analysis was confirmed by the Government Minister, Baroness Neville-Rolfe: "where generous early retirement provisions are offered that include immediate payment of unreduced pensions, some lower-paid staff with very long service can currently be eligible for exit packages above the level of the cap" (House of Lords, 4 November 2015, GC365).

Real examples of the impact of the cap

In one council, the pension strain alone for the following staff would exceed £95k if they were made redundant in March 2020. The annual salary of the post is shown in brackets. The pension strain varies mainly as a result of the age and accrued pension of the individual, rather than his or her current salary.

Principal solicitor £97k (£44k)
Audit manager £102k (£31k)
IT manager £151k (£44k)
Benefits manager £134k (£36k)
Principal accountant £121k (£38k)

In contrast, the redundancy payment for these individuals would be less than £25k in every case.

Another council provided the following illustrative calculations. They show that an employee on a salary of £40,000 with 37 years' service will be caught by the cap just on early retirement costs. In such a case the council would pay £96k to the fund. That is without any redundancy pay, holiday pay or notice pay. The council would have to pay £67k to the fund for an employee on £28,000 with 37 years' service. Therefore even with a low redundancy payment the cap would be reached.

Another council has over 50 staff with 30 years or more of service. It has calculated exit costs for a sample of them, which again demonstrate that staff with salaries in the range of £30 to £40k (team leaders to middle managers) would be caught by the proposed £95k cap because pension strain is included:

- Employee A – Salary £31,371, 55 years old with 39 years' service. Total exit costs by reason of compulsory redundancy £118,957. Redundancy £16,244, Pension Strain £102,713
- Employee B - Salary £33,799, 55 years old with 35 years' service. Total exit costs by reason of compulsory redundancy £131,300. Redundancy £17,501, Pension Strain £113,799
- Employee C - Salary £33,799, 56 years old with 38 years' service. Total exit costs by reason of compulsory redundancy £116,297. Redundancy £17,825, Pension Strain £98,472

- Employee D - Salary £42,806, 57 years old with 29 years' service. Total exit costs by reason of compulsory redundancy £104,354. Redundancy £22,986, Pension Strain £81,368

ALACE does not support any attempt to focus the cap on those who earn above a certain amount as this would probably raise questions of indirect sex discrimination (gender pay gap data across the public sector suggest that men are better paid than women in most organisations, and the proportion of men in more senior roles is likely to be a factor behind that). **It is better simply to remove regulation 6(1)(b) so that pension strain does not count towards the cap.**

Potentially discriminatory nature of the Government's proposals

We are very concerned that the Government has not attempted to update its equality impact assessment since one was produced as part of an earlier consultation in July 2015. That consultation lasted for only 28 days (31 July to 27 August 2015). The assessment published almost four years ago in 2015 was superficial and we demonstrate that by quoting the relevant paragraphs in their entirety.

HM Treasury's equalities impact assessment, July 2015

In terms of impacts on groups protected under equalities legislation, using data from the Labour Force Survey (LFS) , it is possible to break down the working age population by whether they work in the private or public sector – and by age, gender, ethnicity, religion, disability and marital status. To assess the potential impact of this policy, statistics for the total population and the total UK workforce are compared to the statistics for public sector workers.

The LFS, however, cannot be used to estimate the proportion of the public sector workforce according to sexual orientation, gender reassignment status, pregnancy or maternity status – and therefore cannot estimate the impact of this policy on these groups.

As a consequence of the way exit payments are calculated, among a population of high paid individuals those that are long-serving, and in turn more likely to be older, are relatively more likely to be affected.

The response to the consultation, published in September 2015, did not mention the equality impact assessment at all although there was one sentence confirming that "Some argued that this [the cap] would therefore be discriminatory towards older workers" (paragraph 4.18). The Government's response did not comment on this or any other points that had been raised about equality impacts.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/464367/Public_sector_exit_payments_response.pdf

We are obliged to point out that, following three years of silence on the cap, the proposals which are now the subject of consultation differ in material ways from the suggestions set out in the July 2015 document and the outline draft regulations that were released when the Bill was going through Parliament.

It is not appropriate, in our view, 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".

The failure here is that the Treasury seems not to have spoken to employers' bodies, unions and other interested parties over the last three years to seek to establish what the impact of its present proposals would be; or if it has undertaken such engagement (in which ALACE has not been involved), it has not shared the fruits of those discussions in the guise of an updated impact assessment. This seems to us a potentially significant flaw in process that might be challenged if the Government decides to proceed with the proposed regulations.

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. (paragraph 7.7 of "Reforms to public sector exit payments" (February 2016); paragraph 7.4 of "Reforms to public sector exit payments: response to the consultation" (September 2016)).

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, due to their predominantly longer service and, although the pay gap is closing, more being in senior positions. This is the sort of issue that the Treasury

should have explored in an updated equality impact assessment and consulted about it.

Pension strain – another option

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.

ALACE accepts 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 ALACE believes 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 ALACE's 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 suggested by ALACE 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.

ALACE strongly urges the Government to introduce a divisor to assess fairly the "value" of pension strain for the employee if it insists that pension strain has to be counted.

ALACE is concerned that, if its response about pension strain is not heeded, the following consequences will arise:

- a “dash for the door” as experienced staff over the age of 55 seek to leave councils before the cap is implemented;
- an increase in the number of claims for compensation to be addressed by employment tribunals. Such compensation is exempt from the cap. An aggrieved employee who might previously have been prepared to agree terms of departure in the absence of a cap will now have greater incentive to submit a grievance and pursue a tribunal claim in order to maximise any payments that are not subject to the cap. Indeed the regulations will tend to frustrate early conciliation and settlement agreements as an alternative to formal legal proceedings. The regulations seem to conflict directly with the Government’s recognition and promotion of the many benefits of early conciliation. The cap on settlements agreed in an early conciliation process would create a perverse incentive for employees not to reach agreement with the employer. This seems at odds with the Government’s desire to reduce red tape and regulations, leading to an increase in litigation, bureaucracy and administration costs which would have to be funded by taxpayers;
- general hindering of negotiations and agreements necessary for public service reorganisations and further "efficiency savings". The regulations as drafted will have a negative impact on employer flexibility, industrial relations and staff morale at a time of huge ongoing change.

Need for appropriate transitional provision

The regulations or direction need to include appropriate transitional provision to cater for circumstances where a legitimate decision to approve a departure may have been made before the limit in section 153A comes into effect but the exit will not take effect until after the limit comes into effect.

Before the regulations are approved by Parliament and come into force, organisations will be legitimately taking decisions to approve exits as a result of restructuring, down-sizing in the face of Government spending reductions etc. It is entirely possible that some decisions will be taken before the regulations come into effect but in relation to an exit on a date after the regime comes into effect. This is because notice periods are typically a minimum of 3 months for senior posts and sometimes can be longer. We give a worked example in our response to the consultation questions below. The issue is not unique to local government although, in local government’s case, could be solved by giving full councils discretion to waive the cap as the Government originally committed to do and as we propose below.

ALACE is therefore calling for transitional provision in the regulations to cater for circumstances where a legitimate decision to approve a departure may have been made before the regulations come into effect but the exit does not take effect until after the regulations come into effect. Any employee who has already been made redundant but has not yet left service (often at the employer's request) should be outside the cap.

Such an approach to transition was very sensibly taken when new independent person provisions were introduced for processes relating to dismissal of certain officers. All "live" cases at the point of the change were considered under the previous regime, as a result of regulation 3 of the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 No 881. The new regime applied only to new cases. What is more, transitional provision for protecting "exits formally agreed between employer and employee on terms that applied before the new maxima took effect" was explicitly recognised in paragraph 4.19 of the Treasury's consultation on further limiting public sector exit payments (February 2016), so should not cause the Government any concerns.

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. ALACE has already identified examples of some councils that have 6 months' notice for staff. There may be cases elsewhere in the public sector that involve even longer notice periods. 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.

The lack of 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 exceptionally disappointing that the Treasury has failed to set out its intention for when the regulations should come into force. This creates 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.

Staff affected by Government-imposed reorganisations

We think it is invidious that staff in Buckinghamshire and Northamptonshire could find themselves treated significantly worse if they lose their jobs because of the reorganisations in 2020 and 2021 than staff who have lost their jobs in reorganisations in Dorset, Somerset and Suffolk in 2019.

In the case of Buckinghamshire, the Government has taken almost three years to reach a decision since the initial proposals for reorganisation were submitted, and over two years since counter proposals were submitted. It would be unfair for staff to be adversely affected because of the Government's delay in reaching a decision.

Our preferred approach is for these regulations (or the separate restructuring regulations) to provide that the cap does not apply to exits directly arising as a result of the reorganisations.

Alternatively, we explain below changes that are required to the directions to allow councils affected by Government-imposed reorganisations to treat staff in the same way as those who have lost employment because of the reorganisations that took effect on 1 April 2019.

Other drafting points

The effect of regulations 6 and 6(1)(i) as drafted may inadvertently mean that tax charges payable by an employer are counted towards the payment cap. This is incorrect and must be amended if the Government proceeds with the regulations. The drafting states that "a reference to an exit payment made to a person includes a reference to an exit payment made in respect of that person to another person" and that the cap includes "any other payment made, whether under a contract of employment or otherwise, in consequence of termination of employment or loss of office". Under the National Insurance Contributions (Termination Awards and Sporting Testimonials) Bill, the employer will be liable to pay National Insurance contributions on payments in excess of £30,000. This benefits the Exchequer, not the employee but would constitute both "an exit payment made....to another person" and "any other payment made...in consequence of termination of employment". Thus regulation 7 needs explicitly to be expanded to exclude any taxation payment made by the employer that may be connected to exit payments made to a person.

It is not clear if the drafting of regulation 11(c) and 11(d) prevents the delegation of decisions to a committee of a fire and rescue authority or of the London Assembly. These bodies should be treated in an equivalent way to regulation 11(b), which has the effect of preventing delegation to a committee of a local authority.

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. For example, MOD's salaries and roles data (March 2018) shows that Major Generals earn up to £115k-£125k, Lieutenant Generals up to £135-150k and the Chief of the General Staff up to £185k.

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 and the autonomous role of directly-elected councils, 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 remuneration (which would include severance payments) over £50,000 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.

During passage of the Bill, the Minister, Baroness Neville Rolfe, informed the House of Lords, on 30 November 2015:

“Turning to Amendment 73A, the potential inappropriate use of settlement agreements and exit payments more widely is precisely why our clause requires approval by a Minister of the Crown, rather than the employer, when relaxing the cap. Ministerial **or full council approval** means that the power will be exercised objectively and only in exceptional circumstances, set down in guidance, to prevent circumvention and misuse. The power will be discretionary to allow for unique and novel situations. Regulations, as opposed to guidance, stipulating what such situations would be would limit flexibility. The multifaceted consideration that would be needed would not lend itself to the structure and prescriptive nature of regulations.” ((columns 981 and 982; emphasis added)

Thus Parliament was informed that full council approval would be sufficient to waive the cap, subject only to having regard to the guidance. There was no mention of a Treasury consent regime.

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 decided by the Government (such as in Northamptonshire and Buckinghamshire) to treat affected staff in the same way as staff of councils that were reorganised in April 2019 – alternatively, an appropriate mandatory or discretionary exemption is required for reorganisations, as they cannot be described as “workforce reform”.

Paragraph 4c as drafted could result in the following bizarre and completely unfair situation:

- A restructuring is agreed in late June 2019 that would take effect, say, on 1 October 2019, providing a little over three months’ notice. Note that this would be before the consultation on the regulations closes;
- the consultation closes, regulations (which might or might not be different from the consultation draft) are approved by Parliament in September and they come into force on, say, 25 September;
- the £95k cap would bite on anyone being made redundant on 1 October even though the fact of their redundancy had been agreed before the consultation had closed, let alone the regulations having been made. But there would be no ability to relax the cap because of the wording of paragraph 4c.

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?

We do not have detailed data to provide as this would be held by individual employing organisations.