ALACE
'Stronger Together'

REFORMING LOCAL GOVERNMENT EXIT PAY

Response from the Association of Local Authority Chief Executives and Senior Managers (ALACE)

November 2020

About ALACE

ALACE is a registered trade union that represents only senior managers in local government. The vast majority of its members in England and Wales are likely to be affected by the proposals in the consultation paper. ALACE is the sole union on the staff side of the Joint Negotiating Committee for local authority chief executives.

Summary

ALACE calls on MHCLG not to proceed with its proposals and not to make the regulations as drafted – in ALACE's view, they make retrospective provision and have not been subject to the process of consultation and consent set out in section 23 of the Public Service Pensions Act 2013. ALACE would not give consent to such retrospective provision.

In any case, any regulations following this consultation should be limited to the bare minimum to implement the £95k cap (but removing the retrospective element by making clear that only pension strain for service on or after 4 November 2020 can count towards the cap).

The other proposals to reduce exit payments in local government should not be progressed because they place local government in the vanguard of implementation, following a policy statement published by the Treasury in 2016. Such proposals have not been implemented in this way for other parts of the public sector - the Government should bring forward simultaneous proposals for all public sector workers if it wishes to proceed.

ALACE continues to oppose the principle of including pension strain within the exit payment cap and has extant authorisation from its AGM in 2019 "to consider all options to challenge the regulations formally in concert with other interested organisations". Accordingly, we urge the Ministry to pay careful consideration to our representations on the issues raised by the consultation paper and other documents that it has released.

Notwithstanding our clear objection and opposition to the proposals, ALACE provides alternative views of what the regulations should seek to do if the Government determines to proceed regardless.

These proposals form part of the most damaging attacks on the terms and conditions of local government staff for decades, dismantling long-established norms and without full consideration of the serious impact that they will have on individuals. We reluctantly recognise that some changes would be required to the local government pension scheme if the exit payment cap regulations are not overturned by the Courts, but that does not

mean that we support all the proposals in the consultation paper or the draft regulations. We have serious concerns about many aspects of the Ministry's proposals and believe that, if the exit payment reforms are not abandoned altogether in the light of the legal objections now being raised by ALACE and others, a fundamental rethink is required alongside appropriate transitional arrangements and introduction of flexibilities for individuals.

We offer no objection to the proposed amendments to the Discretionary Compensation Regulations **but only if** equivalent changes are made at the same time for all other public sector compensation arrangements, such as those applying in the NHS, education etc.

If the exit payment cap regulations are not overturned by the Courts, we set out detailed comments and suggested alternative approaches for amendments to the Local Government Pension Scheme in the body of our response. Our principal concerns are:

(a) the Ministry's proposals go beyond the approach that Parliament has authorised or required in respect of the £95k cap. If someone's exit payment on redundancy would be over £95k under current rules, they should receive direct or indirect benefits worth £95k and not a penny less. No one whose exit costs are less than £95k should suffer any further impact: they should receive a redundancy payment in accordance with the amended rules on discretionary compensation plus their immediate, unreduced pension;

(b) if ALACE's contention that these regulations make retrospective provision is proven not to be correct, transitional arrangements are required, to protect local government staff from the effects of the cap in respect of pension strain. They have not had time to prepare for this since the Treasury announced its intention to proceed with regulations on 21 July 2020, less than four months ago;

(c) in addition, the maximum range of flexibilities is required for anyone affected by the exit payment cap in managing the impact on their pension. This will include changes being made to the taxation regime for pensions;

(d) the exit payment cap urgently needs to be uprated from £95k, and uprated annually thereafter.

Detailed comments and responses

The role of ALACE in negotiating and agreeing reforms

We raise this because of the confirmation in paragraph 4.1that the Government is working with the main public sector workforces "to negotiate and agree reforms directly with each sector". We welcome this commitment. Paragraph 3.3 also refers to "individual sector workforce negotiations". These words appear in the Ministry's document and must be intended to have some effect or they should not have been used.

In respect of local government, the process of negotiation and agreement is not a matter solely for the employers or even for the LGPS Scheme Advisory Board: MHCLG needs to engage directly in negotiation with the relevant trade unions with a view to reaching agreement with them.

We welcome the meetings that we have already had with MHCLG officials but they have not taken the form of "negotiations" and have certainly not resulted in agreement about the changes to the LGPS.

ALACE has a direct locus and should enjoy direct negotiating rights because:

(1) ALACE is the only union with negotiating rights for the terms and conditions of chief executives as we provide the staff side of the Joint Negotiating Committee for local authority chief executives;
(2) our members would be more severely impacted by the Treasury regulations and the MHCLG proposals than any other group of local government staff.

We have sought, but not received, confirmation that the provisions of section 23 of the Public Service Pensions Act 2013 applies. The consultation paper does not mention relevant provisions of the 2013 Act although the draft regulations which were subsequently released purport to refer only to section 21. In particular, we raise issues of retrospectivity, which appear to us relevant to section 23. For example, an individual who is 57 now would have received an unreduced pension immediately if made redundant 3 or 6 months ago. If made redundant under the exit payment cap regulations now in force, as read with the proposed MHCLG regulations, he or she would receive a much lower pension because of the inclusion of pension strain in the payment cap. The regulations reduce the benefits that an individual would receive significantly below the level that he or she could have had in the recent past and therefore have the effect of removing a past entitlement. We welcome the statement in paragraph 6.3 that the Government will ensure that the reforms do not breach the provisions of the 2013 Act but we are not convinced that the proposals now being contemplated do not, in effect, reduce the pensions that individuals have accrued.

The regulations should not be made as drafted

ALACE calls on MHCLG not to proceed with its proposals and not to make the regulations as drafted – in ALACE's view, they make retrospective provision and have not been subject to the process of consultation and agreement set out in section 23 of the Public Service Pensions Act 2013. ALACE would not give consent to such retrospective provision.

In any case, any regulations following this consultation should be limited to the bare minimum to implement the £95k cap (but removing the retrospective element, for example, by making clear that only pension strain for service on or after 4 November 2020 can count towards the cap).

The other proposals to reduce exit payments in local government should not be progressed because they place local government in the vanguard of implementation, following a policy statement published by the Treasury in 2016. Such proposals have not been implemented in this way for other parts of the public sector - the Government should bring forward simultaneous proposals for all public sector workers if it wishes to proceed.

Opposition to the reforms

ALACE continues to oppose the principle of including pension strain within the exit payment cap and we raise detailed points of objection to proposals in the MHCLG consultation document. **We urge the Ministry to pay careful consideration to our**

representations on the issues raised by the consultation paper and other documents that it has released.

ALACE has extant authorisation from its AGM in 2019 in the following terms:

"ALACE calls on the new Prime Minister and those appointed as Chancellor of the Exchequer and Secretary of State for Housing, Communities and Local Government;

- to reflect on the united opposition from employers and unions to the exit cap regulations and their damaging impact on local government's ability to implement reform;

- if the Government wishes to proceed with regulations, to hold urgent discussions with representatives of employers, ALACE and other relevant unions in order to address the concerns that have been raised, including the absence of an equality impact assessment.

If the Government does not make significant changes to the regulations to address ALACE's concerns, the AGM authorises the Council of ALACE to consider all options to challenge the regulations formally in concert with other interested organisations."

The need for equal treatment across the public sector

The Government has decided to exempt some parts of the public sector from the exit payment cap. Immediately therefore the Government's approach is unequal. ALACE seeks confirmation that the Government is committed to "ensure greater consistency between workforces" (paragraph 2.2) and is serious about "ensuring that there is greater consistency between schemes while recognising the differences between workforces" (paragraph 3.3). Specifically ALACE cannot support any proposal that would result in local government staff being treated more severely than other parts of the public sector – local government staff should not be used as "guinea pigs" if the Government is not proposing or implementing similar reforms for other public sector workers. It is incumbent on the Ministry to work urgently with other departments to ensure that information is provided to demonstrate that there will be equal treatment. **MHCLG should not implement changes affecting local government until clear evidence about equality of treatment in scope and timing has been provided.** We raise specific concerns about this issue below.

The Ministry's understanding of local government and legislation

We would hope that MHCLG would have a better understanding of how local government is funded than is demonstrated by the statement that "exit arrangements in all workforces are ultimately funded by the taxpayer" (paragraph 3.1). All councils derive a proportion of their funding from fees and charges, selling services to residents or businesses or other commercial activity. This is not funding provided by means of taxes, national or local. Since there is no hypothecation of large elements of these non-tax sources of funding, it cannot be proven that the cost of all exit payments is "ultimately funded by the taxpayer". We make this point because similar justification has been provided repeatedly by the Treasury and their Ministers in commenting on the exit payment cap and this demonstrates that the Treasury and Government may have misdirected itself about the rationale for its proposals so far as they affect local government.

Paragraph 3.2 states that "the government legislated for a cap of £95,000 for all exit payments in the public sector in the Small Business, Enterprise and Employment Act 2015 (later amended by the Enterprise Act 2016)". It did not. The Government legislated for the cap in the 2016 Act which amended the 2015 Act.

The sentence in paragraph 4.4 that “employees may have no option but to take immediate payment of their pension on being made redundant” is rather odd when the Ministry knows well that anyone made redundant over the age of 55 must receive their pension immediately under current rules.

The statement in paragraph 4.10 that the exit payment regulations “allow for discretionary relaxation of the cap in exceptional circumstances, including where imposing the cap would cause genuine hardship” is not correct. The regulations state who may relax the cap and those persons – in England - may do so in accordance with Treasury directions or subject to the Treasury’s consent. The regulations do not refer to exceptional circumstances or hardship.

The full council of a local authority has the power to relax the cap in respect of its staff, not “in relation to local government bodies for which its has responsibility” (paragraph 4.11).

We are concerned that the Ministry’s proposals go beyond the approach authorised and required by Parliament in the primary and secondary legislation it has approved, and wonder whether this too is informed by a misunderstanding.

Impact assessment and response to question 1

We welcome the Ministry’s commitment to publish a full impact assessment (paragraph 2.7) and in particular welcome that a draft impact assessment by the Government Actuary’s Department was made available voluntarily on 30 September. This contrasts with the Treasury which released its impact assessment only as a result of an ALACE freedom of information request and subsequent request for an internal review.

The consultation paper refers to “fairness” at a number of points. We do not believe that the proposals are fair to serving local government staff who will suffer potentially significant adverse impacts on their financial position if made redundant, compared to previous long-standing arrangements which were part of the pension scheme reforms negotiated and agreed with employers and unions in 2013.

ALACE is deeply concerned to see in the draft assessment by the Government Actuary’s Department that 86% of staff who were made redundant in the period from 2013-2016 would have received lower benefits as a result of the proposals, with an average negative impact of £13k. We are very concerned that the top 10% of people impacted by the proposals would suffer an average impact of 47.5%. We believe that these extreme effects are in part because the Ministry is taking the wrong approach to what Parliament has authorised in respect of the £95k cap and is seeking to reduce what individuals may receive below the £95k cap.

In our response to the Treasury’s consultation of 2019 we expressed concern that the exit cap would have equality impacts, in addition to issues related to age discrimination: “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 confirmed by the Government Actuary’s document as read with paragraph 120 of the Ministry’s recent consultation in respect of the McCloud judgement. The latter states that at 31 March 2019 only 26% of scheme members were male. Yet the

GAD document shows that, while more women are affected, 55% of those suffering the 10% largest impact in financial terms are men, suffering an average loss of £27k. This is more than double the proportion of scheme members who are male. The proposals plainly have a disproportionate effect on men. The GAD's impact analysis (table 2) further shows that men make up 37.6% of all redundancies that would be affected by the proposed changes.

Looking across the make-up of senior staff in local government as a whole, it is likely that the proposals have a greater impact on people who are white.

In response to **question 1**, ALACE feels it is rather late to be asking this question when the Treasury regulations have been endorsed by Parliament and made with the intention of coming into force before the consultation closes. The answer should be obvious to the Ministry. The following groups of staff are more adversely affected than others:

- anyone over the age of 55 already, with an even more severe impact for those who are closer to 55 (for whom pension strain will, on average, be higher than those who are closer to normal retirement age);
- anyone approaching the age of 55 in the next few years;
- those on the highest salaries in the above groups will suffer the largest impact and, among high earners, males are likely to make up the majority of those affected as set out in the Government Actuary's document.

As set out above, **we do not believe that the regulations should be made in their present form** and, following legal challenges, the Courts may provide rulings that define the Government's scope to legislate. If for whatever reason the Government proceeds broadly along the lines set out in the proposals, we call for the Ministry to include both transitional arrangements and flexibilities for individuals in its regulations and set out detailed proposals below.

The regulations should be limited to the bare minimum to implement the £95k cap

ALACE believes strongly that the regulations made following the consultation should – if the exit payment cap regulations are not overturned by the Courts – be limited to the bare minimum to implement the £95k cap. **This would include removing the retrospective element by making clear that only pension strain for service on or after 4 November 2020 can count towards the cap.**

In this scenario, the regulations should make provision for someone made redundant or retired on grounds of business efficiency over the age of 55:

(a) to allow the individual choice about when the pension is put into payment. This might be immediately or at a date in the future. In either case, the individual's accrued pension for the pre-4 November 2020 service would be paid in full, on an unreduced basis and with the pension accrued for post-3 November 2020 service being subject to a commonly prescribed actuarial reduction;

(b) to allow an individual whose exit payments (which would exclude any pension strain for pre-4 November 2020 service) exceed £95k to choose how the £95k is made up. If the strain cost + redundancy payment (including the statutory element) is more than £95k, the individual must receive their statutory redundancy payment but should then have the choice about how the balance of the £95k is made up: by the balance of the redundancy payment, by a contribution towards strain cost ("pension strain contribution") or by a mixture of the two. The individual would have the choice

about when the pension strain contribution would be deployed. The pension strain contribution would be held “on account” by the relevant pension fund administrator i.e. the employer would have to make a payment to the fund administrator of the amount concerned. We illustrate what we mean in the following table.

	ALACE proposal	**Comments**
Aged over 55, strain cost for post 3 November 2020 service £20k, redundancy payment £90k (of which statutory element £30k)	Individual receives £30k statutory redundancy payment Individual chooses how balance of £65k is made up: maximum £60k as redundancy payment, so a range of £5-20k available as “pension strain contribution” depending on the decision on the redundancy payment.	Pension strain for pre 4 November 2020 service not counted. Otherwise the £95k cap is fully respected. Individual chooses when pension is put into payment and therefore when the pension fund uses the pension strain contribution to reduce actuarial strain.
Aged over 55, strain cost for post 3 November 2020 service £80k, redundancy payment £120k (of which statutory element £25k)	Individual receives £25k statutory redundancy payment. Individual chooses how balance of £70k is made up: maximum £70k as redundancy payment, so a range of £0-70k available as “pension strain contribution” depending on the decision on the redundancy payment.	Pension strain for pre 4 November 2020 service not counted. Otherwise the £95k cap is fully respected. Individual chooses when pension is put into payment and therefore when the pension fund uses the pension strain contribution to reduce actuarial strain.
Aged over 55, strain cost for post 3 November 2020 service £30k, redundancy payment £60k (of which statutory element £20k)	Individual receives £60k and can have full accrued pension, unreduced.	Pension strain for pre 4 November 2020 service not counted. The total cost for the employer which counts towards the cap is less than £95k.

The other proposals to reduce exit payments in local government should not be progressed because they place local government in the vanguard of implementation, following a policy statement published by the Treasury in 2016. Such proposals have not been implemented in this way for other parts of the public sector - the Government should bring forward simultaneous proposals for all public sector workers if it wishes to proceed.

Notwithstanding our clear objection and opposition to the proposals, ALACE provides alternative views of what the regulations should seek to do if the Government determines to proceed regardless.

The remainder of this response sets out comments on the proposals if

(a) **the exit payment cap regulations are not overturned by the Courts; and**

(b) **pension strain in respect of service prior to 4 November 2020 counts towards the cap; and**

(c) **the Ministry does not accept ALACE's request to limit the regulations to those matters that are essential to dealing with the consequence of the exit payment cap regulations.**

Proposals to reform redundancy payments and responses to questions 2, 3 and 4

While the limit of 104 weeks' pay is set in the 2006 regulations, it would perhaps have assisted understanding of the impact of the proposals in paragraph 4.3, if the Ministry had surveyed principal authorities on their policies. Most councils pay significantly lower than the limit in the regulations, as suggested in paragraph 2.5, with many councils paying a maximum of 30 or 52 weeks.

As a union, ALACE would generally resist changes that adversely affect its members. However on this occasion we offer no objection to the proposed changes set out in paragraph 4.3 **but only if** it is confirmed that equivalent changes are going to be made to all other public sector compensation arrangements, such as those applying in the NHS, education, civil service etc. and would be implemented at the same time across all parts of the public sector.

This will include seeing equivalent changes to provisions such as:
- regulation 8 of the Teachers (Compensation for Redundancy and Premature Retirement) Regulations 2015 which sets a limit of 104 weeks for discretionary compensation for teachers made redundant;
- paragraph 16.8 in section 16 of the NHS Terms and Conditions of Service Handbook which provides for a maximum of 24 years' service to count towards a redundancy payment, on the basis of one month's pay for each completed year of service;
- the Civil Service Compensation Scheme 2010 provides for staff to receive one month's salary for each year of service up to a maximum limit of 21 months in cases of voluntary redundancy. Following a judicial review which overturned previous changes that had been agreed with some unions in 2016, the Government issued proposals for changes in September 2017 which are similar in most respects to those now proposed by MHCLG. However they have not been implemented and thus local government staff are being used as "guinea pigs". It also appears that the Civil Service proposals of 2017 would continue to allow redundancy payments to be calculated on a maximum salary of £149k.

While the maximum salary of £80,000 to be used in redundancy payment calculations would adversely affect a significant proportion of ALACE's members, we recognise that equivalent provision has already been implemented for some other parts of the public sector, including the NHS. Again we would offer no objection to what is proposed in paragraph 4.3(c) **only if** it is confirmed that the same £80,000 limit will be applied to, and would be implemented at the same time, for all other parts of the public sector.

In response to **question 2**, we warmly welcome the commitment in paragraph 4.3(c) that the £80,000 figure will be uprated annually and support using CPI as an appropriate index. We contrast this approach with the Treasury's refusal thus far to increase the £95k cap, even though the figure was first announced five years ago, or to commit to annual uprating. We recognise that, unless the Treasury changes its position, uprating the maximum salary of £80,000 will mean that the contribution that might be made to pension strain will fall over time. This underlines why the Treasury's position is indefensible – the value of money changes over time and it is only fair to staff that limits are uprated regularly over time, so that the impact of the limits does not become more punitive.

In response to **question 3**, the following group of staff is more adversely affected than others: anyone who works in a council that operates a scheme of redundancy payments that can result in payments between 66 and 104 weeks' pay.

In response to **question 4**, the following groups of staff are more adversely affected than others:

- anyone earning over £80,000;
- those on the highest salaries in this groups may suffer the largest impact and, among high earners, males are likely to make up the majority of those affected as set out in the Government Actuary's document.

The Ministry's proposals for choice

Our starting point is that, if pension strain counts towards the exit cap, the current regulations must be changed so that an individual is not forced to receive their pension immediately and suffer a significant reduction in that pension, for life. The reduction for someone aged 55 whose normal retirement age is 67 is 40% and it would be intolerable that individuals should have no choice about whether they suffer such a reduction. We believe that MHCLG shares our concern to avoid the situation whereby LGPS members who are made compulsorily redundant face receiving a lower pension for life.

The Ministry's proposals would have been easier to understand if they had been accompanied by some simple worked examples. Our understanding of them is that the Ministry is going beyond the £95k cap authorised by Parliament and proposing other changes that fundamentally affect long-standing arrangements in local government which staff have had a reasonable expectation would apply to them if made redundant above the age of 55.

ALACE's alternative approach

ALACE believes that the following arrangements should be built into the LGPS regulations for staff made redundant over the age of 55:

(a) if the strain cost + redundancy payment (including the statutory element) is £95k or less, they should receive their accrued pension immediately on an unreduced basis. In other words there would be no difference from the current position, other than any change to the redundancy payment arising from the proposals set out in paragraph 4.3;
(b) if the strain cost + redundancy payment (including the statutory element) is more than £95k, the individual must receive their statutory redundancy payment but should then have the choice about how the balance of the £95k is made up: by the balance of the redundancy payment, by a contribution towards strain cost ("pension strain contribution") or by a mixture of the two. The individual would have the choice about when the pension strain contribution would be deployed. The pension strain contribution would be held "on account" by the relevant pension fund administrator i.e. the employer would have to make a payment to the fund administrator of the amount concerned.

To be clear: ALACE rejects any suggestion that individuals whose exit costs under previous rules would have been over £95k should now receive direct or indirect benefits worth less than £95k, which is the consequence of paragraphs 4.5 to 4.8 of the Ministry's proposals.

To assist the Ministry in understanding what we are proposing, here are some hypothetical worked examples:

	Previous position	**ALACE proposal**	**Comments**
Aged over 55, strain cost £200k, redundancy payment £50k (of which statutory element £20k)	Individual would have received £50k plus immediate pension, unreduced	Individual receives £20k statutory redundancy payment Individual chooses how balance of £75k is made up: maximum £30k as redundancy payment, so a range of £45-75k available as "pension strain contribution" depending on the decision on the redundancy payment.	The £95k cap is fully respected. Cost of the exit for the employer falls from £250k to £95k. Individual chooses when pension is put into payment and therefore when the pension fund uses the pension strain contribution to reduce actuarial strain.
Aged over 55, strain cost £50k, redundancy payment £120k (of which	Individual would have received £120k plus immediate	Individual receives £30k statutory redundancy	The £95k cap is fully respected. Cost of the exit for

statutory element £30k)	pension, unreduced	payment. Because the strain cost is £50k, the individual should still receive immediate pension on unreduced basis. The individual would also receive £15k additional redundancy payment (£95k - £50k -£30k).	the employer falls from £170k to £95k.
Aged under 55, redundancy payment £150k (of which statutory element £25k).	Individual would have received £150k.	Individual receives £95k – because of the limits on compensation payments and/or because of the £95k cap.	The £95k cap is fully respected. Cost of the exit for the employer falls from £150k to £95k.
Aged over 55, strain cost £30k, redundancy payment £60k (of which statutory element £20k)	Individual would have received £60k plus immediate pension, unreduced.	No change. Individual receives £60k plus immediate pension, unreduced.	The total cost for the employer is less than £95k and remains unchanged.

The Ministry's proposals in paragraphs 4.5 to 4.8 seek to introduce changes over and above the £95k cap and the reduction in maximum redundancy payments that employers may make set out in paragraph 4.3. It has long been the case in local government that an individual, if made redundant over the age of 55, receives a redundancy payment and immediate pension on an unreduced basis. It is bad enough that many local government staff will now find that they are denied access to an unreduced pension in such circumstances. The Ministry's proposals make a bad situation worse by forcing individuals affected by redundancy to choose between a redundancy payment and a contribution towards pension strain. In some cases this will reduce the cost to the employer below £95k, for an individual whose exit would previously have cost over £95k. This is what makes the Ministry's proposals unacceptable.

Parliament has authorised limiting an employer's expenditure on exit payments to £95k. It has not authorised or required that exit payments should be reduced below that figure. We do not believe that the Government has an electoral mandate for these proposals or that it

can reasonably justify a further attack on the financial settlement that key workers should receive when made redundant.

There is one element of the Ministry's proposals that we reluctantly support. No one should be forced to contribute to making good a reduction in his or her pension as a result of being made redundant. However we recognise that individuals who are fortunate enough to have the resources available should be able to make up any element of pension strain in order to avoid a lower pension for life. Thus we agree that the flexibility in the fourth bullet point of paragph 4.5 should be available to individuals. We would ask that this flexibility should be available at any time before normal retirement age and should not exist solely at the point of being made redundant. For example, an individual made redundant at age 58 might choose to accept an actuarially reduced pension at that point but then at age 62 be in a position to make a contribution to the pension fund that would allow the pension to be paid at a higher or even its full level from that point onwards.

The Government Actuary's Department's draft technical guidance

ALACE strongly supports the need for a common approach to calculation of strain cost across local government pension funds, so that individuals whose circumstances are otherwise the same (age, service, salary etc) are not treated differently simply on the basis of where they happen to work. However the draft guidance is constructed on the basis of proposals that ALACE does not support and it would require a fundamental reworking if the alternative approach we have set out above was to be implemented.

Despite our strong support for a common approach to avoid variances between pension funds, we believe that the Ministry needs to reconsider whether the strain cost should be based on the benefits brought into payment or on standard benefits. This issue is not even mentioned in paragraph 4.9 of the consultation paper or analysed in the draft GAD guidance (indeed paragraph 2.15 of the latter states, without explanation of the reasoning, that "pension strain should be determined based on retirement benefits before commutation"). Based on the examples in the draft guidance, the intention seems to be for the strain cost to be based on standard LGPS benefits. If that route is chosen, it seems to us to require an objective justification by the Ministry given the potential, which is explored in more detail below, for the adverse impact it might have on individuals.

At retirement, an important decision is whether or not to swap pension for lump sum. It is an important option. It has become more important since April 2008 when standard benefit accrual switched to pension accrual only but with the option to take 25% of the value of benefits as a tax free lump sum at retirement through swapping pension for lump sum (up to the lower of the current or protected lifetime allowance or value of benefits).

The swap rate of £12 of lump sum in exchange for £1 of pension is not an attractive rate. From the employee's perspective and with interest rates from the Government and banks at negative rates in real terms, it may be at its least attractive level in terms of prospective "safe" investment opportunities.

An illustration of the unattractiveness of the offer is the calculation of the value of pension benefits for lifetime allowance purposes.

Pension value is determined by multiplying the value of pension to be brought into payment by 20 and adding the value of the lump sum. Thus, say a member chose to swap £5k of pension for a lump sum, the value of benefits for the purposes of taxation will reduce by £40k (decrease in annual pension of £5k x 20, offset in part by increase in lump sum of £5k x 12). This is a voluntary decision by the member. The outcome is that the member increases the value of the lump sum but reduces the total value of the benefit package – this would certainly seem to be the case if the individual lives for significantly more than 12 years after retirement. Thus the employer/pension fund could reap a significant financial benefit from the swap.

Given that the value of benefits is determined by what is brought into payment and that such value is known at the time, ALACE would question whether there is objective justification for the GAD draft guidance basing the pension strain cost only on standard benefits. It seems very unfair that – in addition to the effect of the exit payment cap if the regulations are not overturned by the Courts and the proposals in the MHCLG consultation document - the member could potentially suffer a further loss in effect if they swap pension for lump sum, as that choice would be ignored in calculating pension strain under the approach set out in the draft GAD guidance document.

We recognise that there would be some administrative complication in switching the determination of strain costs to the benefits brought into payment (i.e. after the employee has determined how benefits will be taken) but we feel that the benefits would outweigh the complications.

In summary, ALACE feels there is a strong case for consideration that pension strain should be based on the value of benefits being brought into payment rather than simply using standard benefits. Switching pension to lump sum is the equivalent of a member making a voluntary additional contribution to reduce their exit costs. We feel it is fair and appropriate that the member reaps the benefit of this voluntary contribution in determining the scale of pension strain.

Relaxation of the cap

The process for approval of decisions taken by full council will add delay and uncertainty to processes that already create stress and uncertainty for individuals facing redundancy. ALACE continues to believe that a decision of full council to waive the limit should be sufficient political scrutiny and authorisation of a decision, the cost of which falls entirely on the employer and costs the Government nothing. Councils do not receive more funding from Government on the basis of how many redundancies they choose to implement. It says much of the Government’s commitment to devolution, and how Whitehall has not been subject to the full effects of austerity, that the approval of the Permanent Secretary of the Ministry and two sets of Government Ministers might be required for implementation of such a local decision.

Responses to questions 5 to 7

We assume that **question 5** relates to paragraphs 4.4 to 4.13 of the consultation paper, rather than only to the section on relaxation of the cap. We have set out above that we do not support many of the proposals in paragraphs 4.5 to 4.8 and have outlined an alternative approach. In addition ALACE sets out below its proposals for transitional arrangements and flexibilities for individuals. We consider that these are essential if the Government is successfully to implement change in a way that is also fair to individuals.

Question 6: while we agree that individuals should have flexibilities, we do not support the proposal as set out in paragraph 4.8. This is because it could reduce the direct and indirect benefits from well above £95k under previous arrangements to well under £95k. For example, someone aged over 55 whose redundancy payment was £40k might receive only £40k. This goes far beyond the £95k cap that Parliament has authorised.

Question 7: see our answer to question 1 and our comments on the impact assessment.

Impact analysis and response to question 8

We have provided detailed comments about the impact assessment earlier in our response.

ALACE is concerned about the ability of pension fund administrators and employers to cope with the changes, both immediately, because of the gap in timing between the HMT and MHCLG regulations, and in the future.

There will be potentially very complex choices for employers and individuals. What is MHCLG doing to reassure itself that employers and fund administrators are well prepared and will be able to cope? Clear communications will be required about their role and for employees about the impact on them. As the consultation could have been improved with worked examples, the decision document after the consultation and any guidance to LGPS also need clear worked examples.

To illustrate our concern, there needs to be capacity of employers and fund administrators to support employees with their retirement decisions, such as

- Redundancy / severance payment v contribution to strain cost – value for money of options available
- Which strain costs to meet
- Which benefits to take
- How benefits are taken – lump sum v pension
- Understanding the tax implications, income tax, AA and LTA charges and decisions on how the excess is calculated and how the tax is paid

In that context we also raise concerns about the interaction with the tax system, although we appreciate that it is not MHCLG's responsibility. Some members will have had material annual allowance charges. It seems grossly unfair that a member suffers a large AA charge in one year or charges in successive years and in the next year is made redundant with a much smaller pension than that assumed for AA calculation purposes – and potentially faced with using taxed income to buy back some pension. We are calling for the

annual allowance system to be scrapped altogether or the annual limit lifted very significantly so that this effect is minimised or avoided.

ALACE's submission to the Comprehensive Spending Review, September 2020

The taxation of pensions has become overly complex and requires significant simplification. We call for the annual allowance and lifetime allowance to be lifted significantly above current levels, in order to minimise the number of individuals who are caught by them. Having lifted the limits, annual indexation should be applied. Preferably the annual allowance regime should be removed altogether because it penalises individuals who advance their careers by securing rapid promotions in succession, even in quite junior roles.
We believe the case for lifting the limits is strengthened by the public sector exit payment cap regulations, which mean that an individual could face a tax charge such as the annual allowance for several years in succession only to find that s/he will not receive the full accrued pension if made redundant in an immediately following year. S/he will have been taxed on the full value of increase in the pension even though s/he will not enjoy a pension at that level. This seems grossly unfair.

Finally we are not sure that the Ministry is correct in raising the point about staff transferred under TUPE in paragraph 5.7. The bodies to which the exit cap applies are now set in the regulations that Parliament has approved. They do not apply to private sector companies to whom former local government staff have been transferred.

Employees receiving pay and pension concurrently and response to question 9

This is a most odd part of the consultation paper. No changes are required to the pension scheme or to the guidance on pay policy statements.

Legislation permits flexible retirement and therefore the statutory regime allows individuals to draw their pension while remaining in employment. We are concerned that paragraph 5.9 is seeking to change the statutory guidance on pay policy statements without making clear that that is the intention. The topic of the consultation is described as "proposals for reforming local government exit payment"(sic) but the proposals here are not about exit payments. We are not sure why chief officers are singled out and the effect of the proposals in paragraph 5.9 is unclear: for example, restrict total remuneration to what level?

But we are most concerned by the first and second bullet points of paragraph 5.9. There is reference to "those who have not genuinely retired". The Government introduced flexible retirement some years ago and, unless those provisions are now to be removed, it is insulting to describe those who have taken advantage of flexible retirement as "not

genuinely retired". They remain in employment so, by definition, they have not retired: their employer is still able to draw on their skills and experience.

The second bullet point makes an outrageous allegation. The legislation permits individuals to access their pension and remain in employment (albeit on a changed basis such as reduced hours or lower grade). It is not "favouritism" if individuals choose to exercise such options and their employers freely agree to support their decision. It is certainly not "corruption" and we call on the Ministry to withdraw this outrageous slur on individuals in local government who have exercised the choice for flexible retirement and remained working for their employer.

Need for transitional arrangements and answer to question 10

We assume the question about transitional arrangements relates to section 4 of the consultation paper rather than to paragraphs 5.10 and 5.11.

When major changes to pension entitlements have previously been implemented, there have been extensive transitional arrangements such as those related to the abolition of the 85 year rule and the transition to CARE-based pensions in 2014 - the Ministry's proposals to extend the latter transitional arrangements, in light of the Supreme Court's decision, demonstrate not only why transitional arrangements are needed when major changes are implemented but also that they need to operate for a significant period.

We urge the Ministry to understand that we are now facing significant changes to a very long-standing provision of the LGPS regulations and that transitional arrangements are normal in such circumstances. Long-serving members of the LGPS have, throughout their careers, known that if made redundant above a particular age (now 55, used to be 50) they would receive their accrued pension immediately, without an actuarial reduction. It is a major change to the pension scheme if the entitlement for which they had a reasonable expectation if made redundant might now - on a cliff edge basis - be reduced by 40%, for example, for an individual receiving benefits 12 years earlier than normal retirement age. No individual will have had time to prepare for this since the Treasury confirmed on 21 July 2020, less than four months ago, that it was proceeding with regulations, for example by making additional savings or contributions. Prior to 21 July 2020, there was no certainty that the Government would make regulations, following three years of silence before the April 2019 consultation and the further twelve months of silence after the 2019 consultation closed.

We are very surprised that, despite representations that ALACE made in 2019, the Treasury's regulations and directions do not automatically exempt from the cap any exit where the decision to make someone redundant was taken before the Treasury regulations came into force but the date of redundancy falls after that date. Many staff in local government are on three months' notice, and some on longer periods of notice than that. Thus there could quite easily be redundancies taking effect at, say, the end of November 2020, which were correctly and legally decided before the end of August 2020 following consultation with staff and unions but before the Treasury regulations were even debated in Parliament. Subject to the outcome of legal challenges against the Treasury's regulations, it would now seem to create unnecessary work for councils and the Ministry if such decisions have not been automatically covered by appropriate transitional provision in the Treasury directions. If the MHCLG's regulations had been made in parallel, there

would have been the opportunity to address this obvious oversight in transitional provisions.

ALACE's proposals for transitional arrangements and mitigation

We recognise – arising from the court decision in McCloud and the Ministry's recent consultation proposals on that issue - that transitional arrangements should apply for a period of time rather than be based on the age of scheme members. We note that the changes from the Treasury's exit cap and the MHCLG proposals themselves have the biggest effect on those of a certain age. However that does not mean that transitional arrangements are inappropriate, given the significant and sudden adverse effect of the exit cap if it includes pension strain. ALACE urges consideration of the following options

a) the regulations could provide that, regardless of the GAD table setting out a common way of calculating pension strain for the purposes of the exit payment regulations, the strain is zero for the first five or ten years after the regulations come into force. This could be accompanied by a taper to bring the GAD table into full effect over a longer period;
b) (our preference if (a) cannot be delivered) the regulations should provide explicitly that pension strain is to be paid by the employer to the fund over the period between date of redundancy and normal retirement age and that it is the cost in the first year that counts as the pension strain for the purposes of the exit cap. Hypothetical e.g. pension strain is £150k and the individual is ten years from normal retirement age so the cost in the first year is £15k, and this is what counts towards the cap. (Conversely if the pension strain was £100k and the individual was 4 years from normal retirement age, the strain cost would be £25k.) This could apply either on a permanent basis or on a transitional basis for, say, five or ten years.
c) the regulations could provide that the pension strain in the GAD table, having been calculated, should be divided by a suitable common factor more fairly to reflect the benefit to the individual. In last year's consultation, ALACE proposed a divisor of 20, which mirrors the multiplier of 20 used for calculating whether an individual has exceeded the lifetime allowance. This could apply either on a permanent basis or on a transitional basis for, say, five or ten years.

Question 11

ALACE's proposals for widest range of flexibilities within the LGPS for anyone caught by the cap

The widest possible range of flexibilities would allow individuals to cope with what will otherwise be significant reductions in the annual pension that they receive. These are not alternatives to the transitional arrangements: both are required. **None of these flexibilities would cost employers, MHCLG or the Government a penny.** Some of them would require changes in HMRC approaches to crystallisation and taxation of pensions:

a) to allow an individual caught by the exit payment cap to decide when pension should be put into payment;

b) (our preference) to allow an individual caught by the exit payment cap to decide on what date elements of pension should be put into payment. We believe the time has come for

the pre-2008 pension (the lump sum and annual pension elements being treated separately), the 2008-2014 annual pension and the post-2014 annual pension each to be capable of being put into payment on different dates. This will require changes to the HMRC approach so that it is accepted that one individual can have different pension crystallisation dates and that no tax charge would arise in respect of this for the separate elements. We are particularly interested in flexibility about pre-2008 lump sums as individuals may be prepared to take these on an actuarially reduced basis in order to put off the date at which they receive their annual pension elements, thereby minimising the actuarial reduction they would suffer on an ongoing basis;

c) to allow an individual to deploy the “pension strain contribution” to mitigate the actuarial reduction, with flexibility about when and how that would be deployed. We propose above that the relevant pension fund administrator should hold this sum, pending the individual's decision about when it would be used. With the separate treatment of elements of pension outlined in (b), this might allow an individual to avoid any reduction on one element of the pension while accepting that there would be reductions in other elements;

d) to allow an individual to use his or her own other resources to pay a contribution to the fund to mitigate or avoid an actuarial reduction. Again this should be capable of applying to separate elements of the pension as outlined in (b). We do not commend the effect of legislation that might force individuals to consider having to pay for their accrued pension not to be reduced when they have been made redundant at their employers' choice. However we recognise the need to ensure that individuals should have this flexibility open to them.

We recognise that some of our proposals for flexibilities, such as (b), might not be capable of inclusion in the regulations that the Ministry will make quickly after this consultation but we would nevertheless commend them for future consideration in subsequent regulations during 2021.

Question 12

We call on the Government to exercise its powers to uprate the £95k cap set out in the 2016 Act – inflation alone should mean that its value between 2015 and 2020 should have increased to over £100k – and to uprate it annually thereafter.

Comments on the draft regulations
If ALACE’s comments above are accepted, the regulations will need substantial reworking. We recognise that consultation on the draft regulations continues until 18 December and reserve the right to submit further points on drafting separately.

Preamble
Why is only paragraph 2(c) of Schedule 3 mentioned in the enabling powers? There seem to us potentially other provisions of Schedule 3 that are relevant such as paragraphs 2(a) or 9(a). However since section 3 of the 2013 Act is cited as one of the enabling powers, by virtue of section 3(2)(a) this would seem to encompass all the provisions in Schedule 3, rendering it unnecessary to mention paragraph 2(c).

As noted at the outset, ALACE does not accept that only consultation under section 21 of the 2013 Act is required.

Regulation 6

The exit payment cap regulations are subject to affirmative resolution procedure. Does the Ministry intend that its regulations will also be subject to affirmative resolution procedure, because in our view bodies cannot be added to the exit payment cap regulations without seeking Parliamentary approval? In any event it seems a dubious use of the powers in the 2013 Act to amend the 2020 regulations in this way.

Regulation 9(4)(b)

It does not seem certain that 15 months is the same as 66 weeks, which is the proposal in the consultation paper. The draft regulations do not offer a definition of "month". "Month" in Schedule 1 to the Interpretation Act 1978 means calendar month but this does not assist in understanding how the term is converted to weeks. We note that the 2006 regulations set a limit of 104 weeks' pay, not 24 months. We strongly urge that this provision should refer to 66 weeks.

Regulation 15

We welcome the recognition that transitional provision should be included in the regulations. We argue above for more extensive transitional provisions to mitigate the inclusion of pension strain within the exit payment cap, if that remains the case despite legal challenges to the exit payment cap regulations.