REFORMING LOCAL GOVERNMENT EXIT PAY

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

December 2020

This supplementary response deals with matters relating to the drafting of the draft Local Government Pension Scheme (Restriction of Exit Payments) (Early Termination of Employment) (Discretionary Compensation and Exit Payments) (England and Wales) Regulations 2020 which the Ministry published on 19 October.

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.

Reiteration of objection to the regulations

We set out in our response to the policy consultation why the regulations should not be made as drafted and outlined alternative approaches that the Ministry should consider. We stand by those objections and alternative approaches but will not repeat them here as we appreciate that the Ministry has set a deadline of 18 December for comments on the drafting of the regulations (as opposed to the policy intent that lies behind them).

The points made below concern the drafting of the Regulations, and assume (contrary to the position taken by ALACE as a claimant in the current judicial review claim) that regulations of this nature, and the Exit Payments Regulations to which they refer, are in principle lawful. All these points are without prejudice to, and in addition to, the points made in the judicial review proceedings, and in earlier consultation responses on issues of policy.

The Ministry's readiness to proceed and general observations

We have noted that the Scheme Advisory Board of the Local Government Pension Scheme submitted a response of 24 pages dated 9 December. That detailed response identifies a large number of both significant and minor drafting issues even if the Government intends to proceed as outlined in its consultation paper. The number of matters raised by the Scheme Advisory Board seems to ALACE to provide clear evidence that the Ministry's approach to this whole issue has not been fully thought through. Indeed it seems to provide further evidence that the Government's approach and the proposed regulations have been rushed, primarily as a consequence of the Treasury's precipitate making of the Restriction of Public Sector Exit Payments Regulations 2020. Those Regulations are now the subject of a rash of applications for judicial review, including one in which ALACE is directly involved.

We believe that it will take considerable time for the Ministry to be able to proceed with any regulations. This could arise both from reflection on and due consideration of the detailed comments on policy and drafting that have been submitted in the consultation process and as a result of any pertinent rulings of the Court arising from the judicial review processes. Given the substantial nature of many of the issues raised in the Scheme Advisory Board's response alone, we would be surprised if the Ministry would be in a position to proceed with making any regulations for a considerable period. Indeed, it would seem essential in our view for there to be a further period of consultation on revised drafting once the Ministry has had the chance to consider all these issues, in order to test with all interested parties (including individual members of the LGPS) whether any revised drafting is accurate and works in delivering the Ministry's final policy decisions.

As a general point, we consider that the draft regulations are poorly and obscurely drafted, and that the need to refer, when reading them, to a number of other pieces of legislation, some of which they amend, makes them difficult to follow (and is probably the reason for a number of the difficulties to which we allude below). It would be greatly preferable for the Exit Payments Regulations to be revoked, or amended so as to exclude the LGPS from their scope, and for there to be a single set of clearly worded regulations explaining the application of the exit payments regime to the LGPS and to discretionary compensation.

There are also a number of respects in which the draft regulations seem to include incorrect cross-references: see e.g. regulations 5(3)(b), 9(6) and 9(8). This increases the difficulty of understanding what is intended, and suggests that they were drafted in a hurry, as do our more substantive concerns. Again, we suggest that it would be better to do the job again from scratch, and properly.

A further (and fundamental) preliminary point is that, whilst the draft regulations apparently assume that they will be made by negative procedure under the Public Service Pensions Act 2013, we do not consider that this is permissible. There is no power under that Act to include, for example, regulation 6 of the draft regulations.

Detailed comments on the draft regulations

If ALACE's comments in respect of the policy consultation are accepted, the regulations will need substantial reworking.

We have repeated the comments that we have already submitted on drafting of the regulations and supplemented them where appropriate.

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 in our policy response, ALACE does not accept that only consultation under section 21 of the 2013 Act is required.

Regulation 1(4)
We agree with the Scheme Advisory Board that there is a need for absolute clarity about which members of LGPS are affected by these regulations. In addition to the point that "relevant Scheme member" should mean only a person who is an active member of the LGPS on the termination date, we feel that it should also be certain that the regulations apply only in respect of their "current" pension (including a pension where the individual has opted out of the LGPS before the date of termination), but not in respect of any preserved pension to which they may be entitled as a result of previous local government service and which they have not aggregated with their "current" pension.

Regulation 2
We agree with the Scheme Advisory Board that individuals should have the ability to make a payment to offset any reduction in the employer's contribution towards pension strain. However we do not understand how there would be a redundancy payment that could reduce the pension contribution where an employee is taking flexible retirement under regulation 30(6). It does not matter whether the employee has reduced hours and/or grade in order to access his or her pension under regulation 30(6): we do not believe that a redundancy payment under Part 11 of the 1996 Act would become payable in such circumstances, not least because the employee continues in employment without a break in service. The Scheme Advisory Board's response confirms that there would not be entitlement to a statutory redundancy payment at the point where a member takes flexible retirement (p3 of its response). Thus we question whether regulation 30(6) should be mentioned in regulation 2.

Regulations 3 and 4
We do not understand the intended relationship between regulation 3 and regulation 4(2) of the draft regulations. These both appear to make provision for individual members to make voluntary payments to make up all or part of the shortfall caused by the exit payment cap, but they are expressed in different terms, and set different deadlines, and only in the latter case does regulation 4(3) provide for a resulting enhancement in pension. We also do not understand why regulation 4(2) refers to payments to "the fund", rather than the administering authority. If the intention is that regulation 3 applies to elections made before the termination of employment, and regulation 4 to elections made subsequently, radical overhaul of the drafting is required to clarify and effect this. Amongst other points, the words "the extra charge is reduced" in regulation 3 would not be aptly drafted.

But if that is not the intended relationship between regulations 3 and 4, then we do not know what the point is (and it may be that further consultation will be required to clarify this). Certainly, if regulation 3 operates independently of regulation 4 in some way, it will not be satisfactory to require elections to be made before leaving employment, because termination may sometimes occur on little or no notice (a vague administering authority discretion, such as contemplated by regulation 3(a), is not a good answer to this).

We are also confused by the reference in regulation 4(1) to benefits which "in the absence of this regulation" would become immediately payable without reduction under regulation 10, because regulation 4 is not itself expressed to prevent any benefits from being payable or paid. The only restrictive effect set out in regulation 4 is that in regulation 4(4), which is a restriction upon exercise of the power of waiver in regulation 30(8) of the 2013 LGPS Regulations. Further in relation to regulation 4, we do not understand why that restriction,

by virtue of regulation 4(5), is only to be applied to the exercise of the general power of competence, or indeed what that actually means in the present context, when the power of waiver is a specific statutory power under the 2013 Regulations.

We find ourselves agreeing strongly the Scheme Advisory Board that there need to be consistent deadlines for members of the LGPS to take decisions and that, here and elsewhere, the maximum length of deadlines should be clearly prescribed and the regulations should maintain maximum flexibility for the member. Decisions about pensions (if the Government proceeds with its proposed changes) affect individuals for life and they need to have adequate time to consider options and seek advice before making irrevocable decisions. We outlined in our response to the policy consultation the need for the widest range of discretions for members who are affected by the 2020 Regulations if the Ministry proceeds with its proposals: such flexibilities would benefit members at no cost to employers.

We also agree with the Scheme Advisory Board that the regulations need to be clear about the separate responsibilities of the employing authority and of the administering authority

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.

We would extend our point to the Scheme Advisory Board's suggestions that other amendments are required to the 2020 Regulations in respect of schools (p21 of its response). If the Treasury has made errors in the 2020 Regulations, the Treasury needs to correct them by way of amending regulations under the appropriate powers in the 2015 Act, which we believe would attract affirmative resolution procedure.

Regulation 9(2)
Does regulation 9(2) really mean what it says, namely that a decision to pay compensation has to be taken at least 3 months <u>before</u> the termination of employment? We are also confused by regulation 9(9), because regulation 10 of the draft regulations does not provide for the payment of compensation.

We endorse the Scheme Advisory Board's comment that this drafting is unworkable. It does not take account of the fact that many staff may be on less than three months' notice: indeed a large number are entitled to one month's notice. While it is right that councils should plan redundancies in advance, for practical reasons councils may legitimately be unable to comply with this provision as drafted.

It is also important that members have adequate time to take decisions that affect their future, recognising that employers and administering authorities also need to exchange information.

We believe that, if retained, regulation 9(2) should provide for the employing authority to decide to pay compensation under this regulation no later than three months before the termination date where the employee's contractual notice period is three months or more;

or no later than one month before the termination date where the employee's contractual notice period is one month.

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 9(6)
We note the Scheme Advisory Board's point about defining what constitutes the maximum annual equivalent of pay. We would suggest that any definition is rooted in provisions in the 1996 Act or other extant legislation that defines what constitutes "pay". We would be concerned if the Ministry was to adopt an ad hoc definition for local government in these regulations that did not reflect established statutory definitions.

Regulation 9(8)(a)
We agree with the Scheme Advisory Board's point in respect of previous flexible retirements. The drafting of this regulation should explicitly exclude any payment made under regulation 68 of the 2013 Regulations which relates to a flexible retirement under regulation 30(6). Without such clarification, this regulation would involve double counting. This is particularly so in respect of any flexible retirement predates the coming into force of the 2020 Regulations. We also think such an exclusion is needed generally because, if pension strain in respect of a flexible retirement constitutes an exit payment under regulation 5 of the 2020 Regulations, any reduction to it as a consequence of the 2020 Regulations would be applied at that time and the pension strain should not be counted again in any calculation under regulation 9.

Regulation 9(10)
While we support the need for prompt payments, including immediate release of pension where an individual is entitled to it, read literally this could require an employer to make the payment long before an individual had left the employment of the employer. Once notice of termination has been given, it is "practicable" to make payment more or less immediately as the individual's entitlement can easily be calculated in accordance with the employer's scheme for discretionary compensation. We do not believe that the Ministry has considered this fully and suggest that the regulation should provide for the compensation to be paid on the termination date or as soon as reasonably practicable thereafter. This would reflect current practice, although it is subject to the point we make below on regulation 10(2), about allowing a member adequate time to make a decision on options: in other words it would not be "practicable" to make a payment in relevant cases until a member had decided their options under regulation 10.

Regulation 10
This raises a number of problems. One is whether it falls within Part 3 of the Draft regulations. The use of headings suggests that it does. But if so, there is a problem because regulation 7(a)(ii) excludes cases of non-consensual dismissal on grounds of business efficiency, to which regulation 10 expressly applies. Indeed, we wonder why such cases are excluded from regulation 7, regardless of the relationship with regulation 10.

Either regulation 10 should not be in Part 3, or has a heading for Part 4 been omitted before regulation 10?

The many significant issues raised by the Scheme Advisory Board on pages 14 and 15 of its response, and the detailed points on pages 16 to 18, demonstrate to us that the Ministry needs to rethink its approach substantially. We reiterate our point about the need for a further period of consultation on redrafted regulations, following the current consultation, in order that all interested parties may satisfy themselves that the Ministry has adopted the correct drafting approach.

Another drafting issue is that the relationship between regulation 10 of the draft regulations and regulation 30 of the 2013 LGPS Regulations is not satisfactorily addressed. There is no relevant amendment to regulation 30, save by regulation 5(3)(a) of the draft regulations. But making regulation 30(7) "subject to" does not satisfactorily address the fact that they are two different provisions expressed to create different rights (and also, in the case of regulation 30(7), obligations).

Regulation 10(2)

We agree with the Scheme Advisory Board that the deadline for a member to take these decisions before the termination date will leave them insufficient time fully to consider the options and take advice upon them. We strongly support the need for the employer to be able to extend the period for the member to take a decision, for example for the three months after termination contemplated in regulation 4. (We accept that a delay in the member's decision will therefore delay receipt of payment and pension where relevant but it is more important that the member is given time to make the "right" decision, bearing in mind its potential lifetime effect.)

The next unsatisfactory feature is **regulation 10(3).** It applies where "the payment" made by the employing authority "has been reduced" in accordance with the exit payment cap. But what payment is this? The draft regulations do not say. They also provide that in these circumstances regulation 8 of the Exit Payments Regulations does not apply. We have addressed elsewhere the general difficulty which arises in trying to understand regulation 8, for which the Government have failed to offer a satisfactory explanation, but surely that is the only situation in which it would apply at all?

Next, **regulation 10(4)** refers to charges on the fund resulting from benefits payable under regulation 4. But regulation 4 does not make any provision for the payment of benefits, unless the intention is to refer to the enhancement of benefits under regulation 4(3). But that is something for which the member will have paid, and will lead to no charge on the fund. In any event we do not understand in what circumstances retirement benefits are "payable by the employing authority".

Finally, **regulation 10(5)** calls for estimates to be given no later than one month before termination of employment, but again the problem of termination on short notice is not addressed. The answer may be to insert the words "where possible" into regulation 10(5)(a), and to extend the period specified in regulation 10(5)(c).

Regulation 11

We note the Scheme Advisory Board's points about whether there should be a timetable for an employing authority to adopt a policy under regulation 11(1). Amendments to a

policy under regulation 11(2) cannot take effect until at least one month after publication. This suggests to us both that employers need a reasonable period to adopt a policy in respect of regulations 8 and 9 and that, consistent with regulation 11(2), it should not take effect until at least one month after publication. Bearing in mind that employment issues are not executive functions and such policies in some or even many councils may require a full council decision (and full council meetings might happen only every 2 months or so), the period for councils to adopt a policy under regulation 11(1) should be three months. The consequence of allowing a suitable time for councils properly to adopt policies on this matter is that the full effect of regulations 7 to 9 would be delayed for a period. Explicit provision is therefore required to save the effect of the 2006 Regulations and policies adopted under them for that period, notwithstanding the revocation of the 2006 Regulations by regulation 14. It would be irrational to expect councils to adopt and implement immediately a policy under regulation 11 on the day on which the regulations come into force.

The Ministry might be tempted to think that policies under the 2006 Regulations would be "automatically" or "impliedly" amended by these regulations or that the issue we raise could instead be addressed by transitional provision. We would caution against either of those conclusions. The Ministry does not have complete knowledge of extant policies under the 2006 Regulations and cannot therefore be certain that an "implied amendment" or any transitional provision would "work": in the latter case we are not sure that it would be possible to devise satisfactory transitional provision, for example to seek to transpose the effect of regulations 8 and 9 into extant policies.

Regulation 13

We question the appropriateness of regulation 13, which might be thought to imply that employers' own costs could in the absence of such provision be met out of the pension fund.

Regulation 15

We welcome the recognition that transitional provision should be included in the regulations. We argue in our policy response 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.

It is essential to get right the transitional provision regulation 15 (and also to amend the Exit Payment Regulations so that the two instruments match up in terms of their transitional provision). This is so even leaving aside the legal arguments about retrospective provision under the 2013 and 2015 Acts. The current regulation 15 is, with respect, hopelessly inadequate. What are "those Regulations" in regulation 15(a)? Should it say "<u>these</u> Regulations"? Why is the only transitional provision in prior agreement cases to disapply the amendments made to the 2013 Regulations by the draft regulations - that is, the amendments made by regulation 5? Surely it makes no sense to disapply those whilst leaving the rest of the Draft regulations in place? Further, what about prior terminations which were non-consensual, e.g. if notice of dismissal was given shortly before the Draft regulations came into force? The transitional provision here is very important, not just a detail: it requires a complete re-think, and (we would suggest) further consultation on some better drafted provisions.