

## **BRIEFING NOTE ON “STATUTORY GUIDANCE ON THE MAKING AND DISCLOSURE OF SPECIAL SEVERANCE PAYMENTS BY LOCAL AUTHORITIES IN ENGLAND”**

**June 2022**

### **Introduction and status of this briefing note**

1 This briefing note provides ALACE members in England with information about this guidance which was issued on 12 May under section 26 of the Local Government Act 1999:

Statutory guidance on the making and disclosure of Special Severance Payments by local authorities in England - GOV.UK ([www.gov.uk](http://www.gov.uk))

The Department for Levelling Up, Housing and Communities also published a response to the 2021 consultation on the same day:

Government response to the draft statutory guidance on Special Severance Payments consultation - GOV.UK ([www.gov.uk](http://www.gov.uk))

This briefing note is intended for use only by members of ALACE. It is not intended to substitute for legal or HR advice that local authorities should seek on how to interpret the guidance and what actions they should take in light of the guidance. ALACE is pleased that many of the points that it raised in its response to the consultation draft have been acted upon in the final version.

### **The status of the guidance**

2 The guidance is in respect of the “best value” duty and section 3(4) of the 1999 Act provides that authorities “must have regard” to it. This means that authorities in England must consider what the guidance says but it does not mean that they have to follow it slavishly. Only primary or secondary legislation can set precise and immutable rules about what local authorities must or must not do. Indeed, there are a number of points in the guidance that authorities might be well-advised to ignore and attention is drawn to them below.

### **The authorities to which the guidance applies**

3 This is set out in paragraphs 1.2 and 1.3 and the list at the end of the guidance. The guidance applies to all principal authorities and a range of other local government bodies in England. However the guidance does not apply to Police and Crime Commissioners although it applies to the Common Council of the City of London in its capacity as a police authority. A further inconsistency is that the guidance applies to Fire and Rescue Authorities but not to Police, Fire and Crime Commissioners. The guidance applies to combined authorities. If passed as drafted,

the Levelling-Up and Regeneration Bill will add county combined authorities to the definition of best value authorities in section 1 of the 1999 Act.

4 The Government's response to the consultation contains the following paragraph:

"8.4. The government's preference is to take forward these measures as broadly as possible while retaining valuable certainty as to coverage. Further discussions are being undertaken across government to ensure that a comprehensive and effective set of controls are in place across the public sector. While that is being undertaken, we will clarify that at present this guidance will not apply to any staff working for a combined authority or a fire and rescue authority, nor will it apply to staff working for a PCC or a Police Fire and Crime Commissioner. In addition, it will not apply to those local government staff employed in a maintained school."

5 The statutory guidance flatly fails to do what this paragraph says as combined authorities, fire and rescue authorities and local authority staff employed in a maintained school are all explicitly covered by paragraphs 1.2 and 1.3 of the guidance and the list of bodies appended to it. If the Department did not want these bodies or staff to be covered by the guidance, the guidance should have been written differently. The Department cannot limit the scope of the statutory guidance by a separate document that is not statutory guidance under section 26 of the 1999 Act and does not form part of, and is not mentioned by, the guidance that has been issued. Moreover the Department's understanding of the best value legislation seems shaky. Police and Crime Commissioners and Police, Fire and Crime Commissioners are not best value authorities listed in section 1 of the 1999 Act and therefore the guidance simply does not apply to them for that reason.

### **Local authorities' powers to make special severance payments**

6 In ALACE's response to the consultation draft, we made the following point:

"It would be helpful here to spell out that special severance payments are legal and authorised by powers that councils have. The powers include payments pursuant to a settlement agreement under section 203 of the Employment Rights Act 1996, the 2006 Regulations mentioned on page 3 [now paragraph 2.5(c) of the guidance], the Local Government Pension Scheme Regulations 2013 and other provisions of employment law and local government legislation (including section 1 of the Localism Act 2011). We feel that the [Department's] enthusiasm in listing legislation and guidance about disclosure of payments on pages 8 and 9 needs to be matched with a list of powers on which local authorities can rely."

7 While the issued guidance refers to some of the powers on which local authorities can rely, it does not give a full account. **It is important to bear in mind that the guidance ultimately does not prevent any payment that is legal.** All the guidance does is encourage local authorities to consider whether any payment is consistent with economy, efficiency and effectiveness (which is derived from the best value duty in section 3 of the 1999 Act: "must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness"). The guidance also suggests

appropriate steps that should be taken to approve any payments in the interests of accountability.

### **What constitutes a special severance payment**

8 This is set out in paragraphs 2.3 (“likely to constitute Special Severance Payments”) and 2.4 (“may constitute Special Severance Payments”). Paragraph 2.5 lists items that “do not constitute Special Severance Payments”. Most of this is understandable and unexceptional.

9 While ALACE is pleased to see the wording in paragraph 2.4(a), which it had suggested, unfortunately the Department seems to have placed it in the wrong paragraph of the guidance. Paragraph 2.4 reads

“2.4 The following types of payments may constitute Special Severance Payments, depending on the terms of the individual’s contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:

- a) pay or compensation in lieu of notice where the amount of the payment is not greater than the salary due in the period of notice set out in the employee’s contract”.

10 A payment in lieu of notice that is in accordance with the period of notice set out in the contract of employment should not, in ALACE’s view, be a Special Severance Payment. Only that part of a payment in lieu of notice that exceeds the contractual period of notice should be a Special Severance Payment. Indeed ALACE made that point in its response to the consultation: “We accept that a payment that exceeds the salary due in the notice period would be a special severance payment but only so far as it exceeds the amount that is due under the contract.” Any such payment would appear to be in “no man’s land” as it not covered by any of the drafting in the guidance!

11 We will ask the Department to confirm that paragraph 2.4(a) should in fact appear in paragraph 2.5 and that different wording is required in paragraph 2.3 to cover part of a payment in lieu of notice that exceeds the contractual period of notice. Pending any amendment to the guidance, this issue provides a good example of how authorities can have regard to the guidance but then can ignore it. As we said in our response to the consultation draft, “the employee is entitled under employment law to expect that his or her notice period will be honoured and, in the absence of a payment equivalent to the notice period, can insist on working and being paid for that period. This might not be what the employer wants or requires, as the employer might wish to see change being implemented rapidly.”

### **Comparison with the private sector**

12 Under efficiency and effectiveness in paragraph 3.4, the guidance invites authorities to “consider aligning with private sector practice, where payments are typically less generous”. ALACE pointed out in its response to the consultation draft: “The [Department] does not cite any evidence to demonstrate that special severance

payments in local government are higher than in the private sector, or provide information about what arrangements the private sector typically makes.”

13 The response to the consultation contains the following:

“4.2. However, some of the considerations were not felt to be appropriate. The comparison with private sector practices attracted the most comments. A large number of responses pointed out that practice in the private sector was so variable that it was not easily distilled into a useful benchmark for a local authority’s own practice. London Councils and others expressed the view that private sector employers are not subject to the same standards of transparency and regulation as public sector bodies so it is not possible to carry out systematic research, or understand how severance terms relate to the rest of an employee’s benefit package.”

“4.5. The government remains of the view that a comparison with exit arrangements in the wider economy is an appropriate consideration and one that local taxpayers would expect. Detailed study of arrangements in the private sector is not required by this guidance and it is recognised that practice will be varied. However, it is important that those who put together or approve exit packages have some familiarity with developments in HR practice both inside and outside of the public sector.”

14 The Department’s response to the consultation is not part of the guidance and authorities do not have to have regard to it. It might be considered a novel suggestion that authorities should be familiar with private sector practice – as if they were not sufficiently stretched in keeping abreast of legislation and good practice relevant to local government. Since the Department has not made even a miniscule effort to provide information or data about private sector practice in the statutory guidance, again this bullet point in paragraph 3.4 is an example of something that authorities can have regard to but then ignore. ALACE suspects that the Government holds no meaningful data on the value or makeup of severance payments in the private sector and that it has formed an unreasonable expectation that authorities should be familiar with HR practice in the private sector. For example, a search of the Office for National Statistics website reveals statistics only about the numbers and rates of redundancies.

### **Accountability and disclosure**

15 In the words of the Local Government Association’s Employment Law Update (May 2022: No. 702), “it is this part of the guidance that potentially raises the most issues and questions for local authorities”. ALACE’s response to the consultation draft drew attention to the nexus of extant statutory requirements (disclosure on remuneration in accounts, the requirement to have pay policy statements) and the statutory guidance under section 38 of the Localism Act 2011 and how the draft guidance was meant to interact with these. There have been a number of changes made as a result of ALACE’s and others’ responses but we share many of the LGA’s misgivings and believe that this new statutory guidance creates confusion.

16 Paragraph 5.1 of the guidance states that it applies only to Special Severance Payments, which creates complexity where the payments are only part of the overall cost of severance. What happens where the total cost of severance is, say, £150k but the special severance payment is only £30k within that figure? In accordance with the statutory guidance under section 38 of the 2011 Act, full council should approve the overall package because it exceeds £100k. However this statutory guidance would also seem to require the approval of the Head of Paid Service and “a clear record of the Leader’s approval and that of any others who have signed off the payment”. In ALACE’s view, the approval of full Council renders unnecessary any other approval within the council: it does not seem efficient and effective to duplicate approval mechanisms, so long as full council is provided with all relevant information (for example, drawing attention to which parts of a severance package constitute special severance payments and offering justification for them).

17 A second issue concerns the suggestion that the Leader’s approval must be sought where the Special Severance Payment is over £20,000 but under £100,000. Staffing matters are non-executive functions, and ALACE is aware of cases where decisions taken solely by a Leader (and not involving other councillors) have been found not to comply with legislation. In authorities that operate the Leader and Cabinet model, it is not clear that it represents appropriate governance for the Leader to be involved as suggested. Moreover, even if this role is appropriate, the guidance is silent on who is to perform it in authorities that do not have leaders, including councils that have elected mayors, fire and rescue authorities and combined authorities (notwithstanding the purported exclusion of the last two bodies from the scope of the guidance). Finally, ALACE would concur with the LGA that the involvement of the Leader would definitely be inappropriate in cases – and regrettably there are many where ALACE has supported its members - where complaints about the Leader are part of the reason why a Special Severance Payment is necessary.

18 Paragraph 5.2 of the guidance states that, where the proposed Special Severance Payment is to a Head of Paid Service, “it is expected that the payment should be approved by a panel of at least two independent persons”. The guidance does not define “independent persons” or refer to other legislation. It may well be that they are intended to be the independent persons that authorities are required to appoint under section 28(7) of the Localism Act 2011 in respect of the code of conduct and the Department needs to clarify this. Under Schedule 3 to the Local Authorities (Standing Orders) (England) Regulations 2001 as substituted by SI 2015/881, at least two independent persons appointed under section 28(7) of the 2011 Act should be appointed to the panel that advises an authority on the dismissal of its statutory officers. As the LGA has pointed out, this raises potential conflict issues in decision-making. Discussions about the departure of the Head of Paid Service, including the question of payments that are Special Severance Payments, could be in progress in parallel with processes that involve a panel that might be considering dismissal of that officer. It is axiomatic that the same independent persons should not be involved in the panel that approves a Special Severance Payment and in the panel that is constituted under the Standing Orders Regulations. If this situation were to arise, it would seem that an authority would need access to at least four independent persons.

19 It should be noted that, while independent persons are required to be involved in a panel considering dismissal of a chief finance officer or monitoring officer, the guidance does not suggest involvement of independent persons in approving a Special Severance Payment to those statutory officers.

20 Paragraph 5.9 of the guidance states that “local authorities should also disclose in their annual accounts all severance payments, pension fund strain costs and other special severance payments made in consequence of termination of employment or loss of office (but excluding payments on death or ill-health retirement)”. Statutory guidance cannot change the CIPFA Code of Practice on local Authority Accounting in the United Kingdom 2020/21, which is mentioned in footnote 5 of the guidance. Thus, it would seem that there is no requirement for authorities to follow what is said in paragraph 5.9, pending any amendment that CIPFA might make to its Code of Practice (which in any case will be too late for 2021-22 accounts which are already being prepared).

21 Nor can this guidance change the legislation governing accounts. By way of reminder for ALACE members, the requirements in respect of disclosure of remuneration in the accounts are set out in the Accounts and Audit Regulations 2015 and are not added to this by guidance. The 2015 Regulations require information in the accounts about the remuneration of a “senior employee” as defined in Schedule 1, which applies only to individuals whose salary is more than £50,000. The information to be published about senior employees of local authorities includes “the relevant authority’s contribution to the person’s pension” and:

“(a)the total amount of salary, fees or allowances paid to or receivable by the person in the current and previous financial year.

(b)the total amount of bonuses so paid or receivable in the current and previous financial year;

(c)the total amount of sums paid by way of expenses allowance that are chargeable to United Kingdom income tax, and were paid to or receivable by the person;

(d)the total amount of any compensation for loss of employment paid to or receivable by the person, and any other payments made to or receivable by the person in connection with the termination of their employment by the relevant authority.....;

(e)the total estimated value of any benefits received by the person otherwise than in cash that do not fall within paragraphs (a) to (d) above, are emoluments of the person, and are received by the person in respect of their employment by the relevant authority.....;”

Note that the 2015 Regulations do not require compensation payments to be broken down in the case of a senior employee.