



**BIRMINGHAM LAW SOCIETY**

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**Response to HM Treasury Consultation on  
Restricting exit payments in the public sector**

**July 2019**

## **Response to HM Treasury Consultation on Restricting exit payments in the public sector**

The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective opinions of its members several of whom have direct experience of working with and advising public sector organisations on exit negotiations and are familiar with the practical problems that can be encountered in the implementation of the settlements which result.

### **Question 1**

**Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.**

We believe that the intended bodies are broadly captured.

### **Question 2**

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

We consider that the way the dividing line has been drawn between bodies in and out of scope is broadly logical.

### **Question 3**

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

We do not understand the basis for protecting the pension rights of some public sector workers and not others. We are unclear whether the proposed regulations (at least in their current form) will be effective to curb the pension entitlements of public sector workers who are not exempt from these new requirements.

#### **Question 4**

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

We think that there is a difficulty where a public sector body is contractually obliged to make an exit payment (as defined in the draft regulations) in excess of the cap. It appears to be the Government's policy intention for the cap to override any contractual commitments. See for example the introduction to the guidance which includes this sentence:

“However, the regulations do take precedence over existing contractual agreements, regulations and other exit schemes where they make more generous provision than allowed by these regulations, unless these arrangements are exempt in the regulations.”

However, in their current form the regulations appear to leave public sector employers with two competing obligations, without providing for how they are to be reconciled. Paragraph 4.1 of the guidance states that it is the Government's “expectation” that “employment contracts, compensation schemes and pension schemes will be amended to reflect the introduction of the cap” but is silent about how the numerous legal and industrial relations complexities involved in taking such steps will be addressed. This would be retrospective legislation which purports to remove existing contractual rights, which opens up the possibility of significant litigation. There do not seem to be any proposals to buy out any existing contractual liabilities.

Additionally, we consider that the most likely area of conflict is in the case of pension strain payments. In the case of such payments, section 153A(8)(b) Small Business, Enterprise and Employment Act 2015 contemplates that separate regulations will be required to amend the rules of the relevant schemes. There is no mention of these in the consultation document, and it is unclear whether the Government now thinks that the necessary changes can be made without further legislation, as the guidance appears to suggest.

These are fundamental issues that affect the working of the cap and will be of considerable concern to public sector employers within the scope of these proposals.

## **Question 5**

**Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the regulations, especially in the case of whistle-blowers?**

We believe there should be power to relax the cap where a public sector employer is faced with any litigation, whether in the employment tribunal or otherwise, where the amount of compensation is not capped.

The power to relax the cap should not be limited to cases where an employee is likely to succeed on the balance of probabilities, but in all cases where the amount of the agreed settlement is commensurate with the litigation risk.

It would be helpful if the guidance could identify the correct approach to assessing the litigation risk and explain the factors to be taken into account, acknowledging that in some cases it will be in the public interest to obtain a court/tribunal ruling.

## **Question 6**

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

See our general comments in response to Question 5 above.

## **Question 7**

**Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?**

See our general comments above.

We would also like to point out a drafting error in the draft regulations. We do not believe that the wording of draft regulation 4(a) operates to aggregate a series of separate exit payments made by the same employer for the purposes of the cap within a defined period. We believe a corollary to regulation 4(b) is needed to address this.

One of the unintended consequences of not being clear about the settlement of indefensible claims would be that public sector organisations would feel driven to await a ruling at the end of the litigation rather than carrying out a proper risk assessment and considering settling at a lower cost than proceeding to a full hearing.

Consideration should be given to whether the 28-day gap between multiple public sector exit payments should be extended to 6 months.

We note that the consultation and accompanying guidance makes no mention of an implementation timetable. We do not understand how employers are expected to prepare for these changes without any idea of when they are likely to be introduced.

**Question 8**

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

Not applicable.

**1 July 2019**

A handwritten signature in black ink that reads "L. Thomas". The signature is written in a cursive style with a large initial "L".

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**Linden Thomas**  
**President**  
**Birmingham Law Society**