

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

Response by Prospect to HM Treasury consultation on implementation of exit payment cap

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INTRODUCTION

1. Prospect is an independent trade union that represents over 142,000 working people across the UK. Our members are professionals, managers, technical experts and craftspeople working in a huge range of industries. In the media and entertainment industries our members are part of the BECTU sector of Prospect.
2. Many thousands of Prospect members are in scope of the proposed public sector exit payment cap currently under consultation. Many thousands more could ultimately be in scope as and when the coverage is extended in the future.
3. This submission reflects the strong opposition of Prospect members to the proposed method of implementation of the exit payment cap currently under consultation, as well as potential future extensions to it.

SUMMARY OF PROSPECT'S POSITION

4. The Conservative party's 2015 general election manifesto included a commitment to "end taxpayer-funded six-figure payoffs for the best paid public sector workers". It was very unfortunate that a political party decided to misrepresent redundancy compensation in the public sector as unjustifiably or unfairly high and scapegoat dedicated public servants for terms that are not uncommon in other, similar organisations. However, having won the 2015 general election, it was legitimate for the then government to seek to implement its policies on restricting redundancy compensation for the highest paid public sector workers.
5. Unfortunately the government took a flawed approach to restricting redundancy compensation for the highest paid public sector workers. Changes to public servants' terms and conditions should have been subject to negotiation rather than imposed by legislation. This is particularly the case in areas, like the civil service, where public sector workers had recently agreed to reforms that greatly reduced the cost of redundancy compensation.
6. The primary legislation that gives ministers the power to bring forward regulations capping exit payment in the public sector, the Enterprise Act 2016, is also flawed. This legislation allows for an exit payment cap that is far wider in scope than could possibly have been anticipated by voters ahead of the 2015 general election. It also brings public servants on relatively moderate earnings into the scope of the cap and is therefore not focussed on the "best paid public sector workers" as intended.
7. For the reasons outlined above, the proposed regulations currently under consultation are not a proportionate means of implementing an exit payment cap in the public sector. Thousands of Prospect members want Treasury ministers to withdraw these proposed regulations and to

implement this policy in a manner that is more consistent with the original stated objective instead. Prospect members think there are compelling reasons for MPs to vote against the regulations as currently drafted.

BACKGROUND

8. It is important to put the specific issues that are currently under consultation into the wider context of the purpose of redundancy compensation and the nature and level of redundancy compensation in the public sector.
 - Redundancy compensation
9. Redundancy happens when an employer reduces its workforce because it no longer requires certain roles to be undertaken. Redundancy situations have arisen very frequently in the public sector in recent years due to austerity-driven cuts to funding. Being in a redundancy situation is absolutely no reflection on the public servant in question, it is a decision about what public services can be maintained and what public services must be cut (often due to lack of funding). Employers are legally required to compensate employees who are dismissed by reason of redundancy.
10. It is extremely disappointing that ministers have misrepresented the nature of redundancy and redundancy compensation. Consider what the then Secretary of State said in the debate on second reading of the Enterprise Bill in the House of Commons: "Too many public sector fat cats are handed six figure pay-offs when they leave a job, which are often little more than a reward for failure."¹ It should go without saying, but public servants are not fat cats. The characterisation of redundancy compensation as a "reward for failure" is completely misleading. As noted above, redundancy arises due to high level decisions about what public services can be maintained and what roles can no longer be carried out; it has nothing whatsoever to do with the performance of the public servants carrying out the role.
11. The Treasury described redundancy compensation as a "give away"². Again, this misrepresents the nature of redundancy compensation as a windfall gain rather than compensation for the loss of a job.
12. These and other mischaracterisations of redundancy and redundancy compensation (and, indeed, of public servants themselves) by ministers and officials were a deliberate attempt to scapegoat public servants and their terms and conditions. It is important to reject these mischaracterisations and deal with the issues currently under consultation in their own terms.
 - Level of redundancy compensation in the public sector

¹ [Hansard, 2 February 2016, Column 817](#)

² [Press release, 5 February 2016](#)

13. Underlying the government's approach to the public sector exit payment cap is a sense that redundancy compensation in the public sector is out of line with redundancy compensation in the private sector.
14. The government's evidence base on the levels of redundancy compensation in the public and private sectors is sparse. In a consultation on a related matter, it cited Family Resources Survey data for 2010-11 to 2013-14 showing average compensation of £12,700 in the private sector and £15,800 in the public sector³. However, these overall averages are not controlled for the average age, length of service, size of employer or salary and so tell us nothing about the relative generosity of the underlying terms.
15. Prospect negotiates with many private sector employers in the aviation, defence, telecoms and energy sectors that offer similar terms to those available in the public sector and reported these in our submission to the consultation referred to in paragraph 14⁴.
16. This consultation is specifically about exit payments over £95,000. The consultation document states that the government does not believe these are "proportionate". In fact the compensation payable is proportionate to earnings and length of service and it is entirely appropriate for redundancy compensation to reflect these factors.
17. The consultation document also states that the government believes that these payments do not provide value for money and are unfair to taxpayers. These assertions are unsupported by any evidence and could well be influenced by the type of mischaracterisation of redundancy compensation and public servants that has been outlined above.
- Proposal to cap exit payments
18. For whatever reasons, whether based on a genuine misunderstanding of the nature of redundancy and the redundancy compensation payable to public servants, or for cynical political motives, the winning manifesto for the 2015 general election contained a commitment to cap public sector exit payments. The government has a legitimate interest in implementing this commitment but it also has a duty to implement it in a proportionate way that adheres to the stated objectives.

IMPLEMENTATION OF EXIT PAYMENT CAP

19. Prospect acknowledges the manifesto commitment to implement a public sector exit payment cap. However there are a number of problems with the approach that has been taken to implement it. It is inappropriate to impose an exit payment cap that does not match the stated objectives of the original policy.

³ [Box 4.A, Page 11](#)

⁴ [Paragraph 29](#)

20. It is important to set out the problems with the government's approach to implementing a public sector exit payment cap in a little detail.

- Imposition of changes through legislation

21. Redundancy compensation is an important element of any employee's terms and conditions. The terms of compensation are often set out in contracts of employment. The appropriate mechanism for implementing significant changes (such as a cap on compensation) is through negotiating changes to the relevant terms and not imposing changes through legislation.

22. The distinction between a negotiated change and an imposed one has real consequences for the rights of public servants and for industrial relations.

23. There should be absolutely no doubt about the plausibility of reaching agreements to reduce redundancy compensation. In 2010 Prospect members in the civil service voted to accept reforms to their redundancy compensation terms that were significantly less generous than those that applied previously. The then Cabinet Office minister described the reformed terms as "fair for civil servants and fair for other taxpayers"⁵. The NAO found that these reforms saved taxpayers 40-50 per cent compared to the old terms⁶.

24. In fact the government subsequently reneged on the redundancy compensation terms agreed in 2010 and later sought even further savings. Despite the gross bad faith this showed on the government's part, Prospect members were still able to agree reforms that delivered further savings in 2016. Those reforms were subsequently overturned by the High Court though the Cabinet Office is currently consulting with the trade unions about further reforms. Prospect members have shown willingness and ability to agree reforms to redundancy compensation through negotiation and it is inappropriate to bypass these processes and seek to impose changes to their terms and conditions through legislation.

25. Imposing changes through legislation and bypassing the usual consultation and negotiation framework can only worsen the industrial relations environment right across the public sector.

26. There are other compelling reasons to seek to implement a public sector exit payment cap through agreement rather than through imposition. Courts have ruled that redundancy compensation is a possession under the Human Rights Act and this imposes restrictions on the government's ability to interfere with these terms. It was because previous governments were overturned in court on this point that the Superannuation Act 2010 imposed a requirement on government to consult with a view to reaching agreement on any detrimental changes to civil service redundancy compensation

⁵ [Press release, 22 December 2010](#)

⁶ [Key facts, page 4](#)

terms⁷. Imposing these changes through legislation, rather than by agreement, exposes the government to unnecessary legal challenges.

- Focus of the cap on the best paid

27. The 2015 general election manifesto commitment was clear that the intention was to cap exit payments for “the best paid public sector workers”. This mantra was repeated by ministers on numerous occasions during the passage of the Enterprise Act 2016 through Parliament.

28. For good measure, when first announcing the policy, the then Exchequer Secretary to the Treasury committed that: “those earning less than £27,000 will be exempted to protect the very small number of low earning, long-serving public servants”⁸.

29. That commitment from the minister reflected the fact that the level of redundancy compensation is a function of at least two factors: earnings and length of service. It is possible for someone on relatively moderate earnings to exceed a set cap on redundancy compensation if they have particularly long service. The minister recognised that it would be unfair for the proposed cap to impact moderate earners.

30. It was with this in mind that the following amendment to the Enterprise Bill was tabled at report stage in the House of Commons:

“Amendment 15, in clause 41, page 57, line 10, at end insert “, including payments relating to employees earning less than £27,000 per year”.”⁹

This amendment merely sought to give statutory effect to the written commitment from the then minister and to ensure that the exit payment cap was targeted at the best paid employees as intended.

31. The government whipped against this amendment and, as a consequence, legislated for a cap on exit payments that is not in line with the original manifesto commitment.

32. There is still potential for the proposed cap to be amended in order to make it consistent with the original manifesto commitment. This can be achieved by exempting the cost of any “pension strain” payments to buy out reductions on early payment of pension on redundancy.

33. It is particularly important for the cost of “pension strain” to be exempted from the cap in cases where redundancy compensation is in the form of an unreduced pension in certain cases. This is necessary to honour the government’s promise that accrued pension benefits will not be affected by the cap. If this is not done then there will be cases of public servants being obliged to reduce their long-term pension income as a consequence of the

⁷ [Section 2, Superannuation Act 2010](#)

⁸ [Daily Telegraph, 3 January 2015](#)

⁹ [Hansard, 8 March 2016, Column 169](#)

form their redundancy compensation takes. In some cases including "pension strain" payments within the cap will have a negative impact on the funding level of pension schemes and will have negative impacts on the security of benefits for other members.

- Scope of organisations covered by the cap

34. The stated policy intention was to implement a cap on public sector exit payments. However early consultations made it clear that many employees of private companies would be in scope. Amendments were proposed at committee stage and at report stage to exclude the employees but these were rejected by the government.
35. The consultation document suggests that only payments by public sector authorities that fall within the responsibility of the UK government will be captured in the initial implementation of the cap and that other payments will be captured in later stages. It is unclear whether there will be a further opportunity to object to the overly wide scope of the cap so these are registered below.
36. **Nuclear decommissioning companies (eg Sellafield Ltd, Magnox Ltd, DSRL Ltd)**. Employees of these companies never considered themselves to be in scope for a cap on exit payments in the public sector. It is counter-productive to interfere with the redundancy compensation payable to workforces whose very success is defined by making themselves redundant in the long-run. It is particularly unfair to cap compensation for workers who made a specific agreement to stay and complete decommissioning in return for a guarantee of an agreed level of compensation that would be payable when that work was complete and they were consequently made redundant. For these reasons targeted relaxations to the cap have been offered to employees working in nuclear decommissioning but these relaxations are not enough, it would be far more appropriate to exclude employees of these companies from the scope of the cap.
37. **Atomic Weapons Establishment Ltd**. Employees of AWE Ltd were transferred from the public sector to the private sector over thirty years ago. On leaving the public sector, these employees lost access to public sector pension schemes. When their private sector pension scheme had funding issues and was closed just a few years ago the government refused to consider granting them access to a public sector pension scheme as a remedy. It is unacceptable for the government to treat employees of a company as private sector in denying them access to a public sector pension scheme but as public sector when deciding the scope of this exit payment cap. Employees of AWE Ltd should be excluded from the scope of the cap.
38. **Other corporations / companies (eg BBC, British Film Institute, National Nuclear Laboratory)**. It is inappropriate for government to legislate to impose changes to the terms and conditions of employees of statutory corporations and publicly owned companies. Management of these bodies should be at arms-length from government. Many of these bodies

are customer-funded and / or operated by private companies and hence any potential savings from applying the cap may not accrue to taxpayers. A cap on public sector exit payments should be restricted to public authorities.

39. Within the public sector, the government proposes that the Secret Intelligence Service, the Security Service, the Government Communications Headquarters and the Armed Forces should be exempt from the cap. The reasons given for these exemptions also apply to other groups of public sector workers (including civil servants at the Ministry of Defence) and these groups should also be exempted from the scope of the gap for the same reasons.

- Level of the cap

40. Section 41 of the Enterprise Act amends the Small Business, Enterprise and Employment Act by inserting a public sector exit payment cap of no more than £95,000¹⁰.

41. The level of the cap was first announced in 2015. Even before it has been implemented, the level of the cap has fallen in real terms and amounts to less than £90,000 in 2015 prices today. If it remains unchanged, in another 20 years it is estimated that it will be worth less than £60,000 in 2015 prices.

42. Recognising the increasing problems that a fixed cap with no provision for indexation over time would cause, the following amendment was tabled at report stage in the House of Commons:

“Amendment 18, in clause 41, page 56, line 18, at end insert—

“(1A) The restriction placed on public sector exit payments must be reviewed at regular intervals and, where necessary, be adjusted in line with inflation and earnings growth.”¹¹

This amendment merely sought to maintain the value of the cap and prevent ever increasing proportions of public servants from being caught in its scope.

43. During the passage of the Enterprise Bill through Parliament ministers were specific about the proposed cap only impacting the top 5% in value of all exit packages and not impacting on public servants on moderate earnings. These assurances are worthless in the context of a cap that will fall in value in real terms every year. It was completely disingenuous of ministers to state that the cap would impact a small minority of departures on the one hand and then whip against an amendment to ensure that remained the case in the future on the other.

¹⁰ [Section 41, Enterprise Act 2016](#)

¹¹ [Hansard, 8 March 2016, Column 169](#)

44. Without any provision for indexation, the cap is set at an arbitrary level in real terms and will become increasingly unfair over time. The cap should not be introduced until this is rectified. Any regulations under Section 41 of the Enterprise Act 2016 will be flawed for this reason and should be rejected.

CONSULTATION QUESTIONS

45. The questions in the consultation document are addressed below.

Q1. Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.

46. We have no comments on this question.

Q2. Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

47. It makes sense for a public sector exit payment cap to be targeted at public authorities.

Q3. Do you agree with the exemptions outlined? If not, please provide evidence

48. No, the exemptions are drawn far too narrowly. Please see paragraphs 36, 37, 38 and 39 for our views on further bodies and groups of workers that should be exempt from the public sector exit payment cap.

49. For the reasons outlined in paragraphs 27 to 33, "pension strain" payments to pension schemes should also be excluded from the scope of the cap.

Q4. 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.

50. We have no comments to make on this question.

Q5. Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the regulations, especially in the case of whistleblowers?

51. The guidance refers to paragraph 3.3 of HMT directions. There is a problem with these directions in relation to the mandatory relaxation of the cap for certain payments by the Nuclear Decommissioning Authority. This paragraph refers to a requirement that the relevant employee work "on a site that is subject of a decommissioning programme agreed between the NDA and the BEIS Secretary of State". This mandatory relaxation arises from a separate agreement between the NDA and the recognised trade unions in relation to pension reform and assurance was given at that time that employees who are involved in decommissioning work but who are not

based on a decommissioning site (eg in a related support function in a corporate office) would be covered. This requirement should be removed from the HMT directions.

52. It is unclear why the mandatory relaxation of the regulations applies in the case of payments to avoid litigation in relation to a dismissal as a result of whistleblowing or a complaint of discrimination under the Equality Act 2010 but not in the case of litigation relating to dismissal for health and safety reasons. The reasons given for mandatory relaxation in the former cases also apply to cases of dismissal for health and safety reasons so mandatory relaxation should be extended to this category too.

53. In the case of discretionary relaxation of the regulations, the guidelines should specify reasonable timescales within which Treasury will respond to requests to approve business cases. Given the nature of many of these cases, the discretionary relaxation powers will be only be of use if they can be exercised in a timely manner.

Q6. 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.

54. We have no comments to make on this question.

Q7. Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

55. The proposed cap will have a greater impact on individuals who have longer service and hence will be indirectly discriminatory on the grounds of age. A more proportionate means of capping public sector exit payments would allow for length of service. We believe the cap will be subject to challenge on age discrimination grounds.

56. The issues summarised in paragraph 42 also raise equality issues that should be addressed as they will result in the cap having a greater and greater impact over time.

Q8. Are you able to provide information and data in relation to the impacts set out above?

57. It is for government to carry out an adequate impact assessment of its own measures and it is government that has access to data on its own workforce.