



National Audit Office

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COMPTROLLER AND
AUDITOR GENERAL**

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Investigation

Confidentiality clauses and special severance payments

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National Audit Office

Investigation

Confidentiality clauses and special severance payments

Report by the Comptroller and Auditor General

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Amyas Morse
Comptroller and Auditor General
National Audit Office

19 June 2013

This report examines the policy and practice in the public sector's use of confidentiality clauses, and the associated special severance payments.

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This report can be found on the
National Audit Office website at
www.nao.org.uk/confidentiality-clauses-2013

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Key facts

£28.4m

is the total value of HM Treasury approvals for special severance payments, three years to 31 March 2013

1,053

approvals for special severance payments

£15,000

is the median value of approvals

- 49 of our sample of 50 compromise agreements included a confidentiality clause covering the existence and terms of the agreement
- 6 cases in our sample clarified that nothing in the agreement prevented the individual whistleblowing
- 0 cases in our sample would prevent someone making a public interest disclosure

Summary

Introduction

1 This report is the first in a number of risk-based investigations, designed to examine identified or suspected weaknesses in performance by public sector organisations. We decide what to investigate using a range of sources, including: our own analysis of trends and financial information; matters raised by MPs; issues referred to us by consumers of public services; and cases passed to us through whistleblowing. The aim of this work is to make recommendations to help organisations improve the delivery of public services, using the insight from our investigations.

2 Public sector workers are sometimes offered payment for terminating their employment contract and agreeing to keep the facts surrounding the payment confidential. This raises questions of transparency about how public funds are used. In such circumstances, the contract is often terminated through a compromise agreement, and the payment is known as a 'special severance payment'. Compromise agreements are commonly used in the public and private sector and can be in the best interests of employer and employee. They should not be used to prevent people raising issues of public interest, to reward failure or to avoid management action, disciplinary processes, unwelcome publicity or reputational damage.

3 With the public purse under sustained pressure, and public services increasingly provided at arm's length, compromise agreements should not be used to gag staff, or to reward individual or organisational failure. In response to the Committee of Public Accounts' interest in this area we investigated how the public sector uses compromise agreements in the termination of employment contracts.

Scope of this investigation

- 4 This investigation was designed to examine:
- the number of compromise agreements written, including the amount of each settlement made;
 - the legal basis for confidentiality clauses, and the governance arrangements behind their use; and
 - how far confidentiality clauses are used to gag employees, particularly regarding whistleblowing.
- 5 We focused on the Treasury's role in payment approvals, the overall number of agreements, and five government departments, to illustrate how agreements are used. In the time available we could only obtain information from four departments: health, defence, education, and communities and local government. We: reviewed central and departmental guidance; interviewed departmental staff; spoke to people who had signed compromise agreements; extracted and analysed data; and sought legal advice. Our work was hampered by incomplete records, and limited access to data. We highlight these limitations where appropriate and discuss our audit approach at Appendix One.

Key findings

6 There is no central or coordinated system of controls over how compromise agreements are used. We could not accurately gauge the prevalence of compromise agreements or the associated severance payments. This was owing to: decentralised decision-making; limited recording; and the inclusion of confidentiality clauses which mean they are not openly discussed. No individual body has shown leadership to address these issues. The Treasury's *Managing Public Money* sets standards to apply to special severance payments (paragraphs 1.8, 3.3, 3.4).

Compromise agreements are prevalent, but cannot prevent public interest disclosures

7 Compromise agreements are commonly used in the private and public sector. When used to terminate an employment contract there is usually an associated special severance payment. Compromise agreements can be used when one or both parties (the employer and employee) decide that terminating an employment contract is in their best interests. They are used to minimise potentially time-consuming processes. For example they may be used to manage poor performance, or to mitigate the chances of a grievance being taken to an employment tribunal. A financial consideration is usually given, which can exceed any contractual entitlement (paragraphs 1.2, 1.3, 1.4, 1.7, 1.8).

8 **Compromise agreements normally keep some information confidential, which can benefit both parties.** There are legitimate reasons for keeping some information confidential, such as intellectual property. The agreement also often includes a clause to ensure that the employer gives the employee a good reference, which benefits the employee. However, this could mean a poorly performing staff member receives a good reference which helps them gain employment in another part of the public sector (paragraph 1.5).

9 **A confidentiality clause in a compromise agreement cannot legally prevent a person from making a public interest disclosure (whistleblowing) should they wish to do so.** The Public Interest Disclosure Act 1998 (PIDA) (see footnote 6) amends the Employments Rights Act 1996, Section 43J (see footnote 7) which states that any confidentiality clause “is void in so far as it purports to preclude the worker from making a protected disclosure ... this applies to any agreement between a worker and his employer” and would apply to both employment contracts and compromise agreements (paragraphs 1.10, 1.11).

10 **None of the agreements we reviewed would restrict a person’s rights under the Public Interest Disclosure Act.** We reviewed 50 agreements across four departmental groups. Of these agreements 49 (98 per cent) contained a confidentiality clause preventing a person from disclosing the existence and terms of the agreement, 23 (46 per cent) had clauses not to disclose confidential information obtained during the course of employment. Twenty-three agreements (46 per cent) contained a clause prohibiting a person from publishing derogatory, defamatory or disparaging statements about the employer and 12 (24 per cent) contained a mutual clause in respect of the employee. No agreements would restrict the individual’s rights under PIDA, and six, all in the health sector, stated that nothing in the agreement prevented the individual whistleblowing (paragraph 2.10, 2.11, Figure 3).

11 **However, some people we spoke to who had been offered, or accepted, compromise agreements have felt gagged.** An organisation’s culture, the events leading up to the person being offered an agreement, and the wording of the agreements contributed to whether the individual felt gagged. Legal advice to the employee is a prerequisite of making a compromise agreement legally enforceable. However, the individuals we spoke to felt that it was not generally made clear that confidentiality clauses do not prevent employees from raising legitimate public interest concerns. Protection under the Public Interest Disclosure Act has not yet been tested in a court of law (paragraphs 2.11, 2.16, 2.17).

12 Because employees are at a relative disadvantage in negotiations they find it difficult to speak out. The public sector is a large employer, especially in health, and it is in a relatively strong position compared with the employees. If a person is unfairly dismissed and turns down a compromise agreement, they may be unable to find another job in their chosen profession without a reference. Getting compensation can be expensive, and the organisation has greater financial resources than the individual. Some people said that they had felt compelled to sign a compromise agreement to 'draw a line' under the issue. They felt that this maintained their chances of finding another job; but the terms of the agreement left them unable to speak out (Appendix Four) (paragraphs 1.5, 2.16, 2.17, 2.18).

It is not possible to identify the number of compromise agreements signed, the closest indicator is the number of related payments

13 There is little transparency in how government departments use compromise agreements. Neither the Cabinet Office nor the Treasury provide formal guidance to departments, nor keep records of how departments use compromise agreements. We appreciate an individual's rights to keep their personal data appropriately protected. However, the departments we reviewed could not tell us how many compromise agreements they had signed, within their departmental group, or the content of confidentiality clauses. Despite our access rights, we received only 68 per cent of the compromise agreements we requested from departments and their related bodies (see footnote 14). The Department for Culture, Media & Sport did not provide information within a reasonable timeframe (paragraphs 2.10, 3.1, Figure 3, Appendix One).

14 The only central oversight of the system comes from the Treasury, which approves associated payments. The Treasury's guidance *Managing Public Money* states that departments should get the Treasury to approve special severance payments, which often sit alongside compromise agreements. Any contractual element, such as pay instead of notice, does not need approval. The Treasury reviews each departmental request and does not assess, in aggregate, which bodies it received applications from, the sums involved, or whether it had approved them. We used the Treasury's data to create a list of approved cases for each department to estimate the number, and value, of compromise agreements (paragraphs 3.3, 3.4, 3.10, 3.12).

15 We estimate that in the three years to 31 March 2013, the Treasury approved some 1,053 special severance payments totalling £28.4 million for departments and their associated bodies, but this money was not necessarily paid out. This is an incomplete picture because: of limitations in the Treasury's data collection; it does not include judicially mediated settlements; and bodies do not always seek approval because of an oversight, or they have the Treasury's authority to make payments without approval. The £28.4 million represents approvals, not actual settlements, as departments will negotiate with the individual receiving the settlement. In a sample of 41 cases, amounts paid were on average 89 per cent of the approved amount. This figure should not include any contractual entitlement, which does not require the Treasury's approval; it also excludes any associated legal costs on either side (paragraphs 3.13, 3.14, Figure 5).

16 The median approval across all the Treasury's data was £15,000, but the number of approvals varies by department. A total of 40 per cent of approved payments was for £10,000 or less. In our four case study departments, the number of cases per year has fallen overall, while the annual value of approvals has increased (paragraph 3.13, Figure 6).

17 We could not identify the reasons for all payment requests, but the majority of approvals related to accusations of unfair or constructive dismissal, which might include discrimination. There were also several cases where the primary grounds for dismissal were for capability and attendance issues. In these cases, the department did not wish to follow the performance management process, owing to the length of time it might take, and wished to prevent a case of unfair dismissal (paragraph 3.12).

18 There are inconsistencies in the governance and use of special severance payments:

- a Policy:** From September 2012, the Treasury gave authority to academies to make some payments without approval, which the Department for Education feels is similar to the position in maintained schools. It has not offered this arrangement to other organisations with similar governance structures. Some organisations wrongly thought they had a similar authority. The Treasury also gives retrospective approval inconsistently (paragraphs 3.7, 4.3, 4.8).
- b Size of approvals:** The Treasury approves each request individually, assessing the proposed payment against possible tribunal damages. We found apparently similar cases which had significantly different approval amounts. (paragraph 4.16).
- c Who seeks the Treasury's approval:** Some organisations within a departmental group approach the Treasury directly and some go through the sponsor department. Organisations sometimes seek payment approval without apparent senior or independent oversight, for example from non-executive directors (paragraphs 4.2, 4.10).
- d Who gives the Treasury's approval:** The Treasury Officer of Accounts approves most payments, but the Treasury's spending teams approve some payments. There is no central record of approvals (paragraph 3.14).

19 Departments' and the Treasury's value for money test is primarily whether a special severance payment is less than the potential costs of defending an employment tribunal case, despite the Treasury's guidance that settling is not always advisable. On the cases we reviewed, approved payments were lower than the estimated damages had the employee won at an employment tribunal. However, this is not necessarily value for money. There must be a balance between protecting the public purse and compensating people for unfair treatment. Saving time and money by avoiding a tribunal should not be the overriding factor as some cases may be worth defending where the cost of defeating a claim will exceed the cost of the proposed settlement. For example, a case may show that the department does not reward failure, or it may prevent future similar claims. Moreover, if a failure of process has occurred within the organisation lessons must be learned to prevent reoccurrence (paragraph 4.21).

Concluding comment

20 There is a lack of transparency, consistency and accountability in how the public sector uses compromise agreements, and little is being done to change this situation. This is unacceptable for three reasons: the imbalance of power between the employer and employee leaves the system open to abuse; poor performance or working practices can be hidden from view, meaning lessons are not learned; and significant sums of public money are at stake. The responsibility to address these issues is shared, and the following recommendations are designed to bring better governance to this serious issue.

The Treasury view

21 "The Treasury agrees that it is important that special severance payments should be made to high and consistent standards. These payments should never be automatic and must always honour the value for money requirement in *Managing Public Money*. But the primary responsibility for making these settlements falls to departments, who are best able to scrutinise and assess each case on its merits and in context, including the case for any confidentiality clauses. The Treasury believes that there is no need for central collection of data on this limited area of public expenditure, amounting to less than £10 million a year across Whitehall."

Recommendations

22 Departments and their related bodies should include a provision in all compromise agreements stating that nothing within the agreement shall prejudice employees' rights under the Public Interest Disclosure Act 1998. This should avoid any doubt about whether signing a compromise agreement allows the individual to make a public interest disclosure (whistleblowing).

23 The Cabinet Office should provide guidance on the use of compromise agreements, including the appropriate application of confidentiality clauses and the requirement for independent accountability. This guidance should include the requirement that departments have a clear and published policy on the use of such agreements in their departmental group including the circumstances in which compromise agreements may be used.

24 Departments should improve their information on compromise agreements, and both the Treasury and departments should improve their information on the related severance payments. This would allow both parties to identify unusual patterns, such as departments or arm's-length bodies with unusually high numbers of agreements, individuals transferring between departments receiving large severance payments, and whether lessons from one area can be replicated more widely. It would also improve accountability. There is no single data source across government for the value of severance approvals and the value of the contractual amounts payable. Treasury does not have an overview of how much compromise agreements are likely to cost in total.

25 Departments and their arm's-length bodies should be more transparent in reporting special severance payments. Compromise agreements can protect public sector organisations from legal challenges. They can, however, be used to limit public accountability on the full cost of early departures. Our position is that there is no case for non-disclosure if statute (or the Treasury and Cabinet Office financial reporting guidance) requires it.

26 The Treasury should be consistent in offering authority to make payments without prior approval, and require organisations with authority to report payments so that it has a complete picture of approvals. This will ensure consistency of approvals across the public sector. The Treasury should also update its guidance to provide clarity over out-of-court settlements for serving employees. The Treasury should hold departments to account when they fail to request approval.

27 The Treasury should modify the special severance payment business case pro forma to include confirmations that strengthen transparency and accountability. The Treasury could replicate the amended pro forma for NHS trusts, which includes the following express confirmations:

- Any compromise agreements or undertakings about confidentiality leave severance transactions open to adequate public scrutiny, including by the NAO and the Committee of Public Accounts.
- Any compromise agreement or any undertaking about confidentiality associated with the severance transaction includes an express clause to say that no provision in the compromise agreement or undertaking can prevent the individual from making a protected disclosure.

Part One

Introduction

1.1 This part describes:

- the terminology of compromise agreements, confidentiality clauses and special severance payments;
- the legal protection for whistleblowers¹ under the Public Interest Disclosure Act; and
- pending changes to the law.

Compromise agreements

1.2 Treasury Solicitor's Department² describe a compromise agreement as "a specific type of contract, regulated by statute, between an employer and its employee (or ex-employee) under which the employee receives consideration, often a negotiated financial sum, in exchange for agreeing that they will have no further claim against the employer as a result of any breach of a contractual, common law or statutory obligation by the employer. Such agreements are used in a variety of circumstances. For example, to settle litigation – both with claimants who are and will remain employees as well as with ex-employees, and where both parties decide that terminating an employment contract is in their best interests. A compromise agreement will only be binding where the individual has received advice from an independent adviser".

1.3 COT3³ agreements are also used to resolve a dispute or terminate an employment contract. A COT3 agreement must involve the Advisory, Conciliation and Arbitration Service (ACAS) in resolving the dispute. We use the term compromise agreement in this report to mean both types of agreement, unless otherwise stated, as the differences do not materially affect our findings or recommendations. We focus in this report on their use in terminating employment contracts.

¹ Whistleblowing in this context refers to protected disclosure, as defined by the Public Interest Disclosure Act 1998, made by an employee to management, a prescribed person or regulator.

² The Treasury Solicitor's Department (TSol) is an executive agency acting under the remit of the Attorney General, it is separate to HM Treasury.

³ This stands for Conciliation Officer Tribunal form 3.

1.4 A compromise agreement, once signed, waives some of the employee's employment rights in return for benefits as set out in the agreement. They can be used in a number of circumstances. For example, in a case where trust and confidence has irretrievably broken down it can be mutually agreed that terminating the employment would be in everyone's best interests. They can also be used where the employer, or employee, believes the other party has somehow breached the contract of employment and wishes to help minimise potentially long, drawn-out processes, before being able to terminate the employment – these cases can include discrimination or poor performance. The agreement usually prevents either party from pursuing any litigation based on the claims subject to the agreement, and protects the employer from an employment tribunal (see **Figure 1**).

Confidentiality clauses

1.5 Compromise agreements often include a confidentiality clause, and these differ in each agreement. Preventing the employee from disclosing a settlement or agreement can be mutually beneficial. Departments have argued that keeping the terms of any settlement confidential will prevent the 'floodgates opening' to other employees making similar claims. For the employee, confidentiality can be helpful, especially where they are wishing to seek employment in the same market. In cases where it is instructed to act, the Treasury Solicitor's Department will provide advice to its client department on the appropriateness of using a confidentiality clause; it has precedent clauses which can be adapted as required – an example is set out in Appendix Two.

Figure 1 Employment tribunals

Employment tribunals are independent judicial bodies that determine disputes between employers and employees over employment rights. There is currently no cost to an employee of raising a case.

In 2011-12, the tribunal accepted 321,800 claims. The largest by number applied to: working time directive (29 per cent), unauthorised deductions (16 per cent), unfair dismissal (14 per cent), and breach of contract (10 per cent). Discrimination cases were a relatively small proportion: sex (3.4 per cent); disability (2 per cent); race (1.5 per cent); age (1.1 per cent); and religion (0.3 per cent).

Of the 230,000 cases disposed between April 2011 and March 2012, 33 per cent were settled through ACAS conciliation, 13 per cent were struck out before a hearing, 2 per cent were dismissed at a preliminary hearing, 12 per cent were successful at a hearing, 7 per cent were unsuccessful at a hearing and 6 per cent received a default judgement.

The maximum settlement for unfair dismissal is £73,400. In cases of sex, age, race, religion and disability discrimination the settlement is unlimited.

NOTE

1 The latest full-year data available are for 2011-12 and are summarised here: www.gov.uk/government/uploads/system/uploads/attachment_data/file/163472/employment-trib-stats-april-march-2011-12.pdf

Source: National Audit Office analysis of Ministry of Justice data

1.6 Recent media coverage suggests that some of these clauses are intended to gag individuals, and to prevent them from speaking out about poor public sector practice, effectively allowing the employer to ‘cover up’ issues. **Figure 2** sets out a range of confidentiality clauses and whether, in our view, they are likely to be considered a ‘gagging clause’.

Severance payments and special severance payments

1.7 Compromise agreements are usually accompanied by a payment to the employee. Where a contract of employment is terminated with a related payment these payments are known as ‘severance payments’ and may include both contractual and non-contractual elements.

Figure 2
Types of confidentiality clause

Not a gagging clause	May be considered a gagging clause	Likely to be considered a gagging clause
<p>Clauses which require the terms of the compromise agreement to be kept confidential.</p> <p>Clauses protecting confidential information which would have been gained by the employee as part of their employment, such as commercially sensitive data or patient records.</p>	<p>Clauses preventing the employee from making vexatious, disparaging or derogatory comments about the organisation. In such cases, there is sometimes a mutual clause which prevents the employer from making disparaging or derogatory comments about the employee.</p> <p>Clauses that require the employee to sign statements suggesting all concerns have been addressed.</p> <p>Clauses that prevent the employee from disclosing to anyone other than immediate family, the events leading up to signing the confidentiality agreement.</p> <p>Clauses which prevent Freedom of Information Act or Data Protection Act requests not pertaining to the subject of the compromise agreement.</p>	<p>Clauses preventing publication of existing whistleblowing complaints.</p> <p>Clauses preventing future whistleblowing complaints.</p>

Source: National Audit Office

1.8 The term ‘special severance payment’ is a payment over and above the employee’s statutory or contractual entitlement upon termination of their employment contract; it seeks to compensate for loss of employment. From an employer’s perspective, the payment reflects an element of risk should a case go to an employment tribunal, where outcomes are uncertain and costs may be significant. The Treasury’s *Managing Public Money*,⁴ states that departments should seek its approval before making special severance payments as it defines them as ‘novel and contentious’ (covered in Part Three of this report). The Treasury’s approval is not needed for contractual severance payments.

Confidentiality clauses and whistleblowing

1.9 Whistleblowers are an important source of information when services are failing, for example in emergency care in the Mid-Staffordshire NHS Foundation Trust, and the out-of-hours service in Cornwall.⁵

1.10 The law is clear that confidentiality clauses cannot be used to stop people making a public interest disclosure. The Public Interest Disclosure Act 1998 (PIDA)⁶ sets out various types of disclosure that may qualify for protection under the Act. These include any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show, for example, that the health or safety of any individual has been, is being or is likely to be endangered or that a criminal offence has been committed, is being committed or is likely to be committed.

1.11 Section 43J of the Employment Rights Act 1996,⁷ as amended by PIDA, provides that any confidentiality clause “is void in so far as it purports to preclude the worker from making a protected disclosure. This applies to any agreement between a worker and his employer, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.” This would apply to both employment contracts and compromise agreements.

1.12 A person who has signed a compromise agreement containing a confidentiality clause and goes on to make a protected disclosure under PIDA, could use the above provision as a defence, if an employer took action to recover any money given in settlement. Protection under PIDA has not yet been tested in a court of law.

⁴ HM Treasury, *Managing Public Money*, May 2012, available at: www.hm-treasury.gov.uk/d/mpm_whole.pdf

⁵ Comptroller and Auditor General, *Memorandum on the provision of the out-of-hours GP service in Cornwall*, Session 2012-13, HC 1016, National Audit Office, March 2013, available at: www.nao.org.uk/publications/1213/gp_services_cornwall.aspx

⁶ Public Interest Disclosure Act 1998, available at: www.legislation.gov.uk/ukpga/1998/23/contents

⁷ Employment Rights Act 1996, available at: www.legislation.gov.uk/ukpga/1996/18/contents

Pending changes to the law

1.13 The Enterprise and Regulatory Reform Act received royal assent on 25 April 2013.⁸ It aims to support long-term growth through a range of measures including the following:

- Encouraging parties to come together to settle their dispute before an employment tribunal claim is lodged, through ACAS's early conciliation and greater use of settlement agreements.
- Preventing workers from making a whistleblowing claim at an employment tribunal for purely private matters, such as problems with their own individual contract. Workers will only be protected if their disclosures are believed to be made in the public interest.
- The Act will change the name from compromise agreement to settlement agreement.

1.14 From July 2013, the Employment Tribunal Service will introduce a charge for the process. It will cost the claimant £160 or £250 to lodge an employment tribunal claim and £230 or £950 to attend the employment tribunal (dependent on the type of claim). It is uncertain what impact this will have on the number of cases lodged and the number settled before the tribunal.

⁸ Press Release, *Enterprise and Regulatory Reform Bill receives royal assent*, 25 April 2013, available at: www.gov.uk/government/news/enterprise-and-regulatory-reform-bill-receives-royal-assent

Part Two

Policy and practice on using confidentiality clauses

2.1 This part examines:

- departments' policies on using confidentiality clauses, and how they work; and
- transparency over using special severance payments.

Departmental policy and guidance

2.2 Employment contracts often contain confidentiality terms. For example, all civil servants, crown agents and members of the armed forces are bound by the terms of the Official Secrets Act 1989.⁹ However, in compromise agreements, the departments we reviewed were unable to tell us how often confidentiality clauses are used as the information is not routinely collected: three of the four departments who provided information use standard text within agreements, but they select appropriate paragraphs depending on individual circumstances and legal advice. The Department of Health has no standard terms, but NHS Employers has recently issued guidance to the health sector (paragraph 2.7).

2.3 Because of an increased public profile of these agreements, three of the four departments have recently issued new guidance on the use of confidentiality clauses.

Department for Communities and Local Government

2.4 In April 2013, the Secretary of State advised that payments should not be made for confidentiality clauses included in packages agreed under the Civil Service Compensation Scheme; and confidentiality clauses should not be included in the settlement of whistleblowing claims. He agreed that confidentiality clauses linked to employment tribunal cases can continue to be considered in very exceptional circumstances when it is necessary to seek protection against possible future legal challenges but has made inclusion dependent on prior agreement by a minister.

⁹ Official Secrets Act 1989, available at: www.legislation.gov.uk/ukpga/1989/6/contents

Department for Education

2.5 Prior to April 2013, the Department for Education’s standard confidentiality clause included an explicit financial consideration of £200, in return for which the employee undertook “to keep the existence, negotiation and terms of this agreement confidential” and to not make “any statement which is derogatory, defamatory and/or disparages or is intended to disparage the reputation of the employer”. This clause was reviewed and revised following recent publicity on the use of confidentiality clauses. The Department has not issued any guidance on using confidentiality clauses to the schools sector.

Department of Health

2.6 The Department of Health issued a policy circular in 1999¹⁰ and a guidance pack in 2010¹¹ reflecting the legal position of confidentiality clauses relative to PIDA and reminding employers that they should not attempt to use such clauses to prevent employees raising issues of concern. Further direction was given in a letter from the NHS Chief Executive in January 2012 and from the Secretary of State and NHS Chief Executive in March 2013.

2.7 In April 2013, NHS Employers¹² issued new guidance to NHS bodies about using confidentiality clauses in compromise agreements.¹³ This latest guidance is explicit that the written agreement must make it clear to the employee that they are not prevented “from raising patient safety concerns, or other such issues, in the public interest”. The guidance includes suggested wording for compromise agreements.

2.8 On 25 April 2013, Monitor, the organisation which regulates NHS foundation trusts, amended its pro forma for special severance payments. The pro forma now asks these trusts to confirm that the agreement:

- a** will be open to public scrutiny, including by the National Audit Office and Committee of Public Accounts;
- b** includes a clause that no provision seeks to prevent a public interest disclosure; and
- c** was approved by the Accounting Officer.

2.9 In April 2013, NHS Employers issued new guidance reinforcing the need for transparency around agreements. NHS bodies are required to confirm that any compromise agreements or undertakings about confidentiality leave severance transactions open to adequate public scrutiny, including by the NAO and the PAC.

¹⁰ HSC 1999/198: The Public Disclosure Act 1998 whistleblowing in the NHS, available at: www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Healthservicecirculars/DH_4004385

¹¹ *Speaking up for a Healthy NHS*, available at: www.pcaw.org.uk/files/SpeakupNHS.pdf

¹² NHS Employers is part of the NHS Confederation (a membership body for all organisations that commission and provide NHS services). It is not accountable to the Department of Health.

¹³ NHS Employers, April 2013, *The use of compromise agreements and confidentiality clauses*, available at: www.nhsemployers.org/Aboutus/Publications/Pages/Use-of-compromise-agreements-and-confidentiality-clauses.aspx

Departmental practice

2.10 Departments were not able to tell us how many severance payments are associated with confidentiality clauses or what the clauses say. We requested a sample of 72 agreements and were able to review 50.¹⁴ A breakdown of our findings is given in **Figure 3**.

Figure 3

Departments' use of confidentiality clauses

Departmental group ¹	Cases requested of department	Confidentiality agreements supplied	Cases reviewed, including documents obtained from the Treasury	Confidentiality over the existence and terms of the agreement	Non-disclosure of confidential information obtained during employment	Clauses prohibiting the publication of derogatory statements	Clauses restricting rights under PIDA	Clauses restricting statements that can be made about the employee
Communities and Local Government	10 ²	9	9	9 (100%)	6 (67%)	1 (11%)	0 (0%)	0 (0%)
Education	18 ³	17	18	17 (94%)	6 (33%)	6 (33%)	0 (0%)	1 (6%)
Health	23 ⁴	12	12	12 (100%)	8 (67%)	10 (83%)	0 (0%)	7 (58%)
Defence	21 ⁵	6	11	11 (100%)	3 (27%)	6 (55%)	0 (0%)	4 (36%)
Total	72	44	50 cases	49 (98%)	23 (46%)	23 (46%)	0 (0%)	12 (24%)

NOTES

- 1 Departmental figures include some agreements relating to bodies within departmental groups, and non-ministerial departments related to the sector.
- 2 We requested compromise agreements for all of the departmental group's special severance approvals (10 cases). The Department was able to produce 9 compromise agreements. The Department confirmed that no compromise agreement existed for the remaining case.
- 3 We identified 12 cases from the Treasury's list, 5 cases from the Department's list (which were not on the Treasury's) and one case from the Department which related to a contractual severance payment so did not require the Treasury's approval. In one case, the file was not held by the Department but the compromise agreement was included in the Treasury's files.
- 4 We requested compromise agreements for 23 cases from the Department (3 from ALBs, 10 from Trusts) and Monitor (10 from FTs). Monitor provided 9 agreements relating to FTs and confirmed that one case in our sample did not have a compromise agreement associated with it as it had been settled at the employment tribunal. The Department was not able to provide those for other Trusts as it did not hold these. It also does not routinely hold agreements relating to ALB staff, but provided the compromise agreement for one case and copies of the confidentiality clauses in agreements for the other 2 cases. NHS bodies and ALBs are independent employers, the governance arrangements for these are discussed further in paragraph 4.12.
- 5 We requested compromise agreements for 21 cases. MoD provided 6 compromise agreements in the time available, and subsequently provided a further 4. MoD confirmed that for 2 cases there were no compromise agreements. Five additional agreements were obtained from the Treasury's files.
- 6 ALB = Arm's-length body; FT = Foundation Trust.

Source: National Audit Office analysis of the Treasury's and departmental data

¹⁴ We requested 72 compromise agreements and received 44 (61 per cent). The departments confirmed that for a further five cases (7 per cent) no compromise agreement existed, for example where the case went to an employment tribunal.

2.11 None of the agreements we reviewed would prevent an employee from making a protected disclosure under PIDA. It is not generally made explicit, however, that such clauses do not prevent employees from raising legitimate public interest concerns (or whistleblowing) in the appropriate forum. Of the 50 cases we reviewed, six made clear that nothing in the agreement prevented them whistleblowing, these were all within the health sector.

2.12 Despite the protection provided under the Act, few people are aware of PIDA and how it operates. A Public Concern at Work¹⁵/YouGov survey in June 2011 found that 21 per cent of respondents believed there was no legal protection for whistleblowers and 56 per cent did not know either way.

2.13 The Department of Health's report on the consultation regarding the NHS Constitution and whistleblowing, published in September 2011, concluded that: "the government considers that the current legal protection available to staff who wish to disclose concerns is strong, but implementation on the ground has not always been consistent or effective ... there have been times when staff who have spoken up for patients have found themselves punished rather than celebrated".¹⁶

2.14 From the business cases submitted to the Treasury we identified a growing awareness within the health sector of issues surrounding confidentiality. Some Trusts made explicit statements in their submissions:

"The [Foundation]Trust will require a COT3 or compromise agreement withdrawing the claims and to sign a confidentiality agreement (although it is confirmed that such confidentiality agreement will relate to the fact of and terms of the settlement agreement only and will not prevent the employee from raising any whistleblowing concerns)."

"The wording of the agreement would not, of course, prevent the Claimant from making a disclosure under the Protected [sic] Interest Disclosure Act 1998."
(a Foundation Trust)

"A compromise agreement was drawn up ensuring that no reference was made to 'gagging' clauses." (a Primary Care Trust)

2.15 We found no similar comments on business cases submitted before January 2013, and we note that such statements appear more regularly from April onwards. We were, of course, unable to verify if these business case commitments were followed-through in the compromise agreement.

¹⁵ Public Concern at Work is a registered charity which "aims to help make whistleblowing work so that dangers, wrongdoing and serious risks that threaten the public good are deterred or at least detected before serious damage is caused."

¹⁶ The Department of Health, *The NHS Constitution and Whistleblowing*, September 2011, available at: www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_130551

Individuals' views

2.16 During the course of our investigation, we approached Public Concern at Work and Patients First,¹⁷ for their help in identifying individuals who had signed or been offered compromise agreements. Individuals we spoke to during this investigation told us how difficult it can be to raise concerns (Appendix Four). Their experiences are by no means representative of all whistleblowers or indeed of individuals who sign compromise agreements. Their cases, however, highlight the stress they were under when they were asked to sign a compromise agreement. They told us that the combination of events leading up to the settlement, the way the compromise agreement was presented to them, and the confidentiality clauses within the agreements made them feel that they had been “gagged”. They were not always clear whether their concerns would legally be classified as a protected disclosure. We are conducting further work to investigate how whistleblowing is handled across the public sector.

2.17 Any employee signing a compromise agreement has to have independent legal advice and the employer usually makes a contribution to the cost of this advice. However, longer disputes and preparing for tribunal cases can require further advice, which can be expensive for the employee. The individuals we spoke to said this was a factor in considering whether or not to sign an agreement.

2.18 Compromise agreements, including confidentiality clauses, exist to draw a line under an issue, which is rarely black-and-white. The agreements can be used because an organisation has not complied with good practice, or the law, or because it wants to remove a member of underperforming staff without going through a potentially time-consuming performance management process. It is important that lessons are learned following these situations. We have not been able to assess these issues in the cases across the public sector owing to limitations in the information provided.

¹⁷ Patients First is a campaign group whose purpose is “to reduce death and harm in the NHS by campaigning for the UK Government to create policies and laws that ensure the NHS becomes open and accountable and we will actively support all those who raise concerns about patient safety.”

Part Three

Central policy and practice on special severance payments

3.1 Neither the Cabinet Office nor the Treasury provide formal guidance to departments, nor keep records of, the use of compromise agreements. As these agreements often include payments to individuals we used the Treasury's approval data to understand the prevalence of these agreements.

3.2 This part, therefore, examines:

- the Treasury's governance arrangements over special severance payments; and
- how these governance arrangements are working in practice.

The Treasury's governance arrangements over special severance payments

3.3 The Treasury's *Managing Public Money* states that "departments should always consult the Treasury about special payments unless there are specific agreed delegation arrangements...Similarly, NDPBs and many other arm's length bodies should consult their sponsor departments in comparable circumstances. In turn, the department may need to consult the Treasury."

3.4 *Managing Public Money* goes on to define special severance payments which "are paid to employees, contractors and others...above normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract"¹⁸ and highlights that they are novel and contentious.

3.5 The guidance is accompanied by a business case template which departments must submit for approval of each individual special severance payment. It requires the department to consider the factors laid out in **Figure 4**. Without the Treasury's approval this type of payment would be irregular,¹⁹ and could be a cause for the Comptroller and Auditor General to qualify his audit certificate in the financial statements (Appendix Five).

¹⁸ HM Treasury, *Managing Public Money*, Annex 4.13 Special Payments.

¹⁹ The requirement for all items of expenditure and receipts to be dealt with in accordance with the legislation authorising them, any applicable delegated authority and the rules of Government Accounting.

Figure 4

Extract from the Treasury's guidance on special severance cases

Factors to consider in special severance cases

Any case for special severance put to the Treasury should explain:

- the circumstances of the case; and
- any scope for reference to a tribunal, with its potential consequences, including the legal assessment of:
 - the organisation's chances of winning or losing the case;
 - the management procedures followed;
 - the value for money offered by the possible settlement;
 - any non-financial considerations, for example, where it is desirable to end someone's employment without dismissal, perhaps because of restructuring; and
 - whether the case could have wider impact, for example, for a group of potential tribunal cases.

NOTE

- ¹ In addition to the areas above, the Treasury submission pro forma includes a section on 'lessons learned', and a requirement to confirm that the Accounting Officer is aware and satisfied with the proposed settlement.

Source: HM Treasury, Managing Public Money, Annex 4.13 Special Payments, Box A.4.13B

3.6 The guidance is clear that the Treasury's approval is not necessary for payments which are legally required, for example, a judgement by an employment tribunal. There was some confusion, primarily in the health sector, before March 2013 as to whether cases settled by judicial mediation required approval. In March 2013, the Treasury confirmed that any employment tribunal case settled at judicial mediation must be approved in advance. It accepted that all such settlements made prior to March 2013 by judicial mediation, without the Treasury's approval, should be classified as regular and legal.

3.7 The Treasury can confer authority on organisations to make payments without the Treasury's prior approval. This means the oversight is limited to the department's governance structures. In the four departments we reviewed, the Treasury has offered authority for some payments to academies within the education sector, the details are covered in Part Four. There is a lack of clarity within the Ministry of Defence – and across some departments' arm's-length bodies as to whether they have authority, as demonstrated by cases which have required the Treasury's retrospective approval (see Appendix Three, Case Study 5).

How the Treasury's governance arrangements are working in practice

3.8 We found that the Treasury does not have sufficient oversight of special severance payments: its records are poor with several teams taking responsibility for approvals; approvals are requested retrospectively, with no sanction; and there is no monitoring of good practice. Some of these issues were highlighted in our March 2012 report, *Managing early departures in central government*,²⁰ and in the Committee of Public Accounts' July 2012 report²¹ on the same subject which recommended that:

“The Treasury should ensure that information on all cases is recorded centrally, and that departments are held to account where they fail to refer a case for approval.”

3.9 In its response the Government disagreed with the recommendation stating:

“Where severance payments are proposed above contractual requirements, it is the responsibility of individual departments and other relevant bodies to refer cases to the Treasury, maintain records of payments, note them in their annual accounts, and to learn lessons from individual cases. Since details of such payments are already placed in the public domain, the Government sees no need to duplicate these records centrally bearing in mind the Treasury does not have the resources to do so.”

3.10 We found it challenging to get a complete picture of the Treasury's approvals, and were only partially successful. Each case submitted to the Treasury is reviewed on its individual merits and not considered systemically; therefore the Treasury was unable to provide a breakdown of which bodies made applications, the sums involved, or whether they were approved.

3.11 The Treasury holds case files electronically. When we requested the Treasury's records, and any associated data analysis, we received some 5,000 emails. Each individual email and attachments had to be opened to check whether the case fell within the three-year timeframe covered as part of this investigation, and then reviewed and analysed. The records did not always include a letter of approval.

3.12 We used the emails to piece together the data to create a list of approved cases for each department. We did not have time to identify fully the reasons for all payment requests, but the majority of approvals related to accusations by the employee of unfair or constructive dismissal which might include discrimination.²² There were also a number of cases where the primary grounds for dismissal were for capability and attendance issues where the department did not wish to follow the performance management process, and wished to forestall a case of unfair dismissal.

20 Comptroller and Auditor General, *Managing early departures in central government*, Session 2010-12, HC 1795, March 2012, available at: www.nao.org.uk/report/managing-early-departures-in-central-government/

21 HC Committee of Public Accounts, *Managing early departures in central government*, Eighth Report of Session 2012-13, HC 503, July 2012, available at: www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/managing-early-departures-report/

22 Unfair dismissal includes cases where the employer does not have a justifiable reason for dismissal or fails to follow the company's formal disciplinary or dismissal process. Constructive dismissal is where the employee terminates the contract under which he is employed, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

3.13 We estimate that the Treasury approved 1,053 severance payments relating to departments and their arm's length bodies in the three years since 1 April 2010. The total value of these approved payments was £28.4 million (**Figure 5**). The median approval across all the Treasury's data was £15,000. Forty per cent of approved payments were for £10,000 or less (**Figure 6** overleaf). For the four departments we spoke to as part of this investigation, we analysed the data for the total departmental group figure into core department and executive agencies, and arm's-length bodies (Part Four).

Figure 5

The Treasury's special severance payment approvals in the three years to 31 March 2013

Departmental group ¹	Number of cases	Total value £	Maximum £	Minimum £	Median £
Business, Innovation & Skills	40	1,119,254	95,376	500	20,563
Cabinet Office	17	642,092	137,737	1,900	23,055
Communities and Local Government	10	127,524	40,000	1,000	11,500
Culture, Media & Sport	56	1,405,090	145,000	300	16,125
Energy & Climate Change	4	114,850	80,000	10,000	12,425
International Development	6	414,083	140,000	12,000	76,480
Work & Pensions	102	2,408,663	181,470	600	15,000
Environment, Food & Rural Affairs	21	727,502	140,625	925	27,560
Education	57	1,647,003	225,000	300	7,500
Transport	23	1,195,386	156,682	2,340	37,500
Foreign & Commonwealth Office	6	245,280	130,320	1,350	28,403
HM Revenue & Customs	20	571,600	160,000	250	11,000
HM Treasury	17	430,951	96,400	1,000	13,200
Health ²	484	11,158,923	266,000	250	13,700
Home Office	40	1,137,359	225,000	525	8,000
Justice	83	2,940,258	250,000	500	26,657
Defence	51	1,559,742	120,000	3,000	17,500
Other departments	16	511,376	175,908	1,000	23,500
Total	1,053	28,356,936	266,000	250	15,000

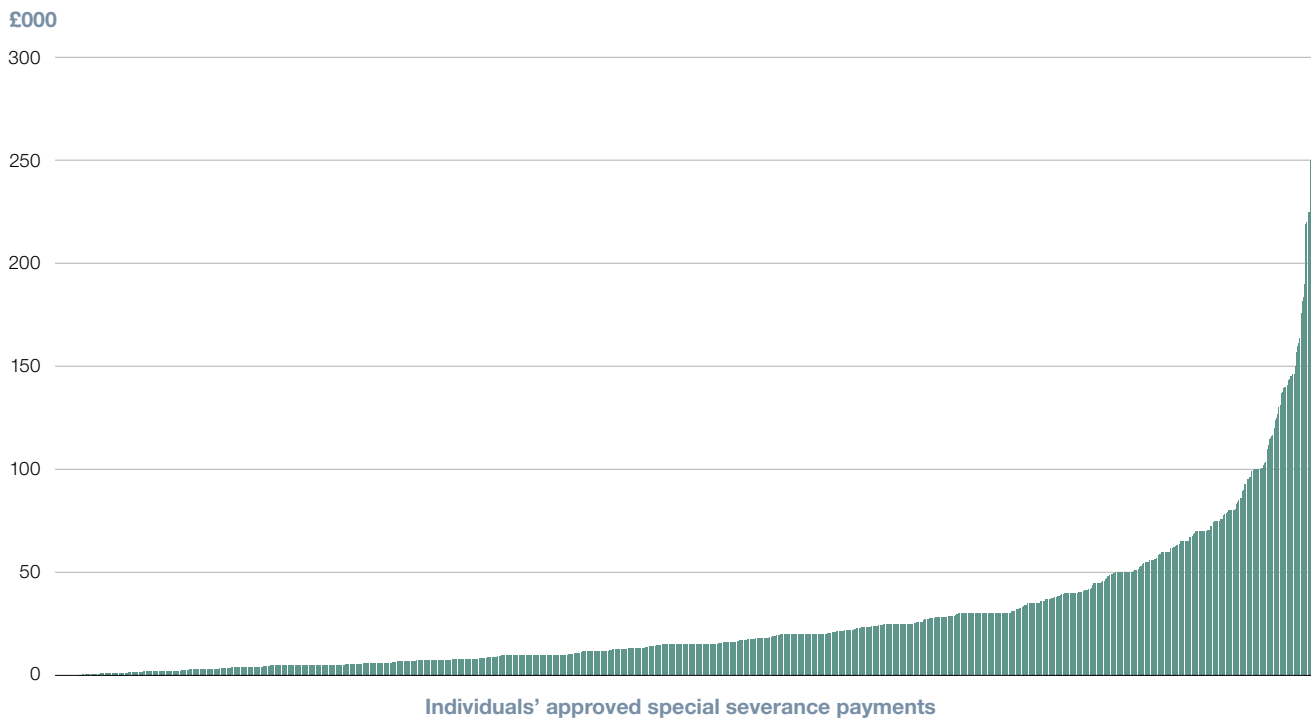
NOTES

- ¹ Departmental figures include approved payments for bodies within departmental groups, and non-ministerial departments related to the sector.
- ² This includes NHS foundation trusts which are in the health sector but not accountable to the Department of Health.
- ³ This table is presented to give an overview of approvals within departmental groups. As they represent differing numbers of employees and departures, it is not appropriate to compare the figures between groups.

Source: National Audit Office analysis of the Treasury's data

Figure 6
Individuals' approved special severance payments

40 per cent of approvals were £10,000 or less



Source: National Audit Office analysis of the Treasury's data

3.14 However, these figures are not a comprehensive picture of payments or contract terms for the following reasons:

- a** The Treasury is not informed of the actual amounts paid to individuals. On a small sample of 41 cases, the amounts paid were on average 89 per cent of the approval amount.
- b** Multiple teams in the Treasury approve business cases – the majority are sent to the Treasury Officer of Accounts Team, but some of the Treasury's Spending Teams have retained responsibility for special severance payments within their respective departments and hold separate files which we asked them to share; none were forthcoming.
- c** The Treasury confers authority to make payments without approval (paragraph 3.7), and some payments are mistakenly made without approval (Appendix Five).
- d** Business cases do not routinely break down payments into contractual and non-contractual elements, nor include copies of compromise agreements.

- e It was not always clear from the Treasury's files whether cases had been approved. Where cases had been clearly rejected we did not include them in our figures. The figures therefore may include some cases which were not approved, and some where approval was given and the case later withdrawn.
- f Payments made following judicial mediation were not approved by the Treasury.

3.15 The Treasury's record keeping is cause for concern. The records suggest that the Treasury does not monitor centrally overall trends in the data and cannot provide assurance that:

- value for money considerations are robust and take a cross-government view;
- unusual trends in the data are identified. For example to establish whether one department has an unusually high level of severance payments, or whether there are individuals transferring between government departments receiving multiple severance payments; and
- lessons learnt in one department are applied, and replicated more widely across government.

3.16 Since April 2010, the Treasury has approved 14 special severance payments to individuals within its own department.

Part Four

Departments' policy and practice on special severance payments

4.1 This part examines:

- departments' governance arrangements regarding special severance payments; and
- the use of these payments.

Departmental governance arrangements over special severance payments and how they are working in practice

Within the central department

4.2 We found, in general, that the four departments' policies on special severance payments were clear and based on, or made reference to, *Managing Public Money*.²³ Responsibility for signing-off payments normally rests with the head of human resources with the exception of the Ministry of Defence where it sits within the finance team. In our conversations with the departments, most staff were aware of the Treasury's requirements.

4.3 The Ministry of Defence also differed from the other departments we spoke to, in that the budget holder's delegation, in line with the Treasury's authorisation, includes making out of court settlements to individuals during service of up to £250,000. This means that these payments do not have the same independent Treasury scrutiny as payments to those who have left employment or are paid to terminate their employment. The Ministry of Defence told us that it "requires those with delegated authority to seek Treasury approval for any payment where it involves important questions of principle, raises doubts as to the effectiveness of existing systems, contains lessons which might be of wider interest, is novel or contentious, might create a precedent for other departments in similar circumstances or is the result of obscure or ambiguous instructions issued by Treasury." The Department's view is that there is no evidence that this form of delegation has resulted in noticeably poorer performance.

²³ Departments should also be mindful of other relevant Treasury guidance, including *Regularity, Propriety and value for money*, which includes cases involving severance payments previously examined by the Committee of Public Accounts.

Within the wider departmental group

4.4 There is less clarity around the policies and guidance between the departments and their arm's-length bodies. *Managing Public Money* guidance states that:

“arm's-length bodies should operate to similar standards as departments unless there are good reasons to the contrary. Departments should ensure that their oversight arrangements enable them to be satisfied that their arm's-length bodies observe the standards.”

We found that oversight arrangements for bodies within the wider departmental groups were often limited. The following paragraphs examine these arrangements in more detail.

Local authorities in England²⁴

4.5 The Department for Communities and Local Government (CLG) does not hold information on the number or value of severance payments within local authorities in England. Constitutionally, local authorities in England are accountable to their electorates for the spending decisions that they make and are not required to refer special severance payments to DCLG.

4.6 In February 2012, DCLG published *Openness and Accountability in Local Pay*,²⁵ to which authorities must have regard when exercising their duties on pay accountability. In February 2013, the Secretary of State sent supplementary guidance to leaders of local authorities in England and chairs of fire and rescue authorities.²⁶ The letter stated that in each authority the full Council should be given the opportunity to vote on severance payments over £100,000.

The Education Sector

4.7 The Department for Education has restructured its departmental group during the period covered by this investigation (April 2010 onwards). This included creating four executive agencies: the Standards & Testing Agency (formed 1 October 2011), the Education Funding Agency, the Teaching Agency and the National College for School Leadership (formed on 1 April 2012).²⁷ Since April 2012, the Department for Education's human resources team has been responsible for managing severance payments to staff employed by its executive agencies, although it is not clear how any payments would have been handled before. The human resources team was not able to tell us how payments to staff employed by its arm's-length bodies were handled. From discussions with the Department's finance team and the Treasury, we found that these bodies submit them to the Department's finance team.

²⁴ Local authorities in Scotland, Wales and Northern Ireland sit within the separate devolved constitutional arrangements for these parts of the United Kingdom.

²⁵ DCLG, *Openness and accountability in local pay: guidance*, February 2012, available at: www.gov.uk/government/publications/openness-and-accountability-in-local-pay-guidance

²⁶ DCLG, *Openness and accountability in local pay: supplementary guidance*, February 2013, available at: www.gov.uk/government/publications/openness-and-accountability-in-local-pay-supplementary-guidance

²⁷ In March 2013, the Teaching Agency and National College for School Leadership merged to form the National College for Teaching and Leadership.

4.8 The Department oversees the schools sector, which includes both maintained schools and academies. Maintained schools operate independently of central government. Under section 37 of the Education Act 2002, local authorities can authorise their maintained schools to make special severance payments, without the need to inform the Department or the Treasury. Academies are funded directly by the Department so are required to comply with *Managing Public Money*. However, in September 2012, the Treasury and the Department gave academies authority to make some special severance payments without approval (discussed further in paragraph 4.26).

The Health Sector

4.9 The accountability arrangements for the Department and the NHS are set out in the Department's *Accounting Officer system statement*.²⁸ Up until March 2013, the Department reviewed and submitted to the Treasury severance payments for staff within NHS trusts (non-NHS foundation trusts), strategic health authorities, and arm's-length bodies. The Department first required trusts to obtain approval from their remuneration committee and strategic health authority. The Department subsequently reviewed these cases to identify areas of concern: for example, if a particular trust had a high number of similar settlement cases that might suggest weak or inadequate governance.

4.10 NHS foundation trusts are not accountable to, or directed by, the Department of Health; the chief executive of each trust is an accounting officer in their own right. NHS foundation trusts' accountability is to: their local communities through their members and governors; their commissioners through contracts; Parliament (through laying their annual report and accounts); and their regulators (Monitor and the Care Quality Commission). NHS foundation trusts submit special severance payment approvals to Monitor, which passes them onto the Treasury and maintains a central list, but does not itself approve or reject payments.

4.11 Following the structural changes to the health service in April 2013, NHS Employers issued guidance on handling special severance payments.²⁹ It sets out the circumstances in which severance payments would be considered appropriate and how they should be handled. It also suggests that business cases should be put to remuneration committees for agreement before submission to a national oversight body (**Figure 7**), before seeking the Treasury's approval.

²⁸ Department of Health, *Accounting Officer system statement*, August 2012, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/126966/Accounting-Officer-system-statement.pdf

²⁹ NHS Employers, *Guidance for employers within the NHS on the process for making severance payments*, April 2013, available at: www.nhsemployers.org/Aboutus/Publications/Documents/severance-payment-guidance.pdf

Figure 7

Special severance payment reporting arrangements in the health system from 1 April 2013

Organisation type	National body
NHS trust	NHS Trust Development Authority
NHS foundation trust	Monitor
Clinical Commissioning Groups	NHS England
Arm's-length body/Special Health Authority	Department of Health

Source: NHS Employers

4.12 The Department's arm's-length bodies are independent employers but are required to submit all special severance payments to the Department. Payments below £20,000 are approved by the human resources team in consultation with the body's departmental sponsor. Where the payment is in excess of £20,000, the payment is also approved by the Department's Governance and Assurance Committee. The Department submits all payments to the Treasury for its approval and maintains a central list of payments made by each body. The Department does not request, or hold, compromise agreements relating to arm's-length body staff as these are confidential documents between the individual and the employer.

Culture, Media and Sport

4.13 The Department did not provide information in a reasonable timeframe (see Appendix One).

The use of special severance payments

4.14 The four departments we reviewed do not routinely keep a list of special severance payments. Given that most departmental agencies submit approvals directly to the Treasury, none of the four departments were able to provide us with a complete list of special severance payments across their departmental group.

4.15 We reviewed business cases submitted to the Treasury to quantify the number and value of approved payments, and sought evidence from within departments and departmental groups to cross-check this data. We did not re-perform the departments' or the Treasury's assessment of whether the business case represented value for money. We checked whether legal advice was sought and took assurance that the amounts requested appeared reasonable given the likelihood of winning the case and the likely damages. We did not form any judgement on the advice given.

4.16 The business cases submitted to the Treasury set out what, if any, legal advice had been sought in relation to the case for which a special severance payment is proposed. The level of detail included by departments varied. Some provided a brief summary within the business case, while others sent copies of the legal advice in its entirety. Where advice was available, some advisers had quantified the employer's chance of successfully defending the claim, or estimated a likely award if the claimant was successful. In other cases, the advice simply stated the maximum that could be awarded in this type of case without assessing the likelihood of this type of award. With this level of detail, it is difficult to judge the true value for money of defending the case compared to settling out of court. We acknowledge that, in some cases, it may not have been possible to provide detailed legal advice as the circumstances that would lead to a legal case had yet to crystallise.

4.17 Figure 8 shows the total number of approved payments across our four case study departments. The approved figure is the maximum amount that the departments could have paid; the Treasury advice is that departments should always try to settle at a lower level. Where we have been able to quantify the amounts paid, these have been on average 89 per cent of the approved amount. The Treasury approves each request on a case by case basis assessing the proposed payment against possible tribunal damages. We found cases where information in the business case covering legal advice on the total cost of defending a case, including a possible settlement, differed markedly on apparently similar cases, and thus the approval amount varied.

Figure 8
Special severance payment approvals in four departments

Departmental special severance cases (four departments)	2010-11	2011-12	2012-13	Total
Number of approvals	206	219	177	602
Value of approvals	£4,844,588	£4,442,941	£5,205,663	£14,493,192
Department and Agencies				
Number of approvals	34	36	28	98
Value of approvals	£1,567,936	£711,264	£1,098,760	£3,377,960
ALBs and other associated bodies				
Number of approvals	172	183	149	504
Value of approvals	£3,276,652	£3,731,677	£4,106,903	£11,115,232

Source: National Audit Office analysis of the Treasury's data

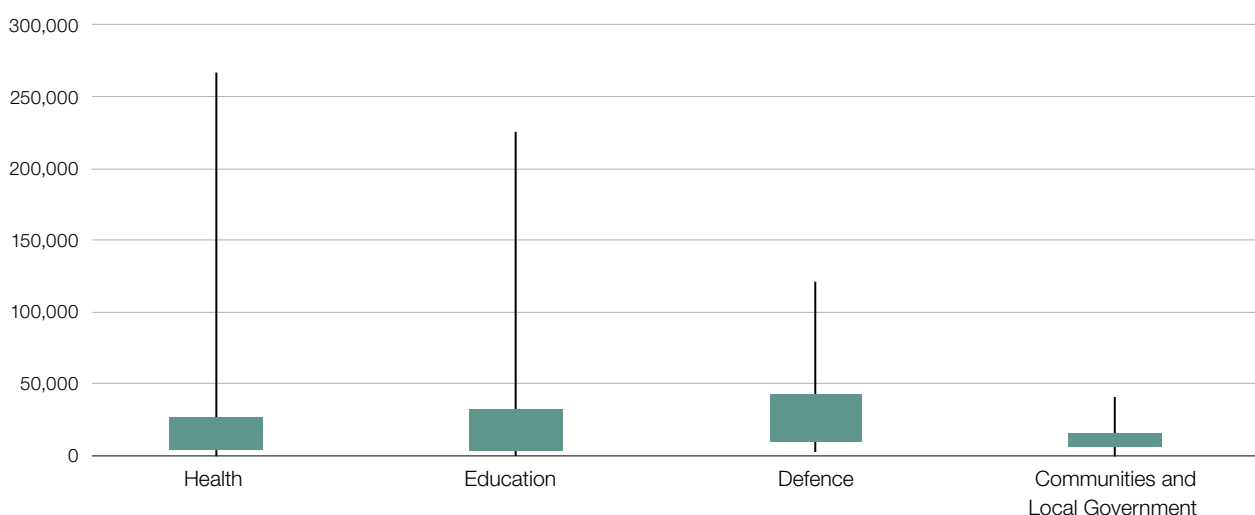
4.18 Figure 9 shows the range and distribution of approvals, it shows a high proportion of approvals at the lower end of the range. For the Department of Health, although the total range was £250–£266,000, half the approvals were between £5,000 and £26,000 (8 per cent of the total range). Similarly, for the Ministry of Defence half the approvals were within the £10,500 to £42,500 range, compared to an overall range of £3,000 to £120,000.

4.19 We analysed the Treasury’s approvals by financial year and by the type of body across the departmental group. The four departmental groups accounted for 57 per cent of approved payments (largely driven by the Department of Health). Our analysis showed that while the number of cases per year had fallen overall, the annual value of payments had increased.

Figure 9

Range of approvals across our four case study departments and their associated bodies

Value of approvals (£)



NOTE

1 The line represents the range of approvals within each department, and the box shows where the value of 50 per cent of approvals lie.

Source: National Audit Office analysis of the Treasury’s data

4.20 For Health and Education, the number of annual approvals had fallen overall between 2010-11 and 2012-13, but for DCLG and Defence, approvals had increased. In all four departments the average approved amount per person had increased. For Defence, the average per person had increased by 60 per cent, from £23,033 in 2010-11 to £36,790 in 2012-13. We also found a difference in the average approval for different types of body in the same departmental group. For example, NHS foundation trusts had an average approval per person across the three years of £22,491 whereas NHS trusts had an average of £16,801. Our analysis suggests that the government's reforms and restructuring of these departmental groups are having an impact on the number and overall value of severance payments. There has been an increase in the number of cases within NHS foundation trusts, and a drop in the number from NHS trusts, possibly due to the number of trusts becoming NHS foundation trusts. The Department for Education restructured its arm's-length bodies and agencies in 2011-12. This led to headcount reductions and may explain the increase in approvals within the departmental group from 2010-11 to 2011-12.

4.21 In all cases we reviewed, the approved amounts were lower than the estimated damages had the case gone in the favour of the employee at an employment tribunal. It is not true to say that this necessarily represents value for money. Saving time and money by avoiding a tribunal should not be the overriding factors in settling a case. The Treasury's guidance states that "even if the cost of defeating an apparently frivolous or vexatious appeal will exceed the likely cost of that particular settlement to the employer, it may still be desirable to take the case to formal proceedings. Winning such cases demonstrates that the government does not reward failure and should enhance the employer's reputation for prudent use of public funds. Departments should not treat special severance as a soft option, eg. to avoid management action, disciplinary processes, unwelcome publicity or reputational damage."³⁰ Equally, the department may have made a mistake or treated an individual unfairly and it is important that the individual gets redress and lessons are learnt.

4.22 Although each case we reviewed is different, we identified a number of areas of concern emerging across more than one department. In particular, the scale of payments over and above contractual entitlement, failure to seek the Treasury's approval, and apparently rewarding failure.

The following section breaks down payments by departmental group.

The Health Sector

Figure 10

Payments approved for the health sector

Health total	2010-11	2011-12	2012-13	Total
Total number of approvals	173	170	141	484
Total value of approvals	£3,761,299	£3,532,427	£3,865,197	£11,158,923
Department & Agencies				
Number of approvals	8	1	2	11
Value of approvals	£681,071	£65,000	£81,318	£827,389
ALBs				
Number of approvals	12	8	8	28
Value of approvals	£248,132	£348,305	£284,136	£880,573
Trusts (NHS trusts and primary care trusts)				
Number of approvals	46	44	8	98
Value of approvals	£590,340	£750,233	£305,939	£1,646,512

The following organisations are independent of the Department of Health. They are included here to give an overview of the health sector.

NHS foundation trusts¹

Number of approvals	107	117	123	347
Value of approvals	£2,241,756	£2,368,889	£3,193,804	£7,804,449

NOTES

- 1 See paragraph 4.10 for how these trusts relate to the Department of Health.
- 2 This table only includes information in the Treasury and departmental files so it will not include those organisations operating completely independently of those bodies, but within the health landscape, for example GP practices.

Source: National Audit Office analysis of the Treasury's data

Communities and Local Government

4.23 The National Audit Office does not have access rights to local authorities in England. Information in the public domain, however, suggests that severance payments in English local authorities are significant. In March 2010, the Audit Commission published a report, *By mutual agreement*, on severance payments to council chief executives.³¹ The findings of the report are based on all types of severance payments made to employees, and therefore include both contractual and non-contractual payments. The study looked at council chief executives' job moves over 33 months, and found that:

- agreed severance packages for 37 council chief executives totalled £9.5 million, 40 per cent of which were in pension benefits;
- three in every ten outgoing council chief executives received a pay-off;
- the average cost to councils of each severance package was almost double the annual basic salary, but in four cases was more than triple; and
- 79 per cent of mutually-agreed severance payments had a confidentiality clause.

Figure 11
Payments approved for Communities and Local Government Sector

	2010-11	2011-12	2012-13	Total
Total number of approvals	3	1	6	10
Total value of approvals	£26,000	£13,000	£88,524	£127,524
Department & Agencies				
Number of approvals	3	1	1	5
Value of approvals	£26,000	£13,000	£40,000	£79,000
ALBs				
Number of approvals			5	5
Value of approvals			£48,524	£48,524
Local authorities				
Number of approvals	Local authorities do not have to submit approvals to the Treasury			
Value of approvals				

Source: National Audit Office analysis of the Treasury's data

31 Available at: www.audit-commission.gov.uk/2010/03/by-mutual-agreement-severance-payments-to-council-chief-executives/

4.24 From 1 April 2010, all local authorities are required to publish, in their statements of accounts, the financial details of severance payments to senior officers earning over £50,000. Officers earning over £150,000 are identified by name, whereas those earning between £50,000 and £150,000 are identified by their post title. We selected a sample of 35 authorities (approximately 10 per cent) and reviewed the disclosures in their statements of accounts for 2010-11 and 2011-12. It was possible to identify 21 payments for compensation on loss of office in 2010-11 and 15 payments in 2011-12. The total value of these payments was £2 million. However, our review showed that the way in which these disclosures are made can vary. For example, some authorities clearly stated when a senior officer had left without a termination payment, whereas others stated that a senior officer had left but made no reference to whether or not they had received such a payment. For officers who do not feature in the remuneration report, it was not always clear where payments would be disclosed and there is no requirement to disclose payments for officers earning less than £50,000.

Ministry of Defence

Figure 12

Payments approved for Ministry of Defence group

Ministry of Defence	2010-11	2011-12	2012-13	Total
Number of approvals	14	17	20	51
Value of approvals	£322,468	£501,474	£735,800	£1,559,742
Department & Agencies				
Number of approvals	11	15	19	45
Value of approvals	£249,537	£457,474	£705,800	£1,412,811
ALBs				
Number of approvals	3	2	1	6
Value of approvals	£72,931	£44,000	£30,000	£146,931

Source: National Audit Office analysis of the Treasury's data

The Education Sector

Figure 13
Payments approved for the Education sector

Education	2010-11	2011-12	2012-13	Total
Total number of approvals	16	31	10	57
Total value of approvals	£734,821	£396,040	£516,142	£1,647,003
Department & Agencies				
Number of approvals	12	19	6	37
Value of approvals	£611,328	£175,790	£271,642	£1,058,760
ALBs				
Number of approvals	3	10	3	16
Value of approvals	£108,493	£188,250	£19,500	£316,243
Non-ministerial departments¹				
Number of approvals	1	1	1	3
Value of approvals	£15,000	£15,000	£225,000	£255,000
Maintained schools				
Number of approvals	Maintained schools do not have to submit approvals to the Treasury.			
Value of approvals				
Academies				
Number of approvals	0	1	0	1
Value of approvals	£0	£17,000	£0	£17,000

NOTE

¹ These non-ministerial departments are directly accountable to the Secretary of State for Education but independent of the Department.

Source: National Audit Office analysis of the Treasury's data

4.25 The Comptroller and Auditor General qualified his audit certificate on the 2011-12 financial statements of the Department for Education and the Young People's Learning Agency (YPLA). The YPLA had identified 14 payments at nine academies where extra-contractual severance payments were made without the Treasury's approval. Although the Treasury provided retrospective approval for these cases, it is unclear how many other special payments were made by academies during the year as the assurance framework the Agency had in place for the 2011-12 financial year was not capable of identifying and managing all cases (see Appendix Five).

4.26 In September 2012, new guidance came into effect for academies as the Treasury authorised them to make special severance payments up to £50,000 without prior approval. Proposed payments in excess of £50,000 require the Treasury's approval. For these, academies are required to submit business cases to the Education Funding Agency³² (EFA took over responsibility from the YPLA in April 2012), which in turn submits them to the Treasury.

4.27 The EFA reviewed audit reports from academies' auditors for the year up to August 2012, to identify payments of any value that require retrospective approval. Three were identified and approved by the Treasury in February 2013 (total value £46,500). Since then, 21 further payments have been identified totalling £366,203. The Treasury proposes to review around a quarter of these payments and if it would offer retrospective approval for these it will apply it to all 21.

Transparency

Information reported in the public domain

4.28 In general, there is an expectation that organisations should be open about their use of public funds. However, they can sometimes be reluctant to publish details of individual agreements. The requirements of the Data Protection Act can be seen as preventing organisations being fully open about specific packages.

4.29 Most compromise agreements permit disclosure if there is a relevant statutory requirement. The Financial Reporting Manual requires exit payments and ex-gratia payments to senior staff to be disclosed in the remuneration report. Other staff in receipt of payments would be reported as part of disclosures on redundancy payments or ex-gratia payments, which normally includes the number of cases and the value within bandings. Organisations often choose not to disclose information on severance and ex-gratia payments, and non-disclosure is allowable under the guidance if the disclosure would breach the terms of a confidentiality agreement. Some organisations have chosen to be transparent about severance packages, such as NHS National Services Scotland, who agreed to the disclosure of a director's remuneration package, despite a confidentiality agreement being in place, following consultation with legal advisers.³³

³² The Education Funding Agency is an executive agency of the Department for Education and is responsible for: making payments to local authorities (for maintained schools), academies, sixth form colleges, further education colleges and other providers; and seeking assurance on the use of those funds.

³³ Auditor General for Scotland and Accounts Commission report, *Managing early departures from the Scottish public sector*, May 2013, available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/63783.aspx

4.30 In the Committee of Public Account's hearing on financial sustainability in local authorities in February 2013,³⁴ the Department for Communities and Local Government stated that special severance payments would be subject to freedom of information and would be disclosable. In a recent survey of councils by a member of the public under the Freedom of Information Act, 52 councils refused to disclose information on their use of compromise agreements. A summary of the results of FOI requests regarding local authorities' use of compromise agreements has been published online.³⁵ We have not verified the completeness or quality of the information.

- 4,562 compromise agreements signed by 256 local authorities in the 6 year period between 2005 and 2010.
- 52 councils refused to provide the information.
- 37 councils had not used the agreements.
- 90 per cent of councils surveyed had used the agreements.

Good practice on governance

4.31 As indicated in the Treasury and Cabinet Office guidance on governance,³⁶ Non-Executive Directors have an important role to play in challenging civil servants in departments and helping to provide greater accountability for the use of taxpayers' money. The Non-Executives can scrutinise the processes and procedures that departments have put in place for taking decisions around both confidentiality agreements and severance payments. They can do this through the Board, or the Board's Committees. For example, the Nominations and Governance Committee could have a remit to consider:

- the policies and procedures that departments have put in place to set out the circumstances in which it may be appropriate to use confidentiality agreements;
- the management's annual assurance arrangements to confirm to the Committee that it has properly applied these policies and that where appropriate, sought advice from the Committee in any unusual or exceptional circumstances outside the parameters of the stated policy; and
- more broadly, the processes and procedures in place to address management of grievances, to avoid departures in the first place that might give rise to confidentiality agreements.

³⁴ HC Committee of Public Accounts, *Financial sustainability of local authorities*: Third Report of Session 2013-14, May 2013, available at: www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/financial-sustainability-of-local-authorities-report/

³⁵ Available at: wirralinittogether.wordpress.com/2013/02/19/2519/

³⁶ HM Treasury and Cabinet Office, *Corporate governance in central government departments: Code of Good practice 2011*, July 2011, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/179693/corporate_governance_good_practice_july2011.pdf

4.32 In addition, it is the role of the Non-Executive Directors on the Audit Committee to consider:

- the adequacy of disclosures in the annual remuneration report and the annual accounts, in particular where the confidentiality agreement and any related severance payments are disclosed (or should be disclosed) for senior managers and board members that have left the department during the year; and
- the regularity of any severance payments that the Accounting Officer has proposed to make, in the context of any related confidentiality agreements. The Accounting Officer is responsible for seeking appropriate approval from both the Cabinet Office and the Treasury. The Audit Committee should question management to ensure that any payments that are in excess of statutory entitlements (which may be novel or contentious in nature) have relevant prior authorisation of Treasury before they are made.

NAO governance arrangements on special severance payments

4.33 In the three years to 31 March 2013, the NAO has made two special severance payments with a total expenditure of £41,660. Both agreements contain clauses about keeping confidential the existence and terms of the agreement, one included a clause not to disclose confidential information obtained during the course of employment. Both agreements contained a clause prohibiting the publication of derogatory, defamatory or disparaging statements about the employer. No agreements would restrict the individual's rights under PIDA. Both payments have been disclosed within the NAO's annual report and accounts.

4.34 Following changes to our governance structure, all future special severance approvals will be sent for independent review by an NAO board member and the remuneration committee chair.

Appendix One

Our audit approach

1 This report examines the policy and practice in government's use of confidentiality clauses, and the associated special severance payments. Our objectives were to look at:

- the legal basis for confidentiality clauses, and the governance arrangements behind their use;
- the number of compromise agreements written, including the amount of settlements made; and
- the extent to which confidentiality clauses are used to 'gag' employees, particularly in relation to whistleblowing.

2 Our work focused on the Treasury, which is responsible for approving special severance payments as outlined in *Managing Public Money*, and five government departments to illustrate how these agreements are used in practice.

3 We selected Health, Defence, Education, Communities and Local Government, and Culture, Media & Sport. This was a purposive sample drawing on our insight across government, recent financial audit experience, correspondence cases from members of the public and recent media coverage. We selected departments with a range of delivery models, including those with a significant number of devolved organisations and those with few. In the time available we were only able to access four departments: Health, Defence, Education and Communities and Local Government.

4 We analysed the Treasury's approval data to understand the prevalence of compromise agreements which are often associated with payments to individuals:

- We **interviewed staff in the Treasury Officer of Accounts team** to understand the central guidance and approach to approving special severance payments; the Treasury's governance arrangements over special severance payments; and how these arrangements are working in practice.
- We **reviewed central policy and guidance** on the use of special severance payments set out in *Managing Public Money*.

- We **analysed documentary evidence** from the Treasury to compile data on the number and value of special severance payments across government in the three years from April 2010. We excluded cases that were not special severance cases, such as personal injury claims or claims relating to the changes to the Civil Service Compensation Scheme rules.³⁷

5 We assessed departments' governance arrangements and their use of special severance payments:

- We **reviewed departments' policies and guidance** on the use of special severance payments and compared it to the Treasury guidance for consistency.
- We **interviewed department staff** involved in setting policy and approving special severance payments in the Department for Communities and Local Government, Department for Education, Department of Health, and the Ministry of Defence. The Department for Culture, Media & Sport would not make staff available to us during the course of our fieldwork.
- We **interviewed staff from Monitor** involved in overseeing special severance payments for NHS foundation trusts. **NHS England** responsible for Clinical Commissioning Groups could not make staff available during the course of our fieldwork.
- We **interviewed staff from** Advisory, Conciliation and Arbitration Service (ACAS), Association of Local Authority Chief Executives (**ALACE**), Society of Local Authority Chief Executives (**SOLACE**) and the Audit Commission to understand the local government context.
- We **reviewed 602 special severance approvals** across the four departments. We reviewed the business cases submitted to the Treasury from the four departments to quantify the number and value of approved severance cases. We did not re-perform the departments' or the Treasury's assessment of whether the business case represented value for money. We checked whether legal advice was sought and took assurance from this that the amounts requested appeared reasonable given the likelihood of winning the case and the likely damages. We did not form any judgement on the advice given.
- We **analysed information in the public domain** on the use of special severance payments in local government.

³⁷ A number of cases within the Treasury's files related to amendments to the Civil Service Compensation Scheme (CSCS) which provides compensation for loss of office for reasons including compulsory and voluntary redundancy. In July 2009, the Government set out proposals to reform the scheme. In February 2010, the Cabinet Office announced a modified set of proposals on which it had reached agreement with five of the six civil service unions. The CSCS was amended accordingly. The largest union, the Public and Commercial Services Union (PCS), opposed the changes and applied for judicial review. On 11 May, the High Court ruled in favour of the PCS. The amendments to the scheme were quashed, with the exception of certain changes to address elements considered age discriminatory. Where it was obvious that the case related to this change, we have chosen to omit the cases.

6 We assessed departments' policies on the use of confidentiality clauses and how they work in practice and looked more widely at transparency over the use of special severance payments:

- We **reviewed departments' policies and guidance** on the use of confidentiality clauses.
- We **reviewed 50 compromise agreements** to identify how policies had been applied in practice. This sample covered payments to individuals within the core department, their agencies and arm's length bodies, and included staff of different grades and length of service. As this was a purposive sample our findings cannot be generalised across all special severance payments.
- We **analysed information reported in the public domain** on the use of confidentiality clauses.
- We **spoke to a number of individuals** to understand their experience of signing or being asked to sign a compromise agreement.
- We **engaged legal advice** to understand the law governing confidentiality clauses and whistleblowing.
- We **reviewed our own governance arrangements** on special severance payments.

Our experience in accessing data as part of this investigation

7 This is the first of a number of risk-based investigations which we aim to conduct quickly. We communicated our scope and timetable to our nominated departmental contact points, and to their finance directors (with the exception of the Department of Health). Unfortunately, some departments did not respond promptly to our requests, and were delayed by their legal teams' questioning of our access rights. The Department for Culture, Media & Sport requested not to be involved in this piece of work, a position which could not be resolved until after our fieldwork window had closed.

8 We found it challenging to gain a complete picture of the use of confidentiality clauses as, by their nature, they are not openly discussed. Our work was also hampered by incomplete records, and access to data as outlined above. It took several attempts to identify the appropriate individuals within departments responsible for compromise agreements and the associated payments. We experienced delays in receiving data, and what departments provided was frequently incomplete or in a format that was difficult to collate and analyse.

9 Given the innovative nature of this work, some initial difficulties were anticipated. We will continue to work with departments, the Treasury and Cabinet Office to explore ways in which we can obtain the evidence on a timelier basis. It is important that departments are able to respond more quickly to these investigations in the future.

Appendix Two

Treasury Solicitor's Department (TSol)'s precedent confidentiality clauses for use in termination cases

1 TSol is an Executive Agency acting under the remit of the Attorney General, it is separate to the Treasury and the Chancellor of the Exchequer.

2 In cases which TSol is instructed to draft a confidentiality clause and/or non-derogatory clause which is to bind the employee in a compromise agreement arising out of the termination of employment, it will consider using the following precedent clauses which will be adapted as appropriate.

TSol's precedent confidentiality clause in a compromise agreement

3 The Employee agrees that s/he will continue to be bound by the terms and conditions of his/her employment and keep confidential and strictly secret and not use or disclose or attempt to use or disclose to any person or entity (orally, in writing or by any form of publication), any confidential information which the Employee has received or obtained during the course of the employment.

The Employee undertakes to the Employer:

- to keep the existence, negotiation and terms of this agreement confidential except to the Employee's professional advisers, immediate family or where required by law. The Employee agrees to procure that the Employee's professional advisers and immediate family comply with the terms of this agreement as if they were a party to this agreement. [In the case of the Employee's Trade Union representatives, the fact of and terms of this agreement can only be disclosed to the extent required by the union rules so long as those rules only require disclosure to union officials or advisors and not to the wider union membership]; and
- not to make or publish nor cause to be made or published, whether in writing or otherwise, any statement which is derogatory, defamatory and/or disparages or is intended to disparage the reputation of the Employer or any other Government Department or Agency or the Crown or any of its or their employees, officers or agents.

TSol's precedent confidentiality clause in a COT 3 agreement

- The parties agree that the terms of this settlement shall remain confidential. The Respondent shall not disclose its terms save as necessary for management purposes or as may be required by law. The Claimant shall not disclose its terms save as is necessary to his/her immediate family, professional advisers or as may be required by law. The Claimant agrees that before making any such disclosure to any third party s/he will ask them to also keep the facts of the terms of this Agreement confidential.
- 4** From 30 April 2013, where TSol is instructed to include a confidentiality clause, its precedent now states "For the avoidance of doubt S43J of the Employment Rights Act 1996 applies in relation to protected disclosures as defined by s43A of that Act".

Appendix Three

Case studies – Business cases relating to the period from 1 April 2010

1 The following case studies were selected as illustrative of some of the wider issues identified across government. They are based on business cases submitted to the Treasury and, where possible, supported by information drawn from compromise agreements selected from our four case study departments.

Case study 1

Department of Health

The organisation lost confidence in a senior individual's ability to perform their role and wished to recruit someone new as soon as possible. The employer felt that following internal performance management procedures would cause delay so they redeployed the individual to a newly created role, on the understanding that this would be a fixed term contract for one year after which the employee would leave.

Key facts

Length of service	6 years
Reason for payment	Additional pension payment

Approved special severance payment

£4,030

Confidentiality clause

No mention of a confidentiality clause

Observations

No approval was required for the individual's salary for the year-long fixed term appointment. In addition for the £4,030 payment, the employer also applied for approval for paying costs of outplacement support and training (up to £6,000) during the fixed term appointment, to assist the employee in identifying a new job for the end of the year, the Treasury stated that these costs did not require approval.

Case study 2

Department of Health

Following the closure of a Primary Care Trust (PCT), responsibility for remaining employment issues passed to the Department. Before closure, the PCT agreed a severance package with an individual without seeking Treasury approval. When this came to light, the Department applied for approval but this was not granted on the basis the settlement did not represent value for money, and the payment was not made.

Key facts

Length of service	Not known
Reason for payment	Severance settlement

Approved special severance payment

Not approved (£30,000 requested)

Confidentiality clause

The business case contains an assurance that the compromise agreement will “not contain a gagging clause”.

Observations

The closing PCT’s legal advice stated that approval was required from both the Department and the Treasury, however it was not sought. The case only came to light when the financial obligation passed to the Department on the closure of the PCT.

The £30,000 for which approval was sought only represents half of the total severance package. The other £30,000 was to be paid by a local government organisation and therefore, there was no need for approval. The total settlement included a contractual element in lieu of notice (£8,314).

Case study 3

Department for Education

Following a political change of direction for the employer, the employee expressed a wish to end their employment. The employer agreed this to be mutually beneficial and the employee resigned with immediate effect. The employer wished to make a compensation payment to mutually agree the resignation, and to minimise the legal and reputational risks arising from it.

Key facts

Length of service	2 years
Reason for payment	Compensation on resignation and as consideration for a compromise agreement (equivalent to three months’ pay)

Approved special severance payment

£15,000

Confidentiality clause

In consideration of the sum received under the compromise agreement, the employee will agree to make no comments that will adversely affect the reputation of the employer, to keep confidential all information in relation to the compromise agreement and the termination of their appointment, and to forego any legal claims they could have against the employer.

Observations

None.

Case study 4

Department for Education

In this case, the employer had concerns about the capability of the individual to perform their role in the context of restructuring within the Department. The employer had the option to manage the exit through an existing voluntary exit scheme, but wished to terminate the employment as soon as possible so agreed an earlier leaving date with the employee in return for a special severance payment.

Key facts

Length of service	5½ years
Reason for payment	To terminate employment as soon as possible

Approved special severance payment

£137,112 (of which £69,500 is contractual notice pay)

Confidentiality clause

Standard TSol clause (including a £200 consideration).

Observations

The confidentiality clause reflects TSol's standard wording of such clauses up to 1 April 2013.

Case study 5

Department for Communities and Local Government

In this case, an arm's length body was being wound up and the framework contracts were transferring to a new organisation. None of the existing roles were expected to map directly into the proposed structure of the new organisation. All the transferring staff were effectively at risk of redundancy and would have to apply for positions in the new structure or be made redundant. Five staff indicated that they did not want to transfer but were reluctant to jeopardise any potential redundancy payment to which they would not be entitled if they did not transfer. The five were offered a compromise agreement option to help facilitate the process.

Key facts

Reason for payment	Five employees signed compromise agreements rather than TUPE to new organisation
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Approved special severance payment

Total severance package £49,000

Confidentiality clause

The confidentiality clause includes the nature and terms of the agreement, any information gained during the course of their employment, and extended to immediate family members.

Observations

Retrospective approval sought to regularise the expenditure following concerns the National Audit Office raised upon audit of the accounts. At the time of agreeing the payments, the employer believed that the payments were being made within their delegated authority. The Treasury granted retrospective approval.

Case study 6

Department for Communities and Local Government

The employee lodged a claim for disability discrimination citing claims that the Department failed to provide reasonable adjustments. While on long-term sickness absence unrelated disciplinary issues were discovered and a charge of gross misconduct was made. As the employee was deemed too unwell to engage in work-related matters, the Department was forced to postpone the gross misconduct hearing until the employee was well enough. This charge was still outstanding when the Department decided, partly for reputational reasons, that it provided better value for money to settle the case prior to the employment tribunal hearing.

Key facts

Reason for payment Disability discrimination

Approved special severance payment

Three months' salary (payment in lieu of notice) plus ex-gratia payment of £40,000.

Left on voluntary redundancy terms (no details given as to the severance package as it is contractual).

Gift of an orthopaedic chair, colour printer and docking station, any stationary and IT equipment the employer has not requested to be returned.

Confidentiality clause

The confidentiality clause reflects TSol's standard wording of such clauses up to 1 April 2013.

Observations

The Department believed that it had a relatively strong case and should the employee not accept settlement, their intention was to fight the case to its full conclusion.

Case study 7

Ministry of Defence

The employee submitted an employment tribunal claim alleging indirect sex discrimination in relation to the Department's selection process for temporary promotion. An independent review found that the employee had been treated unfairly and legal advice was that the Department should endeavour to settle the claim.

Key facts

Reason for payment To avoid an employment tribunal following claims of sex discrimination

Approved special severance payment

£12,000

Confidentiality clause

The clause contains a non-derogation requirement of the claimant and the respondent, and also that the "claimant undertakes that [they] will keep confidential and not disclose or discuss the circumstances leading up to raising the Tribunal Proceedings with any person or organisation except [their] legal and other professional advisors, her spouse, or save as may be required by law."

Observations

None.

Case study 8

Ministry of Defence

The individual claimed that the Department's attempt to make them redundant was unlawful and amounted to a dismissal. In addition to the unfair dismissal, the individual advised that they were claiming protected disclosure rights as they alleged they had raised issues regarding health, safety and medical governance standards.

Key facts

Reason for payment Unfair dismissal

Approved special severance payment

£11,000

Confidentiality clause

The business case states that if the individual agrees to the settlement, they would be required to sign a non-disclosure agreement.

Observations

The Department could not provide a copy of the compromise agreement related to this case.

Case study 9

Department for Education

In this case, the payment was made to an academy employee for compensation on loss of office. The rationale was that the settlement provided value for money because the wording of the compromise agreement avoided the costs of defending the claim to an Employment Tribunal and the costs of an investigation into complaints raised by the employee.

Key facts

Reason for payment Compensation for loss of office

Approved special severance payment

£45,000

Confidentiality clause

This case was not one of our sample so we have not seen the associated compromise agreement.

Observations

This case was one of 14 cases identified by the YPLA where academies had made extra-contractual payments which should have been approved by the Treasury, outlined in Part Three. The Treasury has since authorised academies to make special severance payments of up to £50,000 without prior approval.

Appendix Four

Case studies – Individuals subject to confidentiality clauses

1 We spoke to the following individuals during the course of our work. They were prepared to talk about the circumstances leading up to receiving an offer of a compromise agreement. We present the following cases as examples of how the individuals felt, rather than to demonstrate the facts of the case. We have verified the facts of the case as far as reasonably practical.

Case study 10

In this case, the individual was suspended on full pay following an allegation from a colleague; charges were subsequently dropped but the suspension was not lifted and they remained suspended on full pay. When the employer refused to allow them to return to work, they took their employer to the High Court for a breach of contract. The claim was successful and the employer was ordered to allow them to proceed with an assessment to clear their name. The individual was cleared to return to work as a consultant but was offered only a junior position, which they refused. The employer continued to pay them the full salary, without allowing them to work, for around six years until their retirement. The individual lodged an employment tribunal claim for age discrimination and was successful. The employer was ordered to pay damages, which included exemplary damages. The employer offered the individual a compromise agreement, with a confidentiality clause, which was accepted.

Key facts

Length of service (years)	Unknown
Compensation payment	The confidentiality clause prevents the individual from discussing the terms of the financial payment.

Confidentiality clause

The confidentiality clause prevents the individual from discussing the terms of the financial payment or the wider financial costs incurred by the employer. These include legal costs, management time, and the costs of recruiting first temporary cover and then a permanent replacement to the role while still paying the individual's salary during the suspension. The individual raised with us concerns about these costs and the lack of accountability around them.

Case study 11

This individual worked for a council for 18 years. They took up a new post and became aware of financial mismanagement at the council. For the next five years they raised the issues internally including using whistleblowing procedures but without effect. They felt they worked in a culture of fear, complicity and collusion which made their experience particularly difficult. They subsequently resigned signing a compromise agreement with a severance payment. They said they felt gagged, but had no choice but to sign the agreement to draw a line under the issue as their emotional well-being was suffering. Upon reflection they felt they should have pursued their public interest disclosure and, two years later, they relinquished their anonymity and went to the media.

Key facts

Length of service	18 years
Compensation payment	Up to £50,000 (£500 for confidentiality).

Confidentiality clause

“The Employee agrees not to publicise any of [their] whistleblowing complaints by communicating them to third parties (including the press) but without prejudice to [their] right to report any allegations of criminal offences to the Police or other official bodies who are responsible for their investigation or prosecution and in consideration thereof the Employer agrees to make a payment of £500 (less tax and National Insurance contributions) to the Employee.”

Case study 12

The individual worked for a council for five years. They raised a grievance with their employer regarding what they felt was an inappropriate relationship between their manager and a colleague, which was impacting the working of the team and other people's careers. Due to the difficult working environment, the individual was diagnosed with work-related stress, which led to two extended periods of leave. The individual felt that their employer failed to respond appropriately to this diagnosis during this time. Around two years after lodging the grievance the council began disciplinary proceedings against the individual which led to charges of gross misconduct and suspension from work. The charges were later dropped and the individual was presented with the option to leave employment with the council and signed a compromise agreement. The individual commented on the distress caused by the lengthy and difficult process, for them and their family.

Key facts

Length of service	5 years
Compensation payment	Up to £10,000

Confidentiality clause

“The Employee agrees that [they] will not submit any request under the Freedom of Information Act 2000 or the Data Protection Act 1998.”

Case study 13

This individual worked as a consultant for a Primary Care Trust and wrote to senior managers in July 2006, warning that understaffing and poor record keeping posed a serious risk to patients' safety. In February 2007, the individual became unwell due to the workload and work-related stress (they felt bullied) and was signed off on special leave.

In the Summer of 2007, a locum doctor at the PCT saw an at risk child who subsequently died. The individual asserts that had record keeping been better and a named doctor responsible for child protection, the locum doctor would have had a more complete case history for the child and the death might have been averted.

In November 2007, the individual was offered £80,000 (a year's salary) to leave which they refused as their objective was patient safety, not financial gain; they remained on special leave. The offer had increased to £120,000 and the PCT advised the individual to take the money or face dismissal. The individual was presented with a draft compromise agreement and asked to sign a related statement that all their concerns had been addressed. The individual's legal representative advised them not to sign the related statement. In June 2011, following an independent investigation the hospital and PCT formally apologised. After a four year absence on full pay, in November 2011, the individual was reinstated.

The individual stated that their ability to make any public interest disclosure would have been severely hampered by the necessity to return all documentation, a requirement within the compromise agreement.

Key facts

Length of service	Three years before being asked to leave
Compensation payment	None, but £120,000 offered

Confidentiality clause

"The Employee agrees that [they] will not, directly or indirectly, make any detrimental or derogatory statements about matters concerning the Employer (including any detrimental or derogatory statements in relation to [their] employment about [the] PCT and [their] post at [the hospital] or its termination.

Nothing in this Agreement shall prevent disclosure by the Employee of information disclosed for the purpose of making a protected disclosure within the meaning of Part IVA of the Employment Rights Act 1996."

Observations

The compromise agreement does state that nothing in the agreement shall prevent a protected disclosure under PIDA. However, the emotional pressure the individual felt, combined with the non-derogation statement, and the parallel statement confirming all issues had been resolved, led the individual to feel that they would be "gagged", hence their refusal to sign the agreement.

Appendix Five

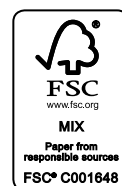
Previous NAO audit qualifications

Figure 14

NAO audit qualifications regarding regularity of severance payments

Year	Department	Nature of qualification
2012-13		At the time of publication, the 2012-13 accounts had not been signed.
2011-12	Department for Education and Young People's Learning Agency	<p>The C&AG qualified his audit opinion because the assurance framework was not designed to detect and manage all cases of spending which required approval under Treasury rules. The YPLA identified 14 cases, mainly from inspection visits, at nine academies, where the academies had made extra-contractual severance payments, which should have been approved in advance by the Treasury. The payments had an aggregate value of £227,000. Although the Treasury provided retrospective approval for these cases, it was unclear how many other special payments were made by academies this year. The assurance framework the YPLA had in place for the 2011-12 financial year was not capable of identifying and managing all cases, and so the Agency was unable to fulfil its responsibilities to gain appropriate Treasury approval.</p> <p>In addition, as YPLA are consolidated into DfE, the DfE accounts had their regularity opinion qualified.</p>
2011-12	The East of England Development Agency (EEDA)	The C&AG qualified his audit opinion because of irregular ex-gratia payments. EEDA paid staff bonuses of £500 each, which were in direct contravention of the pay remit. The bonuses totalled £51,000 and neither the Department for Business, Innovation & Skills nor the Treasury would give retrospective approval.
2011-12	Serious Fraud Office	The C&AG qualified his audit opinion on regularity as a result of severance payments made to the former Chief Executive. The SFO entered into a compromise agreement with the former CEO which provided for payments in respect of the CEO's departure. The agreement included a payment to MyCSP of £407,000 to cover additional pension costs arising from early departure and a special severance payment of £15,000. The C&AG qualified his opinion as there was no evidence that due process was followed in instigating the voluntary redundancy, no evidence that Cabinet Office approval was obtained in respect of the payment to MyCSP and no evidence that approval was sought from HM Treasury for the £15,000 special severance payment.
2010-11		There were no qualifications due to regularity in 2010-11.

Source: National Audit Office



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