



National Audit Office

Investigation

by the Comptroller
and Auditor General

Confidentiality clauses and special severance payments – follow up

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National Audit Office

Confidentiality clauses and special severance payments – follow up

Report by the Comptroller and Auditor General

Ordered by the House of Commons
to be printed on 8 October 2013

This report has been prepared under Section 6 of the
National Audit Act 1983 for presentation to the House of
Commons in accordance with Section 9 of the Act

Amyas Morse
Comptroller and Auditor General
National Audit Office

30 September 2013

This report presents the results of the remaining testing from our previous report. Our results should therefore be seen within the context of the previous report and the findings outlined here support our previous recommendations.

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Printed in the UK for The Stationery Office
Limited on behalf of the Controller of Her
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2594347 10/13 PRCS

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This report can be found on the National Audit Office website at www.nao.org.uk/2013-confidentiality-clauses-2

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Summary

1 On 3 July 2013, the Committee of Public Accounts heard evidence on confidentiality clauses and special severance payments across government.¹ The Committee requested another hearing to allow time for HM Treasury (the Treasury) to develop proposals for a framework, and for us to complete further work on the health; culture, media and sport; and defence sectors.

2 This report presents the results of our testing overall, including items that remained outstanding after our original publication. Our results should therefore be seen within that context and the findings outlined here support our previous recommendations (set out at Appendix One). Specific findings from our detailed testing highlight particularly the need for: better guidance on the use of confidentiality clauses and special severance payments; and improved transparency and oversight to identify and address patterns of behaviour.

Findings

3 The Treasury has approved some severance payments, where business cases refer to failure or inappropriate behaviour. The Treasury's guidance states that payments that reward failure, inappropriate behaviour or dishonesty should not be approved. Yet we found business cases referring to elements of alleged gross misconduct or staff harassment. These alleged behaviours do not meet the standards of the *Civil Service Code*.² Severance terms were approved because legal advice set out that the individual would be likely to win an award in an employment tribunal and settlements would probably be cheaper and quicker and therefore a better use of resources. This may be valid for individual cases, but it may not be true for the wider public sector. For example, alternative options (such as performance management or employment tribunals) may act as a deterrent or set a precedent to reduce future claims and costs (paragraphs 2.15 to 2.20).

4 We have found examples where severance payments were agreed in response to failure to comply with internal policies and procedures. In three cases in the defence sector, managers had not followed the internal policy in relation to the employment of staff. As a result, severance payments were approved to avoid claims for compensation (paragraph 2.26).

¹ Comptroller and Auditor General, *Confidentiality clauses and special severance payments*, Session 2013-14, HC 130, National Audit Office, June 2013.

² Cabinet Office, the *Civil Service Code*, January 1996.

Part One

Scope of our further work

1.1 On 3 July 2013, the Committee of Public Accounts (the Committee) heard evidence from HM Treasury, the Department of Health and NHS England about the results of our investigation into confidentiality clauses and special severance payments across government. At that hearing, the Committee requested a further hearing to allow time for:

- the Treasury to develop proposals for a single framework to ensure consistency and transparency of practice across the public sector; and
- the NAO to do further work on the health; culture, media and sport; and defence sectors.

Framework

1.2 The Committee asked the Treasury to return with proposals for a framework that allows Parliament to hold government to account on how it uses compromise agreements. The Committee asked the Treasury to explain how it would gain assurance about consistency of use and transparency in the public sector. This should cover local government, NHS bodies and private sector bodies that provide public services. The Committee asked the Treasury to consider:

- public reporting requirements for, and central recording of, special severance payments and compromise agreements;
- how to ensure that expenditure provides value for money and stands up to public scrutiny;
- the risk that confidentiality clauses are used to prevent people disclosing matters of public interest, particularly by public bodies looking to cover up their failures;
- governance arrangements with clear responsibilities and independent accountability for policy and decision-making throughout the delivery chain; and
- monitoring trends within bodies and across sectors, as information about compromise agreements could warn of failures, particularly in local services.

1.3 We have discussed with the Treasury and the Cabinet Office initial proposals for this framework, and will continue to consult with them so that it addresses the requirements that have been set out.

1.4 At the Committee's request, we performed follow-up work on the health; culture, media and sport; and defence sectors. This follow-up investigation was designed to examine the departmental policy and practice on using confidentiality clauses and special severance payments. We reviewed central and departmental guidance, interviewed departmental and HM Treasury staff, reviewed board minutes and departmental risk assessments, and extracted and analysed data.

1.5 This follow-up report presents the results of our work that remained outstanding after our original publication. Our results should therefore be seen within that context and the findings outlined below support our previous recommendations.

Part Two

Summary of our results

2.1 In this part, the follow-up report presents:

- a summary of our findings overall; and
- a commentary on our results for the health; culture, media and sport; and defence sectors.

Summary findings

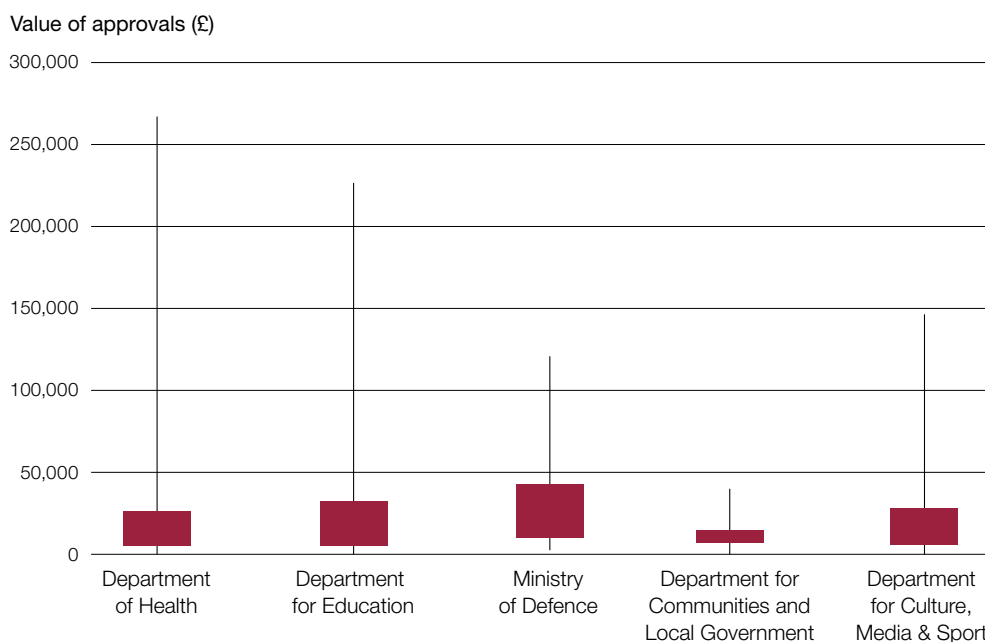
2.2 **Figure 1** overleaf shows the updated range and distribution of approvals across our case study departments after including data from the Department for Culture, Media & Sport and its associated bodies. It continues to show a high proportion of approvals at the lower end of the cost range. For the Department for Culture, Media & Sport and its associated bodies, half the approvals were between £6,525 and £28,496. This is similar to those at the Department of Health and the Ministry of Defence.

2.3 Departments could not say how many severance payments were associated with confidentiality clauses or what the clauses said. We originally asked departments for 72 agreements but could only review 50.³ We selected an additional 19 cases from the culture, media and sport sector. We also asked the Ministry of Defence and the Department of Health for the compromise agreements that they could not give us in time to meet our previous publication deadline.

³ Comptroller and Auditor General, *Confidentiality clauses and special severance payments*, Session 2013-14, HC 130, National Audit Office, June 2013.

Figure 1

Range of approvals in our five case study departments and their associated bodies



Notes

- 1 The line represents the range of approvals within each department, and the box shows the spread within which 50 per cent of approvals lie.
- 2 The Department of Health, the Department for Education, the Ministry of Defence, the Department for Communities and Local Government and the Department for Culture, Media & Sport took part in this review.

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

2.4 We reviewed the compromise agreements and considered whether the related confidentiality clauses would restrict the individual's rights under the Public Interest Disclosure Act (PIDA).⁴ We have presented the combined results of our original and follow-up work in **Figure 2**.

2.5 Including the results of our original investigation and follow-up work, we reviewed 95 cases across five departmental groups with a total value of £3,368,306. Within the 95 cases, 84 contained compromise agreements. Within these 84 compromise agreements, we found that 74 (88 per cent) contained a confidentiality clause preventing a person from disclosing the existence and terms of the agreement, and 31 (37 per cent) had clauses not to disclose confidential information obtained during employment. Thirty-seven agreements (44 per cent) had a clause prohibiting a person from publishing derogatory, defamatory or disparaging statements about the employer and 23 (27 per cent) contained a mutual clause in respect of the employee. Two agreements had provisions that might be considered 'gagging' clauses.

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

Figure 2

Departments' use of confidentiality clauses

Departmental group	Cases reviewed ¹	Compromise agreements reviewed	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	9 ²	9 (100%)	6 (67%)	1 (11%)	0 (0%)	0 (0%)
Education	18	18	17 (94%)	6 (33%)	6 (33%)	0 (0%)	1 (6%)
Health	23	21 ³	21 (100%)	10 (48%)	17 (81%)	0 ³ (0%)	11 (52%)
Defence	25 ⁴	20	16 (80%)	3 (15%)	6 (30%)	0 (0%)	5 (25%)
Culture, Media & Sport	19	16 ⁵	11 (69%)	6 (38%)	7 (44%)	0 (0%)	6 (38%)
Total	95	84	74 (88%)	31 (37%)	37 (44%)	0 (0%)	23 (27%)

Notes

- 1 This includes documents requested of departments, all of which have now been received, and further agreements obtained from the Treasury's files.
- 2 The Department for Communities and Local Government (DCLG) confirmed that no compromise agreement existed for one item.
- 3 Two health cases had no compromise agreements as they were settled by employment tribunals. Two agreements had provisions that might be considered 'gagging' clauses but in one of these there was no evidence that the claimant was a whistleblower.
- 4 The Ministry of Defence (MoD) provided 15 agreements and confirmed that further compromise agreements were obtained from the Treasury's files. Three of these cases relate to an arm's-length body no longer sponsored by the MoD – of which, one case was approved after the body transferred from the MoD.
- 5 In two Department for Culture, Media & Sport (DCMS) cases there were no compromise agreements, while in one further case DCMS could not confirm whether there was a compromise agreement as the entity in question no longer exists.

Source: Communities and local government; education; health; culture, media and sport; and defence sector case files

Sector results

2.6 In the following sections, we discuss our work for the follow-up review, namely: the health; culture, media and sport; and defence sectors only. We do not repeat here the results of our previous work, which we set out in our original report.

The health sector

2.7 During our original investigation, the Department of Health (DoH) could not provide compromise agreements for ten special severance payments made by NHS trusts. Following the hearing, the DoH wrote to trusts asking for the agreements associated with these payments. The trusts provided nine agreements and the DoH confirmed that no agreement had been signed in the remaining case as this was settled by an employment tribunal.

2.8 All of the agreements contained confidentiality clauses. None of the agreements we reviewed would prevent the employee from whistleblowing, and some explicitly acknowledged the employee's rights under the Public Interest Disclosure Act. However, we received two agreements that included clauses where the employee agreed not to pursue further complaints with a number of organisations, including the Care Quality Commission and the Department of Health. There is a risk that clauses like these might discourage the employee raising genuine concerns about service failure with the appropriate oversight bodies. One case involved an employee who had previously reported concerns about fraud and patient safety (**Case study 1**). In the other case, there was no evidence that the employee was a whistleblower. It is not clear from the papers that we reviewed why such clauses were considered necessary.

Case study 1

Clauses suggesting further grievances or complaints could not be pursued with other organisations

A manager in a hospital reported concerns about fraudulent behaviour and risks to patient safety arising from the behaviour of their colleagues. One colleague then reported concerns about the manager's own behaviour. The hospital investigated both allegations and, following the hospital's investigation, the manager was dismissed.

A month later, an interim employment tribunal ordered the hospital to restore the manager's contract of employment pending a full hearing. However, internal restructuring meant that the manager's post no longer existed. The hospital and the manager negotiated terminating the manager's employment with a settlement agreement, which included a confidentiality clause.

The agreement states

"[the Employee] will not bring or pursue any further internal complaint or grievance with the Employer in connection with any aspect of the Employer's business which the Employee is aware of as at the date of this agreement, whether in accordance with the Employer's grievance procedure or otherwise, or bring or pursue any further complaint or grievance against the following organisations in connection with any aspect of the Employer's business which the Employee is aware of as at the date of the agreement:

The Information Commissioner; The Care Quality Commission; The Audit Commission; NHS London and/or; The Department of Health."

The agreement made it clear that the manager could continue to be involved in the investigation related to their complaint, which was ongoing at the time of the settlement.

Source: Health sector compromise agreement

The culture, media and sport sector

2.9 The annual number and value of approvals for the Department for Culture, Media & Sport and its associated bodies over three years from 2010-11 to 2012-13 has ranged from 16 approvals to 22, with a total annual value of £0.3 million to £0.7 million (**Figure 3**).

The Department's governance arrangements

2.10 The Department for Culture, Media & Sport (DCMS) completes risk management reviews throughout the year across the departmental group. Its framework includes assessing each entity's financial, legal, operational, organisational and reputational risk. However, it does not have arrangements in place to monitor compromise agreements or whistleblowing cases as these are considered infrequent. We found that the framework responds to changes in the risk profile of a particular entity, but does not always identify issues before they become a problem.

The core department

2.11 The Department's Human Resources (HR) team handles all compromise agreements for core departmental staff. There have been three departmental cases since April 2010. DCMS seeks Treasury approval for special severance business cases, and handles negotiations over the final agreements and settlements itself. The HR director signs off business cases and agreements on behalf of the Department, although the Remuneration Committee reviews cases involving senior staff.

Arm's-length bodies

2.12 Within an overall accountability framework, DCMS delegates responsibility for propriety, regularity and value for money to the accounting officers of the arm's-length bodies. These responsibilities are set out in the management agreements between the Department and the arm's-length bodies and *Managing public money*,⁵ which mentions arrangements for special severance business cases. The Department's arm's-length body team monitors special severance cases and asks the Treasury to approve them. Arm's-length bodies handle compromise agreements directly with the claimant; however, the central team does not monitor them.

Figure 3

Special severance cases approved for the Department for Culture, Media & Sport sector

	2010-11	2011-12	2012-13	Total
Number of approvals	22	18	16	56
Total value of approvals	£329,755	£403,675	£671,661	£1,405,091

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

⁵ HM Treasury, *Managing public money*, July 2013, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf

2.13 At the beginning of this review we drew up a questionnaire for the DCMS's arm's-length bodies to complete. The Department circulated our questionnaire to an agreed list of ten arm's-length bodies within its departmental group. This asked about internal governance arrangements for compromise agreements. The arm's-length bodies told us that none of them had a policy on using compromise agreements as, in their experience, special severance payments were rare. They said that only accounting officers or chief executive officers could approve compromise agreements, after a member of an executive committee had reviewed them. If the accounting officer became the subject of a special severance case, they told us that the chair of the board would be involved in approval.

A sample of cases

2.14 We selected 19 cases of special severance payments from the Treasury's files, with a total value of £818,963,⁶ all of which related to arm's-length bodies. Agreements were provided for 16 cases and the Department confirmed that no agreements were signed for two of the cases. The one remaining case related to an arm's-length body that no longer exists and the existence of a compromise agreement could not be confirmed. Of the 16 agreements we reviewed, 11 contained confidentiality clauses. None of the agreements we reviewed would prevent the employee from whistleblowing. One of the agreements explicitly referred to the employee's rights under the Public Interest Disclosure Act.

Rewarding failure

2.15 The Treasury's *Managing public money*⁷ requires departments to seek Treasury approval before they make any severance offers, whether oral or in writing. The guidance emphasises that severance payments "should not be treated as a soft option, e.g. to avoid management action, disciplinary processes, unwelcome publicity or reputational damage". The guidance goes on to provide a template for bodies to complete when seeking approval from HM Treasury.⁸ This states that applicants "should be aware that [the Treasury] cannot approve special severance payments that reward, or will be seen to reward failure, dishonesty or inappropriate behaviour".

2.16 The Treasury's guidance does not define *failure* or *inappropriate behaviour*. However, the *Civil Service Code*⁹ sets out expectations for civil servants' behaviour. Officers should:

- "always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings;
- carry out your fiduciary obligations responsibly (that is make sure public money and other resources are used properly and efficiently);

⁶ This figure represents the approved value. The final settlement could be lower.

⁷ See footnote 5.

⁸ Available at: www.gov.uk/government/publications/template-for-hm-treasury-approval-for-special-severance-cases

⁹ Within the culture, media and sport sector, arm's-length body staff are not defined as civil servants. However, arm's-length bodies are expected to observe civil service principles.

- deal with the public and their affairs fairly, efficiently, promptly, effectively and sensitively, to the best of their ability”;

and should not:

- “misuse [their] official position, for example by using information acquired in the course of official duties to further [their] private interests or those of others; or
- act in a way that unjustifiably favours or discriminates against particular individuals or interests.”¹⁰

2.17 Four out of the 19 cases we tested in this follow-up review involved examples of alleged *failure or inappropriate behaviour*. The Treasury approved all of these special severance payments, with a combined value of £251,000, despite references to performance and behaviour issues in the business cases (**Figure 4**). The related correspondence between the Treasury and the Department often reflected the complicated nature of most of the cases.

2.18 The Treasury considered due process, the chances of success at an employment tribunal and the cost of litigation when deciding whether to approve special severance business cases (**Case study 2** overleaf). Performance and behaviour were relevant factors when considering whether to approve special severance payments, although they may not have been relevant when assessing the value for money of the payment.

Figure 4

Culture, media and sport sector cases citing alleged failure (or poor performance) or inappropriate behaviour

Type of behaviour	Extract from the Treasury business case
1 Failure	“Concerns included potential breaches by the claimant of [the arm’s-length body’s] health and safety and contractor management procedures, the claimant having potentially led the [arm’s-length body] to commit contractual breaches.”
2 Failure	“There were concerns with [the individual’s] performance as [the individual] was not producing the work when requested and [the individual’s] relationships with a number of colleagues appeared strained.”
3 Inappropriate behaviour	“Following investigation and a disciplinary hearing [the individual] was found to have harassed the staff in question and was summarily dismissed.”
4 Failure	“Has not consistently demonstrated the behaviours, values and full commitment that are expected from a senior manager.”

Note

- 1 The Department told us that approval was granted in the first three cases following legal advice that there was a reasonable chance of the claimant being successful and taking into account the cost of litigation. The last was approved for operational reasons. We have not found evidence of incorrect decision-making given the merits of each case.

Source: Department for Culture, Media & Sport business cases sent to the Treasury between 2010 and 2013

10 See footnote 2.

2.19 The Treasury told us that where alleged behaviours do not meet the standards of the *Civil Service Code*,¹¹ settlement was not the Treasury's preferred option. In each case the Treasury approved severance because legal advice indicated that there was at least a 50 per cent chance of losing an employment tribunal case or because operational requirements were a priority. The Treasury considered such payments to provide value for money for the wider public sector.

Case study 2

Officer allegedly harassing staff

The individual was suspended pending an investigation into allegations of harassment towards members of staff. The disciplinary process upheld the allegations but found that due process had not been followed and therefore reduced the outcome to a final written warning. However, the hearing caused a breakdown in trust and confidence between the individual and a number of senior colleagues, and the arm's-length body decided to terminate the individual's employment.

Legal advice set out that the arm's-length body had a slightly less than even chance of winning a claim for unfair dismissal even though the arm's-length body believed that it had acted reasonably throughout. Legal advice estimated potential compensation and legal costs of some £80,000 due to the nature of claims made, the witnesses required and the likely length of any hearing.

The Treasury approved a special severance payment of £16,000 for this case.

Source: Department for Culture, Media & Sport arm's-length body business case

2.20 The table and case study above highlight cases from one departmental group. Our previous work in this area has noted that performance and behavioural issues exist in other departments.¹² However, we have not found evidence of incorrect decision-making, given the merits of each case, during this review.

The defence sector

2.21 The Ministry of Defence (MoD) acknowledged that the governance arrangements around severance payments were complicated and varied depending on the originating business area. In many cases the data we asked for resided in various locations.

2.22 For civilian cases, the MoD's business teams discuss severance cases with the Department's Legal Team. Once litigation has started, the business team will discuss further with the Treasury Solicitors (TSol) or other litigators, and where appropriate with the Civilian Human Resources Team, for advice on legal and process matters respectively. Once the director of resources gives approval, the Finance Team reviews the case papers on behalf of the accounting officer. Thereafter, the business case papers are sent to the Treasury for independent approval.

2.23 For service personnel, there are three key stages to approval. The arrangements differ between the services but include: seeking legal advice for a business case; approval by the director of resources or other delegated authority; and Treasury approval.

¹¹ See footnote 2.

¹² See footnote 3.

2.24 We selected 25 business cases for our original review relating to the defence sector. During our initial fieldwork, the MoD gave us the agreements accompanying six of these payments, and explanations for two cases. Following the session at the Committee of Public Accounts, we reviewed the remaining 13 special severance payments and where they existed, the associated compromise agreements. Supporting evidence for a further four cases came directly from the Treasury. None of the agreements we reviewed sought to prevent the employee from whistleblowing. One agreement explicitly referred to the employee's rights under the Public Interest Disclosure Act.

2.25 At the time of publication of this report, the MoD had started to analyse all its severance payments as a result of the first hearing. It planned to understand where these cases were originating from, to inform risk management across the MoD. It has published revised guidance on confidentiality clauses clarifying that they should not try to prevent individuals from making protected disclosures. The guidance now states that managers should seek legal advice before finalising any agreements.

Payments for non-compliance with policies or procedures

2.26 In three cases, accounting for approved payments of up to £42,000, managers had failed to follow the Department's internal guidance in relation to the employment of staff. Following legal advice, the MoD awarded special severance payments to avoid possible compensation claims **Case study 3**.

Case study 3

The Ministry of Defence's severance payment to a contractor

The individual had been a contractor in the MoD as a practice nurse for ten years. The MoD has specific internal guidance for managers in relation to contractors.

The individual's Commanding Officer had not followed this guidance, and made arrangements that were not appropriate for a contractor. The Department attempted to rescind an offer only to find the individual had started legal proceedings against the Department. Following legal advice, a special severance deal was negotiated.

The Treasury approved the application on the basis of financial value-for-money considerations.

Source: Ministry of Defence case files

Appendix One

Recommendations from our original report

- 1 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).
- 2 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.
- 3 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. The Treasury does not have an overview of how much compromise agreements are likely to cost in total.
- 4 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.

5 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.

6 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.



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Design and Production by
NAO Communications
DP Ref: 10253-001



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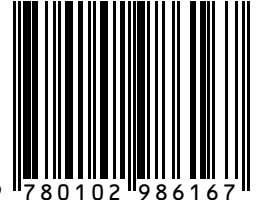
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ISBN 978-0-10-298616-7



9 780102 986167