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Open consultation

Annex C: Restriction of public sector exit payments: guidance on the 2019 regulations

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1. Introduction

This document (the guidance) is designed to be read alongside the 'Public Sector Exit Payment Cap Regulations 2019' (the regulations). The guidance sets out how relevant public sector employers are expected to implement the legislation, and should be used in conjunction with the separate mandatory HM Treasury directions which must be followed if relaxing the £95,000 cap on exit payments (the cap). Where there is any discrepancy between the regulations and the guidance, the regulations prevail.

The guidance and regulations do not replace existing regulations applying to the organisation's exit payments where these apply more stringent conditions than the regulations. However, the regulations do take precedence over existing contractual agreements, regulations and other exit schemes where they make more generous provision than allowed by these regulations, unless these arrangements are exempt in the regulations.

Definitions of relevant terms are set out in the Small Business, Enterprise and Employment Act 2015 (the 2015 act), as amended by the Enterprise Act 2016 (the 2016 act) and in regulation 3 of the regulations.

1.1 Intended audience

The main audience for this guidance are public sector employers in scope of the regulations and their employees.

1.2 Background

Exit payments are important to an employer's ability to reform and react to new circumstances. They are also an important source of support for employees as they find new employment or as a bridge until retirement age. However, these payments must be value for money and fair to the taxpayer.

In line with other decisions on financial management and pay policy, it is the responsibility of individual employers and departments to ensure that their exit payment arrangements are fair, proportionate and lawful.

The government enacted framework powers in the 2015 act (as amended by the 2016 act) to allow for a cap of £95,000 on exit payments in the public sector. Read the primary legislation in full (<http://www.legislation.gov.uk/ukpga/2016/12/contents/enacted/data.htm>).

The regulations set out the detail of the obligations on individuals and employers. The regulations also provide a list of the public sector authorities currently in scope of the policy.

This guidance may be updated from time to time, including if there are any amendments to the policy and legislation.

1.3 How to respond

This consultation will run for twelve weeks and will close on 3 July. Responses can be submitted online or sent by email to: ExitPaymentCap@hmtreasury.gov.uk with the subject heading 'Consultation on Exit Payment Cap'. Alternatively please send responses by post to:

Workforce, Pay and Pensions
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

2. Public sector bodies in scope of the regulations

The cap will apply to the whole of the public sector. In order to determine whether a body is 'public sector' for the purposes of the cap, HM Treasury will be guided by the Office for National Statistics (for National Account purposes) classification of bodies.

The government is undertaking a staged process of implementation across the public sector. The regulations are the first stage, capturing the majority of public sector employees. The regulations will be extended to the whole public sector in due course, subject to a limited number of exemptions.

The full list of bodies in scope of the regulations can be found in Schedule 1 to the regulations.

The following categories of public sector employer are within scope of the regulations where they fall within the responsibility of the UK government regarding their employment:

- the UK Civil Service, its executive agencies, non-ministerial departments and non-departmental public bodies (including Crown non-departmental public bodies and Her Majesty's Prison and Probation Service)
- the NHS in England and Wales¹
- academy schools
- local government including fire authorities' employees and maintained schools
- police forces including civilian and uniformed officers

Some bodies have more than one classification. For example, if an executive agency is also classified as a type of body not currently in scope of the cap such as a trading fund, it should not be captured during this round of implementation.

Where a body or office is not included in the schedule, there will be no legal obligation under the regulations to apply the cap to an exit payment. However, the government expects public sector authorities which are not currently listed to apply commensurate arrangements voluntarily, including relevant aspects of this guidance. The Armed Forces, the Secret Intelligence Service, the Security Service and the Government Communications Headquarters are exempt from this expectation, but must continue to make exit payments that are value for money and fair to the taxpayer.

The regulations cover exit payments made by English, Welsh and Scottish bodies except for payments made by a relevant Scottish authority as defined in section 153B(5) of the act (excluding payments made to non-Ministerial office holders and staff of the Scottish Administration, which are covered by the regulations) and relevant Welsh exit payments as defined in section 153B(6) of the 2015 act. Separate regulations and guidance may be issued by the appropriate devolved administration.

Machinery of Government changes sometimes involve the dissolution of a body and the transfer of its functions to a successor body or the merger of one body with another. At times new bodies may be created to deliver new services or perform new functions.

A newly created public sector body will not be in scope of the regulations until it is added to schedule 1. This is the case even where the new body is carrying out employment functions which used to be the responsibility of a body which was in scope of the regulations. However, it is the government's expectation that such bodies will apply their own commensurate arrangements voluntarily. It is the responsibility of government departments to inform HM Treasury of bodies which should be added to or removed from the regulations.

3. Payments

3.1 Payments in scope of the regulations

An exit payment is subject to the cap if it is the type of payment described in regulation 6(1) which is made in consequence of termination of employment or office whether or not a contract of employment applied. Regulation 6(1) lists the types of specific payment which are in scope of the regulations.

Under the regulations, 'salary' means the annual value of remuneration that the person was contractually entitled to receive for the salaried employment or office on the date they left. This includes any benefit in kind.

If there is any doubt about whether a payment falls within scope of the regulations, departments should consult their legal advisers.

HM Treasury's expectation is that an exit payment should be considered to have been received in full on the date the recipient's employment ended, or that person ceased to hold the office.

3.2 Calculating the capped amount

The regulations provide a standard legal underpin in respect of exit payments made by relevant authorities. However, they do not prevent those authorities from applying alternative contractual capping arrangements where those provisions go further than the regulations.

The exit payment cap applies to the total cost for the public sector employer, as calculated under normal processes. For example, in the case of a pension top-up payment, the capped amount may be the amount as calculated by the scheme actuary.

3.3 Payments out of scope of the regulations

Types of exit payments which are specifically excluded from the scope of the public sector exit payment cap are set out in regulation 7.

The exit payment cap only applies where there is an extra cost to the employer in relation to that exit. As such, payments – or elements within payments - that result from an individual's accrued right to a pension, including additional pension purchased with the individual's own monies, are not exit payments for purposes of the cap. For example, if an individual retires and receives a lump sum from their pension scheme, that lump sum is outside the scope of the cap if it is based on the pension entitlement that the individual had accrued in respect of their employment up to the time of their exit or that had otherwise been paid for by the individual.

However, pension 'strain' payments are within the scope of the cap. These are payments made by an employer as an additional contribution to a pension scheme in respect of an individual's exit, so that the individual receives a greater pension than they would otherwise be entitled to, that payment (sometimes referred to as a 'pension strain' payment) is within the scope of the cap.

Fire and Rescue Authorities (FRA) have discretion that allows them to remove the current commutation lump sum restriction of 2.25 x pension, which applies to firefighter members of the 1992 Firefighters' Pension Scheme who are under 55 years of age and have less than 30 years' service. Where a FRA exercises this discretion, it is required to make a payment equivalent to the additional amount to their pension fund account. These payments are to be exempt from the scope of the regulations as they do not fund an increase in the actuarial value of the firefighter's pension.

Therefore, regulation 7(c)(i) exempts payments made by a FRA to their pension fund account, where the FRA exercises its discretion to allow a firefighter (who is subject to the above 2.25 times pension commutation lump sum restriction) to commute up to a maximum of 25% of their annual pension for a pension lump sum. Effectively, this discretion aligns the commutation entitlement available to firefighters who are aged 55 or over, or who have accrued the maximum 30 years' service.

Payments made by FRAs to their pension fund account in respect of firefighters who are unable to maintain operational fitness through no fault of their own, and where the FRA has agreed to put into payment an authority initiated early retirement pension are also exempt. This will honour the government's previous commitment that firefighter members of the 2006 and 2015 Firefighters' Pension Schemes in these circumstances should be awarded an unreduced pension if they cannot be redeployed.

4. Employers' and employees' responsibilities

4.1 Public sector employers' responsibilities

A public sector employer subject to the regulations has a legal obligation to cap public sector exit payments at £95,000. However, as noted above, there are some payments outside the scope of the cap and there are some circumstances where the cap may be relaxed to allow payments that would otherwise be within scope. Further details on relaxing the cap are at section 5.

Exit payments often comprise a variety of payments, including elements such as payment in lieu of notice and pension top-up payments. The total value of the exit payments need to be calculated (measured in terms of current costs, for example when considering the value of extra continuing pension). Where the total would exceed the exit payment cap, the regulations prescribe the sequence in which exit payments will have been paid for the purpose of applying the cap (reg 5) - see 'Multiple exit payments' in section 4.2 below.

The government's expectation is that employment contracts, compensation schemes and pension schemes will be amended to reflect the introduction of the cap. For example, the pension strain cost for an employer required to fully buy out an actuarial reduction (that normally arises when a pension is taken before normal pension age, see section 3.3 above) may be capped. In such circumstances, the expectation is that pension schemes will provide members with options to use their own monies to make up any shortfall or to take a partially reduced pension.

Where the application of the cap would result in a relevant authority being unable to make a pension strain payment because of pension scheme rules (for example, the scheme has not yet been amended to allow for partial buyouts), it may instead pay the pension scheme member an equivalent cash sum. The aggregate of that cash sum and any other exit payments must not exceed the cap.

Employers must keep a record of exit payments made to an employee or office holder. Further detail on this is set out in section 4.3 below.

4.2 Multiple exit payments

When calculating whether an individual's exit payment should be subject to the £95,000 cap, employers must take into account all payments related to exit received by the individual within a 28 day period.

Where two or more relevant exits take place on separate days in any period of 28 consecutive days, the exit payments are treated as having been paid in chronological order for the purpose of calculating the cap. For example, where an individual leaves employment with authority A with an exit payment of £50,000, then leaves employment with authority B within 28 days, authority B should not make an exit payment in excess of £45,000. Section 4.6 sets out the individuals' responsibilities for informing employers.

Relevant authorities must ensure that an individual receives a redundancy payment that is at least equal to their minimum statutory entitlement under the Employment Rights Act 1996 (ERA 1996). Alternatively, if they are not eligible for statutory redundancy, then in certain circumstances, the relevant authorities must ensure an individual receives the equivalent of that entitlement as if the ERA 1996 provisions had applied.

As such, the regulations provide that an individual can receive a statutory redundancy payment or, where appropriate, its equivalent from a second relevant authority. This is even where the total received by the individual from the first and second authority exceeds £95,000.

Regulation 5 sets out the order in which exit payments will be treated as having been paid for the purpose of calculating the cap, where an individual leaves the employment or office of two or more qualifying public sector authorities simultaneously and the total employer funded exit payments exceed the cap.

Where a capped exit payment comprises several elements such as a contractual redundancy lump sum and a pension top up payment, it is for the responsible authority to establish how the elements are subject to the cap. However, individuals are entitled to receive the full sum of their statutory redundancy entitlement. HM Treasury's general assumption is that, where possible, employers will cap the contractual redundancy lump-sum, and allow individuals to receive the pension top up payment in full. However, the pension top up payment must be reduced if otherwise the total exit payment would be over £95,000.

4.3 Records and reporting

Whole of Government Accounts returns may request information relating to the exit payment cap, or any exit payments made by the relevant body, for later publication. Public sector employers are expected to cooperate in providing such information.

When a responsible authority caps an exit payment, it may wish to keep a record of that payment for public accountability purposes, however this is not required by the regulations. The regulations require records on relaxation of the cap to be maintained for public accountability purposes, and to provide the government or auditors with the information required to evaluate the operation of the policy.

Where the cap is relaxed in accordance with the separate HMT directions, the responsible body must keep a separate record of the exercise of the power. This record must be kept for a minimum of three years from the date the power is exercised, showing:

- the name of the payee in respect of whom the cap was relaxed
- the amount and type of the qualifying exit payment for which the cap was relaxed
- the date on which the power to relax the cap was exercised
- and the reason why the power was exercised (this should refer to the guidance and be sufficiently detailed to enable HM Treasury to assess if it has been appropriately applied)

4.4 Compliance

The relevant public sector employer is responsible for ensuring any exit payment made by their authority does not exceed the public sector exit payment cap. Any payment that exceeds the cap and is not compliant with the relaxation directions is considered to be a payment beyond the organisation's legal competence, which may result in sanctions on the organisation or, if appropriate, sponsoring department by HM Treasury.

Authorities that make payments in excess of the cap which are not compliant with the provisions in the direction must make a value for money assessment on whether to pursue civil repayment through the courts. This assessment must be agreed by the relevant Accounting Officer in line with their Accounting Officer responsibilities.

4.5 Transparency

Public sector bodies must publish information about any decisions to relax the cap. The government strongly recommends that public sector authorities publish such information in their annual accounts. At the end of the financial year, the responsible authority must publish a list of:

- the amounts and types of qualifying exit payments made by the responsible authority in respect of which the relaxation power was exercised in that financial year
- the dates on which that power was exercised
- and the reasons why that power was exercised

The reasons for exercising a power to relax the cap should relate directly to a relaxation category (see section 5 and the separate mandatory HMT directions). For example, 'personal hardship' would be considered a sufficient explanation for this purpose.

As in previous years, employers will be required to disclose in their annual accounts information about exit payments paid during the financial year. This disclosure includes details about the number of exit payments paid in bands from £0 to over £100,000.

Departments are expected to assure themselves that their arm's length bodies (ALBs) and non-departmental public bodies (NDPBs) are properly recording and holding information according to the requirements set out in this guidance.

4.6 Individuals' responsibilities

When an individual has two or more public sector employments or offices that are in scope of the exit payment cap they must inform all other relevant authorities:

- that they are entitled to receive an exit payment
- the amount and type of that exit payment
- the date that they left employment or office
- the identity of the relevant authority that made the exit payment

5. Relaxation of the cap

The government accepts that there will be some circumstances where it is necessary or desirable to relax the restrictions imposed by the regulations. Therefore, the regulations allow for relaxation of the cap in appropriate circumstances. This safeguard is in place for use in exceptional situations, including where imposing the cap would cause genuine hardship.

The power to relax restrictions in relation to exit payments may be exercised by a Minister of the Crown² unless the payment is:

- (a) a relevant Welsh exit payment (see below)
- (b) made by a relevant Scottish authority (see below)
- (c) made by a devolved Welsh authority³ (see section 5.1 below)
- (d) made by a local authority in England or the Greater London Council (see section 5.1 below)
- (e) made by a FRA

The regulations do not cover relevant Welsh exit payments, meaning payments to the offices listed in section 153B of the act⁴. Any power to relax restrictions in relation to these payments may only be made by Welsh ministers.

The regulations do not cover payments made by a relevant Scottish authority, namely the Scottish Parliamentary Corporate authority or any authority which exercises functions devolved to Scotland. Scottish Ministers may relax restrictions in relation to these payments except where payments are made to non-ministerial office holders and staff of the Scottish Administration, which will be covered by the regulations.

This section sets out the circumstances under the regulations where the cap can and must be relaxed, and explains the process for doing so. The separate mandatory HMT directions set down the legal framework for relaxation.

5.1 Process for relaxation of the cap under the regulations

Where the exit payment is made by a devolved Welsh authority, the power to relax restrictions is conferred upon Welsh ministers.

The Minister of the Crown's power to relax a restriction is delegated to the following delegated authorities:

- (a) The full council of a local authority in respect of exit payments made by local government bodies for which it has responsibility,
- (b) The London Assembly in respect of exit payments made by the Greater London Authority
- (c) The FRA in respect of exit payments made by that authority

The Minister of the Crown's power referred to in the second paragraph of this section including where that power has been delegated can be only be exercised either in compliance with the conditions set out in HMT directions (see below and separate HMT directions) or with the consent of HM Treasury (see below) with the exception of payments made by a devolved Welsh authority (see below).

HMT directions set out circumstances where the power to relax restrictions must be exercised ("mandatory cases") and may be exercised ("discretionary cases"). In discretionary cases, the relevant delegated authority must submit a business case to the sponsoring department for approval of the Principal Accounting Officer and the relevant minister before submitting the business case to HMT for approval. In mandatory cases, there is no requirement to send a business case to HMT for approval.

The Minister of the Crown or a delegated authority can relax the cap outside of the circumstances outlined in HMT directions only with HMT consent. In these exceptional cases, the relevant delegated authority must submit a business case to the sponsoring department for approval of the Principal Accounting Officer and the relevant minister before submitting the business case to HMT for approval.

As explained above, a Welsh minister has the power to relax the cap in relation to exit payments made by a devolved Welsh authority. This power is not subject to the requirement to relax only in compliance with conditions set out in HMT directions or with HMT consent.

Departments are expected to put in place and comply with relevant processes and procedures in relation to relaxation of the cap. These processes are expected to ensure decisions are made in a reasonable and timely fashion. Local authorities will be expected to follow any relevant guidance

issued by the Ministry of Housing, Communities and Local Government which puts in place such processes and procedures, and which will ensure accountability and transparency.

5.2 Scope of relaxation powers

The power to relax restrictions imposed by the regulations may be exercised in respect of individuals, or in very exceptional circumstances, in respect of a group of employees for example, where redundancies occur as a result of specific workforce reforms. This could include a relaxation to cover an entire organisation where, for example, that organisation is dissolved and an exit package is offered to its employees to incentivise individuals to stay with the organisation during the wind-down period.

Any relaxation of the cap for a group of individuals must be appropriate to the circumstances, in line with Managing Public Money requirements and follow the process set out above.

Relaxation is expected to be granted only in exceptional circumstances which meet the criteria in this guidance. All decisions should be supported by appropriate evidence, with an explanation of the business interests and a value for money assessment, and should be disclosed in the organisation's annual accounts as in section 4 of this guidance.

5.3 Mandatory relaxation

There are situations in which the power to relax the restrictions imposed by the regulations must be exercised. These are set out in the separate HMT directions.

- (a) Where a payment is made as a result of TUPE applying
- (b) Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of whistleblowing
- (c) Where a payment is made to avoid employment tribunal litigation in relation to a complaint of discrimination under the Equality Act 2010
- (d) Certain payments made by the Nuclear Decommissioning Authority

A. TUPE

Where an obligation to pay an exit payment arises as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

B. Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a whistleblowing complaint.

Whistleblowing is the term used when a worker passes on information concerning wrongdoing. The government believes that genuine whistleblowers are carrying out a service in the public interest, and that victimisation of a whistleblower is not acceptable. The government's guidance on whistleblowing emphasises that any instances of wrongdoing must be taken seriously and managed appropriately.

However, the government accepts that given the number and diversity of organisations in the public sector, there may be occasions where employers do not meet the standard expected of them. In such cases the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998) provides for the right for a worker to take a case to an employment tribunal if they have been subjected to a detriment at work or they have lost their job because they have 'blown the whistle'.

To be covered by whistleblowing law, a worker who makes a disclosure must reasonably believe two things. The first is that they are acting in the public interest. This means that personal grievances and complaints are not usually covered by whistleblowing law. The second is that the disclosure tends to show past, present or likely future wrongdoing falling into one or more of the following categories:

- criminal offences (this may include, for example, types of financial impropriety such as fraud)
- failure to comply with a legal obligation
- miscarriages of justice
- endangering someone's health and safety
- damage to the environment
- covering up wrongdoing in the above categories

The cap is not intended to inhibit protected disclosures, or to prevent such people from receiving an appropriate remedy from an employment tribunal; that is why awards from courts and tribunals are outside the scope of the cap.

In cases where an individual makes a disclosure covered by whistleblowing law, and has subsequently made a complaint that they have been dismissed or subjected to a detriment as a result of that disclosure, an employer must consider whether the employer and complainant should avoid litigation. In such cases, it may be appropriate to enter into a settlement or conciliation agreement involving an exit payment with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour, then the power to relax the restrictions imposed by the regulations must be exercised if the amount payable under the settlement agreement would otherwise lead to the cap being breached.

It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, the individual has made a disclosure covered by whistleblowing law and that an employment tribunal would find that

they had been dismissed or subjected to a detriment as a result of that disclosure.

Read further information about whistleblowing

(<https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers>).

C. Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a discrimination complaint.

Discrimination occurs where an individual is treated less favourably owing to:

- age
- gender reassignment
- being married or in a civil partnership
- pregnancy and maternity
- disability
- race including colour, nationality, ethnic or national origin
- religion, belief or lack of religion/belief
- sex
- sexual orientation

The government is committed to avoiding discrimination, but as with whistleblowing, acknowledges that with the number of organisations and people employed in the public sector that there may be occasions when discrimination occurs.

In cases where an individual makes a complaint that they have been subjected to a detriment or dismissed on discriminatory grounds, an employer must consider whether in their view the complaint is valid. As above, in such cases, it may be appropriate to enter into a settlement or conciliation agreement with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement involving an exit payment is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour then the power to relax the restrictions imposed by the regulations must be exercised as if the amount payable under the settlement agreement would otherwise lead to the cap being breached.

It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, that an employment tribunal would find that they had been a victim of discrimination.

D. Nuclear Decommissioning Authority (NDA): pension related payments paid upon redundancy

These payments arise from an obligation arising from a NDA group pension scheme and which satisfy the conditions outlined in paragraph 3.3 of HMT directions.

5.4 Discretionary relaxation

There are also situations where the power to relax the restrictions imposed by the regulations may be exercised at the discretion of the minister or delegated authority referred to above (in the second paragraph of section 5) where he/she is satisfied that it is appropriate to exercise the power on the basis of one or more of the following conditions:

- (a) there are compassionate grounds owing to genuine hardship
- (b) it is necessary to exit an individual to give effect to urgent workplace reforms
- (c) an arrangement to exit was entered into before the regulations came into force, but the exit was delayed until after that date and the delay was not attributable to the employee or office holder concerned

Where the Minister of the Crown or a delegated authority wishes to exercise this discretionary power, it must submit to HM Treasury for approval a business case approved by the relevant minister or the delegated authority.

A. Compassionate grounds owing to genuine hardship

The government believes that an exit payment of £95,000 should mean that there are few, if any, circumstances where the operation of the cap should lead to genuine hardship. However, where the person exercising the power to relax the cap is satisfied that there are exceptional circumstances, then it may be appropriate for the restrictions to be relaxed.

The circumstances that may be considered are not limited to the employee's own circumstances, and it may be appropriate to consider the position of family members. For example, where an individual is exiting the workforce and is not able to seek re-employment due to caring responsibilities.




B. To give effect to urgent workplace reforms

The government accepts that there may be instances where it is in the interests of urgent workforce reform to relax the restrictions imposed by the regulations. However, cases where it is appropriate to use the power in this way will be exceptional and a detailed business case will need to be prepared in support of any request for a relaxation on this basis.

C. An arrangement to exit before the regulations came into force

The regulations apply to any exit after the date that the regulations come into force, regardless of when any agreement to exit, or on the terms of an exit, were agreed. However, where an agreement between an employer and an employee was entered into in good faith with the intention that the employee would exit before the regulations came into force, and the exit is

delayed for reasons outside the employee's control, it may be appropriate for the restrictions imposed by the regulations to be relaxed. Circumstances where this is may be appropriate include where the employer asks the employee to remain in post for a longer period in order to complete a business critical project.

1. The 2015 act confers power to cap exit payments in the NHS in Wales, because the compensation schemes are not devolved to Welsh ministers. 
2. The definition of a Minister includes Secretaries of State, the Lord Chancellor, Ministers of State, Parliamentary Under Secretaries of State and Parliamentary Secretaries: section 8(1) of the Ministers of the Crown Act 1975. 
3. As defined in section 157A of the Government of Wales Act 2006. 
4. The offices are: member of the National Assembly for Wales; the First Minister for Wales; Welsh Minister appointed under section 48 of the Government of Wales Act 2006; Counsel General to the Welsh Government; Deputy Welsh Minister; member of a county council or a county borough council in Wales; member of a National Park Authority in Wales; member of a Fire and Rescue Authority in Wales. 