LOCAL GOVERNMENT AND ELECTIONS (WALES) BILL

Consultation response from the Association of Local Authority Chief Executives and Senior Managers

About ALACE

1.1 The Association of Local Authority Chief Executives and Senior Managers (ALACE) is a union that represents only the most senior managers in local government. We have over 300 members at director and chief executive level, across Great Britain, and many who work in councils in Wales. Most of our members are chief executives or senior managers who report to chief executives. However any officer who holds the statutory roles of chief finance officer (section151 officer), monitoring officer or head of democratic services is eligible for membership, regardless of their location in a council's structure.

1.2 ALACE welcomes the opportunity to provide the Equality, Local Government and Communities Committee with a response on those provisions of the Bill that affect the union's members. We would be pleased to supplement this with oral evidence if invited to do so.

Summary

ALACE has significant concerns about clause 28 which seeks to remove separate fees for returning officers at local elections, and the proposal to end such fees for Assembly elections. Salaries of relevant officers will need to be re-evaluated upwards if the current arrangements for fees are ended.

ALACE warmly welcomes clause 59, to require the appointment of a chief executive by each principal council.

We believe that consideration should be given to legislating so that the same officer cannot be the chief executive and chief finance officer (Schedule 5).

We strongly oppose clause 60(3), which provides for the possibility of publication of performance reviews of chief executives. No public employee should have his or her performance review published. The review should be confidential to members of the council and the chief executive.

We also call for the power of guidance in clause 60(5) not to extend to standards of performance.

In respect of creation of corporate joint committees, mergers and restructuring, we call for stronger provisions for consultation with unions that have members in the

relevant councils and stronger provisions to transfer staff. In particular, clause 127 should provide for all employees of merging councils immediately prior to the transfer date to be transferred to the new council.

Our detailed comments on these and other parts of the Bill are set out below.

Clauses 24 and 25

2.1 ALACE does not support the changes proposed in these clauses. They would avoid the jeopardy of an individual resigning employment when there is no guarantee that he or she will be successful in seeking election. ALACE recognises that the structure of unitary councils means that a significant percentage of local residents can be deterred from standing for election because councils are major employers in all areas of Wales. We welcome that the Bill preserves the position that an individual cannot be an employee and elected member of the same council. However we are not convinced that the provision made by clauses 24 and 25 is appropriate as it could give rise to potential internal tensions between an employee standing and a current councillor re-standing or a prospective new councillor, both during the election itself and later. We support the objection from the Welsh Local Government Association to the proposal. In our view, the benefits in promoting accessibility to office and a more diverse membership base are outweighed by the risks. Moreover when member allowances are set at half of the UK average salary and there is a guarantee of five years' remuneration only, standing as a councillor is unlikely to be an attractive career choice for the majority.

Clause 28

2.2 ALACE's position is that the role of returning officer is a weighty one, with significant personal responsibilities and liabilities that are faced (including personally defending any election petition). We welcome that the Bill does not make provision to require the chief executive to be the returning officer, retaining local flexibility.

2.3 The rate of remuneration for principal authority and community council elections should rightly be a matter for each principal authority to decide, as is the question of whether that remuneration should be separate from or be incorporated within the base salary of the individual's post. We do not support the purported intention of this clause which (according to paragraph 3.78 of the explanatory memorandum) seeks to remove the payment of fees to returning officers for local elections.

2.4 Leaving to one side that the clause might not have the intended effect, ALACE must register very strong concerns about the implications. If separate fees for local elections are to be removed, then it follows that there must be proper re-evaluation of salaries if the returning officer role at local elections is to be performed for nothing. Otherwise the impact would be that individuals would be paid less than they are now even though their work and responsibilities had not changed. This provision could therefore have additional financial implications because, following the re-evaluation of salaries, any increase in base salary could also attract employer's national insurance and pension contributions.

2.5 While it does not form part of the Bill, we note with even greater concern the proposal in paragraph 3.78 of the memorandum to remove the personal fee for returning officers at Assembly elections. ALACE and SOLACE members have made forceful representations to Welsh Government officials on more than one occasion in the past.

2.6 No council should be expected to provide a free returning officer service to a third party. It is a novel proposal that one body should require another body to conduct elections on its behalf and that the second body should not be able to recover its costs in doing so. In effect, it is suggested that a council employee would have to spend significant amounts of his or her employer's time running an election that was nothing to do with that council's services and responsibilities. At the very least, if the Welsh Government proceeds with this ill-considered proposal, it would have to accept that the Assembly should recompense councils for the time that their staff spend on returning officer duties for Assembly elections. This would in effect be an administrative charge.

2.7 We also consider that there are grave objections to expecting an individual – for no fee – to take on all the personal responsibilities associated with running an Assembly election, including responsibility for employing staff for the election. We believe that, if the personal fee is to be removed for Assembly elections, legislation should be changed so that many of these responsibilities become instead the duties of the Assembly or councils instead, so that the personal liabilities of a returning officer are scaled back to reflect the fact that they would no longer be reimbursed for the current range of personal responsibilities and risks**.**

Clause 59

2.8 ALACE warmly welcomes the provision made by this Clause. We believe that every council should have a chief executive who discharges the role of head of paid service currently provided by section 1 of the 1989 Act. We recognise that the Bill retains the functions of the head of paid service within a wider range of reporting duties set out in clause 59(3) and we support this approach.

Schedule 5

2.9 ALACE generally supports the amendments made by this Schedule. However we are concerned that paragraph 6 potentially widens the effect of the disqualification in section 1 of the 1989 Act. It uses the wording "*any* local authority" in the new subsection (1A) when at present the disqualification in subsection (1) relates to "a local authority". The definition of "local authority" in section 21(1) of the 1989 Act does not include community councils and therefore an individual in a politically restricted post may seek election to and be a member of a community council. We appreciate that paragraph 11 does not amend the definition of "local authority" in section 21, but feel that to avoid creating any doubt it would be preferable if subsection (1A) referred to "a local authority".

2.10 Paragraph 9(b) preserves the status quo in respect of preventing a chief executive from also being the monitoring officer. Section 5(1) of the 1989 Act prevents the chief finance officer from being the monitoring officer. However the Bill

still permits the chief executive to be the chief finance officer. ALACE's policy position is set out in the full statement that can be seen at this link:

https://alace.org.uk/wp-content/uploads/HoPS-S151-policy-position-2019-02.pdf

2.11 In summary ALACE contends, for good reason, that combining the two roles dilutes capacity and governance. For example, it would negate the consultation requirements in section 114 of the Local Government Finance Act 1988 (amended by paragraphs 3 and 4 of this Schedule), as the chief finance officer could not consult himself or herself if also holding the role of chief executive. Therefore we would invite consideration of whether the Bill should prevent an individual being both the chief executive and the chief finance officer.

Clause 60

2.12 We have significant concerns about this clause. The Welsh Government has not discussed the contents of the clause with ALACE even though it is the sole relevant trade union, as it provides the staff side of the Joint Negotiating Committee (JNC) for Chief Executives of Local Authorities. There has never been any proactive and meaningful discussion with ALACE by Welsh Government officials at any stage on these or other proposals which affect the contracts and remuneration arrangements for chief executives and other senior officers. For example, no contact was made with ALACE following publication of the Bill even though it directly (and, we would suggest, adversely) affects our members. We do not feel that this treatment conforms with the espoused Welsh Government position on trade union recognition and engagement. Chief executives are the core of the ALACE membership and our members feel that they are not being given equal treatment to other public sector employees – indeed the impression is that they are being singled out in this Bill and past legislation.

2.13 ALACE supports the need for all chief executives to have appropriate arrangements to review their performance on at least an annual basis. There are excellent examples across Wales where this currently happens, which involve robust appraisal arrangements, often with external and independent facilitation.

2.14 Our first concern is that, as drafted, it removes the flexibility for the review to be undertaken by anyone other than the senior executive member. Some councils choose to have the review undertaken by a small panel of members which can be drawn from more than one political group. This is particularly valuable in authorities which are in no overall control or which may experience frequent changes of control, as it ensures that politicians other than the senior executive member are involved in the reviews. Our members have reported examples in one council where the review is undertaken by the leader and deputy leader, but in the past was undertaken by four group leaders when there was a coalition. In another council, the review panel comprises the leader, deputy leader and leaders of opposition groups. Therefore ALACE seeks provision to allow the arrangements to specify that the review is undertaken by the senior executive member *or* by the senior executive member and such other members as are set out in the arrangements under subsection (1).

2.15 Second, while we have no concern about the report being shared with all members of a council under subsection (2)(d), there needs to be explicit provision that the report about the review shall be exempt from publication under paragraph 12 of Schedule 12A to the Local Government Act 1972. The report of the review plainly contains “information relating to a particular individual”.

2.16 ALACE therefore strongly opposes subsection (3) of this Clause. We are aware of no other provision that requires the performance review of a public sector employee in Wales to be capable of being published. No case has been made to single out chief executives of councils in this way, when performance reviews of chief executives of Assembly Sponsored Public Bodies and Health Boards, the Permanent Secretary of the Welsh Government or the Chief Executive and Clerk of the National Assembly for Wales are not also subject to a statutory provision that allows their publication. The solution is simple: subsection (3) should be removed, so that councils and their senior officers are not singled out for differential treatment. It would constitute an invasion of privacy between employer and employee if this provision remains on the face of the Bill.

2.17 ALACE is also concerned about the power for Ministers to give guidance under subsection (5). The concern arises from the statement on page 13 of the statement of policy intent that “The guidance may cover more detailed information *about the standards of performance required*, the monitoring process and areas where councils consider further clarity is required”. This would interpose Ministers for the first time in the performance management arrangements for an individual member of a council’s staff. However important the role of chief executive may be in a council, it seems to ALACE that the power to give guidance in such a way undermines the independence of local government in managing its staff and setting performance standards for them. We are not aware that any similar legislative provision applies to chief executives of Assembly Sponsored Public Bodies and Health Boards, the Permanent Secretary of the Welsh Government or the Chief Executive and Clerk of the National Assembly for Wales, and therefore ALACE cannot support subsection (5) as drafted. We note, for instance, that Clause 159 of this Bill does not amend section 8 of the Local Democracy (Wales) Act 2013 to provide Ministers with a power to give guidance about the standards of performance of the chief executive of the Local Democracy and Boundary Commission. We would urge consideration either that subsection (5) should be removed or that it should be restricted purely to guidance about process or other matters that are <u>not</u> about standards of performance.

Clause 61

2.18 We believe that chief executives in Welsh councils are subject to much wider transparency and statutory controls over their salaries than any other public servant in the United Kingdom. Clause 61 extends this further to embrace all aspects of remuneration. We are not convinced that this additional provision is necessary, when remuneration is already subject to disclosure and scrutiny through mechanisms such as pay policy statements under section 38 of the Localism Act 2011 and the annual accounts.

Clause 62

2.19 ALACE supports the changes made by this Clause, to require that decisions are taken by full council in the event that the Minister gives a direction. It is not appropriate that decisions about terms and conditions should be taken by an executive when section 112 of the Local Government Act 1972 is not an executive function.

Clauses 78(3) and 80(2)

2.20 We welcome the requirement in clauses 76, 78 and 80 for consultation with recognised trade unions about corporate joint committees. ALACE does not hold such status with any council. There may be other small unions that have members in principal councils but are not recognised. It would be helpful if Ministers would confirm that they would include all trade unions that have members in a relevant principal council as "appropriate persons" under clauses 78(3)(f) and 80(2)(f).

Clause 83

2.21 We welcome the provision made in respect of staff and the potential impact on them including the important application of TUPE by subsection (6). However provision under this clause is discretionary i.e. Ministers do not have to transfer staff to corporate joint committees and do not have to provide for compensation etc. We believe that it is unlikely that the creation of corporate joint committees would not be accompanied by the transfer of at least some staff. Therefore we would suggest that the legislation should be strengthened to require that, if staff are transferred by joint committee regulations, then the regulations *must* make provision about "other staffing matters (including remuneration, allowances, expenses, pensions or compensation for loss of office)" – in other words subsection (5)(e) should be mandatory in the same way as subsection (6).

Clause 123

2.22 We do not understand why there is no requirement on Ministers to consult when making merger regulations following voluntary decisions to merge by two or more principal councils. There is such a requirement in clauses 78 and 80 before making the much less significant joint committee regulations. If a consultation requirement similar to clause 78(3) is not included, then we would seek confirmation from Ministers that guidance under clause 122 would strongly encourage councils to include all trade unions that have members in a relevant principal council as "appropriate persons" in the consultation to be undertaken under clause 121(1)(i).

Clause 127(1)(b)

2.23 We are concerned that this generally worded provision about transfer of staff gives less of a guarantee about transfer of employment than exists in clause 83 in respect of joint committee regulations, notwithstanding the supplementary powers conferred in clause 145(5)(d) and (8). As with clause 83, the powers in clause 145 are discretionary and the point we have made about the need for mandatory provision is also relevant to merger and restructuring regulations.

2.24 However of the first importance is that, in a merger, the entire economic and other activities of a council are being transferred to a new council and therefore, in our view, the TUPE Regulations must apply to all staff employed by the abolished council immediately before the merger takes effect. We believe that it is appropriate to make such provision on the face of the Bill i.e. that merger regulations under clause 123 *must* provide for the transfer of all staff employed by a merging council immediately before the transfer date to the new principal council; and that the regulations must apply the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246), apart from regulations 4(6) and 10, to those transfers (whether or not the transfer is a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006).

2.25 Making such provision would not guarantee ongoing employment for all staff. We recognise that the processes of creating and filling new structures in a merger mean that some staff will be displaced, either through redundancy or being placed into different roles. Guaranteeing that all staff employed immediately before the transfer date would be transferred does not mean that they would be shielded from such processes. However it means that no one would be inappropriately omitted from transfer where such processes have not been completed before the transfer date. We therefore strongly urge reconsideration of the provision for transfer of staff in merger regulations.

Clause 128

2.26 We are concerned that the provisions about consultation with recognised trade unions found in respect of joint committee regulations and merger applications (e.g. clause 78(3) and clause 121(1)) do not appear in respect of restructuring regulations. We appreciate that this could be covered by consultation with “such other persons as the Welsh Ministers consider appropriate” under subsection (4) but believe that there should be explicit provision. As noted earlier, we would in any case ask Ministers to confirm that they would include all trade unions that have members in a relevant principal council as “appropriate persons” under clause 128(4).

Clause 133(2)

2.27 We recognise that the range of possible changes in restructuring regulations means that the situation in respect of transfer of staff may be “messy” compared to a “simple” merger of two or more councils. This was the position under the Local Government (Wales) Act 1994 where there were many cases of council areas that were split. We therefore support the possibility of creating a committee or other body to provide advice on transfer of staff under this subsection, a concept similar to the Staff Commission for Wales that existed for the purposes of the 1996 reorganisation.

2.28 However the provision made in clause 134(2) and (3) seems to us to fall short of the provision that could be made where the whole of a restructuring council is to form part of a new principal area, under clause 130(b)(ii). In that scenario, the point we have made above about clause 127 is also relevant i.e. that the Bill should provide for the transfer of all staff employed by a restructuring council immediately before the transfer date.

Schedule 11

2.29 We recognise that, where mergers or restructuring are taking place, it is appropriate to provide for controls over the decisions of councils that are being abolished, in order to prevent any inappropriate or unwanted impacts for the new or successor council(s). However we feel that the provisions in respect of staffing go wider than necessary.

2.30 In particular we are concerned about paragraph 1(3) and the power for Ministers to "direct a merging council or restructuring council seeking to appoint or designate a person to a restricted post (including from among its existing officers) to comply *with specified requirements* about the appointment or designation" (emphasis added). This seems to go wider than simple matters of process or the provisions in the 2011 Measure about chief executive pay. Indeed paragraph 1(7) explicitly provides for Ministers to override recommendations from the Independent Remuneration Panel for Wales on remuneration. "different" is not defined and therefore this power could perhaps be used to set a lower rate of pay for a chief executive than was paid by a predecessor council, even though the new council covers a wider area, has a bigger budget etc.

2.31 We seek the following changes:

- Limiting "specified requirements" in paragraph 1(3) to matters of process and remuneration only. It should not be a device (for example) to specify qualifications that officers must hold;
- Amending paragraph 1(7) to substitute "higher than that" for the words "different to that".

Clause 157(1)(a)

2.32 ALACE supports the designation of the head of democratic services as a chief officer in subsection (2), and the separation of duties that generally exists between the statutory officers under the 1989 Act and the 2011 Measure. As noted above, we believe consideration should be given in this Bill to preventing the same person from being the chief executive and chief finance officer.

2.33 Based on the same principle we do not therefore support the removal of the restriction that the head of democratic services should not be the monitoring officer. We would take the same stance if any of the other restrictions was proposed for removal. In our view it potentially undermines and weakens the purpose of the head of democratic services that was created by the 2011 Measure.

Other matters

2.34 Ministers have commissioned a review by Peter Oldham QC of the arrangements for dealing with alleged misconduct of senior officers, in the wake of the situation at Caerphilly County Borough Council. If there is any proposal to add provisions to the Bill arising from the recommendations of the review, there must be prior consultation with ALACE and other relevant trade unions that represent senior officers before any amendments are tabled, such consultation to give a meaningful opportunity to influence whether provision is required and how it might be framed.