

Local Government Pensions Committee
Secretary, Terry Edwards

LGPC Bulletin 81 – April 2011

This month's Bulletin contains a number of general items of information.

Please contact Dave Friend with any comments you might have on the contents of this Bulletin or to suggest other items that you would wish to see included in future Bulletins.

[LGPC contacts](#) can be found at the end of this Bulletin.

This month [Bits and Pieces](#) includes an item on [the latest Circular](#) on the Trustees' Conference which will be held on 8 and 9 June, the [Timeline Regulations](#), a brief report on a divorce case ([Schofield v. Schofield](#)) and [a survey](#) conducted by the Prudential on those individuals intending to retire in 2011.

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Contributions to pension schemes other than the LGPS

The LGPS Secretariat understands that a local authority has been approached by a company offering an Employer Funded Retirement Benefits Scheme (EFRBS) aimed at high earners and those potentially caught by recent changes to tax on pension savings. As the name implies, the EFRBS would be funded entirely by the employer, with no contributions from the employee.

Whilst there is nothing in the LGPS Regulations that states that a local authority cannot make a contribution to another pension scheme for employees who are eligible for membership of the LGPS, local authorities are statutory bodies. As statutory bodies, local authorities' powers to act are limited to those matters for which they have an express or implied power. There is a specific power requiring local authorities to contribute to the LGPS - under the LGPS (Administration) Regulations 2008 - and so local authorities **must** offer their employees membership of the LGPS. As there is **currently**, as far as the Secretariat is aware, no express or implied power for local authorities to contribute to another pension arrangement, it is the Secretariat's understanding that they cannot do so (see the Court of Appeal decision in *Allsop v North Tyneside MBC [1992] ICR 639 (CA)*).

This is a view that the Secretariat checked with a legal firm at the time that stakeholder pensions were introduced. The legal opinion agreed with the Secretariat's views. The legal firm also considered the incidental powers in sections 111 and 112 of the Local Government Act 1972 but concluded: "we are of the view that a local authority does not have the necessary powers, whether express, implied or incidental to offer a concurrent stakeholder pension scheme". The same would apply to an Employment Funded Retirement Benefit Scheme (EFRBS).

Readers should note that HMRC are [tightening up the rules on EFRBS](#).

Warning on pension liberation attempts

The Secretariat have been made aware by an administering authority of a Pensions Liberation attempt using AXA's name.

The liberation operates as follows: the current pension providers receive a pension transfer form requesting payment by cheque to AXA at 20 Winchcombe Street, Cheltenham, GL52 2LY. The payee is "AXA re: policyholders name Only". The perpetrators often include HMRC documents in order to make the transaction appear genuine. Please note that the address given is not an AXA office but a mail forwarding company.

The current attempts share the same methods as those using AMP/Pearl's name in 2005 and AXA's name previously in 2007 and 2009.

LGPS 2008: Referendum on the voting system

[Last month's Bulletin](#) set out the Secretariat's view on whether or not fees, which will be paid to counting officers for the referendum on the Alternative Vote, were pensionable. The article generated a number of e-mails and, as a result of representations made, DCLG are considering whether an amendment to regulation of the LGPS (Administration) Regulations 2008 should be made to cover counting officers (and potentially regional counting officers). The Secretariat will let readers know the outcome as soon as possible.

LGPS 2008: Final pay and pay freezes

The Secretariat has received numerous queries regarding the calculation of final pay where there has been a pay freeze.

Under regulation of 8 of the Benefits Regulations a scheme member can only use one of the previous 2 years' pay if, **excluding inflation**, it would produce a higher final pay figure than the final year's pay. Only if it is actually higher can it be used, and only then can PI be added in accordance with the Pensions (Increase) Act 1971.

Does regulation 10 of the Benefits Regulations apply? It would be highly unusual for a person to have a contract that spells out that they are contractually entitled to a pay rise every year. The vast majority of local government employees might like to get a pay rise every year but they are not contractually entitled to a rise every year – so it is the Secretariat's view that regulation 10 of the Benefits Regulations would not apply to them.

LGA Group responds to Fair Deal consultation

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The LG Group has responded to the HM Treasury [consultation on the Fair Deal Policy](#). The LG Group's response, which can be found under [Latest News](#), has not sought to answer the individual questions posed in the consultation document, given that there may be disparate views across local government on a number of those questions, but, instead, sets out the view that:

- the principles of Fair Deal should be retained but be simplified for all parties whilst ensuring, as far as possible, that there is a level playing field;
- the option for those bodies to which staff are compulsorily transferred to be able to enter into an admission agreement in the LGPS should be retained; and
- the Government should add a further policy objective to those outlined in the consultation document. That further objective should be to ensure LGPS Funds can remain sustainable and viable by having a broad active membership base.

Individual authorities may wish to make their own responses to the consultation document. Responses should be e-mailed to fairdealconsultation@hmtreasury.gsi.gov.uk or posted to Public Service Pensions Fair Deal Consultation Workforce, Pay and Pensions Team Public Services and Growth Directorate HM Treasury 1 Horse Guards Road London SW1A 2HQ by 15 June 2011.

Finance (No.3) Bill 2011

On 29 March 2011, [The Finance \(No.3\) Bill](#) had its first reading in the House of Commons. Clause 66 and Schedule 17 to the Bill contain the proposed amendments to the Annual Allowance (AA) regime while Clause 67 and Schedule 18 contain the changes to the Lifetime Allowance.

Annual Allowance

Under the new AA regime:

- tax free pension savings will be restricted to an AA of £50,000;
- tax relief will be granted at a person's marginal rate of tax;
- the Pension Input Period (PIP) does not have to align with the tax year. The PIP for all Local Government Pension Schemes will run from 1 April to 31 March;
- for defined benefit schemes, the accrued pensions rights for a PIP will be multiplied by a factor of 16, prior to the addition of any pre-commutation lump sum, to generate the Pension Input Amount (PIA);
- the opening balance of the PIA will be revalued by CPI;
- the total of employee and employer contributions in a money-purchase arrangement is the PIA for a PIP;
- where the Pension Input Amount (PIA) exceeds the AA within a PIP, the individual will incur a tax charge;
- any unused AA can be carried forward for three years to help offset high AA charges in any given tax year;
- where the AA charge exceeds £2000, members can elect for their scheme to pay for the tax charges in return for an actuarial reduction of benefits;
- the new AA regime applies to those individuals who retire during a PIP and to those individuals who registered for enhanced protection;
- individuals, whose benefits are deferred throughout a PIP or bring their deferred benefits into payment, are exempt from the new AA regime.

As far as the LGPS is concerned, there are two main areas which require further clarification. The first is the treatment of previously deferred benefits in the LGPS on aggregation with membership with a current LGPS employment.

The other point of clarification regards the exemption from the new AA regime for members who retire due to ill-health. The wording of section 229 of the Finance Act 2004, as currently amended by the wording in the Finance Bill, provides that:

(3) But there is no pension input amount in respect of an arrangement if, before the end of the tax year, the individual –

- (a) satisfies the severe ill-health condition, or*
- (b) has died.*

(4) For the purposes of subsection (3)(a) the individual satisfies the severe ill-health condition if the individual -

- (a) becomes entitled to all the benefits to which the individual is entitled under the arrangement in consequence of the scheme administrator having received evidence from a registered medical practitioner that the individual is suffering from ill-health which makes the individual unlikely to be able (otherwise than to an insignificant extent) to undertake gainful work (in any capacity) before reaching pensionable age,*

“Pensionable age” has the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995 or paragraph 1 of Schedule 2 to the Pensions (Northern Ireland) Order 1995 and thus means the new State Pension Age.

There are clearly differences between:

- i) the tier 1 ill health criteria in the LGPS, which refer to someone having no reasonable prospect of being capable of undertaking gainful employment (of 30 hours or more per week for a period of not less than 12 months) before normal retirement age (which for most scheme members is defined as age 65), and
- ii) the wording of the Finance Bill, which refers to someone being unlikely, otherwise than to an insignificant extent, of undertaking gainful work (in any capacity) before reaching pensionable age (which is defined as the new SPA).

The Secretariat has been liaising with DCLG to see if there is a way to overcome this discrepancy to the satisfaction of HMRC and thereby avoid tier 1 cases becoming subject to the annual allowance test. A suggestion has been put to HMRC which, if agreed, would achieve the desired result. It would entail the Independent Registered Medical Practitioner giving a view on whether a person meets both the LGPS criteria and the Finance Act criteria. The annual allowance test would only apply if the person met the LGPS criteria but failed to meet the Finance Act criteria. If HMRC agree to this approach the Secretariat will issue updated sample ill health certificates. The Secretariat will report any outcome from the approach made to HMRC as soon as a decision has been taken.

If HMRC agree to the approach put to them, there could be some tier 2 cases who would also escape the annual allowance test. For example, prior to 2018, a female aged 60 could meet the Finance Act requirement of not being capable of gainful work until new SPA (say age 61) but meet the LGPS tier 2 criteria (as she could be capable of gainful employment before age 65).

It should be noted Scheme members who retire on or after 6 April 2011 and before Royal Assent of the 2011 Finance Bill will not be able to opt for the scheme to pay their annual allowance charge. This is because the pensions regulations needed to set aside the inalienability of accrued benefits to meet a tax bill cannot be laid until the powers in the Bill are in law. Other aspects of the new annual allowance rules will however apply to these retirements from Royal Assent (likely to be in July) backdated to 6 April.

HMRC's website contains some [worked examples](#) of how the new AA regime is intended to work.

The Secretariat will issue a circular on the new AA regime in the near future.

Lifetime Allowance

With effect from 6 April 2012, the Lifetime Allowance will be reduced from £1.8 million to £1.5 million. Paragraph 12 of Schedule 18 to the Finance (No.3) Bill removes article 2 of the Registered Pension (Standard Lifetime and Annual Allowances) Order 2010 [SI 2010/922]. Article 2 of SI 2010/922 kept the Lifetime Allowance at £1.8 million for the tax years 2011/12 to 2015/16. HMRC have produced [draft guidance](#) on the changes to the Lifetime Allowance based on the draft legislation published at the end of last year.

There will be protection for individuals, who do not have primary or enhanced protection, from the effects of the reduction in the lifetime allowance. There will be what HMRC term "fixed protection" for pension savings up to £1.8 million subject to the following conditions:

- no new contributions can be paid to a money purchase arrangement;

- there will be a limit on the amount of benefits which a member can build up each year in a defined benefit (or cash balance) arrangement; and
- individuals will be unable to commence a new pension arrangement with a registered pension scheme unless it is to receive a transfer of pension rights from an existing pension arrangement.

The greater of the standard lifetime allowance and £1.8 million will be used in setting the “post commencement earnings limit” when calculating the relevant benefit accrual for those individuals who registered for enhanced protection before 6 April 2009.

New section 218(5B) will be inserted into the Finance Act 2004 so that the enhancement factor will be applied to the figure of £1.8 million for those members who registered for Primary Protection. Similarly, section 218(5C) states that the lifetime allowance will remain at £1.8 million where an individual dies before 6 April 2012 but a Benefit Crystallisation Event 7 (payment of a lump sum death benefit) occurs after 5 April 2012.

The limit for trivial commutations will be £18,000 with a further provision to permit an increase of the limit by Treasury Order.

HMRC Pension Schemes Newsletter 46

HMRC have issued [Pension Schemes Newsletter 46](#) (dated 8 April 2011). Amongst other matters the Newsletter covers:

- the scheme sanction charge process;
- changes to the penalties for failure to submit an Accounting for Tax Return;
- changes to penalties for failure to submit a Self Assessment return; and
- restriction of pensions tax relief (including recent changes to draft legislation, Pension Input Periods, and payment of annual allowance charge from pension benefits)

Academies

The LGPC Secretariat has written to the Department for Education setting out a number of issues related to academies and the LGPS. These include:

- the need to correct certain misleading statements on the DfE website regarding access to the LGPS for academies’ non-teaching staff;
- matters concerning the setting of the employer’s contribution rate for an academy, calculation of the share of deficit, and appropriate recovery periods;
- seeking a Government legislative guarantee that, should an academy fail and the staff and funding not revert to a local authority, the Government will meet any LGPS underfunding deficit relating to that academy; and
- the impacts on existing contracts and admission agreements entered into whilst the school was a local authority maintained school (e.g. in relation to catering and cleaning).

The Secretariat has suggested that a working group be convened involving representatives from DfE, DCLG and the LGPC to work through the issues mentioned above (and other

technical matters that have been identified by the Secretariat) and, where appropriate, to issue advice.

Free Schools

[Bulletin 73](#) included an article on the Academies Act 2010. The article contained the following text on the topic of “Free Schools”:

“As a consequence of the Academies Act 2010, the Government had announced yet another initiative under the heading of ‘Free Schools’. The term ‘Free School’ is merely a description of a new type of school which it is intended would be legally set up as an academy under the Academies Act 2010. Non-teaching staff within ‘Free Schools’ would therefore be eligible for membership of the LGPS (subject to the appropriate amendments to the Administration Regulations).”

The term “Free School” itself does not appear to be defined in any legislation including the Academies Act 2010. Since the publication of Bulletin 73, regulation 55 of the LGPS (Miscellaneous) Regulations 2010 [SI 2010/2090] inserted the following paragraph into Part 1 of Schedule 2 of the LGPS (Administration) Regulations 2008:

“21. A proprietor of an Academy within the meaning of section 579 (general interpretation) of the Education Act 1996, who has entered into Academy arrangements within the meaning of section 1 (Academy arrangements) of the Academies Act 2010.”

Section 579 (General interpretation) of the Education Act 1996 was amended by paragraph 6 of Schedule 2 to the Academies Act 2010. The following definitions were inserted into s579:

“Academy” means a school to which Academy arrangements relate;

“Academy arrangements” has the meaning given by section 1 of the Academies Act 2010;

“Academy order” means an order under section 4 of that Act.

Section 1 of the Academies Act 2010 says:

1 Academy arrangements

(1) The Secretary of State may enter into Academy arrangements with any person (“the other party”).

(2) “Academy arrangements” are arrangements that take the form of—

(a) an Academy agreement, or

(b) arrangements for Academy financial assistance.

(3) An Academy agreement is an agreement between the Secretary of State and the other party under which—

(a) the other party gives the undertakings in subsection (5), and

(b) the Secretary of State agrees to make payments to the other party in consideration of those undertakings.

(4) Academy financial assistance is financial assistance given by the Secretary of State under section 14 of EA 2002 on terms that require the other party to give the undertakings in subsection (5).

(5) The undertakings are—

(a) to establish and maintain an independent school in England which—

(i) has characteristics that include those in subsection (6), or

(ii) is specially organised to make special educational provision for pupils with special educational needs;

(b) to carry on, or provide for the carrying on of, the school.

(6) The characteristics are that—

(a) the school has a curriculum satisfying the requirements of section 78 of EA 2002 (balanced and broadly based curriculum);

(b) if the school provides secondary education, its curriculum for the secondary education has an emphasis on a particular subject area, or particular subject areas, specified in the arrangements;

(c) the school provides education for pupils of different abilities;

(d) the school provides education for pupils who are wholly or mainly drawn from the area in which the school is situated.

(7) Academy arrangements in relation to a school within subsection (5)(a)(i) must include provision imposing obligations on the proprietor of the school that are equivalent to the SEN obligations.

(8) “The SEN obligations” are the obligations imposed on governing bodies of maintained schools by—

(a) Chapter 1 of Part 4 of EA 1996 (children with special educational needs), and

(b) regulations made under any provision of that Chapter.

(9) Academy arrangements must include terms imposed for the purpose of securing that no charge is made in respect of—

(a) admission to, or attendance at, the school, or

(b) (subject to any exceptions specified in the terms) education provided at the school.

(10) A school to which Academy arrangements relate is to be known as an Academy.

If a “Free School” meets the criteria laid out in section 1 of the Academies Act 2010, it would seem that it is a Schedule 2 (to the Administration Regulations) employer. It follows that non-teaching staff at the “Free School” would be eligible for membership of the LGPS.

The Department for Education has published [a model agreement](#) for free schools which has complicated matters. Paragraph 21 of this model agreement states:

“The Academy Trust shall ensure that all employees at the Academy other than teachers have access to the Local Government Pension Scheme or to a scheme with comparable pension benefit.”

However, the Secretariat understands that the DfE intend to amend this to read:

‘The Academy Trust shall ensure that all employees at the Academy other than teachers (“Non-teaching Staff”) have access to either the Local Government Pension Scheme in accordance with the Local Government Pension Scheme (Administration) Regulations 2008 [SI 2008/239] (“the Regulations”), where the Regulations require this, or such other pension benefits as those Regulations, or any legislation which may in the future replace the Regulations, require for Non-teaching staff.’

Early payment of deferred pension under age 55

As set out in [Bulletin 67](#) there are still deferred pensioner members who can apply for the early payment of their benefits from age 50. Furthermore, the minimum age for early payment is still 50 for councillor members in England and Wales. In both instances, the payment of benefits is subject to employer consent (other than where payment of the deferred benefit is on the grounds of ill health).

During the “transitional period” to 5 April 2011 the administering authority could exercise its discretion under regulation 3 of the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 [SI 2006/364] not to agree to early payment of (unauthorised) benefits where a member aged under 55 applied for early payment (other than on ill health grounds) before 6 April 2011.

As the “transitional period” has now expired, the administering authority no longer has the discretion not to pay the benefits. If an employer does agree to early payment of deferred benefits to a member aged under 55, the payment would be subject to the unauthorised payments charge under section 208 of the Finance Act 2004 and, if applicable, the unauthorised payments surcharge under section 209 of the Finance Act 2004. The scheme

sanction charge would apply to all the payment, rather than just the benefit relating to post 5 April 2006 membership.

Pensions Bill 2011

The [Pension Bill](#) currently before Parliament contains a number of measures. They include the previously advertised equalisation of SPA at age 65 for men and women by November 2018 with a further increase in SPA to age 66 by April 2020. Existing legislation then raises the SPA from 66 to 67 between 2034 and 2036 and from 67 to 68 between 2044 and 2046.

Part 2 of the Bill contains amendments as recommended by the review of auto-enrolment (see [Bulletin 78](#)). Jobholders will have to earn at least £7,475 in 2011/12 earnings terms to be auto-enrolled into a qualifying scheme and employers will be able to utilise a three month waiting period before a jobholder has to be auto-enrolled (although a jobholder will have the right to opt into a qualifying scheme at any point during the waiting period).

The Bill includes clauses which switch the indexation of pensions in payment and revaluation of deferred benefits in defined benefit schemes from RPI to CPI. The Bill amends the Welfare Reform and Pensions Act 1999 so that the minimum increase to pension credits (resulting from pensions sharing on divorce) paid by occupational pension schemes is linked to the increase in “general level of prices” – i.e. CPI.

Consultation on State Pension provision

On 4 April the Department for Work and Pensions (DWP) issued a [consultation paper ‘A state pension for the 21st century’](#), seeking views on options for reform of the state pension that better support saving for retirement, and also on the most appropriate mechanism for determining future changes to state pension age. The consultation period runs until 24 June. GAD have produced a [technical bulletin](#) which summarises key points from the consultation paper.

European Court of Justice decision on gender

The European Court of Justice has now ruled on *Association Belge des Consommateurs Test v. Achats ASBL* [C-236/09]. There was a report on Advocate General Kokott’s opinion on the application of gender in the assessment of insurance risks in [Bulletin 77](#).

The case concerned provisions set out within Directive 2004/113/EC which implements the principle of equal treatment between the sexes in respect of access to and supply of goods and services. The Directive was to apply to new contracts of insurance entered into after 20 December 2007. There was an escape clause which permitted member states to allow gender in the calculation of premiums and benefits if the assessment of risk is “based on relevant and accurate actuarial and statistical data”. The applicants (the Association Belge des Consommateurs Test) argued that escape clause was contrary to the principle of equality between men and women.

The Court’s decision re-affirms the ruling by the Advocate General. Insurers and other financial service firms will have to implement unisex factors by 21 December 2012. Apart from annuities, the decision does not affect occupational pension schemes as they come under a different directive. There is, however, a possibility that the Court’s ruling will be extended to occupational pension schemes either by another court case, domestic

legislation or EU legislation. If occupational pension schemes are affected by the ruling in due course, there are implications for gender-based:

- commutation rates;
- early and late retirement factors; and
- both inward and outward transfer factors.

Bits and Pieces

LGPC Circular

The Secretariat has issued [Circular 248](#) and [an associated flyer](#) since the publication of last month's Bulletin. The Circular and flyer provide an update on the forthcoming Annual LGPS Trustees' conference organised by the Local Government Pensions Committee which is to be held on 8th and 9th June in Bournemouth. The keynote speaker this year is the Rt Hon Bob Neill MP, Parliamentary Under Secretary of State, Department for Communities and Local Government.

Although the intended audience is primarily elected members, the conference will be of interest to other people who attend pension committees, panels or sub-committees etc. (for example employing authority, trade union and pensioner representatives, as well as officers). The conference also acts as an annual update for those persons who have been through the LGPC's "Fundamentals" course, keeping them up-to-date with developments in the local government pension world.

Bearing in mind the present expectation of significant employee contribution increases coupled with medium and long-term scheme design changes, it may also be of particular interest to Pension Managers who are faced with both managing and communicating the transitions to the scheme membership as well as Directors of Finance and other budget holders who will be faced with the financial implications of any scheme changes

Timeline Regulations

HM Treasury's note on the discount rates to be used in the calculation of CETVs payable from the public sector schemes has been added to post March 2008 GAD guidance page. The update also includes the two letters issued by DCLG in respect of the HM Treasury note.

Case Law – Schofield v. Schofield (Court of Appeal)

A British husband and his German wife obtained a divorce in Germany. The German court, however, had no jurisdiction to make a pension sharing order against the husband's army pension. The wife was refused leave to appeal for a pension sharing order in the United Kingdom by an English judge.

The Court of Appeal allowed her appeal on the grounds that there should be judicial collaboration across state boundaries to ensure that adjudication between the parties was complete and comprehensive. The Court of Appeal also added that the original judge's view that the army pension was "paltry" was unsustainable.

Prudential Survey

The Prudential have conducted a survey of those people who intend to retire in 2011. It found that 20% of them have no private or occupational pension so their sole source of income will be state benefits. 10% of men and 28% of women will rely on the State Pension and any personal savings in their retirement. A quarter of those surveyed over estimated what they would receive from the State.

Legislation

United Kingdom

SI Reference Title

2011/821	The Social Security Benefits Up-rating Order 2011
2011/830	The Social Security Benefits Up-rating Regulations 2011
2011/840	The Pension Protection Fund (Pension Compensation Cap) Order 2011
2011/841	The Occupational Pension Schemes (Levy Ceiling) Order 2011
2011/857	The Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment and Equal Pay) Order 2011
2011/938	The Social Security (Contributions) Re-rating Order 2011
2011/940	The Social Security (Contributions) (Amendment No.2) Regulations 2011
2011/1036	The Social Security (Reduced Rate of Class 1 Contributions, Rebates and Minimum Contributions) Order 2011
2011/1060	The Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011
2011/1066	The Equality Act 2010 (Commencement No.6) Order 2011
2011/1099	The Referendum on the Voting System (Counting Officers' and Regional Counting Officers' Charges) Order 2011

Northern Ireland

SR Reference Title

2011/119	The Social Security Benefits Up-rating Order (Northern Ireland) 2011
2011/120	The Social Security Benefits Up-rating Regulations (Northern Ireland) 2011
2011/163	The Transfer of Undertakings and Service Provision Charge (Protection of Employment) (Amendment) Regulations (Northern Ireland) 2011

Useful Links

[The LGE Pensions page](#)

[The LGPS members' website](#)

[LGPS Discretions](#) lists all the potential discretions available within the LGPS in England and Wales, and Scotland.

[Qualifying Recognised Overseas Pension Schemes](#) approved by HMRC and who agreed to have their details published.

[Tax Guide \(Version 11\)](#)

[The Timeline Regulations](#)

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Distribution sheet

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