

Phillip Perry
Scheme governance discussion paper
Department for Communities and Local Government
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Dear Phillip

Local Government Pension Scheme (England and Wales) new governance arrangements

I enclose the LGA's response to the questions posed by the discussion paper on future scheme governance.

In summary, we support flexibility in terms of the timing of the introduction of local pension boards and the avoidance of overly prescriptive parameters for those boards. We are, however, strongly of the view that as the scheme manager function and the pension board are different in both purpose and nature and exist under different primary legislation they cannot be contained in one committee. Therefore we are of the view that regulations should insist that the scheme manager function is discharged by a body separate to the pension board.

With regard to the Scheme Advisory Board we would see no reason not to replicate the structure, membership and remit of the shadow board currently in place. In terms of funding and given the potential for the board having to 'whistle blow' it would seem logical to make such funding mandatory.

Yours sincerely



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Annex A

Q1. What period, after new governance regulations are on the statute book, should be given for scheme managers/administering authorities to set up and implement local pension boards?

22nd May 2014 will see elections for all 32 London boroughs, all 36 metropolitan boroughs, 76 second-tier district authorities, 20 unitary authorities and various mayoral posts, all in England. It would therefore seem sensible to ensure a reasonable period of bedding in for new members prior to having to set up new pension bodies and delegate new functions. The incoming members/regime may have very different ideas on how to go about this task than their predecessors.

We would therefore suggest an implementation date for the delegation of the scheme manager function and the setting up of the pension board of no earlier than 1st December 2014.

Q2. How long after new governance regulations are on the statute book should the national scheme advisory board become operational?

It would seem advisable to allow the current membership of the shadow board to have a decent run prior to any changes as a result of the implementation of the statutory board. We would therefore suggest an implementation date to coincide with local arrangements (i.e. not before 1st December 2014)

Q3. Please give details of any such “connected” scheme that you are aware of.

Section 4(6) of the Public Service Pensions Act 2013 provides that “For the purposes of this Act, a scheme under section 1 and another statutory pension scheme are connected if and to the extent that the schemes make provision in relation to persons of the same description”. Under that definition the LGPS and the NHS Pension Schemes both make provision in relation to persons of the same description i.e. certain types of employee can be in either the LGPS or NHS Pension Scheme depending on whether or not regulation 4(2) of the LGPS Regulations 2013 apply or whether the employer has a Direction Order allowing specified staff to retain access to the NHS Pension Scheme.

We suspect this is not really what section 4(6) of the Act is seeking to cover and, therefore, we could rely on section 4(7) of the Act which provides that “Scheme regulations may specify exceptions to subsection (6)”.

Other than the above, we are not aware of any “connected” schemes.

Q4. Are there any schemes connected to the main Local Government Pension Scheme, other than an injury or compensation scheme, that the new Scheme regulations will need to refer to in setting out the responsibilities of scheme managers?

See the answer to question 3.

Q5. What “other matters”, if any, should we include in Scheme regulations to add to the role of local pension boards?

Local pension boards could also perhaps be asked to monitor the effectiveness of the scheme manager in meeting the fiduciary duty associated with the administration of the LGPS. Such a duty would need to be clear and able to be applied consistently which would therefore require the publication of statutory guidance.

Q6. Should Scheme regulations make it clear that nobody with a conflict of interest, as defined, may be appointed to or sit on a pension board?

Yes. However, the definition of conflict of interest in the Act is not clearly defined. Therefore, either statutory guidance or a tPR code of practice should be made available to enable regulations to refer to the definitions contained therein.

Q7. Should Scheme regulations prescribe the type of information that may be “reasonably required”?

No – statutory guidance or a tPR code of practice is a better place to describe examples of the information which can be required.

Q8. Although not required by the Act, should Scheme regulations prescribe a minimum number of employer and employee representatives?

The balance here is between the relative sizes of the collection of employers in any one fund and the minimum requirement to ensure boards are able to perform the tasks required of them.

Under the Act a board could consist of two members (one each from employers and members). It would seem unreasonable to expect such a small board to fulfil its duties. Therefore, it may well be that a minimum of 4 members could be set without imposing too much of a burden in terms of time, resources and cost.

What is perhaps more important is to put some bones on the definition of employer and member representatives. For example to ensure that employers understand that representatives include both elected members and officers.

Q9. Should the new Scheme regulations require local pension boards to be a body separate from the statutory committee or for it to be combined as a single body?

Separate.

The scheme manager is a function which the named authority can delegate using section 101/102 of the Local Government Act 1972. The purpose of the function is to administer the LGPS in relation to the collection of employers and members defined by LGPS regulations (‘the fund’). This function, being very similar to that of the ‘administering authority’ currently delegated to the pensions committee, one would expect to continue.

The pension board is a body set up under the Public Service Pensions Act 2013 whose role is to assist the scheme manager. Unlike the scheme manager function this role is one of scrutiny and audit rather than decision making and execution.

In order for such a scrutiny role to be both effective and transparent it is difficult to see how one committee could be reasonably expected to perform the executive function and provide scrutiny of the same function.

Furthermore the fact that the delegation of the function (scheme manager) and creation of the body (pension board) fall under two different pieces of primary legislation will undoubtedly lead to conflicts.

Q10. Apart from what is required under the Act, what other elements of local pension boards should be set out in the new Scheme regulations?

Q11. Apart from what is required under the Act, what other elements of local pension boards should be left to local determination?

Apart from defining the minimum number of members and setting out the scope of the duties of the board other elements could be left to the scheme manager to determine as it sees fit. However, it may be worth adding a regulation that in doing so the scheme manager must have regard to ensuring the effective operation of the duties of the pension board (i.e. to prevent scheme managers setting out rules for the size, remit, numbers or meetings or timing of the board that would restrict the effective operation of its scrutiny role).

Such a regulation would give the board the ability to challenge any rules set by the scheme manager it feels are hindering its ability to perform its function under the regulations.

Q12. Should the new Scheme regulations prevent any incumbent scheme member representative being moved from a statutory committee to the local pension board (if the committee and the board are not one and the same body)?

The creation of pension boards should not result in the dilution of representation of either scheme members or employers currently on pension committees.

Q13. Should the new Scheme regulations include a requirement for each local pension board to publish an annual statement of its work and for this to be sent to the relevant scheme manager, all scheme employers, the scheme advisory board and Pensions Regulator?

Yes.

Q14. Apart from the training and qualification criteria that may be covered by the Pensions Regulator in a code of practice, are there any specific issues that we should aim to cover in the new Scheme regulations as well?

This will depend on the scope of the tPR code. If it is restricted to general pensions criteria there may be a requirement to go beyond that code to include knowledge specific to the LGPS.

Q15. Should Scheme regulations simply replicate the wording of the Act? If not, what specific areas of work should the new Scheme regulations prescribe?

Regulations should set the particular role of the Scheme Advisory Board in relation to those parts of the Act which require management of costs to be implemented including being the forum for the development of and ensuring effective consultation on recommended changes to the scheme resulting from cost management.

Regulations should also set out the responsibility of the board to publish an annual report of both its activities and the LGPS as a whole. In doing so regulations should also furnish the board with the ability to obtain the information required by the board to fulfil this responsibility. This could be in the form of a regulation requiring scheme managers to provide such information either directly to the board or in response to a request from the Secretary of State.

Q16. Should Scheme regulations include a general provision enabling the scheme advisory board to advise the Secretary of State on the desirability of changes to the Scheme as and when deemed necessary?

Yes. This will enable the board to play both a proactive and reactive role in this area.

Q17. Are there any specific areas of advice that Scheme regulations should prohibit the scheme advisory board from giving?

No. The board can only advise the Secretary of State who has no obligation to have regard to such advice. Therefore, no limitation is necessary.

Q18. What options (if any other, please describe) would be your preference for establishing membership of the scheme advisory board?

Unless serious flaws become apparent in the methodology used to establish the shadow board it would seem sensible to continue in the same vein.

Q19. Should Scheme regulations require the Secretary of State to approve any recommendation made for the position of Chair?

Yes. The position of chair is vital to the effective operation of the board and its relationship with government. Having the approval of the Secretary of State will facilitate both the necessary relationship and confirm the status of the board.

Q20. Should Scheme regulations prescribe tenure of office? If so, what should the maximum period of office be and should this also apply to the Chair of the board?

Q21. Should Scheme regulations make provision for board members, including the Chair, to be removed in prescribed circumstances, for example, for failing to attend a minimum number of meetings per annum? If so, who should be responsible for removing members and in what circumstances (other than where a conflict of interest has arisen) should removal be sought?

Q22. Should Scheme regulations prescribe a minimum number of meetings in each year? If so, how many?

Q23. Should Scheme regulations prescribe the number of attendees for the board to be quorate? If so, how many or what percentage of the board's membership should be required to be in attendance?

Q24. Rather than make specific provision in Scheme regulations, should the matters discussed at Q19 to Q23 be left as matters for the scheme advisory board itself to consider and determine?

It would perhaps be more sensible to require the board to submit its terms of reference (and any subsequent changes) covering all of the above (Q20 to Q23) to the Secretary of State for approval rather than set these items out in regulation.

Q25. Should the scheme advisory board be funded by a voluntary subscription or mandatory levy on all Scheme pension fund authorities?

Mandatory, but with the proviso that the Secretary of State (or the equivalent in Wales if appropriate) should be able to question the level of the subscription and require the board to set out the reasons for any increase (i.e. for the amount to be subject to the oversight of, but not set by, the Secretary of State).

Q26. What would be your preferred manner of legal constitution of the scheme advisory board and how should Scheme regulations deal with the issue of personal liability protection for board members?

Regulations should establish the board as a body corporate and include an exemption for personal liability for board members. In support of this position set out below is an extract from a paper prepared by Eversheds LLP for the shadow board in respect of legal constitution.

1. Issue to Consider for the Establishment of the Scheme Advisory Board

1.1 The Board of the Pension Protection Fund as a body corporate may prove to be a suitable model to use as a basis for the establishment of the Scheme Advisory Board and would help to address the concerns of the potential Board members in relation to personal liability issues.

1.2 Clearly the detail of the Board will need to be fleshed out in LGPS regulations which have not yet been drafted. The detail of the provisions relating to the creation of the Board should not be underestimated by the DCLG draftsmen based upon the provisions relating to the Board of the Pension Protection Fund under the Pensions Act 2004 (although not all these provisions will be relevant to the Scheme Advisory Board).

- 1.3 Both the LGA and unions are likely to want to input into the drafting of the new LGPS regulations in this regard to be sure the necessary provisions for the proper operation of the Board are included.
- 1.4 The areas we would expect the regulations to cover in respect of the Scheme Advisory Board include (without limitation):
- 1.4.1 The express establishment of the Board as a body corporate;
 - 1.4.2 Exemption for personal liability for Board members.
 - 1.4.3 Provisions about the membership of the Board and in particular the different representative constituencies, the appointment process, terms of appointment, tenure of members and their remuneration (as appropriate);
 - 1.4.4 Provisions dealing with conflicts of interest of Board members (as per Section 7);
 - 1.4.5 Reporting requirements such as annual reports/accounts etc (as applicable);
 - 1.4.6 Provisions for delegation and the establishment of committees and sub-committees;
 - 1.4.7 Provisions for the setting of Board procedures;
 - 1.4.8 Provisions for executing documents; and
 - 1.4.9 Provisions for funding for the running and administration costs of the Board (perhaps through a levy?).
- 1.5 We would normally expect to see a statutory corporation established under primary legislation (e.g. under an Act) rather than under secondary legislation (e.g. under regulations). However, given that Section 7 requires that the regulations must provide for the establishment of the Board, then there would seem to be a clear power to establish the Board under secondary legislation in this case. However, we are not aware of other statutory corporations established in this way.

Eversheds LLP