

LGF Reform and Pensions Team
Benefits Consultation
Ministry for Housing, Communities and Local Government
2nd Floor, Fry Building
2 Marsham Street
London
SW1P 4DF

1 April 2019

Dear Sir or Madam

Local Government Pension Scheme (LGPS): Fair Deal – Strengthening pension protection

Thank you for the Department's consultation document inviting comments on strengthening pension protection in the LGPS.

I respond on behalf of the Local Government Pensions Committee (LGPC) of the Local Government Association (LGA).

The LGA is a politically-led, cross-party membership organisation that works on behalf of councils to ensure local government has a strong, credible voice within national government. In total, 415 local authorities are presently members of the LGA. The Local Government Pensions Committee (LGPC) is a committee of councillors constituted by the Local Government Association (LGA), the Welsh Local Government Association (WLGA) and the Convention of Scottish Local Authorities (COSLA). The LGPC considers policy and technical matters affecting the Local Government Pension Scheme (LGPS) in the UK, a scheme which has over 5 million members.

This letter sets out the LGPC's view on the matters covered in the consultation from both a policy and technical perspective.

Fair Deal

The LGPC is strongly supportive of the general proposals contained in the consultation document to provide for an individual's continued access to the LGPS when compulsorily transferred from their public sector employment. The principles of the proposed Fair Deal regulations were a fundamental part of the reformed Scheme that was agreed between Government, employees and employers prior to the April 2014 reforms to the LGPS being introduced.

Question 1 – Do you agree with this definition? (Protected transferees)

Regulation 3 – new regulation 3B(5)

Regulation 3B(5) provides that a person remains a protected transferee for so long as they are wholly or mainly employed on the delivery of the service or function transferred. Given that there is no definition of the term 'wholly or mainly' in the TUPE regulations, we think it would be helpful if the meaning of the term, in this context, is clarified in the regulations to ensure consistent application across all employers.

For example regulation 3B(5) could be amended as follows:

...wholly or mainly employed (whether full-time or part-time) on the delivery of the service...to a different service provider. In this regulation 'mainly' shall have its literal meaning of 'for the most part'.

Also, our reading of regulation 3B(5) is that the protection would lapse if a person were to cease membership of the LGPS because they are no longer wholly or mainly employed on the delivery of the service or function, even if they remain employed in the transferred employment and return to being wholly or mainly employed at a future date. Is this the policy intent? If so, it is in conflict with the protection offered by the 'Fair Deal for staff pension: staff transfer from central government' guidance which academies are currently subject to which states:

'Where a person moves from full-time to part-time employment, or otherwise reduces the proportion of their time employed on the transferred service or function so that they are no longer wholly or mainly employed on that service or function, they will continue to be eligible to be a member of the pension scheme to the extent that the transferred employment continues.'

Regulation 3 – new regulation 3B(7)

Regulation 3B(7) extends the definition of protected transferee to include employees who are not compulsorily transferred but are working wholly or mainly on the delivery of a service transferred from a Fair Deal employer.

Whilst we understand that service providers employing small numbers of staff may want the ease of having just one pension scheme, this adds a further level of complexity to the Scheme, particularly around monitoring who is a protected transferee under this provision.

An equivalent provision is currently provided for by open admission agreements, which we understand are not commonplace. We question whether a Fair Deal employer would want to guarantee LGPS liabilities for members they have never employed.

It also goes beyond the protections offered by the 'Fair Deal for staff pension: staff transfer from central government' guidance which states that *'the Fair Deal policy does not apply to other staff of the independent contractor, including any staff employed to deliver the outsourced service or function who were not compulsorily transferred from the public sector'*.

Regulation 3 – new regulation 3B(11)

Regulation 3B(11) contradicts 3B(7) so needs amending to include the words ‘subject to regulation 3B(7)’ at the beginning.

Question 2 – Do you agree with this definition of a Fair Deal employer?

The LGPC is concerned that not applying Fair Deal provisions to further and higher education establishments could contribute to a destabilisation of membership in such bodies and a risk to LGPS funds. However, we agree that the provisions should not apply to non-public sector organisations who participate in the LGPS as ‘community’ admission bodies via an admission agreement. We also agree that employees of police and crime commissioners (PCCs) should be protected under these Fair Deal regulations.

Regulation 5 – schedule 1 – Fair Deal employer definition

The definition of a Fair Deal employer needs amending so that ‘15 to 25’ becomes ‘15 to 24’ because paragraphs 24 and 25 were deleted and replaced by a single paragraph 24 by The Local Government Pension Scheme (Amendment) Regulations 2015 [SI 2015/755].

The definition of a Fair Deal employer does not specifically cover employees of bodies in Part 4 of Schedule 2 eg foundation, voluntary and federated schools. An employee of such a school is employed by the governing body of the school, not the local authority which is deemed to be the Scheme employer for the purpose of the LGPS regulations.

If a foundation / voluntary / federated school or technical institute outsources a service or function to a service provider the contract will be between the school and the service provider. Because the draft regulations do not currently include Schedule 2 Part 4 bodies in the definition of a Fair Deal employer, the staff being transferred would not meet the definition of protected transferees in regulation 3B(1).

Is it the policy intent to exclude such employers? If not, the definition of a Fair Deal employer will also need amending to include Schedule 2 Part 4 employers.

In addition, the wording in this regulation needs tweaking to make it clear that it is only Schedule 2 Part 2 employers who are able to designate employees for membership of the Scheme.

Question 3 – Do you agree with these transitional measures?

The LGPC supports pension protection being provided at subsequent tenders to individuals who previously transferred out and are, or would be, entitled to protection under the 2007 Direction or 2012 Welsh Direction.

Regulation 3 – new regulation 3B(9)

Where an outsourcing contract comes to an end and is re-let to the same contractor it would be preferable for staff who have been put in a broadly comparable scheme to be allowed to remain in that scheme. As the regulations are currently worded, the service provider would have to offer the LGPS either via an admission agreement or the deemed employer route. This would be disruptive for the staff concerned, who may be very happy with their broadly comparable scheme. It would also be a time consuming and potentially costly exercise for the contractor.

Where the contract is awarded to a different service provider we agree that the employee should become a protected transferee under the LGPS regulations and eligible for membership of the LGPS.

Question 4 – Do you agree with our proposals regarding the calculation of inward transfer values?

The LGPC agrees that compulsorily transferred employees who have been given access to a broadly comparable scheme should have a statutory right to transfer those benefits to the LGPS when they re-join the Scheme. In our view, the proposed methodology is reasonable; however, we think the protection should go one step further and provide that the final salary link should be kept where the employee did not transfer out the LGPS benefits built up before the initial compulsory transfer, provided that the employee:

- (i) has not accessed those rights, and
- (ii) has been continuously employed on the transferred undertaking, and
- (iii) elects to aggregate those benefits on re-joining the LGPS.

Regulation 3 – new regulation 3B(12)

This regulation does not appear to cover those employees who were originally compulsorily transferred before the 2007 Direction or the 2012 Direction (whichever was relevant) and the contract is only now being re-let for the first time (where the pension scheme to which they had access was not a scheme to which they had access by virtue of the Direction). We think this group of employees also needs to be given the statutory right to transfer in their pension rights to the LGPS.

Question 5 – Do you agree with our proposals on deemed employer status?

Subject to the comments below, the LGPC fully supports the deemed employer status and would prefer that this be the default option where, despite the intention of regulation 3B(3), no provision for continued access to the LGPS is put in place before the contract start date. This would avoid leaving members in limbo, which is currently the case when admission agreements are not in place when the contract starts.

The LGPC concurs with the potential benefits of the deemed employer status, as set out in paragraphs 32 to 36 of the consultation document. It would be helpful if MHCLG could obtain confirmation that where the deemed employer route is taken the service provider will be able to account for their pension obligations on a defined contributions basis.

In our view, the regulations should include that the Fair Deal employer must inform the relevant administering authority of the proposed outsourcing and whether the service providers will be required to bid for the contract on the deemed employer or admitted body status. The regulations should also provide that, if the deemed employer route is taken, the Fair Deal employer must provide the administering authority with copies of the relevant parts of the service contract.

The draft regulations do not allow the Fair Deal employer to ask for a bond or indemnity, if appropriate, where the deemed employer route is taken. A Fair Deal

employer may wish to utilise this option to recover any unmet pension costs eg costs associated with redundancy, pay increases above a set limit or any other cost specified in the service contract, if the service provider were to go into liquidation. In our view, the regulations should be amended to allow the Fair Deal employer to ask for a bond or indemnity, where appropriate, where the deemed employer route is taken.

Question 6 – What should advice from the scheme advisory board contain to ensure that deemed employer status works effectively?

The LGPC is of the view that the service contract between the Fair Deal employer and the service provider is key to making the deemed employer status a success.

The advice should set out what the Fair Deal employer needs to consider when putting together a service contract with a service provider. In our view, the guidance should be split into three sections:

1. Administration – who is responsible for providing information to and paying contributions to the administering authority?
2. Discretions – what responsibilities lie with (i) the service provider and (ii) the Fair Deal employer? In our view, the decision making ability should fall to the body responsible for the liability linked to that decision. The guidance will also need to cover how the IDR process works alongside this.
3. Risk sharing – the management and funding of risk and liabilities as a result of decisions made by the service provider eg pay awards and redundancies.

The advice should include a template service contract for use by Fair Deal employers.

Question 7 – Should the LGPS Regulations 2013 specify other costs and responsibilities for the service provider where deemed employer status is used?

Regulation 3 - new regulation 3B(14)(b)

This regulation provides that the service provider must be responsible for, and meet any costs arising from, decisions which give rise to payments under regulations 68 (in the absence of express provision to the contrary in the service contract).

This is the only instance in these proposals where, in the absence of effective contract provisions, the risks for such payments lie with the service provider, even if other parts of the contract may enforce the Fair Deal employer's policy in these areas. This situation may well result in service providers not excluding risk premiums from their pricing or, in some cases, not bidding at all.

Could regulation 3B(14)(b) instead state that where there is express provision in the service contract, the service provider is responsible for reimbursing the Fair Deal employer for any costs arising from decisions taken by the employer which may give rise to payments under regulation 68 (employer's further payments)?

In our view the interaction of this regulation with regulation 60 (statements of policy about exercise of discretionary functions) of the LGPS Regulations 2013 needs

further consideration. Regulation 60 provides that where a decision is discretionary eg waiving the actuarial reduction, the Scheme employer must have a written statement setting out their policy on the discretion. Does regulation 13(14) need to include that the reference to 'Scheme employer' in regulation 60 is to be read as the employer of a protected transferee, where the discretion falls to them? This would also be relevant for employers covered by Part 4 of Schedule 2.

We think further consideration should be given to providing that the employer of a protected transferee must be responsible for the employer's share of any Shared Cost APC arrangement ie the references in regulations 15(5), 16(2)(e) and 16(4)(d) to 'Scheme employer' should be taken to be references to the employer of the protected transferee.

Lastly, what about decisions and payments under regulations 5 and 6 of the Local Government (Early Termination of Employment) (Discretionary Compensation) Regulations 2006 [SI 2006/2914] and under the Local Government (Discretionary Payments) (Injury Allowances) Regulations 2011 [SI 2011/2954]? Those regulations will need to make it clear what happens if the deemed employer route is taken especially as the service provider will not qualify as an employing authority or LGPS employer in those regulations. The options being:

- i) to make no reference to these benefits and leave it to contracting authorities to determine how such benefits will be covered, if at all under the new arrangements
- ii) to add service providers into the definition of employing authorities and LGPS regulations but leave the policy and payment to the Fair Deal employer, unless provided for otherwise in the service contract

Question 8 – Is this the right approach? (Retaining the admitted body option)

The LGPC would prefer the deemed employer route to be the default with the admitted body route retained for use in exceptional circumstances only eg where a Fair Deal employer lets out a large contract on a long term basis.

In our view, running the two methods alongside each other adds another unwanted layer of complexity to the Scheme. It also helps to reinforce the misconception that the exposure to pensions risk is passed in full to the admission body, when the admitted body route is used. Regulation 64(3) of the LGPS Regulations 2013 provides that where it is not possible for the administering authority to obtain all or part of the exit payment due from the exiting employer, or from an insurer, or any person providing an indemnity, bond or guarantee on behalf the exiting employer, the liability passes back to the related body ie the Fair Deal employer. This makes it clear that pensions risk remains with the Fair Deal employer, as was demonstrated by the collapse of Carillion.

Question 9 – What further steps can be taken to encourage pension issues to be given full and timely consideration by Fair Deal employers when services or functions are outsourced?

As already stated in our answer to question 5, the regulations should include that the Fair Deal employer must inform the relevant administering authority of the proposed outsourcing and whether the service providers will be required to bid for the contract

on the deemed employer or admitted body status. This will help to ensure that an early dialogue takes place between the administering authority and the Fair Deal employer.

The regulations should also provide that if the deemed employer route is taken, the Fair Deal employer must provide the administering authority with copies of the relevant parts of the service contract.

Question 10 – Are you aware of any other equalities impacts or of any particular groups with protected characteristics who would be disadvantaged by our Fair Deal proposals?

No

Additional comments

Aggregation of LGPS benefits

The LGPC would like to see the equivalent of regulation 16(7) of the Local Government Pension Scheme (Administration) Regulations 2008 [SI 2008/239] inserted into the LGPS Regulations 2013. This would make it explicit that administering authorities do not have to set up a new active pension account and offer the various options in relation to aggregation when a member is compulsorily transferred. Whilst it could be argued that this is not necessary when the deemed employer route is taken, as the employee remains with the same Scheme employer under the LGPS regulations, this is not the case for the admitted body route.

In 2013, we obtained legal advice which confirmed that on TUPE transfer the employment with the current employer ends and a new employment commences (albeit that TUPE then protects certain terms and conditions BUT excluding pensions for old age, ill health or survivor benefits). Under the current admitted body route, LGPS administering authorities are obliged to set up a new active pension account and offer the various aggregation options when a member is compulsorily transferred to a service provider. This is disruptive for the employee and an administrative burden on the administering authority. It also provides for an inequality of treatment, dependent on which route the Fair Deal employer takes when outsourcing a function or service.

References to ‘Scheme employer’ in the LGPS Regulations

There are a large number of references to the term Scheme employer in the LGPS Regulations 2013. In order for the deemed employer route to work effectively it will be necessary for the regulations to specify where the term should apply to the employer of a protected transferee under the deemed employer route. This would also be relevant for employers covered by Part 4 of Schedule 2.

Transferring pension assets and liabilities

Question 11 – Is this the right approach?

The LGPC seeks to ensure that LGPS administering authorities are appropriately protected when mergers or takeovers occur; however, we urge caution against introducing a ‘one size fits all’ solution. There may be instances where an automatic transfer of the pension liability may not be in the best interest of the pension fund – for example, when a large contractor sells a small contract to a small contractor. In

these circumstances it might be more prudent for the past service pension liability to remain with the large contractor.

Question 12 – Do the draft regulations effectively achieve our aims?

Regulation 4 – Regulation 64(11)

This regulation needs to make it clear that the successor body becomes responsible for the assets and liabilities from the date of the transfer.

Regulation 4 – Regulation 64(12)

This regulation provides that '*where the successor body is a Scheme employer with active members in that administering authority or another administering authority, the assets and liabilities of the exiting employer must be automatically transferred to the administering authority of the successor body and combined with the successor body's assets and liabilities.*' However, where the successor body is a Scheme employer in the same administering authority the assets do not need to be transferred; merely combined.

I hope the above is helpful; if you have any questions, please do not hesitate to contact me.

Yours faithfully



Jeff Houston

Head of Pensions