sppa
SCOTTISH PUBLIC PENSIONS AGENCY

LOCAL GOVERNMENT PENSION SCHEME (SCOTLAND)
CIRCULAR SPN/LG No. 1/2018

WHO SHOULD READ:	**Secretary General, Convention of Scottish Local Authorities** **Chief Executive, Scottish Local Authorities** **Chief Executive, Water Authorities** **Principal Reporter, Scottish Children's Reporter Administration** **Chief Executive, Scottish Environment Protection Agency** **Director General, Strathclyde Passenger Transport Executive** **Clerk, Strathclyde Passenger Transport Authority** **Chief Executive/Director, VisitScotland**
ACTION:	**This circular should be brought to the attention of Pension Managers, Superannuation Sections and LGPS Employer Payroll Departments. You may also wish to draw it to the attention of the Directors of Finance and Administration**
SUBJECT:	

About Circular No.1/2018:

The purpose of this circular is to:

- **Confirm how Guaranteed Minimum Pension (GMP) related overpayments which arise from the current reconciliation exercise should be managed going forward and**
- **provide information that the Accountable Officer may wish to take into account when deciding on how accrued GMP related overpayments are managed.**

Background

SPPA wrote on 11 February 2016 setting out the process schemes should follow on undertaking its GMP reconciliation exercise. This set out the recommendations on the tolerances to be used, the cases to be included in the exercise and that action on arising overpayments would be considered once the scale was known. The recommendations were issued to all public service schemes with the aim that a consistent approach would be

applied. Fund authorities will be aware that HMRC's timetable for completing the reconciliation exercise by December 2018.

Since then SPPA has recently confirmed the current position of each Funds' reconciliation exercise and understands that at the moment no overpayments have been formerly identified as part of this exercise.

Overpayment action

As you are aware a similar problem was identified in 2008/9 whereby erroneous GMP data lead to incorrect annual indexation being applied and a number of individuals being overpaid pension. At that time it was agreed that overpayments accrued up to the point of identification should be written off across all public service schemes. However, going forward and unique to Scotland, the pensions for affected members of the LGPS, Police and Firefighter schemes were allowed to remain at their original level with the overpaid element being converted to a scheme entitlement known as an Increased Pension Entitlement (IPE).

The responsibility for deciding what action should be taken on the accrued overpayments arising from the current reconciliation exercise rests with the scheme's Accountable Officer (AO). This circular sets out what the AO may wish to consider when deciding on the recoverability of any overpayments that arise from the reconciliation exercise. The circular also confirms how GMP related overpayments should be managed going forward.

Overpayments going forward

Although as far as SPPA is aware overpayments have still to be formally identified from the reconciliation exercise, in line with other public service schemes it estimates that there will be a number of GMP related overpayments in the LGPS. In anticipation of that occurring Scottish Ministers have decided that as in 2008/2009 any LGPS pension in payment affected by this exercise should not be reduced going forward. Instead the identified GMP related overpayment should be converted as before into an IPE allowing the pension to continue at its existing level.

SPPA has confirmed with HMRC that the award of an IPE in these circumstances would be treated as an authorised payment and further work will now be undertaken to draft and consult on the regulations necessary to introduce an IPE to cover overpayments for this reconciliation exercise. The Regulations used to introduce the IPE in 2008/9 were limited to the overpayments that were identified as part of that earlier exercise.

In the meantime an IPE should be awarded administratively pending the finalisation and coming into force of the Regulations. Schemes should keep a note of each IPE awarded and the amount involved as SPPA will need to reconcile the number and level of awards made. Again as in 2008/09 a similar approach is being taken for affected pensioners in the Police and Firefighters schemes.

Accrued overpayments

As mentioned above a decision on how any accrued GMP related overpayments should be managed is the responsibility of the scheme AO in line with any guidance relating to the management of public service pension overpayments. The following information is intended to help inform the AO when considering what action is appropriate on the accrued overpayments.

The complexity and general legal construction surrounding the Pension Increase and GMPs is recognised and accepted and on that basis it would be highly unlikely that affected pensioners would have been aware that they were being overpaid. Therefore the AO may wish to take into account the areas mentioned below, alongside their existing guidance when making any decision to recover overpayments. This is based on advice issued by the LGA to its administrative authorities earlier in June 2017.

Is the size of the overpayment relevant?

In its determination in the case of *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch) the High Court found that "In view of the small scale of the problem, the distress that any attempt to recover the sums would inevitably cause, and the likelihood that the exercise would anyway not be cost-effective" it was not necessary for the Trustees to take any steps to recoup the overpayments." In this case, the amounts of the overpayments to three widows were relatively small (no more than £10,200 in total).

Can 'Estoppel' be used to prevent the recovery of an overpayment?

The starting point used to be that if an overpayment had been made under a mistake of law it was generally not recoverable but if the employer could establish that the mistake was a mistake of fact, the money was potentially recoverable. The Law Commissions in England, Wales and Scotland recommended that the distinction between mistakes of law and mistakes of fact should be removed. The House of Lords has already decided cases on this basis (see *Kleinwort Benson v Lincoln City Council and others* 1998 4 All ER 513). So, whether an overpayment results from a mistake of fact or law, it would seem that, potentially, it could now be recoverable unless estoppel applies (although, in the absence of an employee's consent to repayment, legal advice should be sought before instigating any formal recovery action).

The recipient may lodge the defence of *estoppel by representation* if they can show that:

- the administering authority made a representation of fact that led the recipient to believe that they were entitled to treat the money as their own;
- the recipient has changed their position, in good faith, in reliance of that representation; and
- the overpayment was not caused by the fault of the recipient.

The recipient may lodge the defence of *Estoppel by convention* if they can show that:

- even if the administering authority had not made a representation of fact that led the recipient to believe that they were entitled to treat the money as their own, the administering authority and the recipient had acted on an assumed state of facts or law, the assumption being shared by both parties or assumed by one and acquiesced to by the other (as demonstrated in subsequent mutual dealings between both parties)

However, estoppel is an inflexible, all or nothing defence. A successful plea of estoppel acts as a total bar to recovery. This can lead to unjust enrichment so that the recipient can keep all of the money even if it exceeds the detriment they suffered. In recognition of this, the courts have developed the more flexible 'change of position' defence (see below).

Although the Scottish Government Finance Manual (SGFM) guidance on overpayments does not directly apply to local government the following is provided for information and

allows consideration of how overpayments in the other affected schemes will be considered.

In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. Each case should therefore be dealt with on its merits. When deciding on appropriate action, taking legal advice, organisations should consider:

- whether the recipient accepted the money in good or bad faith;
- the cost-effectiveness of recovery action;
- any relevant personal circumstances of the payee, including defences against recovery;
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances.

As a general rule, public sector organisations should only take a decision not to seek recovery of an overpayment on the basis of a cost benefit analysis of the options but the SGFM goes on to set out examples where a defence against recovery can be made which include:

- the length of time that had elapsed since the overpayment was made see Prescription and Limitation (Scotland) Act 1973 below.
- **hardship**. As a matter of policy public sector organisations may waive recovery of overpayments if it would cause hardship, but hardship must not be confused with inconvenience. To be required to pay back money to which there was no entitlement does not in itself represent hardship, especially if the overpayment was discovered quickly. To be acceptable, a plea of hardship should be supported by reasonable evidence that the recovery action proposed would be detrimental to the welfare of the recipient or his / her family.
- **change of position**. It could be argued that the recipient of an overpayment may in good faith have relied on it to change their lifestyle. It might then be inequitable to seek to recover the full amount of the overpayment. The paying organisation's reaction should depend on the facts of the case. The onus is on the recipient to show that it would be unfair to repay the money

Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act")

Claims for overpayments must be made within 5 year "prescriptive period"

Claims for recovery of overpayments of pension made by either an error of fact or law must be made (i) within 5 years of the date when the overpayment was made; or (ii) within 5 years from the date the overpayment with reasonable diligence could have been ascertained.

A claim must be made by commencement of court proceedings. **(N.B. A simple request for the money is not enough.)** If such a claim is not made within the 5 year period, the right to recover is extinguished (section 6 of the 1973 Act). The 5 year period is known as "the 5 year prescriptive period".

Each overpayment creates a separate right of recovery

Each overpayment of pension gives rise to a separate right of recovery, with each right of recovery subject to the 5 year prescriptive period. This means that if there has been a series of overpayments going back 10 years, only those overpayments made within the last five years from today are recoverable. In practice, however, time would have to be factored in for the raising of court action. This means if court action is still to be raised, only overpayments made within five years of the raising of the court action would be recoverable.

The five year time limit is subject, of course, to the proviso that the 5 year prescriptive period can run from a date later than the date the overpayment was made if the overpayment could not until later with reasonable diligence have been ascertained. Accordingly if the overpayments dating back 10 years could only have come to light 3 years ago, they would all still be recoverable. In fact there would still be another two years to run during which time they would all still be recoverable.

In a simple example schemes will have paid full indexation where a GMP was not held despite having scheme history (i.e. of contracted out employment for the period April 1978 to April 1997 during which GMP accrued) that should have alerted the scheme that a GMP was potentially due where a member has reached state pension age. The split indexation between the scheme and DWP only commences when the member claims their state pension but it may be argued that it would have been reasonable for schemes to make enquiries in these cases. Hence at the point of the member reaching state pension age with reasonable diligence it may have been realistic for a scheme to recognise the indexation being applied could be wrong and enquiries should have been made. So in this example the prescriptive period would have commenced when the member reached state pension age.

Alternatively where the scheme held a GMP but the amount was incorrect it would have been relying on HMRC to provide the correct GMP record. So an error will only come to light once the reconciliation exercise has completed and the correct GMP rate has been established. In these cases it could be argued that the scheme would have undertaken reasonable diligence by applying the incorrect GMP data and would not have been aware that it was incorrect until the reconciliation. In this example the prescriptive period would commence when the scheme became aware of the error following reconciliation.

This is just a brief explanation of how the 1973 Act may be applied. Schemes should seek their own legal advice before reaching a decision on when the prescriptive period commences.

Tax

Where a pension is overpaid, from what date should the pension be corrected?

Pension schemes are obliged to correct any error they discover within a reasonable period of time. To do otherwise would render payments unauthorised under regulation 14 of the Registered Pension Scheme (Authorised Payments) Regulations 2009 [SI 2009/1171].

HMRC have provided a clear steer with regards to timing, in so much that "*When a scheme discovers an overpayment it immediately becomes unauthorised and is subject to an unauthorised tax charge*".

However paragraph 5 of regulation 14 confirms that a pension is an authorised payment if the scheme rules are being amended to allow for such payments to be made indicating that the continued payment of the existing rate of pension would be treated as an authorised payment by the planned introduction of the IPE.

Would sums written off be unauthorised payments?

We understand that any overpayment that is not recovered will not be unauthorised if it falls within regulations 13 or 14 of the Registered Pension Schemes (Authorised Payments) Regulations 2009 [SI 2009/1171].

Regulation 13 says that a payment made in error will be an authorised payment if the:

- payment was genuinely intended to represent the pension payable to the person,
- administering authority believed the recipient was entitled to the payment, and
- administering authority believed the recipient was entitled to the amount of pension that was paid in error.

In addition to the above, there is a further exemption where the overpayment is a 'genuine error' as described in PTM146300 and the aggregate overpayment (paid after 5th April 2006) is less than £250. In such circumstances, if the overpayment is not recovered it remains an unauthorised payment but it does not have to be reported to HMRC and HMRC will not seek to collect tax charges on it.

In the meantime, SPPA has provided a short update and Q&A on its website.

Kimberly Linge
Policy Manager, LGPS
8 February 2018

Contact Information:
Should you have any enquiries about this circular, or require further information, please contact Kimberly Linge, Policy Manager, LGPS.

Scottish Public Pensions Agency
7 Tweedside Park
Tweedbank
GALASHIELS
TD1 3TE

www.sppa.gov.uk
Telephone: 01896 893000
Fax: 01896 893214
annette.greenslade@gov.scot
kimberly.linge@gov.scot