Local
Government
Association

Local Government Pensions Consultation
SPPA Policy
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19 January 2022

Dear Sirs

Response to consultation: the Draft Local Government Pension Scheme (Scotland) (Amendment) Regulations 2021

I write in response to your consultation on the draft Local Government Pension Scheme (Scotland) (Amendment) Regulations 2021.

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. The LGPC is a committee of councillors constituted by the LGA, the Welsh Local Government Association (WLGA) and the Convention of Scottish Local Authorities (COSLA). The LGPC considers policy and technical matters affecting the LGPS in the UK.

This letter and the appendix set out our response to the draft regulations.

1. Early payment of pension at age 55 - these regulations allow deferred members of earlier schemes to elect for early payment of their benefits between age 55 and 60 without needing their former employer's consent. This also applies to pension credit members who were awarded the credit under the Earlier Schemes to be able to elect to receive their benefits early, at a reduced rate, on or after age 55.

The LGA supports this change. See the appendix for our response on technical matters.

2. Calculation of 'the Underpin' - the regulations also clarify how to carry out the calculation of the protection known as 'the underpin', taking into account the actuarial increase/reduction when considering the better of the two benefit options for the member on retirement.

The LGA does not support this proposal. In our view, all underpin cases should be reviewed in full as part of the McCloud remedy process.

The proposal is to make some changes to the current underpin ahead of further changes that will be made as a result of the McCloud remedy. These changes are being made because of an appeal case. If they go ahead, these changes will have effect from 1 April 2015 and administering authorities will need to recalculate all underpin cases since that date.

However, between July and October 2020, you consulted on the Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2020 ('McCloud Remedy Regulations'). These propose to extend the underpin to younger members and make additional changes to ensure the underpin works effectively and consistently for all members. These will also have effect from 1 April 2015. When the McCloud Remedy Regulations come into force, administering authorities will need to recalculate the underpin calculations already revisited under these regulations again.

This means that administering authorities will recalculate underpin calculations for some members twice over a short period. In some cases, the result will change each time and some members will see their benefits change twice with retrospective effect. Retrospectively changing benefits causes significant complications, including pension tax implications for members. These complications are often difficult for members to understand and may cause distress.

In our view, it would be more appropriate for the McCloud Remedy Regulations to deal with this issue. The other changes proposed in these regulations will already place a significant burden on administering authorities, particularly in dealing with survivor partner pension amendments. In addition, administering authorities are already under significant pressure preparing for the McCloud remedy, pensions dashboards and GMP equalisation. In our view, requiring administering authorities to recalculate benefits that will need to be recalculated again a short time later is not justified.

If you decide to continue with the proposal, see appendix one for our response on technical matters.

3. Survivor Benefits Walker & Goodwin Judgements - the regulations amend the calculation of survivor partner pensions so that surviving civil partners, survivors of married same-sex couples and male survivors of female married members are placed in a similar position to female survivors of male married members.

We have two concerns about this proposal.

Firstly, it appears to create a new inequality, risking further legal challenge. Under the proposal, administering authorities will always include relevant additional membership, such as added years, when calculating pensions payable to surviving civil partners, survivors of same-sex marriages and male survivors of female married members. However, this membership is not always included when calculating pensions payable to female survivors of male married members. This means that, in some cases, the survivor pension payable to a same-sex civil partner, or spouse of a male member, will be more than the pension payable to an opposite sex spouse.

We recommend that you consider this risk and whether it would be sensible to resolve the inequality now.

Secondly, when revisiting past cases, administering authorities will find that they have overpaid some eligible children's pensions. This is because the draft regulations will in some cases cause a survivor partner's pension to be payable, where none was previously, such as where the deceased left before 6 April 1988. In some cases, authorities will have paid (or will be paying) eligible children's pensions at a higher rate because they were not paying a surviving partner's pension, which will now be incorrect. Overpayments of children's pensions may also result from increasing an existing survivor partner's pension. We ask that you consider this and how administering authorities should deal with these cases.

Though not mentioned under item three, the draft regulations also propose improving cohabiting partner pensions. We have concerns about how these improvements, which will apply to deaths on or after 1 April 2015, will apply.

You propose that where "the cohabiting partnership was entered into before the member's active membership ceased", authorities should use all membership when calculating the cohabiting partner's pension, rather than just membership from 6 April 1988 (plus any membership before then for which the member paid additional contributions). However, the regulations are unclear on what constitutes a cohabiting partnership being entered into.

It is imperative that administering authorities have clear instructions on how this change should apply. Without this clarity, administering authorities are likely to apply different criteria meaning different levels of survivor benefits could be paid depending on what fund the member paid into.

We therefore ask that regulations define when a cohabiting partnership is entered into. We suspect there are two possible options:

- when the continuous period during which the conditions in the definition of cohabiting partner are first met
- when the couple first started living together.

Under the first option, we assume the partner will need to satisfy the administering authority that the conditions in the definition of cohabiting partner in the LGPS (Scotland) Regulations 2018 were met for a continuous period beginning with the last day of active membership and ending with the date of death. The advantage of this option is that authorities will already be testing these conditions when deciding whether the partner is entitled to the pension. The disadvantage is that the authority may need to test these conditions over a much longer period, which will make it more difficult for the partner to provide sufficient evidence and for the authority to test. In some cases, administering authorities will need to ask the surviving partner for this evidence going back decades. It is very likely that this evidence will not be available and administering authorities will be unable to determine if the conditions are met.

Under the second option, the partner would need to satisfy the administering authority that the couple were living together for a continuous period beginning with the last day of active membership and ending with the date of death. The advantage of this option is that it will be slightly easier for the authority to test. The disadvantage is that it may be unfair when compared to marriages and civil partnerships. In these cases, when deciding whether to calculate the survivor pension on a pre-leaving or post-leaving basis, authorities use the date of marriage / civil partnership rather than when the couple started living together, which may be many years earlier.

You also propose that where the cohabiting partnership was not entered into before the active membership ceased but the couple had been cohabiting with each other while the member was an active member after 31 March 2009, the authority will include relevant additional membership, such as added years, in the calculation. The wording suggests that the authority would simply need to consider whether the couple were living together (and not whether the conditions in the cohabiting partner

definition were met) while the member was an active member after 31 March 2009. This does not seem logical. Is this the intention?

We are also concerned that the improvements to cohabiting partner pensions may penalise members for choosing to marry or enter into a civil partnership. For example, where a couple entered into the cohabiting partnership before the active membership ceased and decided to marry after the active membership ceased, the partner may receive less pension than they would have done had they not married. We ask that you consider this outcome when deciding whether and how to proceed with the improvements to cohabiting partner pensions.

4. Further Flexibilities for Fund Authorities - these regulations provide further flexibilities for fund authorities in dealing with employers and allow for amendments to an employer's contribution rate in between valuations.

The LGA supports these changes. See the appendix for our response on technical matters.

5. Cost Cap - in order for GAD to finalise the result of the 2017 valuation, the cost cap figure is amended, with retrospective effect, to 1 April 2015.

See the appendix for our response on technical matters.

I am happy to meet to discuss our response in more detail if you think that would be helpful.

Yours faithfully

Jeff Houston
Head of Pensions

Appendix

Regulation 3(a) of the draft regulations

This substitutes the wording in regulation 3(13) of the Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014. The new wording (as is also the case with the current wording) refers to deferred members of "one of the Earlier Schemes". Regulation 1 of the Transitional Regulations defines Earlier Schemes to mean "the 1974, the 1987, the 1998, the 2009 and the 2015 Schemes collectively."

We understand that regulation 3(13) intends to cover deferred members whose membership ended before 1 April 2015. It is not intended to cover deferred members whose membership ended on or after then. This is because the Local Government Pension Scheme (Scotland) Regulations 2018 already cover these members. However, by including "2015 Scheme" into the definition of "Earlier Schemes", regulation 3(13) is, in our view, incorrectly also covering these members.

We recommend that you take this opportunity to remove the reference to the "2015 Scheme" from the definition of "Earlier Schemes".

Regulation 4 of the draft regulations

Draft regulation 4 amends regulations 4(5) and 4(6) of the Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014. The amendment requires administering authorities to include "any applicable actuarial adjustment" when calculating, as at the underpin date, the assumed benefits and the underpin amount.

Further to our comments under item two in the letter, we have the following comments to make:

- It is unclear how authorities should include any actuarial adjustment where the benefits become payable after the underpin date. This will apply where:

    - the member is an active member on the normal retirement age applicable to the member under the 2009 Scheme (normally, 65) and does not then leave

    - the member left before 1 June 2018 aged 60 or over and did not elect to receive immediate payment

    - the member left on or after 1 June 2018 aged 55 or over and did not elect to receive immediate payment.

  As no actuarial adjustments are applicable on the underpin date (as the benefits are not then payable), do authorities continue to ignore actuarial adjustments? If not, you will need to make further amends to cover these cases.

- GAD will need to update the early retirement guidance to cover cases where the authority included actuarial adjustments in the underpin calculation. This will need to be done at the same time as the draft regulations. The current guidance, as set out in paragraphs 2.11 and 2.12, says that authorities should reduce the underpin addition and CARE benefits included in the assumed benefits calculation as if they were 2009 Scheme benefits (eg using, in most cases, an NPA of 65). This will not be appropriate where the authority included actuarial adjustments in the underpin calculation. We presume that for these cases it will say that the authority should not further adjust the addition and should reduce the CARE benefits included in the assumed benefits calculation as normal under the 2015 Scheme (rather than treating them as if they were a 2009 Scheme benefit).

- When revisiting past underpin calculations, so to align with the GAD factors authorities used in the actual pension calculation, we assume that authorities should use the GAD factors in force at the underpin date (rather than the current factors)? This may be something that the revised GAD guidance could confirm.

Regulation 8 of the draft regulations

Draft regulation 8 removes the requirement to base the amount of additional pension contributions (APCs) on the member's gender.

We understand this change is being made to align APC factors with other factors in being gender neutral. The APC factors will need to be changed to be gender neutral in tandem with the regulations taking effect.

Regulation 9 of the draft regulations

Draft regulation 9 corrects an error in regulation 40(9)(a)(v) of the Local Government Pension Scheme (Scotland) Regulations 2018 by changing "39/240" to "49/240".

However, there is a further error in regulation 40(10)(a)(vi), which currently says “60/160” whereas it should say “60/120”. We recommend you take this opportunity to also correct this error.

Regulation 11 of the draft regulations which inserts regulation 61(4A) to (4G) into the Local Government Pension Scheme Regulations (Scotland) Regulations 2018

The regulation provides for deferred debt agreements to which we have the following comments / questions:

- The new wording refers to ‘an exiting Scheme employer’. Regulation 61 already refers to ‘exiting employers’. We assume both terms mean the same thing. Therefore, we recommend that you change the reference from ‘exiting Scheme employer’ to ‘exiting employer’.

- Regulation 61(4B)(a) says that an authority may only enter into the agreement where “the last active member in respect of that Scheme employer has left the Scheme.” This suggests that, where an employer becomes an exiting employer because they no longer have any active members in the relevant fund but have active members in a different fund, the authority will need to wait until the employer has no active members in any fund. Is this the intention? If not, we recommend you amend the regulations to make this clear.

- The definition of ‘deferred employer’ says that it means “a scheme employer which enters into a deferred debt agreement with an administering authority”. In our view, at the point of entering into the agreement, the employer is an ‘exiting employer’ rather than a ‘scheme employer’. We recommend that you change ‘scheme employer’ to ‘exiting employer’ in the definition.

- Regulation 61(4E)(a) says that the deferred debt agreement terminates if the deferred employer enrols new active members. We assume you intend for this to only apply if the employer enrols active members in the relevant fund, and not if the employer enrols active members in a different fund? If so, we recommend that you amend the regulation to make this clear. Also, regulation 61(4G) suggests that, on the termination of the agreement in this circumstance, the deferred employer becomes an exiting employer. However, in our view, the deferred employer becomes a scheme employer.

- Regulation 61(4E)(d) refers to a ‘deferred debt arrangement’. We recommend you amend this to ‘deferred debt agreement’.

- Regulation 61(4E)(e) refers to ‘secondary contributions’. We recommend you amend this to ‘secondary rate of the contributions’.

- Regulation 61(4F) allows, where the agreement will terminate on the take-over, amalgamation, insolvency, winding up or liquidation of the deferred employer, the authority to serve a notice stopping the termination where the authority is “satisfied that the event would not be likely to significantly weaken the deferred employer’s ability to meet the contributions payable under the deferred debt agreement in the next 12 months”. The wording appears to be trying to align with the wording of regulation 61(4E)(d). Therefore, we recommend you amend “significantly weaken” to “materially weaken” and “satisfied” to “reasonably satisfied”.

- Regulation 61(10) says that exit date means “the date on which the employer becomes an exiting employer”. However, it is unclear when this date is where an employer has become an exiting employer twice. For example, where an employer became an exiting employer, then a deferred employer and then an exiting employer again. The actuarial valuation of the liabilities under regulation 61(2)(a) is assessed as at the exit date, so it is important that this date is clear.

- Regulation 61(10) says that exiting employer means “an employer of any of the descriptions specified in paragraph (1)”. Under a deferred debt agreement, the employer stops being an exiting employer for a period. We recommend that you amend the definition to reflect the period during which the employer is a deferred employer.

Regulation 12 of the draft regulations which inserts regulation 61A into the Local Government Pension Scheme Regulations (Scotland) Regulations 2018

Regulation 62(1) of the Local Government Pension Scheme (Scotland) Regulations 2018 requires scheme employers to contribute in each year covered by a rates and adjustment certificate under regulation 60 or 61 the amount calculated in accordance with that certificate and regulation 62(4). We recommend you add regulation 61A to regulation 62(1).

Regulation 12 of the draft regulations which inserts regulation 61B into the Local Government Pension Scheme Regulations (Scotland) Regulations 2018

Regulation 61B uses the term ‘exiting Scheme employer’. Regulation 61 refers to ‘exiting employers’. We assume both terms mean the same thing. Therefore, we recommend you change the reference from ‘exiting Scheme employer’ to ‘exiting employer’.

Regulation 13 of the draft regulations

Draft regulation 13 changes the figure in regulation 101(1) of the Local Government Pension Scheme (Scotland) Regulations 2018 from 15.5 per cent to 15.2 per cent with effect from 1 April 2015.

However, regulation 101(1) took effect from 1 June 2018, which means that the change has effect before the regulation it is amending has effect.

We recommend you add regulation 101(1) to the regulations listed in regulation 1(2) of the 2018 Regulations, which has effect from 1 April 2015.