

# LGPC MEETING – 8 February 2021

## Virtual meeting agenda

<b>Item</b>		<b>Timings</b>
1	Welcome, apologies for absence and declarations of interest	11:00
2	Minutes of meeting held on 2 November 2020 - Paper A	11:05
3	Matters arising	11:10
4	Regulations update for England and Wales – Paper B	11:15
5	SAB update for England and Wales – Paper C	11:30
6	Regulations update for Scotland - Paper D	11:45
7	Regulations update for Northern Ireland - Paper E	11:55
8	Update from Technical Group – Paper F	12:05
9	Training and annual conference update – verbal update	12:15
10	Any other business	12:25
11	Dates of future meetings: 10 May, 2 August, 1 November 2021	12:30

## **Paper A: Minutes of Meeting held on 2 November 2020**

### **Present**

Cllr John Fuller	Chair, LGA
Cllr Alan Waters	LGA
Cllr Richard Wenham	LGA
Cllr Phil Murphy	LGA
Cllr Adam Paynter	LGA
Cllr Goronwy Edwards	LGA
Cllr Oliver Ryan	LGA
Cllr Joanne Laban	LGA
Mr Jeremy Hughes	MHCLG
Mr David Murphy	NILGOSC
Ms Kimberly Linge	SPPA
Ms Linda Welsh	SPPA
Mr Kevin Gerard	Technical Group rep

### **Secretariat**

Ms Lorraine Bennett	LGPC
Ms Rachel Abbey	LGPC
Ms Elaine English	LGPC
Mr Jeff Houston	LGPC

### **Non-attendees**

Ms Rachel Brothwood	SAB representative
Cllr Iain Malcolm	LGA

## **1. INTRODUCTION FROM THE CHAIR**

The Chair, Cllr John Fuller [JF] welcomed members to the second virtual meeting and outlined the protocol for the meeting.

## **2. APOLOGIES**

No apologies were received.

No declarations of interest were declared.

## **3. MINUTES**

The minutes of the previous meeting held on 7 September 2020 were agreed.

## **4. MATTERS ARISING**

Cllr Oliver Ryan [OR] thanked the Chair for his welcome and stated that he missed the last meeting due to a funeral.

Lorraine Bennett [LB] informed the Committee that the Secretariat has written to Cllr Byron Rhodes on behalf of the Committee extending their thanks to him. LB also confirmed that, following the Committee's agreement to the budget at the last meeting, the subscription letters to local authorities have been sent.

## **5. EXIT PAYMENT REFORMS**

LB presented the key points from Paper B.

Paper B only covers England and Wales. The exit payment reforms do not apply in Scotland or Northern Ireland. The Government first consulted on exit payment reforms in 2015 but implementation of the reforms was delayed. Two streams of exit payment reforms are now being taken forward at pace:

- the exit payment cap which impacts the whole public sector and is effective from 4 November 2020, and
- further exit payment reforms which impact some LGPS employers only and amend the LGPS regulations to accommodate the cap.

HMT exit payment cap regulations came into force earlier than expected, and before any changes had been made to the LGPS regulations. This has caused an apparent conflict between the two sets of regulations when the exit of an LGPS member aged 55 or over would cost the employer more than £95,000.

The MHCLG consultation on further exit payment reforms has closed, but they have also asked for responses to draft regulations by 18 December 2020. Implementation of these amendments is expected to be early in 2021.

## Exit cap

LB stated that the draft Restriction of Public Exit Payment Regulations 2020 are effective from 4 November 2020. The Schedule to the regulations provides a list of public sector employers and offices that the cap applies to.

The LGPS regulations require immediate payment of unreduced benefits when a member retires due to redundancy or business efficiency. These regulations prevent an employer from meeting the pension strain cost of paying the pension early if the total cost of the exit exceeds £95,000. The LGA has made both MHCLG and HM Treasury (HMT) aware of the predicament this conflict places LGPS administering authorities and Scheme employers in.

HMT has published:

- [Exit Payment Cap Directions 2020](#) setting out further information about waiving the cap
- Guidance for employers on how to implement the exit payment cap, including a pro forma to use to apply to HMT for a waiver.

We expect further guidance from MHCLG on the waiver process.

The Local Government minister wrote to all councils and administering authorities setting out MHCLG's recommended course of action when the cost of an exit would exceed the cap. The minister's view, when the cost of an exit would exceed £95,000 is that:

- the administering authority should offer the member deferred benefits or an immediate fully reduced pension
- the employer should pay a cash alternative instead of making a strain cost payment to the administering authority.

The recommendation does not constitute legal advice or statutory guidance.

Jeff Houston [JH] confirmed that the Scheme Advisory Board (SAB) has obtained legal advice on the risk of challenge when a member is denied an unreduced pension. The SAB has published a commentary on that legal advice on the [Public Sector Exit Payments](#) page of the SAB website. The SAB suggests that:

LGPC Meeting – 8 February 2021

Agenda Item 2

Page - 3

- the administering authority should offer the member deferred benefits or an immediate fully reduced pension
- the employer should delay paying a cash alternative.

The SAB expects that a member who is denied an unreduced pension will launch a legal challenge. If that challenge is successful, and the SAB approach has been followed, the administering authority could then pay an unreduced pension and ask the employer to pay the strain cost. The employer may only be able to meet part of the strain cost.

If an employer pays a cash alternative, and a member launches a successful legal challenge, then the administering authority will ask the employer for a strain cost to cover the early payment of the pension. There is a risk that the employer would pay twice in respect of the same exit.

The MHCLG view is based on the principle of implied repeal. If their view is upheld in a legal challenge, then any administering authority that has paid unreduced benefits when the exit payment cap is breached would have to recover overpaid pensions.

JH noted that these regulations only affect exits if the cost exceeds the cap. There is no change to the benefits payable when an individual leaves and the employer cost is £95,000 or less.

A number of unions have launched legal challenges in response to the introduction of the exit payment cap and opposing MHCLG proposals for further reform.

Kevin Gerard [KG] expressed his concern about redundancies in the immediate future. His preference would be for all administering authorities to take the same approach. JH confirmed that administering authorities were free to take their own legal advice and may choose a different approach to the SAB recommendation. The Chair stated that no instruction should be given but that clear communication was needed. He suggested that a group be formed of representatives of administering authorities and employers to look at the issue and consider what information would be useful for employers in scope of the cap. JH stated that he would be attending a meeting the next day with practitioner representatives and SAB on how to progress.

**Action:** The Committee agreed that the Secretariat should produce a checklist of responsibilities for employers and administering authorities when dealing with an exit covered by the cap.

**Post-meeting script:** LGA published on 4 November an [information note for employers on the exit cap](#). The document is available on the employer guides and documents page of [www.lgpsregs.org](http://www.lgpsregs.org). It supplements the information provided on the [Scheme Advisory Board's website](#).

LGA also published on 9 November an [information note for administering authorities](#).

### Reforming public sector exit pay

LB outlined the second ongoing stream of reforms to exit pay. MHCLG is consulting on changes to LGPS and compensation regulations:

- to accommodate the exit cap by introducing partial reductions and allowing members to pay extra to buy out the reduction
- to make further reforms in line with the 2016 consultation, including limiting the calculation of discretionary compensation payments

The change that will have the greatest impact on LGPS members is the requirement to reduce the strain cost by the statutory redundancy payment (SRP). The member's LGPS pension would be reduced to reflect the lower payment made to the pension fund by the employer.

Figures produced by GAD indicate that 86% of members will be affected by the proposed reforms, predominantly because of the requirement to reduce strain cost by SRP. The LGA will respond to the consultation before the deadline of 9 November. Their response will highlight the impact of the reforms on lower paid workers with a relatively small pension. The response will include figures to illustrate the impact of the reforms on different groups based on age and pay.

Cllr Alan Waters [AW] noted that the purpose of the reforms was to reduce payments made to the highest paid when they exit public sector employment. The figures reinforce the significant impact the proposals would have on lower paid individuals who are facing the difficulties associated with redundancy.

Jeremy Hughes [JHu] confirmed that the purpose of the reforms was to tackle the cost of the exits of higher earners. There were other aims, including making public sector exits more in line with practices in the private sector and to remove incentives for employees to retire early.

The Chair thanked the Secretariat for the useful set of tables. He asked whether the figures could be shared with local authorities, including a list of key points.

## 6. REGULATIONS UPDATE ENGLAND AND WALES

LB presented the key point from paper C.

Three consultations on proposals to remove the discrimination identified in the McCloud / Sargeant cases have recently closed:

- The SAB responded to the MHCLG consultation on amendments to the statutory underpin. The response included comments on both policy and technical considerations of the proposal. MHCLG received 94 responses which they are currently considering.
- The LGPC responded to the equivalent consultation for amending the statutory underpin in Scotland.
- The LGA responded to HM Treasury's consultation on changes to the transitional arrangements of the 2015 unfunded schemes on behalf of the Teachers', Firefighters' and Police Pension Schemes.

The LGA responded to HM Treasury's call for evidence on pension tax relief administration. The LGPS operates on a net pay basis, meaning that it is more expensive for non-tax payers than a relief at source arrangement. GAD provided demographic data about LGPS members that are disadvantaged by the current arrangement. Women over 40 are disproportionately represented in that group, meaning that a legal challenge on the grounds of discrimination is possible.

The rate of CPI rate of inflation in September 2020 was confirmed as 0.5%.

## 7. SAB UPDATE [E&W]

Jeff Houston [JH] presented the key points from paper D.

### COVID-19

The fortnightly meetings of the Practitioners Group have proved very successful. The group has assisted the SAB in producing FAQs and publishing surveys on scheme resilience, cash flow, governance and mortality. The SAB agreed that the time was now right to move back to more strategic and specific issues. Fresh terms of reference and membership of a new practitioners' group will now be formed.

## **Investment, governance and engagement committees**

The terms of reference and composition of the Responsible Investment Advisory Group has been agreed. The group will facilitate a web resource for LGPS stakeholders.

DWP's consultation 'Taking action on climate risk: improving governance and reporting by occupational pension schemes' closed on 7 October. The DWP proposed changes that will apply in the private sector. MHCLG plans to consult in 2021 on proposals to introduce similar changes to the LGPS.

### **8. REGULATION UPDATE SCOTLAND**

The Committee noted the key points from paper E, which was presented by Kimberly Linge [KL].

#### **Consultation – addressing discrimination in the LGPS & amendment to the statutory underpin**

This SPPA consultation closed on 23 October. SPPA received more responses than normal, a number of which were very detailed. The Scottish Ministers are considering those responses before final regulations are laid in 2021.

#### **Cost Cap valuation**

GAD will recommence work on the 2016 cost cap valuation in 2021.

### **9. REGULATIONS UPDATE NORTHERN IRELAND**

The Committee noted the key points from paper F, which was presented by David Murphy [DM].

#### **LGPS Regulations**

The Department for Communities has not yet launched its consultation on changes to the statutory underpin. This is expected in early November 2020.

The Department of Finance is considering what action to take in response to the Goodwin case. The remedy introduced for Walker v Innospec was introduced from January 2020 without retrospection and a similar date is being considered for the Goodwin remedy.



## **10. UPDATE FROM TECHNICAL GROUP**

The Committee noted the key points from paper G, which was presented by Kevin Gerard

KG stated that most of the issues discussed by the Technical Group had already been covered in other Papers. The Technical Group recognises the enormous amount of work that the McCloud remedy will require by both employers and administering authorities. They would welcome the publication of statutory guidance at the same time as the regulations are amended. This would allow all administering authorities to implement the remedy using the same process and timescales.

The National Insurance Database is a facility which administering authorities use to check if a member has membership with any other LGPS administering authority before taking certain actions. In order for the database to work effectively, each administering authority must sign up to the database and regularly upload data. KG thanked LB for liaising with Section 151 Officers of local authorities that have not signed up or uploaded data to the database.

## **11. TRAINING AND CONFERENCE UPDATE**

Elaine English [EE] reported that the Fundamentals Programme that took place virtually during October had been very well received. The annual Governance conference originally scheduled to take place in January 2021 has been postponed until January 2022. The Secretariat is considering a virtual update in early 2021. The training programme for practitioners is currently being reviewed. We may introduce training on the exit payment cap and wider exit payment reforms.

## **12. ANY OTHER BUSINESS**

## **13. DATE OF NEXT MEETING**

8 February 2021, 10 May 2021 [August onwards to be agreed]

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# Paper B: LGPS England and Wales – regulation update

## Key points to note

- LGA/LGPC respond to GMP indexation consultation
- Pensions dashboard data standard and implementation date confirmed
- Judicial reviews on exit cap legislation granted permission

## Decisions

The committee is asked to note the content of this report.

## Summary

### LGPC/LGA response to GMP indexation consultation

On 21 December 2020 we responded, on behalf of the LGA and LGPC, to HM Treasury's consultation on indexation of guaranteed minimum pensions (GMPs) in public service schemes. The consultation set out how the Government proposes to continue to meet its commitment to fully price protect the GMP element of public service pensions following the introduction of the new state pension in 2016.

Members who met their State Pension age before 6 April 2016 are paid cost of living increases in relation to the GMP element of their LGPS pension with their State Pension. This is not possible for members who reach state pension age after that date. In 2016 an interim solution was put in place where public service pension schemes are responsible for paying the increases with the scheme pension. In the response, we state our preference would be for the interim solution to be made permanent.

### The PDP publishes dashboard data standards

On 15 December 2020, the Pensions Dashboard Programme (PDP) published the [key data standards which will underpin pensions dashboards](#).

Data standards provide a common language to describe the pensions information that will be found and displayed on the dashboards. Pension schemes will need to make sure that their data is consistent with the standards, so that members can

access this through the dashboards. With onboarding to dashboards expected from 2023, the PDP urges all schemes to start preparing their data now.

The [dashboard implementation timeline](#) is available on the on the PDP website.

## Exit payment reforms

### Background

1. The Small Business, Enterprise and Employment Act 2015 ('the 2015 Act') as amended by the Enterprise Act 2016 ('the 2016 Act') provides the power for HM Treasury (HMT) to make regulations implementing a £95,000 cap on exit payments in the public sector.
2. In 2015 government first consulted on the restriction of public sector exit payments (the £95k cap). This was followed by a further consultation with draft regulations in April 2019. A response to the consultation was published in July 2020 and regulations The Restriction of Public Sector Exit Payments Regulations 2020 ('the cap regulations') were finally implemented on 4 November 2020.
3. In October 2020 the Scheme Advisory Board, via the LGA, commissioned legal advice on the impact of the £95k cap on pension benefits under current LGPS regulations and on 31 October 2020 published a commentary on that advice on the exit payments page of the Board website.
4. HMT [Directions](#) and [Guidance](#) which were published alongside the cap regulations set out to clarify the payments to be included in the cap and how relaxation of the cap would operate.
5. In addition to the £95k cap in September 2020 MHCLG launched a [consultation on changes to the Local Government Pension Scheme \(LGPS\) and Discretionary Compensation Regulations](#). The consultation covered the required changes to compensation and LGPS regulations to implement both the £95k cap and the [public sector exit payments further reform](#) proposals issued by HMT in 2016.
6. The latter proposals were left to individual departments to implement rather than being via central HMT Directions. At this stage there have been no proposals to implement an [exit payment recovery](#) process that was also consulted on in 2015.
7. The MHCLG consultation closed on 9 November 2020 for policy issues and 18 December 2020 for comments on [draft regulations](#). It is understood that MHCLG's intention was to publish final regulations early in 2021.

8. On 22 December 2020 three Judicial Review (JR) applications regarding the application of the cap regulations in the LGPS were granted permission for hearing in March 2021.

### **Scope of the £95k cap**

9. Most but not all LGPS employers in England and Wales are subject to the £95k cap. Scheme employers excluded from the cap include universities and colleges and private companies with LGPS admission agreements.
10. English employers are covered by the relaxation provisions in HMT Directions. Welsh employers will be subject to different provisions to be determined by the Welsh Government.

### **Effect of the cap regulations and further reform proposals**

11. The £95k cap introduces a limit on the total exit payments that can be made to, or in respect of, a public sector employee on leaving service. This report focuses only on the effect on benefits provided under the provisions of the LGPS, although other payments are included in the cap.
12. Currently, where a scheme member receives their benefits early those benefits are reduced in accordance with actuarial factors determined by the Government Actuary's Department (GAD).
13. In some circumstances LGPS provisions either mandate or allow for the reduction to be waived in return for a payment by the scheme employer known as the strain cost. For example, scheme members aged 55 or over who are made redundant must receive an immediate pension without reduction for early payment.
14. The strain cost is calculated by each LGPS Administering Authority (AA), based on the advice of the actuarial firm it has appointed, therefore the amount can differ across the AAs in England and Wales.
15. The effect of the £95k cap is to limit the amount of strain cost that can be paid by a scheme employer so that the total of all exit payments including the strain cost does not exceed £95,000. The impact will not be limited to high earners but will also affect a significant number of scheme members with substantial pensionable service prior to 2014.

16. The MHCLG proposals include provisions to part reduce benefits where the full strain cost cannot be made by the scheme employer and to standardise the amount of the strain cost using calculations provided by GAD. They also provide that enhanced redundancy compensation shall not be paid where there is a strain cost payable, and that the strain cost should be reduced by the amount of any statutory redundancy payment.
17. As the MHCLG proposals for part reduced pensions are not yet in force there currently exists legal uncertainty regarding the benefits to be paid to scheme members who currently qualify for an unreduced pension where the full strain cost cannot be met by the scheme employer.
18. On 28 October 2020 MHCLG [wrote to all LGPS Administering Authorities \(AAs\) and councils](#) recommending that reduced pensions should be paid where the strain cost is capped and that employers should instead make a cash alternative payment, as per regulation 8 of the cap regulations

### **Judicial review**

19. The three JR applications will be heard together over two days on 24 and 25 March 2021. The applications include a total of 16 grounds which cover the legality of the cap regulations themselves, the question of their impact prior to amendment of the LGPS regulations and the status of the HMT Directions. One of the applications also questions the legality of the draft MHCLG regulations. These grounds are included in [ANNEX A](#) to this report.
20. The immediate effect of the JR hearing is that while it proceeds the Pensions Ombudsman is barred from making any ruling on a complaint brought by a scheme member on this matter, and we further understand that MHCLG are minded to pause their proposals pending the outcome. It would therefore appear that no further clarity will be forthcoming until the JR process is concluded, which may take some time after the hearing in March 2021.

### **LGA involvement in the JR**

21. The LGA has been named as an interested party in the proceedings and will therefore be providing submissions to the hearing.
22. At the meeting of the LGA Board in December it was agreed that the approach to the grounds would be to support where they correspond with existing LGA statements – for example on the current right to an unreduced pension - to not

contest where the legality of the cap regulations is questioned and to contest the claim that redundancy benefits constitute accrued rights.

### **Information for AAs and scheme employers**

23. To assist AAs and scheme employers during the period of legal uncertainty the secretariat has provided dedicated web pages and published a range of documentation including a [guide for administering authorities](#) and a [guide for scheme employers](#).
24. These guides provide information on the steps to be taken, decisions to be made and communications with scheme members until clarity is forthcoming on this matter. In particular, they cover the decision of the AA to pay reduced or unreduced pensions and the decision of the employer to make or delay any cash alternative payment.

### **Impact of potential outcomes of JR**

25. LGPS stakeholders need to be aware that whatever the outcome of the hearings in March there may be further appeals which could prolong the matter depending on what the judgment says and the attitude of the parties. Regardless of this fact, the paragraphs below set out the effects of some of the possible outcomes. These paragraphs do not constitute legal advice or any knowledge of the potential outcome but rather are intended to provide examples of the potential effects. Other outcomes are possible.
26. If claimants are unsuccessful on all grounds - subject to appeal this would confirm the recommendations set out in the MHCLG letter of 28 October 2020. In this case it is our understanding that reduced or deferred pension benefits would stand and that employers should make cash alternative payments.
27. If claimants are successful on those grounds relating to the effect of the cap regulations on the current LGPS regulations, but not on any other grounds - subject to appeal this would negate the recommendations in MHCLG's letter of 28 October 2020 as "implied repeal" would not be in effect. In this case it is our understanding that a member who meets the conditions of reg 30(7) should receive an unreduced pension, and that no cash alternative is payable as regulation 8 of the cap regulations would not apply.
28. In the above outcome an employer would still not be able to pay any amount of strain cost which would exceed the cap as the other provisions of the cap regulations would remain in force. Also, unless clarified by the judgment the

following questions would remain in relation to members who have received a cash alternative, which may impact on the amount of any strain cost payable by the employer:

- a. The cash alternative may be deemed ultra-vires and could be subject to recovery proceedings.
- b. The member may be deemed to have already received some or all their unreduced pension in the form of the cash alternative.

29. If claimants are successful in full on those grounds relating to the parts of the 2015 Act under which the cap regulations were made - subject to appeal this would negate the recommendations in the 28 October 2020 letter as the exit regulations would no longer have legal effect. In this case it is our understanding that the member who meets the conditions of reg 30(7) should receive an unreduced pension and that no cash alternative is payable as regulation 8 of the cap regulations would effectively no longer exist.

30. In the above outcome an employer would be free to pay the full amount of strain cost until/unless HM Treasury and MHCLG make regulations that amend the LGPS. However, the questions raised above in relation to members who have received cash alternatives remain.

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## ANNEX A

### ALACE/LLG JR application

#### Grounds of claim

**Ground 1** - contrary to the position taken by the Defendants in the Guidance, in preaction correspondence, and in the letter from the MHCLG to administering authorities, the Exit Regulations do not when properly construed remove or restrict any right of an individual to receive an unreduced pension.

**Ground 2** - the Exit Regulations are unlawful because the decision to make them was based on a misdirection of law as to their effect.

**Ground 3** - the Exit Regulations are ultra vires -

(a) To the extent that they purport to have retrospective effect by removing accrued pension rights, and/or the right to receive payments pursuant to legal obligations undertaken before the Exit Regulations came into force; and also

(b) To the extent that they purport to apply to contractual payments which are not consequent on leaving employment.

**Ground 4** - to the extent that the Exit Regulations do impair individual pension rights and/or existing contractual rights, they infringe Article 1 of Protocol 1, alone or read with Article 14 of the European Convention on Human Rights (“the ECHR”).

**Ground 5** - in any event, it was irrational and unlawful for the Treasury to make Exit Regulations dealing with pension strain payments under the LGPS prior to completion of the consultation on amendment of the 2013 LGPS Regulations, including associated equality impact assessment, and prior to the making of such amendment to the 2013 LGPS Regulations as was lawful and appropriate.

**Ground 6** - The Treasury Directions as drafted are in part ultra vires and/or purport unlawfully to fetter the exercise of statutory discretion.

**Ground 7** - The proposed amendments contained in the draft LGPS Regulations contain retrospective provision of a kind which it would be unlawful to make without the necessary consent of members or their representatives pursuant to s. 23 of the 2013 Act. Further or alternatively, the making of such provision would infringe Article 1 of Protocol 1 alone or together with Article 14 ECHR.



## UNISON JR application

### Grounds of claim

**Ground 1.** The 2020 Regulations are unlawful insofar as they conflict with the rights and remedies laid down in employment legislation, both primary and secondary, because they were not made under the provision in SBEEA which permits regulations to amend primary or secondary legislation, s.153A(8)(c).

Nor, in the absence of reliance on an express power in the enabling Act, can regulations lawfully amend the provisions of primary legislation or the remedies required by EU law or the ECHR. On either basis, the Regulations are therefore unlawful. Alternatively, contrary to the Defendants' arguments and the Guidance on the 2020 Regulations, as a matter of construction the Regulations cannot restrict the remedies a court or tribunal can award for infringement of statutory or contractual employment rights.

**Ground 2.** The 2020 Regulations are unlawful if they reduce or extinguish the entitlements of employees aged 55 or over to an immediate unreduced pension under regulation 30(7) of the LGPS Regulations where their employment is terminated on grounds of redundancy or business efficiency. This is because the 2020 Regulations were not made under 153A(8)(b) SBEEA, which permits amendment, inter alia, of the LGPS Regulations.

Alternatively, as a matter of construction the 2020 Regulations have no effect on the entitlements in regulation 30(7) of the LGPS Regulations. The First Defendant's Guidance is therefore wrong and unlawful in indicating such entitlements are reduced or extinguished by the 2020 Regulations, as was the Second Defendant's recommendation to local authorities in a letter of 28 October 2020.

**Ground 3.** The Directions of the First Defendant, made under the 2020 Regulations, provide for mandatory relaxation of the exit payment cap for making payments to settle certain types of employment claims. The Directions are irrational and unlawful in that they provide no mandatory relaxation of the cap for payments to settle tribunal complaints based on legal rights which are closely analogous to almost identical to or equally important as those listed in the Directions.

**Ground 4.** The 2020 Regulations are unlawful and in breach of Article 1, First Protocol ("A1P1") to the ECHR to the extent they restrict or extinguish (i) the remedies for infringement of employment rights in courts or tribunals or (ii) the entitlement to an unreduced pension in regulation 30(7) of the LGPS Regulations.

The exclusion of claims similar to those given mandatory relaxation in the Directions is also unlawful by virtue of A1P1.

## **GMB/Unite JR Application**

### **Grounds of claim**

**Ground 1:** the 2020 Regulations in effect purport to require public sector employers to breach existing legal obligations owed to employees

**Ground 1A:** the 2020 Regulations give rise to denial of substantive legitimate expectation to contractual and statutory payments

**Ground 1B:** the 2020 Regulations amount to unjustified interference with A1P1 rights

**Ground 2:** regulation 5(2) is, on the Defendant's case, in part *ultra vires* the enabling power in s.153A of the 2015 Act

**Ground 3:** failure to comply with s.149 Equality Act 2010

# Paper C: LGPC England and Wales – SAB update

## Decisions

The Committee is asked to note the contents of the report

## Summary

### McCloud and Cost management

The Board is working with MHCLG, administering authorities and scheme employers on the changes to the LGPS regulations, software and processes required by the McCloud age discrimination judgment. The LGPC secretariat is leading on the implementation work, preparing authorities and employers for the significant administration task once the changes are finalised.

The Board is also responsible for making recommendations on the back of the its own cost management process which along with the overriding HMT process is currently paused pending revised HMT directions which will set out how McCloud will be incorporated.

### McCloud latest position

The Board was updated on the consultations published for both the unfunded public service pension schemes and the LGPS. It is understood that a ministerial statement will be made on the changes to be made to the LGPS following the publication in early February of the government's response to its consultation for the unfunded public service schemes.

### Cost management latest position

The Board was reminded of the decision it took when it last met in August 2020 to un-pause its own cost cap arrangement when revised HM Directions are published in the New Year. Members were also advised that the Government Actuary's Department is undertaking a review of the cost cap arrangement but that it is unlikely to have any impact on the outstanding 2016 cost cap process or the forthcoming 2020 process.

## Good Governance Project

The Board is working with the project team at Hymans Robertson to make recommendations to MHCLG to:

- introduce a set of new regulations and statutory guidance to improve the standards of governance and administration on a more consistent basis across all 87 LGPS administering authorities
- to better ensure that pension teams within administering authorities are sufficiently resourced and financed to achieve the proposed higher standards of governance and administration.

The main proposals include revised scheme regulations and underlying statutory guidance on governance compliance statements; internal and external monitoring and reporting of performance against the new standards; introduction of a new set of national key performance indicators and establishment of a new responsible officer role within administering authorities.

### Latest position

[A paper setting out the current position of the project](#) including a set of near complete draft papers on the key areas of standard KPIs; senior officer role and new governance compliance standards was presented to the Board. Discussions between the Hymans Robertson project team and members of the implementation group, disbanded in April 2020 by SAB due to the covid-19 emergency, will now resume with the intention of finalising draft papers in time for the SAB meeting on the 8 February 2021.

## Responsible Investment

The Board has been working on several workstreams to better inform LGPS administering authorities about their duties and responsibilities when making investment decisions and what steps can be taken to better integrate responsible investment policies into their investment strategies. To assist administering authorities and other stakeholders the Board has procured for a web design team to build an online A to Z responsible investment guide that will include an extensive search facility across a wide range of topics and LGPS case studies. Content of the online web site will, in part, be managed by a new Responsible Investment Advisory Group (RIAG) that will also be responsible for advising the Board and its Investment Committee on responsible investment and related matters.

## **Latest position**

Following a procurement exercise the Board approved a winning bid from Digitech to build and maintain the online A to Z responsible investment website according to the Board's agreed specification.

The project team at Digitech has undertaken to deliver a working version of the website by the end of January 2021, after which the underlying database will start to be populated with initial content prepared by the Board's Secretariat. The aim is for the website to go live towards the end of March 2021 after which certain parties, for example, administering authorities, will be able to populate the database directly. Other parties will be able to suggest new additions with the soon to be established RIAG recommending to the Board's Investment Committee what should go forward into the database.

The Investment Committee has approved the proposed membership of RIAG which will now go to the Board on the 8 February 2021 for approval. The group will have two functions; firstly to act as editorial board for the online A to Z database and secondly as adviser to the Board and its investment committee on responsible investment matters.

## **Employer Flexibilities**

In September new scheme regulations were introduced to better manage the exit of those scheme employers either leaving or wanting to leave the scheme. The new regulations provide for employer contribution rates to be reviewed between formal triennial valuations, for exit debts to be spread and for deferred debt agreements to be entered into.

## **Latest position**

MHCLG is preparing high level statutory guidance to assist administering authorities and scheme employers and in conjunction with that the Board is preparing more detailed operational guidance with the assistance of a practitioners working group. The aim is to finalise the Board's guidance in time for it to be published at the same time as MHCLG publishes their statutory guidance, in January/February 2021.

## **Practitioners Group**

In April 2020 a Practitioner's Group was established to assist the Board on covid-19 and related work. The group is Chaired by Rachel Brothwood (West Midlands Pension Fund), the Board's practitioner representative. The remainder of

the initial group comprised six representatives from English and Welsh administering authorities across all the different types of local authorities; two representatives from the LGPS in Scotland and Northern Ireland and a scheme member representative from UNISON. The group met on seven occasions between April and September 2020.

### **Latest position**

In November the Board agreed to stand the group down on the basis that it had achieved its objective and that, in future, ad hoc groups should be established to cover specific projects commissioned by the Board.

Since then, a newly established Practitioners Group has been assisting the Board in the preparation of the guidance on new employer flexibilities and a second group will start to meet in February to assist the Board in preparing new surveys and advice on 95K Cap, McCloud, COVID-19 and related matters.

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## Paper D: Regulation Update Scotland 2021

### Decisions

The committee is asked to note the contents of this report.

### Summary

#### 1. Consultation – The Local Government Pension Scheme (Amendment) (No 2) Regulations 2020

1.1 In Spring 2020, the SPPA consulted on the efficacy of the change to Regulation 61. ‘Special circumstances where revised actuarial valuations and certificates must be obtained’, which allow an administering authority to suspend an employer's liability to pay an exit payment when that employer would become an exiting employer.

1.2 We removed the wording ‘for a period of up to 3 years’ and the condition in 61.2(B) that the employer is likely to have one or more active members contributing to the fund within the period specified in the suspension notice. The policy intent was to remove the time limit and provide fund authorities’ with further flexibility when settling of the employer’s exit payment, whilst protecting other employers in the scheme.

1.3 Respondees to the 2020 consultation said that the new regulations allowed greater flexibility, however some respondents wanted more clarity on how the provisions should work in practice.

1.4 In 2018, the UK Government made amending regulations to the Occupational Pension Schemes (Employer Debt) Regulations, which made changes to the section 75 debt regime, providing the ‘deferred debt arrangement’. In September 2020 MHCLG adopted some of these provisions in the 2013 Scheme via The Local Government Pension Scheme (Amendment) (No 2) Regulations 2020.

1.5 SPPA wrote to fund authorities on the 11 January 2021 asking for their view as to whether adopting these amendments would enable administering authorities and employers to agree to defer exit payments in return for an ongoing commitment from employers to meet their existing liabilities in a deferred debt agreement. A

review of the current provisions was a recent recommendation of the LGPS Scotland Working Group on employer exits.

We have asked for replies by the end of February 2021 and these will inform and plans to consult on similar provisions.

## **2. Government Actuary's Department (GAD): Cost Cap**

2.1 On 16 July HM Treasury [announced](#) that the pause on the cost control element of the 2016 valuations should be lifted. This announcement coincided with the publication of the consultation on the changes to the transitional arrangements to the 2015 schemes in E&W (McCloud/Sargeant remedy).

2.2 GAD will recommence work on the 2016 cost cap valuation on receipt of draft directions from HMT, which are expected in early February 2021.

## **3. Scottish Structural Review**

3.1 At the request of Scottish Ministers, the Scottish SAB conducted an options appraisal on the structure of the LGPS funds in Scotland in June 2018. Four options were considered; 1. Retain the current structure, 2. Promote cooperation in investing and administration between funds, 3. Pool investments between the funds and 4. Merge the eleven funds into one or more new funds.

3.2 The Pensions Institute, appointed as consultants to the Scottish SAB, carried out the consultation into the four options, and presented their report in April 2019.

3.3 Following this report, the SAB agreed in October 2019 to progress to an evaluation phase with more detailed cost/benefit analysis of each of these four options to be undertaken.

3.4 Scotland Excel (SE) (a non-profit shared service funded by all 32 local authorities in Scotland) have been asked by the SAB to provide support to procure an expert to carry out a cost benefit review of the options for reform of the structure Scottish funds. The procurement exercise will commence soon and it is expected that a report will be provided to the SAB the first quarter of 2022.

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# Paper E: Northern Ireland update

## Background

Public Service pension regulations are a devolved matter for the Northern Ireland Assembly. Regulations for the Local Government Pension Scheme (LGPS) in Northern Ireland are made by the Department for Communities (the Department).

The Northern Ireland Assembly made its own version of the [Public Service Pensions Act \(Northern Ireland\) 2014](#).

## Decisions

The Committee is asked to note the contents of this report.

## Summary

### LGPS Regulations

- On 11 November 2020 the Department issued its consultation on the McCloud Remedy which does not differ from that proposed for England & Wales or Scotland. The consultation closes on 31 January 2021.
- The Department is also considering how to remedy the discrimination highlighted by the Goodwin case. The Northern Ireland departments with responsibility for public service pension schemes now agree that retrospection needs to apply, possibly to 2005 but definitely before the scheme rules were changed for Walker Innospec.

### Governance

- The NI LGPS Scheme Advisory Board last met in December 2020. The Board discussed the McCloud consultation. The Department gave an early indication that it will not look favourably on the recommendation from NILGOSC that the underpin crystallises at 31 March 2022 as put forward in its response to the consultation.
- It was also reported that a review of the Cost-Cap mechanism is underway by Treasury. The outcome of the review will not affect the 2016 Cost-Cap valuations but could affect the outcome of the 2020 valuation.

- The Minister for Communities has written to NILGOSC, as well as all her other arm's length public bodies, to ask for a report on how it is addressing climate change.

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# Paper F: Technical Group update

## Background

The National Technical Group is made up of representatives from LGPS administering authorities in England, Wales, Scotland, and Northern Ireland. Its purpose is to represent the views of LGPS administering authorities in relation to the direction of pension and other areas of government policy.

## Decisions

The Committee is asked to note the contents of the report.

## Update from Technical Group meeting of 10 December 2020

1. **McCloud remedy** - Technical Group discussed the issues which had been raised at each regional POG. Software suppliers confirmed that they were developing data upload interfaces and were at the user testing stage. It was noted that whilst this may upload service details there would remain a significant amount of manual intervention which will create additional resource requirements. The Group also reaffirmed the requirement for centrally issued national guidance and communications to reduce the administrative burden and clarify for example, what to do when there are data discrepancies or if the employer cannot provide data.
2. **Exit Payments** - Technical Group raised various questions around the practical application of the cap. MHCLG confirmed that they will publish waiver guidance along with FAQs. A brief discussion took place regarding the Lawyers in Local Government and ALACE letters and the possibility of a judicial review.
3. **The NI Database** - is a facility which administering authorities use to check if a member has membership with any other LGPS administering authority before taking certain actions eg paying a death grant, a transfer or refund of contributions. They do this to ensure that that they are complying with the necessary legislation, as entitlement to certain benefits is restricted if a member has other records in the Scheme. You will recall that Technical Group asked the LGA to contact the Section 151 Officers, Chair of Pensions Committee and Chair of Local Pension Board to inform them of non-compliance. LGA contacted each

fund and by the December meeting only one fund has not uploaded data as they are currently undertaking a data impact assessment.

4. **Employer flexibilities** - MHCLG confirmed their intention to publish statutory guidance in respect of exit credits and flexibility on employer exit payments.
5. **GMP indexation and equalisation** - in respect of the current interim indexation solution, Technical Group would welcome a longer extension to the proposed solution due to the impending resource demands of the McCloud remedy. Clarity was sought from MHCLG on the impact to the LGPS as a result of the Lloyds final judgement and the possible requirement to recalculate transfers from 17 May 1990. MHCLG will provide an update at the next Technical Group following receipt of GAD advice.

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