

OFFICIAL

LGPS Consultation: Addressing discrimination – amendments to statutory underpin Scottish Pensions Liaison Group / Investment & Governance Group Response

Below is a group response from the 11 Scottish LGPS Pension Administering Authorities to the SPPA consultation on addressing discrimination in the Local Government Pension Scheme (Scotland).

The response has been reviewed by officers representing all 11 Administering Authorities, including those with governance and administration responsibilities.

In finalising the response, the LGPS (Scotland) Scheme Advisory Board (SAB) have also been made aware of its content.

In summary, the main points are as follows;

1. Concerns that members who joined the LGPS (Scotland) between April 2012 and March 2015 are not covered by the proposals. The group are concerned this omission could lead to future challenge.
2. Scope of work involved for scheme employers and administrators, for what is perceived to be a relatively small number of cases where the updated provisions will apply.
3. Proposed timescale – it has been suggested that the amendment regulations would come into force from April 2021. Whilst the urgency in removing the identified discrimination is appreciated, the group feel this timescale is unrealistic given the scale of the proposed adjustments. April 2022, in line with other Public Service Pension Schemes appears to be a more realistic timescale
4. Ability of software providers to react to additional changes in the benefit structure.
5. Funding in respect of: additional scheme benefits, software enhancements and administrative costs, which are expected to be significant
6. Requirement for a national approach in relation to;
 - prioritisation of adjustments required
 - dealing with missing data
 - Annual benefit statements (if disclosure required)
 - clear guidance for employers and administrators
 - communication to scheme members
7. The group have major concerns regarding the general direction in the increasing complexity of scheme legislation – our closing statement covers these concerns.

OFFICIAL

OFFICIAL

Question	Group response
<p>1 - Do you agree with our proposal to remove the discrimination found in the McCloud and Sergeant cases by extending the underpin to younger scheme members?</p>	<p>Yes.</p> <p>There are however concerns surrounding members who joined between April 12 – March 2015. By excluding these members could the LGPS be open to future challenge on the grounds of discrimination? Clarity would be welcomed that this issue has been considered as part of the equalities impact assessment.</p> <p>The group also believe that alternative approaches could be considered namely;</p> <ul style="list-style-type: none"> a) A simpler rectification method, or b) Fundamental review of the LGPS (Scotland)
<p>2 - Do you agree that the underpin period should end in March 2022?</p>	<p>Yes. The original underpin commitment by the Government did not extend beyond March 2022. The group are unaware of any reasons to extend the underpin protection beyond this date.</p>
<p>3 - Do you agree that the revised regulations should apply retrospectively to 1st April 2015?</p>	<p>Yes, in order to be fair to all members of the scheme, the revised regulations need to be applied retrospectively to 1 April 2015.</p>
<p>4 - Do the draft regulations implement the revised underpin which we describe in this paper?</p>	<p>Please see annex A for comment on the draft regulations.</p> <p>The group would suggest that when producing draft amendment regulations for review, a draft of the revised set of corresponding regulations is also produced. This would make the task of reviewing a much cleaner process.</p>
<p>5 - Do the draft regulations provide for a framework of protection which would work effectively for members, employers and administrators?</p>	<p>Members – provided the revised underpin delivers the policy intent of a ‘no worse off’ position across the board, the group agree the protection works effectively.</p> <p>Administrators – The group feel it’s difficult to say whether the regulations are effective for administrators. The proposed changes indicate that an extensive exercise requiring significant resource is required, with no tangible return in respect of member gains. The requirement for clear and concise national guidance should not be underestimated. The approach must be consistent across all funds. Initial views are that said guidance should cover, but not be limited to;</p> <ul style="list-style-type: none"> - priority of administrative action required - Approach where required data is unobtainable - application of early / late retirement factors - transfers out - death & survivor benefits <p>The heavy reliance of software providers is also a major factor. If the timescale of April 2021 is to be realised, the ability of software providers to deliver is questionable. Some systems also struggle to accurately implement the nuances of some scheme benefits at present. It is expected that the addition of the revised underpin will</p>

OFFICIAL

	<p>add to this level of complexity.</p> <p>Scheme employers – It is expected that scheme employers will share the views of administrators noted above. In addition, processes may have altered since the introduction of the 2015 scheme, in particular payroll history data, resulting in certain data sets no longer being recorded to administer a CARE only scheme. The challenge to recover said data could be significant.</p>
<p>6 - Do you have other comments on technical matters related to the draft regulations?</p>	<p>See annex A for response to Q6.</p>
<p>7 - Do you agree that members should not need to have an immediate entitlement to a pension at the date they leave the scheme for underpin protection to apply?</p>	<p>Yes</p>
<p>8 - Are there any other comments regarding the proposed underpin qualifying criteria you would like to make?</p>	<p>As previously noted, The group would ask has consideration been given to active members who joined between April 2012 – March 2015?</p>
<p>9 - Do you agree that members should meet the underpin qualifying criteria in a single scheme membership for underpin protection to apply?</p>	<p>Yes. Most elements of the scheme are post specific – scheme contributions, pensionable pay, Rule of 85 etc. It seems reasonable that the underpin protection should be assessed in the same manner.</p>
<p>10 - Do you agree with our proposal that certain active and deferred members should have an additional 12 month period to decide to aggregate previous LGPS benefits as a consequence of the proposed changes?</p>	<p>The group agree in principle that active / deferred members should be given an opportunity to review previous elections regarding deferred benefits. This area will prove administratively challenging, as members holding multiple periods of membership is becoming more common place within the membership profile. In some cases, membership is held across multiple funds. The administration is therefore expected to be extensive. In addition, is it fair to require members to make elections in relation to an entitlement yet to be fully realised? As such, there were a number of concerns raised, alongside a number of questions posed, which are detailed below;</p> <ul style="list-style-type: none"> - Identification of cases may prove difficult, resulting in the 12 month timescale adding to the administrative burden - Communication with members within a 12 month window will prove a major challenge - Has consideration been given to an extended period during which a member can elect to aggregate? - Members who have retired without aggregating benefits – is the intention that they will be offered another opportunity?

OFFICIAL

	<p>Suggest that if a 12 month window is the final outcome, it should begin when the Administering Authority write to the member as opposed to commencing from the date regulations become effective.</p>
<p>11 - Do you consider that the proposals outlined in paragraphs 50 to 52 would have 'significant adverse effects' in relation to the pension payable to or in respect of affected members, as described in section 23 of the Public Service Pensions Act 2013?</p>	<p>See response to Q10. Proposals, as currently framed could lead to members claiming to be in a 'worse off' position at retirement as a result of the requirement to make an election when not in possession of full impact on benefits.</p>
<p>12 - Do you have any comments on the proposed amendments described in paragraphs 56 to 59</p>	<p>The proposals contained in paragraphs 56 to 59 seem consistent with the Government's policy intention. Clear guidance at a national level is a must, in the group's collective opinion.</p>
<p>13 - Do you agree with the two-stage underpin process proposed?</p>	<p>In the main, the group agree with this approach. There were concerns however, detailed below (and in response to Q14). - If communication is a requirement at the 'underpin date', it must be consistent and effective– the view being that clarifying a potential benefit before it becomes payable, could lead to an inflated expectation on the part of the scheme member. - Alternatively, should consideration be given to only confirming the underpin amount at the crystallisation date? This approach would allow funds to track any amount due, without potentially misleading scheme members in relation to their eventual benefit.</p>
<p>14 - Do you have any comments regarding the proposed approaches outlined above?</p>	<p>Yes. Responses to each approach as follows; <u>In active membership:</u> The group agree with the approach in terms of scheme membership i.e. member remains in the 2015 scheme with future underpin test carried out. The group disagree that a check should be carried out automatically when a member attains age 65 (or NRA) – unless they are retiring. What value would sharing this information add for members? Assurances that the test is carried out can be delivered via alternative communications. Systems should be adopted where members who remain in the scheme beyond age 65 (or NRA) have the test carried out when a BCE occurs – with the test being performed as at age 65 (or NRA). <u>Concurrent employments:</u> The group agree with the proposed approach. <u>At leaving (without taking benefits):</u> The group agree with the proposals. Guidance on an agreed approach to delivery of this message would be welcomed.</p>

OFFICIAL

	<p><u>Whilst a deferred member:</u> The group agree that the underpin should be included in annual benefit statements for deferred members.</p> <p><u>Re-joiners:</u> The group agree that following aggregation of membership underpin protection should follow through to the ongoing membership.</p> <p><u>Age retirement:</u> The group agree with the proposed approach.</p> <p><u>Ill health retirement:</u> The group agree that members retiring on ill health grounds should benefit from the underpin protection. There are however major concerns that the added complexity of ill health retirements is rendering the process unmanageable at administrator level. Please see closing statement for further comment.</p> <p><u>Death benefits:</u> The group agree that the underpin protection should apply to death benefits and as such, flow through to survivor benefits. A realistic approach must however be adopted in terms of backdated cases. The group would also ask whether a tolerance level will be considered, similar to that used in the recent GMP reconciliation project carried out by Administering Authorities. The cost of tracing survivors is also causing some concerns. An agreed approach for fund administrators in relation to contacting survivors would be welcomed.</p> <p><u>Club transfers:</u> The group agree that underpin protection should apply to club transfers but collectively agree that transfers in general is another area where simplification is required. Please see closing statement for further comment.</p> <p><u>Non Club transfers:</u> See response above to Club Transfer issue. The group are additionally concerned in relation to situations where an additional payment is due to a personal or private provider, but the provider no longer holds rights for a member i.e. the member has flexibly accessed all benefits. It is anticipated that these scenarios are likely to be in the minority.</p> <p><u>Flexible retirement:</u> The group agree with the proposed approach.</p> <p><u>Redundancy:</u> The group agree with the proposed approach.</p> <p><u>Trivial commutation:</u> The group agree with the proposed approach although have concerns that any additional amount due could be viewed as an unauthorised payment. Possible member tax implications.</p>
15 - Do you consider there to be any notable omissions in our proposals on the changes to the underpin?	The group would note that no mention is made in the current proposals of CETV calculations in relation to divorce / pension share arrangements.

OFFICIAL

<p>16 - Do you agree that annual benefit statements should include information about a qualifying member's underpin protection?</p>	<p>No – the group disagree with the proposed approach. Any benefit arising as a result of underpin protection will not be fully realised until the benefit crystallises. Efforts must be made to simplify the provision of annual benefit statements.</p> <p>The group is therefore of the opinion that the inclusion of provisional underpin amount on active annual benefit statements is not required. The group see no value in providing members with this information. Furthermore the inclusion of an underpin estimate will add to the complexity of system requirements in producing annual benefit statements. The inclusion would also see an increase in member enquiries following provision of said information. The group are of the collective opinion that a clear statement advising members that the underpin test will be carried out when required would suffice. The statement should be agreed at a national level and adopted by all administering authorities. Worked examples would also assist members in understanding both the mechanics of the underpin application along with the likelihood of the test producing an increase in their benefit package. It is anticipated that the volume of cases where the underpin will apply would render the extra administrative requirements unnecessary.</p>
<p>17 - Do you have any comments regarding how the underpin should be presented on annual benefit statements?</p>	<p>Yes – see response to Q16.</p>
<p>18 - Do you have any comments on the potential issue identified in paragraph 109?</p>	<p>Whilst the group appreciate the concerns raised in para 109, it is anticipated that such cases will be in the minority. Any underpin addition can only be truly realised in the year in which the benefit crystallises. To use a notional figure prior to that year could potentially result in a member paying tax on a notional benefit which they never become entitled to. It is also noted that annual allowance tax charges can be mitigated using the scheme pays facility available in the current regulations. These views are also held in relation to any breaches of the Lifetime Allowance.</p>
<p>19 - Do the proposals contained in this consultation adequately address the discrimination found in the 'McCloud' and 'Sergeant' cases?</p>	<p>The group do not feel they are qualified to respond. We will however reiterate concerns in relation to the treatment of members who joined between April 2012 – March 2015.</p>
<p>20 - Do you agree with our equalities impact assessment?</p>	<p>The group do not believe it is for them to comment on the equalities impact assessment. If there is any doubt over the validity of the assessment, it would perhaps be reasonable for the SPPA to approach a third party to review their assessment.</p>
<p>21 - Are you aware of additional data sets that would help assess the</p>	<p>The group do not believe they are in a position to respond.</p>

OFFICIAL

<p>potential impacts of the proposed changes on the LGPS membership, in particular for the protected characteristics not covered by the GAD analysis (age and sex)?</p>	
<p>22 - Are there other comments or observations on equalities impacts you would wish to make?</p>	<p>No</p>
<p>23 - What principles should be adopted to help members and employers understand the implications of the proposals outlined in this paper?</p>	<p>Clear guidance should be issued at a national level for administrators and employers. A similar approach should be adopted in relation to member communications. The group believe that these features should be agreed by a cross party group (possibly LGA / SPLG), but ultimately issued by the SAB.</p>
<p>24 - Do you have any comments to make on the administrative impacts of the proposals outlined in this paper?</p>	<p>The group have major concerns regarding timescales and resource for this project. There is a belief that the exercise could mirror the requirements when the 2015 scheme was introduced, or the recent GMP rectification exercise. Final proposals should include reasonable timescales in relation to completion dates. Clear direction from the outset will allow scheme employers, software suppliers and administering authorities' time to properly plan and resource the project.</p>
<p>25 - What principles should be adopted in determining how to prioritise cases?</p>	<p>Whilst guidance will be welcomed, individual Administering Authorities must be allowed to plan based on their own level of expertise and resource. The group feels that before prioritisation occurs, major system developments are required. Initial thoughts are that the following order of priority should generally apply;</p> <ol style="list-style-type: none"> 1. Systems updated to ensure correct benefit crystallised (thus avoiding further rectification) 2. Pensioners in payment (including survivors) 3. Transfers out 4. Members already deferred – targeted by age (if required) 5. Review aggregation cases <p>It is noted that an initial data collection and validation exercise will be required before the above can commence.</p>
<p>26 - Are there material ways in which the proposals could be simplified to ease the impacts on employers, software systems and scheme administrators?</p>	<p>Guidance on approach to cases where data is unavailable would be welcomed. A 'tolerance level' approach should also be considered, in the interests of simplification.</p>
<p>27 - What issues should be covered in administrative guidance</p>	<p>The group believe any guidance should cover the following areas;</p> <ul style="list-style-type: none"> - Data gaps / missing data (pay / hours / service breaks) - Tolerance levels

OFFICIAL

<p>issued by the Scheme Advisory Board, in particular regarding the potential additional data requirements that would apply to employers?</p>	<ul style="list-style-type: none">- Backdated payments, including interest (regulations currently state interest rate but further confirmation helpful)- Scheme employer and member communications
<p>28 - On what matters should there be a consistent approach to implementation of the changes proposed</p>	<p>The group feel that where possible, all topics covered in the consultation, including any added as a result of consultation responses, should be tackled in a consistent manner.</p>
<p>29 - Do you have any comments regarding the potential costs of McCloud remedy, and steps that should be taken to prevent increased costs being passed to local taxpayers?</p>	<p>The cost of the remedy will be assessed as part of the actuarial valuation of the Scottish LGPS funds as at 31st March 2020 which is currently drawing towards its conclusion. Estimates of the potential cost in terms of increased liabilities vary from less than £100m to £355m. It is inevitable that this will ultimately be met by the scheme's employers.</p> <p>Funding strategies and the actuarial process incorporate measures to provide stability in employer contribution rates as far as possible. These should minimise the immediate impact of the remedy in terms of contribution rate increases, particularly for long-term employers with strong covenants, including the local authorities which comprise the core membership of the scheme. However, the cost will fall unevenly across employers, depending on individual employer membership profiles (and particularly member age profiles). This raises the potential for some employers to experience quite significant cost and contribution rate increases.</p> <p>There are also other cost pressures in this year's valuation given the current economic climate and the uncertainty surrounding the outcome of the scheme "cost cap" valuation. Any additional cost will be extremely difficult for employers to accommodate given their existing budget pressures.</p> <p>In addition to the actuarial cost, there will be significant administrative costs in terms of time, resource and charges for system developments and other support. These will initially be incurred by administering authorities, but are also ultimately met by the scheme's employers through their contribution rates.</p>

OFFICIAL

OFFICIAL

Annex A

6 – Do you have other comments on technical matters related to the draft regulations?

Amendment of the LGPS (Scotland) Regulations 2018		
Draft Regulation No.	Regulation to be Amended	Comment or suggestion
3	84	Propose Regulation 3 is removed so it won't be a requirement to provide underpin info in ABS If not removed: 1. Inserted paragraph (5) refers to the 2008 Scheme, but this should be the 2009 Scheme. 2. The closing quotation marks at the end of the inserted paragraph (6) should actually be at the end of the inserted paragraph (10). 3. Paragraphs (8), (9) and (10) are indented too far right.
N/A	Schedule 1	Definition of 'retirement pension should be updated to include 'final guarantee amount'.
Amendment of the LGPS (Transitional Provisions & Savings) (Scotland) Regulations 2014		
Draft Regulation No.	Regulation to be Amended	Comment or suggestion
6	4	There are multiple references to "the 2014 Regulations" in this regulation. Should we take the opportunity to update it to say "the 2018 Regulations"?
6 (b)	4(1)(b)	Spacing/lines are muddled. I think this should be set out as: (b) for paragraph (1)(b) substitute- "(b) is or has been an active member of the 2015 Scheme; and"
6 (c)	4(1)(c)	Spacing/lines are muddled. I think this should be set out as: (c) in paragraph (1)(c) substitute "; and" with " .";
6 (e)	4	Inserted paragraph (1B)(a) refers to Regs 16 and 17. These are for Contributions during reserve forces service leave and trade dispute absence respectively. Should this actually refer to Regs 13 (Re-employed and re-joining deferred members) and 14 (and Concurrent employments) instead?
6 (h)	4	There is already a paragraph (2)(c). Reword as "for paragraph (2)(c) substitute-" Regulation 29(6) is for voluntary retirement before NPA, so don't see why that Regulation is being singled out. Should it be 29(7) for flexible retirement, or 29(8) for redundancy?
6 (i)	4	Needs brackets i.e. should be "after paragraph (2) insert-" instead of "after paragraph 2 insert-"

OFFICIAL

		In the inserted paragraph (2A), also add "or (2)(c)" at the end. Unless there is a reason it shouldn't be included?
6 (n)	4	The paragraph amending paragraph (5)(b) seems to have been missed from the lettered list. It is for a new paragraph, so should really be under list point (o) and subsequent points will need to be re-lettered
6 (s)	4	Agree with the wording for new paragraph (6A), however I'd expect it to be added as (6B) and for (6A) to cover the active ill-health retirement. This would mirror inserted paragraphs (5A) and (5B) which are added to cover IH and DiS for the provisional assumed benefits. I would expect we'd need the equivalent to confirm IH enhancement should be included in the provisional underpin amount. Or is it not needed because the IH enhancement should be calculated using the 2009 Regs enhancements? Inserted paragraph (7)(a) refers to "29(10), 29(5) or 29(6) of the 2018 Regulations". These cover early, late and normal retirement respectively. Should 29(14) also be referenced (payment from deferred) to cover all voluntary retirements? Inserted paragraph (7)(b) refers to "29(7) of the 2018 Regulations". This covers flexible retirement. Should 29(4) and 29(8) also be referenced (payment at 75 and redundancy/efficiency) to cover all other non-voluntary payments? Inserted paragraph (7)(f) confirms the underpin crystallisation date for deaths. For all retirements, the underpin crystallisation date is from date of payment, not retirement. To be consistent I would expect it to be the day after date of death i.e. the date any survivor benefits are payable Inserted paragraph (10) refers to "30(6) of the 2018 Regulations" and "29(6)". There is no regulation 30(6) and as this refers to flexible retirement, I think both references should be to 29(7).

Has any consideration been given to regulation 4 of the LGPS transitional regulation being replaced entirely? The updated provisions are overly technical and will be very difficult for members and administrators to understand. One suggestion would be that revised underpin provisions adopt a similar approach to that of the 'rule of 85', where a separate schedule focusing on that issue and that issue only.

This approach would not only simplify day to day administration but also provide a notable reference point for members who wish to review their entitlement to the revised provisions.

OFFICIAL

Closing statement

In closing, the group would like to highlight their concerns over the general direction of scheme legislation. Since the introduction of LGPS2015, there has been a new set of regulations introduced (The Local Government Pension Scheme (Scotland) Regulations 2018), along with a raft of amending provisions. This has resulted in;

- Member understanding - added complexity in the benefit structure leads to difficulties in communication with scheme members
- Difficulty for scheme employers in the provision of data to fund authorities
- Challenges for software suppliers to provide an automated solution which covers all employment / pension scenarios
- Increased costs from software suppliers due to continuous systemic adjustments being required
- Added pressure on fund authorities ability to comply with overriding statutory requirements
- Day to day administrative complexities – heightening the requirement for manual intervention which in turn, increases the risk of inaccurate benefits being paid

In relation to administrative complexities, particular areas of concern are;

- Aggregation of scheme benefits – multiple employments are a common feature of member activity
- Ill health retirement
- Multiple accrual rates
- Provision of annual benefits statements to comply with statutory requirements
- Overriding member tax requirements under the Finance Act 2004

The above list is not exhaustive. The group feel that to continue on the path of adding continuous layers of legislation runs the risk of the scheme becoming incoherent at member level.

The aim of the scheme is to provide valued retirement benefits for members. Whilst this is generally accepted to be achieved, surely an additional aspiration should be to provide clear, concise and timely information to members, allowing them to both understand the value of the LGPS and make the correct decisions, at the correct time in relation to their pension savings.

A simplified version of the LGPS would not only increase member understanding, but also lead to increased efficiency in scheme administration, whilst lowering the overall operating costs.

Whilst the above suggestion would entail considerable consultation and more likely than not, the consolidation of multiple previous legislative instruments, the group would welcome dialogue with a view to this option being explored.