

CLG (10) PRG 45

LOCAL GOVERNMENT PENSION SCHEME POLICY REVIEW GROUP

This paper invites comments about issues relating to bodies admitted to the Scheme and follows the issue of updated Admitted Body Status guidance last year. CLG also welcome comments on whether the LGPS Regulations need to be reviewed as a result of the 2009 Court of Appeal judgement relating to South Tyneside Metropolitan Borough Council, about issues concerning the admission of third sector bodies to the Scheme and other related matters.

Issues discussed in this paper are:

- i. How to improve the management of admission agreements – p2
- ii. Frequency of revised actuarial valuations and whether more flexibility is needed – p3
- iii. The ability to pursue cessation payments even after the admission agreement has come to an end – p4
- iv. The ability to pursue unmet pension liabilities from an employer when there are no active contributing members - p5
- v. Third sector bodies and parent guarantors – p6
- vi. Implications were a change of fund is needed following a relocation or merger – p7

1. Your views are invited on how best the LGPS regulatory framework can evolve to deal with the challenges of the different status of bodies admitted to the scheme and adapt to future changes in the local authority workforce when more external providers could be called upon to deliver local authority services and functions. This follows the recent reviews of Admitted Body Status (ABS) provisions in the LGPS and revised guidance issued on 16 December 2009 to help practitioners better apply the regulatory framework and ensure that pensions issues are dealt with as early as possible in an outsourcing process.
2. A number of other issues in connection with bodies admitted to the Scheme have been brought to our attention during the course of the review and in the light of a decision in the Courts in 2009 concerning South Tyneside Metropolitan Borough Council relating to former employees of the magistrates' courts committees.
3. Any regulatory recommendations to be taken forwarding the light of PRG's comments and those of other organisations to be consulted informally, such as the CBI and the BSA, will require the usual statutory consultations, subject to Ministerial agreement.

HOW TO IMPROVE THE MANAGEMENT OF ADMISSION AGREEMENTS

Should administering authorities have admission policies so that letting authorities and contracting bodies know their role?

4. We are aware that some authorities already develop and publish an admission policy in relation to transferee admission bodies.
5. The admission policy could be separate to the tripartite agreement for admission agreements mentioned below and set out for potential contractors what the authority's funding strategy and the funding strategy statements mean for them, the funding objective during the life of the contract, and the minimum level of consultation when tenders are being considered. In addition, it could set out what information is required by the administering authority and notice periods needed.
 - Would it be helpful to require all administering authorities to develop and publish an admission policy in relation to transferee admission bodies and, if implemented, should the parties agree that they have adhered to the relevant administering authority's admission policy?

Terms of admission agreements and a tripartite agreement

6. We would appreciate your views on what terms should be included in future admission agreements. For instance:
 - Do we need to revise Schedule 3 of the LGPS (Administration) Regulations 2008, to include the specific roles and responsibilities of the main parties, ie letting authority, administering authority, contractor? Would making a regulatory provision add clarity to the process even though the revised guidance on admitted body status in the LGPS clearly sets out the roles?
 - Would it be desirable to specify the standards of communication needed between the parties and what notice periods are required should circumstances change?
 - Should there be a provision to permit complex, or particular local issues, to be dealt with outside the admission agreement and put on a contractual basis with a reference that this has happened in the admission agreement?
 - What other terms should be set out in the Schedule eg when an agreement would end and what action is needed beforehand?
7. Administering authorities have told us that they often do not know about a service change until the time the staff transfer to a new provider. This shows a failing on the part of the letting authority and even the contractor in its role as an employer in the fund. We would welcome comments on what can be done to remedy this situation.
 - Should there be penalties imposed to act as a deterrent or stringent terms included in the admission agreement so that the organisation is in no doubt about its obligations in this respect?

Separate agreements for contractor with multi contracts

8. Where a contractor enters into several contracts with one or more administering authority, it is important that separate agreements are entered into for each

contract because the start and end dates will be different for each contract (the revised guidance on admitted body status provisions makes this clear). Cessation payments may be required at the end of one authority's contract but, as the agreement does not come to an end because eligible employees are still employed on another contract under that agreement, there may be no obligation on the contractor to make that cessation payment.

➤ As such, should a regulatory provision be included to prevent agreements covering more than one contract?

9. It should, however, be borne in mind that contractors often wish to bid for several tenders and onerous administrative burdens on frequent bidders can increase contract costs. One way of easing this burden would be to consider sharing certain basic information when a contractor bids for a variety of contracts across authorities. It is not proposed that this be a LGPS regulatory solution but something akin to a best practice statement could be included in tender documentation.

➤ Would a best practice statement be something that would be welcomed by practitioners and how could this work in practice?

Review of admission agreements and assessment of risks

10. Concern has been expressed that there may be insufficient assurances for administering authorities where admission agreements were made under previous scheme Regulations or some while ago;. Some administering authorities are considering a review of earlier agreements to ensure that adequate provisions are in place to safeguard the fund.

➤ Is it necessary to prescribe regular reviews of admission agreements, especially for community admission bodies where machinery of government changes could, potentially, crystallise pension liabilities?

11. Some authorities may make regular assessments about the level of risk to which they are exposed with a contractor admitted to their fund. This may result in the need for a contractor to provide an indemnity or bond to meet the level of risk identified as a result of the assessments.

➤ Is it necessary to provide for regular assessments of the level of risk when entering into an admission agreement with a transferee admission body so that adequate steps are taken to indemnify the authority against risk of contractor failure?

Managing the employer contributions during the life of the contract

12. Concern has been expressed by contractors that they could potentially face a hefty bill at the end of a contract to address unmet pension liabilities for benefits accruing during the life of the contract. It is essential that there is prudent management of employer contributions rates during the life of the contract to avoid the need for large payments at the end of contracts. A concern put to us is that the process to obtain rates and adjustment certificates outside the triennial valuation process is insufficiently flexible to make adjustments in the interim and that provision should be made to have a more frequent actuarial review of employer contribution rates for transferee admission bodies.

- Would provision to undertake such reviews on other timeframes, say annually where necessary, on the basis of the different status of transferee bodies, address these concerns?

THE ABILITY TO PURSUE CESSATION PAYMENTS EVEN AFTER THE ADMISSION AGREEMENT HAS COME TO AN END

13. We have been asked to look at the application of the LGPS regulatory framework to see if it provides sufficient flexibility to deal with the termination of a transferee admission body's contract and the process to assess and call for payment of any outstanding pension liabilities before, at the point an admission agreement comes to an end, or even afterwards, especially if adequate notice of the end of a contract has not been given.
14. To address issues raised with us, a letter was sent to the Local Government Employers' Organisation on 19 February which sets out our view concerning the application of the LGPS Administration Regulations where an admission agreement ceases to have effect and the relevant administering authority seeks payment in respect of outstanding pension contributions from the relevant employer. The letter clarifies that an amount can be sought from an employer admitted to the fund in respect of pension liabilities accrued during the course of the admission agreement even after the event that the agreement came to an end.
15. End of contract provisions were introduced into the scheme to deal specifically with the special status of contractors and the fact that contracts were of limited duration compared to the constitutional permanence of scheme employers and relative permanence of community admission bodies. Some practitioners have said that the Regulations may be insufficiently flexible to deal with the termination of admission agreements with community admission bodies and it would be helpful if practitioners let us know what might be needed to address this.
16. We also want your views on whether the regulatory framework can adequately deal with resolution (designating) bodies, where they may be finding their pension obligations onerous and rethinking their status in the Scheme. It has been brought to our attention that some resolution bodies are reversing their resolutions as a result.
 - Should the cessation payment regime for transferee admission bodies be extended and tailored to community admission bodies and scheme employers?

COURT OF APPEAL JUDGEMENT 2009 – LGPS ADMINISTERING AUTHORITIES ABILITY TO PURSUE UNMET PENSION LIABILITIES FROM AN EMPLOYER WHEN THERE ARE NO ACTIVE CONTRIBUTING MEMBERS

17. The Court of Appeal judgement concerning South Tyneside Metropolitan Borough Council ruled that Scheme employers are not required by the LGPS Regulations to meet pension deficits in respect of former employees who remain in a fund as deferred and pensioner members when the employer ceases to have active contributing members. The judgement upheld CLG's view of the application of the relevant Regulations in respect of Scheme employers who are Scheduled bodies.
18. It is particularly important that an actuary working for a ceding fund ensures that there are sufficient assets retained in that fund to meet liabilities for pensioner and deferred pensioner members who stay behind. There have, however, been some concerns raised about the implications of the judgement and we are looking to see if these concerns need addressing in any way. One suggestion has been made that an administering authority should be able to request a monetary amount in respect of pension liabilities that arise in the future from an employer with no active contributing members in the fund, should, of course, this employer still exist.
19. The DOE Northern Ireland are currently consulting on a range of measures which include some relating to the effect of the South Tyneside judgement, and the consultation can be seen at http://www.doeni.gov.uk/lgps_consultation_-_valuation_etc_amendments_12-04-10.pdf. We would like your views on whether it would be helpful to make provision in England and Wales, as they are proposing, for an administering authority to make an interim assessment of a cessation valuation where it reasonably believes that an employer will cease to have active contributing members in the near future but the actual cessation date is not yet known. When the actual cessation date is known, provision could be made to revisit the calculation taking into account any contributions already received from the admission body.
20. DOE NI are also proposing a provision to apportion pension liabilities. In England and Wales this provision could require that, and importantly where all the parties agree, the liabilities could transfer to an inheriting body or a guarantor. This could become the apportionment agreement and the parties would include the administering authority and the former employer, the inheriting body or the guarantor, as appropriate. The draft DOE NI Regulations set out the terms of the apportionment agreement and related matters.
 - Is there merit in following the DOE NI approach?
 - Are other provisions needed to enable administering authorities to deal adequately with these employers when they leave the Scheme and have the assurance that any pension liabilities arising at the time or subsequently, can be satisfactorily met?
21. Where transfer payments have already been made or are about to be made, these would have been agreed in good faith under the existing LGPS regulatory framework and it is not the intention that such agreements should be revisited.

Regulation 38 of the Administration Regulations – when revised actuarial valuations and certificates must be obtained

22. Practitioners have indicated that the provisions in Regulations 38 of the LGPS Administration Regulations 2008 could deal with community admission bodies and transferee admission bodies separately. There is some merit in this approach and I would like your views on whether Regulation 38 should be recast to deal with issues concerning community admission bodies separately, or indeed, another category dealing with Scheduled bodies.
23. We could also take the opportunity to tidy this Regulation as Regulation 38(1) could sit better after Regulation 32 (7), and we could consider improving the flow of regulatory provisions for admitted bodies if this was considered helpful.

Pension Increase liabilities

24. Please note, however, that we are proposing to change the current Regulations regarding a Fund's powers to be able to charge employers, who no longer have any LGPS members, for pensions increase costs so that unfunded PI liabilities post-April 2008 can also be re-charged. In effect, this would mean that the arrangements under the 1997 Regulations (Regulation 91) continue to be in force in respect of post-April 2008 accruals. The provision is to be included in the LGPS (Miscellaneous) Regulations 2010.

ABILITY OF THIRD SECTOR BODIES TO REMAIN IN OR BE ATTRACTED TO JOIN THE LGPS AND PARENT GUARANTORS

25. Increasingly, administering authorities are seeking assurances about the good covenant of a body being admitted to their fund and will seek parent body assurances for the body's pension obligations, particularly when a machinery of government change results in new bodies being formed or bodies merged.
26. This trend raises a particular set of circumstances regarding the place of third sector bodies in the LGPS who are being asked to deliver public services. How can a good covenant be assured for a small charity that might have variable funding streams, and should such a covenant be a pre-requisite for admission to a fund, or can some other form of assurance be provided? How can employer status in the Scheme be adjusted to make it possible for third sector organisations to be attracted to, and stay in, the LGPS without risk to council taxpayers?
27. Is provision needed for actuaries to take into account the body's ability to afford increased employer contribution rates in these circumstances? Where a service or function can only be delivered through, say, a small specialist third sector body but pension costs become an issue because of uncertainties about funding streams, should the parties look at some form of prudent underwriting to avoid precipitating failure of the organisation?
28. Could a mechanism be developed to agree a realistic and affordable contribution rate for a third sector body but with a Scheduled body underwriting some of the risk by agreement, should full funding not be achieved and where the shortfall would, possibly, legally fall to that Scheme body anyway? Is such an approach feasible and fair? Equally, if the third sector admission body had to, or sought to, leave the fund during the period of underwriting, any underpayment by the

organisation established at the cessation valuation, could possibly be corrected by treating it as a liability of the Schedule body. Is this realistic?

29. These possible alternatives may be a preferable option to the body failing and the potential for the shortfall to be spread across other employers in the Fund. Such a mechanism could assist administering authorities to better and more prudently manage the risks for voluntary and third sector bodies. This would help retain existing bodies as well as reducing barriers to admission to the scheme and thus provide pension continuity for those employees. We would wish to ensure sufficient safeguards so that such bodies do not use this provision to avoid their LGPS pension obligations but it could be seen as a safety net where, otherwise, valuable third sector service delivery could be at risk.

CHANGE OF APPROPRIATE FUND

30. There is likely to be continued rationalisation of organisations involving the movement of employers across administering authorities. This could have the potential to crystallise pension liabilities which would not have done so but for a change in location, merger or machinery of government change. One solution may be that - and vitally where all affected parties are in agreement - crystallisation is not required because all assets and liabilities, in respect of active and non active members of the merging or relocating body, transfer to the new administering authority. This approach was taken for the national reorganisation of the Probation Boards where they merged to form Probation Trusts and there was some support voiced for a general provision as part of the statutory consultation. It will be important to link the provision to a particular event and have agreement of all the parties involved.

- Would such a provision be welcomed?

Responses

31. There are several areas of the regulatory framework that we are asking you to consider. Some of you may wish to provide a written commentary by way of response but if practitioners, or groups of practitioners, would find it helpful to discuss the issues being raised, perhaps as part of a meeting of the ABS advisory group or separate group discussions, please let me know and we will make the necessary arrangements.

32. Your replies should be sent to Siobhan Prill (Siobhan.prill@communities.gsi.gov.uk) and it would be helpful to have these no later than **Friday 30 July 2010**.

Workforce, Pay and Pensions, CLG
May 2010