Avon Pension Fund
Local Government Pension Scheme

Post: Avon Pension Fund, Bath & North East Somerset Council,
Lewis House, Manvers Street, Bath, BA1 1JG
Web: www.avonpensionfund.org.uk **Tel:** 01225 395100
Email: avonpensionfund@bathnes.gov.uk **Fax:** 01225 395258

2nd April 2019

LGF Reform and Pensions Team
Ministry of Housing, Communities and Local Government
2nd Floor, Fry Building
2 Marsham Street
London
SW1P 4DF

Dear Sir

Consultation on Local Government Pension Scheme: Fair Deal – Strengthening Pension Protection

I write on behalf of the Avon Pension Fund in its capacity of administering authority in response to the above consultation which was published on 10 January 2019.

We welcome the proposal for greater pension's protection for employees of LGPS employers who are compulsorily transferred to service providers. In Avon Pension Fund we have 105 Transferee Admission Bodies (TAB's) and our responses are approached from a practical standpoint as an LGPS Fund and from our wide range of experience of working with a variety of Scheme Employers and Admission Bodies. Our responses are set out below.

Question 1: Protected Transferees - Do we agree with the definition?

a) *We agree with this definition subject to comments set out in answer to question 2.*

Question 2: Fair Deal employers – Do you agree with this definition of a Fair Deal employer?

a) *We do not agree with this definition of Fair Deal employer. We consider that it should include further education corporations, sixth form college corporations and higher education corporations. The basis for this is equality of right. We believe that as long as staff are in LGPS they should enjoy the same protections as other bodies listed in Schedule 2.*

It is very difficult to argue that further education and sixth form colleges are non-public sector when prima facie the majority of their funding is from the public sector. Universities are mainly funded by the Student Loan Company that is heavily subsidised by the public purse.

We already have evidence of a University seeking to deprive their non-academic staff of their LGPS membership entitlement in order to achieve cost savings. This would be achieved by incorporating a wholly–owned subsidiary to which the staff would be transferred, leaving behind a rump of staff designed to avoid crystallisation of the employer's pension debt. This subsidiary would then provide services to the parent company. At the present time it is possible that this could be challenged in law. Given that the proposal in the consultation paper would withdraw protection altogether ("voluntary" protection effectively amounts to no protection at all) this

practice would be legitimised in the sense that a subsidiary could be established and a contract awarded to it through normal outsourcing processes. In our view the pension rights of higher and further education staff should not be diluted in this way. The example we have provided gives a clear indication of what is likely to happen if the Government withdraws statutory protection. If it is valid that further education corporations, sixth form college corporations and higher education corporations are non-public sector and should have the freedom that non- public sector organisations can expect, then it would be more transparent to remove them from Schedule 2 of the Regulations and allow them to become Community Admission Bodies so that these Employers can legitimately close to new members. This would be preferable to removing the protections as proposed which may affect certain classes of staff unequally and lead to legal challenge.

The impact assessment does not make clear that members of further education corporations, sixth form college corporations and higher education corporations will be excluded from these proposals.

b) *We are unclear if the draft Regulations covers protected transferees who are transferred under a sub contract i.e. a TAB to TAB transfer. In this case the out- sourcing employer is not a Fair Deal employer. This could be exploited by a contractor at the expense of LGPS members and clarity is vital. We do not agree that TAB to TAB transferees should not be protected and this is in conflict with the current arrangements.*

c) *We often find that, where an Academy directs catering/cleaning staff employed by a Unitary Authority to transfer to a new service provider following conversion to an academy , the Academy disputes that they are the Fair Deal employer and that they should protect the transferees. Clarity on this would be greatly appreciated.*

Question 3: Transitional arrangements – do you agree with these transitional measures?

a) *Chapter 2, para 25 makes clear that staff will gain the improved protections the next time a contract is retendered. However it is not clear from draft Regulation [3B(12)] if it applies to a request for an inward transfer at any time during the contract or only at the end of the contract. The Regulation [3B(12)]should make clear that this facility only exists when the current service contract ends.*

Question 4: Transitional arrangements – Do you agree with our proposals regarding the calculation of inward transfer values.

a) *We agree with the proposal regarding the calculation of inward transfer values.*

Question 5: The deemed employer approach - Do you agree with our proposals on deemed employer status?

For the avoidance of doubt the deemed employer option can only be used where the pension risk is retained, i.e. in the case of pass-through contracts. We also note that the Department of Education require that the pensions risk should in all cases be met by the service employer (i.e. not pass through). For the same reasons we generally encourage our employers to transfer the pensions risk for cost control purposes, not just in the case of larger long term contracts. We are aware that in some cases, for example care contracts pass through is used because otherwise Authorities are unable to secure good contracts, however care contracts are usually long term so that the admission agreement route is appropriate. In conclusion we see the current admission agreement route as remaining the backbone of outsourcing and believe it is adaptable to a variety of risk sharing options.

a) *We cannot properly comment on the feasibility of the deemed employer proposal because we do not have the full information in particular we do not have the following:*
    - *guidance to be issued by the LGPS Scheme Advisory Board (SAB) referred to in Chapter 2 , para 38, and Draft Regulation 3B (13);*
    - *the advice to be issued by the Department of Education to Academies in Chapter 2, para 39;*
    - *and the guidance to be issued by the Secretary of State in draft Regulation 3B (4).*

b) *Paragraph 27 of Chapter 2 says 'The outsourcing scheme employer may retain the responsibility for any shortfall in contributions as well as the benefit of any surplus'. This is incorrect as there is no provision in Regulation 64 for an outsourcing employer who enters into an admission agreement and retains the contribution and pension risk to retain the exit credit. This could be overcome if Regulation 64 (2)b refers to 'the exiting employer or Fair Deal Employer' and refers to 'payment or retained debit /credit' ensuring that a payment per se is not necessary. Regulation 64 needs to be addressed urgently to reflect that there are already a large number of pass through contracts in existence.*

c) *Our experience is that service contracts between parties are frequently very poor especially in relation to pensions. The reason for this is the complexity of pensions and a lack of understanding. We believe the response to this should not necessarily be to offer more choice and complexity (for example where the scheme employer is not the legal employer). The system we currently have works, and strengthening in certain areas would in our view be effective, for instance 9b) above. We anticipate that the deemed employer route would be ideal where a Fair Deal employer has failed to put an admission agreement in place effectively. This should be reflected in the guidance from the Secretary of State to prevent members being in limbo for long periods of time. The deemed employer route may also be preferable for very small 'pass through' contracts as it would allow us to use the scheme employers contribution rate, and not procure a valuation and risk assessment therefore saving actuarial costs which are invariably passed on to the Fair Deal employer.*

d) *The administration benefit cited in Chapter 2 para 35 concerning the rising number of scheme employers is theoretical rather than real. For each outsourcing the Fund will be required to record the names of protected transferees; the contacts at the legal employer; sign a service level agreement with the legal employer; establish an employer number to record contributions paid and collect member data in the usual way. Therefore we do not anticipate that the proposals will slow the rate of increase in employers in the Fund or work associated with this trend.*

e) *The deemed employer methodology already exists for Foundation Schools and Voluntary aided schools but it is now proposed to use it on a much larger scale. We believe paragraphs 40 and 41 significantly underestimate the practical difficulties involved in separating the legal employer from the Fair Deal employer. We are particularly thinking of ill health management, use of discretions, first instance decisions and non-payment of contributions as well as all employer responsibilities involving provision of data and any type of retirement where a strain cost is generated. Ultimately the Fair Deal employer is at greater risk. This makes the guidance from SAB critical.*

f) *We currently have some unitary authorities who have allowed or directed that their schools use a third party payroll and/or HR function (in addition to the Foundation / VA schools to which you refer), the deemed employer approach appears to create the same situation. Although we categorically tell the unitary authority they must retain employer responsibilities, the practicalities*

of achieving this once employees are not on the payroll is very difficult for them to achieve and very hard for Avon Pension Fund to enforce.

We have many practical problems with data for these schools. Although the member record retains the unitary authority employer number we have to use a separate indicator to identify who these members are paid by and, under the deemed employer approach, who their legal employer is which creates extra record keeping. These records are then not updated by the Unitary Authority's monthly electronic extract (as employees are not paid by the Unitary Authority) but are updated by a third party payroll which causes considerable difficulty for our record keeping. If data is missing or inaccurate the Unitary Authority are reluctant to help as they have lost resources themselves. Unitary Authorities also do not have records themselves so have to set up a system to monitor and chase information from the payroll provider. The responsibility for strain costs still lies with the legal employer so they need to have a process in place to make sure decisions are not made without consulting them. It is also difficult when dealing with member enquiries as employer responsibility is not always clear and this can lead to anxiety for members if the data submission is not obviously prescribed.

We draw these practical experiences to your attention because if the deemed employer route were to be adopted SAB would need to address these issues so that additional and unnecessary complexity does not result which could make things worse not better.

Question 6: Responsibilities for employers –What should advice from the Scheme Advisory Board contain to ensure that deemed employer status works effectively?

a) *See Question 5 (e) above.*
b) *The need for Fair Deal employers to consult the Fund early, and cover all pensions' aspects at tender stage and in the commercial contract*.
c) *Fair deal employers should be required to state the route they intend to use to achieve continued access to LGPS for protected transferees **at the bidding stage**, i.e. admitted body route or deemed employer route, and whether the pensions risk will be retained or transferred. Making these decisions early in the outsourcing process is vital to achieving the Fair deal employers required outcome.*

Question 7: Responsibilities for employers – Should the LGPS Regulations 2013 specify other costs and responsibilities for the service provider where deemed employer status is used?

a) *This question is best answered when we have the advice from SAB.*

Question 8: Existing arrangements – Is this the right approach?

a) *We disagree with draft Regulation 5A. The pension risk sharing arrangements are the responsibility of the Fair Deal employer and contractor and are set out in the commercial contract. The admission agreement is, for efficiency reasons, a largely standardised document and sets out the basis of participation in the Fund.*

Including the pension risk sharing arrangements in the admission agreement could lead to a misunderstanding of the role of the admission agreement, which is not a substitute for the commercial agreement. Fair deal employers cannot rely on the Fund to resolve their pension arrangements when they choose to outsource. The onus is not on LGPS and we cannot be an arbitrator. This would lead to added legal costs for the Fund and more referred work to solicitors. What would happen if we did not agree with pension risk sharing arrangements in the contract because they were vague, or if they changed during the contract? We have difficulty getting a

signed contract and signed admission agreement and adding the pension sharing arrangements to the admission agreement is in our view an added unnecessary complexity that will inevitably lead to further delays. The Fund, which in this case is the administering authority, has no legal basis to interfere in the contractual arrangements of Employers and to create such a situation does not lead to acceptance of any Fund decisions so would create an industry of legal challenges

Question 9: Timely consideration of pension issues – What further steps can be taken to encourage pensions issues to be given full and timely consideration by Fair Deal employers when services or functions are out sourced?

a) *3B (3) Our experience is that contracts between Scheme Employers and Service Providers can be unsigned when service commences, they can include no reference to pensions and they can be confidential so that the Fund does not know the relevant pension terms. This can leave the members and the Fund in limbo. We believe this unsatisfactory situation could be overcome if Draft regulation3B(3)(b) is made a default position for example 'If a fair Deal Employer commences a contract without an admission agreement in place that service provider will be treated as a 'deemed admitted body' (see point II below) for the purposes of the Regulations and will assume the initial contribution rate of the Fair Deal employer until an admission agreement is effected or the contract ends'*

b) *If there is the possibility of introducing a legal duty of care for Fair deal employers to protect the pension entitlements of protected transferees when outsourcing, we believe this would help.*

Question 10; Are you aware of any other inequalities impacts or of any particular groups with protected characteristics who would be disadvantaged by our Fair deal proposals?

a) *As stated in Question 2 employees of further education corporations, sixth form college corporations and higher education corporations are both disadvantaged and treated unequally by being excluded from the definition of Fair Deal employer. If employees work in an academy they have protection, but this is denied to them if they work in a sixth form college or University. If employees lose their LGPS pension entitlement their remuneration package will have fundamentally changed and they should receive financial remedy.*

b) *Also see our response above to Question 2(b) in relation to subcontracts.*

Question 11: Chapter 3 Transferring pension assets and liabilities – Is this the right approach?

a) *Are these provisions enforceable under Company Law? As all the Academies, FE and HE employers and TAB's are Limited companies (either limited by shares or by guarantee) we do not want to rely on a regulation that is not enforceable.*

b) *The impact of the draft Regulation is that instead of paying in and drawing a line, the pension burden is transferred to another organisation. We have colleges in our Fund where this has happened many times in the past and the present day colleges continue to struggle in part because of predecessor organisations pension obligations. Our view is that whilst all exiting employers should pay their debt, where this is not possible the rules of insolvency should apply. However, in the case of mergers or restructuring due to directions from central government or their agents such as Regional Commissioners, protection (in the form of a guarantee or repayment of the debt) should be provided to the receiving Fund for any outstanding debt to facilitate the restructuring. The consent of the receiving Fund must be required as the risk to the taxpayer will increase if the employer's covenant is weakened and it is unable to support the combined*

liabilities in the long term. It would not be equitable for scheme employers in unrelated sectors to bear this risk.

Question 12: Chapter 3 Transferring pension assets and liabilities – Do the draft regulations effectively achieve our aims?

a) *We believe they do effectively achieve your aims.*

Question 13: Chapter 3 Transferring pension assets and liabilities – What should guidance issued by the Secretary of State state regarding the terms of asset and liability transfers?

a) *We have no views on this aspect of the guidance. However, further actuarial input should be sought to answer this question in detail.*

Other Points that The Avon Pension Fund ask to be considered:

I. **Legal frame work**: *Clarification on whether 'The Best Value Authorities Staff Transfers (Pensions) Direction 2007' be rescinded, and Academies will be removed from 'Fair Deal for staff pensions; staff transfer from central government 2013' following the implementation of the Draft regulation.*

II. **A name for service providers who are not admitted bodies:** *It would be helpful to have a name for service providers who are not admitted bodies, for example 'deemed admitted body' and this would need a definition.*

We hope our responses are useful in taking the proposals forward and look forward to being updated in due course.

Yours faithfully,

Geoff Cleak

Pensions Manager

Avon Pension Fund

Bath and North East Somerset Council

01225 395277

geoff_cleak@bathnes.gov.uk