

Avon Pension Fund

Local Government Pension Scheme

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Re: Consultation on Amendments to the Statutory Underpin

With reference to the recent consultation regarding the proposed amendments to the statutory underpin, published on 16 July 2020, this is the response from Bath and North East Somerset Council as the administering authority for the Avon Pension Fund which represents 38,064 active members from 443 actively contributing employer bodies.

We would like to start by bringing to your attention the following recommendations we have in relation to the proposals that we feel must be strongly considered, and where necessary addressed, before any such changes are implemented:-

Recommendation 1:- Consider removing the requirement to calculate the underpin at a member's 2008 Scheme NPA where they continue in active membership after that date.

Recommendation 2:- We must have the final amendment regulations to implement the remedy published at the earliest possible opportunity and way ahead of their implementation date. We understand that this is possible as the LGPS does not require changes to primary legislation, as the other PSPS do. By publishing these early this would give both administrators and software providers the best opportunity to make the necessary changes in preparation for their implementation in April 2022.

Recommendation 3:- There is nothing in the proposals setting out the likely timescales in which the retrospective review of benefits for those protected members who have already left the scheme must be completed by administrators. It is essential that administrators are given sufficient time to properly address such cases.

In addition to our recommendations above, our responses to the consultation questions are as follows:-

Question 1 – Do you agree with our proposal to remove the discrimination found in the McCloud and Sargeant cases by extending the underpin to younger scheme members?

Yes, we agree that by extending the underpin to younger scheme members and removing the requirement to be entitled to the immediate payment of benefits, this would remove the discrimination found in the McCloud and Sargeant cases.

Question 2 - Do you agree that the underpin period should end in March 2022?

Yes.

Question 3 - Do you agree that the revised regulations should apply retrospectively to 1st April 2014?

Yes.

Question 4 - Do the draft regulations implement the revised underpin which we describe in this paper?

We believe so.

Question 5 - Do the draft regulations provide for a framework of protection which would work effectively for members, employers and administrators?

Whilst they do provide a framework of protection that would be of the benefit to members, the complexity of the proposed protections will be confusing and difficult to understand for members and will be extremely difficult to make work effectively for employers and administrators.

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

- Amendments suggested to Regulation 4 of the 2014 Regulations includes the addition of (1D) under (1)(c) which advises:-

“(1D) Where this paragraph applies, an active or deferred member has a twelve month period commencing from [XXXXXXXX] to elect to aggregate the previous Scheme membership that would give the member relevant Scheme membership”

We feel that this should also provide discretion for the administering authorities to allow for elections made after the 12 month period to be considered where there are exceptional circumstances.

- The regulations do not address changes for members who opted out of the Scheme in an employment (other than a concurrent employment) on or after 11 April 2015 with an entitlement to a deferred benefit. These members do not have the right to aggregate benefits on re-joining because of the amendment made to regulation 22(8) by SI 2015/755. These members do not appear to be getting an opportunity to reconsider their decision to opt out as those members who have chosen not to aggregate benefits will do. This could lead to further grounds for appeal if not addressed.

Question 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?

Yes.

Question 8 – Are there any other comments regarding the proposed underpin qualifying criteria you would like to make?

The qualifying criteria does leave the category of members who joined the scheme on or after 1 April 2012 and before 1 April 2014, and so have accrued membership under the final salary scheme, unprotected by the revised underpin which could lead to future claims.

Question 9 – Do you agree that members should meet the underpin qualifying criteria in a single scheme membership for underpin protection to apply?

Yes, we would insist that this must be the case.

Question 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?

We agree with the proposals, however, the regulations do not appear to allow any flexibility on the 12 month period, which the regulations seem to suggest starts from the date they come into force. We feel that the regulations should also allow discretion where a member makes an election after 12 months and there are exceptional circumstances that should be taken into consideration.

Question 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?

We do not feel that these proposals would have an adverse effect on members as they continue to have a choice on whether or not to aggregate their benefits. What then might subsequently happen in the future to the member, their pay or the benefits they or their dependants are eventually awarded, which causes significant adverse effects on their benefits, is something the member must consider when making that choice, as they have had to do up to now.

Question 12 – Do you have any comments on the proposed amendments described in paragraphs 56 to 59?

Paragraph 58 – We agree that the underpin should apply to a qualifying member who dies in active service.

Paragraph 59 – Again, we agree that survivors pensions should include a proportion of any underpin enhancement awarded to a qualifying member.

Question 13 – Do you agree with the two-stage underpin process proposed?

Whilst we feel that this will be extremely complex to administer for many decades to come and will also cause significant confusion to members, we understand that this is necessary to prevent any future claims which could then lead to further rectification exercises. One concern we do have with the two-stage process is that we could be promising the member a ‘provisional underpin amount’ which may then be reduced or removed completely when the second stage of the calculation is performed decades down the line.

Question 14 – Do you have any comments regarding the proposed approaches outlined above?

Paragraph 66 - To include an estimate of how the underpin would apply to active members, year on year, carries an amount of risk is over complex and will in some cases be misleading, which could lead to complaints in the future.

Paragraph 67 – We feel that by imposing that the underpin calculation must be performed at a member’s 2008 Scheme NPA, where they continue in active membership, this could be seen as further age discrimination for older members who wish to continue in employment passed their NPA and as such restricting their pensionable pay by any increases they may gain after their NPA. We therefore feel that this rule should be removed completely as per our recommendation above (Recommendation 1).

Paragraph 71 - To include an estimate of the ‘provisional underpin amount’ on an annual benefit statement for a deferred member is again over complex and will in some cases be misleading, which could lead to complaints in the future.

Question 15 – Do you consider there to be any notable omissions in our proposals on the changes to the underpin?

The proposals have failed to consider members who opted out of the Scheme in an employment (other than a concurrent employment) on or after 11 April 2015 with an entitlement to a deferred benefit. These members do not have the right to aggregate benefits on re-joining because of the amendment made to regulation 22(8) by SI 2015/755. These members do not appear to be getting an opportunity to reconsider their decision to opt out as those members who have chosen not to aggregate benefits will do and so will be at a disadvantage. This could lead to further grounds for appeal if not addressed.

Question 16 – Do you agree that annual benefit statements should include information about a qualifying member's underpin protection?

No, we feel that annual benefit statements are already complicated enough, both to produce and also for members to understand. To add even more confusion by providing a provisional benefit that may or may not become payable would be a mistake. As any underpin enhancement is not likely to be of a singularly sufficient amount that will contribute to any decision the member is making on the basis of that statement, then why include it. Also, this is surely in direct contrast with the Governments consultation of November 2019 to provide simpler annual benefit statements for workplace pensions.

Question 17 – Do you have any comments regarding how the underpin should be presented on annual benefit statements?

No, other than we do not feel that the underpin should be presented on annual benefit statements.

Question 18 – Do you have any comments on the potential issue identified in paragraph 110?

As the additions are likely to be extremely negligible in most cases we feel that a member is not likely to exceed the annual allowance in that PIP based on the underpin enhancement alone.

Question 19 – Do the proposals contained in this consultation adequately address the discrimination found in the 'McCloud' and 'Sargeant' cases?

We feel that by extending the underpin, so that those members who were in service on 31 March 2012 but not within 10 years of their NPA will qualify, and further removing the requirement that a member must leave active service with the immediate entitlement to a pension for any protection to apply, adequately addresses the discrimination found in the McCloud and Sargeant cases. All further proposals contained in this consultation go much further than the requirement on the scheme to address this discrimination, however, we understand that they are necessary to remove the risk of any future claims being brought against the scheme.

Question 20 – Do you agree with our equalities impact assessment?

Yes.

Question 21 - Are you aware of additional data sets that would help assess the 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)?

No.

Question 22 – Are there other comments or observations on equalities impacts you would wish to make?

No.

Question 23 – What principles should be adopted to help members and employers understand the implications of the proposals outlined in this paper?

Clear, consistent and timely communications will be essential to help members and employers understand the implications of the proposals outlined in this paper. To ensure there is a consistent approach, we feel that communications for all administering authorities should be developed centrally so that a member is getting the same consistent information regardless of geographical location.

What I will say is that, to date, we have not had one query from a member in relation to this and that is a common theme in other administering authorities too and it is important not to over communicate to members giving a promise of improved benefits when most of them will see little or no improvement from the underpin protections.

Question 24 – Do you have any comments to make on the administrative impacts of the proposals outlined in this paper?

The implementation of the proposed changes going forward, as well as the retrospective application, will lead to significant administrative complexity. If the proposals outlined in the consultation are taken forward as is, this will cause decades of additional data collection, member confusion and over complex calculations requiring good knowledge of the scheme both pre and post 2014, which, as the years go by, will become less common place amongst administrators.

The data collection exercise, which we will need to carry out with employers to gather any missing hour change and service break data going back to 1 April 2014, will place a massive strain on our internal resources as well as on the resources of the employers.

This will cost administering authorities so much time and money, which will not only have a negative impact on the service they are able to provide to all members of the scheme, not just those who are protected, but also will result in significant costs. Most administering authorities will need to find a large amount of additional budget to carry out this exercise as they will either need to recruit additional resource to deal with cases or pay third-party consultants to carry this out on their behalf. There is already a lack of candidates with the necessary LGPS knowledge and skills available nationwide to recruit into such posts.

Significant changes will be required to pensions administration systems which, depending on the timing and degree of success of these software changes, could make a big difference to the level of resource required for this exercise, and will most certainly add to the overall costs involved.

Along the way, there will need to be a whole programme of communications developed for members and employers, as well as the need to carry out a full review of the member and employer websites, scheme guides, letters and internal processes in order to ensure that they are updated with any amendments in preparation for the implementation date.

As administrators we urge you to ensure that significant central support is made available to administrators to assist them in any way possible, for example, providing central communications, providing them with clear guidance on what action is required etc.

It is difficult to predict what impact these proposals will have on the future of local administration of the LGPS, or what damage they will this cause to the morale of administrators, who are already under

significant pressure. Our fear is that they will either head out of the door or stay and suffer possible long term negative effects on their mental health.

Question 25 – What principles should be adopted in determining how to prioritise cases?

We would suggest that pensions in payment for both members and survivors should be prioritised first, followed by transfers out and trivial commutations and finally followed by deferred members. We would ask that adequate time is given to administrators in order to apply the remedy retrospectively and we would further hope that systems will at least be updated to automatically apply the underpin to active members who leave following the regulations coming into force, however, this would rely on early publishing of LGPS regulations way ahead of their implementation date.

Question 26 – Are there material ways in which the proposals could be simplified to ease the impacts on employers, software systems and scheme administrators?

Yes, firstly, we would refer you to our recommendations outlined at the beginning of our response which we feel would slightly simplify the proposals, whilst still addressing the discrimination in the McCloud and Sargeant cases.

It would also be extremely useful if there could be a set of assumptions/criteria developed and issued to administrators to assist them when identifying whether the past cases they are required to retrospectively revisit will actually trigger an underpin enhancement. We see this as some kind of data checker which can be run on an extract of our data, containing those members in scope of the protections, and highlight cases that have the potential to trigger an underpin enhancement and therefore recommend them for review. Currently, we have identified around 12,000 members in scope of the protections who will require retrospective review and there must be some way that these can be narrowed down significantly to only include those members for whom the underpin is likely to bite.

Question 27 – What issues should be covered in administrative guidance issued by the Scheme Advisory Board, in particular regarding the potential additional data requirements that would apply to employers?

We also feel that the following administrative guidance will be required to provide a consistent approach across the board:-

- As mentioned in my answer to the last question, it would be extremely useful if there could be a set of assumptions/criteria developed and issued to administrators to assist them when identifying whether the past cases they are required to retrospectively revisit will actually trigger an underpin enhancement.
- How to deal with cases where an employer is not able or willing to provide missing hour change and service break data for a member.
- What to do about additional payments that are due to survivors of scheme members who have subsequently died or, in the case of dependants the payment of their pension has ceased, and no contact can be made.
- Should there be a minimum amount of annual underpin enhancement determined that triggers the requirement for schemes to revise pensions, survivors pensions, transfers out and trivial commutations where payment has already commenced, for example, where a member is entitled to an underpin addition of £5 per annum, less than 50p per month? Guidance on such an area, or confirmation that the expectation is that all cases will need to be corrected however trivial the amount, would be useful to ensure a consistent approach across the board.

Question 28 – On what matters should there be a consistent approach to implementation of the changes proposed?

- How to deal with cases where an employer is not able or willing to provide missing hour change and service break data for a member.
- What to do about additional payments that are due to survivors of scheme members who have subsequently died or, in the case of dependants the payment of their pension has ceased, and no contact can be made.
- There should be a minimum amount of annual underpin enhancement determined that triggers the requirement for schemes to revise pensions, survivors pensions, transfers out and trivial commutations where payment has already commenced. Guidance on such an area, or confirmation that the expectation is that all cases will need to be corrected however trivial the amount, would be useful to ensure a consistent approach across the board.

Question 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?

As already mentioned, the potential cost of the remedy itself and mainly the costs of carrying out this exercise are likely to be disproportionate in representing such little gain to those members it is being put in place to protect. Administrators will require additional resources or will need to look to outsource this exercise to an external company. The costs associated with amendments required to software systems and communications to all stakeholders will be significant. It is inevitable that these costs eventually lead to increased costs to the local taxpayer. As such, steps should be taken to ensure that the proposals to remove age discrimination from the LGPS are adequate but not excessive.

Further Comments:-

In June 2018, MHCLG approached the Scheme Advisory Board (SAB), having identified a need to make the Scheme Regulations more adaptable, flexible and easy to administer and in response to this the SAB set up a 'Simplification Project'. The proposals contained in this consultation most certainly will not make the scheme easy to administer but instead would introduce changes to the regulations that will cause complexities for years to come, very much going against simplification.

We hope our response is useful in taking the proposals forward and that full consideration is given to all points and recommendations raised to ensure that the scheme can deliver the objectives required in a manner that is fair on both members, employers, administrators and the local tax payer.

We look forward to being updated in due course.

Kind Regards,

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