Pensions Committee

2.00pm, Monday, 26 March 2018

2016-2018 Service Plan Update

Item number	5.12
Report number	
Executive/routine	
Wards	All
Council Commitments	Delivering a Council that works for all

Executive Summary

The purpose of this report is to provide an update on progress against the 2016–2018 Service Plan, performance indicators and the key actions to enable the Fund to meet its four key objectives:

- Customer First;
- Honest and Transparent;
- Working Together; and
- Forward Thinking.

Overall progress is being made against the service plan objectives with all but two of performance indicators meeting the target so far for 2017/18. An underspend is projected for the financial year.

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Report

2016-2018 Service Plan Update

1. Recommendations

Committee is requested to:

1.1 Note the progress of the Fund against the 2016-2018 Service Plan;

1.2 Note the UK Government's announcement on Guaranteed Minimum Pension (GMP) indexation; and

1.3 Note the guidance from Scottish Public Pensions Agency in respect of GMP related overpayments.

2. Background

2.1 The purpose of this report is to provide an update on the 2016–2018 Service Plan, performance indicators and the key actions to enable the Fund to meet its four key objectives:

- Customer First;
- Honest and Transparent;
- Working Together; and
- Forward Thinking.

3. Main report

3.1 Progress is being made against the service plan. Progress of particular note since the last update to Committee is shown below. The following areas are covered elsewhere on the agenda:

- Audit reports and plans;
- Review of Funding Strategy Statement;
- 2017 Actuarial Valuations;
- Developments of the Fund's Governance arrangements.

Guaranteed Minimum Pension (GMP) indexation

3.2 On 22 January 2018, the UK Government announced the outcome of its previous statutory consultation in relation to increases to Guaranteed Minimum Pensions (GMPs) for the Public Service Schemes, including the LGPS. Its decision is an extension of the current GMP increase policy, under which members reaching State Pension Age (SPA) between 6 April 2016 and 5 April 2021 will have full GMP increases provided by their scheme (currently this policy applies only to members reaching State Pension Age between 6 April 2016 and 5 December 2018).

3.3 Further consideration will be given in relation to members whose State Pension Age falls after 5 April 2021.

3.4 Costs for the entire LGPS have been estimated as being of the order of 0.5% of accrued liabilities (approximately £1 billion) if full indexation were to be provided to all members reaching SPA after 5 April 2016. The cost of this latest extension of GMP increases is not material in the context of the liabilities of the Funds (less than 0.1%).

GMP related overpayments – guidance from Scottish Public Pensions Agency (SPPA)

3.5 On 8 February 2018, SPPA published "Circular No.1/2018", the purpose of which is to:

a. "Confirm how GMP related overpayments which arise from the current reconciliation exercise should be managed going forward; and

b. Provide information that the Accountable Officer may wish to take into account when deciding on how accrued GMP related overpayments are managed."

3.6 "Scottish Ministers have decided that as in 2008/2009 any LGPS pension in payment affected by the exercise should not be reduced going forward. Instead the identified GMP related overpayment should be converted as before into an Increased Pension Entitlement (IPE) allowing the pension to continue at its existing level."

3.7 "The responsibility for deciding what action should be taken on the accrued overpayments arising …... rests with the scheme's Accountable Officer (AO)". Based "on advice issued by the Local Government Association (LGA) to its administering authorities earlier in June 2017", SPPA has detailed a number of factors and potential legal precedents which may be considered.

3.8 SPPA has also confirmed that "There may also be a small number of cases where the incorrect GMP data has led to an underpayment of pension. In these cases, the affected pension will be corrected going forward with any arrears being paid to the pensioner".

3.9 SPPA Circular No.1/2018 is shown in full at Appendix 2.

Staffing

3.10 As was reported to the Pensions Committee in December 2017, the remaining Fund staff's transfer of employment to LPFE Limited was delayed in October 2017 due to operational issues. These issues have now been completed and the phase 2 transfer was completed on the 31 January. The team is now together under the same employer again providing more opportunities to develop services for members and employers.

3.11 An appointment for temporary (12 months) Human Resources manager has been made and the post holder is now in place.

3.12 After the resignation of the Fund's Bond Manager early in 2017, an offer for the role has been accepted and the role will be filled in April 2018.

Local Authority Pension Fund Forum (LAPFF) update

3.13 Committee will recall that the Fund proposed the following amendments to the LAPFF constitution at the 2017 AGM:

- The introduction of a maximum tenure for members on the Executive.
- The removal of the current two-tier membership of the Executive, which distinguishes between 'trustees' and 'officers'.
- The appointment to the secretarial role of an individual who is independent from the Research and Engagement partner.

3.14 The proposed amendments were not agreed but they did receive 42%, 36% and 42% of members' votes respectively.

3.15 In February 2018, draft amendments to the constitution have been circulated to funds for comment ahead of the AGM on 28 March 2018. The main changes proposed in the draft concern the inclusion of the English & Welsh LGPS investment pools as members of LAPFF.

3.16 While the draft has also removed the requirement for the Research and Engagement partner to undertake the secretarial function, it falls short of requiring the secretary to be independent. There are no amendments introducing a maximum tenure for members on the Executive or to remove the distinction between trustees and officers on the Executive. The draft constitution also introduces a requirement 'to wait for a period of three years before being permitted to re-present an amendment to the Constitution, if it has been defeated at any particular annual meeting.'

3.17 The Fund has responded to the draft re-iterating the principles it proposed in 2017. Further, it is proposed to introduce a requirement to consult on, and respond to, AGM resolutions supported by more than 20% of members, in-line with the FRC's draft Corporate Governance Code. An update will be provided to Committee following the LAPFF AGM.

3.18 Committee has previously agreed for Councillor Rankin to be nominated to the LAPFF Executive. With the changes to the constitution and local elections in England and Wales in May, elections to the LAPFF Executive have been postponed until June 2018.

Freedom of Information (FOI) requests

3.19 The Fund receives regular FOI requests and in 2017 responded to 19 that covered topics such as private market investments, shareholdings, travel, IT and shareholder voting. We also received one subject data request from a member requesting a copy of the information the Fund held on them. These requests are resource intensive and where possible we refer queries to the website for publicly available information.

Performance Indicators

3.20 Performance Indicators for the first three quarters of the financial year are provided in the attached appendix.

Two indicators are highlighted as ‘amber’’:

- The staff training indicator shows that 65% of staff had completed their pro-rata training target up to 31 December 2017. The Fund is comfortable that the target should be achieved by the end of the year.
- The proportion of annual benefit statements issues was 99.9%, missing the 100% target. 26 statements were not issued due to missing information from employers and, of these, all but 2 have now been issued. We are working with the relevant employers to correct the remaining errors.

3.21 Overall employer performance under the Pensions Administration Strategy for the first three quarters of 2017/18 is shown below, with 2016/17 shown for comparison purposes.

Employer performance		April to Dec 2017			2016/17		
Case type	Target (working days)	Number received	Number within target	% within target	Number received	Number within target	% within target
New Starts	**20**	4824	4462	**93%**	4763	4074	**86%**
Leavers	**20**	1577	732	**46%**	3435	1434	**42%**
Retirements	**20**	766	298	**39%**	1244	440	**35%**
Death in Service	**10**	19	9	**47%**	29	21	**72%**

Overall, this shows a continuation of poor employer performance for the first three quarters of this year particularly for retirements and leavers. The Fund has contacted employers requesting outstanding leaver information. Once provided, it is likely this will not be in target and affect performance in the final quarter.

The receipt of new start information through the secure data transmission portal is generally good. The Fund received a large increase in volume in Q3 but the majority of cases were received within target.

3.22 The Fund's annual Customer Service Excellence (CSE) assessment was scheduled to take place on 1 March 2018 but has been postponed due to the weather disruption. A new assessor will be visiting the Fund in April and will cover key customer service provisions such as complaints, listening to customers and responding to feedback.

3.23 The rolling 12 month survey results for overall customer satisfaction (including active, new members, retired and email survey results) to the end of December was 92.5% ahead of target 89%. In January, the Fund conducted the annual employer survey and received helpful feedback on our performance. 41 responses were received. Key results were as follows:

- 100% of respondents were satisfied with the overall service provided by the fund (96% in 2016/17);
- the monthly employer bulletin continues to be well received with 98% (97% in 2016/17) satisfaction and the preferred method of communications for most;
- 89% agreed the website was useful (89% in 2016/17);
- satisfaction of pensionsWEB (the employer portal) increased from 87% to 91%.

The positive results from the employer survey will be included in the overall customer satisfaction next quarter.

Membership and Cashflow monitoring

3.24 The Fund continues to monitor movements in membership numbers to assess potential implications upon cashflow. Early retirement initiatives could trigger significant and immediate outflows due to the payment of tax free lump sums and pensions and reductions in contributions received. However, payment of strain costs by the employer help to mitigate current cashflow pressures.

3.25 The table below details the cashflows as at the end of December and projections for the financial year. This has been prepared on a cashflow basis (compared to the accruals basis of the year-end financial statements and budget projections).

Lothian Pension Fund	2017/18 YTD	2017/18 Projected
Income	**£'000**	**£'000**
Contributions from Employers	104,066	142,000
Contributions from Employees	32,195	42,100
Transfers from Other Schemes	2,896	4,700
	139,157	**188,800**
Expenditure		
Pension Payments	(111,545)	(149,000)
Lump Sum Retirement Payments	(32,514)	(54,000)
Refunds to Members Leaving Service	(512)	(630)
Transfers to Other Schemes	(8,923)	(11,000)
Administrative expenses	(1,700)	(2,221)
	(155,294)	**(216,851)**
Net Additions/(Deductions) From Dealings with Members	**(16,137)**	**(28,051)**

Lothian Buses Pension Fund	2017/18 YTD	2017/18 Projected
Income	**£'000**	**£'000**
Contributions from Employers	5,662	7,320
Contributions from Employees	1,488	1,860
Transfers from Other Schemes	13	13
	7,163	**9,193**
Expenditure		
Pension Payments	(6,541)	(8,740)
Lump Sum Retirement Payments	(2,102)	(3,000)
Refunds to Members Leaving Service	(3)	(18)
Transfers to Other Schemes	(539)	(750)
Administrative expenses	(65)	(85)
	(9,250)	**(12,593)**
Net Additions/(Deductions) From Dealings with Members	**(2,087)**	**(3,400)**

Scottish Homes Pension Fund	2017/18 YTD	2017/18 Projected
Income	**£'000**	**£'000**
Contributions from Employers	**675**	**675**
Expenditure		
Pension Payments	(4,996)	(6,700)
Lump Sum Retirement Payments	(525)	(910)
Transfers to Other Schemes	(47)	(75)
Administrative expenses	(45)	(60)
	(5,613)	**(7,745)**
Net Additions/(Deductions) From Dealings with Members	**(4,938)**	**(7,070)**

3.26 It is expected that active members as a proportion of the whole Lothian and Lothian Buses Pension Funds will continue to decrease during the year, causing a fall in contributions and increase in pension and lump sum payments. Lothian Buses fall in active membership is likely to be at a higher rate than Lothian due to being closed to new members.

3.27 All three Funds' expenditure cashflows are anticipated to continue to exceed cashflow income.

3.28 In 2016/17 Lothian Pension Fund had a negative cash flow position, whereby pension payments exceed total contributions received. This is a trend that is likely to continue for the foreseeable future. Increased investment income has been targeted in recent years for this scenario, which is expected to exceed net cashflow for the long term. The Fund has revised its forecasted negative cashflow figure (decreased by £3m), reflecting higher than previously expected income.

4. Measures of success

4.1 Measures of success include meeting targets for performance indicators and progressing the actions set out in the Service Plan.

5. Financial impact

5.1 A summary of the projected and year-to-date financial outturn compared to the approved budget for 2017/18 is shown in the table below:

Category	Approved Budget £'000	Projected Outturn £'000	Projected Variance £'000	Budget to date £'000	Actual to date £'000	Variance to date £'000
Employees	3,009	2,707	(302)	2,257	1,976	(281)
Transport & Premises	242	242	-	182	175	(7)
Supplies & Services	1,232	1,021	(211)	924	749	(175)

Investment Managers Fees	5,200	5,200	-	3,900	3,612	(288)
Other Third Party Payments	1,392	1,055	(337)	1,044	608	(436)
Central Support Costs	286	250	(36)	215	167	(48)
Depreciation	82	82	-	61	61	-
Direct Expenditure (Invoiced)	**11,443**	**10,557**	**(886)**	**8,583**	**7,348**	**(1,235)**
Income	(727)	(900)	(173)	(545)	(744)	(199)
Net Expenditure (Invoiced)	**10,716**	**9,657**	**(1,059)**	**8,038**	**6,604**	**(1,434)**
Indicative Expenditure (Uninvoiced)	**17,100**	**17,100**	**-**	**12,825**	**12,825**	**-**
Total Cost to the Funds	**27,816**	**26,757**	**(1,059)**	**20,863**	**19,429**	**(1,434)**

5.2 The financial outturn includes year to date budget, actual expenditure and variance as at the end of December 2017. Year to date actual expenditure includes provision for services incurred but for which no invoice has yet been received. Uninvoiced expenditure (i.e. investment management costs deducted from capital) is assumed to be in-line with the budget.

5.3 The projection shows an underspend of approximately £1,059k. The key variances against budget are:

- Employees **- £302k underspend**. This is mainly due to unfilled posts across the division during the period from April to December 2017. Within the Investment team there is a vacant Portfolio Manager post, following a resignation earlier in 2017, and two new Investment Analysts posts. These posts will not be filled until after the financial year end.
- Supplies and Services **- £211k underspend**. Miscellaneous underspends during the year including £110k underspend in investment/collaboration legal expenses.
- Other Third Party Payments **- £337k underspend**. This is primarily due to delays in splitting out research costs from brokers' fees. The Fund will be invoiced directly for all research cost from 1st January 2018 when MiFID regulations came into force requiring the splitting of costs.
- Income **- £173k above budget.** Stock lending commission income has been higher than originally projected. The Fund's custodian had highlighted that securities lending could become less profitable with tighter regulations coming into fruition but this has yet to impact income.

5.4 An outline business case on the Fund's ongoing collaboration work with other LGPS administering authorities was approved by Committee in March 2017. The requisite adjustments to the service plan budget are shown below:

Category	Approved Budget £'000	Business Case adjustments £'000	Description
Employees	3,009	201	Increased staffing resources including a Service Development Manager and an additional Investment Analyst and Administrator
Supplies & Services	1,232	222	Includes costs associated with the procurement of an Investment Front Office System and the transfer of remaining staff into LPFE Ltd.
Other Third Party Payments	1,392	152	Includes £110k of one off revenue costs for services/advisers for due diligence on the legal collaboration structure.
Income	(727)	(583)	Increased revenue from the expansion of services to other Funds.

5.5 The above changes have not yet been integrated into the budget. The following progress has been made during the year with actual year to date spending being below £20k –

- **Employees** – An Investment Administrator has been recruited and a temporary HR Manager. An appointment has also been made for a Bond Manager. Recruitment of other permanent staff will commence after the end of the financial year.
- **Supplies and Services** – a new staff payroll and time recording system has been implemented. Procurement for an Investment Front Office System is underway.

5.6 **Income** –Northern Ireland Local Government Officers Superannuation Committee and Scottish Borders Pension Fund are working with the Fund on collaborative infrastructure investments. Income has been received from the completion of co-investments with these funds as well as the existing relationship with Falkirk Pension Fund. Further income from further new partnerships may result, as covered earlier in this paper.

6. Risk, policy, compliance and governance impact

6.1 The pension funds' service plan aims to manage risk, improve compliance and governance. There are no direct implications on these issues as a result of this report.

7. Equalities impact

7.1 There are no equalities implications as a result of this report.

8. Sustainability impact

8.1 There are no sustainability implications as a result of this report.

9. Consultation and engagement

9.1 The Pension Board, comprising employer and member representatives, is integral to the governance of the Fund and they are invited to comment on the relevant matters at Committee meetings.

10. Background reading/external references

10.1 LPF Service Plan 2016-2018

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11. Appendices

Appendix 1 – Service Plan Performance Indicators

Appendix 2 - SPPA Circular No.1/2018

Appendix 1

Service Plan Performance Indicators – Targets & Actual Performance

	Q1 April to June	Q2 July to Sept	Q3 Oct to Dec	Target	Status
Customer First					
Maintain Customer Service Excellence Standard	Annual assessment will be carried out on 1 March 2018			Retain CSE Award	Not yet known
Overall satisfaction of employers, active members and pensions measured by surveys	Rolling 12-month performance is 92.5% to end December 2017			89%	
Proportion of active members receiving a benefit statement and time of year statement is issued	99.9% issued by 31 August 2017			100%	
Forward Thinking					
Performance and Risk of Lothian Pension Fund	Actual 13.0%pa, Benchmark 11.8%pa. Exceeding benchmark with lower risk.			Meet benchmark over rolling 5 year periods with lower risk with risk/return measures including performance in rising and falling markets	
Proportion of critical pensions administration work completed within standards	95.1%	94.8%	96.2%	Greater than 90%	
Honest & Transparent					
Audit of annual report	Achieved			Unqualified opinion	
Percentage of employer contributions paid within 19 days of month end	99.74%	99.60%	99.85%	99.00%	
Data quality – compliance with best practice as defined by the Pensions Regulator	Assessment will be made at year-end			Fully compliant	Not yet known
Monthly Pension Payroll paid on time	Yes	Yes	Yes	Yes	
Working Together					
Level of sickness absence	0.45%	1.24%	2.6%	4%	
Annual staff survey question to determine satisfaction with present job	Staff survey will be undertaken later in the year			77%	Not yet known
Percentage of staff that have completed two days training per year.	35.63%	46.26%	65.45%	100%	

SCOTTISH PUBLIC PENSIONS AGENCY

LOCAL GOVERNMENT PENSION SCHEME (SCOTLAND)
CIRCULAR SPN/LG No. 1/2018

WHO SHOULD READ:	**Secretary General, Convention of Scottish Local Authorities** **Chief Executive, Scottish Local Authorities** **Chief Executive, Water Authorities** **Principal Reporter, Scottish Children's Reporter Administration** **Chief Executive, Scottish Environment Protection Agency** **Director General, Strathclyde Passenger Transport Executive** **Clerk, Strathclyde Passenger Transport Authority** **Chief Executive/Director, VisitScotland**
ACTION:	**This circular should be brought to the attention of Pension Managers, Superannuation Sections and LGPS Employer Payroll Departments. You may also wish to draw it to the attention of the Directors of Finance and Administration**
SUBJECT:	

About Circular No.1/2018:

The purpose of this circular is to:

- **Confirm how Guaranteed Minimum Pension (GMP) related overpayments which arise from the current reconciliation exercise should be managed going forward and**
- **provide information that the Accountable Officer may wish to take into account when deciding on how accrued GMP related overpayments are managed.**

Background

SPPA wrote on 11 February 2016 setting out the process schemes should follow on undertaking its GMP reconciliation exercise. This set out the recommendations on the tolerances to be used, the cases to be included in the exercise and that action on arising overpayments would be considered once the scale was known. The recommendations were issued to all public service schemes with the aim that a consistent approach would be applied. Fund authorities will be aware that HMRC's timetable for completing the reconciliation exercise by December 2018.

Since then SPPA has recently confirmed the current position of each Funds' reconciliation exercise and understands that at the moment no overpayments have been formerly identified as part of this exercise.

Overpayment action

As you are aware a similar problem was identified in 2008/9 whereby erroneous GMP data lead to incorrect annual indexation being applied and a number of individuals being overpaid pension. At that time it was agreed that overpayments accrued up to the point of identification should be written off across all public service schemes. However, going forward and unique to Scotland, the pensions for affected members of the LGPS, Police and Firefighter schemes were allowed to remain at their original level with the overpaid element being converted to a scheme entitlement known as an Increased Pension Entitlement (IPE).

The responsibility for deciding what action should be taken on the accrued overpayments arising from the current reconciliation exercise rests with the scheme's Accountable Officer (AO). This circular sets out what the AO may wish to consider when deciding on the recoverability of any overpayments that arise from the reconciliation exercise. The circular also confirms how GMP related overpayments should be managed going forward.

Overpayments going forward

Although as far as SPPA is aware overpayments have still to be formally identified from the reconciliation exercise, in line with other public service schemes it estimates that there will be a number of GMP related overpayments in the LGPS. In anticipation of that occurring Scottish Ministers have decided that as in 2008/2009 any LGPS pension in payment affected by this exercise should not be reduced going forward. Instead the identified GMP related overpayment should be converted as before into an IPE allowing the pension to continue at its existing level.

SPPA has confirmed with HMRC that the award of an IPE in these circumstances would be treated as an authorised payment and further work will now be undertaken to draft and consult on the regulations necessary to introduce an IPE to cover overpayments for this reconciliation exercise. The Regulations used to introduce the IPE in 2008/9 were limited to the overpayments that were identified as part of that earlier exercise.

In the meantime an IPE should be awarded administratively pending the finalisation and coming into force of the Regulations. Schemes should keep a note of each IPE awarded and the amount involved as SPPA will need to reconcile the number and level of awards made. Again as in 2008/09 a similar approach is being taken for affected pensioners in the Police and Firefighters schemes.

Accrued overpayments

As mentioned above a decision on how any accrued GMP related overpayments should be managed is the responsibility of the scheme AO in line with any guidance relating to the management of public service pension overpayments. The following information is intended to help inform the AO when considering what action is appropriate on the accrued overpayments.

The complexity and general legal construction surrounding the Pension Increase and GMPs is recognised and accepted and on that basis it would be highly unlikely that affected pensioners would have been aware that they were being overpaid. Therefore the AO may wish to take into account the areas mentioned below, alongside their existing guidance when making any decision to recover overpayments. This is based on advice issued by the LGA to its administrative authorities earlier in June 2017.

Is the size of the overpayment relevant?

In its determination in the case of *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch) the High Court found that "In view of the small scale of the problem, the distress that any attempt to recover the sums would inevitably cause, and the likelihood that the exercise would anyway not be cost-effective" it was not necessary for the Trustees to take any steps to recoup the overpayments." In this case, the amounts of the overpayments to three widows were relatively small (no more than £10,200 in total).

Can 'Estoppel' be used to prevent the recovery of an overpayment?

The starting point used to be that if an overpayment had been made under a mistake of law it was generally not recoverable but if the employer could establish that the mistake was a mistake of fact, the money was potentially recoverable. The Law Commissions in England, Wales and Scotland recommended that the distinction between mistakes of law and mistakes of fact should be removed. The House of Lords has already decided cases on this basis (see *Kleinwort Benson v Lincoln City Council and others* 1998 4 All ER 513). So, whether an overpayment results from a mistake of fact or law, it would seem that, potentially, it could now be recoverable unless estoppel applies (although, in the absence of an employee's consent to repayment, legal advice should be sought before instigating any formal recovery action).

The recipient may lodge the defence of *estoppel by representation* if they can show that:

- the administering authority made a representation of fact that led the recipient to believe that they were entitled to treat the money as their own;
- the recipient has changed their position, in good faith, in reliance of that representation; and
- the overpayment was not caused by the fault of the recipient.

The recipient may lodge the defence of *Estoppel by convention* if they can show that:

- even if the administering authority had not made a representation of fact that led the recipient to believe that they were entitled to treat the money as their own, the administering authority and the recipient had acted on an assumed state of facts or law, the assumption being shared by both parties or assumed by one and acquiesced to by the other (as demonstrated in subsequent mutual dealings between both parties)

However, estoppel is an inflexible, all or nothing defence. A successful plea of estoppel acts as a total bar to recovery. This can lead to unjust enrichment so that the recipient can keep all of the money even if it exceeds the detriment they suffered. In recognition of this, the courts have developed the more flexible 'change of position' defence (see below).

Although the Scottish Government Finance Manual (SGFM) guidance on overpayments does not directly apply to local government the following is provided for information and allows consideration of how overpayments in the other affected schemes will be considered.

In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. Each case should therefore be dealt with on its merits. When deciding on appropriate action, taking legal advice, organisations should consider:

- whether the recipient accepted the money in good or bad faith;
- the cost-effectiveness of recovery action;
- any relevant personal circumstances of the payee, including defences against recovery;
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances.

As a general rule, public sector organisations should only take a decision not to seek recovery of an overpayment on the basis of a cost benefit analysis of the options but the SGFM goes on to set out examples where a defence against recovery can be made which include:

- the length of time that had elapsed since the overpayment was made see Prescription and Limitation (Scotland) Act 1973 below.
- **hardship**. As a matter of policy public sector organisations may waive recovery of overpayments if it would cause hardship, but hardship must not be confused with inconvenience. To be required to pay back money to which there was no entitlement does not in itself represent hardship, especially if the overpayment was discovered quickly. To be acceptable, a plea of hardship should be supported by reasonable evidence that the recovery action proposed would be detrimental to the welfare of the recipient or his / her family.
- **change of position**. It could be argued that the recipient of an overpayment may in good faith have relied on it to change their lifestyle. It might then be inequitable to seek to recover the full amount of the overpayment. The paying organisation's reaction should depend on the facts of the case. The onus is on the recipient to show that it would be unfair to repay the money

Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”)

Claims for overpayments must be made within 5 year “prescriptive period”

Claims for recovery of overpayments of pension made by either an error of fact or law must be made (i) within 5 years of the date when the overpayment was made; or (ii) within 5 years from the date the overpayment with reasonable diligence could have been ascertained.

A claim must be made by commencement of court proceedings. **(N.B. A simple request for the money is not enough.)** If such a claim is not made within the 5 year period, the right to recover is extinguished (section 6 of the 1973 Act). The 5 year period is known as "the 5 year prescriptive period".

Each overpayment creates a separate right of recovery

Each overpayment of pension gives rise to a separate right of recovery, with each right of recovery subject to the 5 year prescriptive period. This means that if there has been a series of overpayments going back 10 years, only those overpayments made within the last five years from today are recoverable. In practice, however, time would have to be factored in for the raising of court action. This means if court action is still to be raised, only overpayments made within five years of the raising of the court action would be recoverable.

The five year time limit is subject, of course, to the proviso that the 5 year prescriptive period can run from a date later than the date the overpayment was made if the overpayment could not until later with reasonable diligence have been ascertained. Accordingly if the overpayments dating back 10 years could only have come to light 3 years ago, they would all still be recoverable. In fact there would still be another two years to run during which time they would all still be recoverable.

In a simple example schemes will have paid full indexation where a GMP was not held despite having scheme history (i.e. of contracted out employment for the period April 1978 to April 1997 during which GMP accrued) that should have alerted the scheme that a GMP was potentially due where a member has reached state pension age. The split indexation between the scheme and DWP only commences when the member claims their state pension but it may be argued that it would have been reasonable for schemes to make enquiries in these cases. Hence at the point of the member reaching state pension age with reasonable diligence it may have been realistic for a scheme to recognise the indexation being applied could be wrong and enquiries should have been made. So in this example the prescriptive period would have commenced when the member reached state pension age.

Alternatively where the scheme held a GMP but the amount was incorrect it would have been relying on HMRC to provide the correct GMP record. So an error will only come to light once the reconciliation exercise has completed and the correct GMP rate has been established. In these cases it could be argued that the scheme would have undertaken reasonable diligence by applying the incorrect GMP data and would not have been aware that it was incorrect until the reconciliation. In this example the prescriptive period would commence when the scheme became aware of the error following reconciliation.

This is just a brief explanation of how the 1973 Act may be applied. Schemes should seek their own legal advice before reaching a decision on when the prescriptive period commences.

Tax

Where a pension is overpaid, from what date should the pension be corrected?

Pension schemes are obliged to correct any error they discover within a reasonable period of time. To do otherwise would render payments unauthorised under regulation 14 of the Registered Pension Scheme (Authorised Payments) Regulations 2009 [SI 2009/1171].

HMRC have provided a clear steer with regards to timing, in so much that "*When a scheme discovers an overpayment it immediately becomes unauthorised and is subject to an unauthorised tax charge*".

However paragraph 5 of regulation 14 confirms that a pension is an authorised payment if the scheme rules are being amended to allow for such payments to be made indicating that the continued payment of the existing rate of pension would be treated as an authorised payment by the planned introduction of the IPE.

Would sums written off be unauthorised payments?

We understand that any overpayment that is not recovered will not be unauthorised if it falls within regulations 13 or 14 of the Registered Pension Schemes (Authorised Payments) Regulations 2009 [SI 2009/1171].

Regulation 13 says that a payment made in error will be an authorised payment if the:

- payment was genuinely intended to represent the pension payable to the person,
- administering authority believed the recipient was entitled to the payment, and
- administering authority believed the recipient was entitled to the amount of pension that was paid in error.

In addition to the above, there is a further exemption where the overpayment is a 'genuine error' as described in PTM146300 and the aggregate overpayment (paid after 5th April 2006) is less than £250. In such circumstances, if the overpayment is not recovered it remains an unauthorised payment but it does not have to be reported to HMRC and HMRC will not seek to collect tax charges on it.

In the meantime, SPPA has provided a short update and Q&A on its website.

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