



## **Pensions Committee**

**2.00pm, Tuesday, 29 September 2020**

### **McCloud and Goodwin discrimination judgements - Update**

**Item number 6.5**

#### **1. Recommendations**

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The Pensions Committee (Committee) is requested to:

- 1.1 note the report and that further regular progress updates will be provided; and
- 1.2 note that the detailed response to the SPPA consultation will be submitted by the Chief Executive Officer, following requisite consultation with the Convenor, by the due date of 23 October 2020.

**Doug Heron**

Chief Executive Officer, Lothian Pension Fund

Contact: John Burns, Chief Finance Officer, Lothian Pension Fund

E-mail: [John.Burns@edinburgh.gov.uk](mailto:John.Burns@edinburgh.gov.uk) | Tel: 0131 469 3711

# McCloud and Goodwin discrimination judgements - Update

## 2. Executive Summary

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- 2.1 The report advises of the consultation by the Scottish Public Pensions Agency (SPPA) on the rectification of age discrimination within the benefit entitlement regulations of the Scottish Local Government Pension Scheme (SLGPS). That is similar to the exercise undertaken by the Ministry of Housing, Communities and Local Government (MHCLG) for the LPGS in England and Wales.
- 2.2 The report also advises of the ‘unpausing’ of the cost control mechanism by HM Treasury, thus recommencing the statutory SLGPS valuation as at 31 March 2017.
- 2.3 An overview of the proposed McCloud remedy is that:
  - 2.3.1 the ‘transitional protections’ underpin is extended to other active members regardless of age;
  - 2.3.2 the revised underpin gives the member the better of Career Average Related Earnings (CARE) or final salary benefits;
  - 2.3.3 eligibility is restricted to members who were active in the SLGPS on 31 March 2012 and have accrued benefits since 1 April 2015;
  - 2.3.4 the revised underpin applies to benefits earned between 1 April 2015 and 31 March 2022, or earlier should the member leave active membership or die in service; and
  - 2.3.5 the revised underpin should allow for the impact of early or late retirement factors.
- 2.4 The administrative burden and communications challenge of rectification are both very significant.
- 2.5 Key points that the Fund would wish to make in its response to the SPPA consultation are also provided, prior to the submission of a more detailed final version by the Chief Executive Officer, following requisite discussion with the Convenor.
- 2.6 Implications of the Goodwin employment tribunal ruling regarding equality of survivor benefits in same sex marriages are also addressed within the report.

### 3. Background

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#### **Scottish LGPS 2015 reform – the statutory underpin**

- 3.1 Unlike most other public service pension schemes, the LGPS provided transitional protection to its older workers via a statutory underpin. All members moved into the 2015 Scheme on the reform date of 1st April 2015, but protected members were given a statutory underpin that provides their retirement pension cannot be less than it would have been in the 2009 Scheme.
- 3.2 The underpin is principally an administrative test undertaken at the earlier of the date a qualifying member leaves active service and the date they reach their 2009 Scheme normal pension age. It is designed to guarantee that a qualifying member's pension calculation gives them the better of a) the pension they have built up in the career average 2015 Scheme and b) the pension they would have built up in the final salary 2009 Scheme, over the same time-period.

#### **Consultation – Addressing discrimination in the LGPS and amendments to the statutory underpin.**

- 3.3 On 4 August 2020, SPPA advised that: *The courts have found transitional protections given to older members in the judicial and firefighters' pension schemes directly discriminated against younger members in those schemes. In line with the UK government commitment to remove the difference in treatment from all public service pension schemes with similar protections, we are seeking views on proposals that would extend LGPS statutory underpin protection to younger members of the scheme. The above consultation is available to view on the [SPPA website](#) and will run for 12 weeks from 31/07/2020 to 23/10/2020.*
- 3.4 Shortly prior to this, SPPA had issued Circular [LGPS 2020/05](#). The purpose of that circular was to inform scheme members and employers of the upcoming SPPA consultation, on proposals to address the age discrimination, arising as a result of scheme reforms in 2015. This is shown in full at Appendix 1.

#### **Cost Control Mechanism**

- 3.5 The Public Service Pensions Act 2013 provides that there is a triennial review of the LGPS to ensure that the cost design parameters do not breach a defined tolerance of 2% of pensionable pay. In broad terms, each LGPS scheme (i.e. separately for England and Wales, Scotland and Northern Ireland) has a target (baseline) cost and should these valuations, undertaken by the Government Actuary's Department (GAD), assess that the cost of the respective scheme has varied by more than 2% of pensionable pay, then action has to be taken to bring overall scheme costs within the 2% pay buffer. Importantly, there is both a cost ceiling and floor and therefore benefits or contributions can be either reduced or improved as a result.

- 3.6 At the 2016 valuation for the English and Welsh LGPS, principally driven by lower salary growth and slower improvement to longevity than had been assumed, a package of benefit improvements had been due to be introduced in April 2019. Given the uncertainty arising from the McCloud judgement, however, in January 2019, the Government intervened to pause the sharing of funding risks between members and employers through the application of the cost control mechanism.
- 3.7 On behalf of the UK Government, the Chief Secretary to the Treasury has now announced the following in respect of the treatment of remedy costs:

*When the cost control mechanism was established, it was agreed that it would only consider costs that affect the value of the schemes to members (a 'member cost'). Addressing the discrimination identified in the McCloud and Sargeant judgments involves increasing the value of schemes to members; the costs associated with this therefore fall into the 'member cost' category. As a 'member cost', this will be considered as part of the cost control element of the valuations process. HM Treasury will set out in the Directions the technical detail of how these costs should be taken into account in the cost control element of the valuations process. By taking into account the increased value of public service pensions as a result of 'McCloud remedy', scheme cost control valuation outcomes will show greater costs than otherwise would have been expected. The government will consider how best to take forward the cost control mechanism outcomes for each scheme once the detail of these is known.*

#### **Goodwin Tribunal - Male survivor benefits – opposite sex marriage**

- 3.8 Following an employment tribunal (Mrs Goodwin versus Department of Education) survivor benefits payable to male survivors of females in opposite sex marriages will be equal to those payable to other categories of survivor. Whilst this case referred to the Teachers' Scheme in England, this has implications for other public service pensions schemes. Scottish Ministers have acknowledged that changes will also be required to devolved schemes, including the Local Government Pension Scheme. SPPA issued Circular LGPS 2020/04, dated 27 July 2020, on this matter. This is provided in full at Appendix 2.

## **4. Main Report**

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### **McCloud – Proposed remedy - Summary**

- 4.1 Unlawful discrimination currently exists between two groups of LGPS members:
- 4.1.1 those who were in service on 31 March 2012 and were within ten years of Normal Pension Age (NPA) on 1 April 2012, therefore benefiting from underpin protection; and

- 4.1.2 those who were in service on 31 March 2012 and were more than ten years from NPA, and so were not eligible for underpin protection.
- 4.2 At a high-level, the SPPA proposal for removing the unlawful discrimination from the LGPS is to extend underpin protection to the second group of members listed above, i.e. those who were not old enough to receive underpin protection when it was originally introduced. This should ensure that the two groups listed are treated equally for benefits accrued from April 2015 onwards.
- 4.3 Under the rules no further underpin dates will be able to take place beyond 31 March 2022, as this is the last date a protected member can reach their 2009 Scheme normal retirement age. To equalise treatment between the unprotected and protected groups, SPPA proposes that both groups will be given underpin protection from 1 April 2015 to 31 March 2022 (or to the member's underpin date, where this is earlier). It is asserted that this approach will mean there is a consistent period of protection for all qualifying members i.e. those who were members of the scheme on 31 March 2012 and who went on to have 2015 Scheme membership without a disqualifying break in service (and who aggregated their membership), regardless of their age. From 1 April 2022, all service in the LGPS will be on a career average basis, with no underpin.
- 4.4 SPPA is aware that the retrospective application of the proposed draft regulations will lead to significant administrative complexity.
- 4.5 For example, certain cases will need to be revisited by scheme administrators:
- 4.5.1 Cases where a member had underpin protection originally and the revised underpin may have applied differently to them. In practice, this may be all cases where a member already has underpin protection and has since had their underpin date.
- 4.5.2 Cases where a member does not currently have underpin protection, but would have under the revised underpin, and has since retired or left the LGPS with a deferred benefit.
- 4.5.3 Cases where a member does not currently have underpin protection, but would have under the revised underpin, and has since transferred out of the LGPS or trivially commuted their benefits.
- 4.5.4 There will also be more difficult cases, for example, where members who may have benefitted from the proposals outlined in this consultation have died.
- 4.6 Further administrative intricacy is inherent in the detailed proposals (at Annex B of the consultation)
- 4.7 Aggregation of membership is a particular area of complexity. The following extract serves to illustrate:

*To ensure that no member is worse off as a result of our proposed amendments, we are proposing that active and deferred members are given an additional 12 months to elect to aggregate previous periods of LGPS membership, where such a decision would mean they have 'relevant Scheme membership' and therefore would have underpin protection. It is not proposed that this decision would be required for pensioner members, whose existing pensions would be unaffected by the aggregation changes outlined here .....*

*The additional 12 months would apply from the date the regulations come into force. This additional election period would not apply in respect of other periods of membership members may wish to aggregate, only to periods where a failure to aggregate would mean the member would not obtain underpin protection. Good communications with members in this situation will be crucial so that they understand whether this election period applies to them and the implications of the decision they are being asked to consider. As set out in paragraphs 131 and 132, SPA would plan to work closely with the Scheme Advisory Board on member communications to support the changes proposed in this paper.*

- 4.8 Other significant complexities also arise and are noted in the consultation, e.g. service breaks, early and late retirement factors and survivor benefits.
- 4.9 Similarly, the proposed introduction of a two stage underpin process would represent an additional administrative burden. "Under current provisions, the underpin calculation takes place at a single point in time – a member's underpin date, being the earlier of the date a member leaves active service with an immediate entitlement to a pension, and the date they reach their 2009 Scheme normal retirement date. This has its advantages, such as in respect of administration. However, ....., a two-stage underpin process would provide a more robust form of protection and the draft regulations attached propose such an approach. Under this, all members would have an 'underpin date' and an 'underpin crystallisation date'." Detail on the proposed two-stage process is contained in Annex C of the consultation.
- 4.10 SPPA is "conscious that the proposals ..... would require significant changes to administration practices and systems. Amongst other matters, local administrators would need to consider the appropriate prioritisation of cases after amendments to regulations are made. Recognising that the LGPS is a single scheme, albeit locally administered, we are supportive of there being consistency across the scheme in respect of prioritisation and hope to work with the sector and the Scheme Advisory Board to agree a standard approach.
- 4.11 A major challenge of implementing the changes proposed would apply in respect of obtaining additional data from employers for members who are newly benefitting from underpin protection. Under the 2015 Scheme, certain members data which was

required for administering the 2009 Scheme (such as details of members' working hours and breaks in service) are not required for calculating member benefits. To administer the revised underpin, administrators would need to obtain this data for protected members for the period back to April 2015.

- 4.12 This would be a highly significant bulk exercise for the scheme's 11 administering authorities and their employers. Particular challenges are likely to arise where employers have changed their payroll provider, and the data isn't stored in current systems".

#### **McCloud – Funding Implications**

- 4.13 Eligibility being restricted to members who were active in the SLGPS on 31 March 2012 and have accrued benefits since 1 April 2015 serves to significantly reduce the anticipated cost, as compared to the liabilities reported in the LPF Annual Report 2020 Unaudited, in accordance with International Accounting Standard (IAS) 26. At that time, the actuarial assumption was that all active members would be eligible.
- 4.14 At the time of writing, a revised IAS26 position has been sought from the actuary, this to reflect both the implications of the McCloud consultation and those of the Goodwin employment tribunal, the latter case being addressed in subsequent paragraphs of this report.
- 4.15 SPPA has also advised that SLGPS fund actuaries should build the McCloud remedy directly into the liability calculations for the Actuarial Valuation as at 31 March 2020.
- 4.16 Provisionally, LPF's actuary has estimated that the cost implication at the whole fund level is likely to be small, circa 0.2% increase on total liabilities, this assuming salary growth of 0.7% in excess of the Consumer Price Index (CPI). The impact on contribution rates for a typical local authority, ignoring contribution stabilisation, is assessed to be:
- 4.16.1 Primary rate – up 0.2% of pay, per annum;
- 4.16.2 Secondary rate – up 0.1% of pay, per annum.
- 4.17 The reason for the small increase in liabilities is that, for most eligible members, the revised underpin simply won't "bite", given that the CARE accrual rate is 22% higher.

<b>Element</b>	<b>2009 Scheme</b>	<b>2015 Scheme</b>
Accrual rate	60ths	49ths
Pre-retirement revaluation	Salary increases	CPI inflation
Retirement age	65	State Pension Age

- 4.18 The liability impact for certain individual employers, however, may be significantly higher. For example, employers particularly at risk are:
- 4.18.1 those ‘immature’ employers with relatively younger age profile of membership, given that higher salary growth is more likely for this cohort; and,
  - 4.18.2 any employer with only one or two active members and those members being in receipt of a large one-off salary increase.
- 4.19 In general, therefore, the funding impact is likely to be material for only a small number of employers.

#### **McCloud – Funding Implications – Interaction with SLGPS Cost Control Mechanism**

- 4.20 The UK Government has now ‘unpaused’ the cost control mechanism and crucially has confirmed that the implications of McCloud will be included in the valuation due for the SPLGS as at 31 March 2017.
- 4.21 Trade Unions had appealed against the Government’s original decision to ‘pause’ the cost cap mechanism. It is unclear how the subsequent ‘unpausing’ will affect this appeal.
- 4.22 Whilst the results of the Scottish valuation at 2017 are not yet known, it is anticipated that there will be equivalent cost savings evidenced by the 2016 valuations across the UK, e.g. 3.2% saving for Northern Ireland, these driven by changes to salary growth and mortality assumptions. The inclusion of McCloud cost implications, therefore, will serve to reduce the expected saving. It remains possible, however, that the 2% of pay ‘buffer’, the ‘cost floor’ as opposed to the ‘cost ceiling’, will still be breached at 2017, despite McCloud, leading to a package of benefit improvements and pension cost increase for employers.
- 4.23 The cost control (floor) mechanism does present a material funding risk at the actuarial valuation 2020 and this will be reported separately to Committee in due course.

#### **Data collection**

- 4.24 Unlike a CARE scheme where pensionable pay is sufficient, the revised underpin will also require a full history of part-time hours and service break information to be provided from 1 April 2015. LPF has already communicated this in our Employer Bulletin, February 2020.

#### **Local Government Association (LGA) guidance and LGPS Practitioners Group**

- 4.25 The England and Wales Scheme Advisory Board (SAB), has established a McCloud Implementation (LGPS Practitioners) Group. The purpose is to assist administering authorities with implementation and communication. It is made up of

representatives from administering authorities, including one representative from the SLGPS, employers, pension software suppliers, unions, actuarial and legal advisers.

- 4.26 In parallel, the LGA has provided guidance for administrators; standard data collection template and notes, these following consultation with payroll providers; key messages and “questions and answers” for employers; together with legal advice on data protection considerations. All this material, however, does refer to the England and Wales consultation provisions and requires to be tailored to the specifics of the SLGPS.

### **Regulatory timeframe**

- 4.27 For the LGPS, unlike other public service schemes, there is no need for primary legislation and SPPA is targeting suitable SLGPS regulations to be in place for April 2021. LPF has already contacted its pension administration software provider in an attempt to ensure that requisite SLGPS programming changes are made in sufficient time. This is particularly important given the potential that regulatory change in Scotland may be implemented sooner than for the England and Wales LGPS.
- 4.28 The England and Wales SAB has commented that: *Consultations have been issued by MHCLG and HMT (Her Majesty’s Treasury) on the remedies for public service pension schemes. SAB will be submitting a technical response to the MHCLG consultation. This will include representations to allow the LGPS regulations to be on the statute book ahead of those of the unfunded public service pension schemes, where the coming into force date is expected to be Spring 2022. LGPS remedy regulations will not have to wait for changes in primary legislation so different timescales should be possible. Getting LGPS McCloud regulations in place sooner will give all parties more opportunity to put processes in place before they come into effect in 2022. The Board also agreed that work should commence on central guidance on how the regulations are to be applied and how individual cases of poor or missing member data should be handled.*

### **Prioritisation of rectification by case**

- 4.29 SPPA has acknowledged that: ...
- Amongst other matters, local administrators would need to consider the appropriate prioritisation of cases after amendments to regulations are made. Recognising that the LGPS is a single scheme, albeit locally administered, we are supportive of there being consistency across the scheme in respect of prioritisation and hope to work with the sector and the Scheme Advisory Board to agree a standard approach.*
- Prioritisation decisions will be influenced by the fact that the revised underpin would have retrospective effect to April 2015, meaning that some members would already*

*be in receipt of pensions that need to be re-calculated in line with the new regulations.*

#### **Project planning and resourcing**

- 4.30 In its Spotlight on McCloud Consultation publication, dated 26 August 2020, AON commented that the *“Impact on administration Implementing the changes is likely to represent the biggest challenge for administering authorities since the introduction of the CARE scheme in 2014/15 (2015/16 for SLGPS). We estimate that around a quarter of the total fund membership will fall into scope of the proposed changes to the underpin resulting from the McCloud ruling. There are many different aspects of work that will need to be carried out to implement the changes and to administer the changes once they take effect. These include ongoing administration changes; benefits review for leavers; member communication; employer communication; data; systems and specialist areas. Whilst MHCLG doesn't envisage that many members will actually see an increase in benefits as a result of the new underpin, the underpin calculations will still need to be carried out for a large number of members, both on an ongoing basis and as a retrospective exercise for leavers.*
- 4.31 The remediation project for McCloud therefore represents a major, supplementary administrative challenge for LGPS funds, concurrent with ongoing workload pressures. Whilst this was anticipated by LPF, with specific budgetary provision having been made for three new Trainee Pension Administrators, recruitment having taken place this year, the two-stage process was not envisaged. The target date for completion is also unspecified, although the desire for this to be within a relatively short timeframe is obvious.
- 4.32 In summary, therefore, there is fundamental concern at the very significant resource implications arising from the SPPA's rectification proposal. As a very provisional estimate, unless the remedy is made simpler, this would require the Fund to recruit up to ten members of staff to supplement its pensions administration team, at least £150,000 in excess of annual budgetary provision. Post rectification, the Fund would commit to managing down to normal levels of staff resource through natural wastage. The potential use of fixed term contracts will also be considered, but the specialist market constraints may preclude this being a viable option. The inevitable concurrent demand across all public service pension schemes is also likely to severely impact the Fund's ability to recruit suitably qualified and experienced pension administrators or indeed outsource to specialist third party administration providers. Retention risk for the Fund may be heightened and very much a focus of concern.
- 4.33 A detailed project plan will be developed and progress reported to future Committee meetings.

## Scottish LGPS Conference 2020

- 4.34 Committee and Board members will have received an invitation to a virtual training event on 1 and 8 October 2020, the Scottish Local Government Pension Scheme Conference 2020. Coverage of the impact of the McCloud judgement on the actuarial valuation 2020, provided by Hymans Robertson LLP, is scheduled for the latter date.

### **Consultation – Addressing discrimination in the LGPS and amendments to the statutory underpin.**

- 4.35 The potential for a joint response to be submitted to SPPA by the Investment Governance Group, comprising senior officers of the LGPS administering authorities, is currently being explored.
- 4.36 In any event, the Fund shall ensure that a suitably detailed response is provided to SPPA by the due date of 23 October 2020. With the timescale for submission not aligned to Committee meeting dates, this will be submitted by the Chief Executive Officer, following requisite consultation with the Convenor.
- 4.37 The key points that the Fund wishes to communicate are:
- 4.37.1 Interplay with cost control (floor) mechanism – there is a detrimental impact on member interests given that McCloud costs are now deemed to be intrinsic part of scheme design, i.e. there is a likelihood that cost floor would have been breached and member contributions reduced had McCloud not been added. It is very questionable that this is equitable.
- 4.37.2 Administrative complexity and cost of McCloud rectification – the big picture is that this is indicative of a general need to consolidate and simplify SLGPS benefit entitlement regulations;

which simply reinforces the point made in the LPF Annual Report 2020, Management Commentary, as replicated by the extract below:

#### **“Complexity in the LGPS**

The Local Government Pension Scheme (LGPS) forms a core part of the employee proposition within the public services managed in local government and members enjoy secure benefits aiding attraction and retention of employees. Over time and with a number of well-intentioned policy interventions, the regulations on which those benefits are based and administered have developed multiple layers, become confusing for most members, and created a need for LPF and other LGPS schemes to offer increasing amounts of individual guidance to members. Our aim here is to make the complex as simple as we can, and to provide clear information from which members can make decisions about how and when to access their benefits according to their own circumstances. A simpler scheme with fewer

layers would increase the potential for administrator efficiency, lower the operating costs of the scheme and allow members to more easily understand, and assign value to the benefits to which they're entitled. Setting the rules is beyond our remit but we stand ready to support any Government led initiatives that intend to achieve this outcome.”

- 4.37.3 Accordingly, there is also potential to explore simpler and more efficient remedy through such consolidation of historic SLGPS regulations, accepting that it is inevitable that such consolidation will entail some compromise solution.
- 4.37.4 Although the intention of government is to provide an entirely equitable remedy to address unlawful age discrimination, it would appear that the potential for the proposed solution, given its complexities, to be the subject of future challenge cannot be immediately ruled out.
- 4.37.5 Prioritisation of redress – it is considered that rectification is likely to take a lengthy period. LPF agrees that there should be SAB guidance in this regard and would also suggest the same as to the interest rate to be applied to these pension payments.

#### **Goodwin Tribunal - Male survivor benefits – opposite sex marriage**

- 4.38 Following an employment tribunal (Mrs Goodwin versus Department of Education) survivor benefits payable to male survivors of females in opposite sex marriages will be equal to those payable to other categories of survivor. Whilst this case referred to the Teachers' Scheme in England, this has implications for other public service pensions schemes. Scottish Ministers have acknowledged that changes will also be required to devolved schemes, including the Local Government Pension Scheme.
- 4.39 SPPA issued “Circular LGPS 2020/04”, dated 27 July 2020, on this matter. This is provided in full at Appendix 2.

## **5. Financial impact**

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- 5.1 Funding implications are as stated above.
- 5.2 A revised IAS26 position has been sought from the actuary, this to reflect both the implications of the McCloud consultation (an estimated reduction in cost from the previous) and those (additional costs arising) of the Goodwin employment tribunal. These will be incorporated with the LPF Annual Report 2020 Audited, as reported separately on this agenda.
- 5.3 Administrative expenditure, specifically staffing and project management resource, of McCloud rectification will be assessed and reported to a future Committee.

## **6. Stakeholder/Regulatory Impact**

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- 6.1 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.
- 6.2 There is no direct stakeholder or regulatory impact arising from this report.

## **7. Background reading/external references**

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- 7.1 None.

## **8. Appendices**

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Appendix 1: SPPA LGPS Circular 2020/05 – Scottish Government Consultation – addressing discrimination in the local government pension scheme – update on employer cost cap

Appendix 2: SPPA LGPS Circular 2020/04 – Male survivor benefits – opposite sex marriage

## Local Government Pension Scheme 2020/05

### 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
- Scheme members and representatives
- The Scottish Local Government Pension Scheme Advisory Board

### 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:

Scottish Government Consultation – addressing discrimination in the local government pension scheme – update on employer cost cap

### Date:

30 July 2020

**The purpose of this circular is to inform scheme members and employers of the SPPA consultation on proposals to address the age discrimination in scheme reforms in 2015, and to provide an update on the cost control mechanism**

### Background

1. Occupational pension policy, including public service pensions, is reserved to UK Government, although Scottish Ministers have executively devolved competence to make regulations for five Scottish schemes. The Public Service Pensions Act 2013 introduced new career average schemes, and all active members moved into the new schemes. As a result of the negotiations for the new scheme and in agreement with trade unions, 'transitional provisions' were introduced for members who were within 10 years of normal retirement age in 2012. These members were protected by an 'underpin' calculation which compares benefits from the 2009 and 2015 schemes and provides the better of the two. This provision currently applies until 2022.

2. The transitional provisions of the Judges' and Firefighters' schemes were challenged through Employment Tribunal and in December 2018. The Court of Appeal found in a joint hearing on McCloud (judiciary) and Sargeant (firefighters) that the transitional protections included in the reforms in 2015 discriminated against younger members on grounds of age. The UK Government sought leave to appeal the decision, which was refused and in July 2019 the Chief Secretary to the Treasury issued a written ministerial statement accepting the decision and explained that the decision had implications for all public service pension schemes, including the local government schemes, although no claims have been lodged in respect to the transitional protection included in those schemes.

### Consultation

3. On the 16 July, the UK Government began a 12 week public consultation on proposals to retrospectively address the discrimination found in the Local Government Pension Scheme. The SPPA on behalf of Scottish Ministers now propose a similar remedy designed to offer the same 'underpin' to all scheme members who joined the 2015 scheme to the end of a "remedy period". Stakeholders are being asked a number of questions, including whether respondents agree with our proposal to remove the discrimination by extending the statutory underpin to younger scheme members and whether the revised regulations should apply retrospectively to 1 April 2015.

### Application – actuarial adjustments

4. Under the current regulations, when a protected member leaves the scheme, the underpin calculation as currently interpreted does not take into account the impact of early or late retirement factors. This may mean the calculation does not correctly identify the scheme from which the member would receive the higher benefits. This situation arises because of differences in normal pension ages in the 2009 and 2015 Schemes. We therefore propose that the revised underpin should be clarified to ensure that, when a member takes their benefits from the scheme, the underpin check is done *after* the application of any early/late retirement factors. This would be consistent with the original policy intention.

5. Given the intention to make these changes retrospective effect to 1 April 2015, some members will already be in receipt of pensions which will need to be re-calculated. In some cases members who should have benefitted from the underpin as originally intended may be detrimentally affected by being in receipt of lower benefits from the scheme, or in some cases there will be survivor benefits in payment in respect of those members. It is our view that administrators should review these cases as a priority and ensure that any retrospective increase in a member's pension arising from the underpin, is taken into account for relevant survivor benefits.

6. The SPPA will engage with stakeholders through the LGPS Scheme Advisory Board over the course of the consultation. In addition, administering authorities may wish to assess the immediate administrative implications of the contents of the consultation and to identify members who may currently be affected by the discrimination. Further information will be provided in due course.

## Employer cost cap

7. In a separate written [ministerial statement](#), the Chief Secretary to the Treasury provided an update on the cost control mechanism in public service schemes which was paused whilst the financial implications of the Court of Appeal judgment were assessed. This is called the employer cost cap, which measures the costs of benefits accruing in a valuation period. Where costs are deemed to breach a 2% corridor either side of the target cost of the scheme, steps should be taken to address that breach. The cost cap element of scheme valuations will now resume. This has particular implications for the Scottish LGPS with funds currently undertaking triennial valuations, and SPPA will engage with funds to explore and support the management of arising issues.

Should you have any enquiries about this circular, or require further information, please contact [Kimberly.linge@gov.scot](mailto:Kimberly.linge@gov.scot) or [Roddy.MacLeod@gov.scot](mailto:Roddy.MacLeod@gov.scot)

Kimberly Linge  
Policy Manager, LGPS

30 July 2020

## Local Government Pension Scheme 2020/04

- 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:** Male survivor benefits – opposite sex marriage

**Date:** 27 July 2020

**The purpose of this circular is to advise of a recent legal case and changes to the entitlement of male survivors in opposite sex marriages; to remove the service restriction on this survivor pension to take into account the female member's service from 6 April 1978 under The Local Government Pensions etc (Civil Partnership) (Scotland) Amendment Regulations 2005.**

**In all future cases and under Section 61 of the Equalities Act, Administering Authorities should pay equal survivor benefits between same and opposite sex widowers.**

### Introduction

1. The Chief Secretary to the Treasury has made a 'Written Ministerial Statement' (WMS) in respect of survivor benefits payable from the Teachers' Pension Scheme in England. Following an employment tribunal, survivor benefits payable to male survivors of females in opposite sex marriages will be equal to those payable to other categories of survivor.

This has implications for other public service pensions schemes. Scottish Ministers have acknowledged that changes will also be required to devolved schemes, including the Local Government Pension Scheme.

## Background

### Changes to Male Survivor Benefits

1. Changes to survivor pensions introduced by the Social Security Act 1986 resulted in most public service pension schemes providing survivor benefits to widowers (that is, male survivors in opposite-sex marriages) based on the female spouse's service from 6 April 1988 onwards. Since the introduction of both civil partnerships and later same sex marriages, public service pension schemes have provided survivor benefits in respect of both which have been in line with those paid to widowers i.e. entitlement based on service accrued from 6 April 1988; although some schemes did provide opportunities for members to buy back pre 1988 service for survivor benefits.

2. On 12 July 2017, the Supreme Court ruled in the Walker v Innospec case that Mr Walker's male spouse was entitled to a pension calculated on all the years of his service with Innospec, provided that at the time of Mr Walker's death they remained married. As a result, public service schemes, including the Local Government Pension Scheme, have been required to amend their regulations to provide equal survivor benefits for same-sex couples (whether married or in civil partnerships) to that provided for widows, based on a member's full length of service. Whilst some schemes have yet to introduce this change into regulations, it is being applied administratively and is backdated to 5 December 2005.

3. As confirmed by [the UK Government's WMS](#), a recent employment tribunal case [Mrs Goodwin v Department for Education] has concluded that a female member in an opposite sex marriage is treated less favourably than a female in a same sex marriage or civil partnership, and that treatment amounts to direct discrimination on grounds of sexual orientation. Where schemes contain provisions deemed discriminatory, those provisions must be dis-applied as being contrary to the non-discrimination rule set out in section 61 of the Equality Act 2010.

### Changes required

4. Same-sex survivors were originally entitled to survivor benefits taking into account the member's service from April 1988, however retrospective amendments remain to be made post Walker with effect from 5 December 2005 (the date when civil partnerships became possible), such that those survivor benefits now take into account the member's service from 6 April 1978. Following the Goodwin Tribunal, regulatory amendments will now need to be made with effect from the same date to extend that entitlement to male survivors of female members

5. Where a male spouse survivor of a female scheme member, whose entitlement to the survivor pension arose on or after 5 December 2005, is in receipt of a survivor pension, that pension will be increased in line with changes planned.

6. The entitlement of a male spouse survivor of a female member whose right to a pension arose before 5 December 2005 (i.e. where the female member deceased before 5 December 2005) will not be affected. This is because the rights under the relevant scheme crystallised at a date before the effective date of the planned amendment.

## Any questions?

Should you have any enquiries about this circular, or require further information, please contact [Kimberly.linge@gov.scot](mailto:Kimberly.linge@gov.scot) or [Roddy.MacLeod@gov.scot](mailto:Roddy.MacLeod@gov.scot)

Kimberly Linge  
Policy Manager, LGPS

27 July 2020