HM Revenue and Customs
Email to: pensions.policy@hmrc.gov.uk

6 January 2023

Consultation: The Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023

Thank you for your technical consultation seeking views and evidence on the draft Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 ('the Regulations').

I respond on behalf of the Local Government Association (LGA) and the Local Government Pensions Committee (LGPC).

The LGA is a politically led, cross-party membership organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. 331 councils in England including district, county, metropolitan, unitary, London boroughs and the City of London are members of the LGA. There are 22 Welsh unitary authorities in membership via the Welsh Local Government Association (WLGA). The LGPC is a committee of councillors constituted by the LGA, the WLGA and the Convention of Scottish Local Authorities (COSLA). The LGPC considers policy and technical matters affecting the Local Government Pension Scheme (LGPS).

This response sets out the LGA's view on the draft regulations.

I hope the content is helpful. Please do not hesitate to contact me if you have any questions about this response.

Yours faithfully

Joanne Donnelly
Head of Pensions

Background to the response

This response is submitted in the context of the Local Government Pension Schemes (LGPS) in England and Wales, and Scotland. The LGPS is one of the largest defined benefit schemes in the world. In England and Wales there are over 19,000 employers, 6.3 million members and assets of £364 billion. The scheme is administered locally by 86 administering authorities in England and Wales, and 11 in Scotland.

General comments

There are two important areas the Regulations do not address:

- members of the Teachers' Pension Scheme (TPS) who will be rolled back into the LGPS as part of the McCloud remedy
- some small pot payments.

We provide more detail on both these issues in the final section of this response.

Timing of the consultation

Whilst we welcome sight of the draft regulations and guidance, we understand the lateness in providing these materials has caused a subsequent delay to DLUHC drafting and consulting on its secondary McCloud legislation. This presents a significant risk to LGPS administering authorities being able to implement the McCloud remedy on time, particularly as the LGPS is locally administered.

Also, the timing of the consultation and the length of time given to reply is disappointing. A six week consultation over the festive period has meant we have been unable to review the guidance that accompanies the Regulations or consult with stakeholders – both of which would have allowed us to provide a more considered response.

Comments on the Regulations

1. In this section we set out our views on the Regulations. Our response concentrates on the application of the Regulations to the LGPS but also includes general comments.

2. Regulation 2(1) refers to Her Majesty's Revenue and Customs. This should instead read His Majesty's Revenue and Customs.

3. Regulation 6 modifies regulation 14A of the Registered Pension Schemes

(Provision of Information) Regulations 2006, but only for Chapter 1 schemes.

Regulation 14 excludes any final salary uplift for the purpose of calculating an LGPS member's pension input amount (PIA) and has retrospective effect.

The PIA for an LGPS member who:

- has already retired or become deferred
- received an increase to their pension as a result of the underpin currently in operation, and
- exceeded the annual allowance in the year they left the Scheme

will now need to be re-visited and will reduce. Certain provisions in Regulation 6 will need to be replicated for members of the LGPS who are in this category.

We are aware that it is not possible for all administering authorities to identify which members received an uplift to the pensions under the current underpin rules. This provision would give extra time for the Scheme manager to identify the relevant members, re-calculate their PIAs and supply revised Pension Savings statements.

The extension is not needed for active members as the underpin has not impacted past PIA calculations. The extension is not required for leavers who did not benefit from an uplift as a result of the current underpin. If an underpin recalculation does result in an uplift to their pension, this will not affect their PIA.

4. Regulation 7 modifies regulation 14B of the Registered Pension Schemes (Provision of Information) Regulations 2006, but for Chapter 1 schemes.

   The PIA for an LGPS member who:

   - has already retired or become deferred
   - received an increase to their pension as a result of the underpin currently in operation, and
   - requested a pension saving statement for the year they left the Scheme

will now need to be re-visited and will reduce. Certain provisions in Regulation 7 will need to be replicated for members of the LGPS who are in this category.

5. Regulation 8 provides a framework for the scheme pays option in respect of annual allowance tax charges arising because of rectification in a Chapter 1 or 2015 Judicial scheme.

   We are currently awaiting final details of how the remedy will apply to protected or taper protected members of another public service pension scheme who completed a transfer of final salary benefits to the LGPS. We believe that the preferred option is for members to acquire the protection offered by the new scheme in respect of the transferred in benefits. In the LGPS, this would mean that any post 2015 final salary benefits transferred in would be converted to CARE pension with underpin protection.

   If this option is adopted, it is possible that a member who could have an increase to their benefits as a result of the conversion of their final salary benefits to CARE pension. As this does not represent ‘a final salary uplift’, it would not be excluded from PIA calculations.

   In our view, an equivalent of regulation 8 is needed for LGPS members to ensure that a framework is in place for any members who incur an increased annual allowance charge as a result of the remedy.

6. Regulation 9 extends the deadline for a member to elect for Scheme pays in respect of an annual allowance tax charge that arises in 2022/23 in a chapter 1 scheme. The PIAs for LGPS members who retire in 2022/23 will also have to be reviewed after the remedy takes effect. We believe that the same extension should apply to LGPS members electing for scheme pays for the 2022/23 year.

7. Regulation 9 (5) refers to the POPJOA 2022 instead of the PSPJOA 2022. The same error occurs in regulation 33(2)(a).

8. Regulation 11 includes provisions that allow a Chapter 1 scheme to reclaim overpaid tax if a member has made a scheme pays election in respect of an annual allowance charge that has reduced as a result of the remedy. There is no corresponding regulation that allows an LGPS administering authority to reclaim overpaid tax. In the absence of such a provision, the LGPS scheme manager may instead amend an earlier Accounting for Tax return to make the correction. If this was not the intention, a regulation that replicates certain provisions in regulation 11 is needed for LGPS members.

9. Regulation 14 provides that a final salary uplift paid to an LGPS member is ignored for annual allowance purposes. This provision has retrospective effect.

These regulations come into force on 6 April 2023, however, this regulation will not have practical effect until 1 October 2023. This is because regulation 14(2) refers to section 78(1) of the Public Services Pensions and Judicial Offices Act 2022 which will come into force on 1 October 2023.

For the period up to 30 September 2023, LGPS must continue to include any increase to a member's benefits as a result of the current underpin calculation in annual allowance calculations, despite the fact that they will have to reverse this position after 1 October 2023.

This further supports our earlier comments on the need for regulations 6, 7 and 9 to also apply to the LGPS.

10. Regulation 15 includes provisions that ensure that the relevant protected pension age condition continues to be met in respect of members of Chapter 1 schemes who elect for new scheme benefits.

    Members of LGPS Scotland rely on a protected pension age if they retire due to redundancy between age 50 and 55 and satisfy certain other criteria. Members in this group who have retired since 1 April 2015 will have their pensions re-visited from 1 October 2023 as a result of the remedy. We assume that the condition in subparagraph (7)(a) of paragraph 22 to Schedule 36 of the Finance Act 2004 will continue to be met in this situation. If this is not the case, then a version of regulation 15 is required to cover members of LGPS (Scotland).

11. Regulation 19 covers the payment of a top up lump sum to a member who has previously received a trivial commutation lump sum. However, the Regulations do not cover how the top-up payment should be treated for tax purposes. The top up payment will be taxed under section 636B of the Income Tax (Earnings and Pensions) Act 2003. However, the calculation of tax depends on whether the rights are crystallised or uncrystallised.

    A top up payment that satisfies the relevant conditions set out in regulation 19 will be treated as a trivial commutation lump sum. However, as it is not actually a trivial commutation lump sum, we think it is necessary to specify whether the payment is treated as representing crystallised or uncrystallised rights when establishing the tax due.

12. Regulation 18 contains provisions that ensure the original trivial commutation lump sum remains an authorised payment when a top up payment becomes due. Regulation 19 provides for the top up payment to be paid and treated as a trivial

commutation lump sum in certain, but not all, circumstances. The top up lump sum would not be an authorised payment if the member has returned to LGPS membership, or if the payment does not satisfy the limits set out in regulation 19(3).

In our view, liability for the top up payment could be discharged by:

- making an unauthorised payment
- making a compensation payment in lieu of the top up payment
- using the payment to provide benefits in the Scheme.

We believe that providing benefits in the Scheme is HMRC's preferred option. The LGPS would need detailed guidance on how such a lump sum payment could be converted into Scheme benefits.

13. Regulation 19(4) disapplies Regulation 3 of the Registered Pension Schemes (Authorised Payments) Regulations 2009 when making payments under this regulation. In our view, it would be appropriate to disapply Part 2 (Commutation Payments) of those regulations instead. This would change the initial treatment of the payment when considering the 2009 regulations, as opposed to changing the outcome.

    A similar issue occurs in:

    - Regulation 21(3), which could disapply Part 2 instead of regulation 3 of the 2009 Regulations
    - Regulation 22(3), which could disapply Part 3 instead of regulation 4 of the 2009 Regulations
    - Regulation 23(5), which could disapply Part 4 instead of regulation 5 of the 2009 Regulations
    - Regulation 24(5), which could disapply Part 2 instead of regulation 3 of the 2009 Regulations
    - Regulation 25(6), which could disapply Part 2 instead of regulation 3 of the 2009 Regulations.

14. Regulation 22 covers arrears of pension payments that arise as a result of the

effect of the remedy on the benefits of a member who has died before the payments are made. ‘Member’ is not defined in the Regulations, therefore the definition of ‘member’ included in section 151 of the Finance Act 2004 applies to these Regulations. Dependants are therefore not covered by this regulation. In our view, a regulation equivalent to regulation 22 is required to cover the payment of arrears of pension in respect of a survivor pension when the survivor has died before the arrears are paid.

15. Arrears of pension payments may become due to a person who was previously in receipt of a child’s pension, but who no longer meets the ‘dependant’ definition set out in paragraph 15 of schedule 28 to the Finance Act. We are not certain of the tax position relating to the payment of arrears in this situation. If the arrears would not be authorised based on current rules, a provision is needed in these Regulations to ensure that payment of arrears in this circumstance would be authorised.

16. Regulation 22(2)(a) refers to section 164(1) of the Finance Act 2004. In our view, it would be better to refer to section 164(1)(f) specifically. How a payment is treated for tax purposes is determined by which subsection of 164(1) it falls under. By specifying 164(1)(f), this would make it clear that tax treatment is determined by these Regulations in accordance with regulation 164(2).

    The same issue occurs in regulation 23(2)(a).

17. Regulation 24 covers a top up payment that arises in respect of a member who took a trivial commutation lump sum payment and has since died. Some of the issues mentioned in paragraphs above may also be relevant to this regulation. These include:

    - Paragraph 11: is the payment treated as representing crystallised or uncrystallised rights for the purpose of section 636B of the Income Tax (Earnings and Pensions) Act 2003?

    - Paragraph 12: what payment can be made if a trivial commutation payment would not have been authorised? This would be the case if the limits set out in 24(4) would be exceeded or the member returned to local government employment after taking the initial trivial commutation lump sum.

    - Paragraph 14: a corresponding regulation is required to cover top up payments of trivial commutation lump sum death benefits in respect of a dependant who has died before the top up payment is made.

- Paragraph 15: a corresponding regulation may be needed to ensure that any top up payment made to a person who trivially commuted a child's pension and no longer meets the 'dependant' definition is authorised.

18. Regulation 26 covers the underpayment of a lifetime allowance tax charge as a result of the application of the remedy.

In the LGPS, extending underpin protection to younger members and changing the methodology of the underpin calculation will mean an increase to some pensions in payment. As the increase will constitute a new BCE, this regulation will not apply to LGPS members in this category.

There is another group of LGPS members who may see a change to their benefits in payment. The rules that will apply to past Club transfers are yet to be confirmed. We understand the preferred approach is for transferred benefits to 'inherit' the protection that applies in the receiving scheme. If this is the case, then pensions in payment may change for members who:

- were protected or taper protected members of another public service pension scheme
- transferred final salary benefits built up after 31 March 2015 from that other scheme to the LGPS
- built up LGPS benefits before 1 April 2022, and
- have already retired or retire before 1 October 2023.

This is because the post 2015 final salary benefits that are currently in payment will be converted into CARE benefits with underpin protection. This could mean an increase or reduction to the benefits currently in payment.

Regulations 27 and 28 would apply if the member's pension and lump sum reduce. However, regulation 29 does not currently apply to the LGPS.

If the benefits increase, in our view this would be treated as a new BCE. We would appreciate the HMRC view on this topic. If HMRC takes the view that this increase represents a change to an earlier BCE, then parts of Chapter 4 of these Regulations would be needed for LGPS members.

19. Regulation 30 defines how a top up defined benefits lump sum death benefit paid outside of the relevant two-year period will be treated in over-riding tax legislation. In our view a third subsection is required in regulation 30(3) to include 206(1B) of the Finance Act 2004.

20. Regulations 37 and 38 include the term 'remediable service' but this term is not defined in regulation 2. We recommend including a definition of this term for clarity.

21. Regulation 43 includes modifications to Schedule 15 of the Finance Act 2020. To fit in with the wording of Paragraph 2 of that Act, we believe the inserted (5A) should read "*A payment is within this paragraph if* it is a compensation payment made by virtue of Part 1 of PSPJOA 2022'.

22. The first sentence of regulation 43(3) ends with 'substituted'. This should instead read 'inserted'. Similarly, the first sentence of 43(4) also ends with 'substituted', which should also read 'inserted'.

Issues not covered by the Regulations

1. 'Excess teacher service' is defined in section 110(2) of the PSPJOA 2022. We await full details of how the remedy will operate for members in this group, but our understanding is that taper protected and unprotected members of the Teachers' Pension Scheme (TPS) will be rolled back to the legacy scheme in respect of a full time contract for the remedy period. If they have an additional part time contract, that will be rolled back to the LGPS. A TPS member who has already retired will be offered an immediate choice. If they choose legacy scheme benefits, a similar adjustment will be needed to move any excess teacher service to the LGPS.

   The provisions in the Regulations that refer to 'rollback' apply to chapter 1 schemes, and therefore they do not apply to the LGPS. Equivalent regulations will be required to ensure that any members in this position are put into the position they would have been in had the discrimination not occurred. This includes provisions covering:

   - Tax relief on pension contributions paid to the TPS new scheme.

   - Adjustments to pension input amounts for the remedy period and 2022/23 including exchange of information between schemes, reporting to HMRC, treatment of past scheme pays elections, changes to the usual thresholds for mandatory scheme pays elections, responsibility for paying extra or reclaiming an overpaid tax charge, etc. By definition, members in this group have a full time teaching post. For simplicity, it may be possible to include a version of regulation 10(5) to ensure liability for a tax charge remains within the TPS scheme rather than transferring to the LGPS after rollback.

- Lifetime allowance charges paid by the TPS new scheme – reporting to changes to HMRC and member, responsibility for paying increased charge. We understand that an unprotected or taper protected member who has taken their TPS pension and elects for legacy scheme benefits will have to take their LGPS pension on the same date as their original retirement. Regulations could stipulate that the LGPS is treated as happening first for lifetime allowance purposes. In the vast majority of cases, this would ensure that the liability for any lifetime allowance tax charge remains within the TPS.

Section 4(4) of the PSPJOA 2022 includes a provision that defines ‘the relevant chapter 1 legacy scheme’ as the local government new scheme for certain purposes. A similar provision in these regulations could simplify the changes needed to deliver a fair result in respect of the tax position for members with excess teacher service after the remedy has been applied.

2. The Regulations include provisions that modify the rules in respect of members who have previously taken a trivial commutation lump sum from a scheme. There are no corresponding regulations to cover members who have taken a small pot payment under regulations 11 or 12 of The Registered Pension Schemes (Authorised Payments) Regulations 2009.

   In our view, the Regulations do not need to cover members in this group as there is no requirement for payments of this type to be paid within a limited period, nor is there a requirement to measure the total value of the member’s pension benefits on a nominated date.

   A member who has previously taken a small pot payment can take a further payment later if they later build up pension benefits in the same scheme. In our view, an LGPS member who had previously taken a small pot payment could take another payment of the same type if their benefits increase because of the remedy with no adverse impact on their tax position. This is subject to the usual conditions that apply when paying a small pot payment.

   We would welcome HMRC’s confirmation that they agree with our opinion. If they do not, then provisions relating to members who have received a small pot payment will also be needed.

This also applies to dependants who have received a trivial commutation lump sum death benefit where the dependant is still alive.