

LOCAL GOVERNMENT PENSION SCHEME: FAIR DEAL – STRENGTHENING PENSION PROTECTION

4 APRIL 2019



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ABOUT THE PLSA

We're the Pensions and Lifetime Savings Association; we bring together the pensions industry and other parties to raise standards, share best practice, and support our members. We represent over 1,300 pension schemes with 20 million members and £1 trillion in assets, across master trusts and defined benefit, defined contribution, and local government schemes. Our members also include some 400 businesses which provide essential services and advice to UK pensions providers. Our mission is to help everyone to achieve a better income in retirement. We work to get more people and money into retirement savings, to get more value out of those savings, and to build the confidence and understanding of savers.

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EXECUTIVE SUMMARY

- ▶ The Government first introduced its Fair Deal guidance in 1999 to provide pension protection to staff outsourced from central government to private sector contracts. A similar, but not identical, framework was set out for local government staff, called the Best Value Direction, in 2007. When Government amended Fair Deal in 2013 to give transferred central government staff continued access to their public service pension scheme, the same amendments were not brought across to local authority employees. This consultation is part of a series of attempts to bring parity between the two different public service pensions schemes.
- ▶ The PLSA supports the vast majority of proposals set out in the 2019 consultation document, which are intended to equalise pension rights between those who have and have not been outsourced from their Local Government Pension Scheme (LGPS) employer, so that those transferred can have continued access to LGPS membership.
- ▶ We also welcome the proposals that seek to provide a new way for employers to participate in the LGPS, as well as the reforms that will give greater certainty on the pensions costs contractors will face over the life of a contract for outsourced work.
- ▶ However, there are additional challenges that should be considered when finalising the regulations for implementing the Fair Deal into the LGPS. Broadly, where there is increase in administrative burden, such as in calculating transfer benefits in transitional arrangements, or in confirming deemed employer status, it may be important to communicate to local authorities the need to increase resources for pensions administration teams to cope with the increase in workload pressure.
- ▶ The proposed definition of protected transferee should be clarified further to ensure that it does not hinder employers from tackling legacy liabilities. It is also needed to distinguish when transferees actually remain in the LGPS and when they are actually now part of another public service scheme. There is also a question raised over whether the new definition of a protected transferee is at odds with the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006.
- ▶ In the transitional arrangements proposed, it may be difficult for scheme members to make an informed decision on whether to transfer past service benefits.
- ▶ Guidance is needed from the Scheme Advisory Board (SAB) on the deemed employer approach, including for the following areas: provide clarity in complicated scenarios on who is the deemed employer; how good and timely data can be ensured; how discretionary decisions should be considered; how contractor's total employer contribution rates should be determined; how

funding deficits of failed contractors should be handled; and how can accountability of responsibilities be ensured.

- ▶ There is merit in specifying both the types of costs and types of responsibilities in broad principles in regulation, but it is important to have the exacting detail in contracts.
- ▶ To encourage timely consideration of pensions issues, training on the out-sourcing process and providing a checklist of key tasks for Fair Deal employers and service provider responsibilities may help.
- ▶ There are also some challenges to consider when transferring assets and liabilities, including that there is uncertainty on whether all liabilities can be transferred under current legislation. Additionally, there may be a chance that significant numbers of bulk transfers could impact fund and pool investment strategies.

INTRODUCTION

BACKGROUND

1. The Pensions and Lifetime Savings Association (PLSA) welcomes the opportunity to respond to the Ministry of Housing, Communities & Local Government's (MHCLG)'s final consultation on the Fair Deal Regulations, "Local Government Pension Scheme (LGPS): Fair Deal – Strengthening Pension Protection".
2. In 1999, the Government first introduced the Fair Deal guidance to provide pension protection for staff transferring from central government to private sector contractors as a result of the outsourcing of services. The Best Value Authorities Staff Transfers (Pensions) Direction 2007 sought to provide similar, but not identical, protection to local authority employees.
3. This Fair Deal and Best Value approach required private sector contractors to provide broadly comparable pension schemes to staff transferring in from central and local government. However, under the 2013 New Fair Deal guidance, HM Treasury opted to give central government employees continued access to their public service pensions scheme after transferring their employment. Additionally, staff who had already transferred under the "old" fair deal should be allowed to return to their former public service scheme (or the nearest equivalent) when an existing contract was retendered.
4. Employees from all central government schemes have been amended to reflect the New Fair Deal principles, including the NHS Pension Scheme, the Teachers' Pension Scheme and the Principal Civil Service Pension Scheme. However, the LGPS regulations are not yet updated and the Best Value Direction currently continues to apply.
5. The consultation in May 2016 included draft regulations to introduce the principles of the Government's "[Fair Deal for Staff Pensions: staff transfers from central Government](#)" policy into local government. It was intended to revoke and override the 2007 Best Value Direction, to ensure that local government employees that had access to the LGPS would have continued access to the LGPS, even after they were compulsorily transferred to an independent provider for outsourced services. This also meant that contractors would no longer have the option of giving members access to a scheme certified as being broadly comparable to the LGPS.¹
6. Key issues highlighted in the responses to the 2016 consultation included the following:²

¹ MHCLG (2018) Local Government Pension Scheme: Amendments to Scheme Regulations – Government response to the consultation. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700733/LGPS_scheme_regulations_government_response.pdf

² MHCLG (2018) Local Government Pension Scheme: Amendments to Scheme Regulations – Government response to the consultation. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700733/LGPS_scheme_regulations_government_response.pdf

- ▶ Administrative complexity
- ▶ Missed opportunity for “pass-through”
- ▶ The employers in scope
- ▶ Revocation of 2007 Direction
- ▶ The position in Wales
- ▶ Requirement for guidance

THE PLSA’S RESPONSE

7. The PLSA conducted a survey with its members and consulted with its Local Authority Committee – one of four bodies within the PLSA that works closely with its Policy Board to make policy recommendations – on the proposals presented in the consultation. There was agreement or approval over the vast majority of suggestions from MHCLG that seek to resolve the remaining challenges (highlighted in this response’s paragraph 6) in implementing the Fair Deal regulation into the LGPS. We outline in the following sections what those areas of agreement are, as well as caveats to consider where applicable.

(CHAPTER 2) THE BASICS: PROTECTED TRANSFEREES & FAIR DEAL EMPLOYERS

PROTECTED TRANSFEREES

Question 1: Do you agree with this definition?

8. The PLSA agrees with the definition of a protected transferee, that it is an individual who [Paragraph 15]:
- a. is an active member or is eligible to be an active member of the LGPS,
 - b. was employed by a Fair Deal employer (as defined) immediately before that person's employment was compulsorily transferred under a contract to a service provider in relation to the delivery of a service or a function of the Fair Deal employer.
9. The PLSA agrees with the circumstances in which a protected transferee remains a protected transferee:
- ▶ [Paragraph 16] A protected transferee will remain a protected transferee for so long as they remain wholly or mainly employed on the delivery of the service or function transferred, even if the service is subsequently sub-contracted or otherwise transferred to a different service provider.
 - ▶ [Paragraph 17] Where an employee is transferred out to an employer which offers membership of another public service pension scheme, the draft regulations provide that they would not be eligible for the LGPS but that they would remain a protected transferee. This ensures that if, following a re-tender, they are subsequently transferred to a new provider which does not offer a public service pension scheme, they do not lose their protection.
10. The PLSA agrees with the draft regulations that [Paragraph 18] “protected transferee status for staff will require the agreement of both the Fair Deal employer and the service provider and it is proposed either party can determine at any time that such an individual is no longer a protected transferee.” As stated in the consultation, this will allow service providers and Fair Deal employers to “offer the same status and protection to all staff who are providing service as part of the contract negotiations, whether or not they were previously employed by the Fair Deal employer.”

Additional considerations for protected transferee definition

11. Paragraph 15a: It may be helpful to explain the transferee definition further, where it indicates a protected transferee “is an active member or is eligible to be an active member for the LGPS”, as this could include individuals that transferred from the public sector pre-Fair Deal and New Fair deal legislation, hindering employers from trying to fully tackle its legacy liabilities if the qualifying circumstances of who are protected transferees are still not completely clear.
12. Paragraph 17: This paragraph could be clarified; when “an employee is transferred out to an employer which offers membership of another public service pension scheme”, does this individual actually remain in the LGPS, or, does s/he become a member of an alternative public service scheme? It may better to be specific, with an alternative suggestion being, “a person remains a protected transferee, even if for a period they are not entitled to be a member of the Scheme, because they are entitled to membership of another public service pension scheme.”
13. Paragraph 18: Under the draft regulations – that provide protected transferee status for all staff, so long as *both* the Fair Deal employer and the service provider agree – it is unclear if these reforms can work for non-Fair Deal staff; doubt has been raised on whether they can work under a deemed employer. This concern is tied to the proposed regulations’ interactions with the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006. TUPE exists to protect the rights of employees if the business is under new management; contracts are automatically transferred, as if it was made originally between the employee and the new employer.³ However, the draft regulations stray from TUPE, in that it allows for either the Fair Deal employer or the service provider to change their determinations at any time on whether someone is a protected transferee.

FAIR DEAL EMPLOYERS

Question 2: Do you agree with this definition of a Fair Deal Employer?

14. We agree with the proposed definition of a Fair Deal employer, which says:

- ▶ [Paragraph 23] “...under our draft regulations all LGPS scheme employers will be Fair Deal employers with the exception of:
 - further education corporations, sixth form college corporations and higher education corporations (i.e. post-1992 universities), and
 - admission bodies.

³ CIPD (2018) A Guide to TUPE Transfers. See: https://www.cipd.co.uk/Images/7697-a-guide-to-tupe-transfers-web_tcm18-44310.pdf

As they do now, contractors providing services to the organisations listed above will be able to provide access to the LGPS to transferred staff via entering into an admission agreement with the pension fund (subject to meeting requirements and with the agreement of the contracting employer), but there would be no obligation for them to do so under scheme regulations.”

(CHAPTER 2) THE BASICS: TRANSITIONAL ARRANGEMENTS

Question 3: Do you agree with these transitional measures?

Question 4: Do you agree with our proposal regarding the calculation of inward transfer values?

15. The PLSA supports the suggested transitional measures and the proposal for the calculation of inward transfer values:

- ▶ [Paragraph 24] “.....Our draft regulations therefore provide that when contracts that fall under the 2007 Direction or 2012 Welsh Direction are next re-tendered, protected staff will become protected transferees under the LGPS Regulations 2013 and gain a right to membership of the LGPS.”
- ▶ [Paragraph 26, summary] Transferred employees who were entitled to pension protection under the 2007 Direction or the 2012 Direction, and were given access to a scheme certified as broadly comparable to the LGPS, will have a right to transfer their benefits from that scheme to the LGPS if the fund receives a request.

Under the draft regulations, such transfers would be treated as individual transfers under existing provisions.

It is proposed that the value of transfers be calculated using Cash Equivalent Transfer Value (CETV) factors contained in actuarial guidance issued by the Secretary of State. CETV factors are issued to convert the transfer value received by an LGPS fund to an amount of career average pension on an actuarially neutral basis. This approach is intended to ensure that inward transfers are calculated using an established process that is fair to scheme members, scheme employers and local taxpayers.

Additional considerations for transitional arrangements

16. It may be difficult for scheme members to make an informed decision on whether to transfer past service benefits. There is also a risk that producing transfer quotes for members, in order for them to make an informed decision, will create a lot of administrative burden on the administering authorities. It may be important to communicate to local authorities the need to increase resources for pensions administration teams to cope with the increase in workload pressure.
17. It should be made clear in the regulations that if staff already have access to a broadly comparable scheme, then on any successful re-tender, there is the option to remain in that scheme, if members prefer it. It has been highlighted that transferring protected employees

back into the LGPS only on a Career Average Revalued Earnings (CARE) basis means that those employees will lose any final salary link that might be attached to them. It has been suggested that a transfer should be similar to an “Interfund”, whereby the service is on a like-for-like basis, so that the final salary link remains.

18. The current transitional process can be too slow; any efforts to encourage a more timely process would be welcome.

(CHAPTER 2) RISK-SHARING: DEEMED EMPLOYER

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

19. The PLSA supports the proposals on “deemed employer” status, including the following:

- ▶ [Paragraph 29, abridged] Some LGPS employers already use pass-through arrangements with their service providers where greater flexibility assists outsourcing. To ensure that Fair Deal employers actively consider the potential benefits of including risk sharing provisions in their service contracts, MHCLG proposes that service providers do not necessarily need to become admission bodies in the LGPS to participate in the scheme. Instead, ‘deemed employer’ status could be used.
- ▶ [Paragraph 30, abridged] Deemed employer status is available under the LGPS Regulations 2013 already. It means that, for specific groups of employees, their ‘scheme employer’ in the LGPS is not their employer in employment law, but is the ‘deemed employer’ instead. For example, under the LGPS Regulations 2013, the ‘deemed employer’ for the employees of voluntary schools is the associated local authority.
- ▶ [Paragraph 31, abridged] The consultation proposes that when an employee is compulsorily transferred from their Fair Deal employer to a service provider, their former employer will have the option of remaining the deemed employer for the transferred staff.
- ▶ [Paragraph 32] “Using this approach, the service provider would not have full scheme employer responsibilities under the LGPS Regulations 2013. Instead, the default position would be that the Fair Deal employer would retain the majority of scheme employer responsibilities (including contributions and funding risk).”

20. Given the rapid growth of Academy related employers in the LGPS, the deemed employer proposals should help in the long-term with the workflow backlogs seen at various administrating authorities, as well as relieve issues with weak employers being permitted to participate in the fund.

Additional considerations for the deemed employer approach

21. It is important to note that in the short-term, the process to confirm deemed employer status may cause confusion and become a significant administrative burden, for both pensions administration teams and for employers. It may be important to communicate to local authorities the need increase resources for pensions administration teams to cope with the increase in workload pressure.

22. An alternative to a deemed employer status would be to have a standard LGPS-wide pass-through arrangement.

Question 6: What should advice from the Scheme Advisory Board (SAB) contain to ensure that deemed employer status works effectively?

23. The PLSA would like to see the following areas included or clarified into the guidance the SAB will create:

- ▶ In a scenario where an academy has let the contract, but the transferring employees are currently employed by the Local Authority, who is the deemed employer?
- ▶ How can consistently good and timely data be ensured? Who is responsible for ensuring that data is of good quality and that data contributions are on time?
- ▶ How should discretionary decisions be exercised, such as early retirement without reduction?
- ▶ How should the contractor's employer contribution rate be determined, as well as its interaction with the funding of ill-health benefits and excessive salary growth?
- ▶ If the contractor fails, how should any funding deficits or surplus, at the contract end, be handled? Additionally, what is the interaction with Regulation 64 for exit credits?
- ▶ Once a deemed employer, how can a contractor be compelled to comply with their employer obligations?

(CHAPTER 2) RISK-SHARING: RESPONSIBILITIES FOR EMPLOYERS, EXISTING ARRANGEMENTS, TIMELY CONSIDERATION, AND PUBLIC SECTOR EQUALITY DUTY

RESPONSIBILITIES FOR EMPLOYERS

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

24. There is merit for specifying both the types of costs and types of responsibilities in the regulations, but the costs and risk-sharing are already typically set out in detail within the service contract between the contractor and Fair Deal employer. If there is evidence that this is not being done, or not being done clearly, then requiring this in broad principles within the regulations would be helpful and it may assist with timely considerations of important issues (see Question 8).
25. Within service contracts, terms must be very clear on who is accountable for which additional costs on discretionary decisions, such as consenting to early retirement without reduction. It would be very helpful to have standard clauses in guidance to prompt consideration and documentation of the risk-share, or a check-list of issues to consider (see Question 8), to help ensure that the quality of the contract details across England and Wales are consistent and that lines of responsibility and timeliness to action are clear.

EXISTING ARRANGEMENTS

Question 8: Is this the right approach?

26. The PLSA supports the approach set out in paragraphs 42 & 43 (abridged below):
- ▶ Alongside the deemed employer approach, it is proposed that the admission body option is retained so that Fair Deal employers can choose to require their service providers to become full scheme employers in the LGPS if they wish.
 - ▶ This approach may be more appropriate for larger, longer term contracts where it is more fitting for a service provider to have full employer responsibilities under the LGPS regulations.
 - ▶ It is also proposed to make clear that risk sharing practices can also be used where the admission body option is used.

TIMELY CONSIDERATION OF PENSION ISSUES

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

27. The following suggestions may assist in encouraging pensions issues to be given full and timely consideration:

- ▶ Specify all costs and responsibilities in the contract;
- ▶ Training on the out-sourcing process;
- ▶ Providing a checklist of key tasks for Fair Deal employers and service provider responsibilities.

PUBLIC SECTOR EQUALITY DUTY

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

28. There are some challenges to consider:

- ▶ There is a risk that employees of employers working on outsourced contracts, but who are not compulsory transferred, will not be protected transferees;
- ▶ There could be adverse funding implications if scheme employers are not fully aware of the implications of the “deemed employer” route. They may solely focus on the contract price and not fully consider the pension risk. This makes specifying costs and responsibilities upfront all the more important in outsourced contracts.
- ▶ Financially responsible employers with legacy deficit could be constrained from fully addressing past service liabilities if they are required to continue with accrual for former public sector staff that transferred pre-2013.

(CHAPTER 3) TRANSFERRING PENSION ASSETS AND LIABILITIES

29. The PLSA supports the proposals set out for handling transferring pensions assets and liabilities:

- ▶ [Paragraph 51, abridged] Proposal 1: The consultation proposes that when an LGPS scheme employer is merged into or taken over by another organisation, the responsibility for that pensions liability automatically transfers to the successor body, unless specific legislative provisions require otherwise. This is intended to ensure that normal business activities, such as mergers and takeovers, can take place effectively and efficiently without unintended consequences occurring because of an employer's LGPS liabilities.
- ▶ [Paragraph 52, abridged] Proposal 2: In addition, the consultation proposes that where the successor body is also an LGPS employer with active members in another fund, the assets and liabilities must be automatically transferred to that fund and combined with the successor body's assets and liabilities.
- ▶ [Paragraph 53, abridged] Proposal 3: The Secretary of State should issue guidance in this area and it should specifically cover the terms of transfers of assets and liabilities between pension funds.

Additional considerations for transferring assets and liabilities

30. There is uncertainty whether all liabilities can be transferred; if current legislation does not allow for deferred and pensioner members to be moved, than moving just the active members may not solve the high exit payment issue facing ceasing employers.
31. There is a possibility that employers with admission agreements in more than one fund will “shop around” for the lowest rates, perhaps clearing the way for Multi-Academy Trusts (MATs) to consolidate into single funds. However, schools move in and out of MATs and future government policy may change, potentially creating long-term instability in being able to manage assets and liabilities.
32. Significant numbers of bulk transfers could also impact fund and pool investment strategies.
33. If an open scheme consolidates with a closed scheme [to new members], then further clarity is needed over the precise classification of the new combined arrangement.

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