

briefing note

The Local Government Pension Scheme (Amendment) Regulations 2014

July 2014



Barry Mack
Partner & Head
of Governance

Draft regulations on scheme governance – consultation response

The consultation seeks responses from interested parties on draft scheme governance regulations for the new Local Government Pension Scheme (LGPS – the scheme) which came into force on 1st April 2014. The consultation asks for comments on the draft regulations themselves and also on separate policy issues. We shall be responding to this consultation by the deadline of 15th August and our current thoughts are set out below.



Ian Colvin
Head of Benefit
Consultancy

Comments on the draft regulations

Local pension boards: establishment

Each administering authority is required to establish a local pension board by 1st April 2015 responsible for assisting it to secure compliance with these regulations (we believe this refers to all the regulations i.e. not just these draft governance regulations), any other legislation relating to the governance and administration of the scheme and requirements imposed by the Pensions Regulator in relation to the scheme. The local pension board is also to be responsible for assisting the administering authority to ensure the effective and efficient governance and administration of the scheme.

The draft regulations largely mirror the provisions of the Public Service Pensions Act 2013 (PSPA2013). This approach makes sense as it provides for a larger degree of flexibility in any accompanying statutory guidance, which is easier to amend than regulations.

Combined or separate?

The regulations allow for the possibility of local authority administering authorities combining an existing pension committee established under the powers of s.101 of the Local Government Act 1972 (LGA1972) and the local pension board into a single body subject to approval by the secretary of state.

We feel that the obstacles inherent in trying to form a joint committee/board under two separate pieces of primary legislation may make the operation of a joint body impractical. In our view a Pension Board does serve a different role to that of a s.101 pension committee. The LGA1972 is designed with elected members in mind and as such, many of its provisions do not sit well with the constitution of a pension board.

We also feel that there are benefits in ensuring a clear separation between the two bodies since they appear to be conceived with different functions in mind. The s.101 pension

“we welcome the flexibility these regulations bring to administering authorities”



The Local Government Pension Scheme (Amendment) Regulations 2014

committee will continue to exercise delegated powers on behalf of the administering authority and it will continue to receive advice and make decisions in line with those powers.

The pension board's role is to assist the administering authority in carrying out its functions and complying with legislation. It is not intended to be the primary decision making body nor second guess decisions made by the s.101 pension committee. Instead, its activities will be centred on ensuring that decisions have been made by the right people, after consideration of the appropriate factors and in accordance with policy and guidance.

We would, therefore, expect the Secretary of State to set a high bar for permitting joint bodies. Our preference would be rather than set a specific set of criteria that must be met in order to receive approval, the onus should instead be placed on authorities wishing to combine functions to demonstrate that their committee/board is fully compliant with both LGA1972 and PSPA2013 and meets the required standards of governance. Indeed, we would go as far to say that given most LGPS funds are material to the finances of their respective administering authority, councillors, answerable to their local electorate for council tax and services provided, will want to ensure that they retain the balance of power when it comes to decision making in relation to pension functions. This balance of power could be frustrated in a combined body if the requirement for equal employer and scheme member representation under PSPA2013 is to be met.

While the regulations mirror the PSPA2013 by allowing local authority administering authorities to set up a combined body, there is silence on what the position should be when the scheme manager is not a local authority. There are, of course, a small number of administering authorities where this is the case.

Does the absence of reference to non-local authorities mean that such bodies can merge their committees and boards or should the lack of a specific permission be read as meaning they cannot?

We would urge an amendment to make clear what the Department of Communities and Local Government's (DCLG's) position is on this point as the current wording is unsatisfactory. Our preference would be to bring such administering authorities onto an equal footing with the rest. Joint bodies should be permitted subject to approval by the Secretary of State, the criteria for which should be demonstration that there is no clash of legislation and that the required standards of governance could be met. We feel that these objectives might be more likely to be met by non-local authorities than by those whose committees must conform to LGA1972. This is simply for the practical reason that some of the difficulties caused by the prohibition of councillors as scheme member or employer representatives, potential issues around employees of the administering authority sitting on a s.101 committee and matters around such things as political representation are not an issue here.

Pension Board constitution

The regulations provide alternative versions of regulation 106(5), with respondents asked to choose between a version in which a pension board's constitution complies with LGA1972 and a version in which the administering authority has greater flexibility around voting rights, sub-committees, joint committees and the payment of expenses etc.

While there may appear to be benefits in adopting the LGA1972 provisions, given that they are already there and provide a ready-made framework, we do have concerns that this is not

the best approach. For the reasons touched on previously we do not believe s.101 type rules are compatible with the different roles of pension boards. In particular, the membership of pension boards is required to be broader than that of s.101 pension committees. While it may be possible to amend the s.101 option to include a series of exemptions from some of the restrictions of LGA1972, the more straightforward approach is, in our view, to go with option two enabling administering authorities to prescribe their own procedures and requirements.

However, if this is the case, there do need to be some safeguards to ensure that administering authorities cannot frustrate the intention of the regulations. As a minimum, the regulations must ensure that employer and scheme representatives are given equal and full voting rights.

We agree that the expenses of the pension board should be viewed as the cost of good administration.

Local pension boards: membership

It is for the administering authority to determine the membership of the local pension board but it must have an equal number of employer and scheme member representatives with relevant experience and the capacity to represent, with a total of at least 4, and must together form the majority of the membership. A member of a local authority may not be appointed as an employer or scheme member representative.

We largely agree with this section of the regulations, however, we do have concerns over the prohibition on elected members being appointed as scheme member or employer representatives. While it is desirable to ensure a degree of separation between the existing pension committee and the new pension board, we believe this aim can best be achieved by other means. Given that in most cases councils will be the biggest employers in a fund there is a strong case for allowing elected members to represent employers on the pension board. We do think it appropriate, however, to draft the regulations in such a way as to prevent any member of the corresponding s.101 pension committee, elected member or otherwise, from also sitting on the pension board.

We are also aware that the requirement for “capacity and experience” is proving unpopular in some quarters. Capacity can be read as meaning someone having available time and resource to carry out their pension board functions or it can be taken as meaning they have knowledge and skills or the capability to acquire these. We would have thought both definitions are welcome when considering membership of a local pension board.

In the absence of a definition the term “experience” is potentially more problematic. Clearly some experience of pension schemes would be useful for a pension board member but if the expectation is set too high it will make it impossible to fulfil. This is especially so when one considers that many people in the LGPS world who have some experience might be excluded by virtue of being elected members. Whether through guidance or the regulations, we would like to see the definition of experience and capacity worded in such a way as to strike the balance between ensuring that people of suitable ability are appointed without setting so onerous a threshold such that administering authorities are unable to populate their boards.

We also note that as currently worded there is a requirement under regulations 107(2)(b)(i) and (ii) for employer representatives and member representatives to have relevant experience and capacity but that the requirement does not extend to any other members of the board. This may be a drafting error but we would like to see the requirements (whatever they ultimately turn out to be) extended to all members of the pension board.

Local pension boards: conflict of interest

This section provides that members of local pension boards must not have a conflict of interest, the administering authority must satisfy themselves of this and a member of the local pension board must provide information reasonably requested to enable this.

Clearly it is essential that members of pension boards do not have conflicts of interest and it is seen that this is the case. Local authorities have experience of managing potential conflicts in such a way that they do not become actual conflicts and we would see the management of potential conflicts on the pension board being handled similarly. Some individuals, such as the s.151 officer for an administering authority are likely to have long term, persistent conflicts that might not be manageable making their position on a pension board untenable.

We take the phrase “to be appointed” in a broad sense meaning that an administering authority can consider the conflict of interest positions of all potential candidates at the start of the appointment process.

Local pension boards: guidance

An administering authority must have regard to guidance issued by the Secretary of State in relation to local pension boards.

In formulating such guidance, we understand that the DCLG will work closely with all relevant interested parties, including the Scheme Advisory Board and the Pensions Regulator. We suggest such guidance will probably need to include the following:

- Minimum number of local pension board meetings per year
- Determining employer and scheme member constituencies for representation on the local pension board
- Local pension board reporting requirements
- Local pension board whistle-blowing mechanisms
- Complying with the Pension Regulator’s code of practice given that this was not written for LGPS funds specifically e.g. good governance around funding and investment and what it actually means for local pension boards.

Our understanding is that the regulations are drafted in such a way as to allow the gaps to be filled by various pieces of guidance. While this is a perfectly sensible approach, it is important that guidance is consistent and appropriate. We understand that the Scheme Advisory Board’s Governance and Standards sub-committee will play a role in devising guidance, elements of which will go on to become the statutory Secretary of State Guidance. Further guidance produced by the sub-committee will serve to interpret the Pension Regulator’s code of practice for LGPS funds.

There is an important role for the Scheme Advisory Board and sub-committee in tying together these various strands of guidance and ensuring a consistent and workable approach. It is important though that this remains guidance and does not reduce flexibility for an administering authority to seek to maximise the value of its local pension board through, for example, setting terms of reference wider than those covered in PSPA2013.

Scheme advisory board: establishment

The Local Government Scheme Advisory Board is established and will be responsible for advising the Secretary of State on the desirability of making changes to the scheme, providing advice to administering authorities and local pension boards in relation to effective and efficient administration and management of the scheme and its pension funds, and may determine its own procedures including voting rights, the establishment of sub-committees, formation of joint committees and the payment of remuneration and expenses.

We welcome the fact that the regulations permit the Scheme Advisory Board to make recommendations to the Secretary of State on their own initiative rather than only upon request from the Secretary of State. It is right that the Board feels able to bring issues and recommendations to the DCLG as it sees fit, just as it is appropriate that the Secretary of State should consider all such recommendations and act upon them as he or she sees fit.

We broadly welcome the flexibility provided to the Board to establish its own procedures in respect of voting rights, sub-committees, joint committees and remuneration and expenses. However, the Board should not be able to use its power over voting rights to frustrate the desirability of equal representation between employer representatives and scheme member representatives (see below). One would also expect the Scheme Advisory Board to have the power to collate data from administering authorities needed to fulfil its duties.

Scheme Advisory Board: membership

The Chair of the Scheme Advisory Board is to be appointed by the Secretary of State, who can then appoint between a further 2 and 12 members with approval of the Secretary of State. This approval should take into account the desirability of there being equal representations of persons representing the interests of scheme employers and those of scheme members. The Chair may also appoint non-members to the sub-committees of the Board.

We note that the maximum number of 12 members of the Board is some way short of the current membership of the Shadow Advisory Board. While it may not be easy to initially pare the numbers we feel that a Board of around 12 members offers the right balance between representation and practical decision making.

Scheme Advisory Board: conflict of interest

Like local pension boards, members of the Scheme Advisory Board must not have a conflict of interest, the Secretary of State must satisfy themselves of this and a member of the Scheme Advisory Board must provide information reasonably requested to enable this.

Again, the phrase “to be appointed” can be taken to mean that anyone wanting to become a member of the Scheme Advisory Board should supply reasonably requested information in advance.

Scheme Advisory Board: funding

The Scheme Advisory Board will need to agree its budget with the Secretary of State and then determine each administering authority's share of this cost in proportion to the number of persons for which this administering authority is the appropriate administering authority.

We feel that a levy based on the total number of members i.e. actives, deferred and pensioners (including dependants in receipt of a pension) in each fund would be appropriate.

Comments on other connected policy issues

The consultation also asks for views on a number of policy areas.

Combined Section 101 committee and local pension board (Regulation 106(2)) and Establishment of local pension boards (Regulation 106(5))

Please see our response to the section Local pension boards: establishment.

Funding of the Scheme Advisory Board (Regulation 113)

Please see our response to the section Scheme Advisory Board: funding.

Joint pension boards

While we accept that the default position for pension boards is one local board per administering authority, we do not believe that joint pension boards serving more than one administering authority fund should be dismissed altogether. While it is clear that a single pension board serving a loose conglomeration of LGPS funds, who otherwise have little in common, may be less appropriate, there are cases where the joint approach may provide some advantages.

This is likely to be the case where LGPS funds already have a strong working relationship, perhaps through sharing their administration functions, and not just formal fund mergers. As local authorities continue to seek new ways of collaboration, these types of arrangements will become more common. Joint boards also provide an opportunity for a local pension board to have access to two or more different ways of working. There is something to be said for a local board getting a different view of things and being able to share best practice across administering authorities; indeed this might lead to the desirable feature of the levelling up of governance standards within the LGPS community. This might also make it easier for the Scheme Advisory Board to do its job where the alternative is dealing with 89 separate LGPS funds.

We would welcome an amendment to the regulations that permits administering authorities to share boards, but only if they first demonstrate to the Secretary of State's satisfaction the governance benefits of doing so. For example, if at least two employer and two scheme member representatives from each administering authority are on the joint pension board and the overall membership of that pension board is limited to say 17, this would prevent such a pension board from becoming unwieldy and allow it to be chaired by someone independent of the corresponding (up to 4) administering authorities.

We would add here that in our view the regulations already permit a single pension board in circumstances where a single administering authority has responsibility for a secondary closed, or sub-fund to the main fund (even where that secondary fund is served by a separate s.101 pension committee).

Annual general meetings, employer forums, etc.

We would be comfortable if the regulations specified a requirement for LGPS funds to hold an annual employer meeting or forum. We note that a number of LGPS funds already do this quite successfully with benefits to administration resulting from employer engagement.

We are less sure what is being suggested by considering the requirement for this to also be extended to “employees”. Since not all scheme members are employees nor are all employees scheme members it is hard to see what the aim is. Some large funds do carry out annual scheme member meetings at which active, deferred and pensioner members participate but these are resource intensive activities and not appropriate for all funds.

We do consider scheme member engagement to be important but rather than a blanket requirement for an annual meeting we think it would be preferable to consider the wider piece around member communications. Perhaps the Scheme Advisory Board or appropriate sub-committee could consider the issue of engaging members through good communications.

Public Sector Equality Duty

We have no problem with this duty being extended to the Scheme Advisory Board.

Knowledge and Understanding

We consider the issue of capability and experience in our response to the section headed “Local pension boards: membership”.

In terms of widening the requirement for Knowledge and Understanding to be extended to members of s.101 pension committees we would welcome such a move but it should be recognised that the knowledge and understanding requirement is different in nature for decision making than it is for oversight. For example, officers and advisers can ensure that decision makers are furnished with all appropriate information and advice prior to a decision being made whereas those conducting oversight would potentially require a deeper knowledge and understanding themselves.

Conclusion

We broadly welcome these regulations, and subject to some of the issues raised above, we welcome the flexibility these regulations bring to administering authorities when considering how they might get maximum value from the setting up of their local pension board.

If you have any questions on this response or any other connected matter, please contact your usual Hymans Robertson consultant or our Head of Governance at barry.mack@hymans.co.uk or our Head of Benefit Consultancy at ian.colvin@hymans.co.uk.