

Briefing

# Consulting on Fair Deal in the LGPS


## Strengthening pension protection

RISK | PENSIONS | INVESTMENT | INSURANCE

### Background

The old Fair Deal policy provided pension protection for those employees whose employment was compulsory transferred when a service or function was outsourced from the public sector and when it was subsequently retendered. It was non statutory guidance. In the LGPS in England and Wales, the Best Value Staff Transfers (Pensions) Direction 2007 and the Welsh Authorities Staff Transfers (Pensions) Direction 2012 Orders applied some of its provision to those employees formerly employed by Best Value and Welsh Police and Improvement Authorities, and Welsh Community Councils. They are legal requirements.

Following revision of the Fair Deal guidance in 2013, the new requirements were to be enshrined in the LGPS Regulations and the Pension Direction Orders revoked. In the meantime, a complex picture of pension protection has remained in place, with New Fair Deal applying to central government, the NHS and academies, while the Best Value and Welsh Police and Improvement Authorities, and Welsh Community Councils continue to be covered by the Direction Orders.



The Local Government Pension Scheme (LGPS) has been waiting since 2013 for New Fair Deal to be enshrined into its regulations. Following an earlier consultation in 2016 and subsequent rejection of the proposals within it, this new consultation proposes a different way in which to take this issue forward.

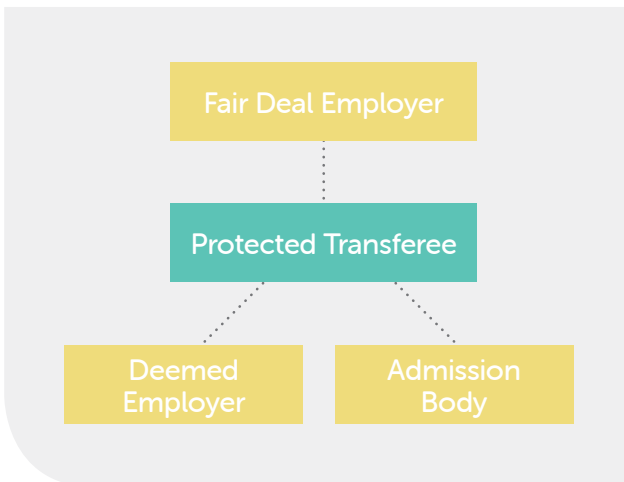
It also takes the opportunity to consult on the automatic transfer of assets and liabilities when an employer is taken over or merges with another. This briefing note looks at the high level proposals.

### The Fair Deal proposals

**Broadly Comparable pension schemes** - with a focus on retaining access to LGPS membership for those protected employees who are compulsorily transferred to another employer, in line with New Fair Deal, the consultation proposes that the use of broadly comparable schemes be no longer allowed. Those members already in such a scheme would return to the LGPS following the next retendering exercise and would be given the opportunity to transfer accrued service into the LGPS on a CETV basis.

While access to the LGPS is likely to be popular with transferring employees, the compulsory loss of active members is unlikely to be popular with the broadly comparable schemes who may find themselves being required to bring their funding up to date via a Section 75 valuation. With the provisions of the Pensions Protection Fund rather than a statutory guarantee to fall back on, their existing deferred and pensioner members may also be placed at greater risk of not receiving their full benefits in due course.

**Back in the LGPS** - the system will work around Fair Deal employers, protected transferees and deemed employers, although the ability to continue to use admission agreements will remain.



### Fair Deal employers

Fair Deal employers will be required to provide access to the LGPS for their protected transferees when outsourcing. They may use the deemed employer or admission body route.

Keeping to the principle of application to public sector employers, but extending it beyond the current coverage of the Direction Orders, Fair Deal employers will be all those employers participating in the LGPS except for further education, sixth form college and higher education corporations, and admission bodies, although they may choose to use the LGPS via the admission body route when outsourcing if they so choose.

### Protected transferees

Protected transferees will be those employees employed by a Fair Deal employer immediately before they were first compulsorily transferred to another employer if they are an active, or eligible to be an active, member of the LGPS.

Protection continues through subsequent transfers and sub-contracting and while they are wholly or mainly employed on the service or function transferred, as opposed to the current requirement to be employed in connection with it.

This is likely to reduce protection for some employees and will require consideration. In addition, the Fair Deal and new employer will be able to decide whether membership of the LGPS should be offered to new employees for the remainder of the contract while they are wholly or mainly employed on the service or function transferred.

### Deemed employers

In a key change to the LGPS, encouraging risk sharing and officially introducing a method of enabling pass-through arrangements, the existing deemed employer provisions will be extended to allow a fair deal employer letting a contract to choose to remain the employer of the protected transferees for pension purposes only i.e. to be the deemed employer. Removing the difficulties, uncertainties and often lengthy process of arranging admission agreements and termination valuations will, we believe, be welcomed by administering authorities, letting and contracting employers and scheme members alike.

Although the contracting employer, as the actual employer of the protected transferees, will retain responsibility for meeting costs associated with early payment of pension and award of additional pension, if the intention to use the deemed employer route is made clear in the tender process, as a pass-through arrangement, it should provide greater cost certainty for the bidding contractors. This should mean that they are less likely to add on a risk premium to their contract price, achieving better value for money, and we may also see an opening up of markets to a wider range of service providers. While we wait for guidance from the Scheme Advisory Board (SAB), however, it remains to be seen how easy it will be to agree the full risk sharing agreement in the service contract.

As the protected transferees actual employer will need to submit member related information and contributions, we do not believe that the introduction of deemed employers will solve the data flow issue for funds, or the ever increasing numbers of employers participating in the LGPS.

We believe that funds will need to retain each contracting employer on a separate identifiable employer code to keep track of members and on top of administration and cost issues, although the anticipated guidance from the SAB may throw further light on the matter.

Finally, the ability of academies to use this facility will be restricted to protect academies, and ultimately the Department for Education (DfE) via their guarantee, from pension risks. Provisions to include in service contracts to achieve this will be included in guidance to be issued by the DfE on the use of the deemed employer route and it remains to be seen just how useful this facility may be to academies.

## Admission bodies

In any event, we will not be seeing the end of admission agreements which will continue to be available and better suited to certain outsourcings. Continuing the Ministry of Housing, Communities and Local Government's (MHCLG) desire to see risk sharing considered, the consultation includes provision that risk sharing may be included in the admission agreement, subject to the Scheme employer having regard to any SAB advice (guidance) issued. This is expected to detail which provisions may be included.

## Deemed employer or admission body route?

Where the new employer is a scheduled body already obliged to offer access to the LGPS or who designates that access will be provided, no decision will be required. However, for the remainder, it will be interesting to see how many Fair Deal employers choose the deemed employer route and how many prefer to stay with the admission body route.

Although the proposed regulations require the Fair Deal employer to specify in the service contract the route chosen, to avoid the highly likely scenario that that does not happen, it would seem sensible for the regulations to include a fall-back position. A deemed employer default could, in due course, sufficiently exercise the minds of those tendering work to discuss pensions at an early stage.

We will be pleased to help administering authorities with discussions with their employers on the pros and cons of using either route in different situations from the pensions funding and benefits administration perspectives.

## The transferring assets and liabilities proposals

Recent years have seen an increasing number of employers in the LGPS being taken over or merging, with a variety of methods of dealing with the existing and future liabilities applied. Without intervention, deficits can crystallise and require immediate payment. Solutions have been found to avoid this via use of legal agreements to pass on deficits, specific changes to the LGPS regulations for that employer, and Secretary of State Direction Orders.

All these solutions can be time consuming and to give greater certainty to all stakeholders about the responsibility for pensions liabilities, the automatic transfer of assets and liabilities to the successor body and combining with their own is proposed, including where this is in a different LGPS fund. Guidance is to be issued by MHCLG, particularly on the terms to be used. As a result, the successor body will become the Scheme employer for both existing and former employees of the exiting body, and a termination deficit or credit payment will be avoided.

As the draft regulations stand, the influence that administering authorities currently have over the liabilities they wish to accept into their fund, strength of covenant of employers and the ability to collect deficits at the point they feel appropriate, will be reduced. Administering authorities may wish to consider these proposals carefully and discuss them with their actuary before submitting their consultation response.

## Guidance, guidance, guidance

With guidance being the new way forward in the LGPS, as noted above, the draft regulations mention three sets, one each to be produced by the SAB, the DfE and the MHCLG. These will therefore be a mix of statutory and non-statutory guidance. Views are sought on what should be included in the SABs and the MHCLGs. Until all three appear, the full understanding of how the new provisions will work will not be known and whether they will address existing concerns or introduce further ones. However, the consultation is an opportunity to suggest the controls, checks and balances that could be included and whether guidance should be statutory or not.

## Next Steps - action required

The consultation closes on Thursday 4 April 2019. Barnett Waddingham is preparing its response which will explore these issues in more detail and will be pleased to discuss this further with its clients.

Please contact your Barnett Waddingham consultant if you would like to discuss any of the above topics in more detail. Alternatively get in touch with Annemarie Allen via the following:

✉ [annemarie.allen@barnett-waddingham.co.uk](mailto:annemarie.allen@barnett-waddingham.co.uk) ☎ 0207 77 63 873

[www.barnett-waddingham.co.uk](http://www.barnett-waddingham.co.uk)

Barnett Waddingham LLP is a body corporate with members to whom we refer as "partners". A list of members can be inspected at the registered office. Barnett Waddingham LLP (OC307678), BW SIPP LLP (OC322417), and Barnett Waddingham Actuaries and Consultants Limited (06498431) are registered in England and Wales with their registered office at 2 London Wall Place, London, EC2Y 5AU. Barnett Waddingham LLP is authorised and regulated by the Financial Conduct Authority and is licensed by the Institute and Faculty of Actuaries for a range of investment business activities. BW SIPP LLP is authorised and regulated by the Financial Conduct Authority. Barnett Waddingham Actuaries and Consultants Limited is licensed by the Institute and Faculty of Actuaries in respect of a range of investment business activities.