

30 September 2015

CIPFA Scottish Pension Workshop Legal Developments in Public Sector Pensions

David Knox, Pension Law Partner, MMS

David Young, Financial Services Partner, MMS



Look Back Year to Aug 15

- Law enacted in year to 31 Aug 15: see Appendix 1

& Forward Year to Aug 16

- Boards & Governance (Legal Aspects): App 2
- Admitted Bodies: App 3
- Conflict, ERI & SI Bonds: App 4
- LTIFs, CIFs & Fund Structure Trends: App 5
- Cross-Netting & Investment Regs Issues: App 6



Look Forward: Topic 1

Boards & Governance - Legal Aspects (1)

- **Scheme Advisory Board Main Functions:** *“to provide advice to:*
 - (a) The Scottish Ministers, at SRs’ request, on desirability of changes to Scheme;*
 - (b) The scheme managers or the Scheme’s pension boards in relation to the effective and efficient administration and management of:*
 - (i) the Scheme and any statutory pension scheme connected with it; and*
 - (ii) any pension fund of the Scheme and any connected scheme”.*
- **SAB Constitution:** 7 scheme employer (SE) reps + 7 relevant trade union (RTU) reps.
- **SAB Conflict of Interest:** SAB members to satisfy SRs they are free of Cols.
- **Pension Boards’ Constitution:** minimum of 4 SE reps + 4 RTU reps, 2 joint secretaries, and admin arrangements as per SR published model for adopting / tailoring.
- **Pension Boards’ Responsibility:** to assist each scheme manager with compliance with:
 - (i) 2014 Regs and other governance & admin legislation; and
 - (ii) requirements imposed on Scheme by Pensions Regulator.

Look Forward: Topic 1

Boards & Governance - Legal Aspects (2)

- **Pension Boards’ Meetings:**
 - (a) *“at the same place and time as the Pension Committee of the scheme manager to consider the same agenda as the Committee; but*
 - (b) *The PB may meet separately from the PC with the agreement of the PC”.*
- **Pension Boards’ Remit:** to *“consider any matter concerning pensions it deems relevant to the activities of the relevant fund...”* so it may:
 - (i) monitor the investments of the relevant fund, its investment principles and strategy and any guidance to which it is subject; and
 - (ii) may seek a report from the scheme manager on any aspect.
- **PB/PC Differences:** if at least half of PB members disagree with a PC decision then:
 - (i) PB may request PC to review that decision on up to 4 grounds;
 - (ii) Any disagreement after review to be published as joint report;
 - (iii) SAB may consider, take a view... and *“provide advice to the scheme manager or the PB in relation to the matter”.*
- **Oversight / Co-ordination:** SPPA to liaise with SAB and SG Legal Dept on LGPS Regs.

Look Forward: Topic 2

Admitted Bodies - Legal Aspects & Trends (1)

- **AB status in Scotland:** main points now in 2014 LGPS Regs (SSI 2014/164):
 - Admission Agreements to comply with requirements of Schedule 2;
 - 5 permitted types of AB provider, doing public service;
 - Scheme employer to be party to Admission Agreement / guarantee payment in some cases;
 - Risk assessment needed of transferee AB contractors v. premature termination risk;
 - Indemnity / Bond needed where risk assessment shows need;
 - Guarantee from parent / funder / Scottish Govt where indemnity / bond “*not desirable*”;
 - Duty on AB to notify take-over / “*material change to body’s business or constitution*”;
 - Right for admin authority to terminate on insolvency, material breach or non-payment;
 - All Admission Agreements to be sent to SG and made “*available for public inspection*”;
- **Admission Agreement Funds:** admin authorities that make an Admission Agreement:
 - May establish a further fund as well as main fund but must notify Scottish Ministers (R52);
 - Must obtain transfers in and annual rates & adjustments certificates from actuary (R52);
 - Must obtain valuations on exit & other “special circs” and recover deficit (R62).

Look Forward: Topic 2

Admitted Bodies - Legal Aspects & Trends (2)

- **Issues for ABs:** Payments from public sector commissioners to NFP / OFPG ABs failing to meet LGPS contribution demands, forcing ABs to consider default / merger / wind-up.
- **Options for ABs:** these are stark for many voluntary sector providers:
 - Reduce LGPS employees & move to 2-tier workforce where Fair Deal / contract allows;
 - obtain extra funds from users / providers;
 - merge with stronger provider that can cross-subsidise services for LAs;
 - demand extra funds from commissioners, using exit debt default as lever v. against LA;
 - end provision & wind-up insolvent, with wrongful trading / reputational risk for trustees.
- **UK-wide solutions / developments:** gradual but increasing use of:
 - “payment by results” procurement of social & ex-offender services by LAs & MoJ;
 - CIPFA-analysed contracts such as Essex “Edge of Care” contracts.

Look Forward: Topic 3

Conflict of Interest, ERI & SI Bonds

- **LA's "Core" Interest as LA:** to minimise balance of pension costs billed to Council taxpayers;
- **LA's Interest as Admin Authority:** to manage LGPS funds in accordance with 2014 LGPS;
- **LA's Interest as Statutory Provider:** to provide / procure services complying with statutory requirements (e.g. youth care, housing) at optimum spending levels;
- **Reconciling these Interests:** to do so:
 - Can admin auth investment criteria allow investing at modest rates of return?
 - Can such rates of return be adjusted to reflect savings LAs expect as statutory providers?
 - If so, could CIPFA value (&/or endorse) the adjustment?
 - If so, would investment by an admin authority in its own local area be an illegal employer related investment (ERI) - in effect if not in law?
 - Even if not an illegal ERI, might it be better still only to acquire such investments at some distance from an authority's own local area, or via a pooled LGPS or other vehicle?
 - But then could that distance / practical protection be undermined by reciprocal investments between separated admin authorities?

Look Forward: Topic 4

ELTIFs & Fund Structure Trends (1)

- A range of new (or relatively new) fund structures are available:
 - EuVECAs
 - EuSEFs
 - Authorised Contractual Funds
 - ELTIFs

Look Forward: Topic 4 ELTIFs & Fund Structure Trends (2)

- ELTIFs may be the most interesting:
 - Focus on long term investment (“patient capital”)
 - Aims to provide cross-border vehicle

Look Forward: Topic 4 ELTIFs & Fund Structure Trends (3)

- Must have specific characteristics
 - Defined asset types
 - Closed-ended structures
 - AIFM required
 - Leverage and use of derivatives restricted

Look Forward: Topic 4

ELTIFs & Fund Structure Trends (4)

- Thames Tideway Tunnel:
 - A new model for funding economic infrastructure?
 - How was this structured?
 - What were benefits for long term investors?

Look Forward: Topic 5

Cross-Netting & 2010 Regs (1)

- Focus on the wording of the Local Government Pension Scheme (Management and Investment of Funds) (Scotland) Regulations 2010:
 - Potential impact of the ability of LGPS to operate cash sweeps across branch accounts
 - Not the intention of the 2010 Regulations to create this problem

Look Forward: Topic 5 Cross-Netting & 2010 Regs (2)

- Regulation 6(1) provides: “*On or after 1st April 2011, an administering authority must hold in **a separate account** kept by it with a deposit taker in accordance with this regulation-*
 - (a) all monies held by the authority on that date; and*
 - (b) all monies received by it on or after that date,**for the purpose of its pension fund...”*

Look Forward: Topic 5

Cross-Netting & 2010 Regs (3)

- Regulation 6(3) is intended to prevent set-off between pension fund and other administering authority bank accounts. It provides:
*“The deposit taker (i.e. RBS) must not, in relation to **the account referred to in paragraph (1)** (i.e. the LPF account), exercise any right of set-off it may have in respect of any other account held by the administering authority (i.e. CEC) or any party connected to the administering authority.”.*

Look Forward: Topic 5

Cross-Netting & 2010 Regs (4)

- A strict interpretation of Regulation 6(3) would suggest that RBS must not set-off liabilities of one LGPS bank account against another LGPS bank account also held by CEC.
- In this way, the 2010 Regulations do not anticipate pension funds requiring to operate more than one bank account, which is an unintended consequence of the Regulations.

Appendices

Look back (Law enacted in year to 31 Aug 15)

Law	Summary	Today's Topic
Pensions Act 2014	<ul style="list-style-type: none"> • Single-tier State pension: replaces existing OAP + additional pension for those reaching SPA on or after 6 April 2016. • Contracting-out: abolished for COSRs from 6 April 2016. • Incentives: Power taken to ban practice of providing incentives to encourage individuals to transfer CETV from DB scheme. • State Pension Age: SPA increase from 66 to 67 brought forward by 8 years, process adopted for more periodic reviews of SPA. 	
Taxation of Pensions Act 2014	<ul style="list-style-type: none"> • DC pensions: major new flexibility regime accommodated. • Death benefits: access changed & new test against lifetime allowance. 	
Finance Act 2014	<ul style="list-style-type: none"> • DC Pension Flexibility: Drawdown, Lump Sum etc. Relaxations. • Pension Liberation: Major counter-measures. 	
Finance Act 2015	<ul style="list-style-type: none"> • DC Pension Flexibility: Annuities Relaxations etc. 	
Pension Schemes Act 2015	<ul style="list-style-type: none"> • 3 Scheme Types (DB/DA/DC): Now defines shared risk (or 'defined ambition') scheme, to encourage greater risk sharing employer/member. • Collective Benefits: Now defined, to enable risk pooling among members. • Guidance & Independent Advice Regime: Triggered by DC flexi-access, but relating to both public service and private sector pension schemes. • Same Sex Marriage: Extension to Scotland of certain provisions. 	

Any
questions?



Very Smart People Hire Smart Lawyers

www.mms.co.uk