**BSA – The Business Services Association**

**Response to the Ministry of Housing, Communities and Local Government**

**‘Local Government Pension Scheme – Amendments to the statutory underpin consultation’**

**October 2020**

**Background**

The Business Services Association – the BSA - brings together those who are interested in delivering efficient, flexible and cost-effective service and infrastructure projects across the private and public sectors. A list of our members is attached as an Annex. They include large and small businesses, charities and social enterprises.

The sector includes ICT, facilities management, construction and infrastructure provision and other project delivery. 70 per cent of services are provided business-to-business and 30 per cent for the public sector. The sector employs 3.3 million people across the UK, accounting for around 1 in 10 jobs. As such it is an important driver of inclusive economic growth across every region and community.

The BSA represents many employers who participate in the Local Government Pension Scheme (the “LGPS”). Almost all BSA members who participate do so as tier 4 members, or admission bodies.

Our response is based on the concerns of those employers. With this in mind, we have only included responses to those questions on which we offer comment or those that directly impact upon our members.

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| **No.** | **Question** | **BSA response** |
| **1** | **Do you agree with our proposal to remove the discrimination found in the McCloud and Sargeant cases by extending the underpin to younger scheme members?** | It is difficult to rectify discriminatory practices by “levelling down” to the inferior position without some form of objective justification.The BSA supports fairness in the workplace and cannot see that, in this case, cost would provide an objectively justifiable reason for removing the underpin from those members who previously benefitted from it.Consequently, while we agree with the approach being proposed, we would like to see some form of protection (as set out in our responses to questions 5, 26 and 29 below). |
| **2** | **Do you agree that the underpin period should end in March 2022?** | This proposal is consistent with the original underpin regime so we agree that the underpin period should end on 31 March 2022. |
| **3** | **Do you agree that the revised regulations should apply retrospectively to 1st April 2014?** | The principle of “minimum interference” has been recognised in pension cases in the courts, most recently in the *Lloyds Banking Group Pension Trustees v Lloyds Bank [2018] EWHC 2839 )Ch)*.Consequently, we agree with the proposal to backdate the revised regulations to 1 April 2014 in line with the provisions of the original underpin. |
| **4** | **Do the draft regulations implement the revised underpin which we describe in this paper?** | Generally, the draft regulations appear to implement the underpin in the manner described. |
| **5** | **Do the draft regulations provide for a framework of protection which would work effectively for members, employers and administrators?** | We do not comment on whether the draft regulations provide protection for members and for administrators. However, in our view, the draft regulations do not provide adequate protection for all employers.The additional costs which contractors who were required to become admission bodies under contracts with public sector contracting authorities will incur by the rectification of a position which was not of their making are likely to be material. Contractors are incurring these costs as a consequence, in many cases, of contractual obligations being imposed on them by public sector contracting authorities as a requirement under the Local Government Act 2003 whereby bidding for the contract without becoming an admission body would have been a non-compliant bid.This imposition of additional costs, which were never disclosed by the public authority at the time of entering into the contract, is contrary to the public policy of obtaining the best value from contractors and, to maintain the value and protect contractors from a position which is not of their making. In some cases, the contracts may have protections for contractors – whether by capped or fixed contribution rates, passthrough or, less commonly, indemnities or guarantees from the contracting authority – but in many cases, the additional costs will impact materially on the viability of the contracts for those contractors who entered into the contract with the public sector contracting authority in good faith.Our view is that the reforms should be accompanied by some form of protection for affected contractors. An example would be the inclusion of statutory pass-through in the new regulations or a Ministerial Direction for pass-through to ensure that these additional, material costs fall where they should lie – with the contracting public authorities.Such pass-through arrangements could be total or partial aimed at the additional costs imposed by compliance with McCloud or Sargeant (although this would impose an additional burden on administrators to identify these costs) and be achieved by directed contractual variation or statutory overrides. |
| **6** | **Do you have other comments on technical matters related to the draft regulations?** | As set out above, our view is that the Regulations should provide protection for contractors who have entered into arrangements with contracting public authorities without disclosure of the additional costs which could place such contractors in financial jeopardy. Those additional costs are likely to be material for contractors potentially making existing contracts and tendering for new contracts uneconomic which in turn would have wider financial implications for contractors. |
| **7** | **Do you agree that members should not need to have an immediate entitlement to a pension at the date they leave the scheme for underpin protection to apply?** | As the MHCLG point out in the consultation, the preservation laws require that short service benefits should not be different to long service benefits. Consequently, where members have preserved short service benefits then, in order to ensure that the entitlement is not lower than they would have had with the underpin on retirement, the underpin should be applied to those preserved benefits.We have not considered the matter in detail but question whether this raises any “uniform accrual” issues for any members with residual “rule of 85” entitlements. |
| **9** | **Do you agree that members should meet the underpin qualifying criteria in a single scheme membership for underpin protection to apply?** | In theory, the practice is sensible. However, in practice, the proposal could lead to certain members being disadvantaged – for example certain deferred members for whom current addresses are not available. |
| **10** | **Do you agree with our proposal that certain active and deferred members should have an additional 12 month period to decide to aggregate previous LGPS benefits as a consequence of the proposed changes?** | We agree with the principle of certain members being given an extra 12 month period to aggregate.However, in order to protect vulnerable or untraceable members, we suggest that the protection has caveats whereby it can be extended in certain exceptional circumstances. |
| **11** | **Do you consider that the proposals outlined in paragraphs 50 to 52 would have ‘significant adverse effects’ in relation to the pension payable to or in respect of affected members, as described in section 23 of the Public Service Pensions Act 2013?** | The key to the process is, as set out in the consultation, effective member communications although we would encourage the adoption of protections in exceptional circumstances – perhaps at the discretion of the Secretary of State – to ensure that the rights of vulnerable members or those members who, for legitimate reasons, are left out of the communications exercise are protected. |
| **18** | **Do you have any comments on the potential issue identified in paragraph 110?** | The annual allowance is a very real issue in the public sector following the reduction in the allowance and the implementation of taper relief.In many cases, members will not have issues with the annual allowance although high earners who seek flexible retirement may have issues if they seek to provide pension elsewhere during the flexible retirement period.The issue is likely to be most pertinent for those who have an underpin and who, as identified by MHCLG, receive large promotional increases over time. For those caught in the taper relief bandings, the marginal rates of tax payable can be penal and we would encourage some form of additional relief to be available to these members similar to NHS Pension Scheme members.For individual members who may have taken some protections against the Lifetime Allowance charge, the approach could be prejudicing those protections and, again, we would encourage some form of additional protections for these individuals. |
| **26** | **Are there material ways in which the proposals could be simplified to ease the impacts on employers, software systems and scheme administrators?** | As set out earlier, our view is that some form of statutory pass-through or Ministerially directed pass-through should be incorporated to protect those admission bodies who do not have the relevant contractual protections in place. |
| **29** | **Do you have any comments regarding the potential costs of McCloud remedy, and steps that should be taken to prevent increased costs being passed to local taxpayers?** | As set out earlier, we have concerns on the additional material costs which will, under the current proposals, be imposed on contractors contracting with relevant contracting public authorities.The additional costs which contractors will incur by the rectification of a position which was not of their making are likely to be material. Contractors are incurring these costs as a consequence, in many cases, of contractual obligations being imposed on them by public sector contracting authorities.In some cases, the contracts may have protections for contractors – whether by capped contribution rates or passthrough – but in many cases, the additional costs will impact materially on the viability of the contracts for those contractors who entered into the contract with the public sector contracting authority in good faith.This imposition of additional costs is contrary to the public policy of obtaining the best value from contractors and to maintain the value and protect contractors from a position which is not of their making, our view is that the reforms should be accompanied by some form of statutory pass-through to ensure that these additional,, material costs fall where they should lie – with the contracting public authority.Failure to obtain best value from their contracts will have a direct impact on local taxpayers through the public contracting authorities’ failures to protect those local taxpayers by obtaining the best value contracts in terms of delivery as well as cost. |

**Annex 1.**

**List of BSA Members, October 2020**

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