LGE
Local Government Employers

Local Government
House, Smith Square,
London SW1P 3HZ

Tel 020 7187 7373
Fax 020 7664 3030

pay, pensions and
employment solutions

Local Government Pensions Committee
Secretary, Terry Edwards

LGPC Bulletin 50 – May 2008

As administering authorities will be well aware, the new look LGPS came into force in England and Wales on 1st April 2008. The Local Government Pension Scheme (Amendment) Regulations 2008 [SI 2008/1083] came into force on 7th May 2008 but have retrospective effect from 1st April 2008. They amend:

- the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 [SI 2007/1166],
- the Local Government Pension Scheme (Transitional Provisions) Regulations 2008 [SI 2008/238], and
- the Local Government Pension Scheme (Administration) Regulations 2008 [SI 2008/239].

The LGPC Secretariat has compiled a consolidated version of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, incorporating the amendments made by SI 2008/1083. The consolidated version is attached as Annex A and includes initial comments on various provisions of the consolidated regulations. These initial comments have been sent to CLG for their consideration and the Secretariat will, as appropriate, update and redistribute Annex A to administering authorities in the light of any responses received from CLG. Views from administering authorities would also be welcomed.

The Secretariat is currently working on producing similar documents in relation to:
- the Local Government Pension Scheme (Transitional Provisions) Regulations 2008,
- the Local Government Pension Scheme (Administration) Regulations 2008, and
- the guidance issued by GAD

and these, including details on such matters as "how membership counts", will be issued as soon as possible.

The Secretariat has sent to CLG copies of draft ill health certificates for:
- current leavers, and
- deferred beneficiaries seeking early payment of their benefits on the grounds of permanent ill health who left
    - pre 1st April 1998
    - between 1st April 1998 and 31st March 2008
    - on or after 1st April 2008.

Hopefully CLG will include these (or a variation of them) with the ill health guidance they are due to issue.

Email info@lge.gov.uk
www.lge.gov.uk
Managing Director Jan Parkinson

STATUTORY INSTRUMENTS

2007 No. 1166

PENSIONS, ENGLAND AND WALES

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

Made - - - -	*3rd April 2007*
Laid before Parliament	*4th April 2007*
Coming into force - -	*1st April 2008*

These Regulations are made in exercise of the powers conferred by sections 7 and 12 of the Superannuation Act 1972(**a**).

In accordance with section 7(5) of that Act, the Secretary of State has consulted (a) such associations of local authorities as appeared to her to be concerned; (b) the local authorities with whom consultation appeared to her to be desirable; and (c) such representatives of other persons likely to be affected by the Regulations as appeared to her to be appropriate.

The Secretary of State makes the following Regulations:

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007.

(2) These Regulations apply in relation to England and Wales(**b**).

(3) These Regulations shall come into force on 1st April 2008.

(4) In these Regulations—

"the 1997 Regulations" means the Local Government Pension Scheme Regulations 1997(**c**);

"the Administration Regulations" means the Local Government Pension Scheme (Administration) Regulations 2008([1]); **[inserted by SI 2008/1083]**

`"the 1997 Scheme" means the occupational pension scheme constituted by the 1997 Regulations;
[Comment: there is a superfluous ' at the beginning of this entry]

"administering authority" has the meaning ascribed by Schedule 1 to the Administration Regulations; **[inserted by SI 2008/1083]**

"appropriate administering authority" means the body maintaining the appropriate fund;

"appropriate fund", in relation to a member, means the fund into which he pays contributions and from which he receives benefits;

([1]) S.I. 2008/239.
(**a**) 1972 c. 11.
(**b**) The Secretary of State's functions under section 7 of the Superannuation Act 1972 in so far as they were exercisable in relation to Scotland were devolved to Scottish Ministers by section 63 of the Scotland Act 1998 (1998 c. 46) and article 2 of, and Schedule 1 to, the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999 (S.I. 1999/1750).
(**c**) S.I. 1997/1612.

"eligible child" has the meaning given by regulation 26;

"employing authority" means a body employing an employee who is eligible to be a member;

"financial year" means the year ending 31st March;

"nominated cohabiting partner" has the meaning given by regulation 25;

"part-time employee" means an employee whose contract of employment provides—
(a) that he is such an employee for the Scheme, or
(b) who is neither a whole-time employee nor a variable-time employee;

"the Scheme" means the Local Government Pension Scheme 2008 constituted by these Regulations;
[Comment: It is not clear why "the Scheme" is defined differently here to the definition of "the Scheme" in the Administration Regulations and the Transitional Provisions Regulations. As "the Scheme" when referred to in the Benefits Regulations also at times seems to encompass elements of the Administration Regulations, it would have been better (for the sake of consistency) to define "the Scheme" in the Benefits Regulations as meaning "the occupational pension scheme constituted by these Regulations, the Administration Regulations and the Transitional Regulations. In this way, "the Scheme" would be defined in the same way in the Benefits Regulations, the Administration Regulations and the Transitional Provisions Regulations]

"variable-time employee" means an employee whose contract of employment provides that he is such an employee for the Scheme and—
(a) whose pay is calculated by reference to his duties (rather than necessarily by reference to the number of hours he has worked), or
(b) whose duties only have to be performed on an occasional basis; and

"whole-time employee" means an employee whose contract of employment provides—
(a) that he is such an employee for the Scheme, or
(b) that his contractual hours are not less than the number of contractual hours for a person employed in that employment on a whole-time basis.
[Comment: The commentary from CLG says, in relation to term-time employees:

"Where authorities are calculating pensions as follows;-

Works 37 hours per week for 44 weeks per year
Earns £12,692 p.a. (£15,000 x 44/52)
Contributions based on pay of £12,692
Membership counts at full length
Final pay for benefits calculation purposes £12,962 (actual earnings);

they should continue to do so.

Where the calculation is
Currently
Works 37 hours per week for 44 weeks per year
Earns £12,692 p.a. (£15,000 x 44/52)
Contributions based on pay of £12,692
Membership reduced by 44/52 (84.62%)
Final pay for benefits calculation purposes £15,000
Under 2008 LGPS
Pension contributions will be based on the band applicable to £12,692 (as now)
Membership and final pay will be the same
NO CHANGE

The opportunity could be taken, if employing authorities and/or administering authorities wish, to split the calculation in terms of pre and post 2008 to avoid any windfalls, and ensure consistency of approach from 1 April 2008, but this is no obligatory. It would however mean that a common approach to dealing with

the issue of whole timers working less than the normal 36/37 hour week would be adopted across all funds."

It is difficult to see how the definition of "whole-time employee" would support the second example above i.e. where the membership is pro-rated by 44/52 and final pay is grossed up by 52/44. The only way such an approach could be justified within the regulations is if the employee's contract defined them as a "part-time employee". However, this would cause problems as it would run counter to regulation 3(6). Thus, if all administering authorities follow the wording of the Regulations, those who had historically pro-rated term-time membership would cease to pro-rate it from 1st April 2008 onwards. Service prior to 1st April 2008 which had been pro-rated would remain pro-rated. Upon ceasing, the benefits based on membership to 31st March 2008 would be calculated on the pro-rated membership and grossed-up final pay, and the benefits calculated on membership from 1st April 2008 would be based on non pro-rated membership and non grossed-up pay. As the CLG commentary says, this would "*mean that a common approach to dealing with the issue of whole timers working less than the normal 36/37 hour week would be adopted across all funds."* Whether or not one agrees with the non pro-ration of term-timers (given that non pro-ration means that those members who move from a term-time post to a 52 weeks of the year post gain by reason of the increase in their whole time pay, and those who move from a 52 weeks of the year post to a term time post lose by reason of the reduction in their whole-time pay – unless they retain separate benefits) it would make sense for all Funds to operate in the same way. This should not be optional as, surely, the regulations are *"mandatory"* and Funds should apply them.]

Active members

~~**2.**—(1) An employee of a body listed in—~~
~~(a) Chapter 1 of Part 2 of;~~
~~(b) Chapter 1 of Part 5 of; or~~
~~(c) Schedule 2 to~~
~~the 1997 Regulations is an active member of the Scheme.~~

~~(2) But a person is not an active member unless he is employed under a contract of employment of more than three months' duration.~~

~~(3) An active member of the 1997 Scheme is an active member of the Scheme for as long as he continues in Local Government Pension Scheme employment.~~

[Reg 2 substituted by SI 2008/1083]

2.—(1) The term "active member" in relation to the Scheme is to be construed in accordance with regulation 4(1) of, and Schedule 1 to, the Administration Regulations.

(2) An active member of the 1997 Scheme is an active member of the Scheme for as long as he continues to be in employment which makes him eligible to be such in accordance with Part 2 of the Administration Regulations.

[Comments:

An employee who opts out of membership of the Scheme under regulation 14 of the Administration Regulations is, technically, still "in employment which makes him eligible to be" an active member of the Scheme. The act of opting out does not stop the person from being eligible for membership. Thus, a strict reading of regulation 2(2) would suggest that an active member of the 1997 Scheme has to remain an active member until such time as he / she ceases employment or attains age 75 i.e. the person cannot opt out of membership. This, of course, is in direct contradiction of regulation 14 of the Administration Regulations. To overcome this anomaly, regulation 2(2) ought to start with the words "Subject to regulation 14 of the Administration Regulations"

Despite what regulation 2(2) says, a Councillor member who is an active member of the 1997 Scheme is **not** to be an active member of the 2008 Scheme – see regulation 13 of the Transitional Provisions Regulations. Thus, in regulation 2(2) the words "An active member of the 1997 Scheme is an active member of the Scheme" should be amended to "An active member of the 1997 Scheme, other than a Councillor member, is an active member of the Scheme"]

(3) But a person is not an active member unless he is employed under a contract of employment for at least three months.
[Comments:

This regulation has been amended to specify that to be eligible for membership of the LGPS an employee must have a contract of employment that is for at least 3 months (i.e. be for 3 months or more). Previously, the regulation had said that the contract had to be for more than 3 months. Why has this slight change been made? Well, the rules governing Stakeholder pensions provide that an employer does not have to designate a stakeholder scheme for staff not eligible to join the LGPS if they are employed for less than 3 months. Thus, prior to the amendment, employees employed for exactly 3 months would have been excluded from the LGPS but would not have been covered by the stakeholder exemption and the employer would have had to designate a stakeholder scheme for them. The amendment ensures this situation is avoided.

It should be noted that in cases where an employee who is taken on with a contract for less than 3 months has that contract extended, such that the total period will be 3 months or more, the employee should, from the date of extension:

- be auto enrolled into the scheme (if otherwise eligible) if they are employed by a body listed in Part 1 of Schedule 2 to the Administration Regulations, or
- be auto enrolled into the scheme (if otherwise eligible) if they are designated by a body listed in Part 2 of Schedule 2 to the Administration Regulations as being eligible for membership, or
- be given the choice to opt into the Scheme (if otherwise eligible) if they are designated by an admitted body as being eligible for membership

and, if employed by a body listed in Part 1 of Schedule 2 to the Administration Regulations (not by Part 2 of Schedule 2 body or an admitted body), the employee should be given the option to backdate contributions (and membership) to the beginning of the original contract (as per regulation 13(5) of the Administration Regulations).

Employers will need to identify whether, in the case of a new employee, the contract is for at least three months. Despite what is intimated in the CLG commentary, it will be important, in the case of a new casual employee, to determine whether there is mutuality of obligation in employment law i.e. there is a contract of employment between the parties under which the employer is obligated to offer work and the employee is obligated to accept work when it is offered – see the House of Lords decision in the case of Carmichael and Others v National Power PLC which was appended to LGPC Circular 87 of June 2000 (see http://www.lge.gov.uk/lge/aio/56226). If there is mutuality of obligation, and the mutuality of obligation contract is open-ended (or is for at least 3 months), that person:

- will be auto enrolled into the scheme (if otherwise eligible) if they are employed by a body listed in Part 1 of Schedule 2 to the Administration Regulations, or
- will be auto enrolled into the scheme (if otherwise eligible) if they are designated by a body listed in Part 2 of Schedule 2 to the Administration Regulations as being eligible for membership, or
- will be able to opt into the Scheme (if otherwise eligible) if they are designated by an admitted body as being eligible for membership

If, however, the nature of the relationship between the employer and a casual worker means there is no mutuality of obligation (i.e. the employer is not obligated to offer work or, where work is offered, the person is not obligated to accept it), the person would only be eligible to join the Scheme if they were offered and accepted work continuously for a 3 month period.

It should also be noted that employees who have opted out can, subject to meeting the normal eligibility criteria, rejoin the Scheme. The old restrictions on the number of times a person could opt out and back in again have been removed. Furthermore, it has been clarified that an employee with multiple jobs can opt out of one, some or all of their jobs.

One final comment on regulation 2(3). In the recent ECJ case of Impact v Minister for Agriculture and Food (Ireland) [Case C-268/06] it was held that the non-discrimination rules in the Fixed Term Workers Directive 99/70/EC have direct effect, meaning they can be enforced directly irrespective of national laws, and that the principle of non discrimination against fixed term workers extends to pension entitlements. As a response to Directive 99/70/EC, Parliament passed SI 2002/2034, the Fixed-Term Employees (Prevention of

Less Favourable Treatment) Regulations 2002. This SI gives fixed-term contract employees the right to be not treated less favourably than a, "comparable permanent employee". Under paragraph 3(3)(b), employers can treat fixed-term contract employees less favourably if the less favourable treatment can be "justified on objective grounds". There is guidance on this on the BERR website at http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page18475.html and the section on pensions for fixed term workers says: "There may be occasions where an employer can justifiably treat a fixed-term employee less favourably than a similar permanent employee. For example, where an employee is on a fixed-term contract that is shorter than the vesting period for a pension scheme, the employer may be able to justify excluding them from that scheme if including them has a disproportionate cost and/ or is of no benefit to them. The employer will not have to provide alternative compensation." The Secretariat assumes that CLG are using an objective justification reason to keep those with fixed term contracts of less than 3 months out of the scheme in England and Wales and that the objective justification argument goes something like - if we let them in and they leave with less than 3 months they would not have any vested pension rights because we have a 3 month vesting period, so what's the point letting them in?]

Contributions payable by active members

3.—(1) Subject to paragraph (9), each active member shall make contributions to the Scheme at the contribution rate from his pensionable pay in each employment in which he is an active member.

~~(2) Subject to paragraph (4), the contribution rate to be applied to his pensionable pay in any financial year is calculated on the basis of his pensionable pay in the previous financial year in accordance with the following table.~~

~~*Band*~~	~~*Range*~~	~~*Contribution rate*~~
~~1~~	~~£0-£12,000~~	~~5.5%~~
~~2~~	~~£12,001-£14,000~~	~~5.8%~~
~~3~~	~~£14,001-£18,000~~	~~5.9%~~
~~4~~	~~£18,001-£30,000~~	~~6.5%~~
~~5~~	~~£30,001-£40,000~~	~~6.8%~~
~~6~~	~~£40,001-£75,000~~	~~7.2%~~
~~7~~	~~More than £75,000~~	~~7.5%~~

~~(3) On 1st April 2009, and each subsequent anniversary thereof, the figures in the second column of the table in paragraph (2) ("Range") are increased as if they were pensions to which the Pensions (Increase) Act 1971(**a**) applied.~~

~~(4) Where a member is employed in any employment for part only of any financial year, the range (and the contribution rate) applicable to him are those that would have applied had he been so employed for the whole of that financial year.~~

~~**(a)** 1971 c. 56.~~

[Sub-paragraphs (2), (3) and (4) substituted by SI 2008/1083]

(2) Subject to paragraph (4) the annual contribution rate to be applied to a person who becomes an active member is determined by his employing authority at the commencement of his membership on the basis of his pensionable pay in accordance with the following table.

Band	*Range*	*Contribution rate*
1	£0 to £12,000	5.5%
2	£12,001 to £14,000	5.8%
3	£14,001 to £18,000	5.9%
4	£18,001 to £30,000	6.5%
5	£30,001 to £40,000	6.8%
6	£40,001 to £75,000	7.2%
7	More than £75,000	7.5%"

[Comments: The bands as currently cast do not obviously cover someone earning, say, £12,000.50. Such a person should, according to CLG, be allocated to band 1 as they are earning £12,000 but are not earning £12,001. This runs contrary to draft regulations that were issued in December 2007 under which such a person would have been allocated to band 2 as they fell into the second band which, at that time, was being described as covering people earning more than £12,000.

Those manual workers paying the protected 5% rate at 31st March 2008 will, by virtue of regulation 9 of the Transitional Provisions Regulations, pay the following rates:

1 April 2008 5.25%

1 April 2009 5.5%

1 April 2010 6.5% or the rate from the standard table if lower

1 April 2011 the rate from the standard table

Regulation 8 of the Transitional Regulations required employing authorities to notify those members who were being transferred from the old scheme to the new scheme on 1st April 2008 of the contribution rate that was to be applied to them from that date. The notification had to be issued before 1st April 2008.]

(3) On 1st April 2009, and each subsequent anniversary, the figures in the second column of the table in paragraph (2) ("*Range*") are increased by applying the appropriate increase and rounding the result down to the nearest £100.

[Comment: Although the figures in the table are to be increased on 1st April 2009 and each 1st April thereafter, the first weekly, fortnightly or 4 weekly payroll in the year might have a start date before 1st April. In this case the Secretariat would suggest that the contribution rate for that pay period should assessed as if the figures in the table had been increased from the beginning of the pay period, rather than from 1st April]

(3A) In paragraph (3), "the appropriate increase" means the amount by which the figures would be increased with effect from 6th April of the relevant year if they were pensions to which the Pensions (Increase) Act 1971 applied.

[Comment: this regulation does not seem to deliver the policy intention for two reasons.

Firstly, it does not specify what Pensions Increase date is to be used. Clearly, however, the intention is that if the Pensions Increase (Review) Order 2009 says that a pension attracting a full year's increase should go up by 3.5%, then the figures in the Table should be increased by 3.5% and the resulting figures rounded down to the nearest £100. Let's now perform this calculation:

Old Range		*New Range*	*New Range (having rounded down answers to nearest £100)*
1. £0 to £12,000	+ 3.5%	£0 to £12,435.23	£0 to £12,400
2. £12,001 to £14,000	+ 3.5%	£12,436.27 to £14,507.77	£12,400 to £14,500
3. £14,001 to £18,000	+ 3.5%	£14,508.81 to £18,652.85	£14,500 to £18,600
4. £18,001 to £30,000	+ 3.5%	£18,631.04 to £31,088.08	£18,600 to £31,000
5. £30,001 to £40,000	+ 3.5%	£31089.12 to £41450.78	£31,000 to £41,400
6. £40,001 to £75,000	+ 3.5%	£41,401.04 to £77,720.21	£41,400 to £77,700
7. More than £75,000	+ 3.5%	More than £77,720.21	More than £77,700

If, from 1st April 2009, a person earns, say, £14,500 would they fall into band 2 or band 3? This problem would have been resolved if the bands had referred to "More than £x and up to £y" e.g. more than £14,500 and up to £18,600 (which the Secretariat believes to have been the intention).

Secondly, the regulation says the pay ranges should be increased by "the amount by which the figures would be increased with effect from 6th April of the relevant year if they were pensions to which the Pensions (Increase) Act 1971 applied." Unfortunately, Pensions Increases rarely fall exactly on a 6th April. The regulation should have said "with effect from the first Monday falling on or after 6th April of the relevant year …..").]

(4) (a) Where there has been a permanent material change to the terms and conditions of a member's employment which affect his pensionable pay in the course of a financial year, his employing authority may determine that the contribution rate to be applied in his case is not to be calculated in accordance with paragraph (2).

(b) In such a case, the authority shall inform the member of the contribution rate applicable to him, and the date from which it is to be applied.

[Comment: this regulation permits an employer to reallocate a member to a new band during the course of a financial year. "During the course of a financial year" includes, of course, "at the beginning of a financial year" as the first day of a financial year is still "during the course of" that year. However, it only permits a reallocation if "there **has been** a **permanent** material **change** to the terms and conditions of the member's employment". Let's look at each of the three highlighted phrases / words.

Reallocation can only occur where "there **has been** a permanent material change". Thus, can an employer who decides to reassess bandings on a 1st April take account of the expected level of pay award due from 1st April when determining the pay band from 1st April if that pay award has not yet been agreed? The use of the words "has been" in the regulations would suggest not. However, the commentary from CLG says an employer can take account of an expected pay rise.

Reallocation can only occur if the change is **permanent**. This begs the question of how variable payments are to be treated. Let's take the case of a member allocated to band 6 because they have basic pay of £39,000 but have historically received performance bonuses of £3,000 (as their terms and conditions provide for the possibility of a performance payment). If in the following year they do not receive a bonus because their performance has dipped, can the employer reallocate to band 5 even though there has been no change in the terms and conditions? What if the converse were true i.e. the member was allocated to band 5 because, even though their terms and conditions provided for the possibility of a performance payment, they had not historically received one? Then, due to exceptional performance, they receive a £3,000 performance payment. Can the employer reallocate to band 6 even though there has been no change in the terms and conditions and the increase in performance might only be temporary? Despite the reservations over the meaning of the word "permanent" in this context, the commentary from CLG clearly implies that an employer can reallocate in these circumstances.

If a member's pay increases due to an increment or a pay rise, is this a material **change** to the person's terms and conditions or is the rise part and parcel of their original terms and conditions? One assumes the draftsman believes it to be the former otherwise if pay rises outstrip inflation, the employer would not be able to reallocate members to higher bands nor, conversely, allocate members to lower bands if inflation outstrips pay rises. The commentary from CLG clearly implies that an employer can reallocate in these circumstances.

If a member is reallocated to a new band in accordance with regulation 3(4), and in accordance with regulation 55(9) of the Administration Regulations, the employer must notify the member of the decision in accordance with regulation 57 of the Administration Regulations, including the information contained in that regulation regarding the right of appeal, and send a copy of the notification to the administering authority under regulation 64(1)(a) of the Administration Regulations.

Regulation 4(a) says that where there has been a permanent material change to the terms and conditions of a member's employment which affect his pensionable pay the employer may determine that his contribution rate is not to be calculated in accordance with paragraph (2). As the actual rates are contained in the table in paragraph (2), paragraph (4)(a) could be read to mean that the employer could determine not to apply a rate from the table, but could come up with their own rate. This is clearly not intended and so, in paragraph (4)(b), the words "the contribution rate applicable to him" ought to be clarified by changing the wording to "the contribution rate applicable to him from the table in paragraph (2)".]

(5) Where a member is a part-time employee, his contributions shall be calculated by multiplying the contributions he would have paid had he been a full-time employee (calculated in accordance with paragraph (2)) by the proportion that the number of his weekly hours bears to the number of weekly hours that he would have worked had he been a full-time employee.

[Comment: rather than saying that the band a part-time employee shall be placed in should be determined by reference to their whole-time equivalent pay, this strangely suggests that the employer should work out the contributions that would be paid by a whole time employee and then pro-rate those contributions by

part-time hours / whole-time hours. What is not clear is why this regulation refers to "full-time employee" when, throughout the rest of the Benefits Regulations the words "whole-time employee" are used]

(6) ~~But a term-time worker~~ But a whole time term-time worker **[SI 2008/1083]** is not a part-time employee for the purposes of this regulation.
[Comment: the band for a whole-time term-time worker is assessed by reference to the pay for that term-time post. The band for a part-time term-time worker is assessed by reference to the pay they would have received as a whole-time term-time worker]

(7) In this regulation, "term-time worker" means a person whose contract of employment provides for a regular pattern of periods of work and periods of no work so as to result in a recognisable cycle of work consisting of one year (but is not limited to persons working in educational establishments).
[Comment: a strict reading of this regulation would mean that a full-time employee working condensed hours over 4 days instead of 5 is a term-time worker and an employee who, for work-life balance reasons, agrees with the employer that, instead of working for 52 weeks of the year they will work for 44 weeks would also be a term-time worker. This does not accord with the CLG commentary which indicates (and is a view with which the Secretariat agrees) that such a person should be treated a part-time employee but not a term-time employee.]

(8) The amount of an employee's pensionable pay for the purposes of this regulation is calculated in accordance with regulation 4.

(9) In any event, an active member does not make any contributions after the day before his 75th birthday.
[Comment: This suggests that contributions can be paid on the day before 75. However, regulation 17(4) says that benefits must begin to be paid no later than the day before 75 and regulations 50(1) and 50(6) of the Administration Regulations say that payment of benefits can be deferred until no later than the day before 75 i.e. benefits cannot be deferred until 75 which means they must be brought into payment on the day before 75. Given that benefits must be paid, at the latest, on the day before age 75, it appears that regulation 3(9) is incorrect and should have said *"In any event, an active member does not make any contributions* ***on or after*** *the day before his 75th birthday"*.]

(10) A person who is an active member in more than one employment must make contributions for each of those employments at the rate applicable to the sum of his pensionable pay in each such employment. **[words from "at the rate" added by SI 2008/1083]**
[Comment: this appears to say that if a member has two employments, one with a whole-time equivalent pay of £14,500 and one with a whole-time equivalent pay of £15,000, the member must make contributions for each of those employments based on the **sum** of his / her pensionable pay i.e. £29,500 which would generate a 6.5% contribution rate, rather than each separate job attracting a rate of 5.9%. The Secretariat believes the intention is that the member would pay 5.9% and **not** 6.5%]

(11) His appropriate administering authority may decide the intervals at which the contributions are made.
[Comment: the Secretariat suggests that this regulation should be deleted as we can see no reason for specifying that it should be for the administering authority decide the intervals at which employee contributions are made or, alternatively, the regulation should be amended to refer to the "employing authority" rather than to the "administering authority"]

(12) For this regulation any reduction in pensionable pay by reason of the actual or assumed enjoyment by the member of any statutory entitlement during any period away from work shall be disregarded.
[Comment: in assessing the band that a member falls into this regulation says that "any reduction … by reason of … any statutory entitlement … shall be disregarded". However, it does not tell us to disregard any reduction in pay for any other reason (for example, where a member has been on half or nil pay due to sickness, or has been on maternity leave, etc). Surely, the regulation should specify that we should also disregard these types of reductions when assessing the contribution band a member falls in]

Meaning of "pensionable pay"

4.—(1) An employee's pensionable pay is the total of—
(a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
(b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

(2) But an employee's pensionable pay does not include—
(a) payments for non-contractual overtime;
(b) any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment;
(c) any payment in consideration of loss of holidays;
(d) any payment in lieu of notice to terminate his contract of employment; or
(e) any payment as an inducement not to terminate his employment before the payment is made.
[Comment: in addition to the above, the following provisions of the 1997 Regulations have been retained by virtue of Schedule 1 of the Transitional Provisions Regulations:
- regulation 13(2)(f) which provided that the amount treated as the money value to the employee of the provision of a motor vehicle or any amount paid in lieu of such provision should be non-pensionable, except for some historic cases protected by retained regulations 13(8) and 13(9) of the 1997 Regulations,
- regulation 13(2)(g) which provided that, in the case of an employee or former employee of the Commission for the New Towns, any payment made under any scheme relating to the termination of the employment of employees by the Commission in respect of the completion before a specified date of specified functions, should be non-pensionable, and
- regulation 13(2)(h) which provided that a payment made in consequence of a School Achievement Award under the scheme established by the Secretary of State known as the School Achievement Award Scheme should be non-pensionable.

It should be noted that an equivalent of regulation 13(3) of the 1997 Regulations has not been included in regulation 4. Regulation 13(3) of the 1997 Regulations said "the pay of a part-time employee for any period is the pay he would have received if during that period he had worked the contractual hours." The absence of such an equivalent provision in regulation 4 will mean that employers will now only be able to rely on regulation 4(2)(a) to exclude "excess hours" above an employee's contractual hours from being pensionable (i.e. by treating them as non-pensionable "non-contractual overtime")]

(3) No sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it.
[Comment: this appears to mean that an employee who is based outside the UK and who is not assessable to income tax can join the LGPS if employed by a Scheme employer but, if they do so, they will not have any pensionable pay. As benefits would be accruing at the rate of 1/60th x £nil = £nil there would be no point in them joining the LGPS (unless they subsequently return to the UK and have taxable pensionable pay)]

Benefits

5.—(1) Membership of the Scheme only entitles the member to benefits under these Regulations if—
(a) his total membership is at least three months; or
(b) a transfer value is credited to him.
[Comment: membership is defined by regulation 6 but regulation 6 does not include pre 1st April 2008 membership. So, based purely on regulation 5, if a member leaves with less than 3 months post 31st March 2008 membership they would not be entitled to benefits under the 2008 Scheme even though they may have many years of pre 1st April 2008 membership. Whilst the Transitional Provisions Regulations provide that the benefits in respect of the pre 1st April 2008 would be payable, regulation 5 does not provide for payment of post 31st March 2008 membership which itself lasts for less than 3 months. This clearly cannot be correct as a person moving over from the old to the new scheme who retires in, say, May 2008 would get no benefits in respect of the membership for April and May 2008]

(2) But paragraph (1) does not apply to benefits in respect of a member under regulation 23 (death grants: active members), regulation 24 (survivor benefits: active members), or regulation 28 (children's pensions: active members).

(3) Subject to paragraph (4), a member who has satisfied one of the conditions in paragraph (1) need not satisfy either of them again if he ceases to be an active member and subsequently becomes such a member again before drawing benefits under regulation 16, 17, 19, 20, 30 or 31. **[inserted by SI 2008/1083]**

[Comment: this regulation is intended to prevent a member being able to receive a refund of contributions if, having become entitled to a pension or to a deferred pension, he rejoins the LGPS and leaves again within 3 months. However, the only people it catches are those who have previously satisfied the conditions in regulation 5(1) and who rejoin the Scheme before drawing the earlier benefits under

regulations 16, 17, 19, 20 30 or 31. It does not catch cases (although the Secretariat believes it should) where:

a) a member does not have 3 months post 31st March 2008 membership and has not had a transfer in post that date and so does not meet the condition in regulation 5(1) but who does have far more than 3 months membership in total (when their pre 1st April 2008 membership is included), or

b) a member who does not have 3 months post 31st March 2008 membership and has not had a transfer in post that date and so does not meet the condition in regulation 5(1) but who already has a LGPS pension or deferred pension in respect of membership that ceased prior to 1st April 2008 (although these cases might be covered by paragraph 3 and notes 1 and 2 to Schedule 3 of the 1997 Regulations which have been retained by Schedule 1 of the Transitional Provisions Regulations – see Comment on regulation 6 below), or

c) a member who has satisfied one of the conditions in regulation 5(1) and who subsequently becomes a member again but who only become such a member again **after** drawing the earlier benefits under regulations 16, 17, 19, 20 30 or 31, or

d) a member who has satisfied one of the conditions in regulation 5(1) and who subsequently becomes a member again but who only becomes such a member again **after** drawing the earlier benefits under regulation 18]

(4) Paragraph (3) does not apply to a member in respect of whom a transfer payment has been made under regulations 79 to 82 of the Administration Regulations. **[inserted by SI 2008/1083]**
[Comment: this is not quite correct. Paragraph (3) **should** apply to a member who has transferred out benefits from the LGPS to a Qualifying Recognised Overseas Pension Scheme (as such a member should not be entitled to a refund if they subsequently rejoin the LGPS and leave within 3 months)]

Periods of membership

~~**6.** (1) These are the periods which count as periods of membership—~~
~~(a) any period for which a member has paid (or is treated as having paid) contributions under regulation 3; and~~
~~(b) any period added under regulations 12 or 20.~~

~~(2) Where a member who has left local government employment rejoins such employment before his normal retirement age, the periods mentioned in paragraph (1) are (unless he chooses otherwise) aggregated with any such subsequent periods.~~

[Reg 6 substituted by SI 2008/1083]

6. These are the periods that count as periods of membership (and which may accordingly be aggregated under regulation 16, or as the case may be, 17 of the Administration Regulations)—

(a) any period for which a member has paid (or is treated as having paid) contributions under regulation 3;

(b) any period added under regulation 12 or 20; and

(c) any period added following a transfer in of pension rights under regulations 83 to 87 of the Administration Regulations.

[Comment: the list above does not include pre 1st April 2008 membership. How pre 1st April 2008 membership is used in the calculation of benefits is set out in regulations 3, 4 and 5 of the Transitional Provisions Regulations. Also, it would seem logical that membership purchased from the proceeds from an AVC pot by those who took out an AVC pre 13th November 2001 (and who have this retained right by virtue of the saving of regulation 66(8) of the 1997 Regulations by Schedule 1 of the Transitional Regulations) should count that membership under paragraph (c) above.

Although (a), (b) and (c) above say that membership as defined therein counts, this is tempered by paragraph 3 and notes 1 and 2 to Schedule 3 of the 1997 Regulations which have been retained by Schedule 1 of the Transitional Provisions Regulations i.e. :
"3. Any period which has already been counted to determine whether a relevant member was entitled to the relevant benefit or has been or may be used to calculate its amount ….. cannot count as membership for the purpose of all regulations but see regulation 32(5)(aa)".

Thus, although the reference to "all regulations" is technically a reference to all regulations of the 1997 Regulations and "regulation 32(5)(aa)" no longer exists, the Secretariat believes the intention is that any

period which has already been counted to determine whether a member was entitled to a benefit, or has been or may be used to calculate its amount, cannot count as membership for the purpose of deciding entitlement to, or calculating the amount of, any subsequent benefit apart from deciding whether the member has the necessary membership to be entitled to a benefit (regulation 5(1)).

Also see regulation 42 below which bars double counting of membership.]

Calculation of length of periods of membership

7.—(1) In calculating the length of a period of membership, fractions of years of membership count.

(2) The numerator of such fractions is the number of complete days of membership and the denominator is 365.

(3) Membership in part-time service is counted as the appropriate fraction of the duration of membership.
[Comment: This regulation should be qualified by excluding the part-time membership pro-ration when determining whether a member has 3 months membership for the purposes of regulation 5(1)(a)]

(4) The numerator of that fraction is the number of contractual hours during the part-time service and its denominator is the number of contractual hours of that employment if it were on a whole-time basis.

(5) The amount of any ~~benefit~~ annual pension **[SI 2008/1083]** payable to a member as a result of his membership is his total period of membership multiplied by his final pay and divided by 60.
[Comments:
It is assumed that added years purchased under regulation 55 of the 1997 Regulations will count as a 1/80th + 3/80^{ths} lump sum where contributions continue beyond 31st March 2008, even in cases where the contract was taken out pre 1st April 2008 but the contributions didn't start until the first birthday falling on or after 1st April 2008

It may be necessary, depending on how flexible retirement works when the member draws only part of the pension, to qualify the method of calculation under regulation 7(5).

This regulation is subject to regulations 20(4)(a) and 20A of the 1997 Regulations, as retained by Schedule 1 of the Transitional Regulations, which specify how benefits are to be calculated for a Pension Debit member. Note: how will a Pension Sharing Order which specifies that 30% should be given to the ex-spouse be applied? Presumably, 30% of both the pre and post April 2008 membership at the relevant date is debited. We are awaiting updated GAD guidance on Pension Sharing on Divorce.]

Final pay: general

~~**8.** (1) Subject to regulations 9 to 11, a member's final pay for an employment is his pay for as much of the final pay period as he is entitled to count as active membership in local government employment.~~

~~(2) A member's final pay period is the year ending with the day on which he stops being an active member.~~

[Sub-paragraphs (1) and (2) substituted by SI 2008/1083]

8.—(1) Subject to regulations 9 to 11, a member's final pay for an employment is his pensionable pay for as much of the final pay period as he is entitled to count as active membership in relation to that employment.

[Comments:
The use of the words "in relation to that employment" clarifies that where a member holds more than one concurrent employment, it is only the pay in relation to active membership in the employment that is ending that counts towards the benefit calculation for that employment. It also prevents a person using a previous years pay that goes back into a period in respect of which the person holds an unaggregated period of membership or is already in receipt of a pension.

Also, the use of the words "for an employment" and "in relation to that employment" should be construed as meaning that a member who has chosen to aggregate a concurrent period of membership (under regulations 17 or 46(4) of the Administration Regulations or who is subject to regulation 5 of the Transitional Provisions Regulations) and who leaves within 3 years can only choose to use the pay from the job that they are now leaving. Otherwise, the member could get a double benefit. Take for example, the

case of a member with two concurrent posts, one with a whole-time equivalent pay of £20,000 and a second with a whole-time equivalent pay of £10,000. He leaves the first job and the 2 years membership in that job becomes reckonable as 4 years in the second job. He leaves the second job 1 year later. If the final pay were not restricted to the pay from the second job he could choose to use the best 1 of the last 3 years pay i.e. the £20,000 pay figure. If this were allowed, the member would have doubled the membership from job 1 and have benefits calculated by reference to £20,000, thereby getting a "double" benefit.

What is not clear is whether the use of the words "for an employment" and "in relation to that employment" mean that only pay from the current employer can count in the final pay calculation under regulations 8(1) or 8(2) e.g. where the member had moved employer within the final year, or had moved employer within the last 3 years where the member's pay with the former employer was higher than with the current employer, and had aggregated membership. If pay from a previous employer is not included in the final pay calculation it not only makes the calculation of final pay easier to administer, but would also mean that the last employer would not pick up the pension strain in cases where pay with a previous employer was higher than with the last employer. Even though the Intra / Inter-Fund Adjustment system has been amended to provide a fair transfer sum in respect of the past service, the new employer would still be faced with the strain cost relating to the benefits accrued in respect of service with them as the benefits would be based on the higher pay figure the employee had earned with the previous employer. Conversely, where a member moves to a higher paid post with a new employer within 1 year of leaving, using only the pay with the current employer, grossed up by 365/period of membership with the current employer, would add to the cost for the current employer. The commentary from CLG says:
"Detailed discussions also considered the option of whether this principle should apply only in respect of changes with same employer. There is clearly a need to avoid the potential risk of the last employer being responsible for pension increases where pension has been calculated against an earlier salary with a different employer when an individual chooses to step down by changing jobs and employers. However, it is also recognised that by excluding the use of salary with a different employer when an individual moves for higher pay (as is more usually the case) the last employer automatically takes on the responsibility for pension increases. This is being ameliorated by a movement away from Inter Fund Adjustments.
On balance it has been decided the principle should only apply to changes with same employer."
Thus, it appears from the CLG commentary that the intention is that only pay with the current employer can be used.]

(2) A member's final pay period is the year ending with the day on which he stops being an active member or, if that would produce a higher figure, either of the two immediately preceding years.
[Comment: an earlier year's pay can only be used under this regulation if it is actually greater, before the application of Pensions Increase, than the final year's pay]

~~(2A) But a member may choose instead to treat as his final pay period either of the two preceding years ending with a day that is the anniversary of the last day he was an active member.~~ **[inserted by SI 2007/1488 then deleted by SI 2008/1083]**

(3) In the case of part-time employment, the final pay is the pay that would have been paid for a single comparable whole-time employment.
[Comments:
This regulations should be amended by adding at the beginning "Subject to regulation 23(4)". A cross-reference to regulation 23(4) is necessary because that regulation restricts final pay, for death grant purposes, to the actual pay of a part-time member who dies in service.
Like regulations 8(1) and 8(4), this regulation should refer to "pensionable pay" and not to "pay" in order to be consistent with regulation 4.]

(4) Any reduction or suspension of a member's pensionable pay during the final pay period because of his absence from work owing to illness or injury is disregarded.

Final pay: reserve forces, maternity leave etc.

9.—(1) If a member's final pay period includes reserve forces service leave, his final pay is—
(a) in a case where he has continued to pay contributions in respect of it, the amount it would have been if his reserve forces pay were pay received in his former local government employment, or
(b) otherwise, the amount it would have been if he had continued to be employed in his former employment during the period of that leave.
[Comment: it should be noted that the CLG commentary says -

"Communities and Local Government is not un-sympathetic to the response from earlier consultations suggesting that scheme members who belong to the reserve forces should not be required to pay contributions, in order for any lost membership resulting from reserve forces leave to count towards their pension. However, this issue will also be of interest to those with responsibility for other public sector pension schemes, and it would not be appropriate for the LGPS to adopt a new approach without adequate prior consultation and consideration. Communities and Local Government will inform Scheme interests later of its decision on this issue."]

(2) For the purposes of these regulations, a member's final pay for any period of maternity, paternity or adoption absence during the final pay period in respect of which he pays or is treated as paying contributions is the pay he would have received had he not been absent.

(3) If a member is absent from work for any other reason during his final pay period, he is only to be treated for these regulations as having received the pensionable pay he would otherwise have received if he has continued to pay contributions in respect of it for the period he is absent.

(4) If a member is only entitled to count part of the year specified in regulation 8(2) as a period of active membership in relation to the employment which he ceases to hold, his final pay is his pensionable pay during that part multiplied by 365 and divided by the number of days in that part.
[Comments:
This means that if a member goes on strike for, say, 2 days during the last year of membership, it is the pay received in the last year x 365/363 that is used and not, as was the case under the 1997 Regulations, the pay received in the last 365 days that counted as membership (which would have included 2 days pay from the previous year).

Also, where an employee takes full (rather than partial) flexible retirement and carries on in the Scheme for, say, a further 200 days before fully retiring, the final pay used for the second benefit should be the pay for those 200 days x 365/200. Regulation 8(1) says that a member's final pay for an employment is his pensionable pay for as much of the final pay period as he is entitled to count as active membership in relation to that employment. Regulation 8(2) says that a member's final pay period is the year ending with the day on which he stops being an active member but regulation 9(4) says that if the member is only entitled to count part of the year specified in regulation 8(2) as a period of active membership in relation to the employment which he ceases to hold, his final pay is his pay during that part multiplied by 365 and divided by the number of days in that part. Although the employee was a member throughout all the last 365 days, he was only entitled to count 200 days in relation to the employment which he ceases to hold and so the pay for those 200 days has to be grossed up. This contrasts with the calculation of final pay under regulation 10 below where the pay prior to the flexible retirement could be used.]

~~(5) Final pay does not include any pension in payment.~~ **[Deleted by SI 2008/1083]**

Final pay: reductions

~~**10.** (1) A member who is in whole time employment and~~ **[words "who is in whole time employment and" deleted by SI 2007/1488]** ~~whose pensionable pay has been reduced because he has chosen to continue in local government employment at a lower grade or with less responsibility than his previous post may, subject to paragraph (3), choose to have his final pay calculated as the average of his annual pensionable pay in any three consecutive years ending 31st March within the period of ten years ending with the last day he was an active member.~~

~~(2) And the average referred to in paragraph (1) is increased as if it were a pension to which the Pensions (Increase) Act 1971 applies.~~

~~(3) A member who has had a request under regulation 18 granted may not choose under paragraph (1) in respect of the same event.~~

[Reg 10 substituted by SI 2008/1083]

10.—(1) Subject to paragraph (2), where a member's pensionable pay in a continuous period of employment is reduced because he chooses to be employed by the same employer at a lower grade or with less responsibility, he may choose to have his final pay calculated as mentioned in paragraph (3).
[Comments:

This covers voluntary reduction cases (including flexible retirement cases) as well as compulsory reduction cases, which means that the employer will pick up the cost where the Scheme member's pay is reduced within the last 10 years prior to leaving and chooses to have benefits based on the average of the best 3 consecutive years pay in the last 10 (ending on a 31st March), including pay prior to a flexible retirement.. Thus an employee who takes flexible retirement following a reduction in grade in the last 10 years will have those flexible retirement benefits based on the pre-downgrade pay and, when they finally retire, can have the subsequent benefits based on the average of 3 years pre downgrade pay ending on a 31st March even though, for the last few years, they will only have been paying contributions on the downgraded pay. Indeed, where a person has downgraded more than once in the last 10 years, they could have their final benefits based on the average of 3 years pre downgrade pay ending on a 31st March (which could all fall before the **first** downgrading) even though, for the last few years, they will only have been paying contributions on downgraded pay.

Note that although a reduction has to have occurred during a continuous period of employment with the employer, the member can use the average any 3 consecutive years in the last 10 (ending on a 31st March) and this regulation **does not** restrict these 3 years to being pay with the current employer – this is inconsistent with regulations 8(1) and (2) and does not deliver the intention, as confirmed in the CLG commentary, that only pay with the current employer can be used (subject to the modification of this rule by regulation 10(4)).

As this regulation only comes into force on 1st April 2008 and uses the words "is reduced" (rather than using the words "is or has been reduced"), this regulation is restricted to just those cases where the downgrading occurs after 31st March 2008. Thus, a member leaving on, say, 31st August 2009 who had a downgrading in 2006 could not ask for benefits to be based on the average of the best 3 consecutive years pay in the last 10 years (ending on a 31st March). Such a person might, of course, have had a Certificate of Protection of Pension Benefits issued under the 1997 Regulations and, if so, final pay can still be calculated using that Certificate.

However, if a downgrading occurs post 31st March 2008 and the member leaves in, say, 2012, the 10 year window includes pay prior to 1st April 2008 and so, in effect, includes a retrospective element (i.e. covers a period prior to when the 2008 Scheme came into operation).

Regulation 23 of the 1997 Regulations (Certificate of Protection of Pension Benefits) not only covered downgrading but also:
a) any other type of reduction in pay (e.g. the removal of a pensionable emolument), and
b) frozen / restricted pay.

In many cases, frozen / restricted pay results from a downgrading and regulation 10 would cover such cases. However, it appears that (despite what is said in the CLG commentary on regulations 8, 9 and 10) regulation 10 does not cover cases of frozen or restricted pay which results from something other than a downgrading or move to a job with less responsibility. Equally, regulation 10 does not cover cases where a member's pay is reduced otherwise than by reason of moving to a post on a lower grade or with less responsibility e.g. where pay is reduced due to the removal of a pensionable allowance, such as a pensionable lease car (for those who had a protection to treat the value of a lease car as pensionable). Of course, most allowances that an employer might seek to remove might fall into the category of a "temporary allowance" (such as a market premium) and these were never covered anyway, even by the old style Certificate of Protection under the 1997 Regulations.

The regulation does not specify to whom, or by when, an election has to be made nor what happens if a member dies before being able to make an election. The Secretariat therefore believes that the provisions of regulations 22(6) and (7) of the 1997 Regulations should have been replicated i.e.

22(6) An election under this regulation by a member must be made by notice in writing given to the appropriate administering authority before the expiry of the period of one month beginning with the day he is notified of his entitlement to a benefit.

22(7) Where a member has died without having made an election under this regulation, the appropriate administering authority may make an election on his behalf (whether or not the period within which he could have elected has expired).]

(2) Paragraph (1) does not apply if the member's employment at a lower grade or with less responsibility—

(a) commences before the beginning of the period of ten years ending with his last day as an active member; or

(b) immediately follows a period in which he occupies a post on a temporary basis.

(3) The calculation is made by dividing by three the member's annual pensionable pay in any three consecutive years of his choice ending with 31st March within the period of ten years ending with his last day as an active member.

[Comments:
Although this regulation does not specifically say so, the calculation of each year's pay is of course subject to the provisions of regulations 8(3), 8(4) and 9.

It is appreciated that the reference to 31st March is meant as a simplification. However, apart from monthly paid employees, year ends tend not to end on a 31st March (e.g. a weekly payroll, which could include a week 53, and the 13th payroll of a 4 weekly payroll could end on a date other than 31st March). The Secretariat believes it would have been better to simply refer to the employer's payroll/financial year end although it is understood that CLG specified 31st March in the regulation as it links with the period specified by CLG as an input period for HMRC purposes.

Unlike under regulation 8(2), the average pay calculation under regulation 10 does not have to be higher than the final year's pay. It can be lower, although, once Pensions Increase is added to the pension benefits in accordance with the Pensions (Increase) Act 1971, the resultant benefits will be higher than benefits based on the final year's pay.]

(4) Paragraph (1) applies to a member who has been the subject of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006([2]) apply as if the transferor employer were the same employer as the transferee employer.

Final pay: fees

11.—(1) Subject to paragraph (2), where a variable-time employee's pensionable pay for the purposes of regulation 8(1) consists of or includes fees, his final pay is calculated as the sum of—
(a) the average of all such fees for the three consecutive years ending with the final pay period; and
(b) any sums falling within regulation 4(1), other than fees, for the final pay period.
[Comment: if the membership period is less than 3 years then the fees received should be divided, not by 3, but by the number of years and days constituting the membership period]

(2) But a member's employer may consent to him having his final pay calculated as the average of all such fees for any three consecutive years ending 31st March within the period of ten years ending with the last day he was an active member.
[Comment:
To be consistent with regulation 11(1), the following words should have been added to the end of regulation 11(2) - "plus any sums falling within regulation 4(1), other than fees, for the final pay period" - or, alternatively, the words "average of all" should have been amended to "average, for the purposes of (1)(a), of all".

Pensions Increase will, of course, need to be added to the resultant pension benefits in accordance with the Pensions (Increase) Act 1971.]

Power of employing authority to increase total membership of active members

12.—(1) An employing authority may resolve to increase the total membership of an active member.
(2) A member's total additional membership under this regulation (including additional membership in respect of different employments) must not exceed 10 years.
[Comments:
Any augmented membership granted by the employer under regulation 12 will not count towards the protected 85 year rule – see paragraph 3(2) of Schedule 2 to the Transitional Provisions Regulations. This contrasts with augmented membership granted by the employer under regulation 52 of the 1997

([2]) S.I. 2006/246.

Regulations which did count towards the 85 year rule for those members subject to the 85 year rule protections.

Regulation 40 of the Administration Regulations says that the additional membership can only count if:
a) the employing authority pays an appropriate sum, calculated in accordance with GAD guidance, to the Fund within one month of resolving to grant the additional membership, or within such longer period as the employing authority and the administering authority agree, or
b) the employing authority agrees with the administering authority within one month of resolving to grant the additional membership, or within such longer period as the employing authority and the administering authority agree, to meet the cost by way of additional employer contributions or an additional amount (calculated by the Fund actuary)

See also regulation 42(1)(c) of the Administration Regulations (payments by employing authorities to appropriate administering authorities) and regulation 44 of the Administration Regulations (interest on late payments).

We are, in relation to (a) above, awaiting new GAD guidance on the calculation of the capital cost of augmenting membership.]

Power of employing authority to award additional pension

13.—(1) An employing authority may resolve to award a member additional pension of not more than £5000 a year payable from the same date as his pension payable under any other provisions of these Regulations.
[Comments:
Regulation 12 above specifically refers to an **active** member and so does regulation 40(1)(a) of the Administration Regulations which says that regulation 12 of the Benefits Regulations *"confers power to increase the membership of an **active** member by an additional period."* The Secretariat believes that regulation 13 is also only meant to apply to active members only, but neither it nor regulation 40(1)(b) of the Administration Regulations specifically say so. Given that regulation 12 and other regulations in the Benefits Regulations (e.g. regulations 2 and 3) specifically say they only apply to active members, it would be helpful if regulation 13(1) could be amended to also refer specifically to an "active member".

It should be noted that the additional pension granted by the employer could have a different Pensions Increase date to the basic pension (if an earlier year's pay is used for the basic pension). This will have implications for the pension payroll PI routines. It should also be noted that any additional pension granted by the employer does not generate any survivor benefits.

It is understood that a member can elect under regulation 21 to commute part of the extra pension payable under regulation 13.

The £5,000 limit applies in aggregate across all pensionable employments as per paragraph 2.3 of the GAD guidance i.e. it is not £5,000 per employment.

If an active member is awarded £5,000 additional pension by an employer in say June 2008, in April 2009 partial PI is added to bring it to, say, £5100. However, the GAD guidance says that the maximum values will increase by PI, so the maximum value for 2009/10 that may be awarded increases to £5,200. Can the active member who was awarded £5,000 - that increased to £5,100 in April 2009 - be awarded another £100 by the employer in 2009/10? Well, although indexation is mentioned in LGPC Bulletin 49 (because GAD mention it in paragraph 2.3 of their guidance), regulation 13 (nor, indeed, regulation 14) does not actually provide for indexation. Those regulations are quite clear that the limit is £5,000. If CLG intend the limit to be indexed this really ought to be provided for in regulations 13 and 14. Assuming the limit is indexed then the Secretariat cannot see why an active member who has been granted the maximum permissible by the employer (or an active member who is buying the maximum permissible at the point they take out the contract) should subsequently be permitted any extra (given that the maximum they have been granted or are buying will itself have RPI added, thereby inflation proofing the value) i.e. in the example given above, it should not be possible for the member to be granted another £100.

Other issues surrounding regulation 13 are covered in LGPC Bulletin 49 at
http://www.lge.gov.uk/lge/aio/196591#AddPen]

Regulation 40 of the Administration Regulations says that the additional pension can only count if:

a) the employing authority pays an appropriate sum, calculated in accordance with GAD guidance, to the Fund within one month of resolving to grant the additional pension, or within such longer period as the employing authority and the administering authority agree, or
b) the employing authority agrees with the administering authority within one month of resolving to grant the additional pension, or within such longer period as the employing authority and the administering authority agree, to meet the cost by way of additional employer contributions or an additional amount (calculated by the Fund actuary)

See also regulation 42(1)(c) of the Administration Regulations (payments by employing authorities to appropriate administering authorities) and regulation 44 of the Administration Regulations (interest on late payments).

The GAD guidance in relation to (a) above has been received.]

(2) Additional pension may be paid in addition to any increase of total membership resolved to be made under regulation 12.

Election in respect of additional pension

14.—(1) A member may choose to pay additional contributions in order to be credited with additional pension, in respect of him alone or in respect of him and any survivor, of £250 a year or multiples thereof to a maximum of £5000.
[Comments:
Given that other regulations which only apply to active members specifically say so – see regulations 2, 3 and 12 - it would be helpful if regulation 14(1) was amended to also refer to "active member".

The £5,000 limit applies in aggregate across all pensionable employments as per paragraph 2.3 of the GAD guidance i.e. it is not £5,000 per employment.

Although regulation 14(1) refers to "survivor" that term is not defined in the regulations. The GAD guidance however says that this covers a spouse, civil partner, nominated cohabiting partner and / or eligible child.

It is understood that a member can elect under regulation 21 to commute part of the extra pension payable under regulation 14.

See the issue mentioned in regulation 13 above regarding the inflation proofing of the £5,000 limit.

Other issues surrounding regulation 14 are covered in LGPC Bulletin 49 at
http://www.lge.gov.uk/lge/aio/196591#AddPen]

(2) If he chooses to take the additional pension referred to in paragraph (1) earlier or later than his normal retirement age, it is reduced or, as the case may be, increased.

(3) The amount of the additional contributions to be paid under paragraph (1), and the reduction or increase referred to in paragraph (2), is calculated in accordance with guidance issued by the Government Actuary.
[Comment: the GAD guidance has been received but there are a number of outstanding issues – see LGPC Bulletin 49 at http://www.lge.gov.uk/lge/aio/196591#AddPen]

Elections to pay AVCs
[Comment: why is this regulation headed up "Elections to pay AVCs" when the regulation is all about what a member may do with his / her AVCs? A better heading might have been "Use of AVCs"]

15.—(1) A member who has entered into an arrangement to pay additional voluntary contributions ("AVCs") or to contribute to a shared cost AVC in addition to any other contributions he may pay under these Regulations is entitled to additional benefits in accordance with one of the methods permissible under the Finance Act 2004.
[Comment: although this regulation says that the member " is entitled to additional benefits in accordance with one of the methods permissible under the Finance Act 2004", regulation 26 of the Administration Regulations is more prescriptive. As regulation 26 of the Administration Regulations is, in some respects, more restrictive than the Finance Act 2004, which regulation should administering authorities obey –

regulation 15 of the Benefits Regulations or regulation 26 of the Administration Regulations? The Secretariat believes regulation 26 of the Administration Regulations should be followed.]

(2) Where a member chooses to take some or all of the benefits referred to in paragraph (1) in the form of a lump sum, that sum forms part of the total amount referred to in regulation 21(2).

(3) In this regulation, "a shared cost AVC" means an arrangement established and maintained by an employing authority for the purpose of enabling contributions to be paid by and for active members.

Retirement benefits

16.—(1) A member who has attained the Scheme's normal retirement age and ceases to be employed in local government pension scheme employment is entitled to immediate payment of retirement pension without reduction.
[Comments:
Although Schedule 1 of the Administration Regulations defines "local government employment", the term "local government pension scheme employment" is not defined anywhere. The Secretariat suggests therefore that it should be assumed to mean "local government employment" as defined in the Administration Regulations.

Note that regulation 50(6) of the Administration Regulations qualifies the provisions of regulation 16 by saying *"A person who is entitled to a retirement pension under regulation 16 ….. of the Benefits Regulations may choose to defer payment until a date no later than the day before his 75th birthday".]*

(2) The normal retirement age of the Scheme is 65.

Retirement after the normal retirement date

17.—(1) A member who remains in employment after his 65th birthday is entitled to a pension when he retires from service.
[Comment: The Secretariat believes that regulation 17(1) should be amended to read:

*"(1) A member **who first joins the Scheme on or after age 65 or** who remains in employment after his 65th birthday is entitled to a pension when he retires from service"*

This is because, otherwise, a strict reading of the regulation would mean that a person who first joins after age 65 would have to pay contributions but would not be entitled to draw a pension in respect of them as regulation 17(1) only covers those who **remain** in employment beyond 65 (which implies they must have been in employment before age 65 in order to be covered by the regulation).

(2) His pension rights accrued at that date, and any rights accruing between that date and the date of his retirement or the day before his 75th birthday, whichever is earlier, shall be enhanced in accordance with guidance issued by the Government Actuary.
[Comment: this paragraph is inextricably linked to paragraph (1) which only covers members who remain in employment after age 65. Only they are entitled to an actuarial increase in their benefits under this paragraph. Members who leave before age 65 with a deferred pension and who, by virtue of regulation 50(2) of the Administration Regulations, defer payment of their benefits beyond age 65, will be entitled to an actuarial increase to recompense them for the delayed payment of their benefits by virtue of regulation 29(5) of the Benefits Regulations. However, members who leave at 65 and choose to defer payment of their benefits beyond age 65 in accordance with regulation 50(6) of the Administration Regulations will not be entitled to an actuarial increase to recompense them for the delayed payment of their benefits. This cannot be intended but, unfortunately, neither regulation 17(2) nor regulation 29(5) covers them. Nonetheless, paragraph 1.3 of the GAD guidance which has been received, despite the absence of any regulatory back-up, says *"For the avoidance of doubt, Communities and Local Government's (CLG's) policy intention is that similar increases should also be applied in respect of members who leave service with immediate entitlement to benefits under regulation 16 but who choose not to receive payment immediately."*]

(3) The pension is payable immediately on retirement.
[Comment: Note that regulation 50(6) of the Administration Regulations qualifies the provisions of regulation 17(3) by saying *"A person who is entitled to a retirement pension under regulation 17 ….. of*

the Benefits Regulations may choose to defer payment until a date no later than the day before his 75th birthday".]

(4) But it must begin to be paid not later than the day before the member's 75th birthday even if he has not retired.

Flexible retirement

18.—(1) A member who has attained the age of 55 and who, with his employer's consent, reduces the hours he works, or the grade in which he is employed, may make a request in writing to the appropriate administering authority to receive all or part of his benefits under these Regulations, ~~and the authority may pay those benefits~~ and such benefits may, with his employer's consent, be paid **[SI 2008/1083]** to him notwithstanding that he has not retired from that employment.
[Comments:
Although it is clearly intended that flexible retirement benefits should be payable from the date of the reduction in hours or grade, it would have been helpful if this had been made explicit by including after the words "be paid to him" in regulation 18(1), the words "from the date of the reduction in hours or grade".

Regulation 18(1) permits a member to elect to receive all or part of his benefits on flexible retirement. However, the regulation provides no detail of how certain aspects of this will work and does not specify:

- how the benefits to be drawn on partial flexible retirement are to be calculated e.g. can the member choose to take, say, 20% of all their accrued pension, or can they choose to take only the basic benefits accrued after, say, 31st March 2008. Note: the CLG commentary says that if a member opts to take part of their benefits, they will only be allowed to take the benefits that have accrued post 31st March 2008 (but perhaps excluding any transferred in membership which includes a GMP).

- what will be the effect on accrued membership

- how the 85 year rule will apply in relation to that part of benefits not taken on partial flexible retirement and how it will apply to benefits accruing in the ongoing employment

- how added years contracts are to be treated. It would seem logical, certainly in the case of partial flexible retirement following a downgrading, that any added years contract should cease, otherwise the member would be paying for the remainder of the contract on the lower pay but could receive the benefits for that contract based on the average of 3 years pay in the last 10 (ending on a 31st March) or, in the case of a partial flexible retirement, the best 1 of the last 3 years pay[3] i.e. on the pay prior to the downgrading. However, there is nothing in the regulations to say that the contract should cease. Indeed, unless the member opts to cease the contract before flexible retirement, the contract would continue. So where does this leave us?

  Well, regulations 55 and 83 of the 1997 Regulations are continued in force by virtue of Schedule 1 of the Transitional Provisions Regulations. Regulation 55 of the 1997 Regulations assumes that the member purchasing added years enters into a commitment to pay extra contributions from the birthday following their election through to the birthday immediately preceding or coincident with their Normal Retirement Date (NRD). Regulations 55(10) and (11) of the 1997 Regulations say that if the member continues paying the additional contributions until then, the whole of the additional period under the contract can be counted as membership; otherwise only a proportion may be counted in accordance with regulation 83 of the 1997 Regulations.

  Regulation 83(1) of the 1997 Regulations allows a member to elect to stop paying additional contributions even if he continues to be an active member of the LGPS.

  If the member opts to stop paying before taking flexible retirement it would seem that he can then count the proportion paid for and draw it with his main LGPS benefits upon flexible retirement.

  If the member does not opt to stop paying before taking flexible retirement, the provisions of regulation 83 of the 1997 Regulations do not apply. Thus, the member could not draw benefits in

[3] But see the second comment under regulation 9(4)

respect of the added years purchased up to the date of flexible retirement. He would continue making payments under the original added years contract, albeit that he would be purchasing a lesser period of added years if he has reduced his hours, or would be paying for a reduced level of benefit from the added years if he has reduced his grade (unless, as stated above, his benefits are based on the pre reduction pay by using the average of 3 consecutive years in the last 10, ending on a 31st March, where the reduction occurred in the last 10 years or, in the case of a partial flexible retirement, the best 1 of the last 3 years pay, where the pay reduction occurred in the last 3 years).

The member would, therefore, need to consider the pros and cons of ceasing the contract before the date of flexible retirement.

- how ARCs are to be treated. Please see Bulletin 49 for more details – see http://www.lge.gov.uk/lge/aio/196591#AddPen

- how AVCs are to be treated. Please see Bulletin 49 for more details – see http://www.lge.gov.uk/lge/aio/196591#AVC2008

- what happens when someone who is paying part-time buy back contributions under the 1990 buy-back terms takes flexible retirement.

  There may be some cases where an employee is still paying additional contributions to purchase pre 1st April 1986 part-time membership under the 1990 buy-back terms (i.e. in accordance with regulation C7A of the Local Government Pension Scheme Regulations 1986 as carried forward into Schedule C6 of the Local Government Pension Scheme Regulations 1995 and regulations 12 and 15 of the Local Government Pension Scheme (Transitional Provisions) Regulations 1997). In such cases, paragraph 7 of Schedule 4A of the 1986 Regulations and paragraph 6 of Schedule C6 of the 1995 Regulations provided that where a person ceased to be a pensionable employee / scheme member before completing payment of the additional contributions the person would be entitled to count as a period of reckonable membership X / Y multiplied by Z where

  X = the aggregate additional contributions paid by the employee and, where the employer had agreed to meet part of the cost, the additional contributions paid by the employer;
  Y = the total additional contributions that were due; and
  Z = the period of reckonable membership that would have been purchased if contributions had been completed.

  Paragraph 8 of Schedule 4A of the 1986 Regulations and paragraph 6 Schedule C6 of the 1995 Regulations went on to say that where the person ceased to be a pensionable employee / scheme member and this was because he had ceased to be employed by an LGPS employer, he could within one month of the date he so ceased pay off the balance of the contributions so that the whole period would count.

  Clearly the precise wording of the 1986 and 1995 Regulations did not envisage flexible retirement and the relevant provisions of the 1986 and 1995 Regulations, and of the Local Government Pension Scheme (Transitional Provisions) Regulations 1997, have not been carried forward by the Transitional Provisions Regulations. It would seem logical, as the person has not ceased to be employed, to:

  - calculate the proportion of the membership being purchased that had been paid for at the point of flexible retirement and include this in the flexible retirement benefit calculation; and
  - permit the employee to continue paying additional contributions in the ongoing employment to pay for the remainder of the outstanding period of membership being purchased. Subject to completion of payment of those remaining contributions, the outstanding period of membership being purchased would be included in the calculation of benefits when the person finally leaves / retires from the ongoing employment.

- what happens when someone who is paying part-time buy back contributions under the Preston judgment takes flexible retirement

  The part-time buy-back agreement with the national unions (see paragraph 26 of LGPC Circular 152 at http://www.lge.gov.uk/lge/aio/55866) says:

"If the person leaves with the immediate payment of pension benefits before completion of the contract owing an outstanding balance of contributions, the balance of the outstanding contributions (calculated in accordance with the agreed GAD model spreadsheet) will be deducted from the lump sum retiring allowance due and, if necessary, by making a deduction from the monthly pension in payment (although the deductions should not exceed the additional monthly pension payable as a result of the buy back of part time service unless the person agrees to a higher deduction) until any outstanding sum due is recovered. In these circumstances the respondent will need to reduce the amount recoverable by the amount of tax relief the employee will not receive on the outstanding contributions." Thus, as immediate benefits are payable upon flexible retirement, the above provisions should be followed

- what death in service benefit is payable. It appears that the death grant will be 3 times pay PLUS a 10 year guarantee on the pension already in payment

- whether that part of benefits not drawn on partial flexible retirement will subsequently increase in line with RPI (i.e. be treated as if it were a deferred benefit) or whether it should continue to increase in line with the rise in the member's earnings. The latter appears to be the most appropriate

- what are the implications if the member marries after flexible retirement and before full retirement

  Regulation 42(1) of the 1997 Regulations, which continues in effect by virtue of regulation 6(3) of the Transitional Provisions Regulations, provides that where a male "pensioner member" marries (after becoming a pensioner member) the widow's short and long-term pension is to be based only on so much of the pensioner's pension as is attributable to the period of membership in contracted-out employment after 5th April 1978. A pensioner in receipt of benefits following flexible retirement is a "pensioner member" and so regulation 42(1) of the 1997 Regulations would apply. Thus, if the member were to subsequently marry after flexible retirement but before full retirement the widow's pension payable in respect of the flexible retirement pension would be based only on the post 5th April 1978 contracted-out membership[4]. This contrasts with the position if the member had not flexibly retired but had married before full retirement. In that case the widow's pension would have been based on all membership (including any pre 6th April 1978 membership).

  Similarly, regulation 42(2) of the 1997 Regulations, which continues in effect by virtue of regulation 6(3) of the Transitional Provisions Regulations, provides that where a female "pensioner member" marries (after becoming a pensioner member) the widower's short and long-term pension is to be based only on so much of the pensioner's pension as is attributable to the period of membership after 5th April 1988. A pensioner in receipt of benefits following flexible retirement is a "pensioner member" and so regulation 42(2) of the 1997 Regulations would apply. Thus, if the member were to subsequently marry after flexible retirement but before full retirement the widower's pension payable in respect of the flexible retirement pension would be based only on the post 5th April 1988 membership[5]. This contrasts with the position if the member had not flexibly retired but had married before full retirement. In that case the widower's pension would have been based not just on the post 5th April 1988 membership but also on any pre 6th April 1988 membership where the employer had resolved that such membership would count for widower's pension purposes.

  The Secretariat is not convinced that, in the above two scenarios, the policy intention is to exclude, respectively, the pre 6th April 1978 and pre 6th April 1988 membership and has asked CLG for clarification.

The CLG commentary says that guidance on flexible retirement will be produced and that some of the mechanics may not be dissimilar to the approach to be taken in relation to a Pension Debit applied following receipt of a Pension Sharing Order. Let us hope that the guidance deals with the various questions outlined above.]

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[4] The widow's pension payable in respect of the membership accrued after flexible retirement and before full retirement would be based on all the member's pension accrued for that period.

[5] The widower's pension payable in respect of the membership accrued after flexible retirement and before full retirement would be based on all the member's pension accrued for that period.

(2) If the payment of benefits referred to in paragraph (1) takes effect before the member's 65th birthday, the benefits payable are reduced in accordance with guidance issued by the Government Actuary.
[Comment: the GAD guidance has been received]

(3) But the employer may agree to waive, in whole or in part, any such reduction as is referred to in paragraph (2).
[Comments:
Regulation 41(2) of the Administration Regulations provides that the administering authority can charge the employer for the cost *"as calculated by the fund's actuary, incurred by the fund as a result of a waiver of such reduction as is referred to in regulation 18(2) .. "*

The Secretariat believes that a further sub-paragraph should be added after regulation 18(3) along the lines of "If the payment of benefits referred to in paragraph (1) takes effect after the member's 65th birthday, the benefits shall be increased in accordance with guidance issued by the Government Actuary" This would ensure that the benefits of those who take flexible retirement post age 65 are actuarially increased, thus treating them equitably with those who fully retire post age 65. Regulation 17(2) does not already cover these cases as that regulation only provides for increases between 65 and the date of retirement but, by virtue of regulation 18(1), a member drawing benefits under regulation 18 "has not retired from that employment" (regulation 18(1) merely permits payment of benefits even though the member has not retired).

(4) ~~In~~ Subject to paragraph (4A), in **[SI 2008/1083]** the case of a person who is a member on 31st March 2008, and who makes a request before 31st March 2010, paragraph (1) applies as if "the age of 50" were substituted for "the age of 55".
[Comments:
By virtue of paragraph (1), a member can only make a request once they have reduced their hours or grade. Thus, for a request to be made before 31st March 2010, the latest a reduction, and hence a request, can be made is 30th March 2010. This seems illogical. Surely paragraph (4) should have said "makes a request before 1st April 2010". This would have tied in with regulation 30(6). Furthermore, what if a person reduces their hours or grade on or before 30th March 2010 but does not make a request until on or after 31st March 2010 i.e. they delay sending in their request for a day or two. On the face of it they would lose the protection. This cannot have been intended.

Also, why does paragraph (4) cover "a person who is a member on 31st March 2008" whereas regulation 30(6) covers "a person who is an **active** member on 31st March 2008"? The absence of the word "active" from paragraph (4) could be interpreted to mean that paragraph (4) covers any person who was a member – active, deferred or pensioner member – at 31st March 2008 and who was in employment on that date. Thus, a person who:

a) was in employment (see paragraph (4A)) on 31st March 2008, and
b) was not an active member on that date (e.g. an optant out), and
c) was a deferred or pensioner member from a previous employment on that date, and
d) subsequently rejoins the scheme on or after 1st April 2008 and retires under regulation 18 before 31st March 2010

would be covered by paragraph (4). It is assumed this is not intended, as such a person would not have been covered by regulation 30(6) if benefits were to be paid under regulation 30.

To overcome the above problems, paragraph (4) ought to be amended to read:
Subject to paragraph (4A), in the case of a person who is an active member on 31st March 2008, and to whom paragraph (1) applies before 1st April 2010, paragraph (1) applies as if "the age of 50" were substituted for "the age of 55".

And paragraph (4A) ought to be amended to read:
Paragraph (4) only applies to a member whose active membership has been continuous with that same employer throughout that period.

And paragraph (4B) ought to be amended to read:
For the purposes of paragraph (4A), the active membership of a member who has been the subject of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply shall be treated as being continuous with the transferee employer.

It should be noted that a person who is a member at 31st March 2008, who takes full or partial flexible retirement on or after 1st April 2008 and who, during continuous employment with that employer, again

takes full or partial flexible retirement before 31st March 2010, will still have the age 55 protection in relation to that second flexible retirement.]

(4A) Paragraph (4) only applies to a member whose employment has been continuous with that same employer throughout that period. **[inserted by SI 2008/1083]**

[Comment: see comment under paragraph (3) above]

(4B) For the purposes of paragraph (4A), the employment of a member who has been the subject of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply shall be treated as being continuous employment with the transferee employer. **[inserted by SI 2008/1083]**

[Comment: see comment under paragraph (3) above]

~~(5) Where a member is receiving benefits under this regulation, the period of membership used to calculate those benefits is not taken into account in any subsequent calculation of such benefits to which he is entitled under these Regulations.~~ **[substituted by SI 2008/1083]**

(5) The value of any benefits paid to a member under paragraph (1) shall be taken into account in any subsequent calculation of his benefits under regulation 16, 17, 19, 20, 30 or 31 in accordance with guidance issued by the Government Actuary. **[SI 2008/1083]**

[Comments: as a member can take flexible retirement more than once, regulation 18 should not have been omitted from the list in regulation 18(5). We are awaiting the relevant GAD guidance]

Early leavers: inefficiency and redundancy

[Comment: given the wording in regulation 19(1)(b) it might have been more appropriate if the heading to this regulation had read "Early leavers: business efficiency and redundancy"]

19.—(1) Where—
(a) a member is dismissed by reason of redundancy; or
(b) his employing authority has decided that, on the grounds of business efficiency, it is in their interest that he should leave their employment; and
(c) in either case, the member has attained the age of 55,
he is entitled to immediate payment of retirement pension without reduction.

[Comment: there is no longer a reference to the cessation of a joint appointment, presumably on the assumption that no such appointments still exist]

(2) In the case of a person who is a member on 31st March 2008, and to whom paragraph (1) applies before 31st March 2010, that paragraph applies as if "the age of 50" were substituted for "the age of 55".

[Comments:
In regulation 19(2) the words "to whom paragraph (1) applies" need to be amended to "to whom paragraphs 1(a) or (b) apply", as the inclusion of (c) completely defeats the objective of regulation 19(2) i.e. as currently written, the protection granted by regulation 19(2) only applies if 19(1)(a), (b) **and** (c) apply and so only covers those made redundant / retired on business efficiency grounds when already aged 55 or over (by which time an age 50 protection has become entirely irrelevant).

A member can only have the protection given by regulation 19(2) if they are dismissed before 31st March 2010. This seems illogical. Surely, in order to tie in with regulation 30(6), paragraph (2) should have referred to "1st April 2010" and not to "31st March 2010".

Also, why does paragraph (2) cover "a person who is a member on 31st March 2008" whereas regulation 30(6) covers "a person who is an **active** member on 31st March 2008"? The absence of the word "active" from paragraph (2) could be interpreted to mean that paragraph (2) covers any person who was a member – active, deferred or pensioner member – at 31st March 2008. Thus, a person who:

a) was in employment on 31st March 2008, and
b) was not an active member on that date (e.g. an optant out), and
c) was a deferred or pensioner member from a previous employment on that date, and
d) subsequently rejoins the scheme on or after 1st April 2008 and retires under regulation 19 before 31st March 2010

would be covered by paragraph (2). It is assumed this is not intended, as such a person would not have been covered by regulation 30(6) if benefits were to be paid under regulation 30.

To overcome the above problems, paragraph (2) ought to be amended to read:
Subject to paragraph (3), in the case of a person who is an active member on 31st March 2008, and to whom paragraph (1) applies before 1st April 2010, paragraph (1) applies as if "the age of 50" were substituted for "the age of 55".

To be consistent with regulations 18(4A) and 18(4B), two more paragraphs should be added to regulation 19 as follows:
(3) Paragraph (2) only applies to a member whose active membership has been continuous with that same employer throughout that period.

(4) For the purposes of paragraph (3), the active membership of a member who has been the subject of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply shall be treated as being continuous with the transferee employer.

The above would reflect the statement in the CLG commentary which says *"Breaks in employment will break this protection."*

It should be noted that a person who is a member at 31st March 2008, who takes full or partial flexible retirement on or after 1st April 2008 and who, during continuous employment with that employer, is subsequently retired under regulation 19 before 31st March 2010, will still have the age 55 protection in relation to that second retirement.]

Early leavers: ill-health

~~**20.** (1) If an employing authority determines, in the case of a member who has at least two year's total membership—~~
~~(a) to terminate his local government employment on the grounds that his ill health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and~~
~~(b) that he has a reduced likelihood of obtaining gainful employment (whether in local government or otherwise) before his normal retirement age,~~
~~they shall pay him benefits under this regulation.~~

~~(2) If the authority determine that there is no reasonable prospect of his obtaining gainful employment before his normal retirement age, his benefits are increased—~~
~~(a) as if the date on which he left local government employment were his normal retirement age; and~~
~~(b) by adding to his total membership at that date the whole of the period between that date and his actual normal retirement age.~~

~~(3) If the authority determine that, although he cannot obtain gainful employment within a reasonable period of leaving local government employment, it is likely that he will be able to obtain gainful employment before his normal retirement age, his benefits are increased—~~
~~(a) as if the date on which he left local government employment were his normal retirement age; and~~
~~(b) by adding to his total membership at that date 25% of the period between that date and his actual normal retirement age.~~

~~(4) In the case of a member in part-time service, the period to be added under paragraph (2)(b) or (3)(b), as the case may be, is calculated in accordance with regulation 7(3) as if he had remained in such part-time service until his actual normal retirement age.~~

~~(5) But if, in the case of a person who is a member before 1st April 2008, and—~~
~~(a) has attained the age of 50 before that date, or~~
~~(b) became a member of the 1997 Scheme having—~~
~~(i) attained the age of 45 before that date; and~~
~~(ii) not received a transfer for any other scheme,~~
~~the period to be added under paragraph (3)(b) is less than the period that would have been added had regulation 28 of the 1997 Regulations applied, then his benefits are increased by adding the latter period.~~

~~(6) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local~~

~~government employment because of ill-health or infirmity of mind or body and, if so, as to the likelihood of the member being able to obtain other gainful employment within a reasonable time of leaving local government employment or, as the case may be, before reaching his normal retirement age.~~

~~(7) In this regulation, "qualified in occupational health medicine" means—~~
~~(a) holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes of this definition, "competent authority" has the meaning given by the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003~~**(a)**~~; or~~
~~(b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.~~

~~(8) In this regulation, "gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months.~~

~~**a**) S.I. 2003/1250.~~

[Reg 20 substituted by SI 2008/1083]

20.—(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5—

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of obtaining any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

(2) If the authority determine that there is no reasonable prospect of his obtaining any gainful employment before his normal retirement age, his benefits are increased—

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he cannot obtain gainful employment within three years of leaving his employment, it is likely that he will be able to obtain any gainful employment before his normal retirement age, his benefits are increased—

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be able to obtain any gainful employment within three years of leaving his employment, his benefits—

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of obtaining any gainful employment before reaching his normal retirement age.

(6) A person who receives benefits under paragraph (4) shall—

(a) inform the authority if he obtains employment; and

(b) answer any inquiries made by the authority as to his current employment status, including as to his pay and working hours.

(7) (a) Once benefits have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

(8) (a) The authority shall discontinue the payment of benefits under paragraph (4) if they consider—

(i) that the person is in gainful employment; or

(ii) in reliance on the certificate obtained under paragraph (7)(b), that he is capable of obtaining such employment

and may recover any payment made in respect of any period before discontinuance during which they considers him to have been in gainful employment.

(b) The authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

(c) The authority shall forthwith notify the appropriate administering authority of any action they have taken under this paragraph.

(9) A person in respect of whom the payment of benefits is discontinued under paragraph (8) shall be treated as a pensioner member with deferred benefits from the date the suspension takes effect, and shall not be eligible to receive benefits under paragraph (4) in respect of any future period.

(10) If a person in respect of whom the payment of benefits is discontinued under paragraph (8) subsequently becomes an active member of the Scheme, his earlier period of active membership in respect of which benefits were paid under paragraph (4) shall not be aggregated with his later active membership.

(11) (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

(12) (a) Subject to sub-paragraph (b) and to paragraph (13), in the case of a member in part-time service, the period to be added under paragraph (2)(b) or (3)(b), as the case may be, is calculated in accordance with regulation 7(3) as if he had remained in such part-time service until his normal retirement age.

(b) If the certificate obtained under paragraph (5) states that, in the medical practitioner's opinion, the member is wholly or partly in part-time service as a result of the condition that has caused him to be incapable of discharging efficiently the duties of the relevant local government employment, no account shall be taken of such reduction in his service as is attributable to that condition.

(13) But if, in the case of a person who is a member before 1st April 2008, and who has attained the age of 45 before that date, the period to be added under paragraph (2)(b) or (3)(b) is less than the period that would have been added had regulation 28 of the 1997 Regulations applied, then his benefits are increased by adding the latter period.

(14) In this regulation –

"gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

"permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

"qualified in occupational health medicine" means—

(a) holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes of this definition, "competent authority" has the

meaning given by the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003(6); or

(b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

(15) Where, apart from this paragraph, the benefits payable to a member in respect of whom his employing authority makes a determination under paragraph (1) before 1st October 2008 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall have effect in relation to him as if they were still in force instead of the preceding paragraphs of this regulation.

[General comments:

The period to be entitled to an enhanced pension, which was 5 years in the 1997 Regulations, was reduced to 2 years in the original Benefits Regulations and has now been reduced to 3 months. Thus, an employee who is not a Scheme member and for whom termination on health grounds is likely or is pending might be well advised to opt in, get three months membership under his / her belt, and then get awarded a tier 3, tier 2 or even tier 1 benefit. Whilst the advantage of doing so for a tier 3 benefit is negligible, getting a tier 2 or tier 1 benefit for only three months contributions is an extremely good deal.

There is no provision corresponding to that in the 1997 Regulations which prevents a member who is already in receipt of an enhanced ill health pension from again receiving an enhanced pension should they subsequently be retired on ill health grounds for a second (or further) time.

The Secretariat is (and always has been) against the use of the phrase "obtaining any gainful employment" and had pressed for "capable of undertaking any gainful employment because of his ill health". This would have made the ill health decision one based on a person's "capability" rather than one based on the possibility of them "obtaining" any gainful employment.

However, CLG have decided to continue with the phrase "obtaining gainful employment".

Let us look at some of the practical issues this creates. Regulation 20(1)(b) says that the employing authority must determine whether the person has a reduced likelihood of obtaining any gainful employment before age 65. However:

i) there is no reference in that regulation to the reduced likelihood having to be connected with the medical condition. One could postulate that there is a reduced likelihood of obtaining other gainful employment at times when unemployment is high but surely the reduced likelihood ought to be linked to the medical condition, not the state of the job market

ii) even if assessed purely on the medical condition (and not based on the job market), how will "reduced likelihood" be assessed (and this question is equally true of the question the doctor has to give a view on under regulation 20(5))? One could argue that all employees whose employment is terminated on health grounds have a reduced likelihood of obtaining gainful employment (even if it is only a 0.5% reduced likelihood) given that in the real world employers (although they perhaps shouldn't) tend to be more cautious of taking on an employee with a medical history who lost their last job because of ill health. Thus all terminated employees would pass the test (in which case, why not delete regulation 20(1)(b) - indeed, why not delete it anyway given that regulations 20(2), (3) and (4) themselves all refer to obtaining gainful employment?). Conversely, one could argue that a significant proportion of employees would not meet the test because they would be immediately "capable" of some other gainful employment (stacking shelves for 30 hours per week, posing as a model in an art school for 30 hours per week, etc) and so would not be entitled to an ill health pension at all (and would instead be awarded a deferred pension). But which is the correct view?

Regulations 20(2), (3) and (4) refer respectively to the employer (not the doctor) having to decide:
(2) that there is no reasonable prospect of the employee obtaining any gainful employment before 65, or
(3) that the employee cannot obtain gainful employment within 3 years of leaving, or
(4) that the employee is likely to be able to obtain gainful employment within 3 years

(6) S.I. 2003/1250.

The same questions as posed in (i) and (ii) above again arise. How is the employer supposed to make the determination? Also, once again, there is no specific requirement in regulations 20(2), (3) or (4) for the person's lack of prospect of "obtaining" gainful employment to be connected in any way with the medical condition. Surely all the decisions should be based on the likelihood, by reason of the person's medical condition, of them being "capable" of other gainful employment. Furthermore, whilst the employer is required to decide which tier the person falls into, the doctor is only required by regulation 20(5) to opine on whether the person has "a reduced likelihood of obtaining any gainful employment before" age 65. If that is all the doctor does (i.e. the doctor simply says that the person is permanently incapable and has a reduced likelihood of obtaining gainful employment before age 65), how will the employer decide which tier to place the person in?

The Secretariat has a number of other concerns about the regulations i.e. how they operate, the wording and effect of some of the protections, the administrative impact on employers, etc. These are listed below:

1. The protection afforded by regulation 20(15) means that, until the end of September 2008, the ill health certificate will also need to ask the medical adviser whether the person meets the old ill health definition. The question needs to be asked as a person who:
a) meets the old and new ill health definitions will get the better of the old and new ill health benefits
b) meets the old but not the new ill health definition under regulation 20(1) will get no ill health benefits (because to get the protection under regulation 20(15) the person must satisfy the requirements of regulation 20(1))
c) meets the new but not the old ill health definition will get the new ill health benefits

2. The protection afforded by regulation 20(15) seems to also cover people who join the LGPS post 31st March 2008 and have an ill health determination pre 1st October 2008 i.e. protection is provided even if the person was never a member of the Scheme under the 1997 Regulations because the regulation simply says "had the 1997 Regulations continued to apply" and not "had the 1997 Regulations continued to apply to him". Only if the words "to him" had been added would it have implied that the person would have had to be a member pre 1st April 2008. The absence of those words means that the 1997 Regulations apply whether or not the person was a member pre 1st April 2008. Also, the determination under regulation 20(1) only needs to be made before 1st October 2008 but the date of leaving could be later than that (due to notice periods), so protection in these cases will go beyond 30th September 2008.

3. One assumes that the intention behind the protection afforded by regulation 20(15) is that the enhancements under the 1997 Regulations should continue to apply. However, that is not what the regulation says. It says that the 1997 Regulations (in their entirety) continue to apply. If those regulations continue to apply, is the benefit payable at the rate of a 1/80th pension plus a 3/80ths lump sum? Is there a 5 year pension guarantee rather than a 10 year guarantee? Can the person commute the pension on the grounds of serious ill health? If the person has paid more than 6% since April should we refund the "overpaid" contributions and if they have paid less than 6% should we recover the "underpaid" contributions etc etc etc? If the 1997 Regulations continue to apply (in their entirety) and a person falls under regulation 20(15) and also under regulation 20(13) one would assume that regulation 20(13) will apply, given that 20(15) would produce a 1/80th plus 3/80ths benefit with a 5 year guarantee whereas regulation 20(13) would produce a 1/60th benefit with a 10 year guarantee.

4. The "transitional" protection under regulation 20(15) only protects those members who not only cannot do their current job but who have a reduced likelihood of obtaining gainful employment before 65. The protection, as drafted, requires the employer to make a positive determination under regulation 20(1) in order for regulation 20(15) to apply and will only offer protection if a member satisfies both regulation 20(1)(a) and 20(1)(b). It, therefore, offers no protection to a member who would have satisfied the ill-health retirement criteria of the old scheme but does not satisfy the criteria under the new regulations (because they are immediately capable of another job i.e. they do not have a reduced likelihood of obtaining any gainful employment before age 65).

5. Regulation 20(9) says that a tier 3 person whose pension is suspended shall be treated as a pensioner member with deferred benefits from the date the suspension takes effect. Is the wording correct? How can a person be a pensioner member with deferred benefits (as this is not a category of member recognized by the Finance Act 2004 or the Pensions Act 1995)? Surely the person would be a pensioner member with a suspended pension. What happens if the person's health health worsens? Can the person subsequently be moved into tier 2 or, indeed, tier 1?

6. Where a tier 3 pension is suspended under regulation 20(8) it is suspended from that point onwards. However, if the employer believes the person was in gainful employment before the date of suspension, the employer can recover any "overpayment". So, the pension Fund will have paid the money out up to the point of suspension and the pension Fund will view the payment as being legitimately paid up to that point. However, the employer could write to recover an "overpayment" of money that the pension Fund appears to view as a legitimate payment. Isn't this likely to lead to a few disagreements where the person will say that if the Fund doesn't see it as an overpayment, why is the employer seeking recovery (particularly as it was the Fund and not the employer that had paid the money direct to the person)? Also, whilst regulation 20(8) says that the employer **may** recover any overpayment, the clear implication of regulation 20(4)(a) is that the benefit is **not** payable if the person is in gainful employment. Why does one regulation say the benefit is not payable and another say that the employer "may" (but does not have to) recover any overpayment? If a benefit isn't payable, it isn't payable - discretion should not come into the equation.

7. If an employer undertakes a review at 18 months and the doctor says that the person is still incapable but is likely to be capable within the original 3 year time frame, it appears that the employer could seek a further opinion within that 3 year period or simply sit back, wait for the 3 year period to end and then stop the pension. If the latter course is taken there will surely be a number of appeals from employees wishing to have their cases reviewed within the 3 year period (with a view to being placed into a higher tier).

8. Regulation 20(11) says that a person being paid a tier 3 benefit can be moved into tier 2. Why is it restricted to tier 2 i.e. why can't a person be moved from tier 3 to tier 1 (which could affect some tier 3 cases who are near to age 65)? The failure to provide for a case to be moved from tier 3 to tier 1 discriminates against someone who leaves under the 3rd tier but then becomes incapable of any employment before age 65. If their condition worsens but they can still obtain gainful employment before age 65 they can get increased benefits under tier 2 but if their condition worsens to such an extent that they cannot obtain gainful employment before 65 then they cannot have their benefits increased because they do not satisfy the specific criteria for tier 2 and the regulations do not allow for them to be moved to tier 1.

9. Note that under regulation 20(12)(a) the ill health enhancement for part timers will, subject to the provisions in regulation 20(12)(b), be based on hours at date of leaving, not the historical average. Also, there is no protection for those part-timers who have 13 1/3rd or more years whole–time employment.

10. Let's look at a case of an employee taken on by an employer with a pre-existing medical condition which meant the employee could only work half time. Ten years later the condition worsens and the person is medically retired (no change in hours). The wording of regulation 20(12)(b) would appear to require that enhancement be granted as if the person were full time.

11. The retention of regulation 83 of the 1997 Regulations means that a person with an added years' contract will have it bought out if they meet the old definition of ill health retirement under regulation 27 of the 1997 Regulations. This means that:
a) a person who meets the 1997 Regulations ill health definition but not the new definition will get the added years contract bought out even though they won't be entitled to an ill health pension under the new regulations
b) a person who does not meet the 1997 Regulations ill health definition but does meet the new definition won't get the added years contract bought out but will be entitled to an ill health pension under the new scheme

12. A person paying ARCs who falls into tier 3 won't have the ARC contract paid up (see regulation 24(2) of the Administration Regulations). However, if the person is subsequently moved into tier 2 under regulation 20(11), is the ARC contract deemed to then be bought out?

13. Shouldn't the protection at regulation 20(13) refer to "a person who was an active member at 31st March 2008" rather than to "a person who is a member before 1st April 2008". Also, given that regulations 20(13) and 20(15) are transitional protections, wouldn't they have been better placed in the Transitional Regulations?

14. Regulation 20(13) refers to the period that would have been added under regulation 28 of the 1997 Regulations. However, regulation 28 did not "add" membership – it simply referred to an enhanced (total) membership period.

15. Regulation 20 uses the words "reduced likelihood" and "reasonable prospect", without defining these terms. We assume these will be defined in the statutory guidance to be issued by the Secretary of State.

16. It should be noted that where a member has more than one concurrent job and is ill health retired from one but continues in another, the member is likely to fall into tier 3 (because they are likely, by reason of their continuing employment, to be certified as being capable of gainful employment – as defined in the regulations)

17. It should be noted that to get enhancement under regulation 20 the member has to have 3 months total membership but if a member dies in service with less than 3 months membership the benefit payable to the spouse, children, etc is, by virtue of regulations 24(2) and 28, based on enhanced membership.

Election for lump sum in lieu of pension

21.—(1) A member in respect of whom a benefit crystallisation event within the meaning of the Finance Act 2004 occurs on or after 1st April 2008 may choose in writing to the appropriate administering authority before any benefits become payable to commute his pension, or a part thereof, at a rate of £12 for every £1 of annual pension entitlement surrendered .
[Comments:
The Secretariat believes that, in order to ensure that a member who has had a previous Benefit Crystallisation Event (BCE) can still elect to commute part of the pension from the current BCE, and to ensure that the date benefits become payable is linked to the BCE date, the words "any benefits become payable" in regulation 21(1) should be replaced with the words "any benefits become payable in respect of that Benefit Crystallisation Event".
Regulation 21(1) says the member can "commute his pension". The Secretariat believes this also includes any pension payable to the member which is derived from regulations 13 and 14.]

(2) But the total amount of the member's commuted sum, including any sum received as benefits provided in the form of a lump sum in accordance with regulation 15 shall not exceed 25% of the capital value of his accrued rights.

(3) For the purposes of this regulation, a member's accrued rights include rights accrued in respect of any payments made by or for him in accordance with the 1997 Regulations.
[Comment: there is an argument that this paragraph would have been better placed in the Transitional Provisions Regulations]

(4) The capital value of a member's accrued rights shall be calculated in accordance with guidance issued by the Government Actuary.
[Comment: Although the GAD commutation guidance says that a member cannot commute their pension to below the level of their GMP (if any) and that the requisite benefit test is performed before commutation, the Secretariat nonetheless believes it would have been wiser to include these points in the Regulations so as to provide statutory cover]

(5) And for the purposes of paragraph (1), a member's pension is his pension after any reduction pursuant to regulation 18 or 30.
[Comment: although this refers to regulation 18 it is, more correctly, a reference to regulation 18(2)]

Limit on total amount of benefits

22.—(1) A member and any dependent of his shall not be entitled, under any provision of these Regulations, to receive benefits the capital value of which exceeds his lifetime allowance increased, where applicable, by his primary protection or his enhanced protection except in accordance with guidance issued by the Government Actuary.
[Comment: the Secretariat believes that the words from "value of which" to "enhanced protection" should be deleted and replaced with the following "value of which exceeds his enhanced protection, or which exceeds his lifetime allowance increased, where applicable, by his primary protection,". This is to reflect the fact that enhanced protection is not a multiple of the lifetime allowance.]

(2) In this regulation, "lifetime allowance", "primary protection" and "enhanced protection" are to be construed in accordance with section 218 of, and Schedule 36 to, the Finance Act 2004(**b**).

(**b**) 2004 c. 12.

(3) Any calculation of the capital value of a member's benefits for the purposes of this or any other of these Regulations is to be carried out in accordance with guidance issued by the Government Actuary.

(4) The appropriate administering authority is responsible for deducting from any payment of benefits under the Scheme any tax to which they may become chargeable under the Finance Act 2004.

Death grants: active members

23.—(1) If an active member dies, a death grant is payable.

(2) The appropriate administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member's nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.

(3) The death grant is his final pay multiplied by 3.

(4) But in calculating death grant in respect of a part-time employee, actual pensionable pay in part-time employment is to be used.

(5) If the administering authority have not made payments under paragraph (1) equalling in aggregate the member's death grant before the expiry of two years beginning with his death, they must pay an amount equal to the shortfall to the member's personal representatives.
[Comments:
This does not cater for those cases where an administering authority first finds out about the death more than 2 years after the date of death. Paragraph 13 of Part 2 of Schedule 29 to the Finance Act 2004 permits schemes to contain a rule requiring the death grant to be paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member's death and the day on which the scheme administrator could first reasonably be expected to have known of it. Regulation 23(5) ought to be amended to give this extra leeway to administering authorities.

Where death is suspected but no body has been found there may be an interim death certificate but no final death certificate. For the purposes of issuing probate the Registrar of Births, Deaths and Marriages has to be reasonably satisfied that the person is dead e.g. bank accounts have not been touched, there has been no contact with friends or relatives over the period of 7 years since the person was last seen. This means that the administering authority will not be in a position to make a death grant perhaps for several years after the suspected date of death. The Secretariat would argue that in these cases the two year period in regulation 23(5) should only run from the date that probate is issued]

Survivor benefits: active members

24.—(1) If a member dies leaving a surviving spouse, nominated cohabiting partner or civil partner, that person is entitled to a pension.
[Comment: to be consistent with regulation 27(2) there should be a further paragraph which says that the survivor's pension is payable from the day following the date of death]

(2) The pension is calculated by multiplying his total membership, augmented as if Regulation 20(2) applied, by his final pay and divided by 160.
[Comments:
This regulation ought to also cross-refer not only to regulation 20(2) but also to regulations 20(12), 20(13) and 20(15).

This regulation specifically covers benefits accrued on or after 1st April 2008. However, benefits in respect of membership accrued up to 31st March 2008 are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which, subject to regulation 3(4) of the Transitional Provisions Regulations, says that the survivor benefits shall be calculated as if regulation 24 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date. Regulation 3(4) of the Transitional Provisions Regulations says that only periods of membership after 5th April 1988 count towards a nominated co-habiting partner's or civil partner's pension.

There are no short-term survivor benefits.

It should be noted that if the member dies in service after age 65, whilst the member's notional pension would have been increased under regulation 17(2) if he / she had retired rather than died in service, the survivor's pension under regulation 24(2) is not similarly increased.]

(3) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1).
[Comments:
A pension payable under this regulation must be shared out equally where there is more than one surviving spouse. This contrasts with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension.

The regulation only refers to "more than one surviving spouse" as it is not possible to have more than one nominated co-habiting partner or civil partner. There can, however, be more than one surviving spouse if the member legally entered into a polygamous marriage abroad.]

Meaning of "nominated cohabiting partner"

25.—(1) "Nominated cohabiting partner" means a person nominated by a member in accordance with the terms of this regulation.

(2) A member (A) may nominate another person (B) to receive benefits under the Scheme by giving to his administering authority a declaration signed by both A and B that the condition in paragraph (3) has been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.
[Comment: regulation 25(2) refers to a "member" being able to nominate. Deferred and pensioner members who left prior to 1st April 2008 cannot nominate as they were never members of the new scheme. Post 31st March 2008 active members can obviously nominate and those who become a pensioner or deferred member after that date can, by virtue of paragraph (8) below, nominate after leaving (so as to ensure equality of treatment with civil partners and post retirement marriages).]

(3) The condition is that—
(a) A is able to marry, or form a civil partnership with, B,
(b) A and B are living together as if they were husband and wife or as if they were civil partners,
(c) neither A nor B is living with a third person as if they were husband and wife or as if they were civil partners, and
(d) either B is financially dependent on A or A and B are financially interdependent.
[Comment: regulation 25(3)(d) uses the terms "financially dependent" and "financially interdependent". These terms are not defined in the regulations and there is no overriding definition in the Finance Act 2004. Administering authorities are left to make their own determination as to the meaning of these terms.]

(4) But a nomination has no effect if the condition in paragraph (3) has not been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.
[Comment: the Secretariat cannot see the benefit of retaining paragraph (4) as it means that, technically, for a co-habiting partner's pension to be paid, the conditions in paragraphs (3), (4) and (6) have to be met. Thus, an administering authority would need to check the conditions in paragraphs (3) and (4) are met at the point the declaration is signed, and also check that the conditions in paragraphs (3) and (6) are satisfied at the member's date of death. This appears to be unnecessarily complicated. All an administering authority really ought to need to concern itself with is whether the conditions in paragraphs (3) and (6) are satisfied. Paragraph (4) should, in the Secretariat's view, be deleted.]

(5) A nomination ceases to have effect if—
(a) either A or B gives written notice of revocation to ~~the Secretary of State~~ the administering authority **[SI 2008/1083]**,
(b) A makes a subsequent nomination under this regulation,
(c) either A or B marries, forms a civil partnership or lives with a third person as if they were husband and wife or as if they were civil partners, or
(d) B dies.

(6) B is A's surviving nominated partner if—
(a) the nomination has effect at the date of A's death, and

(b) B satisfies ~~the Secretary of State~~ the administering authority **[SI 2008/1083]** that the condition ~~in paragraph (2)~~ in paragraph (3) **[SI 2008/1083]** was satisfied for a continuous period of at least 2 years immediately prior to A's death.

(7) For the purposes of this regulation, two people of the same sex are to be regarded as living together as if they were civil partners if they would be regarded as living together as husband and wife if they were not of the same sex.

(8) In this regulation, "member" means an active member or a former active member who has become a deferred or pensioner member in accordance with these Regulations. **[inserted by SI 2008/1083]**

Meaning of "eligible child"

~~**26.**—(1) The child of a deceased member is an eligible child if he falls within the meaning of "dependant" for the purposes of Part 2 of Schedule 28 to the Finance Act 2004 as modified by regulation 34 of the Taxation of Pension Schemes (Transitional Provisions) Order 2006(**a**)~~

~~(**a**) S.I. 2006/572.~~

~~(2) But a child who was born on or after the first anniversary of the date of the deceased's death is not an eligible child.~~

~~(3) If an appropriate administering authority wish—~~
~~(a) they may treat education or training as continuous despite a break.; and~~
~~(b) they may suspend payment of any entitlement to benefits under regulations 28, 34 or 37 during such a break.~~

[Reg 26 substituted by SI 2008/1083]

26.—(1) Subject to paragraph (3), the child of a deceased member is an eligible child if he is wholly or mainly dependent on the member, and is less than 18 years of age, at the date of the member's death.
[Comments:

This paragraph only covers a child **of** the deceased member if the child is **under 18** and is wholly or mainly **dependant** on the member at the date of death. So, if a child of the deceased member is under 18 but is not wholly or mainly dependant on the member at the date of death, that child is not an "eligible child" and no child's pension will be payable. It is important to note, too, that to be an "eligible child" the child has to be a child **of** the deceased member. The advice the Secretariat has received from HMRC is that *"Child is not defined for the purposes of paragraph 15 of Schedule 28 to Finance Act 2004. So we have to look to the legal definition of a child – which is the natural (whether born legitimate or illegitimate and includes a child "en ventre sa mere" i.e. "an unborn child inside the mother's womb") or legally adopted child of a person".* Thus, a child accepted as part of the family (e.g. the child of a cohabiting partner) who is not the natural child (legitimate, illegitimate or "en ventre sa mere") or legally adopted child of the deceased would not be entitled to a child's pension under regulation 26(1), whereas such a child if older and dependant on the deceased would have been entitled to a pension under regulation 26(3) if the conditions therein were met. This is clearly not intended. To overcome this, the words "the child of a deceased member is an eligible child" should be amended to "a child is an eligible child".

It should be noted that the regulation refers to age 18 and not, as is currently the case for benefits payable to children under the 1997 or 1995 Regulations, age 17. The Secretariat assumes the increase to age 18 is to reflect the Government's intention that all children should stay in education or training until age 18. The relevant provisions in the 1997 and 1995 Regulations may eventually be amended to also refer to age 18 and need to be amended to comply with the provisions of the Finance Act 2004 and the transitional provisions contained in the Taxation of Pension Schemes (Transitional Provisions) Order 2006 [SI 2006/572] which extend the definition of a child to:

A child of the member is a dependant of the member if the child:

(a) has not reached the age of 23;

(b) has reached that age and, in the opinion of the scheme administrator, was at the date of the member's death dependant on the member because of physical or mental impairment.

(c) has reached that age and is in full time education or undertaking vocational training, or

(d) on reaching on reaching that age or, if later, on ceasing full time education or vocational training is, in the opinion of the scheme administrator, suffering from physical or mental deterioration which is sufficiently serious to prevent the individual from following a normal employment or which would seriously impair his earning capacity.

The transitional provisions apply (if scheme rules wish to adopt them) where:

(a) a child was already in receipt of a pension on 5 April 2006 (or the member had died before then and the child's pension was due to come into payment); or

(b) a member was in receipt of a pension on 5 April 2006 and his or her child is born on or before 5 April 2007]

(2) But a child who is born on or after the first anniversary of the date of the member's death is not an eligible child.

(3) A dependent child who has reached the age of 18 but has not reached the age of 23 and is in full time education or undertaking vocational training at the date of the member's death is an eligible child.

[Comment: Paragraph 15(3) of Part 2 of Schedule 28 to the Finance Act 2004 defines dependency as being where

(a) the person was financially dependant on the member,

(b) the person's financial relationship with the member was one of mutual dependence, or

(c) the person was dependant on the member because of physical or mental impairment]

(4) An appropriate administering authority may treat a dependent child who commences full time education or vocational training after the date of the member's death as an eligible child after he reaches the age of 18 and until he reaches the age of 23 .

(5) In the case of a dependent child falling within paragraph (4), an appropriate administering authority may —

(a) treat education or training as continuous despite a break; and

(b) suspend payment of any entitlement to benefits under regulation 28, 34 or 37 during such a break.

(6) An appropriate administering authority may treat a dependent child who is disabled within the meaning of the Disability Discrimination Act 1995([7]) as an eligible child.

[Comment: paragraph 15(2) of Part 2 of Schedule 28 to the Finance Act 2004 qualifies this by saying that the payment will only be an authorised payment if a child of the member is a dependant of the member i.e. if the child-
(a) has not reached the age of 23, or
(b) has reached that age and, in the opinion of the scheme administrator, was **at the date of the member's death** dependant on the member because of physical or mental impairment.]

Children's pensions

27.—(1) If a member dies leaving one or more eligible children, they are entitled to a children's pension.

(2) The pension is payable from the death.
[Comment: this ought to say that the pension is payable from the day following the date of death]

(3) An eligible child ceases to be entitled to a pension when he ceases to be a child within regulation 26.

(4) The amount of that pension is calculated in accordance with regulation 28, 34 or 37, as the case may be.

([7]) 1995 c. 50.

Children's pensions: active members

28.—(1) The amount of the pension of an eligible child of a deceased active member is calculated as follows.

(2) If a survivor benefit is payable under regulation 24—
(a) where there is only one such child, the pension is calculated by multiplying the member's total membership, augmented as if Regulation 20(2) applied, by his final pay, and dividing by 320; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership, augmented as if Regulation 20(2) applied, by his final pay, and dividing by 160; and
(ii) those children are jointly entitled in equal shares.
[Comments:
This regulation ought to cross-refer not just to regulation 20(2) but also to regulations 20(12), 20(13) and 20(15).

This regulation specifically covers benefits accrued on or after 1st April 2008. However, benefits in respect of membership accrued up to 31st March 2008 are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which says that the children's pensions shall be calculated as if regulation 28 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date.

There are no short-term survivor benefits.

It should be noted that if the member dies in service after age 65, whilst the member's notional pension would have been increased under regulation 17(2) if he / she had retired rather than died in service, the children's pension under regulation 28(2) is not similarly increased.
A pension payable under this regulation must be shared out equally where there is more than one surviving child. This contrast with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension.]

(3) If no survivor benefit is payable under regulation 24—
(a) where there is only one such child, the pension is calculated by multiplying the member's total membership, augmented as if Regulation 20(2) applied, by his final pay, and dividing by 240; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership, augmented as if Regulation 20(2) applied, by his final pay, and dividing by 120; and
(ii) those children are jointly entitled in equal shares.
[Comments: same comments as for paragraph (2) above]

Calculation on leaving early

~~**29.**—(1) This regulation applies in the case of a member who leaves local government employment and is not entitled to immediate payment of retirement pension under any of regulations 16 to 20.~~

~~(2) His entitlement to benefits that would, apart from any other provision of these Regulations, become payable on his attaining normal retirement age, is calculated in accordance with regulation 7 as at the date of his leaving such employment.~~

~~(3) But that entitlement is extinguished if an aggregation takes place under regulation 6(2) or if a transfer out takes place under regulations 116 to 118 of the 1997 Regulations.~~

[Reg 29 substituted by SI 2008/1083]

29.—(1) This regulation applies in the case of a member who leaves his employment and is not entitled to immediate payment of retirement pension under any of regulations 16 to 20.

(2) His entitlement to benefits that would, apart from any other provision of these Regulations, become payable on his attaining normal retirement age, is calculated in accordance with regulation 7 as at the date of his leaving such employment.

[Comment: as regulation 29(1) says that the regulation only applies to a member who leaves his employment and regulation 29(2) says that the deferred benefit can only be calculated at the date of leaving the employment, it appears that technically benefits for an optant out cannot be calculated and awarded until such time as the member ceases employment. In order to ensure that the Scheme is easily able to comply with:

a) the provisions of regulation 27A of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (SI 1991/167) which requires that members be informed of their leaver rights and options within 2 months of making a request or within 2 months of the employer or the member notifying the administering authority that pensionable service has terminated, and

b) Parts and of the Pension Schemes Act 1993 (right to a Cash Equivalent Transfer Value), and

c) regulation 3 of the Occupational Pension Schemes (Transfer Value) Regulations 1996 (SI 1996/1847) which provides for the right to a CETV of post 5th April 1988 benefits upon opting out,

regulations 29(1) and (2) ought to be amended to permit the benefits to be calculated and awarded upon opting out. However, the regulations should not permit payment until such time as the person ceases local government employment (as defined in Schedule 1 of the Administration Regulations).]

(3) Subject to regulations 30 and 31, his retirement pension becomes payable on attaining normal retirement age.

[Comment: this regulation ought to commence "Subject to regulations 30 and 31 and to regulation 50(2) of the Administration Regulations" in order to recognise that the member can defer payment beyond age 65]

(4) But that entitlement is extinguished if an aggregation takes place under regulation 6(2) or if a transfer out takes place under regulations 78 to 80 of the Administration Regulations.

(5) Where a member chooses not to receive payment of his retirement pension, or any part of it, immediately on attaining normal retirement age, his entitlement is enhanced in accordance with guidance issued by the Government Actuary.
[Comment: the GAD guidance has been received.
Also, see comment under regulation 17(2) above]

Choice of early payment of pension

30.—(1) If a member leaves a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he has attained the age of 55 he may choose to receive payment of them immediately.
[Comments:
There has been some debate in the past as to the meaning of the word "immediately". For example, in regulation 30(1) does it mean "immediately from age 55" or "immediately from the date of election". In order to be precise and to ensure consistent application of the regulations, the word "immediately" in regulation 30(1) ought to be amended to "immediately from the date of election".

Regulation 30(1) does not specify to whom the member has to make an election for early payment. It is to be assumed the election has to be made to the administering authority – but see also the requirements in regulation 30(2) below.]

(2) A choice made by a member aged less than 60 is ineffective without the consent of his employing authority or former employing authority ~~(but see paragraph (6))~~ **[SI 2008/1083]**.

(3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29 **[words from "calculated" inserted by SI 2008/1083]**.

(4) His pension must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary.
[Comment: the GAD guidance has been received]

(5) A member's employing authority may determine on compassionate grounds that his retirement pension ~~and grant~~ **[SI 2008/1083]** should not be reduced under paragraph (4).

~~(6) In the case of a person who is a member on 31st March 2008, and who makes an election before 31st March 2010, paragraph (1) applies as if "the age of 50" were substituted for "the age of 55".~~

[sub –paragraph (6) substituted by SI 2008/1083]

(6) In the case of a person who is an active member on 31st March 2008, and who makes an election before 1st April 2010, paragraph (1) applies as if "the age of 50" were substituted for "the age of 55".
[Comments:
To be consistent with regulations 18(4A) and 18(4B), two more paragraphs should be added to regulation 30 as follows:
(7) Paragraph (6) only applies to a member whose active membership has been continuous with that same employer throughout that period.

(8) For the purposes of paragraph (7), the active membership of a member who has been the subject of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply shall be treated as being continuous with the transferee employer.

Note: should the age 55 change also be built into regulation 31 of the 1997 Regulations and regulation D11 of the 1995 Regulations? If it is built in, deferred members subject to those Regulations would surely opt out of the change in order to protect the age 50 payable date. Thus, there seems no point in amending the 1997 and 1995 Regulations.]

Early payment of pension: ill-health

~~**31.**—(1) Subject to paragraph (2), if a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body—~~
~~(a) he may request to receive payment of the retirement benefits immediately, whatever his age, and~~
~~(b) paragraphs (2) and (4) of regulation 20 apply.~~

~~(2) If a member does not request immediate payment under this regulation, he is entitled to receive a pension without reduction, payable from his normal retirement age.~~

[Reg 31 substituted by SI 2008/1083]

31.—(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits immediately, whatever his age.
[Comment: There has been some debate in the past as to the meaning of the word "immediately". For example, in regulation 31(1) does "immediately" mean "immediately from the date the person became permanently incapable" or "immediately from the date of election"? In order to be precise and to ensure consistent application of the regulations, the word "immediately" in regulation 31(1) should be amended to "immediately from the date of election".

Regulation 31(1) does not specify to whom the member has to make an election for early payment. Given the requirements of regulation 31(2) it is to be assumed the election has to be made to the former employing authority.

(2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner .
[Comment: Regulation 31 is not clear. Paragraph (1) simply says that a person who is permanently incapable of his former job by reason of ill health or infirmity of mind or body can ask for payment of his benefits. Paragraph (1) is, therefore, essentially the criteria under which a member can apply for payment of the benefit and makes no mention of him / her being unable to obtain gainful employment before

normal retirement age or for at least three years. Therefore, if the medical practitioner agrees that the deferred member satisfies the criteria of paragraph (1), i.e. permanently unable to do the former job, then there would be no grounds for the employer refusing to put benefits into payment. If the intention is that benefits can only be paid if the criteria in paragraph (1) are met AND the person is unlikely to be able to obtain gainful employment before NRD or for at least three years, regulation 31 needs to say so. It doesn't do so at present as there is nothing in regulation 30(1) which says the requirements of regulations 30(1) AND 30(2) both have to be met (although the Secretariat assumes that is what is intended).]

(3) In this regulation, "gainful employment", "permanently incapable" and "qualified in occupational health medicine" have the same meaning as in regulation 20.

Death grants: deferred members

32.—(1) If a deferred member dies, a death grant is payable.

(2) The administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member's nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.

(3) The death grant is his retirement pension multiplied by 5.
[Comment: This regulation specifically covers the death grant in respect of that part of a deferred benefit which relates to membership accrued on or after 1st April 2008. Benefits for a post 31st March 2008 leaver in respect of their membership accrued up to 31st March 2008 are covered by regulation 7 of the Transitional Provisions Regulations which says that *"the sum of any death grants to which he is entitled under any provision of the [new] Scheme or of the 1997 Scheme, as continued in effect by regulation 3 [of the Transitional Provisions Regulations], shall not exceed his retirement pension multiplied by 5"*. This appears to still provide that the death grant for the pre 1st April 2008 membership is 3/80ths of final pay for each year of membership and for the post 31st March 2008 membership it is 5/60ths of final pay for each year of membership (as these combined do *"not exceed his retirement pension multiplied by 5"*). However, CLG have repeatedly confirmed that their intention is that the death grant for the pre 1st April 2008 membership should be **5/80ths** of final pay for each year of pre 1st April 2008 membership and for the post 31st March 2008 membership it should be 5/60ths of final pay for each year of post 31st March 2008 membership. To achieve this, regulation 7 of the Transitional Provisions Regulations needs to be amended to read something like "Where a person to whom regulation 3 applies becomes a deferred member after 31st March 2008 and dies before his pension comes into payment, the death grant payable shall be the aggregate of 5 times the deferred pension in respect of the pre 1st April 2008 membership and the death grant payable under regulation 32 of the Benefits Regulations"

(4) If the administering authority have not made payments under paragraph (1) equalling in aggregate the member's death grant before the expiry of two years beginning with his death, they must pay an amount equal to the shortfall to the member's personal representatives.
[Comments:
This does not cater for those cases where an administering authority first finds out about the death more than 2 years after the date of death. Paragraph 13 of Part 2 of Schedule 29 to the Finance Act 2004 permits schemes to contain a rule requiring the death grant to be paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member's death and the day on which the scheme administrator could first reasonably be expected to have known of it. Regulation 32(4) ought to be amended to give this extra leeway to administering authorities.

Where death is suspected but no body has been found there may be an interim death certificate but no final death certificate. For the purposes of issuing probate the Registrar of Births, Deaths and Marriages has to be reasonably satisfied that the person is dead e.g. bank accounts have not been touched, there has been no contact with friends or relatives over the period of 7 years since the person was last seen. This means that the administering authority will not be in a position to make a death grant perhaps for several years after the suspected date of death. The Secretariat would argue that in these cases the two year period in regulation 32(4) should only run from the date that probate is issued]

Survivor benefits: deferred members

33.—(1) If a deferred member dies leaving a surviving spouse, nominated cohabiting partner or civil partner, that person is entitled to a pension.

[Comment: to be consistent with regulation 27(2) there should be a further paragraph which says that the survivor's pension is payable from the day following the date of death]

(2) The pension is calculated by multiplying his total membership by his final ~~salary~~ pay **[SI 2008/1083]** and divided by 160.
[Comments:

This regulation specifically covers benefits accrued on or after 1st April 2008. However, where the deferred benefits for a post 31st March 2008 deferred beneficiary also include membership accrued up to 31st March 2008, the survivor benefits for that membership are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which, subject to regulations 3(4) and 6(3) of the Transitional Provisions Regulations, says that the survivor benefits are to be calculated as if regulation 33 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date. Regulation 3(4) of the Transitional Provisions Regulations says that only periods of membership after 5th April 1988 count towards a nominated co-habiting partner's or civil partner's pension and regulation 6(3) of the Transitional Provisions Regulations says that regulation 42 of the 1997 Regulations (post leaving marriages) shall continue to apply to a deferred member who marries after leaving.

It should be noted that if the deferred member dies whilst deferring payment after age 65 (in accordance with regulation 50(2) of the Administration Regulations), the survivor's pension under regulation 33(2) is not actuarially increased on account of the member's deferment of payment beyond age 65.]

(3) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1).
[Comment: A pension payable under this regulation must be shared out equally where there is more than one surviving spouse. This contrast with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension. The regulation only refers to "more than one surviving spouse" as it is not possible to have more than one nominated co-habiting partner or civil partner. There can, however, be more than one surviving spouse if the member legally entered into a polygamous marriage abroad.]

Children's pensions: deferred members

34.—(1) The amount of the pension of an eligible child of a deceased deferred member is calculated as follows.

(2) If a survivor benefit is payable under regulation 33—
(a) where there is only one such child, the pension is calculated by multiplying the member's total membership, calculated in accordance with regulation 29, by his final pay, and dividing by 320; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership, calculated in accordance with regulation 29 , by his final pay, and dividing by 160; and
(ii) those children are jointly entitled in equal shares.
[Comments:

This regulation specifically covers benefits accrued on or after 1st April 2008. However, where the deferred benefits for a post 31st March 2008 deferred beneficiary also include membership accrued up to 31st March 2008, the children's pensions for that membership are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which says that the children's pensions are to be calculated as if regulation 34 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date.

It should be noted that if the deferred member dies whilst deferring payment after age 65 (in accordance with regulation 50(2) of the Administration Regulations), the children's pensions under regulation 34(2) are not actuarially increased on account of the member's deferment of payment beyond age 65.

A pension payable under this regulation must be shared out equally where there is more than one surviving child. This contrast with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension.]

(3) If no survivor benefit is payable under regulation 33—

(a) where there is only one such child, the pension is calculated by multiplying the member's total membership, calculated in accordance with regulation 29, by his final pay, and dividing by 240; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership, calculated in accordance with regulation 29, by his final pay, and dividing by 120; and
(ii) those children are jointly entitled in equal shares.
[Comment: same comments as for paragraph (2) above]

Death grants: pensioner members

35.—(1) If a pensioner member dies before his 75th birthday, a death grant is payable.

(2) The administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member's nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.

(3) The death grant is ~~his pension multiplied by 10~~ his pension in payment multiplied by 10 **[SI 2008/1083]**, but the amount so calculated is reduced by the amounts of any retirement pension paid to him.
[Comments:
This regulation covers the death grant in respect of a pensioner who ceased membership on or after 1st April 2008. The regulation specifies that the guarantee is a multiplier of 10 times the pension in payment (including any pension resulting from regulations 13 or 14, any pension resulting from purchased added years including any 1/240th increase in the pension as the result of regulations 54 or 57 of the 1997 Regulations, any top up LGPS pension bought by an AVC pot, any part time-buy back pension, etc .).

However, the regulation needs to be amended to provide that any abatement reduction at the date of death due to re-employment should be ignored when calculating 10 times the pension in payment. Also, the regulation needs to be amended so that the 10 year calculation is reduced not just be the amount of any retirement pension paid to the deceased member but also by the amount that would have been paid to him / her if abatement had not applied. For example, take a case where a pensioner dies after 6 years on pension but for 5 of those years the pensioner had been re-employed and the pension had been abated to £nil. The death grant should be 10 x pension less 1 year of pension paid less 5 years of notional pension paid leaving a death grant of 4 years pension (not 10 years pension less 1 year of pension paid leaving a death grant of 9 years pension). These two points can be overcome by amending regulation 35(3) to read "*The death grant is his pension in payment multiplied by 10, ignoring any reduction due to abatement under regulation 71 of the Administration Regulations, but the amount so calculated is reduced by the amounts of any retirement pension paid to him or that would have been paid to him had his pension not at any time been subject to abatement under regulation 71 of the Administration Regulations.*"

The Secretariat is not certain of the logic behind a 10 year guarantee for a pensioner compared to a 5 year guarantee for a deferred pensioner.

Where a member dies in service following flexible retirement, a death grant equal to the aggregate of 3 years' pensionable pay plus a 10 year guarantee on the pension in payment is payable.

General Comment:
An additional regulation - 35(4) - should be added to accord with regulations 23(5) and 32(4) but amended to cater for those cases where an administering authority first find out about the death more than 2 years after the date of death. Paragraph 13 of Part 2 of Schedule 29 to the Finance Act 2004 permits schemes to contain a rule requiring the death grant to be paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member's death and the day on which the scheme administrator could first reasonably be expected to have known of it. The additional regulation - 35(4) - ought to be written in such a way to give this extra leeway to administering authorities.
Where death is suspected but no body has been found there may be an interim death certificate but no final death certificate. For the purposes of issuing probate the Registrar of Births, Deaths and Marriages has to be reasonably satisfied that the person is dead e.g. bank accounts have not been touched, there has been no contact with friends or relatives over the period of 7 years since the person was last seen. This means that the administering authority will not be in a position to make a death grant perhaps for

several years after the suspected date of death. The Secretariat would argue that in these cases the two year period in the new regulation - 35(4) - should only run from the date that probate is issued]

Survivor benefits: pensioners

36.—(1) If a pensioner member dies leaving a surviving spouse, nominated cohabiting partner or civil partner, that person is entitled to a pension.
[Comment: to be consistent with regulation 27(2) there should be a further paragraph which says that the survivor's pension is payable from the day following the date of death]

(2) The pension is calculated by multiplying his total membership by his final ~~salary~~ pay **[SI 2008/1083]** and divided by 160.
[Comments:

This regulation specifically covers benefits accrued on or after 1st April 2008. However, where the pension benefits for a post 31st March 2008 pensioner also include membership accrued up to 31st March 2008, the survivor benefits for that membership are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which, subject to regulations 3(4) and 6(3) of the Transitional Provisions Regulations, says that the survivor benefits are to be calculated as if regulation 36 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date. Regulation 3(4) of the Transitional Provisions Regulations says that only periods of membership after 5th April 1988 count towards a nominated co-habiting partner's or civil partner's pension and regulation 6(3) of the Transitional Provisions Regulations says that regulation 42 of the 1997 Regulations (post retirement marriages) shall continue to apply to a pensioner member who marries after leaving.

It should be noted that if the pensioner member dies and had received an actuarial increase to his / her benefits under regulation 17(2) for payment of benefits after age 65 the survivor's pension under regulation 36(2) is not similarly increased.

At a more fundamental level, it appears that a survivor benefit calculated using the formula contained in regulation 36(2) could, in a very limited number of cases, result in an unauthorised payment where the member dies after attaining age 75. Paragraphs 16 to 16C of Part 2 of Schedule 28 to the Finance Act 2004 appear to restrict the dependants' pensions to no more than the pensioner was in receipt of in the previous 12 months plus 5% of any tax free lump sum that had been paid to the member. This could cause difficulties in cases where the member had taken maximum commutation and/or the member's pension had been paid at an actuarially reduced rate, or where the member had commuted his pension on the grounds of serious ill health (and possibly where the member's pension had been subject to abatement during the previous 12 months). If, in the case of a death after age 75, the survivor's pension exceeds that in payment to the deceased at the date of death, the excess would represent an unauthorised payment, reportable to HMRC.]

(3) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1).
[Comment: a pension payable under this regulation must be shared out equally where there is more than one surviving spouse. This contrast with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension. The regulation only refers to "more than one surviving spouse" as it is not possible to have more than one nominated co-habiting partner or civil partner. There can, however, be more than one surviving spouse if the member legally entered into a polygamous marriage abroad.]

Children's pensions: pensioner members

37.—(1) The amount of the pension of an eligible child of a deceased pensioner member is calculated as follows.

(2) If a survivor benefit is payable under regulation 36—
(a) where there is only one such child, the pension is calculated by multiplying the member's total membership used in calculating his benefits under these Regulations by his final pay, and dividing by 320; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership used in calculating his benefits under these Regulations by his final pay, and dividing by 160; and

(ii) those children are jointly entitled in equal shares.
[Comments:

This regulation specifically covers benefits accrued on or after 1st April 2008. However, where the pension benefits for a post 31st March 2008 pensioner also include membership accrued up to 31st March 2008, the children's pensions for that membership are also covered by this regulation by virtue of regulation 6(1) of the Transitional Provisions Regulations which says that the children's pensions are to be calculated as if regulation 37 applied to all of the deceased member's membership, whether accrued before 1st April 2008 or on or after that date.

It should be noted that if the pensioner member dies and had received an actuarial increase to his / her benefits under regulation 17(2) for payment of benefits after age 65 the children's pensions under regulation 37(2) are not similarly increased.

A pension payable under this regulation must be shared out equally where there is more than one surviving child. This contrast with the 1997 Regulations under which the administering authority could decide in what proportions to share out the pension.

At a more fundamental level, it appears that dependants' pensions calculated using the formula contained in regulation 37(2) could, in a very, very limited number of cases, result in an unauthorised payment where the member dies after attaining age 75. Paragraphs 16 to 16C of Part 2 of Schedule 28 to the Finance Act 2004 appear to restrict the dependants' pensions to no more than the pensioner was in receipt of in the previous 12 months plus 5% of any tax free lump sum that had been paid to the member. This could cause difficulties in cases where the member had taken maximum commutation and/or the member's pension had been paid at an actuarially reduced rate, or where the member had commuted his pension on the grounds of serious ill health (and possibly where the member's pension had been subject to abatement during the previous 12 months). If, in the case of a death after age 75, the dependant's pension exceeds that in payment to the deceased at the date of death, the excess would represent an unauthorised payment, reportable to HMRC.]

(3) If no survivor benefit is payable under regulation 36—
(a) where there is only one such child, the pension is calculated by multiplying the member's total membership used in calculating his benefits under these Regulations by his final pay, and dividing by 240; and
(b) where there is more than one such child—
(i) the pension is calculated by multiplying the member's total membership used in calculating his benefits under these Regulations by his final pay, and dividing by 120; and
(ii) those children are jointly entitled in equal shares.
[Comment: same comments as for paragraph (2) above]

Pension increases under the Pensions (Increase) Acts

38. Where a pension to which the Pensions (Increase) Act 1971 applies is payable out of an appropriate fund, any increase under that Act or the Pensions Increase Act 1974 must be paid from that fund.

Commutation: small pensions

~~**39.** A lump sum which is a trivial commutation lump sum within the meaning of section 166 of the Finance Act 2004 or a trivial commutation lump sum death benefit within the meaning of section 168 of that Act may be paid in accordance with the rules relating to the payment of such benefits under the Finance Act 2004.~~

[Reg 39 substituted by SI 2008/1083]

39.—(1) A lump sum which is a trivial commutation lump sum within the meaning of section 166 of the Finance Act 2004 or a trivial commutation lump sum death benefit within the meaning of section 168 of that Act may be paid in accordance with the rules relating to the payment of such benefits under the Finance Act 2004.

(2) Any payment under paragraph (1) is calculated in accordance with guidance issued by the Government Actuary.

(3) The benefits referred to in paragraph (1) do not include any survivor benefit that is being paid to the member.

Guidance on future costs

40. Administering and employing authorities shall have regard to guidance to be issued by the Secretary of State, before 31st March 2009, as to the manner in which the costs of the Scheme will be met after 31st March 2010.

Pension debits [inserted by SI 2008/1083]

41. Administering authorities shall have regard to guidance issued by the Government Actuary as to reduction of benefits payable under these Regulations in consequence of a pension debit created under section 29 of the Welfare Reform and Pension Act 1999([8]).

No double entitlement [inserted by SI 2008/1083]

42.—(1) Where (apart from this regulation) any member would be entitled to a pension or retirement grant under two or more regulations by reason of the same period of membership—

(a) he shall be entitled to benefits under only one regulation;

(b) he may choose under which provision he is to be paid those benefits; and

(c) if he does not choose, the administering authority may notify him in writing of the provision.

[Comment:
Although not directly relevant to this regulation there are in reality, as practitioners will know, two types of overlapping service. The first type relates to genuine concurrent employment which the member can opt to aggregate under the apportionment routines in regulations 17 and 46(4) of the Administration Regulations and regulation 5 of the Transitional Provisions Regulations. The apportionment is based on the relativities of pay in the terminated job to pay in the continuing employment, thereby producing a fair service credit upon aggregation.

The second type is overlapping service where a person leaves one employer and takes leave during the last week or so of that employment, and then starts with the new employer during the period he is on paid leave from the old employer. It seems to the Secretariat that a specific provision ought to also be included in the Regulations to deal with this latter type of case. It should be made clear that such cases are not to be dealt with under the concurrent employment apportionment routine and that either:

a) the overlapping service does not double count, or
b) regardless of whether or not the employer aggregates the two periods of membership, the overlapping service can double count (on the basis that the member and the employers have paid into the Funds for that period)

(2) A member's choice must be by notice in writing, given to the administering authority before the expiry of three months beginning with the day on which he becomes entitled to choose under which provision his pension or retirement grant is to be paid.

(3) Paragraph (1) does not affect the member's rights under the Pension Schemes Act 1993([9]).

(4) This regulation also applies to any survivor benefits payable under regulation 24, 27, 33, 34, 36 or 37.

Signed by authority of the Secretary of State

Angela Smith
Parliamentary Under Secretary of State
Department for Communities and Local Government

3rd April 2007

([8]) 1999 c. 30.
([9]) 1993 c. 48.

OTHER COMMENTS

1. Trivial Pensions

In relation to small pensions, it would be helpful if there were a provision permitting small ongoing pension payments in different Funds to be aggregated and paid from one Fund (with the paying Fund receiving a capital payment from the other Fund). This would reduce pension payroll costs.

2. Optants out

There needs to be a regulation specifying that an optant out (who meets the requirements of regulation 5) is to be awarded a deferred benefit under regulation 29 and that deferred benefit cannot come into payment under the provisions of regulation 30 (or 31) until the member has ceased local government employment.

3. Death of a member with a frozen refund

To fit in with HMRC rules the regulations need to provide that in the case of the death of a member with a frozen refund, the refund is payable to the member's personal representatives as a lump sum death benefit and that a Certified Amount may be deducted from the payment. There would normally be no tax deduction.

4. Bona Vacantia

Where a death grant is payable, but there are no known beneficiaries, payment is currently made to the Treasury Solicitor. A number of schemes contain a Bona Vacantia rule which permits the sum to revert to the Fund rather than paying it to the Treasury Solicitor. This would be a welcome amendment to add into the Scheme Regulations.

5. GMPs and Requisite Benefits

Although GMPs and Requisite Benefits relate to periods of membership prior to the introduction of the new Scheme on 1st April 2008 they nevertheless may affect the benefits of members retiring on or after that date. Hence, should they not be referred to in the Benefits Regulations or at least have a saving provision in the Transitional Provisions Regulations?

What's gone in relation to benefits payable under the new Scheme

GONE! 3/80ths underpin for death grant on death in service

The 3/80ths underpin on death in service (where 3/80ths x membership x final FTE pay is greater than 2 x final year's actual part time pay).

GONE! Death grant for deaths after age 75

There will no longer be entitlement to a lump sum death grant for pensioners who die aged 75+

GONE! Commutation for exceptional ill health cases

The facility to pay the terminally ill five years' pension in one go has been removed.

GONE! Short term survivor pensions

The pretty unique financial cushion formerly provided by the LGPS whereby survivor pensions were payable at a higher rate for the first 3 or 6 months has been removed. The long-term lower rate of pension is now payable straight away.

GONE! Minimum membership requirement for survivor's benefits

The requirement to have a minimum of 3 months membership (unless a transfer had been received) for there to be entitlement to a long-term spouse's or civil partner's pension upon death in service has been removed. Long-term survivor's pension following death in service is now payable after just 1 days membership if member dies in service.

GONE! The 10 year minimum underpin for childrens' pensions

The guarantee that long-term childrens' pensions following death of an active, deferred or pensioner member would be based on a minimum of 10 years membership or, if shorter, total notional membership to age 65, has been removed. However, all "Survivor" pensions following death in service are now based on the deceased's notional membership to age 65.

GONE! Certificates of Protection

No new certificates of protection of pension benefits for pay reductions / restrictions occurring after 31st March 2008 (but any member whose pay goes down in the last 10 years as a result of downgrading or less responsibility can choose to have benefits based on best consecutive 3 years pay in the last 10 ending on a 31st March).

GONE! Minimum membership requirement for an ill-health enhancement

Actually, it hasn't gone, it has just been replaced by a lower qualification. The membership required for ill health enhancement has dropped from 5 years to just 3 months.

GONE! Councillor Members

Oops – no they haven't. Councillor members are still covered by the 1997 Regulations (as modified by Schedule 8 of those Regulations) and continue in their CARE scheme paying a 6% contribution rate. The CLG commentary says:
"We are currently considering the best approach to manage the pension arrangements for elected members, especially in light of the Report of the Councillors Commission, published in December 2007, which contained recommendations relating to allowances and pension provision for Councillors. The Government will publish its response early in 2008. A consultation with stakeholders will be undertaken shortly after the Government's response, taking into account accepted recommendations from the Report and inviting comment on how pension provision should be shaped in the context of changes to the LGPS beyond April 2008. As an interim step, however, we intend to retain the current arrangements under the 1997 Regulations."

GONE! **Benefits at age 65**

Members with less than 3 months' membership (and who had not transferred-in membership from another pension scheme) were nonetheless entitled to a benefit on retirement at 65 under the 1997 Regulations. This has gone. The Secretariat asked CLG to introduce a transitional protection for those who are active members at 31st March 2008 and who leave post that date, aged 65 or over with less than 3 months (and no transfer in) in order to ensure they are not disadvantaged. However, no such transitional protection has been granted. In reality this is unlikely to affect hardly anyone.

GONE! **Right to a refund in certain cases**

The right to a refund of contributions if a member leaves with less than 3 months membership and has not had a transfer in of other pension rights has gone if the member has a deferred pension or pension in payment under the LGPS in England and Wales (although, to all intents and purposes, this change has been in effect since Aril 2006 due to HMRC rules)

GONE! **Method of calculating inter fund adjustments**

The calculation method for inter fund adjustments has been changed to a cash equivalent basis.

GONE! **The 1997 Regulations**

Well, not all of them, but most of them are revoked courtesy of regulation 2 of, and Schedule 1 to, the Transitional Provisions Regulations. The question remains 'Shouldn't the following words be added at the end of regulation 2 (2) of the Transitional Provisions Regulations "but, subject to regulation 4, a deferred member, pensioner member, or pension credit member of the 1997 Scheme as at 31st March 2008 remains subject to the 1997 Regulations"?'. Otherwise, if the 1997 Regulations are simply revoked, what Regulations govern the benefits due to pensioner or deferred pensioner members who left between 1st April 1998 and 31st March 2008 (inclusive)?
The Local Government (Transitional Provisions) Regulations 1997 have also been revoked. However, there are provisions in those Regulations which should still be applied to members of the new Scheme (but apparently can't be as the Regulations have been revoked). Interestingly, the saved provisions of the Local Government Pension Scheme Regulations 1995, which still apply to pre 1st April 1998 leavers by virtue of the Local Government (Transitional Provisions) Regulations 1997, have not been revoked.

This will all be covered in more detail in the commentary on the Transitional Provisions Regulations.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out provisions relating to benefits, membership and contributions in the new Local Government Pension Scheme ("the Scheme") which is to come into existence on 1st April 2008 and replace the Local Government Pension Scheme 1997 ("the 1997 Scheme").

Regulation 1 contains definitions.

Regulation 2 sets out who is a member of the Scheme: broadly speaking, this is anyone who is, or could have been had it continued in existence, a member of the 1997 Scheme.

Regulation 3 contains a table of rates of contributions on pensionable pay, and makes provisions for part-time and term-time workers. "Pensionable pay" is defined in regulation 4.

Regulation 5 provides for a minimum membership of three months for entitlement to benefits in most cases, and regulations 6 and 7 explain how length of membership is calculated.

Regulations 8 to 11 provide for the calculation of final pay.

Regulations 12 and 13 respectively provide power for employing authorities to increase membership or award additional pension.

Regulations 14 and 15 respectively provide for voluntary additional payments to increase pension, and for AVCs.

Regulation 16 provides for the normal retirement age (65), regulation 17 for retirement after this age, and regulation 18 for flexible retirement.

Regulation 19 makes provision relating to redundancy and inefficiency, and regulation 20 makes provision relating to ill-health retirement.

Regulation 21 provides for commutation of pension, and regulation 22 places a limit on the total amount of benefits.

Regulations 23, 24 and 28 (active members), 32, 33 and 34 (deferred members) and 35,36 and 37 (pensioner members) provide for death grants, survivor benefits and children's pension for the respective classes of member. Regulation 25 contains a definition of "nominated cohabiting partner" and regulation 26 of "eligible child" for these purposes. Regulation 27 makes further provision about children's pensions.

Regulations 29 to 31 make provision relating to early payment of pension.

Regulation 38 provides for payment of increases under the Pensions (Increase Act 1971), regulation 39 for commutation of small pensions, and regulation 40 requires administering and employing authorities to have regard to guidance issued by the Secretary of State about future costs of the Scheme.

A regulatory impact assessment has been produced for these Regulations and is available via the Local Government Pension Scheme website at www.communities.gov.uk/lgps.

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LGPC
Local Government Employers
Local Government House
Smith Square
London, SW1P 3HZ

or email:terry.edwards@lge.gov.uk
tel 020 7187 7346
fax 020 7187 7367