

Pension Fund Committee

28 July 2008



Ill-Health – Draft Statutory Guidance

Report of Stuart Crowe, County Treasurer

Purpose of the Report

- 1 The purpose of the report is to advise Members of the current position regarding the new three-tier system of ill health in the Local Government Pension Scheme (LGPS).

Background

- 2 The new-look LGPS introduced from 1 April 2008 included a three-tier system of ill-health benefits with different levels of benefit payable on ill-health retirement depending on the likelihood that an individual would be able to gain future full-time employment.
- 3 The regulations introducing the third tier of ill-health were not put in place until several weeks after the new-look scheme took effect and the promised statutory guidance on operating the new ill-health provisions is still not in place yet.

Draft Statutory Guidance

- 4 Communities and Local Government (CLG) has issued draft statutory guidance and has asked for comments on this guidance by 12 August 2008. A copy of the draft guidance is attached at Appendix A.
- 5 CLG also provided example medical certificates as an annex to the draft guidance. Local Government Employers (LGE) has also provided example medical certificates and these have been reformatted and passed on to all employers within the Fund.
- 6 The three-tier ill-health process will be more complicated to administer than the previous system and it is important that the statutory guidance is clear and consistent.

Recommendations

- 7 Members are asked to note the report and to authorise me to respond to the consultation as appropriate.

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**LOCAL GOVERNMENT PENSION SCHEME
STATUTORY GUIDANCE – ILL-HEALTH**

THIS DRAFT PAPER IS ISSUED FOR CONSULTATION PURPOSES AND REFLECTS THE STATUTORY PROVISIONS OF THE LOCAL GOVERNMENT PENSION SCHEME (BENEFITS, MEMBERSHIP AND CONTRIBUTIONS) REGULATIONS 2007 (SI 2007 NO 1166), AS AMENDED BY THE LOCAL GOVERNMENT PENSION SCHEME (AMENDMENT) REGULATIONS 2008 (SI 2008 NO 1083)

**THE NEW LOOK ILL-HEALTH RETIREMENT PENSION PROVISIONS
DRAFT GUIDANCE**

This guidance is issued under Regulation 56(3) of The Local Government Pension Scheme (Administration) Regulations 2008 to all administering authorities, employing authorities, independent registered medical practitioners and other relevant interested parties in England and Wales with statutory responsibilities under the new Local Government Pension Scheme that came into effect on 1 April 2008.

This guidance includes a combination of descriptive text explaining the background and operation of the new ill-health retirement benefit provisions as they apply in the new look scheme after 31 March 2008, a description of the relevant statutory provisions, and a set of best practice documentation that LGPS employers and independent doctors are expected to employ in each ill-health retirement case.

The Secretary of State will keep the content of the guidance under review in the light of employing authorities', independent doctors' and other interested parties' experiences of applying this guidance. The guidance will be updated as necessary to reflect this and any future legislative changes.

Unless a reference is made to regulations by their full title, it can be assumed for the purposes of this guidance that the reference is to a regulation of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007 No 1166), as amended. ("the Benefit Regulations").

Section 1 - Background

1. In July 2000, HM Treasury published its review of ill-health retirement in the public sector. The 35 recommendations of the report were accepted in full by the Government and government departments responsible for public service pension schemes were tasked to come forward with individual action plans to implement the report's recommendations. The then DETR's action plan was agreed and published in October 2001.

2. The Department's action plan to implement the inter-Departmental report into ill-health retirements in the public sector 2000, included an undertaking to prepare a discussion paper outlining the scope for introducing four changes to the arrangements for the payment of ill-health retirement benefits under the Local Government Pension Scheme Regulations 1997.

3. The four recommendations included in the Action Plan relevant to this guidance were :-

- **Recommendation 27** - To examine the scope for introducing a two-tier ill-health retirement provision into the LGPS;
- **Recommendation 28** – To introduce the facility to review the levels of ill-health retirement benefit during retirement;
- **Recommendation 29** – To consider the role of abatement in the context of ill-health retirement, and
- **Recommendation 34** – To consider the scope for introducing a more efficient system for awarding enhanced membership on ill-health retirement with less incentive for members to seek ill-health retirement at specific ages.

The rationale for a multi tier ill-health pension provision

4. In common with most other occupational pension schemes in the public sector, the LGPS has historically assessed entitlement to ill-health retirement benefits on the individual employee's capacity to perform efficiently the duties of their former employment. However, the LGPS is different to the extent that for some time, it has also required LGPS employers to consider the capacity to undertake other local government employments that are comparable on the basis of pay, location, training/skill levels, etc. But that apart, there remained the problem envisaged by the July 2000 report that the LGPS, in common with most other occupational pension schemes in the public sector, failed to address the issue of a person's ability to perform a wide range of jobs in the employment sector as a whole.

5. The proposal to introduce a two-stage level of ill-health retirement benefit entailed the introduction of a new upper level of benefit for the minority of LGPS members whose condition rendered them permanently incapable of any work, whether in local government or elsewhere. For the remainder whose incapacity meant that they were still capable of performing work elsewhere, the second level of benefit would be assessed on a case by case basis according to a number of factors, including the degree of incapacity and the extent to which this might affect future earning potential. But given the Government's aim of reducing the levels of ill-health retirement and of retaining people in the workforce up to their normal retirement age and possibly beyond, the scope for introducing a series of measures designed to ease the transition between work and retirement and to retain staff in employment despite their inability to perform their current duties because of ill-health would have to be explored.

6. Although the HM Treasury review focussed its attention on a two tier ill-health pension arrangement, the working group set up by the then DETR to take forward implementation of the action plan considered that the range of incapacities covered by the second tier - from those just short of meeting the top tier criteria and those who would be capable of obtaining gainful employment within a reasonable period after ceasing their local government employment on permanent ill-health grounds - was such that a three tier provision might be more appropriate.

7. It was also suggested that there could be a role for some form of income-protection arrangement as a way of managing long term sickness absence and ensuring that other alternatives to ill-health retirement, eg, re-training, rehabilitation, re-deployment and flexible retirement, were fully explored before employment is finally terminated on grounds of incapacity.

Policy development

8. After consideration of the views expressed by interested parties, Ministers came forward, in April 2007, with a two tier arrangement and contained in the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (*benefit regulations*). A 1st tier member will receive their accrued pension entitlements plus a service enhancement of all (100%) of their prospective membership to their normal retirement rate. A 2nd tier member with a lower level of

incapacity will receive 25% of that prospective membership along with their accrued pension entitlements.

9. The final element of ill health remained to be decided. CLG explored with key stakeholders the scope for a form of income replacement allowance, outside the pension scheme and to be paid by local authority employers from their revenue. However, agreement was not reached. As new tax rules, introduced in the 2007 Finance Act, did not preclude the cessation of a pension, consideration of a 3rd tier within the LGPS was then an option.

10. In November 2007, interested parties were consulted on a reviewable third tier of ill health retirement benefit for a Scheme member who leaves employment because they are assessed by an independent occupational health practitioner as being permanently incapable of their current job but medical evidence indicates that they are capable of obtaining alternative employment within three years of their leaving.

Section 2 - Statutory position

11. The regulatory provisions governing ill-health retirements under the LGPS with effect from 1 April 2008 are set out in regulations 20 and 31 of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007 No 1166), as amended by The Local Government Pension Scheme (Amendment) Regulations 2008 (SI 2008 No 1083) :-

A : Entitlement on ceasing employment :-

“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(1); 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.”.

B : Entitlement after ceasing employment :-

“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.

(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 .

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

C : First instance determinations: ill-health :-

(Regulation 56 of The Local Government Pension Scheme (Administration) Regulations 2008. (“the Administration Regulations”) as amended by regulation 24 of the Local government Pension Scheme (Amendment) Regulations 2008).

(1) S.I. 2003/1250.

“56.—(1) An independent registered medical practitioner from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that—

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case,

and he must include a statement to that effect in his certificate.

(2) If the employing authority is not the member’s appropriate administering authority, it must first obtain that authority’s approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

(3) The employing authority and the independent registered medical practitioner must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation or, in the case of the employing authority, when making a determination under regulation 20 of the Benefits Regulations.”

Section 3 - General Guidance

Part I - Role of the employer

12. In the context of ill-health retirements, the role of local authority employers begins long before employment has been terminated and the question of entitlement to an ill-health retirement benefit arises. The management of ill-health in the work force and in particular, during the period leading up to termination, is outside the scope of this guidance. But it is covered in the “Management of Ill-Health Handbook” published by the Employers Organisation in 2002 and revised in 2007.

13. Under the former 1997 Scheme regulations, any question concerning entitlement to an ill-health retirement benefit could only be decided when a member’s employment had been terminated on the grounds of permanent ill-health. This did not fetter the right of a local authority employer, the scheme member, medical advisers and other interested parties to commence proceedings beforehand. But in regulatory terms, the actual decision about entitlement and any appeal arising from the determination of that question could only have been made on or after termination. Concerns have been raised in the past about the effect that certain decisions made by the courts and the Pensions Ombudsman might have on this separation between the “termination of employment” and the “entitlement to pension benefit” question that has been part of the scheme’s regulations for a considerable time. Regulation 20 has therefore been drafted to better reflect the practical reality that the medical processes should be completed prior to termination to enable the employer to decide whether or not to terminate a member’s employment with an entitlement to an ill-health retirement pension.

14. As has always been the case, responsibility for deciding the grounds on which the employment of a scheme member has been terminated rests solely with the local government employer (Reg 20(1)). But under Regulation 20(5), a determination for the purposes of Regulation 20 can only be made where the authority has obtained a certificate from an independent registered medical practitioner (“IRMP”) qualified in occupational health medicine. It is also important to note that all the regulations referred to in this guidance are subject to the civil law code. As such, the

determination of questions is based on the “balance of probabilities” test and not on the stricter criminal law test of “beyond reasonable doubt”.

Part II - Questions for the employer to determine

15. Under Regulation 20, the appropriate LGPS employer is required to consider and decide a number of questions before entitlement to an ill-health retirement benefit under that regulation can be paid. These include :-

- Is the length of total membership at least three months (Regulation 5 (1)(a) and 20(1));
- Will the employment be terminated on the grounds that the member’s ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment (Regulation 20(1)(a));
- Does the member have a reduced likelihood of obtaining gainful employment (whether in local government or elsewhere) before his normal retirement age (Regulation 20(1)(b)).

If the answers to all three questions are in the affirmative, there is a prima facie entitlement to payment of an ill-health benefit under Regulation 20. To decide the level of benefit, the LGPS employer must further decide which of the following three situations applies :-

- Is there no reasonable prospect of the member obtaining gainful employment before reaching his NRA? In these circumstances, the member receives benefits based on his accrued rights up to the date of termination and enhancement equal to all his prospective service from that date to his NRA. (Regulation 20(2); or
- If the member is judged to be incapable of obtaining gainful employment within three years of leaving local government employment, but is likely to be able to do so before reaching his NRA, benefits equal to his accrued rights and enhancement of 25% of his prospective service to NRA will be awarded. (Regulation 20(3)), or
- If the member is judged to be capable of recovering sufficiently from his incapacity to enable him to be capable of obtaining gainful employment within three years of leaving local government employment, benefits equal to his accrued rights, with no enhancement, will be awarded. (Regulation 20(4)).

Additional questions concerning part time employment and the protection rights of certain members fall to be considered by virtue of Regulations 20(12), (13) and (15) respectively.

16. Under Regulation 31, an ill-health benefit can also be paid to a person who has left a local government employment with an entitlement to a deferred benefit, who becomes permanently incapable of discharging efficiently the duties of their former employment before becoming entitled to payment of that benefit. By virtue of regulation 31(2), the early payment of deferred benefits can only be made in circumstances where the IRMP has certified that the member’s condition is likely to prevent him or her from obtaining gainful employment, whether in local government employment or elsewhere, before reaching his normal retirement age or for at least three years, whichever is the sooner. In other words, the deferred pensioner member would have to satisfy the criteria set out in regulation 20(2) or (3).

Part III - The role and status of the independent registered medical practitioner

17. The introduction of the certification of ill-health retirements by an independent registered medical practitioner qualified in occupational health was one of the 35 recommendations made in the HM Treasury review. It was a feature of the 1997 scheme regulations for a number of years and is carried forward into the new scheme arrangements by virtue of Regulation 20(5). That regulation sets out the questions that the IRMP must address in his certificate but provisions relating to the doctor's conduct are in the Local Government Pension Scheme (Administration) Regulations 2008. In particular, regulation 56(1) of those regulations, shown at Section 2, requires the IRMP to include a statement confirming his independent status in his certificate.

18. Regulation 20(14) of the Benefit Regulations defines what is meant by "qualified in occupational health medicine".

Part IV - Questions for the independent registered medical practitioner

19. In many respects, these reflect the questions that the LGPS employer is ultimately responsible for deciding but it is important to bear in mind that the independent doctor is not being asked to confirm the termination or otherwise of the member's employment. Under Regulation 20(5), the role of the IRMP is to certify whether or not, in his opinion, on the balance of probabilities, the criteria for entitlement to an ill-health benefit are satisfied in any individual case. On this basis, the questions to be considered by the IRMP doctor are :-

- is the member **permanently** incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body (**Regulation 20(5)**) and, if so –
- whether this has resulted in a reduced likelihood of **obtaining** any **gainful employment** and, if so :-
 - whether there is a reasonable prospect of his obtaining gainful employment within three years of leaving local government employment (**Regulation 20(5) when read in conjunction with Regulation 20(4)**); or if not,
 - Whether there is a reasonable prospect of his obtaining gainful employment before reaching his normal retirement age. (**Regulation 20(5) when read in conjunction with Regulation 20(3)**); or
 - Whether there is no reasonable prospect of his obtaining any gainful employment before his normal retirement age (**Regulation 20(5) when read in conjunction with Regulation 20(2)**).
- in the case of a member who is wholly or partly in part-time service, was this as a result of the condition that had caused him to be incapable of discharging efficiently the duties of the relevant local government employment. (Regulation 20(12)(b)).
- Under regulation 20(8)(a)(ii), a third tier benefit may be discontinued if, at the 18 month review, the employer, based on the opinion of the certifying doctor, determines that the member is now capable of obtaining gainful employment. Under regulation 20(5), the certifying doctor is only asked to consider whether or not there is a reduced likelihood of obtaining gainful employment, but in the context of regulation 20(8)(a) and the definition of "reduced likelihood" in Part V below, it is clear that a negative response to this question, ie, there is no reduced likelihood, means that the criterion of regulation 20(8)(a)(ii) is satisfied.

- By virtue of the protection offered by regulation 20(15), there will be a period up to 30th September 2008 inclusive when employers will need to consider a member's entitlement under both the current provisions of regulation 20 and the former ill-health provisions of the 1997 Scheme regulations. This does mean that, for a limited period, IRMPs will need to consider the permanency question both in relation to a member's actual local authority employment and any comparable employment for the purposes of regulation 27 of the former 1997 Scheme regulations. Under those regulations, the term "comparable employment" was defined as employment in which, when compared with the member's employment-

(a) the contractual provisions as to capacity either are the same or differ only to an extent that is reasonable given the nature of the member's ill-health or infirmity of mind or body; and

(b) the contractual provisions as to place, remuneration, hours of work, holiday entitlement, sickness or injury entitlement and other material terms do not differ substantially from those of the member's employment

20. It is important at this stage to highlight the fact that both regulations 20(1) and (5) restrict entitlement considerations to medical factors, but in slightly different ways. Although regulation 20(1) enables the authority to make an award where a member, amongst other things, "...has a reduced likelihood of obtaining any gainful employment", it is important to note that by virtue of the conjunctive "and" at the end of regulation 20(1)(a), any "reduced likelihood" for the purposes of regulation 20(1)(b) must be as a direct result of the permanent incapacity referred to in regulation 20(1)(a). On this basis, exogenous, non-medical factors such as the availability of gainful employment, are not relevant factors for the purposes of regulation 20(1). The same rule applies to regulation 20(5), except here, the relevant conjunctive is "and, if so, whether as a result of that condition".

Part V - Definitions

21. At this stage, it is important that all parties are clear about the meanings behind the terms shown in bold above. Some of the examples given below expand on the definitions given in regulation 20(14), but others refer to words or phrases that are not defined but which merit explanation.

22. The term "**permanently incapable**" is defined in regulation 20(14) as meaning "that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday." In addressing questions about permanency, whether in terms of the local government employment or gainful employment elsewhere, consideration must therefore be given not to the immediate or foreseeable future, but to the date when the member attains their NRA.

23. The term "**gainful employment**" is defined by Regulation 20(14) as "paid employment for not less than 30 hours in each week for a period of not less than 12 months". This term is **not** to be confused with the concept of "comparable employment" which was a feature of the 1997 Scheme for a number of years. As from 1 April 2008, independent doctors will be required to apply the wider test of capacity to undertake general employment of a remunerative nature - rather than one based on the type of local government formerly held by the member. This reflects the recent change in government policy whereby public service ill-health pensions are to be paid not only on the basis of capacity to undertake the member's actual employment, but also other employment in the general workforce.

24. **“Reasonable period”**. The level of benefits payable under regulation 20 depends on the extent of the “reduced likelihood” of obtaining gainful employment, taking account of the incapacitating condition that existed at the time when employment in local government ceased. Originally, the view was taken that the regulations should rely on the concept of a “reasonable period” to distinguish 2nd tier from 3rd tier cases. Several ways of defining that term were considered, including :-

- For administrative and medico-legal simplicity, the term “reasonable period” could refer to a specific period of time, eg, 12 months, regardless of the nature of the member’s condition or incapacity, or
- It could vary in each individual case according to the nature of the condition or incapacity in question. This would be likely to result in greater complexity and more pressure on the appeals process, or
- The period could relate to whatever time limit or review period is imposed under any third tier arrangement. In other words, the 2nd/3rd tier entitlement threshold would need to be clear and consistent.

25. In view of the representations made by interested parties, the decision was taken that any reference to a reasonable period should be to a fixed period of time, applied consistently across all cases. The regulations, therefore, provide for a limit of 3 years for payment of 3rd tier benefits. In other words, 3 years represents a “reasonable period” for the purposes of regulation 20.

26. **“Obtaining”**. In the context of regulations 20 and 31, the word “obtaining” may be taken to include the capacity of the individual in question to carry out gainful employment, taking into account the full medical effects of the condition which gave rise to the retirement on the grounds of permanent ill-health. In some cases, the condition may comprise certain barriers or impediments which may impact on the individual’s capacity to work again in gainful employment. For example, a person who is house-bound or unable to travel because of their condition, but is otherwise capable of carrying out gainful employment, is likely to have a reduced likelihood of obtaining gainful employment for the purposes of regulations 20 and 31. The regulations therefore allow for the possibility that certain individuals with a permanent incapacity, although theoretically having the capacity to carry out gainful employment, may not in practice be able to obtain it because of the full medical effects of their condition.

27. It follows that non-medical factors, such as the general availability of gainful employment in a particular area or the attitude of employers to certain conditions, would not be material factors and should not be part of the IRMP’s consideration, while the effect a medical condition would have on their practical ability to obtain gainful employment would. The same would apply to the individual’s own attitude towards their condition, which could be a limiting factor to obtaining gainful employment, although it is recognised that in some cases, their attitude may constitute a medical condition in itself.

28. **“Reduced likelihood”**. From the outset, the policy objective has always been to incentivise a return to work for those people forced to leave their local government employment because of ill-health but who are otherwise capable of carrying out a wide range of employment elsewhere. Regulation 20 does not therefore provide an ill-health retirement benefit to any member whose employment was terminated by reason of permanent health for the purposes of regulation 20(1)(a) but who, at that time, was judged to be capable immediately of obtaining gainful employment as defined in regulation 20(14). It follows that a 1st, 2nd or 3rd tier pension can only be awarded to a

member whose likelihood of obtaining gainful employment, because of that permanent incapacity, is reduced.

Section 4 – The Regulations in practice

Part VI – The first tier

29. Regulation 20(2) provides for payment of a first tier ill-health retirement pension where :-

- The member has a qualifying period of at least 3 months (regulation 5);
- A certificate has been obtained under regulation 20(5),
- Based on that certificate, the employer has decided to terminate the member's employment on the grounds that ill-health or infirmity of mind or body renders them permanently incapable of discharging efficiently the duties of their current employment and, because of that condition, they have a reduced likelihood of obtaining any gainful employment before normal retirement age (regulation 20(1), and
- The authority determines that there is no reasonable prospect of the member obtaining any gainful employment before normal retirement age (regulation 20(2).

30. Where a first tier pension is awarded under regulation 20(2), the member's normal benefits are increased as if the date on which he left local government employment was his normal retirement age and by adding to the total membership at that date the whole of the prospective service up to normal retirement age. Regulation 20(12) makes provision for a different calculation in the case of a member in part-time service. A first tier pension is not subject to any review mechanism.

Part VII – The second tier

31. Regulation 20(3) provides for payment of a second tier ill-health retirement pension where the circumstances are the same as those described in the first three points in paragraph 29 above, and the employing authority determines it is likely that the member will become capable of obtaining gainful employment before their normal retirement age but where there is no reasonable prospect of this happening within three years of them leaving local government employment.

32. Where a second tier pension is awarded under regulation 20(3), the member's normal benefits are increased by adding to the member's total membership at the time of leaving, 25% of their prospective service to normal retirement - subject to the provisions of regulation 20(12) if the service in question was part-time. A second tier pension is not subject to any review mechanism.

Part VIII – The third tier

33. This provides that a member who is judged by an IRMP to be permanently incapable of their local authority employment but is capable of obtaining gainful employment within three years of leaving employment, is entitled to pension benefits equal to those he would have received if the date on which he left employment was the date on which he would have retired at normal retirement age.

Requirement to obtain a certificate from an Independent Registered Medical Practitioner qualified in occupational health medicine (IRMP)

34. Regulation 20(5), requires an authority to obtain a certificate from an IRMP qualified in occupational health medicine.

Return to gainful employment

35. The 3rd tier member is required to notify the previous employer when employment is found - providing details, including the pay and working hours of that employment. The employer considers the details regarding employment and, if they decide this is gainful employment according to the regulations, payments are stopped.

The Review mechanism

36. Under regulation 20(7), the previous employer needs to undertake a review when 3rd tier payments have been made for 18 months. The employer should write to the 3rd tier member asking for details of their employment status. If, from the information provided, the employer decides that gainful employment had been obtained, the 3rd tier payments are stopped.

37. The employing authority is required to notify the appropriate administering authority without delay when payments are stopped. If payments have continued when gainful employment has been found, the employer has powers to recover any overpayment from the 3rd tier member. Regulation 20(8)(c) and (a) refer.

3rd tier member returns to local government employment

38. Regulation 20(10), requires that when benefits are stopped and the 3rd tier member subsequently becomes an active member of the LGPS, the earlier period of membership which resulted in 3rd tier benefits is not aggregated with the later active membership.

Special considerations

Member reduces their hours because of the ill health condition which results in ill health retirement

39. Protection is given under regulation 20(12)(b) to any member who has a reduction in hours which directly relates to the ill health condition that resulted in termination of employment. In these circumstances, no account will be taken of the reduction in service for the purposes of calculating his benefits.

Treatment of those aged 45 before 1 April 2008 - 1st and 2nd tier determination

40. Under regulation 20(13), protection is given for those aged 45 before 1 April where there is entitlement to an enhancement. This provides that the member should be in no worse a position than they would have been, had Regulation 28 of the 1997 Regulations applied.

Status of member when payments cease

41. The status of a 3rd tier member whose benefits are stopped is 'a pensioner member with deferred benefits', and he is not eligible to receive 3rd tier payments in respect of any future period. Regulation 20(9) refers.

Seeking a further opinion from an IRMP

42. If, as a result of the employer's enquiry at the review, it is found that a 3rd tier member has not found gainful employment, the employer is required by regulation 20(7)(b) to seek a further opinion from an IRMP concerning the condition which resulted in the 3rd tier membership.

Employers' ability to uplift the 3rd tier member to a 2nd tier member following the review

43. The employer can determine that a 3rd tier member becomes a 2nd tier member upon the certification by the IRMP following the review or at any time even if the payment of the 3rd tier benefit has been stopped. The employer must take the same steps when determining the 2nd tier concerning certification by an IRMP. The date of the second determination will decide the date from which the uplift to 2nd tier will be put into payment.

Part IX – General

Transitional protections

44. Under regulation 20 (15), transitional protections apply for determinations made before 1 October 2008 to provide that if the benefits payable to a member under the amended Reg 20 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall apply as if they were still in force. For all practical purposes, Regulation 27 of the 1997 Regulations and Regulation 20 of the Benefits Regulations 2007, as amended, both remain in force in the transitional period.

This means that the employer needs to consider whether the employee would be entitled to ill health benefits under Regulation 20 of the benefit regulations as amended by the LGPS (Amendment) Regulations 2008. The employer also needs to consider whether the member is entitled to ill health benefits under the 1997 Regulations. A calculation of any benefits payable, under the two sets of regulations, is made and any enhancement of prospective service for both calculations is at the 1/60th accrual rate. A comparison should then be made and the member is awarded the greater amount.

Until the end of September 2008, the ill health certificate to be completed by the independent registered medical practitioner will need to include questions about whether the member would meet the ill health definition in the LGPS Regulations 1997 as well as ill health questions relating to the Benefits Regulations 2007 (as amended).

For example, in the transitional period, a member who qualifies for a 3rd tier pension and would also qualify for an enhancement of 6 2/3 under the 1997 Regulations, would receive a 1997 Regulation non reviewable, permanent pension with the enhancement calculated at 1/60th accrual.

Section 5 – Documentation

45. The regulations themselves do not prescribe the precise format of the certificate that the independent registered medical practitioner is required to provide under Regulation 20(5), though the overall content is set out in the regulation itself. To assist practitioners in this process, examples of pro-forma certificates are included at **Annex A and B**. Individual authorities, in consultation with their medical advisers and IRMP, may wish to adapt the example to reflect local circumstances and procedures provided that the content complies fully with the scheme's regulatory requirements.