



HM Treasury
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Cc: The Home Office Police Workforce and Professionalism Unit

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Dear Sirs

I am writing to you as Chair of the Firefighters' Pensions (England) Scheme Advisory Board (the SAB) in connection with your note, Processing immediate detriment cases – November 2021. This note sets out HM Treasury's best assessment at this point on the advisability of processing immediate detriment cases before new legislation to enact the McCloud remedy is in place, and the implications of this assessment for the Home Office guidance on processing immediate detriment cases published in August 2020 and revised in June 2021.

You will be aware that on 29 November 2021, the Home Office withdrew its informal and non-statutory guidance on processing certain kinds of immediate detriment case ahead of legislation, with immediate effect. This decision was based on the above guidance note from HMT and the Home Office stated that, although the decision remains for scheme managers to make, it does not advise schemes to process any immediate detriment cases before legislation is in place, given the risk and uncertainty of correcting benefits before the PSPJO Bill, scheme regulations and relevant tax legislation come into force.

At our most recent SAB meeting, held on 9 December, we discussed the position as a result of these developments, given our remit to provide advice to scheme managers and local pension boards in relation to the effective and efficient administration and management of this scheme. The SAB would like to be able to fulfil this role by helping the scheme managers to understand better the nature of the risk and uncertainties mentioned in your note.

The scheme managers are the Fire and Rescue Authorities (FRAs) who, as you will be aware, recently considered the extent of their powers. This consideration took the form of an appeal under Schedule 22 of the Equality Act 2010, in which the FRAs

argued that they were required to follow the pensions regulations and so by law they had no choice but to implement the transitional protections which have now been established as being discriminatory. On 12 February 2021, the Employment Appeal Tribunal (EAT) gave its judgment on the FRAs appeal which was that FRAs could not rely on the Schedule 22 defence. Effectively, the EAT held that the FRAs in their capacity as scheme manager could have decided not to follow the discriminatory legislation and in fact should have done so by refusing to treat firefighters as having transferred into the 2015 scheme. This is because it held that Section 61 prohibits FRAs from acting in a manner which discriminates on the grounds of age, and it prioritises that obligation over other provisions in the pension scheme which would oblige the FRAs to act in that way. In addition, the EAT held that, under Section 62 of the Equality Act 2010, the FRAs have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers.

Legal cases concerning immediate detriment issues were brought in the High Court against two FRAs; the claimants were supported by the FBU. It was apparent similar issues would arise more widely across the sector. The FBU was clear that matters for affected individuals needed to be resolved sooner rather than later and it would, if necessary, support further legal cases.

The SAB understands that, with that in mind, the LGA and the FBU commenced discussions to identify a mutually acceptable Framework, setting out a mechanism for handling immediate detriment cases, to assist all parties prior to completion and implementation of the remedying legislation. Agreement was reached on a Memorandum of Understanding and Framework on 8 October 2021.

Whilst the withdrawal of the Home Office Guidance does not fundamentally alter the position of the Framework, as the MoU is separate from, and is not subject to or dependent on, any guidance issued in relation to immediate detriment before the legislation comes into force, understandably it is a cause of concern to FRAs who are considering adopting or who have adopted the MoU. This is particularly the case given the statements made with regard to funding of immediate detriment cases processed in the interim period between the guidance being withdrawn and the retrospective elements of remedy being effective.

FRAs may now be in the untenable position of having to choose to either process immediate detriment cases at what you have termed to be significant financial risk with unknown consequences for the authority and the member or facing potential legal action if they follow the latest government advice. As noted earlier, the SAB is keen to try to assist the FRAs in being able to analyse these risks and to take an informed decision on them. With over 40 FRAs involved in the English Scheme there is clearly a risk to the overall governance of this public sector scheme if the various managers get their own legal opinions and adopt different practices.

It was therefore agreed that I should write to you to request more information about the benefit risks and uncertainties that you have identified in general about relying on Section 61 (and we assume also Section 62) to remedy the benefits in advance of the retrospective regulations, so that we can consider whether these are relevant in the case of the Firefighters' Pension Schemes. You have indicated that there are some obscure areas of the McCloud remedy where Section 61's impact is not clear.

Whilst we understand that Section 61 may not override some of the taxation impacts where payments are deemed unauthorised, we do not understand for example, the problem you have quoted regarding the payment of contributions to the reformed vs legacy scheme. Contributions to fire schemes all fall into one notional account in this regard and under the EAT's interpretation of the FRA's powers to make resolutions, I might expect that either both contributions and benefits could be determined to have been both paid and earned in the legacy scheme respectively or if this were not the case that the managers could resolve to accept a notional transfer of the contribution for the purposes of remedying the discrimination. Whilst we understand that your legal advice on this issue is privileged, it would be helpful to understand the alternative legal arguments and more about the problems that might be encountered.

It would also be useful to understand whether the risks and uncertainties that have now been identified are likely to be mitigated, at least in part, once the Finance (No.2) Bill is enacted in April 2022 or whether you anticipate that the risk will only be significantly reduced once all remedying legislation is in force; expected to be October 2023 for the FPS, as indicated to me by the Home Office

In particular, we have been informed that members would prefer to see benefits remedied sooner rather than later even though they are already aware of the risk that the tax position may take a little time to sort with potentially iterations of calculations.

I look forward to hearing from you with what I hope will be a more detailed explanation of the risks so that the SAB is able to fulfil its brief. You will appreciate the urgency of this request given the competing challenges and legal risks that FRAs are facing, therefore your early attention would be welcome.

Kind regards

A handwritten signature in black ink, appearing to read 'J Livingstone', written in a cursive style.

Joanne Livingstone