Briefing to the Chief Fire Officer and Director of Finance on Immediate Detriment Cases in Fire Service

Decision Required – Does Oxfordshire

a) implement payment of fire pensions in line with principles set out in Immediate Detriment Framework with immediate effect,

b) delay decision to seek further clarification

c) determine not to make any payments under Immediate Detriment unless instructed by the Courts/Pensions Ombudsman and await implementation of Remedying Legislation.

The Pension Fund Committee at their special meeting of 12 November 2021 agreed in principle to adopt the Immediate Detriment Framework published jointly by the LGA (on behalf of all Fire Authorities) and the FBU (on behalf of scheme members), but to defer implementation until clarification had been received on the outstanding financial issues. At their meeting on 3 December 2021, the Committee clarified that the decision on when to implement payments under the Framework was delegation to the Chief Fire Officer and the Director of Finance once they had agreed on the implications of doing so.

<u>National Background</u>

On 8 October 2021, the LGA and FBU published an Immediate Detriment Framework, which attempted to provide a standard approach for all Fire Authorities to follow in responding to the Employment Tribunal Decision that the current transitional arrangements were unlawful on ground of age discrimination. The Framework accepted that due to the complexity of the issues, there were certain elements of the benefits that could not be resolved until full remedy and primary legislation could be published having passed through government machinery.

Subsequent to the publication of the Immediate Detriment Framework, the Government withdrew their previous guidance on the matter based on their latest understanding of the complexities involved and advise all fire authorities not to make further payments under the Immediate Detriment process given the uncertainty over a number of the tax implications of the payments and the likely need to make further amendments to the payments once the remedy legislation was in place. The Government further advised that any payments made outside the pension accounts would not be re-imbursed by the Government.

Given the previous decision of the Employment Tribunal that supported the FBU case that there is an obligation on Fire Authorities to act now under Section 61 of the Equalities Act 2010 to remove those elements of the pension scheme that were unlawful, this leaves Fire Authorities in an unenviable position. The FBU have indicated that they are prepared to take further legal action to require Fire Authorities to remove the existing discrimination cases through either the Courts or the Pensions Ombudsman and will be seeking further compensation for the non-financial stress and anxiety caused to their members.

The LGA have sought further advice on the outstanding issues. The Queens Counsel legal advice received confirms the previous view that Fire Authorities can make pension payments under Section 61 of the Equalities Act 2010 from the scheme members pre-2015 Scheme (the 1992 Scheme or the 2006 Scheme as appropriate), and that any payment of arrears of pension or lump sums made in such circumstances can be treated as having been made from the pension account. The legal view is therefore that such payments can be reclaimed from Government under the normal pension grant arrangements.

The advice confirms that complexity around the treatment of contributions and tax relief which include:

- no automatic right to treat contributions made to the “wrong” scheme as having been made to the member’s former scheme
- members may lose their right to tax relief on the contributions made to the “wrong scheme” and therefore maybe liable to make further tax payments to Government
- members may not be able to claim tax relief when making good underpaid contributions to the “wrong” scheme

(These issues arise as the 1992, 2006 and 2015 Schemes all have different contribution rates which the 1992 Scheme having higher rates than the 2015 Scheme, whereas the rates in the 2006 Scheme are lower than the 2015 Scheme).

There are further tax complications around annual allowance, life-time allowance divorce debits and scheme pays calculations.

The Government have also stated that where arrears of lump sums are paid under the Immediate Detriment Framework, and that these payments fall more than 1 year after the initial payment of lump sum on retirement, then the payments are unauthorised payments under the Regulations and therefore subject to an unauthorised tax charge. The Immediate Detriment Framework states that the Fire Authority should meet this charge by compensating the scheme member. As this payment would be under the relevant compensation regulations and not the Pension Regulations, the payment would not be refundable by the Government. Since publication of the Framework, HMRC has published a Policy document and a Finance (No 2) Bill which both now indicate a move towards making payments of lump sums paid more than 12 months after retirement authorised (once the relevant legislation is in place).

<u>The Position in Oxfordshire</u>

From the information available to us, we have identified 6 cases where members have already retired and are likely to be entitled to payment under the Immediate Detriment Framework. Assuming a payment date of 31 December 2021, the total payments to these individuals would be in the region of £105,000 of which £31,500 is compensation in respect of unauthorised tax charges relating to late payment of lump sums. £71,000 is in respect of arrears of pension and lump sums which should be recoverable via the normal pension top up grant. The remaining £2,500 is non-recoverable compensation payments relating to interest on the late payments and excess contributions paid.

There is another group of members expected to retire on or around 31 March 2022 on completion of 30 years of service. If payment is made in line with the Immediate Detriment Framework, then it is expected that the full cost of their pensions and lump sums would be recoverable from government grant. As payment of lump sums would be made at the point of retirement there are no issues with unauthorised payments for this group. Due to the traditional wholetime recruitment practices of the Fire Service there would then be a gap to May 2024 before the next intake of individual's would hit their 30 years of service (though there could be individual cases who have transferred to the Oxfordshire Fire Service part way through their careers who could reach between 25-30 years in the interim period). There are also potential retirements from the 2006 scheme – 3 employees will attain the normal retirement age of 60 in 2022/23, with a further 3 individuals in 2023/24.

If payment was made to these individuals in line with the Immediate Detriment Framework, there would be considerable uncertainty about the tax issues associated with their cases, and any re-conciliation of contributions owed/due would need to await remedying legislation. Assumptions would have to be made in respect of annual allowances, life-time allowance and divorce debits and scheme pays in calculating benefits payable, which would need to be re-visited once the remedying legislation was put in place.

The 6 members who have already retired paid a total of £62,000 by way of employee contributions to the "wrong" scheme. It is expected that the remedy legislation will enable us to treat this money as having been made as a contribution to the member's former scheme. For those returning to the 1992 Scheme, this would leave a shortfall of £9,000 which would need to be recovered from the members reflecting the higher contribution rate in the 1992 Scheme. There is a risk we would be unable to recover this sum. If we were not able to offset the contributions paid into the 2015 Scheme against the contributions to the previous scheme, the total liability that would fall to the Council would be just over £70,000.

Figures for the group due to retire at the end of the year are not currently available.

<u>Options and Risks</u>

1. Agree to implement payments consistent with the Immediate Detriment Framework with immediate effect.

Such a course of action would lead to an immediate cost to the Council of £31,500 in respect of the compensation payment to offset the unauthorised tax charge, and £2,500 in respect of interest etc.

Risks

Further costs to the Council of at least £75,000 if the Government take a different view on the legal status of payments of arrears of pensions and lump sums. These costs would increase in respect of all new retirements including the group expected to retire in the next few months.

Future legal claims if remedying legislation does not cover measures to allow retrospective resolution of outstanding contribution payments including appropriate tax relief.

Future legal claims if remedying legislation does not protect individuals from need to revisit annual allowance/scheme pays calculations.

Future legal claims if information only available after remedying legislation in place determines individual would have been better placed not seeking payment under Immediate Detriment Framework.

There is a question as to the extent that these last 3 risks can be mitigated by individuals being offered a choice on retirement as to whether to follow the extant 2015 pension scheme regulations or accept the risks associated with having their pension benefits paid under the Immediate Detriment Framework principles.

Legal Advice
The Legal advice in relation to the option is that to proceed to implement payments consistent with the Immediate Detriment Framework with immediate effect would address the risks identified above although it is difficult to accurately quantify the risk and the cost implications arising. The overall result would be that Oxfordshire would be deemed to be acting lawfully having corrected the immediate detriment at the first available opportunity.

It is important to note that there may be further costs to the Council of at least £75,000 if the Government take a different view on the legal status of payments of arrears of pensions and lump sums. These costs would increase in respect of all new retirements including the group expected to retire in the next few months. It is difficult to predict the likely approach that the Government may take and the prospect of incurring additional being at least £75,000 is a possibility. There remain significant financial risks associated with the making of a decision before remedying legislation is in place.

The option to mitigate the risk by way of a settlement agreement which compromises the right of a member to take legal action was explored. This is not viable and unlikely to withstand challenge as if the basis of the agreement is deemed to be unlawful, the agreement itself will not be enforceable and could have detrimental public relations implications. The application of non-disclosure clauses are not considered appropriate in these circumstances which will present confidentiality issues.

2. Defer a Decision to seek more clarification.

Advice suggests that further clarification could come in the next 2 months. Figures included within this report are indicative only and based on our best understanding of the current position and set out best/worst case scenarios. Figures subject to change as legislative position becomes clearer and future cases identified and pension implications calculated.

Risks

Increased likelihood of legal challenge to failure to act in accordance with the ruling of the Employment Tribunal.
Brings a further group of individuals into scope for any compensation payments. Whilst non-financial compensation in LGPS Scheme is in region of £500 to £2,000, much higher figures have been paid under the Police/Fire schemes.
Workforce planning issues as members may choose to defer retirement where they were reliant on their full pension entitlement to afford retirement. This in turn could

lead to further compensation claims where individual’s pay contributions to the 2015 Scheme which cannot buy service above the maximum years in the 1992 Scheme.

Legal Advice

Oxfordshire is not currently facing any legal challenges and it is not certain when clarity from the Government may be provided. There is a potential danger that Oxfordshire may be targeted as a test case, although bearing in mind the current number of potential claims, it is thought that this is unlikely.

Should a test case be presented, there is the option of settling the case and bringing forward the decision-making, should a decision be made to seek further clarification. The cost implications of this approach will be minimal taking into account that the position is established and settlement would be untaken quickly before matters escalated.

3. Agree not to make any payments under the Immediate Detriment Framework and await implementation of the remedying legislation or an instruction from the Courts/Pension Ombudsman

This option means any calculation will be completed in accordance with current legislation or the direct order of a Court so reducing the risk of a need to rework the calculation in future and maximising the chances that all costs will be met by Government.

Risks

The risks are similar to those under Option 2, although a clear decision not to implement the Immediate Detriment Framework increases the risk of further legal challenge in light of the decision of the Employment Tribunal.

Depending on timescales, this option is likely to increase the numbers of individual’s likely to include a compensation element into any future claim, and those impacted by an inability to plan their retirement date without certainty over the level of payments, or a known shortfall in the initial sums payable.

Legal Implications

Deciding not to make a decision will result in the Oxfordshire perpetuating a course of action which has been determined as unlawful and discriminatory. Deciding not to make a decision and await implementation until remedying legislation is in place or an instruction from the Courts or Pension Ombudsman is a high-risk strategy with reputational implications. The Council will be acting unlawfully.

The position as regards tax implications and contributions in each individual case is particularly complex. Although at this point only broad indicative figures have been provided, these need to be factored into the overall decision making and assessment of cost implications that may arise. Each individual case may have different tax implications and members may decide to approach the issue of contributions in a number of ways.

The Chief Fire Officer and the Director of Finance will need to determine whether they have sufficient detail as to the financial implications upon which to make an informed decision in line with their delegation.