HIWFRA Standards and Governance Committee

Purpose: Approval

Date: **29 July 2022**

Title: **IMMEDIATE DETRIMENT**

Report of Chief Financial Officer

SUMMARY

1. This report provides an update on the Immediate Detriment Framework (IDF) by way of a Memorandum of Understanding (MoU) issued jointly by the Local Government Association (LGA) and the Fire Brigade Union (FBU) on 8 October 2021 and the withdrawal of the informal Immediate Detriment guidance by the Home Office on 29 November 2021.

2. The report recommends the continued suspension of the framework due to unacceptable risks to the Authority and Members that would be the result of processing Immediate Detriment claims at the current time.

3. The report also provides an update on the issue of incorrect historical pension contribution rates for former members of Isle of Wight Fire and Rescue Service and recommends a resolution.

BACKGROUND

4. The McCloud pensions remedy to remove age discrimination from the reformed public sector pension schemes will be implemented by October 2023. This will mean that on retirement eligible members will be able to choose to receive benefits from the legacy scheme or the reformed scheme for the period 2015 – 2022. This will apply to employees as they retire and to pensioners who were affected by the 2015 pension changes. Immediate Detriment (ID) refers to the ability to access the benefits of legacy schemes in advance of the October 2023 legislation.

5. In February 2021, HIWFRA started to accept Immediate Detriment (ID) cases on a case-by case basis. Each case was assessed and where it was deemed to be clear and straightforward then the member was offered ID at the point of their retirement. Although this was not a complete remedy it meant that ID could be offered in most cases. Several cases were processed using the Home Office guidance that was available.

6. On 8 October 2021, the LGA and the FBU issued a Joint Statement and published an MoU. Its purpose was to provide a framework under which members in scope could receive benefits prior to all remedying legislation being in force, therefore avoiding significant additional numbers of Immediate Detriment legal claims as a result of the McCloud age discrimination case. This framework not only permitted upcoming prospective retirements (Category 1 cases) to receive remedy, but also allowed members who had already retired and were already receiving a pension to receive retrospective remedy (Category 2 cases).

7. On 27 October 2021, HM Revenue and Customs (HMRC) published a policy intention note with regard to new legislation that would be effective from 6 April 2022. This specifically affects retrospective remedy payments where the date of retirement is more than 12 months ago, and this triggers the late payment timing condition which makes the payment unauthorised and incurs a 55% tax charge. The new legislation would deem such payments to be authorised for purposes of the McCloud remedy.

8. This caused some issues and these raised questions over funding. The IDF makes these unauthorised payments as compensation to the member which means that the FRA would have to pay for this until such time as the legislation was in force. There was an additional concern about whether funding would be provided for payments occurring before 6 April 2022.

9. Although HIWFRA had been processing Immediate Detriment cases for members that had upcoming retirements since February 2021, on 16 November 2021, HIWFRA adopted the IDF in full and started to accept applications from members. The framework was adopted with the knowledge about the HMRC policy intention.

10. On 29 November 2021, the Home Office then withdrew its informal guidance on ID with immediate effect. HM Treasury (HMT) and HMRC have cited issues with the interpretation of the powers in Section 61 with regard to pension contributions and that they had also not anticipated the extent of the complexities involved with the tax issues (e.g. tax relief and Annual Allowance).

11. In principle, HIWFRA along with other Fire Authorities could continue to process Immediate Detriment cases using the MoU. However, due to the significant risks and lack of clarity, the Framework was suspended by an urgent decision from the Chief Financial Officer.

12. The framework remains suspended, with a delegation in place (February 2022 HIWFRA) for the Chief Financial Officer in consultation with the Chairman of the Authority, Chairman of Standards and Governance and the Chief Fire Officer to make necessary decisions about Immediate Detriment in the interim, including decisions to apply immediate detriment in very exceptional circumstances where significant hardship could be caused by not applying it.

13. This report provides an update on the latest advice on Immediate Detriment and recommends the continued suspension of the Framework. The next section covers the issue that led to the withdrawal of Immediate Detriment guidance by the Home Office, section 61 of the Equality Act 2010.

SECTION 61 EQUALITY ACT 2010

14. Any correction to members pension benefits by providing remedy prior to legislation being in force is completely dependent on an interpretation of how Section 61 of the Equality Act 2010 operates. This is based on the view that Section 61 permits pension scheme regulations to be read as though discriminatory provisions do not apply, allowing members in this position to be treated as a member of their legacy scheme.

15. HMT and HMRC have carried out some further work and it now appears that Section 61 may not give all the powers required to operate the remedy smoothly and predictably, without generating significant uncertainty for schemes, and risking significant second or third adjustments for individuals.

16. Because of this, HMT’s current view is now that ID cases, including those yet to retire, cannot be processed before legislation is in place without considerable risk, cost, uncertainty and administrative burdens for individuals, schemes and employers.

17. This risk has become more apparent over time, as HMT and HMRC have worked through the McCloud remedy and its tax consequences in more detail.

18. For example, where an individual’s situation is corrected before legislation is in place, analysis at this point suggests it is not certain that Section 61 will allow contributions paid in the past to reformed schemes to be treated as though they were paid into legacy schemes. This could in turn call into

question the tax relief that a member will have received on contributions that they had paid into the reformed Scheme.

19. Whilst section 61 permits individuals affected to be treated as members of their legacy scheme, given the uncertainty around how it operates on some of the detailed elements of the McCloud remedy, HMT and Home office do not advise that Schemes process ID cases before the legislation is in place. This is due to uncertainty on how to proceed on some elements, and the significant risk of generating unintended tax consequences that may, to a greater or lesser extent, then need to be reversed once legislation is in force.

20. It is also important to note that if Schemes process cases and run up against tax issues which are not straightforward to resolve – because the situation is either ambiguous under current rules due to uncertainty about how Section 61 acts on some elements, or the current rules generate unwelcome tax outcomes – they will have to operate within the existing tax legislation and HMRC will not be able to help resolve those issues. This may mean that individuals could face unwanted tax bills and/or corrections to their tax affairs, which may then need to be corrected again once the legislation is in place.

21. In addition to this, the Home Office have confirmed that as the Government does not advise that ID cases should be processed in advance of the legislation coming into force, they will not be in a position to provide any additional funding for those costs which are paid outside of the pension account. Therefore, these will need to be funded locally by the FRA from local budgets.

RISKS FOR THE FIRE AUTHORITY

22. Section 61 permits paying arrears of pension & lump sum for category 2 cases (retrospective retirements) but does not resolve the issues around tax and contributions.

23. The FRA retains powers to make compensation payments as an employer to members (e.g. interest on contributions, refund of contributions, contribution holiday payments, unauthorised tax charges where lump sum more than 12 months after retirement, additional PAYE paid on arrears of pension etc) but none of these payments will be recompensed by the Home Office.

24. There is no guarantee that further tax liabilities will not arise leading to further claims for compensation. There is no way to establish how much any

additional costs would be. These additional claims would not be recompensed by the Home Office.

25. An FRA may use its powers to make compensation payments, but if these are not exercised reasonably and properly, then claims could be brought against the FRA. It is recommended that where the FRA decides to use these powers, then specific legal advice for the individual FRA should be sought on the risks of any threatened claims because the likely outcome will depend on the facts for the specific claim and remedies sought.

26. Although the LGA will continue to work with Bevan Brittan on recovering costs including under the New Burdens doctrine or similar, there is absolutely no guarantee that they will be successful and FRAs should assume that there will be no funding to cover these costs.

27. Latest advice from the NFCC (25th March 2022) is that Immediate Detriment should not be applied.

RISKS FOR THE MEMBER

28. Section 61 does not allow contributions that were paid to one scheme to be simply moved to another scheme.

29. Where a member is currently in 2015 scheme and will move back to 1992 scheme, they will have underpaid contributions. HMT now state that any tax liability (i.e. tax relief) may now in the event not be able to be retrospectively made good by remedying legislation. This means that the member may not be able to claim tax relief and may be liable for late payment and interest charges.

30. The member may also not be entitled to the tax relief that they received on the contributions that were paid into the 2015 scheme and this may have to be repaid by the member. This could mean that the member will have a personal tax liability of an unknown amount that would be due once the remedying legislation is in place.

31. Members are understandably keen to access their remedied benefits. The issues are extremely complex and there is a real risk that members may make decisions without a full understanding of the potential risks and benefits.

CONTINUED SUSPENSION OF IMMEDIATE DETRIMENT FRAMEWORK

32. For the reasons set out in this report, it is recommended that the framework continues to be suspended. The continued suspension will allow maximum flexibility for Immediate Detriment to be restarted once the necessary conditions are in place.

33. It is possible that draft legislation will provide sufficient information to allow the processing of Immediate Detriment cases to continue while managing the risks to the Fire Authority and members. The impact of any developments will be assessed and updates will be provided to the Standards and Governance Committee as appropriate.

HISTORICAL CONTRIBUTIONS RATES

34. As part of the transfer to the CFA, it came to light that employee pension contribution rates had not been applied correctly to IoW retained firefighters for the period 1 April 2012 to 31 March 2021. The contributions rates applied had been based on the actual part time pay, rather than assessed by using the whole time equivalent reference pay for a retained firefighter. This meant that these members had not been paying enough pension contributions.

35. The contribution rates were corrected from 1st April 2021.

36. However, in total 109 members underpaid contributions over some or all of the 9 year period between 1 April 2012 to 31 March 2021. The total amount of underpaid employee pension contributions is £69,506.57 and is split over the various years as shown in the table below:

Year	Number of records	Total amount	Average amount per record
2012/13	44	£1,816.24	£41.28
2013/14	53	£3,832.67	£72.31
2014/15	63	£5,876.57	£93.28
2015/16	81	£5,309.30	£65.55
2016/17	72	£11,045.86	£153.41
2017/18	61	£9,707.47	£159.14
2018/19	66	£9,353.50	£141.72
2019/20	71	£11,770.88	£165.79
2020/21	63	£10,794.08	£171.33
TOTAL		**£69,506.57**	

37. The firefighters could not reasonably have known that they were underpaying pension contributions and all pension contribution rates are now correct. Although the total sum of underpaid contributions is

considerable, the amounts for individual firefighters are small and would be administratively complex to collect. The underpayments date back several years and cover current employees, pensioners and deferred members. Therefore, it is recommended that the underpaid sums are covered by the Fire Authority i.e. not recovered from individual members.

38. The Firefighters Pension Board were also supportive of this recommendation. Following the decision of the Standards and Governance Committee affected members will be contacted to advise them of the decision.

CONSULTATION

39. The Firefighters Pension Board were consulted on the proposed approach at their meeting on 19th April 2022. The board members expressed their frustration at the lack of progress in resolving the McCloud Pensions remedy and their concern about the impact on individuals. They noted their support for the efforts of the Local Government Association to achieve a swift resolution to the issues. However, given the current uncertainty surrounding the tax position, they were supportive of the continued suspension of the Framework.

RESOURCE IMPLICATIONS

40. There are no resource implications of continuing with the suspension of the Framework. The resource implications of any different courses of action will be considered as part of any future decisions, with approval sought in line with Financial Regulations.

41. The continued suspension mitigates potential significant and unquantifiable costs to pension scheme members and the Fire Authority.

CONCLUSION

42. The Fire Authority would like to process Immediate Detriment cases as soon as this is possible. The risks outlined in this report mean that Immediate Detriment cases cannot currently be processed.

43. As soon as there are any developments, such as draft legislation, officers will review to assess whether the processing of Immediate Detriment cases can resume.

RECOMMENDATIONS

44. That the continued suspension of the Immediate Detriment Framework be approved by the HIWFRA Standards and Governance Committee

45. That the recommendation not to recover underpaid pension contributions relating to the specific historical pension contribution rate issue be approved by the HIWFRA Standards and Governance Committee

BACKGROUND PAPERS

HIWFRA Standards and Governance - Immediate Detriment Framework 16th November 2021

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