

Firefighters' Pension Scheme- Age Discrimination Remedy and Employment Appeal Tribunal Judgement

Report of the Chief Fire Officer

For further information about this report please contact Rod Hammerton
Chief Fire Officer, on 01743 260201 or Simon Hardiman Assistant Chief Fire Officer
on 01743 260196

1 Purpose of Report

This report details the current position in relation the Firefighters Pension Schemes and to immediate detriment (ID) cases under the McCloud / Sargeant ruling. The report provides an overview of ongoing activity and the current advice in order to enable the Authority to make an informed decision in relation to the application of Home Office Guidance.

2 Recommendations

The Fire Authority is asked to:

- a) Note the report and acknowledge the current position in relation to application of Home Office Guidance for 'immediate detriment' cases; and
- b) Agree in principle, pending confirmatory legal advice, the application of the Home Office guidance to dealing with immediate detriment cases as they arise.

3 Background

In 2015 most public service pension schemes, including the Firefighters' pension scheme, were reformed. These reforms included 'transitional protection' for people closest to retirement.

In 2018, the Court of Appeal ruled that the 'transitional protection' element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' and Judge's pension schemes. The Government accepted the ruling and confirmed that it will remove the difference in treatment across all public service pension schemes.

The Government consulted on proposals to remove this discrimination in 2020. This was followed by a response to the consultation on 4 February 2021, indicating the intention to proceed with the deferred choice option.

The changes proposed in the consultation to remove the discrimination will apply to all the main public service pension schemes and provide members of the Firefighter schemes affected; the Firefighters Pension Scheme 1992 (FPS 1992) or New Firefighters Pension Scheme 2006 (NFPS 2006), with a choice, at the point of retirement, which scheme they would like to be in for the remedy period.

The remedy period is defined as between 1 April 2015 and 31 March 2022. The remedy only applies to members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years.

4 Immediate Detriment

Whilst the response to the consultation has now indicated, it is unlikely that the required changes to regulations will be in place before 1 April 2022. In advance of reaching this date the Fire Brigades' Union (FBU) requested that the Home Office issue guidance to employers on dealing with 'immediate detriment' cases.

The requested guidance was issued on 21 August 2020 (attached to this report as Appendix A). Clarity on the guidance has been sought both via the Local Government Association (LGA) and Scheme Advisory Board (SAB) to assist Scheme Managers (the Fire and Rescue Authorities) to determine what action should be taken. This clarity is required in relation to the legal status of the note, who it applies to, how to make pension calculations and how to manage the consequences of payments being made that ultimately turn out to be incorrect as legislation is put in place and more detailed guidance is provided.

The argument was made in the Employment Tribunal that FRAs could not act without legislation, and were required to follow the pension regulations that were in force, even though their lack of action could be seen as discriminatory

The Employment Appeal Tribunal's judgement is that FRAs cannot rely on this defence and that, under section 62 of the Equality Act 2010, FRAs have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers.

The ruling gives an expectation that FRAs should deal with immediate detriment cases to the extent that they are able within the terms of the government guidance.

It is understood that the Home Office and Her Majesty's Treasury (HMT) are relying on section 61 of the Equality Act 2010 to provide legal underpinning to the note for non-claimants.

The Home Office have now updated their "Informal" ID Guidance note on 10 June 2021 which seeks to provide further clarity regarding application. (Appendix C)

It remains the decision of each FRA as to whether the guidance is adopted, adapted, or rejected.

5 Available Guidance

In order to ensure the Authority is sighted on all aspects, the following guidance notes have been utilised in conjunction with the LGA.

- Home Office published Guidance note 21- August 2020
- LGA published Information Note- October 2020
- Immediate Detriment Matrix for Decision Making
- Legal Advice provided to FRAs on powers under the Equality Act 2010
- Schedule 22 Employment Appeal Tribunal judgement on FRA Powers
- LGA Immediate Detriment Information Note Version 2- June 2021
- Home Office: Police Workforce and Professionalism Unit: Firefighters' Pension Schemes – McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases – 10 June 2021

Further guidance is expected from Her Majesty's Treasury; however, this is currently subject to clearance procedures.

6 Legal Advice

To ensure an Authority decision is legally compliant, several options have been considered through local and national arrangements. The Service has requested advice from Telford & Wrekin Legal Services in relation to application of the guidance, whilst also registering interest in a collective agreement with the West Yorkshire Pension Fund, following extension of an offer outside their existing customer base. This has been superseded with a collective approach to legal advice through the LGA and the Service and Authority await further advice at the time of writing this report.

7 Tapering of members

Although the upcoming HMT guidance will clarify members in and out of scope, it will not include guidance on tapering and advice from the LGA at this time is that the Authorities should continue to taper members until 31 March 2022.

However, this will create increased anxiety amongst employees and only has the potential of creating additional work for administrators. There is also concern that continuing to taper individuals will continue with the discriminatory element of the ruling.

The Government has indicated in its response to the consultation that individuals will be returned to the legacy scheme until they make their choice at retirement as to how they wish the remedy period to be treated. It is therefore an option as a result of the Employment Appeals Tribunal judgement that individuals, now remain in their legacy scheme until further details are known and new regulations are drafted.

A decision is required as to whether the Authority continue to taper individuals until 31 March 2022.

8 Pensions Administration

The LGA has drafted a note (attached to this report as Appendix B) to provide additional information to FRAs on the key consideration of implementing the Home Office guidance note. This includes identifying some of the legal and technical considerations.

There are still technical areas to be resolved and clarified in relation to remedy as pension benefits will need converting from one scheme which is Career Average Revalued Earnings (CARE) scheme to final salary scheme benefits. Guidance is not currently available in relation to matters such as taxation and transfer values for example, calculation of benefits in some immediate detriment cases may be difficult and will present significant challenge for Pensions Administrators.

Whilst the LGA will aim to support FRAs to evidence robust decision making on whether a case can proceed under the current guidance, and if not, why not, it is evident that there are still many unknown factors which will need consideration on a case-by-case basis. There is expectation that the LGA will work with Pensions Administrators to provide example calculations to assist with bringing benefits into payment where the guidance is not explicit.

The Service are currently in the process of tendering for a new Pensions Administrator in conjunction with Warwickshire Fire and Rescue Service. This is due to the current contract coming to an end and the current Administrator indicating that they will not be resubmitting a tender for the new contract. Whilst this provides opportunity for the Service to identify new providers, it also places further uncertainty into the process. As a result of this and the additional workload, recruitment of an internal pensions administration post will be created.

Once clarity regarding the provision of benefit calculations is reached, further work will be required to develop, build, or adapt a software system that is capable of dealing with the complexity associated with the remedy actions. Until this system is implemented, all immediate detriment calculations will need to be undertaken manually. This creates a risk in terms of incorrect calculation of pension benefits.

9 Risks

The FBU have indicated that legal action will be taken against the FRA if the decision is made to reject the immediate detriment guidance and give eligible members the choice of benefits. There are currently cases being heard in the High Court nationally, however, these are retrospective cases, which adds further complexity, and the recommendation is to await further guidance. To mitigate this risk locally, the Service have agreed to share the costs collectively as the current claims are common to all and if the Service were to receive claims, they too would be covered. Calculations will be difficult for complex cases.

Insufficient information being available to the individual to inform their decision or result in the administrator not being able to calculate benefits accurately

Individuals may make decisions based on information available at the time of retirement, to then find themselves liable for unanticipated tax charges.

It is not yet clear whether tapered members have to forfeit any deferred benefits in the Firefighters Pension Scheme 2015 scheme if they choose to revert to the Firefighters Pension Scheme 1992 pension for the remedy period.

The risk to the FRA may be mitigated to some extent by requiring the individual to sign a disclaimer to indicate they understand the request they are making and potential consequences of their decision at retirement. The disclaimer will cover the following areas:

- Paid under powers of section 61 of the Equalities Act 2010.
- Interest may apply to contributions.
- Tax charges may apply.
- Tax relief will be applied at a later date.

Further guidance is expected in relation to disclaimers from HMT and this will support consistency in application across the Sector. It is also worthy of note that a signed disclaimer may not be sufficient to avoid later claims.

The Service may also be required to sign a similar document when instructing the Pensions Administrator, accepting liabilities arising from the instruction.

Due to the current absence of a software system to support the provision of figures to enable individuals to make an informed decision, there is an inherent risk that benefits may be calculated incorrectly, due to complexities associated with contribution rates, taxation, and the period of time available to recalculate benefits for individuals.

10 Current Position

The Authority are currently faced with making a decision as to whether to apply the Home Office Guidance Note or to await further guidance or the advent of change being fully legislated.

The Service is anticipating 9 claimants and 28 non-claimant retirees between now and 31 March 2022. This creates an additional workload and burden on the Service and Pensions Administrator due to the manual interventions required to provide individuals with options figures and the time period required to undertake this work.

To support the work required to provide individuals with options figures, it is critical that processes are developed, and the Service are currently undertaking a data accuracy and accessibility exercise with the Pensions Administrator, to ensure all required data to provide both options is accessible through current and historical data systems.

This work will also identify processes and resources required to manage immediate detriment cases into the future. This work is time consuming and administratively burdensome for both the Service and the administrator. To mitigate further risk, the Service will prioritise claimants followed by non-claimants.

To assist with the process moving forward, the Service are currently undertaking a tendering exercise for a new Pensions Administrator and any savings in contract costs, will be reinvested to create an internal pensions administration role to support immediate detriment work.

It is envisaged that this role will work closely with the Pensions Administrator, the LGA and any regional pensions groups, whilst also providing communications to individuals within the Service.

The current work supports the Authority in making an informed decision, in relation to the adoption of the Home Office guidance note.

11 Conclusions

This report is provided to outline the current position in relation to the Firefighters' Pension Scheme- age discrimination remedy and Employment Appeal Tribunal judgement.

The Service has sought a range of information and guidance to ensure the Authority are furnished with appropriate and adequate information to make an informed decision.

Members are requested to approve in principle the application of the Home Office Guidance Note Version 2 - June 2021, to individuals that are eligible as immediate detriment cases.

Please note that this will not apply to individuals who have already retired from the Service due to added complexity, as per Home Office Guidance Note Version 2.

Members are requested to approve the cessation of transfer of "tapered" pension scheme members onto the 2015 Scheme

The application of the Home Office Guidance Note will be supported by the signed disclaimer by the eligible member of the scheme.

The agreement in principle will not be enacted until collective legal advice is provided. This approach will ensure the Service are in the best position to apply the Home Office Guidance Note in a timely manner, whilst also being cognisant of the national position.

If the perceived legal advice is contrary to current views and recommendations, a further paper will be brought to the Fire Authority for consideration.

The Service will work with the National Fire Chiefs Council and the LGA in an endeavour to support the sector in taking a consistent approach.

12 Capacity

Given the significant manual processes involved in providing benefit options to individuals, there will be capacity issues with the current Pensions Administrator and in Service. To overcome this issue, the Service are currently undertaking a tendering exercise for a new Pensions Administrator and also recruitment of an internal pension's administration post.

13 Fire Alliance / Collaboration / Partnership Working

The Service has been involved in several areas of collaboration throughout the period since the Employment Appeal Tribunal judgement. This has included national work as part of collective legal advice and legal costs.

When creating tender requirements for a new Pensions Administrator, the Service have worked in partnership with Warwickshire Fire and Rescue Service to create a joint tender as both Services are currently going to market for a new provider.

Pensions, immediate detriment and guidance has formed part of discussions within the Fire Alliance, and this has led to sharing of information between Services and intelligence.

14 Financial Implications

It is not possible at this stage to identify the specific costs associated with the application of the Home Office Guidance Note as these will be identified on a case-by-case basis.

Early adoption of the Home Office guidance note will not increase amounts payable to individuals, it will however, bring some costs forward. When considering the application of interest to payments, early adoption would result in lower overall costs, due to the period being reduced for calculation of interest for the 9 claimants and 28 non-claimants.

It is expected that costs associated with the administration of the remedy will be borne by FRAs, whilst monies owed to members will be met by government. In some cases, individuals may also incur additional costs as a result of a change in schemes such as annual allowance costs.

If a decision is made to reject the guidance, further legal action could be taken by the FBU and result in further costs. The decision to participate in collective costs will mitigate some of these costs.

Given the absence of some technical information and a suitable software system, there is potential for error. Whilst best efforts will be made by the Service and Pensions Administrator, the Authority may be required to meet any financial liabilities arising as a result in these circumstances.

15 Legal Comment

Currently, the Home Office guidance is contrary to the legislative provisions concerning pensions. Due to the lack of regulations to give effect to the judgment of the Employment Appeal Tribunal, the Home Office guidance referred to in this note is not considered to be statutory guidance. Therefore, reliance on this guidance note does not provide the Authority with any legal protection or indemnify it against any claim or costs arising from action on the guidance. However, the Authority can rely on the Employment Appeal Tribunal's judgement and sections 61 and 62 of the Equality Act 2010 in making its decision regarding immediate detriment cases and those due to taper to the 2015 scheme for those to whom those claims applied. .

Any individual challenge against the decision of the Scheme Manager would be made through the Firefighters' Pension Scheme internal dispute resolution procedure. If this process does not reach a resolution, the issue can be progressed to the Pension Regulator.

16 Community Safety

There are no community safety impacts arising from this report.

17 Environmental

There are no environmental impacts arising from this report.

18 Equality Impact Assessment

If a decision is reached to adopt the guidance, individuals who meet the eligibility criteria are provided a choice of which scheme they would like to be in for the remedy period regardless of whether they are a claimant or non-claimant, thus removing any discrimination.

19 Health and Safety

There are no health and safety impacts arising from this report.

20 Human Rights (including Data Protection)

There are no human rights impacts arising from this report.

21 ICT

There are no ICT impacts arising from this report.

22 Public Value / Service Delivery

There are no public value or service delivery impacts arising from this report.

23 Reputation

There are no reputational impacts arising from this report.

24 Security

There are no security impacts arising from this report.

25 Training

There are no training impacts arising from this report.

26 Appendices

Appendix A

Home Office Immediate Detriment Guidance Note (August 2020)

Appendix B

Local Government Association Information Guidance Note (October 2020)

Appendix C

Local Government Association Information Note (June 2021)

27 Background Papers

There are no background papers associated with this report.

Firefighters'/Police Pension Schemes

McCloud/Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases

1.0 Purpose of guidance

- 1.1 The purpose of this note is to provide informal guidance to Fire and Rescue Authorities (in England) and Police Forces (in England and Wales) on processing 'immediate detriment' cases (see definition in section 3 of this guidance) in advance of a decision on the Government's final approach to removing the age discrimination as found in the McCloud/Sargeant Employment Tribunal litigation.
- 1.2 The guidance is provided at the request of the Fire Brigades Union and for the purpose of assisting employers with "immediate detriment" cases. For that reason, it is only relevant to members of the Police and Fire Pension Schemes.
- 1.3 Further, it must be noted that the issues raised in this document are the subject of both ongoing litigation and the Government's consultation. As such this guidance will be kept under review to ensure that it is consistent with any judgment or outcome from the consultation and will be amended to give effect to any such judgement or outcome.
- 1.4 In this guidance a reference to the "2015 scheme" is to the applicable reformed Police or Fire CARE Pension Scheme, and a reference to the "legacy scheme" is to the applicable Police or Fire Pension Scheme that applied to a member before 1 April 2015.
- 1.5 The term 'pension authority' refers to the appropriate Fire and Rescue Authority or Police Force.

2.0 Background to McCloud/Sargeant ruling

- 2.1 In 2015 most public service pension schemes, including the Firefighters' Pension Scheme and Police Pension Scheme, were reformed. These reforms included 'transitional protection' for people closest to retirement.
- 2.2 In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' and Judges' Pension Schemes. The Government respects the Court's decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes, including the Police Pension Scheme.

- 2.3 The Government is currently consulting on proposals to remove this discrimination. Detail on the current proposals can be accessed here: <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>. The changes proposed in the consultation to remove the discrimination will apply across all the main public service pension schemes and provide members with a choice of which scheme they would like to be in for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022 in the consultation paper.
- 2.4 The remedy only applies to members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years.

3.0 What are 'Immediate Detriment' cases

- 3.1 For the purposes of this guidance, immediate detriment includes those scheme members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, and who did not benefit from full protection and were moved into the 2015 Scheme on or after 1 April 2015:
- I. who become eligible to retire with an ordinary pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept deferred 2015 scheme benefits); **OR**
 - II. who don't qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement BUT would do so under the IHR arrangements in their legacy scheme.
- 3.2 Any scheme members that fall within either of the two categories above can have their pensions calculated and put into payment according the guidance set out in section 5 below.
- 3.3 This guidance **should not** be applied to scheme members who have already retired and are in receipt of their pension payments. These cases are more complex to address, especially due to complexities in rectifying the member's tax position.
- 3.4. It is important **to note** that ALL cases processed using this guidance will need to be revisited once the Government's approach to removing the discrimination has been finalised, due to relevant matters that are currently subject to consultation, to include interest on contributions etc. This is likely to be after April 2022.

4.0 Guidance on treating immediate detriment cases

- 4.1 There are some transitional scheme members who have already been dismissed from work without a pension as they did not qualify for an ill-health pension under the 2015 Scheme. In addition, there are transitional members who are now

approaching retirement and want to take their full pension benefits under their legacy pension scheme. This guidance provides employers with advice on how these cases can now be processed in advance of final remedy implementation.

Transitional members who are already in receipt of a pension

- 4.2 There are cases (in respect of both ill-health/ordinary retirements) where transitional members have already retired and are currently receiving an ill-health/ordinary pension. It is recognised that many of these members' pensions are lower than they would be if they were paid under the member's legacy pension scheme. For example, where a transitional member has retired on ordinary grounds below age 55, their benefits accrued under the 2015 Scheme will currently be deferred until their State Pension Age.
- 4.3 These cases involve complex tax implications, employee/employer contribution adjustments etc. which still need to be resolved – these points are currently being consulted on and a final approach has yet to be confirmed. We will look to process these cases as a priority as soon as these outstanding points have been resolved.

5.0 Giving scheme members a choice

- 5.1 Scheme members falling under the scope of this guidance will effectively be given the opportunity to take all their pension benefits accrued between 1 April 2015 and 31 March 2022 under their legacy pension scheme, rather than take some benefits under the 2015 Scheme.
- 5.2 Pension authorities can now offer this choice to all those scheme members who:
 - have transitioned into the 2015 Scheme who are approaching retirement; and
 - have retired due to poor health but who didn't qualify for an ill-health pension under the 2015 Scheme regulations but would qualify under their legacy scheme regulations.
- 5.3 In order to provide this choice, pension authorities will need to present two sets of pension entitlement quotes to each qualifying scheme member. Whilst not an exhaustive list, each quote should set out the main pension benefits that they would receive under each choice, to include: recurring annual pension (before and after commutation), commutation retirement lump sum entitlement, employee contributions owed/refunds due etc. Each scheme member should be required to provide written confirmation of their election.
- 5.4 There remain a number of outstanding issues that will not be resolved until such time that the Government finalises its approach to removing the discrimination identified by the McCloud/Sargeant ruling (see unresolved pensions issues section below). Each scheme member will need to agree to accept the Government's final approach and any future adjustments that this requires.

- 5.5 Once written confirmation has been received from each member, the pension authority can put the pension chosen into payment.

Unresolved pension issues:

- 5.6 As explained above, there remain outstanding issues that will not be resolved until the Government finalises its approach to removing the discrimination. The Government is currently consulting on its proposed approach and will finalise its proposals following careful consideration of stakeholder responses.

Recovery of outstanding employee contributions

- 5.7 Any scheme members who choose to take their full pension benefits under their legacy scheme will owe employee contributions or be entitled to a refund. Any employee contributions owed will need to be paid before the member's legacy scheme pension can be put into payment.
- 5.8 Any contributions owed will need to be based on the pay that is considered to be pensionable under the legacy scheme, which may vary from that pay which is considered pensionable under the 2015 Scheme. It will be for employing pension authorities to make an assessment for each member and seek payment. The member has a choice to pay any outstanding employee contributions from their retirement lump sum or from any other personal source. Any refunded employee contributions can be repaid to the member from the employer's local pension fund account.
- 5.9 A final decision has yet to be made in respect of whether, and at what rate, interest should be applied to contributions owed by employees should they elect to receive benefits from their legacy scheme during the remedy period (2015 to 2022). As the Government's approach to this issue has yet to be confirmed, this guidance proposes that interest is not applied to employee contributions owed at this time.
- 5.10 Notwithstanding this, any immediate detriment cases where the pension is put into payment now may need to be revisited if the Government's final approach includes the application of interest on owed employee contributions. Pension authorities should ensure that any members making a decision under this guidance are aware of, and accept, this condition.

Tax relief on employee contributions

- 5.11 Where possible, pension authorities should ensure that the employee contributions owed are repaid by the member before they leave service to ensure that any tax relief entitlement can be applied. Where this is not possible, for example where an individual has retired previously on ill-health grounds and did not qualify for a pension under the 2015 Scheme but would qualify under their legacy scheme, the

scheme member will have to wait until the Government's final approach to removing the discrimination has been implemented to receive any appropriate reimbursement. This is likely to be after April 2022.

Recovery of outstanding employer contributions (Firefighters' Pension Schemes only)

5.12 The Firefighters' Pension Schemes are in a unique position compared to other public sector pension schemes in that they do not have a uniform employer contribution rate across all schemes. As such, any scheme member who elects under this guidance to take their full pension benefits under their legacy scheme will impact on the corresponding employer contributions owed in respect of that member during the period that they were in the 2015 Scheme.

5.13 It will be for each employing Fire and Rescue Authority (FRA) to recalculate the contributions that they, as the employer, should have paid under the legacy scheme for each member and pay any shortfall into their pension fund account. Where this results in an excess of employer contributions having been paid, these can be refunded to the employer from their pension fund account.

Treatment of Cash Equivalent Transfer Value (CETV) transfers into the 2015 Scheme

5.14 It is recognised that there will be some transitional scheme members who will have transferred benefits from an external pension arrangement into the 2015 Scheme. Where a scheme member elects to take all their benefits from the legacy scheme, the original transfer-in (the Cash Equivalent Transfer Value) will need to be recalculated to determine the amount of pensionable service that should be purchased in the member's legacy scheme.

5.15 The recalculation of the transfer-in will need to be undertaken by pension authorities as if it had been taken at the time of the original transfer, using the actuarial factors that were applicable at that time.

5.16 Where conversion of transferred benefits from the 2015 Scheme to the legacy scheme results in the pension input amount changing due to actuarial adjustment, then an individual's Annual Allowance position may need to be reassessed.

Treatment of purchased added pension in the 2015 Scheme

5.17 Some transitional scheme members will have elected to make voluntary contributions to purchase 'additional pension' in the 2015 Scheme. For those members that elect to take their full benefits under the legacy scheme, any employee contributions paid in respect of the additional pension purchased will need to be converted to the equivalent value of additional pension that could have been purchased in the member's legacy scheme.

- 5.18 The legacy schemes do not currently have ‘additional pension’ provisions. Additional pension purchased in the 2015 Scheme is one of the unresolved issues that the consultation is considering.

Scheme PAYS– treatment of debits applied to 2015 Scheme pension

- 5.19 There may be instances where transitional members have previously incurred certain tax charges and have elected for these to be paid under Scheme PAYS with the associated pension debit applying to the 2015 Scheme benefits.
- 5.20 Where this is the case and the member elects for all their pension benefits to be paid from their legacy scheme, there may be subsequent changes to the tax charges retrospectively. If this is the case, pension authorities will need to recalculate the pension debit. The recalculation of the pension debit will need to be undertaken by pension authorities as if it had been taken at the time of the original Scheme PAYS elections, using the actuarial factors that were applicable at that time.

Revisiting AA tax assessments on previous years

- 5.21 Under current arrangements, there is a four-year statutory time limit for reassessing tax for previous years. This means that where a scheme member’s pension benefits change for past years, altering their tax position, HMRC can collect and refund tax where it is owed for the current tax year, and the four full tax years immediately preceding the point at which the individual’s benefits change.
- 5.22 Where a scheme member’s benefits change due to an election under this guidance so that additional tax is due for a tax year that sits outside the four previous tax years, HMRC cannot collect that additional tax. As such, the member will not be required to pay this. However, the recalculation will still be necessary to ensure the member’s tax position going forward is correct.
- 5.23 The Government has confirmed that where a scheme member’s benefits change so that they are owed a reimbursement of any tax charges paid since April 2015, they will get a full refund for the full period. The scheme member will initially be able to seek a tax refund from HMRC in respect of any overpaid tax charges in the previous four tax years.
- 5.24 Any further entitlement to a tax refund for years outside the four-year period will be refunded by means of compensation payments, which are expected to be paid after the Government finalises its approach to removing the discrimination, likely to be after April 2022.

Police Workforce and Professionalism Unit, Home Office

21 August 2020



Information

Immediate Detriment

Purpose

1. The purpose of this information note is to provide Fire and Rescue Authorities (FRAs) with additional information to the immediate detriment guidance note supplied by Home Office on 21 August 2020. It does not give detailed guidance on the process of payment of benefits.
2. This note will be subject to any changes on the note supplied by Home Office.

Background

3. Following the 2018 Court of Appeal judgment in Sargeant, an [interim order was made by the Employment Tribunal](#) on **18 December 2019** which provided that members who had brought claims (claimants) are entitled to be treated as if they remained in the FPS 1992, as long as they were in the scheme at 31 March 2012 **and** 31 March 2015 *ending the final determination of the issues of remedy, all existing Claimants who, by reason of their age would not satisfy paragraphs 12(2)(c), 12(3)(c), 13(e) or 14(e) of Schedule 2 to the 2014 English Regulations or the 2015 Welsh Regulations from 31st March 2015 are entitled to be treated as satisfying those paragraphs from that date.*
4. We communicated the following Government position in [FPS Bulletin 28 - January 2020](#):
...all entitlements including immediate ones should proceed under the 2015 scheme rules for the time being. This includes those who are due to taper into the 2015 scheme should continue to taper, and those due to retire normally at a later date should continue in the 2015 scheme.
5. The bulletin asked FRAs to provide numbers of members who were likely to have an immediate event in 2020 and recommended some immediate steps that authorities could take in relation to ill-health assessments.
6. The SAB used the information provided to request guidance on dealing with immediate events as per their [paper submitted to Home Office in March 2020](#).

7. On 21 August 2020, at the request of the Fire Brigades Union (FBU), the Home Office issued a note¹ directly to English FRAs via finance leads titled 'McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases' for both the Firefighters' and Police Pension Schemes.

Home Office immediate detriment guidance

8. The note headed 'McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases' for both the Firefighters' and Police Pension Schemes is available on the dedicated [Age Discrimination Remedy \(Sargeant\) page](#).
9. The note is labelled as informal guidance only and notes that the issues raised are subject of both ongoing litigation and the UK Government's consultation. It does not confirm on what basis FRAs may rely on the note for the purpose of making pension payments.
10. The scope of the note includes members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, and who did not benefit from full protection and were moved into the 2015 Scheme on or after 1 April 2015:
 - 10.1. who become eligible to retire with an ordinary pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept deferred 2015 scheme benefits); **OR**
 - 10.2. who don't qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement BUT would do under the IHR arrangements in their legacy scheme.
11. It is unclear whether the note applies to FPS 2006 members, however, based on the scope detailed above:
 - 11.1. For ordinary retirement, it is likely to only apply to special members (who have a normal retirement age of 55) and a very small cohort of standard members who would want to have benefits **paid from their legacy scheme** (i.e. do not accept deferred FPS 2015 benefits).
 - 11.2. For ill-health, it is unlikely that special and standard members of the 2006 scheme will qualify because FPS 2015 has the same criteria for ill-health as FPS 2006, and therefore if they do not qualify for lower tier ill-health in FPS 2015, they would also not qualify under FPS 2006.

¹ <http://www.fpsboard.org/images/PDF/Boarddocs/Remedy/Home-Office-immediate-detriment-guidance-21-August-2020.pdf>

12. The note should **not** be applied to scheme members who have already retired and are in receipt of their pension payments. The note refers to these cases being more complex to address, especially due to complexities in rectifying the member's tax position. We believe this to refer to the HMRC timing of payment conditions and the potential for unauthorised payments.
13. Paragraph 5.3 of the note sets out that in order to provide a choice to members, two sets of pension entitlement quotes should be provided. The paragraph includes a "non-exhaustive" list of items to include in the quote. It does not include any mention of the change to the pension input amount for each pension input period of the remedy, or any tax charge as a result of that recalculation.
14. Under the heading '*Unresolved pension issues*', paragraphs 5.6 to 5.24 detail outstanding issues that are being consulted on and will not be resolved until the Government finalises its approach to removing discrimination.

Current position

15. The note is helpful to explain UK government policy and shows progression from the previous position that all entitlements should proceed under the terms of FPS 2015. However, it does not cover the steps that FRAs and administrators would need to put into place to enact the guidance.

Matters for the FRA to consider

16. Being mindful of the interim order which entitles claimants to be treated as members of the FPS 1992, FRAs now need to understand practically how they could give effect to the guidance. As the document notes in several places that it is informal guidance only, FRAs may wish to seek individual legal advice, which some authorities have advised they are pursuing.
17. We understand that the Home Office assert the legal position which underpins the application of the guidance in the note for non-claimants (those not covered by the interim order) is Section 61 of the Equality Act. The effect of Section 61 being contested in the FRA's appeal under Schedule 22 of the Equality Act, in which they argue that they were required to follow the pensions regulations and so by law had no choice but to implement the transitional protections for older firefighters.
18. The HO Guidance on the face of it does not make it clear;
 - 18.1. What the position is for FRAs if members make decisions without all the correct information, such as understanding tax relief.
 - 18.2. How auditors might treat such payments under legacy terms and on what basis an FRA can rely on the guidance to satisfy auditors.

18.3. What risk the member accepts by having benefits paid out before the consultation has concluded, although the note states that **all** cases will need to be revisited once remedy is finalised (3.4). It is understood that the Home Office and HM Treasury (HMT) are considering providing a waiver.

19. Nominated contacts at each FRA should be consulted on further matters to consider.

Employer contributions

20. Contrary to the position as stated in paragraphs 5.12 and 5.13, we understand the Home office expectation is that revised guidance will now be issued to confirm there is no requirement for the FRA to make the employer contributions in order to enable payment of retirement benefits.

21. Any adjustments in employer contributions will be captured in the scheme valuation process and reflected in the future employer contribution rates going forward. This position would be welcomed.

Employee contributions

22. The position of tax relief on employee contributions as stated in paragraph 5.11 means that if a member chooses to have the contributions deducted from their lump sum, they will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process once the consultation has concluded, this should be clearly caveated in member communications.

Technical issues

23. There are several technical questions which have been raised with Home Office and HMT that mean in some cases the guidance cannot be applied until an answer has been received, which would leave FRAs in the position of being able to remedy some members but not others:

23.1. Paragraph 3.1 refers to 'members who were in service'. It is not clear whether this means 'in service as a firefighter' or pensionable service, and as such it is not clear whether someone who was '[eligible to be an active member](#)' is in scope, albeit as per paragraph 11 above it is noted that FPS 2006 members to whom that definition applies are likely to be out of scope.

23.2. The suggested position in paragraphs 5.14 to 5.16 on Cash Equivalent Transfer Values (CETVs) needs further clarification of how this could work in practice. Under the current rules for CETVs, benefits cannot be transferred into the FPS 1992 as the scheme is closed and there are no current factors available. So, it is unclear how a transfer could be processed under FPS 1992 terms.

23.3. Furthermore, if it was possible to calculate a CETV, the guidance does not comment on what effect this would have if the CETV took the member over the 30 year' service cap.

23.4. Where a member has paid into FPS 2015 and bought added pension, paragraphs 5.17 to 5.18 are not clear on how an equivalent added years pension would be created in the final salary scheme. It also does not comment on the position where the member would not have qualified for added years in the legacy schemes, for example, the requirement in FPS 1992 to be more than two years from retirement when purchasing added years, or what the effect would be if that added years conversion took the member over 30 years' service.

23.5. The guidance only comments under paragraphs 5.21 to 5.24 on the position where there is tax to be paid or refunded, it does not comment on the steps needed to calculate whether there is a tax liability, i.e. by re-calculating the pension input amount over each of the pension input periods in the remedy period.

23.6. It is understood that the informal position from HMT is that the pension input amount should be re-calculated over the periods in the remedy period based on the legacy scheme benefits. An HMRC CLM query form² has been submitted for further guidance and HMT and HMRC are understood to be jointly considering further guidance on this.

Absent from the guidance

24. There are several areas where we would have expected a policy steer to be provided, but this is lacking from the guidance:

24.1. There is no commentary on the treatment of temporary promotion where an FRA has used their discretion to award Additional Pension Benefits (APBs) in the legacy schemes. Temporary promotion is not pensionable under CARE.

24.2. There is no commentary on creating an APB in the legacy scheme for a member who has received CPD during FPS 2015 membership.

24.3. There is no commentary on where a [two-pension entitlement](#) would have occurred if they had been a member of the legacy scheme.

² <http://www.fpsregs.org/images/HMRC/HMRC-CLM-template-immediate-detriment-implementation-and-annual-allowance.pdf>

24.4. There is no reference to invoking a [contribution holiday](#)³ by returning to the legacy scheme.

24.5. There is no instruction of how to convert any divorce debits applied in FPS 2015 and the impact on pension credits.

24.6. There is no reference to caveating that the recalculated cost cap may revise the accrual rate of FPS 2015 from 1 April 2019 and whether that would retrospectively affect the calculation of CARE benefits used in the choice calculation.

24.7. There is no commentary on abatement that would apply under the legacy schemes but not reformed schemes.

24.8. The consultation proposals suggest that taper members would only be able to select legacy or reform benefits for the whole remedy period, i.e. 1 April 2015 to 31 March 2022.

- It is not clear how choice should be offered to a taper protected⁴ member in the immediate detriment category. Under the current legislation a taper protected member who has already moved into FPS 2015 would have both a pension that could immediately be paid from FPS 1992 which would include service past 1 April 2015, and a deferred entitlement in FPS 2015.
- It is not clear whether a taper member choosing to retire under immediate detriment and accepting payment of an FPS 1992 pension based on service to date of retirement would have to forfeit any existing FPS 2015 deferred pension, and if that should be caveated at the time of retirement, based on the outcome of the consultation.

25. We understand that the Home Office are in discussion with HMT regarding the issues brought to them and are working on reflecting this in revised guidance, however, this is a complex area of work so will take some time.

26. In advance of that guidance being available, we would offer the following commentary:

³ The Government introduced an employee contributions holiday for FPS 1992 members who accrue the maximum 30 years' pensionable service prior to age 50. This applies from the point of accruing maximum pensionable service in the scheme until the member's 50th birthday. This change was applied retrospectively to 1 December 2006.

⁴ A taper-protected member is somebody who was not fully protected by virtue of age to stay in the final salary scheme (1992, 2006 or Special Modified 2006 Scheme), but was moved into the FPS 2015 between 24 May 2015 and 31 March 2022, depending on their age, as per the [table in the regulations](#).

27. Supplementary commentary

<u>Two Pension Entitlement</u>	Where a member would have an entitlement to two pensions due to a drop in pay during the period 1 April 2015 to retirement date or 31 March 2022, the two-pension entitlement must be recalculated in the estimate of benefits under FPS 1992
Contribution holiday	<p>Under the terms of FPS 1992, anyone who accumulates 30 years' service in the 1992 Scheme before reaching age 50 is entitled to a contributions holiday⁵ between the date on which they reached 30 years' service and their 50th birthday.</p> <p>For those opting to retire under the 1992 Scheme, the value of this holiday must be deducted from the accumulated deficit in contributions. That may have the effect of turning the deficit into a surplus.</p> <p>If as a result of this exercise, there is:</p> <ul style="list-style-type: none">• a net deficit in contributions, the member must pay it, or have it deducted from their lump sum;• a net surplus in contributions, the employing FRA must refund it to the member or add it to their lump sum.
<u>Additional Pension Benefits (APBs)</u>	<p>Where a member has received a CPD payment pensionable under the FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.</p> <p>If there is a discretion in place to treat temporary promotion as pensionable under the FPS 1992 and a member has had a temporary promotion while a member of FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.</p>

FRA immediate action

28. The FRAs have always been mindful of the interim order which entitles **claimants** to be treated as members of FPS 1992 and wish to give effect to this where they are able to do so.

29. This note highlights some of the issues with the content of the guidance in terms of FRAs being in a position to do this, for example in terms of;

29.1. What is absent from the guidance; or

⁵ Further information on [contributions holiday](#) is available on the password protected area of the website.

- 29.2. Unanswered technical questions which would leave FRAs in the position of being able to remedy some members but not others, e.g. a technical issue, such as a CETV or divorce on the record and no guidance on how to convert to final salary benefits.
30. In order to ensure the FRA has all the information needed in order to proceed with an immediate detriment case under the guidance, we have provided FRAs with a [template matrix](#) to complete. This template may also be used in order to evidence where they do not have the information to proceed. Completion of this checklist will no doubt require both employer and administrator input, please ensure this is complete before proceeding with a case.
31. In addition, nominated contacts at each FRA should be consulted before actioning any immediate detriment cases in order to inform decision making.
32. We issued guidance in [FPS Bulletin 28](#) on immediate action that FRAs could take, under the heading *Update on transitional protections remedy (Sargeant)*. If that action was not taken, we recommend that FRAs do so now.
33. We are pleased to provide further commentary on immediate action below.

Current or new cases

34. III-Health: IQMP assessment

- 34.1. Members with transitional 1992 benefits – ask the IQMP to assess the applicant under both the 1992 and 2015 scheme terms.⁶
- 34.2. Under the immediate detriment note members who don't qualify for lower-tier ill-health in FPS 2015 but would do so under FPS 1992 should be allowed to retire under the arrangements of their legacy scheme where possible.
- 34.3. Transitional Special Members of the 2006 scheme – ask the IQMP to assess the applicant under the terms of the 2006 scheme noting that the normal retirement age of a special member is 55⁷.
- 34.4. The criteria for ill-health retirement are the same for standard 2006 members and transitional members of the 2015 scheme, therefore assessment under the 2015 terms should be enough.

⁶ Ill-Health certificates are available here - <http://www.fpsregs.org/index.php/member-area/ill-health-and-injury>.

⁷ Rule 3, Paragraph 3 of FPS 2006 - <http://www.legislation.gov.uk/ukxi/2014/445/schedule/paragraph/2/made>

35. Estimation of benefits

35.1. The estimate of benefits under both schemes should include:

- The pension payable to the member.
- The lump sum that would be payable, along with details of tax consequences, such as receiving an unauthorised lump sum or limiting the lump sum so it doesn't incur tax.
- Dependant benefits such as a partner's pension and death in retirement five-year guarantee from FPS 2015. This is particularly important where someone is retiring under ill-health terms and is paid their pension under the 'one-pot' arrangements from FPS 2015.
- A clear statement that all calculations are provisional and may be revised depending on decisions still to be made and changes to scheme rules, in particular regarding interest and taxation; and that further payments or refunds, or recalculation of pension benefits, are possible.

36. Schedule of contributions owed

36.1. In order to receive benefits under the terms of FPS 1992, the immediate detriment note confirms that employee contributions must be repaid where they are due.

36.2. Members should be provided with a schedule of contributions owed, to include:

- Difference between FPS 2015 and FPS 1992 contributions for the remedy period.
- This should include any additional contributions that need to be paid in order to count a service break.
- Contributions on FPS 1992 terms of any temporary promotion to be treated as an APB.
- Difference between FPS 2015 and FPS 1992 contributions on any CPD payments in order to calculate the APB that will be payable under the legacy scheme.
- Adjustments for the contribution holiday if the member would be eligible under the legacy scheme.

36.3. Members should be made aware of the effect of claiming tax relief on their pension contributions if they choose to have contributions deducted from their lump sum, rather than paying before retirement.

- Pension Contributions made before retirement will qualify for tax relief under HMRC PAYE or self-assessment.

- Pension Contributions made after retirement, such as deducted from the lump sum will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process once the consultation has concluded.

37. Annual allowance

37.1. For some members the impact of treating them as if they had never left their previous final salary scheme might mean that they would have breached the annual allowance limits in former pension input period years.

37.2. We understand that the HMT position on this is that benefits over each pension input period should be re-assessed on final salary scheme terms.

37.3. If benefits are put into payment under the immediate detriment note, the member will need to be aware of the recalculation of their pension input periods and the change on any carry forward, as this may affect other pension entitlements elsewhere.

37.4. Where a member has exceeded the annual allowance limit and there is no carry forward to mitigate the breach, a tax charge will fall due on the excess over the annual allowance. The member should be informed of any annual allowance breach for them to calculate the tax charge.

Retrospective Ill-health Cases

38. Under paragraph 3.1 this applies only to members who did not qualify for lower-tier (and therefore higher-tier) ill-health retirement under FPS 2015 but would have done under their legacy scheme. They may have now left the FRA but are not in receipt of pension benefits.

39. These members should be treated as above as a current ill-health case and the relevant IQMP assessment should be sought and benefits put into payment where possible.

40. For members with a pension in payment and who therefore do not fall within the scope of the immediate detriment note, FRAs may want to ensure they are prepared to offer revised benefits as soon as possible by having valid IQMP assessments in place, as detailed at paragraphs 32.1 to 32.4 above.

41. Some of these members may be better off in the reformed schemes, for example, members with a higher tier ill-health in payment under the FPS 2015. FRAs may want to ensure members are aware of this by providing a quotation of benefits under the legacy scheme.

Other pensions in payment

42. Our understanding is that pensions in payment, even if they have come into payment since 21 August 2020 are not in the scope of the immediate detriment note, as there are tax and other consequences that rely on policy decisions yet to be made by the HMT consultation.

LGA practitioner support

43. We are talking to practitioners about how best to support implementation of the note to promote best practice and aid consistency, that work includes:

43.1. Working with the [Fire Communications Working Group](#) to provide a consistent template on how a member may be provided with a choice and what this should include, using documentation provided to support choice in 2006 as a guide⁸.

43.2. Working with administrators to provide example calculations for:

- APB calculations for members with CPD payments or temporary promotions.
- Pension tax breaches, where high earners might breach tax limits by gaining additional final salary pension growth.
- Members who would qualify for a contribution holiday in FPS 1992 by returning to the legacy scheme.
- Members who would be liable for abatement by choosing legacy benefits.

Please address any queries on the content of this request to bluelight.pensions@local.gov.uk

October 2020

⁸<https://webarchive.nationalarchives.gov.uk/20120919193018/http://www.communities.gov.uk/archived/general-content/fire/optionsexerciseddocuments/https://webarchive.nationalarchives.gov.uk/20120919193018/http://www.communities.gov.uk/archived/general-content/fire/optionsexerciseddocuments/>

Firefighters' Pension Schemes

McCloud/Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases

1.0 Purpose of guidance

- 1.1 The purpose of this note is to provide informal guidance to Fire and Rescue Authorities (FRAs) in England on processing 'immediate detriment' cases (see definition in section 3 of this guidance) in advance of legislating to remove the age discrimination as found in the McCloud/Sargeant Employment Tribunal litigation. As the guidance is non statutory and informal, it does not in itself place legal obligations on FRAs. However, FRAs have the power to calculate and pay pension entitlements for those members who fall within either of the two categories at paragraph 3.2 under their legacy schemes, through the application of section 61 of the Equality Act 2010. That provision means that these individuals have the right to be treated as though they have been in service in their legacy scheme since 1 April 2015, if that is what they want and they inform the scheme of this¹.
- 1.2 The informal guidance is provided at the request of the Fire Brigades Union and the Firefighters' Pensions (England) Scheme Advisory Board to assist employers with "immediate detriment" cases. It is specific to members of the Fire Pension Schemes.
- 1.3 The issues raised in this document are the subject of ongoing litigation and the Government's announced proposals to introduce legislation, when Parliamentary time allows, to address the discrimination identified by the Court of Appeal. As such this guidance will be kept under review to ensure that it is consistent with any judgment, or legislative proposals, and it is therefore subject to any further developments in these respects.
- 1.4 In this guidance a reference to the "2015 scheme" is to the applicable reformed 2015 Fire CARE Pension Scheme, and a reference to the "legacy scheme" is to the applicable Fire Pension Schemes that applied to a member before 1 April 2015.
- 1.5 This guidance **should not** be seen as providing a definitive resolution to all of the consequences arising from the discrimination, rather as a way to progress certain immediate detriment cases (as defined in this guidance) now there is some clarity as to how certain issues should be approached. It is important **to note that ALL cases processed using this guidance will need to be revisited** once the full detail of the Government's approach is finalised, and legislation is in place. Legislation is expected to be in place by October 2023.

¹ To note, Part 3 Chapter 1 Regulation 7(2) of the 2014 Regulations states: "A person who is in service in a scheme employment (P) is an eligible person in relation to that employment unless in relation to service in that employment— (a) P is a protected member of the 1992 Scheme or the NFPS; or (b) P is a member of any other pension scheme and the authority employing P pays contributions to that scheme in respect of P."

2.0 Background to McCloud/Sargeant ruling

- 2.1 Most public service pension schemes, including the Firefighters' Pension Schemes and, were reformed in 2015. These reforms included 'transitional protection' for scheme members closest to retirement.
- 2.2 In December 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' and Judges' Pension Schemes. The Government respects the Court's decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes, including the Police Pension Scheme.
- 2.3 The Government consulted on proposals to remove this discrimination and responded on 4 February 2021. Details of the proposal and the response are available online from GOV.UK². The changes set out in the consultation response to remove the discrimination will apply across all the main public service pension schemes and provide affected members with a choice of which scheme benefits they would like to receive for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022 in the consultation paper.

3.0 What are 'Immediate Detriment' cases?

- 3.1 This guidance aims to deal with cases where the benefits are not yet in payment as these are less complicated to deal with (compared to where benefits are already in payment).
- 3.2 For the purposes of this guidance, the term 'immediate detriment' applies only to individuals who were members or eligible to be members of a legacy scheme immediately prior to 1 April 2012, and have a period of service after 31 March 2015 during which they were members of a legacy or reformed scheme, where those periods of service are continuous including those with a qualifying break in service of less than 5 years (this is irrespective of whether they have submitted a legal claim or not) and who
 - I. become eligible to retire (for any reason, including ill health) and draw their pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept 2015 scheme benefits); **OR**
 - II. do not qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement, and are therefore left without a pension in payment **BUT** would be eligible under the IHR arrangements in their legacy scheme.

² <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>

- 3.3 Any scheme members that fall within either of the two categories above can have their pensions calculated and put into payment according to the guidance set out in section 5 below. As set out above, FRAs have the power to calculate and pay pension entitlements for these members under their legacy schemes, through the application of section 61 of the Equality Act 2010. That provision means that these individuals have the right to be treated as though they have been in service in their legacy scheme since April 2015, if that is what they want and they inform the scheme of this.
- 3.4 This guidance **should not** be applied to scheme members who have already retired and are in receipt of their pension payments. As set out in more detail in para 4.4 below, these cases are likely to be more complex to resolve, including on tax. At present, it is not clear that cases where an individual has already retired can consistently be processed under current legislation without adverse impacts. Nor should the guidance be applied where the member has died in service as the government's approach to these cases has not yet been finalised.
- 3.5 This guidance applies only to unprotected and taper protected members of the reformed schemes. This guidance should not be applied to protected scheme members, whose benefits will be received from the legacy scheme.

4.0 Guidance on treating immediate detriment cases

- 4.1 Transition members are members who were members of a legacy scheme and subsequently moved into the 2015 scheme either at 1 April 2015 or later under the tapered protection arrangements in relation to their service from that date and are in scope for remedy, as set out in paragraph 3.2 above.
- 4.2 There are some transition members who have already been dismissed from work on grounds of ill-health, but without a pension as they did not qualify for an ill-health pension under the 2015 Scheme. In addition, there are transition members who are now approaching retirement and want to take their full pension benefits under their legacy pension scheme. This guidance provides employers with advice on how these cases can now be processed in advance of final remedy implementation.

Transition members who are already in receipt of a pension

- 4.3 There are cases (in respect of both ill-health/ordinary retirements) where transition members have already retired and are currently receiving an ill-health/ordinary pension. It is recognised that many of these members' pensions are lower than they would be if they had instead been members of their legacy pension scheme since April 2015. For example, where a transition member has retired on ordinary grounds below age 55, their benefits accrued under the 2015 Scheme will currently be deferred until their State Pension Age.
- 4.4 These cases are likely to be more complex to resolve, and at this stage it is not clear that cases where an individual has already retired can consistently be processed

under current legislation without adverse impacts. Even for cases that do not need legislative change, schemes and in some cases individuals will require further guidance or information to be provided on how the detail of cases should be processed, and on interpretation of existing rules where these do not provide immediate clarity, given the complexity and novelty of this situation. This material needs to be worked through in some detail, to ensure that – as far as possible – individuals whose cases are processed under section 61 receive the same, or as close as possible, treatment as those being processed once new legislation is in place. Work in this area is ongoing. FRAs may be able to process these cases once outstanding points have been resolved. However, providing a full remedy in these cases may not be possible until legislation has been implemented.

5.0 Giving scheme members a choice

- 5.1 This section provides guidance where FRAs offer members meeting the criteria set out in para 3.2 the opportunity to take all their pension benefits accrued during the remedy period under their legacy pension scheme, rather than under the 2015 Scheme.
- 5.2 In order to provide this choice, FRAs will need to present two sets of pension entitlement quotes to each qualifying scheme member, which includes any legacy scheme entitlement that becomes due such as APBs or Two Pension entitlement, and include updated Pension Input Amounts for all years of the remedy period for all members who have paid an annual allowance (AA) charge or who may be liable for an AA charge – more detail on this is set out below.
- 5.3 Whilst not an exhaustive list, each quote must also set out the pension benefits that the member would receive under each choice, to include: recurring annual pension (before and after commutation), commutation retirement lump sum entitlement, employee contributions owed/refunds due etc.
- 5.4 It should be noted that any decision to take benefits from their legacy scheme may impact earlier tax liabilities (AA charge) on the increase in a member's pension savings – FRAs should consider what support they can provide to members to revisit these assessments.
- 5.5 Given section 61 of the Equality Act allows individuals to be treated as though accruing in their legacy scheme since 2015, the information that schemes should provide to members includes:
 - recalculated Pension Input Amounts (PIAs) for every year of the remedy period to date; and
 - PIAs for 2012-13, 2013-14, and 2014-15 (which would not be changed by an election under section 61).
- 5.6 Members should contact HMRC about any changes to their AA tax liabilities for the remedy period. AA charges can only be corrected within the tax system, with HMRC,

for years within the statutory time limits. Further information about statutory time limits can be found in the Compliance Handbook (CH51300)³.

- 5.7 However, individuals will also need revised PIAs for earlier years, beyond the statutory time limits and out of scope for tax correction, including to claim compensation where they have paid higher AA charges on reformed scheme benefits for out of scope remedy period years.
- 5.8 For periods within the usual statutory time limits for correction of tax, where an individual has already used mandatory Scheme Pays, pension debits for previous years can be adjusted to accommodate any revisions to the AA charge owed.
- 5.9 Where an individual has already used voluntary Scheme Pays and there is a reduction in the AA charge owed, pension debits for previous years can be adjusted.
- 5.10 Where individuals have not used Scheme Pays before or used voluntary Scheme Pays and there is an increase in the AA charge owed, pension schemes should offer voluntary Scheme Pays to help individuals affected to pay any additional AA charge. Alternatively, individuals can pay additional AA charge owed in cash, if they prefer. An election/option must be made into Scheme Pays before an individual's pension is put into payment. Interest will be payable on late paid AA charges.
- 5.11 There remain several outstanding issues that will not be resolved until such time that the Government finalises its approach and legislation is in place to remove the discrimination identified by the McCloud/Sargeant ruling (see unresolved pensions issues section below). Each scheme member will need to agree to accept the Government's final approach and any future adjustments that this requires.
- 5.12 Each scheme member should be required to provide written confirmation of their election, stating that it is made by reference to section 61 of the Equality Act. Once written confirmation has been received from each member, the FRA can put the chosen pension into payment, once scheme pays elections have been made.
- 5.13 In the absence of any written confirmation, the default position should be the current regulatory position for a transition member. Therefore, the pension paid will be in accordance with their pension entitlement as provided under both the legacy scheme regarding accrual from years before the remedy period, and 2015 CARE Scheme regarding accrual for remedy period years.

Unresolved pension issues:

- 5.14 As outlined above, there remain outstanding issues which limit the provisions of this guidance, where the Government is still finalising the details of its approach. Legislative change will also be required in some areas, to implement a full remedy.

³ <https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch51300#:~:text=The%20normal%20time%20limit%20of%204%20years%20applies%20to%20all%20taxes>

Adjustments to employee contributions

- 5.15 Scheme members who choose to take their full pension benefits under their legacy scheme will either owe employee contributions or be entitled to a refund. Any employee contributions owed will need to be paid before the member's legacy scheme pension can be put into payment, or paid out of a member's retirement lump sum upon retirement. Where contributions owed are paid from a retirement lump sum it is less likely they will attract tax relief – as set out below in paragraph 5.18.
- 5.16 Any contributions owed will need to be based on the pay that is considered to be pensionable under the legacy scheme, which may vary from that pay which is considered pensionable under the 2015 Scheme. It will be for employing FRAs to make an assessment for each member and seek payment.
- 5.17 A member will be permitted to pay any outstanding employee contributions from their retirement lump sum or from any other personal source, though it should be noted that in these cases the individual is unlikely to get tax relief. Members will eventually have an opportunity to apply for compensation for any shortfall in tax relief in relation to those contributions when the legislation is in place. If the contributions are made under net pay before an individual has retired, and go through the payroll, then tax relief should be available. Therefore, where possible, FRAs should ensure that any employee contributions owed are paid by the member before they leave service. This may not be possible in some cases, for example for deferred members or where an individual has retired previously on ill-health grounds and did not qualify for a pension under the 2015 Scheme but would qualify under their legacy scheme. In such cases, the scheme member will have to wait until legislation has been implemented to receive any appropriate compensation.
- 5.18 Where an individual has overpaid contributions, their case should not be processed at this time. This is due to complexities regarding ensuring fair and non-discriminatory treatment of returned contributions, without new legislation, that have not yet been resolved.
- 5.19 A final decision is yet to be made in respect of whether, and at what rate, interest should be applied to contributions owed by employees should they elect to receive benefits from their legacy scheme during the remedy period (2015 to 2022). As the Government's approach to this issue is yet to be confirmed, this guidance proposes that interest is not applied to employee contributions owed at this time.
- 5.20 Notwithstanding this, any immediate detriment cases where the pension is put into payment now may need to be revisited in respect of interest if the Government's final approach includes the application of interest on owed employee contributions. FRAs should ensure that any members making a decision under this guidance are aware of, and accept, this condition. As at para 1.15, all cases processed using this

guidance will need to be revisited once the full detail of the Government's approach is finalised, and legislation is in place.

- 5.21 It is recognised that some members by virtue of age and service would qualify for a contribution holiday under the legacy 1992 Scheme having reached 30 years' service before age 50. These members may also be taper members who have paid contributions to 2015 Scheme after their 30-year anniversary date. The position of applying tax relief and interest on contributions underpayments or refunds for these members is yet to be confirmed. Therefore, these cases should not be processed at this time.

Recovery of outstanding employer contributions

- 5.22 The Firefighters' Pension Schemes are in a unique position compared to other public sector pension schemes in that they do not have a uniform employer contribution rate across all schemes. As such, any election by a scheme member under this guidance to take their full pension benefits under their legacy scheme will impact on the corresponding employer contributions owed in respect of that member during the period that they were in the 2015 Scheme.
- 5.23 Employing FRAs do not need to recalculate the contributions that they, as the employer, should have paid under the legacy scheme for each transitional member that chooses to take their full benefits under the legacy scheme. This shortfall in employer contributions will be captured in future scheme valuations as an unfunded, past service deficit and reflected in the employer contribution rates going forward.

Treatment of Cash Equivalent Transfer Value (CETV) transfers into the 2015 Scheme

- 5.24 It is recognised that there will be some transition scheme members who will have transferred benefits from an external pension arrangement into the 2015 Scheme under a Cash Equivalent Transfer Value (CETV), known as a transfer in.
- 5.25 However, the rules of the FPS 1992 legacy scheme do not permit the receipt of a transfer in after 5 April 2006 when the scheme closed.
- 5.26 The transfer-in should remain in the 2015 Scheme until such time that the Government's approach to removing the discrimination has been finalised and legislation is in place. It will be at this time that these cases can be revisited. If this is not done the transfer in will be considered an unauthorised payment for tax purposes, with the member incurring unauthorised payments charges of up to 55%, and scheme sanction charges may apply.

Treatment of purchased added pension in the 2015 Scheme

- 5.27 Some transitional scheme members will have elected to make voluntary contributions to purchase 'additional pension' in the 2015 Scheme. For those members that elect to take their full benefits under the legacy scheme, any employee contributions paid in respect of the additional pension purchased will

need to be converted to the equivalent value of additional pension that could have been purchased in the member's legacy scheme.

- 5.28 The legacy schemes do not currently have 'additional pension' provisions. Additional pension purchased in the 2015 Scheme is one of the unresolved issues for which the Government's approach has not yet been finalised. Until this issue has been resolved, any added pension accrued by a member should remain in the 2015 Scheme. As with 'transfers-in', these cases will need to be revisited when the Government's approach to removing the discrimination has been finalised and legislation is in place.

Scheme Pays – treatment of debits applied to 2015 Scheme pension

- 5.29 There may be instances where transitional members have previously incurred certain tax charges and have elected for these to be paid under Scheme Pays, with the associated pension debit applying to the 2015 Scheme benefits.
- 5.30 Where this is the case and the member elects for all their pension benefits to be paid from their legacy scheme, FRAs will need to recalculate the pension debit. The recalculation of the pension debit will need to be undertaken by FRAs as if it had been taken at the time of the original Scheme Pays elections, using the actuarial factors that were applicable at that time.

Revisiting AA tax assessments on previous years

- 5.31 Under current arrangements, there is generally a statutory time limit for reassessing tax for previous years – this is usually the current year and the four full previous tax years. This means that where a scheme member's pension benefits change for past years, altering their tax position in relation to their AA charge, HM Revenue and Customs can collect and refund tax where it is owed for the current tax year, and the four previous tax years. As noted at paragraph 5.8-5.10, this may require FRAs to adjust previous Scheme Pays calculations or make Scheme Pays available where it was not used previously. As set out above, where Scheme Pays has not previously been used, schemes will need to make voluntary Scheme Pays available. Otherwise, members will need to pay additional AA charges in cash.
- 5.32 Where a scheme member's benefits change due to an election under this guidance so that additional AA tax is due for a tax year that sits outside the statutory time limits, HMRC cannot collect that additional tax. As such, the member will not be required to pay this. However, the recalculation of the pension input amount will still be necessary, including to enable members to claim compensation for overpaid AA in out of scope years, where appropriate.
- 5.33 The Government has confirmed that where a scheme member's benefits change, reducing their liability to tax, the scheme member will be able to seek a tax refund from HMRC in respect of any overpaid tax charges within the usual statutory time limits.

For years outside the statutory time limit, scheme members can claim compensation for overpaid tax, once legislation is in place.