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**London Borough of Haringey Pension Fund**

**Government Consultation to address Age Discrimination  
relating to ‘transitional protection’ in the LGPS  
(commonly referred to as “McCloud”)**

**A paper by the Independent Advisor  
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The purpose of this paper is to inform the Pensions Committee and Board of the Government Consultation issued on 16 July 2020 to address age discrimination relating to transitional protection arrangements introduced as part of the 2014 reforms of the LGPS.

On 16 July 2020 the Ministry of Housing Communities and Local Government (MHCLG) issued a consultation called “Amendments to the statutory underpin.” This consultation proposes amendments to the LGPS Regulations to remove age discrimination in relation to ‘transitional protection’ arrangements introduced when the LGPS was reformed in 2014. This whole issue is now commonly referred to as “McCloud” which refers to one of the court cases that highlighted the age discrimination present in all the public service pension schemes (which include the Judicial, Firefighters’, Civil Service, NHS, Police, Teachers and Local Government schemes) covered by the Public Service Pensions Act 2013.

When the LGPS was reformed in 2014 a number of changes were made including changing the scheme going forward from a final salary to a career average scheme. However, the new scheme included transitional protection arrangements for members nearing retirement designed to ensure older workers would not be worse off as a result of the introduction of the new scheme. This protection meant that members who met certain criteria, including that they were within ten years of their final salary scheme normal pension age on 1 April 2012, received ‘underpin protection.’ This meant that a member’s pension entitlement under the new career average scheme could not be lower than it would have been under the previous final salary scheme. An underpin test was required to be carried out comparing career average benefits the member accrued against the ‘underpin amount’ which is the final salary benefits that would have accrued if the LGPS had not been reformed.

Transitional protection arrangements for older workers were also introduced into the other major public sector pension schemes which were reformed in 2015 (a year later than the LGPS). These protections were challenged in the cases of both the Judicial and the Firefighters' schemes in what are known as the "McCloud" and "Sergeant" cases respectively where it was argued that younger members received less favourable treatment than those older members who were given transitional protection. In December 2018 the Court of Appeal ruled that the transitional protection in the Judicial and Firefighters pension schemes constituted unlawful age discrimination. Consequently in 2019 the Government stated that it would take action to address this issue across all the public sector pension schemes covered by the Public Service Pensions Act 2013.

On 16 July 2020 the Ministry of Housing Communities and Local Government (MHCLG) issued a consultation called "Amendments to the statutory underpin" to address the age discrimination identified in the LGPS. A separate consultation to address the age discrimination in the other (unfunded) pension schemes covered by the Public Service Pensions Act 2013 was issued at the same time by HM Treasury.

The Consultation issued by the MHCLG is very long (69 pages), detailed and technical in nature. It includes draft Regulations to remedy the present defects in the LGPS Regulations. The Consultation also includes 29 questions which respondents may wish to address. The Consultation appears to have been very carefully prepared by MHCLG who also held technical discussions with the LGPS Scheme Advisory Board for England and Wales prior to formally issuing the Consultation. The Consultation runs from 16 July to 8 October 2020. The final proposals as put into place through revisions to the LGPS Regulations will be back dated to 1 April 2014 when the new LGPS arrangements came into effect.

Given the overall complexity of the issue to be remedied there will almost certainly be amendments made to the Consultation proposals by MHCLG following their consideration of the responses submitted by the Scheme Advisory Board, individual LGPS Funds and other stakeholders (including Hymans Robertson the Haringey Fund Actuary). However, given the nature of the issue to be resolved and the way in which the MHCLG have approached the Consultation process it seems very likely that changes will be wholly or primarily in respect of the "detail" rather than the "principles" contained in the Consultation.

As the LGPS Regulations are currently constituted they treat members of the Scheme differently depending on their age as follows:

- Those who were active members of the Scheme on 31 March 2012 and were within ten years of their normal pension age (NPA) on 1 April 2012 are entitled to underpin protection and are therefore potentially "better off" than the group below

- Those who were active members of the Scheme on 31 March 2012 and were more than ten years from their NPA were not eligible for underpin protection and were therefore potentially “worse off” than the above group as they were not guaranteed a pension of at least the level they would have received in the final salary scheme. However, in reality most younger members will not benefit from any change to the underpin protection

The exact details and the mechanism for calculating whether a member is better off under the non-discriminatory underpin proposed in the Consultation are complex and lengthy. However, the proposals may be briefly summarised as described in the following paragraph:

The Consultation proposes a solution and amendments to the LGPS Regulations which extend the underpin to the second group above (those described in the second bullet point) – that is it is proposed to extend protections to those who were not old enough to receive underpin protection when it was originally introduced. This should ensure equality between the two groups for benefits accrued from 1 April 2014 onwards. Vital general features of the proposed solution are briefly described at 1 to 4 below but these are only extremely brief summaries of a technically complex solution which is described and explained in the actual Consultation. Therefore, the summaries below should not be relied upon as describing the situation as it would apply to any particular individual

1. Eligibility is restricted to those who were active members of the LGPS on 31 March 2012 and who went on to accrue benefits since 1 April 2014
2. The underpin applies between 1 April 2014 and 31 March 2022 only. It will cease earlier than 31 March 2022 if the member ceases to be an active member or dies in service. **Crucially it is only service between 1 April 2014 and 31 March 2022 that will be assessed under both “final salary” and “career average” calculations. Service before 1 April 2014 will be assessed only under the final salary arrangements of the previous LGPS. Service from 1 April 2022 will only be assessed using a “career average” basis.**
3. The final salary for comparison purposes is the salary when the member ceases to be an active member or reaches age 65. Therefore, some underpin calculations will still need to be undertaken in the 2050s!
4. As paragraph 136 of the Consultation makes clear *“A major challenge of implementing the changes proposed would apply in respect of obtaining additional data from employers for members who are newly benefitting from underpin protection – estimated to be around 1.2 million individuals. Under the 2014 Scheme, certain member data which was required for administering the 2008 Scheme... are not required for calculating member benefits. To administer the revised underpin, administrators would need to obtain this data for qualifying members for the period back to April 2014... Particular challenges are likely to arise where employers have changed their payroll provider, and the data isn’t stored in current systems.”*

Assuming the Consultation proposals are implemented then this will result in a huge task for Pension Administration Teams such as that which services the Haringey Fund.

This challenge goes way beyond the major Data collection/analysis implications of the proposed solution and will also require significant Governance, Communication and Training challenges. Careful planning and appropriate resourcing will be required to ensure that implementation of the remedy within Haringey is as smooth and effective as possible. There is a huge task facing individual LGPS Funds, such as Haringey, to implement the amendments to the underpin.

The Haringey Fund will need to develop and implement a project plan and commence the necessary steps to implement the “McCloud” remedy. This should include consideration of the extensive governance, data, communication, training and education activities that will require to be undertaken. Consideration should also be given to additional resourcing to implement the “McCloud” remedy. Given the scale of the task, all LGPS Funds need to plan and consider what they can do now to prepare for implementation including considering what additional resources will be required.

The increase in liabilities resulting from the proposed “McCloud” remedy is uncertain and dependent on a number of variables. It is however not expected to be material in relation to the total liabilities of the LGPS. Paragraph 142 of the Consultation provides an estimate based on work by the Government Actuary Department (GAD) which states “...Assuming future member experience replicates the 2016 scheme valuation assumptions the future cost to LGPS employers could be around £2.5bn in the coming decades...” The Value of LGPS liabilities at 31 March 2019 was (according to the Scheme Advisory Board Annual Report) £296 billion and therefore the GAD estimate suggests an increase in liabilities of less than 1%.

This estimate by GAD may however be a significant over estimate. Hymans Robertson who are the Actuary to the Haringey Fund have stated in a Briefing Note, of 17 July 2020, that “Based on typical LGPS funding assumptions, we estimate that total liabilities might increase...around £0.5bn across the whole of the English & Welsh LGPS.” The Hymans Briefing Note goes on to state “This estimate is significantly less than the £2.5bn quoted in the LGPS consultation. This will be due to a combination of factors, with the pay growth assumption being a crucial one. The Government estimate uses CPI +2.2% pa which is significantly higher than that used by a typical LGPS fund (which might only be around CPI + 0.7% pa).”

While the impact of the “McCloud” remedy on liabilities is likely to be very small at the level of a whole LGPS Fund, for example the Haringey Fund, it could possibly be significant for some Employers. For many Employers with a mature workforce, like most councils, there is likely to be minimal impact. However, for Employers with a young workforce there could be a material impact on costs. Also, smaller Employers may possibly be more affected as the change in an individual

member's benefits may make up a significant proportion of their liabilities. Consequently, the impact on smaller Employers is likely to be more volatile. The Hymans Briefing Note of 17 July 2020 includes the following commentary:

*“The variation in McCloud underpin impact arises due to differing membership profiles, and particularly age. Younger members will have a longer period of salary increases compared to older members (especially once promotional increases are considered, which tend to be higher at younger ages). There is therefore a higher likelihood that the underpin ‘bites’ for younger members. Our modelling suggests that some employers may see their total liabilities increase by as much as 5-10% (which may equate to at least a 1% of pay contribution rate increase), whilst other employers will see no impact at all. There is also the potential for one-off significant increases which may result in an impact greater than noted above, for example, an employer with only one member who is awarded a significant pay increase...”* The issue of the effects of the proposed “McCloud” remedy on individual Employers is therefore a matter the Haringey Fund may wish to raise with its Actuary Hymans Robertson.

The full (69 page) Consultation issued by the MHCLG to address the unlawful age discrimination in the present LGPS Regulations entitled “Amendments to the statutory underpin may be accessed at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901173/Condoc - amendments to LGPS underpin - FOR PUBLICATION.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901173/Condoc_-_amendments_to_LGPS_underpin_-_FOR_PUBLICATION.pdf)

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