



To: Andrew Bosmans, chair of South Yorkshire FRS LPB – by email

18 February 2022

Dear Andrew,

Thank you for your letter of 25 January 2022 in which you asked about the questions that the Scheme Advisory Board (SAB) has put to the government.

The Home Office was asked to provide its rationale for withdrawing the informal guidance at the Board meeting of 9 December 2021. Concern was also raised regarding the timing of the decision. The reasons given were as stated in the [HM Treasury note of 29 November 2021](#), regarding the perceived limitations of Section 61 of the Equality Act 2010 and the potential for unintended consequences to both employers and employees.

You will also have already seen my [letter to HM Treasury of 17 December 2021](#), which as of today's date has not received either acknowledgement or reply, despite a number of reminders.

You will be aware that, although the Home Office's informal immediate detriment guidance has been withdrawn, HMT also stated within its note that it is up to schemes to choose to process cases based on their own assessment of the competing legal risks. This should include the risk of acting outside of tax and pension law, measured against the risk of future litigation from representative bodies.

I met with the Home Office again on 2 February 2022, in order for the SAB to be able to explore the aspects of legal risks in the context of the individual and unique circumstances of our schemes. Echoing some of the comments in your letter, I noted two particular factors which are pertinent to the risk evaluation in the context of our schemes.

- The Firefighters' Pension Scheme (FPS) was a direct party to the McCloud/ Sargeant litigation and scheme managers were consequently told by the courts in Sargeant that they had a duty not to discriminate and, indeed, that any limitations of Sections 61 and 62 of the Equality Act 2010 were not a reason for them to have failed to rectify the discrimination caused by the transitional protections of the FPS 2015. Hence, the risk of inaction would seem to be considerably higher for the FPS and, indeed, there is additional pressure on scheme managers to respond to the court rulings. This pressure has increased with the threat of further legal action following the withdrawal of the Home Office guidance.
- Another key feature of the FPS in England is that the scheme managers are separate from the responsible authority, rather than the two roles being vested in the same institutions. HMT acknowledges that it is up to scheme managers to review the balance of risks and I would expect that, where other government departments are the scheme managers, they will have done this. This then means the legal advice is being taken by the entities that are also responsible for funding. The separation of the roles for the FPS means that this is not the case.

The Home Office has confirmed that they continue to work with HMT and will hold further discussions. I understand that the situation will continue to be reviewed.

With regard to your question about what the government determines as legitimate expenditure, I asked for clarification of a number of elements when the guidance was originally withdrawn. In particular, I received the following comments with regard to your questions on legitimate expenditure.

*“To confirm, all costs will be captured under the AME top up grant if they are considered legitimate pension expenditure. The Scheme rules (and associated finance guidance) sets out clearly what costs can be paid for a FRA’s pension fund account. Please see attached (while it has not been updated to capture the 2015 scheme, the same principles apply). It is up to FRAs to interpret and apply the regulations when determining what are legitimate pension costs.”*

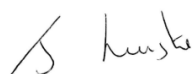
The Appendix was the [2006 Guidance for Fire and Rescue Authorities on new financial arrangements for firefighter pensions with effect from April 2006](#).

You will see from the above that it is for FRAs rather than government to determine legitimate expenditure. The Home Office has repeatedly been approached for further clarification on this issue, both by the SAB and the LGA. As yet, it has been unable to provide any direction or words of assurance.

With regard to my own views on legitimate expenditure, I would be very disappointed if a decision to pay benefits on a remedied basis at least to pipeline members (as envisaged by the courts) was deemed to be illegitimate. I would though believe that FRAs might also be expected to minimise administration expenses and seek to avoid incurring unauthorised payments where possible, which may mean deferring certain elements of the remedy. I am also hopeful that the introduction of the Finance (No.2) Bill and its enacting secondary legislation, from April 2022 onwards, may alleviate some of the concerns relating to, for example, unauthorised payment changes incurred for lump sum arrears paid more than 12 months after date of retirement. However, this is a personal view and is not based on either legal advice or any further clarifications from the Home Office.

I would be happy to discuss this further with you. I would like very much, with your consent, for our correspondence to be in the public domain as I am sure your concerns are shared by other parties, and I am also keen to ensure consistency across the sector.

Kind regards



Joanne Livingstone

Chair of the Firefighters' (England) Pension Scheme Advisory Board