

# IN THE LOOP - McCloud/Sargeant

## Fire Pensions

July 2021 - Issue 03



### Remedy & Immediate Detriment

Prior to the government's consultation response on 4 February 2021, on 20 August 2020 the Home Office issued guidance to FRA's (in England and Wales) on processing prospective 'Immediate Detriment' cases in advance of a decision relating to the Remedy. Since then the following has occurred:

- 4 February 2021: the government has confirmed its final Remedy approach: the Deferred Choice Underpin ("The McCloud Remedy").
- 23 March 2021: the government published a command paper titled "Tax Policies and Consultations (Spring 2021)". The Government stated that in designing the McCloud Remedy, it has identified several aspects of the pension tax framework that do not work as intended in all situations and need updating to deal with cases of this type.
- 11 May 2021: The Public Service Pensions and Judicial Offices Bill was announced in the Queen's Speech. The purpose of the Bill is to ensure equal treatment for all members within each of the main public service pension schemes in order to remedy the discrimination identified in the McCloud Remedy.
- 10 June 2021: The Home Office issued revised informal Immediate Detriment Guidance ("**the Guidance**").

This bulletin will concentrate on the revised guidance, and how we propose to work with FRA's to process member cases falling under this category.

Whilst there has been some progress from the government, there remain a number of administrative, technical, and legal issues which require confirmation and clarification before the McCloud Remedy can be fully implemented. Until legislation is finalised, and technical issues are resolved, administrators are unable to put in place systems which reflect and are able to deliver the McCloud Remedy.

The revised guidance is a policy note, which expands on issues/areas which were not previously covered in the first version. However, it does **not provide a clear instruction** as to the steps that FRA's and Administrators would need to put in place to give effect to it.

### Editorial:

Welcome to the latest edition of "In the loop" – our bulletins designed to keep you, the fire authorities, updated with all of the latest developments surrounding public sector pension reform.

In this bulletin we will highlight further developments following the Home Office revising its informal guidance in relation to Immediate Detriment. We will also outline our updated approach and requirements for the calculation and payment of Immediate Detriment benefits and provide details of the member data collection exercise.

*The content of this document is based on our assessment of the update and the requirements needed to allow any changes to be made. Whilst care has been taken to ensure its accuracy XPS cannot accept liability for any loss caused as a result of any actions taken based solely on information contained in this document.*

We are aware that there will be members who will be approaching retirement in advance of the government's current deadline date of October 2023 to put in place legislation, and administrators updating IT systems to deliver the Remedy.

As such, we have been asked to work with employers to create a process to enable the formulation of FRA Immediate Detriment policies to allow for the calculation and payment of Immediate Detriment benefit options for those officers approaching retirement before implementation of legislation and IT system development, should FRA's chose to offer this. option.

## Purpose of the Revised Immediate Detriment Guidance and Legal Basis

The purpose of the June 2021 revised guidance is to provide informal guidance and advice (in England and Wales) on processing "Immediate Detriment" cases in **advance** of the government introducing legislation to remove the unlawful age discrimination identified by the Court of Appeal in the McCloud/Sargeant litigation.

The guidance is non-statutory and informal and it does not place legal obligations on FRA's. However, the guidance states FRA's have "the power to calculate and pay pension entitlements for those members who fall within the [Immediate Detriment] category under their legacy schemes, through the application of Section 61 of the Equality Act 2010".

Section 61 is overriding legislation and provides that the rules of an occupational pension scheme must be taken to include a non-discrimination rule and that the scheme's provisions take effect subject to that rule. **Therefore, the government assert in this guidance that this provision means that affected members 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 about this.**

Notwithstanding, the Home Office's assertion that S61 underpins the application of the revised guidance, it is not clear from the guidance if S61 provides the relevant authority to treat consequential matters that rely on other legislation. It is clear however, that S61 is unable to deal with all consequential effects of remedying pension benefits: in the government's Tax and policies consultations published on 23 March 2012, it stated that amendments were needed to the tax legislation as a consequence of the McCloud ruling, which have yet to be enacted.

The latest ID Guidance continues to be subject to review to ensure that it is consistent with any Court judgement or legislative proposals. Furthermore, a number of issues raised within the document are the subject of ongoing litigation.

The Guidance is caveated and states it "**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 . . . 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**".

***The area of members with 30 years accrued service and taking a contribution holiday still requires further Home Office clarification, which we hope to receive and share with you in due course.***

## Members in Scope of Immediate Detriment

The latest guidance provides clarity regarding those members who fall in and out of scope for Immediate Detriment.

The guidance has clarified that the following **are in scope** for Immediate Detriment:

- (a) 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 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, and become eligible to retire **for any reason**;
- (b) Those members eligible to retire are claimants and non-claimants including those with all forms of ill health, **and** want to have **all** their benefits **paid from their legacy scheme**;
- (c) Immediate Detriment applies to qualifying active and deferred members;
- (d) Qualifying individuals can be members of any qualifying legacy or reformed scheme post 31 March 2015.

The following individuals **will not be in scope** for Immediate Detriment under the Guidance:

- (a) Where eligible members have already retired and are in receipt of their pension payments;
- (b) Payments to beneficiaries of members who have died in service.
- (c) Where a fully protected member wishes to access reformed scheme benefits.
- (d) Where a member has overpaid contributions, their case should not be processed.

In addition to the above, the following **will not be in scope** for Immediate Detriment because technical issues need to be resolved or further detail is required:

- (a) Members with pension sharing orders.
- (b) Transferred-in **non-fire** benefits where the transfer could not have been accepted into the legacy scheme at the date of the transfer payment.
- (c) Any member who has purchased added years/pension.

## **XPS suggested approach to meet Immediate Detriment requirements:**

### **General issues:**

Please note the following regarding the process XPS is proposing to meet the Immediate Detriment requirements:

**Requirement for a policy:** We will require a policy confirming that each FRA wishes to adopt and take forward Immediate Detriment retirements. This is consistent with good governance.

**Case by case review:** There are limitations as to which members can be offered Immediate Detriment; each application for Immediate Detriment will be looked at on a case-by-case basis to determine if calculations are possible.

**Immediate Detriment calculations will be based on our interpretation:** We will be processing cases based on our interpretation of how the McCloud Remedy will be delivered i.e. ahead of the government finalising its legislative approach and resolving a number of technical issues (including the taxation framework).

**Member to sign Agreement confirming Immediate Detriment Election:** We will require all members to sign an agreement confirming their election to take benefits via the Immediate Detriment route **before** we process any Immediate Detriment cases. This requirement is further supported in the revised government Guidance, which states the member should:

- (a) confirm their election in writing by reference to S61 of the Equality Act 2010; and
- (b) agree to accept the government’s final approach, and any future adjustments that this requires.

**Absence of written confirmation:** The Guidance states that in the absence of any written confirmation, the default position should be the current regulatory position for a transition member, i.e. 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.

**Draft Agreement:** In the Loop 2, refers to our waiver which is now referred to as an Agreement, which we attach together with guidance for members regarding the Immediate Detriment process. We ask that you review the Agreement and guidance, and share with your legal teams, as it is our intention for all FRA’s that adopt an Immediate Detriment policy to use this Agreement as part of the retirement process.

**Immediate Detriment is for formal retirements:** The Immediate Detriment process should not be used as an estimate mechanism; therefore, all members must follow the formal Immediate Detriment process before any options or estimates are issued.

Please see below the Member Immediate Detriment Agreement and Immediate Detriment Guidance for Employees in addition to our Immediate Detriment process chart and amended flowchart which reflects a few changes to our final policy and requirements.



Fire Member ID Agreement.pdf



Fire Member ID Guidance.pdf



**Action required!**

FRA’S SHOULD CONSIDER THEIR OWN ID POLICY FORMATION SHOULD THEY DECIDE TO APPLY ID. ADDITIONALLY FRA LEGAL TEAMS WILL NEED TO CONSENT TO THE USE OF THE ID MEMBER AGREEMENT IN CONJUNCTION WITH THE FRA POLICY.

**Project Initiation Document:** Immediate Detriment cases fall outside of current legislation and therefore calculations will need to be performed manually outside of the software system by the XPS project function. This will mean that there will be limited disruption to the blue light administration team who will continue to provide service on a business-as-usual basis. You will be sent our Project Initiation Document under separate cover which illustrates the project phases and details our charges and terms for processing Immediate Detriment cases, in addition to charges for data collection.



### Action required!

PLEASE SIGN AND RETURN YOUR ACCEPTANCE OF OUR TERMS AND CHARGES OUTLINED IN THE PID ALONG WITH ANY REQUESTED PURCHASE ORDER TO COMMENCE REMEDY PROJECT WORK.

### Immediate Detriment Process

Our ID process is summarised below and should be read in conjunction with the attached flowchart and process note below.



Basic ID Process -  
Employer & XPS.pdf



Draft XPS Fire  
Immediate Detriment

- Firstly, the FRA must have an Immediate Detriment Policy in place and the member **MUST** satisfy Immediate Detriment criteria detailed above and in the policy.
- XPS will look at each Immediate Detriment member on a case-by-case basis.
- XPS will require data on final salary entitlements during the period of Reformed Care Scheme service, including hours changes or breaks in service, such as pay, so that we can calculate the benefits that would have been paid under legacy terms.
- In the case of an Ordinary Retirement the member must contact the FRA with at least **80 days'** notice or more to confirm their formal retirement and intention to request legacy scheme benefits for the Remedy Period. The 80-day notice period is required to provide employers with additional time to obtain information to enable the member's legacy benefits to be calculated, and to calculate any additional pension contributions which would have been paid into the legacy scheme had the member remained there. [Additionally, it also provides XPS time to calculate the alternative benefits that may be available to the member, and for the member to consider the information, and seek independent financial advice, before selecting their final retirement options].
- Given the nature of ill-health retirements, there will be flexibility around the **80 days** notice, where the member is retiring under these circumstances.
- Under the revised Guidance the government has stated that where an individual has overpaid contributions, their case should **not be processed** at this time.
- Further, **XPS are unable to process** Immediate Detriment cases for members who have already retired and/or have pension sharing orders and/or have transferred-in non-fire benefits and/or have purchased added years; these technical issues require further policy decisions from the government, which presently remain unresolved.
- Employer will determine if the member is in scope for an Immediate Detriment calculation (this should include an assessment as to whether the member falls in scope of the McCloud Remedy i.e. they were a member of a relevant public service pension scheme on or before 31 March 2012 and remained in a relevant pension scheme on or after 1 April 2015).

- Once employer decides that member is in scope of the McCloud Remedy **AND** satisfies the criteria for Immediate Detriment calculations, the member **must sign** the Member Immediate Detriment Agreement.
- Employer / Payroll will determine member contributions due and arrange for the member to sign a form to agree to re-payment of contributions via payroll adjustments prior to retirement to enable Immediate Detriment tax relief. Additionally, a leaver form will need to be completed and payroll details provided for the remedy period and forwarded to XPS. A new Immediate Detriment Leaver Form and Immediate Detriment pay details form will be published onto the employer section of our website over the next few weeks, to be used for all Immediate Detriment retirement cases.

**The following will be provided to the member, which is also reflected in the revised guidance:**

- (a) Two sets of benefit options reflecting the pension benefits that the member would receive under **each choice**:
- **Quote 1:** current scheme benefits – final salary and CARE to date of retirement (i.e. a quote which reflects the current legislative position);
  - **Quote 2:** benefit calculations reflecting the benefits you would receive had you remained a member of your legacy scheme to your date of leaving or 31 March 2022, whichever is the earliest.
- (b) Each set of quotes will include the recurring annual pension (before and after commutation).
- (c) Commutation retirement lump sum entitlement, together with details of tax consequences such as receiving an unauthorised lump sum or limiting the lump sum, so it does not trigger a tax charge.
- (d) Details of dependant benefits.
- (e) Additionally, the Guidance recognises that any decision by a member to take benefits from their legacy scheme may impact earlier Annual Allowance tax liabilities on the increase in members' pension savings. The Guidance, makes it clear that FRA's will provide the following to members:
- Recalculated Pension Input Amounts for every year of the Remedy Period to date; and
  - Pension Input Amounts for the years 2012-13, 2013,14, and 2014 – 15
  - [Revised details of Pension Input Amounts beyond the statutory times limits and which are out of scope for tax correction so member can claim compensation where they have paid higher Annual Allowance charges on reformed scheme benefits for out of scope remedy period years].
- (f) Each quote will contain a clear statement that all Immediate Detriment calculations are provisional and will be revisited and recalculated to ensure that the member has the correct benefit entitlement once the government has finalised its approach to implement the McCloud Remedy. Therefore, depending on decisions to be made by government, and changes to the governing scheme rules, with specific reference to interest and tax treatment, further additional payments, refunds and revised benefit amounts are possible.
- (g) XPS will issue both sets of options to the member with an Election form for completion before payment is processed. The member will have a choice of which benefits they wish to take.

**Member Agreement requirement**

The Immediate Detriment calculation is an interim method of calculating benefits for members who have transferred to the Firefighters Pension Scheme 2015 and will retire before remedy is fully available. The calculation used to

determine the level of benefits payable is based on guidance provided by the Home Office in advance of primary and secondary legislation being made. The Immediate Detriment calculation can only be applied if the member signs an Agreement, which is required for the following reasons:

- The revised Home Office Guidance is clear that members electing for Immediate Detriment should confirm the election stating that the election is made by reference to the S61 of the Equality Act 2010. 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.
- Any benefit calculated and paid via the Immediate Detriment process will be recalculated once the government has agreed its final approach to Remedy. The Agreement requires members to accept and acknowledge this point.
- The member will need to agree to accept the government's final approach and any future adjustments to their pension in payment that this requires.
- Ensure the member understands the financial and taxation risks in agreeing to the calculations in advance of the government finalising legislation and related policies to implement the Remedy.
- Obtain the member's authority to make presently and/or at a future date the relevant tax and administrative adjustments/financial deductions to reflect their chosen option at the point of payment, and at the point of recalculation once the government has agreed its final approach.
- To highlight XPS's liability exclusions regarding our interpretation of the Remedy.

### **Main tax and financial implications of Immediate Detriment and XPS calculation assumptions**

In calculating the member's Immediate Detriment pension options we will take into account the following technical issues:

#### **Recovery of outstanding employee contributions and tax relief**

If the member chooses to take their full pension benefits under their legacy scheme it will be necessary to charge them the appropriate contribution for the benefits that they accrue. Therefore, their pension contributions will be adjusted, the member will either owe employee pension contributions or they will be entitled to a refund of overpaid contributions. The revised Guidance confirms that any employee contributions owed will need to be paid **before** their legacy scheme pension can be put into payment, to ensure that any tax relief at source can be applied.

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. The employing FRA will need to make an assessment if contributions are owed.

It is our understanding, that if the member chooses to have their outstanding contributions deducted from their lump sum or from any other personal source, it is highly likely that they will **NOT** qualify for tax relief under the current HMRC PAYE or self-assessment process. This position may change once a wider review has taken place of the final legislation to implement and give effect to the Remedy. **This is why XPS suggest to approach the issue of member contributions via payroll adjustment.**

The Guidance recognises that it will not be possible in all cases for any outstanding contributions to be paid before the member's pension is put into payment, for example, deferred members. In these cases, the scheme member will have to wait until legislation has been implemented to receive any appropriate compensation.

The consultation response and the guidance refer to compensation for tax relief but neither document covers any detail of how the compensation scheme will operate. We advise that all member communications should highlight that tax relief will be subject to further government policy and legislation coming into force.

Where the member is owed a return of overpaid scheme contributions, the government consultation response has stated that they will receive a payment to cover the value of their overpaid contributions, but with an amount deducted to reflect underpaid tax.

### **Interest charges will be applied to sums owed to and by members**

It is the government's policy intention to apply interest charges to any contributions owed. The Treasury are currently reviewing the appropriate rate of interest to apply, until this detail is received any scheme contributions due will need to be paid **without** the application of interest. If a member's benefits are paid under Immediate Detriment, they will be required to make payment of additional charges as soon as the rate of interest has been set. It is understood that the government will be consulting the Government Actuary on the appropriate rate of interest to add to sums owed to and by members.

### **Annual Allowance Impact**

Under the Remedy the member will be moved back to their legacy scheme. This will potentially alter pension benefits they have accrued in each of the tax years during the Remedy Period, this could mean they may breach the annual allowance limits in former pension input period years.

If benefits are put into payment under Immediate Detriment, the member needs to know that the pension growth in the 4 input periods up to and including the payment year will need to be recalculated. The revised pension growth could impact on any carry forward arrangements, and other pension entitlements elsewhere.

If, on recalculation, it is found that the member exceeds their 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.

**In terms of calculating annual allowance charges for Immediate Detriment calculations XPS's view is that the calculation should be backdated to 2015 (but subject to the current statutory 4-year time limit for reassessing tax for previous years), as opposed to calculating annual allowance growth in the final year when the member makes their election.**

It is understood the Treasury are reviewing and are expected to issue guidance as part of their final review of the Remedy, which could mean could that any over/under paid tax or charges may become payable at a later date.

### **Payment of Tax Charge**

The revised guidance offers more narrative on the position of calculating and paying pension tax where it is due.

The guidance states that where tax is to be paid or refunded, this can only be corrected within the tax system, with HMRC, for years within the statutory time limit, which is the current tax year and the previous four year statutory time limit, and where it is due it will be refunded for the whole period (i.e. beyond the statutory time limit) via a compensation scheme, details of which are not yet known.

Given that S61 of the Equality Act 2010 allows members to be treated as though accruing benefits in their legacy schemes since 2015, the Guidance states that schemes should provide members with the following:

- Recalculated Pension Input Amounts (PIAs) for each year of the remedy period to date; and
- PIAs for 2012-13, 2013-14, and 2014-15 (which would not be changed by election under 61).



Whilst the Guidance states that the above information related to PIAs should be provided to members it does not provide commentary on the steps needed to calculate whether there is a tax liability, i.e. by recalculating the pension input amount over each of the pension input periods in the remedy period as opposed to calculating annual allowance growth in the final year when the member makes their election.

As we state above XPS's view is that the calculation should be backdated to 2015 (but subject to the current statutory 4 year time limit for reassessing tax for previous years).

The Guidance provides brief commentary where reassessment will result in the annual allowance being exceeded, resulting in a tax charge, the Guidance provides comments on how any pension tax charge can be paid. Tax charges can usually be satisfied either individually with a payment from the member, or by scheme pays. The Guidance provides brief comments on the two types of Scheme Pays: Mandatory Scheme Pays (MSP) and Voluntary Scheme Pays (VSP).

MSP can only be used to the immediately preceding tax year, therefore, it cannot be used to pay tax breaches of the annual allowance in previous years within the remedy period. It clearly, has limited reach.

Where in certain circumstances, a member is unable to use MSP to pay a HMRC tax charge, then they may be able use VSP. Under VSP, the member is individually responsible. As a VSP is a voluntary arrangement there are no conditions attached to it other than the scheme agreeing to pay it. It is noted that the Guidance is encouraging pension schemes to offer VSP to help individuals affected to pay any additional Annual Allowance charge.

The current limit for VSP is £1000; therefore, amendments to scheme regulations would be necessary to change this limit.

Finally, the Guidance makes it clear that members should contact HMRC about any changes to their Annual Allowance liabilities for the remedy period, i.e. it is a member responsibility.

### Processes and Governance

We will work with FRA's to ensure strong governance and formal processes are in place to implement the government's policy. The following areas have been identified as key governance and process issues:

- (a) Calculation validation and assumption processes;
- (b) Recording details of calculations to enable correction/adjustment once legislation is in force.
- (c) Decision-making regarding calculation of benefits
- (d) TPR requirements, which we can discuss with FRA's (for example, recording breaches of the law).
- (e) Support to members when revisiting reassessments.

### Tapering

It is our understanding that FRA's are considering the removal of member tapering prior to 31 March 2022. The removal of tapering members across to the reformed scheme will have implications for FRA's, members, payroll, calculations and member record reporting and it is therefore very important that this area is given a lot of consideration.



**Action required!**

FRA'S TO CONSIDER THEIR STANCE WITH REGARDS TO THE REMOVAL OF TAPERING MEMBERS BEFORE 31 MARCH 2022 AND THE POTENTIAL IMPLICATIONS. FRA'S TO CONFIRM TO XPS THEIR DECISION ON TAPERING AS SOON AS POSSIBLE.

**Data Collection Exercise**

We have been working closely with our software provider Aquilla Heywood and the LGA to develop reports and a data template to aid in the collection of employee data in order to build legacy and reformed scheme records for the remedy period for all affected members for the eventual Deferred Choice Underpin option.

The member data needed for remedy records includes information for the period 1 April 2015 to 31 March 2022 in the areas of member part time hour details, service history, breaks in service and financial details including legacy scheme pay, reformed scheme pay and member pension contributions.

The data collection process will focus on extraction and reporting of members affected by remedy and the details held for these members on the pension software system.

A report will outline all affected members which will be extracted and will be populated on the Data Collection Template. All details held, reported and produced will be checked over before we refer the data templates to employers for further verification and completion where employers will be required to provide missing member information.

It is our intention to begin the data collection exercise over the next few weeks once we have been provided with all of the reports required to extract member data from our software provider and agreements for the commencement of the project have been received.

Please see below the data collection notes and guidance issued by the LGA to assist with the data collection process and a copy of the unpopulated template.



Fire LGA Data  
Collection Guidance.p



Fire LGA Data  
Collection Template -



FPS remedy data  
collection template.xls



**Action required!**

FRA'S SHOULD CONSIDER THE DATA HELD ON THEIR PAYROLL AND HR SYSTEMS AND HOW THIS INFORMATION CAN BE COLLECTED AND UPDATED TO THE DATA COLLECTION TEMPLATE.

*If you have any queries relating to the content of this bulletin, please contact Leanne Ferreira at [leanne.ferreira@xpsplc.com](mailto:leanne.ferreira@xpsplc.com).*