

	<p style="text-align: center;"><b>GENERAL PURPOSES COMMITTEE</b> 27<sup>th</sup> September 2006</p> <p style="text-align: center;"><b>Report from the Director of Finance and Corporate Resources</b></p>
For Action	Wards Affected: ALL
<p><b>Discretionary Policies under the Local Government Pension Scheme</b></p>	

Forward Plan Ref:

## 1.0 Summary

1.1 On the 11<sup>th</sup> July 2002 the General Purposes (GP) Committee agreed the continuation of a number of discretionary policies which were delegated to local authorities under the Local Government Pension Scheme 1997. This report proposes amendment to some of those policies following an officer review.

## 2.0 Recommendations

- 2.1 That the policies attached to this report as Appendix 1 remain unchanged unless amended in recommendations 2.2 – 2.4 below or by the report entitled “A New Council Severance Scheme” also on this agenda.
- 2.2 That the decision making procedure that allows payment of pension under regulation 31 of the Local Government Pension Scheme (LGPS) 1997 and regulation D11 of the LGPS Regulations 1995 be amended per paragraphs 3.4 – 3.6 of the report.
- 2.3 That the policy statement regarding the issue of a certificate of protection for pensionable pay is amended as set out in paragraph 3.7.
- 2.4 That the Council changes its policy on abatement so that there is a reduction of members’ pensions in all cases if they return to employment with a Scheme employer, subject to the retention of existing arrangements for appeals against abatement. This change of policy is subject to consultation with the admitted and scheduled bodies who like the Council employ active members of the Brent Pension fund.

### **3.0 Detail**

- 3.1 A working group of officers from Finance & Corporate Resources, Legal and Human Resources reviewed the discretions available to Brent Council under the LGPS and other regulations in 2002. Their proposals, which included the review of the Council's discretions on a three yearly basis, were agreed by the GP Committee on 11<sup>th</sup> July 2002. Accordingly the group reconvened in 2005 and concluded that some amendment was required to current policies for administrative ease, better member understanding and regulatory compliance. Tax rules governing pension legislation, anti discrimination legislation and the LGPS have been subject to amendment. These issues had a bearing on the proposals now being made to members.
- 3.2 The LGPS is a statutory scheme. Generally the Council must comply with the scheme rules as they are laid down with limited discretion. It is the Council's policy in respect of these discretions that the review team considered.
- 3.3 There are a number of discretions that are separate from the LGPS but are associated with the pension service. Other relevant legislation considered was:
- (i) the Local Government (Discretionary Payments) Regulations 1996. This governs the provision of gratuity payments and injury allowances
  - (ii) the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000. This regulation grants the power to make enhanced redundancy payments based on actual pay as opposed to a maximum pay specified by the government.

#### **Early payment of benefits (Recommendation 2.2)**

- 3.4 Regulation 31(2) of the LGPS 1997 allows the immediate payment of pension benefits to members who are aged 50 or more and who leave employment before the earliest retirement date of 60 provided that the member elects to receive immediate payment and the employer gives consent. The Council's criteria in deciding whether to give such consent are:
- (i) There are operational or financial advantages to Brent ;or
  - (ii) The result is cost neutral to Brent and to the Brent Pension Fund and no operational disadvantages apply ; or
  - (iii) There are genuine and compelling compassionate grounds.

Regulation 31(4) of LGPS 1997 provides that where such consent has been given then the employer must reduce the member's pension benefits in accordance with guidance issued by the Government Actuary ( unless the "85 –year rule" applies). However Regulation 31(5) of LGPS 1997 gives the employer a discretion on compassionate grounds not to reduce the member's pension benefits in this way.

3.5 The current procedure in making decisions under 3.4 (iii) and Regulation 31(5) involves numerous stages that could lead to delays and confuse scheme members. Applications are rare and only one case has been agreed and pension benefits paid since April 2001. The current procedure is given in appendix 2 of this report. A detailed procedure will be drawn up by officers. Members are asked to agree the following steps in the process:

- The scheme member will make an application to the Pension Team who will collate all relevant information.
- The information will be passed to the Deputy Director of Finance and Corporate Resources for decision on whether to allow the immediate payment and (if this decision is required) whether any reduction to the pension will apply.
- If the reasonableness of the decision is challenged the Director of Finance and Corporate Resources will review the original decision.

3.6 Compassionate Retirement under regulation D11 of LGPS 1995: Members who left the LGPS before 1<sup>st</sup> April 1998 are entitled to request the early payment of their deferred pension on compassionate grounds. It is proposed that such cases are dealt with under the process detailed in 3.5., enabling all applications for compassionate retirement to be dealt with in a consistent manner.

### **Certificate of Protection (Recommendation 2.3)**

3.7 Where a scheme member suffers a reduction in pay in circumstances that are beyond their control, a certificate of protection issued under Regulation 23 of LGPS 1997 ensures that they do not suffer an undue loss of pension benefits. It is not proposed that there is a change in the current policy but that the wording of the policy statement is altered for clarity to read: “A certificate of protection will be issued in all circumstances where a scheme member suffers a permanent reduction in pay, provided that the reduction is not as a result of the scheme member’s own circumstances.” This wording accords with that of Regulation 23. The current policy statement reads as follows “The certificate will be issued automatically in circumstances of redeployment following reorganisation which results in a reduced or restricted salary”.

### **Abatement of pension benefits (Recommendation 2.4)**

3.8 Where a pensioner recommences employment with a “Scheme employer” (e.g. another local authority) the Council, as Administering Authority for the Brent Pension Fund may reduce or suspend the pension dependent on its policy. It is a requirement of regulation 109 of the LGPS 1997 that the Council has, and regularly reviews, an abatement policy. Regulation 109 also says that in formulating a policy the Authority must consider the following:

- (i) The level of potential financial gain at which they wish abatement to apply
- (ii) The administrative costs which are likely to be incurred as a result of abatement in the different circumstances in which it may occur, and
- (iii) The extent to which a policy not to apply abatement could lead to a serious loss of confidence in the public service.

3.9 Currently full abatement of the member's pension applies to all pensioners save those who have retired on voluntary grounds (i.e. on grounds other than ill-health, redundancy or the efficiency of the service) after the age of 60, who are exempt from abatement, and save for those who successfully appeal against abatement. An abatement of pension can occur where the pension paid plus the new salary exceeds the pensioner's salary with the Council on retirement (updated for inflation). Under current policy the Council will reduce the pension by the whole of the amount of this excess. However a right of appeal is afforded to re-employed pensioners whose salary on re-employment is less than £25,000 and who notify the Council of the re-employment in advance of its starting. In such cases a pensioner who can demonstrate special circumstances such as extreme financial hardship or medical reasons can have the amount of the abatement waived up to a maximum of £5,000 per annum.

3.10 The rationale behind abatement is to compensate the Pension Fund where a loss to the Fund has occurred due to the member's retirement. For example, in the case of early retirement on the grounds of redundancy future investment of the employee's and the employer's contributions has been lost while the Fund has incurred potential extended liability. Abatement offsets part of this loss for the duration of the second employment. As the current policy is applied on the basis of age it will not comply with Age Discrimination legislation coming into force.1<sup>st</sup> December 2006. The Council could maintain the current policy provided it could be "objectively justified". Officers do not believe that the current policy would fulfil the criteria for objective justification. For example, under the current policy abatement would be applied to a pensioner who retired on voluntary grounds before the age of 60, even if the pensioner receives an actuarially reduced lump sum and pension upon retirement, with the result that the pensioner's early retirement causes the Pension Fund no loss.

3.11 Officers have considered the need for a fair policy that applies to all members. It is therefore proposed that all re-employed pensioners are subject to abatement. It is also proposed that the current appeal arrangements are retained so as to allow the Council to continue to take account of special circumstances in particular cases. It is felt that it would be unfair that staff could both receive a pension and pay, whilst others performing the same tasks only received pay. This approach also avoids any financial strain on the pension fund, which is currently in deficit and requiring additional employer contributions to return it to solvency.

3.12 If Members were to agree any change to the current abatement policy the Council as Administrating Authority must consult with other employers with active members of the Brent Pension Fund (i.e. the Scheduled and Admitted Bodies) about its proposals. Any responses made should be considered before the final decision is made by Members on a policy change. Once a final decision is made by Members on a policy change the new policy must be published one month prior to the date of its commencement to ensure scheme members are fully informed.

#### **4.0 Financial Implications**

4.1 In view of the financial position of the fund proposals to exercise discretion are only made where there is likely to be a neutral or positive effect on the fund. Although reviewing individual cases may lead to a small cost to the Fund. None of the proposed policy changes alter this position.

#### **5.0 Legal Implications**

5.1 Under Regulations 3 and 11 of the Employment Equality (Age) Regulations 2006 ( as amended) from 1<sup>st</sup> December 2006 direct and indirect age discrimination in the formulation of policies made under occupational pension schemes will become unlawful. Direct age discrimination involves treating a person on the grounds of their age less favourably than other people are or would be treated. Indirect age discrimination occurs where:

- \* A applies to B a provision, criterion or practice which A applies, or would apply, equally to persons not of the same age group as B; and
- \* that provision, criterion or practice puts persons of B's age group at a particular disadvantage when compared with other persons ;
- \* which puts B at that disadvantage; and
- \* A cannot objectively justify the provision, criterion or practice i.e. A cannot show it to be a proportionate means of achieving a legitimate aim. A "proportionate" means of achieving a legitimate aim is one which is appropriate and reasonably necessary i.e. there is not a less discriminatory way of achieving the employer's aim which would be equally practicable for the employer to implement.

5.2 If the proposals in paragraph 3.11 are implemented then there is a risk that the Council would lose a claim for indirect age discrimination brought to the Employment Tribunal by a pensioner member of the Brent Pension Fund aged 60 or more who was subject to abatement. There will be far more members of the Brent Pension Fund aged 60 or more who are receiving an immediate pension as compared with members aged under 60. As a result it may be that the proportion of members of the Brent Pension Fund aged 60 or more who would be subject to abatement would be significantly higher than the proportion of members of the Brent Pension Fund aged below 60 who would be subject to abatement. Whether this is the case would also depend

on the number of members of the Pension Fund aged 60 or more and aged below 60 receiving an immediate pension who had been re-employed by a Scheme employer at a salary which was subject to abatement. If there is a significant difference in the proportions as mentioned the proposed policy would put pensioner members aged 60 or more at a particular disadvantage.

- 5.3 In the event of such a challenge the Council might not be successful in objectively justifying the policy. The justification for the policy would appear to be recouping part of the loss to the Pension Fund where the payment of immediate pension would cause such a loss and helping generally to reduce the current deficit in the Pension fund where the payment of immediate pension would not cause such a loss (e.g. where the payment of pension starts on or after the pensioner's 65<sup>th</sup> birthday). However caselaw under other discrimination legislation which is likely to be applied by the Employment Tribunals in age discrimination cases indicates that cost savings may not on their own be permissible as a "legitimate aim" of a policy for the purposes of justification. Even if the aim of making costs savings in respect of the Pension Fund was accepted as legitimate the Council would have to be in a position to show there were not available less discriminatory but equally practicable steps it could take to achieve those costs savings.
- 5.4 The proposed policy retains the current arrangements for appeals against abatement. There are general administrative law requirements that local authorities' policies should not be rigid but allow for the policy to be departed from in individual cases. Allowing no opportunity for discretion within the Council's policy could lead to a challenge to the Pensions Ombudsman or through the courts which is likely to be successful from a pensioner whose pension had been abated. The Council would then be required to consider the pensioner's case on abatement on its merits. The current arrangements for appeals could still lead to such a challenge from a pensioner denied a right of appeal ( i.e. those whose salary on re-employment is £25,000 per annum or more or those who fail to advise the Council in advance of taking up new employment). However given the reasons for the denial of a right of appeal it seems highly unlikely that the challenge would achieve a decision on the merits in the pensioner's favour and in those circumstances a challenge is unlikely to be made.
- 5.5 Given the risk of a successful indirect age discrimination claim being made as mentioned above it would be prudent for the Council to consider allowing an appeal against abatement where indirect age discrimination was being alleged and legal advice was that there was a real risk of the Council losing such a claim. Such circumstances could be treated as an example of special circumstances justifying allowing the appeal.

## **6.0 Diversity Implications**

6.1 The review team considered diversity implications of the discretionary policies and an Impact Needs Requirement Assessment (INRA) has been completed for each of the discretions reviewed. Given the statutory nature of the Local Government Pension Scheme and the fact that the discretions will be applied universally no significant diversity implications are envisaged however.

## **7.0 Staffing Implications**

7.1 No direct staffing implications are envisaged.

## **8.0 Background Papers**

- 1 Report to the General Purposes Committee 11<sup>th</sup> July 2002.
- 2 LGPS Regulations 97 and 95.
- 3 DCR Regulations 2000 and 1996

## **9.0 Contact Officers**

Andy Gray, Pensions Manager, Finance and Corporate Resources,  
Chesterfield House, 9 Park Lane, Wembley, Middlesex HA9 7RJ. Tel 020  
8937 3157.

**DUNCAN McLEOD**  
**Director of Finance and Corporate Resources**

## Appendix 1

The following are the discretions considered by an officer review in 2005:

1. Shared Cost AVC's: Scheme members are entitled to make additional contributions to increase their pension benefits – know as Additional Voluntary Contributions (AVC's). Regulation 67 of the LGPS 1997 gives local authorities the option to pay an employer contribution to those AVC's. Current policy is that the Council does not contribute to AVC's.
2. Discretion to award additional service: Regulation 52 of LGPS 1997 allows the Council to award additional pension scheme membership and therefore increased benefits. The current policy is that:  
*“The Authority resolves not to award additional service under Regulation 52 of the LGPS Regulations 1997 (as amended) save in exceptional circumstances. Such circumstances may include where this becomes appropriate to secure improvements in the retention and morale of staff transferring to the Council under TUPE.”*
3. Discretion to allow early retirement from age 50. Regulation 31 of LGPS 1997 gives the Council discretion to allow the early retirement of scheme members from age 50. Current policy is as follows:  
*“It has been agreed not to grant early payments of benefits to employees seeking early retirement unless one or more of the following conditions apply:*
  - i. *There are operational or financial advantages to Brent (or there are no such disadvantages)*
  - ii. *The result is cost neutral to Brent and to the Brent Pension Fund and no operational disadvantages apply.*
  - iii. *There are genuine and compelling compassionate grounds.”*

Regulation 34 of the Local Government (Discretionary Payments) Regulations 1996 gives the Council discretion to pay an Injury Allowance where:

*“as a result of anything he was required to do in carrying out his work a person who is employed in a relevant employment—*

- (i) *sustains an injury; or*
- (ii) *contracts a disease; and*
- (b) *he ceases to be employed in that or any other relevant employment as a result of an incapacity which is likely to be permanent and was caused by the injury or disease, he shall be entitled to an annual allowance not exceeding 85 per cent. of his annual rate of remuneration in respect of the employment when he ceased to be employed.”* The current policy is that each case will be dealt with dependant on its merits. (See also recommendation 2.2)



4. Gratuity Payments: The provisions of regulation 39 of the Local Government (Discretionary Payment Regulations) 1996 allow the Council to make a gratuity payment to staff who, during their employment were debarred from entering the LGPS. It is Council policy to make such payments. These are in decline due to improvements to the LGPS which allows all Council staff to be members.
5. Certificate of Protection: Regulation 23 (3) of LGPS 1997 states:  
*"If, otherwise than by virtue of a member's own circumstances-*
  - (a) *his rate of pay is reduced, or*
  - (b) *the rate at which it may be increased is restricted in such a way that it is likely that the rate of his retirement pension will be adversely affected,**he is entitled to be issued with a certificate to that effect by the employing authority". (See recommendation 2.3)*
6. Abatement of pension upon local government re-employment. A description of this discretion and the proposed changes to it are covered in the body of this report.
7. Compensatory Added Years: The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000 and Part V of the Teachers (Compensation for Redundancy and Premature Retirement) Regulations 1997 currently allow employers to adopt a policy for the payment of additional unfunded pension benefits for officers and teachers respectively. These are the subject of a separate report to this committee.
8. Abatement and suspension of compensatory added years (cay): Where a scheme member has received additional pension benefits under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000 these benefits fall to be abated upon commencement of the new employment and permanently reduced upon cessation of the second employment. The DCR 2000 specifies minimum requirements but allows the Council the discretion to have a more stringent policy. Council policy is does not go beyond these. This approach has been adopted by several other local authorities.
9. Redundancy Payments – Weekly pay: The Employment Rights Act (ERA) requires that redundancy payments are based on a number of weeks' pay. The ERA imposes a maximum changed annually on the amount of a week's pay (£290 for 2006-07) that can be taken in account in calculating a redundancy payment. The DCR 2000 allows the Council to make redundancy payments made on actual gross contractual pay with no maxima. This issue is dealt with in a separate report to this committee.

## Procedure for Early Retirement On Compassionate Grounds

### Current Scheme Members

Current scheme members will make an application to their unit head or director and this will be endorsed by the service area director. If endorsed the application (and endorsement) will be forwarded to the Brent Pension Team in order that the compassionate retirement procedure can be invoked.

### Deferred Members

Deferred beneficiaries will make a formal application direct to the Brent Pension Team.

The scheme member will be made aware of both their right to appeal for early payment of benefits and the waiving of the actuarial reduction, where appropriate on compassionate grounds. The member will be informed that a calculation of their preserved benefits together with actuarial reduction where appropriate will be requested from the LPFA and will be sent as soon as possible.

The application will be forwarded to the pension team stating the grounds and supporting evidence for their appeal:

1. For early payment of their pension benefits.
- 2 For the waiving of the actuarial reduction where appropriate.

The pension team will forward to the member within 5 working days of receipt of the application:

- (i) Copies of the relevant regulations.
- (ii) A copy of Brent's current discretionary policy where appropriate

The member will be informed of their right to a personal interview or a home visit, if appropriate, as part of the assessment process.

The member will also be requested to give full written details of the circumstances surrounding their application.

If the information provided is not adequate for a review to take place, a further letter will be sent to the individual within 15 working days requesting further details

The collated data and **relevant** information will be forwarded to the Director of Finance and Corporate Resources within 20 working days of receipt.

If a decision is not made within 20 working days after sending all relevant information to the Director of Finance and Corporate Resources, a further letter will be sent to the applicant informing them that we are still awaiting a decision.

The Director of Finance and Corporate Resources makes a recommendation to the Chief Executive.

The final decision will be made by the Chief Executive. Positive as well as negative decisions will be forwarded to the Chair of the Pension Fund Sub Committee to seek their endorsement. The Chief Executive will give reasons for the decision in order that these may be passed onto the scheme member where the response is negative and to ensure public confidence where the response is to allow early payment.

The Pension Team will write to the member and inform them of the outcome of their application within 3 working days of a decision being made

- If the retirement is agreed the Council's pension contractor will be informed within 5 working days and the benefits paid within the LPFA's SLA time limits. The pension will be paid in accordance with the appropriate Regulations.
- If the payment is not agreed the scheme member will be given within 5 working days:
  - (i) The Council's reason(s) not to allow the payment.
  - (ii) Their right of appeal. Under IDR. This is limited to appeal against procedural flaws, as the appointed person cannot overturn the decision itself.