

	<p style="text-align: center;">General Purposes Committee 27th September 2007</p> <p style="text-align: center;">Report from the Director of Finance and Corporate Resources</p>
For Action	Wards Affected: ALL
Pension Implications for Transferred Staff	

1.0 Summary

- 1.1 On 27th April 2004 the General Purposes Committee agreed the policy governing pension provision for staff transferred from the Council to an organisation contracted to provide services to the Council. Members agreed that the policy should be reviewed once directions had been made under sections 101 and 102 of the Local Government Act 2003 (LGA). On the 27th June 2007 the Secretary of State for Communities and Local Government made a direction under section 101 of the LGA. The direction comes into force on 1st October 2007. This report recommends amendment to the current policy for the stated reasons.

2.0 Recommendations

Members are asked to agree:

- 2.1 That the Council's policy concerning the securing of a pension scheme for former Council staff transferring to a private or voluntary sector employer should be as set out in paragraphs **3.13 and 3.14** below.
- 2.2 That the Director of Finance and Corporate Resources is authorised to decide, where a contract for the provision of services is being retendered, whether there are exceptional circumstances justifying the Council not requiring in the contract either access to the Local Government Pension Scheme (LGPS) or an alternative pension scheme which is at least broadly comparable to the LGPS.

- 2.3 That the Director of Finance and Corporate Resources is authorised to decide in any particular case ,after taking advice from the Borough Solicitor, whether the Council should commence a contract for the provision of services notwithstanding the failure of the contractor to comply with the terms of the contract concerning pension protection for transferring Council or former Council employees. In the event the contract is commenced in these circumstances the Director of Finance and Corporate Resources is also authorised to require the contractor to comply with such conditions seeking to protect the pension rights of the transferring employees as the Director considers appropriate.

Members are asked to note:

- 2.4 That relevant documentation including the Council's Contract Procurement and Management Guidelines, governing procurement procedure and practice will be amended to comply with the policy set out in paragraphs 3.13 and 3.14 below. and to refer to the authorisations given in paragraphs 2.2 and 2.3 above.
- 2.5 That the People Centre will issue guidance regarding the requirements of the policy set out in paragraphs 3.13 and 3.14 below and regarding the authorisations given in paragraphs 2.2 and 2.3 above to all units of the Council to ensure that procurement officers understand their obligations and are duly compliant.

3.0 Detail

- 3.1 The General Purposes Committee decided on 27th April 2004 that Council staff transferring to a private or voluntary sector employer as a result of an outsourcing (and on subsequent re-tendering of an outsourced contract) must continue to have access to the LGPS or be offered an alternative good quality occupational pension scheme. Such an alternative scheme was, save in exceptional circumstances, to be actuarially certified as broadly comparable to the LGPS. The Director of Finance and Corporate Resources was authorised to decide whether in any particular case there were exceptional circumstances justifying the Council not requiring an alternative pension scheme to the LGPS being offered by a contractor to be broadly comparable to the LGPS. That committee also decided that this policy should be reviewed if and when directions were made by the Government, under sections 101 and 102 of the Local Government Act 2003.
- 3.2 Section 101 of the LGA empowers the Secretary of State to require best value authorities in their service contracts to deal in accordance with directions issued by him with matters affecting the pension arrangements of staff engaged in providing the service before the contract is carried out, if their employer changes as a result of the contract being entered into and carried out.

- 3.3 Section 102 of the LGA requires the Secretary of State to exercise his power to give directions under section 101 of the LGA so as to ensure that local authorities, in contracting for the provision of services, secure specified pension benefits for:
- (a) their employees who transfer under TUPE to contractors or sub-contractors as a result of an outsourcing ; and
 - (b) their former employees who were transferred under TUPE to a contractor or sub-contractor a result of an outsourcing and who then transfer under TUPE to a new contractor or sub-contractor as a result of a re-tendering of the contract.
- 3.4 On 27th June 2007 the Secretary of State issued a direction under section 101 of the LGA entitled "The Best Value Authorities Staff Transfers (Pension) Direction 2007". The direction applies to both the outsourcing of Council services and to re-tendering by the Council of a contract for an outsourced service. The direction comes into force on 1st October 2007.

Outsourcing

- 3.5 Where the whole or part of a Council service is outsourced and the outsourcing contract is entered into by the Council after 30th September 2007, the direction imposes a legal requirement on the Council to include in the contract a term requiring the contractor to secure pension protection for Council employees who transfer under TUPE to the contractor or to a sub-contractor of the contractor as a result of the outsourcing. In order that pension protection is secured for these employees they must as employees of their new employer have rights to acquire pension benefits and those rights must be:
- (i) the same as, or
 - (ii) count as being broadly comparable to or better than
- those which they had, or had the right to acquire, as a Council employee (i.e. the rights they had to the future accrual of pension benefits as members of the LGPS or would have had if they had joined the LGPS). The direction does not give the Council any discretion to omit this term from the contract.
- 3.6 As a result of the direction the contract must also allow each of the transferring employees to enforce against the contractor its obligation under the contract to secure pension protection for that transferring employee i.e. to bring legal proceedings against the contractor for breach of contract if the obligation is not complied with.

Retendering of a contract

- 3.7 Where the whole or part of a Council service is transferred by the retendering of a contract and the contract with the new contractor is entered into by the Council after 30th September 2007, the direction imposes a legal requirement

on the Council to include in the contract a term requiring the contractor to secure pension protection for transferring former Council employees .These will be employees:

- (i) who originally transferred from the Council under TUPE when the service was outsourced ; and
- (ii) who have transferred between contractors and/or sub-contractors under TUPE each time the contract for the service has been retendered; and
- (iii) who transfer under TUPE to the new contractor or a sub-contractor of the new contractor as a result of the retendering of the contract

In order that pension protection is secured for these employees they must as employees of their new employer have rights to acquire pension benefits and those rights must be:

- (i) the same as, or
- (ii) count as being broadly comparable to or better than

those which they had, or had the right to acquire, as a employee of their current employer

The direction does not give the Council any discretion to omit this term from the contract. However it allows the new contractor to make available to the employees a pension scheme that may be inferior to the LGPS.

- 3.8 As a result of the direction the contract must also allow each of the transferring former Council employees to enforce against the contractor its obligation under the contract to secure pension protection for that transferring employee i.e. to bring legal proceedings against the contractor for breach of contract if the obligation is not complied with.
- 3.9 In the case of transferring employees who are members of the LGPS the contractor will be able to secure pension protection as required by the direction by ensuring these employees are allowed access to the LGPS as a result of an admission agreement. The direction does not define what “count as broadly comparable” means but legal advice is that the definition of the words “broadly comparable” in the Government’s guidance “A Fair Deal for Staff Pensions” should be followed in the drafting of the contract. Accordingly where the contractor secures pension protection by ensuring the transferring employees are allowed access to a pension scheme other than the scheme of which they are currently members (or eligible to be members), then under the contract the new scheme will be “broadly comparable” to the current scheme ,if in the opinion of a professionally qualified actuary the new scheme satisfies the condition that there are no identifiable employees who will suffer material detriment overall in terms of their future accrual of pension benefits under the new scheme.

- 3.10 Legal advice has confirmed that a transferring employee would be able to take judicial review proceedings against the Council if it does not comply with the direction.
- 3.11 In addition to the direction's requirements the Council must have due regard to, but may if it has proper and rational grounds for so doing depart from, the Code of Practice on Workforce Matters in Local Authority Service Contracts. This is part of Best Value guidance issued by the Government under the Local Government Act 1999. Legal advice has confirmed that it is clear that the Council can depart from the approach in the code in circumstances which are genuinely exceptional in some way. Under the Code local authorities must apply the principles set out in the Cabinet Office statement of practice on Staff Transfers in the Public Sector and the annex to it, "A Fair Deal for Staff Pensions". The Code and the annex provide that the Council is to require pension arrangements to be made for former Council employees transferring between contractors as a result of a retendering which would be at least broadly comparable with the LGPS.
- 3.12 Although in the normal course of events the Council would expect to be able to secure from the contractor for transferring ex-Council staff membership of the LGPS or of a broadly comparable scheme circumstances can be envisaged where insisting the contractor meets this requirement would be undesirable and contrary to the Council's duty to achieve best value. For example, contract costs could be increased substantially where there are a significant number of transferring ex- Council staff whose existing pension arrangements with the current contractor are inferior to the LGPS. Where there are only a small number of transferring ex-Council staff it may be more cost-effective for the new contractor to pay compensation to these staff than to adjust its proposed pension scheme for them. Accordingly Members are asked to agree that the Director of Finance and Corporate Resources is authorised to decide, where a contract for the provision of services is being retendered, whether there are exceptional circumstances justifying the Council not requiring in the contract for transferring former Council employees either access to the LGPS or an alternative pension scheme which is at least broadly comparable to the LGPS.
- 3.13 Given the requirements of the direction and the legal advice concerning it that has been received Members are asked to agree that where the whole or part of a Council service is outsourced and the outsourcing contract is entered into by the Council after 30th September 2007, the contract must:
- (a) require the contractor to ensure there is made available to Council employees who transfer to the contractor or a sub-contractor under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as a result of the outsourcing, either access to the Local Government Pension Scheme (LGPS) or to an alternative pension scheme which is either the same as, counts as broadly comparable to or counts as better than the LGPS. Under the contract a pension scheme will count as broadly comparable to or better than the LGPS if so

certified by a professionally qualified actuary. An actuarially certified broadly comparable scheme will be one which, in the professional opinion of the actuary, satisfies the condition that there are no identifiable employees who will suffer material detriment overall in terms of their future accrual of pension benefits under the scheme.

- (b) allow the transferring Council employees to enforce this contractual requirement against the contractor

3.14 Members are also asked to agree that where the whole or part of a Council service is transferred by the retendering of a contract and the contract with the new contractor is entered into by the Council after 30th September 2007, the contract must:

- (a) require the new contractor to ensure there is made available to employees:-
 - (i) who originally transferred from the Council under TUPE when the service was outsourced; and
 - (ii) who have transferred between contractors and/or sub-contractors under TUPE each time the contract for the service has been retendered; and
 - (iii) who transfer under TUPE to the new contractor or a sub-contractor as a result of the retendering of the contract

a pension scheme which is either the same as, counts as broadly comparable to or counts as better than the pension scheme made available to them by their current employer. Except in exceptional circumstances, the contract must also require the contractor to ensure there is made available to these employees either access to the LGPS or an alternative pension scheme which is at least broadly comparable to the LGPS. Under the contract a pension scheme will count as broadly comparable to or better than the current employer's scheme and as broadly comparable to the LGPS if so certified by a professionally qualified actuary. An actuarially certified broadly comparable scheme will be one which, in the professional opinion of the actuary, satisfies the condition that there are no identifiable employees who will suffer material detriment overall in terms of their future accrual of pension benefits under the scheme. If there are exceptional circumstances justifying the Council not requiring an alternative pension scheme to the LGPS being offered by the contractor to be broadly comparable to the LGPS, then the contract must require the alternative pension scheme to be one the Council considers of good quality and the contractor to offer appropriate compensation to any of these employees who will be disadvantaged by the alternative pension scheme.

- (b) allow the transferring former Council employees to enforce these contractual requirements against the new contractor.

- 3.15 The direction may cause practical difficulties should a contractor offer a broadly comparable pension scheme instead of access to the LGPS. This is due to the way in which pension schemes are certified broadly comparable by the Government Actuaries Department (GAD. The terms of the contract would require the contractor offering a broadly comparable pension scheme to provide by the contract start date a final certificate of broad comparability from the GAD or some other professionally qualified actuary. When GAD has completed its test of the scheme it will issue an interim certificate with the measures required. Once the necessary action has been taken the new scheme may apply for a final certificate from GAD. Experience has shown that whilst pension schemes may take all necessary action required to make its pension scheme broadly comparable it is common practice not to apply for a final certificate from GAD. By its very nature an interim certificate does not provide the evidence that a pension scheme is broadly comparable as defined above. If by the contract start date the contractor has failed to obtain a final certificate it would be in breach of contract. Given these potential difficulties it is therefore proposed that the Director of Finance and Corporate Resources is authorised to decide in any particular case, after taking advice from the Borough Solicitor, whether the Council should commence the contract notwithstanding the failure of the contractor to comply with the terms of the contract concerning pension protection for transferring Council or former Council employees. In order to allow the Council to seek to protect the pension rights of the transferring employees it is also proposed that the Director of Finance and Corporate Resources is authorised to require the contractor in the event the contract is commenced in these circumstances to comply with such conditions as the Director considers appropriate.
- 3.16 The direction applies to all best value authorities in England. This includes but is not limited to local authorities. It does not apply to the governing bodies of maintained schools or to Arms Length Management organisations such as Brent Housing Partnership. The People Centre has issued advice to all relevant Brent employers regarding this issue. Further advice will be given following the decisions made by this committee.
- 3.17 The proposed policy offers a high level of pension protection to Council and former Council staff transferred under TUPE to a private or voluntary sector employer contracted to provide services to the Council. A copy of this report has been sent to the trade unions recognised by the Council and their comments on it invited. Officer will provide Members at the meeting of the Committee with details of any comments made on this report by the trade unions.

4.0 Financial Implications

- 4.1 The direction under section 101 and 102 of the LGA mainly replicates Council policy and the requirements of the Code of Practice for Workplace Matters. Contracts involving the transfer of staff under TUPE already have due regard

to the Code and comply with Council policy. Pension provision represents an area of potentially high expenditure to contractors. This will be reflected in the contract price of services provided. Whilst this cost to the Council is acknowledged the direction does not represent a significant shift from current arrangements. It is not anticipated that the new legislation represents an increased financial risk to the Council.

- 4.2 There is an area of risk should a preferred bidder not provide pension protection. The Council may be forced to delay the commencement of the contract pending full compliance with contractual terms providing for pension protection for transferring employees. . The delay may require the extension of services from the incumbent provider at an inflated cost. The deferment whilst unlikely has the potential to impose inflated costs to ensure service continuity. Service failure whilst unlikely may also result in additional expense.
- 4.3 Should the Council decide to transfer staff where pension protection has not been secured it may face legal action from a transferred employee. This is because individuals may argue the Council is in breach of the direction. The result of such action could require the Council to pay compensation and any associated legal costs.

5.0 Legal Implications

- 5.1 In cases where the Director of Finance and Corporate Resources decides to commence a contract notwithstanding the failure of the contractor to comply with the pension protection terms steps will need to be taken on legal advice to ensure as far as possible that such an action cannot be construed as a variation of the pension protection terms in such a way as to involve a breach by the Council of the direction. This action would need to be communicated as a unilateral decision by the Council not to enforce the terms breached rather than a variation of them.
- 5.2 Given the stated purpose of the direction is to make statutory within local government the provisions in the Cabinet Office statement of practice Staff Transfers in the Public Sector and the annex to it, a Fair Deal for Staff Pensions, it is reasonable to assume that the definition of the words “broadly comparable” in the annex should be followed by the Council in applying the direction to its service contracts. In any case the Code of Practice on Workforce Matters requires the Council to have regard to the definition in the annex which means it should be adopted in the absence of an appropriate alternative definition.

6.0 Diversity Implications

- 6.1 This report has been screened by officers and there are no diversity implications arising from it.

7.0 Background Papers

7.1 The LGA

7.2 Direction Order under section 101 of the LGA by the Secretary of State for Communities and Local Government 27th June 2007.

7.3 The Code of Practice for Workplace Matters in Local Authority Service Contracts

8.0 Contact Officers

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