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Dear Colleagues,

Subject: The Public Service Pensions and Judicial Offices Bill – Second Reading

I would like to extend my sincere thanks to those who were present, and for the valuable contributions peers made, both at the Second Reading debate on the Public Service Pensions and Judicial Offices Bill on 7 September, and at the drop-in session I held on 6 September. I promised to write and provide answers on questions I was not able to fully address during the debate and hope that this letter will prove helpful in that regard.

Judicial Mandatory Retirement Age

Baroness Kramer and Lord Ponsonby raised questions on the consultation undertaken by the Ministry of Justice on raising the judicial Mandatory Retirement Age (MRA). A full public consultation ran for three months between July and October 2020 and received 1,004 responses, 84% of which supported an increase to the MRA, with 67% supporting an MRA of 75. This included responses from the senior judiciary, individual judicial office holders, judicial associations, and professional bodies. 88% of respondents identified as judicial office holders with the largest proportion of responses coming from those identified as magistrates (over 700 responses).

Of the 937 individual respondents who reported their gender, 523 identified as male and 414 as female. 258 (62%) of female respondents supported an MRA of 75. This number does not take into account the proportion of responses that came from judicial associations on behalf of their members. Five of these were in favour of raising the MRA to 75: Magistrates' Association, District Judge (Magistrates' Court) Bench, Council of Circuit Judges, Council of Tribunal Members Association and Association of Fee-Paid Judges. Other judicial associations, including the Association of District Judges did not indicate a preference for an age, but all supported an increase from 70. Women make up 56% of magistrates, 39% of all judges, and 53% of tribunal members.

Of the 948 individual respondents who reported their ethnicity, 64 (7%) identified as Black, Asian or minority ethnic with 39 (61%) supporting an MRA of 75. As with the female responses above, this does not take into account the proportion of Black, Asian and minority ethnic judicial office holders whose views were included in the responses from judicial associations or professional associations. 13% of magistrates, 10% of all judges and 17% of tribunal (non-legal members) are from a Black, Asian or minority ethnic group.

Transitional provisions for changes to Judicial Mandatory Retirement Age

Lord Etherton asked about the timing of the introduction of the new MRA and transitional arrangements. It is intended that the Bill will gain Royal Assent in early 2022, with the new MRA having effect at that point. We decided against providing for the reappointment of judges under 75 as this would have a negative impact on the effective management of judicial resource. The plans for recruiting judges relies on forecasts over multiple years and allowing reappointment would have a major impact on the forecasting and the effective operation of the recruitment programme. Particular complications would arise with reappointment to leadership offices. At present where there is a business need for judges below High Court level to continue beyond the MRA, their extension can be approved under section 26 of the Judicial Pensions and Retirement Act 1993.

Furthermore, the decisions to select which judges would be reappointed could impact on judicial independence. Lord Etherton also asked specifically about transitional arrangements for judges who reach the MRA between January and April 2022 and specifically justices of the UK Supreme Court. It would be unfair and potentially discriminatory to implement transitional reappointment provisions for only the senior judiciary, or for only the most recently retired judges or for one judicial group over another, and therefore this does not form part of our plans. Any judges in the position of having retired but being below the age of 75 are welcome to apply for office again through the relevant selection process, provided they can meet the required reasonable length of service as set out by the selection criteria.

Diversity in senior courts

Lord Etherton raised concerns on the diversity impact on the senior courts and the effect on the inflow of new entrants if judges remain in office until 75. Lord Judge raised similar concerns at the drop-in session I held on 6 September. We recognise that increasing the MRA to 75 will have differential impacts across the judiciary. However, increasing the MRA to 75 does mean all office holders will defer their retirement until 75, but provides them with an opportunity to sit up to then if desired. Data from the 42nd Annual Report on Senior Salaries, published by the Review Body on Senior Salaries, showed that from 2011-12 to 2018-19 the average age of retirement across salaried judges was 67, indicating that on average, salaried judges have consistently retired before they reach the MRA.

As I stated in my closing speech, careful consideration was given by the Government before deciding that the MRA should be raised to 75. The decision was made to ensure that this is a once in a generation question and that the maximum benefits in recruitment and retention would be achieved by an increase to 75 rather than 72. In addition, I confirmed that the Government is clear on the importance of judicial diversity and of having a judiciary that is representative of society. The Ministry of Justice is a member of the Judicial Diversity Forum

and of the Magistrates Recruitment and Attraction Steering Group and is committed to continuing the work to improve diversity across the judiciary and the recruitment pipeline. In the recruitment context, we believe that an increase in the MRA to 75 will provide greater opportunity for career progression to those who may have entered the judiciary or are considering a judicial career later in life, possibly following career breaks to balance professional and family responsibilities.

Cost of remedy and valuations

Lord Davies, Baroness Kramer and Lord Ponsonby raised questions regarding the cost of remedy and the valuations processes. Given the complexity of this topic it may be helpful to recap on some of what I covered in my closing remarks, and add further detail where specific questions were asked.

The Government has previously announced that the legislative remedy should be taken into account when completing the cost control element of the 2016 valuations. When the cost control mechanism was established, it was agreed that it would only consider costs that affect the value of the schemes to members. Addressing the discrimination by giving members a choice of scheme benefits for the remedy period, involves increasing the value of schemes to members. The usual way these costs are managed is through the cost control mechanism.

As the pause on the 2016 valuations has been lifted, Treasury Directions will be finalised and published when possible. The Directions will set out the technical detail of how these costs should be taken into account in the cost control element of the valuations process. Before finalising them, the Treasury has shared the Directions with schemes so that, in consultation with Scheme Advisory Boards, they are able to make any updates to the 2016 valuation assumptions that are required. Schemes will finalise the results for the 2016 cost control valuations once final Directions are published.

Lord Ponsonby raised a particular concern on whether floor breaches would be honoured. I can confirm that the Government has committed to honouring benefit improvements for members arising due to any floor breaches which may occur at the 2016 valuations. The Bill will also waive the impact of any ceiling breaches that may occur so, crucially, no member will see a reduction in benefits as a result of the 2016 valuations.

2020 valuations

Lord Davies and Baroness Kramer asked questions about the 2020 valuations. The 2020 valuations are underway and HMT will publish a new set of draft Directions in due course, which will set out the process for schemes to follow. The outcomes of the 2020 valuations are currently unknown. Various demographic and economic assumptions will be required to calculate the required future employer contribution rates, and it would not be right to prejudge the outcome. Future changes to employer contribution rates will take effect from April 2024.

Cost control mechanism consultation

Lord Davies, Baroness Janke, Baroness Kramer and Lord Ponsonby raised questions regarding the cost control mechanism. The consultation on the Government's proposed reforms to the cost control mechanism closed on 19 August 2021. The Government is considering all

responses in detail and will publish its conclusions shortly. The aim is to implement any reforms in time for the 2020 valuations. Once the Government has responded to the consultation, where any changes require legislation, measures will be brought forward for Parliament to consider. I recognise this is an area of close interest for a number of Peers and I will write to the House again, as soon as I am able to, following the consultation response publication.

Implementation of remedy

The Bill will ensure that all eligible public service workers have access to high quality defined benefit schemes on a fair and equal basis. For past service, the Bill ensures that all members have the same choices over the benefits they receive for service from April 2015 to March 2022. As I said in my closing remarks, schemes will have until 1 October 2023 to introduce retrospective changes, in order to balance bringing the discrimination identified by the courts to an end as soon as possible with giving schemes and administrators the time needed to establish systems to deliver the necessary changes. From 1 April 2022, all those who continue in service in the main unfunded schemes will do so as members of the reformed schemes, regardless of age.

Guidance for members

Lord Hope asked for assurance that guidance will be offered to all those in the judicial schemes taking part in the 'options exercise' so that they may be fully informed before they make their decision. I can confirm that such guidance will be provided. Indeed, Clause 60 of the Bill specifically requires that, ahead of the election period, each person must be provided with a statement containing a description of the benefits that would be available in respect of the member's remediable service under both the legacy scheme and the 2015 scheme. In relation to the other schemes, equivalent provision is made in Clause 26.

Baroness Kramer asked a question on whether the pensions dashboard will show both sets of benefits ahead of members making a choice at retirement. The Department for Work and Pensions (DWP) is actively considering the data requirements for displaying Estimated Retirement Income values on dashboards, including for public service pension schemes recognising the additional complexity that may arise from the proposed remedy. The DWP's forthcoming consultation on draft regulations will provide further clarity on the intended approach to data and other issues.

Compensation

The Government acknowledges the complexity involved in retrospectively correcting some members' tax positions. Steps will be taken to minimise the administrative burden on members - such as through providing key information that will help members to decide which set of benefits to take in remediable service statements - but it may not be possible to completely remove the burden in all cases. We are continuing to work with schemes to ensure that a comprehensive remedy, taking into account members' circumstances, is implemented at the earliest opportunity.

The Bill provides powers for schemes to pay compensation for costs that are attributable to the discrimination. The Government envisages that schemes will consider compensation in

cases where members incur reasonable costs as a result of their agent needing to resubmit tax returns.

Baroness Janke also asked about situations in which the employer and the scheme manager are the same body, for example in relation to firefighters. On the prevention of double recovery in situations, for example in the firefighters' scheme, where a member has received compensation from an employer rather than a scheme manager, it may be helpful to note that Clause 21, in particular Clause 21(13)(a), is designed to prevent double recovery by setting out that a scheme manager cannot pay compensation in respect of "compensatable losses" insofar as the member has already received compensation in respect of those losses. Clause 28 disapplies section 2 to 27 of the Bill in relation to a person who has benefited from an "immediate detriment remedy", which includes situations where the scheme manager has agreed with a person that they have any rights arising as a result of the discrimination and has paid any benefits or otherwise taken any other steps to implement that agreement. In such cases, clause 28(2) provides that scheme regulations may make provision to ensure that such a person is placed in the correct position - as though the discrimination had not occurred. Clause 28(3) states that the provision made in scheme regulations may include provision corresponding to any provision under section 2 to 27 of the Bill.

Police service

Lord Davies, Baroness Janke, Lord Hendy, Lord Mackenzie, Baroness Kramer and Lord Ponsonby raised questions relating to the police force. We recognise that police officers – and all public sector workers – play a vital role in the running of our public services, including in their remarkable commitment to keeping the public safe in the continuing fight against Covid-19. It is therefore important that representatives of this workforce are consulted and engaged on changes that will affect them. As I set out in my closing speech, the Government undertook consultation on the proposals to remedy the discrimination identified by the courts in July 2020. Treasury officials met with Scheme Advisory Boards for the public service schemes during the consultation, including the Scheme Advisory Board for the police pension scheme. The Government published its response to the consultation in February of this year.

A further meeting to discuss the Bill with stakeholders, including the Police Superintendents Association and other police representative bodies also took place on 8 September 2021. The Home Office will in due course be undertaking further consultation with employer and employee representatives of the police pension scheme in relation to the scheme regulations, which will ultimately set out the detailed changes to the scheme. From 1 April 2022, all those who continue in service in the main unfunded schemes will do so as members of the reformed schemes, regardless of age. Legacy schemes will close to future accrual. This means, from this point onwards, all members will be treated equally in terms of which pension scheme they are a member of.

HM Treasury Directions

Lord Davies, Baroness Kramer and Lord Ponsonby raised the use of Treasury Directions. I would like to provide some clarity on the purpose of these. Treasury Directions are intended to set out to schemes how they should exercise a particular power, rather than creating a new power. They ensure that where Treasury ministers, who are responsible for policy on public service pensions, consider that a consistent approach is necessary or desirable, the Treasury

may give Directions to schemes. This allows schemes to make regulations that work best for them, while ensuring that where a particular outcome is desirable, it is achieved. These regulations will be laid by the departments responsible for schemes by 1 October 2023, and consultations will be undertaken in advance of this. Further detail on the use of Treasury Directions and regulations is included in the Bill's delegated powers memorandum.

The Delegated Powers and Regulatory Reform Committee have considered the Bill and reported that there is nothing in this Bill which they would wish to draw to the attention of the House.

Tax

Lord Davies and Baroness Kramer asked about tax treatment across public services. I touched on this in my closing remarks but would like to provide more detail on the Annual Allowance. The reforms to the standard Annual Allowance and Lifetime Allowance made since 2010 are expected to save over £6 billion per year, and are necessary to deliver a fair system, and to protect the public finances. 99% of pension savers make annual contributions below £40,000, the level of standard annual allowance which has applied since April 2014. The Government has also taken steps to ensure that those in defined benefit schemes are not unduly affected by a one-off charge when they receive a promotion, the Government allows up to three years of unused annual allowance to be carried forward. Individuals can also use an option called 'scheme pays', under which they can require their pension scheme to pay their annual allowance tax charge now (in return for an actuarially fair reduction in their pension), provided that the annual allowance charge is at least £2,000 and they have exceeded the annual allowance of £40,000.

At Budget 2020, the Government also spent £2 billion increasing the annual allowance taper threshold and adjusted income limit. These measures apply to all individuals across the UK. These changes mean that any public servant whose sole income after deducting pension contributions is less than £200,000, has been taken out of the scope of the Annual Allowance taper altogether. We estimate that these changes have taken up to 96% of GPs and up to 98% of NHS consultants outside the scope of the tapered annual allowance. In the Armed Forces, two- and three-star officers at the top of their pay band (all of whom have a salary below £200,000) do not pay pensions contributions. This means that if their sole income is from the Armed Forces they should not interact with the annual allowance taper. Where there is an interaction with the standard annual allowance they will be able to take advantage of the steps the Government has taken (as set out above) to settle any tax bills if due.

I hope this letter has been useful. I will send a copy to all Peers who spoke and place a copy in the House Library.

*With best wishes,
James Younger*

VISCOUNT YOUNGER OF LECKIE