

Scheme Advisory Board

MEETING HELD ON 7th MARCH 2022

ITEM 5 PAPER C

SHARIA COMPLIANT INVESTMENTS IN THE LOCAL GOVERNMENT PENSION SCHEME IN ENGLAND AND WALES – ADVICE

Background

1. Lydia Seymour a leading junior counsel and specialist in pensions and employment law practice (Outer Temple Chambers) was instructed in October 2021 to provide advice on 4 questions relating to issues raised by some administering authorities.
2. A conference was held via MS Teams with Counsel, LGA Legal and SAB Secretariat members in late November 2021 to discuss the questions in more detail.
3. Counsel provided their written advice recently, which is annexed in full, and has confirmed that it can be published with an appropriate disclaimer.

Consideration

1. A number of LGPS administering authorities have raised the issue of members opting out of the LGPS on the basis of their religious belief – currently as far as we are aware these appear to be limited to those of the Muslim faith who are concerned that LGPS funds/investments are not Sharia compliant / halal.
2. Employers are becoming concerned about potential discrimination claims being brought in the Employment Tribunal (ET) by employees who feel excluded from membership of the LGPS due to their religious beliefs. At present there is no alternative pension provision with their employer beyond the LGPS.
3. We explored with Counsel the risk of a claim made on this basis being successful, and what – if any – defence could be mounted were there to be such a claim. Counsel advised that taking pre-emptive action, such as exploring the legal issues and procuring advice, would be an important part of any future defence.

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4. Counsel was not asked to opine on whether or not the LGPS is Sharia compliant – there are many differing views on this question; what is important is an individual's genuinely held beliefs. Counsel advised that either a discrimination claim in the ET was possible, or a broader human rights-based challenge in the civil courts.
5. Clearly this is a complex area, and Counsel's lengthy advice demonstrates that. At a high level, her advice is that at present it is arguable whether employers have the legal power to offer an alternative to the LGPS. If that were to be clarified as permissible, offering alternative pension provision could most likely not be limited just to Muslim employees who opt out of the LGPS by reason of their religious beliefs. Any alternative provision (which would probably be a DC scheme offering inferior benefits to the LGPS) would need to be offered to all employees.
6. There are obvious implications for employers and administering authorities of offering and administering more than one scheme, especially where those schemes could differ significantly. Clearly there are also implications for employees opting out of the LGPS for reasons other than religious beliefs. They may choose a cheaper, less beneficial DC scheme without fully understanding the benefits they receive through membership of the LGPS.
7. Recognising one group of employees' beliefs may also lead to pressure from others with strongly held philosophical beliefs who may wish to have more control over the funds that their pension contributions are invested in. It is unlikely to be desirable to have an LGPS employer offering a number of different pension options, all of which would likely be inferior to the LGPS (even if the employer contribution rate was the same).

Next steps

8. There are some further questions that could be explored in more detail, on Counsel's recommendation. These would include instructing an Islamic scholar to provide an opinion on the LGPS and Sharia law.
9. The Committee is asked to consider whether further enquiries should be made, and expert advice sought, and whether to recommend that – plus publication of Counsel's advice (if agreeable, an abridged version if necessary) – to the Board.

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Recommendations: The Board are asked to:

- **Note the contents of this paper and Counsel's advice (annexed)**
- **Agree that Counsel's advice is published on the Board's website**
- **Agree that further expert advice is sought on the questions posed by Counsel**

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ANNEX A

This legal advice is provided for the benefit of the named client only and should not be relied upon by, or construed as legal or professional advice to, any other person. Any person other than the named client should take their own legal advice and I disclaim liability for any loss caused to any person other than the named client arising from reliance on the advice.

**IN THE MATTER OF LOCAL GOVERNMENT PENSION SCHEME
EMPLOYERS AND THE PROVISION OF A
SHARIA-LAW COMPLIANT ALTERNATIVE PENSION SCHEME**

OPINION

INTRODUCTION

1. I am asked to advise the Local Government Pension Scheme Advisory Board (England and Wales) (**'the Board'**) on the possibilities, and associated risks, for an LGPS employer offering an alternative pension scheme to eligible employees that is Sharia Law compliant.

2. The question raises a number of potential issues:
 - A. What is the current position in relation to pension provision by LGPS employers?
 - B. What is the risk of a successful claim for discrimination from an eligible employee complaining of a failure by LGPS employer to provide a Sharia Law compliant scheme?
 - C. Is there a potential human rights challenge in addition to any discrimination challenge?

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D. What are the potential risks and consequences of providing a Sharia Law compliant scheme?

A. THE CURRENT POSITION

A.1 Membership of the LGPS

3. The current position in relation to the pension provision offered by LGPS employers is set out in full in my Instructions. I do not repeat those Instructions here, save to note the following key factual background.
4. The current LGPS Regulations¹ provide that anybody employed by a ‘Scheduled Body’ should be automatically enrolled into the LGPS². For ease of reading this Opinion will refer to Scheduled Bodies collectively as ‘**LGPS employers**’.
5. It is possible for an individual member to opt out of the LGPS, either at the point of their enrolment or later. If a member does opt out, their employer is obliged to re-enrol them three years later. If they still wish to opt out, they need to do so again, with the ‘every three year’ re-enrolment obligation continuing to apply.
6. Neither my instructing solicitor nor I are aware of any LGPS employer offering any pension scheme other than the LGPS. Indeed, with the exception of the matters discussed in this Opinion it is difficult to conceive of many scenarios in

¹ Local Government Pension Scheme Regulations 2013

² I should note for completeness, that the employees of a variety of other bodies are also potentially entitled to LGPS membership. The complexities of the LGPS eligibility provisions go beyond the scope of this advice, which is restricted to considering the legal obligations of ‘Scheduled Bodies’ within the meaning of Part 1 and Part 2 of Schedule 2 of the LGPS Regulations.

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which employees would want, or need, membership of an alternative pension scheme.

A.2 Employees opting out of the LGPS for religious reasons

7. My instructing solicitor understands that over recent years and months a number of employees who are eligible for LGPS membership have been opting out of the scheme due to their religious beliefs – and specifically the belief that the LGPS is not compliant with Sharia Law because of its funded nature and the role of interest on investments.
8. The Board has been approached by a small number of LGPS employers who have raised concerns around their employees opting out for this reason, both because those employees are left without pension provision, and because they have concerns about whether they may be under an obligation to provide an alternative by reason of discrimination legislation.
9. Some employees who have opted out of the LGPS on the basis that it is not Sharia Law compliant have queried whether they might have a claim for discrimination on the grounds of religious belief on the basis of the failure of their employer to provide an alternative scheme. As yet, I understand that no such claim has been made in relation to the LGPS or any other defined benefit scheme³.

A.3 The LGPS and Sharia-Compliance

³ The question of whether defined contribution occupational pension schemes are obliged to offer Sharia-compliant investment funds has been considered in an Opinion by Paul Newman QC, which is available at the Islamic Finance Guru website at <https://islamicfinanceguru.com/wp-content/uploads/2021/05/Sharia-op-v2.pdf>

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10. In the absence of a specific claim for discrimination in relation to the LGPS, it is not possible to be certain of the precise basis upon which employees have concluded that the LGPS is not Sharia Law compliant.
11. Indeed, I understand that the question of whether the LGPS is compliant with Sharia Law is not a simple one, and that this issue is subject to differing views among Islamic scholars. My instructing solicitor refers in my Instructions to the Islamic Finance Guru website which discusses this issue and concludes, in part on the basis of the opinion of Mufti Zambia Butt that the LGPS is Sharia compliant. I am also referred to a decision of the Pensions Ombudsman in 2016⁴ which noted that “different scholars take different views” on the matter of whether the LGPS is Sharia-compliant.
12. This potential difference of opinion as to Sharia-compliance extends beyond the LGPS, to other pension schemes and financial products. In this context it is interesting to note the outcome of research conducted for the NEST Corporation in April 2011, which explored the extent of demand for Sharia compliant pension funds in advance of the introduction of pensions auto enrolment in the UK. This research found that there was no clear consensus as to what would be sufficient for individual employees to consider a pension fund ‘Sharia-compliant’, but rather a range of different views. Further, different individuals may consider different aspects of a pension scheme important for the purpose of identifying Sharia-compliance, or give different weight to different features for that purpose.

B. RISK OF A SUCCESSFUL CLAIM OF DISCRIMINATION

⁴ PO-10901

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13. As I have noted above, the Board is not currently aware of any claims that have been issued in relation to the failure of LGPS employers to offer an alternative pension scheme. Inevitably, therefore, any consideration of potential claims is to some extent speculative. Nonetheless, with that caveat, the most obvious potential claim would be one alleging indirect discrimination on the grounds of religion or belief⁵ in relation to the terms upon which employment is offered⁶.

14. The basic “ingredients” of a claim for indirect discrimination are set out in section 19(2) of the Equality Act 2010, and require the complainant to show that:

- a. there is a provision, criterion or practice (**‘PCP’**) which is applied to everyone but which puts people who share a particular religious or philosophical belief at a particular disadvantage when compared with people who do not share that belief; and
- b. the PCP puts, or would put, the complainant at that disadvantage.

15. If the complainant succeeds in establishing each of these points then the PCP will be unlawful indirect discrimination unless the employer can show that it is justified. A PCP is justified if it is a proportionate means of achieving a legitimate aim.

16. Applying those requirements to potential claims here, the broad questions are whether:

⁵ See Equality Act section 10.

⁶ See Equality Act 2010 section 39.

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- a. there is some form of rule or practice in relation to the LGPS which puts Muslim employees (and the individual complainant) at a particular disadvantage; and
- b. the rule or practice cannot be shown to be a proportionate means of achieving a legitimate aim.

B.1 Potential PCPs

17. The starting point for any claim for indirect discrimination is that the complainant must set out the PCP to which they object. Here, there are various different ways in which a potential complainant might put their case in terms of the PCP relied upon, including:

- a. that their employer only offers the LGPS;
- b. that their employer does not offer a Sharia-compliant scheme;
- c. that the LGPS invests or administers its funds in a manner which is not Sharia compliant?

18. Each of them raises the same essential factual case, but as will be clear from the analysis which follows, they are potentially quite different in legal terms and could therefore end up with a different result. The choice of PCP is a matter for the complainant (provided that the choice is coherent), and so any of these permutations – or another that I have not thought of - might be advanced. For ease of reference I will refer to the potential PCP as ‘**sole provision of the LGPS**’ albeit noting the potential nuances set out above.

B.2 Correct pool for comparison

19. Once the PCP has been identified, the next question is whether that PCP places Muslim employees (and the individual complainant) at a particular

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disadvantage? There is generally no issue as to the disadvantage to the individual complainant, but in deciding whether Muslim employees generally are disadvantaged, a Tribunal would need to decide on which group of people was relevant to consider when making the comparison between the situation of Muslim employees and other employees.

20. This is known as identifying the 'pool' for comparison. The obvious pool for comparison here would be all employees who are eligible to be auto-enrolled into the LGPS – in broad terms all employees of LGPS employers⁷. So the question of particular disadvantage is to be determined by asking whether the decision to only offer the LGPS places Muslim employees of LGPS employers at a particular disadvantage when compared to non-Muslim employees of LGPS employers?

21. However, there is an alternative argument, arising from a line of cases relating to indirect discrimination in the context of access to benefits, particularly *Rutherford v Secretary of State for Trade and Industry*⁸ and *British Medical Association v Chaudhary*⁹.

22. These cases say that where the subject matter of a complaint is the terms on which a benefit is provided, the correct pool for comparison is not all employees, but only those employees who have an interest in the provision of the relevant benefit. Pursuing that argument, in this case, rather than asking whether the sole provision of the LGPS:

⁷ I appreciate that this is in fact an over-simplification, and that there are age and other restrictions on eligibility for the LGPS, but these are not material for the purpose of this Opinion.

⁸ [2004] EWCA Civ 1186

⁹ [2007] EWCA Civ 788

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- creates a particular disadvantage to Muslims when compared with other members of the LGPS employer's workforce?

the Tribunal should ask

- does that provision create a particular disadvantage for Muslims when compared with other people who do not wish to (or are unable to be) members of the LGPS?

23. So, the comparison asks whether Muslim employees are at a particular disadvantage when compared to other employees who also want an alternative to the LGPS, rather than at such a disadvantage when compared to the workforce as a whole. The basis of this argument would be that when looking at whether Muslim people specifically are at a disadvantage the only people who should be considered for the purpose of the comparison are people who have, or might have, an interest in the provision of an alternative scheme. As can be easily seen, characterising the comparison in this way makes it significantly harder for the complainant to establish particular disadvantage.

24. As to which approach a Tribunal might ultimately take, these are technical arguments, and the issue of the pool for comparison in particular, has generated significant case law and legal debate. In the absence of a specific case being brought it is difficult to give a determinative opinion on which the above two approaches would be adopted by a Tribunal. Nonetheless, with that caveat, in my opinion this case demonstrates the limitations of the *Rutherford/Chaudhary* approach, as a pool based solely upon those who are excluded (or exclude themselves) from the LGPS does not properly test the alleged discriminatory effect. Further, although in one sense it is fair to say that a pension scheme is a benefit, which an employee can choose to accept or reject, it is also a fundamental part of the employment relationship. Pensions

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are pay, albeit pay which is deferred to be taken at a later date, and there are strong social policy reasons as well as individual benefits from people being members of pension schemes.

B.3 Group disadvantage?

25. Assuming that the Tribunal does reject the *Rutherford/Chaudhary* approach, the question for the Tribunal is whether a potential complainant could establish that sole provision of the LGPS places Muslim employees generally at a disadvantage when compared with other employees of LGPS employers?

26. The question of group disadvantage in another potentially complex issue in indirect discrimination, particularly where the group share a religion. Clearly, Muslim employees are a very large group of people, who will have significant variations as to their views in relation to this issue. My Instructing Solicitor has sent me a Report prepared for the Nest Corporation from 1 April 2011 which explores some of the issues relating to Muslim employees and their attitudes to Sharia obligations and finance. It contains an interesting discussion of different responses given by Muslim employees to questions about Sharia-compliant financial products generally, and it is reasonable to assume that these differences would extend to their opinions in relation to the LGPS and potential alternatives. There is thus no single 'Muslim' opinion or position, but rather a multiplicity of different approaches. The question therefore arises of how a Tribunal should address group disadvantage in circumstances in which only a proportion of Muslim employees are likely to consider themselves unable to be members of the LGPS by reason of their religious beliefs.

27. A number of cases have recognised that the question of group disadvantage may need to be addressed differently in relation to discrimination on the

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grounds of religious belief, given both the inevitable individual variations within religious groups and the importance of guaranteeing freedom of religion¹⁰. The effect of these is that it is not necessary for all members of a religious group to be impacted in order for group disadvantage to be shown, nor even that a significant number are affected. However, there must be some basis for the assertion that some Muslim employees are particularly disadvantaged by the PCP as a result of their religious beliefs¹¹.

28. It follows that the hurdle of establishing group disadvantage in the context of discrimination on the grounds of religious belief is relatively low - and that it would be sufficient to demonstrate that some Muslim employees feel unable to join the LGPS by reason of their religious beliefs. Given this, and the reference in my Instructions to both LGPS employers and employees' concerns about the Sharia compliance, it seems likely that the relatively low hurdle of group disadvantage will be met. However, this is not a point upon which I can give a firm view without statistical or other evidence as to there being at least some Muslim employees who have refused (or would refuse) membership of the LGPS on the grounds of their religious belief.

B.4 Justification

29. If a potential claim is brought, and the complainant succeeds in relation to each of the points set out above, then the claim will succeed unless the LGPS employer can establish that the sole provision of the LGPS is justified. The precise nature of any justification defence will depend upon the details of the individual claim that is brought, and it is only possible to address potential justification defences in claims have not been brought in general terms.

¹⁰ See, for example, *Eweida v British Airways* [2013] 1 WLUK 142

¹¹ See *Trayhorn v Secretary of State for Justice* [2018] IRLR 502.

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30. In deciding whether a potentially discriminatory provision is justified the Tribunal needs to identify whether it is a proportionate means of achieving a legitimate aim? This requires the Tribunal to balance the reason given by the employer for making the relevant decision against the impact of the discriminatory provision on the complainant¹². The more serious the impact of the discrimination, the more cogent the employer's justification needs to be¹³.
31. The Tribunal is required to scrutinise any justification defence carefully¹⁴. So in this case, it would not be sufficient for an LGPS employer simply to say that they are obliged to enrol members into the LGPS and that they have been doing so for many years. Whilst both of these points are true, the obligation to enrol in the LGPS does not prevent the provision of an alternative scheme to those who opt out, and the mere fact that 'things have always been done this way' is equally irrelevant.
32. Rather, the justification argument would need to scrutinise why the LGPS employer provides only the LGPS, and determine whether its decision not to offer an alternative is proportionate in the light of the fact that this may lead some Muslim employees to opt out of the LGPS and thereby receive no occupational pension provision.
33. Clearly, the justification argument that may be advanced by any particular LGPS employer is a matter for them to determine, on the basis of their own workforce and aims. However, when looking at justification they may wish to

¹² *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2010] 1 CMLR 210 at [39]

¹³ *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2010] 1 CMLR 210 at [40]

¹⁴ *Hardy & Hansons plc v Lax* [2005] ICR 1565 at [54]

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consider the way in which a Tribunal will approach the question of justification, and in particular the following matters which I would expect a Tribunal to wish to consider:

- a. what precise aspects of the LGPS are considered to not be Sharia-compliant?
- b. would it be possible to operate the LGPS in a manner which would be Sharia-compliant, or would compliance require a wholly different scheme?
- c. how large is the group of employees who either have or might opt out of the LGPS for religious reasons, and what is the impact on them? Whilst it is only necessary for some Muslim employees to be affected in order to establish group disadvantage, the size of that group is nonetheless relevant when balancing the employer's aims against the discriminatory impact?
- d. do LGPS employers have the power to offer an alternative to the LGPS?
- e. if so, what alternative could be offered, and to whom must (or should) the choice be provided?
- f. might other groups seek alternative schemes, on the basis of either religious or philosophical beliefs? Would a Sharia-compliant scheme address their concerns, or might further alternatives be necessary?
- g. what would the impact on the funds be of changing to operate in that manner?
- h. what level of benefits would one expect any such potential alternative to provide? I note from my Instructions that the Board anticipates any alternative scheme being defined contribution rather than defined benefit, and that one would therefore expect any alternative to be less generous overall than the LGPS;
- i. is there any single alternative scheme (or set of alternative options) that all Muslim employees would recognise as Sharia-compliant, or

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might an alternative scheme still not be considered compliant by some Muslim employees?

- j. might there be any negative impacts on some Muslim employees if an alternative scheme was offered? e.g. might some Muslim employees who are currently LGPS members switch to the alternative scheme or even opt out altogether as a direct result of an alternative scheme being offered?
- k. what would be the impact on LGPS employers and employees of an obligation to offer two (or more) different schemes, particularly given the requirement to re-enrol members periodically in the LGPS?

34. These are the matters which LGPS employers who are concerned about this issue may wish to consider now, in advance of any claims. They fall into three broad categories:

- a. sub-paragraphs 32(a) – (c): factors which will depend upon the specific complainant and LGPS employer– e.g. the precise reason why the LGPS is not considered Sharia-compliant and the size of the affected group in comparison to the remainder of the workforce;
- b. sub-paragraphs 32(d) – (f): factors relating to the power of an LGPS employer to provide an alternative and the potential legal consequences; and
- c. sub-paragraphs 32(g) – (k): practical issues relating to whether the provision of an alternative scheme would actually solve the problem; the impact of any alternative scheme on the operation of the LGPS; the level of benefits that any alternative scheme might offer and the effect on both Muslim and non-Muslim employees?

35. The factors in the first category will depend upon the individual complainant and workforce. Each individual LGPS employer therefore needs to identify the

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potential extent of LGPS opt outs for religious reasons in relation to their own workforce/Fund. However, the factors in the second and third category are more likely to be generally applicable across LGPS employers, and it may therefore be helpful to address in broad terms the issues which arise.

B.4.1 The power to provide an alternative to the LGPS and the potential consequences

36. The general power of an LGPS employer to decide upon salary (including pension) of its employees is set out in section 112(1)(2) of the Local Government Act 1972, which provides that the authority has the power to employ its officers:

“on such reasonable terms and conditions as to remuneration, as the authority appointing him see fit.”

37. A number of cases in the High Court have addressed the question of whether particular decisions by a local authority as to the remuneration of an individual fall outside the powers of the authority under section 112. Typically these arise either from decisions made by an authority to enhance an individual’s enhancements¹⁵ or policy decisions to provide enhanced benefits across a group, such as long service awards¹⁶.

38. I am not aware of any cases in which the Courts have considered whether a decision by a local authority to provide an alternative pension scheme to the LGPS would be within the powers set out in section 112, although a decision by a local authority to offer additional salary payments in lieu of LGPS

¹⁵ See *Hinckley and Bosworth Borough Council v Shaw* (1999) 1 LGLR 384.

¹⁶ *Barking and Dagenham v Watts* [2003] ICR 1059.

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contributions for staff who would otherwise have breached the annual allowance were recently declared by the authority's auditor to be *ultra vires* that power¹⁷. The key reason for the auditor's opinion that the payments went beyond the authority's power under s112 was that the additional salary payments were being used as a means to avoid the taxation impact of the annual allowance.

39. The position here would be different – any alternative scheme would not be for the purpose of avoiding taxation, but for the sole purpose of providing pension benefits for Muslim staff. In principle, in my view, there would be a power under s112 to provide such a scheme. However, that does not mean that there is an unlimited power to provide an alternative scheme. Any decision to provide a choice of pension schemes, and any alternative scheme itself, would need to comply with the authority's duties under section 112, and other similar duties, including the need for the scheme to provide value for money and adequate benefits to the member.

40. Any decision to provide an alternative pension scheme would also need to consider the potential legal consequences of doing so – including the potential consequences for other groups who share a religious/philosophical belief and the workforce more generally. I discuss these more fully in Section D below, but note here that each of these issues would need to be considered as part of any decision that the provision of an alternative pension scheme would be appropriate under section 112.

B.4.2 Practical issues – impact of an alternative scheme

¹⁷<https://www.wao.gov.uk/publication/senior-officers-pay-and-pensions-pembrokeshire-county-council-report-public-interest-0>

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41. Turning to the third category of factors that would be relevant to justification – these relate to the practicalities of providing an alternative scheme, both for the potential members (in terms of the level of benefits that it might be possible to provide and the ways in which an alternative might influence people’s behaviour) and for the LGPS employers and Funds (in terms of the administrative and other costs that such a scheme might create). This third category also raises the key question of whether the provision of an alternative scheme would be effective in removing the discrimination complained of, by providing a scheme that all (or at least most) Muslim employees who would otherwise have opted out of their pension entitlement would consider Sharia-compliant.
42. These are matters which require expert evidence, and I would suggest that any LGPS employer which is considering whether or not to provide an alternative scheme obtain evidence in relation to these points before reaching a final decision. That is both in order that ensure that any decision is well-informed, and to strengthen their potential justification defence in the event that a claim is subsequently brought. Whilst it is possible to put forward a justification defence which has only been analysed after the event (i.e. after the case has been brought), a justification defence advanced by an LGPS employer who can demonstrate that it explored the issues relevant to justification before reaching its decision is likely to be treated with greater respect by the Tribunal¹⁸.
43. Given that many of these issues are general, in the sense that they will apply in the same or similar ways across LGPS employers, it may be that it would be helpful for the Board to obtain some expert evidence at this stage about these

¹⁸ *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, [128-132]

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general practical questions (i.e. the matters raised in sub-paragraphs 32(c) – (i) above) to inform LGPS employers who are considering these issues.

44. I would suggest that the starting point would be to instruct an expert in Islamic finance to provide evidence including the following:

- a. their opinion on the Sharia-compliance of the LGPS, and insofar as it is (or may be) thought not to be compliant an explanation of why that is;
- b. a summary of the potential range of views that they would expect among Muslim employees of LGPS employers on this issue;
- c. an explanation of what alternative pension schemes exist that the expert considers are Sharia-compliant and their features/benefit structures if one assumes that contribution levels remain as provide in the LGPS;
- d. the extent to which the expert would expect consensus among Muslim employees of LGPS employers on the Sharia-compliance of the alternative schemes.
- e. (if they are able to give an opinion based upon their knowledge of Islamic finance) their view on the overall impact on Muslim employees of offering Muslim employees who opt out of the LGPS an alternative pension scheme– i.e. would they expect more people to opt out or fewer overall, and what would they expect the split between LGPS and alternative scheme to be if people were offered the choice?

45. It would then also be helpful to have the opinion of an actuary with experience of the LGPS to address:

- a. the extent to which any features of the LGPS identified by the Islamic finance expert could be addressed within the existing basic structures of the LGPS such as to make the scheme Sharia-compliant?

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- b. the likely difference in benefits that would be provided by any alternative schemes that have been identified (assuming that same levels of contributions);
- c. any additional administrative costs to LGPS employers of a requirement to offer/provide an alternative scheme (or schemes) to the LGPS, particularly in the light of the obligation to re-enrol employees who opt out every three years;
- d. (if they are able to give an opinion) their view on the potential impact of offering a choice of pension schemes to all employees - i.e. would they expect more people to opt out or fewer, and what would they expect the overall split between LGPS and alternative to be if people were offered the choice?

C. HUMAN RIGHTS CHALLENGE UNDER ARTICLE 9/ARTICLE 14/PROTOCOL 1.

46. For completeness, I should note that in the alternative to bringing a claim for indirect discrimination in the Employment Tribunal, a potential complainant could bring a Human Rights Act challenge in the Civil Courts under Article 14 (right to protection from discrimination in respect of the rights/freedoms under the Act)/Article 9 (right to freedom of thought, belief and religion), and Protocol 1, Article 1 (right to peaceful enjoyment of property).

47. If brought as an indirect discrimination claim the same basic issues would arise as in relation to a claim in the Employment Tribunal. However, a Human Rights Act challenge could also raise what is known as a *Thlimmenos* claim. A *Thlimmenos* claim goes beyond a 'standard' claim for indirect discrimination and says that the right not to be discriminated against can extend to a requirement upon the state to treat people differently when they are in different situations.

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48. Per Lord Wilson in *R (DA) v Secretary of State for Work and Pensions* [2019]

UKSC 21 , at paragraph 40:

“... the concept of discrimination is ... underpinned by the fundamental principle not only that like cases should be treated alike but also that different cases should be treated differently. And in some cases, unlike the A case but exemplified by that in the ECtHR of Thlimmenos v Greece (2000) 31 EHRR 15 , the natural formulation of the complaint is indeed that the complainants have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently.”

49. The *Thlimmenos* principle could be used to argue that Muslim employees who opt out of the LGPS for religious reasons are in a relevantly different situation to non-Muslim employees (in that they are unable/unwilling to be enrolled into the LGPS) and they should therefore be treated differently to others by means of the provision of an alternative scheme.

D. RISKS/CONSEQUENCES OF PROVIDING AN ALTERNATIVE SCHEME

50. Turning to the question of the potential risks and consequences of an LGPS Employer deciding to offer a Sharia-compliant scheme (assuming that one could be identified), a number of issues arise:

- a. the consequences for non-Muslim employees of offering an alternative scheme to Muslim employees;
- b. whether any other group of employees might seek alternative schemes?
- c. the risk that any alternative scheme could itself give rise to discrimination allegations.

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51. Considering these in turn:

D.1 Consequences for non-Muslim members

52. If an LGPS authority chooses to offer an alternative pension scheme to Muslim employees who opt out of the scheme for religious reasons then that scheme would also need to be offered to all employees. Any restriction of the offer would be direct discrimination on the grounds of religious belief. That has a variety of potential consequences, depending upon the nature of the alternative scheme offered. Whilst in broad terms one would expect most employees who have no religious belief which would indicate otherwise to opt for the LGPS if given the choice, that might not always be the case. For example, if member contribution levels in the alternative scheme were lower, this could encourage employees to opt out of the LGPS in favour of the alternative scheme for financial rather than religious reasons.

53. Equally, if the alternative scheme were cheaper for the employer, this could give rise to the sort of “cash for pensions” issues which have arisen in relation to teachers and NHS pension in recent years, whereby a hypothetical cash-strapped LGPS employer might seek to encourage its staff into the alternative scheme for its own financial benefit.

D.2 Requests from other groups who share a religious or philosophical belief and alternative schemes

54. Insofar as an LGPS employer is considering providing an alternative pension scheme for Muslim employees who wish to opt out on religious grounds it must also consider whether there are any other groups who might argue that the LGPS is not suitable for them, and as an alternative scheme should

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therefore be provided. I should stress that I am not aware of any such groups in the context of the LGPS. However, in the context of private trust schemes it is becoming more and more common for members to seek to restrict their own investments to ethical, or 'green' schemes. It is not difficult to imagine an argument that a philosophical belief in pacifism, for example, could be advanced as a reason for wishing to avoid certain pension scheme investment choices. LGPS Employers may therefore find that other groups of people are opting out of the LGPS for religious or philosophical reasons, and may receive requests for alternative pension schemes for reasons other than Sharia-compliance.

55. There is no "hierarchy" of protected characteristics by which any religious or philosophical belief is any more or less important than any other. Hence, when considering whether to provide an alternative pension scheme to Muslim employees, an LGPS employer would also need to consider whether there are any other groups which might argue for alternative scheme, and the overall implications of allowing such alternatives.

D.3 Risk that any alternative Scheme would be vulnerable to claim for discrimination.

56. One final point that it is important to consider in relation to the provision of an alternative scheme (or schemes) to the LGPS is whether there is a risk that the alternative schemes themselves could give rise to a claim for discrimination.

57. Any alternative scheme would (by definition) be different from the LGPS, and would therefore result in different cost and benefit structures. As I have noted above, a complete analysis of this issue will require expert advice on how any Sharia-compliant scheme would work, but given the various structural

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advantages of the LGPS it is highly likely that any alternative scheme in which contributions were the same as the LGPS would be likely to generate lower payments at retirement (or at the very least greater volatility).

58. In fact, even if the alternative scheme were able to provide more generous benefits than the LGPS, the key point is that it would be different, and hence the effect of providing an alternative scheme would be that some people would be receiving more pay (in the form of pension) than others for the same work. That is, on its face, a difference in treatment which could be argued to be indirectly discriminatory – in the sense that Muslim employees who opt out of the LGPS are receiving less generous pension benefits than other employees (or vice versa in the unlikely event that the alternative scheme resulted in more generous benefits).

59. Whilst it is likely to be possible to justify the existence of the difference, on the basis that it is caused by the choice of those Muslim employees to opt out, that does not mean that any potential ‘gap’ between the benefits provided by the LGPS and the compliant scheme will automatically be justified. To the contrary, it could be argued that it is the obligation of the LGPS employer to ensure that the alternative scheme is as close as is possible to LGPS benefits.

60. Thus, insofar as an LGPS employer does decide to provide a Sharia-compliant alternative scheme, it will also need to consider potentially difficult issues as to which Sharia-compliant alternative is the closest in terms of benefits to the LGPS, a question made more complex by the lack of consensus as to what constitutes a fully Sharia-compliant scheme in any event.

E. CONCLUSION

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61. Turning to the specific questions I am asked:

- (i) What is the level of risk of a successful claim of discrimination against an LGPS employer from an employee who opts out based on such a genuinely held belief where no alternative Sharia compliant pension provision is made available?

There are two potential claims that could be brought by an employee who opts out of the LGPS on the basis of religious belief and who argues that an alternative pension scheme should be made available - a claim for indirect discrimination in the Employment Tribunal and claim under the Human Rights Act in the civil courts. In the absence of an actual claim and without further information, it is not possible to give a determinative answer as to whether any potential challenge of this nature might succeed. However, I have set out in paragraph 34(a) – (k) above the issues to which the Tribunal or Court would have regard in deciding whether or not the failure to offer an alternative scheme to the LGPS was unlawful discrimination, and the further evidence (including expert evidence) which would be necessary to identify the merits of a potential claim at least on a preliminary basis.

- (ii) Is there any reason in law why an LGPS employer (specifically a council) could not offer an alternative Sharia compliant pension scheme solely for employees who are eligible for the LGPS but opt out on the grounds of a protected characteristic – distinct from any other reason for opting out which is not covered by the Equality Act 2010?

Yes. In my opinion if an LGPS employer chooses to provide an alternative Sharia-compliant pension scheme it would be obliged to offer it to all potentially eligible employees. Any practice of offering the alternative pension

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scheme only to those who shared a particular religion would be direct discrimination on the grounds of religion or philosophical belief.

(iii) Is there any reason in law why an LGPS employer (specifically a council) could not offer an alternative auto-enrolment compliant pension scheme to employees who are eligible for the LGPS, but opt out (for reasons other than those associated with a protected characteristic)?

No, subject to Answer (iv) below. There is no reason in principle why an LGPS employer should not offer an alternative auto-enrolment compliant scheme in those circumstances, although any such decision would need to be made in accordance with section 112 Local Government Act 1972 and their duties as a public authority. The caveat as to answer (iv) below is that whilst an LGPS employer has the power to offer such an alternative, the specific terms of any such alternative could potentially be argued to be unlawfully discriminatory.

(iv) Any alternative Sharia compliant scheme is highly likely to be a defined contribution scheme, not a defined benefit scheme – due to both ease of provision and the certainty of offering a compliant scheme/fund. Even if the employer matches LGPS employer contribution rates the fundamental difference in scheme structure would remain. Therefore what is the level of risk of a successful equal pay claim against an LGPS employer based on the differences in pension provision?

The risk specifically of an equal pay claim in relation to a difference in pension provision is low. Equal pay claims can be brought only in relation to difference in pay between men and women, and insofar as an employee who had chosen to be in the alternative scheme sought to compare themselves with an employee of the opposite sex in the LGPS I would expect their claim to fail as

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the reason for the difference in pension is not related to sex, but to their choice of pension scheme.

However, in my opinion there is a risk of claims for indirect discrimination on the grounds of religion or belief in circumstances in which employees who have opted for the alternative scheme end up with benefits which are less generous than those available under the LGPS. In particular, there is a risk that an employee might argue that any alternative scheme should be as close as it is possible to get to the LGPS (as any difference is a difference in treatment which should be the minimum possible) and that the 'gap' between their compliant pension entitlement and the LGPS was in fact greater than was necessary for Sharia compliance.

(v) Could an LGPS administering authority ringfence part of its fund solely for Sharia-compliant investments?

Each fund is under an obligation to formulate an investment strategy which is in accordance with guidance and the LGPS Investment Regulations¹⁹. The question of whether it is feasible, whilst complying with these regulations, for an individual LGPS Fund (or section of a Fund) to be Sharia-compliant is a matter which requires expert evidence. Specifically it would require an expert Islamic finance to address the question of what constitutes a Sharia-compliant investment (or, if there is no consensus on that point, the range of views on that issue) and then actuarial evidence as to whether such investments could be ringfenced in the LGPS whilst complying with the LGPS Investment Regulations.

¹⁹ SI 2016/946

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My Instructing Solicitor should not hesitate to contact me if she, or the Board, have any queries on the contents of this Opinion, or if there are any further matters which it would be helpful for me to address.

LYDIA SEYMOUR

3 February 2022

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