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SUMMARY OF FURTHER LEGAL OPINION FROM LYDIA SEYMOUR ON SHARIA LAW AND THE LGPS (COUNSEL)

1. Counsel’s advice assesses the likelihood of an Employment Tribunal finding that a Muslim employee who has opted out of the LGPS for Sharia-compliance reasons has suffered unlawful discrimination.
2. Her conclusion is that the hurdle for satisfying a claim of group disadvantage is relatively low and would likely succeed. The question of whether this would be unlawful is more complex and would hinge on the question of what the Tribunal felt a proportionate response to that disadvantage would be.
3. In assessing proportionality, the Tribunal would take into account that there are varied views across the Muslim community. Whilst the report written by Faraz Adam concludes that Muslim employees can be in the LGPS, some Muslims may not be satisfied with this opinion due to their own personal religious views. There is no source of a definitive view within the Muslim community and while the report does offer some statistical evidence of Muslim employees being more likely to opt out of a workplace pensions there is no LGPS specific evidence. Because of this any claim of group disadvantage would apply only to an unknown (and possibly quite small) subset of people of the Muslim faith.
4. On the issue of providing an alternative scheme to the LGPS for employees that opt out on the basis of a protected characteristic, Counsel is of the opinion that there is in principle an obligation to consider the possibility of providing such a scheme. This is however subject to various legal constraints and carries various potential legal and practical consequences and risks.
5. As detailed in Counsel’s first opinion ‘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 Local Government Act 1972¹, and other similar duties, including the need for the scheme to provide value for money and adequate benefits to the member. Allowing Muslim employees to receive/make contributions into an alternative pension scheme could also have unintended consequences, e.g. reduced participation in LGPS, and would have to be considered in the light of the fact that there may also be requests for an alternative scheme from other groups holding particular religious or philosophical beliefs relevant to pension schemes. If an alternative pension scheme were offered to Muslim employees, it would need to be offered to all staff.
6. One option suggested by Faraz Adam’s report was that the LGPS itself, or a portion of the fund, could be operated in a Sharia-compliant manner, with a Board set up to certify and monitor compliance. Whilst this would not necessarily result in all Muslim employees accepting that LGPS membership was Sharia-compliant, it could be expected to maximise the number of

¹ <https://www.legislation.gov.uk/ukpga/1972/70/section/112>

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employees who were comfortable with membership. In terms of there potentially being a legal obligation on administering authorities to do this, Counsel thought it very unlikely that a claim alleging that there is an obligation to amend the LGPS such that its investments were all Sharia-compliant, or to create a Sharia-compliant section, would succeed. This is in part because of the additional costs and negative impact on investment yield, but also because provision of a Sharia-compliant LGPS fund is not likely to comply with the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (particularly Regulation 7), the general legal principles governing the administration of public sector pension schemes or public law principles.

7. Counsel suggested that it would be helpful at this stage to have high-level expert evidence on the practical, administrative and actuarial consequences of operating the LGPS in a wholly or partially Sharia-compliant manner, albeit more detailed expert evidence may be necessary if a specific legal challenge was presented.
9. A key recommendation is that the Board seek to gather data on the number of people opting out of the Scheme on the basis of their faith or any other reason, since the scale of the problem remains unknown. Any further discussion on making recommendations to DLUHC on changing the Scheme would need to be considered in the light of this evidence. Changes would need to be proportionate and address the potential legal and practical risks detailed above.
10. In conclusion, there is no known live case before a Tribunal on this matter and the legal risk to the scheme is assessed as low. The strongest potential claim would be that scheme employers are indirectly discriminating against Muslim employees by only offering membership of the LGPS and not providing the option of a Sharia-compliant scheme for those who opt out for religious reasons. On balance, and with the caveat that the merits of such a potential claim can only be fully assessed once a claim was made, Counsel would not expect that claim to succeed, as she would expect the Tribunal to find that the scheme employer’s decision is justified. As to whether an employee could succeed in arguing that the LGPS itself should be amended such that its investments, or a proportion of those investments, were administered in a Sharia-compliant manner, Counsel thought that very unlikely.