

Report to: Pension Board

Date: 27 May 2022

By: Chief Finance Officer

Title: Representation on the Pension Committee

Purpose: This report looks at the structure of the Pension Committee and comments on governance of the Fund.

RECOMMENDATION

The Pension Board is recommended to discuss the report and appendix and consider if there are any governance areas it suggests require review.

1. Background

1.1 At the Pension Board meeting on 10 February 2022 Councillor Tom Druitt agreed to produce a report on employer organisation representation on the East Sussex Pension Committee proposals to be shared with the Chair of the Pension Board by end of February 2022 and to be considered at the next Pension Board meeting in June 2022. The paper received from Councillor Druitt on 28 February 2022 is included in **Appendix 1**.

1.2 In addition to the paper received in Appendix 1, a petition was presented to the Chairman before the Full Council meeting on 10 May 2022 with 450 signatures, calling for Brighton & Hove City Council to have representation on the Pension Committee. This petition is included as **Appendix 2**.

1.3 This report addresses the legal position of the Pension Committee structure, representation, and governance for consideration alongside Councillor Druitt's paper. This report does not address any political views, discussion around climate change or the topic of divestment verses engagement as, although these are themes in the Appendix 1, they are not considered relevant to the issue of representation and governance.

1.4 The main purpose of the Pension Board is to assist the Scheme Manager, (East Sussex County Council "ESCC"), to ensure the effective management and administration of the Local Government Pension Scheme (LGPS), secure compliance with the LGPS regulations and any other legislation relating to the governance and administration and requirements imposed by The Pension Regulator (TPR), of the East Sussex Pension Fund (the Fund) and to provide oversight of Fund governance and administration matters.

1.5 The Pension Board is not a decision-making body, it is an advisory body that also seeks to obtain assurance that due process is followed by the Fund.

1.6 Pension Board members are appointed as scheme employer representatives or member representatives. Employer representatives are appointed to offer the breadth of employer representation for the Fund. Scheme member representatives are appointed to represent the views of Active, Deferred and Pensioner members of the Fund.

1.7 Board members should consider only those areas in which the Board has a responsibility, such as whether the Pension Committee makes decisions in line with the legislation and with due

diligence and effective governance. The Board does not have any powers or involvement in the appointment of members of the Pension Committee, its only course of action of a governance concern on the Pension Committee structure would be to advise the Governance Committee of East Sussex County Council if it felt the appointment process required review.

2. Fund responsibility

2.1 The prime duty the Pension Committee Members is to act in the best financial interest of the Fund's beneficiaries, i.e. Scheme Members. Scheme members make contributions to the Fund in the course of doing their jobs, and as a result of this, it was found by the Supreme Court that members' pensions represent deferred pay, hence the assets invested by the Fund are those of the beneficiaries and not of any other stakeholder.

2.2 The views of other parties, whether scheme employers, taxpayers, or Scheme Members themselves cannot supersede the ultimate obligation of the Committee to decide strategic investment matters itself with the aim to provide the best long term investment return for Scheme Members.

2.3 In the LGPS, the assets of the Fund are owned solely by the Administering Authority (East Sussex County Council, as named by the Local Government Pension Scheme Regulations 2013) or Scheme Manager, not by the beneficiaries, employers or other stakeholders. This is confirmed in opinion by Nigel Giffin QC in October 2016 to the Local Government Association (LGA), who advises that the assets of the fund legally and beneficially belong to the administering authority and do not 'belong to another person' despite the administering authority, through its Pension Committee, owing fiduciary duties to Scheme Members and indirectly to scheme employers.

3. Regulations

3.1 The Fund is part of the national LGPS, and is a defined benefit scheme, the terms of which are prescribed by delegated legislation made under section 7 of the Superannuation Act 1972. The main current governing instrument for the Fund is the Local Government Pension Scheme Regulations 2013 (the "2013 Regulations").

3.2 Regulation 2(2) of the 2013 Regulations provides: "The Scheme manager responsible for the local administration of pensions and other benefits payable under these Regulations is referred to in these Regulations as the "administering authority"."

3.3 Regulation 53(1) of the 2013 Regulations provides that: "The bodies listed in Part 1 of Schedule 3, referred to in these Regulations as "administering authorities", must maintain a pension fund for the Scheme."

3.4 Part 1 of Schedule 3 provides "The following bodies are required to maintain a pension fund and are administering authorities for the purposes of these Regulations— (a) a county council in England;" among other specific bodies.

3.5 The regulations also specifically comment on the administering authority for Brighton and Hove City Council in Part 2 of Schedule 3 where it provides that the appropriate administering authority for a member of the Scheme from Brighton & Hove City Council is East Sussex County Council, effective in accordance with reg. 1(2)(b) of the amending S.I. by The Local Government Pension Scheme (Amendment) Regulations 2015 (S.I. 2015/755), regs. 1(2), 32(e).

4. Pension Committee Structure

4.1 It is a statutory obligation for membership of the Pension Committee to be allocated in accordance with the rules under s15 of Local Government and Housing Act 1989 and the Local Government (Committees and Political Groups) Regulations 1990 which provide for representation of different political groups on committees.

4.2 The Pension Committee is made up of five East Sussex County Councillors, the composition of the committee is defined in the ESCC constitution to be politically representative of ESCC.

4.3 Whilst ESCC is also a scheme employer, the appointment of the Pension Committee is under the capacity of ESCC as Administering Authority and, as such, the Committee members are not appointed as scheme employer representatives but representatives of the Administering Authority to act on behalf of all Scheme members and employers. This is made expressly clear in the Pension Committee Terms of Reference where it states “No matters relating to East Sussex County Council's responsibilities as an employer participating within the East Sussex Pension Fund are delegated to the Pension Committee“. The members of the Pension Committee are required to consider “views expressed by employing organisations and staff representatives in relation to the operation of the East Sussex Pension Fund” but are not permitted to take decisions in order to benefit any particular employer ahead of the overall interests of the Fund.

4.4 The Local Government Association (LGA) obtained legal opinion from James Goudie QC in January 2015 where it was confirmed that a Pension Committee with investment decision making powers is a Finance Committee and is, therefore, restricted in its membership, excluding non-elected members onto the Committee unless there is a separate subcommittee for investment decisions, which consists solely of elected members of the Administering Authority. For the Fund, investment decisions are taken by the Pension Committee.

4.5 The current roles and responsibilities set out in the Terms of Reference of the Pension Committee, indicate that this Committee is appointed to regulate and control the finance of the Fund. As such non-ESCC councillors would not be permitted to be allowed to be members of the Pension Committee via section 102(3) of the Local Government Act 1972.

4.6 The Pension Committee is required under the 2016 LGPS Investment Regulations to take ‘proper advice’ – meaning the advice of a person whom the authority reasonably considers to be qualified by their ability in and practical experience of financial matters in formulating its investment strategy.

4.7 Whilst all Committee Members bring with them their own knowledge and experience, political views should form no part of the consideration of issues or of the decision-making process. Committee Members must act as fiduciaries, safeguarding the interests of those to whom they owe their duties. Committee Members must take decisions in accordance with their public law obligations, including the obligations of reasonableness, rationality and impartiality.

5. Representation

5.1 The Pension Board has three employer representatives, a Councillor representative from Brighton and Hove City Council with another Councillor to represent the Borough and District Councils and the third representative to represent the smaller employers. Scheme Member representatives include two union members who are active members of the Fund and a pensioner member. The Board also has an independent chair. All appointments are made by the ESCC Governance Committee under delegated authority.

5.2 The independent chair of Pension Board attends all Pension Committee meetings and comments on all papers during the meeting, the independent chair stays for the exempt section of Committee meetings also (this is at the agreement of the Pension Committee at each meeting rather than in the Terms of Reference). The Pension Board minutes are the first item of the Pension Committee agenda so feedback from the Pension Board can be taken into account by the Pension Committee. Other Pension Board members are welcome to attend as a member of the public to the Pension Committee.

5.3 The Chair of the Pension Committee attends Pension Board meetings on the request of the Pension Board, other Pension Committee members are also invited to attend, and they do occasionally sit in.

5.4 In addition to the Pension Committee and Pension Board, the Fund has a number of working groups to help develop, progress and monitor specific areas of work such as administration, communications and the McCloud project. There is also an investment implementation working group to implement investment decisions made by the Pension Committee, and to carry out research to present to the Pension Committee for decision, membership is open only to Fund Officers and advisers with the Chair of the Pension Committee invited to sit in.

5.5 The Pension Committee discusses the same papers as the Pension Board, other than investment items, with the Pension Committee also approving the budget and accounts of the Fund. The Pension Board has the opportunity to comment on the budget in its meetings in advance of the Pension Committee prior to the decision making.

5.6 The Fund and the Administering Authority has no fiduciary duty to residents of any locality and as such there is no representation in any form of "residents" in either the Pension Committee or Pension Board structure. The fiduciary duty of the Fund is to the beneficiaries of the scheme. Scheme Members are located not just in East Sussex or Brighton and Hove but across the UK and farther afield.

5.7 As laid out in the Communications Strategy, elsewhere on the agenda, there are several routes for communication with the Fund for Scheme Members. In addition to the representation of the Scheme Members on the Pension Board, the Fund also carries out surveys with members to get feedback on the administration of the Fund; the results of the recent surveys will be discussed at Communications Working Group when available.

6. Governance

6.1 The Fund underwent a comprehensive Governance review in 2020 carried out by an independent governance consultant. The findings of this review were presented to Pension Board and Committee in June 2020. This review was a follow up to focus on governance and resource arrangements following a report in January 2019 which looked at the evolution of the Fund and interaction with the Fund's management. The governance review focused on ensuring the Fund would be compliant with the Scheme Advisory Board's Good Governance Project and making it a leader in the LGPS for governance arrangements.

6.2 As a result of this review the independent consultant made a number of recommendations aimed at improving the Fund's organisational and governance structure. Most of the recommendations were implemented immediately with a change to the constitution, the terms of reference to both the Pension Committee and Pension Board, change to delegations, creation of a new Pensions Team structure and implementation of two new strategies, the remaining recommendations were implemented in the following quarters with the last item implemented in November 2020. These recommendations have led to major changes within the management and governance of the Fund.

6.3 The Fund won the Fund of the Year (over £2.5bn assets) at the 2021 LAPF investment awards. The LAPF Investments Awards were established in 2015 and have come to be recognised as a mark of excellence in the field of pensions provision in the LGPS. To win this award the Fund has to demonstrate excellence in: Implementing best practice; Leadership across pension fund operations; Investment performance; Governance; Administration; Collaboration and leadership within the LGPS.

6.4 Internal Audit reports in 2020 and 2021, both found substantial assurance on regulatory compliance, with no recommendations made in 2021.

6.5 The Fund publishes a governance and compliance statement annually, the most recent update has been covered in an earlier paper to this Board meeting. The Fund is fully compliant in all areas.

6.6 The LGPS Investment Regulations 2016 require the Fund to take and follow expert advice, the investment strategy is in line with all advice from the Investment Consultant, Independent Adviser and all government department and ministerial advice. Failure to follow investment advice could lead to intervention by the Secretary of State.

6.7 The Pension Committee must maintain an Investment Strategy Statement (ISS) which is maintained in line with statutory guidance from the Department of Levelling Up, Housing and Communities (previously Ministry of Housing Communities and Local Government). The ISS provides an overall framework for the Fund to invest and expresses the Pension Committee's views on a range of factors to take into account when making investment decisions. The ISS includes a comprehensive Statement of Responsible Investment Principles, which is publicly available which addresses climate risk and energy transition risk. Climate risk including a number of mitigations are clearly presented in the Fund Risk Register. This Risk Register is considered at all Pension Board and Pension Committee meetings.

6.8 The Fund was highly commended on their Climate Strategy at the 2021 LAPF investment awards.

7. Conclusion and reasons for recommendation

7.1 Legal advice obtained by the Fund and reported throughout as relevant legislation, confirm that the Pension Committee is structured in line with the Local Government Act 1972; in that the Committee must be solely appointed from elected members of the Administering Authority (as defined in the Local Government Pension Scheme Regulations 2013 as East Sussex County Council), as the work of the Pension Committee include areas such as Investments which are deemed to regulate and control the finance of the Fund. In addition, the Pension Committee is politically balanced to represent the Administering Authority in line with rules under s15 of Local Government and Housing Act 1989, the Local Government (Committees and Political Groups) Regulations 1990.

7.2 Pension Board members are requested to consider whether the Administering Authority makes decisions in line with the legislation and with due diligence and effective governance and that it upholds its fiduciary duty to act in the best financial interest of Scheme Members. If further details are required from the Pension Committee or Officers to determine whether there is effective governance in decision making or compliance with the law, then a request for information can be made in line with the SAB's guidance in relation to the operation of the Pension Board.

7.3 The Pension Board is recommended to discuss and consider if there are any governance issues the Pension Board feel require review by the Administering Authority.

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