

# Scheme Advisory Board

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## **Public service pension schemes: changes to the transitional arrangements to the 2015 schemes**

We are writing to you in our capacity as co-Chairs of the NHS Pension Scheme Advisory Board (SAB) to respond to the consultation published by HM Treasury (HMT) on 16 July 2020. The consultation is seeking views on removing the age discrimination that has arisen in public service pension schemes and ensuring equal treatment of members going forward.

We welcome the opportunity to submit our views on the proposals and our full response is enclosed with this letter. In March 2020, SAB submitted its initial advice to the Department of Health and Social Care (DHSC) around the two proposed remedy options: immediate choice and deferred choice underpin (DCU). We were unable to provide a recommendation at that time due to a lack of detailed information available and the insufficient time available to fully assess the impacts of both options.

As part of our consideration of the consultation proposals, we commissioned the Technical Advisory Group (TAG), a subgroup of SAB, to undertake analysis of the two remedy options. Specifically, TAG was asked to consider the potential implications of both options on members of the NHS Pension Scheme.

As a result of this analysis and numerous further discussions, SAB has a strong preference of DCU as the option to remove the age discrimination.

This preference was largely influenced by the overarching principle that no member should suffer any detriment as a result of this remedy. An immediate choice would require multiple assumptions to be made, which would create the significant risk of members making a decision that was not ultimately in their best interests. This does not align with SAB's no-detriment principle and could potentially result in further legal challenge where members do not end up with the most beneficial outcome. However, a deferred choice would allow members to make an informed decision that best suited their personal circumstances when they come to take their benefits.

Although DCU is our preferred remedy approach, there will still be significant challenges in implementing this successfully. These challenges become even greater when considering the tight implementation timescales being proposed in the consultation. Two key areas that need to be addressed with the highest priority are effective communications, to both members and employers, and the potential impacts of the remedy on workforce supply. Both areas will need to be given full and appropriate consideration to minimise the risk of any unintended, but detrimental, consequences of the remedy.

### **Communications**

The NHS Pension Scheme is already difficult for many members to understand, and this remedy will introduce further complexity. It is therefore vital that the final policy is clearly set out, so that it is easy for both members and employers to understand.

It is our strong expectation that HMT has robust legal backing to support its proposals. We would therefore also expect clear legal positions to be provided as part of the government's response to this consultation, particularly in relation to decisions that could potentially cause detriment to any member. This information should be provided in simple and unambiguous language.

As well as understanding the remedy, members will also need to be provided with comprehensive information and resources to support them to make an informed decision. It will be a significant challenge to design and deliver the quality communication materials that are needed within the implementation timescales proposed in the consultation. This will require a considerable amount of additional resource both nationally and from employers locally.

The materials produced should clearly outline the potential consequences of decisions that are made, including but not being limited to impacts on special class status and mental health officer status, survivor benefits, normal pension age (NPA) and pension tax positions. The annual allowance has been a particularly sensitive issue in the NHS, affecting a large number of members, so transparency and assurance within these communications will be vital.

The NHS Business Services Authority (BSA) and the NHS Pension Board will have a key role to play to ensure effective communications to members of the scheme. SAB is supportive of the views that the NHS BSA and the Pension Board have submitted as part of their respective responses to this consultation.

### **Workforce supply**

We have further concerns about the potential unintended consequences that the remedy could have on the NHS workforce. There is a risk that, without mitigating actions being taken, a large number of NHS staff could leave the service when the remedy is implemented, as a result of the lower NPA in the legacy schemes and the lack of flexible retirement options in the 1995 Section.

Losing a significant number of experienced staff at this time would counteract the substantial national and local efforts are being made to expand the NHS workforce.

We therefore consider it a priority that suitable flexible retirement measures are introduced to the 1995 Section of the NHS Pension Scheme as part of this remedy. Specifically, we would like members to be able to access their 1995 Section benefits whilst continuing in pensionable employment. This would provide an incentive for members of the 1995 Section to continue to work past their NPA of 60 and would be essential to mitigate against a considerable number of employees leaving the NHS workforce when the remedy is implemented.

Our enclosed full response to the consultation sets out the above concerns and suggested mitigating actions in further detail.

We await the outcome of this consultation from HMT so that SAB can further consider the government's final position in the context of the NHS Pension Scheme.

Please do not hesitate to contact us if you require any clarification or if further information is needed.

Yours sincerely



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Employer co-chair



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## Public service pension schemes:

### Changes to the transitional arrangements to the 2015 schemes

Consultation response from the NHS Pension Scheme Advisory Board

#### **Equalities impacts**

**Question 1: Do you have any views about the implications of the proposals set out in this consultation for people with protected characteristics as defined in section 149 of the Equality Act 2010? What evidence do you have on these matters? Is there anything that could be done to mitigate any impacts identified?**

The proposed remedy applies to those members who joined the scheme on or before 31 March 2012. Those who joined the scheme after 31 March 2012 were ineligible for transitional protection regardless of their age.

It is understood that the scope of this consultation from HM Treasury is to remedy the age discrimination for the cohort of staff that were discriminated against, which does not include those that joined the scheme after 31 March 2012.

However, we have some concern regarding members who joined the scheme between 1 April 2012 and 31 March 2015 and whether there is a risk of not including those members in the scope of the remedy. The equalities impact highlights that those outside of the proposal remedy are more likely to be younger, woman and/or from ethnic minority groups.

We understand HMT's position that those joining the scheme after 1 April 2012 were not discriminated against, however we strongly suggest that this is clearly set out for members and employers, who will inevitably receive queries from their staff in this group. We would appreciate assurance that legal advice has been sought on this issue and there remains no residual risk of future legal challenge from this cohort of the membership.

**Question 2: Is there anything else you would like to add regarding the equalities impacts of the proposals set out in this consultation?**

Under the immediate choice approach, there is greater future uncertainty for younger members than older members due to the longer timeframe between the end of the remedy period and the end of their active membership. Also, younger members are more likely to be women and/or from ethnic minority groups, as referenced within the equality impact assessment.

This leads to greater risk of younger members making the least beneficial immediate choice, recognising in hindsight that they would have been better off making the alternative choice.

The equalities impact acknowledges this and that members would need support with, for example, online models and calculators. However, many members are likely to find online models difficult to use and understand without substantial support and some members may be unable to access such support at all.

#### **Taper protected members**

**Question 3: Please set out any comments on our proposed treatment of members who originally received tapered protection. In particular, please comment on any potential adverse impacts. Is there anything that could be done to mitigate any such impacts identified?**

We acknowledge that if the transitional protections are deemed to be age discriminatory then that must mean that tapered protection is too. It is estimated that the NHS Pension Scheme had around 118,000 members with tapered protection in April 2015 when the reformed scheme was introduced – this was around 8% of total membership.

Although the consultation document states that a choice exercise will “...be beneficial for the majority of taper protected...” it also raises the key concern that “...for a small number of individuals tapered protection may have been more advantageous...”.

At the time of this consultation closing (11 October 2020), the table below categories those scheme members by date of birth as to whether they have already transitioned to the reformed scheme or not.

	<b>Members already transitioned to the reformed scheme</b>	<b>Members not yet transitioned to the reformed scheme</b>
<b>Legacy scheme 1995 Section NPA 55</b>	Between 2 December 1967 and 2 August 1970 inclusive	Between 1 May 1967 and 1 December 1967 inclusive
<b>Legacy scheme 1995 Section NPA 60</b>	Between 2 December 1962 and 2 August 1965 inclusive	Between 1 May 1962 and 1 December 1962 inclusive
<b>Legacy scheme 2008 Section</b>	Between 2 December 1957 and 2 August 1960 inclusive	Between 1 May 1957 and 1 December 1957 inclusive

The majority of members with tapered protection have already experienced the transition from the legacy scheme to the reformed scheme and will already have received pension statements showing benefits earned in each scheme.

The longer the full implementation of a remedy takes, the greater the number of scheme members who will transition from the legacy scheme to the reformed scheme and be left in a situation where their benefits will need to be adjusted – positively or negatively. Indeed, the remedy period is proposed to end on 31 March 2022, when all taper protected members will have already transitioned to the reformed scheme.

We feel that ceasing the transition of taper protected members to the reformed scheme as soon as is reasonably practical would be preferable to leaving a situation to progress where members will build up benefits in the remedy period across two schemes which, ultimately, will have to be unwound.

Some members’ tapered position will be favourable to being solely in either scheme over the remedy period. The consultation document states that an advantageous tapered position “*will have arisen by chance ... and it would have been the result of a policy that has been identified by the Courts as giving rise to unjustified discrimination*”. Whilst we acknowledge the legal complexities, we do not wish to see any detriment to members as a result of this remedy, both on the principle of fairness and to mitigate against further legal action.

We therefore considered whether a separate option could be made available to all taper protected members who have already transitioned from the legacy scheme to the reformed scheme. These members could have the option to choose their tapered position for the remedy period, rather than benefits wholly within the legacy or reformed scheme. We do acknowledge that the taper was a function of the age discrimination and it may not be appropriate or legally viable to replicate this in the remedy.

Some taper protected members will already have started to draw benefits from one or both schemes. If these members are not offered a choice of their tapered position for the remedy period, then some of these members will have been overpaid, which will require correction under the current proposals. We have concerns around the fairness of taking benefits back from pensioners and the increased risk of further legal action that would be associated with this.

If the decision is made to not offer members their tapered position as part of the remedy, we would expect HMT to clearly set out its legal justification for this decision. This should include specific reference to HMT's final position on reclaiming benefits from pensioners.

### **Immediate choice**

#### **Question 4: Please set out any comments on our proposed treatment of anyone who did not respond to an immediate choice exercise, including those who originally had tapered protection.**

The proposed treatment of members who do not respond to an immediate choice exercise would be critical to the success of such an exercise.

Aside from the taper protected members, the current default is for members to stay in their existing scheme for the remedy period unless they make an active choice to change. We note that this does not seem to align with the DCU option, which proposes that all members would be in their legacy scheme for the remedy period.

We are concerned with the concept of a default position for those not engaging with a choice exercise, as assumptions will be made about members that could potentially be challenged in the future. This is a particular concern as previous take up of choice exercises has been low.

In past choice exercises, 1995 Section members were able to transfer their benefits to the 2008 Section. This was first run in July 2009 for three years and again during October 2014 to March 2015, with the proportion of membership opting to transfer service at around 3.5% and 2% respectively.

Some members may actively opt for the default position on an informed basis. It would be helpful to capture all decisions made to measure the engagement of the choice exercise, so it would be positive for the choice form to include 'tick boxes' for both choosing the default and choosing the alternative.

Evidence from previous NHS Pension Scheme choice exercises suggests that members do not always make the best choice and therefore members may lose out by making the wrong (or no) decision.

Modelling carried out prior to April 2015 showed that members with transitional protection in the 2008 Section of the legacy scheme would (unless they received significant increases in pensionable pay) have lower benefits at retirement compared to moving to the reformed scheme on its introduction. The two main reasons why the reformed scheme often projects higher pensions than the 2008 Section of the legacy scheme are: (1) the faster accrual rate (1/54<sup>th</sup> compared to 1/60<sup>th</sup>) and (2) revaluation of reformed scheme benefits in line with CPI plus 1.5% pa (compared to the final salary link).

Members with 2008 Section protection were offered the chance to opt-out of this protection to, potentially, build up higher benefits in the reformed scheme. However, just over 15% of in-scope members chose to opt out of this protection, with the rest opting to keep protection or making no decision. Of course, offering a new choice exercise provides members with a second chance to make the most beneficial decision.

Although it is proposed that significant support would be designed to help members understand immediate choice, there is a high probability that most would accept (or not consider) the default position. Also, we understand that pensions knowledge across the service is perceived to be quite low. Even with considerable support, we are concerned that members will not make the most beneficial choice for their personal circumstances. It would be expected that those most engaged and with most knowledge would be more able to make an informed choice.

It seems reasonable that younger members will find the choice more difficult than those closer to retirement, as the longer period of time between the choice and leaving the scheme means a longer period of uncertainty. There are three main factors affecting the projected benefit outcome for members: (1) future pay progression, (2) retirement age, and (3) length of future pensionable service. If any, or a combination, of these factors change in practice from those assumed at the time of the immediate choice they could have a material impact on the level of benefits in hindsight.

The last date on which a member could have joined the 1995 Section of the legacy scheme is 31 March 2008. Without any transitional protection, the shortest period of pensionable service in the legacy scheme is 7 years up until the reformed scheme was introduced and 14 years up until the proposed end of the remedy period. Even the youngest former 1995 Section member could have a significant period of total pension scheme service in the legacy scheme. This illustrates that even the youngest 1995 Section members can have a material proportion of their overall retirement benefits in the legacy scheme and any subsequent changes to assumed future career (pay progression, retirement age, length of service) may have a material impact to their benefits in the remedy period.

As highlighted, these members will need significant support to understand how future pay progression, pensionable service and retirement age can impact on the remedy period benefits.

To enable any member to both engage with the choice exercise and to make the most beneficial immediate choice would require a very detailed communications exercise with simple messages at their core to ensure members are as best informed as they can be. These communications would need to include annual and lifetime allowances positions where relevant.

People generally dislike change and, potentially, see any change as bad. As such, the default position, in the vast majority of cases, may be considered to be the final outcome despite the alternative potentially being a better option.

We agree that the default position for members with transitional protection in the 1995 Section of the legacy scheme should be that they retain membership of the legacy scheme in the remedy period.

We agree in principle that the default position for members with transitional protection in the 2008 Section of the legacy scheme should be that they retain membership of the legacy scheme in the remedy period. However, these members will need significant support to understand how future pay progression, pensionable service and retirement age can impact on the remedy period benefits.

We agree in principle that the default position for members who did not have transitional protection in the legacy scheme should be that they retain membership of the reformed scheme in the remedy period.

However, we feel that former 1995 Section members should be given another opportunity to move their 1995 Section benefits to the 2008 Section to take advantage of the improved accrual rate and the current lack of late retirement adjustment factors applying to 1995 Section benefits drawn after normal pension age. This option was given to members as part of the Choice exercises. When assessing the previous choice to move 1995 Section benefits to the 2008 Section, members would not have anticipated the potential addition of a further 7 years of pensionable service in the 1995 Section of the legacy scheme. Also, with current national plans to bolster the NHS workforce, improve service delivery and retain staff longer than may have previously been expected, it is reasonable to suspect that some scheme members are likely to retire later than previously planned. For these reasons, members may now have different plans for their retirement age which would make another opportunity to transfer 1995 Section benefits to the 2008 Section more attractive.

Providing members with this further opportunity is specific to the NHS Pension Scheme and we feel that the NHS Scheme Advisory Board is best placed to advise on such matters.

We feel that the default position for taper protected members should be that they retain membership of the legacy scheme for the whole of the remedy period. Taper protected members were within 10 to 13½ years of the normal pension age in their legacy scheme on 1 April 2022 so will be within 3½ years of normal pension age in their legacy scheme at the proposed end of the remedy period. It feels reasonable to assume that taper protected members will be planning retirement with a greater focus on their normal pension age in the legacy scheme rather than that of the reformed scheme.

As for timescales, ideally all affected members should be contacted within six months of the end of the remedy period - i.e. before October 2022. In the consultation document, an example suggests chasing members after 3, 6, 9 and 12 months after the initial communication. The scheme administrators will have a view on the frequency of chasing members given their experience of past choice exercises.

### **Immediate choice and deferred choice underpin**

**Question 5: Please set out any comments on the proposals set out above for an immediate choice exercise.**

We agree that an irrevocable choice, made as soon as practicable after the end of the remedy period, would be a reasonable approach under immediate choice. As highlighted in our previous response, ideally all affected members should be contacted within six months after the end of the remedy period.

Written materials are a must, to explain clearly why the exercise is being carried out. 'Heatmaps' and decision trees are a relatively simple way to illustrate the impact of different choices by varying the most sensitive factors – such as pay progression and retirement age. However, some members will prefer more sophisticated support such as online calculators to project benefits into the future.

Other methods of communication which may be valued by affected members are videos and webinars to explain the written materials in simple terms.

The consultation document does not make reference to the method of contacting affected scheme members. Again, the scheme administrators will have a view on the most appropriate methods of communicating with members given their experience of past choice exercises.



Whilst an immediate choice would provide certainty to affected members and to future scheme valuations, as already highlighted it is likely that some members (and 'some' is difficult to quantify) will not end up with the most beneficial outcome. This raises the possibility, however small, that there is a risk of future legal challenge if, with hindsight, scheme members recognise they ended up in a less beneficial position than if they'd selected the alternative.

For affected members with clear retirement plans, an immediate choice may not be difficult to make but the choice needs to be made by younger workers too. There are many factors and uncertainty for younger members to take into account and they will have a relatively longer period between making a choice and retirement compared to older members and may find it more difficult to make the most valuable choice.

We feel that the proposed tax treatment is reasonable – that is, each member's tax position would be corrected with underpaid tax limited to the previous four tax years prior to making a decision and overpaid tax refunded in full.

Where the default position is to leave both transitionally protected members and members with no protection in their existing scheme in the remedy period this would not involve making any retrospective tax adjustments. It would only be if a member chooses the alternative option (and taper protected members) where tax adjustments would be required.

However, NHS BSA will be required to calculate the tax position of all members during the remedy period as this will provide crucial information for those affected.

**Question 6: Please set out any comments on the proposals set out above for a deferred choice underpin.**

We agree that an irrevocable choice made when a pension award becomes payable (e.g. on retirement) is a reasonable proposal.

The proposal under "DCU" is that all members would be deemed to be in their legacy scheme throughout the remedy period.

It is estimated that around 689,000 members of the NHS Pension Scheme did not have transitional protection in April 2015 when the reformed scheme was introduced – this was around 48% of total membership.

The proposed default position would involve moving all 689,000 members to a different scheme in the remedy period. Whilst members may perceive this to be positive, we recognise that the reformed scheme would result in a beneficial outcome for many members.

Tax calculations would be required for all unprotected and taper protected members covering the whole of the remedy period. Clearly not all the tax calculations will result in tax adjustments (e.g. changing Annual Allowance tax charges), but this would be a challenging situation where tax is owed.

We considered an alternative default position which would mirror that under immediate choice – i.e. both protected members and unprotected members stay in their respective schemes (and taper protected members are treated as legacy scheme members throughout the remedy period). This would reduce immediate workload pressure for NHS BSA as tax adjustments would not be required at the end of the remedy period. However, we understand the rationale for moving unprotected members into their legacy schemes for the remedy period, as this reflects the wishes of the original litigants.

Where a decision on retirement (for example) to change remedy period benefits from one scheme to another (likely when a member opts for higher remedy period benefits from the alternative scheme) results in additional pension growth in the final year of active membership then this would be when the mechanism to compensate the member for additional Annual Allowance tax charges would kick-in.

Either way, sufficient assurances would be needed around the compensation element of Annual Allowance tax charges at a future point in time which will extend to many decades in the future. The Annual Allowance has been a particularly sensitive issue in the NHS, affecting a large number of members, so transparency and assurance will be vital.

Two of the perceived negatives around the DCU approach are the uncertainty for members, which could influence the apparent value of the scheme, and the potential for lack of trust from members around the process being changed in the future. To counter these perceived negative views, clear communications (both within the government's response to the consultation to provide clarity to members and employers, and within the materials issued as part of the choice exercise) and definitive scheme regulations will be required.

### **Question 7: Please set out any comments on the administrative impacts of both options**

#### Immediate choice

Immediate choice is not the preferred choice for NHS BSA.

Managing a complex choice exercise is likely to be significant both locally (e.g. payroll, finance, human resources, pensions managers, etc) and nationally (NHS BSA, DHSC, NHS England and NHS Improvement, etc).

There will be significant resource implications. Also, the COVID-19 response is likely to increase the pressure on being able to effectively deliver an "immediate" large scale choice exercise and an intense period of member communications.

#### Deferred choice underpin

Deferred choice underpin is the preferred choice for NHS BSA. However, there are still many challenges to overcome.

Dual calculations will be required to cover benefits in each of the legacy and reformed schemes in the remedy period throughout each affected member's pensionable service. Although dual calculations are routine in other areas of the scheme, this approach would significantly increase the volume of such calculations with associated resource implications.

These extra requirements may increase the risk of failing to deliver the legal obligations of annual benefits statements and will likely increase individual member queries for the NHS BSA. Increased individual member queries would be expected at local levels too.

Where retirement quotations are issued, we are concerned that extra figures and wording may overwhelm and confuse members. The information provided would need to include the benefits where no change is made to the default scheme in the remedy period and the benefits if the alternative scheme is selected in the remedy period – with maximum pension and maximum lump sum options under both choices. Although it may seem reasonable to assume that members will pick the highest benefits so perhaps retirement quotations could simply flag those benefits, in practice different members value pension and lump sum differently.

We would appreciate some reassurance that sufficient resource will be available at NHS BSA to handle immediate detriment cases, support up to and soon after the end of the remedy period, and beyond if deferred choice underpin is the chosen approach. Also, appropriate resource will need to be in place to support the modellers, calculators and online tools available for members to use and employers to promote.

We would also like clarification on the impact to the scheme admin levy and whether further administration for NHS BSA may lead to an increase in the levy. If this is the case, we would like assurances as to whether this would be covered centrally or a cost that may fall to employers. Rather than levy the cost of employers, it would be preferable for these costs to be covered centrally.

**Question 8: Which option, immediate choice or DCU, is preferable for removing the discrimination identified by the Courts, and why?**

We strongly prefer the deferred choice underpin as the method by which to remove the discrimination.

This feels like the safest option as members are able to select remedy period benefits with the benefit of hindsight, rather than having to make significant assumptions about their future career and retirement plans which may, ultimately, not be borne out in practice. This would seem to mitigate the residual risk of members in hindsight recognising that their benefits would have been higher if they had made the alternative choice.

**Equalising future treatment**

**Question 9: Does the proposal to close legacy schemes and move all active members who are not already in the reformed schemes into their respective reformed scheme from 1 April 2022 ensure equal treatment from that date onwards?**

Future equal treatment of members

We agree that it would be reasonable to assume that if all pension scheme members, without qualification, build up benefits in the reformed scheme from 1 April 2022, this will ensure equal treatment from that date onwards. We appreciate the acknowledgement that the 'final salary link' on previous earned legacy scheme benefits will continue beyond the end of the remedy period.

As the proposed date to move all members to the reformed scheme is 1 April 2022, this is the 10<sup>th</sup> anniversary of the date when protection was assessed. This will mean that all fully protected legacy scheme members will have reached their legacy scheme pension age. Protected members working beyond their legacy scheme normal pension age will have future benefit expectations changed by moving to the reformed scheme rather than previous expectations that they would remain in the legacy scheme until retirement.

One area of concern is that members with Mental Health Officer ("MHO") status earn 'double accrual' after 20 years' pensionable service. There could potentially be some members with MHO status who are expecting to receive 'doubling' beyond 1 April 2022, but with being moved to the reformed scheme will miss out on their expected benefits. Appropriate communication materials will be vital to give members sufficient information and assurances around this situation.

It makes sense to end the remedy period and to ensure equal treatment of all members on the first day of the scheme year – i.e. on 1 April.

### Implementation timescales

We have some practical concerns relating to the proposed timeframe of the remedy, with less than 1½ years between the end of this consultation and the proposed end of the remedy period. The timeframe feels rather tight to gather feedback from this consultation, for government to issue a response, to consult on scheme-specific regulation changes, change administrative practice, and design and deliver a comprehensive member communication programme.

### Unintended workforce consequences

Following on from the practical challenges, we also have significant concerns about the potential unintended consequences that the remedy could have on the NHS workforce. When the remedy is implemented and members can choose to re-join their legacy scheme over the remedy period, it is possible that many individuals will decide to take their benefits and leave the NHS. This is due to the lower NPA associated with the legacy schemes and the current lack of incentives for members of the 1995 Section to continue to work in the NHS past their retirement age.

A large number of staff leaving the service would be counter-productive to the current national and local efforts to increase the number of staff working in the NHS, as is outlined in the NHS People Plan and reflected in the national workforce targets that have been set by government.

A key factor that could lead to members leaving the service when the remedy is implemented is the current lack of flexible retirement options in the 1995 Section of the NHS Pension Scheme. Specifically, there is currently no provision for members to access their 1995 Section benefits whilst continuing in pensionable employment; there are therefore no incentives for these members to retire and return to work past their NPA of 60.

We consider it a priority that this is addressed as part of the remedy to help to preserve the NHS workforce over this period.

The tight timescales proposed by the consultation could exacerbate the issue of staff leaving the workforce, as implementing the remedy on 1 April 2022 leaves limited time for members to fully understand their situation and assess their retirement options in a meaningful way. There is a risk that insufficient time for engaging with members could lead to decisions being made to leave the service without a full understanding of their situation. The importance of effective communications in helping members to understand their position cannot be stressed enough.

Although our view is that the implementation date of 1 April 2022 is less than ideal from a workforce planning perspective, we appreciate the legal and financial reasons behind why this has been proposed. The potentially significant and disruptive effects of these tight timescales on workforce availability could be somewhat mitigated against with the introduction of retirement flexibilities to the 1995 Section.

### **Revising past cases**

#### **Question 10: Please set out any comments on our proposed method of revisiting past cases.**

We agree that affected members with pensionable service in the remedy period who have retired should have the opportunity to choose benefits between the legacy and reformed schemes, and that this choice applies whether they had transitional protection, tapered protection or no protection. It also sounds reasonable that the actuarial factors in place at the time of retirement should be used to assess benefits under the alternative scheme.

Where affected members have started to draw benefits, the consultation document correctly highlights that some members may opt to increase or reduce their pension and may opt to increase or reduce their pension commencement lump sum.

Affected members should be given clear information about the consequences of retrospectively changing their benefits – in particular, the impact on their personal tax position and on state benefits.

### **Member contributions**

**Question 11: Please provide any comments on the proposals set out above to ensure that correct member contributions are paid, in schemes where they differ between legacy and reformed schemes.**

Although the contribution rates themselves do not differ between the NHS legacy and reformed schemes, the contributions paid by certain members can be different.

General practitioners pay contributions on ‘annualised’ pensionable pay in the reformed scheme, rather than aggregated pensionable pay in the legacy scheme. Also, officer members can pay different contributions under each scheme where pensionable pay is capped in certain scenarios.

The proposals themselves seem reasonable to reassess contributions at the end of the remedy period under immediate choice and both at the end of the remedy period and at retirement under the deferred choice underpin.

As suggested, details of any overpayments and underpayments would have to be provided clearly alongside the choice of scheme in the remedy period. In cases where member contributions are adjusted, there is a possibility that these may link in with assessing tapering of the Annual Allowance.

We would appreciate clarification as to whether contribution adjustments would retrospectively impact on Annual Allowance tapering or whether they would be taken into account within the tax year a choice is selected.

We would like to raise the idea of introducing of a minimum level of contribution to be paid back by a member where they have underpaid contributions, to mitigate additional work required by the member, and administratively at both local and national levels.

### **Voluntary member contributions**

**Question 12: Please provide any comments on the proposed treatment of voluntary member contributions that individuals have already made.**

We agree that the value of additional pension contracts should be retained by members.

Where a member ends up in the alternative scheme during the remedy period, we agree that the additional pension should be converted into a cost-neutral benefit payable under the alternative scheme. We welcome that any retrospective breaches of the relevant limits would be ignored.

The proposal is currently that any contributions paid for Early Retirement Reduction Buy Out (“ERRBO”) would be refunded net of tax where a member is returned to the legacy scheme. We would like to raise the possibility of offering alternative benefits as another option on top of receiving a refund. For example, the contributions paid for ERRBO could be converted into additional pension.

## Annual benefit statements

### **Question 13: Please set out any comments on our proposed treatment of annual benefit statements.**

The main issue here is how to clearly communicate two sets of benefits in annual benefits statements (“ABSs”) under the deferred choice underpin approach.

Currently, members with benefits in both the legacy and reformed schemes receive two separate ABSs. If dual records are to be established with benefits in the remedy period recorded under each scheme and ABSs are kept separate, then this could result in members receiving four ABSs. This is likely to result in confusion for members.

We recommend amalgamating ABSs into one version which could then clearly show the total benefits where benefits in the remedy period are held in each scheme.

Another issue we would like to raise on ABSs is that, due to the faster accrual rate in the reformed scheme, accrued benefits are often higher in the reformed scheme compared to the equivalent benefits in the legacy scheme. The extra value from the legacy scheme often comes from the lower pension age, automatic lump sum and late career pay progression.

To help members understand that comparing accrued benefits with projected benefits at retirement age are different, ABSs could be extended to project benefits payable under both the legacy and reformed schemes at both the legacy and reformed scheme’s normal pension ages.

## Ill-health retirement

### **Question 14: Please set out any comments on our proposed treatment of cases involving ill-health retirement.**

Ill-health retirements which have already been awarded during the remedy period and ill-health retirements to be assessed between now and the end of the remedy period need to be treated with great sensitivity but also as a priority.

Although the eligibility for ill-health retirement differs between the legacy and reformed schemes, NHS BSA would still be able to calculate benefits as at the date ill-health retirements were awarded assuming that the member would still be eligible under the terms of the alternative scheme.

We would like to raise an area for consideration. Where the ill-health benefits already awarded are higher than those which would be (subject to eligibility) awarded under the alternative scheme, then we consider it reasonable to contact the member to tell them no further action would be taken unless the member specifically wants to investigate further.

Where the ill-health benefits already awarded are lower than those which could be awarded under the alternative scheme then the member should be contacted with the possibility of further medical evidence required to fulfil the eligibility criteria needed.

However, we recognise that the lump sum already awarded, either as an automatic lump sum or exchanging pension for cash, may make it difficult to assess which benefit is higher.

Members who were rejected for ill-health retirement may, retrospectively, meet the eligibility criteria for the award. Additional medical evidence will likely to be required in such cases where the member wishes to pursue the application.

Members with tapered protection will, again, be a specific issue. For example, where such members had already transitioned to the reformed scheme then they would have been assessed under that scheme. Also, under the proposals such members will also have their benefits adjusted as they cannot have a mix of legacy and reformed scheme benefits within the remedy period.

Affected members should be given clear information about the consequences of retrospectively changing their benefits – in particular, the impact on their personal tax position and on state benefits.

### **Cases where members have died since 1 April 2015**

**Question 15: Please set out any comments on our proposed treatment of cases where members have died since 1 April 2015.**

Cases which have resulted from the death of a member will need to be handled with the utmost sensitivity and as quickly as possible.

As a general principle, we feel that adult survivors should be given a choice in a similar way to that for members as they too could be materially affected by this issue – i.e. the adult survivor would be provided with a choice of residual benefits payable dependent on the scheme selected for the remedy period.

We appreciate the proposal that child pensions will be unaffected where otherwise an adult survivor in a separate household could make a choice which adversely impacts their benefits. However, we agree that it's reasonable to adjust child and adult survivor benefits where they do share a household.

We appreciate that any tax charges and/or out-of-pocket expenses triggered by payments related to this remedial action will be reimbursed where evidence is provided.

### **Contingent decisions**

**Question 16: Please set out any comments on our proposed treatment of individuals who would have acted differently had it not been for the discrimination identified by the Court.**

We feel that it is appropriate for a mechanism to be set up for former scheme members who have made decisions on the actual or perceived implications of the introduction of the reformed scheme. Although we recognise that there will be a number of individuals that will need to be considered on a case by case basis, we feel that this section of the proposed remedy could benefit from having a specific list of common and accepted examples.

For example, the list below are some examples which could be highlighted (this is not intended to be exhaustive):

- Members who left pensionable service before or soon after the introduction of the reformed scheme due to the perceived negative aspects of the reformed scheme.
- Members who left pensionable service temporarily or permanently due to the Annual Allowance who would have made a different decision had they remained in the legacy scheme.
- Members who left pensionable service temporarily or permanently due to the Lifetime Allowance who would have made a different decision had they remained in the legacy scheme – for example, fixed protection would have been lost.

We understand that the process surrounding contingent decision cases has not yet been finalised but that this is expected to be the responsibility of the scheme and/or employer to manage. It is preferable that clear rules are set out in the scheme regulations to provide consistency and to reduce the risk of challenge.

We recognise that contributions would be required retrospectively to buy-back lost periods of pensionable service. However, whereas a member may wish to buy back pensionable service, this would not necessarily be fair on employers suddenly having to find additional pension contributions from existing budgets. Rather than levy the cost of employers, it would be preferable for these unexpected costs to be covered centrally.

### **Voluntary pension transfers**

#### **Question 17: If the DCU is taken forward, should the deferred choice be brought forward to the date of transfer for Club transfers?**

If the deferred choice underpin approach is implemented, then we feel that the approach for the treatment of transferring benefits should be consistent with the approach where benefits are not transferred. In other words, dual records are kept by the receiving scheme so that members can make a decision at retirement (mostly) with the benefit of hindsight. Asking members for their choice at the date of transfer has a similar risk of negative consequences as explained earlier for the immediate choice approach.

#### **Question 18: Where the receiving Club scheme is one of those schemes in scope, should members then receive a choice in each scheme or a single choice that covers both schemes?**

Continuing on from our response to the previous question, we feel that the approach should be as consistent as possible between members with pensionable service in a single scheme and those with pensionable service in more than one scheme following a Club transfer. To clarify, it seems reasonable and consistent for members to have a single choice that covers both schemes.

Members and potential members subject to bulk transfer also need to be given consideration.

### **Divorce cases**

#### **Question 19: Please set out any comments on our proposed treatment of divorce cases.**

We agree that the scheme member should make the immediate or deferred choice and this choice would have a knock-on effect to the benefits payable to their ex-spouse or civil partner.

### **Interest of under- or over-payments and refunds**

#### **Question 20: Should interest be charged on amounts owed to schemes (such as member contributions) by members? If so, what rate would be appropriate?**

We feel that it is fair to apply interest to amounts owed to schemes by members and it is reasonable for this rate to be in line with the Bank of England base rate over the time the amounts owing were incurred.

#### **Question 21: Should interest be paid on amounts owed to members by schemes? If so, what rate would be appropriate?**

We feel that it is fair to apply interest to amounts owed to members by schemes and it reasonable for this rate to be in line with the SCAPE discount rate over the time the amounts owing were incurred.



**Question 22: If interest is applied, should existing scheme interest rates be used (where they exist), or would a single, consistent rate across schemes be more appropriate?**

This provides an opportunity to harmonise another aspect across public service pension schemes so applying the same interest rates across all schemes appears reasonable.

**Abatement**

**Question 23: Please set out any comments on our proposed treatment of abatement.**

Our overriding principle would be that any remedy choice made would not impact adversely on members affected by abatement, similar to the suspension of abatement due to help with service delivery through the COVID-19 outbreak.

**Pensions tax relief**

**Question 24: Please set out any comments on the interaction of the proposals in this consultation with the tax system.**

Immediate choice

Under the proposals, members will only have an Annual Allowance tax adjustment if they opt to move away from the default position. However, revised Pension Input Amounts will need to be calculated and presented by NHS BSA for all affected members with benefits in either the legacy or reformed scheme in the remedy period to assist each member's choice. This will be a considerable exercise and NHS BSA will need to have appropriate resource to carry it out and support member queries.

Deferred choice underpin

We made some comments on the default position in our response to question 6 and will not repeat them here.

Under the proposals, all members will be deemed to be in the legacy scheme in the remedy period. Pension Input Amounts will need to be calculated by NHS BSA for all unprotected members as benefits will be switched into the legacy scheme in the remedy period. This will be a considerable exercise and NHS BSA will need to have appropriate resource to carry it out and support member queries.

As the Annual Allowance has been a sensitive subject over several years, unilaterally changing every unprotected member's tax position over the remedy period may result in unintended consequences – such as unwelcome additional Annual Allowance tax charges. There is also a possibility that higher earning members with Mental Health Officer status receive further doubling of accrual and a significantly worse tax position.

The optimal position for members would be to have the 'least-worst' Annual Allowance position over the remedy period and opting at retirement for the alternative scheme in the remedy period if these benefits are higher. Any additional uplift in benefits which results in a higher Annual Allowance tax charge in that final tax year of active membership could then be compensated as described in the consultation document.

We appreciate that the detail of the compensation scheme has not yet been finalised, but would encourage HMT to clearly set out in their response to this consultation:

- What form this compensation would take and how it would be delivered

- Whether there would be any adverse tax implications
- Who would provide the compensation and, specifically, if any of this cost would fall on employers
- The legislation that will underpin this scheme.

It would be preferable for this compensation mechanism to require little or no action from the affected member and if the compensation itself would be met by government.

#### Comments regardless of approach to choice

##### *Independent financial advice*

The Annual Allowance and its interaction with scheme benefits is very complex and many affected members are likely to need additional advice and guidance to be able to reassess their position, on top of any previous advice already received. This would likely be at the expense of the individual as a direct result of the discrimination that occurred.

It is important to note that an added complexity is that the remedy period will cover four separate tax years. We would invite HMT to clearly set out its position on this, and proposals to address it, within its response to this consultation. We understand that members have found it difficult to find independent financial advisers that have been able to provide such advice for these reasons.

It is important to note that members that are not necessarily impacted by the Annual or Lifetime Allowances are also in need of good quality independent financial advice.

##### *Communications*

As the pension tax implications of the remedy are likely to be complex, it will be vital that clear and detailed information is provided to members to ensure they take any required actions. Specifically:

- Where tax adjustments are required, members will need to be clear about whether they need to re-open previous submitted tax returns or not.
- We understand that Annual Allowance tax adjustments over the remedy period would be assessed for individual years, rather than the period being taken as a whole. It would be important that this mechanism is clearly set out and so is easy for members and employers to understand.

##### *Scheme Pays*

Adjusting previous Scheme Pays pension debits and offering Scheme Pays to pay retrospective Annual Allowance tax charges would be welcomed.

##### *Acting Up payments*

Acting Up payments are pensionable and make sense under a CARE scheme, as a member would benefit from the accrual made whilst acting up, even when they have returned to their substantive post. In a final salary scheme, the member may receive an (increased) Annual Allowance charge as a result of their higher Pension Input Amount whilst acting up but, depending on their age, may not actually benefit from this in terms of an increased pension if they return to their substantive role.

This could have an impact on members if they decide to move back to the final salary scheme for the remedy period. It is likely to affect members that are acting up later in the remedy period to a greater extent, as the PIA will include a longer period of final salary service.

The potential Annual Allowance impact of this situation may influence a member's decision about scheme membership over the remedy period. It will therefore be important to include a clear and detailed explanation of the potential impacts within the information provided to members when making their decision.