

The British Medical Association Northern Ireland response to the consultation on McCloud remedy: part 2 - proposed changes to scheme regulations

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INTRODUCTION

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

BMA Northern Ireland welcomes the opportunity to respond to this consultation on the implementation of the McCloud remedy.

Issues relating to the HSC scheme should be seen in the wider pensions context, accounting for its day to day operation and the impact on members. The McCloud judgement, while rightly addressing discrimination faced by scheme members, also introduces significant complexity to an already complex system.

Our substantive response will address the questions posed in this consultation, however, but we would like to place on record our ongoing concerns that the scheme is simply not accessible and navigable for most members, often necessitating expensive, external advice to be sought.

This complexity is further enhanced when changes occur that create discrepancies between how the scheme is delivered in different parts of the UK. The most recent example relates to tax changes announced in the UK Government March 2023 budget, which apply equally across the UK. Alongside these measures, England, Wales and Scotland implemented partial retirement and pensionable reemployment, allowing the health services to maximise the impact of tax changes in retaining more doctors. However, these measures are not in place in Northern Ireland.

In relation to other mitigations, such as pension contribution recycling, the Department of Health maintains that parity with Great Britain is required. Yet, with flexibilities such as pensionable reemployment and partial retirement, the Department is choosing not to align with other UK nations.

Ultimately, scheme members in Northern Ireland suffer, impacting retention of senior doctors to the detriment of the health service. Whilst we welcome the Department's consultation on the McCloud remedy and its efforts to address previous unlawful discrimination, it's vital that further work is undertaken to ensure the pension scheme is fully accessible to all, with no members worse off in Northern Ireland compared to other UK colleagues.

RESPONSE TO THE CONSULTATION

Question 1

Do you agree or disagree that the draft Regulations deliver the policy objectives and requirements set by the Public Service Pensions and Judicial Offices Act 2022?

BMA Northern Ireland believes that most of the draft regulations deliver the desired objectives, except where feedback on individual regulations is provided in this response.

Question 2

Do you agree or disagree that the draft Regulations allow members to be put as far as possible in the pension position they would have been in had the discrimination not occurred?

BMA Northern Ireland understands that putting members in the position they would have been in had the age discrimination not occurred is complex. However, we believe more can be done to ensure that no member suffers detriment.

Contingent decisions

There will be many legitimate courses of action that a member would have taken had the discrimination not occurred. BMA Northern Ireland believes that there should be a low evidence threshold for members to make their case (for example to reinstate opted out service), and that all cases should be considered fairly with clear guidance in place. In terms of deadlines for applications, we believe that these should be 'soft deadlines' and members should not be turned away from making an application at any time.

Reinstating opted-out service

One area where members do not have the ability to be in the same position as they otherwise might have been if not for the discrimination, is in reinstating opted out service.

Our understanding of the current regulation intentions is that members will only have the option to reinstate their entire opted-out remedy service. Members may find reinstating the whole period of opted-out service to be unaffordable – even where instalments are payable over a set time period. The current draft regulations seem to provide for an “all or nothing” approach. Yet, in practice, were it not for the discrimination, a member could have chosen to remain in the scheme for less than the full period, such as by opting out at a later date within the remedy period to suit their personal circumstances. This could raise equalities issues, for example, lower paid members, including those who may work less than full time due to caring responsibilities or a disability, may be less able to reinstate service.

BMA Northern Ireland believes there should be more flexibility in the options available, as some members may want to reinstate only part of their opted-out service. BMA Northern Ireland therefore would request that the Department of Health adopt a flexible position which gives members the opportunity to reinstate a certain amount of service that they may otherwise have chosen to do if they had not been subject to the unlawful discrimination. It is also essential that they are not penalised from doing so if their circumstances have changed and they are now unable to afford to reinstate the full amount of lost service.

Pension contribution recycling - contributions of employers in relation to employees opting in who have received employers' contributions as pay during the 2015-2022 period.

Many higher earning members in scope of the McCloud Remedy may have opted out of the scheme to mitigate their annual allowance tax position. They may have opted out in circumstances where recycling of employer pension contributions was available, such as within primary care, and in circumstances where this was not.

In general, the impacts of pension tax were lower if scheme members were only members of the legacy scheme. Consequently, some taper-protected or unprotected members who incurred annual allowance tax charges as a result of being in both the legacy and reformed schemes during the remedy period would not have faced these charges had they remained solely within the legacy scheme. These members may

therefore have taken financial advice and opted out of pension scheme membership during the remedy period and/or employed pension contribution recycling - foregoing active Scheme membership in return for additional payments broadly equivalent to the locally held component of the employer's contribution (typically 16.7% with further deductions to take into account additional national insurance contributions and then subject to income tax). Had the discrimination not occurred, these individuals may not have chosen to opt out of the scheme or recycle employer contributions.

A UK BMA member viewpoint survey from December 2022 found that around 60% of GPs regarded the financial impact of pensions taxation as being a high influence on their thoughts about leaving the health service.

BMA Northern Ireland accepts that impacted members will have to make-up their individual contributions when reinstating any opted-out membership - it would be unfair for those who have accessed pension recycling to retain the recycled payment, with the employer paying the full amount of employer contributions for any reinstated service. However, the amount payable to reinstate lost service for a member who has accessed recycled contributions may be significant. As above, the decision to access pension recycling may have been a direct result of the unlawful discrimination that occurred, and they may not have done so had they remained in the legacy scheme.

We understand that paying to reinstate service may be offered by a lump sum, payment by instalments, or through a reduction in pension benefits. We would urge the Department of Health to offer maximum flexibility in terms of structuring these payments.

In addition, calculating the amount to be repaid is complex, particularly if recycling contributions has occurred, as any national insurance and income tax payments will also need to be considered. It is likely that members will incur accounting fees to determine the correct payment and the cost of this must be compensated for.

Furthermore, we are concerned that GP partners, as employers themselves, could be held responsible for any employer contributions if a member seeks to reinstate pension service. Whilst they may have previously received funding to cover these contributions, GP partners received this funding via the 'global sum' and they had a 'legitimate expectation' that the 2015 regulations applied to the remedy period (2015-2022) and would not be revisited. We do not, therefore, believe that it is appropriate for GP practices to be liable for these payments if an employee reinstates their service. Indeed, we believe this would be subject to legal challenge.

There is a risk that a liability for these payments many years after the event will result in a significant financial pressure, especially if the payment is required to be made via a lump sum. This may even result in some GP practices becoming financially unviable if a significant number of employees seek to reinstate service. Further complexity results from the fact that many GP practices that employed in scope members during the remedy period may no longer exist.

BMA Northern Ireland is concerned that the draft regulations do not provide a mechanism for recovering the additional payments from members who seek to reverse their retrospective opt-outs from the scheme. The proposed solution therefore is simply to give the scheme manager the power to waive or reduce contributions payable. This is obviously favourable to the member who has received additional payments though it does not seem particularly fair, especially to the employer that may, in any event, have a decision made against it.

BMA Northern Ireland believes that an express mechanism should be built into the regulations permitting the employer from being exempted from repaying sums that, but for a member's opt out, should be repaid.

We provide further feedback on the regulations relating to employer's retrospective contributions under question 3.

Choice 2

If members had been able to remain in the 1995 Section beyond 1 April 2015, then they may have made a different decision, or Choice 2 may have been conducted differently. Although members who took Choice 2 are being given the opportunity to revoke this decision, members who did not take Choice 2 will not be able to revisit this decision under the current draft regulations, and BMA Northern Ireland believes this should be considered to ensure that members are not suffering detriment.

Furthermore, we understand that members will be required to decide whether to revoke Choice 2 prior to the McCloud Remedy choice and potentially before McCloud pension savings statements will be available. This means that members will not have the necessary information to determine whether the 1995 or 2008 scheme is better for them once the McCloud Remedy is considered. For example, a member may decide to revoke their Choice 2 and revert to the 1995 section of the legacy scheme, only to find that many years down the line when they make their McCloud choice, that they would have been better off remaining in the 2008 section.

Taper-protected members

BMA Northern Ireland is concerned that fully protected and unprotected members will have the option to receive the same benefits as they were always building up, whereas taper-protected members have no option to retain the benefits they were originally entitled to when the discrimination occurred. Though this is putting members back in their pre-discrimination position, it remains worth noting as a consequence of part 2 of the remedy, as some members may have been better off with their tapered position.

Ill-health retirement

In relation to immediate choice election members, it is our understanding that if a member met the ill health criteria in both schemes, then they can choose which benefits to claim. If the member has claimed actuarially reduced benefits because they did not meet the ill health criteria, but met the ill health criteria in the other scheme, the member will be able to choose ill health benefits in the alternative scheme. Yet, an alternative option does not seem to arise in instances where actuarially reduced benefits in the other scheme are more favourable than the ill health benefits actually received. It does not appear possible to opt for the actuarially reduced benefits.

Additionally, where a deferred choice election member's application for early payment of deferred benefits was not accepted, but they are accepted under the rules of the alternative scheme, a deferred choice election will be deemed to have been made in favour of benefits under the alternative scheme. This does not appear to leave open to the member the option of sticking with the status quo.

Moreover, we note that transitional regulation 27 will be amended to ensure that where a member applied for ill health retirement in the 2015-2022 period as a member of the 2015 scheme, but then has service rolled back into the legacy scheme, the application will be reconsidered under the legacy scheme provisions and, if the legacy scheme criteria are met, the member will be entitled to receive a minimum of

the benefits that they would have received had they retired on health grounds from the legacy scheme on 31 March 2022. If, however, they would have been entitled to more favourable 2015 scheme benefits, those will be payable.

Yet, a member may have applied for ill health retirement at the beginning of the 2015 -2022 period, and this remedy therefore would seem to apply an underpin from 2022 only, rather than the date on which the application would have been granted, had it been considered under legacy scheme rules at the time.

Injury to feelings

BMA Northern Ireland believes that many members will have legitimate injury to feelings claims due to the age discrimination they were subjected to and could be entitled to claim compensation for the distress, anxiety and anger that was caused.

Communications for members and employers

Pensions is an incredibly complex subject matter, and members will inevitably have questions and be looking for advice on what the McCloud remedy means for them, and we anticipate that the BMA Pensions Department will receive a significant increase in member queries.

BMA Northern Ireland requests that the Department of Health and HSC Pensions Service ensure that the processes and member communications are clear, concise and easy to follow and detail exactly what decisions members need to make and their implications. Clear communications and guidance that can easily be signposted to online will enable the BMA to better support its members and reduce the amount of queries directed to the Department of Health and HSCPS.

Funding for financial advice

Members will need to find sufficient time beyond their busy day jobs to consider their pension position and many will also need to seek financial advice given the complexities. Therefore, it's important that appropriate timelines are given for members to make decisions, and the deadlines are flexible where possible.

BMA Northern Ireland believes that funding should be made available to compensate members for the fees that they will incur for the financial advice, as they would not have to be seeking this advice nor making these retrospective decisions had the age discrimination not occurred.

Question 3

Do you have any comments on any of the individual draft Regulations?

Employer contributions

As stated, BMA Northern Ireland is clear that it would not be fair to expect already overstretched GP practices to pay retrospective contributions where financial decisions have already been made to spend sums elsewhere, that would have gone on employer contributions had the individual not opted out. We are disappointed that there does not appear to be any recognition of this issue within this consultation. These GP practices relied, to their detriment, on the unequivocal representation from government that the 2015 Regulations applied to service in the 2015-2022 period and they would not be revisited. We believe that there is potential for a public law challenge on the grounds of breaching 'legitimate

expectation' to require GP practices to meet the cost of employers' contributions on reinstatement, when the remedy is in response to an act of discrimination which is not the fault of employers.

Regulation 8 does provide the power on the scheme manager to waive or reduce contributions, however we do not believe the wording is strong enough. For example, additional wording, shown below in bold red font, could be added to 8(7):

The scheme manager may waive or reduce contributions payable by an employing authority where pensionable service has been reinstated following an opted-out service election under this regulation, taking into consideration

(a) The particular circumstances of the employing authority, and

*(b) A presumption in favour of recovering the liability unless it is uneconomic **or prejudicial to the operation of the employing authority** to do so.*

Default positions and Scheme Manager discretions

A number of individual regulations have default positions in the event that a choice is not received from a member or their representative within a given timeframe. BMA Northern Ireland believes that in circumstances where a member has a valid reason for not responding in time, they should be able to make this retrospective choice at a later date.

Some individual regulations refer to the Scheme Manager's discretion, including the ability to extend a specified time period if considered 'reasonable'. We would highlight the importance of such default positions and discretion being transparent, ideally with published guidance to show how discretionary cases will be considered, so there is as much consistency as is possible for members.

Measuring timescales for elections

The time periods mentioned in the regulations for various elections also refer to letters and applications being 'provided', 'received' and 'issued' in different places. There is a concern that setting a deadline for a member based on when a communication is 'provided' or 'issued' may not enable them to have the benefit of the full allotted time period if they do not actually receive the communication promptly.

Consultation with Scheme Actuary

There are issues for which the Scheme Manager may consult with the Scheme Actuary before coming to a final decision, for example, choosing 2015 scheme equivalent benefits where these are determined to be beneficial, switching additional pension from one scheme to the other, and re-evaluating transfer value payments. BMA Northern Ireland again stresses the importance of adopting a transparent process for such consultations and published guidance.

The BMA does also have feedback on some of the individual regulations:

Remediable Service Statements (regulation 6)

Members crystallising benefits between 1 October 2023 and 1 April 2025 will receive an immediate choice Remedial Service Statement (RSS). For most of these members, this will be the first time they are presented with actual numbers related to their remedy benefits. Connected to this, most members will not receive an RSS for many months (backstop date 1 April 2025) so there is a potentially long period without personal figures to inform a member's understanding of their own position.

BMA Northern Ireland is interested to know if members will have the opportunity to view their rolled back service before receiving their first RSS – which may be when they are making an immediate choice before 1 April 2025. Whilst we are aware that a calculator may be made available, online pension tools can often be difficult for members to access and to understand without sufficient support.

Reinstated service (regulation 8)

BMA Northern Ireland supports a low evidential threshold for applications to reinstate opted-out service, to reduce the administrative burden, limit inconvenience to members, and encourage scheme membership in general.

This is another area where the Scheme Manager has some discretion, in this case whether to accept each requested reinstatement from members or not. BMA Northern Ireland would welcome further clarity on how this discretion will be exercised, given the low evidential threshold, so that it is fair for all members no matter who their Scheme Manager is.

Also, the intentions behind the regulations on reinstating opted-out service are silent on a number of complicated matters which the BMA believe are important and need further clarification:

- Employers which no longer exist
Clarification and guidance are needed for members who wish to reinstate service but whose associated employer no longer exists. This should not prevent these members from reinstating service should they wish to.

- Recycling of pension contributions
One area which could present significant difficulties for reinstating opted-out service is where members were in receipt of recycled contributions, such as GPs (as described above). The draft regulations do not recognise the possibility that such policies may have been in operation during the remedy period. Given that many opt-outs have been due to pensions tax issues, there may be a significant number of members in this position who now wish to opt back in. Unpicking such recycling transactions could be very complex, but it is essential that the Department of Health considers this and provides guidance on employer and member liabilities.

- Members who reduced hours because of the discrimination
The regulations consider members who opted out of the scheme due to the discrimination, but do not consider that some members may have opted to reduce their hours or programmed activities because of the discrimination. For example, members may have reduced hours to reduce their pension growth in the reformed scheme but they may not have needed to, had the legacy scheme been available to them. Such contingent decisions should be given due consideration.

- Members who opted out and died without death in service benefits
Another area which the regulations do not appear to consider is members who opted out of the scheme due to the discrimination and who have died while still working for the Service. These members' dependants may have been entitled to death in service benefits but for the discrimination.

Early Retirement Reduction Buy Out (regulations 16-24)

The option for Early Retirement Reduction Buy Out (ERRBO) and additional pension payments to be carried forward has been addressed in part by the consultation, but the options appear limited.

It is our understanding that members electing for legacy scheme benefits must forgo their ERRBO rights entirely except for the refund of contributions. It is presumed that a member who purchased ERRBO rights will find it easy to persuade their Scheme Manager that they would have purchased additional benefits in the legacy scheme in the relevant period. We believe that guidance needs to be produced for decision-makers so that this process is fair for members.

There does not seem to be a mechanism for retaining employers' contributions to ERRBO rights. They are not returned to members with the contributions and there is no mechanism for converting them directly into alternative rights for those who elect to receive legacy scheme benefits in respect of 2015-2022.

What is more, there is no option to have ERRBO rights 'paid forward' into the 2015 scheme. Presumably the only option under the current proposals is to leave it to individuals to try to recover any arrangement made with their employers and to replicate that in respect of future service. Of course, this may not be possible for those who have now left service.

In terms of members who gave up added years' contracts because of the tax implications, or were dissuaded from continuing other voluntary member contributions, there is the opportunity to apply for a remedial arrangement under regulation 24. It is vital this is included in any policy and/or guidance that is developed.

We believe that members should be able to waive the return of their ERRBO contributions until their deferred choice election. However, should a member choose the legacy scheme for their remediable service, the refund of contributions is of significantly lower value than the benefit they would have purchased in the reformed scheme. Members should be able to use their waived ERRBO contributions to purchase a form of additional benefits of equivalent value to the improved reformed scheme benefits.

Additional Pension (regulations 20, 21)

Rollback will convert any remediable reformed scheme Additional Pension (AP) into legacy scheme AP. Where a member later makes a reformed scheme election, the regulations state that AP will be reconverted back to reformed scheme AP on an 'equivalent value' principle. BMA Northern Ireland strongly believes that the conversion terms should be the same as those used to convert the reformed scheme AP to legacy scheme AP originally, so that the nominal amount (excluding revaluation) is unchanged as a result of rollback and deferred choice. Anything else could be deemed unfair to members.

There may also be an interaction of AP and annual allowance calculations. As such, BMA Northern Ireland would appreciate further clarity on the tax treatment in such cases.

Transfers (regulations 33,34)

Where transfers are rolled back from the reformed scheme to the legacy scheme, then back again when making a deferred choice election, it seems reasonable for the meaning of 'equivalent value' benefits to mean their original value from the original transfer.

Choice 2 (regulation 61)

Allowing members to revoke Choice 2 should be accompanied by giving those who were eligible but did not originally opt for Choice 2.

The regulations currently set out Choice 2 revocation as an immediate and irreversible decision. We would ask whether this decision could be delayed until the member's position at their deferred choice election is clear.

Partial retirement (regulation 64)

BMA Northern Ireland understands that the regulations state that members opting for partial retirement must make their deferred choice election at the point of their first partial retirement. We do not think that it is fair that members are being forced to lock in their choice at the first access date, given that their first partial retirement date could be more than a decade before their full retirement. During this period there are a lot of unknowns for the member, both in terms of personal circumstances and pay progression, which could affect which option they would prefer at full retirement.

BMA Northern Ireland believes that, in order to mitigate this, affected members should be given the option to make the McCloud choice either at the point of partial retirement or when they fully retire from the pension scheme.

We note that whilst partial retirement is not currently due for implementation in Northern Ireland for those in the 1995 scheme, as in other UK nations, the Department has stated that it will consider it when in a position to do so. At such time, the McCloud remedy will need to be considered.

Question 4

Are there any further considerations and evidence that you think the department should take into account when assessing any equality issues arising as a result of the proposed changes?

Funding for financial advice

As mentioned previously, BMA Northern Ireland believes funding should be made available to members to compensate for financial advice sought in order for them to make informed retrospective decisions on what is a very complex subject matter. Had the age discrimination not happened, they would not need to be seeking this advice. Many members will, reasonably, have a limited understanding of the HSC pension scheme and what the McCloud remedy means for them and could make ill-informed decisions as a result. Furthermore, some lower paid members, or those in certain other circumstances, may not be able to afford financial advice.

Reinstating opted out service

As mentioned previously, there is a risk that the option to reinstate opted out service may only be more affordable to higher paid employees, with some unable to afford this option in current circumstances. This presents prospective equalities issue. One possible solution would be to allow members the option to reinstate less than the full period of opted-out service if the full period is unaffordable to them.

Communications

Communications relating to the McCloud remedy should be written in plain language and in a clear and concise way to ensure that all members can easily follow the information being shared with them, especially if English may not be their first language. Members should be supported as far as possible

to make informed decisions and should not be at a disadvantage or out-of-pocket as a result of complex correspondence.

Where possible members should be sent one single letter detailing the decisions they will be expected to make and the deadlines associated with each, rather than receiving several different letters over a period of time. It would also be helpful for the BMA to receive in advance a timeline outlining when communications will be issued and a summary of what they will say, so we can brief staff in our BMA Pensions Department and be as prepared as we can to answer any member queries.

Deferred members and designated persons

There will be more communication channels available for contacting active members and scheme opt-outs still working for HSC employers, compared to deferred members who have left HSC employment. Extra effort must be made to make contact with these deferred members who have left the health service.

Additionally, where a designated person is making a decision on behalf of a deceased or incapable member, they may have little-to-no knowledge of the scheme and the McCloud remedy, and may need additional guidance (provided sensitively) to help them make informed decisions. We would welcome dedicated resource ensure such additional support is provided.