

## The British Medical Association's response to the National Health Service (Scotland) Pension Scheme Consultation on implementing the 2015 Remedy

July 2023



## FOREWORD

The British Medical Association (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. The majority of BMA members in Scotland are members of the NHS (Scotland) Pension Scheme. This is a response from the BMA to the consultation on the McCloud remedy part 2 and the proposed changes to Scheme Regulations.

We would from the outset emphasise our disappointment at the organization of the consultation undertaken by the Scottish Public Pensions Agency (“SPPA”). Having initially had the English and Welsh version of the consultation, we have had legal advice that has highlighted that the wording of this consultation is broadly similar to that particular consultation bar an increased number of spelling and other errors, and the removal of three important sections, which we will detail in our response below.

In order to therefore ensure that our full opinion is conveyed as clearly as possible in response to the consultation, we have attempted to deal with the points raised rather than necessarily addressing the increased number of questions provided within the consultation. We hope this is reasonable and are happy to discuss our response and our approach further. We suggest that the Scottish Public Pensions Agency provide a further opportunity for contributors to respond to the consultation once the various errors have been addressed.

## RESPONSE TO THE CONSULTATION

### INTRODUCTION AND IDENTIFICATION OF MISSING PARTS OF THE CONSULTATION

In terms of firstly addressing whether the draft regulations deliver the policy objectives and requirements set by the Public Service Pensions and Judicial Offices Act 2022 the BMA believes that most of the draft regulations deliver the desired objectives, except where feedback on individual regulations are provided in this response.

However, we would note and emphasise our disappointment that 3 separate sections of the English and Welsh consultation do not appear in this consultation, these being Parts 5 (Divorce or dissolution), 7 (Taxation) and 10 (Immediate Detriment Cases) of the E&W draft regulations.

In relation to divorce and dissolution, the current draft of the Scottish regulations merely has a placeholder. The consultation document says that the draft will be updated to include draft Part 5 provisions. As far as we are aware, no updated draft is yet available, and given that the consultation document said that an update was expected within two weeks of the start of the consultation period (which was some weeks ago) and given the impending closure of the consultation period, we would request an updated draft as soon as possible, as well as considering the opportunity to extend the consultation period to allow proper consideration of the draft Part 5 provisions when available, given the failure of the SPPA and/or the Scottish Ministers to meet this deadline.

Part 7 of the E&W draft regulations (regulations 51-54) contains provisions as to certain tax consequences of the McCloud remedy. There is no equivalent in the Scottish draft regulations, and nor is there reference to it, or any explanation as to why it is not covered, in the SPPA consultation document. We would therefore ask why there is no equivalent to Part 7 in the E&W version, and what, if any, provisions it is intended should apply to members of the Scottish schemes.

Finally, Part 10 of the E&W draft regulations (regulation 63) and Schedule 2 contain provisions which apply to members who have already obtained an immediate detriment remedy (as defined in section 32 of the Public Service Pensions and Judicial Offices Act 2022 which does not come into force, other than for limited purposes, until 1 October 2023). As with the taxation provisions discussed above, it is unclear why there are no

equivalent provisions in the Scottish draft regulations. We would therefore ask why there is no equivalent to Part 7 in the E&W version, and what, if any, provisions it is intended should apply to members of the Scottish schemes.

In furtherance to these points, we will now address the consultation in general and identify areas which require attention from the Government.

## **1. Position for members whereby age discrimination would not have occurred**

The BMA understands that putting members in the position they would have been in had the age discrimination not occurred is a complicated task. 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. The BMA 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, the BMA believes 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. In practice, if it was not for the discrimination, a member could have chosen to remain in the Scheme for less than the full period, for example opting out at a later date within the remedy period due to 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.

The BMA believes there should be more flexibility in the options available, as some members may argue that they only want to reinstate part of their opted-out service. The BMA asks the Scottish Ministers to adopt a flexible position which gives members the opportunity to reinstate a certain amount of service that they arguably would 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 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 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 entered into “pension recycling” agreements in which they forego active Scheme membership in return for additional payments broadly equivalent to the locally held component of the employer’s contribution (typically 14.3% 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 access “recycled employer contributions”.

A 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.

Employees will rightly have to make employee contributions when reinstating any opted-out membership. The BMA recognise that 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 Scottish Ministers to offer maximum flexibility in terms of structuring these payments. In addition, calculating the amount to be repaid is complex, particularly when recycling of employers recycling contributions has occurred, as any national insurance and income tax payments will 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, employers may be liable for any employer contributions if a member seeks to reinstate pension service. Although employers may have previously received funding to cover these contributions, there is a significant time gap between when these payments were received and the point at which an employee seeks to reinstate service. There is a risk that a liability for these payments many years after the event will result in a significant financial pressure for employers, especially if the payment is required to be made via a lump sum.

This is a particular issue for GP partners and may even result in some GP practices becoming financially unviable if a significant number of employees seek to reinstate service. Moreover, as 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 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. Further complexity results from the fact that many GP practices that employed in scope members during the remedy period may no longer exist.

The BMA 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.

The BMA 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 later in our response.

### **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 the BMA 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**

We would also highlight that fully protected and unprotected members will have the option to receive the same benefits as they were always building up, whereas tapered protection 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 feels 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 meet the ill health criteria in the other scheme, the member will be able to choose ill health benefits in the alternative scheme. However, an alternative option does not seem to arise, namely that if actuarially reduced benefits in the other scheme are more favourable than the ill health benefits actually received, it does not appear to be 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 regulations 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 he 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.

However, 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**

The BMA 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.

The BMA requests that the Scottish Ministers 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 help the BMA to help its members and reduce the number of queries that come back to the Scottish Ministers.

### **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, so it is important that appropriate timelines are given for members to make decisions, and the deadlines are flexible where possible.

The BMA believes that the Scottish Ministers should offer funding 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.

## **FURTHER COMMENTS ON THE INDIVIDUAL DRAFT REGULATIONS**

### **Employer contributions**

In the BMA's response to the original McCloud consultation in 2020, we strongly made the point 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 concession made for employers in this consultation (March 2023). These GP practices relied, to their detriment, on the unequivocal representation by the 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 by the Government and not the fault of employers.

The proposed regulations do 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 in bold red font, could be added to point 15.5: *Where a scheme manager considers applying these powers, the scheme manager must comply*

with the requirements set out in the PSP Directions 2022 in that they must:

- (a) Have regard to the particular circumstances of the member (or personal representative) by whom the liability is owed
- (b) Apply a presumption in favour of recovering the liability unless it is considered uneconomical 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. The BMA 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. The BMA 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**

Members crystallising benefits between 1 October 2023 and 1 April 2025 will receive an immediate choice 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.

The BMA are 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**

The BMA 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. The BMA would be interested

to receive 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 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 employers' contributions**

One area which could present significant difficulties for reinstating opted-out service is where members chose to receive recycled employer contributions (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 Scottish Ministers considers this and provides guidance on employers and members 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, to reduce their pension growth in the reformed scheme if they would 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**

The option for 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 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 the proposed regulations. We believe that it is vital this is included in any policy / 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 feels of significantly lower value than the benefit they would have purchased in the reformed scheme. We suggest that 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. Indeed, in our original response to the McCloud Consultation, the BMA advocated that those who had purchased ERRBO but elected for legacy scheme benefits could have these ERRBO payments converted into additional pension. This was acknowledged in the Government response as something that would be considered but the current regulations are silent on this.

#### **Additional Pension**

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. The BMA 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 so the BMA would appreciate further clarity on the tax treatment in such cases.

#### **Transfers**

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**

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**

The BMA 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.

The BMA believe 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. The BMA are awaiting guidance on how partial retirement will be implemented and would highlight the need for this guidance to take the McCloud remedy into consideration.

We would also welcome confirmation that the regulations ensure that partial retirement cases will not attract an artificially large pension input amounts (which would undermine the policy intentions of the remedy) in the tax year after partial retirement is first accessed.

#### REQUEST FOR FURTHER CONSIDERATIONS AND EVIDENCE THAT THE SCOTTISH GOVERNMENT SHOULD CONSIDER

##### **Funding for financial advice**

As mentioned previously, the BMA 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. Some lower paid members, or those in certain circumstances, may not be able to afford financial advice, and if they have limited understanding of the NHS Pension Scheme and what the McCloud remedy means for them, they will be at a disadvantage and as a result may make ill-informed decisions.

##### **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, which presents an equalities issue. One possible solution would be to allow staff 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 English 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 NHS employers, compared to deferred members who have left the NHS. Extra effort must be made to make contact with these deferred members who have left the NHS.

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 (conducted sensitively) to help them make an informed decision. Perhaps there could be a dedicated team to ensure such additional support is provided.