



Scottish Public
Pensions Agency
Buidheann Peinnseanan
Poblach na h-Alba

**National Health Service
(Scotland) Pension Scheme
Consultation on implementing the
2015 Remedy**

About This Consultation

Overview

This consultation is seeking views on draft regulations to implement the retrospective phase of the 2015 remedy. The regulations are intended to support delivery of The Public Service Pensions and Judicial Offices Act 2022 (PSPJOA 2022). The PSPJOA 2022 and these Regulations are part of a package of measures to address the age discrimination that was identified by the Courts in the transitional protections afforded to some scheme members in public service pension schemes.

While the Scottish Ministers have executively devolved functions in relation to National Health Service (NHS) pensions in Scotland, occupational pensions, including public service pensions, are a reserved matter outside the powers of the Scottish Parliament. The Scottish Ministers must therefore implement the policy reflected in PSPJOA 2022.

Duration of Consultation

This consultation will run from 25 May 2023 ending on 23 July 2023

How to respond

Please use the consultation response form and once completed send to sppapolicy@gov.scot before midnight on the closing date.

Alternatively, responses can be posted to:

National Health Service (Scotland) Pension Scheme Consultation



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Further information

If you are unable to access an electronic version of the document, please write to the above address and a paper copy will be provided.



Data Protection Statement

The Scottish Public Pensions Agency (SPPA) is an executive Agency of the Scottish Government and forms part of the legal entity of the Scottish Ministers (Framework Document).

This framework of statutory powers and responsibilities, as agreed with the Scottish Ministers, enables SPPA to undertake the role of data controller for the processing of personal data which is provided as part of your response to the consultation. Any response you send us will be seen in full by SPPA staff dealing with the issues which this consultation is about or planning future consultations.

The process allows informed decisions to be made about how SPPA exercises its public function.

Where SPPA undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g., a research organisation or a consultancy company). Any such work will only be undertaken under contract. SPPA use Scottish Government standard terms and conditions for such contracts which set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, the SPPA intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response.

If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

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-
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For further details about the information the SPPA holds and its use, or if you want to exercise your rights under the GDPR, please refer to our Privacy Policy in the first instance or contact:

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1. Background

1.1. The Public Service Pensions Act 2013 (the 2013 Act) introduced reforms to public service pension schemes. The aim of the reforms was to implement the recommendations of the [Independent Public Service Pensions Commission: Final Report](#)¹, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced, designed to make public service pensions sustainable through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.

1.2. The 2013 Act required responsible authorities, including devolved governments, to make regulations establishing the reformed schemes. The CARE schemes in Scotland were all introduced with effect from 1 April 2015. The final salary pension schemes (referred to as “legacy schemes”) were closed on 31 March 2015 and scheme members could no longer accrue any pension in them unless they fell into the category of what is known as ‘transitional protection’. All other members joined the reformed scheme, in this case the NHS Pension Scheme (Scotland) 2015 (the reformed scheme).

1.3. Transitional protection provided for scheme members who were aged within 10 years of their NPA on 31 March 2012, to be “fully protected” and allowed to remain in their legacy scheme(s). “Tapered protected” members who, on 31 March 2012, were aged between 10 and 13 years 5 months of their NPA were allowed to remain in their legacy scheme for a period before transitioning to the reformed CARE scheme before 31 March 2022.

¹ This is also known as ‘The Hutton Report’.

1.4. Following reform, members of the judicial and firefighters' pension schemes challenged the transitional protection element of the reforms. This case, known as McCloud/Sargeant, was decided in December 2018 when the [Court of Appeal found](#) that the transitional protections unlawfully discriminated against younger members, as transitional protection was only offered to older scheme members. The Courts required that this unlawful discrimination be remedied by the government. In a [written ministerial statement](#) the UK government accepted the ruling had implications for all public service schemes that contained similar transitional protection arrangements, including the National Health Scheme (Scotland), and have since [consulted extensively](#) on the mechanism for the remedy.

1.5. Following consultation, the UK Government introduced primary legislation, (PSPJOA 2022), on 10 March 2022. The provisions in this Act mean that all scheme members, regardless of transitional protections, who continued in service from 1 April 2022 did so as members of the reformed scheme. The National Health Service Superannuation Scheme (Scotland) Regulations 2011 and The National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013, both known as "the Legacy Scheme," closed to all members for future service from 31 March 2022. The period between 1 April 2015 and 31 March 2022 where scheme members may have built up pension benefits in any one of the above schemes² is known as 'the remedy period'. Eligible scheme members will have a choice of pension benefits for the remedy period³.

² This is dependent on a scheme member's personal transitional protection status. Between 1 April 2015 and 31 March 2022 protected members will have built up pension in their legacy scheme while unprotected scheme members will have built up pension in the reformed scheme. Tapered protected members may have built up a mixture of both legacy and reformed scheme pension during the remedy period.

³ The remedy will allow all eligible members to choose whether they wish to receive legacy or reformed scheme benefits in relation to the remedy period. Members can choose either legacy scheme benefits for the full period or reformed scheme benefits, they cannot opt for a mixture of the two.

1.6. The primary (and secondary) legislation removes the discrimination as all eligible members, irrespective of age and proximity to NPA, will now have accrued rights in their legacy schemes for the remedy period. All eligible active and deferred members will be given a choice of preferred pension benefits for the remedy period under the provision known as deferred choice underpin or deferred choice (DC). Pensioner members and representatives of deceased members will be given what is referred to as an immediate choice (IC).

1.7. Secondary legislation in support of the Act will be made in two phases. The first phase of secondary legislation delivered the “prospective remedy”. That is, all active scheme members moved to the reformed scheme from 1 April 2022 and the legacy schemes were closed to future accrual from 31 March 2022⁴. This ensures that from 1 April 2022 all NHS staff who are in pensionable service will be accruing future benefits in the same scheme. Regulations delivering the first phase were consulted on between November 2021 and February 2022 and came into force on 1 April 2022⁵.

1.8. The second phase of secondary legislation is the subject of this consultation and addresses the retrospective changes needed to deliver remedy in full. These regulations will deliver changes such as:

- implementing DC and IC
- facilitating the return of remediable service to the legacy scheme
- establishing how remedy information must be provided to recipients
- facilitating the correction of pensions already in payment, including the underpayment and overpayment of pensions and,

⁴ This moved those who are not already members of the 2015 Scheme. In all cases these will be members who held full transitional protection and were classed as protected scheme members. Those previously classed as Unprotected and Tapered Protected will already be accruing pension as members of the 2015 Scheme.

⁵ SSI 2022/100 – The National Health Service Pension Schemes (Scotland) Amendment Regulations 2022

- rectifying the pension contributions for pension scheme members, pensioners and dependants in relation to voluntary additional contributions arrangements.

2. The consultation and who we want to hear from

2.1. The provisions of the NHS Pension Scheme are set out in Regulations, which are a form of secondary legislation. Provisions can be amended or replaced by new Regulations drawn up in accordance with the powers under, and requirements of, the PSPJOA 2022, the 2013 Act and the Superannuation Act 1972.

2.2. This consultation focuses on the proposed second set of regulations known as “the retrospective regulations.” These regulations will enact the various complex elements of pension remedy that will address the retrospective elements of the 2015 remedy as set out in the PSPJOA 2022.

2.3. This consultation welcomes views from all interested parties on the draft regulations and policy intent contained in this document. We are particularly interested in feedback from those who work in the NHS and their representative bodies, including associated trade unions, and employers, and others who have an interest in NHS pensions and wider public service pensions.

3. The Remedy Period and Remediable Service

3.1. The remedy period is defined as the period between 1 April 2015 and 31 March 2022. This is the period in which the age discrimination occurred. The discriminatory rules ended when the differential treatment based on age ended on 31 March 2022, with the transfer of all remaining members in the legacy schemes to the reformed

scheme. The choice of scheme benefits, which is the core of the remedy, is only offered in relation to pensionable service which took place in this remedy period.

3.2. Remediable service is defined in section 1 of the PSPJOA 2022, and eligibility is subject to four conditions:

1. The pensionable service took place in the period between 1 April 2015 to 31 March 2022 (the remedy period)
2. The pensionable service is either from the legacy scheme or was accrued while the member was considered as being in the reformed scheme (i.e. was considered unprotected for some or all of the service)
3. The member was a member of a legacy scheme on or before 31 March 2012
4. The member does not have a disqualifying break of service⁶

3.3. Remediable service includes legacy and reformed scheme service in the remedy period. This is set out in Part 1 of the draft Regulations as “remediable service”.

4. Rollback to the Legacy Scheme

4.1. Service built up by eligible members of the reformed scheme will be placed back into the legacy scheme retrospectively for the remedy period. This is known as ‘rollback’ because from 1 October 2023, remediable service in the reformed scheme is treated as never having been pensionable in that scheme and is instead treated as always having been pensionable service under the legacy scheme. This means the remediable service is effectively rolled back to the section of the legacy scheme that the eligible member was a member of immediately before they moved to the

⁶ a disqualifying break is defined as a break of more than five years between membership of a public service pension scheme, or five years or more when the gap is between NHS pension schemes (i.e.

reformed scheme. Section 2(1) of the PSPJOA 2022 establishes the rollback of remediable service to the legacy scheme.

5. Revocation of elections to convert pensionable service in “Choice 2”

5.1. In anticipation of the pension reforms coming into force on 1 April 2015, active unprotected or tapered protected members of the legacy scheme who had service in the 1995 section of the legacy scheme were offered a choice to elect to move their previous accrual in the 1995 section to the 2008 section. This was known as a ‘Choice 2’ election and it took effect immediately before the member joined the reformed scheme.

5.2. This choice was offered because it was recognised that some members who were joining the reformed scheme on or after 1 April 2015 and expected to be working closer to the reformed scheme normal pension age could be better off with their legacy scheme accrual in the 2008 section rather than the 1995 section. The 2008 section has a higher accrual rate and includes late retirement factors so it would be beneficial for some members to move to this section of the legacy scheme.

5.3. Some members who made a ‘Choice 2’ election may not have done so had they been able to remain in the 1995 section of the legacy scheme post 1 April 2015 (or later transition date for tapered protected members). Part 10 of the draft regulations makes provision for members in this position to retract their election. If a member decides to retract their election, their legacy scheme service accrued before the remediable service period will be returned to the 1995 section and will be treated as if it was never converted to 2008 section benefits.

5.5. The member will then, at IC or DC have the choice of benefits being accrued during the remediable service period between either reformed scheme benefits or 1995 section legacy scheme benefits. Where a member decides not to revoke their

'Choice 2' election then that choice will be between reformed scheme benefits and 2008 section legacy scheme benefits.

5.6. The SPPA will write directly to members who made an election during the Choice 2 period notifying them of their right to retract their original decision and informing them how to do this. For pensioners making an IC election, it is intended to manage this with their IC. Where a member is to make a deferred choice election the SPPA will provide this information in a notification no later than 31 March 2025. Members will have a period of three months, from the date the notification is issued, to notify the SPPA if they want to revoke their Choice 2 election, or longer where the scheme administrator considers it reasonable.

6. Deferred choice to receive new scheme benefits

6.1. Deferred choice (DC), is set out in Section 10 of the PSPJOA 2022 and Part 3 of the draft Regulations. DC applies to eligible members who are not yet in receipt of their pension benefits. This includes active and deferred members of the pension scheme. At retirement, eligible members will make a choice between legacy or reformed scheme benefits for the remedy period. The result of the choice will be reflected in the value of the benefits put into payment for the remedy period. As a result of rollback, benefits accrued in the remedy period are paid from the legacy scheme but will be calculated according to the scheme that was chosen.

6.2. The scheme manager must specify an election period⁷ during which time the member must make their choice. This must not be earlier than one year before the date it is reasonably expected that, if a deferred choice is made, reformed scheme benefits would become payable in relation to the member's remedy period service. The choice is deemed to take effect immediately before the member becomes a

⁷ Section 11 – PSPJOA 2022

pensioner, or where a member dies in service, the choice is deemed to have taken effect immediately before the member died.

6.3. If a member does not make a choice within the election period, the scheme manager may use powers in Section 12 of the PSPJOA 2022 to determine which scheme benefits to pay (see “deemed election” in section 7 below).

6.4. To allow the member to make an informed choice a statement of DC benefits will be issued to the eligible member on request (generally through an application for retirement benefits). This will be sent to the member in the form of a remediable service statement (RSS) (see section 8 on RSS in this consultation). We propose that the election period in which the member must make their choice between legacy and reformed scheme benefits, is set at three months from the RSS being provided. A DC is irrevocable.

6.5. In circumstances where an eligible member has died before making a choice, the regulations provide for a person to make an election in respect of the deceased member’s benefits. The regulations describe such a person as an “eligible decision maker.” The election period for an eligible decision maker is also proposed to be set at three months from the RSS being issued. Part 3 of these draft regulations set out who can make a DC for a deceased member on or after 1 October 2023.

6.6. There may be limited circumstances where an eligible member retires or dies on or after 1 October 2023 without having made a DC. Provision is proposed in part 3 of the draft regulations to provide that this group can still make a deferred choice even after they become a pensioner, or after any death benefits are paid to the beneficiaries of deceased members. This cohort of members will have retired with entitlement to legacy scheme benefits for their remediable service. Those legacy scheme benefits will remain in payment unless and until a DC election for reformed scheme benefits is made. Similar to the provision set out above, the election period

for these members is proposed to commence when the RSS is provided and will last for three months.

7. Immediate Choice

7.1. Immediate Choice (IC) is set out in Section 6 of the PSPJOA 2022 and in Part 3 of the draft Regulations and applies to eligible members who are already in receipt of pension benefits before 1 October 2023. This includes pensioner members and representatives of deceased pensioner members. Under IC, members will make a choice as soon as is practicable on or after 1 October 2023. A time limit of one year from receipt of an RSS is set in the PSPJOA 2022 and eligible members must make their IC choice within that time limit⁸.

7.2. Eligible pensioners who will make an IC do not need to apply to be able to make their choice. The SPPA will send each eligible member an RSS within the statutory period, 1 October 2023 to 31 March 2025. It is the intention of the SPPA to prioritise the provision of remediable service statements to IC members who are anticipated to be in a position of immediate detriment, that is they may be in receipt of a rate of pension that is lower than the rate they would have claimed had they not been subject to the discrimination. In particular, that category could include pensioner members who have retired on grounds of ill-health, and those who retired with mixed service⁹ who may wish to receive benefits solely from their legacy scheme.

7.3. An IC decision is irrevocable and is deemed to take effect immediately when the member first became a pensioner, or if the member died before becoming a pensioner, then immediately before the member's death. Underpaid or overpaid

⁸ This is established in Section 6 of the PSPJOA 2022. The scheme manager retains discretion to set a later time where reasonable to do so.

⁹ These are members who were termed as holding tapered transitional protection so were members of the legacy scheme after 1 April 2015 but transitioned to the reformed scheme before 1 April 2022

pension benefits that arise from an IC decision will be settled with the eligible pensioner (or for deceased pensioners the eligible decision-maker).

7.4. Underpayments or overpayments may occur because the legacy scheme and reformed scheme have different accrual rates, different lump sum rules, different normal pension ages and different bereavement benefit amounts. It is also important to note that eligible members who were considered tapered protected and have since retired with a mix of legacy and reformed scheme benefits in the remedy period cannot keep their mixed benefits and must therefore make a choice between all legacy scheme benefits or all reformed scheme benefits in the remedy period.

7.5. Where an IC leads to an increase in the value of the pension benefits then pension arrears will be payable. Where an IC leads to a reduction in the value of the pension benefits then the member will be required to pay the net overpaid amount back to the scheme. Liabilities and payments are set out in more detail in section 15 of this consultation.

8. Deemed Election

8.1. If an eligible member or eligible decision-maker fails to make a choice of benefits before the end of the election periods set out above, the PSPJOA 2022 provides that the scheme manager may deem an election to have taken place. Should a retiring member who is eligible to make a DC fails to communicate a decision in the election period, the benefits that are to become payable will need to be determined. The decision will be part of the retirement application process so it is expected that members will comply with the requirement to make a choice in the election period. Where the member is making an IC choice, or where an eligible decision maker must make a choice, the default position that SPPA expects to adopt is to deem that legacy scheme benefits have been chosen. The scheme

manager will not ordinarily deem that the failure to make a choice is treated as an election for reformed scheme benefits.

8.2. However, there may be some exceptional cases where it is appropriate for the scheme manager to use discretion as decision-maker to take a different approach. In these cases, an assessment of the total value of the pension benefits (pension and lump sum) will be undertaken. Where it appears that reformed scheme benefits may be more beneficial to the recipient following consideration of the total value of the pension benefits, the scheme manager will consult with the scheme actuary.

8.3. If it is established that the overall pension value is greater when based on remediable service in the reformed scheme rather than legacy scheme, then an election for those benefits will be deemed to be made on behalf of the member (or other decision-maker).

9. Remediable Service Statements

9.1. The PSPJOA 2022 requires scheme managers to provide all eligible members with a remediable service statement (RSS) by 1 April 2025 or such later date as the scheme manager considers reasonable after considering the circumstances of a particular member or class of members. The RSS is intended to ensure that these members, pensioners, or the beneficiaries of deceased members have sufficient information to make an informed choice of which benefits they wish to receive for their remediable service. The information provided in each RSS must comply with the requirements of the PSPJOA 2022 and the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 (PSP Directions 2022). The provisions for RSS are set out in Part 2 of the draft Regulations.

9.2. It is important that eligible members are provided with accurate and relevant information that meets their specific circumstances. The content, timing and

frequency of an RSS will therefore depend on whether the eligible member is to make an IC or a DC. The format of the RSS will be tailored to the circumstances of particular groups of members.

RSS for active and deferred members

9.3. This RSS will set out dual benefit information based on the remediable service in the member's legacy scheme and for reformed scheme equivalent benefits. The timing for this RSS will align with the requirement to provide active scheme members with annual scheme information by 31 August each year¹⁰, so the RSS will be incorporated into the Annual Benefit Statement (ABS) for these members. This means that the first statement will be issued to this group by 31 August 2024.

9.4. Active members will then receive an annual RSS combined with their ABS until they reach the point of retirement or other benefits crystallisation event that means they must make a deferred choice. Deferred members (those who are no longer contributing to their pension but have not claimed their pension benefits) will also receive a RSS after rollback. However deferred members are not automatically entitled to receive an ABS every year however can request one each year, and the same entitlement will apply to an RSS.

Deferred choice election RSS for active, deferred, and deceased members

9.5. Eligible active or deferred members who, on or after 1 October 2023, apply to retire and access their pension benefits, will be given a DC RSS. The information provided in this statement will enable the active or deferred member to make a choice about which set of benefits they wish to receive in respect of their remediable service.

¹⁰ section 14 of the Public Service Pensions Act 2013

9.6. Where an active or deferred member dies on or after 1 October 2023, the scheme manager will provide a DC RSS to an eligible decision-maker¹¹, and they will make the choice in respect of the deceased member's remediable service.

Immediate choice election RSS for pensioner and deceased members

9.7. Eligible pensioners or the beneficiaries of deceased pensioners who retired before 1 October 2023, will be provided with an IC RSS within 18 months of 1 October 2023 (or such later date as the scheme manager considers reasonable after considering the circumstances of a particular member or group of members).

9.8. The IC RSS will illustrate the effect of choosing alternative scheme benefits to those already in payment and to be paid in the future. This will include details of the total benefits for annual pension, and pension commencement lump sum (if applicable), and any under or overpayments that may occur if an election for alternate scheme benefits is made (including the consequences of any adjustments in respect of benefits for voluntary contributions and transferred in benefits). The immediate choice RSS will also detail how to make a choice, the election period¹² (the time limit in which members must make a choice), and what happens if no choice is made within the election period.

9.9. In order to ensure that eligible immediate choice members receive accurate information, the distribution of RSS will be prioritised so that those who are considered by the scheme manager to be in the most immediate detriment will receive a choice statement first, and those who are considered to be in receipt of preferred benefits receive a choice later in the statutory period. In all cases, if the member choice results in a member being owed extra pension benefits by the scheme, the scheme manager will backdate the extra pension benefits to the member's retirement date (or died, if a choice has been made by an eligible decision-

¹¹ see Part 3 of the draft Regulations for who can be an eligible decision-maker.

¹² See Sections 5 & 6 of this document for the election periods for DC & IC decisions.

maker) and pay the difference with interest. See section 15 for more information about how interest will be applied to these sums.

9.10. Where an eligible member dies before these regulations come into force the scheme manager will provide an RSS to a designated person (see regulation 8) and they will make the choice election in respect of the deceased member's remediable service.

10. Contingent decisions

10.1. A contingent decision is a decision that was taken by an eligible member during the remediable service period that they believe they may not have taken had it not been for the discrimination identified by the courts. In order to use the process set out below, the decision must relate to the member's NHS pension and in all cases an eligible member must make a claim to the scheme.

10.2. To facilitate this, an application process is being designed and members will be made aware of the process and time limits for making a contingent decision application. Within the application, members will be expected to confirm the decision that was made and outline how that decision would have been different had they been able to either remain in their legacy scheme or join the reformed scheme in the remedy period.

10.3. Evidence to support the claim will be required and should be submitted with the application. This may be evidence that the member holds or information that is already known to the scheme administrators, such as information held in an opt out form or an application for additional pension that was not acted on. On receipt of the application and evidence the scheme manager will consider and decide if the claim is accepted or not. If the application is rejected, the applicant may submit an appeal through the existing Internal Dispute Resolution Procedure process.

10.4. We have identified three main categories of contingent decision in the NHS pension scheme:

- Opted-out service
- Transfers
- Additional service

Opted-out service

10.5. Provision is made in Part 3 of the draft Regulations for members who opted-out of the NHS Pension Scheme because of the discrimination to have the opportunity to have their opted-out service during the remedy period reinstated.

10.6. The eligible member must complete a contingent decisions application within one year of section 2(1) coming into force on 1 October 2023. The decision to opt-out must have been communicated to the scheme on or after 10 March 2012. This was the date on which the reforms to the public service pension schemes were announced which may have prompted some members to opt-out of the scheme.

10.7. A decision to opt-out of the scheme may have been made before 1 April 2015, however only opted out service during the remedy period can be reinstated under this provision. Evidence in support of the application that demonstrates the decision to opt-out of the scheme related in some way to the discriminatory elements of the pension reforms must be provided.

10.8. The scheme manager will consider the application and where the claim is accepted the applicant will have a period of one year to confirm their election to have opted out service reinstated. An opted-out RSS will be sent to the applicant detailing the contributions (and any interest) required to be paid to the scheme by the member for the opted-out service and the options available to pay those

contributions. Where the member proceeds with the election, to have their opted-out service reinstated, and payment arrangements have been agreed, then they will be considered in the same way as other eligible members and offered either an immediate choice if they are already in receipt of benefits, or a deferred choice of benefits at retirement (or other eligible Benefit Crystallisation Event (BCE)).

Transfers

10.9. In some cases, a member may have chosen to transfer (in and/or out) and now wish to revisit the decision. Some may also have chosen not to transfer and now wish to do so.

10.10. Eligible members who have not transferred in and who could have done under the legacy scheme rules and now wish to retrospectively transfer in through the contingent decisions process will be given the opportunity to do so. This is provided in Part 6 of the draft Regulations, where a window of one year from 1 October 2023 is offered to members wishing to transfer in retrospectively, or to reverse a transfer that was made, if the transferring scheme agrees to this request.

Additional Service

10.11. The legacy NHS pension scheme allowed members to buy additional service, known as 'additional pension'. Eligible members may, through the contingent decisions application process, make a claim to retrospectively purchase this benefit under the terms that would have been available at the time.

10.12. Part 4 of the draft regulations covers this provision and sets out that members will have a period of one year from the issue of the RSS to make a claim of this nature. If accepted, contributions must be paid to retrospectively purchase this benefit, including an amount for interest.

11. Divorce and Dissolution

11.1. A pension, particularly a public service pension, is one of the most valuable assets members have. Consequently, the value of any pension rights must be considered as part of a divorce settlement or on the dissolution of a civil partnership. In Scotland, a cash equivalent transfer value (CETV) is calculated for the period of marriage i.e. from date of marriage to date of separation, as only pension rights accrued during the period of marriage are deemed to be shareable on divorce.

11.2. Once pension assets have been identified and valued, the couple must determine how to value this in any financial settlement. There are a number of ways in which this can be achieved. In Scotland, the main arrangements are:

- **A qualifying pension sharing agreement**, which is a formal agreement through the parties agree to divide the value of the pension benefits
- **A pension sharing order** a court order which directs how pension assets should be divided.

Pension sharing agreements and orders

11.3. In Scotland, pension assets can be divided either by mutual agreement or by court order. Most commonly, this is done using either a qualifying pension sharing agreement or a pension sharing order. A pension sharing agreement is a formal agreement to divide a member's pension assets at the time of divorce or dissolution of a civil partnership. A pension sharing order is a court order that instructs a particular division of the pension assets. In the regulations, we refer to these methods collectively as "pension sharing arrangements".

11.4. The beneficiary of the pension sharing arrangement then becomes a “pension credit” member of the pension scheme the member has agreed to share the pension from. In Scotland, either a percentage or a monetary amount is stipulated to be shared.

11.5. A qualifying pension sharing agreement is made using a minute of agreement on how the assets are to be shared. This is recorded in the Books of Council and Session, whereby it becomes legally enforceable. A pension sharing order is issued by a court in response to a request from one of the separating parties. Where a member has benefits in both the legacy scheme and reformed scheme a separate order is created for each scheme.

11.6. The beneficiary of a pension sharing arrangement is entitled to a Pension Credit and the scheme member’s pension benefits are subject to a Pension Debit. The Pension Credit is retained within the scheme, as a deferred benefit payable at the scheme’s NPA, or earlier with an actuarial reduction.

11.7. The value of a CETV used as the basis for a pension sharing arrangement may be different if the remediable benefits are calculated for the alternative pension scheme, so the approach proposed for the remedy is to calculate the CETV value for both legacy and reformed scheme benefits. This would operate differently depending on when the arrangement has been put in place.

Pension sharing arrangement in place before 1 October 2023

11.8. Where the pension debit member has remediable service, that service will be rolled back to the legacy scheme on 1 October 2023. The pension debit member will then receive a choice to elect for reformed scheme benefits either as an immediate choice election if they are already a pensioner, or as a deferred choice election at retirement.

11.9. Whatever choice the pension debit member makes, the debit to be deducted from their pension should reflect the agreed proportion in the pension sharing arrangement. In order to achieve this, administrators will need to work out the percentage of the total pension value that has been attributed to the pension credit member and then use that to calculate the new value of the pension sharing arrangement¹³. It should not be linked to whether any top-up amount is paid to the pension credit member.

11.10. In order to obtain the correct value of pension credit, administrators should use the percentage worked out from the original pension sharing arrangement amount to work out what the value of the arrangement would be in the alternative scheme. If that value is higher than what has already been attributed, then this top-up amount should be awarded to the pension credit member.

Pension sharing arrangement not in place before 1 October 2023

11.11. For eligible active and deferred members who are going through divorce or dissolution on or after 1 October 2023, the proposal for pension sharing arrangements is to calculate two CETVs: one CETV based on legacy scheme benefits for the remedy period, and the other based on reformed scheme benefits. The higher value CETV will be used as the basis for either a qualifying pension sharing agreement or a pension sharing order. This means that the pension credit will be derived from the higher of the two CETVs (and will not be affected by the member's choice at retirement). For the debit member, the pension sharing arrangement will apply to their pension choice i.e. the debit may change to reflect the member's choice at retirement.

11.12. For an eligible pensioner member who has made their IC before the pension sharing arrangement is finalised, the scheme administrator will provide a CETV

¹³ where the pension sharing arrangement does give a percentage, the pension debit is the percentage specified in the qualifying pension sharing agreement or order applied to the pension benefits the member chooses at retirement.

based on the pension in payment. The effect of this is that since the member's choice of benefits in respect of their remediable service is already known at the point of calculation, both the pension credit and the pension debit should reflect the member's actual choice.

Arrangements other than a pension sharing arrangement

11.13. Where a divorce decision has been made that affects an eligible member's remediable NHS service through a mechanism other than qualifying pension sharing arrangement or pension sharing order, the regulations set out that the value of the remediable rights for the purpose of the proceedings is to be the greater of those rights secured in either the legacy scheme or the reformed scheme. This will be established by the scheme in consultation with the scheme actuary.

Divorce and Dissolution in the draft regulations

11.14. The draft regulations do not currently contain any provision for divorce and dissolution and Part 5 of the draft regulations has been reserved as a placeholder for this purpose. An updated version of the draft regulations that contains the provision covering divorce and dissolution will be available approximately two weeks from the launch date of this consultation and notice of the updated draft will be issued to stakeholders when the updated version is available. We have comprehensively set out the policy intention for divorce and dissolution arrangements in section 11 of this consultation document to give you an understanding of the provision that will be included in the updated draft regulations.

12. Voluntary Contributions

12.1. 2015 Scheme members can elect to pay additional voluntary contributions in order to increase the value of their pension benefits, through additional pension (AP) and/or buying out the reduction applied to benefits claimed before NPA using the early retirement reduction buy-out (ERRBO) provision. Only additional pension is available to purchase in both the legacy and reformed schemes. ERRBO is only available in the reformed scheme and does not have an equivalent in the legacy scheme. This means that when remediable service is rolled back to the legacy scheme on 1 October 2023, the arrangements taken out in that period require to be changed in line with the rollback.

12.2. The draft regulations propose to offer members who have voluntary contributions arrangements in the reformed scheme a choice of either reconstruction of the arrangement to the legacy scheme, or compensation for the voluntary contributions that were made towards that arrangement. From 1 October 2023, the scheme administrator will write directly to eligible members who have made voluntary contributions arrangements in the reformed scheme to provide information and set out the options for each of the arrangements that must be changed. The member will have a period of six months to make a choice. The choice will be to either:

1. Continue the arrangement through reconstruction of the election as legacy scheme additional pension (with provision to reconstruct back to reformed scheme AP if an election is made at retirement)
2. Cancel the arrangement and receive immediate compensation for the contributions paid to date.

12.3. Where a member opts for option 1 then the arrangement will be reconstructed using actuarial factors to match the equivalent value of AP that would have been

purchasable in the legacy scheme (i.e. costed for payment of normal pension age 60 if the member's remedy section of the legacy scheme is the 1995 section, and normal pension age of 65 if the member's remedy section of the legacy scheme is 2008 section). Where the member chooses option two then the arrangement will be extinguished, and compensation paid to the member. The compensation will be the sum of the contributions paid to the date of cessation minus an amount representing tax relief. Interest will be payable on the net contributions. Once compensation has been accepted the arrangement will be extinguished and will not be included in any future ABS/RSS.

12.4. Where a member does not communicate a choice during the six-month window a default election will be applied to the arrangement and AP will be reconstructed. This ensures that the original arrangement is protected in case the member elects to receive reformed scheme benefits at their DC.

13. Transfers in the remedy period

13.1. Pension scheme members can apply to transfer their public service pension from previous employment(s) into their current pension arrangement if both schemes allow for such transfers. Applications to Transfer benefits are generally accepted up to one year from commencing pensionable employment.

13.2. Transfers between public sector schemes are agreed under public sector transfer club rules and are known as "club transfers". Other transfers, in particular those between public sector and private sector occupational schemes, are known as "non-club transfers." Club transfers are calculated with reference to the salary and accrual in the sending scheme (the previous pension scheme) with an appropriate the credit awarded in the receiving scheme (the current pension scheme) reflecting that value. Non-club, or CETV transfers are based on the capital value of the benefits held in the sending scheme, with the transfer-in credits

calculated by reference to the member's pensionable salary in the receiving scheme. Club transfers are generally more beneficial to members as they tend to generate a higher credit in the receiving scheme than they would if they were calculated as non-club.

13.3. Bulk transfers occur when a group of members are compulsorily moved between public sector employers. There have been no bulk transfers in or out of the National Health Service (Scotland) Pension Schemes in the remedy period. There is no specific provision in the regulations that covers bulk transfers. Instead, the treatment of any bulk transfers that include remediable service that may occur in future, will mirror the treatment of equivalent single transfers, as set out in the draft regulations and this consultation.

13.4. As a result of the rollback of remediable service to the legacy scheme, transfers that were completed in and out of the reformed scheme during the remediable period will be re-calculated to reflect this rollback. The PSPJOA 2022 gives scheme managers powers to determine what happens to transfers in during that period.

13.5. Part 6 of the draft regulations set out the provision for transfers impacted by the remedy.

Transfers completed on a CETV basis before 1 October 2023

13.6. Draft scheme regulations set out that the scheme administrator will calculate the transfer value of the member's remediable service under both the legacy and reformed scheme. If the value would have been higher had the member been in the alternative scheme during the remedy period, an additional amount will be paid to the receiving scheme where possible. Where the value cannot be paid to the scheme, for example if the other scheme no longer exists, compensation may be offered representing the difference in amounts.

13.7. For transfers into the scheme from another public service pension scheme on a CETV basis the opposite will occur, and the transferring scheme may provide the alternative CETV value to facilitate the calculation of benefits under the alternative scheme rules in anticipation of the member choice process. For transfers in from the private sector there will be no change to the amount of CETV receivable. as private sector pension schemes do not fall under the provision of PSPJOA 2022 so no change to the transfer value is required. However, the level of benefit that becomes payable in the receiving scheme will depend on the member's choice at retirement.

Club transfers completed before 1 October 2023

13.8. Transfers out of the scheme on a club basis that were completed before 1 October 2023 require to be revisited to take into account the remediable service in the alternative scheme. The regulations provide that the scheme manager must calculate the transfer value and provide the receiving scheme with that alternative value and the value of the remediable service in the original transfer.

13.9. Where a transfer into the scheme on a club basis was completed before 1 October 2023 the sending scheme will provide the scheme manager with the remediable service transfer value and any other required information in both schemes which will be held on the members record and reflected (through the transfer credit) in any RSS the member is issued. In most cases when there is an increase in the value of the club transfer, no payment between club schemes will be made. However, for club transfers involving the Local Government Pension Schemes in Scotland, Northern Ireland or England and Wales (LGPS) a top up payment may be due either to or from the LGPS.

13.10. For all transfers completed before 1 October 2023 the scheme manager must send a transfer out RSS in accordance with paragraph 6 of the 2022 directions to members who have transferred out rights in respect of remediable service.

Transfers completed on or after 1 October 2023

13.11. For transfers out of the NHS Pension Scheme that occur on or after 1 October 2023, the scheme must calculate two transfer values. One that represents the legacy scheme accrual in the remedy period and another representing reformed scheme accrual. For Club transfers both values will be given to the receiving scheme and the highest of the two values will be paid to the scheme. For non-club CETV transfers the highest value CETV should be used, and that value paid to the receiving scheme.

13.12. For Club transfers into the NHS Pension Scheme, the sending scheme will provide the SPPA with two transfer values: one that represents the legacy scheme accrual in the remedy period, and another representing reformed scheme accrual. Both values will be held on the member's record, and these will be applied to the member's options for retirement as illustrated on the RSS. The transferring scheme will pay the highest transfer value to the scheme. For non-Club CETV transfers the sending scheme will only send one transfer CETV reflecting the value of benefits.

14. Pension contributions of medical practitioners and non-GP providers

14.1. All active scheme members must pay contributions in return for the benefits they will receive in retirement. For general medical practitioner and non-GP providers who were active or deferred members on 30 September 2023 and eligible to make an IC, provision is made for the return or recovery of overpaid or underpaid contributions for unprotected and tapered protected members who had breaks in

pensionable service within scheme years during the remedy period after joining the reformed scheme.

14.2. For these members, the amount of contributions they will have already paid will have been determined on the basis of the contribution rate tier within which their annualised earnings placed them.

14.3. At rollback, the scheme manager will treat their remediable service in advance of such a member making a DC election for 2015 scheme equivalent benefits, as pensionable service in the legacy scheme. Whether they may be due a return of contributions (as the amount they should have paid in the legacy scheme for the remedy period) will be determined on the basis of the contribution tier rate within which their actual earnings would have placed them.

14.4. Provision is also made that these members will have an option to waive a return of contributions until their DC election has been made. This avoids compensation being paid for overpaid contributions due to rollback becoming owed back to the scheme if the member then makes a deferred choice election for 2015 scheme equivalent benefits. Where a member decides to take up the option of a waiver and does not make a deferred choice election for 2015 scheme equivalent benefits, a return of contributions plus any interest will become payable.

14.5. In line with other remedy members, general medical practitioner and non-GP providers who were active or deferred members, and who after joining the reformed scheme had breaks in pensionable service within scheme years during the remedy period, are eligible to make a DC election.

14.6. Apart from those who waived a return of overpaid contributions, where a member makes a deferred choice election for 2015 scheme benefits for their remediable service, they may have underpaid contributions. This is due to the

amount they have already paid may have been determined on the basis of the contributions rate tier that the actual earnings placed them.

14.7. Part 8 of the regulations makes provision for the calculation and application of interest on amounts owed to or from the scheme as a result of remedy.

15. Liabilities and Payment

15.1. As a consequence of the remedy there will be occasions where payments will need to be made between the scheme manager and eligible members (or those acting on behalf of deceased members). For example, the correction of contributions, correction of pensions in payment, payment of contributions for retrospective opt-ins, for additional voluntary arrangements and tax corrections.

15.2. Where overpayments and underpayments have occurred the scheme manager will calculate and apply interest on the amount owed or owing. The interest rate(s) to be applied to these amounts are determined by the PSP Directions 2022.

15.3. Where more than one overpayment or underpayment arising from the remedy occurs at once, the scheme manager must net off the amounts in accordance with the PSP Directions 2022. The effect of this is that the amounts will be aggregated, with the balance of the amounts becoming payable to either the scheme or the scheme member, thus avoiding the need for multiple payments to and from the pension scheme. The PSP Directions 2022 stipulate that the scheme manager must provide an explanation of the calculation where the netting off approach has been used.

15.4. The draft regulations also provide that amounts owed by an eligible member may be reduced or waived. The use of these powers is expected to be limited to situations where the liability has arisen from an unavoidable consequence of the remedy. For example, where the removal of entitlement to mixed benefits in the remediable period arising from tapered protection leads to a member being given how the option of a lower overall pension in both the legacy and reformed scheme design. This may result in an overpayment of benefits. In this specific case, the member's liability for any overpayment may be reduced or waived entirely subject to the conditions below.

15.5. Part 8 of the draft Regulations sets out the powers a scheme manager holds to reduce or waive a liability incurred by an eligible member. 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:

- Have regard to the particular circumstances of the member (or personal representative) by whom the liability is owed
- Apply a presumption in favour of recovering the liability unless it is considered uneconomical to do so
- Have regard to whether, instead of or in addition to reducing or waiving the liability, it is appropriate to, in the reasonable opinion of the scheme manager, to exercise powers to vary the process of the payment of relevant amounts

15.6. In addition, the scheme manager will use existing policy on the management of overpayments, including the principles published in the Scottish Public Finance manual.¹⁴

¹⁴ [Scottish Public Finance Manual - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/scottish-public-finance-manual/pages/14/)

16. Additional provision covering non-standard retirement pensions

16.1. Part 12 of the regulations provide for certain non-standard retirements. These are where a member has partially retired, where there may be additional employer costs or where eligible members have retired early through ill-health. The provision is summarised in section 16 and 17 of this document.

Premature retirement in the interests of efficiency

16.2. It is proposed in the regulations that where an eligible member has accepted a premature retirement package in the interests of the efficiency of the service and subsequently makes a choice that leads to an increase in the cost of the pension benefits to the employer, payment of the further employer costs will be waived.

Premature retirement on grounds of redundancy

16.3. Where a member claims the early payment of scheme benefits due to redundancy, the costs of paying benefits up to normal pension age are determined by the member's terms and conditions of employment rather than the scheme. In most cases this cost is met by paying the redundancy pay to the scheme. If a redundancy payment paid to the pension scheme by an employer is insufficient then the member could incur an actuarial reduction to their pension. In these cases, a member may make up the shortfall by paying additional contributions to the scheme.

16.4. Where a redundancy pension is in payment that includes remediable service, those costs may decrease or increase depending on the choice the eligible member makes. Where the costs decrease, any overpaid redundancy payment (and/or additional contributions) will be refunded to the employer, who in turn will return this to the member. Where the costs increase, (i.e. where reformed scheme benefits are

chosen) provision is made for the member to have an actuarial reduction applied or for the member to pay additional contributions to cover the shortfall.

Partial retirement

16.5. Prior to 1 October 2023, and where certain qualifying conditions are met, members of the 2008 section of the legacy scheme and members of the reformed scheme are entitled to take a percentage of their benefits whilst continuing in employment, known as ‘partial retirement’.¹⁵ Where the value of the benefits in payment changes the members’ choice, provision is proposed to allow the partial retired member to vary the original percentage of benefits claimed to maintain the level of partial retirement pension already in payment, or change the amount of partial retirement in payment.

17. Ill Health Retirement

17.1. Scheme members who are unable to continue working due to ill-health may be entitled to receive enhanced ill-health retirement benefits. In order to qualify for ill-health retirement, members must meet particular criteria set in scheme regulations. These criteria may differ between the reformed scheme and legacy schemes. Consequently, eligible members who applied for and received an ill-health pension during the remediable period may be entitled to ill-health benefits in the alternative pension scheme.

17.2. This applies to applications for ill health benefits received from eligible active and deferred members and applies whether or not the member originally qualified for an ill-health pension as a result of their application.

¹⁵ Proposals currently under consultation will extend this provision to members of the 1995 section from 1 October 2023.

17.3. In order to understand whether ill-health retirement in the alternative scheme is possible, the scheme manager is required, through Part 7 of the scheme regulations, to review the original application along with the supporting medical evidence and decide whether the member would have qualified for an ill-health pension in their alternative scheme. Where the member's original application was assessed under the reformed scheme regulations, the alternative scheme is the member's legacy scheme, and where the member's original application was assessed under the legacy scheme regulations the alternative scheme is the reformed scheme.

17.4. Once the review is completed the scheme manager will write to eligible members to inform them of the outcome of the review. For IC members, this must be before the remediable service statement is sent, and for DC members, this must be as soon as is practicable after 1 October 2023.

17.5. The majority of eligible ill-health members will be in receipt of pension benefits so will be entitled to IC for their remedy benefits. If a member meets the criteria for ill-health retirement in both schemes, then they will be able to choose between ill-health retirement benefits they are in currently in receipt of, or the ill-health benefits offered in the alternative scheme.

17.6. If an eligible pensioner member retired without ill-health benefits but would have qualified in the alternative scheme, then they will be able to choose ill-health benefits in place of their normal pension benefits. If this includes actuarially reduced benefits, then these will be replaced, and any underpayment of benefits will be paid to the member in accordance with the draft Regulations.

17.7. Some members may have been turned down for ill-health retirement and decided to leave employment, becoming entitled to a deferred pension (e.g. if they were under the minimum pension age for their scheme). If these members are accepted for ill-health retirement in the alternative scheme, they may choose these

benefits through DC and may be backdated to the date on which the member left employment through ill-health.

18. Benefits for surviving adults and children

18.1. The principal mechanism of the remedy is for eligible members to receive a choice of legacy scheme accrual or equivalent reformed scheme benefits for their remediable service. Where an eligible member dies before they have made an IC or DC, an ‘eligible decision-maker’ must make a choice between the eligible deceased member’s remediable service in the legacy and the reformed scheme, in respect of benefits that are already in payment, or benefits that are about to be paid. Part 3 of the draft scheme regulations set out the criteria for who is an eligible decision maker.

18.2. The election period for an eligible decision-maker is aligned with that of an eligible member making the same choice. For an eligible decision-maker making an IC, the time-limit is no later than one year from the issue of the RSS. This period is set by the PSPJOA 2022 so cannot be varied. The draft scheme regulations propose that the DC election period for an eligible decision-maker is set at 12 weeks from the date the RSS was issued, in line with that of an eligible member.

18.3. Where a pensioner has died after making a DC but before benefits are in payment, scheme regulations allow for that choice to be revoked. Where a pensioner has died after making a DC and where benefits are already in payment, the eligible decision-maker will not be entitled to make another choice.

Child pensions guarantee

18.4. The UK Government made a commitment in its consultation response that provision would be made to protect scheme pensions already in payment to

children, which would otherwise be impacted by a decision taken by someone outside the child's household. This commitment is reflected in Section 22 of the PSPJOA 2022.

18.5. Where such a child's pension is in payment then the amount of pension is dependent on the immediate choice of the eligible decision-maker. This choice could result in the child pension value increasing, decreasing, or staying the same. In cases where the pension value is decreased, it is proposed through Part 7 of the draft regulations, that the higher amount will continue to be paid to the child.

19. Consultation Questions

1. Immediate choice and Deferred choice – Do the proposals in this consultation achieve the policy intention of giving all eligible members a choice of retirement benefits for the remedy period?
2. Remediable Service Statements – Do the policy proposals in relation to scheme members' receiving an RSS achieve what is required in the PSPJOA 2022 and PSP Directions 2022?
3. Deferred Choice - Does the proposed deferred choice (DC) election period of three months from when the RSS is issued seem reasonable, in that it gives eligible members a suitable window to make a decision with consideration for the proximity to retirement and administrative considerations?
4. Deferred Choice - Does the proposed deferred choice (DC) election period of three months from when the RSS is issued seem reasonable, in that it gives eligible decision-makers enough time to make a DC decision taking into account the administrative requirements and the emotional impact of bereavement?
5. Deemed Election – Do you agree with the proposal for when and how a deemed election may be made? If not, please say why.
6. Voluntary Contributions – Do the policy proposals for members with additional pension and/or early retirement reduction buyout agreements ensure that all eligible members are put in the same position?

7. Ill-health retirement – Does the proposal for ill health retired members meet the requirements in the PSPJOA 2022?
8. Contingent decisions – Do the proposals for contingent decisions adequately provide members with an opportunity to revisit pension-related decisions taken during the remedy period?
9. Divorce and dissolution – Do the proposals for the treatment of pension sharing align with the requirements of the PSPJOA 2022?
10. Survivor benefits and child pensions – Does the proposed “child pensions guarantee” ensure that children are fairly treated in line with the requirements of the PSPJOA 2022?
11. Do you agree with the overall policy approach set out in the consultation to address the discrimination with the transitional protection arrangements?
12. Do you agree that overall, the draft regulations deliver the policy objectives and requirements set by the PSPJOA 2022?
13. Do the equalities considerations set out in the equalities analysis address the impact of the remedy on members with protected characteristics?
14. Do you have any other comments about this consultation?