



Department  
for Education

# **Teachers' Pensions Scheme: Transitional Protection Regulations**

**Government consultation response**

**July 2023**

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## Introduction

1. The Teachers' Pension Scheme (TPS) provides pensions and other benefits to teachers in England and Wales. There is a legacy final salary scheme with two sections, with normal pension ages of 60 and 65 (depending on when the member joined), and a reformed career average scheme with a normal pension age equal to State Pension Age or 65 (whichever is higher).
2. The legacy scheme closed to further accrual by any members on 31 March 2022. All active members of the TPS are now in the reformed scheme and it is this scheme that all new members join.
3. The Department for Education (the Department) published for consultation draft regulations proposing changes to the TPS rules to implement the second phase of the McCloud remedy as required by the Public Service and Judicial Offices Act 2022.
4. The draft regulations were subject to a public consultation which began on 27 March 2023 and ended on 4 June 2023. A document describing the purpose and effect of the proposed regulations was published on [www.gov.uk](http://www.gov.uk) alongside the proposed regulations and an Equalities Impact Assessment (EIA), with responses invited through the consultation platform or by email or post.
5. Key stakeholders were notified of the consultation. Prior to publication of the consultation, the proposals were discussed with the Teachers' Pension Scheme Advisory Board (TPSAB). This is a statutory board, comprising member and employer representatives whose purpose is to provide advice to the Secretary of State for Education on the desirability of potential changes to the TPS rules.
6. Respondents were invited to submit comments and views on the draft regulations and whether the stated policy aims would be achieved.
7. This document summarises the response to the consultation and sets out the changes the Department now intends to implement.

## Background to the McCloud remedy and consultation proposal

8. When new public service pension schemes were introduced in 2015, transitional protection arrangements allowed older members to continue accruing pension in the existing legacy (final salary) schemes whilst younger members were moved into reformed (career average) schemes.
9. Following a successful legal challenge in the [McCloud](#) case, the Court of Appeal found that this difference in treatment in the transitional arrangements amounted to age discrimination. The Government brought forward legislation in the form of the Public Service Pensions and Judicial Offices Act 2022 (the Act). This legislation provides the affected public service pension schemes with the powers to implement the remedy to the identified discrimination which was confirmed in the Government's [consultation response published in February 2021](#).
10. The remedy consists of two parts. The first part ensures equal treatment of all members from the end of the remedy period by moving all remaining active members of the legacy scheme to the reformed scheme on 1 April 2022.
11. The second part of the remedy is to remove the difference in treatment that was caused by the transitional protection provisions by rolling back reformed scheme service accrued during the remedy period to the legacy scheme and providing eligible members with a choice of benefits that they wish to receive for their service during this time - those that would have been accrued in the legacy scheme or the equivalent of those that would have been accrued in the reformed scheme.
12. The remedy period is from 1 April 2015 to 31 March 2022, as this is the period in which those affected members were treated differently due to their age.
13. Members who are eligible for the remedy are those who were members of the legacy scheme on or before 31 March 2012 (when the reforms were announced) and continued to be in pensionable service at some point during the remedy period without having had a disqualifying break in service.

14. The Department consulted on draft regulations making changes to the TPS rules which are necessary to implement the second part of the remedy. The regulations contain consequential and procedural provisions as required by the Act. Following the consultation, the regulations will be finalised and laid in Parliament.
15. Regulations will come into force on 1 October 2023 in accordance with the requirements of the Act.

## Summary of responses received and the Government's response

16. A total of 309 responses were received through the consultation platform and by email, the majority of which were from individuals.
17. The Department has considered all responses and notes that the vast majority of respondents agree that the regulations meet the policy aims as described in the consultation document.
18. Most of the comments and queries from respondents centred on three key themes: the complexity of the regulations, the timings and deadlines for decision making and the proposed approach to scheme flexibilities. The Department's response to all issues raised is covered in the sections below.
19. 96% of respondents agreed with the policy approach proposed in the consultation document (Q.1).
20. 90% of respondents believe the draft regulations achieve the policy aims as described in the consultation document (Q.2).
21. 82% of respondents replied that no other regulations were required to achieve the stated policy aims (Q.3).
22. In Question 5, when asked if there were any further considerations the Department should consider when assessing equalities issues arising because of the proposed regulations, 62% of respondents replied 'no.' The subsequent comments made in relation to this question generally did not reference equality impacts but stated alternative policy approaches that respondents would like to see implemented. Analysis of the equalities related comments are contained in the Equality Impact Assessment section on pages 38-40.
23. 92% of respondents agreed overall with the draft regulations (Q.6).
24. Seven responses were received from organisations which represent workers and employers in the education sector. These organisations were:

- The Association of School and College Leaders (ASCL)
- Community
- The Confederation of School Trusts (CST)
- The National Association of Head Teachers (NAHT)
- The National Association of Schoolmasters and Union of Women Teachers (NASUWT)
- The National Education Union (NEU)
- The University and College Unions (UCU)

## Main findings from the consultation

25. A number of respondents commented on the complexity of the subject and, consequently, the regulations. The Department acknowledges that this is a very complex area and will continue to provide clear information and resources to affected members and employers via the TPS website and in direct communications.
26. Nearly all respondents agreed that, overall, the draft regulations achieve the policy aims as described in the consultation document.
27. Additional provisions have been included in the final regulations to ensure the policy as described in the consultation will be delivered. Further information on these amendments is provided in paragraphs 179 to 187.

## TPS retrospective regulations

28. The regulations which were subject to consultation are to deliver the second part of the McCloud remedy, which must be implemented by 1 October 2023 in accordance with the provisions of the Act. They provide the powers needed to allow eligible members of the TPS to be given a choice of benefits (legacy or reformed scheme) in relation to their remediable service. The regulations also provide for those members to be issued with a Remediable Service Statement, which will provide them with the information that they need to make an informed choice about their remedy period benefits.
29. The Department has included provisions to manage the consequential effects of rollback of reformed scheme service to the legacy scheme that happens on 1 October 2023 and member choices on issues such as scheme flexibilities, transfers and orders made during divorce/dissolution proceedings that arose during the remedy period. The Department has also included provision to manage special cases such as ill-health retirement assessments, the protection of child pensions in payment and Excess Teacher Service (a period of service that is pensionable in the reformed section but not the legacy section of the TPS which may therefore have been pensionable in the Local Government Pension Scheme (LGPS) - if the employer was also an eligible employer in that scheme).
30. Additionally, where the remedy results in any amounts being owed to and/or by the scheme, provisions have been made as to how these are to be recovered from, or paid to, the member.
31. This response document addresses the following policy areas that respondents have specifically commented upon: -
  - Deferred Choice/Immediate Choice and Remediable Service Statements
  - Opted-out service elections
  - Scheme flexibilities
  - Transfers



- Ill-health retirement
- Liabilities and payment
- Miscellaneous
- Equality Impact Assessment

# Deferred Choice/Immediate Choice & Remediable Service Statements

## Background and consultation proposal

32. The consultation explained that on 1 October 2023 any reformed scheme service of eligible members that was accrued during the remedy period will be moved to their legacy scheme. This is known as 'rollback' and is provided for in section 2(1) of the Act.
33. Following rollback all affected members will be deemed to have accrued benefits during the remedy period in the legacy scheme. It is recognised, however, that reformed scheme benefits may be more beneficial for some members. Therefore, all affected members are to be given a choice of benefits (legacy or equivalent reformed scheme) for their remedy period service.
34. Members who are active or deferred on 1 October 2023 and have not taken any retirement benefits from the TPS are Deferred Choice (DC) members. These members will be provided with their choice when they apply for retirement benefits. Should the member die before making a DC or before a DC has been implemented, the choice will be provided to an eligible decision maker. The regulations include provision about who the eligible decision maker is in a range of scenarios.
35. Members who have taken retirement benefits before 1 October 2023 are Immediate Choice (IC) members and will be provided with their choice as soon as practicable after 1 October 2023. Where the member has died, the IC will be provided to an eligible decision maker.
36. The Act provides that the scheme manager is to issue a Remediable Service Statement (RSS) to all eligible members within 18 months of 1 October 2023. An RSS can be issued on a later date if the scheme manager deems this to be reasonable. The RSS will include details of remedy period benefits calculated as legacy scheme and alternatively as reformed scheme benefits, to allow members to make an informed choice.

37. Active DC members must subsequently receive an RSS annually. For Deferred members, a subsequent RSS can be requested each year.
38. When DC members apply for retirement benefits, they will receive an RSS which includes their final benefit calculations. They will have 12 months from the RSS being issued to confirm their Deferred Choice decision over the benefits they wish to take. A member may subsequently revoke their decision and make a different choice at any point before an application for retirement benefits has been processed.
39. If a DC member fails to communicate a decision before the end of the election period, no retirement benefits will become payable. The retirement process is instigated by the member, and they are required to provide all necessary information before the application can be implemented.
40. Should a DC member die following issue of the RSS, the eligible decision-maker will be contacted and asked to make a DC decision. They will be provided with an updated RSS and will have 12 months from the date that the RSS is issued to them to confirm their choice. If a choice is not confirmed before the end of the election period, the regulations allow the scheme to 'deem' an election for reformed scheme benefits where the scheme calculates that there would be a higher monetary value.
41. The draft regulations also make provision for the payment of death benefits and lump sums when a DC member dies after 1 October 2023 but before their DC decision has been communicated to the scheme. These benefits will be calculated under both the legacy scheme and reformed scheme rules and the lower of those amounts would be paid pending a decision by the decision maker. This is to prevent the possibility of an overpayment being created. If needed, an adjustment to payments would subsequently be made in accordance with the decision-maker's choice.
42. IC members will be provided with an RSS within 18 months of 1 October 2023 and will then have 12 months from the date of issue to confirm their decision. Should an IC member fail to communicate their choice before the end of the

election period the draft regulations allow the scheme manager to deem an election for reformed scheme benefits if that would have a higher monetary value.

## Consultation findings

43. Several respondents queried the rationale for making a decision over remedy period service at retirement instead of when the regulations come into effect.
44. Four respondents commented that the two choices available to members when they make their election may unfairly affect tapered protection members as they may potentially see a reduction in the pension benefits compared to the position before rollback. This is because the choice the member receives is for all of their remediable service to be in the legacy scheme or the reformed scheme – it cannot be a combination of the two.
45. The following responses were received in relation to the RSS:
  - Several respondents questioned when they will receive their RSS.
  - One respondent asked how pension benefits will be calculated.
  - The NAHT and one other respondent stated that the 18-month window in which the scheme manager should issue RSSs is too long and should be shortened.
  - One respondent suggested that an annual RSS should be provided to all affected members, not just those retiring.
  - Another respondent stated that there should be a mechanism to challenge the accuracy of the RSS.
  - The UCU requested clarity on how hypothetical calculations will be impacted by the implementation of the remedy and how they will be reflected in the RSS.

- The NEU stated that deferred members should automatically receive an annual RSS as they believe few deferred members are likely to make a written request.
- The NASUWT stated that the RSS should include an option for active and deferred members to pay contributions for opted-out service from their accrued pension when it comes into payment.

## Government response

46. In 2020 HM Treasury consulted on changes to the transitional arrangements of the 2015 public service pension schemes and as a result it was decided that members would make their decision about the benefits to take for the remedy period at the point of retirement. This was legislated for in the Act and therefore cannot be changed. The intention behind deferring the decision until retirement is that it is only at this point that members will have all of the necessary information regarding the value of each option.
47. Members who have already retired or who retire before the regulations are implemented on 1 October 2023 will make an immediate decision and, where relevant, their pension payments will be adjusted in accordance with their choice. While exact timelines cannot be given for the completion of this process, the scheme administrator will endeavour to implement the changes as soon as possible once an IC decision has been communicated to the scheme. The process of retrospectively adjusting benefits is complex due to the number of factors which will affect the choice(s) to be presented to the 590,000 members involved. This is why the Act specifies an 18-month deadline to provide members with an RSS.
48. All affected members regardless of whether they received full, partial or no protection when the reformed scheme was introduced must be treated in the same way. Any reformed scheme service accrued during the remedy period must be rolled back to their legacy scheme and the member will be given a choice of benefits for the remedy period.

49. Allowing tapered protection members to retain a mix of legacy and reformed scheme benefits for the remedy period would continue the identified discrimination as this would result in some members retaining transitional protection on the basis of their age. This position is prohibited by the Act.
50. All adjustments to benefits will be clearly communicated in the RSS and any resulting under or overpayment will be visible to the member before they make their choice. Should the effect of the member's choice be an overpayment of benefits (or underpayment of member contributions) the member will be required to repay the outstanding amount to the scheme. If this cannot be repaid as a lump sum the scheme administrator will consider a payment plan. Non-payment of outstanding amounts would result in a reduction in the benefits in payment.
51. The regulations also include provision for amounts owed to the scheme to be waived in certain circumstances. This power may only be used on a case-by-case basis and in accordance with [HM Treasury Directions](#). In the unlikely event that both options provided to an IC tapered protection member would result in benefits lower than those arising from their mixed service and an overpayment of benefits is unavoidable, this may be a scenario where the scheme could consider waiving the overpayment of benefits paid up to that point.
52. All members affected by the McCloud remedy will be provided with an RSS as soon as is practically possible from 1 October 2023 and it is expected that this exercise will be completed well in advance of the 18-month period specified in the Act.
53. Active members of the scheme will receive an RSS combined with their Annual Benefit Statement (ABS) on an annual basis. Those with a My Pension Online (MPO) account will be able to access this information at any time. Deferred members of the scheme can request an RSS once per year, although this can be accessed at any time for those with an MPO account.
54. Active and deferred members who apply for retirement benefits will be issued with a final RSS. Pension calculations will be displayed in three sections:

Section 1 - A pre-2015 legacy scheme calculation.

Section 2 - Benefits calculated for the remedy period under both legacy and reformed scheme rules.

Section 3 - Post April-2022 reformed scheme calculation (where applicable).

55. The RSS will explain that the calculations are based on information the scheme has about the member's service. The member should check that the information is correct and if not, they should contact the relevant employer to request that they update the salary or service information. Once updated, a new RSS will be available to access from the member's MPO account, or if they do not have an MPO account they can contact the scheme administrator for a revised version.
56. Existing hypothetical calculations will not be impacted by the remedy due to the salary link that applies between the legacy and reformed schemes. Any hypothetical calculations will be displayed in the RSS.
57. The approach providing deferred members with an RSS upon request is specified within the Act rather than the scheme regulations consulted on, however, those deferred TPS members with an MPO account will be able to access their RSS at any time.
58. The RSS will detail how members will be able to repay any overpaid benefits or underpaid contributions. The options available to the member are to pay a lump sum or make payment by instalments. Any outstanding amounts will be recovered through a reduction of pension benefit payments. HMRC recycling rules may apply which restrict the proportion of a pension lump sum payment that can be used to further increase pension benefits, or an unauthorised payment charge being levied. Full information on payment options will be provided to members.

## Opted-out service elections

### Background and consultation proposal

59. The consultation outlined that the regulations include provisions that could allow opted-out remediable service to be reinstated.
60. In order for the scheme manager to consider reinstatement of service, the member will need to complete an opted-out service application within 12 months of s2(1) of the Act coming into force on 1 October 2023. The member must also provide evidence to show that they opted-out of the scheme because of the discrimination.
61. The decision to opt-out must also have been communicated to the scheme on or after 10 March 2012. This was date on which the government set out its final position on the reformed scheme design and transitional protections. Whilst a decision to opt-out of the scheme may pre-date 1 April 2015, only service during the remedy period can be reinstated under these provisions.
62. Applications will be considered by the scheme manager and, where the claim is accepted, an RSS will be issued to the member. The RSS will detail the contributions owed by the member for the opted-out service and the options available to pay those contributions. The member will then have 12 months to confirm that they want to have their opted-out service reinstated and they would then be treated in the same way as other eligible members.
63. If the member's application is rejected they can submit an appeal via the existing [Internal Dispute Resolution Procedure process](#).

### Consultation Findings

64. One respondent queried whether members will be able to apply to reinstate opted-out service for some periods but not others during the remedy period.
65. Another respondent was concerned that the opted-out service regulations contradict the provisions in the Act. The regulations stipulate an opted-out service



election can only be made if it is received by the scheme within 12 months of 1 October 2023. However, the Act defines the end of an opted-out service election period as one year beginning on the day the member receives their RSS. They believe that unless all members receive their RSS on 1 October 2023, they will not have the indicated time to make an opted-out service election.

66. The NAHT, NEU and NASUWT asked for further clarity on the evidence members will be required to provide and whether that requirement is reasonable given most members will not have kept an evidence trail of their decision to opt out of the scheme.
67. The NAHT also believe that a clear communication strategy is required to ensure all those that are eligible for opted-out service elections are aware of the provision.
68. The NEU and NASUWT raised concerns that only members who opted out on or after 10 March 2012 can have their service reinstated given that the public service pensions dispute was at its height in 2011 and so members might have opted out earlier than March 2012.
69. The NASUWT also believe that it is unfair that members could have opted-out from 10 March 2012 due to the discrimination but service from 10 March 2012 to 31 March 2015 cannot be reinstated under that provision.

## Government Response

70. Members will be able to opt in for different periods of the remedy period if they can clearly demonstrate that the opt in or opt out would have occurred at the time.
71. The opted-out service election is a two-step process. The regulations stipulate that members intending to make an opted-out service election must submit their application within 12 months of 1 October 2023 - they do not require an RSS to do this. If their application is accepted, they will receive an RSS which will include information about the member contributions that would be owed if the service

was reinstated. There will be a further 12-month period from when the RSS is issued for the member to confirm that they agree to pay the member contributions and confirm they want that service to be reinstated.

72. All applications to reinstate opted-out service will be considered on a case-by-case basis. If a member submits an application to have their opted-out service reinstated and they can demonstrate that the reason they opted out was because of the discrimination, then the application will be accepted. The Department cannot be prescriptive about what can and cannot be considered as suitable evidence as there may be a wide range of circumstances linked to the pension reforms that led to members opting out of the scheme. The Department assures respondents that all forms of evidence will be appropriately considered.
73. The Department has a detailed communication strategy for providing affected members and employers with relevant information and this includes the process and timescales to reinstate opted-out service. As part of the scheme administrator's communications campaign, the issue of eligibility to reinstate opted-out service has already been covered in member bulletins.
74. The Department does not believe it is likely that a member could have suffered from the effects of the identified discrimination in relation to transitional protection where they opted out of the scheme before 10 March 2012. This is because the Government had not confirmed its policy before this date and the actual difference in treatment only began from 1 April 2015. If a member could demonstrate that they were affected by the discrimination in such circumstances, although they would be prevented from having their service between 1 April 2015 to 31 March 2022 reinstated, they could submit a claim through the Contingent Decision process.
75. The remedy period is specified in the Act and therefore the TPS cannot reinstate opted-out periods of service before 31 March 2015 via the provisions of the Act. As above, a member could make a claim under the Contingent Decision process in respect of any opted-out service between 10 March 2012 and 31 March 2015 if they can demonstrate that it related to the discrimination.

76. As all members of the TPS are in the reformed scheme as of 1 April 2022, there cannot be any service from this date which could have been affected by the identified discrimination.

## Scheme flexibilities

### Background and consultation proposal

77. Scheme flexibilities purchased during the remedy period will be affected when reformed service is rolled back. Members that paid voluntary contributions to purchase reformed scheme flexibilities during the remedy period will need to decide how they would like those flexibilities to be managed as they cannot simply be moved across to the legacy scheme.
78. Active and deferred members who have purchased reformed scheme flexibilities during the remedy period will be presented with three options to manage their flexibilities at rollback:
  - (a.) Maintain their flexibility election: keeping the payments within the scheme which will be reconstructed as legacy scheme Additional Pension (AP); or
  - (b.) Cancel the flexibility election and receive an immediate compensation payment for the contributions paid; or
  - (c.) Cancel the flexibility election (as in option b) but agree for the scheme to hold the compensation until the time of making their Deferred Choice.
79. Retired members who have purchased reformed scheme flexibilities during the remedy period will be provided with options (a) and (b).
80. The proposed regulations also made provision for eligible members with remediable service to apply to retrospectively purchase legacy scheme AP for the remedy period. The member must be active, deferred or retired (this provision does not extend to deceased members) and will need to satisfy the scheme manager that they would have entered an arrangement to purchase legacy scheme AP if they had been in that scheme at the time. The purchase must be completed within 12 months of rollback and regulations require members to submit an application within 6 months of 1 October 2023 to allow sufficient time for the scheme manager to consider the application and to complete payment

arrangements. This timescale can be extended at the scheme manager's discretion.

81. Reformed scheme regulations allow members of that scheme to make an election for Buy-Out of the actuarial reduction between age 65 and 68, that applies to pension benefits if the member retires before reaching their scheme Normal Pension Age (NPA).
82. A member has 6 months from entering the reformed scheme to elect for this option. The impact of rollback is that effectively these members have not entered the reformed scheme until 1 April 2022. Under the existing rules on Buy-Out elections, the applicable window would therefore be from 1 April 2022 to 30 September 2022.
83. As rollback provisions in the Act and scheme specific regulations will not come into force until 1 October 2023, the window for affected members will have closed before members have had the opportunity to make a Buy-Out election. The draft regulations therefore make provision to create a new Buy-Out election window for eligible members to allow 6 months from 1 October 2023 for an application. This measure ensures equal treatment with protected members who had access to the Buy-Out window when they entered the reformed scheme on 1 April 2022.

## Consultation Findings

84. There were a number of responses expressing similar views which are summarised as follows:
  - Respondents commented that the actuarial figures used for conversion of flexibilities should be the figures that were applicable during the remedy period.
  - Respondents queried how the limit on AP will be exercised for members with both final salary and career average flexibilities.
  - Respondents raised the fact that there should be an option for affected members to retrospectively elect for Faster Accrual or Buy-Out.

- Some individual respondents raised concerns about the requirement for evidence to demonstrate that they would have purchased legacy scheme APB had it not been for the discrimination as it may be difficult to evidence. The NEU raised similar concerns.
85. One respondent suggested that any Faster Accrual needs to be calculated as if the additional accrual rate continued up to the point of the member's NPA.
  86. One respondent stated that Past Added Years (PAY) should be included in the remedy.
  87. One respondent raised the fact that the Act sets a one-year window to retrospectively purchase flexibilities in the legacy scheme whereas the draft regulations provide that members only have six months to make an application.
  88. The ASCL and others emphasised the need for a clear communications strategy to aid member understanding of the scheme flexibilities policy which members might struggle to understand.
  89. The NASUWT stated that cases where a member purchased an AVC (see paragraph 97) rather than a TPS flexibility, because they wished to take their pension savings at a lower pension age, are an example of a Contingent Decision case. The NASUWT asked that AVCs are included in the contingent decisions process.

## Government Response

90. If a member chooses to have their purchased flexibilities reconstructed under option (a), the scheme will apply the factors that were in force at the time the election would have been made.
91. On 1 October 2023, all affected members will have their remedy period service in the legacy scheme. Those still in active service will have technically joined the reformed scheme for the first time from 1 April 2022. All flexibilities purchased in the reformed scheme during the remedy period will be extinguished and either removed (with the member receiving compensation for contributions paid) or

reconstructed to legacy scheme AP. For these members, all reformed scheme purchase limits will begin from 1 April 2022.

92. Affected members will be able to retrospectively elect legacy scheme flexibilities for the remedy period if they can evidence that they would have purchased them at the time. Anyone who purchased reformed scheme flexibilities during the remedy period will have the option for their additional benefits to be reconstructed into legacy scheme AP of an equivalent value. Alternatively, they can choose for the payments to be refunded as compensation and the election removed.
93. As with opted-out service elections, if members were unable to purchase scheme flexibilities and they demonstrate that it was because of the discrimination, the scheme administrator will consider this under the Contingent Decisions process. If further evidence is required to support their application, this will be requested from the member. All applications will be dealt with on a case-by-case basis where the circumstances of that member will be considered.
94. The remedy does not affect Past Added Years (PAY) which has not been available since 1 January 2007.
95. The Act requires that all applications to retrospectively purchase legacy scheme AP must be completed within 12 months of 1 October 2023. The Department has therefore included a six-month time limit on applications to be submitted as the scheme needs sufficient time to consider and process applications including how the member contributions will be paid. Discretion may be used if appropriate.
96. The Department acknowledges the complexity of elements of the remedy for members and a robust communication strategy has been developed. The options and actions that members may need to take at each phase of the remedy will be clearly set out in the RSS and other forms that all affected members will receive. All members who haven't done so already are encouraged to sign up for a TPS [My Pension Online](#) account which will be the easiest way to access further support and guidance.

97. Additional Voluntary Contributions (AVCs) are another way that a member can increase their benefits. Contributions build up an additional pension that is held and managed separately from the member's Teachers' Pension. AVCs are outside of the scope of the remedy because they are not held by a public service pension scheme. The issue raised by the NASUWT however, that members may have purchased an AVC because of the discrimination, could potentially be considered under the Contingent Decision process. The Department will consider any claim in relation to the discrimination on a case-by-case basis and taking account of the circumstances of the member.



## Ill-health retirement

### Background and consultation proposal

98. Where an affected active or deferred member has applied for ill-health retirement after 1 April 2015 and that application was rejected before 1 October 2023, the regulations make provision for the scheme to reassess the member against the ill-health criteria of the alternative scheme. If a member satisfies the alternative scheme criteria following reassessment, they will be notified that they can make an immediate ill-health retirement election. The notice will detail the ill-health retirement benefits available to the member, the process by which the member can elect to take ill-health retirement benefits and the effects of making an election. The member would have three months to make this election.
99. Where a member who became a deferred member of the scheme on or before 1 April 2022 makes an out of service ill-health retirement application after 1 April 2022, and the application is finally determined from 1 October 2023 onwards, the member must be assessed against the ill-health criteria of both the legacy and reformed schemes. This is because the member's service ended during their remediable service, and they had no pensionable service in the new scheme on or after 1 April 2022. Therefore, in line with their DC, the member may be entitled to a choice of legacy scheme ill-health benefits or reformed scheme ill-health benefits, depending on whether they meet the criteria of one or both schemes.
100. Some members may have applied for ill-health retirement before 1 April 2022, but their application may not have been finally determined until after this date, for example because they were rejected under the rules of one scheme but are being reassessed against the ill-health criteria of the alternative scheme. If the member continued in pensionable employment after 1 April 2022, they will have transitioned to the reformed scheme before their application has been finally determined – under existing rules they would only be eligible for ill-health retirement from the reformed scheme. In such cases the member's application will be tested against the ill-health criteria of both schemes.

101. Where the member meets the criteria of both schemes, they will receive benefits paid from the reformed scheme and the scheme will complete a calculation to determine how much the member would have been paid under the legacy scheme, calculated as of 31 March 2022. If legacy scheme benefits would have been higher, the reformed scheme benefits will be uplifted to that amount.
102. Where the member only satisfies the legacy scheme ill-health criteria, they will receive ill-health retirement benefits payable from the reformed scheme calculated at the same rate as they would have been paid from the legacy scheme, as of 31 March 2022 (the last date for which legacy scheme benefits could be accrued).
103. If the member were to only satisfy the reformed scheme ill-health criteria, the existing rules and processes will apply.
104. IC members who retired under ill-health provisions during the remedy period will be reassessed against the criteria of the alternative scheme. The outcome of the reassessment and ill-health retirement benefits available will be presented to the member in their RSS – their existing ill-health benefits and alternative scheme ill-health benefits if applicable. The reassessment is only concerned with eligibility in the alternative scheme and whether that would result in a higher level of ill-health benefits, it does not review eligibility for the current award and therefore reassessment would not result in existing ill-health benefits ceasing to be paid. For tapered protection members who were awarded ill-health retirement from the reformed scheme, please note the information in paragraphs 50-52 regarding mixed service.
105. There may also be IC members who were rejected for ill-health retirement who then took an alternative form of retirement benefits, e.g. Early Retirement. These members will also be assessed against the ill-health criteria in the alternative scheme and the outcome of this (including any ill-health benefits the member may be entitled to) will be displayed in the member's RSS. Any necessary adjustment would be backdated to the applicable ill-health retirement date.

## Consultation findings

106. Several respondents raised concerns about their ill-health retirement benefits being reduced because of the remedy implementation.
107. The NAHT believes that the Department should assess how many members may be eligible for ill-health retirement under the remedy provisions and should communicate this figure to schools in case there are a significant number of individuals suddenly eligible for ill-health retirement as part of the remedy.
108. The NEU raised concerns about three months potentially being too short a period for a member to consider and accept ill-health retirement given the potential impact of their illness.

## Government response

109. As noted in the consultation document, members will be reassessed against the ill-health retirement criteria in the alternative scheme to assess whether they might be eligible for a higher level of ill health benefits. If they are, they will be presented with the option to choose alternative scheme ill-health retirement benefits in their RSS. If alternative scheme benefits are selected, these payments will be adjusted and backdated to the relevant date.
110. There will be a very small cohort of members who are still teaching who will be affected by the ill-health reassessments. By the very nature of these cases, the Department does not believe there are likely to be many examples of a teacher still being able to work when they have met the ill-health criteria for some time. The scheme administrator will however monitor the reassessment data and include any relevant information in the ongoing employer communications.
111. The three-month deadline for members to accept ill-health retirement will apply to active members being reassessed under the alternative scheme and found to be eligible for ill-health retirement. As the scheme will have been in correspondence ahead of reassessment, these members will have had a much longer period than three months to consider this matter and decide whether they want to cease

teaching and take ill-health retirement. This is to ensure that members who have applied for ill-health retirement and have been assessed as not being fit to work retire on these grounds in a reasonable timescale. The Department believes it would not be consistent with existing rules to allow an open-ended period in which a member could take ill-health retirement based on an application submitted before 1 April 2022.

112. Members already in receipt of ill-health retirement will be provided with an RSS within 18 months of 1 October 2023. The RSS will detail any choices the member has to make including whether they could be entitled to ill-health retirement benefits under the alternative scheme, if higher. These members would have 12 months from the issue of the RSS to confirm their decision.

## Liabilities and payment

### Background and consultation proposal

113. As a result of the application of the remedy and certain decisions that may be taken by a member at rollback or when they make their DC/IC decision, adjustments to monies paid to and/or from the scheme may be required. There may have been overpayment or underpayment of TPS contributions, or overpayment or underpayment of TPS benefits.
114. The consultation outlined that where such adjustments are required, these amounts will be adjusted by relevant tax amounts and interest will be applied in line with HM Treasury Directions. These adjustments will be 'netted off' to produce a final value.
115. Any amount owed to or from a member will be clearly displayed in the member's RSS, with details of how these amounts were calculated and the amount of interest that is applicable. The RSS will also detail how and when amounts owed to the member or scheme should be paid.
116. The consultation outlined that DC members who have a choice at rollback to receive compensation for overpaid contributions or reformed scheme flexibilities will have the option to waive that compensation until they make their DC at retirement. This would allow a member to still receive the amount of a reformed scheme flexibility taken out during the remedy period if they believe that they are likely to choose reformed scheme benefits at retirement.
117. The scheme has powers in line with the Act and HM Treasury Directions to pay compensation in some circumstances where a member can demonstrate that a financial loss has arisen as a direct result of the identified discrimination or application of the remedy. Members will be able to make an application for compensation and the TPS website will be updated with details of this process.

### Consultation Findings

118. Several respondents queried the rate of interest that will be applied to monies owed to members as a result of the remedy.
119. Several respondents commented that any overpayment of benefits, underpayment of contributions or underpayment of tax that arise due to the remedy should be waived. The NAHT similarly commented that members should not have to pay back any overpayment which has occurred due to the remedy implementation because the remedy is required as a result of a mistake in the way that scheme reforms were introduced in 2015.
120. Two respondents queried how tax will be calculated for the remedy period and when updated Pension Saving Statements (PSS) will be sent out to members.
121. The NEU accept that member contributions need to be paid in respect of missing service being reinstated, but they do not believe that members should have to pay interest on these contributions. They also requested that the scheme gives serious consideration to waiving any monies owed by tapered protection members where both options (having remedy period service as all legacy scheme or all reformed scheme) could be of lower value than the current pension in payment.
122. Community queried if support will be available for pensioner members who might owe money to the scheme as a result of their remedy choice.
123. One respondent queried if retired members will be able to retrospectively choose to take a higher or lower lump sum amount when they make their IC decision.
124. The ASCL, NEU and NASUWT commented that the cost of seeking independent financial advice for members with complex financial arrangements should be compensated by the scheme. The NASUWT referred to the need for a clear process to apply for compensation for such costs with a clear criterion for assessing claims. Similarly, the NEU has asked that the compensation process be as straightforward as possible, so it is easy for members to navigate.
125. The CST raised concerns that the draft regulations do not refer to scheme employers and therefore do not cover the arrangements for any monies owed to

or by the employer. Other responses raised concerns about the potential impact of reinstating opted-out service on individual employers' budgets where they could need to pay contributions on seven years of service at a time.

## Government Response

126. The calculation of interest and the rates to use is provided for in Chapter 4 of [HM Treasury Directions](#). The Directions apply across all the affected public service pension schemes to ensure consistent treatment. The TPS must comply with those Directions.
127. There are several reasons why interest must be applied to payments, although principally there is a requirement to reflect the position that the member would have been in as closely as possible. Generally, where amounts are owed to a member the rate of interest is higher than the interest rate applied to amounts owed to the scheme.
128. Further information about the HM Treasury directions and rationale for the approach to applying interest can be found at <https://www.gov.uk/government/publications/public-service-pensions-and-judicial-offices-act-2022-treasury-directions>.
129. As explained in paragraph 115 of this document, all members making an IC or DC decision will be made aware of any adjustments that will arise as a result of their options. Members will then be able to choose to make any outstanding payments as a lump sum or, if they are unable to, the scheme administrator will arrange for the payments to be made by instalments.
130. Pension tax rules for TPS members are not determined by the Department, they are set by HMRC and apply to all pension schemes. The remedy should provide members with the benefits they would have received were it not for the identified discrimination – this is inclusive of tax. To ignore tax adjustments would not provide members with the benefits they would have had and would create new differences in treatment that could not be justified.

131. HMRC is in the process of updating tax regulations to support the implementation of the remedy for the affected public service pension schemes and has been consulting separately.
132. The Department is working with HMRC to ensure that TPS members will receive clear and accurate information regarding tax related issues and processes, both on the TPS website and within a member's RSS.
133. Annual Allowance (AA) tax charges will continue to be managed as they are currently. All members who exceeded AA limits during the remedy period, or will exceed AA limits due to the remedy, will have their calculations revisited and a revised Pension Saving Statement will be provided by the later of six months after an election is made (or the end of an election period for IC members) or 6 October 2024.
134. Where IC members choose to retain the benefits that they are already in receipt of they will not be able to revisit the lump sum amount. Where the member chooses alternative benefits, the default lump sum amount will be based on the rules of the alternative scheme and the member will have the choice to take an alternative amount in line with existing scheme rules. Making that choice is likely to necessitate an adjustment to benefits already paid. A member's lump sum options will be displayed in their RSS.
135. The cost to members of seeking independent financial advice in relation to their retirement options may be compensable under HM Treasury Directions – this might be where the member has complex financial arrangements, and they can demonstrate that their choices in relation to remediable service were not straightforward and independent financial advice was therefore needed. Such compensation claims will be considered on a case-by-case basis and details of the process will be published on the TPS website before October 2023.
136. Any adjustments required to employer contributions would fall under existing processes and regulations, therefore no specific provision was needed in draft regulations. Whilst the cost of providing pension benefits should be covered by the relevant employer, having considered the responses the scheme will not



require employers to directly pay for costs associated with remedy period adjustments. Those costs will instead be recovered in the next scheme valuation which will set the level of employer contributions required for that period. The Department does not forecast a large volume of cases for which additional employer costs would arise and therefore this approach is not expected to make a material difference to a future valuation.

137. As explained in paragraph 113 retired members may owe amounts to the scheme where their IC results in an overpayment of benefits or underpayment of contributions. The member will have full knowledge of any repayment that would occur as a result of their decision as it will be detailed in their RSS. Monies owed to the scheme will need to be paid back and the scheme will take a flexible approach to this. Members will have two methods of repayment as detailed in paragraph 58.

138. Where both options would result in an overpayment being created, the scheme will consider the circumstances in which it arose and decide whether to use the powers to waive certain overpayments as described in paragraph 51. The Department acknowledges that the scenario described is possible but considers that it is very unlikely.

## Miscellaneous

### Consultation findings

139. Several respondents suggested that this remedy should be implemented in August 2023 so that teachers retiring at the end of the 2022-23 academic year can make their choice for the start of their retirement.
140. Several respondents queried how pension benefits can be taken from both schemes at the same time given that the final salary and career average schemes have different retirement ages.
141. One respondent asked what the policy will be if a member transferred out of the scheme during the remedy period into another public service pension scheme but would now like this returned due to the remedy.
142. Numerous individual responses commented on the complexity of the subject matter and asked for model scenarios and other guidance to be provided on the Teachers' Pensions website to aid their understanding.
143. One individual respondent asked how the remedy will work for members who have taken phased retirement. The UCU also commented on the complexity of phased retirement cases and requested that detailed information and advice is made available to assist members in this position.
144. The NAHT queried what would happen with Excess Teacher Service cases if an employer is no longer in the TPS and did not participate in the LGPS at the time service was accrued. They emphasised the importance for clear communication to those who have been impacted.
145. Community believes that the remedy period (1 April 2015 – 31 March 2022) should be flexible to provide for any circumstances which are not yet apparent.
146. The NEU commented that abatement rules should not be applied to the remedy.

147. The NASUWT asked that the contingent decision claims process is subject to full consultation with the Teachers' Pension Scheme Advisory Board (TPSAB).
148. One respondent identified a misspelt word in chapter 12 of the draft regulations.
149. Some respondents stated that members should be allowed to remain in the legacy scheme that they joined until their retirement.

## Government response

150. The Normal Pension Age (NPA) for the final salary schemes is either 60 or 65, depending on which section the member is in. The career average scheme has an NPA which is the higher of 65 or the member's State Pension Age. This is the age at which accrued pension benefits are paid in full. However, the Normal Minimum Pension Age (NMPA) is currently 55 for both the final salary and career average schemes. Once a member has reached their NMPA, they are able to access their accrued benefits. Factors are applied which will reduce the member's entitlement – this is not punitive but based on actuarial factors which take account of the accrued pension being in payment for a longer period.
151. When an IC member receives their RSS which sets out the retirement benefits available to them, if they have not reached their NPA in one or both sections, the figures provided will include the normal actuarial adjustment that would apply.
152. If a member chooses to retire at NMPA then they must take benefits from both schemes at the same time, they cannot defer retirement from one of the schemes. However, if a member retires according to the NPA of their final salary scheme, they can choose to defer payment of their career average scheme benefits.
153. The NMPA is due to increase to 57 in April 2028 and the Department acknowledges that there may be implications of this for the TPS rules. The Department will be considering this in due course and any proposed changes would be subject to consultation.

154. The consultation outlined where an eligible member has transferred service into or out of the TPS during the remedy period, the value of the transfer will be revisited to take account of the remedy and the higher value will be used. The scenario raised by the respondent will need to be considered as a Contingent Decision claim. The member will need to justify and evidence that their decision to transfer out of the scheme was a course of action that they took because of the discrimination.
155. The Department acknowledges that the application of the remedy can be complex and may be difficult to understand without sufficient tools and guidance being provided. The terminology and acronyms used are consistent with existing guidance and there is a [glossary](#) available on the TPS website; any new terms or acronyms that have been introduced in relation to the remedy will be added. Model scenarios and further guidance continue to be developed and will be accessible on the TPS website to support members making their IC/DC decision.
156. Members who have already taken phased retirement before 1 October 2023 will be treated as IC members and presented with their choices in their RSS. Members who take phased retirement after 1 October 2023 will be DC members and their calculations and remedy period options will be presented in their RSS when they choose to retire.
157. The remedy applies to all affected public service pension schemes and timescales for implementation were determined by HM Treasury and provided in the Act. Whilst the Department did consider if it would be possible to bring forward the implementation date to account for TPS members retiring in August 2023, it was determined that there was not sufficient time following the consultation period to analyse responses, finalise the policy, prepare appropriate guidance to allow members to make informed choices and finalise administration processes and necessary system development etc.
158. Members retiring in August 2023 will receive the retirement benefits they are entitled to at that time and will become IC members – they will receive their RSS in the 18-month period from 1 October 2023 and if different benefits are to be paid, the adjustment will be backdated to their retirement date.

159. For Excess Teacher Service (ETS) cases, whether the employer continues to participate in the TPS or not will not affect the choices available to members. If the employer was an LGPS employer during the remedy period, then members' ETS will roll back to the LGPS. If the employer was not an LGPS employer at the time, those members will be provided with a refund of contributions for the ETS as compensation. Active and deferred members could choose for the scheme to waive that refund until they make their DCU, which they might do if they believe that they are likely to choose reformed scheme benefits for the remedy period.
160. As explained in paragraph 12 the remedy period is specified in the Act and cannot be changed. It relates to the period in which there was an unjustified difference in treatment based on the members' age – that difference in treatment did not exist before 1 April 2015 or after 31 March 2022.
161. The Department acknowledges the view of some member representatives that abatement rules should not be applied to the implementation of the remedy. To ensure consistent treatment for all members, including those without remediable service, existing abatement rules will need to continue to apply.
162. The Department has already held detailed discussions with the TPSAB regarding the development of the TPS remedy including on the contingent decision process. The Department will continue to discuss relevant aspects of the approach to the remedy in future meetings and welcomes feedback and discussion with TPSAB members.
163. The misspelt word in chapter 12 has been amended.
164. The Government consulted on the proposals to address the discrimination arising from transitional protection. Part of that consultation was to remedy the discrimination moving forward by closing the public service pension legacy schemes ensuring that all members would accrue service in the new reformed schemes from 1 April 2022. The Act made provision requiring schemes to close legacy schemes to all further accrual on 31 March 2022. This was a requirement placed upon schemes and was consulted on by the TPS in 2022. The TPS legacy scheme closed to further accrual in accordance with the Act.

# Equalities Impact Assessment

## Background

165. The Department has conducted a thorough Equalities Impact Assessment (EIA) in relation to the scheme rules needed to deliver the second part of the McCloud remedy. The data available on TPS membership relates to a member's age and sex, as the scheme administrator only collects data that is needed for the administration of the scheme, in line with General Data Protection Regulations (GDPR). Where TPS specific information is not available, the Department has obtained data from the School Workforce Census' (SWC) and the Office for National Statistics (ONS). This data was collected over a different period than the TPS data, however the Department believes that it provides a reasonable representation of the scheme membership.
166. Data is limited for the protected characteristics outside of age and sex, but the Department has, and will continue to consider the impact of potential changes on all protected characteristics as far as possible based on the information available.
167. The Department has concluded that any disproportionate adverse impact on eligible members is unlikely and that the reforms represent a proportionate means of achieving the legitimate aim of removing the direct age and indirect sex and race/ethnicity discrimination that has been identified.
168. There are positive impacts eliminating the discrimination for those sharing the protected characteristics of age and race as the removal of transitional protection provides for members with the same, and equal, benefit options irrespective of age. Any impact on those sharing the protected characteristic of a particular age is likely to have an indirect correlative impact on those sharing the protected characteristic of a particular race, given the recent increase in the diversity of the teaching workforce. This protected characteristic is therefore judged to be positively impacted, despite the lack of specific scheme data.
169. Impact on groups sharing other protected characteristics is considered to be neutral. There is no evidence to suggest that the changes being implemented are

likely to discriminate against these groups, but there is also no evidence to suggest that these groups would see a positive impact, as with age and race.

## Consultation findings

170. One respondent raised concerns about the impact of the remedy depending on the socio-economic background of the members. They were concerned that the remedy will have a disproportionate impact on scheme members with different backgrounds or in different parts of the country. They believe this should be considered in the regulations.
171. The ASCL and NAHT emphasised the importance for the Department to continue to monitor potential inequality as they believe that unintended consequences could emerge upon implementation.
172. The NAHT, UCU and NASUWT raised concerns that there is a lack of appropriate scheme-specific data to effectively analyse the impact of the remedy across all protected characteristics and some member representatives have asked the Department to review its data collection approach.
173. Finally, the NEU stated that younger members of the scheme are bearing the costs of the remedy as a result of the TPS cost sharing mechanism and the decision by HM Treasury to treat the remedy costs as a member cost in the scheme valuations.

## Government response

174. The Department is committed to ensuring the remedy rectifies the identified age discrimination whilst considering its effect on those sharing other protected characteristics and ensuring equality is achieved throughout the approach.
175. The Department considers a wide range of factors when developing policy, not just the protected characteristics that fall under the public sector equality duty that applies. Information on the socio-economic background of the scheme membership is not available, however the Department believes that its approach

to providing all affected members with a choice of benefits for the remedy period should ensure that no member is disadvantaged.

176. The Department does give due consideration to the information that is routinely collected when deciding policy. It would not be proportionate to go outside of that, however, and ask members for further, intrusive, information given what the Department sees as a low likelihood of unjustified disadvantage or inequality of opportunity, in relation to other characteristics, that these policies might reasonably address.

177. The cost sharing mechanism is set by HM Treasury and is outside of the scope of this consultation.



## Government's overall response

178. The Department appreciates the work that respondents have put into considering and commenting on the issues involved. The Department has looked closely at all of the comments raised and considers that the draft regulations should now form the basis of the final regulations, subject to some minor amendments to the drafting which does not affect any of the policies described in the consultation.

## Changes and additions to the draft amendments

179. Some minor amendments have been made to the final version of the regulations. This is to ensure that the regulations provide for the policy that has been developed throughout the various stages of consultation, including detailed conversations with the TPSAB. The amendments do not alter the proposed policy approaches outlined in the consultation document. The purpose and detail of the additional regulations are detailed below.

180. Provision has been included in the regulations allowing the scheme to pay legacy scheme benefits for the remedy period to members who apply for retirement benefits on or after 1 October 2023 if for any reason an RSS could not be issued prior to the intended retirement date. The Department notes that other public service pension schemes have included this contingency in their scheme regulations and believes it is appropriate to include in the TPS regulations in case of unforeseen circumstances.

181. Legacy scheme benefits would be paid to the member in this scenario as a result of the rollback of any reformed scheme service to the legacy scheme. The benefits that would be put into payment would include core benefits only and any benefits arising from scheme flexibilities would be included in benefit calculations included in the member's DC options when available.

182. When the member receives their RSS, it will display their DC options and they would have 12 months to confirm their decision. Were the member to make an election for reformed scheme benefits, any necessary corrections to benefits

would be displayed in the member's RSS and over or underpayments would be addressed.

*Regulation 12*

183. Provision has been included in the regulations clarifying that the calculation method for higher value benefits will continue to be the Benefit Crystallisation Event (BCE) value which is based on the Lifetime Allowance figure. This provision has been included following the Government's decision to abolish the Lifetime Allowance.

*Regulations 10 and 15*

184. Provision has been included in the regulations to ensure that there are no adverse tax consequences for retired members who opt to reconstruct any reformed scheme flexibilities to legacy scheme AP.

*Regulation 35*

185. A provision on transfers has been included to ensure that where a member is paid compensation for any credit owed there are no adverse tax consequences.

*Regulation 46*

186. Further provisions have been included in the regulations in relation to Excess Teacher Service (ETS) allowing active protected members a period of 12 months from receipt of their RSS to transfer LGPS service into the TPS. For retired members, the effect of rollback on any ETS is delayed so that if they make an election for reformed scheme benefits, those benefits include the ETS.

*Regulations 55 and 66*

187. Provision has been included in the regulations for where the deadline has passed for a member to make a Mandatory Scheme Pays election before they have been advised of any changes to their annual allowance position which may result in tax charges. The scheme will therefore accept a voluntary Scheme Pays election.

*Regulation 68*

## Next steps

188. Subject to the changes described in the section above, the draft regulations will now form the basis of the final regulations. Regulations will be laid in July 2023 and come into force on 1 October 2023.



Department  
for Education

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