



Department
of Health &
Social Care

Consultation Response

**The National Health Service Pension Scheme,
Additional Voluntary Contributions and Injury Benefits
(Amendment) Regulations 2019**

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**National Health Service Pension Scheme, Additional Voluntary Contributions and Injury Benefits (Amendment)
Regulations 2019**

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1. Introduction

- 1.1 The Department published for consultation a draft statutory instrument titled: the National Health Service Pension Scheme, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019. The instrument proposed amendments to the Regulations which set out the rules for the NHS Pension Schemes in England & Wales and associated schemes.
- 1.2 The amendments are for the following main purposes:
- (a) Implement a new contribution rate of 20.6% for employers from 1 April 2019 (see paragraph 2.4 below for further information on funding of the increase) and renew current employee contribution rates so that the same rates continue to apply beyond 31 March 2019;
 - (b) Following the Supreme Court judgment in the case of Walker v Innospec Ltd ([2017] UKSC 47), civil partners and same sex spouses will have the same survivor pension rights as widows;
 - (c) Extend existing forfeiture rules so that the Secretary of State may suspend pension benefits if a member or other beneficiary is charged or convicted with an offence that may lead to all or part of those benefits being forfeited;
 - (d) Update provisions relating to 'contracting-out' from the second state pension so that these are in line with revised HM Revenue & Customs and Department for Work & Pensions legislation.
 - (e) Exempt from controls on final pensionable pay, any pay increases which result from a nationally agreed Agenda for Change pay award;
 - (f) Make miscellaneous and consequential amendments to scheme rules, in particular relating to the provision of a statement of estimated pensionable income/contributions; and
 - (g) Make other changes that were presented in a previous consultation in November 2017, including:
 - (i) removing the nomination requirement to nominate unmarried co-habiting partners for survivor benefits; and
 - (ii) Miscellaneous corrections and refinements to improve the operation of scheme rules.

National Health Service Pension Scheme, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019

- 1.3 This document sets out the Department's response to comments received through consultation.
- 1.4 The Department will produce informal full consolidations of the NHS Pension Scheme regulations incorporating the changes implemented by the final instrument. These will be available on the scheme administrator's website after 1 April 2019: <https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations>.

2. Consultation process

- 2.1 The proposals and draft regulations were subject to public consultation which began on 18 December 2018 and ended on 28 January 2019. A document describing the proposals and draft regulations was published on the gov.uk website and consultation platform, with responses invited through the consultation platform or post.
- 2.2 The major NHS trade unions, a number of NHS employers and other interested parties were formally notified of the consultation, as part of governance arrangements for the NHS Pension Scheme. Prior to publication of the consultation document, the proposals were shared and discussed with the NHS Pension Scheme Advisory Board (SAB) in October. This a statutory board, comprising NHS Trade Union and employer representatives, that advises the Secretary of State for Health and Social Care on the merits of making changes to the scheme.
- 2.3 The Department welcomed any comments or views on the proposals and draft regulations.
- 2.4 Almost 1,500 responses were received through the consultation platform, by post and by email. The majority of these were from individuals. GP surgeries, medical centres and other primary care providers were the main respondents on behalf of organisations. Other organisations included:
- (a) Association of Independent Specialist Medical Accountants;
 - (b) The British Dental Association;
 - (c) The British Medical Association;
 - (d) Charitable or not-for-profit organisations;
 - (e) Hospice organisations;
 - (f) The Independent Healthcare Providers network;
 - (g) NHS Clinical Commissioners
 - (h) NHS Directions Group;
 - (i) NHS Employers;
 - (j) NHS Foundation Trusts;

(k) NHS Trade Unions - joint response;

(l) Private providers;

(m) Social Enterprise organisations, including Community Interest Companies and Social Enterprise UK; and

(n) Universities and representative organisations.

- 2.5 Some respondents took the opportunity to express views on topics related to the NHS Pension Scheme but outside of the scope of the consultation.
- 2.6 The Department is grateful for the suggestions respondents made to improve the format and response methods. These comments will be considered for future public consultation exercises.

3. Member contribution rates

3.1 The consultation proposed the removal of the time limit on current member contribution rates so the scheme can continue to collect contributions at those rates until such time that new rates are introduced.

Background and consultation proposal

3.2 The current contribution rates were set for the four-year period 1 April 2015 to 31 March 2019. This means unless these rates are renewed or substituted with new rates, the NHS Pension Scheme will be unable to collect contributions from members from 1 April 2019 onwards. This is because the current rates expire on 31 March 2019.

3.3 The current member contribution rates are:

Whole time equivalent pensionable pay used to determine contribution rate	Contribution rate (before tax relief) (gross) to 31 March 2019
Up to £15,431.99	5%
£15,432.00 to £21,477.99	5.6%
£21,478.00 to £26,823.99	7.1%
£26,824.00 to £47,845.99	9.3%
£47,846.00 to £70,630.99	12.5%
£70,631.00 to £111,376.99	13.5%
£111,377.00 and over	14.5%

3.4 The consultation document described how the SAB has undertaken a review of member contributions. The review explored a number of design elements, including whether the rate payable should be determined using whole-time equivalent or actual earnings, the range and number of tiers, and whether tier boundaries should be indexed.

3.5 The SAB reached full agreement that:

- The principles underpinning the current contribution structure should be retained including: protection for the low paid, minimising the risk of opt-outs, and ensuring the scheme remains a sustainable and valuable part of staff reward.
- 'Cliff edges' in the contribution structure should be resolved. 'Cliff edges' are where increases in pay can result in members moving to a higher contribution rate.
- There is a pressing need to explore ways to minimise scheme opt-outs and mitigate other issues caused by the impact of pension taxation.

- A move to use actual pay, rather than whole-time equivalent pay, to determine contribution rates would be appropriate.

- 3.6 The SAB reached a majority recommendation that the existing member contribution structure be retained for a further two years until 31 March 2021. There was a recognition that further discussion was required on a number of areas, including the approach to avoiding 'cliff edges', and a desire by the majority of trade union representatives to seek formal mandate from their membership before recommending any move to actual pay as the basis for determining contribution rates. Further, the SAB expressed concern that if a part of the recently agreed Agenda for Change pay deal is seen to be offset by contribution rate rises, member confidence in both the pay agreement and pension scheme would be undermined.
- 3.7 The Department accepted this recommendation, subject to public consultation. During this period, the SAB will continue developing a recommended contribution structure based on the agreed elements outlined above. However, the SAB recommendation was made and accepted subject to the outcome of the quadrennial actuarial valuation of the scheme.

Consultation findings

- 3.8 Some of the responses received commented on this proposal. NHS Employers stated that employers agree with the recommendations from the Scheme Advisory Board on reforming member contribution rates to minimise opt outs, use actual pay to determine member contribution rates and addressing 'cliff edges' which result in members moving into a higher contribution rate tier following a pay increase. In this context, NHS Employers suggested that most employers agreed with the proposed retention of current rates until 31 March 2021, as this gives sufficient time to design, implement and communicate the changes. However, some employers viewed the 2018 pay deal as an opportunity to implement changes to member contributions in a way that minimises the impact on take home pay.
- 3.9 Rather than remove the expiry date from current rates, the BDA asked whether a new expiry date of 31 March 2021 should be applied in scheme regulations given that the Department had accepted the SAB recommendation to retain current rates until that point.
- 3.10 The BMA expressed disappointment that current rates would be retained, viewing the differential in rates paid by the lowest and highest earners as unjustifiably wide in a scheme that calculates benefits based on career average earnings rather than final salary. Furthermore, the BMA expected a move to contributions being

assessed using actual pay on the basis that most members participate in the 2015 career average scheme. The use of whole-time pay was raised by other respondents, suggesting it disadvantages part-time staff.

- 3.11 A number of respondents commented that staff are experiencing 'cliff edges' in the current contribution tiers, and have had their take-home pay reduced as a result of receiving a pay increase. Some respondents suggested this may increase the risk of individuals leaving the scheme. NHS Employers noted that some employers have approached them for more advice and guidance on managing the issues related to cliff edges locally, particularly where staff request to postpone or turn down their pay award.
- 3.12 Other respondents suggested the scheme was in surplus, and that NHS staff pay higher contributions for similar pensions than other public-sector workers. Several respondents took the opportunity to highlight the effect of the annual and lifetime allowance pension tax limits as being a factor in some GPs and consultants taking early retirement or seeking to limit their NHS commitments. Some suggested there should be greater flexibilities, for example, an option to reduce contributions or vary the pensionability of their pay. by tax liabilities to continue in the scheme rather than opting to leave it.

Response

- 3.13 The Department recognises the importance of having the right approach to member contributions. Accordingly, the SAB was asked to review current arrangements and recommend a future approach. The points raised by respondents concerning features of the current contribution structure, are being given detailed consideration through the ongoing SAB review.
- 3.14 The SAB unanimously agreed that a future contribution structure should seek to limit the impact of 'cliff edges' and that it would be appropriate to determining contribution rates based on actual rather whole-time equivalent pay.
- 3.15 The review considered ways to mitigate 'cliff edges', such as indexing tier boundaries with general pay awards or using a banded system of contribution rates (where different rates apply to different bands of pay, comparable to the UK income tax system), however no consensus was reached by the SAB on a preferred approach. As noted in paragraph 3.6 above, the SAB recommended retention of the current rates to allow for further discussion on how to proceed with such changes and for some trade unions to seek formal mandate from their membership, in particular for a move to determining contributions based on actual pay. The Department accepted this recommendation, and looks forward to the SAB continuing to develop their proposals.

- 3.16 In renewing current rates, the objective is to ensure that the scheme is able to continue collecting member contributions from 1 April 2019. The current rates expire on 31 March 2019 until there is agreement on future rates. However, renewal of the rates does not rule out any changes to member contributions that might be agreed in potential remedy of a scheme cost cap breach, as explained in the consultation document, notwithstanding the intention set out at paragraph 4.9 to pause that element of scheme valuation. The BDA suggest applying a new expiry date of 31 March 2021. The Department appreciates this suggestion, though considers it an unnecessary step in light of the commitment it has made to the SAB to review member contributions. Removing the expiry date altogether should not be taken as implying the Department is intending to retain the current rates after 31 March 2021.
- 3.17 In reply to the comment about scheme surplus, the 2017-18 scheme accounts show that the scheme currently receives more contribution receipts than it pays out in pension benefits. However, this simply reflects the cashflow position of the scheme in a given year, and it does not follow that member contributions should be reduced correspondingly. The scheme is financed on a 'pay as you go' basis, with the Treasury meeting the cost of pension benefits as they fall due for payment. The Treasury uses contribution income to defray the cost of pensions in payment. The scheme actuary prices the cost of the pension rights that individuals build up in the scheme, and member and employer contributions are set at a level necessary to meet that cost. See the [2017/18 scheme accounts](#).
- 3.18 In relation to concerns raised about the impact of pension tax, the Department recognises that, particularly for individuals subject to a tapered annual allowance, these reduce the incentive for higher earners to continue scheme membership or increase their earnings by taking on additional work or responsibilities. The Department is reviewing recruitment and retention of GPs and consultants and will explore what, if any, mitigation might be appropriate in the context of total reward and fiscal considerations.
- 3.19 Where an annual allowance tax charge is incurred, the Scheme Pays facility is available for individuals to settle their tax charges without needing to pay upfront. Individuals can elect for the NHS Pension Scheme to pay the tax charge on their behalf. The scheme then recoups the cost by reducing the value of the individual's pension by an amount equivalent to the tax charge plus interest.
- 3.20 To maximise the usefulness of Scheme Pays, the Department has closed a gap in coverage which prevented those with charges arising from the tapered annual allowance or charges under £2,000 from utilising it. The scheme administrator has confirmed that from tax year 2017-18, Scheme Pays can be used to meet any pension tax charge of any amount.

- 3.21 In conclusion, the Department confirms it will proceed with the proposal to remove the expiry date for existing contribution rates in implementation of the SAB recommendation to keep the member contribution rate approach unchanged until 31 March 2021.

4. Employer Contribution Rate

- 4.1 The consultation proposed an increase to the employer contribution rate from 14.3% to 20.6% from 1 April 2019. This does not include the scheme administration charge of 0.08%, which when added creates an effective employer rate of 20.68%.

Background and consultation proposal

- 4.2 The Government Actuary's Department (GAD) has undertaken a quadrennial actuarial valuation of the scheme. Scheme valuation is an actuarial assessment of the cost of past and future pension benefits accruing within the scheme.
- 4.3 The consultation document explained how provisional valuation results showed that an employer contribution rate of 20.6% is appropriate to meet the cost of pension rights that individuals are building up. This is a 6.3 percentage point increase to the current employer contribution rate. The increase is driven principally by two factors: a reduction in the SCAPE discount rate, and substantial changes in member-related costs.
- 4.4 The SCAPE discount rate is used to set contribution rates for unfunded public service pension schemes. The rate is set by HM Treasury and is the notional investment return on contribution income received. At Budget 2016, the Treasury announced that the SCAPE rate of 3%+CPI would reduce to 2.8%+CPI from 1 April 2019. However in view of more recent assessments of economic outlook, the Treasury confirmed at Budget 2018 that the SCAPE rate would be further lowered to 2.4%+CPI.
- 4.5 The consultation document described how a cost control mechanism (the 'cost cap') was introduced by the Treasury as part of the 2015 reforms of public service pension schemes, to protect taxpayers from significant changes in member-related pension costs. The mechanism provides that where such costs of the scheme move by more than a 2% from a target level set when the scheme first opened, then steps must be taken to return costs back to the target level.
- 4.6 The draft valuation results indicated that member-related costs had fallen from target by 3.2% of pensionable pay, which, if confirmed, would trigger the cost cap mechanism. This would require the value of the 2015 scheme for members to be improved to restore the costs back to target. If the opposite occurred, with the scheme becoming more expensive, then members would either contribute more or accrue less valuable benefits to reduce costs back to target.

- 4.7 However, a material level of uncertainty relating to scheme costs has since been created by a judgment handed down by the Court of Appeal on 20 December 2018 in the cases of McCloud and Sargeant. The judgment may have implications for the value of member benefits accrued since 1 April 2015. See the [judgment](#).
- 4.8 The Court ruled that ‘transitional protection’ provided to some members as part of the 2015 public service pension reforms as implemented in the Judicial Pension Scheme and the Firefighters Pension Scheme, amounted to unlawful discrimination. Individuals with transitional protection were permitted to remain in the former final salary pension. As part of the 2015 reforms, most public servants moved to career-average pensions with increased pension ages. However, ‘protected’ members within 10 years of Normal Pension Age (as at 1 April 2012) remained in the old schemes. Further protection was offered on a tapered basis to members between 10 and 13.5 years from Normal Pension Age. The NHS Pension Scheme operates a similar set of transitional arrangements.
- 4.9 The Government has sought permission to appeal this judgment to the Supreme Court. However, whilst the legal process is ongoing, the substantial potential impact of the judgment means it is now impossible to assess with certainty the value of current public service pension arrangements. Consequently, in a Written Ministerial Statement on 30 January 2019, the Government announced a pause to the cost cap mechanism element of scheme valuations pending the outcome of the final appeal. See the [Written Ministerial Statement](#).
- 4.10 The Statement explains that if Government is successful in appealing the judgment, the cost cap process will resume with scheme improvements implemented retrospectively from 1 April 2019 as envisaged. If the Government is unsuccessful then steps will need to be taken to compensate members who were transferred to the new schemes. Irrespective of whether or not the judgment stands, the cost of NHS pension benefits is set to become more expensive from 1 April 2019 and the employer contribution rate should reflect this.
- 4.11 Accordingly, HMT have issued new valuation Directions to implement the cost cap pause. HMT valuation Directions set a range of assumptions and technical approaches that GAD must use in their valuation calculations. Based on those Directions, GAD have issued a finalised valuation report that recommends an employer rate of 20.6%.
- 4.12 Finally, the consultation document set out the commitment made by the Treasury as part of the five-year funding settlement for the NHS, to provide extra funding to meet the costs arising from the valuation.

Consultation findings

- 4.13 The majority of respondents disagreed with the proposal to increase the employer contribution rate from 14.3% to 20.6%. Some respondents agreed with the proposal provided the increase in employer contribution rate is funded. The availability of such funding was the main issue raised by respondents, in particular whether and how the additional funding committed by the Treasury would cover the higher pension costs faced by their organisation. Many felt the increase was too high and an unaffordable financial burden that will require employers, including GP practices, to review their workforce. Some thought the increase would exacerbate the recruitment and retention issues they were currently facing.
- 4.14 Many respondents asked for written clarification of the scope of the funding commitment, specifically confirmation whether all employers are eligible and the extent of such funding. Respondents expressed concern about the impact on employers who participate in the scheme but are not 'traditional' NHS providers. Representations from hospices described how increasing the employer contribution will add significantly to hospice costs and sought reassurance that the additional funding would be equally available to such organisations.
- 4.15 In addition to voicing concerns about the financial impact of the increase, Social Enterprise UK highlighted that offering the NHS Pension Scheme is vital to attract and retain staff, enabling a 'level playing field' which would be put at risk if funding is not provided. A joint response by NHS trade unions shared these concerns and noted that organisations who do not receive funding support may seek to change their pension offer to staff to the detriment of the scheme overall.
- 4.16 Concerns were raised by GP practices that the impact would compromise the sustainability of the partnership model and threaten the viability of their practice. Without appropriate funding, some suggested they would look at options to discontinue scheme membership for staff. Some practices were sceptical that additional funding would be available and sought reassurance that the rate increase would be fully reimbursed on a recurring basis. One organisation highlighted that a range of organisations, including GP Federations and Primary Care Networks, hold a variety of NHS contracts and asked about the implications for multi-contract providers. Whilst welcoming the Government's commitment to provide additional funding, the BMA echoed concerns about the impact the increase would have on employers should funding not be forthcoming.
- 4.17 Respondents from, or representing, universities were concerned that the increase to the employer contribution rate made the NHS Pension Scheme one of the most expensive schemes that universities will contribute to. These respondents also requested more information about whether non-NHS employers, such as

university medical schools, will be eligible for additional funding if they have employees in the NHS Pension Scheme.

- 4.18 The Universities and College Employers' Association also raised that medical schools question whether the administration levy provides value for money and requested that the Department review the levy.

Response

- 4.19 Having considered the consultation responses, the GAD valuation reports, and the Statement made by the Chief Secretary to the Treasury, the Department confirms that the increased rate of 20.6% (plus the 0.08% administration charge) will be implemented from 1 April 2019.
- 4.20 It is important that the cost of pension rights is met in full by staff and their employers at the point those liabilities are incurred, and avoid leaving deficits for the future. The new rate reflects the SCAPE discount rate changes and makes provision for the increased cost of improved NHS pension benefits going forward.

Funding for employers

- 4.21 The most frequent issue raised was the financial impact of the increase and the availability of funding to meet the cost.
- 4.22 Employer contribution rates are set to increase across all public service pension schemes, creating cost pressures for Departments and participating employers to manage. Some increase in costs were foreseen in Budget 2016 when the SCAPE rate was last changed. The Treasury will be supporting departments with unforeseen costs in 2019-20, and confirmed at Budget 2018 that it has allocated extra DEL to the reserve for 2019-20 to cover an expected £4.7 billion of additional costs. Funding for future years will be a matter for the Spending Review process later this year. For the NHS Pension Scheme, the foreseen cost equates to an expected 2.5 percentage point increase in employer contributions, with the remaining 3.8 percentage points (together totalling the 6.3% increase) constituting the unforeseen costs.
- 4.23 The NHS is an exception to this general position on funding support. As highlighted in the consultation document, alongside the funding settlement for NHS England announced in June 2018, the Government committed to provide additional funding for NHS pension costs until 2023-24, adjusting the level of additional funding to reflect the final SCAPE rate change. This provision includes both the foreseen and unforeseen costs arising from this scheme valuation described above.

- 4.24 Employers that receive funding from the budget set out in NHS England's mandate are in scope of the commitment to the NHS. This includes Trusts, Clinical Commissioning Groups, Commissioning Support Units, GP practices and Dentists. However, we also recognise that some non-NHS organisations receive funding from the NHS for the delivery of NHS services, including independent providers, social enterprises, New Fair Deal, charities and hospices. Whilst individual circumstances may vary, these organisations mostly deliver NHS services or functions commissioned and funded by the NHS on a basis of 'level-playing field' with other providers. Consequently, these organisations are also included within scope of the funding being provided to NHS England to take account of these costs to the NHS.
- 4.25 Employers that are outside this scope will receive funding support for the unforeseen costs in 2019-20. This principally applies to the non-NHS England Arm's Length Bodies of the Department of Health and Social Care and Local Authorities. For these organisations, the unforeseen cost will be funded, however they will have to manage the impact of the foreseen cost pressure, an expected 2.5 percentage point increase in employer contributions from 1 April 2019. For university medical schools, we propose providing support towards pension costs to reflect that a combination of both NHS and other sources (including non-NHS) funding usually contributes towards overall costs. In line with this, university medical schools will have to manage an element of the foreseen cost.

Distributing the funding

- 4.26 A transitional approach for 2019/20 has been agreed with NHS England and the scheme administrator, the NHS Business Services Authority.
- 4.27 In 2019/20 an employer rate of 20.6% (20.68% inclusive of the administration charge) will apply from 1 April 2019. However, the NHS Business Service Authority will only collect 14.38% from employers. Central payments will be made by NHS England and the Department of Health and Social Care for their respective proportions of the outstanding 6.3%.
- 4.28 NHS England will pay the balance to the Scheme for those employers who are within scope of full funding (as set out in paragraph 1.23). Employers outside the funding scope will also continue to pay 14.38% with the Department paying the balance. However, the 2.5% foreseen cost will be recouped by a corresponding reduction to the funding such organisations receive from the Department. The Department is currently considering the optimum way of recouping the costs for those organisations which do not directly receive funding from DHSC. It is important from a scheme administration perspective that all employers pay the same percentage rate so that income can be reconciled and facilitate accurate

calculation of the balance to pay centrally. The pension scheme administration system is set up to maintain a single employer rate at any given time.

- 4.29 Arrangements for 2020/21 will be confirmed in due course, with the expectation that the Scheme will return to 'business as usual' arrangements in 2020/21 both in terms of contribution collections and funding flows.

Administration levy

- 4.30 Whilst the administration levy is outside the scope of the consultation, the Department considers that the levy provides good value. The total cost per member is £12.42 compared to an adjusted (for scale) peer average of £19.99. The member score (measuring how satisfied members are with the service they receive) is equal to the peer medium.

5. Entitlement of survivors of civil partners and same-sex spouses

- 5.1 The consultation proposed amendments to provide the survivors of same-sex partners to have their entitlements equalised with those of widows.

Background and consultation proposal

- 5.2 Amendments are required to the NHS Pension Scheme to provide civil partners and same-sex spouses with the same pension benefits as widows. This is due to a Supreme Court judgment in the case of *Walker v. Innospec Ltd* [2017] UKSC 47. The judgment is available [online](#).
- 5.3 As a result, public sector schemes, including the NHS Pension Scheme, must amend their rules to provide the same survivors' benefits for same-sex couples (whether married or in civil partnerships) as those for opposite-sex married couples. The NHS Pension Scheme will also provide back-dated survivor benefits based on all relevant service to surviving same-sex spouses or civil partners where their right to claim a survivor's pension arose on or after 5 December 2005.
- 5.4 The proposals do not extend the same treatment to widowers (male survivors of opposite-sex marriages). The Government consulted widely on this issue in the joint HM Treasury and Department for Work and Pensions review of survivor benefits in Occupational Pension Schemes. This is a complex area and it was to be expected that a thorough consideration of the issue would take time. No final decisions have been made on these issues. The Government will respond in due course.
- 5.5 In addition, the European Court of Justice judgment on *Barber v Guardian Royal Exchange* required schemes to provide survivor benefits for males who survive their female spouse that are equal with those provided to females who survive their male spouses in relation to service from May 1990. The NHS Pension Scheme provides such equal benefits in relation to service from 6 April 1988. See [Barber judgment](#).

Consultation findings

- 5.6 The changes to the provisions for civil partners and same-sex spouses were welcomed by the majority of respondents who supported the proposal to provide civil partners and same-sex spouses with the same pension benefits as widows in line with the Supreme Court judgment. One respondent suggested that surviving

spouses and civil partners should receive the Scheme member's full pension and that this should further pass on to their children on death.

- 5.7 NHS trade unions and others felt that the changes proposed did not go far enough to eliminate all differential entitlement due to sex and/or gender as male survivors of female members will continue to receive lower survivor benefits compared to male survivors of male members. The BMA urged the Government to complete its ongoing review into this swiftly.
- 5.8 The BMA also welcomed the prospect of a proposed mechanism to refund members in same sex partnerships who made purchases to increase these benefits or whose lump sums at retirement were reduced and ask to be involved in agreeing a joint communication programme to ensure that all those affected are made aware of these changes.

Response

- 5.9 The Department welcomes the support received for this proposed change and will proceed with the amendments. In relation to survivor benefits for widowers, this is a matter for the Treasury, and the Government will respond to the review in due course. This consultation concerns the steps necessary to comply with the *Walker* judgment.
- 5.10 The NHS Pension Scheme provides a survivor pension for widows and widowers of NHS Pension Scheme members. There are no current plans to pass a member's pension to their widow/widower or children upon the death of the member.
- 5.11 The NHS Business Services Authority recognises the need to provide further information to affected members about a refund mechanism and will make appropriate arrangements. The Department thanks the BMA for its offer to be involved in the communication process, and welcomes input from all member representatives to ensure affected members are identified in the most effective way possible.

6. Forfeiture of pension benefits

- 6.1 The consultation proposed amendments to the forfeiture provisions to:
- (a) Suspend the right to, or the payment of, benefits when a member or other beneficiary has been charged with or convicted of an offence, which may be an offence to which the forfeiture provisions apply; and
 - (b) If the Secretary of State does not subsequently direct forfeiture or directs forfeiture of an amount less than the amount suspended, to pay the amount suspended or the difference together with interest.

Background and consultation proposal

- 6.2 Where a member of the NHS Pension Scheme or other beneficiary is convicted of certain offences, the regulations give the Secretary of State power to direct that part or all of their pension benefits be forfeited.
- 6.3 The forfeiture provisions only apply to certain offences. In the case of Scheme members, these are offences committed in connection with their employment which are liable to lead to serious loss of confidence in the public service, or are gravely injurious to the State. The powers also apply in respect of convictions for treason or offences under the Official Secrets Acts where the member has been sentenced to at least 10 years imprisonment. In the case of Scheme beneficiaries, relevant offences are the murder or manslaughter of the member, or any other offence of which the unlawful killing of the member is an element.
- 6.4 Currently, the forfeiture powers only apply where a member or beneficiary is convicted of a relevant offence and the Secretary of State has directed forfeiture. Before this happens, the practice is for the Secretary of State to seek representations from the member or beneficiary. This takes time and means that a member may claim benefits before the outcome of court proceedings is known or before the Secretary of State directs forfeiture. As a consequence, a member or beneficiary may receive substantial pension and lump sum payments from the public purse, notwithstanding the fact that the member has been charged with, or convicted of, serious relevant offences.
- 6.5 Scheme regulations already include provisions which allow the Secretary of State to defer making a transfer value payment in circumstances where it is the Secretary of State's opinion that disciplinary or court proceedings may lead to all or part of the member's benefits being forfeited. The proposed amendments would extend those existing provisions to enable the Secretary of State to make a

decision suspending the right to, or the payment of, benefits pending a forfeiture decision, where a member has been charged with or convicted of relevant offences.

- 6.6 Where a suspension decision is invoked, the member or beneficiary will be informed and invited to make representations as to why the suspension should be lifted, in whole or in part. All representations, including whether suspension will cause severe financial hardship, will be considered by the Secretary of State.

Consultation findings

- 6.7 A few respondents commented on these proposals, disagreeing with the extension of the Secretary of State's powers to include the suspension of pension benefits of those charged with, but not convicted of, certain offences. One respondent commented that forfeiture represents a fine additional to any court penalty, including money paid into the scheme by the individual. One response commented that the proposal seemed to give rise to the possibility of suspending benefits for (alleged) offences where the forfeiture provisions do not apply. Further, that this might cause financial hardship to potential beneficiaries.
- 6.8 The BMA opposed allowing the Secretary of State to suspend an individual's pension benefits before they have been proved guilty of committing a crime suggesting that this risks unfairly subjecting innocent members to hardship. The BMA believes the proposed new power is neither necessary nor proportionate. Alternatively, they suggested such a power should be limited to a maximum length of time for suspension or the amount of benefits that may be suspended.
- 6.9 The British Dental Association raised similar concerns and commented that the proposal would appear to pre-empt natural justice and withhold the earned possessions of a scheme member, prior to any conviction. Representations from members affected by any suspension decision, or their representatives, should be considered and financial hardship avoided in the case of any individual who has not been subject to any conviction.

Response

- 6.10 The Department acknowledges the concerns raised by respondents and emphasises the discretionary nature of the proposed suspension power. The Secretary of State is required to act in accordance with obligations under the Human Rights Act 1998, and also to consider equality implications under the Public-Sector Equality Duty and the impact on families under the 'Family Test.' In addition, general public law principles require the Secretary of State to maintain an

open mind when deciding whether or not to suspend the right to, or payment of, benefits pending a forfeiture decision and to reach a reasonable and rational decision following consideration of all relevant facts. As mentioned in paragraph 6.6, all representations, including those relating to financial hardship, will be considered by the Secretary of State.

- 6.11 In circumstances where the Secretary of State applies a suspension but does not subsequently direct forfeiture, or directs forfeiture of an amount less than the amount suspended, then the amount suspended or the difference will be paid to the member together with interest.
- 6.12 In conclusion, having considered the responses, the Department confirms it will proceed to implement the proposed amendments.

7. Contracting out

- 7.1 The consultation proposed technical amendments to bring the statutory position up to date by amending provisions relating to contracting out.

Background and consultation proposal

- 7.2 The Pensions Act 2014 made various amendments to the Pension Schemes Act 1993 and a new set of regulations, the Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015, provided for the end of contracting-out with effect from 6th April 2016 and the preservation/protection of contracting-out rights earned by members up to that date.
- 7.3 However, to support the transition and especially the associated administrative processes during the three-year period up to 6th April 2019, some of the existing contracting-out provisions remained in place pursuant to the Pensions Act 2014 (Savings) Order 2015.
- 7.4 At the time, only a small number of immediate technical changes and only one consequential change to NHS Pension Scheme Regulations were necessary to ensure that scheme regulations worked correctly in tandem with the new and revised legislation between 2016 and 2019.
- 7.5 The proposed amendments are technical only and bring the statutory position up to date to ensure that the pensions regulations properly fit with the revised HM Revenue & Customs and Department of Work & Pensions legislation from 6th April 2019.

Consultation findings

- 7.6 No comments on these amendments were received. Accordingly, the Department will proceed to implement the changes.

8. Exempting Agenda for Change pay increases from Final Pay Control charges

- 8.1 The consultation proposed the exemption of Agenda for Change pay increases from final pay control charges which means that employers will not be liable for a final pay control charge where members receive a pay increase further to the nationally agreed Agenda for Change pay award.

Background and consultation proposal

- 8.2 Final pay controls are provided for under Regulation D3 of the 1995 Regulations to safeguard the NHS Pension Scheme against inordinate pensionable pay increases for members approaching retirement. Regulation D3 protects the scheme from the increased cost of paying pensions inflated by excessive late career pay rises and is only relevant to members with final salary pension benefits. Consequently, final pay control charges are only provided for by the 1995 Regulations.
- 8.3 If a member receives an increase to their pensionable pay that exceeds the 'allowable amount' in any of the three years prior to their last day of service, the employing authority that awarded the excess pay will be liable for a final pay control charge. The increase in pay must have occurred on or after 1 April 2014 for a final pay control charge to be triggered.
- 8.4 Regulation D3 also sets out the formula for calculating whether a final pay control charge will arise and the value of the charge. A threshold was set because the policy intent was not to impose a final pay control charge following every pay rise. Therefore, where a member has a pay rise prior to retirement that falls under the allowable amount, their employer would not be subject to a final pay control charge. After consulting in 2014 with various stakeholders, including the Government Actuary's Department, the allowable amount threshold was set at 4.5% plus the rate of the Consumer Price Index (CPI). Where CPI is nil or a negative, the allowable amount is 4.5%.
- 8.5 The value of a final pay control charge is the difference between the pension that will be payable and the pension that would have been payable if it had been based on a final salary that is the same as the allowable amount. Consequently, an employer will have to pay the difference between the two amounts because they will be charged for any increase above the allowable amount.

- 8.6 The Agenda for Change pay deal provides increases to pay of at least 6% for all NHS employees over three years. The initial pay increases awarded under the Agenda for Change pay deal have been backdated to 1 April 2018. NHS employees who receive a pay increase under the Agenda for Change pay deal and then retire shortly afterwards may fall within the scope of the final pay control regulations and their employer would subsequently be liable for a charge under the 1995 Regulations.
- 8.7 The purpose of the final pay controls policy is to claim back extra pension monies from an employer where that employer has purposefully awarded a pay increase with a view to increasing their employee's pension entitlement. It is not intended to capture mandatory pay increase such as those in relation to the Agenda for Change pay deal.
- 8.8 The Department therefore proposed that the 1995 Regulations are amended to exempt from the final pay control provisions, any pay increase arising from the Agenda for Change pay award.

Consultation findings

- 8.9 Respondents to this proposed change agreed that Agenda for Change pay rises should not trigger the final pay control mechanism and were supportive of the need to protect the Scheme from pay manipulation. However, some respondents would like to see further reform to the final pay controls policy so that only deliberate attempts to manipulate the scheme are covered by final pay controls.
- 8.10 Responses from employers agreed with the proposed amendments who feel that they should not incur a final pay control charge where members receive the agenda for change annual pay award, as the regulations are not intended to capture mandatory pay increases. Respondents raised other situations where employers are incurring significant charges by operating within nationally agreed pay frameworks, including:
- (a) promotional pay increases
 - (b) pay progression to the next pay step within a pay band
 - (c) where a post is regraded following a job evaluation process
- 8.11 Some respondents proposed that the regulations should be amended to exempt all pay increases awarded within any nationally agreed pay framework, including those applicable to the medical workforce and very senior managers. NHS

Employers reported that employers suggested the changes should be backdated to the introduction of the regulations in April 2014.

Response

- 8.12 The Department welcomes the positive reception for this proposal and intends to proceed with the proposed amendment but is not intending to backdate the amendment to April 2014. Whilst the Department has considered the response, the need to amend the regulations arises due to the nature of the current Agenda for Change pay deal. Previous Agenda for Change pay deals have not been as generous and consequently were less likely to give rise to a final pay control charge.
- 8.13 Whilst some of the comments received on final pay controls were outside the scope of the proposals presented in this consultation, it is good practice to periodically review policies to assess impact and effectiveness. The final pay control mechanism came into force on 1 April 2014 and therefore the Department proposes to undertake a review of the policy in conjunction with the Scheme Advisory Board. The observations and comments received through this consultation will be considered within this review.

9. Amendments presented in an earlier consultation

- 9.1 In late 2017, the Department consulted on a draft statutory instrument that was intended to come into force on 1 April 2018. The consultation document is available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657843/NHS_Pension_Scheme_and_AVC__Amendment__Regulations_2018_-_Consultation_document1.pdf.
- 9.2 The consultation proposed amendments to scheme rules relating to:
- (a) Removing the requirement to nominate unmarried co-habiting partners for survivor benefits; and
 - (b) Miscellaneous technical corrections and refinements to improve the operation of scheme rules.
- 9.3 The other amendments presented in the earlier consultation are included in the Draft Regulations and further comments were invited.

Background and consultation proposal

Removal of the requirement to nominate unmarried co-habiting partners for survivor benefits

- 9.4 The consultation proposed the removal of a scheme rule requiring an unmarried co-habiting partner to have been nominated to receive survivor pension benefits upon death of the member. The Supreme Court decided an equivalent rule in the Local Government Pension Scheme (Northern Ireland) to be unlawful.
- 9.5 In order to qualify for this benefit, an unmarried co-habiting partner must have been nominated to receive the pension before the member's death and to have been in a financially interdependent and co-habiting relationship for at least two years before the member's death. The validity of the nomination is tested at death.
- 9.6 On 8 February 2017, the Supreme Court handed down its decision in *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC 8. The case concerned an unmarried co-habiting partner being refused a survivor pension under the Local Government Pension Scheme Northern Ireland on the basis that

scheme Regulations required a co-habiting surviving partner to have been nominated by the member. No nomination had been made for the partner.

- 9.7 The Supreme Court found 'that the essence of entitlement to the benefit is that the couple have lived together for a sufficiently long period of time and that one is financially dependent on the others or that they are financially interdependent'. Further, that being required to make a nomination added nothing to the objective inquiry as to whether an unmarried partner satisfied these other conditions. It also found that the requirement of a nomination resulted in less favourable treatment on the basis of the unmarried status of the co-habiting partners when compared with married couples and those in a civil partnership (where there was no nomination requirement). The Court dis-applied the nomination requirement, having found it to be unlawful, and held that the partner was entitled to receive a survivor's pension.
- 9.8 In response to the judgment, HM Treasury have determined that public service pension schemes remove the nomination form requirement for new claims and pay survivor pensions in qualifying cases from the date of the member's death, regardless of when the claim is made.
- 9.9 The judgment does not call into question the remaining qualifying criteria, namely that for a continuous period of at least two years ending with the member's death, the member and the partner were:
- Living together as if they were married or civil partners;
 - Not prevented from marrying or entering into a civil partnership;
 - Financially interdependent or the partner was financially dependent on the member, and;
 - Neither were living with a third person as if they were married or civil partners.
- 9.10 The scheme currently relies on section 3 of the Human Rights Act 1988 to set aside the unlawful nomination requirement when considering claims. However, to provide legal certainty, the Department proposed removal of the unlawful provisions from scheme regulations. Accordingly, the draft regulations proposed amending scheme regulations with retrospective effect for members who have service on or after 1 April 2008 so that surviving partner pensions are paid to survivors who meet the qualifying criteria set out above but without the need for a nomination to be made.

Minor and miscellaneous amendments

Statements of estimated contributions

- 9.11 The Department proposed the requirement for employers to provide certain statements of estimated contributions be in future at the discretion of the scheme administrator rather than mandatory for all employers. Historically this information has assisted the scheme administrator forecast financial cash flows, however improvements in administration data systems means that information for this purpose can be derived from returns made by most participating employers. Accordingly, the future provision of such statements will be at the request of the scheme administrator, typically in instances where this information is not available or an employer is at risk of not adhering to contribution obligations.
- 9.12 The proposed amendment does not affect GP surgeries who, since 2009, have been required to provide statements of estimated pensionable pay and contributions in respect of Practitioners and non-GP Providers one month prior to the start of the pension year. This is so that the Practitioners and non-GP Providers, who are in the main self-employed, pay employee contributions 'on account' at the most appropriate tiered rate based on projected earnings. If at year end, actual earnings means a different rate should have applied, this is corrected through their certification process.
- 9.13 The amendment also does not affect Independent Providers who, since 2014, have been required to provide statements of estimated pensionable pay and contributions in respect of all their employees prior to the start of the pension year. This is so the scheme administrator can establish that estimated contributions are in line with the 'qualifying contract' values, that the estimated and actual contributions paid over are similar, and that the 75% pensionable pay threshold has not been exceeded.

Scheme contributions

- 9.14 Amendments were proposed to paragraph 10(2S) of Schedule 2 to the 1995 Section, regulation 3.C.2(16) of the 2008 Section and regulations 38 and 39 of the 2015 Scheme. The purpose is to provide clarity in the definition of NDPS in the formula for uprating the pensionable earnings of a dental performer/practitioner and, in the case of the 2015 regulations, a medical practitioner and non-GP provider is used to calculate the member contributions payable for a scheme year.
- 9.15 The change makes it clear, as occurs in practice, that NDPS is the 'number of days of pensionable service' in the scheme year and not the number of days from the start of the performer or practitioner's service in the scheme year. This change brings the regulations in respect of these performers and practitioners in line with

Officer scheme members who are subject to the annualising rule in respect of establishing their tiered employee contribution rate.

- 9.16 The Department is aware that, in the past, some GPs have had breaks of up to three months (or, if they are a salaried GP, breaks of no more than one month) ignored when setting an annual rate of pay. From April 2019, breaks in pensionable service will be treated in line with the wording of the regulations, as amended. Consequently, a GP's annual rate of pay will be based on the number of days of pensionable service that they have undertaken during the relevant scheme year.

NHS standard sub-contract definition

- 9.17 Proposed amendments update the definition of NHS standard sub-contract in regulation A2 of the 1995 Section, regulations 2.A.1 and 3.A.1 of the 2008 Section and Schedule 15 of the 2015 Scheme with reference to the latest guidance for the years 2017-18 and 2018-19.

Consultation findings

- 9.18 The changes to the provisions for surviving partners were generally welcome. One respondent, disagreeing with the above proposed change to survivor benefits, considered it unfair that non-married co-habiting partners should have the same rights to pensions as those who are married.
- 9.19 In response to the proposed NDPS changes, the BMA disputed that the correct annualising principles have been applied in practice by the scheme administrator and thus no member has been disadvantaged. The BMA recognise that the amendments seek to reflect the original intention of the annualising rules, but remain opposed to annualising in principle. The Association of Independent Specialist Medical Accountants (AISMA) stated that the clarification in the consultation document and that the interpretation can be backdated is helpful.
- 9.20 Paragraph 7.41 of the consultation document explained that the Department was aware that, in the past, some GPs have had breaks of up to six months (or if they are a salaried GP, breaks of no more than one month) ignored when setting the rate of annual pay. The consultation document outlined that, from 1 April 2019, breaks in pensionable service will be treated in line with the wording of the regulations, as amended. The BMA commented that they are opposed to this because it will lead to any annual leave, study leave, sick leave or weekends resulting in a locum being annualised.

- 9.21 The BMA believe that the removal of an exemption for locum GPs from annualising provided they worked at least once every three months (the "three-month rule") may constitute discrimination against GPs. The BMA explained that they believe many GP locums are from groups who have legally protected characteristics are more likely to have breaks in their work.

Response

- 9.22 The Department notes that the amendments were generally welcomed and will proceed with the proposed amendments in order to remove the requirement for unmarried co-habiting partners to be nominated for survivor benefits in compliance with the legal judgment.
- 9.23 In order to determine a member's tiered contribution rate, that member's rate of pay is annualised. The Department annualises earnings to ensure that someone who became a member in the middle of the pension year pays contributions at the same rate as someone who started at the beginning of the year. The Scheme Advisory Board have been consulted on the approach to annualising and determined, by majority view, that annualising remains appropriate for the NHS Pension Scheme.
- 9.24 The Department recognises the BMA's concerns regarding removing the exemption relating to annualising for locum GPs. However, making amendments to the regulations to provide for such an exemption would place locums in a significantly advantageous position compared to the rest of the scheme membership who would have their earnings annualised if they had a break from pensionable employment, no matter the length of the break. The Department has carefully considered the suggestion that locum GPs are more likely to be from groups with legally protected characteristics. The research the Department has seen does not support this proposition; notwithstanding this, the Department considers that, if locum GPs were to be from such groups, removing the exemption is justified as exempting locums would place them in a significantly advantageous position. The proposal to no longer apply the three-month rule is intended to bring the administration of the NHS Pension Scheme in line with what is provided for by scheme regulations and provide the same treatment as for the rest of the NHS Pension Scheme membership. Therefore, all NHS Pension Scheme members will have their tiered rate calculated using the same rules.
- 9.25 Locum GPs are self-employed and therefore do not have annual leave, study leave or sick leave. Such self-employment gives locum GPs further flexibility compared to other scheme members because they can choose whether or not to 'pension' individual locum assignments.

10. Miscellaneous and consequential amendments

10.1 A number of miscellaneous and consequential amendments were proposed.

Background and consultation proposal

Amendments to the 1995, 2008 and 2015 Regulations

Statements of estimated contributions of pensionable income

- 10.2 Amending regulations 40(6), 73(2) and 93(2) amend paragraph 23 of Schedule 2 of the 1995 Regulations, regulation 3.J.14 of the 2008 Regulations and paragraph 4 of Schedule 12 to the 2015 Regulations by inserting new sub-paragraph (14A), paragraph (13A) and new sub-paragraph (5) respectively.
- 10.3 In accordance with the regulations, all GMS/ PMS practices, APMS contractors and GDS/PDS must provide the host Board (NHS England (NHSE) or Local Health Board (LHB)) with a statement of the annual estimated pension contributions due no later than one month before the start of the Scheme year. NHSE or the LHB must be in possession of the form outlining the estimated pensionable income in respect of relevant medical and dental practitioners and non-GP Providers by 1 March of the preceding Scheme year.
- 10.4 If a practice or an APMS contractor fails to provide a statement of estimated contributions by the required date, the amendments allow the host Board to determine the estimated pensionable income and to deduct member contributions at the maximum contribution percentage rate (currently 14.5%) specified in the Regulations. Where it subsequently transpires that pension contributions have been deducted at a higher rate than would have been due if the statement had been provided, arrangements are in place for appropriate adjustments to be made during the Scheme year.

Amendments to the 1995 and 2008 Regulations

- 10.5 Amending regulations 3(5), 43(3)(e) and 59(5) amend the definition of "officer" in the 1995 and 2008 Regulations to clarify that the term "officer" does not include a GP performer, a dentist performer or a person engaged under a contract for services. The revised definition is consistent with the 2015 Scheme provisions.

Amendments to the 1995 Regulations

- 10.6 Amending regulation 3(7) omits the definition of "CCT", Certificate of Completion of Training, relating to medical practitioner training. This definition previously featured in the definition of "trainee practitioner". However, the "trainee practitioner" definition was replaced with effect from 1 April 2013 by the current definition "specialist trainee in general practice", meaning the CCT definition is no longer required and can be omitted.

Amendments to the 2008 Regulations

- 10.7 Amending regulation 43(2) makes a correction to the paragraph numbering in 2008 regulation 2.A.1 (interpretation: general). A superfluous reference to paragraph (2) before the definition of "contracting-out" requirements is omitted and subsequent paragraphs are re-numbered accordingly.

Amendments to the 2015 Regulations

Recovery of arrears of scheme contributions from benefits

- 10.8 Amending regulation 93(3) brings paragraph 10(2)(b) of Schedule 12 to the 2015 Regulations into line with the 1995 and 2008 Section provisions.
- 10.9 Where a GP or non-GP Provider has failed to pay over their NHSPS contributions, paragraph 10(2)(b) of Schedule 12 allows NHSBSA to recover these arrears from their NHS pension benefit, usually at retirement.
- 10.10 The amendment streamlines the recovery of arrears by replacing the current requirement for 'member consent' to be obtained for recovery from benefits, with a simpler duty for the Scheme Administrator to "notify the member".

Consultation findings

- 10.11 One respondent concluded that it is reasonable to collect contributions at the top rate if the forms are not submitted by the due date, but only if such forms are correctly actioned by Primary Care Support England (PCSE) once submitted.

Response

- 10.12 The Department notes the response and observes that PCSE are an agent of NHS England. Therefore any underperformance by PCSE in the delivery of their contractual obligations would be a commercial matter for NHS England. The

National Health Service Pension Scheme, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019

Department confirms that it will proceed with the proposed amendment in order to protect the NHS Pension Scheme from the underpayment of contributions. The other proposed amendments did not receive any comments and will also be implemented.

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