



Department  
of Health

The draft National Health Service  
Pension Scheme Regulations 2015

The draft National Health Service  
Pension Scheme (Transitional and  
Consequential Provisions) Regulations  
2015

The draft National Health Service  
Pension Scheme, Injury Benefits and  
Additional Voluntary Contributions  
(Amendment) Regulations 2015

Consultation response

February 2015

<p><b>Title:</b> The draft National Health Service Pension Scheme Regulations 2015; The draft National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015; The draft National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015  Consultation response</p>
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# Introduction

1. The Department of Health published for consultation three Statutory Instruments titled:
  - The National Health Service Pension Scheme Regulations 2015
  - The National Health Service Pension Scheme (Transitional and Consequential Provisions) 2015
  - The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015
2. These instruments form part of a group that together implement reforms to pension scheme arrangements for NHS workers in England & Wales.
3. The first establishes a new, reformed pension scheme. The second instrument implements a series of transitional and consequential arrangements for the treatment of pension benefits built up under the old scheme where a person joins the new scheme on or after 1 April 2015. Such arrangements also include protections permitting members close to normal pension age to remain in the old scheme.
4. The third implements reforms to the 1995 and 2008 Sections of the NHS pension scheme (“the old scheme”) including new employer & member contribution rates and provisions to support future contractual terms relating to redundancy retirement. It also accommodates the new scheme within the Injury Benefits scheme and Additional Voluntary Contribution (AVC) facility, enables greater flexibility for members in relation to their money purchase AVC benefits and makes a series of technical clarifications.
5. This document sets out the Government’s response to the comments received through consultation.

# 1. Consultation Process

- 1.1 Two consultation exercises were held. The main scheme regulations, establishing the new 2015 scheme, were published for consultation from 17 October 2014 to 5 December 2014. A further consultation presented the transitional and consequential regulations, and ran from 14 November 2014 to 15 December 2014.
- 1.2 Alongside the draft regulations, explanatory documents were prepared and are available at [www.gov.uk/government/collections/nhs-pensions](http://www.gov.uk/government/collections/nhs-pensions). Responses to the consultation were invited by email or post.
- 1.3 As part of existing governance arrangements underpinning the NHS Pension Scheme, the major NHS Trade Unions were formally notified of the consultation. A workshop was held on 18 November 2014, facilitated by the Department which explained the proposals and received comments on the draft regulations. The workshop was attended by representatives from NHS trades unions, employers and the scheme administrator.
- 1.4 While recognising their continued opposition to these reforms, ahead of the formal consultation NHS trades unions have actively engaged with the Department in developing the detailed provisions of the reformed scheme and transitional arrangements. Discussions on these detailed provisions and scheme rules began in April 2012 with over 80 meetings held since with trades unions and employer representatives.
- 1.5 A total of 32 responses were received across both consultations. The majority of respondents were individuals working within the NHS, in particular those with roles in finance or pension administration. Responses were also received from the following organisations:

Association of Pension Lawyers  
British Medical Association  
Equitable Life Assurance Society  
Government Actuary's Department  
Mercers  
NHS Business Services Authority  
NHS Employers  
Prudential

- 1.6 Two group responses were also received from certain NHS trades unions represented on the shadow Scheme Advisory Board. Those responses are referred to in this document as being from the 'NHS trades unions' and were submitted on behalf of the British Dental Association, British Medical Association, Chartered Society of Physiotherapy, Federation of Clinical Scientists, GMB, Hospital Consultants and Specialists Association, Managers in Partnership, Royal College of Midwives, Royal College of Nursing, Society of Radiographers, Society of Chiropodists and Podiatrists, UNISON and UNITE.
- 1.7 There are other organisations who represent the interests of certain groups working within the NHS, and the phrase 'NHS trades unions' in this context is used solely to assign authorship of those group responses.

## 2. Scheme structure & governance

### 2015 scheme construction

- 2.1 The British Medical Association (BMA) observed that unlike the Local Government pension scheme, the new NHS pension scheme is constructed as an entirely separate scheme to the existing scheme which comprises the 1995 & 2008 sections (“the old scheme”). The BMA reiterated previously expressed concerns that:

“This could have implications for doctors who have any form of HMRC protection against potential pension taxation charges.”

BMA

- 2.2 In line with other major public service pension schemes such as those relating to the Civil Service and Teachers, the Department established the new scheme as a separate entity to the old scheme, using the powers provided by the Public Service Pensions Act 2013.
- 2.3 The Department recognises that where an individual joins the new scheme on account of being ineligible to remain active in the old scheme, this may affect lifetime allowance protection granted by HM Revenue & Customs. Where such protection is held the individual must generally ensure that any benefit accrual is limited to being within a specified percentage and not join another pension scheme arrangement to avoid loss of protection. Individuals holding a lifetime allowance protection should seek independent financial advice on the implications of moving to the new scheme and their options.

### Role & membership of the Scheme Advisory Board

- 2.4 The NHS trades unions provided a collective response to the consultation. This raised several points relating to the Scheme Advisory Board provisions. The Public Service Pensions Act 2013 requires a Scheme Advisory Board to be established for the purpose of advising the Secretary of State on the desirability of any changes to both the new and old schemes. The Act states that this advice be given where requested by the Secretary of State.
- 2.5 Trades unions commented that the ‘on request’ element of the Board’s role in regulation 5 of the main scheme regulations artificially limits its effectiveness by ruling out a more pro-active approach. The Local Government pension scheme was cited as having adopted such an approach despite the clear direction in the

Act. The Department does not propose to follow suit and prefers to frame the purpose of the Board in line with the wording of the Act. This is consistent with the approaches taken by the other major public service pension schemes such as the civil service and teachers schemes. We are keen for the Board to be a forum where matters of overarching scheme policy can be discussed.

- 2.6 Concerns were raised about the provisions in schedule 2 that disqualify from membership of the Board a person who has an unspent conviction for an offence involving dishonesty or deception, or is a disqualified company director, or an undischarged bankrupt, or has been removed from the office of trustee, member or chair of a public body.

“the NHS scheme is unfunded and the disqualification provisions were targeted to avoid misuse of members funds. Given this fundamental difference between the NHS and ‘funded schemes’ we believe this requirement does not need to be equal to that of a Trustee. Further Board members may be nominated by their employers rather than individually volunteering themselves and could be required to sign some form of declaration which could potentially cause them difficulty if refusal led to something being disclosed which their employer was not previously aware of.”

NHS trades unions

- 2.7 Whilst this Board will not have a direct role in the management or oversight of the scheme, it is a formal statutory Board with a clear role to advise the Secretary of State. Accordingly the Department is of the view that if the Secretary of State is to have confidence in that advice then the Board members must be of sound judgement and integrity. We do not accept potential revelation of matters previously concealed from an employer as a reason to dilute or waive these requirements.
- 2.8 The Association of Pension Lawyers observed that whilst the role of the Board to advise and make recommendations where breaches of the cost cap occur feature within the regulations, other responsibilities as set out in the draft terms of reference for the Board do not.
- 2.9 The Department’s approach has been to hardwire into regulations those events in relation to which the Secretary of State must seek the advice of the Board. Terms of reference provide a more flexible way for the Secretary of State to agree with the Board their scope of work, with changes more readily accommodated than if set in legislation.

#### Connected schemes

- 2.10 The Trades Unions response commented that the scheme’s money purchase AVC arrangements should fall within the remit of the Pension Board. The AVC



arrangements allow members to optionally supplement their retirement benefits by paying money purchase additional voluntary contributions (AVCs) to an approved external provider. The primary role of the Pension Board is to assist the scheme manager secure effective and efficient administration of the pension scheme and any 'connected scheme'.

- 2.11 Section 5 of The Public Service Pensions Act 2013 provides that the new scheme is connected to old scheme, as they are open to 'persons of the same description'. Scheme regulations are permitted to make exceptions, and declare that certain schemes are not connected.
- 2.12 The Department, in common with the approach taken for the Civil Service and Teachers schemes, does not consider it appropriate to connect the external AVC schemes in this way. To do otherwise would inappropriately require the Pension Board to have formal oversight of the management and administration of externally provided AVC funds, and subject those funds to the general scheme valuation requirements at regulation 7. As defined contribution arrangements, these separate AVC funds are already subject to The Pensions Regulator's compliance regime.

## 3. Scheme access

### Transfers from corresponding health service schemes

- 3.1 Special transfer arrangements currently operate between Health Service Schemes in England and Wales, Scotland and Northern Ireland. This is made possible by the almost identical nature of the scheme rules and regulations across 'corresponding' 1995 and 2008 sections. It is the Department's intention that these arrangements will continue for the transfer of final salary benefits between corresponding 1995 and 2008 schemes after the introduction of the new scheme. Scheme regulations permit the same arrangement to be available in relation to transferring benefits between corresponding career-average schemes (i.e. the new scheme).
- 3.2 The BMA raised concerns that the 12 month transfer time limit that applies to transfers from other pension schemes appears to have now been also applied to transfers from corresponding health service schemes. We can confirm that the 12 month limit has always applied in relation to corresponding health scheme transfers. It features in 1995 section regulation R8(4) and 2008 section regulations 2.F.8 & 2.F.9. The new scheme reflects and continues existing arrangements.

### Eligibility for members who claim 1995 section retirement benefits whilst in employment subject to 'Fair Deal' terms

- 3.3 Mercers highlighted the position of former 1995 section members who:
- become subject to a TUPE 'old' Fair Deal transfer to non-NHS employment,
  - receive a 'broadly comparable' pension in that employment,
  - defer their 1995 section benefits and, whilst in the non-NHS employment,
  - reach age 60 and so become entitled to payment of those benefits and, therefore,
  - are unable to re-join NHS pension scheme, following either:
    - a) a re-tendering exercise subject to New Fair Deal terms, or
    - b) a 'second-generation' TUPE transfer.
- 3.4 Mercers wondered if this might be age-discriminatory, given that younger employees (under age 60) would normally still have scheme benefits in deferment and may be able to re-join the scheme.

- 3.5 When NHS employees are TUPE transferred to the private sector, under ‘old’ Fair Deal rules, the ‘sending’ and ‘receiving’ organisations are obliged to make bulk transfer terms available under which staff can transfer their accrued NHS pension scheme benefits to the ‘broadly comparable’ scheme.
- 3.6 Employees who do not wish to transfer their NHS pension scheme benefits to their broadly comparable pension arrangement are not obliged to do so, and can instead choose to defer their 1995 section benefits in the NHS pension scheme for payment at their normal pension age of 60. However, if they do choose to defer their NHS pension scheme benefits and reach age 60 before any return to the NHS, they will be paid their pension and lump sum, and thereafter be unable to re-join the scheme - like any other 1995 section member.
- 3.7 However, when a TUPE transferred employee chooses to transfer their NHS pension scheme benefits into their broadly comparable pension arrangement, those benefits will remain ‘active’ and, if the employee is subsequently TUPE transferred back to NHS pension scheme, or subject to a re-tendering exercise under New Fair Deal rules, they remain able to re-join the NHS pension scheme. The Department is therefore satisfied that the scheme’s transfer and deferment arrangements provide a range of options in TUPE transfer circumstances and treat staff fairly.

#### The impact of auto-enrolment into the NHS pension scheme for organisations subject to New Fair Deal

- 3.8 Whilst acknowledging that the issue was beyond the scope of the current consultation, Mercers suggested that employees should have the option to waive their right to join the NHS pension scheme under New Fair Deal. This would leave employers free to offer an alternative qualifying pension arrangement in order to fulfil automatic enrolment obligations. This would:

“remove a potentially onerous administrative obligation upon private sector contractors, who currently are required to auto-enrol employees who opt out into the NHS Pension Scheme every three years.”

Mercers

- 3.9 The Treasury document, *Fair deal for staff pensions: staff transfers from central government*<sup>1</sup> sets out the terms of the Government’s New Fair Deal. The

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<sup>1</sup> [www.gov.uk/government/publications/fair-deal-guidance](http://www.gov.uk/government/publications/fair-deal-guidance)

Department has provided supplemental guidance on the application of New Fair Deal to the NHS<sup>2</sup>. Enrolment and triennial re-enrolment into the NHS pension scheme is automatic for *all* eligible NHS staff, not just employees who become subject to the terms of the Government's New Fair Deal. This is a long-standing NHS scheme policy, designed to help NHS employers treat their staff fairly and equally, and to ensure that all eligible employees are made aware of the advantages of joining a good pension scheme with a significant employer contribution.

- 3.10 Automatic enrolment legislation works to ensure that many workers are enrolled in a qualifying pension arrangement. However, such schemes often lack the level of guaranteed benefits provided by the NHS pension scheme, and the minimum required employer contribution may be much lower. In addition, the arrangements may not apply to younger or lower paid individuals. Employer pension contributions are effectively 'deferred pay' and so the NHS as a 'good employer' aims to ensure that all its employees receive an equal contribution.
- 3.11 Private sector employers are of course free to make their own pension decisions within the parameters of DWP or other pensions legislation. However, those private sector employers who opt to join the NHS pension scheme under the 'Independent Provider' access route, or who compulsorily transfer staff from the NHS under New Fair Deal terms, are then obliged to maintain NHS pension scheme membership for those staff and operate the same enrolment rules as traditional NHS employers.
- 3.12 It is important to remember that NHS employees are not *obliged* to contribute to the NHS pension scheme, and if they opt-out of the scheme within a month, either on first joining or at the DWP mandatory triennial re-enrolment point, they can be treated as if they had never joined. Any pension contributions made will be returned in full.

### Tapered protection

- 3.13 The Proposed Final Agreement<sup>3</sup> included a set of protections as part of the transitional arrangements for member of the old scheme. Members of the old scheme who on 1 April 2012 were less than 10 years from their normal pension are able to remain in that scheme. Tapering protection is provided to members who at 1 April 2012 are more than 10 but less than 13 years and 5 months away from normal pension age.

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<sup>2</sup> [www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme](http://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme)

<sup>3</sup> [www.gov.uk/government/publications/reforming-the-nhs-pension-scheme-for-england-and-wales-proposed-final-agreement](http://www.gov.uk/government/publications/reforming-the-nhs-pension-scheme-for-england-and-wales-proposed-final-agreement)

3.14 Tapered protection delays the point at which a member moves from the old to the new scheme. Members who do not qualify for protection are moved to the new scheme on 1 April 2015. In relation to those protections, one respondent commented:

“The new scheme starts in April 2015 so why does the tapered protection only commence from April 2012. Should it not be from when the new scheme starts?”

3.15 1 April 2012 is the date against which eligibility for protection is assessed (i.e. the age of the member) and is the date when the programme of reform began. The terms of the protection facilities were set out in the Proposed Final Agreement on reforms to the NHS pension scheme published in March 2012.

## 4. Scheme contributions

### Contribution rates and structure

- 4.1 The Department held discussions with trades unions and employer representatives on the structure of member contribution rates for the four year period 1 April 2015 to 31 March 2019 that would deliver the required average contribution of 9.8% as set out in the Proposed Final Agreement.
- 4.2 Following those discussions the Department finalised in June 2014 a proposed set of contribution rates, tiered according to earnings and fixed for four years. The rates & tiers remain the same as the current rates for the 2014-15, save for a small adjustment to the tier 4-5 boundary. These were published ahead of consultation in the document, *NHS Pension Scheme: Update on scheme reforms and contribution rates*<sup>4</sup>.
- 4.3 In their response, the trades unions reiterated their preferred option which would have added 0.1% to all contribution rates but allowed revalorisation of the earnings tiers in line with any future uplift to Agenda for Change pay scales. This was felt to be the fairest way of achieving the required contribution yield.

“The proposed basis places an unfair burden on a small but not insignificant minority of members who will move between the fixed bands should their pay rise over the four year period.”

NHS trades unions

- 4.4 The Department remains of the view that on balance the proposed approach is an appropriate solution. A further rise in contribution rates for all members would be the fourth successive year of such rises and unwelcome. Also the prevalence of pay supplements means that only a minority of staff have their pensionable pay directly linked to Agenda for Change basic pay points.
- 4.5 For instance there are significant areas of the workforce that are in receipt of shift work enhancements (such as around 60% of nursing staff and 97% of ambulance staff), and 20% of NHS staff are in receipt of geographical allowances. This calls into question the relevance of continuing to link contribution rate tiers to Agenda for Change basic pay points.

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<sup>4</sup> [www.gov.uk/government/publications/nhs-pension-scheme-reforms-and-contribution-rates-update](http://www.gov.uk/government/publications/nhs-pension-scheme-reforms-and-contribution-rates-update)

- 4.6 The BMA commented that there should be flatter contribution tiers because the new scheme is based on a CARE<sup>5</sup> methodology.

“The BMA has long argued that this is the only fair solution in a career average revalued earnings (CARE) scheme. As acknowledged in Lord Hutton’s Final Report, once a scheme design changes from final salary to CARE, the original justification for tiered contributions becomes less valid. This is because the removal of the final salary link ends the discrepancy between the benefits for higher and lower earners.”

BMA

- 4.7 The Department agrees that the argument for contribution tiers is strongest in relation to final salary schemes in which higher earners tend to derive more value per pound contributed. Irrespective of scheme design, tiering does though allow account to be taken of the beneficial effect of higher rate income tax relief on pension contributions. However the valuable “final salary link” transitional protection means that all members who transfer to the 2015 CARE scheme on 1 April 2015 will have their old final salary scheme benefits calculated using their pay at retirement or leaving the new scheme, rather than the date of leaving the old scheme.
- 4.8 The final salary link serves to increase the value of a member’s final salary benefits even though no further rights are accrued. Until that link expires, the discrepancy highlighted by BMA and described by Lord Hutton will continue in relation to past benefit accrual, even though the member has moved into the CARE scheme for future benefit accrual. This final salary link protection still needs paying for. The Department therefore considers it appropriate to retain tiering until the balance of members with final salary link protection become less dominant as members retire or have breaks in service of five years or more. Accordingly we propose to review the case for tiering in light of results from the next scheme valuation. The four year valuation cycle means that any change in approach would be from 1 April 2019.
- 4.9 12 individuals responded suggesting that the use of a member’s notional whole-time equivalent (WTE) earnings to determine the contribution rate payable by part-time workers is unfair. Some respondents illustrated their reply with a worked example, which – in a pure CARE pension scheme – indicated that a part-time worker paid more as a percentage of their income for the same pension than a whole-time colleague.
- 4.10 NHS trades unions and employer representatives agreed that the general approach to assessing member contribution rates will remain the same as that

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<sup>5</sup> Career Average Revalued Earnings (CARE)

used in the 1995 and 2008 scheme. That is employed members will have their contribution rate assessed based on their notional whole-time earnings for that employment and self-employed members on their actual earnings for that 'employment'.

- 4.11 Notional whole-time is applied where the hours worked are less than full-time. The member is assigned a contribution rate based on the full-time earnings for the role but pays as a percentage of their actual earnings. In a final salary scheme, it allows for equity of treatment between full and part-time members doing the same role – i.e. both pay the same rate but get pension proportionate to their length of service. The same isn't true for a CARE scheme, however the transitional arrangements means that the salary of members transferring to the 2015 CARE scheme will have application in relation to their accrued final salary benefits and the accrual of future benefits under the new CARE scheme.
- 4.12 The Department considers that retention of notional whole-time as a basis for assessing contribution rates is not unfair to part-time workers in the context of the transitional final salary link protection that will benefit those same members when transferring to the new CARE scheme.
- 4.13 As described at paragraphs 4.7 & 4.8, when the new CARE scheme is open on 1 April 2015, the vast majority of scheme members will have substantial final salary benefits in the old scheme for which they retain an active link to final salary at retirement, not date of deferment. The cost of that final salary accrual and its value to the member will continue to rise over time due to pay progression, and must be paid for. It is therefore appropriate for the contributions paid by members of the new scheme to take account of this ongoing member benefit.
- 4.14 Accordingly, the use of notional whole-time as a basis for setting a contribution rate for part-time members remains appropriate because the member's final salary pension benefits will be calculated using their notional whole-time salary.
- 4.15 The Department intends to review this approach so that it evolves in step with how the balance of scheme members with active final salary links is expected to shift over time. The prevalence of active final salary benefits, dominant in the early years of the 2015 scheme, will diminish as members retire or otherwise lose their final salary links. The arguments for retaining existing contribution methodologies also diminish equally and we envisage a future move to a flatter tiering and assessment based on actual earnings rather than notional whole-time. We expect the next scheme valuation in 2018-19 to be a natural review point and a source of data to inform such a move.



## Refund of contributions in cases of short service

- 4.16 Members who leave the scheme without qualifying for a pension are entitled to claim a refund of the contributions that they have made. Trades unions commented that one element of the short service condition at regulation 40 did not reflect the intended policy position. We agree and are grateful for the observation. Sub-paragraph 40(3)(e) has been removed as it may otherwise have meant that a refund could not have been paid until five years had passed since leaving the scheme.
- 4.17 The policy is that if a member returns to active membership within five years and repays the refunded contributions (inclusive of any interest that was paid with those contributions), then the earlier period of refunded pensionable service is reinstated.

## 5. Scheme benefits & AVCs

### Revaluation

5.1 The concept of an 'account' is used to keep a record of the amount of pension that an active member has earned year on year. The account balance is revalued at the end of each scheme year. For the NHS scheme, the rate of revaluation whilst in active membership is a percentage figure that is representative of earnings growth.

5.2 The BMA have expressed concerns about how that figure is determined.

“Section 5. (c) of the “Proposed Final Agreement” clearly states that revaluation of active members’ benefits will be in line with CPI plus 1.5%. The BMA is therefore concerned to note that the draft regulations refer instead to “an HMT order under section 9(2) of the Public Service Pensions Act 2013 plus 1.5%.”

BMA

5.3 The BMA conclude that the PFA has given a clear expectation to scheme members that revaluation is CPI plus 1.5%, and that the Act provides that the Treasury Order can apply a negative revaluation percentage to detrimental effect.

5.4 Section 9(2) of the Act does indeed require ‘the change in prices or earnings to be applied for the purposes of such a revaluation is to be such percentage increase or decrease as a Treasury order may specify in relation to the period’. The Act, passed in 2013, represents the will of Parliament and clearly requires revaluation of the scheme to operate by reference to such a Treasury Order. Whilst this does not capture precisely the PFA position, in drawing up scheme regulations the Department has no option but to act in accordance with the powers and requirements laid down by the primary legislation that applies across all new public service pension schemes.

### Additional Pension purchases

5.5 Scheme rules permit purchases of additional pension by a member or by an employer in respect of a member. However such purchases can only be made whilst that member is an active member of the scheme; the facility is unavailable if the person has left the scheme. The Association of Pension Lawyers suggested that this rule be relaxed where a person’s employment is

terminated in order that the employer is able to purchase additional pension as part of an exit package.

“...have come across circumstances on several occasions where use of the additional pension facility was effectively prohibited as a result of individuals having already ceased employment, and alternative pension/remuneration arrangements had to be put in place at a greater administrative cost to the employer.”

Association of Pension Lawyers

- 5.6 The NHS pension scheme is an occupational pension scheme. Accumulation of benefits is therefore contingent on the individual actually being in NHS employment and having active membership. The Department does not propose to vary this principle in order to allow benefits to be purchased, albeit supplementary ones, by or on behalf of an individual who no longer an active member of the scheme.

#### Early Retirement Reduction Buy Out option

- 5.7 The scheme will have a new facility for members or their employer to make additional contributions to buy-out some of the actuarial reduction applied to a pension claimed before the member reaches normal pension age. This facility is known as an Early Retirement Reduction Buy Out purchase (‘an ERRBO’).
- 5.8 The cost of earlier retirement will be actuarially neutral, and expressed as a percentage increase in the member contribution rate, per year of earlier retirement. Periodically, the additional contribution rate will be reviewed, and may change during the period of purchase.
- 5.9 The buy-out only applies to the pension accrued during the buy-out period, i.e. the period during which the additional contributions are paid. For example, if a member took out an agreement after 15 years of pensionable service and five years before retirement then the buy-out period would be the last five years of the 20-year period of pensionable service. Only the pension accrued in those last five years, the buy-out period, would attract the buy-out – the pension accrued from the first fifteen years of pensionable service would attract the full actuarial reduction as this was not in the buy-out period.
- 5.10 Both the BMA and the NHS trades unions expressed disappointment at the prospective nature of the buy-out purchase.

“It should be made clear that any payments made to use this facility can be applied retrospectively for all service in the 2015 scheme, not just for future service.”

NHS trades unions

- 5.11 The facility is intended to assist members and employers with long term retirement planning. It was designed with the express principle that any improvement in a member's benefits should be prospective, i.e. only applicable to the benefits accrued during which the facility is being purchased. It is for this reason that the purchase can only be made by periodic additional contributions as a percentage of pensionable earnings rather than via a lump sum as requested by the NHS trades unions in their response. Employers can choose to make those contributions on behalf of a member, either in full or in part.
- 5.12 The BMA also expressed concerns that a member retiring on ill-health grounds would not get any value from any ERRBO purchases made, in contrast to the treatment of members for premature retirement in the interests of the efficiency of the service (IES).

“Being forced to retire on ill health grounds can be a very distressing situation and it is unfair to financially punish members who have purchased the ERRBO in good faith. The BMA would prefer to see members in this position receive a refund of their ERRBO contributions, or a credit for those contributions as is the case with *redundancy in the interests of the service.*”

BMA

- 5.13 The purpose of the facility is to buy out an early retirement reduction, allowing the member to plan ahead and pre-pay some or all of the costs of early retirement. Where a member retires on IES grounds there is an early retirement reduction but the cost of this is paid by the employer. The member gets a late retirement pension enhancement proportionate to the amount of reduction bought out via ERRBO contributions. This is fair because the ERRBO would otherwise serve to lower the employer's costs.
- 5.14 For ill-health retirements however, there is no early retirement reduction to buy out. The member is paid an unreduced pension as a scheme benefit, without needing to reach minimum pension age. In such a scenario there is no contingent value of an ERRBO purchase. This has however been reflected in the pricing of the ERRBO contribution rate. Members would otherwise pay a higher rate if their ERRBO purchase has value in relation to ill-health retirement.

#### Premature retirement on grounds of redundancy

- 5.15 Trades unions and the BMA expressed significant concern about and argue against introduction of an alternative redundancy retirement entitlement that would remove the requirement for employers to fund the shortfall where the member's redundancy payment is less than the cost of paying a pension early.

- 5.16 This alternative is inserted alongside current arrangements in the 1995 & 2008 Section, and both alternative and current entitlements have been included in the new 2015 scheme. Members may choose to exercise the redundancy retirement entitlement that is provided for in their employment terms & conditions held by the member.
- 5.17 In particular, trade unions view the current entitlement as a right under scheme regulations rather than having basis in employment terms and conditions. Further, they argue that any change to the current redundancy retirement arrangements constitutes a breach of the Government's 25 year guarantee of no further change to public service pensions.
- 5.18 The Department disagrees that introducing an alternative redundancy retirement entitlement infringes the guarantee. The current entitlement has not been withdrawn or altered. It is not, in any event, a 'protected element' as defined by section 22 of the Public Service Pensions Act 2013. Section 22 gives effect to the guarantee.
- 5.19 Scheme regulations for early retirement on grounds of redundancy apply only if the member is entitled to claim such a pension under the terms and conditions applying to their employment as an alternative to receiving a lump sum redundancy payment. The regulations do not provide for a redundancy pension to be paid unless the relevant employer certifies this to be the case. It is therefore a conditional right. The trades unions argue that:
- “[the wording of section 16.10 of the AfC handbook] is describing a member's rights under pension scheme rules to an unreduced pension rather than making it subject to, or conferring an entitlement through, their terms and conditions.”
- NHS trades unions
- 5.20 The reforms to redundancy entitlements in 2006 incorporated early retirement on redundancy into Agenda for Change handbook section 16, making clear it was a contractual right. This was a concession to trade unions but one that clearly set out that it was a contractual term given effect to by scheme regulations rather than a benefit governed by scheme regulations. Otherwise in 2006, the Department would have had the option to change redundancy retirement entitlement through secondary legislation without recourse to the collective agreement required for changing national employment terms & conditions.
- 5.21 Currently, it is possible for a member of staff to be made redundant and receive no lump sum redundancy payment from their employer. This might happen where the member has no contractual right to this: for instance a very senior manager not on national agreed terms. The new alternative entitlement enables

employers to offer an alternative contractual benefit to either Agenda for Change section 16 or no benefits at all. Any change to Agenda for Change section 16 is a matter for collective agreement. The current redundancy entitlement therefore remains enabled in order that the contractual right can continue to be fulfilled.

### Commutation of trivial pensions

5.22 Where a member claims their pension benefits but the amounts involved are very low, paragraph 6 of schedule 3 permits the scheme manager to optionally pay a single lump sum in discharge of those benefits rather than an annual pension. The cost of administering nominal pensions equating to a few pounds a month tends to outweigh the amount paid to the member. This facility allows the scheme manager to effectively 'buy-out' the pension rights by way of a single lump sum payment.

5.23 In relation to this, the Association of Pension Lawyers commented:

“Whilst retaining the flexibility to amend the commutation provisions to take account of variable administrative costs could clearly be seen as an advantage, the draft Regs do not appear to provide any counterbalancing certainty or a framework as to how the discretion will be operated or systematically amended in practice.”

Association of Pension Lawyers

5.24 In deciding whether to convert a pension into a lump sum on grounds of trivial value, the scheme manager must ensure that the payment complies with the other requirements set out in paragraph 6 of schedule 3. Advice from the scheme actuary must be sought by the scheme manager when calculating the lump sum payable. The size of pensions that are converted in this way are tiny, typically amounting to a couple of hundred pounds per year. However members are given the choice, and may opt for a pension to be paid.

### Allocation and survivor benefits

5.25 Allocation is an optional facility whereby a member elects to give up a portion of their annual pension for payment to a spouse, civil partner or dependent after the member's death. The member's pension is reduced proportionately, whilst the allocated pension becomes payable to the beneficiary upon the member's death.

5.26 In relation to this, the BMA commented that the new scheme regulations include a new provision which:

“discards the election where the beneficiary ceases to be the member’s spouse or civil partner or a dependent in the period before the allocation pension becomes payable.”

BMA

- 5.27 The provision in question, at regulation 54(2) of the main scheme regulations, is not a new policy. It already existing within the 2008 section at regulations 2.D.20(2) & 3.D.16(2), which the 2015 scheme regulations replicate.
- 5.28 NHS trades unions suggested that in relation to payment of a survivor pension, the long-standing scheme requirement to formally nominate a partner should be removed on the basis that the Local Government Pension Scheme does not have such a requirement.

“In line with the LGPS regulations we believe there to be no need to have specifically ‘nominate’ a partner for payment and this should be an automatic right on receipt of the relevant evidence of entitlement being provided (i.e. living together for 2 years etc).”

NHS trades unions

- 5.29 Making such nominations is also a requirement in the Civil Service and Teachers pension schemes. These schemes have retained the requirement in their reformed schemes and the Department intends to follow suit.

### Forfeiture of pensions

- 5.30 Forfeiture is a discretionary power that the Secretary of State exercises in cases where a member has been convicted of a serious criminal offence in connection with performance of their duties or employment. Paragraph 12 of schedule 3 permits the Secretary of State to direct that all or any part of any rights to a benefit or other amounts payable to or in respect of that member be forfeited if the member is convicted of a prescribed offence committed before the benefit or amount becomes payable (i.e. before retirement or death in the case of a lump sum).
- 5.31 The offences are set out in paragraph 12(2) of schedule 3. In relation to an ‘offence in connection with employment’, the Secretary of State is required to issue a ‘forfeiture certificate’ confirming that the Secretary of State is satisfied that the offence has either been gravely injurious to the State or is liable to lead to serious loss of confidence in the public service.
- 5.32 In relation to these provisions, the Association of Pension Lawyers commented that:

“It is not immediately clear how widely the meaning of the term offences should be construed. Could it, for example, be extended to include conduct which is subject to a determination by the Medical Practitioners’ Tribunal Service?”

Association of Pension Lawyers

- 5.33 This is a long standing provision which is present in both the 1995 and 2008 section regulations. In order for an offence to be established there has to have been a criminal conviction. The Secretary of State will therefore only consider forfeiture in cases once the individual has been convicted in court.

#### Additional Voluntary Contributions (money purchase)

- 5.34 The National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 provide facilities for NHS pension scheme members in pensionable employment to supplement the value of their pension by making money purchase additional voluntary contributions (MPAVCs) to external pension providers.
- 5.35 The scheme has three authorised MPAVC providers, the Standard Life and Prudential Assurance Companies, and the Equitable Life Assurance Company which is now closed to new business.
- 5.36 The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015 proposed a series of amendments to accommodate the flexibilities confirmed by the Treasury in *Freedom and choice in pensions: government response to the consultation* (July 2014) and implemented by the Taxation of Pensions Act 2014.
- 5.37 The new flexibilities apply to NHS MPAVC benefits only and enable providers to offer members a wider range of options when taking their MPAVC benefits on retirement. Responses were received from Prudential and the Equitable Life Assurance Society. The Department is grateful to both these organisations for their detailed assessment of the proposals. These helped significantly to refine the regulations.
- 5.38 In addition, the NHS trades unions raised the following point:

“Whilst we welcome the proposal to apply the “freedom and choice” flexibilities to AVC funds, we’d like these to go further and allow members to claim the whole or as much as possible of their AVC fund in the form of tax-free cash. This is possible for AVC policies that commenced prior to the 1 April 2014 in the LGPS – i.e. members if they draw their AVC fund at the same time as their main scheme benefits can take their whole AVC fund as tax-free cash if when aggregated with any tax-free cash from the main scheme, the total value falls below HM Revenue & Customs 25% limit for this



purpose. It's difficult to see a justification for not permitting this in the new "freedom and choice" world."

NHS trades unions

- 5.39 Until recently, there have been are differences between the Local Government pension scheme and the NHS as regards taking AVC investments as a lump sum. Prior to 1 April 2014, as noted by trades unions, members of the Local Government scheme were allowed to draw tax-free cash based on the combined value of main scheme and AVC investments (a lump sum of up to 25% of the combined value). Combining meant it could be possible to take the whole of the AVC fund as tax-free cash.
- 5.40 In contrast, the NHS main scheme and AVC scheme are separate in terms of their investment and the value of the separate arrangements cannot be combined in this way.
- 5.41 However the Local Government scheme changed their regulations from 1 April 2014 and the option ceased for members joining the scheme on or after that date, who will be able to take the cash they are entitled to from the main scheme and up to 25% from the AVC but the two will be calculated separately. This change aligned Local Government scheme policy with NHS scheme policy introduced with the tax reforms in April 2006 (allowing NHS members the option to take part of the lump sum held in the AVC scheme (up to 25% of the proceeds of the investment) tax-free).
- 5.42 *Freedom and choice* will allow those who wish to draw the whole of their AVC fund as cash. Subject to the individual having available LTA only the first 25% will be tax-free and the remainder will be taxed at their marginal rate.

#### Claiming benefits from the old scheme

- 5.43 In the context of greater flexibility for claiming AVC benefits, one individual commented in relation to main NHS pension scheme benefits:
- "This is not very flexible I think you should be able to take 1995/08 scheme at normal retirement age without leaving the NHS employment."
- 5.44 In response to the *freedom & choice* consultation the Treasury concluded that the flexibilities could not be safely extended to the public service defined benefit pension schemes without presenting significant fiscal risk. The concept of retirement requiring NHS employment to have ceased is long-standing. However active members of the 2008 section have the flexibility to partially retire and take a proportion of pension in exchange for reducing (but not ceasing) work commitments.

## 6. Technical

- 6.1 The Department received detailed technical comments on the structure and operation of the regulations from the NHS Business Services Authority (the scheme administrator), the Government Actuary's Department (the scheme actuary) and NHS Employers. We are grateful to these organisations for reviewing the regulations in detail from a pensions technical perspective.
- 6.2 As a result, a number of corrections and technical refinements have been made throughout the draft regulations to improve and clarify their operation.
- 6.3 We have also reflected on the grouping of provisions dealing with transitional and consequential provisions across the two instruments that accompany the 2015 scheme regulations. To make it easier for a reader to gather the whole picture without needing to look across two instruments, we have consolidated transitional and consequential provisions into one instrument.
- 6.4 Accordingly, amending regulations 4, 5, 6, 17, 19, 26, 27 but not 27(3), 40, 41, 43, 49, 50, 56, 47 and 59 have been moved from the National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015 and located instead within the National Health Service Pension Scheme (Transitional and Consequential Provisions) 2015. The title of the receiving instrument has also been amended to reflect its newly enlarged scope.

## 7. Conclusion

- 7.1 The Department wishes to thank the organisations and individuals who submitted comments on the draft regulations. This document sets out our reply to those comments; describing how the draft regulations have been altered in response or providing an explanation where we disagree with a point raised.
- 7.2 Having considered the comments received and made adjustments, the regulations have been finalised and laid before Parliament. The new pension scheme and transitional arrangements will, subject to Parliament, come into force from 1 April 2015.
- 7.3 Further details about the new pension scheme, transitional arrangements and contribution rates are available on the NHS Business Service Authority's (the scheme administrator) website. This presents a range of resources including factsheets, online videos and scheme guides. All members of the current scheme will also receive a payslip leaflet during February and March 2015.
- 7.4 The scheme administrator is also providing supportive resources to employers in the form of Frequently Asked Questions, readiness checklists, communication packs for local use (e.g. posters, screensavers etc), internet seminars and an e-learning package.