

UCEA response to consultation on changes to transitional protections 2015

Question 1: Do you have any views about the implications of the proposals set out in this consultation for people with protected characteristics as defined in section 149 of the Equality Act 2010? What evidence do you have on these matters? Is there anything that could be done to mitigate any impacts identified?

No. We would hope that the Government has received appropriate legal advice and is satisfied that all aspects of the current proposal do not introduce further age discrimination.

Question 2: Is there anything else you would like to add regarding the equalities impacts of the proposals set out in this consultation?

No.

Question 3: Please set out any comments on our proposed treatment of members who originally received tapered protection. In particular, please comment on any potential adverse impacts. Is there anything that could be done to mitigate any such impacts identified?

If these tapered members are identifiable, it seems unfair that the small number of members that are better off under tapering than either having legacy or career average benefits can only choose between those two options and will be worse off under the proposed McCloud remedy. This issue could be even worse for the member if they have made retirement plans based on their tapered retirement benefits.

As these cases are likely to be low in numbers it seems right that they should be allowed to keep their tapered benefits. We would suggest that each scheme assesses the number of members affected in order to consider the administrative burden of ensuring these members are not worse off.

Question 4: Please set out any comments on our proposed treatment of anyone who did not respond to an immediate choice exercise, including those who originally had tapered protection.

Increasing member engagement is an issue for the entire pensions industry. Given that it is to be anticipated that a large number of members will not respond to an immediate choice exercise, the default position must be chosen carefully.

If members that do not respond are simply assumed to have accepted benefit in the existing scheme, the discrimination issues in respect of these members are not addressed in line with the rulings in McCloud and Sargeant. The court ruling did not require members to be given the choice, simply that they be entitled to benefits without discrimination. As the impact on individuals will vary between schemes it seems reasonable for any default to be dealt with at a scheme level through scheme specific regulations. For example, it is anticipated that most members in TPS would be better off in the new scheme but this may not be the case in all schemes.

Question 5: Please set out any comments on the proposals set out above for an immediate choice exercise.

There are a number of risks related to the immediate choice option.

Member engagement is a challenge for the whole pensions industry so to it is to be expected that many members will not make a choice. This may be managed somewhat through a robust default position, but as the immediate choice will apply to some members who have a number of years remaining in their working lives, there is the potential for future challenge as those members who did not respond approach retirement and begin to engage with their pension. It may be difficult for the scheme to demonstrate that it made all reasonable attempts to contact the member which could lead to member demand for, in essence, a deferred choice to be applied closer to retirement. We do not believe the courts applied any time limit on the duration of the entitlement of members affected by discrimination.

Immediate choice would require members to make pension choices now which might not be obvious because of possible future career and life choices they could make. In many cases members might wish to obtain individual financial advice and this could be problematic due to the low level of advisers with expertise on the public service pension schemes and the McCloud remedy. Of the two choice options, it seems that the uncertainty regarding future assumptions would lead to immediate choice being more difficult to implement and more open to challenge by members. While members may think they've chosen the better option at the time of their immediate choice decision, when they actually come to retirement, potentially decades into the future, it could be that they would have been better off choosing benefits from the other scheme. Whilst the consultation document states that the decision is irrevocable, members could later claim that they had not been provided with adequate information or insufficient time to make an informed decision.

The timetable will be challenging. Twelve months from first contact might seem like a sufficient amount of time for members to make a decision regarding their pension benefits, however it is likely that many people will simply leave this until the last minute. With thousands of members wanting information, asking questions, and potentially needing financial advice it seems likely that the 12 month timeframe will not be long enough. In addition, employers will need to provide additional salary and service data to allow benefits in both schemes to be calculated correctly. This will take time and there needs to be a robust process in place for dealing with gaps in records. It would be very difficult to resolve historic remedy service queries when the member retires in the future. This then raises issues around whether the Court of Appeal ruling is being applied properly across the public service schemes and whether the age discrimination issues are being fully addressed for those impacted members.

It would require significant investment in IT and communications, as well as member tracing. If the intention is to start this in 2022, following the implementation of the required regulations, this does not leave very long to develop the necessary IT systems and tools, test them and implement them in order to calculate the options, communicate with members and record their responses. And it is well understood that the faster IT development is required, the higher the cost.

Question 6: Please set out any comments on the proposals set out above for a deferred choice underpin.

From an individual member perspective, the deferred choice option seems preferable, as the member will have detailed information available at retirement on the actual benefits they have accrued in both the legacy and reformed schemes. This should mean it is easier for the member to make the appropriate decision as to which benefits to take, rather than making a decision using figures calculated on a set of assumptions prepared years or decades before retirement - assumptions which may prove to be wrong and render their immediate choice invalid.

Under deferred choice some members may not choose their benefits for many years. Schemes would have to ensure that member data on both bases could be maintained for decades. Schemes would need to engage with employers to develop new templates for data gathering to ensure the data necessary under both schemes is collected now and into the future. Resolving queries on remedy service benefits at retirement will be extremely difficult.

From an administration and cost perspective, deferred choice will be more complicated and require parallel systems and communications to be run for many years, increasing the cost.

The proposal to return members to the legacy scheme in the interim period would not be an easy task for the schemes to undertake as it would require the recalculation of all active members benefits on the legacy basis, with the necessary IT and administrative changes and data collection needing to take place up front. This would be a huge exercise and would take significant time, cost and resource to implement, thus removing one of the main benefits when compared to immediate choice. This would potentially not provide value for money in relation to a scheme like TPS where most members are expected to be better off in the reformed scheme and would simply need to be returned to that scheme at retirement. It would also impact on the assessment of the cost control mechanism as this focuses on the cost of benefits accruing in the reformed scheme with limited inclusion of the increases in benefits in the legacy scheme. Additionally, depending on the choices made regarding additional contributions, transferring members to the legacy scheme for the remedy period could unwind their chosen additional pension facility or remove some options they had exercised under the reformed scheme.

It should be noted that there will still be a substantial administrative job to resolve those cases of members who are affected but have already drawn benefits or died. It is right that these cases be tackled first and it would be reasonable to allow the schemes to focus on these more sensitive cases rather than having to assess all members immediately.

Question 7: Please set out any comments on the administrative impacts of both options

It is noted that under both options there will be a considerable amount of additional administration work that needs to be undertaken to implement the remedy. This includes revisiting retirements, deaths, ill healths, and transfers as well as dealing with current members of the scheme.

From an administrative perspective, immediate choice provides early clarity in relation to the benefit entitlement, and removes the requirement to hold records over many years on two different benefit entitlements and communicate both those entitlements to members until they retire. However, an immediate choice exercise would be a huge undertaking across the public service pension schemes and given the scale of the task it is not clear how “immediately” this choice could be applied to member records. The consultation document states that the expectation of the administration of an immediate choice exercise would be that it would be completed within a few years but even this may not be achievable.

Significant changes to IT systems would need to be set up swiftly to enable data capture, benefit recalculations undertaken and member choices to be recorded as well as attempted contact efforts and cases where no decision is made. Modellers and calculators would need to be developed, member choice communications, and communications and guidance to support employers, including detailed guidance on additional pension options, pensions tax implications etc. There would be significant pressure on schemes to have in place complex systems and processes in 2022 for immediate choice, with consequent cost and resource implications and this may still not be possible given the lead time for the required scheme regulations.

Under deferred choice, subject to those cases that need to be assessed immediately, the implementation period would be longer although the changes to be implemented and the tools required will be in the main the same. The exception being that data will be needed from employers on both scheme bases (as there are differences in the pensionable salary and service calculations). Therefore from the employer and individual scheme perspective, the deferred choice underpin is clearly the more complicated and complex of the two options. It will require dual record keeping for many years and decades into the future. This will inevitably add to the cost of administering the public service schemes and is likely to place additional administrative burdens on participating employers in relation to payroll and HR systems.

The impact of deferred choice on member annual benefit statements would create a huge additional and ongoing administrative task. This would be extremely complex for schemes to administer and would add complexity to a document that members already find difficult to understand. The presentation of this information needs to be considered carefully.

Under the deferred choice option, it is proposed that all members would be placed in the legacy scheme for the remedy period from 2022. This would be a significant administrative exercise for schemes both in terms of amending members' records and communicating changes to members. There would also be additional, complex changes to rectify differences between the reformed and legacy schemes in relation to additional voluntary benefit options, member and employer contributions. This will remove some of the benefits of choosing the deferred option from an administrative perspective and drive up the implementation cost, for little gain in many cases, especially TPS where reformed scheme benefits are expected to be more beneficial in most cases.

It should also be noted that there may be cost implications in terms of the differential contribution calculations between the two schemes. This will result in potential overpayments or underpayments depending on the choices made by the members. This will take time to unwind and we would recommend that employers and members be able to choose to rectify these amounts over a reasonable period. Larger employers may appreciate this being sorted out as soon as possible rather than dragging out over a number of years, but for smaller employers there could be a budget impact that may be better dealt with over a longer period. As much advance notice as possible of any additional sums due would be welcomed to enable employers to plan ahead.

Universities that participate in the TPS and NHSPS have raised significant concerns relating to the additional administration burden that will fall on them as employers in providing data to the schemes in which they participate in order that the age discrimination issues can be remedied. Several participating universities have also raised concerns that administering the remedy will mean that the day to day administrative tasks undertaken by each scheme will be negatively impacted.

It is not clear who will fund the administration cost. Universities in the NHSPS have often commented about their negative experiences in relation to the administration of the that scheme and have questioned why they should pay the full administration charge when they do not benefit from all the online functionality that larger participating employers have access to. As such, university hospitals will find it very difficult to stomach increases in the cost of the administration of the scheme resulting from the implementation of the age discrimination remedy without significant reviews into the administration as a whole and whether this is value for money.

Under TPS, currently there is an administration levy of 0.08% and it does not seem reasonable that the employers fund the entire administration cost on the case of McCloud out of existing budgets.

Employers will need clear communications on how to provide the relevant data required for schemes to calculate benefits under each option, in particular, what processes to follow when there is missing or insufficient data. Employers will need assistance in communicating with their staff on these complicated issues. It would be very helpful if there were some central templates alongside guidance from each Scheme Advisory Board to ensure consistency in the messages getting out to members and employers.

There is still some uncertainty about the interaction between the age discrimination remedy and the cost cap process and whether or not the benefit uplifts resulting from the 2016 valuations will come into effect. If they do not, there is the potential for further legal challenge on this issue from member representatives. Universities are also mindful that the 31 March 2020 valuations for TPS and NHSPS are being progressed and are keen to stress that employer contributions in both schemes are at the maximum of affordability, especially as the HE sector did not receive any government funding to mitigate the increase in costs. Any further increase in the costs of the scheme would be very difficult for many participating universities to absorb in this post Covid-19 world we find ourselves in.

Question 8: Which option, immediate choice or DCU, is preferable for removing the discrimination identified by the Courts, and why?

As mentioned above, we have doubts regarding whether offering members choice actually meets the requirement to remove the discrimination identified by the courts and would appreciate government sharing the legal advice they have received on this point through the SABs.

However, if member choice is found legally compliant, on balance, it is our view that deferred choice is the preferred option because members will have clear information on both sets of benefits at the time they retire and are more likely to make the most appropriate decision for them. Making this decision at retirement will remove the impact of one of the main variables, namely chosen retirement date. However we note that the deferred choice option is the more costly and complex from an administrative perspective.

Question 9: Does the proposal to close legacy schemes and move all active members who are not already in the reformed schemes into their respective reformed scheme from 1 April 2022 ensure equal treatment from that date onwards?

Yes, however there are some potential issues with doing this.

We anticipate calls from member representatives to review the reformed scheme benefits once the transitional protection, and the assumed cost of this facility, is removed.

If all members are now accruing career average benefits this will raise the same issues that the original transitional protection was trying to address (for completeness, we would like to comment that we do not believe that protection of benefits for members closer to retirement is warranted as we do not believe it is fundamentally unfair).

There are also scheme specific issues to address, for example, in the NHSPS members currently cannot draw their 1995 benefits and continue to accrue benefits in the reformed career average schemes. This could lead to experienced staff simply retiring early from the NHS because of pension issues at a time when they are needed the most. Issues like this need to be addressed as part of implementation of the remedy.

We agreed that the final salary link should be retained until retirement, however the legal status of the legacy scheme needs to be clearly documented as while no future service will build up in the schemes, benefits will be linked to final salary so this may be deemed accrual. It should also be clarified how the cost control mechanism should apply to legacy benefits.

Question 10: Please set out any comments on our proposed method of revisiting past cases.

Cases where the impact of the remedy will impact on benefits already in payment should be prioritised. This includes death cases, ill health cases and recent retirements.

We strongly believe that retired members affected in these cases would prefer a simplified choice. It could be possible, for example, to assume that the amount of tax free cash taken remains the same and to offer a choice between the pension income figures under each scheme. Given that in these cases the focus is likely to be on monetary amounts (rather than the different benefit structures of the schemes), it would be helpful if there was an administratively simple default position to ensure that members received the appropriate entitlement as soon as possible. Should a member wish to revisit their initial retirement decisions regarding pension and lump sum this should, of course, be possible but a robust default position would be extremely helpful.

We would also strongly recommend that a “de minimis” amount be set across the public service schemes to avoid disturbing bereaved families, those members with serious health issues or those who have gone through divorce proceedings unless absolutely necessary.

For recalculating benefits it seems reasonable that the factors in force at the date of retirement are used.

Question 11: Please provide any comments on the proposals set out above to ensure that correct member contributions are paid, in schemes where they differ between legacy and reformed schemes.

In schemes such as TPS, where it is anticipated that most members will be better off in the reformed scheme, this seems administratively burdensome and would result in the majority of members having their contributions adjusted twice. In the reformed TPS, previously excluded employment was made pensionable so many members would be entitled to a refund that would, in many cases, have to be repaid (potentially with interest) at retirement. If deferred choice is the preferred option then it would seem more appropriate to make the assessment of the correct member and employer contributions due at the time the member retires and chooses their benefit option. Then an overpayment can be refunded or underpayment deducted from the pension put into payment at the time and only one adjustment made.

Question 12: Please provide any comments on the proposed treatment of voluntary member contributions that individuals have already made.

The administrative and communications burden associated with this issue should not be underestimated, but it seems reasonable that, wherever possible, a conversion is made to enable the member to draw the same additional pension amount under whichever facility is available to the scheme they ultimately choose. But we would suggest this should be applied at the point of retirement.

We would suggest that if deferred choice is chosen and members are transferred back into the legacy scheme that no adjustment is made to their voluntary additional contribution arrangements and no refund of contributions paid until the member makes their choice at

retirement. Otherwise arrangements may need to be made for a member to re-purchase these additional benefits under the reformed scheme on terms that are less favourable than those that originally applied. Consideration will need to be given as to how this is reflected on annual benefit statements. We would suggest that GAD guidance should be prepared.

It is important to ensure that refunds are paid in a way that is not detrimental to the member concerned, for example, threshold income calculations towards the pensions taper. No member should find themselves in a worse position financially having received a refund. It may be preferable to allow the member to choose to convert any refund into a money purchase AVC.

We agree that breaches of the limit of additional pensions should be ignored.

Question 13: Please set out any comments on our proposed treatment of annual benefit statements.

Under the deferred choice option there does not seem to be any alternative to the proposal to show two sets of benefits on the annual statement. We are aware that members can currently find the annual benefit statement complex, and this will add to the complexity, so this is an area that needs further thought so the additional information can be set out clearly and in a way that is easily understandable to the members. This needs to be consistently done across all the public service schemes. Some centralised templates and guidance would be welcomed.

Maintaining and reporting on dual benefits will require significant systems changes and appropriate resources will need to be available. Even so we would suggest a significant lead in time (at least 1 year from implementation) be allowed before the new dual benefits statements need to be issued.

Question 14: Please set out any comments on our proposed treatment of cases involving ill-health retirement.

It is important to ensure the process doesn't become too administratively burdensome, particularly where there are issues raised due to the differences in rules between a legacy and reformed scheme. As these cases are sensitive we would ask that consideration is given on a case by case basis as to whether the member should be contacted. This would have to depend on whether they would be significantly better off. For many affected members, a review of their ill health retirement terms, having to re-supply medical data or have further medical check ups (at a time when face to face medical appointments are difficult to arrange) may outweigh the higher benefit they may potentially receive. We would suggest that a de minimis level is set to decide whether these cases should be reopened.

For those members who did not qualify for ill health terms under the scheme they were in, are the government suggesting that they be contacted and asked to reapply under the alternative scheme? Or will communication go wider to encourage more applications as members may have been put off under the assumption they would not have qualified, but now might?

Question 15: Please set out any comments on our proposed treatment of cases where members have died since 1 April 2015.

We agree that these cases should be prioritised. We would strongly recommend that a reasonable "de minimis" amount be set across the public service schemes to avoid disturbing bereaved families and reopening estates unless it can be demonstrated that there would be a material benefit.

Question 16: Please set out any comments on our proposed treatment of individuals who would have acted differently had it not been for the discrimination identified by the Court.

It is hard to imagine a scenario where a member could prove definitively that they would have acted differently, but if such proof were available then it would seem reasonable to consider it on a case by case basis. Many employers have significant opt out levels and allowing these members to backdate membership in the legacy schemes, with the relevant backdated employer contributions, could be costly. Therefore we would suggest that employers should be involved in this decision making process, although it is unlikely that employers would themselves be able to supply any evidence of the members reasons for opting out and should not be expected to do so. We would also suggest that interest not be applied to backdated contributions (as they are not “late” in the true sense) and reasonable payment periods should be allowed.

Question 17: If the DCU is taken forward, should the deferred choice be brought forward to the date of transfer for Club transfers?

No, although deferring the choice adds further administrative complexity.

Question 18: Where the receiving Club scheme is one of those schemes in scope, should members then receive a choice in each scheme or a single choice that covers both schemes?

Members should be given a single choice covering both schemes.

Question 19: Please set out any comments on our proposed treatment of divorce cases.

We would recommend that divorce cases are one of the categories to be dealt with as a matter of urgency. We would also suggest that as they are sensitive cases a de minimis amount should be set across the public service pension schemes to ensure that they are not re-opened without there being a material impact on the member.

Question 20: Should interest be charged on amounts owed to schemes (such as member contributions) by members? If so, what rate would be appropriate?

Firstly, we would suggest that there should be a consistent approach to interest across the public sector schemes and government may wish to consider this. An appropriate rate of interest should be applied but compounding over many years could lead to a disproportionate cost, which may influence a member’s choice.

In addition, we should point out that in some cases there may be financial implications to employers, either now or in the future, that are by their nature unpredictable. Some employers may struggle to meet these costs. It should also be noted that Higher Education Institutions do not receive any additional funding from DfE in order to meet TPS costs and only partial funding to meet NHSPS costs. If any government funding is made available to employers in the public service schemes to meet these unforeseen additional costs we would ask that it be recognised that there are non-public sector employers that participate in these scheme and HE should be included in any funding arrangement.

Question 21: Should interest be paid on amounts owed to members by schemes? If so, what rate would be appropriate?

Yes, it is reasonable for interest to be applied to amounts owed to members but not for this to be compounded.

Question 22: If interest is applied, should existing scheme interest rates be used (where they exist), or would a single, consistent rate across schemes be more appropriate?

A single rate of interest across all schemes should be applied.

Question 23: Please set out any comments on our proposed treatment of abatement.

There is no mention of those member who have retired with mandatory and discretionary compensation under the TPS.

Question 24: Please set out any comments on the interaction of the proposals in this consultation with the tax system

This is incredibly complicated. Given that the design of final salary makes it more likely that a member in the legacy scheme will trigger an AA charge, it seems that making this assumption on behalf of these members will compound the issue. It would therefore seem sensible, as suggested above, that the impact on benefits, contributions and tax implications are assessed once the member has actually made their choice, rather than having to be done twice.

HE members in TPS and NHSPS are likely to be among those members impacted by pension tax issues as they have relatively high salaries. It is important to have clear communications to members, particularly where they might owe tax depending on the option they choose.

LTA issues need to be considered for those that have already retired as they may wish to choose a lower retirement benefit in order to be better off in terms of the net payment they actually receive due to a lower LTA tax charge deduction.