



Pension Remedy Project Team
HM Treasury
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PUBLIC SERVICE PENSION SCHEMES: CHANGES TO THE TRANSITIONAL ARRANGEMENTS TO THE 2015 SCHEMES

The National Education Union (NEU) welcomes the opportunity to respond to this government consultation. The NEU is an independent, registered trade union and is the largest education union in the United Kingdom (UK) and Europe.

We represent over 400,000 serving teachers, headteachers, lecturers and support staff in maintained schools, academies, maintained nurseries, sixth form, tertiary and further education colleges in the UK.

The NEU represents the largest number of staff working in the independent sector.

We recognise the link between education policy and members' conditions of service. The NEU exists to help members, as their careers develop, through first rate research, advice, information and legal counsel. Our evidence-based policy making enables us to campaign and negotiate locally and nationally.

The NEU is affiliated to the Trades Union Congress (TUC), European Trade Union Committee for Education (ETUCE) and Education International (EI). The NEU is not affiliated to any political party and seeks to work constructively with all the main political parties.

Summary

The NEU's views on the questions asked are given below. Overall, the NEU favours the deferred choice underpin of the two options presented. The key advantage of deferred choice is that the choice is made at the point benefits would be payable, so the decision is based on known facts rather than assumptions about the future.

However, the NEU also believes that serious consideration should be given to a 'Government Choice' option perhaps modelled on Method C2 in the Lloyds Banking Group Pensions Trustees vs Lloyds Bank case. This could lead to members automatically getting the better benefits without a choice being necessary.

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?

The NEU believes these proposals have a significant impact on younger members of the scheme who joined after 1 April 2012. These members will not have access to final salary scheme benefits for the 2015-2022 period, may have expected improvements in the career average scheme taken from them, and will be invited to pay part of the bill for protection for their elders.

The key issue is that schemes went through the 2016 valuation process which would have led to improvements in the career average schemes. In the Teachers' Pension Scheme, this would have led to an improvement to the scheme accrual rate from 1/57 to 1/49.2, which would have been introduced from April 2019. These improvements were put on hold due to the McCloud litigation.

The Government's position is that any associated cost for the McCloud remedy will be considered for the cost control mechanism as a 'member cost'. Whether this is correct is the subject of litigation. The Government's view is that members should have to pay for the Government's proven unlawful age discrimination. This is especially stark for young members who as a class joined the Teachers' Pension Scheme after 1 April 2012 and are not eligible for the remedy, but will find the cost included in the cost sharing mechanism. This may or may not mean that the scheduled improvement in the accrual rate is cancelled. The way to mitigate this impact is for the Government to bear the cost of its own unlawful actions.

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

The NEU notes that members who have joined since 1 April 2012 will be younger than average, and should therefore contain a higher proportion of BAME teachers than would be expected for older teachers.

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?

The NEU agrees with the proposed approach. Tapered members should have to make one decision for the period 2015-2022 in the same way as other scheme members. It is possible that some tapered members would be better off receiving one type of benefit for the period 2015 to point of transfer into their new scheme and another for point of transfer to new scheme to April 2022. However, this would be giving these tapered members a choice not available to other members.

Given the specific age range of these members, the alternative of giving them an extra choice could arguably be viewed as age discrimination, opening the door to more legal action.

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.

The NEU believes this highlights the weakness of the immediate choice approach. If a member does not reply to the choice exercise, then there is a danger that the member will be deemed to have accrued benefits in their previous final salary scheme where career average would have been more favourable (or vice versa).

There may be schemes or sections of schemes (for example in the uniformed services) where it may be straightforward to state that final salary benefits would have been better than career

average and default members appropriately. This is unlikely to be the case in teaching, especially in a comparison of the 2007 NPA 65 final salary section vs the 2015 career average scheme. Discussion at scheme level would be a necessity.

The NEU believes that a deferred choice approach is the superior of the two options presented. Members will have to make a choice in order to access their pension. In the vast majority of cases it will be logical to choose the higher pension amount, which will be a known quantity at the point of retirement.

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

The NEU sees the proposals for immediate choice as something constructed by an economist with a belief in their neo-classical economics training. The notion is that a perfectly informed consumer armed with the appropriate tools will be willing and able to make a 'correct' choice when asked.

This proposition works in theory, but in the real world it will fall on several counts. The first is the notion that members will make a choice. As our answer to question seven shows, the NEU has serious doubts that the Government will be able to trace all affected members, especially deferred members. We also have serious doubts that members will make a decision. At that point a choice will have to be made for them. It may come as a shock to Treasury officials, but most public sector scheme members are not overwhelmed with enthusiasm at having to make an irrevocable choice over the structure of seven years' worth of their pension entitlement. Many, perhaps even hundreds of thousands, will not respond.

The consultation document argues that it will be a 'benefit' to members to have the issue solved so that members will have 'certainty' over whether they have chosen final salary or career average benefits for the remedy period. The only 'certainty' here is that many members will end up having chosen the wrong option. How can this be seen as a benefit compared with deferred choice, where the member can be reasonably sure that they will get the better of two options?

The consultation document argues that the immediate choice will be facilitated by online tools and calculators which 'could allow members to input assumptions for variables such as future earnings, prices or earnings indexation, expected retirement age, their longevity and possible survivor benefits' to see what benefits they might receive in each scenario. Our rational consumer will then make a rational decision based on this information. The NEU considers this a hopelessly optimistic view and believes that members will not be able to make this type of decision given the uncertainties involved. For example, the August 2020 CPI figure published recently shows inflation at 0.2 per cent. Is this a reasonable inflation rate on which to make an assessment? Should it be the Bank of England target rate of 2 per cent? What will happen to pay? Will the Government's planned increases in teacher pay to 2022-23 be carried through into the medium term or will austerity re-emerge? All of these questions will have a significant bearing on the 'correct' decision to take between final salary and career average benefits.

The NEU believes that public sector workers cannot be reasonably expected to make this type of decision – even qualified economists would struggle. This applies in a graduate profession like teaching, and would certainly apply to other occupational groups. Our conclusion is that the Government wishes workers to make a premature decision which will be wrong in many cases in order to save the Government money. This is not the way to remedy discrimination caused by the Government's unlawful actions.

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

The overwhelming advantage of deferred choice is that set out in paragraph 2.45 of the consultation document. The choice is made at the point benefits would be payable, so the choice is based on known benefit entitlements provided by the two benefit structures, rather than assumptions about the future. Members in the TPS with potential entitlement to final salary benefits in the TPS could be in their early 30s in 2022, with a thirty-five year career in front of them. There is no need to force them to make an immediate decision about their pension, with all the uncertainties that brings, when there is an alternative of waiting until retirement when a decision can be taken based on actual entitlement.

The NEU disagrees with the proposal that eligible members would automatically be deemed to have been accruing benefits in their legacy final salary scheme for the remedy period. This may well be the best assumption, but should be decided at a scheme-specific level through the Scheme Advisory Boards.

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

The NEU believes both options have their administrative challenges. Deferred choice has the major administrative hurdle of making scheme administrators carry two sets of benefit design alongside each other for decades.

However, immediate choice has its own challenges. It would necessitate a huge choice exercise which will involve contacting millions of public sector workers asking them to make an important decision in a short timeframe. The consultation document estimates 3 million people. This would be a difficult enough task if it merely involved active scheme members, but it will also involve contacting deferred members (who may be difficult to trace) and members who have put pensions into payment after April 2015.

The NEU believes that this type of choice cannot realistically be made without the provision of Independent Financial Advice to affected workers. Even if the Government was willing to fund this, it is extremely doubtful that there would be the necessary supply of advisers who would be able and willing to provide the advice. The consultation document imagines that benefit calculators could provide a solution. It is doubtful whether members could make an informed decision given the uncertainties involved over future inflation, pay growth and individual career paths. This applies in a graduate profession like teaching, and would certainly apply to other occupational groups.

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

The NEU believes a DCU is the preferable option of the two available for the reasons outlined in questions 4-7. The key advantage of deferred choice is that the choice is made at the point benefits would be payable, so the decision is based on known facts rather than assumptions about the future.

A weakness of both of the options is that the individual has to make a choice at all. This raises the possibility of the wrong choice being made. Deferred choice minimises this possibility, but there may be occasions where the individual makes the 'wrong' choice. At retirement there are uncertainties over longevity. If an individual faces a choice between a scheme which provides a higher retirement pension but another has higher survivor pension then the 'correct' choice may vary.

The NEU believes serious consideration should be given to a 'Government Choice' option perhaps modelled on Method C2 in the Lloyds Banking Group Pensions Trustees vs Lloyds Bank case. This could lead to members automatically getting the better benefits without a choice being necessary. This seems a suitable response given that the remedy is intended to deal with the Government's unlawful age discrimination.

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?

The NEU believes that the proposal to move all active members into career average schemes from 1 April 2022 would secure equal treatment. This does not constitute agreement with the design of the career average schemes in the period leading up to April 2015. The NEU still believes that scheme design should have been decided at a scheme-specific level.

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

The NEU agrees that all past retirements during the remedy period will have to be revisited. This will mean members having to make a choice between receiving a pension from their legacy final salary scheme and the career average pension scheme introduced in 2015 for the period April 2015 to their retirement date. For the most part this will involve giving members who retired under the final salary NPA 60 scheme the choice of final salary or career average benefits. However, there will be some members with tapered protection who were transitioned into the career average scheme and therefore have a small amount of career average accrual which they could choose to have classified as final salary benefits.

The major complication which could arise is members revisiting automatic lump sum or lump sum commutation decisions. Members retiring from the NPA 60 scheme will have received an automatic tax-free lump sum of 3x pension. Members retiring under the final salary NPA 65 scheme or with some career accrual will have made a lump sum conversion decision which may have to be revisited.

This could involve possible arrears situations and overpayment situations. However, the fact that the member is making a choice should (in theory at least) minimise overpayment situations. The Government should give serious consideration in writing off overpayments arising from transitional protection discrimination, and certainly set a high de minimis limit at which arrears are pursued.

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.

The NEU does not believe that this applies to the Teachers' Pension Scheme as contributions did not vary between final salary and career average schemes. The NEU believes interest should not be payable by members if they have underpaid for the scheme they ultimately choose to be in.

Rectification of contributions is more difficult in a deferred choice model than an immediate choice model. Something like the two-stage approach set out in the consultation document would seem a sensible approach. This does not affect the NEU's view that immediate choice would be an inferior solution.

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

The NEU believes that the default option should be an actuarially equivalent additional pension benefit if a member chooses to take benefit from the other scheme. However, refunds should be available under all types of scheme flexibilities. The NEU agrees that where the additional pension limit is breached solely as a result of proposals to remedy the McCloud discrimination that these breaches should be ignored.

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

The NEU believes that clear benefit statements will be an important tool to aid member understanding. Benefit statements need not be provided on an annual basis. The TPS provides updated information to members on a monthly basis.

The Teachers' Pension Scheme has been a leader among public sector pensions in providing online information to members through its 'MyPensionOnline' system. The benefit statement information here can be easily updated to account for a deferred choice approach.

The key piece of information is pension accrued to date. This is a sum of three relevant time periods. Period A for service prior to the introduction of the new career average schemes in 2015. Period C covers service after any final move to career average for all members. Period B covers the McCloud age discrimination period and for this it will be necessary to know whether final salary or career average gives a higher pension at the particular date. The system will then show A+B+C to give accrued pension to date.

Given members' career paths, there will be times when period B will display a pension amount based on final salary and other times an amount based on career average. Online tools can be used to inform members whether period B is currently based on career average or final salary. But the member will not have to make a choice under a DCU until the point of retirement at which time they will know whether career average or final salary has delivered the higher amount.

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

As the consultation document notes, this is a very complex area and the correct approach is for the Government to work with schemes to offer eligible members a choice of final salary or career average benefits.

Members refused an ill health pension in one scheme could be eligible for an ill health pension in the other scheme. The obvious example is where a member in the career average scheme was denied an ill health pension because of the inability to prove an inability to return to work until the (higher) normal pension age. The NEU considers this a rare contingency, but it is possible.

On the other side a member who received an ill health pension with a higher level award in the final salary scheme may have been better off if they had been in the career average scheme due to enhancement in respect of potential lost service to a higher NPA.

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

The NEU welcomes the Government's acknowledgement in paragraph A.32 of the sensitivities involved in death cases. While there is an argument for not approaching families, the NEU believes that where beneficiaries of a deceased member are entitled to an improvement in pension benefits, schemes should make good that benefit. The NEU believes that the decision on which benefit structure to choose should lie with the beneficiaries or the member's estate, with illustrations of the different benefit structures being provided by the Teachers' Pension Scheme.

The structure of the Teachers' Pension Scheme fortunately does not in most cases lend itself to complex choices between different types of survivor benefits. Unmarried partner pensions were introduced in 2007 so cover both the final salary and career average schemes. This should prevent many of the complications outlined in the consultation document.

Some complications do remain. The survivor benefits in the 2015 career average scheme are intended to mimic those in the 2007 NPA 65 final salary section. It is however likely that

survivor pensions are superior in the pre-2007 NPA 60 final salary section compared to the 2015 career average scheme.

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.

The NEU believes this will be a rare contingency which will have to be dealt with at first instance by schemes on a case-by-case basis. It is clear the full combined contributions will have to be repaid (including interest) to re-establish the pension rights. The NEU does not believe that interest should be paid where it is established that an individual would have acted differently but for the Government's unlawful discrimination.

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

The NEU has nothing to add on this matter.

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?

The NEU has nothing to add on this matter.

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

The NEU accepts that where an earmarking or attachment order is in place, any choice will have to be exercised by the scheme member as to which scheme they prefer for the remedy period.

The NEU has reservations with the Government's position that where there is a pension sharing order in place specifying a percentage to be awarded to the member's ex-spouse or civil partner, that the choice be exercised by the scheme member (pension debit member) only. A pension sharing order allows separation of benefits so that the pension credit and pension debit member are treated as separate entities. The pension credit member has not suffered direct discrimination but their scheme benefits may be linked to service accrued during the remedy period. The NEU believes there should be further investigation of whether pension credit members could be permitted to exercise a choice.

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

The NEU believes that interest should not be charged on amounts owed to schemes. These amounts would arise from the Government's unlawful age discrimination. It is unfair to force members to pay interest (which may have accrued for many years) on a payment arising from the Government's error.

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

The NEU believes that interest should be paid on amounts owed to members by schemes. These amounts would arise from the Government's unlawful age discrimination. If a member is owed money then it is correct that they receive interest. If the Government is allowed to avoid the payment of interest it is effectively a reward for the Government's own unlawful actions.

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?

The NEU has previously raised the issue of Teachers' Pension Scheme interest rates being higher when the scheme is receiving money than when it is paying money out. We welcome the consultation document highlighting this unequal treatment.

The NEU believes there should be a single rate of interest for McCloud payments, but as noted in question 20, that members should not be forced to pay interest on late contributions arising from the Government's unlawful discrimination.

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

The NEU has long argued that the abatement rule in the Teachers' Pension Scheme is unhelpful. It does not apply to phased retirement or actuarially reduced early retirement within the scheme. It also does not apply if the teacher seeks work outside teaching. The result of this is that the abatement rule acts as a perverse incentive for teachers to seek phased retirement or early retirement with an ARB rather than carry on to the scheme normal pension age.

The NEU has always viewed this as inconsistent with Government policy which seeks to promote the retention of staff in employment for as long as possible, thereby retaining valuable skills and experience in the workforce.

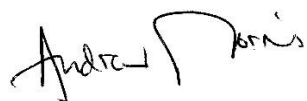
The NEU welcomes the commitment in paragraph A68 that where deferred choice or immediate choice results in a retrospective increase to a pension that abatement would either not apply or would not be increased retrospectively.

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

The NEU recognises that there may be significant tax implications for some members of public sector pension schemes. If the deferred choice option is chosen, members will be deemed in 2022 to have been members of their legacy final salary scheme for the remedy period. If at retirement the member chooses to take career average benefits for the 2015-2022 period then the value of the pension accrual for the period could change significantly. If they choose final salary benefits there will be no additional effect.

The NEU welcomes the plan to compensate members for the difference in the annual allowance charge if career average benefits are chosen.

Yours faithfully

A handwritten signature in black ink that reads "Andrew Morris". The signature is written in a cursive style with a large, stylized 'M'.

ANDREW MORRIS
Assistant General Secretary – Employment and Bargaining