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Of England and Wales



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The Right Honourable Steve Barclay MP
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Sent via email to PensionsRemedyProjectConsultation@hmtreasury.gov.uk

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11th October 2020

Dear Mr Barclay

Public service pension schemes: changes to the transitional arrangements to the 2015 schemes - Consultation

Enclosed is PFEW's formal response to the consultation *Public service pension schemes: changes to the transitional arrangements to the 2015 schemes* which commenced on 16 July and closes on 11 October. We appreciate the Government's willingness to engage through a consultation process to put right the unlawful aspects of the 2015 pension scheme. We believe this process is essential, as the complex matters involved cannot solely be dealt with through the courts.

As requested, we have responded to the twenty-four questions in the Remedy consultation. PFEW is also a participant in the Scheme Advisory Board, and we have engaged fully in that process. Many of our positions are captured in the SAB response: but in the document attached here we have taken the opportunity to set out any matters where our response differs from that of other bodies. We have also taken the opportunity to expand on and clarify points that we believe are of particular concern for our members.

Those principles that we believe must be held to in the Remedy design are: the existing discrimination must be removed; no further discrimination must be introduced; affected members should be put back into the position they would have been in had the discrimination not occurred, and no detriment should be caused to any members.

We have vested considerable time and resource in responding. It is, however, disappointing to note that several of the questions that we were invited to put to Government during the Scheme Advisory Board Technical Working Groups remain unanswered. This hampers SAB members' ability to help and advise.

Finally, although it is not formally a part of this consultation, we are compelled to note that we remain deeply concerned that the un-pausing of the cost cap and the actions proposed to complete the cost cap mechanism element of the 2016 valuation are inextricably linked to the Remedy, and that officers may be unfairly penalised for Government's error.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alex Duncan', with a stylized flourish underneath.

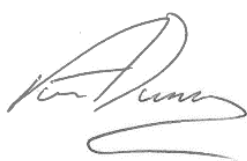
**ALEX DUNCAN, NATIONAL SECRETARY
POLICE FEDERATION OF ENGLAND AND WALES**

Consultation response to the proposed Remedy to the discriminatory transitional arrangements in the 2015 police pension scheme
11th October 2020

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Prepared on behalf of PFEW National Secretary

Authorised by:



National Secretary

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1. Introduction

1.1. General position

1.1.1. It is important to reiterate PFEW's original position in relation to the introduction of the 2015 CARE Scheme, which was that only new recruits should be admitted to the reformed scheme and existing members should have been allowed to remain in their existing schemes until retirement. This remains PFEW's position, and we believe that had Government done as we sought, then the current situation could have been avoided, and no unlawful discrimination introduced.

1.1.2. It is also important to note that PFEW were not party to the discussions that Government had with the TUC prior to the introduction of the 2015 CARE Scheme and the transitional arrangements, but rather these were imposed upon the police scheme. Our subsequent engagement in discussions about the exact form of those transitional arrangements in respect of the police scheme arose after we were presented with the existence of transitional protections as a fait accompli, and having taken legal advice that suggested that, although the protections had known age discrimination, this could be justified by Government as a proportionate means to achieve a legitimate aim. On that basis we engaged in order to obtain the best situation possible for our members.

1.1.3. PFEW believes that the overriding principles behind the formation and implementation of the Remedy to the unlawful discrimination caused by the transitional provisions should be:

- removal of the existing discrimination,
- ensure no further discrimination,
- affected members should be put back into the position they would have been in had the discrimination not occurred, and
- no detriment is caused to any members.

1.1.4. Subject to our below comments, and our answers to the questions raised in this consultation, we do not have any fundamental objection to the use of the 2015 CARE Scheme for future pension provision. We acknowledge that the 2015 reformed scheme compares favourably for some members to the 2006 scheme, and to many other schemes in the UK, particularly for our members within the Federated ranks.

1.1.5. However, we do have some major concerns about how the 2015 CARE Scheme is perceived both within our membership and by those who will join the force in the future. There is some evidence that opt-out rates are higher than desirable and we believe that the Government, as the sponsor of the scheme, should be doing more to publicise the benefits of joining and remaining a member of the scheme to members of the force, especially in light of the current Uplift programme. This is relevant to the ongoing viability and sustainability of the scheme in the future and we are conscious that the attraction of scheme membership may be further compromised if the result of the un-pausing of the cost cap mechanism leads to an erosion of benefit accrual rate in the scheme.

1.1.6. Whilst we have addressed the consultation questions within the main body of our response, attention is drawn to the following matters, which we consider are of particular concern.

1.2. Timescales and resources

1.2.1. PFEW recognises that designing and implementing the processes necessary to Remedy the discrimination will require considerable resources and is concerned about the realistic likelihood of all parties being able to achieve readiness for implementation by 1 April 2022, especially as further scheme specific consultations will be required after this current consultation concludes. Whilst we understand the need to cease the ongoing discrimination and implement the Remedy as soon as possible, we have doubts about the feasibility of this deadline.

1.2.2. There is a risk that a rushed implementation will lead to mistakes and inaccuracies, and it is not in the interests of any of the parties involved that such actions lead to the perpetration of further unlawful measures, such as discrimination. PFEW has no desire to find itself obliged to pursue legal avenues to correct matters where our members have been subject to further detriment or discrimination, but we will do so if necessary, and must ultimately be guided by the legal advice we are given. For that reason, during the course of this consultation period we have taken advice from no fewer than 4 leading Queen’s Counsels, and their supporting teams. This has included specialist advice regarding public law, discrimination, and taxation, as well as advice on all broad aspects of the Remedy.

1.2.3. We appreciate that implementation of the Remedy in the police scheme is more complex than other public sector schemes due to the localised way in which the scheme is administered, and the proliferation of different pension administration providers. There are also some particularly complex features of the schemes. This provides the context for our concerns around the provision of adequate and competent resources to ensure effective and efficient implementation of the Remedy, and it is our view that Government, as the scheme sponsor, needs to provide the necessary resources, funding and oversight to ensure that the Remedy is implemented correctly, comprehensively and consistently.

1.2.4. Whilst acknowledging the importance of ensuring that administrative concerns are adequately addressed, PFEW hold the view that it is imperative that any such concerns do not constitute the primary reason for adopting any given approach within the implementation of the Remedy.

1.3. Scope of Remedy

1.3.1. PFEW have concerns about the proposed treatment of three distinct groups of members and these are outlined below.

Group 1: joiners between 2012 and 2015

- 1.3.2. Firstly, those members who joined the New Police Pension Scheme 2006 (NPPS) on or after 1 April 2012 and before 1 April 2015. The consultation correctly notes that these members did not qualify for the transitional protections and were therefore not subject to any discrimination caused by their application: consequently this cohort of members are not in scope of the Remedy required as a result of the McCloud/Sargeant judgement. Whilst acknowledging that all of this is technically correct, PFEW believe that there is a possibility that failing to make provision for this group of members to have a choice of benefits for the Remedy Period equivalent to that provided for those identified as discriminated against by the McCloud/Sargeant judgement would in itself give rise to further new indirect discrimination on the grounds of age, and possibly gender and ethnicity.
- 1.3.3. The age profile of the group of members who are excluded from the scope of the Remedy (joiners from 1 April 2012 to 31 March 2015) is highly likely to be different to the overall membership during this period; being younger, and may include a higher proportion of both female and Black and Minority Ethnic (BAME) officers. They are the only group of members within the overall membership during that three year period who are being denied a choice between legacy and reformed scheme benefits, and we believe this raises the risk of their exclusion constituting indirect discrimination.
- 1.3.4. Furthermore, we note that the justification for the aforementioned exclusion provided within the consultation states that these members should reasonably have known that they would, as of 1 April 2015, cease to be members of the NPPS 2006 and become members of the 2015 CARE Scheme. We believe this argument is fatuous and without basis; we and other members of the Scheme Advisory Board's (SAB) Technical Working Group (TWG) sought to obtain material that was issued to this group of members explaining their current and future pension position. To date no SAB member, nor the Home Office, has been able to source any such material issued by scheme sponsors/managers to affected members which unequivocally explains their position.

1.3.5. In the absence of any evidence of the information provided to this cohort of members, we consider this an abject failure to comply with the disclosure of information requirements and we do not support the suggestion within the consultation that members should have relied on the media for information about their occupational pension provision. The suggestion in itself is nothing short of extraordinary and an attempted abrogation of responsibility. It is worth noting that the McCloud/Sargeant claim succeeded because the Government was unable to provide an evidence base that justified the known age discrimination within the transitional protections. We believe this failure to undertake basic fact checking when delivering policy decisions must not be allowed to be repeated.

1.3.6. Consequently, in order to mitigate against the likelihood of the need for further legal action and to remove the creation of any further discrimination we suggest that the aforementioned excluded cohort of members should also be given the choice of benefits for the Remedy Period.

Group 2: late joiners to the 1987 scheme, whose protection runs beyond 2022

1.3.7. The second group of members which PFEW has concerns about are late joiners of the Police Pension Scheme 1987 (PPS) who were aged 45 on 1 April 2012 and therefore received full transitional protection, and whose full protection under the current transitional arrangements extends beyond 31 March 2022. Whilst they may have reached their Normal Retirement Age (NRA) by March 2022 they will not have reached their Compulsory Retirement Age (CRA) and we maintain that as they are protected until retirement, their protection could extend for as much as a further five years past 31 March 2022.

1.3.8. The consultation document does not adequately address this situation and merely reiterates that all members will be moved into the 2015 CARE Scheme with effect from 1 April 2022. PFEW questions whether the position of such members was considered and seeks details of the Government's justification, both legal and moral, for simply removing this existing protection from such members. It is our view that it is incumbent on the Government to make good on the promises made to this group over the last five years.

1.3.9. It is distasteful and hypocritical for the Government to state, on the one hand, that officers who joined after 2012 should have known that they would be moved into the 2015 scheme, (despite scant evidence of having communicated this to them), and yet on the other hand to attempt to remove the protections from this second group, despite having clearly communicated these protections to them over a prolonged period of time.

Group 3: those who have opted out

1.3.10. The third group of members which PFEW feel have been somewhat overlooked within the consultation are those who chose to opt out of membership as a result of the introduction of the 2015 CARE Scheme. PFEW has a substantial and understandably vociferous cohort of such officers within its membership, and it is vitally important that this issue is dealt with in a fair and consistent manner. Question 16 of the consultation invites comment on the treatment of such members but provides no real detail on a contingent decision process or its scope. PFEW suggest that the best way to deal with this cohort would be to allow all such members a time limited opportunity to be reinstated in the police scheme for the period subsequent to their opt out.

1.4. Remedy

Choice

1.4.1. The consultation asserts that a Remedy to the discrimination could have been achieved by simply returning all affected members to their original legacy scheme and presents the giving of choice as a concession by Government. We dispute the veracity of this statement, and believe such an action would have introduced further unlawfulness. Going forward, it is essential that any options suggested by Government are first robustly reviewed by Government's legal, pensions, and policy teams, as it is imperative that the options put forward are credible, in order to rebuild confidence and trust amongst scheme members.

- 1.4.2. Our reasoning is that this assertion appears to ignore the fact that any member who has transitioned into the 2015 CARE Scheme since 1 April 2015 will have been accruing rights under that scheme, and those rights cannot simply be disregarded in this process without giving rise to further claims. These are accrued rights, and in some cases (mainly for ex NPPS 2006 members), these accrued benefits in the 2015 scheme may or will be better than benefits under their legacy scheme.
- 1.4.3. Our view is that the provision of choice is necessary to ensure that the Remedy is legally sound and does not operate to diminish accrued rights or breach the provisions of section 23 of the Public Service Pensions Act 2013. In fact, we believe that the provision of a choice (and thus consent) is required for all members in order to legitimise the proposed approach.
- 1.4.4. In order to ensure that the operation of the choice is valid it is also vitally important that members are provided with sufficient information to make the choice an informed one, and thereby validate the choice as also demonstrating the obtaining of consent.

Immediate vs. deferred

- 1.4.5. There is a suggestion within the consultation that an advantage of the Immediate Choice (IC) option over the Deferred Choice Underpin (DCU) is that members will have “certainty” over their benefits. PFEW regard this statement as, at best, misleading, and PFEW strongly favours the DCU option over IC for the very reason that DCU is the only method of Remedy which ensures that all members in scope can make their choice based on fact, rather than projections that may not be borne out in reality.
- 1.4.6. The Immediate Choice option might provide certainty to some degree, but does not represent the optimal outcome for all. Under the DCU choice members can be assured that their position will be at least as good as it is now, and we consider that to be much more akin to a “certainty”. We also believe that by comparison the DCU option provides a much lower risk of subsequent challenge on either discrimination or other grounds than the IC option.

1.4.7. The consultation provides that under the DCU option all members will be returned to their legacy scheme for the entirety of the Remedy Period, and this position will only be eligible to change when the member reaches retirement and can make their choice. For those members who were previously in the PPS 1987 this is a perfectly sensible approach as it seems likely that for the vast majority of these members the legacy scheme benefits will be preferable (with the exception of those seeking adult survivor benefits), and will likely mean that there are no contribution and tax adjustments to be made when they take their benefits at retirement.

Ex NPPS 2006 members

1.4.8. However, the suitability of this approach under DCU is less clear when considering those who were previously members of NPPS 2006. There is a common understanding among all stakeholders that some of these members will ultimately prove to have been better off in the reformed scheme during the Remedy Period, and are therefore likely to elect for the 2015 CARE scheme benefits at retirement.

1.4.9. It is as yet unclear how many ex NPPS members are likely to be in this position, or what proportion of the ex NPPS group this will be, but PFEW would be interested to know whether the alternate approach of automatically placing ex NPPS members into the reformed scheme for the Remedy Period was considered as an option: and - if so - why it was rejected, as this approach would avoid members incurring two contribution and tax reconciliations (at retirement as well as at the end of the Remedy Period).

1.4.10. Our concerns about the most beneficial outcome for ex NPPS members under the DCU option are similar to those held about members who originally benefitted from tapered protection. Namely, how accrued rights are to be treated with regards to the Remedy, and how the implementation will be designed to avoid any potentially unlawful detriment or discrimination – particularly with regard to phase one of DCU where the member’s movement back into the legacy scheme(s) will be automatic.

Those with tapered protection

- 1.4.11. PFEW also has concerns about the treatment of members who have had tapered protection. The SAB TWG is awaiting confirmation from the Home Office/Government Actuary's Department (GAD) as to whether any such members of the police scheme would have been better off maintaining their benefits accrued under their tapered protection rather than accruing benefits solely in either their legacy or reformed scheme for the whole of the Remedy Period.
- 1.4.12. If there are members for whom their tapered arrangement proves to be more beneficial than solely legacy or reformed scheme benefits, PFEW reject the consultation's assertions that this detriment would be justified on the basis that it has arisen by chance, and seek the Government's legal and moral justification for causing such detriment when implementing the Remedy.

Expenses

- 1.4.13. We also consider that the consultation does not fully address the issue of expenses incurred by members as a result of the implementation of the Remedy. PFEW welcome the proposal to meet any costs incurred by those in receipt of widow or survivor benefits, but it is not explained why the same conciliation is not extended to those incurring expenses through, for example, re-assessment of divorce cases and those members needing to seek advice in respect of their taxation or financial arrangements.
- 1.4.14. We hold the view that any expenses incurred by members as a result of the Remedy to the unlawful discrimination should be reimbursed, and any failure to do so may give rise to claims in this regard. The implications of the Remedy for some members will be particularly complex, and the absence of any such provisions to allow for professional advice to be taken without members incurring costs is unfair.
- 1.4.15. PFEW recommend that a compensatory sum is provided to members (free of any taxation liabilities) with which they can seek appropriate financial and tax advice before making their choice of benefits for the Remedy Period.

1.4.16. Similarly, the suggestion of a scheme pays facility to recover contributions owed by members is wholly inappropriate if the intention is that such a facility would operate in the same way that it is currently utilized for the payment of Annual Allowance charges, where the pension debit relating to the Annual Allowance charge is applied for the entire period that the pension is in payment, thereby creating a circumstance where members may end up paying more than they originally owed. For this reason we do not support scheme pays (in its current iteration) as suitable for use in the implementation of the Remedy.

Police scheme specific issues

1.4.17. Whilst the consultation acknowledges that scheme specific consultations will be conducted where required, some of the matters that we (and our membership) consider fundamental to their pension benefits are not addressed, and we seek reassurance that these provisions (including those referenced below) will be maintained as part of the Remedy.

1.4.18. The consultation confirms that the Final Salary Link (FSL) will continue to apply where a member's active membership continues after the end of the Remedy Period. However, within the police scheme there are a number of other provisions linked to the transitional protections (which were not found to be discriminatory) and PFEW seek confirmation on whether such provisions will continue to apply once the Remedy Period comes to an end. These include – but are not limited to – weighted accrual, a normal minimum pension age under the 2015 CARE Scheme of age 55, early access to legacy scheme benefits, and instances where membership across more than one scheme is combined to determine eligibility for specific provisions. (For example, the use of combined legacy and reformed scheme membership in qualifying for the unrestricted 25% cash commutation from the PPS 1987). Whilst we have received some verbal reassurance on this matter from Home Office officials, we would welcome assurance in writing.

1.5. The reinstatement and operation of the Cost Cap

1.5.1. Whilst we appreciate that the un-pausing of the Cost Cap does not form part of this consultation, and are clear that the Government has gone to great lengths to try and divorce this matter from the Remedy, PFEW has serious concerns about the veracity of this approach. We are of the firm belief that the two matters are inextricably linked and to suggest otherwise is to distort the reality of how the scheme fundamentally operates. This is evident through the potential effect on both future member contribution levels and the ongoing rate of accrual under the 2015 CARE Scheme.

- 1.5.2. It has been inferred during our meeting with Her Majesty's Treasury (HMT) officials that completing the cost cap mechanism of the 2016 Valuation may introduce the possibility of retrospectively altering benefits accrued under the 2015 CARE Scheme since 1 April 2019. PFEW wish to make clear that any attempt to diminish members' accrued rights would give rise to legal action, and we invite the Government to explain the legal justification in such a circumstance.
- 1.5.3. We also have major concerns about the proposed allocation of the cost of the Remedy as a member cost: that is, a cost which will be met solely by continuing and future members of the 2015 CARE Scheme. Conversely, the costs associated with the Remedy relate primarily to an earlier cohort of older members, and on the basis that the discrimination giving rise to the need for the Remedy was caused by the unjustified discrimination perpetrated by Government - PFEW hold the view that this is not only unfair but also immoral. The introduction of the cost cap mechanism for public sector pension schemes was intended to protect against undesirable fluctuations in both cost to the public purse and benefits for members, it was not intended nor designed as a method for Government to recover the cost of putting right their unlawful discrimination.
- 1.5.4. Below we go on to address the specific questions raised in the consultation document.

2. Responses to Consultation Questions

2.1. 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?

2.1.1. PFEW have identified areas of potential discrimination and other related problems within the consultation, though it is clear from the wording of both the consultation and the accompanying Equality Impact Assessment that the Government considers any such discrimination/detrimental impact to be justifiable.

2.1.2. However, given the calamitous position that has arisen because of Government's previous failure to adequately consider potential discriminatory impacts we respectfully suggest that Government must:

- a) publish any and all advice received, that suggests discrimination introduced might be defensible. (In keeping with the Brown principles¹, Government must demonstrate that rigorous and documented consideration of equality matters has taken place and an audit trail should be available); and
- b) set out in full the evidence it has gathered to support its policy options. This must include any evidence gathered to determine whether discrimination – against any group – might be a proportionate means to achieve a legitimate aim. Again, in keeping with the Brown principles sufficient information must be gathered and assessed. (Further, this should also include the evidence used to make assertions such as that officers who joined after 2012 should have known they would be moved to the 2015 scheme).

¹ R. Brown v Secretary of State for Work and Pensions (2008) EWHC 3158 paras 90-96.

2.1.3. Until the Remedy is outlined in more comprehensive detail it is not possible for PFEW to have certainty on any potential areas of discrimination nor how these could be fully mitigated. However, we have outlined some of the groups about whom we have concerns below. This is not an exhaustive list, and we must stress that the Public Sector Equality Duty falls to Government as the employer to identify possible discrimination in formulating policy.

- Late joiners to PPS 87 whose full protection extends past March 2022.
- As noted in 2.33 above, the cohort of members joining between 2012-2015 who are excluded from the Remedy.
- Those who opted out due to actual or perceived implications of reformed scheme membership.
- Members farthest from retirement who are at a disadvantage if required to make a choice of their Remedy benefits under the Immediate Choice option.
- The making of choice for a member; does the use of a 'default' option meet the relevant threshold for consent if the choice results in a detriment?
- Inequity of treatment through inconsistent application of reimbursement for tax charges relating to the Remedy.
- Time limits and options for payment of contributions owed by members to schemes may disproportionately affect those closest to retirement .

2.1.4. Additionally, and in keeping with our long held view that only joiners from 1 April 2015 should have been placed into the Reformed Scheme, PFEW take the view that the relevant cut-off date in determining Remedy eligibility, is and should be 1 April 2015, not 1 April 2012. The potential indirect discrimination referred to above is therefore easily and readily mitigated by including the cohort of joiners from 1 April 2012 to 31 March 2015 within the scope of the Remedy.

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

- 2.2.1. We have already made some comment within this response (in both the introduction and in our response to question 1) on the position for those who joined between 1 April 2012 and 1 April 2015 and who are out of scope of the proposed Remedy, but we reiterate our position here to draw attention to this point.
- 2.2.2. As previously noted, we have been unable to verify the claims made within the consultation and EIA which asserts that scheme changes were well publicised to the extent that joiners from 1 April 2012 had no reasonable expectation to continue membership in their original (now legacy) scheme past 1 April 2015.
- 2.2.3. We must stress that it is incumbent on Government to provide this evidence. It is a clear policy choice – not a “given” – to exclude these members from the Remedy. These are almost certainly younger members, and therefore age discrimination is an obvious concern. In order to make this policy choice, the employer must demonstrate that the argument it relies upon is underpinned by compelling evidence. Where, therefore, is the proof that these members were informed?
- 2.2.4. In the absence of any evidence which can establish the totality and timeliness of information provided to joiners from 1 April 2012 about the impact of the pension reforms on their membership, PFEW do not support the consultation’s proposal to exclude this cohort from the Remedy.
- 2.2.5. Equality issues should be considered as early as possible in policy formation. Whilst acknowledging that scheme specific consultations will follow, PFEW feel it is vital that Government does not underestimate two significant challenges in dealing with police pensions, and devotes the requisite time and resources to address these:

- a) First, we wish to bring attention to the complexities which arise from the existence of many unique provisions contained within police schemes, which differentiate it from the rest of the affected public sector pension schemes (with the exception of the Firefighters' scheme, in some instances) covered by this consultation.
 - b) Second, we would remind Government that the composition of the workforce in policing presents significant challenges in addressing equality matters, due to the relationship between age, gender, and BAME status. Younger officers are also more likely to be female and / or BAME than older, and this means that across several protected characteristics groups there is a risk of direct or indirect discrimination.
- 2.2.6. In this context PFEW would welcome a detailed Equality Impact Assessment (EIA) which encompasses and addresses all impacts of the Remedy in a way which is directly relevant to the membership and structure of the police schemes.

2.3. 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?

2.3.1. In the first instance PFEW are disappointed that the Government have not been able to confirm whether there are any members of the police schemes with tapered protection who are likely to suffer detriment if required to choose solely legacy or reformed scheme benefits during the Remedy Period. There are, in fact, a number of questions that were posed to the Government during the period leading up to this consultation that remain unanswered. This is an unacceptable omission. We touch on others in our commentary on the consultation process, in the conclusions and summary section.

2.3.2. Irrespective of any specific examples, we maintain that no Remedy outcome should force a detrimental effect on a member's benefits. This is particularly relevant in the circumstances of tapered protection members, for whom any Remedy outcome means a change to their existing benefits (and income/tax position) during the Remedy Period.

2.3.3. We hold particular concerns over the proposal for default choice where a member fails to respond during the timescale required for an Immediate Choice exercise in particular where the default approach for tapered members may diminish some of their accrued rights. PFEW could only support a reduction to existing pension benefits in such an eventuality where a) there is a clear advantage of so doing, that the member feels outweighs the accrued rights, and b) the member gives explicit consent for this to happen (i.e. in electing to receive a lower level of retirement benefit in exchange for the inclusion of survivor benefits for unmarried partners).

2.4. 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.

- 2.4.1. The proposal to apply a default approach to members who do not respond to the IC option seems to present more challenges (and potential discrimination) than it solves. We believe the terms of the Public Service Pensions Act 2013 mean that the Secretary of State must obtain the consent of anyone who appears likely to have adverse effects in relation to the pension payable to them due to retrospective provisions. With the exception of members who originally received full protection and who we believe are likely to maintain membership in their legacy scheme, the default approach will have tangible financial consequences for affected members and raises the question as to whether such an approach could satisfy the legal threshold for consent (where the default approach provides for a detriment to accrued rights).
- 2.4.2. In order to mitigate against any of the membership not responding to an IC exercise it would be our suggestion that every effort must be made to make contact with a member before implementing any default choice to their benefits. This is of particular importance where the default choice results in a contribution deficit and/or changes to tax liabilities. Member tracing exercises are a relatively normal part of pension scheme administration and it would be sensible to use this if a member does not respond after 12 months (with an appropriate extension to their choice deadline once contact has been established).
- 2.4.3. In the cases of members who originally held tapered protection, PFEW recognises that the proposed Remedy will mean that there is no option available to them which results in no change to their existing pension position during the Remedy Period. As noted in paragraph 2.3.3 PFEW cannot support the application of a default approach for those who do not respond to an IC exercise, where such an approach would result in a lower level of benefit.
- 2.4.4. To summarise, PFEW make clear that any financial detriment to members must only occur where consent has been obtained, and then only if the member has been furnished with all of the relevant information in relation to their pension, contribution and tax position.

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

- 2.5.1. Whilst recognising that the Immediate Choice option does have some advantages, these are, in our opinion, outweighed by the many challenges inherent within implementing the Remedy through IC. In seeking to achieve the fairest outcome for our members, we cannot prefer an approach which sees the majority of those in scope asked to make their choice based on projections – in some cases many years before retirement – rather than fact, as would be the case under DCU.
- 2.5.2. The consultation acknowledges (at paragraph 2.34) that there is a significant risk in members making a choice under IC that later transpires not to have been in their best interests. It is stated that members already have to make assumptions about their future (for example when to retire and whether/how much pension to commute for lump sum), but to infer that the choice required from members under IC is of a similar expectation to those retiring is to exclude the considerations of the majority of members in scope of the Remedy. With the exception of those members imminently due to retire, members will have to consider future career progression, Consumer Price Index (CPI) rates and taxation implications to even approach a realistic model on which to base their decision. The number of variables at play are, in our view, insurmountable to implementing the Remedy through IC in a way which both mitigates the risk of further discrimination and provides the best member outcome in that regard.
- 2.5.3. PFEW wish to highlight the profile of those members required to make an Immediate Choice many years before retirement: they are likely to include a greater proportion of younger, female, and/or BAME members, and for this reason the IC option presents a particular risk of further discrimination.
- 2.5.4. In addition to those members referenced above, and as highlighted elsewhere in our response PFEW remain troubled by the lack of clarity over how members who originally benefited from tapered protection will be treated with regards to their accrued rights during the Remedy Period. We maintain that a detriment to accrued rights can only be lawful where the member has provided valid consent.
- 2.5.5. PFEW maintain that the IC option is likely to be more advantageous to Government than to members, as the scheme's liabilities will be clearer.

2.5.6. For the reasons outlined above we do not support IC as the preferred method of implementation for the Remedy.

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

- 2.6.1. PFEW prefer the DCU option for Remedy implementation primarily because it allows members to make their decisions based on fact rather than projections.
- 2.6.2. Whilst accepting that DCU does present some challenges (largely administrative), in our view these are not insurmountable when compared with the issues presented by the IC option.
- 2.6.3. The implications of the un-pausing of the cost cap are also a factor at play in our decision-making process as we have no appetite for requiring member choice until the outcome of this process is known. A key advantage of DCU is that for most members the outcome of the cost cap mechanism calculation in the 2016 Valuation will be known by the time they make their decision, and so any resulting changes to the accrual or contribution rate would be reflected in the information provided to inform their choice.

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

- 2.7.1. PFEW acknowledge that the administrative impacts will no doubt be best addressed by employer representatives, and we offer our views in that context.
- 2.7.2. In the interests of protecting our members it is imperative that data is clean and accurate to ensure effective implementation and administration of the Remedy. This is a process that can be undertaken and continued both before and during Remedy implementation.
- 2.7.3. The consultation raises particular challenges with administration of the DCU option, in part due to the length of time over which pension administrators will have to hold relevant data until the member retires. However, this issue will arguably recede over time as the process becomes embedded and software developments automate much of the process. In addition, many pension schemes have (and some still do) operate with an underpin and from an administrative point of view the use of an underpin is not an unsurmountable challenge to effective implementation of the Remedy through DCU.
- 2.7.4. On the other hand, the IC option would bring its own administrative burden. Providing information in quick time, and dealing with responses from all members at the same time is equally challenging, if not more so. At least with the DCU option members would be dealt with over a longer period, evening out the flow of requests for information a little better.
- 2.7.5. Whether the Remedy is implemented through an IC exercise or the DCU option it is imperative that sufficient resource and support is made available to administrators to ensure they fulfil their role. Without this, there is a risk of failed implementation which is not a desirable outcome for any of the parties involved, not least those members who have been subject to the unjustified discrimination.

2.7.6. Further, it is imperative that timescales and timelines are clearly outlined and communicated whether the Remedy is implemented via IC or DCU. Whilst acknowledging that the timeframe for the member's choice under DCU will (for the most part) be governed by their date of retirement, the approach under IC will need to implement a sufficient support system to avoid any members failing to understand or engage with an IC exercise. The importance of timescales cannot be understated and the final details of the Remedy Implementation must ensure this matter is addressed fairly, and provides for sufficient time to enable members to seek appropriate advice.

2.7.7. PFEW also wish to draw attention to the additional administrative challenge which results from the scheme being locally administered (a factor only relevant to one other public sector pensions scheme: fire). In our view, the Remedy must be implemented uniformly across the scheme; the quality of information and efficiency of implementation must not vary by location or pension administrator. The risk of a fragmented implementation can be mitigated by Government through effective engagement and guidance with employer representatives and administrators.

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

2.8.1. As noted in our response to question 6 above, DCU remains our preferred method for Remedy implementation because it allows for members to make their choice according to actual, rather than estimated data.

2.8.2. Additionally, IC would appear to introduce a considerable element of risk in requiring a member to make a decision on their benefits which could consequently prove to be the less beneficial choice. Additionally, as noted in our response to question 5 of the consultation, we consider there to be a potential for further discrimination against members with protected characteristics if the IC option were to proceed. This risk is mitigated by using DCU to Remedy the discrimination.

2.9. 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?

2.9.1. On the face of it, the proposal to cease accrual in legacy schemes and move all active membership to the 2015 CARE scheme appears to provide equal treatment in line with the recommendations of the Hutton report (which we note specifically warned against the use of transitional provisions). However, there are some concerns:

2.9.2. There are a cohort of late joiners who were originally eligible for full protection, and if they continued to work until their Compulsory Retirement Age (CRA) of 60 would be eligible to accrue pension in their legacy scheme until retirement, which could be as late as the end of March 2027. The position of these members has not been dealt with despite numerous enquiries from PFEW directly and through its engagement with the Scheme Advisory Board. Our reading of the consultation's proposals for pension arrangements from April 2022 onwards suggests that this cohort will be forced into membership of the 2015 CARE Scheme despite this earlier commitment. Whilst there are not likely to be many members in this situation, we do not consider this sufficient justification for not specifically addressing this cohort in designing and implementing the Remedy to the discrimination. We believe these members were led to expect to remain in the legacy schemes, and that there is a moral argument that Government must now honour that in a manner that meets its legal responsibilities. Given the Uplift programme, and the need to retain experienced officers to help tutor and supervise the new intake, there is a legitimate aim for the employer to do all it can reasonably do to retain their expertise.

2.9.3. Whilst PFEW accept that the announced un-pausing of the Cost Cap mechanism does not explicitly form part of the consultation, we are concerned that the inclusion of the cost of the Remedy as part of the calculation of member costs (bearing in mind that post 2012 joiners are not in scope for the Remedy) will disproportionately affect post 2012 joiners. Until and unless there is clarification on the application of the results of the un-pausing of the cost cap mechanism PFEW are not in a position to provide an informed opinion as to whether this proposal affords for the equal treatment of members by moving all members into the 2015 CARE Scheme from 1 April 2022.

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

- 2.10.1. The availability of commuted cash is an important issue for police officers, and our concerns about how this interacts with the proposed method of revisiting past cases are detailed below:
- 2.10.2. PFEW welcomes the proposal in the consultation to compensate members for any excess Annual Allowance charge resulting from their choice of benefits for the Remedy Period. However, why would the same approach not apply to a tax charge arising from an additional lump sum, which has only become payable due to the Remedy to the discrimination?
- 2.10.3. Our reading of paragraph A.3 is that a member may make a choice regarding their Remedy benefits which results in an additional lump sum (whether optional or automatic) becoming payable. This issue seems most likely to arise where a member has transitioned into the 2015 CARE Scheme during the Remedy Period and subsequently retired. Their maximum commuted lump sum from PPS 1987 will have been lower than if they had remained in the legacy scheme throughout the Remedy Period.
- 2.10.4. However, a second payment of commuted cash from the same scheme would constitute an unauthorised payment under Her Majesty's Revenue and Customs (HMRC) regulations and we are of the view that the regulations enacting the Remedy should provide for such a payment to be exempted from incurring the HMRC charge on unauthorised payments. In support of this position is the approach taken as a result of the Pension Ombudsman's decision in the case of *Milne v GAD*.² Alternatively, we seek the Government's confirmation that any increase to a member's Pension Commencement Lump Sum (PCLS) will be treated as an adjustment to the original payment and therefore not fall within the criterion for an unauthorised payment under HMRC regulations.

² *Milne v Government Actuary's Department*, Pension Ombudsman Determination 13 May 2015

2.10.5. This section of the consultation would appear to propose that where a member makes a retrospective choice which means that they have received too big a commuted cash payment (i.e. where a previously fully protected member opts for 2015 CARE Scheme benefits for the Remedy Period), they will be prevented from repaying the excess by lump sum and instead their pension for the Remedy Period will be reduced “on the usual terms”³. This phraseology is ambiguous and gives rise to concerns that a conversion rate of 12:1 (the 2015 CARE Scheme commutation rate) will be used to reduce the residual pension for the Remedy Period, rather than the PPS conversion rate.

2.10.6. PFEW see no reason why members should not be given the choice of repayment either by lump sum or in instalments. Furthermore, if repayment is to be prevented then the conversion rate used to calculate the reduction in pension should be with reference to the cash that the scheme was originally taken from (i.e. PPS), not the 12:1 factor from the 2015 CARE Scheme. This position is supported by the proposal that benefits will be paid from legacy schemes even where members choose the underpin (2015 CARE Scheme benefits), further highlighting the mismatch in using the 2015 CARE Scheme factors in calculating any pension reduction as a result of commutation from PPS 1987.

2.10.7. It is also imperative that where re-calculations are required for members retiring since 1 April 2015, any commutation factors used are with reference to their age at retirement. Failure to do so could result in a less generous factor potentially being applied to part of their benefits and would not achieve the aim of returning the member to the position they would have been in had the discrimination not occurred.

³ Where a member’s Remedy choice results in an overpayment of the cash lump sum received at retirement, the consultation proposes to reduce future pension payments rather than seek to reclaim the overpayment from the member. A potential problem arises from the different commutation factors used in the three police schemes, and we therefore seek confirmation that any calculation in this circumstance is made with reference to the scheme from which the commuted cash was originally taken.

2.11. 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.

- 2.11.1. Overall, the consultation's proposals for the reconciliation of contributions seem sensible. In our view most ex PPS 1987 members are likely to be better off receiving legacy benefits for the Remedy Period and therefore no further adjustment will be necessary at retirement, as this will have been done at the end of the Remedy Period.
- 2.11.2. The position is less clear for ex NPPS members who, if they opt for the underpin of 2015 CARE Scheme benefits, will need to make up a contribution shortfall when the benefits come into payment. PFEW are of the belief that members should be able to choose to pay any contributions due in a way which best suits their circumstances. A sensible range of options would include deducting contributions due from retirement lump sum, repay in (monthly) instalments, repay as a one off lump sum.
- 2.11.3. We note that the consultation raises the possibility of members electing to pay any contributions owed through a Scheme Pays facility. It is with great disappointment that PFEW understand such a facility is proposed to operate *exactly* as it does currently for the payment of charges arising from a breach of the Annual Allowance. This is completely unacceptable and will mean that members may end up paying/foregoing far more value in benefit than was originally owed.⁴
- 2.11.4. PFEW are of the opinion that members should only pay the contributions they owe in respect of the Remedy Period and maintain that there are many other payment options available that would mitigate the disparate treatment which Scheme Pays introduces. A sensible conciliation would be to operate Scheme Pays in such a way that the reduction in benefit is limited only to the extent that the member actually owes (i.e. not a permanent debit).
- 2.11.5. The consultation makes reference to schemes agreeing their own repayment facility, and we look forward to receiving further detail and clarity on how this can be progressed with a view to ensuring its readiness for Remedy implementation.

2.11.6. The consultation makes reference to overpaid contributions being refunded to the member, but PFEW are not convinced that sufficient detail is provided in this regard. Whilst we of course support the proposal that any overpaid contributions due as a result of the Remedy should be returned to the member, we are also cognisant of the fact that any such payment is not a 'true' refund of contributions under HMRC legislation.

2.11.7. PFEW seek confirmation that any refund of overpaid contributions will not constitute an unauthorised payment and/or attract any tax penalties. Failure to ensure this position may give rise to expenses incurred by members as a result of the Remedy, a situation which we have already noted may give rise to claims.

4 If a member exceeds their Annual Allowance (and has no available Carry Forward from previous years) they can pay the resulting tax charge either directly to HMRC as a lump sum, or alternatively elect for the charge to be converted into a pension debit which is applied to their police pension (the scheme pays the HMRC charge upfront on the member's behalf). When Scheme Pays is used, the pension debit applies for the entire period over which the pension is paid (i.e. from retirement until death). If the same approach applied to members who owe contributions to the scheme as a result of the Remedy, members may ultimately end up foregoing more pension than equates to the original contribution deficit. PFEW maintain that members should only pay exactly the amount of their contribution deficit, and no more.

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

2.12.1. PFEW have no objections to the proposals on the treatment of members who have made additional voluntary contributions, and take the view that the fundamental principles of the treatment of this cohort seem reasonable.

2.12.2. We do consider that there are serious complexities for those who are subject to Annual Allowance charges under the DCU option and whose Remedy choice will also need to address their voluntary member contributions. The information provided to members who have made additional voluntary contributions will need particular attention to ensure members are fully aware of the impact of the choice they make.

2.12.3. Whilst we understand that changes to the PPS 87 and NPPS 2006 regulations will need to be made in order to facilitate the provision of additional pension (rather than additional years) when the Remedy is implemented, there remains a concern among some of our membership about the timeliness in which detailed information/guidance on this technical area will be available. Members who are currently considering purchasing additional pension in the 2015 CARE Scheme are not able to make an informed decision about how exactly this will impact their benefits during the Remedy Period. PFEW are uncomfortable that the longer this uncertainty is perpetuated, the less time our members have to make a decision in this regard.

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

- 2.13.1. In light of PFEW's preference for the DCU option for Remedy implementation, it is imperative that future annual benefit statements include details of both sets of benefits 'accrued' during the Remedy Period. Whilst this adds a level of complexity compared to the current statements, we maintain our position that administrative challenges should not form the basis for decisions taken about the implementation of the Remedy to the discrimination.
- 2.13.2. Further, in the Pension Regulator's presentation at the SAB on 1 July 2020 it was reported that only 60% of active members received their annual benefit statements within the statutory deadline. This is absolutely unacceptable and highlights the almost insurmountable challenge of proceeding with IC; if administrators cannot provide annual benefit statements in a timely manner then how can PFEW have the confidence that they can conduct an exercise as intensive and complex as the implementation of Immediate Choice?
- 2.13.3. Members' annual benefit statements are only one of the many communication streams which will form an integral part of informing and engaging affected members in the implementation of the Remedy and the future pension provision from April 2022 onwards. PFEW take the view that the Remedy provides an opportunity not just to engage with officers in understanding their pension arrangements, but to communicate the multitude of benefits of the 2015 CARE Scheme which we feel has been 'undersold', to date.

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

- 2.14.1. The consultation highlights several specific challenges posed by the Remedy implementation for cases involving ill-health retirement (IHR); (i.e. interaction with state benefits, difference in IHR provisions between schemes, member consent to re-assessment) however it does not provide any answers or proposed solutions. This part of the consultation lacks detail and leads to concerns about an unsuccessful application of the Remedy to IHR cases increasing the already disproportionately high number of claims being taken in relation to IHR.
- 2.14.2. PFEW were given sight of the Home Office document released on 21 August 2020 titled *McCloud/Sargeant ruling – Guidance on treatment of ‘Immediate Detriment’ cases*. Notwithstanding that the Guidance was issued with the caveat that the Remedy is still under consultation, the detail contained within is relevant to this question (14) of the consultation in particular. Whilst cognisant of the challenges in implementing the Remedy for those who have recently retired, PFEW consider that recently retired members are among those who have suffered ‘immediate detriment’ and in that context it is disappointing that this cohort are not within scope of the Guidance. Further, the Guidance does not appear to be fit for purpose and we understand that it has not been adopted by all pension administrators. This is, in our view, a warning as to how a failed Remedy implementation may occur and gives rise to the question of whether affected members are then subject to further detriment.
- 2.14.3. PFEW feel strongly that members who were ill-health retired during the Remedy Period and those currently going through the IHR process are prioritised in Remedy implementation. This position also supports our preference for the DCU option, where inevitably there will be more resource available to address immediate detriment cases than if IC is implemented and all members in scope are required to make their choice within the same timescale.

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

- 2.15.1. PFEW welcome the concession that any tax charges arising due to the implementation of the Remedy will not be passed on to a deceased member's estate (or survivors), and that any out of pocket expenses will also be reimbursed. Additionally, we support the proposal in paragraph A.39 that survivors will not be contacted where a choice of benefits would result in someone continuing to receive their survivor's pension or receiving nothing, and that the scheme will continue to pay the survivor's pension on the same basis on which it commenced.
- 2.15.2. In parallel with our comments on question 14, above, the consultation's proposals around the treatment of cases where members have died since 1 April 2015 identifies the potential issues and challenges rather than offering any solutions or mitigations.
- 2.15.3. The provision of a choice is explored but some of the fundamental details about how this would work in practice are lacking. In our view it is imperative that the approach to these cases is clearly defined in terms of who is exercising the choice, the extent and scope of the information provided to survivors, and how any associated expenses can be covered/reimbursed.

2.16. 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.

2.16.1. Since the McCloud/Sargeant case was ruled on, PFEW has and continues to receive communication from officers who state they would have acted differently had the implications of the introduction of the reformed scheme (and thus discriminatory transitional protections) been known to them. In that context, PFEW welcome the consultation's acknowledgement that there are a cohort of members keen to re-join the scheme and pay the contributions that would be owed in order to accrue benefits for their service during the Remedy Period. We also support the scope of the intended contingent decisions process applying to those members who took action based on 'actual or perceived' implications following the 2015 reforms, which we feel is appropriate in capturing all those who may stand to be impacted by this option.

2.16.2. However, there is a lack of detail within the contingent decision proposals to provide the reassurance that we wish to be able to provide to those of our members who have raised their concerns with us.

2.16.3. A clear and comprehensive policy on contingent decisions is needed to ensure that this cohort are dealt with appropriately when implementing the Remedy. We would expect such a policy to outline key information, such as:

- which members (and in which circumstances) are eligible to apply for retrospective membership under the contingent decisions process;
- how members should apply and the timescales/deadlines which will apply;
- who makes the final decision on whether the member re-joins and against what criterion cases are assessed;
- the process for members to appeal a decision;
- the options available for paying the contributions owed, if the member is permitted to re-join retrospectively.

2.16.4. For the reasons noted above, PFEW are not comfortable with the consultation's high-level outline of the contingent decisions process. We also consider that the majority of those likely to utilise the contingent decision process will be those who opted out, and for this reason we would suggest that this cohort are given a limited time frame in which to opt back in and thereby obtain a choice of benefits for the Remedy Period.

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

- 2.17.1. PFEW do not agree with the proposal to bring forward the deferred choice for members with a Club transfer⁵: this is counter intuitive to the concept of implementing the Remedy through the DCU option. We cannot see the justification for treating this one group of members differently and removing the key advantage of DCU (making a decision based on fact rather than projections) in forcing these members to make their choice prior to retirement.
- 2.17.2. If the final DCU Remedy effectively implemented Immediate Choice for members with Club transfers, then the key advantage of DCU is removed for the member. Whilst accepting that the making of a transfer or otherwise is an individual choice, the purpose of Club transfers is to provide for a smooth transition of members and their accrued pension benefits into other areas of the public sector whilst ensuring the transferred benefits are comparable. In our view imposing Immediate Choice for this cohort of members undermines the purpose of DCU.
- 2.17.3. We believe the correct approach to ensure equity of treatment is to use the same approach as proposed for non-Club transfers where, as we understand it, a calculation of the transfer value is done for both sets of benefits and the greater amount paid.
- 2.17.4. It would appear that the only advantages of requiring members with Club transfers to make their choice at the date of transfer are borne by the scheme administrators, in as much as the administration would be simpler if an immediate choice could be made in these circumstances. We are firmly of the view that administration considerations, whilst of course relevant, should never be the primary reason for a course of action – particularly in these circumstances where the intention is to Remedy an unlawful situation.
- 2.17.5. In summary, the provision of deferred choice should be maintained until the member takes his or her benefits in the receiving scheme, ensuring equal treatment of all members (those with Club transfers, and those without).

2.18. 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?

2.18.1. Our view on the choice for members where the receiving scheme is in scope of the Remedy is consistent with our response to the preceding question (17).

2.18.2. The member's choice in the receiving Club scheme should be exercised when the member takes their benefits under that (the receiving) scheme, in accordance with the principle of deferred choice. This view is grounded on the basis that ~~that~~ the member will no longer have any benefits within their previous, ceding scheme but will instead have chosen to transfer them into their new (receiving) scheme, and so it is logical that their choice (in respect of their benefits during the Remedy Period) is also transferred accordingly.

2.18.3. PFEW maintain that when a member makes their choice it will have effect over all of their benefits accrued during the Remedy Period under the receiving scheme, including those added by any transfers-in.

⁵ A Club transfer refers to the transfer of benefits from one public sector pension scheme to another. Members who transfer their pension between two employers in the Public Sector Transfer Club ("the Club") receive broadly equivalent benefits in their new scheme, with the aim of ensuring that final salary pension rights are unchanged, or offered on the same terms regardless of changes in employment within the Club.

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

- 2.19.1. The consultation’s proposals for the treatment of divorce cases are reasonable and sensible for the most part, which we support in so much as they prevent members using their choice to the detriment of their ex-spouse’s benefits.
- 2.19.2. Whilst the consultation acknowledges the impact of the uncertainty of the Remedy with regards to ongoing divorce proceedings, it does not address potential issues arising from Pension Sharing Orders (PSOs) or Attachment Orders which have been implemented during the Remedy Period.
- 2.19.3. It is not unreasonable to consider that a member and/or an ex-spouse may wish for the split of assets to be reconsidered in light of any change in pension benefits, but there is no mention of this or of covering any associated costs in the event that the divorce settlement is reopened.
- 2.19.4. It is the view of PFEW that any expenses incurred by members as a result of the Remedy required to address the unlawful discrimination must be reimbursed, and that failure to do so may give rise to claims in this regard.
- 2.19.5. PFEW support the proposed treatment of divorced cases on the whole, but recommend that reimbursement of expenses caused as a result of the implementation of the Remedy in the same way that it is being offered to expenses incurred by those in receipt of survivor benefits.

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

2.20.1. PFEW's opinion on the application of interest is made in the context of how the requirement for the Remedy has arisen; these changes are necessary to remove a discriminatory provision which was caused by Government. To now impose on these members what amounts to a penalty in the form of interest charges is patently unjust.

2.20.2. It should be remembered that the introduction of the transitional protections was something that the Government negotiated with the TUC during the pension reform process. The Police staff associations were not party to those discussions, and the membership of the police scheme had both the new CARE Scheme and the accompanying transitional protections imposed upon them. The fact that PFEW then chose to engage in discussions with Government over the precise shape of those protections under the police scheme was a pragmatic response in order to obtain what concessions we could on behalf of our members. PFEW's position was, and remains, that the 2015 CARE Scheme should only have been applied to new members of the police service from 1 April 2015.

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

2.21.1. As noted in our response to the previous question (20), the Remedy has been necessitated due to the discrimination caused by the Government. The principle is that in correcting that mistake, affected members should be placed back into the position they would have been in had that mistake not been made, and the addition of an appropriate rate of interest forms an integral part of that process. The members in scope of the Remedy are the innocent and wronged parties here and the moral argument is crystal clear as far as PFEW is concerned.

2.21.2. In relation to the request for suggestions on the appropriate rate of interest, PFEW's view is that a fair, rational and consistent basis should be applied based on economic experience in the intervening period. Failure to at least meet inflationary increases during the period would represent a worsening of the members' positions and does not satisfy the principle of ensuring members are put back in the same position they would have been in had the mistake not been made.

2.22. 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?

2.22.1. We do not believe that there are any scheme specific rates applicable under the police schemes. Consequently, PFEW acknowledge the merit of using a single, consistent rate in keeping with our comments under question 21, above.

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

2.23.1. PFEW's view is that what is proposed in the consultation seems fair, reasonable and pragmatic.

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

2.24.1. Our response to the proposed Remedy's interaction with the tax system is in line with our aforementioned position that members should not suffer detriment through implementation of the Remedy, and it should be recognised that tax implications may take the form of changes to income tax, tax relief, Annual and Lifetime Allowance usage and charges.

2.24.2. In particular we are concerned that any refund of overpaid contributions, and/or any additional PCLS payments arising from the member's Remedy choice should not constitute an unauthorised payment for HMRC purposes. The tax treatment of Remedy payments must be clearly stated within regulations to ensure administrators are empowered to provide all relevant information relating to the member's choice.

2.24.3. The position on whether interest is due on any tax debt should be made clear to members in their annual benefit statements (DCU only), documentation relating to their choice of benefits for the Remedy Period, and any general member communications about the Remedy.

2.24.4. Given the retrospective application of the Remedy, PFEW are of the view that changes to tax liabilities are dealt with as per the prevailing rules at that time. Further, the proposed commitments within the consultation to refund overpaid tax in respect of the entire Remedy Period, and reclaim underpaid tax in respect of four years only (being the current tax year and preceding three tax years) should be included within the wording of the legislation to mitigate any confusion or misapplication.

3. Conclusions/Summary

3.1. The Consultation process

- 3.1.1. We welcome the fact that Government is trying to address the discriminations caused by the transitional protections by way of engagement. We believe that this consultation process is necessary, as this complex situation cannot be addressed via a simple court imposed solution. There is too much danger that in addressing one part of the jigsaw in isolation there will merely be a knock on effect causing unintended consequences – perhaps even further discrimination – later.
- 3.1.2. The complexity of this issue has demonstrated the need for multiple, informed perspectives to be set out and attended to, with opportunities to challenge thinking and build a more robust solution.
- 3.1.3. To be clear, although arising from a legal ruling, this is not solely a legal problem, albeit the legal aspects themselves are multi-faceted and play to several different domains of expertise (including public law, and discrimination). There are moral issues too, including issues of promises made that Government now seems willing to retract; and issues of how the Remedy will be paid for, and whether that will fall to those responsible for the error. There is also a need to ensure that the Remedy supports overarching operational policies, including the 20,000 Uplift programme; to take into account the structure of the workforce and the idiosyncrasies of – in the case of policing – three pension schemes; and to address all of these issues in a manner that places costs appropriately.
- 3.1.4. When so many variables must be taken into account, and so many imperatives (e.g. legal, moral, financial, operational) must be satisfied, evidence and information are essential. And so it is extremely disappointing that when the members of the Scheme Advisory Board collectively sought information from Government departments (the Treasury, and the Home Office) that would help us to give due consideration to the issues at hand, much of that we sought was not forthcoming. Just a few examples are listed below, (not an exhaustive list) and these requests are a matter of public record, being noted in SAB TWG minutes:

- we sought information as to whether some of those in tapered protection would be worse off by being placed in a single legacy scheme for the entire Remedy Period than they are under current arrangements, but although a calculator was made available it did not give an unequivocal answer, and in any case we sought a written, clear answer;
- we repeatedly sought clarity over what would happen to late joiners whose current protection could last as long as until 2027;
- by the time of the final Technical Working Group, there were at least 4 action points outstanding with Her Majesty's Treasury;
- both the Home Office and the Treasury confirmed they would not provide information requested regarding the Cost Cap prior to the closure of the consultation.

3.1.5. All of these questions were asked in good faith, having been identified as necessary to inform the Remedy design, and avoid further discrimination and / or unfairness. There was considerable consensus in SAB, and all the stakeholder constituents are trying to assist with this Government created problem – using their own funding, time, and resources. It is now time that Government steps up to the plate and demonstrates sufficient humility to work alongside other parties. Information must be shared and evidence must be given in a transparent manner: otherwise there is a real danger that this initial Remedy will prove to simply be the first of many such exercises.

3.1.6. In addition to questions raised to which we have received no response, it is worth also noting the circulation of the Immediate Detriment Guidance which was published without warning one month into the consultation period. The way in which this Guidance was issued serves as a warning on how a lack of clarity and engagement can generate more problems than it solves. The Guidance was in places ambiguously worded and at times contradictory, unsurprisingly this caused great concern among our membership as to the scope and application of the Guidance. Had prior warning and detailed information been made available to affected parties, PFEW would have been in a position to assist members in understanding the impact of the Guidance on their personal circumstances. We are also aware that the Guidance was also not adopted by all administrators, which evidences a shared opinion as to the risk of implementing Guidance which is not fit for purpose. PFEW maintain that the final implementation of the Remedy must not repeat the mistakes made in the handling of the Immediate Detriment Guidance.

3.2. The core consultation questions

- 3.2.1. We have provided responses to the 24 consultation questions, and key points are as follows:
- 3.2.2. We have identified a number of areas of potential discrimination within the consultation. It is essential that Government publishes any and all advice that suggests discrimination may be defensible; sets out in full the evidence it has gathered to support its policy options, and especially that which it believes demonstrates any discrimination to be a proportionate means to achieve a legitimate aim; and undertakes an Equality Impact Assessment specific to policing.
- 3.2.3. We have identified a number of groups who we believe are in danger of suffering further discrimination, and we invite Government to demonstrate that the Remedy will not cause such effects.
- 3.2.4. No member should be worse off following the Remedy, and we have set out specific concerns regarding tapered members.
- 3.2.5. We have set out our concerns regarding default options, and in particular we remind Government of the need to adhere to the legal retirement to obtain consent, as per the PSPA 2013.

- 3.2.6. Our preference is for the DCU option, rather than the IC, as the DCU allows members to make decisions based on fact rather than projections.
- 3.2.7. We recognise the administrative burdens of both options. But this must not be a key factor in determining which option is used. It is for Government to make resources available to redress the discrimination caused by its actions. The additional administrative challenge which results from the police scheme being locally administered must be planned for.
- 3.2.8. On the face of it the proposal to close legacy schemes on 1st April 2022 seems to provide equal treatment. Crucially, however, some late joiners who work until their CRA would currently be eligible to accrue pension in their legacy scheme until 2027. These members were led to expect to remain in these schemes.
- 3.2.9. The welcome proposals regarding treatment of excess Annual Allowance charges must be extended to tax charges arising from an additional lump sum. Members must have the choice whether to make repayments by lump sum or in instalments.
- 3.2.10. Overall the proposals for the reconciliation of contributions seem sensible: but we have outlined concerns regarding the nature of the Scheme Pays facility.
- 3.2.11. The fundamental treatment of members who have made additional voluntary contributions (AVCs) seems reasonable, but there are complexities for some individuals. There is also a concern about the timeliness of information.
- 3.2.12. Under the DCU option, future annual benefit statements must include details of both sets of benefits potentially accrued during the Remedy Period. The Pension Regulator has shown that there is considerable cause for concern, and room for improvement regarding police benefit statements. This must be addressed.
- 3.2.13. There is a lack of detail regarding IHR. It is our view that these members must be prioritised.
- 3.2.14. The consultation does not provide solutions for cases where members have died since 2015.

- 3.2.15. A clear policy is needed regarding those who have opted out of the scheme, and who argue that they would have behaved differently had it not been for the effects of the discrimination caused by the transitional provisions.
- 3.2.16. We do not agree that the deferred choice should be brought forward for those with a Club transfer, as this is contrary to the concept of the DCU option.
- 3.2.17. Any expenses incurred by members as a result of the Remedy (such as needing to revisit divorce settlements, i.e.. PSOs) should be reimbursed.
- 3.2.18. Members must not be charged interest even where they will need to pay additional contributions: this was a Government error, and to penalise members in this way would be unjust.
- 3.2.19. Affected members should be placed back into the position they would be in had the discrimination not occurred: to that end they should be paid interest they would have gained had the error not occurred.
- 3.2.20. Any refund of overpaid contributions or retirement lump sum should not constitute an unauthorised payment for HMRC purposes.

3.3. Key issues excluded from the consultation

- 3.3.1. But just as important as the questions asked in this consultation are those unasked.
- 3.3.2. The Cost Cap has been inextricably linked to the Remedy, by Government. The Written Ministerial Statement (HCWS1286) from the Chief Secretary to the Treasury statement on 30 January 2019 makes clear that the pause in the Cost Cap was necessitated by the McCloud/Sargeant ruling. We would protest in the strongest possible terms, and use any measures available to prevent the manifest unfairness were Government to now insist on forcing members to bear the costs of its error, by including the Remedy costs as member costs.
- 3.3.3. We understand there will be a separate consultation on the Cost Cap. We must have clear timescales set out for this so that we, individually as a staff association, and within the SAB of which we are a constituent member, can ensure we are best placed to engage and respond.

3.4. Next Steps

- 3.4.1. We have set out in this document some of the next steps that Government must take in order to redress this wrong, and to avoid introducing further discrimination and unfairness.
- 3.4.2. Urgent policy actions incumbent on Government include conducting a policing EIA; providing evidence in support of its policy positions (or reviewing these positions urgently); and addressing those aspects that seem to have attracted little consideration, to date.
- 3.4.3. Communications actions include the need to set out clear timetables for the consultations required for individual schemes, such as the police scheme; and for consultation on the Cost Cap. Communications to members must be improved, and in particular the benefits of the scheme must be sold to members.
- 3.4.4. The infrastructure must be put in place to administer the Remedy as soon as possible. Benefits statements are a particular concern, as is the current ability to provide a consistent process for all, given local administration.
- 3.4.5. Finally, we believe there is a need to take immediate action to address the cultural barriers that have been demonstrated throughout the period working up to this consultation. There is a need for departments to develop a culture better able to work productively with other stakeholders. This includes the need for more openness and transparency, such as a better responsiveness to legitimate questions, and a willingness to consider constructive challenges. As we move towards a period of intensive effort, working through technical detail, it will be important to mobilise all available resources.