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of England and Wales



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22 May 2023

Dear Sir/Madam


McCloud / Sargeant remedy: phase two (retrospective) Government consultation 2023

Please find enclosed the formal response to the government consultation in respect of *Public Service Pensions: Police Pensions (Amendment) Regulations 2023* from the Police Federation of England and Wales (PFEW), the Police Superintendents' Association (PSA) and the Chief Police Officers' Staff Association (CPOSA). We trust the response is helpful and would be happy to discuss further if that would be useful.

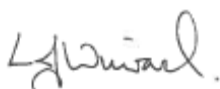
Yours faithfully



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C005/2023

McCloud / Sargeant remedy: phase two (retrospective) government consultation

22 May 2023

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1. Introduction

1.1. General

- 1.1.1. Overall, the associations consider that the draft regulations do provide for the implementation of the retrospective phase of the remedy. However, there are elements which require further clarification which are detailed in the substantive body of this response.
- 1.1.2. The associations attended and provided input into the various collaboration sessions held with stakeholders and Home Office officials. In considering this consultation response, it is disappointing to note that many of the suggestions that were verbally agreed by attendees have not been fed into the policy proposals. It is also noted that some of the later collaboration sessions were held in 2023 and it would appear that the discussions therein were never a true opportunity to assist Home Office officials in forming policy around police specific elements of the remedy, due to the timings between the sessions and the commencement of this consultation.
- 1.1.3. In addition to the above, the launch of the consultation was delayed on several occasions. This is worrisome in that it speaks to the rushed approach to implementing the retrospective remedy – the associations have repeatedly warned that such an approach will be to the detriment of all. The National Police Chiefs Council (NPCC) have helpfully been vocal in the challenges posed to the pension administrators and their software providers due to the delays in being able to code and test the changes required to their software to enable them to implement remedy. This will have a knock-on effect for all members eligible for remedy, including those aiming to retire from 1 October 2023 onwards.
- 1.1.4. A further implication of consulting on changes in such short time before implementation is that it introduces the risk that stakeholders will not be best placed to identify potential issues before they occur. This can be seen in the many problems and subsequent litigation that have occurred in respect of the Police Pensions Regulations 2015 (PPR 2015). The associations have no desire to litigate, particularly on issues that could be avoided with careful and considerate drafting of regulations and retain concern that past mistakes are being repeated. The government have been aware of the requirement for remedy since 2019 and we therefore collectively question why consultation on the retrospective implementation has not taken place until eight months before implementation.

- 1.1.5. As an aside, but of considerable importance (and in our view relevant to all policing stakeholders) is the accessibility of up to date, current pension regulations. There have been many amendments to the legacy schemes' regulations and yet it is not possible to freely access a current version. The associations view the impending changes as an obvious opportunity to produce up to date versions of the regulations for both the legacy and reformed schemes.
- 1.1.6. Furthermore, by implementing remedy through a separate Statutory Instrument, the government are perpetuating an already complex set of regulations with further complication. It would have been desirable to amend the PPR 2015 rather than effectively layering amendments on top of an already burdensome set of regulations. In the absence of such an approach, should the amendments expressly state that they override any existing contrary provisions within the PPR 2015?

1.2. Discretionary Provisions

- 1.2.1. The response to this consultation from the associations identifies several areas where the scheme manager has the power of discretion over the member's choice in respect of remedy. The associations are concerned that such powers will lead to disparate decisions across forces. The correct outcome should be that scheme managers make the same decision for different members who are in the same circumstances, but this presents a huge challenge bearing in mind the lack of guidance.
- 1.2.2. From the outset, the associations have advocated for an independent body to review cases which require the scheme manager to make a remedy choice on a member's behalf. Such an approach would not remove the powers inferred on the scheme manager, but would provide a consistent approach and recommendation that would have the advantage of empowering the scheme manager and giving confidence to the member that their case has been considered fairly. In our view, this would also minimise any potential challenges from the member or their representative as to the outcome of any decision made by the scheme manager.
- 1.2.3. The associations are concerned that the plethora of discretionary powers placed in the hands of the scheme managers represent an attempt to abrogate the responsibility of government to comply with the Court of Appeal judgment in *McCloud / Sargeant* and take the necessary steps to adequately and effectively remedy the unlawful discrimination which they have caused. This is not the responsibility of the scheme managers.

1.3. Interest

- 1.3.1. The application of interest, particularly where the member owes contributions to the scheme presents both moral and practical unease when considering the implementation of the retrospective phase of the remedy. Further, the associations are concerned about potential legal issues with the proposed approach.
- 1.3.2. The substantive part of this consultation response considers in more detail the associations' concerns about the impact that the application of interest poses, but in summary there is a considerable challenge in communicating financial information to members and the impact of decisions made as a result of this information – both on the Remediable Service Statement (RSS) and future Annual Benefit Statements (ABS). In particular, members must be made aware of how their underpayment will be calculated and could change depending on when they choose to repay owed contributions.
- 1.3.3. For moral reasons, the associations have always held the view that charging interest on owed contributions is unfair, which is exacerbated by the fact that members could not have previously paid the correct level of contributions even if they had wished to, due to the operation of the transitional protections. Members have not had any influence over the timing of the remedy to the unlawfully discriminatory transitional protections, nor do they have any influence over when they receive their RSS and can only then make a decision about repayment. It is clearly and wholly unfair to apply interest to owed contributions at all, and if government are content to apply interest then it should be limited to the remedy period only. The associations consider that an Equality Impact Assessment (EIA) accompanying the consultation would have been beneficial to outlining any potential adverse impacts from the proposed approach to the application of interest.

2. Consultation Questions

2.1. Question 1 – In and out of scope: Do the proposed amendments to scheme regulations clearly define which members of the police pension schemes meet the criteria to be eligible for remedy?

2.1.1. The members eligible for the Remedy are broadly determined by the *McCloud / Sargeant* judgment. However, it is noted that the process and detail around contingent decision members remains high level and would have benefited from more clarity, which would ensure a more consistent approach during implementation.

2.1.2. As outlined in our previous consultation responses and discussions with stakeholders, the associations remain concerned about the exclusion of members who joined a legacy scheme between April 2012 and March 2015. In our view, a satisfactory explanation of the reason for their exclusion has never been provided, and our position stands that this cohort should be eligible for the remedy. Previous explanations have maintained that:

- This cohort are out of scope of the *McCloud / Sargeant* judgment. Whilst this is factually correct, it is also the position that contingent decision members were not subjected to the unlawfully discriminatory transitional protections, yet they can apply to be in scope of the retrospective remedy through the contingent decisions process.
- Another point of justification was that this cohort of members would have been aware of the future changes to their pension arrangements when they joined, however no evidence of the provision of this information by those responsible for the governing of the scheme has ever been provided. There appears to have been no attempt to comply with the disclosure provisions. The government's seeming reliance on the media to inform the membership is nonsensical and a blatant disregard of their responsibilities to members.

2.2. Question 2 – DCU and IC: Are there any other areas which you think should be addressed in these regulations in order to ensure that all eligible members receive a choice of pension benefits at their point of retirement, for the period for which the discrimination existed (1 April 2015 – 3 March 2022), from 1 October 2023?

- 2.2.1. The associations remain concerned that the specific details to be included on the RSS have yet to be clearly defined. Further comments on this lack of clarity are outlined in the response to question four in this document.
- 2.2.2. Similarly, whilst there has been some further detail on the eligibility criteria for contingent decisions, it is unhelpful that the exact details required from members in order to apply has not been specifically outlined. The associations provide a comprehensive response to its concerns in response to question ten of this consultation.

2.3. Question 3 – DCU timing of RSS: Do you [think] the policy proposals about the timing of when a scheme member can request an RSS in anticipation of retirement strike the right balance between a suitable period to make a decision, proximity to retirement date and any administrative considerations?

- 2.3.1. Is it not the case that all members will receive an RSS (§5.37 and §5.56 of the consultation) in order to arrange payment of contributions or compensation constituting a de facto refund, what is the document members will receive if this is not the case?
- 2.3.2. The proposed time period for a member to make a decision following receipt of an RSS seems sensible and allows enough time for a member to seek any advice necessary before making their election. However, there are caveats to the associations' support of this proposal, which are outlined below.
- 2.3.3. In §5.14 of the consultation document, it is stated that a deferred choice must be made by the member within twelve weeks of receiving their Remediable Service Statement and choice package. However, in §5.19 ("*Changing a choice*"), reference is made to "*powers for active or deferred members who make a DC by the standard deadline of six calendar months before benefits are due to come into payment, may revoke up until the benefits come into payment.*" which appears to contradict the timescales outlined in §5.14. The logic does not follow that a member may receive their choice package and RSS six months prior to retirement, whilst also being required to make an election by the 'standard deadline' of six calendar months before retirement.
- 2.3.4. In addressing the remedy in relation to survivors and child pensions, §5.107 refers to the "*deadline before which the eligible member or member representative must make a DC, and a default action if a choice is not made within the deadline*" – it would be useful if it was clarified whether this is the twelve-week deadline referred to elsewhere in the consultation.
- 2.3.5. The associations have great concern over the proposal in §5.13 to allow scheme managers to make decisions on behalf of members in certain circumstances. There is an obvious argument that to make such a decision may be, or arguably is likely to be,

potentially detrimental to the member, without the scheme manager being able to give due regard to the member's individual financial circumstances. Indeed, this is acknowledged in the consultation document in §5.22, but the proposal in §5.23 which refers to "*an investigation will always be carried out*" does not provide sufficient detail and therefore reassurance that this process will be applied consistently and fairly.

- 2.3.6. The associations question whether undue risk is introduced by requiring the scheme manager to take on a fiduciary responsibility to act in the best interests of the member, and accept the potential legal consequences associated with that responsibility. Further, is there a potential that the policy position as proposed could arguably amount to the scheme manager providing financial advice to the member or their representative?
- 2.3.7. In light of the comments above, the associations again suggest that an independent body (such as a third-party trustee body) are engaged to provide recommendations to scheme managers on cases requiring a discretionary decision. Acknowledging that such decisions will need to be made on a case by case basis, nonetheless this approach would further benefit from centralised guidance.
- 2.3.8. In cases where a member fails to respond, there is again a question as to how exhaustive the process should be in attaining contact with the member, and what the process should be in order to determine definitively that a member has been given every opportunity to respond. Further, it is not clear what benefit there is for a scheme manager to make a decision on behalf of the member representative of a deceased member, as the benefits cannot be put into payment without the scheme manager obtaining the relevant bank details.
- 2.3.9. In considering the application of interest and its link to the date that the RSS is provided, the associations consider that the proposals as they stand introduce a lottery approach as to individual implications for members. In acknowledging that the huge administrative burden caused by implementing remedy means that it is not possible to issue every RSS at the same time, it is, in our view, wholly unfair and immoral that the level of interest applied to overpaid and underpaid contributions, pensions and commutation amounts depends on where each individual member sits in the tranche of RSS prioritisation.
- 2.3.10. Consideration as to the treatment of taxation liabilities for IC members also presents a particular challenge, especially (but not limited to) how each individual's position is communicated on their RSS. In §5.65 it is noted that only active members are eligible

for tax relief, but that former members will need to have the tax relief included in their calculation. This will need to be very carefully explained to affected members on their RSS and does not need to constitute tax advice – but should provide guidance on who to approach for next steps, if appropriate.

2.4. Question 4 – RSS: Do [you] think the policy proposals in relation to scheme members receiving an RSS achieves what is in Section 29 of the PSPJOA and Direction 20 of [the] Treasury Directions?

- 2.4.1. The associations are disappointed that despite many collaboration sessions and discussions about the RSS between stakeholders and Home Office officials, there has been little clarity as to the exact content of the RSS itself. Whilst the associations were of the understanding that the Public Sector Pensions and Judicial Offices Act 2022 (PSPJOA) gave powers to individual public sector pension schemes to design the requirements of their RSS specifically, this has not been borne out in reality.
- 2.4.2. It is a matter of concern that albeit the Position Definition Document (PDD) and His Majesty's Treasury (HMT) directions state what should be included in the RSS, the detail has not been translated into regulations. Therefore, the position is not fixed and could be changed at any point without further legislative process.
- 2.4.3. In addressing the requirements for Immediate Choice (IC) members receiving their RSS, §5.42 advises that calculations requiring the use of factors should refer to the factors in place at the original date of retirement. The associations consider this a sensible and fair approach, however the paragraph goes on to state that the RSS "*will need to include information about when a benefit would become payable*". It would be useful to receive a response from government which clarifies exactly what cohort of IC members this approach is intended to apply to. As the benefit is already in payment, does this approach refer solely to members who were previously given full transitional protection and will be given the choice to elect for reformed scheme benefits? If this is the case, the RSS will need to clearly explain the impact and effect of the reformed scheme benefits becoming deferred, should the member make an election to that effect.
- 2.4.4. It is our understanding that the proposals outlined in §5.63 refer to the commitment that members who originally received tapered protection will not be worse off as a result of remedy, on the basis that they will not be able to retain their mix of legacy and reformed scheme benefits for the remedy period (as per the PSPJOA). The associations seek clarity on the sentence which refers to retired members in this position, specifically that "*there is a provision that maintains the monetary value of the benefits within certain parameters*." (our underline for emphasis). It is not clear what the 'certain parameters' are and whether this leaves open the possibility that

some members who originally received tapered protection will ultimately end up worse off financially. This is of particular concern in respect of members who have been ill-health retired.

- 2.4.5. The associations have long sought a common and comprehensive approach to Annual Benefit Statements (ABS); in particular that the Scheme Pays debits (SP) for the payment of the Annual Allowance tax charge (AATC) are incorporated into the ABS. CPOSA's survey in December 2022 indicated a wide variation in reporting, with some ABS making no mention of SP whatsoever. Consequently, those members would be expecting the predicted pension in the ABS, only to be informed at the point of retirement that a number of SPs have to be deducted. Given the remedy will generate new AA tax charges (for all ranks from Chief Inspector) and associated SPs, the associations are of the view that the proposed approach for the RSS is insufficient.
- 2.4.6. The Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022, direction 20 is only the legal minimum. It simply requires an explanation of tax issues and where such further details can be found. Given that the source of that additional information will be the same administrator creating the RSS, it will not be an onerous burden for the draft pension regulations to require all tax issues, including SP to form part of the RSS. History has already confirmed that some administrators will only comply with the HMRC Pension Tax Manual, the associated directions, and police pension regulations and circulars. Therefore, the information should form an integral component and not require a separate stand-alone cross-referenced document, which may well even operate on a different time frame.
- 2.4.7. The draft regulation ignores the clear preference already indicated by all parties during the informal consultation. The associations very much welcomed the employer's mocked up RSS (also shared with officials) as it was such an inclusive document. Members can only obtain a complete and informed view if all the relevant information is presented in one information pack.
- 2.4.8. Finally, given that the employer has already agreed to reimburse professional costs arising from reviewing a member's RSS, a comprehensive statement will obviously reduce those charges.

2.5. Question 5 – Transfers: Do you think that the policy proposals that transfers that came into the 2015 reformed scheme will be held in the 2015 reformed scheme until the point of decision achieves the policy intention of preserving transfer rights?

- 2.5.1. The associations are not convinced that the preservation of transfer rights is achieved through the current drafting of the proposed amendments to the pension regulations. The key issue arising relates to members for whom their transfer cannot (in full or part) be converted to legacy scheme benefits.
- 2.5.2. It is noted that the final bullet point of §5.46 states that a member “*will be paid equivalent value in the legacy scheme benefits as an adjustment of contributions accordingly*”, which in its construction is not particularly clear or meaningful. Further, this wording is not reflected in the 2023 regulations, which instead refers to compensation in lieu of the legacy scheme benefits that would have otherwise been accrued.
- 2.5.3. The associations are of the view that the correct and fair approach to the affected cohort of members would be to offer added pension if their transfer cannot be converted to legacy scheme benefits. This could present a problem if the member has already attained maximum accrual in the legacy scheme and they have no pension in the reformed scheme. Compensation in lieu of the transfer benefits should only be payable to the member if the transfer cannot be attributed to existing benefits, and a partial compensation payment should be made if only some of the transfer can be converted to legacy scheme benefits due to restrictions arising from maximum accrual.
- 2.5.4. There are financial implications for the compensation which members receive in relation to their transfer, and the RSS will need to be clear as to the (in particular) taxation consequences for receiving such compensation.
- 2.5.5. Finally, the above response is given on the assumption that the government have confirmed with HMRC that compensation in lieu of transferred-in pension rights does not breach nor put members at risk of breaching existing HMRC legislation that governs pension transfers.

2.6. Question 6 – Added pension: Do you think the policy proposals in relation to scheme members with added pension puts all eligible members in the same position?

- 2.6.1. The associations strongly disagree that the policy proposals for added pension puts all eligible members in the same position. In the first instance this question is clumsily worded, as it is obvious that applying the same policy to all eligible members with added pension would result in those members being placed into the same position.
- 2.6.2. However, we have grave concerns about a blanket policy position to compensate members who have purchased added pension. Members in this cohort will have made a decision to increase their benefits for retirement, and to implement a policy whereby the additional pension is removed is fundamentally wrong, even if they are compensated for that loss.
- 2.6.3. Further, to compensate members for their loss of any additional pension could present adverse tax consequences which have therefore been imposed without their consent. The associations suggest that at the very least there should be a consent driven decision by the member as to the timing of any repayment of their additional pension contributions, if they cannot otherwise use the contributions to purchase additional benefits.
- 2.6.4. In our view, there should be a default position to allow for added pension to be converted to additional service in the legacy scheme. Where such a conversion would breach the maximum service in the legacy scheme, only the excess added pension should be automatically repaid to the member through compensation.
- 2.6.5. It is a notable concern that HMRC considerations have not been referenced in the consultation. The associations would have preferred to see evidence that HMRC implications had been fully considered and any problems mitigated. For example, it is not clear if members who receive compensation in lieu of their added pension and elect to apply for additional service through the contingent decisions process will be breaching any HMRC regulations governing the recycling of pension benefits.

2.7. Question 7 – Contributions: Do you think the policy proposals in relation to scheme members contribution adjustments is in line with section 26 of the PSPJOA 2022 and HM Treasury Directions?

- 2.7.1. The associations consider the contribution adjustments to be reasonably well understood. However, the impact that the application of interest rate(s) to be applied in respect of contribution adjustments needs to be very carefully and comprehensively communicated to members. In particular, DC members will need to receive a very clear explanation as to how the payment of any underpaid or overpaid contributions will be impacted by interest, and how this impact varies up until retirement (where applicable).
- 2.7.2. Whilst overall the associations support the ability of members having the option of retaining any overpaid contributions in the scheme until retirement (which will be of particular advantage to members of the NPPS 2006), it is unwelcome that, as we understand it, these contributions will attract interest at the applicable National Savings and Investments rate(s). Conversely, if a member were to receive a refund of those contributions the interest rate applied would be 8% per annum (simple).
- 2.7.3. Further, for DC members who receive compensation in lieu of their overpaid contributions at rollback, §5.59 of the consultation proposes that if a member subsequently elects for reformed scheme benefits at retirement they will have their pension reduced with reference to the value of contributions subsequently owed to the scheme. The associations seek clarity on whether the deduction from the pension in this circumstance will be a choice between deduction from any commuted lump sum, or through an actuarially neutral pension deduction which operates similarly to the existing Scheme Pays provisions. The associations maintain that members should receive the choice of which option they wish to take, having been provided with figures for both.

2.8. Question 8 – Ill-health Retirement: Do you think the proposed arrangements for members that qualify for ill-health retirement during the remedy period (1 April 2015 – 31 March 2022) may cause any adverse impacts?

- 2.8.1. In the first instance, it is disappointing that the consultation document gives a very high-level overview of how ill-health retirement (IHR) cases will be dealt with for remedy. The associations are of the view that whilst not all of the collaboration sessions with stakeholders and Home Office officials were particularly useful, the session on how to address IHR cases was supported by a comprehensive PDD. It was apparent during discussions amongst Scheme Advisory Board members that there was general consensus as to the policy proposals contained within the paper. The remedy for IHR cases was acknowledged as being particularly sensitive and the associations agreed that due regard had been given to this cohort, therefore it was surprising to note that the consultation did not include the level of detail or consideration to match the aforementioned PDD.
- 2.8.2. In keeping with other proposals within the consultation, the approach to the re-assessment of IHR cases is again an area that would benefit from comprehensive guidance – both to scheme managers and Selected Medical Practitioners (SMPs) to ensure consistency of application across the various administrators. The associations are grateful to the National Police Chiefs Council (NPCC) for the work they have undertaken in drafting template member correspondence, in addition to templates for the SMPs. Although, in our view, this responsibility ultimately falls to the Home Secretary and is a piece of work that should have proactively been created and circulated by the relevant Home Office officials. The provision of appropriate guidance is imperative in ensuring that no member suffers a financial detriment as a result of remedy, as stated in §2.4.3 of this response.

2.9. Question 9 – Abatement: Do you think the policy proposals in relation to scheme members abatement achieves the correct position the member would have been in had they no[t] transitioned to the reformed scheme?

- 2.9.1. The associations recognise that the issue of abatement in relation to remedy will impact very few members. The proposals outlined in the consultation seem sensible and are in keeping with the overarching principle of offering members a choice over their benefits during the remedy period.
- 2.9.2. One point of note regarding abatement is that where a member is affected, the financial impact and explanatory information should be included in the RSS to enable the member to make their choice having been provided with all relevant information in relation to their remedy benefits.
- 2.9.3. In addition to the above, there is a particular challenge arising from the existing discretionary application of abatement. Noting that the PPR 2015 does not allow for abatement, there is a specific requirement for bespoke communications to members affected by abatement, which will need to be carefully explained to those eligible for legacy scheme benefits for the remedy period where abatement can apply.

2.10. Question 10 – Contingent decisions: Do you think that the proposals with regards to contingent decisions give members opportunities to revisit pension benefit decisions taken during the remedy period?

- 2.10.1. The associations broadly agree that the proposals in the consultation do provide members the opportunity to revisit their pension benefit decisions taken during, or around, the remedy period. However, at this late stage the proposals are still relatively vague and, in our view, still lack a clear commitment to implement a process which is fair and consistent.
- 2.10.2. For example, similarly to the comments made in this consultation about the detail contained within the RSS statements, an opportunity has been missed to clearly outline the basic/initial information required from the member in their application through the contingent decision route. This presents a real danger that scheme managers will inadvertently implement the contingent decision process inconsistently, resulting in a ‘postcode lottery’ for contingent decision applicants.
- 2.10.3. Additionally, to further ensure a consistent process it would be advisable for the Home Office to produce a standard template for contingent decisions applications for members to use. This would be to the benefit not only of members, but also to scheme managers.
- 2.10.4. Further, the communications to members have been given scant consideration. In particular, it is still unclear how members will be made aware of the application process and to whom, in the first instance, their application should be made to. Whilst it will fall to the scheme manager to make a decision, in the absence of clear and consistent communication it seems likely that undue pressure will be placed on scheme managers, forces and administrators to individually deal with queries as to the correct process(es) and point of contact.
- 2.10.5. Given the variety of circumstances under which members will be seeking to apply for reinstatement of their benefits through the contingent decisions process, the associations restate their recommendation (as per the comments in this consultation at §2.3.7 for an independent body to be engaged to review applications and make a recommendation to the scheme manager.

- 2.10.6. In reviewing the categories of contingent decisions cohorts (as outlined at §5.82 of the consultation document), the associations suggest that a further category is included: members who purchased Additional Pension (AP) and wish to have the pension converted to additional service as part of the remedy. The consultation acknowledges those members who could have purchased Additional Service have a legitimate basis for applying through the contingent decisions process, therefore this option should also be available to those who could have done the same in the reformed scheme had they not been fully protected.
- 2.10.7. Additionally, the associations suggest that it is made clear to all members as part of their RSS that they are entitled to apply for the purchase of additional service through the contingent decisions route. It should be explained that this option is not solely available to those who opted out, or have periods of part-time service, for example. For clarity, our reading of §5.82 iii (Additional Service) is that it is not limited to those who have already purchased *some* additional service, only that members are eligible to apply to purchase additional service whether they have already done so previously or not.
- 2.10.8. It is noted in §5.85 of the consultation that all members could have opted back in to the reformed scheme from 1 April 2022. However, there is provision within the PPR 2015 for a scheme manager to deem an election to opt in to be backdated. The associations strongly suggest that this discretion is made clear to members who apply to reinstate their service during the remedy period, and to outline the implications of not retrospectively reinstating post remedy service – namely that their remedy period service will otherwise become deferred.
- 2.10.9. The communication requirements on this issue are two-fold. Firstly, scheme managers need to be made aware of their power to backdate an opt in application. Secondly, members must be fully informed as to the consequences of their opt in not being backdated to April 2022. Specifically, that if their benefit is deferred it is not payable (unreduced) until State Pension Age. Further, that the deferred benefit means that they lose entitlement to the benefits associated with Weighted Accrual and the Final Salary Link.

2.11. Question 11 – Divorce: Do you think the policy proposals in relation to the calculation/re-calculation of CETV figures to be used with pension sharing orders members achieve an outcome that recognises the impact of remedy on such calculations?

2.11.1. The associations agree that the policy proposals in relation to divorce and the requirement for the re-calculation of the CETV accurately address the impact of remedy. Further we support the proposal that any remedy choice made by the member will not negatively impact on the pension credit member.

2.11.2. As stated elsewhere in the consultation, communications will need to be clear and carefully worded. This particular cohort of members require specific consideration and it will be key to explain the impact (or lack thereof) to both the member and the pension credit member to avoid any confusion or misunderstanding.

2.12. Question 12 – Bereavement and Child Pensions: Do the proposed amendments to scheme regulations achieve the policy intention of ensuring that the resulting ‘member representative’ can make an immediate choice or deferred choice in relation to the remedy period service of a deceased member?

- 2.12.1. The associations consider that the government must ensure that the regulations achieve the policy intent.
- 2.12.2. Regulations aside, the associations support the approach to ensure that no child’s pension will be reduced as a part of remedy.
- 2.12.3. In the instances where a member representative is making the DC, the associations refer to the comments made in §2.3.4 of this response. Namely, that the deadline for making a choice should be clearly defined as it is for other cohorts of members eligible for remedy.
- 2.12.4. In recognising the unique challenge that this cohort presents, the associations suggest that template communications are shared with all scheme managers to ensure a consistent approach which strikes the careful balance between providing relevant information, whilst approaching the request sensitively. The circumstances of having to contact a member representative will be at an unquestionably difficult time, and scheme managers should ensure they do all they can not to unduly burden those affected.
- 2.12.5. In summary, the associations ultimately maintain the view that members should not be forced to be at a financial detriment as a result of the implementation of remedy (our comments under §2.4.3 refer), in particular with reference to the difference in the death in service multiplier between the legacy and reformed schemes.

2.13. Question 13 – Additional Changes: Are there any additional points not covered in this consultation paper that need to be considered as part of the McCloud Remedy proposed amendments to scheme regulations?

- 2.13.1. It is noted in §5.111 of the consultation that the PSPJOA provides that “*schemes may decide whether to waive all or part of any such liabilities owed to the scheme*”. This is another instance where guidance would be useful to ensure a consistent approach from all scheme managers.
- 2.13.2. Separately, it is noted that DC members will receive details on their Annual Benefit Statement (ABS) as to any underpaid contributions, including the amount due including interest. The associations understand that members will be given the opportunity to repay any owed contributions at any point until they make their DC and again reiterate that members should be given every option available to make this repayment – including in instalments (assuming the underpayment is not waived).
- 2.13.3. It would be remiss of the associations not to make reference to the lack of appetite within government to address what is colloquially known as the pensions trap. The issuing of an advice note from the NPCC which reiterated current regulations around retiring and re-joining is accepted amongst stakeholders as not providing a comprehensive solution to the problem caused by the pensions trap. The associations again call for government to seriously consider taking the opportunity presented by the current amendments required to the pension regulations to resolve this problem, and refer to our letter of 17 July 2021 for full and further detail.
- 2.13.4. As noted in the PFEW and PSA response to the recent consultation concerning pensionable pay for part-time officers, the associations request that a pensionable pay definition is written into the relevant regulations. The failure to include a pensionable pay definition in the pension regulations would be a missed opportunity. Including the definition would have the advantage of alleviating many of the inconsistencies of application and subsequent legal challenges that the absence of a definition causes.
- 2.13.5. Further, the ability for all interested parties (including members) to clearly establish from a scheme’s governing documentation which elements of their pay are pensionable is a fundamental cornerstone of any pension scheme. The associations do not understand why government are so reticent about providing such clarity, or their justification for not doing so.

- 2.13.6. It would be unhelpful to include a pensionable pay definition outside of the pension regulations, and evidence of the impact of such an omission can be seen by the way in which the retrospective amendment to the pensionable pay for part-time officers was not effectively communicated and has now required a project based approach to rectifying benefits that could/should have been accrued in the 2015 CARE Scheme.
- 2.13.7. To reiterate the associations' position on those who are eligible for remedy, we refer to §2.1.2 of this response and request government to provide evidence as to how joiners from 2012 – 2015 were informed of their forthcoming changes to pension scheme membership and adequately advised as to the future changes to their pension accrual. This issue was discussed in some detail in previous Scheme Advisory Board meetings but was never resolved.
- 2.13.8. Finally, it is noted that the member or member representative's decision following receipt of their RSS is irrevocable. The associations note the risk of this policy position if the information provided to the member (or member representative) later turns out to be materially incorrect. In such a situation, members or their representative should have the right to change their decision (if required) should the information provided on their original RSS is found to be materially incorrect.

2.14. Question 14 – Equalities: Do any of the proposed amendments unlawfully discriminate against a particular protected characteristic, fail to advance equality of opportunity between those who share a protected characteristic and those who do not, or fail to foster good relations between people who share a protected characteristic and those who do not?

- 2.14.1. It is noted that the equality implications arising from the implementation of the retrospective phase of remedy relies on the Equality Impact Assessment (EIA) undertaken as part of the enactment of the PSPJOA. The associations are disappointed that once again government do not see that it is appropriate to conduct an EIA when forming policy intent, rather than when the policy is finalised. The associations deem that the proper course of action to be an initial EIA which is revisited when the policy decisions are finalised, particularly in instances such as this where the initial EIA pertains to a very wide scope (all of public sector schemes affected by remedy) whereas this consultation is specific to only the police scheme.
- 2.14.2. The lack of a scheme specific EIA also gives the associations cause for concern that government are lacking in their commitment to ensure the remedy meets the requirements of the *McCloud / Sargeant* judgment. It is the government who introduced the discriminatory transitional protections and are therefore required to remedy their effect. It should not be incumbent on respondents to the consultation to perform the Public Sector Equality Duty which lies solely with public authorities.
- 2.14.3. In ensuring the remedy fosters good relations between people who share a protected characteristic and those who do not, the associations once again raise the issue of the pensions trap. It is clear that government has no appetite to address this problem, which calls into question how seriously the consideration of good relations is being included in policy proposals and decision making. In short, the associations question the legitimacy of the use of pension scheme provisions to effectively force officers who are both young joiners and long in service to remain in service for longer than they expected or wished to.

3. Conclusion

3.1. Interest

- 3.1.1. The application of interest remains of great concern to the associations. In the absence of a fully comprehensive consultation, we have had to combine the wording within the consultation alongside information provided by the Government Actuary's Department to try and inform our view.
- 3.1.2. In addition, it is clear that the implementation of the retrospective phase of the remedy presents a huge challenge not only technically, but also in communicating member's options to them. The application of interest brings this challenge into particular focus, as it will be necessary for the information accompanying and/or within the RSS to explain to members the impact of how they choose to deal with their overpaid or underpaid contributions.

3.2. Transfers

- 3.2.1. The associations are not content that members should receive compensation in relation to transferred benefits. Transferred pension benefits provide important added benefits for members, and removing them has financial implications both in the short term and at retirement. Further, it will diminish any potential benefits payable to survivors and members will therefore need to be made aware of all of these implications. In our view, this approach does not comply with the principle of returning members to the position they would have been in had the discrimination not occurred.

3.3. Added Pension

- 3.3.1. The associations disagree with the policy proposal to compensate members who have purchased Added Pension, without any option for at least some of the additional pension to be converted into legacy scheme service. Whilst members may be able to apply via the contingent decisions route, this will need to be made clear to them from the outset and in our view still does not resolve some of the problems created by the proposed policy.

3.3.2. Government are aware that the United Kingdom is experiencing a cost of living crisis and should be mindful that any short term lump sum payment may put members in a position where those funds are used to meet current living costs, rather than providing for additional retirement benefits as originally intended. Whilst the nature of the remedy is about member choice, it would be irresponsible of government to not be cognisant of the position they are putting members in.

3.4. Discretionary Provisions

3.4.1. As noted throughout this consultation response, the associations have identified numerous instances where the scheme manager maintains discretion over the member choice and/or other remedy related benefit decisions. Whilst accepting there are some, very limited circumstances where this may be necessary, we are given no confidence as to the consistency of decision making across the 43 forces due to the lack of clarity on how the process will be dealt with, nor the parameters or requirements for a scheme manager to make such a decision.

3.4.2. The associations again suggest the use of a third-party independent advisory body who can make recommendations to the scheme manager and therefore maintain a level of consistency and independence over discretionary decisions.

3.4.3. Further, the associations reiterate their concerns that the discretionary powers give rise to fiduciary responsibilities imposed on scheme managers, and the legal connotations and risks that such powers provide for.

3.5. Irrevocability

3.5.1. The associations note the policy proposal for a member's choice to be irrevocable (except where a member makes a choice but dies prior to the benefits coming into payment). Whilst theoretically this presents a practical and logical policy proposal, there appears to have been a disregard of the reality that mistakes and inaccuracies will invariably make their way onto some member's RSS.

3.5.2. Therefore, the associations suggest that the Statutory Instrument is amended to allow for an exception to the irrevocability clause which allows for the member or member representative to change their decision in the event that any of the information included in the RSS is later found to be materially incorrect.

3.6. Future amendments

3.6.1. In considering the huge challenge posed by remedy, the associations anticipate that issues and problems relating to the amended regulations will be identified. In that regard we suggest that a review should be undertaken one year after the amendments are enacted to consider any further changes required to regulations. In this time, stakeholders will have been able to collect evidence of any problems with the regulations and/or their interpretation. This can be reviewed through the Scheme Advisory Board so that a solution can be found and implemented.

3.7. Partial Opt Outs

3.7.1. On page twelve of the PDD pertaining to contingent decisions, HMT confirmed that partial opt outs were an acceptable method of tax planning. For reference, the convention was last used with the Civil Service Pension Scheme removed the upper earnings limit and was subsequently extended to the police pension schemes at CPOSA's request. However, on 14 February 2013, the Home Office wrote to forces to advise that regulation G1(1A) was suspended. In keeping with the convention that the police service is afforded the same developments from the wider public sector (in recognition of the legal restrictions on the police), these regulations present a timely vehicle to rectify this lacuna.