

## Addendum

# BMA's response to the Public Service Pension Schemes consultation, specific to the Armed Forces Pension Scheme

October 2020



This response to the consultation considers the issues raised from the point of view of medical and dental officers (MODOs) who are members of the Armed Forces Pension Scheme (AFPS). While the position of the Armed Forces Committee (AFC) aligns with that set out in the [BMA's main response](#), there are some issues specific to the AFPS and to military service.

**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 2019? What evidence do you have on these matters? Is there anything that could be done to mitigate any impacts identified?**

Members who joined between April 2012 and March 2015 were members of the 2005 scheme and were then moved to the 2015 scheme. These personnel were recruited in the immediately preceding period during which the new pension terms were very quickly announced, consulted upon and implemented. They were not given adequate notice of the changes, which has created unfairness and disillusionment among many recruited at that time. These personnel should be given legacy rights for the period 2012 to 2015 and flexibility (i.e. DCU) for the remedy period.

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

Nothing further to add to the [BMA's main response](#).

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

The Armed Forces were not offered tapered protection and therefore, this question is not relevant to the AFPS.

**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.**

As set out below, it is impossible to determine at the time of an immediate choice exercise what option is best for a member.

It is likely that members who do not respond to an immediate choice exercise will have either not received the information or not understood it. The latter is highly likely given the immense complexity of any exposition of all the possible permutations of facts and consequences that would be necessary to allow an informed decision. Therefore, where a member defaults to the reformed scheme which, in time, may be revealed to be disadvantageous, they would have effectively received no remedy for the discrimination that they suffered. We believe this is unacceptable.

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

Immediate choice is not a workable solution for delivering on the principles laid out in the consultation. In all affected public sector schemes, the facts needed to determine the best scheme for an individual are only available at the time at which their benefits come into payment. Key facts, such as final salary, have a huge impact on pension benefits in the legacy

schemes and cannot be known in advance. Only a choice made at the time when all relevant facts are known can hope to meet the objective of ensuring that no one is disadvantaged.

This issue is more acute in the AFPS because of the existence of immediate pensions (IPs) and early departure payments (EDPs). For example, a member with AFPS75 legacy rights who planned to serve a full career might, under immediate choice, elect to join the new scheme for the remedy period. However, subsequent events could mean that they have to leave the service earlier than they had planned. These could include consequences of active service such as injury by enemy action or the psychological consequences of deployed service. More subtly, they may choose to leave due to the accumulating burden of Service life on, for example, their family life. In these situations, they would very likely be better off in the old scheme for the remedy period, with access to the AFPS75 IP. A combination of immediate choice and the unpredictable nature of a Service career would have left them worse off.

Conversely, immediate choice could result in members electing to be in AFPS75 for the remedy period. Many members will regard this as the “safe” option, preserving their rights to a pension that they understand and to which they originally signed up. Sadly, the logic of such a choice will then favour their early departure from service. Immediate choice is likely to be highly retention-negative for members with AFPS75 rights, such as the great majority of military consultants and senior GPs.

Where personnel are given immediate choice, they may have missed the opportunity to take full advantage of their options. For example, a member whose AFPS75 IP point falls in 2021 who was transferred to the new scheme may wish to move back on to AFPS75 and leave the Service, taking advantage of the IP. However, they would have missed the opportunity to do so at the IP point, which would mean that they could only leave on disadvantageous Premature Voluntary Release terms. This is an example of a consequent action and members in this position would have to be offered the chance to leave on their full IP.

The only alleged advantage of immediate choice that has been identified is that it gives certainty about which scheme members belong to. While this may be advantageous to the government it is of no use to members, who are the wronged party in this matter.

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

For the reasons given above, DCU is the only proposal that can meet the requirements of an adequate remedy.

DCU must operate for members of the AFPS on the same basis as it does for members of other schemes, i.e. the decision is taken at the time that benefits come into payment. The MOD issued a paper entitled “[McCloud Consultation update](#)” at the start of the consultation:

It describes the DCU option in these terms (table, page 20):

*Irrevocable choice made at the earliest point at which it is necessary to determine benefits payable. For the regular armed forces, this could be the immediate pension point or EDP point, or the point at which a pension becomes payable (e.g. retirement or ill-health).*

The MOD has subsequently stated that any DCU exercise will occur at a benefit crystallisation event and not at a time when a member merely becomes eligible for an IP or EDP, as a literal interpretation of the text above could imply. We respond on that basis.

There are some specific issues in relation to the operation of DCU in the AFPS as it effects medical and dental officers:

Firstly, any election for a particular scheme must entail also opting for the IP/EDP/MODO bonus arrangements that are associated with that scheme. EDPs and MODO bonuses are not technically benefits of the scheme (and are payable to those who elect to leave the pension scheme). Legislation and regulations on this matter will need to be explicit.

Secondly, MODO members with legacy rights in AFPS05 have the option to take a MODO bonus, a form of retention scheme. The handling of MODO bonuses under DCU will be complex. The BMA is currently in dispute with the MOD about the latter's unlawful attempt to recover MODO bonus payments which the MOD claims were overpaid due to individuals' enforced transition to AFPS15. The terms of the remedy, making the choice of scheme voluntary, will remove much of the grounds of this dispute. We would urge the MOD and the Treasury to engage with us constructively to design an approach to MODO bonuses under both the remedy and the replacement post-remedy scheme that will satisfy all parties. Undertakings given to members who transferred to AFPS05 from AFPS75 in respect of MODO bonuses must be respected in this process.

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

Immediate choice would generate a huge immediate burden of case work, made worse by the impossibility of providing adequate information to describe all the possible outcomes. DCU will spread case work over many years, making it more manageable for the scheme administrators. DCU involves tracking two sets of potential pension benefits over a member's career. However, the systems for calculating the two sets already exist so the additional burden of running them twice for each individual is relatively small.

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

DCU is the preferred option for the reasons set out above. Immediate choice will inevitably lead to individuals being disadvantaged. These individuals will likely be able to demonstrate that their circumstances could not be foreseen or were not anticipated in the information they received at the time of immediate choice. This will leave the government open to further legal challenge, which is in no one's interest.

**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?**

In respect of the AFPS, this is broadly acceptable (since the BMA's concerns in respect of the tiered contribution rates in the NHSPS do not apply). However, we note the following concerns about AFPS15 which should be addressed:

- AFPS15 rights are indexed to Average Weekly Earnings (AWE). AWE can fall behind CPI, causing pension rights to shrink. Other public sector schemes are indexed to CPI +1.5% (as in the NHSPS) and AFPS15 should be aligned to this.

- Membership of two schemes that are regarded as separate *arrangements* for the purpose of calculating annual allowance charge creates absurd and unfair tax charges in situations where one scheme's benefits fall in real terms and the other's rise. The falling benefits are disregarded, and tax applied to the rising benefits alone. This is manifestly unfair and easily reformed.
- Members with legacy scheme accrued rights who are transferred to the new pension scheme are unable to access their pension at the old scheme's normal retirement age (55) if they wish to qualify for the full benefits of the new scheme (which requires service to age 60). Late crystallisation of legacy benefits should be accompanied by actuarial adjustment so that personnel retain the full value of the pension that they have earned.

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

The early retirement dates for many Service personnel make the *usual rates* clause of the proposal unacceptable. An actuarial assessment should be made, and conversion factors based on age and time of retirement should be used.

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

This is not relevant to the AFPS.

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

Members must be able to access all benefits in the scheme they opt for. This implies having access to all the pension enhancements that they would have had available had they been in that scheme in the normal way during the remedy period, with balancing payments as necessary. In particular, this means restoring access to added years to members who elect to remain on the old schemes.

Some members may have adjusted the additional contributions they have been making in response to the tax charges generated by membership of two schemes. These members should be allowed to restore themselves to the position they would have enjoyed but for the discriminatory change of scheme.

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

Nothing further to add to the response provided in the substantive response above.

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

There is a lack of detail. As noted above, an AFPS member who retires on grounds of ill-health may be severely adversely affected by a prior immediate choice election in favour of the new scheme. Immediate choice should be avoided and, if implemented, ill-health retirement should prompt an opportunity to revisit that choice that was made.

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

Even where it is clear that a survivor is in receipt of the more beneficial pension terms, it would be preferable for them to be contacted to have this explained to them so that they know that their case has been considered. Additionally, they would have the opportunity to check the facts on which such an assessment rests. As such, it will always be best to contact survivors and provide them with full calculations and options, accepting that this must be done sensitively and with materials that will not confuse.

**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.**

We believe that some consequential actions should merit automatic restoration of the situation that would have obtained but for the unlawful discrimination:

- Personnel who left the AFPS, perhaps to avoid taxation of pension growth that, due to the annual allowance taper, could have been subject to marginal taxation at an effective rate greater than 100% should be allowed access to their full rights in the legacy scheme as though they had always been members. There should be no employee contributions to consider and members who left the scheme during the remedy period should be contacted and offered individual assessments.
- Under immediate choice, if a member elects for AFPS75 rights but has missed the opportunity to leave the Service at one of the normal departure points, they should be entitled to leave the Service without having to accept PVR terms.
- Under DCU, members who have AFPS75 rights and have missed the opportunity to leave at a normal departure point should be able to depart on non-PVR terms at the time of their choosing.
- Some members elected not to accept a MODO bonus to which they were entitled because of the reduced rates that were implemented for those who had transferred to the new scheme. These members should be able to accept these bonuses with the effective date of payment (from which interest and return of service would be calculated) backdated to the point during the remedy period at which they qualified for the award.
- Members should be able to restore the position they would have enjoyed in respect of added years and other similar benefits.

We accept that some issues would need to be considered on a case by case basis. Where members have or will need to take financial advice in respect of the consequences of the unlawful transfer, e.g. due to tax implications, this should be reimbursed. Where a member left the Service to avoid the adverse pension tax consequences as a result of their membership of the two schemes, they should be able to seek re-employment in the Service and be able to obtain restoration of lost pension rights (regardless of whether or not they in fact re-enter the Service). How the latter could be achieved equitably would require further exploration.

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

No. The recruitment of mid-career doctors from the NHS to the DMS is vital to maintenance of the latter's effectiveness. To effectively remove the benefits of DCU from such individuals would be detrimental to their interests and those of the Services.

**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?**

Maximum flexibility should be retained.

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

We are broadly content with the proposals outlined in the consultation document, but the government must ensure that where a divorce case is reviewed, neither party will be disadvantaged.

**Question 20: Should interest be charged on amounts owed to schemes (such as member contributions) by members? If so, what rate would be appropriate?****Question 21: Should interest be paid on amounts owed to members by schemes? If so, what rate would be appropriate?****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?**

*(We have taken Q20, 21 and 22 together, as there are no employee contributions under the AFPS.)*

As set out in the main response, the BMA's position is that monies owed to members should attract interest at 2% above the Bank of England base rate at the time of the payment, or 2% above the average base rate over the period that the monies are owed, whichever is greater.

On a matter related to Question 20, the government proposes to treat the costs of the remedy as a burden on the 2015 pension schemes and to include this in its re-evaluation of the employer cost caps. This is wholly inappropriate. Firstly, affected members are assumed to be in their legacy schemes and, as such, their option to access the rights of the new scheme is a flexibility introduced to the old schemes, not to the new schemes. Secondly, it is the government, not the members of the 2015 schemes, that has erred. It would be unacceptable for the costs of the remedy to be borne by those who suffered the unlawful discrimination. It would be still worse if the cost fell on those without legacy rights, who cannot benefit from the remedy either. The idea that a soldier joining AFPS15 this year should receive a smaller pension because of the government's prior unlawful actions is manifestly unfair and irrational. The government must find an approach to the cost cap mechanism that does not place the costs of the remedy on members.

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

Abatement is an outdated concept that is detrimental to flexible employment of personnel across the public sector. The recent suspension of abatement for NHS staff returning to work in response to COVID-19 illustrates this and should be made permanent across all schemes.

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

The proposals in respect of immediate choice will do nothing to alleviate the considerable and unfair impact of the tapered annual allowance on our members. Consultants and GPs in the Armed Forces have faced inflated tax charges due to the absurdities of the pension tax system which have, in many cases, produced marginal tax rates in excess of 100%. Whereas civilian colleagues have been able to take advantage of various options to mitigate this, including the extraordinary provisions of the NHS England and Wales AA Repayment scheme introduced last year, military doctors (and other AFPS members) have had no effective remedy.

DCU, by contrast, offers a welcome opportunity to alleviate part of this problem. We endorse the proposed approach, noting that:

- the 4-year statutory tax period for the purposes of any tax that may be due from the scheme member will count from the point at which the choice between schemes is made, and
- the government will refund any overpaid tax in respect of the entire remedy period, regardless of when the choice is exercised by the scheme member.

The government must ensure that the peculiarities of the AFPS (such as IPs) are taken into account when framing the relevant rules and advice to members so as to ensure that Service personnel are not inadvertently disadvantaged.