

The British Medical Association's response to the consultation on the Public Services Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023

January 2023



FOREWORD

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives. Most BMA members are members of the NHS Pension Schemes. This is a response from the BMA to the consultation on the Public Services Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023.

We recognise that this is a technical consultation but, given the importance of the proposed amendments to our members and the issues we have identified, we have chosen to respond to underline the importance of these issues and ensure they are considered as part of any future steps in bringing about changes to the Public Services Pension Schemes Regulations.

RESPONSE TO THE CONSULTATION

Overall, the draft regulations and associated guidance outline a reasonable approach for correcting the unlawful age discrimination that occurred when the 2015 pension scheme arrangements were imposed on the NHS. We note that there are several important areas that are out of scope of these regulations, and many of our members will have taken contingent decisions as a direct result of suffering this unlawful discrimination. As these issues are explicitly out of the scope of these draft regulations, we have not discussed these further, but it is essential that the Government provides clarity as soon as possible.

However, there are a number of areas within the proposed draft regulations that we believe require addressing or further clarification.

- 1. Inconsistency of treatment for unprotected members, who make a new scheme benefit election but have retired or other scheme members who are required to make an immediate scheme election before Section 2 comes into force.**

Under the current proposal, unprotected and taper protected members who are not yet in receipt of their pension and are in scope for the McCloud remedy will have their membership of the remedy period transferred back to their Chapter 1 legacy scheme. This will result in the re-calculation of their pension input amounts and reassessment of any annual allowance tax charges. At the point of retirement, they will be given the opportunity to make a scheme election and choose either to retain legacy benefits for the remedy period or elect to choose reformed benefits if this was more advantageous. Correctly, these members will be compensated for any annual allowance tax liability that may result from this choice.

However, unprotected members who have retired will be required to make an immediate choice before Section 2 comes into force. Although these members will still be able to choose either legacy or reformed pension benefits for the remedy period, they would not benefit from the “better of test” annual allowance calculation set out in the Draft Regulations that will be applicable to deferred choice members in the calculation of the annual allowance in the year of retirement if they make a new scheme benefit election. This is likely to result in these individuals paying more in annual allowance tax than a member who can make a deferred choice. This is likely to become a greater problem given the delay in Section 2.

We note that members of the Armed Forces Pension Schemes who leave the Services prior to normal retirement age, such as medical officers who leave to work as NHS doctors, may be particularly affected by this issue. Payment of the immediate pension under AFPS75 and/or the early departure payments under AFPS05 and AFPS15 are likely to mean that these individuals are required to make an immediate choice. Precisely because these benefits are payable to those leaving the Services mid-career, they will often be paid to members who were unprotected.

To avoid this problem, we suggest that the draft regulations are amended such that all members, including those that have retired or have been required to make an immediate choice prior to 2023, using the same “better of” annual allowance test that will be used for members making a choice at retirement so that the same approach is applied to all members.

2. Commitment regarding HMRC revisiting underpaid tax or compensation for overpaying tax and how this interacts with HMRC’s powers to raise a discovery assessment under the Taxes Management Act

We are aware that HMRC typically under the Taxes Management Act would limit the recovery of past tax owed by individuals to a likely period of 4 previous tax years in circumstances such as these where there is no careless or deliberate error by the individual which we do not consider there would be in this situation. As there is no legal change in the Draft Regulations regarding HMRC’s use of powers to raise discovery assessments for past historic underpaid tax arising from the McCloud rectification we expect this position would apply and HMRC would not revisit any additional tax payable in accordance with these principles, but note there is no commentary on this in the guidance. The same point arises for any overpaid AA charge from more than 4 years ago as to whether this will be repaid to individual members. We believe that this should be clarified.

3. Delayed provision of pension savings statements

The Draft Regulations extend the period by which information about the tax implications is required to be provided to October 2024 for the 2022/23 tax year, extending the usual deadlines, to reflect the complexity and adjustments to past statements. Members who have issues with tax planning for these issues, particularly alongside the taper, may find it difficult to work and tax plan given the extension to the information to be provided.

We believe that the delay to these statements could impact Members detrimentally, for example in planning additional work commitments, tax planning or retirement planning, particularly in the context of the high inflationary environment we are in at present where timing of these decisions can have a greater impact. We believe that this extension should be reconsidered.

4. Additional information obligations

The information to be provided to members fits within the existing tax framework, so for example pension saving statements may need to be provided, updated or no longer be necessary as a result of the rollback and would be rectified. Otherwise, where the obligation does not apply (which can be in circumstances where a tax charge would be due as a result of the taper but not under the standard annual allowance) members need to request a statement.

We believe that schemes should be required to provide corrected PIAs for the whole remedy period to any member who has previously been provided with PIAs, regardless of whether this was automatic or at their request.

5. No commentary on interaction with carry forward for the annual allowance

For those who have tax planned, there could of course be implications in respect of carry forward or other tax planning. Again, these would likely depend on individual circumstances but there is no particular commentary on the use of these mechanisms in the consultation on the Draft Regulations.

We note that, as well as reducing the amount of AA charge payable during the remedy period for many members, these regulations will also have an impact of the carry forward of unused AA both within the remedy period and into the period after it. It must be explicit that beneficial consequent changes to AA charges beyond the remedy period will be compensated.

We note that some scheme members will have made decisions about scheme membership (such as leaving temporarily) as part of tax planning that will be undermined by the changes to AA charges and the carry forward of unused AA into subsequent years. We believe that clarity should be given on the use of the carry-forward mechanism.

6. Lack of clarity regarding assessment of annual allowance in years subsequent to making a new scheme election for those members undertaking partial retirement.

As outlined within the draft regulations, a member who elects for new scheme benefits will be compensated for an annual allowance tax liability that arises from this choice. The proposed mechanism for this is that, where the closing value in the year of retirement when choosing reformed benefits is higher than that calculated if choosing legacy benefits, the PIA will be based on the difference between the opening value in the retirement tax year and the closing value using the (lower) legacy benefits. We understand that, as outlined in the Finance Act, the opening value for the 2015 scheme will still be based on the value of the reformed pension rather than the previous year's closing value. It would be important to clarify this however, as otherwise this could result in those members who take partial retirement essentially seeing their compensation for annual allowance charges that resulted out of a new scheme election being removed if they continued in pensionable employment.

In addition, we understand that when calculating carry forward for years after the new scheme election, the PIA based on legacy accrual will continue to be used even if the new scheme election resulted in a higher PIA. It would be useful for this to be clearly clarified in the response to this consultation.

7. Payment of retrospective benefits to already retired members or deceased members dependents and impacts on Lifetime Allowance

If, because of any rectification in the case of a retired member, a deceased member or a member taking ill-health retirement, an increased lump sum or a serious ill health retirement payment becomes payable and this resulted in exceeding the LTA charge, the regulations state that this would result in a reduction of pension. In the case of a retired member, they make have taken different decisions (such as retiring earlier) had they been aware of an additional LTA

charge. Similarly, it seems exceptionally harsh to place an additional tax burden on the family of deceased members or those with serious ill health conditions. We believe that the regulations should be amended to compensate individuals from additional lifetime allowance tax charges that result directly from choice.

8. With respect to payment of any increased pension, the arrears in pension will be treated as for tax purposes as having been paid in the year it was received.

This could have impacts on the tapered annual allowance for an adult dependent who is also a member of the NHS/other pension scheme in respect to their threshold income calculations. Similarly, it may impact those members who have retired and returned to pensionable employment. This could also result in higher rates of income tax being paid than would have been the case had it been paid in the correct tax years due to the impact of potentially being taxed at higher or additional rates of income tax. This would result in further detriment in we suggest that these arrears are excluded from relevant threshold income calcs and taxed at the rate of income tax that would have applied had it been paid in the correct years.