



Scottish Public
Pensions Agency

Buidheann Peinnseanan
Poblach na h-Alba

The National Health Service Pension Schemes (Amendment) (Scotland) Regulations 2022

Scottish Government consultation 2021

About This Consultation

Overview

This consultation is seeking views on the draft regulations to amend the National Health Service Pension Scheme (Scotland) Regulations 2015. The amendments are intended to support delivery of The Public Service Pensions and Judicial Offices Bill that is currently being enacted by the UK government. The Bill and these Regulations are part of a package of measures to address the age discrimination that was identified by the courts in the transitional protections afforded to some scheme members in public service pension schemes.

While the Scottish Ministers have functions in relation to NHS pensions in Scotland, occupational pensions in general are a reserved matter outside the powers of The Scottish Parliament. The Scottish Ministers must therefore implement the policy reflected in the Bill.

Duration of Consultation

This consultation will run for a period of eight weeks commencing on Monday 22 November 2021 and ending on Sunday 16 January 2022.

How to respond

Please use the consultation response form and once completed send to sppapolicy@gov.scot before midnight on the closing date.

Alternatively, responses can be posted to:

NHS Scotland Pension Scheme Consultation
SPPA
Tweedside Park
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Further information

If you are unable to access an electronic version of the document, please write to the above address and a paper copy will be provided.

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Agency Data Protection Officer
Scottish Public Pensions Agency
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Contents

1. Background	6
2. The prospective regulations to be consulted on	8
3. The Draft Amendments	9
4. Eligibility to join the 2015 Scheme	11
5. Ill Health Underpin	16
6. Added Service and Additional Pension Arrangements	17
7. Other Transitional Provisions	18
8. Consultation Questions	19

1. Background

1.1. The Public Service Pensions Act 2013 (the 2013 Act) introduced reforms to public service pension schemes. The aim of the reforms was to implement the recommendations of the [Independent Public Service Pensions Commission: Final Report](#)¹, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced, designed to make public service pensions sustainable through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.

1.2. The 2013 Act required responsible authorities, including devolved governments, to make regulations establishing the new schemes with effect from 1 April 2015. The final salary pension schemes (referred to as “legacy schemes”) were closed on 31 March 2015 and scheme members could no longer accrue any pension in them unless they fell in to the category of what is known as ‘transitional protection’.

1.3. Transitional protection provided for scheme members who were aged within 10 years of their Normal Pension Age (NPA) on 31 March 2012, to be “fully protected” and allowed to remain in their legacy scheme(s). “Taper protected” members who, on 31 March 2012, were aged between 10 and 13 years and six months of their NPA were allowed to remain in their legacy scheme for a period before transitioning to the reformed CARE scheme before 31 March 2022.

1.4. Following reform, members of the judicial and firefighters pension schemes challenged the transitional protection element of the reforms and in December 2018 the [Court of Appeal found](#) that the transitional protections unlawfully discriminated against younger members, as transitional protection was only offered to older scheme members. The Courts required that this unlawful discrimination be remedied by the government. In a [written ministerial statement](#) the UK government accepted the ruling had implications for all public service schemes that contained similar transitional protection arrangements, including the National Health Service Pension Scheme (Scotland), and have since [consulted extensively](#) on the mechanism for the remedy.

1.5. The UK Government introduced primary legislation, [The Public Service Pensions and Judicial Offices Bill \(PSPJO Bill\)](#), to Parliament in July 2021. The provisions in this Bill mean that all scheme members, regardless of transitional

¹ This is also known as ‘The Hutton Report’

protections, who continue in service from 1 April 2022 will do so as members of the National Health Service Pension Scheme (Scotland) 2015, hereafter referred to as “the 2015 scheme”. The National Health Service Superannuation Scheme (Scotland), known as “the Legacy Scheme”, will be closed to all members for future service from 31 March 2022. The period between 1 April 2015 and 31 March 2022 where scheme members may have built up pension benefits in any one of the above schemes² is known as ‘the remedy period’. Eligible scheme members will have a choice of pension benefits for the remedy period³.

1.6. The primary and secondary legislation will remove the transitional protection that the Courts found to be discriminatory as all eligible members, irrespective of age and proximity to NPA, will now have accrued benefits in their legacy schemes for the remedy period. All eligible members will be given a choice of preferred pension benefits for the remedy period under the provision known as deferred choice underpin (DCU) (pensioner members and representatives of deceased members will be given what is referred to as an immediate choice).

1.7. Secondary legislation in support of the Bill will be made in two phases. The first phase addresses the prospective changes and is the subject of this consultation. Phase two will follow in 2022/23 and will establish the DCU/immediate choice and return eligible members to their legacy schemes for the remedy period.

1.8. The first phase of secondary legislation to be consulted on now will allow provisions for the prospective remedy changes to be enabled. That is, the move of all active scheme members to the reformed scheme from 1 April 2022 and the closure of the legacy schemes to future accrual from 31 March 2022. This ensures that from 1 April 2022 all serving officers who are in pensionable service will be accruing future benefits in the same scheme.

1.9. The second phase of draft Regulations will be new provisions that implement the DCU/immediate choice and facilitate the correction of pensions already in payment including addressing the underpayment and overpayment of pensions and pension contributions for pension scheme members and pensioners. The second set of draft Regulations is out of the scope of this consultation and will be consulted on separately at a later date.

² This is dependent on a scheme member's personal transitional protection status. Between 1 April 2015 and 31 March 2022 protected members will have built up pension in their legacy scheme while unprotected scheme members will have built up pension in the reformed scheme. Taper protected members may have built up a mixture of both legacy and reformed scheme pension during the remedy period.

³ The remedy will allow all eligible members to choose whether they wish to receive legacy or reformed scheme benefits in relation to the remedy period. Members can choose either legacy scheme benefits for the full period or reformed scheme benefits, they cannot opt for a mixture of the two.

2. The prospective regulations to be consulted on

2.1. The rules of the NHS Pension Schemes are set out in Regulations, which are a form of secondary legislation. Rules can be amended or replaced by new Regulations drawn up in accordance with the powers under, and requirements of, the Public Service Pensions Act 2013 and, where relevant, the Superannuation Act 1972.

2.2. Two distinct sets of Regulations are required to support the Bill requirements and address the discrimination in the transitional protections. This consultation covers the first set of draft scheme regulations and must be consulted on at the same time as the Bill progresses through Parliament to ensure that necessary scheme amendments can be enacted for 1 April 2022 when the Bill comes into force.

2.3. The draft Regulations under consultation will:

1. Close the legacy National Health Service Superannuation Scheme (Scotland) to future accrual from 1 April 2022
2. Move all active scheme members to the 2015 Scheme⁴
3. Create an underpin that facilitates the continuation of any ill-health retirements that are in progress over the period when the Legacy Scheme closes and active scheme members move to the 2015 Scheme

⁴ This will effectively move those who are not already members of the 2015 Scheme. In all cases these will be members who held full transitional protection and were classed as protected scheme members. Those previously classed as Unprotected and Taper Protected will already be accruing pension as members of the 2015 Scheme.

3. The Draft Amendments

3.1. The Scottish Ministers present for consultation the draft **National Health Service Pension Schemes (Amendment) (Scotland) Regulations 2022**. This section explains how the draft Regulations amend existing scheme rules and deliver the Bill requirements.

3.2. **Regulation 1(1)** establishes the title of the Regulations and in 1(2) the commencement date is set at 1 April 2022.

Closure of the National Health Service Superannuation Scheme (Scotland) to future accrual

3.3. **Regulations 2 and 3** of this draft Scottish Statutory Instrument (SSI) ensures that NHS Pension Scheme Regulations follow the requirements of the 2013 Act (section 18) as amended by clause 76 of the PSPJO Bill restricting the further accrual of pensionable service in the National Health Service Superannuation Scheme (Scotland) from 1 April 2022.

3.4. **Regulation 2** addresses this in the National Health Service Superannuation Scheme (Scotland) 1995 Section by:

- Amending Regulation B(3) of the 2011 Regulations⁵ (Restrictions on further participation in this Section of the scheme) thus preventing further accrual in the legacy scheme after 31 March 2022, and
- Limiting the effect of B(3) to service accrued before 1 April 2022

3.5. The proposal in the draft Regulations is for B(3) to be amended to read at the beginning of the Regulation:

“(A1) A person may not contribute to or accrue further pensionable service under this Section of the scheme in relation to the person’s service after 31st March 2022.

“(A2) Paragraphs (1) to (18) of this regulation apply to a person’s service under this Section of the scheme before 1st April 2022.”.

3.6. **Regulation 3** addresses this in the National Health Service Superannuation Scheme (Scotland) 2008 Section by:

⁵ S.S.I. 2011/117

- Amending Part 2 (Benefits for Officers), Regulation 2.B.3 of the 2013 Regulations⁶ (restrictions on eligibility: general) thus preventing officers from any further accrual in the legacy scheme after 31 March 2022, and
- Limiting the effect of 2.B.3 to service accrued before 1 April 2022,

and

- Amending Part 3 (Benefits for Practitioners), Regulation 3.B.3 of the 2013 Regulations (restrictions on eligibility: general) thus preventing practitioners from any further accrual in the legacy scheme after 31 March 2022, and
- Limiting the effect of 3.B.3 to service accrued before 1 April 2022,

3.7. The proposal in the draft Regulations is for both 2.B.3 and 3.B.3 to be amended to read at the beginning of the Regulation:

“(A1) A person is not eligible to be an active member of this Section of the Scheme in respect of service in NHS employment after 31st March 2022.

“(A2) Paragraphs (1) to (7) of this regulation apply in respect of service in NHS employment before 1st April 2022.”.

and for 3.B.3

“(A1) A person is not eligible to be an active member of this Section of the Scheme in respect of practitioner service after 31st March 2022.

“(A2) Paragraphs (1) to (8) of this regulation apply in respect of practitioner service before 1st April 2022.”.

⁶ S.S.I. 2013/174

4. Eligibility to join the 2015 Scheme

4.1. Protected members of the Legacy Scheme whose membership of that scheme will be restricted after 31 March 2022 through Regulations 2 and 3 of these draft Regulations must then be made eligible to join the 2015 Scheme. This is achieved through the interaction between the proposed Regulations 2 and 3 and Regulation 19 (Restrictions on membership) of The National Health Service Pension Scheme (Scotland) Regulations 2015⁷. Regulation 19(b) prevents those with eligibility to be an active member of either the 1995 or 2008 sections of the National Health Service Superannuation Scheme (Scotland) from being members of the 2015 Scheme. When Regulations 2 and 3 of these draft Regulations come into force all members who were previously restricted from joining the 2015 Scheme through 19(b) will be eligible to do so. No amendment to these Regulations is therefore required.

4.2. **Regulation 4** amends the National Health Service Pension Scheme (Transitional and Consequential Provisions) (Scotland) Regulations 2015⁸ to ensure that certain transitional arrangements are extended to previously protected members who join the 2015 Scheme from 1 April 2022.

4.3. **Regulation 4(1)** amends Regulation 18 (Uprating of old scheme practitioner earnings) of the transitional regulations to ensure that practitioners who join the 2015 Scheme on 1 April 2022 will have old scheme practitioner earnings uprated in line with the scheme rules. This prevents increases being applied to practitioner earnings twice. The proposal in the draft regulations is for Regulation 18 to be amended (in bold) to read:

*(1) Subject to paragraphs (2) and (3), in relation to a practitioner transition member, as regards the period **in which the member is a member of the new scheme** —*

*(a) paragraph 15(2)(b) of Schedule 1 to the 2011 Regulations; and
(b) regulation 3.D.1(4) of the 2013 Regulations,*

apply as though the words “the annual increase due under the provisions of the Pensions (Increase) Act 1971 and section 59 of the Social Security Pensions Act 1975, plus” were omitted.

(2) Paragraph (3) applies if a practitioner transition member is purchasing additional service pursuant to regulation 22 (existing additional service and unreduced lump sum contracts) of these Regulations.

⁷ S.S.I. 2015/94

⁸ S.S.I. 2015/95

(3) Paragraph (1) does not apply for the purposes of calculating that member's uprated pensionable earnings in relation to that purchase for the purposes of sub-paragraph (5) of paragraph 26 (right to buy additional benefits) of schedule 1 of the 2011 Regulations.

4.4. **Regulation 4(3)** amends regulation 25 (Decoupling of benefits derived from additional contributions) of the transitional regulations. This regulation allows 1995 Section members to elect to take additional service or additional pension benefits at their chosen date or birthday without having to retire. Amendments made to this regulation in Regulation 4(3) ensure that this option is also available to 1995 Section members who join the 2015 scheme on 1 April 2022. The proposal in the draft regulations is for Regulation 25 to be amended (in bold) to read:

(1) This regulation applies to a transition member who has accrued entitlements in the 1995 Section from the payment of additional contributions under Part Q of the 2011 Regulations.

(2) Where this regulation applies, the member may elect that the part of a pension payable under regulation E1 of the 2011 Regulations derived solely from the payment of additional contributions under Part Q of those Regulations should be payable from—

*(a) the member's chosen date (as defined in regulation Q5, except as provided for in paragraph (10) below), **or, if later, the date on which the member joins the new scheme,** in the case of purchase of additional service or an unreduced retirement lump sum;*

*(b) the member's chosen birthday (as defined in regulation Q8, except as provided for in paragraph (10) below), **or, if later, the date on which the member joins the new scheme,** in the case of purchase of additional pension,*

*notwithstanding the fact that the member continues in pensionable service under the new scheme (and for the purposes of any calculation, the member is to be taken to have retired from pensionable service on the member's chosen date or ~~the member's~~ chosen birthday (as applicable)) **or, if later, the date on which the member joins the new scheme.***

(3) Paragraph (4) applies where the member has—

(a) made more than one election under regulation Q4 or Q6 of the 2011 Regulations;

(b) exercised the option under regulation Q8 or Q10 of the 2011 Regulations more than once; or

(c) made one or more elections under regulation Q6 of the 2011 Regulations and exercised the option under regulation Q8 of the 1995 Regulations once or more.

(4) Any election under paragraph (2)—

(a) must—

(i) where it relates to an election under regulation Q4 or Q6 of the 2011 Regulations, be made in relation to every election under those regulations; and

(ii) where it relates to an option under regulation Q8 or Q10 of the 2011 Regulations, be made in relation to every election under those regulations;

which has the same date as the member's chosen date or chosen birthday (as applicable); and

(b) may be made on a second or subsequent occasion in respect of elections under regulation Q4 or Q6 of the 2011 Regulations and options under regulation Q8 or Q10 of the 2011 Regulations which have as the member's chosen date or chosen birthday (as applicable) a date different from any date in respect of which an election has previously been made under paragraph (2).

(5) Regulations E13 and E17 of the 2011 Regulations (where relevant) apply in relation to a payment made pursuant to this regulation.

*(6) An election for the purposes of paragraph (2) must be given in writing to the scheme manager, containing such information as the scheme manager **requires—***

(a) no later than one month before the member's chosen date or chosen birthday (as applicable); or

(b) if—

(i) the member joins the new scheme less than six months before the member's chosen date or chosen birthday (as applicable); or

(ii) the member joins the new scheme on or after the member's chosen date or chosen birthday (as applicable), no later than three months after the date on which the scheme administrator provides the notification referred to in paragraph (9).

(7) Where payment of part of a pension is made pursuant to paragraph (2) in respect of additional service resulting from an election under regulation Q4 or Q6 of the 2011 Regulations—

(a) regulations F2, G3 and H4 of the 2011 Regulations apply to that part of a pension as though it was the member's pension for the purpose of those regulations;

(b) the 2011 Regulations apply to the member's remaining entitlements under those Regulations as though no additional contributions had been made under Part Q; and

(c) no further pension in respect of the additional contributions actually paid under Part Q of the 2011 Regulations is payable under those Regulations.

(8) Where payment of part of a pension is made pursuant to paragraph (2) in respect of additional pension resulting from an option under regulation Q8 or Q10 of the 2011 Regulations—

(a) regulation Q14(4) to (8) of the 2011 Regulations applies;

(b) the 2011 Regulations apply to the member's remaining entitlements under those Regulations as though no additional contributions had been made under Part Q; and

(c) no further pension in respect of the additional contributions actually paid under Part Q of the 2011 Regulations is payable under those Regulations.

*(9) The scheme manager must notify the member in writing of the right to make an election under this **regulation**—*

(a) at least six months before the member's chosen date or chosen birthday (as applicable); or

(b) if the member joins the new scheme at a time specified in paragraph (6)(b)(i) or (ii), no later than three months after the date on which the member joins the new scheme.

“(9A) A notice for the purpose of paragraph (9) must specify—

(a) the date on which any pension payable pursuant to this regulation would come into payment were an election to be made;

(b) the amount of any pension payable under this regulation (before any option to commute part of the pension into a lump sum); and

(c) the date by which the election under this regulation must be received by the scheme administrator pursuant to paragraph (6).

(10) In paragraph (2)—

(a) the “chosen date” for an election under regulation Q4 is the date of the member's 60th birthday; and

(b) the “chosen birthday” for an election under regulation Q10 is the member's 60th birthday.

5. Ill Health Underpin

5.1. There will be cases that will be in the process of being considered for ill-health retirement during the transition to the reformed scheme i.e. the ill-health process will begin on or before 31 March 2022 and will not conclude until 1 April 2022 or later. This area is still under development so our draft regulations do not contain any provision on ill health retirements.

5.2. Once the policy is finalised the intention is to make Regulations protecting the position of ill health retirees whose cases are underway but still pending on 31 March next year, and in particular to ensure they are no worse off as a result of a retirement decision being made after that date. This will be achieved through an “underpin” ensuring that members who will receive a 2015 Scheme ill health pension calculated at the date they actually retire will not receive less than they would have achieved if the pensioner had received a legacy scheme pension calculated at 31 March 2022. If it is shown that the legacy terms would have been greater, the 2015 Scheme pension must be increased by the difference between the two.

5.3. The proposed ill-health underpin will work as follows:

- A member makes an application for retirement on grounds of ill health on or before 31 March 2022
- The member then automatically moves to the 2015 Scheme on 1 April 2022 and remains in the scheme until the ill health retirement has completed
- The new scheme pension arrangement applies in the same way as it does to any other member who moves to the 2015 Scheme before their ill-health process starts
- A notional ill health pension is calculated in accordance with the member’s legacy scheme provisions on the basis that they had been ill health retired on 31 March 2022
- A comparison of the two pensions is made and where the legacy arrangements would have resulted in a higher pension the new scheme pension is uplifted by the amount of the difference between the two arrangements
- The final ill health pension and uplift (if applicable) will be paid from the 2015 Scheme

5.4. Where the notional legacy scheme ill health pension provides a greater ill health pension entitlement, the difference between both calculations will be paid to the member as a pension enhancement from the 2015 Scheme. Survivor benefits will be paid in accordance with the 2015 Scheme regulations.

6. Added Service and Additional Pension Arrangements

6.1. Provisions which allow arrangements for purchasing added service⁹ or additional pension in the Legacy Scheme through periodical contributions agreements will continue after 31 March 2022.

6.2. It is possible for members of the Legacy Scheme to purchase additional pension, depending on individual circumstances and by agreement with the scheme manager. Additional pension can be paid for either in a lump sum or by paying additional contributions in instalments over a number of years. Added service and additional pension agreements that are already underway will continue after the transfer to the 2015 Scheme. This is because they do not involve continuing to accrue legacy scheme pensions, rather, the scheme members concerned are paying in instalments for a previously agreed enhancement to their pension or pensionable service. These arrangements are therefore unaffected by the Bill or by these draft regulations.

6.3. The policy intention is to ensure that only valid, existing arrangements entered into before 1 April 2022 will be permitted to continue and that scheme members will not be able to enter into any new arrangements to purchase additional pension in the Legacy Scheme after 31 March 2022.

6.4. We are considering the impact of the Bill on the existing arrangements and may need to make additional amendments to these regulations to ensure the policy intention can be fulfilled. Any further amendment that is required will be included in the final Regulations made in the Scottish Parliament.

⁹ Provision to purchase added service, called “past added years” or “added years” was ended on 31 March 2008.

7. Other Transitional Provisions

7.1. All other transitional provisions that exist in the 2015 Scheme are not affected by the Bill or these draft Regulations. In particular:

7.2. **Final salary link** – The 2013 Act¹⁰ already provides a final salary link, meaning that legacy scheme benefits are calculated with reference to the member's pensionable earnings at the point of retirement, even though that may be as a member of the 2015 scheme. This provision is maintained beyond 2022.

7.3. **Eligibility of Pensioners** - Pensioner members of either the 1995 Section (Ill-health pension recipients only) or the 2008 Section of the National Health Superannuation Scheme (Scotland) are eligible to be members of the 2015 Scheme through Schedule 1 of the National Health Service Transitional and Consequential Provisions (Scotland) Regulations 2015. No additional amendment is required.

¹⁰ [Schedule 7 of The Public Service Pensions Act 2013](#)

8. Consultation Questions

8.1 Question 1 - Do you think the draft Regulations adequately ensure that the legacy pension schemes are closed to future accrual from 31 March 2022 and that all active pension scheme members are moved to the 2015 pension scheme from 1 April 2022? Do you think there are any errors or omissions in the draft in achieving this aim?

8.2 Question 2 - Do you have any views on the proposed treatment of pension scheme members who have applied for ill health retirement before 31 March 2022 but who don't retire until on or after 1 April 2022? In particular, does this proposal in your view, ensure that these members are treated no less favourably than if the application was determined on 31 March?

8.3 Question 3 - Do you have any views on the proposed treatment of additional contributions arrangements? In particular, do you agree that existing provisions in the regulations allow for arrangements on added pension and added service entered into under the existing schemes to continue after 31st March 2022?

8.4 Question 4 - Do the prospective Regulations in this consultation have an impact on people with protected characteristics, beyond those equality considerations undertaken and set out in the equalities impact analysis undertaken alongside this consultation and in support of the PSPJO Bill. Protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation. Specifically, do you think that the draft regulation amendments and policy intent described above will have any positive or negative impacts on people with protected characteristics, beyond those already considered? If so, which and why/why not?

8.5 Question 5 - Are there any other areas that you think should be addressed in these regulations to ensure all members are moved to the 2015 scheme and the differential treatment as identified by the Court of Appeal is ended?