



**The Professional Trades Union for Prison,
Correctional & Secure Psychiatric Workers**

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Dear Colleagues

GOVERNMENT'S PROPOSALS REGARDING AGE DISCRIMINATION

Members will recall that the Court of Appeal decided in 2018 that the changes made to the Civil Service and NHS pension schemes in 2015 were unlawful. The transitional provisions, which meant that older members remained in the old schemes and younger members had to transfer, were age discriminatory.

The Government accepts that this position has to change, and it has just published its proposals. The main points are summarised below.

Who does this apply to?

It is important to recognise from the outset that the Court of Appeal said that the transitional arrangements were unlawful – it did not say that the new schemes were unlawful in their entirety.

The effect of a finding of discrimination is that the disadvantaged class must be treated as favorably as the advantaged class. In this case:

- Younger members who had to transfer to the new schemes must be permitted to transfer back to their old scheme if that provides them with better benefits. For prison officer grades/OSG's and secure psychiatric nurses that is likely to be the case in many instances because the retirement ages in the old schemes are lower.
- Older members who were not permitted to join the new schemes must be given the opportunity to do so. In some cases, the new schemes are better than the old schemes, particularly for members who intend to work beyond the old scheme normal retirement age, because the rate at which benefits build up each year are better in the new schemes.

The result is that members must be given a choice.

This only applies to the cohort of members who have been discriminated against. All members who joined the service on or after 1st April 2012 were treated in the same way – none of them were allowed to stay in their old scheme and all of them had to transfer on 1st April 2015. **This means that only members who joined before 1st April 2012 are affected.**

Members who joined the service on or after 1st April 2012 were placed in the PCS or 2008 NHS Pension Scheme when they joined. They were all transferred on 1st April 2015, regardless of their age. They were all treated in the same way, so there is no age discrimination. They will not be given the opportunity to transfer back to their former pre-2015 scheme.

Does this apply for the future?

Remember, the new schemes are not themselves unlawful. It is the way they were introduced which was discriminatory.

The Government takes the view that the new schemes are still the way forward, and it intends to apply them to everyone at the earliest opportunity. It says that for practical reasons that could not take place before 1st April 2022.

There will not be any transitional protection for older or younger members. We are considering with our lawyers if there are grounds for challenging the new schemes, particularly in respect of the new scheme pension ages which we do not believe are realistic. We will continue to fight that issue.

As matters stand, the upshot is that:

- Everyone who is still in the service on 1st April 2022 will transfer to the new scheme on that date.
- Anyone who was in service on 31st March 2012 and who was still in service on 1st April 2015 will have to be given a choice, but the choice will apply only to the portion of their pension that they earned between 1st April 2015 and 31st March 2022.
- That will also apply to members who have already retired. They will **NOT** be required to change their current pension but, if it is a better outcome for them, they will be able to have their pension recalculated on the basis of the scheme which did not apply to them when they retired.

How will the choice be made?

This was the main subject matter of the consultation. Everyone recognises that this will be a very difficult choice for members to make.

Two options were considered. The first was to give everyone affected the opportunity to make a once-and-for-all-time decision, probably in 2023. The second was to give them the opportunity when they retire or leave the scheme.

- The first option (“immediate choice”) would make the position of members who are still in service very difficult indeed. They would have to predict how their career will develop over the remainder of their career. For younger members, in particular, that would be impossible.
- We pressed the case for the second option (deferred choice underpin”) and happily that is what the Government has gone for. This means that when a member leaves the scheme, either by retiring or by leaving the service, they will be presented with two clear packages and invited to choose one or the other.

It is a sad fact that some members leave the scheme because they die. In those cases, the choice will be made by their family members.

What this means

The affected members’ pensions will be calculated in three slices: the pension that they built up until 31st March 2015, the pension that they built up between 1st April 2015 and 31st March 2022, and the pension they build up on and after 1st April 2022. The choice they will be offered will apply to the middle slice.

The choice should be presented in terms of simple numbers: a pension of £X or a pension of £Y, in both cases with an opportunity to take part of the pension as a tax-free lump sum. The choice will not be quite as easy as that however. Members will still have to consider the death benefits and partner’s pensions that apply in both packages. That is particularly the case for members who were in Classic: their pension might be higher if they elect for the Classic option, but if they do the pension payable to an unmarried partner, if they have one, would be lower.

You will be able to see how your position develops over the coming years. Each year you will be given a benefit statement showing the alternatives if you choose one way or the other. You will not have to make any decision until you leave, but the information will help you to decide whether or not to make a decision about, for instance, retiring early.

What happens if I have already retired?

You will be given the same choice. But the choice process will commence for everyone from 1st October 2023, including members who have already retired.

That is not acceptable. It means that retired members would have to wait for more than two years and survive on a pension that is lower than it should be in the interim. The Employment Tribunal has already made a formal declaration that members should be allowed to make a choice, now, not in 2023. Members who are still in service may be prepared to wait until they know what the choice means for them when they eventually retire, but members who have already retired will know which package is better for them and they should be permitted to choose without waiting.

We are pursuing further legal action to enforce the declaration that the Employment Tribunal has made. We will keep you informed of developments.

What if I opted out of the scheme altogether?

Some members became so dispirited by the 2015 changes that they opted out of pensions altogether.

The Government has listened to the representations made by us and by others. These members will be able to change their mind and opt back in again, at least in some circumstances. They will have to be able to make out a case that they would not have opted out if the changes had not been made.

These members will have to take action to protect their position. Their cases will not be reviewed automatically – they will have to make an application for a review. There is no need for them to take action at this stage.

I paid voluntary contributions to buy out the increase to my retirement age – does this mean that these contributions have been wasted?

Members of the 2015 Civil Service Scheme were given the option to pay increased contributions for a reduced pension age of 66, 67 or 68, called an “effective pension age” or “EPA” option. Members of the 2015 NHS scheme were given a similar option called an “early retirement reduction buy-out” or “ERRBO” option. The original proposal was that these additional contributions would simply be returned to them. We pointed out that this approach was age-discriminatory, and the Government has relented. The value of making an EPA or ERRBO election will be preserved, but quite how will be discussed in future negotiations.

I have heard that the cost of this remedy is massive. Who will have to pay for it?

The 2015 schemes all have a mechanism built into them, which measures how far the cost of the scheme has deviated from what was expected. If they turn out to be more expensive, then in some cases benefits are reduced or member contributions are increased. If they turn out to be cheaper, then benefits are increased, or contributions are reduced. As it happens, when the cost was measured in 2019, they turned out to be cheaper.

The Government threatened to meet the cost of the remedy by putting it into the cost control mechanism, meaning that the improvements that should have been introduced last year (with effect from April 2019) would be eliminated. Alongside the FBU, GMB and PCS we challenged this threat in judicial review proceedings. They are on hold at the moment.

The Government’s position is now very unclear, but it appears that they have backed down, in part or entirely. The judicial review has not been withdrawn and will not be until all of the technical detail is known.

But the good news, in the meanwhile, is that the benefits that 2015 scheme members have built up since 1st April 2019 should be increased retrospectively.

Conclusion

We and our lawyers are still digesting all of the detail of the Government's proposals. On the main issue – immediate choice or deferred choice – the Government has reached the conclusion we were pressing for.

As ever, the devil is going to be in the detail, which will eventually be set out in new legislation. We will continue with our action to protect the position of members who have already retired, and we will continue our action regarding the benefit improvements that should have been made to the 2015 schemes. On other issues we will provide further updates as the position develops.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Gillan', with a small dash at the end.

STEVE GILLAN
General Secretary