

# Update on the remedy to remove discriminatory provisions from the police pension schemes

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Briefing by Research and Policy Support, PFEW

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## Introduction

*This update and the attached FAQs are relevant to all members. This is the case whether you originally qualified for any of the transitional protections or not and whether you joined the pension scheme before 1 April 2015 or on or after that date, as ultimately all members are likely to be affected in some way by the remedy.*

*The intention of this communication is to update members about what has happened so far and what might happen in the future regarding the design and implementation of the remedy to the unlawful discrimination caused by the transitional protections within the police pension schemes. We appreciate that members will have many questions and that some will remain unanswered. Obviously, more details about the remedy and its application will emerge as the process described below progresses, and we will provide further updates as and when we are able.*

*In the meantime, the information given below and in the attached FAQs represents our best understanding of the position at this point in time, but it should not be relied upon in the making of any financial decisions.*

*We hope you find this update and the attached FAQs helpful.*

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## Background

Following a review of public sector pensions in 2012, in order to maintain sustainability, the Government passed the Public Service Pensions Act 2013 which changed the basis on which public service pensions (including police pensions) were earned. From 1 April 2015 a Career Average Revalued Earnings (CARE) scheme called the Police Pensions Scheme 2015 (2015

CARE Scheme) was introduced to replace the existing final salary schemes (Police Pensions Scheme (PPS) 1987 and New Police Pensions Scheme (NPPS) 2006).

In a final salary scheme, a member receives a pension which is a proportion of their final salary based on their length of membership (there is also a separate lump sum payable under the NPPS). In the 2015 CARE Scheme members build up pension each year based on a percentage of their pensionable earnings for that year. Each subsequent year during which their membership continues, the pension built up in previous years is revalued annually by the annual rate of increase in the Consumer Price Index plus 1.25%.

At retirement, the member receives the total of the earned pension plus increases as an annual pension and can also elect to commute some pension for a tax-free lump sum.

When the 2015 CARE Scheme was introduced, special provisions (known as transitional protections) were afforded to members of PPS and NPPS who were within 10 years of their scheme retirement age at 1 April 2012. Members who fell into this category could remain in their existing scheme until retirement and would not join the 2015 CARE Scheme. This group of members are referred to as having received full transitional protection.

As a result of the feedback received regarding the proposed changes to public service pensions, the Government extended transitional protections to a wider population of the membership; namely members of PPS and NPPS who were between 10 and 14 years of their scheme retirement age. These members would still move into the 2015 CARE Scheme but would remain in their existing Scheme (PPS or NPPS) for a graduated length of time before joining the 2015 CARE Scheme. This group of members are referred to as having received tapered transitional protection.

## **Legal Proceedings**

Following the implementation of the CARE schemes in the public service sector (including the 2015 CARE Scheme) two pensions cases were brought to the Employment Tribunal; one by judges (McCloud) and the other by firefighters (Sargeant). The claimants in both cases argued that the transitional protections were discriminatory on the basis of age, sex and race. In October 2015 a claim was also brought on behalf of a group of police officers (the pensions challenge group), which was stayed pending the outcome of the judges and firefighters' cases.

The Court of Appeal heard the McCloud and Sargeant cases together and determined that the transitional protections did give rise to direct age discrimination. The Government sought to appeal that decision to the Supreme Court, but permission was refused. As a result, the Government conceded in July last year that the judgement would apply to all of the main public service pension schemes (including the police schemes).

The judges and firefighters' cases were referred back to the Employment Tribunal to determine remedies to the discrimination. The stay was also lifted on the police pensions challenge case. The Government has since stated that the same remedial action to remove the discrimination will be extended to non-claimants who are in the same legal and factual position as the police claimants in the pensions challenge case.

The police pensions challenge case proceeded to an Initial Case Management Hearing on 28 October 2019. The Police Federation of England and Wales (PFEW) along with the other six UK staff associations (The Police Superintendents' Association, the Scottish Police Federation, the Scottish Superintendents' Association, the Police Federation of Northern Ireland, the Superintendents' Association of Northern Ireland, and the Chief Police Officers' Association) applied for and were granted Interested Party status in the proceedings.

In a written Order issued on 31 October 2019, the Employment Tribunal provided a draft interim declaration stating that the claimants were entitled to be treated as if they had qualified for full transitional protection and had remained in their existing pension schemes from 1 April 2015.

The issue of compensation for the detriment the claimants have suffered as a result of the discrimination has yet to be addressed by the Employment Tribunal. The claims for compensation fall into two categories: (1) compensation for injury to feelings and (2) compensation for financial loss.

There is to be a further hearing to determine the wording of the final declaration, in the meantime the Employment Tribunal has been sent a submission from the seven UK staff associations. The associations' legal advisor drafted the submission, with significant support from our professional pension specialists. The intention is to ensure that the court is made aware of the many complex practical issues which will need to be addressed when resolving the ongoing discrimination inherent in the transitional protections.

The issues which have been raised are numerous but include the following;

- How long will the transitional protections continue to apply?
- How are pension rights accrued under the 2015 CARE Scheme to be protected?
- How is the disparity between contributions paid by members under the three police schemes to be resolved?
- Will commuted cash lump sums paid to members who have retired after moving into the 2015 CARE Scheme be recalculated and any additional amount paid?
- How will the benefits payable to members who have ill-health retired after transitioning into the 2015 CARE Scheme be corrected?

- How will the survivors' benefits payable as a result of the death of a member who had transitioned into the 2015 CARE Scheme be corrected?
- How will transfer values and pension sharing orders that have been processed in respect of members who had transitioned into the 2015 CARE Scheme be corrected?
- How will those members who have joined the 2015 CARE Scheme on or after 1 April 2015 without having any previous scheme membership be treated?
- How will payments made by members to purchase additional benefits since 1 April 2015 be treated?

Additionally, there remains uncertainty as to how all the taxation and other financial implications of the correction of the position will be dealt with, to ensure that no detriment is suffered by any members.

## Changes to the Police Pension Scheme

In order to eliminate the discriminatory effects of the transitional protections in the pension scheme, changes will need to be made to the scheme regulations. The discrimination will be removed for all affected members, not just those who have lodged legal claims.

Changes made to the scheme to implement the remedy will also need to ensure that all members keep the benefits they have earned to date. ***Whilst some members will have been better off remaining in their previous scheme, other members may have benefited more from joining the 2015 CARE Scheme.*** This will depend on the individual circumstances of affected members and any changes to the scheme must take account of this in order to ensure that no member loses out. In changing the scheme to remove the discrimination it will also be vital to ensure that no new and unintended discriminatory effects are created. This may lead to some changes being made for all those who have been members of any of the police schemes from 1 April 2015, even those who have been entitled to full transitional protection.

## What happens next?

In January this year the Home Office (HO) issued a paper to members of the England and Wales Scheme Advisory Board (SAB), setting out the Government's outline proposals for the remedy to the unlawful discrimination. The SAB is a statutory body established under the legislative amendments that introduced the 2015 changes. It comprises the NPCC, APCC, and staff associations, and is attended by Home Office staff who deal with pension matters. It exists to facilitate the smooth running of the schemes and to provide advice to the Government when requested. Members provide responses to government consultations on pensions, either collectively, or individually. Equivalent versions of the Home Office paper have been issued to the SABs elsewhere in the UK.

The HO paper is intended to be the basis for the discussions in the Technical Working Group (TWG) meetings that are scheduled to take place in February and early March 2020. It should be noted that both the HO paper and the TWGs are non-binding in nature in order to facilitate a free and frank discussion between interested parties about the remedy without committing any of them to a particular position. The staff associations (including PFEW) are taking part in those TWGs along with representatives from NPCC and APCC and the Home Office. The intention of the TWGs is that by receiving feedback from all parties, the subsequent formal consultation on the proposed remedy will be both comprehensive and correct.

Further detail about the remedy and its implementation will be clarified as the process progresses. As and when that detail emerges and we are able, we will update members further.

## Frequently Asked Questions - remedy to discrimination

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### Introduction

*These FAQs and the Update to which they are attached are relevant to all members as it is likely that all members will be affected in some way by the remedy.*

*The intention of these FAQs is to answer (as best we are able at this point) the most important questions raised by members about what has happened so far and what may happen in the future regarding the design and implementation of the remedy to the unlawful discrimination caused by the transitional protections within the police pension schemes. We appreciate that members will have other questions which will remain unanswered. As more details about the remedy and its application become clear we will provide further updates.*

*In the meantime, the answers in these FAQs and the information given in the Update to which they are attached represent our best understanding of the position at this point in time, but they should not be relied upon in the making of any financial decisions.*

*We hope you find these FAQs helpful.*

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#### **Q. What is meant by “the remedy”?**

**A.** The remedy refers to the changes to the pension schemes that the Government will need to make in order to remove the unlawful discriminatory effects of the transitional protections. In order to avoid further discrimination being created by those changes the Government will almost certainly need to make further changes in respect of members who are not directly affected by the unlawful discrimination and these changes will also form part of the overall remedy.

#### **Q. What is meant by the “Remedy Period”?**

**A.** Reference to this term is made throughout these FAQs. This refers to the period starting on 1 April 2015 and ending on an, as yet unspecified, date.

Once that date is specified by Government it will be the date on which:

- the application of the transitional protections ceases,
- the unlawful discrimination caused by those transitional protections ceases, and
- the period of membership to which the remedy must apply ends.

**Q. Who is affected?**

**A.** The remedy to the discrimination will need to be applied to all relevant members for any period during which they were members of any of the police schemes in the period from 1 April 2015 until the application of the transitional protections and the discrimination ends (i.e. the Remedy Period).

This means that if you did not qualify for full transitional protection at 1 April 2015 or you only qualified for tapered transitional protection then the remedy will definitely apply to you. This means you will be entitled to receive benefits for your membership during the Remedy Period as if you had remained a member of your original scheme. However, because some members may actually have been better off accruing benefits under the 2015 CARE Scheme for their membership during the Remedy Period, you will be given an opportunity to opt for those 2015 CARE Scheme benefits instead.

If you qualified for full transitional protection at 1 April 2015 and have remained in your original scheme, in order to ensure that everybody is treated the same and that nobody loses out, the remedy is also likely to apply to you, and you will be given the same choice of benefits in respect of your membership during the Remedy Period.

If you joined the 2015 CARE Scheme on or after 1 April without having previously been a member of one of the earlier schemes then it may be that, in order to avoid the creation of new discrimination, the remedy (and a choice of benefits) will also apply to you. Representations have been made to the Home Office on this matter and we await the outcome.

In exercising any choice of benefits Members should be careful to weigh up the pros and cons as, for example, commutation terms and survivor benefits vary from one scheme to another, and everyone's personal circumstances differ.

**Q. I did not qualify for any transitional protection and was moved to the 2015 CARE Scheme on 1 April 2015. The Employment Tribunal has said claimants should be treated as if they were entitled to remain in their old scheme from April 2015. Will I automatically be moved back into my old scheme?**

**A.** Unfortunately, it's not as simple as that.

The interim declaration stated that claimants are entitled to be treated as if they were members of their pre-2015 scheme since 1 April 2015. The Government have confirmed that the same treatment will be extended to non-claimants in the same legal and factual position and it is their intention that no member loses out as a result of the changes made to remove the discrimination. As a result of this it is not possible to simply place all members back into their former schemes as this would risk some individuals being worse off.

In order to ensure that nobody loses the benefit of their accrued rights under the 2015 CARE Scheme, it seems likely that as part of the remedy you will be able to opt for the 'better of' the following benefits for any of your membership within the Remedy Period:

- Your accrued 2015 CARE Scheme benefits
- What you would have accrued in your previous scheme.

However, until the final declaration is issued by the Employment Tribunal, the discussions in the TWGs take place, and the formal consultation on the necessary changes is undertaken and completed, it is not possible to definitively identify all of the actions necessary. These processes will inevitably take time.

**Q. I qualified for full transitional protection. What does this mean for me – will the older schemes be reformed as a result of this?**

**A.** As a fully protected member you were not adversely affected by the discrimination caused by the transitional protections and you remain entitled to continue accruing benefits in your existing scheme during the Remedy Period. However, in order to ensure that the remedy is implemented fairly and without creating any further discrimination it seems likely that even those members with full transitional protection will also be given the same choice of benefits (previous scheme or 2015 CARE Scheme) in relation to any period of their membership of any of the police schemes that falls within the Remedy Period. Members should be careful to weigh up the pros and cons of choosing benefits from one scheme or the other as, for example, commutation terms and survivor benefits vary from one scheme to another, and everyone's personal circumstances differ.

**Q. I qualified for tapered transitional protection and have already moved from PPS or NPPS into the 2015 CARE Scheme. Does this apply to me?**

**A.** Yes. The tapered transitional protections introduced as part of the scheme changes in 2015 gave rise to unlawful direct age discrimination, and this includes members who were eligible for tapered transitional protection and have moved into the 2015 CARE Scheme. As described in the answers above, it seems likely that you will be given the same choice of benefits in relation to any period of your membership of any of the police schemes that falls within the Remedy Period.

**Q. I qualified for tapered transitional protection and am due to move to the 2015 CARE Scheme between now and 2022, does this apply to me?**

**A.** Yes. As a member due to move into the 2015 CARE Scheme under the tapered transitional protection arrangements, you are affected by the remedy in the same way as a member who qualified for full transitional protection as described in the answer given to the fifth question posed above is.

**Q. I have been paying a different contribution rate in the 2015 CARE Scheme compared to my previous scheme (PPS or NPPS). What will happen in relation to my contributions?**

**A.** This is one of the many complex issues to be considered in forming and implementing a remedy to the discrimination. However, it seems likely that any remedy implemented will include steps to ensure that the disparity in the rate of member contributions under the police schemes will be corrected for any period of scheme membership that falls within the Remedy Period.

**Q. For how long will I be entitled to the continued application of the remedy?**

**A.** The interim declaration stated that claimants are entitled to be treated as if they had remained members of their pre-2015 scheme since 1 April 2015, and the Government has stated both that non-claimants in the same position will be treated in the same way and that nobody will lose out as a result of the implementation of the remedy. Therefore, for as long as the transitional protections remain in place and the Remedy Period continues you will continue to be entitled to the remedy. Currently the Government has given no indication of when it intends the application of the transitional protections, the ongoing discrimination and the Remedy Period to come to an end.

It is worth remembering that the establishment of the 2015 CARE Scheme itself was not challenged, it is only the transitional protections that have been found to be discriminatory.

**Q. What does this mean for the long-term future of police pensions?**

**A.** Occupational pensions policy, including that for public service pensions, is reserved to Government. The Home Office have made clear that the underlying aims of the 2015 pension reform remain; to ensure that public service pensions are both affordable for taxpayers and sustainable for the future.

PFEW and the other staff associations do not have any negotiation powers in respect of any changes to police pensions and therefore cannot block changes by refusing to agree to them. However, they are entitled to be consulted on changes in order to ensure that member and employer representatives' views are considered accordingly. This does not prevent Government from ignoring those views.

**Q. I joined the 2015 CARE Scheme on or after 1 April 2015 without transitioning from membership of one of the previous schemes, will the remedy apply to me in any way?**

**A.** This is still to be decided although representations about the treatment of this group of members have already been made to the Home Office.

**Q. I opted out after moving into the 2015 CARE Scheme. Had I known that I would be entitled to remain in my former scheme I would not have opted out. What does this mean for me?**

**A.** This is still to be decided.

**Q. I have retired with an ill-health pension after being moved to the 2015 CARE Scheme. Will my benefits be reassessed?**

**A.** The status of all members who took ill-health retirement during the Remedy Period will be addressed as part of the remedy and the details of this are as yet unknown, although the Home Office have indicated that the correction of the position in respect of those in receipt of ill-health pensions will be given priority following the implementation of the remedy.

**Q. I am not a claimant under the pensions challenge action but this whole episode has caused me a great deal of upset and/or has caused me to incur financial losses, will I be compensated for either or both of these?**

**A.** This has yet to be decided but the seven staff associations have raised both of these issues with the Home Office, on the basis that we believe that non-claimants should be compensated for hurt feelings and any financial losses incurred in the same way as those who are claimants.

We are aware that members in this position are concerned that their ability to make a claim on this basis will be lost due to the lapse of time. Although we are still awaiting confirmation from Government that they agree with us, our best understanding is that, for as long as the discrimination continues (which will be until the commencement of payment of benefits), the three month time limit for making claims does not start to run and therefore members are not “timed out”.

**Q. Will there be any tax implications arising from the implementation of the remedy?**

**A.** Yes, inevitably there will be taxation consequences as a result of the implementation of the remedy. These may include, but are not limited to

- an increased liability for income tax,
- HMRC charges as a result of breaching the Annual Allowance, Lifetime Allowance, or breaking Fixed or Individual Protection,

- additional payments due where some pension has been commuted for a cash lump sum at retirement.

However, in discussing the form of and implementation of the remedy, the staff associations will be seeking to ensure that taxation issues that arise are dealt with in a fair and appropriate manner, bearing in mind that this situation has arisen as a result of errors made by Government rather than through any fault of members.

**NB – These FAQs and answers are currently based on ongoing discussions in relation to non-binding working proposals that have been provided by the Government. As such they may require revision once the Government provides its formal proposal(s) during the forthcoming consultation phase.**

**21 February 2020**