

## Fire Brigades Union submission



### Response to Department of Health Consultation on Northern Ireland Firefighters' Pension Scheme Retrospective Remedy

The Fire Brigades Union (FBU) is the democratic, professional voice of firefighters and other workers within fire and rescue services across the UK. The union represents the vast majority of wholetime (full-time) and retained (part-time, on-call) operational firefighters and operational fire control staff.

#### Question 1

**In and out of scope: Do the proposed amendments to scheme regulations clearly define which members of the firefighters' pension schemes meet the criteria to be eligible for the remedy?**

1. Despite the wording of the question, we note that the draft regulations do not in fact define the members who are eligible for the remedy. The definition, such as it is, is derived from the definition of remediable service in s.1 of the Public Service Pensions and Judicial Offices Act 2022 ('PSPJOA'). There are two reasons why it would be helpful if an express definition is included:
  - (a) There are some members who were not in pensionable service on 31 March 2012 but who were entitled to active membership on that date. Specific provision is made for such members in s.1(5)(b) of the PSPJOA.
  - (b) We anticipate that the Department will conduct a second options exercise, following the *Matthews* litigation, similar to the one envisaged in the draft Firefighters' Pension Schemes (England) (Amendment) Order 2023, for firefighters employed under the retained duty system ('RDS firefighters') who will be retrospectively admitted to the 2006 Firefighters' Pension Scheme. The draft regulations which are the subject matter of this consultation need to explain how an RDS firefighter who opts for special membership of the 2006 Scheme which falls (retrospectively) in the remedy period will be treated.
2. The question of disqualifying breaks also needs to be dealt with explicitly. A member might have a break of five years or more which commenced after the remedy period commenced and falls wholly within the remedy period, bearing in mind that the remedy period lasts for seven years. For example, a firefighter might have been employed between 1 April 2015 and 31 March 2016, then left for five years, and then rejoined on 1 April 2021. The period in 2015/16 is remediable service (as a deferred member) even if the period in 2021/22 is not. The consultation paper says (in paragraph 4.4) that a disqualifying break must fall wholly within the remedy period, and we agree, but the issue is not addressed in the draft

regulations. It would be helpful if the draft regulations explained how disqualifying breaks will be dealt with.

## Question 2

**DCU timing of RSS: Do the policy proposals about the timing of when a scheme member can request an RSS in anticipation of retirement strike the right balance between a suitable period to decide, proximity to retirement date and any administrative considerations?**

3. We understand the need for a timetable for making an election in good time before members' benefits come into payment, to ease administration problems, but in our view a process that requires a decision to be made no later than 6 months before the anticipated retirement date (a) makes no sense if the member can revoke the election at any time up to the time when the entitlement to benefits become payable, and (b) places undue pressure on members to make a decision which they might be led to believe is irrevocable when in fact it isn't. It must be borne in mind that a member's entitlements might change very significantly in quite a short period: for instance if FPS commutation factors are changed, a member has a substantial pay increase, or the tax treatment of commutation lump sums were to change in the future.
4. It would make more sense to fix the timetable by reference to the practicalities of making a decision to retire. Notice of retirement must be given before the anticipated retirement date, and that notice is copied to the scheme administrators. It would make more sense for that notice to trigger the requirement for the production of an RSS. In our experience, once a firefighter has made a firm decision to retire (and handed their notice in) they will also have made a clear decision as to their pension options regarding, for instance, commutation. In the future that decision-making process will need to include making a decision about remedy period service. They will have received annual statements in previous years to enable them to do that.
5. In our view, Members should be provided with a statement of their entitlements, including their choices regarding legacy scheme service, once they have given notice of their intention to retire. A statement of their pension choices should be supplied as at present – "business as usual" – and they should be required to make a choice before any benefits are paid.
6. We also have concerns about the position of members who will retire shortly after 1 October 2023 and how the timetable will apply to them. We address this in response to question 8.

### Question 3

**Ill-health Retirement: Do you think the proposed arrangements for members that qualify for ill-health retirement during the remedy period (1 April 2015 – 31 March 2022) may cause any adverse impacts?**

(a) *Drafting: paragraph 2 of schedule 1 to the Employment Equality (Age) Regulations (Northern Ireland) 2006*

7. We appreciate that the intent of the draft regulations contained in chapter 2 is to give effect to paragraph 2 of schedule 1 to the Employment Equality (Age) Regulations (Northern Ireland) 2006 (**‘Age Regulations’**), but the drafting is unclear as to whether the effect of paragraph 2 of schedule 1 is recognised (that is, it inserts a deemed and overriding non-discrimination rule).
8. The drafting could be read either way. So, for instance where draft regulation 49(1) says that the chapter applies to a member who, during the remedy period, became entitled to an ill-health pension under article 15 of the FPS, article 12 of the NFPS or regulation 73 of the 2015 Regulations: it could be taken as meaning those articles and regulations without more, or it could be taken to mean those rules and regulations as amended by the Age Regulations.
9. The failure to deal with paragraph 2 of schedule 1 renders chapter 2 ambiguous in many important respects. For example, is an FPS IHR member to be taken to mean a member who was recognised as entitled to an FPS ill-health award, or a member who was in fact entitled to an ill-health award but was not recognised as such? In what follows we assume the latter because paragraph 2 of schedule 1 is not mentioned.
10. The consequences may not be material because what follows is intended to give ill-health retired (**‘IHR’**) members the better of both worlds, but grappling with paragraph 2 of schedule 1 would make the chapter much easier to understand.

(b) *Policy*

11. The draft regulations do not give effect to the policy intention or what the law requires, in a number of respects.
  - (a) They give FPS, NFPS and reformed scheme IHR members access to “alternative scheme” benefits, but only if they are an FPS, NFPS or reformed scheme IHR member as defined in regulation 49(1): that is they became entitled to an ill-health award under one of the three schemes. This means that the position of a member who *should have been* entitled, but whose case was dismissed, is not dealt with. A member might have suffered from a condition that was expected to resolve before age 60 for instance, but not before age 50-55. Such a member would meet the permanence requirement of the FPS but not the reformed scheme.

In similar vein, the drafting assumes a direct mapping from lower-tier in one scheme to lower-tier in another, and higher-tier to higher-tier in the same way. It is possible that, on re-examination, the conclusion is reached that a lower-tier pension in one scheme should be converted to an upper-tier pension in the alternative scheme. The drafting should not prohibit that outcome.

- (b) For the same reason, draft regulation 49(1) should not limit the application of chapter 2 to immediate choice cases. A member who left with a deferred pension on medical incapability grounds is a deferred member, and their cases should be reconsidered too, and reconsidered now.
- (c) We understand the policy intention behind draft regulation 50(2) (questions relating to IHR entitlement should not be reopened), but it should be made clear that the prohibition against reopening only applies where the issue is the need for reconsideration *because of* the enactment of the PSPJOA. There are many instances where an IHR decision is reassessed after a member has left the service and new evidence regarding the member's condition becomes available (so-called "after-appearing" injuries or illnesses). There will be cases where a question of entitlement is reopened both because further evidence about a member's health becomes available and, simultaneously the chapter 2 reconsideration process is triggered.
- (d) Any reference to a "relevant period" in draft regulation 51 should be removed. It implies that a pension should not have been granted when the "original decision" was made, but that is not how the FPS works. Under the FPS, if a member recovers to the extent that he or she would be capable of performing active duties, a lower-tier pension continues unless and until the Board offers him or her a firefighter role.

Moreover, if the IQMP expresses an opinion that the member concerned was incapable when the original decision was made, but became capable within the following five years: were it not for the discrimination the member would have received an IHR pension for the period between the original decision and the decision on review. That is the position that must be replicated.

- (e) Draft regulation 51 says that the role of the IQMP is to give an opinion and also to decide. Under the 1992 Order the IQMP's role is to give an opinion (which is binding on the Board), but it is the Board which decides.
- (f) The wording of regulation 51(3)(a) suggests that a re-examination should be the default. We suggest that the word "as" should be replaced with "if" or "only if".

12. We note that for the purpose of qualification for IHR benefits, the termination of employment under the FPS, NFPS and reformed scheme rules might be dismissal or resignation. It would be helpful to spell that out in the draft regulations to avoid cross-referencing and possible confusion, particularly in the case of members who resigned

because they were not, or thought they were not entitled to IHR benefits when in fact they were.

(c) *Generally*

13. You are well-aware that, in our view, IHR cases that occurred during the remedy period should be dealt with in accordance with paragraph 2 of schedule 1 to the Age Regulations. You should not take our response to consultation to indicate anything to the contrary.
14. The proposals in the consultation paper indicate that they might not be resolved until April 2025 which denies these members the remedy what they are entitled to now. **We expect the response to consultation to explain, explicitly, why these cases are not being dealt with now as required by the Age Regulations.**

**Question 4**

**Added pension: Do you think the policy proposals in relation to scheme members with added pension puts all eligible members in the same position?**

15. We understand the policy intention to be that, although a member's additional voluntary contributions will be refunded with interest, he or she does not lose out because the refund can be used to purchase added pension in the reformed scheme or to enter into a remediable arrangement to purchase added years. In our view that raises the following problems:
  - (a) The amount of the voluntary contributions required to purchase added pension is age-related. It is not right that a member should have to pay more to purchase the added pension in the reformed scheme after the remedy period than he or she paid to purchase the same added pension during the remedy period.
  - (b) The amount of added pension that a member is entitled to purchase in the reformed scheme is capped.
  - (c) It is not possible to pay for added pension after the member concerned has retired or left. Refunding the contributions and clawing back any additional pension that has been paid (draft regulation 26(6)) defeats the objective that the member sought to achieve when he or she paid the additional contributions – to secure additional defined benefit pension.
16. We cannot see any principled reason why the additional pension purchased should not be treated as a benefit retained in the reformed scheme rather than refunded and then repurchased. The actuarial factors applicable should be the factors applicable at the time when the member chose to start making the additional contributions.
17. So far as purchasing added years is concerned:
  - (a) The purchase price for added years varies considerably according to the member's age. In most cases it will be obvious when the member would have started or continued to pay for added years: they will have continued to make additional

payments for added pension, or made some other contributions into a defined contribution arrangement. The actuarial factors used to calculate the added years purchased should be the factors in force when the added years contract would have commenced or been continued.

- (b) There is no explanation as to why the facility to purchase added years (retrospectively) should only be exercisable if the member has not died. If the member would have purchased added years, or would have continued with an added years contract, the member's eligible decision-maker should be permitted to make that decision now.

- 18. Members will need to be told very carefully that, although their contributions have been refunded the refund can be used to purchase additional benefits. Paying a refund without more will be confusing and will be perceived as very unfair.

### **Question 5**

**Transfers: Do you think that the policy proposals that transfers that came into the 2015 reformed pension scheme will be held in the 2015 reformed pension scheme until the point of decision achieves the policy intention of preserving transfer rights?**

- 19. We agree with the proposal that transferred-in CETVs should be retained as providing benefits in the reformed scheme until the member concerned makes his or her choice.
- 20. We question whether the proposal to pay equivalent value to compensate members who would otherwise exceed a pensionable service cap, by adjusting their contributions, is compatible with s.91 of the Pensions Act 1995 or s.21 of the PSPJOA. If there is any such excess it should be converted to legacy scheme benefits (and the cap disappplied accordingly) or retained as a reformed scheme entitlement.

### **Question 6**

**Bereavement: Do the proposed amendments to scheme regulations achieve the policy intention of ensuring that the resulting 'member representative' can make an immediate choice or deferred choice in relation to the remedy period service of a deceased member?**

- 21. There is a potential ambiguity as to the precise definition of who will be a relevant "decision-maker" where a firefighter whose legacy scheme is the FPS has died leaving a cohabiting partner with whom they were neither married nor in a civil partnership. Specific provision should be made to make it clear that the surviving cohabiting partner of a deceased firefighter will be given the same rights to elect between the FPS and reformed scheme as their late partner would have had if they had lived long enough to benefit from the remedying legislation.
- 22. We are also concerned to ensure that all relevant inquiries are made to find out if there is a surviving cohabiting partner or child of the member and cohabiting partner. The scheme manager may not know if there is one, and the cohabiting partner may not know that he or she could make a choice to receive a pension. We believe that it should be incumbent on

the scheme manager to make all reasonable inquiries before any choice is made by any other person, and that the timetable for making a choice is sufficiently flexible to enable the choice to be made before the section 6 or section 10 election period closes.

### Question 7

**Contingent decisions: Do you think that the proposals with regards to contingent decisions give members opportunities to revisit pension benefit decisions taken during the remedy period?**

*(a) Opt-outs*

23. We think that draft regulation 5(5) is very unclear, and we think draft regulation 5(5)(a) is unnecessary. The date specified (12 March 2012) seems to be arbitrary, and surely draft regulation 5(5)(b) is all that is required? We accept that if the decision to opt out was not a consequence of the discrimination, the right to opt back in under the McCloud remedy arrangements need not arise, but if the decision *was* made as a result of the discrimination, it should be reversible whenever it was made.
24. If draft regulation 5(5)(a) is removed, the scheme manager still retains the right to determine that the discrimination was not the cause, and that is all that is required. This would be a quasi-judicial decision (with a right of appeal under the internal disputes resolution procedure), but it is not right that the possibility of making that judgement is wholly excluded by reference to an arbitrary date.
25. In draft regulation 5(6), we do not understand the reference to 28 February 2022. The date should be 31 March 2022.

*(b) Transfers and additional service*

26. These two contingent decisions are addressed above.

*(c) Other contingent decisions*

27. There are a number of other contingent decisions that a member may have made as a consequence of the discrimination.

- (a) The most important is a decision taken by a pensioner member as to the proportion of his or her pension he or she commuted for a lump sum. That may well have been different.

If the legacy scheme is the FPS, he or she may have commuted less than would have been the case if he or she had been treated as a legacy scheme member, bearing in mind the substantially greater commutation rates that would have applied.

In all cases, he or she may have commuted less than would have otherwise been the case, believing that the residual pension would otherwise be less than needed in retirement.

- (b) The decision that a member made about his or her retirement date may have been different.
- (c) A decision whether or not to buy back periods of unpaid leave may have been different.
- (d) The decisions that a member may have made (or a court may have ordered) in connection with divorce proceedings may have been different.

The consequences do not only affect the pension credit and pension debit that follows from the divorce settlement because the settlement provisions regarding offsetting the value of other assets might well have been different if it had been appreciated that the pension credit rights were more valuable.

- (e) A member may have had to rearrange their mortgage arrangements, believing that the commutation lump sum would now be insufficient to clear the mortgage at the point of retirement.

28. We do not know if these issues will be covered in further scheme regulations, but they must be dealt with. As discussed below, some of these questions are not remediable by the payment of compensation.

### **Question 8**

**DCU and IC: Are there any other areas which you think should be addressed in these regulations to ensure that all eligible members receive a choice of pension benefits at their point of retirement, for the period for which the discrimination existed (1 April 2015 - 31 March 2022), on 1 October 2023?**

- 29. We have concerns regarding members who retire shortly after the regulations come into force.
- 30. You are aware of our view that any member who gives notice of their intention to retire should be given an immediate choice now: that is the effect of the non-discrimination rule implied into the firefighters' pension schemes by paragraph 2 of schedule 1 to the Age Regulations, and no further legislation is required to.
- 31. But the problem is particularly acute for members who retire shortly after 1 October 2023. If a member gives notice of intention to retire with effect from any time on or after 1 October 2023 they should be treated as an immediate choice member.
- 32. As a separate matter, we are keen to ensure that any choice that is available to members is carefully explained. A choice must mean an informed choice. Although there is no consultation question that directly addresses the subject, in our view the greatest risk of lack of clarity relates to abatement. The effect of abatement needs to be clearly explained in the RSS that is sent to members, and the draft regulations should spell out how that is to be done.



## Question 9

**Are there any additional points not covered in this consultation paper that need to be considered as part of the proposed amendments to scheme regulations?**

*(a) Contributions*

33. The underpayment and overpayment of contributions is discussed in the consultation paper (although there is no direct question asked) but we note that the mechanism for arranging payment is not dealt with in the draft regulations and we would like to understand the Department's approach: is the view being taken that the PSPJOA and Directions are all that is required? Does the Department intend to publish further draft regulations? Does the Department intend to publish guidance?
34. One particular issue that needs to be covered is the contribution holiday to which FPS members are entitled if they complete 30 years' reckonable service below the age of 50. We fear that in the absence of regulations that cover the issue, or at least guidance on the subject, there is a strong possibility of the issue being missed.

*(b) Compensation and commutation*

35. We note the provisions that deal with compensation in draft regulation 57. More detailed guidance on the process that will be followed would be welcome including, specifically, the steps that the Board will take to inform members of their potential right to compensation.
36. Compensation will apply principally to the contingent decisions mentioned above, and taxation. But adjustments to commutation decisions are of a different character: they are not simply a question of compensation, they also require adjustments to the residual pension. The amounts in issue could be very substantial.

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