

## Fire Brigades Union submission



### **Response to Welsh Government Consultation on Remediating Age Discrimination in Firefighters' Pensions in Wales 2023**

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.

#### **Consultation question 1**

**How far do you agree with our proposal that, where an entitled member had multiple employment contracts during the remedy period with the same employer, all those contracts should be covered by the remedy, regardless of when they were entered into?**

1. In our view this is entirely right. Not only might an FRA have made different decisions about the contractual arrangements that it would like to make, as the consultation paper points out, members may have made different decisions regarding opting in or opting out in respect of a secondary contract.

#### **Consultation question 2**

**How far do you agree with our proposal that all affected members who opted out of 2015 Scheme membership during the remedy period should be entitled to opt back into their legacy schemes retrospectively, without having to show why they originally opted out?**

2. We welcome this proposal, and agree that it is almost inevitable. Only the firefighter who opted out will be able to say why he or she did so.

#### **Consultation question 3**

**How far do you agree with our proposal that scheme managers should be required to repay surpluses in contributions as a single lump sum only?**

3. We agree with this proposal – it is hard to see how an FRA could insist on anything else.

#### **Consultation question 4**

**How far do you agree with our proposals that scheme members with a contributions deficit should be allowed to choose whether to repay it as a lump sum or (if the deficit is at least £100) in instalments over a period of up to 10 years?**

4. We understand the point regarding the possibility of allowing a member to trade lower contributions for lower benefits, but we do not agree that the same problems arise if members are permitted to wait until their benefits crystallise before deducting any underpaid contributions.

5. We cannot see that any discrimination issue arises. It would surely be a proportionate way of achieving a legitimate aim (remedying the discrimination found in McCloud and Sargeant). We do not want any barriers put in the way of members electing for 1992 Scheme benefits which in almost all cases would be the better choice to make where the legacy scheme is the 1992 Scheme.
6. We note that this is not the position taken by the Home Office for the firefighters' pension schemes in England or the Department of Finance for the schemes in Northern Ireland, and it is difficult to see how adopting a different position in Wales would fit in with transfers from Welsh FRAs to FRAs elsewhere in the country.

#### **Consultation question 5**

**How far do you agree with our proposals that scheme members who are entitled to a refund of remedy period contributions should be entitled to waive it, to avoid having to repay it on retirement?**

7. This follows on from the proposal for "indicative choice" which, in our view, is entirely sensible.

#### **Consultation question 6**

**How far do you agree with our proposals that immediate choice elections must be made in writing, and will be irrevocable?**

8. We agree with this proposal with one caveat: such an election should be revocable until it is acted upon, and benefits come into payment. It will rarely be the case that a member (or representative decision-maker) makes a choice that he or she immediately regrets, but the possibility is easily foreseeable.

#### **Consultation question 7**

**How far do you agree with our proposals that deferred choice elections:**

- **must be made in writing;**
  - **must be made no later than the later of the date one year before benefits become payable, and the date the member gives notice of a claim for pension benefits; and**
  - **can be revoked and remade by the member before benefits come into payment?**
9. We agree with these proposals (and agree with what is said in the consultation paper: it is almost inevitably the case that the time when the member gives notice of intention to retire will be the later date). By the time a firefighter decides to retire, he or she will almost inevitably have decided which package of benefits to take having received RSSs or annual benefit statements in previous years.

#### **Consultation question 8**

**How far do you agree with our proposals that deferred choice members who wish to retire shortly after 1 October 2023, and for whom the deadline for making a deferred choice has already passed on that date, should be able to retire on the basis that their remedy period service was in their legacy scheme; and that they should be able to make an immediate choice themselves following retirement?**

10. We share the view that members who are to retire shortly after 1 October 2023 should be treated as immediate choice cases.
11. The Welsh Government is aware of our view that that a failure to do so amounts to a breach of s.61 of the Equality Act 2010, and most FRAs are already dealing with imminent retirements as “pipeline” cases under the agreement we made with the Local Government Association. There is no reason why they should not be approached in the same way by all FRAs.

### **Consultation question 9**

**How far do you agree with our proposals that members who have multiple contracts with the same employer should make separate immediate or deferred choices in respect of each contract?**

12. We welcome these proposals. Which we think necessarily follows from the answer to question 1.

### **Consultation question 10**

**How far do you agree with our proposal that members or their survivors who do not make an immediate or deferred choice by the stipulated deadline should be deemed automatically to have chosen remedy period service in their legacy scheme?**

13. Whilst we agree with the broad proposition that members who do not make a deferred choice should be treated as members of their legacy scheme for service in the remedy period, we think it would be helpful to include a back-stop position which would allow the scheme manager to deem an election to have been made where it is obvious that the value of reformed scheme benefits is greater. There are many reasons why a member or his or her representative might not make a choice, the clearest case being where an FRA has lost contact with a deferred member and does not have an up-to-date address.
14. We do not envisage that this back-stop would need to be used except in unusual circumstances, but we believe that it should be there.

### **Consultation question 11**

**How far do you agree with our proposal that entitled members who were granted IHR during the remedy period should be reassessed against the criteria of their legacy scheme or 2015 Scheme as the case may be, and offered an immediate choice between the entitlements that result; but that they cannot have an automatic right to be re-employed?**

*(a) Drafting: section 61 of the Equality Act 2010*

15. We appreciate that the intent of the draft regulations contained in Part 7 is to give effect to s.61 of the Equality Act 2010, but the drafting is unclear as to whether the effect of s.61 is recognised (that is, it inserts a deemed and overriding non-discrimination rule).
16. The drafting could be read either way. So, for instance where draft regulation 53(1) says that the Part applies to a member who, during the remedy period, became entitled to an ill-health pension under the 1992 Order, the 2007 Order or regulation 74 of the 2015 Regulations: it could be taken as meaning those rules and regulations without more, or it could be taken to mean those rules and regulations as amended by s.61.

17. The failure to deal with s.61 renders chapter 2 ambiguous in many important respects. For example, is a 1992 IHR member to be taken to mean a member who was recognised as entitled to a 1992 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 s.61 is not mentioned.
18. The consequences may not be material because what follows is intended to give IHR members the better of both worlds, but grappling with s.61 would make the chapter much easier to understand.

(b) *Policy*

19. The draft regulations do not give effect to the policy intention or what the law requires, in a number of respects.
  - (a) They give 1992, 2007 and 2015 IHR members access to “alternative scheme” benefits, but only if they are a 1992, 2007 and 2015 IHR member as defined in regulation 53(1): that is they became entitled to an ill-health award under one of the three schemes (noting again the effect of s.61 on the word “entitled”). Subject to the effect of s.61, this means that the position of a member who *should have been* entitled, but whose case was dismissed, is not dealt with.
  - (b) 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.
  - (c) For the same reason, draft regulation 53(1) should not limit the application of Part 7 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.
  - (d) We understand the policy intention behind draft regulation 54(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 Public Service Pensions and Judicial Offices Act 2022 (**‘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 Part 7 reconsideration process is triggered.
  - (e) Any reference to a “relevant period” in draft regulation 55 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 1992 Scheme works. Under the 1992 Order, 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 FRA 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.

- (f) Draft regulation 55 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 FRA), but it is the FRA which decides.
- (g) We have concerns about the wording of regulation 55(3)(a), which suggests that a re-examination should be the default. We suggest that the word "as" should be replaced with "if" or "only if".

(c) *Generally*

- 20. The Welsh Government is aware that, in our view, IHR cases that occurred during the remedy period should be dealt with in accordance with s.61 of the Equality Act 2010. You should not take our response to consultation to indicate anything to the contrary.
- 21. The FBU and the Local Government Association want to resolve any such cases now. Section 61 requires that. The proposals in the consultation paper indicates 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 s.61.**

**Consultation question 12**

**How far do you agree with our proposal that scheme managers should not be required to re-examine cases where entitled members were not granted IHR and continued in employment?**

- 22. We broadly agree that, as a matter of practical necessity this is likely to be the case. We believe however that an exception should be made for members who, although they remained in employment, they were on reduced or nil pay.

**Consultation question 13**

**How far do you agree with our proposal that scheme managers should be required to:**

- **re-examine cases where affected members whose legacy scheme is the 1992 Scheme were not granted IHR but were dismissed on related grounds of poor fitness and/or attendance? and;**
- **offer an immediate choice between a 1992 Scheme ill health pension and a deferred 2015 Scheme pension to any member who is found to have qualified for IHR under the former Scheme?**

- 23. We repeat the point made above that these cases should be re-examined, and for that reason Part 7 should not be limited to immediate choice cases.

**Consultation question 14**

**How far do you agree with our proposal that, where an entitled scheme member dies without making an immediate or deferred choice:**

- **that choice should instead be made by an “eligible decision-maker” as defined in paragraph 111 above; and**
- **that the 2015 Scheme criteria should be used in all cases to identify the eligible decision-maker.**

24. We agree with these proposals, and we welcome, in particular, the clarity with which the position of a co-habiting partner is dealt with in schedule 1.

#### **Consultation question 15**

**How far do you agree with our proposals that:**

- **If there is no agreement on the identity of the eligible decision-maker, or if the eligible decision-maker fails to make a decision by the deadline, the scheme manager must deem that an election for remedy period service in the 2015 Scheme has been made; and**
- **If a scheme member makes a valid immediate or deferred choice before s/he dies, that choice will be honoured and that no survivor would be entitled to revisit it.**

25. We agree with these proposals noting, in particular, how the position of a co-habiting partner is protected.

#### **Consultation question 16**

**How far do you agree with our proposals that:**

- **Historic overpayments of survivor benefits to survivors who are eligible decision-makers should be recovered from them, but overpayments to other survivors should be written off; and**
- **Only the eligible decision-maker would be eligible to receive a contributions surplus, or liable to repay a contributions deficit, arising from her or his choice.**

26. We agree with these proposals.

**Consultation question 17 How far do you agree with our proposals that:**

- **Death lump sums for members who died during the remedy period should be recalculated in line with the eligible decision-maker’s choice, and any reduction in a lump sum paid to the eligible decisionmaker should be recovered from her or him; but**
- **Surpluses in death lump sums that were paid to persons other than the eligible decision-maker, or to the deceased’s estate, should be written off.**
- **Where an affected member died during the remedy period leaving no-one entitled to a survivor’s pension, but with a valid nominee for a 2015 Scheme death lump sum, the scheme manager should simply pay that sum without needing to offer the nominee a choice.**

27. We think the reference to draft regulation 66 in paragraph 131 of the consultation paper is an error. We are cautious of the inheritance tax consequences if the payment of a lump sum is automatic (the third bullet point above) but subject to that we agree with these proposals.

### Consultation question 18

How far do you agree with our proposals that:

- **Entitled members who purchased 2015 Scheme additional pension during the remedy period will be able to receive a refund of the cost of that, plus interest; but**
- **Members who are to make an immediate choice will not receive that refund if they make an immediate choice in favour of the 2015 Scheme.**

### Consultation question 19

How far do you agree with our proposals that:

- **Affected members would have a right retrospectively to purchase added pension benefits in their legacy schemes during the remedy period, on the same terms as applied to such purchase and with the cost of doing so adjusted for interest; and**
  - **Any such choice must be made within one year of a member receiving her or his initial remediable service statement.**
28. We understand the policy intention behind these questions 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 31(6)) defeats the objective that the member sought to achieve when he or she paid the additional contributions – to secure additional defined benefit pension.
29. 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.
30. 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.

31. 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.

#### **Consultation question 20**

**How far do you agree with our proposals for pension attachment orders, namely that:**

- **Where a pension attachment order is already in force but the pension is not yet in payment, no action is to be taken;**
- **Where a pension attachment order is already in force and the pension is already in payment, the pension payable to the pension credit member may change as a result of the pension debit member's immediate choice, but that any historic overpayment of such pension arising from the choice is written off;**
- **For divorces and dissolutions taking place in the future but before the pension debit member has made a deferred choice, CETVs for remedy period service in the 2015 and legacy schemes should be calculated, and the court should use the higher of the two.**

#### **Consultation question 21**

**How far do you agree with our proposals for pension sharing orders already in place on 1 October 2023, namely that:**

- **Remediable service statements for entitled pension debit members include pension debits based on remedy period service in the legacy and 2015 Schemes (and immediate and deferred choices are made accordingly);**
- **Scheme managers should recalculate CETVs at the point of divorce or dissolution based on the scheme of which the debit member was not a member at the time; and**
- **If that CETV is higher than the one used by the court, then the pension credit member should receive a pension credit for the difference between them.**

#### **Consultation question 22**

**Do you favour such a pension credit being applied automatically to the pension credit member's benefits in whichever scheme had the higher CETV; or should such members be offered a choice about that?**

#### **Consultation question 23**

**How far do you agree with our proposals for pension sharing orders that are made on or after 1 October 2023, namely that:**



- **For active and deferred members, the CETV provided to the court should be based on remedy period service in the legacy scheme.**
- **Where such members then make a deferred choice for remedy period service in the 2015 Scheme, their pension debit is adjusted accordingly (but the pension credit member's benefits do not change); and**
- **For retired members who enter into a divorce or dissolution after making an immediate or deferred choice, the CETV provided to the court reflects that choice.**

#### **Consultation question 24**

**How far do you agree with our proposals for pension offsetting arrangements, namely that:**

- **Where offsetting arrangements are already in place when our regulations come into force, no action is taken; and**
  - **For divorces and dissolutions taking place in the future but before the pension debit member has made a deferred choice, CETVs for remedy period service in the 2015 and legacy schemes should be calculated, and the court should use the higher of the two.**
32. The only comment we wish to make regarding all of these divorce and dissolution questions is that it must be recognised that settling the couple's financial arrangements is a complicated process and does not concern pensions in isolation. The division of a member's pension, by a pension attachment or pension sharing order, will in most cases involve consideration of the couple's other assets, and any order that is made may be irreversible.
33. We note that the consultation paper does not deal with compensation arrangements under s.23 of the PSPJOA, but it should be noted that these are cases where compensation may be properly payable.

#### **Consultation question 25**

**How far do you agree with our proposals for club transfers during the remedy period, namely that:**

- **The scheme manager for the sending scheme should calculate the alternative set of benefits for unprotected members based on legacy scheme service during the remedy period, and communicate that to the scheme manager for the receiving scheme, who should convert that into service in the relevant legacy scheme;**
  - **The scheme manager for the sending scheme should calculate the alternative CARE scheme benefits for protected members and communicate that to the receiving scheme manager so that an alternative benefit amount can be created in the receiving scheme; but**
  - **Other than for transfers to or from the LGPS, there is no need to amend the actual payment from the sending scheme to the receiving scheme.**
34. We have no strong views on these proposals.

### **Consultation question 26**

**How far do you agree with our proposals for non-club / CETV transfers during the remedy period and up to 30 September 2023 namely that:**

- **The scheme manager for the sending scheme should recalculate the CETV based on service during the remedy period in the scheme other than the one from which the member transferred. Any contributions deficit, net of tax, should be deducted from it, and any contributions surplus, net of tax, should be added to it.**
  - **If the result is higher than the CETV that was used at the time of transfer, the scheme manager should make a supplementary transfer payment for the difference, plus interest, to the scheme manager of the receiving scheme.**
  - **If the receiving scheme cannot accept such a payment, it should instead be made to the member directly, as compensation.**
35. We welcome the proposal that payment of compensation will be made if a receiving scheme cannot or will not accept a transfer. Apart from that, we have no particular issue to raise with these proposals.

### **Consultation question 27**

**How far do you agree with our proposals for transfers in the future, namely that:**

- **The scheme manager for the sending scheme should calculate two transfer values or CETVs, based on the member's remedy period service being in the 2015 Scheme and her or his legacy scheme.**
  - **For CETVs to schemes outside the public sector, if the member has not yet made good any contributions deficit or received any contributions surplus, that should be subtracted from or added to the relevant value.**
  - **The higher of the two values should then be used for the purposes of the transfer**
36. We have no strong views on these questions.

### **Consultation question 28**

**How far do you agree with our proposals to allow affected members to revisit and reverse transfer decisions made during the remedy period, provided that both the sending and receiving scheme can permit a transfer to be retrospectively made or reversed?**

37. We note that the consultation paper does not deal with the question of transfers into the 2015 Scheme which would have been paid to the member's legacy scheme if they had not been put into the 2015 Scheme.
38. We agree with the principle set out in question 28, but we would like to know how the Welsh Government proposes to deal with transfers-in in such circumstances.

### **Consultation question 29**

**We are interested in understanding whether the proposals in this consultation document will have an impact on people with protected characteristics. Protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual**

**orientation. Do you think that the proposals in this consultation will have any positive or negative impacts on people with protected characteristics? If so, which and why/why not?**

39. Our views regarding immediate detriment cases are well-known to the Welsh Government. Sections 61 and 62 of the Equality Act 2010 require these cases to be resolved now, and further legislation is not required.
40. For that reason the proposed amendments plainly fail to advance equality or foster good relations.

### **Consultation question 30**

**We would like to know your views on the effects that the above proposals would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?**

### **Consultation question 31**

**Please also explain how you believe the proposed policy could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language**

41. We have no strong views on these questions.

### **Consultation question 32**

**Do you have any other comments on our proposals which are not covered by the other questions in this consultation?**

#### **(a) Retained firefighters**

42. the draft regulations do not 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 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 Welsh Government 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 2007 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 2007 Scheme which falls (retrospectively) in the remedy period will be treated.

(b) *Contingent decisions*

43. There are a number of contingent decisions apart from opting out or transferring 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 1992 Scheme, 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.

44. We do not know if these issues will be covered in further scheme regulations, but they must be dealt with.

(c) *Compensation*

45. As noted above, no questions have been raised regarding compensation under s.23 of the PSPJOA. It would be helpful to have an indication of what losses and expenses the Welsh Government believes are potentially compensatable. We accept that this is possibly a more appropriately dealt with in guidance.

46. It would also be helpful to know if guidance will be produced as to the process that will be followed if a claim for compensation is made, in order to ensure consistency of treatment between FRAs.

(d) *Commutation*

47. It should be recognised that adjustments to commutation decisions are not simply a question of compensation. because they also require adjustments to the residual pension. The amounts in issue could be very substantial.

(e) *“Information overload”*

48. The issue of RSSs is mentioned n the consultation paper but only tangentially. Affected firefighters will be given a great deal of information which is hard to digest, and we recognise that most of the information requirements are dealt with in Treasury Directions rather than scheme regulations.

49. 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.

Submitted 23 June 2023