



Department
of Health

The National Health Service Pension Scheme (Amendment) Regulations 2017

Consultation response

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Introduction

- 1.1. The Department published for consultation a draft Statutory Instrument titled: The National Health Service Pension Scheme and Additional Voluntary Contributions (Amendment) Regulations 2017. This instrument proposes amendments to the regulations that provide the rules for the NHS Pension Schemes in England & Wales.
- 1.2. There are two NHS Pension Schemes: the new reformed 2015 scheme and the older, closed scheme which is divided into the 1995 and 2008 sections. Accordingly there are three sets of regulations under which entitlement to pension and other benefits are calculated:
 - The National Health Service Pension Scheme Regulations 1995 (SI 1995/300)
 - The National Health Service Pension Scheme Regulations 2008 (SI 2008/653)
 - The National Health Service Pension Scheme Regulations 2015 (SI 2015/94)
- 1.3. The National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (SI 2015/95) put in place transitional arrangements for members of the new 2015 scheme who have pension rights accrued in either the 1995 or 2008 section of the old NHS pension scheme. The transitional regulations make provision for the treatment and payment of old scheme benefits during or following a period of membership of the new scheme. They also include protections permitting members close to normal pension age to remain in the old scheme.
- 1.4. The draft instrument proposed amendments to the scheme regulations for the following main purposes:
 - to support the development and adoption of new care models as articulated in the Five Year Forward View by ensuring income from new types of contracts relating to new ways of delivering primary and secondary care are pensionable;
 - to enable independent providers of clinical health care services for the NHS who only hold an NHS standard sub-contract or a Multispecialty Community Provider standard sub-contract to apply to become an NHS Pension Scheme employing authorities;
 - to prevent increases to the National Minimum Wage from triggering the scheme's final pensionable pay controls.
 - to make technical corrections and refinements to improve the operation of scheme regulations.

2. Consultation process

- 2.1. The proposals and draft regulations were subject to an eight-week public consultation which began on 1 December 2016, ending on 26 January 2017.
- 2.2. A document describing the proposals and draft regulations were published on the gov.uk website. Responses to the consultation were invited by email or post.
- 2.3. As part of existing governance arrangements underpinning the NHS Pension Scheme, the major NHS Trade Unions, NHS employers and other interested parties were formally notified of the consultation. The draft regulations and consultation documents were published on gov.uk and the scheme administrator's website.
- 2.4. Nine responses to the consultation were received, with representations from the following organisations:
 - Bevan Brittan
 - Medway Community Healthcare
 - Provide
 - Prudential
 - Social Enterprise UK
 - Symphony Integrated Healthcare
- 2.5. Both the Scheme Advisory Board¹ and the Workforce Issues Group² replied to the consultation. Feedback was also received from the scheme administrator, the NHS Business Services Authority.

¹ The Scheme Advisory Board is a statutory board that advises the Secretary of State on the merits of making changes to the scheme. It comprises representatives from NHS trade unions and employers.

² The Workforce Issues Group is a sub-group of the NHS Staff Council. The group comprises NHS trade unions and employer representatives.

3. New Care Models

- 3.1. The consultation explained that the NHS England are developing new models of delivering care services, as outlined in the Five Year Forward View published in October 2014³.
- 3.2. The contracting arrangements underpinning these new models of care has led to the identification of specific issues surrounding access to the NHS pension scheme. To ensure work that is currently pensionable in the NHS pension scheme continues to be so under new care models, the consultation proposed amendments that recognised the new forms of contracts that NHS England expected to be in use from April 2017. The amendments concerned the introduction of the Multispecialty Community Provider (MCP) model.

Multispecialty Community Providers

- 3.3. NHS England published in July 2016 a document titled 'The Multispecialty Community Provider (MCP) emerging care model and contract framework'⁴. This set out the vision of MCPs being about integration; redesigning care around the health of the population and breaking down the historical partitions between primary, community, mental health and social care and acute services.
- 3.4. Key to delivering MCPs is the introduction of a new form of contract which will be used to commission a mix of health and care services. The Department intends that the MCP contract becomes a contract that is pensionable. The consultation proposed inserting the MCP contract into relevant sections of scheme regulations relating to groups of staff whose eligibility for the scheme arises from the work they do and the services they deliver in relation to certain contracts. These include GP practice staff, practitioners (GPs) and Independent Providers (IPs).
- 3.5. In particular, consultation proposed that the MCP contract be included as a 'qualifying contract' for Independent Providers. This would enable organisations holding an MCP contract to apply for Employing Authority status under IP access rules, which allows those organisations to offer the NHS pension scheme to its eligible employees.
- 3.6. Respondents to the consultation welcomed these developments. Both Bevan Brittan and Symphony Integrated Care argue that the amendments to accommodate MCPs should be extended to include the Primary and Acute Care System (PACS) new care model.

³ <https://www.england.nhs.uk/wp-content/uploads/2014/10/5yfv-web.pdf>

⁴ www.england.nhs.uk/wp-content/uploads/2016/07/item4-28-07-16.pdf

New Care Models

The Department agrees with this observation. The scope of these amendments concentrated on MCPs in the first instance, because at the time of consulting it was envisaged that MCP arrangements would start being adopted from April 2017. Development of contracting arrangements for PACS continues, led by NHS England, with further publications on the contracting framework expected later this year.

- 3.7. NHS England advise that vanguard Clinical Commissioning Groups are working throughout 2017-18 to procure the first MCP contracts, with PACS procurements also underway. As such, the contracting frameworks for both models are continuing to evolve, meaning the MCP contract is not yet in a sufficiently final state for the purposes of referencing it in scheme regulations. Accordingly, the Department is in favour of bringing forward a suite of changes that accommodate both MCP and PACS arrangements from October 2017 instead, in line with the earliest expected procurement of these models, and as such withdraw the immediate amendments planned for April. The Department will seek to apply to PACS the same approach as that consulted on for MCPs, including the use of approved standard sub-contracts.

Sub-contracts

- 3.8. An amendment to scheme regulations last April permitted income from a specified sub-contract to be pensioned by those EAs that qualify via the contracts that they hold (such as IPs and GP practices). That sub-contract was the NHS standard sub-contract. For income to be pensionable, it was also a requirement that the holder of the main NHS standard contract (from which the sub-contract flowed) was an EA.
- 3.9. The consultation proposed a limited extension of IP access to sub-contractors. This is on the basis of continuing the checks and balances that had been introduced from April 2016 when sub-contracts were first included in the regulations. The consultation presented amendments that recognised 'NHS standard sub-contracts' and 'MCP standard sub-contracts' as qualifying contracts for the purpose of the Independent Provider (IP) access to the scheme.
- 3.10. This development was welcomed by Medway Community Healthcare, Provide and Social Enterprise UK. Whilst the MCP standard sub-contract provisions will be withdrawn, further to the work to accommodate PACS described above, the Department will proceed with the amendments relating to NHS standard sub-contracts.
- 3.11. This will permit organisations that are not already Employing Authorities who only hold one (or more) permitted sub-contracts to apply to become an IP. All of the existing regulations concerning IPs will apply equally to new IPs that are solely sub-contractors (including, for example, the wholly or mainly requirement and that only a maximum of 75% of the contract value should be pensionable).
- 3.12. As the consultation explained, requiring the use of the standard sub-contract ensures that only NHS work is pensioned, and scheme liabilities are appropriately controlled.

Ensuring that the holder of the main contract is also an Employing Authority allows checks and oversight of sub-contracting to be undertaken by the scheme administrator via the annual returns that practitioners and IPs must complete and return by law to NHS BSA after the end of each pension scheme year.

- 3.13. Bevan Brittan suggested that the regulations could make clear whether to be classed as a qualifying contract, the sub-contract must take the form of the published sub-contract template or if a commissioner-approved sub-contract under the relevant Head Contract is sufficient. The Department confirms that the published sub-contract template must be used. It is this template that is specifically identified in the regulations. This is no different to the position regarding use of the NHS standard contract as a qualifying contract. The use of a standardised sub-contract allows the scheme administrator to reliably validate eligible sub-contracted pensionable earnings when necessary and ensures consistency and legal certainty.
- 3.14. Whilst the consultation focused on permitting NHS pension scheme access in relation to MCP standard contracts and MCP standard sub-contracts, respondents argued that PDS contracts or sub-contracting arrangements involving GMS and PMS contracts should also be permitted as 'qualifying contracts' for Independent Providers. The NHS Staff Council's Workforce Issues Group requested that non-clinical contracts be added to the list of qualifying contracts. This is outside the scope of this consultation, however the Department will consider the case for extension as part of the work described above to develop appropriate access to the NHS pension scheme for the PACS new care model.

4. National Minimum Wage

- 4.1. Regulation D3 was inserted into the NHS Pension Scheme 1995 section regulations from 1 April 2014. This provided a means for the scheme to charge employers who awarded excessive pay increases to members of the 1995 Section within the final pay period used for the calculation of benefits. In so doing the regulation ensures that the scheme is protected from the increased cost of paying pensions inflated by excessive late career pay rises.
- 4.2. However recent legislative changes relating to the National Minimum Wage have the potential to trigger regulation D3. This is clearly not within the spirit or intent of the regulation. The draft regulations consulted on provisions, retrospective to 1 April 2016, to exclude pay increases that relate solely to changes in the National Minimum Wage.
- 4.3. In their response, the Scheme Advisory Board supported this change. The exclusion also applies to increases in the National Living Wage. This is because the National Living Wage is defined in the relevant regulations as being an amount of National Minimum Wage. The Scheme Advisory Board recommended that scheme communications should explain clearly that increases to either are excluded. The Department agrees and will ask the scheme administrator to update their literature accordingly. No other comments were received.
- 4.4. In their response, the Scheme Advisory Board supported this change. However, both the Scheme Advisory Board and the NHS Business Services Authority asked for clarification on whether increases to the National Living Wage are also excluded. The Department confirms that the exclusion applies to such increases. This is because the National Living Wage is defined in the relevant regulations as being an amount of National Minimum Wage. The Scheme Advisory Board also recommended that scheme communications should explain clearly that increases to either are excluded. The Department agrees and will ask the scheme administrator to update their literature accordingly. No other comments were received.

5. Technical & consequential amendments

- 5.1. The consultation proposed a number of miscellaneous amendments. These made consequential adjustments to accommodate changes in primary legislation, or other technical corrections and refinements. Very few comments were received in relation to these.
- 5.2. This chapter will cover only those amendments that were the subject of comment or further change resulting from the consultation. Draft amendments that are not mentioned, attracted no comment.

The National Health Service Pension Scheme Regulations 2008

Amending regulations 10(2)(c) and 18(2)(c) amend regulation 2.A.1 and 3.A.1 (interpretation: general) respectively, and amending regulations 11 and 21 amend regulations 2.B.2 and 3.B.2 (restrictions on eligibility: general)

- 5.3. Protected members of public service final salary schemes (including other Health Service Schemes) are, in certain circumstances, permitted to join other public service final salary schemes when voluntarily moving around the public service. These amendments ensure that those arrangements also apply to protected members of public service final salary schemes in Northern Ireland by the inclusion of relevant references to the Public Service Pensions Act (Northern Ireland) 2014.
- 5.4. The Scheme Advisory Board pointed out a typographical error in the reference to 'The Public Service Pensions Act (Northern Ireland) 2014'. This has been corrected in the final version of the Statutory Instrument.

The National Health Service Pension Scheme Regulations 2015

Amending regulation 25 amends regulation 43 (eligibility to make buy-out election) of the 2015 Scheme Regulations

- 5.5. These amendments ensure that members have the opportunity to take out an election to buy out an actuarial reduction once in respect of each period of pensionable service that result in a new active member's account being established. A new active member's account is established when a member first joins the 2015 Scheme or re-joins the 2015 Scheme after taking a refund or a transfer or after having a break in pensionable service of more than five years.
- 5.6. The NHS Business Services Authority asked if members should be permitted to take out an election at the start of each period of pensionable service. Eligible members are able

Technical & consequential amendments

to take out a contract at the start of their first period of pensionable service, at the beginning of each subsequent scheme year, on returning to service after a break of over five years or after having taken a refund or transfer. The Department is content that this provides ample opportunity for an election to be taken out by members who have numerous breaks in service and those who have longer periods of continuous service. No further comments were received.

Amending regulation 41(2) amends paragraph 3 (meaning of “leaver index adjustment”) of Schedule 9 with retrospective effect to 1 April 2015

- 5.7. The “leaver index adjustment” (LIA) generally applies when pensions first come into payment. It is the prorate increase or decrease to the pension resulting from the application of the Consumer Price Index (CPI) plus 1.5% for the period from 1 April in the member’s last year of service up to their retirement date.
- 5.8. CPI for this purpose is the increase or decrease set out in orders made by the Treasury under section 9(2) of the Public Service Pensions Act 2013. The index is not confirmed until the following year. This means that the prorate LIA is generally applied after a pension comes into payment. In circumstances where the application of a negative CPI plus 1.5% would otherwise cause the amount of pension in payment to reduce, this amendment ensures that the reduction will not apply so that the pension in payment will remain unchanged.
- 5.9. The NHS Business Services Authority pointed out that the LIA also applies to deferred benefits due to come into payment at a future date and asked if the amendment should be tailored further to exclude such benefits. However, deferred benefits may also come into payment before the LIA is known, potentially on health, age or early retirement grounds. Therefore, in order that the LIA for all deferred members is calculated in the same way regardless of when the benefits come into payment, the Department is content that no further tailoring should apply.

The National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000

- 5.10. The National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 provide facilities for NHS Pension Scheme members in pensionable employment to supplement the value of their pension by making money purchase additional voluntary contributions (MPAVCs) to external pension providers.
- 5.11. Amending regulation 52 amends regulation 15 (payments by the Secretary of State) to extend the same death benefit nomination options to MPAVC members that are currently available to members in respect of main scheme benefits and pension credit benefits.

- 5.12. The Prudential asked whether the amendment is providing for a discretionary death benefit lump sum (DBLS) with potential consequences for the assessment of Inheritance Tax. This is not the case. In common with main scheme provisions, the payment of a DBLS is mandatory. It must be paid to a spouse, a nominated partner, civil partner, personal representative or another nominated beneficiary (see regulation 15(3)). The facility to pay a nominated beneficiary (new regulation 15(3B)) does say that a DBLS 'may' be paid to a nominated beneficiary unless the nominee has died or it is not practicable. However, if that proves to be the case the DBLS must be paid to another eligible beneficiary.

6. Conclusion and next steps

- 6.1. The Department is grateful for the responses received. In summary, the proposed amendments to the NHS Pension Scheme were supported by respondents or received no comment.
- 6.2. The measures enabling scheme access for Independent Providers holding an MCP contract, MCP sub-contract or an NHS standard sub-contract were well received. Some respondents called on the Department to go further and extend the list of qualifying contracts further to include PACS contracts, non-clinical contracts, PDS dental contracts and sub-contracting arrangements involving PACS or GMS and PMS primary medical care contracts.
- 6.3. NHS England advise that contracting arrangements for MCPs and PACSs continue to be developed and are likely to be ready for use later this year. Accordingly scheme amendments to accommodate MCP contracts are withdrawn in favour of bringing forward a suite of changes that accommodate both MCP and PACS new care model arrangements from October 2017. The requests to include other contracting arrangements as qualifying contracts for Independent Provider access to the NHS Pension Scheme are outside the scope of this consultation. However the Department will consider the case for extending the scope of qualifying contracts as part of the work described above to develop appropriate access to the NHS pension scheme for both MCP and PACS new care models.
- 6.4. The draft scheme regulations will be updated as described in this document and laid before Parliament with a view to becoming effective from 1 April 2017.