



Information

Immediate Detriment

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Purpose

1. The purpose of this information note is to provide Fire and Rescue Authorities (FRAs) with additional information relating to immediate detriment.
2. Immediate detriment is the term used to refer to firefighters who will retire from the scheme before the secondary regulations are amended to bring in the age discrimination remedies outlined in Chapter 2 of the [HMT consultation response](#) dated 4 February 2021.
3. There are two main categories of immediate detriment members:
 - 3.1. Those who have already retired
 - 3.2. Those who will retire before the legislation is amended to bring in the DCU remedy.

4. This note does not attempt to deal with stopping tapering or death benefits.

This note has been updated following:

- the publication of the consultation response by HMT
- the decision by the Employment Appeals Tribunal (EAT) following the FRAs schedule 22 appeal
- [Updated Immediate Detriment guidance](#) from Home Office published on 10 June 2021

5. This note may be subject to any further changes made to guidance issued by HMT or Home Office on the matters of remedy.
6. **The LGA (on behalf of FRAs) is in ongoing discussions with the FBU about the adoption of a consistent approach. If your FRA is receiving and considering processing claims, please liaise with your FRA's nominated contact.**

Background

7. Following the 2018 Court of Appeal judgment in Sargeant, an [interim order was made by the Employment Tribunal](#) on **18 December 2019** which provided that members who had brought claims (claimants) are entitled to be treated as if they remained in the FPS 1992, as long as they were in the scheme at 31 March 2012 and 31 March 2015

“Pending the final determination of the issues of remedy, all existing Claimants who, by reason of their age would not satisfy paragraphs 12(2)(c), 12(3)(c), 13(e) or 14(e) of Schedule 2 to the 2014 English Regulations or the 2015 Welsh Regulations from 31st March 2015 are entitled to be treated as satisfying those paragraphs from that date.”

8. The Government position was communicated in [FPS Bulletin 28 - January 2020](#):

“...all entitlements including immediate ones should proceed under the 2015 scheme rules for the time being. This includes those who are due to taper into the 2015 scheme should continue to taper, and those due to retire normally at a later date should continue in the 2015 scheme.”

9. The bulletin asked FRAs to provide numbers of members who were likely to have an immediate event in 2020 and recommended some immediate steps that authorities could take in relation to ill-health assessments.
10. The Scheme Advisory Board (SAB) used the information provided to request guidance on dealing with immediate events as per their [paper submitted to the Home Office in March 2020](#).
11. On 21 August 2020, at the request of the Fire Brigades Union (FBU), the Home Office issued a note directly to English FRAs via finance leads titled '[McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases](#)' for both the Firefighters' and Police Pension Schemes. That guidance was updated on 10 June 2021.
12. The SAB requested via [FPS Bulletin 37 – September 2020](#) for FRAs to return data providing details on the number of members expected to fall into any of the immediate detriment categories before 31 March 2022.
13. 33 of the 45 English FRAs responded to this request and the Board were provided with a [paper of these results](#) at their meeting in December 2020.
14. On 4 February 2021, HMT published its [response to the consultation](#) along with [written statement HCWS757](#). All information on the implementation of the remedy is held on the [Age discrimination remedy - implementation](#) tab of [www.fpsregs.org](#).
15. Alongside the HMT consultation response, the Home Office published an [FAQ for members](#). Within that, FAQ Q10 directly commented on immediate detriment issues, in particular highlighting that the legislation that allows schemes to return members to their former schemes is limited in effect.

Home Office immediate detriment guidance

16. The Home Office note issued on 21 August was labelled as informal guidance only; it noted that the issues raised were subject of both ongoing litigation and the UK Government's consultation, and did not confirm what basis FRAs may rely on the note for the purpose of making pension payments.
17. Home Office have now published [updated guidance](#), which confirms that the power to calculate and pay pension entitlements under the legacy schemes is through the application of section 61 of the Equality Act 2010. That provision means that these individuals have the right to be treated as though they have been in service in their legacy scheme since 1 April 2015.
18. The status of the revised guidance is still labelled as informal, and caveated that
*“it **should not** be seen as providing a definitive resolution to all of the consequences arising from the discrimination, rather as a way to progress certain immediate detriment cases (as defined in this guidance) now there is some clarity as to how certain issues should be approached. It is important to **note that ALL cases processed using this guidance will need to be revisited** once the full detail of the Government's approach is finalised, and legislation is in place. Legislation is expected to be in place by October 2023.”*
19. The Home Office guidance aims to deal only with cases where the benefits are not yet in payment (prospective cases).
20. The scope of the note includes members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, and who did not benefit from full protection and were moved into the FPS 2015 on or after 1 April 2015.
21. The category of members included has been revised to include all forms of ill-health retirement and not just those who do not qualify for lower tier ill-health in the reformed scheme:
 - 21.1. who become eligible to retire (for any reason, including ill-health) and draw their pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept 2015 scheme benefits); **OR**
 - 21.2. who don't qualify for lower-tier (and also therefore does not qualify for higher-tier) ill-health pension under the FPS 2015 because of the single pot³ Ill-Health Retirement (IHR) arrangement BUT would do under the IHR arrangements in their legacy scheme, and are therefore left without a pension in payment.

³ Single pot refers to the arrangements for ill-health and death that benefits are paid from FPS 2015 only with 'equivalent amounts' payable from the former legacy scheme.

22. That puts all ill-health retirements into scope under the first category of retirement (for any reason).
23. FPS 2006 members who fall into the two categories described above would come into scope of the guidance, however it is important to note that:
 - 23.1. For ordinary retirement, it is likely to only apply to special members (who have a normal retirement age of 55) and a very small cohort of standard members who would want to have benefits **paid from their legacy scheme** (i.e. do not accept deferred FPS 2015 benefits).
 - 23.2. For ill-health, it is unlikely that special and standard members of the 2006 scheme will qualify because FPS 2015 has the same criteria for ill-health as FPS 2006, and therefore if they do not qualify for lower tier ill-health in FPS 2015, they would also not qualify under FPS 2006.
24. Members who were originally protected and received benefits or will receive benefits from the legacy scheme and argue that they would want benefits paid from the reformed schemes are not in scope of the Home Office guidance.
25. Paragraph 3.4 of the revised guidance repeats the express instruction that it **should not** be applied to scheme members who have already retired and are in receipt of their pension payments. The note refers to these cases being more complex to address, especially due to complexities in rectifying the member's tax position.
26. This paragraph has also now been revised to confirm that the guidance should not be applied where the member has died in service as the Government's approach to these cases has not been finalised.
27. The revisions to paragraph 5.2 of the note now include that to provide a choice to members, two sets of pension entitlement quotes should be provided, which include legacy scheme pension entitlements becoming due such as APB and Two Pension entitlement, as well as updated pension input amounts for all the years of remedy.
28. The revised note now also confirms how scheme pays may be used to satisfy a tax charge. The note looks in detail at scheme pays tax charge in paragraphs 5.5 to 5.10 and again in paragraphs 5.31 to 5.33.
29. Under the heading '*Unresolved pension issues*', paragraphs 5.14 to 5.33 detail outstanding issues that were consulted on and will not be resolved until the Government finalises its approach to removing discrimination.

Current position

30. The Home Office note published in August 2020 was helpful to explain UK Government policy and progressed significantly from the previous position that all entitlements should proceed under the terms of FPS 2015.
31. The revised guidance is extremely helpful, expanding on policy areas that had previously not been covered.
32. However, as a policy note, it was not the intention of the Home Office note to cover the steps that FRAs and administrators would need to put into place to enact the guidance.
33. The revised guidance now offers a pathway towards paying immediate detriment payments for those whose benefits are not already in payment.
34. Nevertheless, in the guidance available from the Government, there is a clear steer that members who have **already retired cannot be processed under immediate detriment** due to complex issues that have not yet been resolved.
35. On these matters, the consultation response and the Home Office FAQs are more cautionary.
36. Q10 of the [Home Office FAQ](#) says:

“Members who have retired before the deferred choice underpin is implemented and have a period of relevant service between 1 April 2015 and 31 March 2022 will be offered a choice once the legislative changes have been made to implement the deferred choice underpin. The choice will be retrospective and backdated to the point that payment of pension benefits began.

In some cases, it may be possible for schemes to offer members a choice before the deferred choice underpin is implemented.

However, the legislation that allows schemes to do this is limited in effect. It allows schemes to return eligible members who retired from the reformed schemes to the legacy schemes in relation to service after 1 April 2015 but does not allow for all consequential matters to be dealt with satisfactorily in all cases. For example, in cases where there are interactions with the tax system, perhaps where members have incurred or will incur tax charges or where contributions differ between the schemes, it might not be possible to address all these issues before new legislation is made to implement the deferred choice underpin.

Where possible, schemes will seek to offer reformed scheme members who retire before October 2023 a choice of legacy or reformed scheme benefits for the relevant period at retirement.

In due course it may be possible for schemes to revisit cases of reformed scheme members who have already retired ahead of the introduction of the deferred choice underpin.

However, there are still some complex issues to be resolved before schemes are in a position to process cases - further details will be provided as soon as possible.

In all cases where an individual receives a revised pension award, this will be backdated to the date that their pension award relating to the remedy period was originally made.”

37. The consultation response, paragraph 2.100 (emphasis added) confirms

“As set out in the consultation, the government accepts that members who moved to the reformed pension schemes on or after 1 April 2015 and have subsequently retired, already have an entitlement to be treated as a member of their legacy scheme for the remedy period if they wish. In recognition of this, the government will work with schemes to develop processes to give effect to this entitlement for those who retire before the introduction of the DCU. Where possible, schemes will also seek to offer reformed scheme members in this position who retire before October 2023 a choice of legacy or reformed scheme benefits for the relevant period at retirement. **Once the complex issues described in paragraphs A.8 to A.12 have been resolved, schemes will also seek to revisit cases of reformed scheme members who have already retired ahead of the introduction of the DCU, where, and to the extent, this is possible.** This process will be administratively complex and individual schemes will set out their plans for beginning to process such cases in due course.”

Matters for the FRA to consider

38. Being mindful of the interim order which entitles claimants to be treated as members of the FPS 1992, FRAs now need to understand practically how they could give effect to the guidance. As the document notes in several places, it is informal guidance only.

39. The revised guidance now sets out the Home Office assertion that the legal position which underpins the application of the guidance in the note is Section 61 of the Equality Act.

40. Nevertheless, it is accepted that Section 61 cannot deal with all consequential effects of remedying the pension benefits. In the Government’s [Tax policies and consultations](#) published on 23 March 2021, paragraph 3.8 deals with the amendments to tax legislation that will be needed as a consequence of the McCloud case.

“Pensions tax technical updates – The government is finalising the remedy for the age discrimination found in the 2015 public service pension reforms (the ‘McCloud case’). In the process of designing the remedy, the government has identified several aspects of the pension tax framework that do not work as intended in all situations and need updating to deal properly with cases of this type. For example, the current framework does not straightforwardly permit individuals to ask their pension scheme to settle annual allowance charges from previous tax years by reducing their future pension benefits (‘Scheme Pays’). The government will therefore make technical updates to pension tax rules to remove such anomalies.”

41. On 12 February 2021, the EAT gave its judgment on the FRAs' appeal based on Schedule 22 of the Equality Act 2010. The appeal was based on the argument that the FRAs did not make the legislation which was found by the Court of Appeal to be discriminatory on grounds of age but were bound to follow it because it was the law. Schedule 22 can give a defence where an employer is required by legislation to act towards its employees in a way which is discriminatory.
42. The EAT's judgment is that the FRAs **cannot rely on the Schedule 22 defence**. Effectively, the EAT held that the FRAs in their capacity as scheme manager could have decided not to follow the discriminatory legislation and in fact should have done so by refusing to treat firefighters as having transferred into the FPS 2015. This is because it held that Section 61 of the Equality Act 2010 prohibits FRAs from acting in a manner which discriminates on the grounds of age and it prioritises that obligation over other provisions in the pension scheme which would oblige the FRAs to act in that way. In addition, it held that, under Section 62 of the Equality Act 2010, the FRAs have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers.
43. Given the decision of the EAT on the effect of Section 61 of the Equality Act (as above), FRAs have the power, at least in some respects, to treat claimants (and also non-claimants) as having remained within their old schemes.
44. As set out in paragraph 6 above, if your FRA is receiving and considering processing claims, please liaise with your FRA's nominated contact

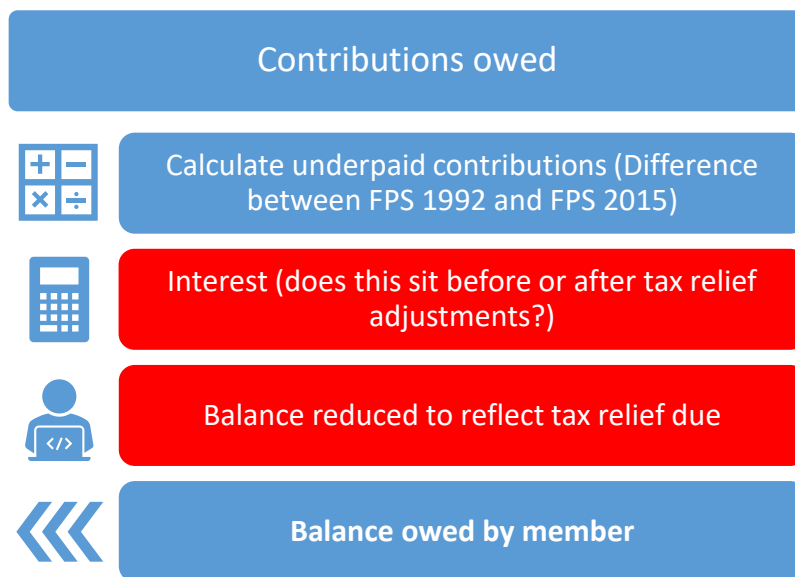
Employer contributions

45. The revisions to the Home Office guidance now confirm that there is no requirement for the FRA to make the employer contributions in order to enable payment of retirement benefits under immediate detriment.
46. The note now confirms that any adjustments in employer contributions will be captured in the scheme valuation process and reflected in the future employer contribution rates going forward.
47. [WMS HCWS757](#) confirms that any changes to employer contribution rates resulting from the 2020 valuations will be delayed from April 2023 to April 2024.
48. Existing employer contribution rates set by the 2016 valuation remain in place until 2024.

Employee contributions

49. The revisions to the Home Office guidance now consider in further detail the application of tax relief and interest to any contributions owed to the scheme or refunded to the member.
50. The guidance confirms that employee contributions owed will need to be collected before the members legacy scheme pension can be put into payment.
51. If a member chooses to have the contributions deducted from their lump sum or pay contributions via any other personal source, **they will not qualify for tax relief under the HMRC PAYE or self-assessment process**, this is a result of normal HMRC policy that tax relief is not available to non-active members of a pension scheme. Instead this will be claimed through a separate government process once the legislation is in place.
52. The consultation response refers to compensation for tax relief but does not cover any detail of how this compensation will be expected to be accessed. It should be clearly caveated in member communications that tax relief will be subject to further government policy and the regulations coming into force.
53. If the contributions are made under net pay before an individual has retired and go through the payroll, then tax relief should be available, but only on the tax code in operation at the time of payment, and adjustments will still be necessary to reflect the whole of the remedy period.
54. Paragraphs A.32 to A.34 of the [consultation response](#) confirm that government policy will be to apply interest to the sums owed by members, and that the rate of interest will be determined centrally after consultation with the Government Actuary's Department (GAD).

55. The revised Home Office guidance proposes that interest is not applied to contributions owed at this time.
56. Nevertheless, it should be clearly caveated in member communications that interest will be payable on the contributions owed and will be collected in the future, however, timescales are yet unknown.
57. The overall policy for collecting contributions, applying interest, and deducting tax relief has not yet been determined.
58. **Adjusting contributions⁵.**

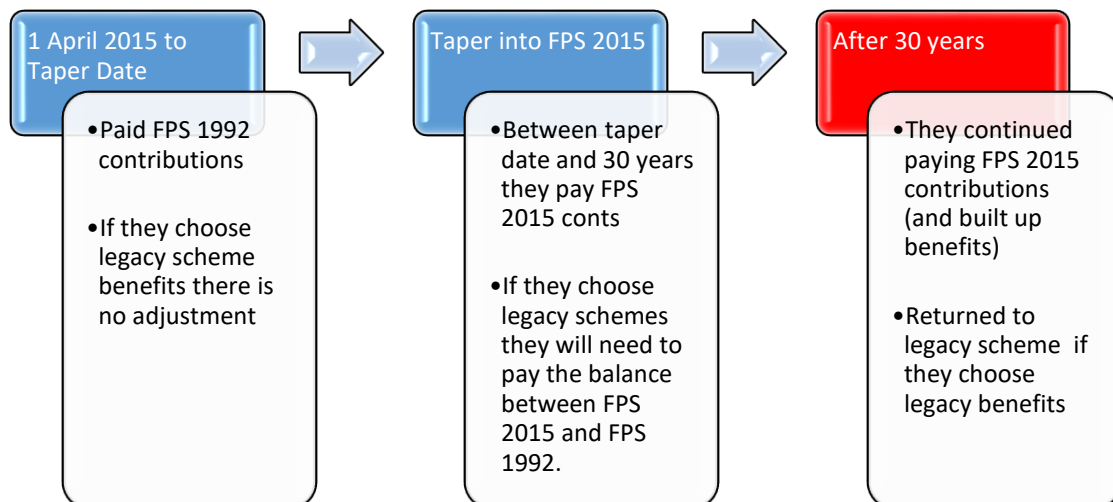


Contributions holiday

59. Under the terms of the FPS 1992 the maximum pensionable service that a member can accrue is 30 years' service, while the earliest point at which they can retire is at age 50. This means that some scheme members – mainly those who joined before age 20 – must continue to pay employee contributions beyond the point of accruing maximum pensionable service but before they are able to retire.
60. For example, if someone joined the scheme at 18 and paid contributions for 30 years by age 48 they would have accrued maximum pensionable service in the pension scheme yet could not retire until age 50.
61. The Government introduced an employee contributions holiday for FPS 1992 members who accrue the maximum 30 years' pensionable service prior to age 50. This applies from the point of accruing maximum pensionable service in the scheme until the member's 50th birthday.

⁵ Red shading indicates where policy intent is unknown

62. The [legislation](#) giving effect to the employee contributions holiday came into force on 30 September 2016 and was applied retrospectively to 1 December 2006.
63. Where contributions had already been made, the firefighter was entitled to a lump sum payable by the FRA equal to the value of the contributions they had paid with interest applied. HMRC confirmed that refunding the contributions in this way constituted unauthorised payments and as such generated unauthorised payment charges.
64. Further information on the [contributions holiday](#) is available on the password protected area of the FPS Regulations and Guidance website.
65. It is not yet clear how membership in the FPS 2015 beyond 30 years' service will be rectified where a taper member chooses legacy scheme benefits for the remedy period.
66. It is assumed that contributions paid under the FPS 2015 would need to be refunded and subject to PAYE, however, paragraph 2.95 of the consultation response confirms that the Government has changed its initial approach, and eligible individuals will receive a payment to cover the value of their contributions, but with an amount deducted to reflect the underpaid tax. The consultation does not comment on how that calculation would be done, so it is unclear where that leaves members with refunds due to them.
67. Rectifying membership after 30 years



68. Members most likely to qualify for immediate detriment by virtue of service and age may also be more likely to be eligible for a contribution holiday.
69. The Home Office revised guidance refers to contribution holidays under paragraph 5.21 and recognises that the position of applying tax relief and interest on contribution underpayments or refunds is yet to be confirmed. **Therefore, the Home Office guidance comments that these cases should not be processed at this time.**

Technical issues

70. There are some technicalities that will need to be legislated for in order to address properly; in some cases FRAs can make decisions in advance of that legislation and in other cases FRAs will need HMT to make policy decisions, which have not yet been made.
71. The revisions in the guidance now address some of these areas and a way forward where it is possible to do so, but others will be subject to legislation amendments in order to treat the benefit correctly.
72. It is not clear to what extent Section 61 applies and whether this provides the relevant vires to treat consequential matters that rely on other legislation, such as tax relief, pension tax and applying interest to contributions, in the same manner as calculating the conversion of final salary benefits.

CETVs (Cash Equivalent Transfer Values), otherwise known as transfers-in

73. When the FPS 2015 was introduced and members were automatically moved into this scheme, it opened a new window with no timing restrictions for transfers-in, and several members transferred pensions into FPS 2015. The Home Office guidance published in August 2020 originally suggested that these transfers-in should be re-calculated under FPS 1992 terms.
74. However, the rules of FPS 1992 would not have allowed those transfers to take place:
- Transfers into FPS 1992 are only accepted within 12 months of joining employment.
 - Entry to the FPS 1992 was closed from 1 April 2006.
 - A transfer-in would not be allowed in the FPS 1992 if it put someone over the 30-year service cap.
 - There are no current GAD factors to calculate FPS 1992 transfers.
75. The [consultation response document](#) does not comment on the process of restoring membership to the legacy scheme [2.91] where activity within the reformed scheme was not permitted in the legacy scheme.

76. Confirmation on how these cases should be treated is still outstanding, however it will need legislative change as current legislation does not permit transfers-in to FPS 1992.
77. The SAB sought information from FRAs on how many members may be affected. Of the 33 FRAs that responded, in a [paper submitted to the Board](#) it was confirmed that there were at least 94 identified CETV cases that had been received after 1 April 2015.
78. The revised guidance now offers a solution that “The transfer-in should remain in the 2015 Scheme until such time that the Government’s approach to removing the discrimination has been finalised and legislation is in place. It will be at this time that these cases can be revisited.”
79. While it is acknowledged that brings in additional burdensome administrative processes to keep the transfer-in within FPS 2015, the solution is recognised as a way forward to bringing most of the pension into payment.

Added pension

80. Under the FPS 2015 a member can pay contributions to purchase [additional pension](#).
81. To make up for what they considered to be a loss in pension by moving to the FPS 2015 some firefighters chose to buy added pension with the additional contributions they would have paid under the FPS 1992.
82. As confirmed in the Home Office guidance note published in August, paragraph 5.18, the legacy scheme does not currently have an added pension provision. The legacy schemes provide for added years only.
83. The rules of the added years provision in FPS 1992 scheme in some cases would not have allowed members to make additional payments.
84. Paragraphs A.34 to A.44 of the consultation response set out responses received with regards to the complexities of the treatment of voluntary member contributions that individuals have already made. It confirms that discussions are still ongoing with schemes to consider their approach and that the technical detail and proposed treatment will be consulted on in secondary legislation.
85. The SAB sought information from FRAs on how many members may have purchased added years in the FPS 2015. Of the 33 FRAs that responded, in a [paper submitted to the Board](#) it was confirmed that there were at least 22 identified added year cases that had been received after 1 April 2015.
86. As above, the revisions to the guidance now offer a solution that “any added pension accrued by a member should remain in the 2015 Scheme. As with ‘transfers-in’, these cases will need to be revisited when the Government’s approach to removing the discrimination has been finalised and legislation is in place”

87. While it is recognised that brings in additional burdensome administrative processes to keep the added pension in the FPS 2015, the solution is acknowledged to bring a way forward to bringing most of the pension into payment.

Divorce

88. When a member divorces, the value of their pension can be considered by the court as part of the financial settlement and they may determine that a pension share order (PSO) can be awarded to the ex-spouse/civil partner.

89. A PSO on the record creates a pension debit for the member and a pension credit for the ex-spouse, these are calculated in accordance with GAD factors.

90. When the 2015 reforms were introduced, we understand that the policy intent was that only the member would benefit from any protection and that all pension credit members would receive pension under the terms of the FPS 2015 only. However, that position was not finalised in the secondary legislation, and it is for the court to determine which scheme the pension credit should sit in for the pension credit member.

91. This means that for some members who divorced after 2015 they will have a pension debit ordered by a court that applies to both portions of pension built up in the legacy scheme and the reformed scheme.

92. For members who wish to receive benefits as if they have never been in the FPS 2015, a question arises as to how any pension debit that applies to the FPS 2015 should be treated.

93. The revised guidance does not comment on adjusting divorce debits, nevertheless the government approach was confirmed within paragraph A.112 of the consultation response.

94. While there remain some questions about whether a pension debit ordered by the court on the FPS 2015 can be adjusted without a further court order, it is considered the [GAD guidance for divorce cases](#) would allow for the adjustment to be re-calculated under the FPS 1992 scheme.

95. Of the 33 FRAs that responded to the SAB request for data, it was confirmed that there were at least 39 identified divorce cases that had been processed after 1 April 2015.

Final Salary Data

96. For the FRA to calculate the benefits that would have been paid under legacy terms, information needs to be available on final salary entitlements.

97. [Additional Pension Benefits \(APBs\)](#). Under the final salary schemes, certain pensionable payments such as continuous professional development (CPD), and temporary promotions are pensionable under an APB. To calculate these APB entitlements under legacy scheme terms, the FRA would need to identify where these payments had been made to the member.
98. Temporary promotion is not pensionable under CARE; however it can be pensionable under an APB in the legacy schemes. Treating temporary promotion as pensionable in the legacy schemes may increase pension growth for annual allowance purposes.
99. If there is a discretion in place to treat temporary promotion as pensionable under the FPS 1992 and a member has had a temporary promotion while a member of FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.
100. CPD is counted towards CARE pension in the reformed schemes, however, in the legacy schemes CPD is treated as an APB. Where a member has received a pensionable CPD payment under the FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.
101. [Two pension entitlement](#). To protect against a drop in pay in the final salary scheme, the regulations provide for the pension to be split into two elements, the first calculated at the highest pay and the second based on pay at retirement. To calculate pension under final salary terms, an FRA would need to identify if there had been any drop in pay that occurred after 2015 that would trigger a two-pension entitlement.
102. Where a member would have an entitlement to two pensions due to a drop in pay during the period 1 April 2015 to retirement date or 31 March 2022, the two-pension entitlement must be recalculated in the estimate of benefits under FPS 1992
103. Of the 33 FRAs that responded to the SAB request for data, it was confirmed that there were at least 41 identified cases where this final salary data could not be identified or was unavailable.

Data about these members

104. Data was sought on members in the above four categories as part of the SAB data research request. Of the 33 FRAs that responded to the request, it was confirmed that there were at least 196 potential cases with a technical issue on record.

CETVs	94
Divorce	39
Final salary data unidentified or unavailable	41
Added Pension	22
Total	196

Taper Members

105. A taper-protected member is somebody who was not fully protected by virtue of age to stay in the final salary scheme (FPS 1992, FPS 2006 standard or special) but was moved into the FPS 2015 between 24 May 2015 and 31 March 2022, depending on their age, as per the [table in the regulations](#).

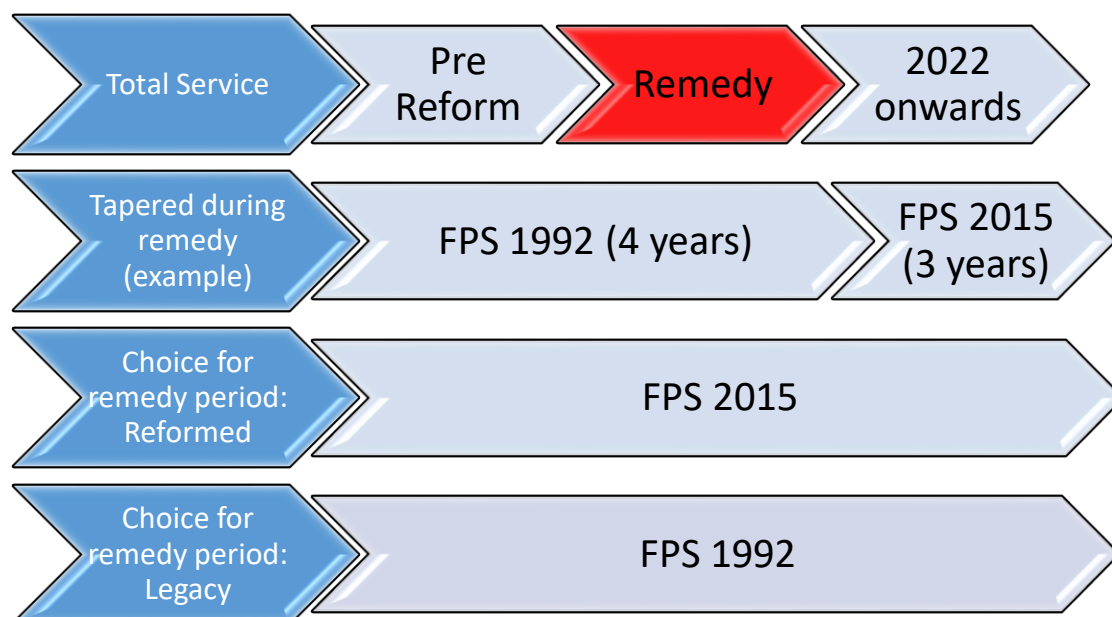
106. Paragraphs 2.25 to 2.41 of the consultation response confirm the government approach that taper members will only be able to select legacy or reform benefits for the whole remedy period i.e. 1 April 2015 to 31 March 2022.

107. The revised guidance from the Home Office does not comment on the approach for rectifying taper members under immediate detriment. The SAB have [written to HMT](#) regarding the lack of clarity on the policy for taper members, in particular those who would have reached 30 years' service during the remedy period and continued in employment.

108. It is not clear how choice should be offered to a taper protected member in the immediate detriment category. Under the current legislation a taper protected member who has already moved into FPS 2015 would have both a pension that could immediately be paid from FPS 1992 which would include service past 1 April 2015, and a deferred entitlement in FPS 2015.

109. It is not clear whether a taper member choosing to retire under immediate detriment and accepting payment of an FPS 1992 pension based on service to date of retirement would have to forfeit any existing FPS 2015 deferred pension, and if that should be caveated at the time of retirement, based on the outcome of the consultation.

Taper member options for remedy period



Abatement

110. Abatement is the reduction or suspension of a pension in payment in the event of re-employment. Where abatement applies, and the post-retirement pension plus relevant earnings on re-employment exceed pre-retirement salary, any excess will usually be deducted (abated) from the pension in payment.
111. [Abatement](#) is commonly used in the FPS 1992 and FPS 2006, however there is no requirement to abate pension in the FPS 2015.
112. Taper members who meet their 30-year service date during the remedy period, will be the most common type of member eligible for immediate detriment benefits.
113. These members may have tapered into the FPS 2015 shortly before meeting their 30-year service date and continued earning pension and salary in the FPS 2015 with a near full 30-year FPS 1992 pension available when they retire.
114. It is not clear how proposed government policy on abatement would apply to these members who continued working after they had reached 30 years' service and would now apply for a backdated pension.
115. The consultation response acknowledges this complexity in paragraph A.120 and confirms that the Government will continue to work with schemes to consider this further.

Tax rules and consequences

Pension Tax

116. The revised Home Office guidance now offers more commentary on the position of calculating and paying pension tax where it is due.
117. The calculation of pension tax under these paragraphs refer to pension tax where it would normally fall due had the member remained in the legacy pension scheme and not because of the mechanisms of remedy.
118. The Home Office guidance now comments in paragraph 5.5 that the impact of Section 61 of the Equality Act which allows individuals to be treated as though they had accrued benefits in their legacy scheme since 2015, also allows for the Pension Input Amounts (PIAs) to be recalculated for each relevant year of the remedy period and pension savings statements to be issued for each year.
119. Apart from the revised guidance, no further written update has been received in response to the [HMRC CLM query form](#) which was submitted to HMRC to consider how pension input periods can be re-assessed.
120. If, because of the re-assessments, the annual allowance is exceeded and a tax charge falls due, the revised guidance now comments on how any pension tax charge can be paid.
121. Tax charges can usually be satisfied either individually with a payment from the member, or by scheme pays which is a mechanism that allows the member to request the scheme to satisfy the charge on their behalf with the **amount then deducted from the member via an annual debit to their pension**.
122. There are two types of scheme pays: Mandatory Scheme Pays (MSP) and Voluntary Scheme Pays (VSP).

Mandatory scheme pays (MSP)

123. Section 237B of the Finance Act 2004 allows MSP where:
- the tax charge is over £2,000, and
 - the individual is subject the standard annual allowance (currently £40k)
 - this relates to a single scheme and **to the immediately preceding tax year**.
124. If the conditions are met, then the scheme administrator becomes jointly and severally liable (with the member) for the annual allowance charge and must pay this to HMRC within a given timescale. They must also make a consequential adjustment to the member's pension savings or their benefits under the pension scheme.
125. MSP can only apply to the immediately preceding tax year, so MSP cannot be used to pay breaches of annual allowance in previous years within the remedy period.

126. For periods within the statutory time limits, where an individual **has already used MSP**, pension debits for previous years can be adjusted to accommodate any revisions to the annual allowance charge owed.

Voluntary Scheme Pays (VSP)

127. Where in certain circumstances an individual cannot use MSP to pay a relevant HMRC tax charge, they may be able to use [VSP](#), so called because the scheme can agree to voluntarily pay the tax charge and deduct from the member via the debit.

128. As a voluntary arrangement there are no conditions attached to it other than the scheme agreeing they can pay it.

129. However, under VSP the member is individually and solely liable and the charge must be paid within the normal HMRC rules for paying tax (31 January following the year of tax charge).

130. In May 2017, following legal advice a [technical note](#) was issued to confirm that FRAs were able to utilise VSP to pay tax charges on a members behalf, and [guidance](#) was subsequently issued including election forms for the [member](#) and [scheme manager](#).

131. FRAs may now wish to re-visit the decisions they made about allowing VSP, to amend the conditions they apply to payments under VSP.

Unauthorised payment charges

132. Under the rules of the Finance Act, schemes may pay a [Pension Commencement Lump Sum \(PCLS\)](#).

133. To be a PCLS, a lump sum must meet the payment conditions as follows:

- [Entitlement to pension](#)
- [Lifetime allowance \(LTA\) available](#)
- [Timing of payment](#)
- [Minimum age](#)
- [Permitted maximum](#)
- [Excluded lump sum](#)

134. If a commutation lump sum does not meet these conditions, the excess is not a PCLS and is unauthorised, and will be subject to unauthorised payment charges

135. There are three types of charges that can become due when a payment is deemed to be unauthorised. The charge is made on the difference between the authorised payment and unauthorised payment.

- [The unauthorised payments charge](#)
- [The unauthorised payments surcharge](#)
- [The scheme sanction charge](#)

136. A lump sum from the FPS is typically unauthorised when:

- It exceeds the permitted maximum
- The member has used their available LTA
- It does not meet the timing of payment condition
- The member has a [protected pension age](#) and is re-employed (minimum age)

137. The two most common conditions that cause the lump sum to be unauthorised are:

137.1. Timing of payment condition, and

137.2. Exceeds the permitted Maximum

Timing of payment condition

138. The timing of payment condition is most likely to affect any lump sum being paid due to rectification of benefits already in payment

139. The timing of payment condition means, that to be considered a PCLS, the lump sum must be paid within an 18 month period starting 6 months before and ending 12 months after the member becomes entitled to it [[Paragraph 1\(1c\) of Schedule 29 of the Finance Act 2004](#)]

“(c) it is paid within the period beginning six months before, and ending one year after, the day on which the member becomes entitled to it”

140. The meaning of the term ‘**becomes entitled to it**’ is important. If it is a new entitlement, i.e. one the person was not entitled to at retirement then schemes have a new twelve-month period in which to pay the lump sum.

141. Payments made from the FPS that may not meet this rule, i.e. are not new entitlements, are where a further lump sum is paid out more than 12 months after retirement to retrospectively correct an error. Examples of such payments are:

- Retrospective pensionable pay adjustments, such as [Booth vs Mid and West Wales](#) or [Norman v Cheshire](#)
- Retrospective [two pension entitlement](#) adjustments
- Payments from PO-1327 (often referred to as [GAD v Milne](#))

142. Guidance has been sought from HMRC and HMT whether in the circumstances of remedying the pension that would have been due from the legacy scheme, additional payments of lump sum more than 12 months after the original retirement would be treated as a new entitlement. HMT have yet to confirm.

Exceeds the permitted maximum

143. To be considered a PCLS, the lump sum must not exceed the [permitted maximum](#). The permitted maximum is the lower of two measures

143.1. Available portion of the members lifetime allowance¹². This is equal to 25% of the members standard lifetime allowance, or

143.2. The applicable amount, this broadly represents 25% of the capital value of the benefits coming into payment

144. The applicable amount is the most common measure used in most cases. [The applicable amount formula for benefits arising under a defined benefits arrangement](#) is $(LS + AC) \div 4$

- LS = Lump sum being paid
- AC = The amount crystallising, which is calculated by multiplying the annual rate of scheme pension by a factor of 20.

145. In 2011 the [commutation factors for the FPS 1992](#) were amended, and the factors went above 20. This meant that all firefighters retiring with a commutation factor above 20 would breach the permitted amount, and the lump sum would be unauthorised and subject to tax charges, unless the member chose to commute a lower proportion of pension.

146. Most firefighters retiring choose the maximum lump sum and choose to pay the unauthorised tax charge as a result of breaching the permitted maximum.

147. In cases where the lump sum has already been paid with an unauthorised tax charge payable at the original retirement date, it is not clear how the second lump sum should be calculated and the unauthorised tax charge that would have ordinarily been due when the member retired paid.

Income Tax

148. Pensions in payment are subject to income tax and changes to pensions already in payment may require adjustments to income tax. No guidance has been received on how income tax adjustments can be applied to changes in pension or what legislation an FRA would rely on to make those adjustments.

149. It is not known whether adjustments to income tax would be performed by HMRC outside of the four-year statutory period. It is likely that not all tax years within the remedy period could be adjusted through existing HMRC processes.

¹² The standard lifetime allowance for the tax year 2020/2021 is £1,073,100 - <https://www.legislation.gov.uk/uksi/2020/342/regulation/2/made>

FRA immediate action

150. FRAs have always been mindful of the interim order which entitles claimants to be treated as members of FPS 1992 and wish to give effect to this where they are able to do so.
151. In order to ensure the FRA has all the information needed in order to proceed with an immediate detriment case under the guidance, we have provided FRAs with a [template matrix](#) to complete. This template may also be used to evidence where they do not have the information to proceed. Completion of this checklist will no doubt require both employer and administrator input; please ensure this is complete before proceeding with a case.
152. We have published [data guidance](#) in order to help FRAs collect and consider what data will be needed for both immediate detriment and main remedy cases.
153. We issued guidance in [FPS Bulletin 28 - January 2020](#) on immediate action that FRAs could take, under the heading *Update on transitional protections remedy (Sargeant)*. If that action was not taken, we recommend that FRAs do so now.
154. We are pleased to provide further commentary on immediate action below.

Current or new cases

Ill-health: IQMP assessment

155. Members with transitional FPS 1992 benefits – ask the IQMP to assess the applicant under both the 1992 and 2015 scheme terms.¹⁸
156. Under the immediate detriment note, members who don't qualify for lower-tier ill-health in FPS 2015 but would do so under FPS 1992 should be allowed to retire under the arrangements of their legacy scheme where possible.
157. Transitional special members of the 2006 scheme – ask the IQMP to assess the applicant under the terms of the FPS 2006 noting that the normal retirement age of a special member is 55¹⁹.
158. The criteria for ill-health retirement are the same for standard FPS 2006 members and transitional members of the FPS 2015, therefore assessment under the 2015 terms should be enough.

¹⁸ Ill-Health certificates are available here - <http://www.fpsregs.org/index.php/member-area/ill-health-and-injury> .

¹⁹ Rule 3, Paragraph 3 of FPS 2006 - <http://www.legislation.gov.uk/ukxi/2014/445/schedule/paragraph/2/made>

Providing information to the member to enable a choice

159. It is currently unknown whether there would be an opportunity for a member to revise their decision if it later proved to be the wrong choice for them or their dependants.
160. Guidance should be issued to members so they are clear on the benefits that would be payable from either scheme, and they are not relying on myths or misunderstanding. This is particularly important with regard to ill-health benefits particularly if the member would qualify for higher tier ill-health from the FPS 2015 or members who are unmarried and want to claim benefits from the FPS 1992.
161. Most commonly this might occur where a dependant might have benefited from a partner's pension that is paid under the FPS 2015 but is not available under FPS 1992 which can only pay spouse or civil partners pensions, and/ or the five year death in retirement guarantee which pays the balance of pension payments if the member dies within five year of retirement.
162. It is therefore important to ensure this information is communicated to the member when they make their choice as to how this could affect survivor benefits.

Estimation of benefits

163. The estimate of benefits under both schemes should include:
- The pension payable to the member.
 - The lump sum that would be payable, along with details of tax consequences, such as receiving an unauthorised lump sum or limiting the lump sum so it doesn't incur tax.
 - Dependant benefits such as a partner's pension and death in retirement five-year guarantee from FPS 2015. This is particularly important where someone is retiring under ill-health terms and is paid their pension under the 'one-pot' arrangements from FPS 2015.
 - A clear statement that all calculations are provisional and may be revised depending on decisions still to be made and changes to scheme rules, in particular regarding interest and taxation; and that further payments or refunds, or recalculation of pension benefits, are possible.

Schedule of contributions owed

164. To receive benefits under the terms of FPS 1992, the immediate detriment note confirms that employee contributions must be repaid where they are due.

165. Members should be provided with a schedule of contributions owed, to include:

- Difference between FPS 2015 and FPS 1992 contributions for the remedy period.
- This should include any additional contributions that need to be paid to count a service break.
- Contributions on FPS 1992 terms of any temporary promotion to be treated as an APB.
- Difference between FPS 2015 and FPS 1992 contributions on any CPD payments in order to calculate the APB that will be payable under the legacy scheme.

166. At this point Government guidance is that contribution holiday adjustments should not be applied, nevertheless it would be good practice to calculate these contributions.

167. It is unclear how interest on these contributions will be applied, and how the adjustment of the contribution holiday would be affected.

168. Members should be made aware of the effect of claiming tax relief on their pension contributions if they choose to have contributions deducted from their lump sum, rather than paying before retirement.

- Pension contributions made before retirement will qualify for tax relief under HMRC PAYE or self-assessment **based on their current tax code only**.
- Pension contributions made after retirement, such as deducted from the lump sum, will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process once the consultation has concluded.

169. The final policy on obtaining tax relief has yet to be confirmed, as such it may be different to any treatment the member receives at retirement.

Annual Allowance

170. For some members the impact of treating them as if they had never left their previous final salary scheme might mean that they would have breached the annual allowance limits in former pension input period years.
171. If benefits are put into payment under the immediate detriment note, the member will need to be aware of the recalculation of their pension input periods and the change on any carry forward, as this may affect other pension entitlements elsewhere.
172. Where a member has exceeded the annual allowance limit and there is no carry forward to mitigate the breach, a tax charge will fall due on the excess over the annual allowance. The member should be informed of any annual allowance breach for them to calculate the tax charge.
173. The FRA policy on making scheme pays debits through VSP should be notified to the member if it is likely they will have a tax charge to pay.

Retrospective Ill-health Cases

174. Paragraph 3.2 of the Home Office guidance suggests immediate detriment applies only to members who did not qualify for lower-tier (and therefore higher-tier) ill-health retirement under FPS 2015 but would have done under their legacy scheme. They may have now left the FRA but are not in receipt of pension benefits.
175. These members should be treated as above as a current ill-health case and the relevant IQMP assessment should be sought and benefits put into payment where possible.
176. For members with a pension in payment and who therefore do not fall within the scope of the immediate detriment note, FRAs may want to ensure they are prepared to offer revised benefits as soon as possible by having valid IQMP assessments in place, as detailed at paragraphs 155 to 158 above.
177. Some of these members may be better off in the reformed schemes, for example, members with a higher tier ill-health in payment under the FPS 2015. FRAs may want to ensure members are aware of this by providing a quotation of benefits under the legacy scheme.
178. FRAs will need to consider what powers they have under Section 61 to make retrospective ill-health adjustments to pensions already in payment.

Processes and governance

179. FRAs will need to make local assumptions or decisions on how to apply government policy intent.
180. FRAs who decide to make immediate detriment payments will be doing so without automated software systems.
181. Having an automated system usually provides an additional layer of governance that the calculation will be right. FRAs will need to ensure that processes are in place so that they can assure themselves the correct benefits are being paid to members.
182. FRAs will need to ensure that the details of calculations, how they applied before remedy, and the underpinned benefits on the reformed basis are properly recorded to enable rectification or answer questions once the legislation comes into force.
183. Local Pension Boards (LPBs) may want to consider what assurances they can seek that additional processes are in place to check decision making, and how decisions are being made so they are consistent between FRAs.
184. LPBs will want to assure themselves that TPR requirements are being complied with. Particularly to ensure:
- 184.1. The policies in place to support the [six key processes](#) TPR use to measure performance are updated to ensure they take account of immediate detriment decision making and payments.
 - 184.2. How [breaches of law](#) will be recorded and reported to TPR.
 - 184.3. How immediate detriment data will be measured as part of the [TPR data scoring requirements](#), without automated systems, and methods to record the data.

Please address any queries on the content of this request to bluelight.pensions@local.gov.uk

June 2021