

EXPLANATORY MEMORANDUM TO

The Health and Social Care Pension Schemes (Amendment) Regulations (Northern Ireland) 2022

S.R. 2022 No. 156

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Health (DoH) to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under sections 1(1) and (2)(e), 2(1) and 3(1) to (4) of, and paragraph 5 of Schedule 2 and Schedule 3 to, the Public Service Pensions Act (Northern Ireland) 2014⁽¹⁾ and is subject to the negative resolution procedures.

2. Matters of special interest to the Examiner of Statutory Rules

- 2.1. The Department of Health apologises to the Examiner that this rule, which comes into force on 1st April 2022, is laid in breach of the 21-day rule.
- 2.2. The rule could not have been made and laid sooner because it is dependent on the Public Service Pensions and Judicial Offices Act 2022 (“the Act”), which received Royal Assent on 10 March 2022. Chapter 4 of Part 1 of the Act contains the operative prospective remedy provision necessary to bring to an end the unlawful age discrimination identified in the McCloud judgment (referenced in paragraph 4 below).
- 2.3. In particular, section 88(5)(c) of the Act has the effect of closing the legacy public service pension schemes to future accrual after 31st March 2022. This instrument makes consequential provision for the HSC Pension Scheme. This provision must come into force immediately after the legacy pension schemes are closed to future accrual by the Act to ensure legal certainty and fairness. If there is any delay, then there will be a period in which certain members can no longer accrue pension in the legacy scheme but scheme rules would prevent those members from joining the new scheme.
- 2.4. Scheme members have been on notice, through consultation processes, including the Department of Finance consultation document of August 2020 and consultation response document of February 2021, through the introduction of the Bill in the House of Lords on 19th July 2021, and through the scheme-specific consultation referenced in paragraph 5 below, that the commencement date for the prospective remedy would be 1st April 2022. In these circumstances, a breach of the 21-day rule should not give rise to any unfairness.

⁽¹⁾ 2014 c.2 (N.I.) section 3 was amended by section 94(11) to (14) of the Public Service Pensions and Judicial Offices Act 2022 (c. 7)

3. Purpose

- 3.1. The Statutory Rule will ensure equal treatment for all members by moving all members into the 2015 HSC Pension Scheme on 1 April 2022 irrespective of age. This is the first stage of what is known as the “McCloud Remedy”.

4. Policy Background – What is being done and why

- 4.1. In December 2018 the Court of Appeal found that the transitional protection given by the judicial and firefighters’ pension schemes to older members when moving from final salary to career average schemes unlawfully discriminated against younger members, and also gave rise to indirect sex and race discrimination (the McCloud judgment). In 2019 the UK government acknowledged that this judgment had implications for all of the public service pension schemes; legal advice confirmed that the identical transitional measures introduced for equivalent devolved schemes must be similarly remedied.
- 4.2. Following a consultation run by the Department of Finance it was confirmed that all the legacy schemes would close on 31 March 2022 and that affected members would be given a choice of which pension benefits they wish to receive for the period from 1 April 2015 to 31 March 2022 when those benefits are paid. This choice of pension benefits when the pension becomes payable is referred to as a deferred choice underpin (DCU).
- 4.3. This proposed legislation implements the first stage of the McCloud remedy for the HSC pension scheme by ensuring that from 1 April 2022 all active members will accrue benefits for service only in the reformed schemes.
- 4.4. The legislation will apply to members who were in service on or before 31 March 2012 and who have service on or after 1 April 2015 (including those with a qualifying break in service of less than 5 years). As the unlawful discrimination identified by the Courts only applied to those who were in service on or before 31 March 2012 it is therefore only that group who are in scope of the remedy.
- 4.5. The exceptions that allowed certain members who were closer to their normal pension age to remain in the legacy scheme after 31 March 2015 under transitional protection arrangements will apply only in respect of service up to 31 March 2022. On 1 April 2022, all active members will be moved to the 2015 HSC Pension Scheme and from that point will build future pension rights on the same basis irrespective of age.

5. Consultation

- 5.1. The changes introduced by this statutory rule have been subject to statutory consultation which commenced on the 6 December 2021 and ended on the 31 January 2022.
- 5.2. Among those consulted were HSC Trade Unions representatives; All HSC Employers; HSC Pension Service (Scheme Administrators); Scheme Advisory Board; Pension Board; DoF and the Government Actuary Department.

- 5.3. Six responses were received, of which 4 were from individual respondents who enquired about how the remedy applies in their individual circumstances. They were directed to the scheme administrator for further information and advised that there will be a second set of draft scheme regulations which will be consulted on later in 2022 dealing with many of the queries raised.
- 5.4. Employer organisations and Trade Unions reiterated previous concerns on the principle of closing the legacy schemes and concerns that in seeking to address the discrimination caused to younger members, there may now be a disadvantage to older members and female members. They agreed the proposed amendments were consistent with the intended policy objective to remedy the identified discrimination against younger members. The Trade Unions referenced ongoing legal action by TUS in E&W in relation to both McCloud and the cost cap.
- 5.5. The consultation response document is available on the Department of Health website at [Consultation on McCloud Remedy - HSC Pension Scheme | Department of Health \(health-ni.gov.uk\)](https://www.health-ni.gov.uk/consultation-on-mccloud-remedy-hsc-pension-scheme)

6. Equality Impact

- 6.1. The McCloud remedy is designed to remedy age discrimination. The remedy proposals were equality screened during the original DoF consultation. An Equality Screening/Impact Assessment (EQIA) was carried out by the Department, and this has been published on the Departments website.

7. Regulatory Impact

- 7.1. A regulatory impact assessment has not been produced for this rule as it is not anticipated that there will be any adverse impact on business, charities social economy or voluntary bodies.

8. Financial Implications

- 8.1. None from this legislation.

9. Section 24 of the Northern Ireland Act 1998

- 9.1. Consideration has been given to the human rights implications of these regulations. They are considered compatible with section 24 of the Northern Ireland Act 1998.

10. EU Implications

- 10.1. None

11. Parity or Replicatory Measure

- 11.1. Similar legislation has been introduced for the NHS Pension Schemes in England & Wales.

12. Additional Information

- 12.1. Not applicable.