

## **EXPLANATORY MEMORANDUM TO**

### **The Teachers' Pension Scheme (Remediable Service) Regulations (Northern Ireland) 2023.**

**S.R. 2023 No. 131**

#### **1. Introduction**

- 1.1. This Explanatory Memorandum has been prepared by the Department of Education (the Department) 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)(d), 2(1) and 3(1) and (2) of and Schedule 3 to the Public Service Pensions Act (Northern Ireland) 2014 and is subject to the negative resolution procedure.

#### **2. Purpose**

- 2.1. The regulations relate to the provision of a remedy in respect of a legal case (McCloud) that affects the main public service pension schemes. Certain elements of the remedy are achieved by provisions in the Public Service Pensions and Judicial Offices Act 2022 (the PSPJO Act) including establishing who is eligible for the remedy and that eligible pensionable service in a reformed scheme is to be 'rolled back' to the relevant legacy scheme. The PSPJO Act requires schemes to make provision in regulations to deliver other aspects of the remedy. The regulations therefore include provision to allow members to make a choice about which set of benefits they wish to take for eligible remedy period service (legacy or reformed scheme) as well as provisions to address the consequential impacts of the rollback of service for the remedy period.

#### **3. Background**

- 3.1. The Northern Ireland Teachers Pension Scheme (NITPS) is governed by the Teachers' Superannuation Regulations (Northern Ireland) 1998 (SR 1998/333) which provide for legacy final salary schemes with Normal Pension Ages of 60 and 65, and the Teachers' Pension Scheme Regulations (Northern Ireland) 2014 (SR 2014/310) (The 2014 Regulations), which provide for a reformed career average revalued earnings (CARE) scheme with a Normal Pension Age linked to the member's State Pension Age.
- 3.2. When reformed public service pension schemes were introduced in 2015, transitional protection arrangements allowed older workers to continue building pension in the legacy final salary schemes whilst younger workers were moved into reformed career average schemes. Following a successful legal challenge in the McCloud case, the Court of Appeal found that this difference in treatment in the transitional arrangements amounted to age discrimination. The Government has enacted the PSPJO Act to implement changes to remedy the age discrimination that was identified.
- 3.3. The remedy consists of two parts. The first part ensures equal treatment of all members from the end of the remedy period which was achieved by

moving all remaining active members of the legacy scheme into the reformed scheme on 1 April 2022. The second part of the remedy seeks to remove the difference in treatment that was caused by the transitional protection provisions by rolling back reformed scheme service during the remedy period to the legacy scheme and providing eligible members with a choice over the set of benefits (those that would have been accrued in the legacy scheme or those that would have been accrued in the reformed scheme) that they wish to receive for their service during the remedy period. The remedy period is 1 April 2015 – 31 March 2022, which is the period during which some members had been treated differently according to their age.

- 3.4. Members who are eligible for the remedy are those who were members of the legacy scheme on or before 31 March 2012 (when the reforms were announced) and continued to be in pensionable service at some point during the remedy period without having had a disqualifying break in service. More detailed information concerning the scheme reforms and McCloud judgment is provided in subsequent sections of this document.
- 3.5. In April 2015, following the Hutton review, new pension schemes were introduced for each of the public sector workforces. The reforms were implemented by regulations made under the Public Service Pensions Act (Northern Ireland) 2014.
- 3.6. As part of the 2015 reforms, those within 10 years of retirement remained in their legacy pension schemes. This transitional protection was not a recommendation of the Hutton review but was agreed following discussions with member representatives on a UK wide basis.
- 3.7. In December 2018, the Court of Appeal found, in *Lord Chancellor and Secretary of State for Justice versus McCloud, The Secretary of State for the Home Department versus Sargeant* [2018] EWCA Civ 2844 (the McCloud judgment), that the transitional protection unlawfully discriminated against younger members of the judicial and firefighters' pension schemes, and also gave rise to indirect sex and race discrimination. On 27 June 2019, the Supreme Court denied the GB government permission to appeal the Court of Appeal's judgment.
- 3.8. On 15 July 2019, the Chief Secretary to the Treasury's written ministerial statement set out that the GB government considered that the Court of Appeal's judgment had implications for all of the public service pension schemes and planned to come forward with proposals to remedy the discrimination across all the schemes. Legal advice confirms the identical transitional measures introduced for equivalent devolved schemes must be similarly remedied.
- 3.9. Following a consultation run by the Department of Finance (DoF), it was confirmed that 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).

- 3.10. In the Queen’s Speech on 11 May 2021, the GB government announced its intention to bring forward the necessary primary legislation in the form of the The Public Service Pensions and Judicial Offices Act 2022 (the PSPJO Act) which received Royal Assent on 10 March 2022. The Act puts in place a framework to address the discrimination identified by the Court of Appeal, both retrospectively and prospectively, as well as the consequential effects of that remedy. Departments are required to make new pension scheme regulations to implement the remedy. The Department of Education has identified that two sets of scheme regulations are necessary to give effect to the requirements of the Act. These regulations will make changes to scheme rules to implement the remedy.
- 3.11. The PSPJO Act makes provision to remedy the discrimination arising from the transitional protection introduced into the public service pension schemes in 2015. Certain elements of the remedy are achieved solely by provisions in the PSPJO Act including who is eligible for the remedy and for reformed scheme service to be ‘rolled back’ to the legacy scheme. The PSPJO Act also gives schemes the power to make provisions in regulations to deliver other aspects of the remedy.
- 3.12. The proposed Teachers’ Pension Scheme (Remediable Service) Regulations (Northern Ireland) 2023, implements the second part (retrospective) of the McCloud remedy for the Northern Ireland Teachers’ Pension Scheme by ensuring that from 1 October 2023, members who are eligible for the remedy will have service between 1 April 2015 and 31 March 2022 ‘rolled back’ to the legacy scheme.
- 3.13. When those members retire, they will be given a choice as to whether their remedy period service is to be treated as legacy or reform scheme. This is because one scheme will not always be better than the other scheme for members – which is more beneficial will depend on each individual’s circumstances up to retirement. For this reason, most members will make their choice at the point immediately before retirement so that their decision is based on all relevant information.
- 3.14. The PSPJO Act also provides that those who have already taken retirement benefits before 1 October 2023 will be given their choice as soon as possible after this date.
- 3.15. NITPS regulations are being made in consequence of provisions in the PSPJO Act to deliver the retrospective remedy. The PSPJO Act addresses the difference in treatment experienced by some members of the public service pension schemes between 1 April 2015 and 31 March 2022 (this is known as the remedy period) by returning reformed scheme service of those affected to the relevant legacy scheme. The regulations then make provision for those members with service during the remedy period to be given a choice of benefits (legacy or reformed scheme) for that period. Certain regulations are also made subject to provisions in the Public Service Pensions (Exercise of Powers Compensation and Information) Directions (Northern Ireland) 2023.
- 3.16. The 2022 Act requires this part of the remedy to be implemented from 1 October 2023 at the latest.

#### **4. Consultation**

- 4.1. One set of regulations, the Teachers' Pension Scheme (Amendment) Regulations (Northern Ireland) 2022, provided for the closure of the legacy scheme on 31 March 2022 and moved all remaining active members to 13 the reformed scheme on 1 April 2022 (phase one).
- 4.2. This followed an earlier consultation by the Department which was held from 20 December 2021 to 13 February 2022 which dealt with the prospective phase of the remedy. The consultation response document was published on 21 March 2022 on the Department's website.
- 4.3. The changes introduced by this statutory rule have been subject to a statutory consultation which ran for 8 weeks beginning 24 April 2023 to 16 June 2023. The draft scheme regulations and consultation document outlining proposals that will enable the Department to give effect to the retrospective phase of the PSPJO Act for the NITPS were published on the Department's website.
- 4.4. The Department notified those persons, and their representatives, which appear to the Department likely to be affected by the proposed amendments in accordance with section 21 of the Public Service Pensions Act (NI) 2014.
- 4.5. The Department received 12 responses to the consultation: 5 from individuals, 5 from teacher unions, 1 from a representative body and 1 from an employer organisation.
- 4.6. Respondents broadly agreed that the draft amendments achieved the stated policy aims as described in the consultation document. Most of the comments and queries from respondents centred on three key themes: the complexity of the regulations, the timings and deadlines for decision making and the policy on scheme flexibilities during the remedy period. The Department acknowledges this is a complex area and will continue to provide clear information and resources to affected members via direct communications and the scheme website, to aid member understanding of the retrospective remedy and to assist informed decisions.
- 4.7. Additional provisions have been included in the final regulations. This is as a result of ongoing discussions across the affected schemes to ensure that the policy approach that has been developed is achieved by the regulations. The additions do not alter the proposed policy approaches outlined in the consultation document and are technical in nature.
- 4.8. The Department has addressed all relevant comments in the consultation response document and the Department's full consultation response is published on the Department's website.

#### **5. Equality Impact**

- 5.1. The McCloud remedy is designed to remedy age discrimination. The remedy proposals were equality screened during the original DoF consultation. An Equality and Human Rights policy screening (EQHR) was carried out by the Department, and this has been published on the Department's website.

## **6. Regulatory Impact**

- 6.1. A Regulatory Impact Assessment has not been prepared for these regulations as they have no impact on businesses, charities, social economy enterprises or voluntary bodies.

## **7. Financial Implications**

- 7.1. The costs of the McCloud remedy have been factored into scheme actuarial valuations; McCloud remedy costs associated with financial loss compensation and corrective payments, made under the PSPJOA 2022, will be funded within Annually Managed Expenditure (AME) and will not impact Departmental Expenditure Limit (DEL) budgets.

## **8. Section 24 of the Northern Ireland Act 1998**

- 8.1. 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.

## **9. EU Implications**

- 9.1. Not Applicable.

## **10. Parity or Replicatory Measure**

- 10.1. These regulations put in place similar amendments to those introduced by the Teachers' Pension Schemes England and Wales, and Scotland.

## **11. Additional Information**

- 11.1. Not applicable.