EXPLANATORY MEMORANDUM TO

The Local Government Pension Scheme (Amendment No. 2) Regulations (Northern Ireland) 2023

S.R. 2023 No. 149

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department for Communities to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under the Public Service Pensions Act (Northern Ireland) 2014 ("the 2014 Act"), and the Public Service Pensions and Judicial Offices Act 2022 ("the 2022 Act"). It is subject to the negative resolution procedure. The Department of Finance has consented to the making of these Regulations.

1.3. Section 3(3)(b) of the 2014 Act provides that scheme regulations may make retrospective provision. These Regulations are retrospective in effect. The retrospective provisions contained in these Regulations do not appear to the Department to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, or members of previous schemes. Accordingly, the procedures set out in section 23 of the 2014 Act are not applicable in relation to these Regulations.

2. Purpose

2.1. The purpose of these regulations is to amend the Local Government Pension Scheme (Northern Ireland) ("LGPS (NI)") to address the discrimination found in McCloud v Lord Chancellor [2018] EWCA Civ 2844([1]). In that case the Court of Appeal found that protections provided to older members of public service pension schemes when the schemes were reformed in 2014 and 2015 unlawfully discriminated against younger members on grounds of age.

2.2. These Regulations will address the discrimination in the LGPS (NI) by amending the LGPS (NI) Regulations so that 'the statutory underpin', the mechanism through which older LGPS (NI) members closest to retirement were protected, is extended to the scheme members who were discriminated against (i.e. those who were too young to receive protection under the original rules). The Regulations also makes a number of related changes to the underpin to ensure it works effectively and in line with the policy intent.

2.3. These Regulations make amendments to:

- The Local Government Pension Scheme (Amendment and Transitional Provisions) Regulations (Northern Ireland) 2014 (S.R. 2014 No. 189) ("the Transitional Regulations"); and
- The Local Government Pension Scheme Regulations (Northern Ireland) 2014 (S.R. 2014 No. 188) ("the 2014 Regulations").

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1 Lord Chancellor -v-McCloud & others (judiciary.uk)

2.4. Both the Transitional Regulations and the 2014 Regulations constitute the legal framework for the LGPS (NI). ("the 2015 Scheme").

2.5. The differences between the original regulations (the position before this set of amendment Regulations came into operation) and the new regulations (the position after this set of amendment Regulations came into operation) are summarised in the following paragraphs.

2.6. Regulation 4 of the Transitional Regulations gave statutory underpin protection to older members of the LGPS (NI), in line with the government's commitment to provide transitional protection to those nearing retirement. Under regulation 4(1), statutory underpin protection applied to those who met the following criteria:

- they were active members of the LGPS (NI) on 31st March 2012,
- they were within ten years of their 2009 Scheme normal pension age (usually 65) on 1st April 2012,
- they had membership of the 2015 Scheme, and
- they did not have a continuous break in active membership of a public service pension scheme of more than five years after 31st March 2012.

2.7. Where underpin protection applied, regulation 4(4) required that a member's scheme manager (the Northern Ireland Local Government Officers' Superannuation Committee ("NILGOSC")) would undertake a comparison of their final salary 2009 Scheme and career average 2015 Scheme benefits. Where the 2009 Scheme benefits were calculated to be higher than the 2015 Scheme benefits, an addition would be made to the member's pension. For the purposes of the underpin calculations, a member's 2015 Scheme benefits are called their 'assumed benefits' (as calculated under regulation 4(5)) and their 2009 Scheme benefits are called their 'underpin amount' (as calculated under regulation 4(6)).

2.8. The underpin comparison would take place on a member's underpin date. Under regulation 4(2), the underpin date was the earlier of the date the member attained their 2009 Scheme normal pension age (usually 65) and the date they left active membership of the scheme.

Why is it being changed?

2.9. Principally, the Transitional Regulations are being amended to remove the age-related element of the underpin qualifying criteria. This will address the unlawful discrimination found in the McCloud case.

2.10. Additionally, a number of related changes are being made to how the underpin works currently, with the aim of ensuring underpin protection works more fairly, consistently and effectively. The following points are noted in particular:

- Currently, regulation 4 of the Transitional Regulations requires that a member was in active service on 31st March 2012 specifically to qualify for underpin protection. Provision is being made so that underpin protection can apply to anyone who was in the LGPS (NI) on or before 31st March 2012, so long as they do not have a subsequent continuous gap in membership of a public service pension scheme of more than five years.
- Under the existing provisions, a member who moves to the LGPS (NI) from another public service pension scheme will only qualify for underpin protection

on the service they build up in the LGPS (NI) if they transfer the previous membership into the LGPS (NI). In line with cross-government policy, we are amending the regulations so that there is no requirement to transfer in previous public service pension scheme membership to qualify for underpin protection. Instead, if a member was in another public service pension scheme on or before 31st March 2012, moves to the LGPS (NI) and meets the other qualifying criteria, they will have underpin protection for the protected period (referred to as the underpin period), whether they transfer the previous membership to the LGPS (NI) or not.

- Regulation 4 of the Transitional Regulations provides that the underpin comparison takes place on a member's underpin date, which is defined as being the earlier of the date a member reaches their 2009 Scheme normal pension age and the date they leave active membership of the Scheme with an immediate entitlement to benefits. There are a number of practical issues with this, which we are seeking to address:
  - The current underpin date definition does not provide what should happen if a member dies before either of the two events occurring. The Regulations clarify that an underpin comparison should be undertaken after a member's death and be considered in the calculation of survivor benefits.
  - As the current underpin date definition requires that a member has an immediate entitlement to benefits when they leave active membership of the scheme, it requires that a member must be at least 55 (the earliest age a member can elect to immediately receive their pension) to get underpin protection. This is being changed so that the underpin works for members who leave with only a deferred entitlement to benefits (i.e. they are younger than 55).
  - The current underpin date definition does not take into account the effect 'actuarial adjustments' might have on the comparison of benefits. In the LGPS (NI), where a member takes their pension at an age other than their normal pension age (this is usually 65 in the 2009 Scheme and state pension age in the 2015 Scheme), actuarial adjustments may apply. Actuarial adjustments are reductions (if a member retires before their normal pension age) or enhancements (if a member retires after their normal pension age) which are applied to a person's pension to reflect that they will be receiving the pension for a longer time or a shorter time, whichever is applicable. The adjustments are intended to ensure the member receives the same value pension overall, regardless of when they take it for the first time. Currently, the underpin comparison takes place on a member's underpin date. However, this could be many years before they take their pension, and therefore before the quantum of actuarial adjustment is known. A new set of calculations is, therefore, being introduced which take place at a member's 'final underpin date' when it can be sure the underpin calculations give the correct outcome for each member. The final underpin date usually takes place when the date of benefit crystallisation and type of benefits the member takes from the Scheme is confirmed. Undertaking a final comparison on this date, and tailoring the calculations to the way in which a member is taking their benefits, allows the policy intent to be met that a member receives the higher of their 2009 Scheme and 2015 Scheme pensions for the underpin period.

- Regulation 4 of the Transitional Regulations does not explicitly clarify what should apply in relation to a number of situations, including how the underpin should be taken into account in the calculation of survivor benefits (pensions that are payable to qualifying partners and eligible children after a member dies), how the underpin calculation should work if a member leaves the LGPS (NI) but then rejoins, and how the underpin calculation should work if a member takes flexible retirement (where a member remains in work but takes some or all of their accrued pension). These new Regulations seek to address these and other similar gaps.

2.11. Changes are also being made to reflect that the new Regulations arise from a discrimination remedy which is retrospective:

- Retrospection – Some LGPS (NI) members affected by the remedy will have already retired from the Scheme or otherwise taken their benefits. In the Regulations, specific provisions are included which set out how the calculations should work retrospectively to ensure that the member is not detrimentally impacted by the fact that the calculations are taking place after their original benefit calculation.
- Interest – As retrospection is a core part of the remedy, the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions (Northern Ireland) 2023 ("the PSP Directions") set out a cross-government approach to the interest terms that must apply where payments of different types are paid late. As required by the 2022 Act, the new Regulations implement the policy set out in the PSP Directions.
- Compensation – The 2022 Act sets out the circumstances where compensation relating to the discrimination or the remedy is permitted. The Act's provisions are built on in the PSP Directions, which contain more detail on the circumstances where compensation may be payable. As required by the 2022 Act, the new Regulations implement the policy set out in the PSP Directions.

What will it now do?

2.12. The new Regulations implement the McCloud remedy and incorporate the changes identified above. They are broken down into the following parts.

2.13. **Part 1 (General Provision)** – Contains general provisions relating to the Regulations, including the coming into operation date of these Regulations, 1st October 2023.

2.14. **Part 2 (Amendments relating to the statutory underpin)** – The part of these Regulations which makes the principal changes, setting out the substantive changes that are being made to how the underpin works. Amongst the changes being made, regulation 2 replaces the current regulation 4 of the Transitional Regulations, with effect from 1st October 2023, by the addition of 20 new regulations (regulations 4A to 4T).

2.15. In general, the provisions apply in relation to 'eligible members' over the 'underpin period' (regulation 4A). Eligible members are those LGPS (NI) members who are entitled to underpin protection, being those who have remediable service under the 2022 Act or have transferred remediable service into the 2015 Scheme from another public service pension scheme. The underpin period is the period statutory underpin protection applies for – the period when the 'best of both' of the 2009 and 2015

Schemes applies. It runs from 1st April 2015 and ends with the earlier of 31st March 2022, and the date when the eligible member attains their 2009 Scheme normal pension age (usually 65).

2.16. The underpin is assessed in two stages for each eligible member. The underpin date (regulation 4G) is the date that the 2009 and 2015 Scheme pensions are valued for the purposes of the underpin comparison. The calculations undertaken at the underpin date are the provisional assumed benefits (regulation 4I), which is the value of the eligible member's 2015 Scheme benefits, and the provisional underpin amount (regulation 4J), which is the value of the eligible member's 2009 Scheme benefits.

2.17. To ensure that the underpin works effectively for members of different types, the underpin comparison does not take place until a member's final underpin date (regulation 4H). This is the date a member retires or they otherwise take their benefits from the Scheme. At the final underpin date, a member's provisional assumed benefits and provisional underpin amount are updated, respectively, to give the final assumed benefits (regulation 4K) and the final underpin amount (regulation 4L). The calculation of 'final' values at this point is necessary to ensure that the underpin comparison gives the correct outcome on which of the 2009 and 2015 Schemes' benefits are higher at the point final benefit calculations are taking place. Where the final underpin amount is higher than the final assumed benefits on the final underpin date that is referred to as a final guarantee amount.

2.18. What happens at the final underpin date varies according to the way the pension is taken and is provided for in regulations 4B to 4F. Regulation 4B covers normal, redundancy and ill-health retirements. It provides that where there is a final guarantee amount at an eligible member's final underpin date, this should be added to the member's pension account. Regulation 4C covers flexible retirement. Regulation 4D covers trivial commutation and lump sum payments. Regulation 4E covers members who transfer out to another scheme. Regulation 4F covers members who leave with only an entitlement to a refund from the scheme.

2.19. Part 2 also covers the following matters:

- Regulations 4M and 4N set out how the underpin should apply to the calculations of survivor benefits and death grants following the death of an eligible member.
- Regulation 4O covers situations where a member has multiple pension accounts, which arise from pension built up either concurrently or consecutively.
- Regulations 4Q to 4T of the Transitional Regulations cover the circumstances where compensation may be payable and set out the interest terms for indirect compensation.
- A number of consequential technical amendments to the 2014 Regulations that are necessary to ensure the underpin works effectively are made through regulation 3.

2.20. **Part 3 (Provision for certain classes of person, including retrospective provision)** – This part sets out how the provisions in Part 2 should apply to eligible members where events relating to their underpin protection will have already taken place before these Regulations come into operation (i.e. in the period between 1 April 2015 and 30 September 2023). These provisions are intended to ensure that an eligible member should see no detriment from the fact that these calculations are retrospective, and that they get the full benefit of the remedy contained in Part 2. Regulation 14 outlines the interest terms that should be applied to different payments arising under Part 3, in line with the relevant provisions of the PSP Directions.

2.21. **Part 4 (Minor Amendments)** - This Part includes some minor amendments unrelated to the McCloud Remedy. These are in respect of the following –

- Regulation 15 of the Regulations amends regulation 12 (application of abatement policy in individual cases) in the LGPS (Amendment and Transitional Provisions) Regulations (NI) 2009 (SR 2009 No. 34) to ensure the continuity of the abatement provisions and has retrospective effect from 1st April 2009.;
- Regulation 16 amends regulation 3 (membership before 1 April 2015) in the Transitional Regulations to correct a cross reference, ensuring the continuity of the abatement provisions and has retrospective effect from 1st April 2015; and
- Regulations 17 and 18 make minor amendments to correct 2 drafting errors in the LGPS (Amendment) Regulations (NI) 2023 (SR 2023 No. 83) which changed the revaluation date in the LGPS (NI) from 1 April to 6 April and have retrospective effect from 1st April 2023.

Policy Background

2.22. In April 2015 a series of changes were made to the LGPS (NI) to reform the scheme's benefits structure (the Scheme). These changes were implemented as part of a wider project across the United Kingdom to reform public service pensions and put them on a more sustainable, affordable and fairer footing for the longer term. Reformed schemes included transitional protection elements which meant that those within ten years of retirement at 2012 would not be affected by the changes. In the LGPS (NI), all members were moved to the new scheme but protected members have an underpin which means that, on retirement, they get the better of the benefits under the two schemes.

2.23. In July 2019([2]), the government accepted that the McCloud judgment impacted all schemes that provided similar protections and has since been working on implementing a remedy. In May 2021, the Minister for Levelling up, Housing and Communities made a written ministerial statement([3]) which was laid before Parliament confirming how the McCloud Remedy would be taken forward in the LGPS (England & Wales).

2.24. On 1 November 2021, the Assembly agreed a legislative consent motion tabled by the Minister of Finance requesting that the Assembly endorse the extension to Northern Ireland of provisions to implement the remedy solution for age discrimination in public service pension schemes (amongst other matters) in the Public Service Pensions and Judicial Offices Bill as introduced in the House of Lords on 19 July 2021. The Public Service Pensions and Judicial Offices Act 2022([4]) (the 2022 Act) received Royal Assent in March 2022 and provides the framework within which the McCloud judgment will be addressed.

2 Written statements - Written questions, answers and statements - UK Parliament
3)Written statements - Written questions, answers and statements - UK Parliament
4 Public Service Pensions and Judicial Offices Act 2022 (legislation.gov.uk)

2.25. These Regulations will address the discrimination in the LGPS (NI) by extending the underpin protection to all eligible members of the scheme.

3. Consultation

3.1. As required by section 21 of the 2014 Act, the Department has consulted with such persons or representatives of such persons as appeared to the Department to be appropriate. In 2020/21 the Department consulted on a broad range of issues relating to the McCloud Remedy. A further consultation was launched in July 2023 to address specific issues covered in the first consultation as well as supplementary proposals not covered in the first consultation. 9 responses were received and these were generally supportive of the proposals.

3.2. Copies of the consultation papers and the Department's Response can be found on the website for the Department for Communities.

4. Equality Impact

4.1. The Department has given consideration to compliance with section 75 of the Northern Ireland Act 1998 and has conducted a screening analysis to identify any significant discriminatory or negative differential impact on any particular section 75 group. The screening analysis concluded that a full equality impact assessment is not required as no adverse impacts have been identified.

5. Regulatory Impact

5.1. The Department considers that the amendments will not have a direct impact on businesses, charities, social economy enterprises or the voluntary sector.

6. Financial Implications

6.1. No Executive expenditure required.

7. Section 24 of the Northern Ireland Act 1998

7.1. The Department is satisfied that the Regulations comply with section 24 of the Northern Ireland Act 1998.

8. EU Implications

8.1. Not applicable.

9. Parity or Replicatory Measure

9.1. Not applicable.

10. Additional Information

10.1. Not applicable.

11. 21 day rule

11.1. The 21 day rule is the convention by which a Statutory Rule should be made and laid before the Assembly at least 21 days before coming into operation.

11.2. The Department regrets that on this occasion it has not been possible to observe this rule because the Department was awaiting a final copy of the Statutory Instrument (SI) on which these Regulations are closely based, as a matter of policy. The SI was published on 8 September 2023 The Regulations must be in place by 1 October 2023, the date specified in section 131(2)(e) of the Public Service Pensions and Judicial Offices Act 2022 for when that Act comes into force in respect of local government pension schemes. Unfortunately, this has meant that it has not been possible to make the Regulations 21 days before coming into operation.