

**EXPLANATORY MEMORANDUM TO**  
**THE ARMED FORCES PENSIONS (AMENDMENT) REGULATIONS 2022**  
**2022 No. 323**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence (MOD) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 These regulations make consequential amendments to the rules of various armed forces pension schemes to ensure that they reflect the provisions of the Public Service Pensions Act 2013 (“the 2013 Act”), as amended by Chapter 4 of Part 1 of the Public Service Pensions and Judicial Offices Act 2022 (“the 2022 Act”). Part 1 of the 2022 Act makes provision for amendments to public service pensions as a result of the finding of unlawful age discrimination under certain transitional arrangements in the cases of *Lord Chancellor & Anor v McCloud & Ors, Secretary of State for the Home Department v Sargeant & Ors* [2018] EWCA Civ 2844 (*McCloud*).
- 2.2 The provisions in Chapter 4 of Part 1 of the 2022 Act amend the 2013 Act in order to close relevant pre-2015 legacy pension schemes to all future pension accrual, so that all active members will accrue pension in the reformed schemes from 1st April 2022. These regulations also make retrospective amendments to transitional provisions previously made in 2015<sup>1</sup>; and make consequential amendments (some of which are retrospective) to the reformed pension scheme, the Armed Forces Pension Scheme 2015.

**3. Matters of special interest to Parliament**

***Matters of special interest to the Joint Committee on Statutory Instruments***

- 3.1 The MOD apologises to the Committee that this instrument, some provisions of which come into force on 31st March 2022 and the remainder on 1st April 2022, is laid in breach of the 21-day rule.

The instrument could not have been made and laid sooner because it is dependent on the 2022 Act, which received Royal Assent on 10 March 2022. Chapter 4 of Part 1 of the 2022 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 6 below).

In particular, section 88(2)(c) of the 2022 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 various armed forces pension schemes affected. This provision must come into force immediately after the legacy

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<sup>1</sup> The Armed Forces (Transitional Provisions) Pensions Regulations 2015 (S.I. 2015/568).

pension schemes are closed to future accrual by the 2022 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.

Scheme members have been on notice, through consultation processes, including the HM Treasury's consultation document of July 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 10 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.

- 3.2 This instrument has been made in part in consequence of defects in SI 2014/2336 and 2015/568. These defects are outlined in paragraph 7.16. Although this instrument combines new and correcting provisions, MOD considered that the corrections made up a significant part of the instrument and the free issue procedure would be appropriate. In accordance with paragraph 4.7.6 of Statutory Instrument Practice, MOD has consulted with the Statutory Instrument Registrar on the use of this procedure in relation to this instrument.

#### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom, and it applies to members of the armed forces pension schemes wherever they are in the world.

#### **5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

#### **6. Legislative Context**

- 6.1 The 2013 Act provides the framework for reformed public service pensions, most of which were introduced in 2015, with transitional arrangements for those who were within ten years of their normal pension age on 31st March 2012. The 2022 Act amends the 2013 Act to close legacy public service pension schemes (which existed before 1st April 2015) to future accrual after 31st March 2022, thus ending those transitional arrangements. This is part of the Government's strategy for remedying the unlawful age discrimination found in the *McCloud* judgment (see next section for further details).

These regulations make consequential amendments to six legacy armed forces pensions schemes and the reformed scheme to ensure that they reflect the provisions of the primary legislation. It does so by making amendments to the 2015 transitional arrangements – contained in the Armed Forces (Transitional Provisions) Pensions Regulations 2015 (“the 2015 transitional provisions”) – and the reformed scheme. Some of these changes are retrospective in order to correct defects identified on review.

## 7. Policy background

### *What is being done and why?*

- 7.1 In 2010 Lord Hutton of Furness was invited to chair the Independent Public Service Pensions Commission (IPSPC). The IPSPC was tasked with undertaking a fundamental structural review of public service pension provision: this led to reformed public service pension schemes being introduced for workers in local government, teachers, the NHS, the armed forces, firefighters, police, judiciary and civil service. As part of the 2015 reforms, those within ten years of the normal pension age remained in their legacy pension schemes, while other, usually younger, members had to move into the new, reformed, schemes.
- 7.2 In December 2018, the Court of Appeal in the case of *McCloud* (see paragraph 2.1) found that these transitional arrangements gave rise to unlawful age discrimination, as this transitional protection was only offered to older scheme members. The government accepted that this age discrimination applied across all the public service pension schemes which had implemented similar transitional arrangements. In July 2020 the Government launched a public consultation on options to remedy the discrimination, and also measures to bring the ongoing discrimination to an end. The Government published its Response to that consultation in February 2021<sup>2</sup>, and in July 2021 the Public Service Pensions and Judicial Offices Bill 2021, which provides the legal framework for the remedy, was introduced into Parliament. The Bill received Royal Assent on 10 March 2022.
- 7.3 The *McCloud* remedy has two strands: a prospective strand in which the Government brings the ongoing discrimination to an end on 1st April 2022, and a retrospective strand, in which the Government will amend pension schemes to provide a remedy for those who have suffered the discrimination. The retrospective strand must be implemented by 1st October 2023 and these regulations do not deal with that strand of the remedy.
- 7.4 The prospective strand of the remedy is implemented through primary legislation (see paragraph 6.1) which effects the complete closure of all legacy pension schemes to further accrual after 31st March 2022. Those members who had been allowed to remain in their legacy schemes in 2015 will move to the reformed schemes, so that all members are treated equally by accruing pension in the same pension scheme.
- 7.5 Although the legacy schemes are closed by primary legislation, the legacy pension scheme rules require updating to reflect the change in the law (this is done by amending the 2015 transitional provisions), with corresponding amendments to the reformed scheme. This exercise has identified a number of amendments that need to be made with retrospective effect to ensure the 2015 transitional provisions and the reformed scheme work as intended for members, and they do not suffer detriment.
- 7.6 The affected armed forces pension schemes are the following:
- Armed Forces Pension Scheme 1975 (AFPS 75);
  - Armed Forces Pension Scheme 2005 (AFPS 05);
  - Armed Forces Early Departure Payments Scheme 2005 (EDP 05);

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<sup>2</sup> <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>

- Reserve Forces Pension Scheme 2005 (RFPS 05);
- Full-Time Reserve Service Pension Scheme 1997 (FTRS 97);
- Non Regular Permanent Staff Pension Scheme 2011 (NRPS 11); and
- Armed Forces Pension Scheme 2015 (AFPS 15)

Closing legacy schemes: common provisions

- 7.7 Members who were given transitional protection in 2015 and remained in their legacy schemes are known as full protection members in the legacy armed forces pensions schemes. Full protection members of a legacy scheme cannot belong to the AFPS 15 in relation to service that would be pensionable under the legacy scheme. These regulations amend the transitional rules in each scheme to bring full protection to an end for all members by no later than 31st March 2022. This means that these members will be eligible to become active members of the AFPS 15 from 1st April 2022.
- 7.8 In 2015, transitional provisions allowed members who were in the process of being assessed for ill-health retirement to remain in their legacy schemes until a decision had been made. These provisions are not consistent with the closure of the legacy schemes and are revoked.

UN/NATO secondments/loans - AFPS 75, AFPS 05, RFPS 05 and AFPS 15

- 7.9 Members of the AFPS 75, the AFPS 05 and the RFPS 05 who are seconded or on loan to an external organisation (such as the UN or NATO) may, if they return to pensionable service in the armed forces, purchase additional reckonable service to cover the period of secondment/loan if they meet certain conditions. Members of the AFPS 15 in a similar position may purchase added pension for that period of service, on meeting similar conditions.
- 7.10 Members who transition from a legacy scheme to the reformed scheme while on secondment/loan have the opportunity to purchase reckonable service in their legacy scheme up to the date of transition, and to purchase additional pension in the AFPS 15 for the remaining period of their secondment/loan. However, they must apply for this facility in both schemes so that the entire period of seconded/loan service is pensionable under an armed forces pension scheme.
- 7.11 These regulations amend the AFPS 75, the RFPS 05 and the AFPS 15 to take account of members who transition to the AFPS 15 in consequence of the 2022 Act, to clarify the requirement that the reckonable service or added pension must be purchased in both the legacy scheme and the AFPS 15, and to ensure contributions and lump sums returned to the member from the external organisation's scheme are appropriately apportioned across the legacy scheme and the AFPS 15. This provision on secondment/loans was also entirely omitted, in error, from the transitional provisions in the AFPS 05 rules in 2015 and these regulations now insert the necessary rule. These amendments are made with retrospective effect to ensure that the rules operate as intended for all transitional members and that members of the AFPS 05 do not suffer a detriment in not being able to purchase reckonable service.

Minor and consequential amendments

- 7.12 In both the AFPS 05 and the RFPS 05, retrospective amendments correct an error in the 2015 transitional provisions relating to who could be full protection members of

those schemes. MOD's policy intent at the time was that where a person who had been protected in an older legacy public service scheme which had been closed to new members before 31st March 2012 (e.g. the AFPS 75, the FTRS 97 or the NRPS 11), joined (or re-joined) the armed forces, they could (if they met all the criteria) return as full protection members of the applicable 2005 scheme (the AFPS 05 or the RFPS 05). The original drafting of the 2015 transitional provisions inadvertently excluded this possibility. This is corrected (in regulations 3(2)(c) and 5(2)(d)). The power under which these corrections is made is section 18(5) of the 2013 Act, which will be repealed by the 2022 Act on 1st April 2022. Accordingly, these two provisions come into force on 31st March 2022 and take effect from 1st April 2015.

- 7.13 In the AFPS 15, an amendment clarifies that members who had opted out of a legacy scheme do not automatically become active members of the AFPS 15 in connection with that service when they transition. This ensures that members who have opted out are not involuntarily returned to pensionable service without their express consent. This amendment is made retrospective to reflect the fact that this has been MOD's policy since 2015.
- 7.14 There is also a retrospective amendment to the meaning of qualifying service in the AFPS 15. At present, a member is only entitled to count service in a connected legacy scheme on or before 31st March 2015 as qualifying service in the AFPS 15. These Regulations replace references to 31st March 2015 with references to the member's transition date: that is, the point the member joined the AFPS 15. This takes account of members who join the AFPS 15 in consequence of the 2022 Act. It is also necessary to update this reference retrospectively to take account of members who joined the AFPS 15 after ceasing to be full protection members between 2015 and the present.
- 7.15 Minor consequential amendments are made to dates specified within the schemes' rules to ensure that they will work smoothly both for those who transitioned to the new scheme in 2015, and for those who will transition in 2022.

*Provision with retrospective effect*

- 7.16 As noted, there are provisions in these Regulations which have effect from 1st April 2015 and are therefore retrospective. They are made in reliance on powers in section 3(3)(b) of the 2013 Act. The provisions with retrospective effect are:
- the provisions on UN or NATO secondments/loans [see paragraphs 7.9 to 7.11];
  - the provisions correcting the error concerning re-joiners who can be full protection members of the AFPS 05 or RFPS 05 [see paragraph 7.12]
  - the provision clarifying that opt outs of legacy schemes apply to the AFPS 15 [see paragraph 7.13]
  - the provision amending the meaning of qualifying service in the AFPS 15 [see paragraph 7.14].
- 7.17 The MOD has considered whether any of these provisions give rise to the enhanced consultation requirement contained in section 23 of the 2013 Act. The amendments make clarificatory and correcting provision to ensure that the 2015 transitional provisions and AFPS 15 provisions operate as intended. It appears to the MOD that none of these changes will have significant adverse effects in relation to the pension

payable to or in respect of members of the scheme. Similarly, it appears to the MOD that none of these changes will have significant adverse effects in any other way in relation to scheme members. The enhanced consultation requirement in section 23 therefore does not apply.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 The Department has no plans to consolidate the armed forces pensions legislation at this time.
- 9.2 Copies of the instruments relating to Schedule 1 of the AFPS 75 can be found at [www.gov.uk/government/publications/armed-forces-pension-scheme-1975-regulations](http://www.gov.uk/government/publications/armed-forces-pension-scheme-1975-regulations). Hard copies can be obtained from Ministry of Defence, AF Remuneration - Pensions, Main Building, Level 6 Zone M, Whitehall, London SW1A 2HB.
- 9.3 Copies of the Defence Council Regulations relating to the RFPS 05, the FTRS 97 and the NRPS 11 can be found at [www.gov.uk/government/publications/reserve-forces-pensionscheme-regulations](http://www.gov.uk/government/publications/reserve-forces-pensionscheme-regulations). Hard copies can be obtained from Ministry of Defence, AF Remuneration - Pensions, Main Building, Level 6 Zone M, Whitehall, London SW1A 2HB.

## **10. Consultation outcome**

- 10.1 The MOD ran a public consultation exercise on these measures between 22st November 2021 and 31st January 2022. All Service Personnel, veterans, and expert organisations were invited to comment on the draft legislation. A total of 37 responses were received: 34 from individuals and three from organisations (Forces Pension Society, Royal British Legion and the British Medical Association).
- 10.2 The Consultation and Government Response can be found here: [AFPS Future Pension Provision](#). The majority of the individual responses did not address the issues raised in the consultation, covering instead wider pension issues and/or the personal situation of the respondent(s). Of the three organisational stakeholders who responded, two agreed that the draft regulations were consistent with the Government's policy to close the legacy schemes and transfer all members to the reformed schemes, and raised no concerns regarding the other measures set out in this instrument. The third organisation did not express a view, but took the opportunity to put forward proposals on advice and support for the armed forces community.

## **11. Guidance**

- 11.1 Updated guidance will be available to members through the internal intranet. Scheme administrators will also be contacting all members who are directly affected by these regulations.

## **12. Impact**

- 12.1 There is no impact on business, charities or voluntary bodies.

12.2 It is anticipated that c3,000 serving personnel will be moved into the new scheme on 1 April 2022. Existing regulations and processes which deal with transitional members will apply to them, and there is no requirement to develop additional processes.

12.3 An Impact Assessment has not been prepared for this instrument as a result.

### **13. Regulating small business**

13.1 The legislation does not apply to activities that are undertaken by small businesses.

### **14. Monitoring & review**

14.1 The rules of the armed forces pension schemes are kept under regular review by the Ministry of Defence.

### **15. Contact**

15.1 Gill Martin at the Ministry of Defence Telephone: 0207 807 8914 or email: [Gill.Martin959@mod.gov.uk](mailto:Gill.Martin959@mod.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Air Commodore Adrian Bettridge, Head of Armed Forces Remuneration at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

15.3 Leo Docherty MP, Minister for Defence People and Veterans at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.