

EXPLANATORY MEMORANDUM TO
THE TEACHERS' PENSION SCHEME (REMEDIAL SERVICE) REGULATIONS
2023

2023 No. 871

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 The instrument relates 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 instrument therefore includes 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. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

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 Teachers' Pension Scheme is governed by The Teachers' Pensions Regulations 2010 ([S.I. 2010/990](#)) which provide for legacy final salary schemes with Normal Pension Ages of 60 and 65, and The Teachers' Pension Scheme Regulations 2014 ([S.I. 2014/2651](#)) (The 2014 Regulations), which provide for a reformed career average revalued earnings scheme with a Normal Pension Age linked to the member's State Pension Age.

- 6.2 The Public Service Pensions Act 2013 provided for the reform of public service pension schemes, including the Teachers' Pension Scheme, and introduced transitional protection arrangements which allowed older workers to continue accruing pension in the existing legacy schemes whilst younger workers were moved into the reformed schemes. The 2014 Regulations were made under powers contained in the 2013 Act.
- 6.3 The Court of Appeal subsequently found in the cases of Lord Chancellor and another v McCloud and others, Secretary of State for the Home Department v Sargeant and others [2018] EWCA Civ 2844 that the transitional protection arrangements unlawfully discriminated against younger members of the judicial and firefighters' pension schemes. The Government accepted that the discrimination found by the Court of Appeal applied to all public service pension schemes containing equivalent transitional protection and would need to be retrospectively remedied.
- 6.4 The Government has legislated to this effect in the PSPJO Act. The regulations are being made in consequence of provisions in the PSPJO Act to deliver the retrospective remedy. The 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 2022.

7. Policy background

What is being done and why?

- 7.1 As the difference in treatment between certain members of some of the other public service pension schemes was found to be discriminatory, this must be addressed including in the Teachers' Pension Scheme where equivalent changes were made. The transitional protection provisions allowed older members, those within ten years of their Normal Pension Age, to remain in the legacy sections of their schemes, whilst the other (younger) members were moved into new arrangements. The Government consulted on options to address the discrimination in July 2020, and following that consultation has provided for the prospective and retrospective remedies in the PSPJO Act.
- 7.2 These regulations are made in consequence of the PSPJO Act and deliver the retrospective remedy covering the period where there was a difference in treatment between 1 April 2015 and 31 March 2022.
- 7.3 The prospective remedy, which involved the closure of the legacy (final salary) section to any further accrual on 31 March 2022, thereby equalising treatment of members from that point onwards, was achieved via The Teachers' Pension Scheme (Amendment) Regulations 2022.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.4 Prior to the provisions made in these regulations, 'full protection' members of the final salary sections of the Teachers' Pension Scheme, would have final salary

retirement benefits for their service during the remedy period. Members who transitioned to the reformed scheme would have career average benefits for some or all of their service during the remedy period (depending on the date on which they transitioned to the reformed scheme).

- 7.5 For ‘unprotected’ members the date of transition was 1 April 2015, but for ‘tapered protection’ members, those who were between 10-13.5 years from their scheme Normal Pension Age when the reforms were announced, they moved across at a later date.

Why is it being changed?

- 7.6 The difference in treatment afforded to older members who received transitional protection (on account of their proximity to their scheme Normal Pension Age) was found to be discriminatory. The Government undertook to remedy the discrimination across all affected public service pension schemes.

What will it now do?

- 7.7 In order to equalise treatment, the PSPJO Act provides that members who accrued benefits during the remedy period in a reformed scheme will have that service rolled back to their relevant legacy scheme for that period. This means that all members with remedy period service will have accrued that service in the legacy scheme when the relevant section takes effect on 1 October 2023. The PSPJO Act also requires schemes to make regulations in order to allow affected members to choose between legacy and equivalent reformed scheme benefits for the remedy period.
- 7.8 The SI is a standalone set of regulations which makes provision for members with service during the remedy period to be offered a choice between legacy scheme and reformed scheme benefits. Where members have crystallised benefits prior to 1 October 2023, they will be provided with that choice as soon as possible after 1 October 2023.
- 7.9 The SI also makes provision for consequential and procedural changes required as a result of the PSPJO Act. This includes providing Remediable Service Statements to affected members which will provide information about retirement benefit options. The SI also makes provision to manage the consequences of rollback and/or member choices in relation to issues such as: voluntary contributions, Pension Sharing Orders, transfers and ill-health retirement during the remedy period, and liabilities for any under or over paid amounts.

Introductory provisions – Part 1

- 7.10 This is an introductory provision which details the citation, coming into force date and extent of the regulations.

Remediable service statements Part 2

- 7.11 The regulations make provision requiring the scheme manager to issue Remediable Service Statements to affected members or, in the case of deceased members, to eligible decision makers (please see paragraph 7.36). The Remediable Service Statement will provide members with all of the information they need in order to be able to make an informed choice about what retirement benefits they wish to receive for the remedy period. The regulations include details about when statements will be provided to specific member groups as well as the contents of the statement.

Decisions about the treatment of remediable service Part 3

Opted-out service elections - Chapter 1

- 7.12 Members who opted-out of the Teachers' Pension Scheme, but who would otherwise have had remediable service in the scheme, may apply to have that service reinstated. The regulations include details of how an application can be made including timescales and what criteria the member must satisfy in order for an application to be accepted. Where an application is accepted, the regulations provide that a member will be issued with a Remediable Service Statement which will include details of contributions owed by the member for the service and how those contributions can be paid. The member will then have a specific period of time to confirm that they want their service to be reinstated. Where service is reinstated, the member will be treated in the same way as any other eligible member i.e., they will have a choice of benefits for the remedy period.

Immediate choice decision for reformed scheme or legacy scheme benefits - Chapter 2

- 7.13 The regulations include provision for members who retired or died before 1 October 2023 to be given an Immediate Choice to take legacy scheme or reformed scheme benefits for the remedy period. Where a member has died, the choice will be made by an eligible decision maker (see paragraph 7.36). The regulations provide that these members may make an immediate choice decision to elect reformed scheme benefits for the remedy period, or not to make an election and to take legacy scheme benefits for the remedy period. Regulations include details of the timescales and effect of any decision. The regulations also make provision allowing the scheme to deem that an election for reformed scheme benefits has been made where no decision is communicated to the scheme before the end of the election period and where an election would result in the member receiving a higher value of benefits (as calculated by the scheme administrator).

Deferred choice decision for reformed scheme or legacy scheme benefits - Chapter 3

- 7.14 The regulations include provision for active and deferred members of the scheme to be given a Deferred Choice (at the point of retirement) to take legacy or reformed scheme benefits for the remedy period when they come to retire. The regulations make the member's Deferred Choice decision a requirement of the overall retirement process. Where no decision is communicated to the scheme no benefits are payable.
- 7.15 Where a Deferred Choice member dies before making their decision or dies after making their decision but before benefits have been put into payment, a Remediable Service Statement will be issued to an eligible decision maker who will then make the choice. Where no choice is communicated before the end of the election period, the regulations make provision for the scheme to deem an election for reformed scheme benefits to have been made where an election would result in the member receiving a higher value of benefits.
- 7.16 Where a Deferred Choice member applies for retirement with an intended retirement date that precedes a Remediable Service Statement, for example where the scheme manager is not able to issue a Remediable Service Statement to the member prior to the date that benefits are payable, the regulations allow for the scheme manager to pay the member legacy scheme benefits in relation to their remediable service. The benefits that will be put into payment will not include rights arising from voluntary contributions (additional scheme flexibilities) paid to the scheme during the remedy

period. The member will then be issued with a Remediable Service Statement and will have 12 months to confirm their decision. Calculations in the Remediable Service Statement will include those in relation to any voluntary contributions. Corrections to benefits would be made in accordance with the member's choice where relevant.

- 7.17 Where a Deferred Choice member dies before their decision has been confirmed, regulations make provision for bereavement benefits to be paid. The benefits would be the lesser of the benefits available under the legacy or reformed scheme. Any necessary adjustments would then be made in accordance with the eligible decision maker's choice, or any deemed election where relevant.

Provision about divorce and dissolution arrangements - Part 4

- 7.18 The regulations include provision about the treatment of Pension Sharing Orders that include a member's remediable service. The provisions provide for the calculation or recalculation of the value of a pension debit and corresponding pension credit which ensure that the impact of the remedy is considered in calculations and resulting values.
- 7.19 The regulations also make provision about the calculation of the value of rights for the purposes of sharing those rights under an arrangement other than a Pension Sharing Order.

Voluntary contributions- Part 5

- 7.20 The regulations include provision about the treatment of the rights arising from voluntary contributions a member has purchased during the remedy period. This is in relation to determining the value of pension rights arising from voluntary contributions in the scheme other than the scheme in which they were originally purchased, and elections that may be made in relation to a member's further pension rights.
- 7.21 The regulations also include provision enabling a member who did not have the opportunity to elect to purchase rights to Additional Pension under the legacy scheme during the remedy period to do so retrospectively.

Transfers - Part 6

- 7.22 The regulations include provision about the treatment of transfers in and out of the Teachers' Pension Scheme of pension rights that include a member's remediable service.
- 7.23 The regulations require the scheme manager to provide a Remediable Service Statement to a person who has transferred out rights in respect of remediable service.
- 7.24 The regulations include provisions about transfers in and out of the Teachers' Pension Scheme on a cash equivalent basis or a Club basis (transfers between equivalent public service schemes) including provision about the calculation or recalculation of the transfer value and the making and accepting of payments in relation to the transfer value of rights secured by virtue of remediable service.
- 7.25 The regulations include provision to vary the period during which a member may apply for rights to be transferred into the Teachers' Pension Scheme. This ensures that members do not miss the opportunity to transfer rights into the Teachers' Pension Scheme due to the timing of the implementation of the remedy.
- 7.26 The regulations confirm that where a member transferred service into the Teachers' Pension Scheme during the remedy period, the service is treated as being transferred

into the legacy scheme. Where a member elects reformed scheme service for the remedy period, regulations include provision to vary the value of the rights.

Provisions about special cases - Part 7

Ill-health retirement - Chapter 1

- 7.27 The regulations make provision for members who applied for ill-health retirement during the remedy period or in relation to their remediable service to be reassessed against the alternative scheme ill-health retirement criteria which applied at the time they made their application.

Protection of the amount of pension payable to an eligible child - Chapter 2

- 7.28 The regulations make provision for the protection of the amount of pension in payment to an eligible child of a deceased member. The regulations provide that where the surviving adult does not live in the same household as an eligible child and they make an Immediate Choice decision that would result in a reduction to that child's pension in payment, there will not be an overpayment created in respect of those benefits paid to date. The ongoing payment of the pension will also not be reduced.

Immediate choice members with excess teacher service - Chapter 2

- 7.29 Provision is included in the regulations to delay the rollback of Excess Teacher Service (pensionable service in addition to a full-time contract which is pensionable in the reformed TPS section but not pensionable in the legacy TPS section) accrued by retired members that would otherwise roll back to the Local Government Pension Scheme on 1 October 2023. The rollback is delayed until the member makes their Immediate Choice decision or the end of the election period. Where the member decides to take legacy scheme benefits, the excess service will roll back to the Local Government Pension Scheme. Where the member elects for reformed scheme benefits those benefits will include the Excess Teacher Service and will be paid from the TPS legacy scheme.

Premature Retirement - Chapter 2

- 7.30 The regulations include provision excluding Premature Retirement Compensation from remedy period benefit calculations. Premature Retirement Compensation is a form of compensation some employers choose to pay to certain employees who are retiring prematurely and therefore receiving actuarially reduced pension benefits. Premature Retirement Compensation is not part of the Teachers' Pension Scheme benefits.

Payment of annual allowance tax charges and provision of information – Chapter 2

- 7.31 The regulations include provision for where the deadline has passed for a member to make a Mandatory Scheme Pays election before they have been advised of any changes to their annual allowance position which may result in tax charges. The scheme will therefore accept a voluntary Scheme Pays election.

Liabilities and payment - Part 8

- 7.32 The regulations include various provisions about any amounts owed to or by a person as a result of provisions in the PSPJO Act or these regulations.

- 7.33 Provision is made for the calculation of interest on relevant amounts, for the increase of benefits instead of the payment of a relevant amount, for the making of an application where a person wishes to claim compensation in respect of the discrimination or implementation of the remedy and for the netting off of relevant amounts owed to and by a person.
- 7.34 Provision is included about the reduction and waiver of relevant amounts, in particular a requirement for the scheme manager to reduce some relevant amounts by tax relief amounts, the discretion of the scheme manager to reduce or waive relevant amounts owed by a person to a scheme in certain circumstances, and the option to defer payment of certain relevant amounts owed to a member until an election is made in relation to the member's remediable service.
- 7.35 The regulations also include provisions about when and how relevant amounts must be paid.

Eligible decision-maker for deceased member – Schedule

- 7.36 The regulations include a framework to identify the different categories of eligible decision-maker where a member has died before making their Immediate or Deferred Choice decisions. In most cases that decision-maker would be the surviving adult (the member's spouse, civil partner or surviving qualifying partner). There are some circumstances where there may be multiple beneficiaries and therefore the schedule provides a route to identify who the eligible decision-maker should be. Where no decision-maker can be agreed or identified, the scheme manager would be the decision-maker.

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 These regulations are separate to the main Scheme regulations. There are no imminent plans to consolidate the SI with existing Teachers' Pension Scheme regulations. The Department will continue to review and expects to consolidate at the appropriate time.

10. Consultation outcome

- 10.1 The draft SI and consultation document were published on 27 March 2023 and can be found here: www.consult.education.gov.uk/teachers-pension-scheme-transitional-protection/. The consultation was open for 10 weeks, closing on 4 June 2023. A total of 309 responses were received, 302 from individuals and seven from organisations which represent members and employers in the education sector.
- 10.2 Prior to the consultation, the Department discussed the proposed changes to Teachers' Pension Scheme rules with the Teachers' Pension Scheme Advisory Board. The Scheme Advisory Board is made up of member and employer representatives and provides advice on the desirability of changes to the Teachers' Pension Scheme rules.
- 10.3 Nearly all responses to the consultation 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

purchased 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 the scheme website, to aid member understanding of the retrospective remedy and make informed decisions. The Department has addressed all relevant comments in the consultation response document and the Department's full consultation response is available here: www.consult.education.gov.uk/teachers-pension-scheme-transitional-protection/.

- 10.4 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.

11. Guidance

- 11.1 Guidance on the rollback of service and the Deferred Choice (active members) and Immediate Choice (retired members) processes is available on the Teachers' Pensions website. Resources on the site include factsheets, videos and modellers. The website is supported by ongoing digital communications to members and employers and through direct engagement with employers through the provision of training resources.
- 11.2 Members and employers are informed of relevant updates regarding the McCloud case through a series of email campaigns and by working with key partners including member and employer representatives. The website can be accessed at <https://www.teacherspensions.co.uk/members/scheme-changes/transitional-protection.aspx>.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is limited to those members who have affected service during the remedy period. 590,076 members of the Teachers' Pension Scheme have been identified as having affected service.
- 12.3 A full Impact Assessment has not been prepared for this instrument because it relates to necessary changes to existing pension provision. The changes address discrimination in scheme rules and must be implemented in accordance with the PSPJO Act.
- 12.4 A brief [Impact Assessment](#) that considered the impact on the Exchequer and in turn the impact on UK taxpayers was accepted in 2012 for the previous Public Service Pensions Bill (PSPB). This was based on the position that the measures in the PSPB 2013 were public spending measures rather than regulation.
- 12.5 As then, segmented data on the minority of public service pension scheme employers who are classified to the private sector is not readily available. The system changes necessary to provide detailed segmented information on private sector employers would take a significant amount of time to design and implement. Additionally, to implement at a time when schemes' administration is stretched because of the focus on the design and delivery of the remedy would not be feasible.

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 instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Nick Gibb has made the following statement.
- 14.2 The Department does not consider that a review clause is necessary given that the changes are needed to address identified discrimination and cannot be reversed. Any instances of the approach not working as intended will be clear following implementation of rollback on 1 October 2023 and as members eligible for the remedy receive Remediable Service Statements and begin to confirm their remedy service choices.

15. Contact

- 15.1 Sarah Hutton at the Department for Education (sarah.hutton@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Peter Springhall, Deputy Director for the Teachers' Pension Scheme, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Nick Gibb at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.