

EXPLANATORY MEMORANDUM TO
THE CIVIL SERVICE (OTHER CROWN SERVANTS) PENSION SCHEME
(REMIABLE SERVICE) REGULATIONS 2023

2023 No. 963

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of His Majesty.
- 1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to put in place in respect of the Secret Intelligence Service and Security Service pension schemes ('agency schemes') new specific pension scheme regulations to fulfil the requirements of the Public Service Pensions and Judicial Offices Act 2022 ('PSPJOA 2022') to implement the McCloud retrospective remedy for affected members of the agency schemes. This instrument also puts in place measures for members who transferred to the agency schemes from civil service schemes between 1 April 2015 and 31 March 2016, to ensure they are not disadvantaged by the McCloud retrospective remedy. More detail is set out in sections 6 and 7 of this Explanatory Memorandum.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These Regulations contain ambulatory references to provisions of the Public Service (Civil Servants and Others) Pensions (Remediable Service) Regulations 2023 ('the 2023 Regulations'). This is so that the agency schemes continue to be by analogy to the Civil Service pension scheme ('alpha') established by the Public Service (Civil Servants and Others) Pensions Regulations 2014 (S.I. 2014/1964) ('the 2014 Regulations'), and so that any future technical modifications to the 2023 Regulations will flow through to this instrument. If any future changes to the 2023 Regulations are inappropriate for staff of the agencies, further provisions can be made by amending regulations to disapply the changes in respect of the agency schemes.

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 the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

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 Between 2014 and 2016, new ('reformed') public service pension schemes were established by regulations made under the Public Service Pensions Act 2013 ('PSPA 2013'). Transitional arrangements made as part of the 2014-2016 reforms enabled pension scheme members within 10 years of retirement to remain in their pre-existing pension ('legacy') schemes.
- 6.2 In December 2018, the Court of Appeal in *Lord Chancellor and Secretary of State for Justice and another v McCloud, Secretary of State for the Home Department and others v Sargeant and others* [2018] EWCA Civ 2844 (the 'McCloud judgment') found that transitional arrangements provided for in relation to the reformed judicial and firefighters' pension schemes discriminated against younger pension scheme members, also giving rise to indirect sex and race discrimination. On 27 June 2019, the Supreme Court denied the Government permission to appeal the Court of Appeal's judgment. The Government subsequently committed to apply a remedy across all affected public service pension schemes created under the PSPA 2013, legislating to this effect with the PSPJOA 2022.
- 6.3 This instrument forms new pension scheme regulations to implement the McCloud retrospective remedy for affected agency schemes, to put right the discrimination that occurred between 1 April 2016 when transitional arrangements under the PSPA 2013 first began, and 31 March 2022, when legacy schemes closed to future accrual.
- 6.4 The reformed agency scheme was established by the Civil Service (Other Crown Servants) Pension Scheme Regulations 2016 (S.I 2016/326) ('the 2016 Regulations'). The legacy agency schemes are defined as 'Connected Schemes' in the 2016 Regulations.
- 6.5 The Connected Schemes are by analogy to the legacy Civil Service schemes. The Civil Service legacy scheme sections are the Principal Civil Service Pension Scheme ('PCSPS') classic, premium (including classic plus) and nuvos arrangements. The reformed agency scheme established by the 2016 Regulations is by analogy to alpha. Accordingly, this instrument incorporates the 2023 Regulations by ambulatory reference, to ensure the agency schemes remain by-analogy to the Civil Service schemes.
- 6.6 The establishing provisions for alpha under the 2014 Regulations came into force a year earlier than the 2016 Regulations, on 1 April 2015. Accordingly, this instrument makes some modifications by ambulatory reference to accommodate the modifications made when incorporating the 2014 Regulations into the 2016 Regulations.
- 6.7 This instrument has retrospective effect, which is authorised by section 3(3)(b) of PSPA 2013.

7. Policy background

What is being done and why?

- 7.1 On 15 July 2019, the Chief Secretary to the Treasury made a written ministerial statement setting out that the Government considered that the McCloud judgment had implications for all public service pension schemes. The statement explained that the Government planned to make proposals to remedy the discrimination across all affected schemes.

- 7.2 HM Treasury carried out a public consultation in 2020 for the remedy solution and a written ministerial statement issued in 2021 set out that schemes would offer members a choice between their legacy or reformed pension schemes for the remedy period (1 April 2015 (or 2016 for some schemes) until 31 March 2022).
- 7.3 The PSPJOA 2022 provides the framework and legislative powers for public sector pension schemes to implement the remedy by 1 October 2023, via pension scheme regulations made under the PSPA 2013.
- 7.4 The fundamental principle of the remedy is, as far as possible, to put the member into the position they would have been in had the discrimination never happened, by returning all active and deferred members who were transitioned to the reformed scheme from 1 April 2016 to the respective legacy scheme they were in prior to 1 April 2016. This removes the age discrimination transitional protection by placing all members in the legacy scheme arrangements for the remedy period. This is referred to as ‘rollback’ and is the foundation for the provision of member pension benefits choices for the remedy period.
- 7.5 The purpose of these regulations is to put in place, in respect of the agency schemes, specific provisions to remedy the age discrimination that resulted from the transitional protection policy (‘McCloud retrospective remedy’).
- 7.6 The policy objectives set out in the PSPJOA 2022 that are relevant to these regulations are:
- to address discrimination that arose when legacy schemes were closed to certain members between 2014 and 2016; and
 - to deliver changes to public service pension schemes to ensure that all eligible public service workers have access to high quality defined benefit schemes on a fair and equal basis.
- 7.7 By virtue of the reference to the 2023 Regulations in this instrument, relevant agency pension scheme members will have the choice of pension scheme benefits between legacy and reformed schemes for the remedy period. The remedy is made up of two parts. The first part, the prospective remedy, was completed in 2022 with the closure of the legacy schemes and the moving of all active members of the agency schemes to the reformed scheme from 1 April 2022. This officially marks the end of the discrimination identified in the 2018 court judgment. The second part is the McCloud retrospective remedy. Remedial action may be necessary for members who have benefits for the remedy period and have either put them into payment or completed a relevant action that may affect remedy benefits. A relevant action could be the purchase of added pension, transferring between schemes or the implementation of a Pension Sharing Order. This instrument permits the Scheme to use powers provided by the PSPJOA 2022 to carry out the required remedy actions and to make further scheme provisions within the framework of the PSPJOA 2022. Regulation 4 of the instrument also provides for modifications to the application of the 2023 Regulations to the agency schemes to provide for certain unique characteristics of those schemes.

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 Cabinet Office has no plans to consolidate the legislation at this time.

10. Consultation outcome

10.1 Under the PSPA 2013, before making scheme regulations the Scheme Manager must consult such persons (or representatives of such persons) as appear to the Scheme Manager likely to be affected by them. For this instrument a written consultation was used to reach out to all members – active, deferred and pensioner – and also representatives of the members to gather opinions on the draft proposals. The consultation ran from 6 March 2023 to 14 May 2023. During the consultation period a number of engagement sessions were run with staff representatives who were available to answer member questions on the proposed regulations as set out in the consultation.

Engagement

- 10.2 Eight responses were received from scheme members and staff representatives. None of these responses contained objections to the proposed regulations themselves. However, those responses demonstrated members’ recognition of the complexity and an ensuing lack of understanding around certain elements of the regulations and a general dissatisfaction with the original reform. The majority of those responses did not directly answer the consultation questions, instead providing wider commentary about the remedy or referencing personal circumstances – such as issues around taxation and additional voluntary contributions. Direct responses have been sent to these members where appropriate.
- 10.3 The agencies’ consultation response was issued to staff representatives on 9 August 2023.

11. Guidance

11.1 No guidance has been produced to accompany this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 A full Impact Assessment has not been prepared for this instrument because this instrument follows the PSPJOA 2022, for which HM Treasury produced an impact assessment that can be seen using this link:
https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod_20220007_en.pdf
- 12.3 HM Treasury confirmed that the government’s estimate for removing unlawful discrimination across all public service pension schemes for the remedy period will cost on average £2.5 billion in additional future pension payments to all members in scope of the remedy for each year of the remedy period, totalling £17 billion. This estimate reflects the expected additional cost of members receiving benefits from whichever scheme provides the highest value to them for the remedy period.
- 12.4 As a full Impact Assessment was not completed, we have utilised this Explanatory Memorandum to assess the costs of these Regulations. Across the six-year remedy period, the increased costs of benefits as result of the McCloud retrospective remedy are in the region of £0.05 billion for the agency schemes.

- 12.5 The costs to the agency schemes will be captured in the 2020 Scheme Valuation, which is in progress at the time of publishing this Explanatory Memorandum. It will then also be allowed for in future valuations, which have a four yearly cycle.
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- 12.7 This instrument does not impose an additional cost on public sector bodies or the taxpayer, rather implements what has already been costed and accounted for during the McCloud litigation and passage of the PSPJOA 2022.
- 12.8 An equalities impact assessment was carried out with regard to the Public Sector Equality Duty provisions.

13. Regulating small business

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

14. Monitoring & review

- 14.1 These Regulations will be periodically monitored by the Scheme Manager and amended as necessary.
- 14.2 The instrument does not include a statutory review clause as the instrument provisions do not relate to business activity (including voluntary and community bodies).

15. Contact

- 15.1 Ian Korner, Head of Policy and Legislation for the 2015 Remedy Programme at the Cabinet Office, email: cspconsultation@cabinetoffice.gov.uk or telephone: 07469907095, can be contacted with any queries regarding the instrument.
- 15.2 Kerrie Cureton-Williams, Deputy Director for Civil Service & Royal Mail Pensions, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Alex Burghart, Parliamentary Secretary at the Cabinet Office, can confirm that this Explanatory Memorandum meets the required standard.