EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE PENSION SCHEMES (AMENDMENT) REGULATIONS 2022

2022 No. 327

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ('DHSC') 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 This instrument amends four statutory instruments relating to pension benefits provided for National Health Service staff. These are:

- The National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) ('the 1995 Regulations');
- The National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) ('the 2008 Regulations');
- The National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) ('the 2015 Regulations');
- The National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95) ('the Transitional Regulations').

2.2 The Public Service Pensions and Judicial Offices Act 2022 ('the PSPJO Act 2022') addresses discrimination that arose when existing public service pension schemes were closed to certain members between 2014 and 2016. In line with the provisions of that Act, the amendments in this instrument close the 1995 Regulations and 2008 Regulations of the NHS Pension Scheme ('the legacy NHS Pension Scheme') to future accrual from 1 April 2022 and move all remaining active members to the Scheme set out in the 2015 Regulations from that date. The instrument also updates and makes minor corrections to the Transitional Regulations to support the movement of this group of members to the 2015 Regulations Scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 DHSC regrets that this instrument, which comes into force on 1 April 2022, is laid in breach of the rule that statutory instruments subject to the negative resolution procedure should normally be laid, and copies provided to the Committee, at least 21 calendar days before the instrument comes into force ("the 21-day rule").

3.2 This instrument could not have been made and laid sooner because it is dependent on the PSPJO Act 2022, which received Royal Assent on 10 March 2022. Chapter 4 of Part 1 of that Act contains the operative prospective remedy provision necessary to bring to an end the unlawful age discrimination identified in the *McCloud* judgement (referenced in paragraph 6 below).

3.3 In particular, section 88(2)(c) of the Act has the effect of closing the legacy public services pension schemes to future accrual after 31 March 2022. This instrument makes consequential provision for both the legacy and the 2015 NHS Pension Schemes. The provisions made by this instrument must come into force immediately after the legacy NHS Pension Scheme is closed to future accrual by the 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 NHS Pension Scheme, but scheme regulations would prevent those members from joining the 2015 NHS Pension Scheme.

3.4 Scheme members have been on notice, through consultation processes, of changes to the Scheme. This includes the HMT Treasury's consultation document of July 2020 and consultation response document of February 2021, through the introduction of the PSPJO Bill in the House of Lords on 19 July 2021, and through the scheme-specific consultation referenced in paragraph 10 below, that the commencement date for the prospective remedy would be 1 April 2022. In these circumstances, a breach of the 21-day rule should not give rise to any unfairness.

3.5 As outlined at paragraph 2.2 above, regulation 5 of this instrument makes minor corrections to the Transitional Regulations. In accordance with paragraph 4.7.6 of Statutory Instrument Practice, DHSC has consulted the SI Registrar and this instrument is issued free of charge to all known recipients of the Transitional Regulations. It is so issued in view of the corrections to regulation 27(1)(c) and (3)(a)(iii) of, and Schedule 1 to, the Transitional Regulations as those corrections are of errors which are not obvious (see paragraphs 7.22 and 7.24 below for more detail).

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument 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 Between 2014 and 2015 new pension schemes were introduced for each of the main public service workforces – local government, teachers, the armed forces, firefighters, police, the Civil Service and the National Health Service (the 2015 Scheme). The reforms were implemented by regulations made under the provisions of the Public Service Pensions Act 2013 ('the PSP Act 2013'). As part of the reforms, members within 10 years of retirement were permitted to continue building pension in existing, "legacy schemes" under transitional protection arrangements agreed following discussions with member representatives.

6.2 In December 2018, the Court of Appeal in the combined judgments of *The Lord Chancellor and Secretary of State for Justice v V McCloud & others and N Mostyn & others* and *The Secretary of State for the Home Department, the Welsh Ministers & others v R Sargeant & others* [2018] EWCA Civ 2844 ('the *McCloud* judgment') found 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. The Chief Secretary to the Treasury made a written ministerial statement on 15 July 2019 setting out that the Government considered that the Court of Appeal's judgment had implications for all of the public service schemes and planned to come forward with proposals to remedy the discrimination across all the schemes.

6.3 On 16 July 2020, the Government published a Command Paper that consulted on two options for retrospectively removing the discrimination suffered by members who were not eligible for transitional protection due to their age and proposed that the legacy schemes should be closed to all members on 31 March 2022. The Government further proposed that members should be given a choice of which scheme benefits they wished to receive during the period from when the new schemes were introduced to the closure date of the legacy schemes (the remedy period). The consultation sought views on whether that choice should be made immediately once necessary legislative changes were made or deferred until the member's pension benefits became payable.

6.4 In February 2021, the Government published its response to the consultation, confirming that the discrimination was to be remedied in two parts. Part 1 of the remedy would be introduced prospectively. Legacy schemes, including those set out in the 1995 Regulations and 2008 Regulations would close from 1 April 2022 and remaining members would join the new scheme for their workforce. For NHS staff this is the 2015 Scheme. Part 2 of the remedy would be introduced retrospectively. Members who have been affected by the discrimination would be given a choice at retirement of whether legacy or new scheme benefits should be paid in respect of scheme service during the remedy period.

6.5 The Government explained that this approach would provide members with greater certainty about their decision and avoid the need for them to make assumptions about their future career and retirement age and avoid younger members making decisions which may not turn out to be in their best interests. The response also confirmed that, under Part 2 of the remedy, affected members who are already receiving scheme benefits in respect of the remedy period would also be given the same choice as soon as possible after necessary changes to the schemes are implemented.

6.6 The PSPJO Bill was introduced into the House of Lords on 19 July 2021. The Bill put in place a framework to enable schemes to address the discrimination by amending regulations to implement Part 1 of the remedy from 1 April 2022 and Part 2 of the remedy from 1 October 2023 at the latest. The Bill received Royal Assent on 10 March 2022.

6.7 This instrument implements the prospective changes required by the PSPJO Act 2022 to implement Part 1 of the remedy for NHS Pension Scheme members.

6.8 DHSC anticipates that a consultation on draft regulations to implement Part 2 of the remedy for NHS Pension Scheme members will be held in autumn 2022.

6.9 A separate instrument introducing new arrangements for setting member contribution rates in the 2015 Scheme was laid before parliament on 11 March 2022. That instrument also temporarily suspended provisions which require NHS pensions to be reduced on re-employment in the NHS in certain circumstances. The provisions in that instrument implement NHS Scheme-specific policy, whilst the amendments in this instrument are aligned with changes in other public service pension schemes to implement a uniform cross-government remedy in response to the *McCloud* judgment.

Therefore, for the purpose of clarity and to aid understanding, relevant changes are contained in two separate instruments.

7. Policy background

What is being done and why?

Closure of the 1995 and 2008 Regulations relating to the NHS Pension Scheme and movement of all remaining members to the Scheme set out in the 2015 Regulations

7.1 Section 88 (restriction of existing schemes) of the PSPJO Act 2022 amends section 18 (restriction of existing pension schemes) of the PSP Act 2013 so that all further accrual further to the 1995 Regulations and 2008 Regulations is prevented from 1 April 2022.

7.2 Consequently, regulation 2 of the instrument makes two amendments to the 1995 Regulations. The first amendment makes it clear on the face of the 1995 Regulations that members are prevented from contributing to or accruing further pensionable service under the 1995 Regulations from 1 April 2022. The second amendment limits the application of provisions relating to further participation under the 1995 Regulations up to and including 31 March 2022 only. This includes the provisions which contain the transitional protections, which in respect of similar provisions in other public sector schemes, were found to be discriminatory by the Court of Appeal.

7.3 Regulation 3 makes equivalent amendments to the 2008 Regulations. The amendments make it clear that officers and practitioners are not eligible to be active members of the scheme set out in the 2008 Regulations from 1 April 2022. The amendments also limit the application of the 2008 Regulations, including the discriminatory provisions referred to in paragraph 7.2 above, up to and including 31 March 2022.

7.4 Regulation 4 amends the 2015 Regulations to ensure that active and deferred members who are prevented from further accrual further to the 1995 Regulations and 2008 Regulations from 1 April 2022 are eligible to join the Scheme set out in the 2015 Regulations from that date.

7.5 Regulation 19(1)(d) of the 2015 Regulations allows certain 1995 and 2008 Regulations pensioners to join the 2015 Regulations Scheme if they are eligible to do so under the provisions of Schedule 1 (eligibility of pensioners) to the Transitional Regulations. Schedule 1 to the Transitional Regulations is amended by regulation 5(10) of this instrument so that new groups of 1995 and 2008 Regulations pensioners who will no longer be eligible to accrue benefits in those Regulations from 1 April 2022 because of the implementation of the Part 1 prospective remedy will instead be eligible to join the 2015 Regulations Scheme from that date.

Updating of and minor corrections to the Transitional Regulations

7.6 The Transitional Regulations provide a number of bespoke arrangements for members of the schemes set out in the 1995 and 2008 Regulations who have moved over time to the 2015 Regulations Scheme. For example, the Transitional Regulations include provisions to ensure that certain options and elections made by members under their legacy NHS Pension Scheme continue to apply on joining the 2015 Scheme. The Transitional Regulations also ensure that service in the 1995 and 2008 Regulations counts for certain purposes in the 2015 Regulations Scheme, and benefits,

pensionable pay and contributions are calculated correctly in circumstances where members have service and benefits across both NHS Schemes.

7.7 Most of the regulations in the Transitional Regulations will apply automatically to legacy scheme members joining the 2015 Regulations Scheme from 1 April 2022. However, the instrument does amend a small number of those regulations to ensure they work correctly and to introduce further or revised arrangements which are specifically required to support the movement of this last group of members to the 2015 Regulations Scheme from 1 April 2022. Those amendments are set out in detail in the following paragraphs 7.8 to 7.24.

7.8 Regulation 5(2) amends regulation 11 (contribution rate setting: Groups A to C). The contribution rate for members employed in the NHS that apply from 1 April each year are set by reference to the member's pensionable earnings during the previous year. Regulation 11 is amended to ensure that members first joining the 2015 Regulations Scheme from their legacy NHS Pension Scheme on 1 April 2022 can have their contribution rate set by reference to pensionable earnings from that scheme in the previous year.

7.9 Regulation 5(3) amends regulation 12 (contribution rate setting: Group D). The contribution rate for self-employed practitioners and non-gp providers may be set by reference to the member's most recently certified or confirmed final pensionable earnings from previous years. Regulation 12 is amended so that such members first joining the 2015 Scheme on 1 April 2022 can have their contribution rate set by reference to final pensionable earnings derived from service in their legacy NHS Pension Scheme.

7.10 Regulation 5(4) amends regulation 18 (uprating of old scheme practitioner earnings) which prevents increases applying to certain practitioner pensions twice, once under the Pensions (Increase Act) 1971 and once under their legacy scheme. The amendment made to regulation 18 ensures that this regulation also applies appropriately to members moving to the 2015 Regulations Scheme from 1 April 2022 for the duration of their membership of the 2015 Regulations Scheme.

7.11 Regulation 5(5) amends regulation 25 (decoupling of benefits derived from additional contributions) which provides for 1995 Section members to elect to take benefits derived from additional voluntary contributions (AVCs) paid whilst a member of that scheme at their chosen date or birthday without having to retire from the 2015 Regulations Scheme. The amendments made to this regulation ensure that this option is also available to 1995 Regulations Scheme members joining the 2015 Regulations Scheme on 1 April 2022. However, such members may have passed or be fast approaching their chosen age or birthday on that date. Therefore, further amendments to regulation 25 provide an additional process and time limits for members who join the 2015 Regulations Scheme less than six months before their chosen age or birthday or after that date. The additional process requires the scheme administrator to provide all the option information to the member no later than three months after the member joins the 2015 Regulations Scheme. The member must then choose whether to take up the option within five months of the option information being provided. If the member takes up the option, the payable date for the benefits derived from 1995 Regulations Scheme AVCs will be (as now) the member's chosen date or birthday or, if later, the date the member joins the 2015 Regulations Scheme.

7.12 Regulation 5(6) amends regulation 27 (ill-health benefits: continuity of existing applications) which provides arrangements for the treatment of applications for ill-health retirement submitted under legacy NHS Pension Scheme Regulations in circumstances where the member joins the 2015 Regulations Scheme before the outcome of that application has been finalised. Under those arrangements members were permitted to remain in their legacy Regulations until the outcome of their application had been finalised. However, the powers under which those arrangements were made will be removed from the PSP Act 2013 by the PSPJO Act 2022 on 1 April 2022. This means that members who have submitted an application for ill-health retirement before that date may no longer remain in their legacy scheme but must, along with all other members, join the 2015 Regulations Scheme on 1 April 2022. The substantial amendments made to regulation 27 introduce new arrangements that will apply from that date.

7.13 The transitional arrangements implemented by new paragraphs (7) to (19) of regulation 27 apply to members who make an application for ill-health retirement under legacy NHS Pension Scheme Regulations that is received by the Secretary of State before 1 April 2022. The purpose is to ensure that the member and the member's dependants are not placed in a less beneficial position than they would have been had the outcome of the application been determined under relevant legacy scheme Regulations and the member's retirement on health grounds taken place on 31 March 2022.

7.14 To qualify for ill-health retirement benefits, members must meet certain qualifying criteria linked to their health and its impact on their ability to work until normal pension age. Normal pension ages are 60 in the 1995 Regulations, 65 in the 2008 Regulations and the state pension age in the 2015 Scheme. For more seriously ill members, benefits may be increased by the proportion of the pension that could have been earned had the member been able to remain in their job until normal pension age ("a higher tier ill-health pension"). Under the new transitional arrangements, the member's application will be tested against both their legacy scheme qualifying criteria and the 2015 Scheme qualifying criteria (new paragraphs (7)(a), (8) and (9)).

7.15 If the application meets the criteria in the member's legacy scheme but does not meet the criteria in the 2015 Regulations Scheme, the member and the member's dependants will receive benefits from the 2015 Regulations Scheme equal to the benefits that would have been paid from the member's legacy scheme on retirement on 31 March 2022. In these circumstances, the member's benefits in the legacy scheme are exhausted (new paragraphs (10)(a) and (b), (13) to (15) and (17) to (19)).

7.16 If the application meets both the criteria in the member's legacy scheme and the criteria in the 2015 Regulations Scheme, the ill-health benefits due from the 2015 Regulations Scheme (which include the equivalent value of the member's legacy Section benefits accrued up to 31 March 2022) are compared to the ill-health benefits that would have been due from the member's legacy scheme on 31 March 2022. If the 2015 Regulations Scheme ill-health benefits are higher, the member and the member's dependants will receive those benefits (new paragraph (10)(d)). If the ill-health benefits due from the member's legacy scheme are higher, the member and their dependants will receive benefits from the 2015 Regulations Scheme that are increased by the difference between the two sets of benefits (new paragraphs (10)(c) and (16)).

7.17 For the purposes of any comparison, account is taken of circumstances where the member may have been entitled to a mandatory lump sum on retirement from their legacy NHS Pension Scheme but not entitled to such a lump sum on retirement from the 2015 Scheme (new paragraphs (11) and (12)).

7.18 If the member's entitlement in the 2015 Regulations Scheme is to benefits equivalent to legacy scheme ill-health benefits on 31 March 2022 only, as described at paragraph 7.15, the member is treated as being entitled to the equivalent pension under the 2015 Regulations Scheme. If the member is entitled to have their 2015 Regulations Scheme benefits increased by the difference between a higher tier ill-health pension in their legacy scheme and a lower tier pension in the 2015 Regulations Scheme, the member is treated as being entitled to a higher tier ill-health pension under the 2015 Regulations Scheme (new paragraph (20)).

7.19 The arrangements apply until the end of the "application period". This period ends when the member either withdraws their application or all appeal routes have been exhausted including complaints to the Pensions Ombudsman and proceedings before a court or tribunal (amendments to paragraphs (1) to (3) of regulation 27 made by regulation 5(6)).

7.20 Regulation 5(7) amends regulation 28 (ill-health benefits: members below old scheme normal pension age) to take account of the new transitional arrangements for ill-health retirement applications introduced by amendments to regulation 27. The amendments update paragraphs (6B) and (6C) so that any dependant's benefits described in those paragraphs take account of an increase that has been applied under new paragraph (16) of regulation 27.

7.21 Regulation 5(8) amends regulation 37 (variations to lump sums for 1995 and 2008 Regulations pensioners joining new scheme) which provides for 1995 and 2008 Regulations pensioners who die whilst in service in the 2015 Regulations Scheme to receive an adjusted lump sum on death in like manner to 2015 Regulations Scheme pensioners. Regulation 37 is amended to ensure that it will apply to the new groups of pensioners who will become eligible to join the 2015 Regulations Scheme from 1 April 2022 (as provided for in amendments to Schedule 1 to the Transitional Regulations (see paragraph 7.5 above)).

Minor corrections and clarifications

7.22 Regulation 5(6) inserts into regulation 27 (ill-health benefits: continuity of existing applications) a missing opening parenthesis (into paragraph (1)(b)); the words "(or such other form as the Secretary of State accepted)" after the reference to the form "AW33E" (in paragraph (1)(c)); and the word "an" before "ill-health pension" (in paragraph (2)(b)), and the substitution of the words "an action before the courts" with "by proceedings before a court or tribunal" (in paragraph (3)(a)(iii)). The correction to paragraph (1)(c) makes it clear that the receipt by the Secretary of State of a form other than the form "AW33E" which is accepted by the Secretary of State also satisfies the condition in paragraph (1)(c). This is one of the conditions that must be satisfied for regulation 27 to apply. The correction to paragraph (3)(a)(iii) makes it clear that a determination by the Secretary of State in respect of an application for ill-health pension becomes final and binding when it may not be the subject of a further challenge by the member by proceedings before a court or tribunal.

7.23 Regulation 5(9) amends regulation 40 (death in service – entitlement of or in respect of a transition member) to replace two references to "transitional member" with references to "transition member".

7.24 Regulation 5(10)(b)(i) corrects a typographical error in the cross-reference to regulation "2.G.5(5)(b)" in Schedule 1 to the Transitional Regulations so that the reference now reads "2.G.4(5)(b)".

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 2018.

9. Consolidation

9.1 DHSC recognises that formal consolidated regulations are good practice and intends to undertake a formal consolidation once Government business allows. In the interim period, the DHSC has produced informal full consolidations of NHS Pension Schemes regulations incorporating all the changes implemented up to and including those which came into effect on 1 July 2021. These are available on the scheme administrator's website: https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations

10. Consultation outcome

10.1 The proposals and draft instrument were published for consultation on 9 December 2021. The consultation closed on 20 January 2022. This followed the public consultation prior to the introduction of the PSPJO Bill as detailed in paragraph 6.3.

10.2 A total of 72 consultation responses were received. Respondents included the Scheme Advisory Board, the British Medical Association ('BMA'), the NHS Business Services Authority (the scheme administrator), GP Practices and 67 individual members.

10.3 Responses from organisations included comments, in particular, on the policies relating to the transitional arrangements for ill-heath retirement applications and the payment of benefits derived from AVCs in the 1995 Section. Some requested further clarification on how the arrangements would operate and some were technical in nature. DHSC welcomed a suggestion from the BMA that the time limit for 1995 members to make an election to claim AVCs should be extended to five months and the draft provision was amended accordingly. Many responses from individual members expressed dissatisfaction that the legacy NHS Pension Schemes were closing and posed questions about their own individual circumstances. Some respondents made comments relating to the implementation of Part 2 of the remedy. Whilst these are outside the scope of this consultation, relevant comments have been noted by DHSC and will be considered as part of its future work on the remedy.

10.4 The consultation response document is available at: https://www.gov.uk/government/consultations/nhs-pension-scheme-mccloud-remedy-part-1-proposed-changes-to-scheme-regulations-2022

11. Guidance

11.1 Pension Scheme guidance is provided via a range of resources including factsheets, online videos and scheme guides on the scheme administrator's website: https://www.nhsbsa.nhs.uk/nhs-pensions A range of information specifically about

Parts 1 and 2 of the *McCloud* remedy are also provided on the website for both members and NHS employers. In addition, during January 2022 a letter explaining the remedy and how it will affect scheme benefits was sent to all members who will move to the 2015 Regulations Scheme on 1 April 2022 under Part 1 of the remedy.

12. Impact

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

12.2 Regarding impact on the public sector, the Government has estimated an expected increase to pension liabilities for the main unfunded public service pension schemes (covering the NHS, teachers, Civil Service, armed forces, firefighters and police) of £17 billion over the next four to five decades. This figure reflects the cost of Part 1 and Part 2 of the remedy. An estimated £4.5 billion of this amount represents an estimated increase to NHS Pension Scheme liabilities.

12.3 An Impact Assessment has not been prepared for this instrument because no impact on business is foreseen.

13. Regulating small business

13.1 This instrument does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is by way of the Scheme Advisory Board ('SAB') comprising representatives of NHS employers, NHS trade unions and the scheme administrator. The SAB discusses changes to the NHS Pension Schemes and provides advice to the Secretary of State for Health and Social Care where requested on scheme policy.

14.2 The instrument does not include a statutory review clause pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (Duty to review regulatory provisions in secondary legislation). DHSC does not consider that the NHS Pension Schemes Regulations amended by this instrument make regulatory provision in relation to a qualifying activity or amend any regulatory provision relating to that activity for the purpose of section 28 of the Small Business, Enterprise and Employment Act 2015. They regulate only the activities of public bodies. The exempting provision of section 29(3)(b) of the same Act therefore applies.

15. Contact

15.1 Peta Cowan at the Department of Health and Social Care (email: peta.cowan@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Tim Sands, Deputy Director for NHS Pensions policy at the Department of Health and Social Care, can confirm that this explanatory memorandum meets the required standard.

15.3 Edward Argar MP, Minister of State for Health at the Department of Health and Social Care, can confirm that this explanatory memorandum meets the required standard.