POLICY NOTE

THE NATIONAL HEALTH SERVICE PENSION SCHEMES (REMEDIABLE SERVICE) (SCOTLAND) REGULATIONS 2023

SSI 2023/246

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 10 and 12 of the Superannuation Act 1972 ("the 1972 Act"), sections 1(1) and (2)(e), 2(1) (together with paragraph 5(b) of Schedule 2) and 3(1) and (2)(c) of the Public Service Pensions Act 2013 ("the 2013 Act"), and sections 5(1) and (5), 6(1), 7(3), 8, 10(1) and (4), 11(1) and (5), 12(1) and (3), 18, 19(1), (4) and (5), 20, 21, 23(1), 24(1), 25(1) and (4), 26(1) and (2)(a), 29(1), (7) and (8), 31(2) and (3), 37(2) and 108(1) of the Public Service Pensions and Judicial Offices Act 2022 ("PSPJOA 2022"). The instrument is subject to negative procedure.

In accordance with section 10(1) of the 1972 Act and section 3(5) of the 2013 Act, these Regulations are made with the consent of the Treasury.

This Instrument implements the remedy to the reforms to the NHS pension scheme in Scotland under the Public Service Pensions and Judicial Offices Act 2022 ("the PSPJOA 2022") in respect of pensions for NHS workers in Scotland. The PSPJOA 2022 requires schemes to make provision in regulations to deliver aspects of the remedy to address the impact of the rollback to the legacy scheme and to allow members to make a choice about their pension benefits for the period between 1 April 2015 and 31 March 2022.

Policy Objectives

Occupational pensions policy is reserved to the UK Government with HM Treasury the department responsible for public service pension policy. The 2013 Act introduced reforms to public service pension schemes including those in devolved nations. The aim of the reforms was to implement the recommendations of the Independent Public Service Pensions Commission: Final Report, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced from 1 April 2015, characterised through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.

Transitional protection provided for some scheme members, dependent on proximity to their NPA on 31 March 2012, to be either "fully protected" or "taper protected". Members in these categories were allowed to remain in their legacy scheme permanently, or for a set period before transitioning to the reformed CARE scheme before 31 March 2022.

In 2018, following a successful challenge by members of the judicial and firefighters' pension schemes, the transitional protections were found to be discriminatory against younger members by the Court of Appeal, as protection was only offered to older scheme members. The UK government accepted this ruling had implications for all public service schemes that

contained similar transitional protection arrangements and introduced legislation through the 2022 Act to remedy the discrimination caused by these transitional protections.

Through implementing the PSPJOA 2022, the purpose of this instrument is to complete the statutory arrangements of the 2015 as set out in the Act. References are made within the instrument to The Public Service Pensions (Exercise of Powers, Compensation and information) Directions 2022 (PSP Directions 2022). The remedy period is 1 April 2015 to 31 March 2022.

Part 1 details the introductory provisions, including citation, coming into force date and interpretation.

Part 2 makes provision for the adjustment of pension contributions for certain groups of scheme member in circumstances where the contribution amounts due vary between the reformed pension scheme and the legacy pension scheme. This Part also makes provision requiring the scheme manager to provide Remediable Service Statements (RSS) to eligible active, deferred and pensioner members, or the beneficiaries of deceased members. The information contained on the RSS will allow for a member to make an informed choice of which retirement benefits they wish to receive for their remediable service. The timing and frequency of an RSS will depend on whether the member is due to make an immediate choice or a deferred choice. Immediate choice is appropriate to those who are in receipt of pension benefits before the commencement date (1 October 2023) and deferred choice is appropriate to those who retire on or after the commencement date.

Part 3 makes provision for elections. Regulation 7 of Part 3 sets out a framework to determine the eligible decision-maker in circumstances where a member has died before making their choice decision. This defines the circumstances where the eligible decision-maker may be a sole beneficiary such as the surviving adult, who may be the spouse, civil partner or other qualifying surviving partner. In other circumstances there may be multiple beneficiaries therefore the regulation provides a route for the scheme manager to identify who the eligible decision-maker should be. The regulation also confirms that where no eligible decision-maker can be identified then the scheme manager is the decision-maker.

Regulation 8 of Part 3 allows for members who opted out of the pension scheme to make an election for that service to be reinstated. The regulations detail how a member should apply and submit evidence in support of the application within specified timescales. Where an application is accepted, the regulations set out that an RSS will be issued to the member setting out details of any contributions owed to the scheme to reinstate the service and how they must pay the contributions due (as detailed in Part 8 and 9 of these regulations).

Regulation 9 of Part 3 makes provision for eligible members to be given an immediate choice for reformed scheme or legacy scheme benefits. Where a member has died, the immediate choice should be made by an eligible decision maker, as detailed in Regulation 7 of this Part. Where an immediate choice election has been made, this decision is irrevocable.

Regulations 11 to 13 of Part 3 detail that a deferred choice should be given to eligible active or deferred members at retirement. Where a deferred choice election has been made, this decision is irrevocable.

Where a deferred choice member dies before making a choice, or before benefits begin to be paid, an RSS may be issued to an eligible decision maker to make a deferred choice. Where no choice has been made within the election period, the regulations allow the scheme manager to deem that an election has been made.

Where a deferred choice member retires before the scheme is able to provide an RSS, the regulations allow for the scheme manager to pay legacy scheme benefits in relation to a member's remediable service in the first instance. The member will then be provided with an RSS as soon as is reasonably practicable where they will have a period of 12 months to make a choice.

Part 4 makes provision for those who have elected to pay voluntary contributions to secure additional pension benefits during the remedy period. The scheme manager must determine the value of the pension rights secured through voluntary contributions arrangements as if they were secured in the alternative scheme. Where a member has secured pension rights by way of voluntary contributions to secure reformed scheme flexibilities, the scheme manager must inform the member of their rights to secure those pension rights in the alternative scheme or to extinguish the arrangement and receive compensation for the contributions paid. The provisions in this part also enable a member to retrospectively elect to purchase additional pension under the legacy scheme.

Part 5 makes provision for divorce and dissolution arrangements for both pension sharing agreements and orders, put in place before, on or after the commencement date. The provisions set out that the calculation, or recalculation of a pension debit and the corresponding pension credit must take account of the effect of the remedy.

Part 6 makes provision for transfers in and out of the NHS pension schemes in Scotland that include remediable service on both a cash equivalent basis or a Club basis (transfers between equivalent public service pension schemes). These provisions detail the requirements for the calculation or re-calculation of transfer values and the making and accepting of payments in relation to the transfer value of remediable pension rights.

Where a member has transferred remediable pension right out of either the legacy or reformed scheme, the scheme manager must provide a transfer RSS detailing the value of the transferred-out rights in the alternative scheme.

Part 7 makes provision for certain lifetime allowance and annual allowance charges where the consequences of the remedy lead to a change in a members liability to pay tax on pension benefits. Regulation 58 confirms that where a private sector scheme administrator successfully applies to discharge their liability, the NHS pension scheme administrator will remain jointly liable for any lifetime allowance charge. Regulation 59 requires the scheme manager to accept a scheme pays notice retrospectively if an annual allowance tax charge arises in a remediable tax year as a consequence of the rectification of the pension input period(s) in the remedy period.

Part 8 makes provision about compensation. Specifically when a scheme manager may pay direct or indirect compensation (where benefits are increased rather than members receiving direct compensation).

The provisions set out in Part 9 include the calculation and process of applying interest to relevant amounts owed to and by a person, the netting off of relevant amounts owed to and by a person, and the reduction and waiver of liabilities owed by a member to the scheme.

Provision in Part 10 permits a member of the 1995 section of the legacy scheme who elected to move their previous accrual in that Section to the 2008 Section, before they joined the 2015 scheme to revoke that election with the effect that the member's pensionable service is treated as having always been 1995 section pensionable service.

Part 11 makes provision for circumstances where a member enters into premature retirement and partial retirement, and makes provision about ill-health pensions.

Where a member has or is about to agree to premature retirement in the interests of efficiency, any increase in the employers contribution amount as a consequence of a member choice will be waived by the scheme manager. Where premature retirement is on the grounds of redundancy the scheme manager will, in most cases, not waive the amount of any increase. Instead, the member may opt to pay all or part of the additional contribution due. If the member decides not to pay then the scheme manager must reduce the amount of benefits accordingly. Where the additional contribution is due to be met by the member's employing authority as a consequence of the terms of employment then the scheme manager must waive the additional amount.

Provision in regulations 72 to 73 sets out that a person who has partially retired may elect to adjust the original specified percentage of pension they receive in order to maintain the amount of partial retirement in payment once they have made a choice of remediable benefits.

Regulation 74 covers ill-health retirement and provides that members who have applied for ill-health retirement in relation to their remediable service should have their applications reassessed against the alternative ill-health retirement criteria that applied at the point of the original application. Regulation 75 makes provision for a member to submit a retrospective ill-health retirement application.

Part 12 makes provision for amendments of the principal superannuation scheme 2011 and 2013 regulations, and 2015 Transitional Regulations as detailed in the schedule. The provision in the Schedule ensures that remediable service between 1 April 2015 and 31 March 2022 is always treated as pensionable service in the relevant section of the legacy NHS scheme.

Consultation

In accordance with the requirements of section 21 of the 2013 Act, a public consultation was undertaken from 25 May 2023 and closed on 23 July 2023[1]. Five responses, from organisations representing members in the health sector, were received.

Prior to the public consultation a period of informal consultation was carried out from September 2022 to February 2023 with members of the Scottish NHS Pension Scheme

[1] https://pensions.gov.scot/nhs/scheme-governance-and-legislation/consultations

Advisory Board (SAB). The SAB is made up of member and employer representatives and provides advice to Scottish Ministers on the NHS Pension Scheme in Scotland.

All five responses to the public consultation agreed that the draft regulations achieved the policy objectives and requirements set by the PSPJOA 2022. A summary of the consultation responses will be made available on the website of the Scottish Public Pensions Agency (SPPA): www.sppa.gov.uk in due course.

Impact Assessments

An equality impact assessment has been carried out for this instrument and can be found on the SPPA's website[2]. An overall assessment was also carried out by the UK government for the Public Service Pensions and Judicial Offices Bill[3]. The assessment found that offering all eligible members a choice of benefits and removing the transitional protections rectifies the age discrimination that was found by the Court of Appeal. Furthermore, the assessment found that the policy of giving all eligible members a choice of benefits for the remediable period equalised treatment for all members for that period and thus removes any indirect sex discrimination previously found in the transitional protections element of the pension reforms. The assessment found that in relation to the other protected characteristics of disability, religion or belief, sexual orientation, gender reassignment, race/ethnicity, pregnancy and maternity, and marriage and civil partnership there were no findings that showed members to be adversely or otherwise impacted by the remedy.

A Fairer Scotland Duty Assessment was not carried out. The policy set out in this SSI is technical in nature and implements reserved UK legal changes. Accordingly, the Fairer Scotland Duty Assessment is not considered to be applicable here.

Financial Effects

In line with HM Treasury's Statement of Funding Policy, the cost of pensions paid under the Scottish NHS Pension Schemes are managed through UK Government-funded Annually Managed Expenditure (AME), with pensions forecasts submitted to the Office for Budget Responsibility. Financial transactions, both income and expenditure, under these two schemes score as AME; this includes the McCloud corrective payments under the PSPJOA 2022 and these Regulations. On that basis no Business and Regulatory Impact Assessment is required for these Regulations.

In its initial consultation on public service pensions remedy[4], the UK Government estimated that removing the unlawful discrimination would cost on average around £2.5 billion for each year of the remedy period in additional future pension payments to those eligible members. This equates to £17 billion across all of the relevant public service schemes. The additional

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[2] https://pensions.gov.scot/nhs/scheme-governance-and-legislation/consultations

[3] https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes?utm_source=6b2b166d-b9a7-4c3c-b015-3a54b30ae67a&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

[4]https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes?utm_source=6b2b166d-b9a7-4c3c-b015-3a54b30ae67a&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

costs for the Scottish NHS schemes, estimated at £400 million[5], will, in the same way as the other schemes, be factored into future employer contribution rates to apply from 1 April 2024

A full Impact Assessment[6] was provided for the PSPJOA 2022 which includes detail of the £17 billion estimated cost. These regulations translate the policy requirements of the PSPJOA 2022 in the context of the Scottish NHS pension schemes.

Scottish Public Pensions Agency
An Agency of the Scottish Government
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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069102/Teachers_Scotland_2016_Unpause_Report.pdf

[6] https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod_20220007_en.pdf