EXPLANATORY MEMORANDUM TO

THE TEACHERS' PENSION SCHEME (AMENDMENT) REGULATIONS 2022

2022 No. 320

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education 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 The instrument facilitates the full closure of the final salary (legacy) sections of the Teachers' Pension Scheme (TPS) on 31 March 2022, with all remaining active members transitioning to the new career average scheme on 1 April 2022.

2.2 This ensures that all members of the TPS will be accruing benefits in the same scheme from 1 April 2022.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Department for Education regrets that this instrument, which comes into force on 1st April 2022, is laid in breach of the 21-day rule.

3.2 The instrument could not have been made and laid sooner because it is dependent on the Public Service Pensions and Judicial Offices Act 2022 ("the Act"), which received Royal Assent on 10th March 2022. Chapter 4 of Part 1 of the 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).

3.3 In particular, section 88(2)(c) of the 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 TPS. This provision must come into force immediately after the legacy pension schemes are 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 scheme but scheme rules would prevent those members from joining the new scheme.

3.4 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.

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 The TPS is currently governed by The Teachers' Pensions Regulations 2010 (SI 2010/990) which provide for final salary schemes with normal pension ages (NPA) of 60 and 65, and The Teachers' Pension Scheme Regulations 2014 (SI 2014/2651) (The 2014 Regulations), which provide for a new career average scheme with an NPA 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 such as the TPS and included transitional protection arrangements which allowed older workers to continue accruing pension in the existing final salary schemes whilst younger workers were moved into the career average 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 on the grounds of age against younger members of the judicial and firefighters' pension schemes. The Government accepted that the age discrimination found by the Court of Appeal will need to be retrospectively remedied and that the final salary sections should close to all remaining members on 31 March 2022, to end the ongoing difference in treatment.

6.4 The Government has legislated to this effect in the Public Service Pensions and Judicial Offices Act 2022 (The PSPJO Act). The 2014 Regulations are therefore being amended in consequence of provisions in the PSPJO Act to provide the prospective remedy by transitioning remaining active members of the legacy scheme to the new career average scheme on 1 April 2022.

6.5 A further set of regulations will be made and will come into force by 1 October 2023 at the latest to deliver the retrospective remedy under powers in the PSPJO Act. Those regulations will address the difference in treatment experienced by some members between 1 April 2015 and 31 March 2022 by rolling their service back into the legacy schemes and offering all members with remediable service a choice of benefits (legacy or reformed scheme) for that period.

7. Policy background

What is being done and why?

7.1 As explained in paragraph 6.3, the difference in treatment between certain members of some of the other public service pension schemes was found to be discriminatory and this must be addressed, including in the TPS where equivalent changes were made. The transitional protection rules allowed older members, those within 10 years of their NPA, 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 that Act and deliver the prospective remedy.

Explanations

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

7.3 Prior to the amendments made in these regulations, 'full protection' members of the final salary sections of the TPS were able to continue accruing pension in that section of the scheme until they took their final salary pension benefits. Full protection members are those who were within 10 years of their scheme NPA (60 or 65), the age at which pension benefits are payable in full, on 31 March 2012. All other members of the final salary scheme transitioned to the new career average scheme between April 2015 and February 2022.

Why is it being changed?

7.4 The difference in treatment afforded to full protection members was found to be discriminatory on the grounds of age. Changes are needed to ensure that as of 1 April 2022 that difference in treatment is ended and all members of the TPS will accrue benefits in the same scheme.

What will it now do?

7.5 The amendments made by this instrument are to Schedule 3 to The 2014 Regulations. Schedule 3 sets out the transitional arrangements for members of the TPS including those with service in the legacy scheme. The amendments made in this instrument provide for the full protection members to move into the new scheme.

7.6 Regulation 2 (2) (b) inserts a new definition of "transition date" in Schedule 3 to The 2014 Regulations for a full protection member who has not taken a retirement pension under the legacy scheme. This effectively provides a full protection member of the legacy scheme with a date of transition to the new scheme of 1 April 2022.

7.7 Regulation 2 (3) inserts a definition of the legacy scheme closing date, being 31 March 2022, for full protection members. This reflects the provisions in the PSPJO Act that require the TPS legacy scheme to close to all members on 31 March 2022.

7.8 Under Regulation 2 (4), a full protection member will cease to be a full protection member on 31 March 2022 if they have not already ceased to be a full protection member as a result of no longer being in pensionable service in the legacy scheme.

7.9 Regulation 2 (5) amends the arrangements in respect of Fair Deal transfers to limit transitional protection to transfers that take place before 1 April 2022. Fair Deal transfers concern staff who are compulsorily transferred from the public sector to independent providers delivering public services. After 1 April 2022 no member is eligible for transitional protection.

7.10 Regulation 2 (6) makes an exception to the rule that there cannot be further accrual in the legacy section of the TPS after 1 April 2022, where there is a club transfer of service from certain unreformed schemes. This relates to some of the smaller public body pension schemes that have not yet been reformed, and it will ensure that those members are not prevented from transferring their service into a different scheme. Regulation 2 (7) makes a similar amendment in respect of bulk transfers, where those transfers are from an unreformed scheme. This allows those who accrue pensionable service on or after 1 April 2022 in a broadly equivalent unreformed public service

pension scheme to be awarded a credit in respect of that service when transferring it to the TPS legacy scheme, which is permitted under s. 89 (2) of the PSPJO Act.

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 There are no imminent plans to consolidate amendments to The 2014 Regulations. These regulations came into force in 2015 and there have not been a large number of amendments to those 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 30 November 2021 https://www.gov.uk/government/consultations/teachers-pension-scheme-proposed-changes-to-scheme-regulations. The consultation was open for 8 weeks, closing on 24 January 2022. 59 responses were received, 47 were from individuals and 12 from organisations which represent members and employers in the education sector.

10.2 Prior to and during the consultation, the Department discussed the proposed changes to TPS regulations with the Teachers' Pension Scheme Advisory Board (SAB). The SAB is made up of member and employer representatives and provides advice on the desirability of changes to the TPS rules to the Secretary of State.

10.3 Nearly all responses to this consultation agreed that the draft amendments achieved the stated policy aims as described in the consultation document. A minor amendment was proposed to provide clarity that the closure of the scheme on 31 March 2022 takes place at the end of that day, but after careful consideration the Department determined that an amendment was not necessary. 31 March 2022 is the final day of accrual in the legacy scheme.

10.4 Several respondents commented that despite agreeing that the proposed amendments achieve the stated policy aims of this consultation, that did not mean that they necessarily support the overall policy of closing the final salary section of the TPS. The Government's response to its Public service pension schemes consultation: changes to the transitional arrangements to the 2015 schemes explained why this approach needs to be taken, which is to ensure that the ongoing difference in treatment does not continue beyond 31 March 2022.

10.5 Similarly, some respondents commented on how the McCloud remedy will be captured in the finalisation of the 2016 scheme valuations as a member cost. This issue is not directly related to these regulations.

10.6 One respondent objected to the length of consultation period on such a critical matter. As the policy approach to the remedy had already been determined following an earlier consultation which was open for over 12 weeks and taking account of the ongoing engagement activity with the SAB and wider membership, the Department considers that eight weeks was sufficient for this consultation. This length of consultation was consistent with the consultations held by the other public service pension schemes making equivalent amendments. The Department's consultation document was clear that the purpose of the consultation was whether the draft

regulations achieved the stated policy aim, as the decision to close the legacy scheme to any further accrual after 31 March 2022 had already been made and communicated.

10.7 The Department's full consultation response is available at https://www.gov.uk/government/consultations/teachers-pension-scheme-proposed-changes-to-scheme-regulations.

11. Guidance

11.1 Guidance on the closure of the TPS legacy scheme is available on the Teachers' Pensions website. Resources on the site include factsheets, videos, calculators 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.

11.3 The scheme administrator has directly contacted members who are affected by these amendments to regulations.

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 due to the relatively small proportion of members who are still accruing benefits in the final salary section at this time.

12.3 A full Impact Assessment has not been prepared for this instrument because it relates to amendments 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. 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 McCloud 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 Robin Walker 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 the full closure of the final salary section of the TPS after 31 March 2022.

15. Contact

15.1 Sarah Hutton at the Department for Education can be contacted with any queries regarding the instrument. (Telephone: 07384 905984 or email: sarah.hutton@education.gov.uk)

15.2 Peter Springhall, Deputy Director for the Teachers' Pension Division at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Robin Walker, Minister of State for School Standards at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.