

## **EXPLANATORY MEMORANDUM TO**

### **The Health and Social Care Pension Schemes (Remediable Service) Regulations (Northern Ireland) 2023**

**S.R. 2023 No. 132**

#### **1. Introduction**

- 1.1. This Explanatory Memorandum has been prepared by the Department of Health (DoH) to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under sections 1(1) and (2)(e), 2(1) and 3(1) to (4) of, and paragraph 5 of Schedule 2 and Schedule 3 to, the Public Service Pensions Act (Northern Ireland) 2014<sup>1</sup> and is subject to the negative resolution procedures.

#### **2. Purpose**

- 2.1. This Statutory Rule will introduce the retrospective part of the McCloud Remedy through the Health and Social Care Pension Schemes (Remediable Service) Regulations (Northern Ireland) 2023. They will allow eligible HSC Pension Scheme Members to make the retrospective choice which will put them, as far as possible, in the pension position they would have been in had the discrimination not occurred. This is the second stage of what is known as the “McCloud Remedy”.
- 2.2. The Health and Social Care Pension Schemes (Amendment) Regulations (Northern Ireland) 2022 introduced the first stage.

#### **3. Background**

- 3.1. In December 2018 the Court of Appeal found that the transitional protection given by the judicial and firefighters’ pension schemes to older members when moving from final salary to career average schemes unlawfully discriminated against younger members, and also gave rise to indirect sex and race discrimination (the McCloud judgment). In 2019 the UK government acknowledged that this judgment had implications for all of the public service pension schemes; legal advice confirmed that the identical transitional measures introduced for equivalent devolved schemes must be similarly remedied.
- 3.2. Following a consultation run by the Department of Finance it was confirmed that all the legacy schemes would close on 31 March 2022 and that affected members would be given a choice of which pension benefits they wish to receive for the period from 1 April 2015 to 31 March 2022 when those benefits are paid. This choice of pension benefits when the pension becomes payable is referred to as a deferred choice underpin (DCU).

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<sup>1</sup> 2014 c.2 (N.I.) section 3 was amended by section 94(11) to (14) of the Public Service Pensions and Judicial Offices Act 2022 (c. 7)

- 3.3. The Health and Social Care Pension Schemes (Amendment) Regulations (Northern Ireland) 2022<sup>2</sup> ensured that from 1 April 2022, all active members will accrue benefits for service only in the reformed schemes and implemented the first stage of the McCloud remedy.
- 3.4. This proposed legislation implements the second stage of the McCloud remedy for the HSC pension scheme from 01 October 2023. These regulations will allow the HSC Pension Scheme to implement the rollback, which will treat 'unprotected' and 'taper protected' members as if they had never left the legacy scheme for their remediable service, introduce the retrospective remedy, and put provisions in place for members to choose between 2015 scheme benefits or legacy scheme benefits for remediable service. It will offer an immediate choice election for members whose benefit entitlement has already arisen, including members who have received benefits or died during the remedy period, and provide a deferred choice election to allow members to make an informed choice of the benefits they wish to receive at retirement or when benefits are brought into payment for their remediable service and correct any overpayment or underpayment of pension benefits or member contributions already paid.
- 3.5. The legislation will apply to members who were in service on or before 31 March 2012 and who have service on or after 1 April 2015 (including those with a qualifying break in service of less than 5 years). As the unlawful discrimination identified by the Courts only applied to those who were in service on or before 31 March 2012 it is therefore only that group who are in scope of the remedy.

#### **4. Consultation**

- 4.1. The changes introduced by this statutory rule have been subject to statutory consultation which commenced on the 7 April 2023 and ended on the 30 June 2023.
- 4.2. Among those consulted were HSC Trade Unions representatives; All HSC Employers; HSC Pension Service (Scheme Administrators); Scheme Advisory Board; Pension Board; DoF and the Government Actuary Department.
- 4.3. Seven responses were received, of which four were from individual respondents who enquired about how the remedy applies in their individual circumstances. They were directed to the scheme administrator for further information.
- 4.4. Employer groups and trade unions expressed concerns about the need for greater flexibility and sensitivity in applying deadlines. They also mentioned numerous areas where they felt more might have been done to put members in the position, they would have been in. Reinstating opted-out service, pension recycling, Choice 2, ill-health retirement, communications to members and employers, taper-protected members, compensation for emotional distress, and financial advice expenses were among them.
- 4.5. Concerns were also raised about the interaction between the remedy and the taxation regime, given that specifics of HMRC's approach were disclosed late in the consultation window and opted-out service, dealing with annual allowance charges and notification to members. Concerns were raised, particularly for GP practises, about the significant time gap between employers receiving funding to cover pension

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<sup>2</sup> S.R. 2022/156 (NI)

contributions that may not have been required at the time and members electing to reinstate service, the purchase of ERRBO and Added Pension, and contingent costs.

- 4.6. Also, some felt it was imperative to have consideration and guidance on employer's and member's liabilities when they joined into a pension contribution recycling arrangement and members later elected to reinstate opted-out service.
- 4.7. The consultation response document is available on the Department of Health website at [HSC Pension Scheme - McCloud remedy: part two - Proposed changes to HSC Pension Scheme Regulations \(Northern Ireland\) 2023 | Department of Health \(health-ni.gov.uk\)](#).

## **5. Equality Impact**

- 5.1. The McCloud remedy is designed to remedy age discrimination. The remedy proposals were equality screened during the original DoF consultation. An Equality Screening/Impact Assessment (EQIA) was carried out by the Department, and this has been published on the Departments website.

## **6. Regulatory Impact**

- 6.1. A regulatory impact assessment has not been produced for this rule as it is not anticipated that there will be any adverse impact on business, charities social economy or voluntary bodies.

## **7. Financial Implications**

- 7.1. McCloud remedy costs were included in the rerun of the 2016 scheme valuation. HMT have indicated that compensation payments linked to the remedy should now be treated as AME. This applies to all types of corrective payments and compensation payable under the PSP&JO Act 2022 and will include Corrections to pension benefits, contributions and interest, Corrective payments for overpaid tax and Compensation for financial losses.

## **8. Section 24 of the Northern Ireland Act 1998**

- 8.1. Consideration has been given to the human rights implications of these regulations. They are considered compatible with section 24 of the Northern Ireland Act 1998.

## **9. EU Implications**

- 9.1. None

## **10. Parity or Replicatory Measure**

- 10.1. Similar legislation has been introduced for the NHS Pension Schemes in England & Wales.

## **11. Additional Information**

11.1. Not applicable.

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