

EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE PENSION SCHEMES (MEMBER CONTRIBUTIONS ETC.) (AMENDMENT) (NO. 2) REGULATIONS 2022

2022 No. 991

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 His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends the National Health Service Pension Schemes (Member Contributions etc.) (Amendment) Regulations 2022 (S.I. 2022/273) (the “Member Contributions Regulations”) to update the pensionable earnings bands in the member contribution structure.
- 2.2 When the Member Contributions Regulations were consulted on, it was proposed that pensionable earnings bands in the member contribution structure would be uplifted annually in line with Agenda for Change pay awards. This instrument increases the pensionable earnings bands in the member contribution structure to give effect to this policy intention.
- 2.3 This instrument also corrects an omission in the National Health Service Pension Schemes (Amendment) Regulations 2022 (S.I. 2022/327) (the “Prospective Regulations”) which made changes to the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95) (the “Transitional Regulations”) to comply with provisions in the Public Service Pensions and Judicial Offices Act 2022 (the “PSPJO Act 2022”) to prospectively remedy the unlawful age discrimination identified in the *McCloud*¹ judgment.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 22 of the Public Service Pensions Act 2013 (the “2013 Act”) provides the procedures to be followed when changing the protected elements of Scheme regulations within the protected period. Amendments to members’ contribution rates are a protected element of Scheme regulations under section 22(5) of the 2013 Act.
- 3.2 Accordingly, DHSC has consulted with the persons (or representatives of the persons) who appear to the Secretary of State likely to be affected by this instrument with a view to reaching agreement on the changes to the pensionable earnings bands for member contributions contained in regulation 2. Additionally, a report setting out why the Secretary of State proposes to make these regulations has been laid before Parliament in accordance with section 22(2)(b) of the 2013 Act. The amendments to

¹ The Lord Chancellor and Secretary of State for Justice and the Ministry of Justice v V McCloud & Others and N Mostyn & Others, and the Secretary of State for the Home Department, the Welsh Ministers & Others and R Sargeant & Others [2018] EWCA Civ 2844

the Member Contributions Regulations contained in regulation 2 of this instrument have effect from 30 September 2022, before the Member Contributions Regulations come into force on 1 October 2022.

- 3.3 As outlined at paragraph 2.3 above, regulation 3 of this instrument corrects the omission of an amendment to the Transitional Regulations which was intended to be included in the Prospective 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 Prospective Regulations.
- 3.4 Regulation 3 has retrospective effect to 1 April 2022. Section 3(3)(b) of the 2013 Act confers a power to make retrospective provision but refers the reader to section 23. Section 23 provides the procedure for making scheme regulations containing retrospective provision which appear to the responsible authority to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, or appear to have significant adverse effects in any other way in relation to members of the scheme (for example, in relation to injury or compensation benefits). The Secretary of State is of the view that the retrospective provision in regulation 3 will not have significant adverse effect for the purposes of section 23. The amendment is wholly beneficial to relevant members, ensuring they are eligible to join the pension scheme set out in the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) (the “2015 Regulations”) and provides for no reduction to the pension payable.
- 3.5 DHSC regrets that this instrument breaches the convention that statutory instruments subject to the negative resolution procedure should be laid before Parliament no less than 21 days before coming into force (the “21 day rule”). Given that this instrument is making changes to provisions in the Member Contributions Regulations which will come into force on 1 October 2022, this instrument must come into force on 30 September 2022. The reason for the delay in laying this instrument before Parliament, and therefore breaching the 21 day rule, was due to the suspension of Parliamentary activity during the national mourning period following the death of the late monarch, Queen Elizabeth II, on 8 September 2022.

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 2013 Act provides the power for the Secretary of State to make regulations establishing the NHS Pension Scheme. This instrument amends the Member Contributions Regulations and the Transitional Regulations.
- 6.2 Part 2 of the Member Contributions Regulations makes amendments to member contribution provisions in the 2015 Regulations, which will come into force on 1 October 2022. Regulation 2 of this instrument amends provisions in Part 2 of the

Member Contributions Regulations to update the pensionable earnings bands which determine a member's contribution rate. This instrument will come into force on 30 September 2022, the day before Part 2 of the Member Contributions Regulations comes into force.

- 6.3 The Transitional Regulations implemented transitional and consequential arrangements for members of the scheme set out in the 2015 Regulations (the "2015 Scheme") who had pension rights accrued in the scheme set out in the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) or the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) (the "2008 Section").
- 6.4 The Prospective Regulations made amendments to the Transitional Regulations in order to implement the prospective changes required by the PSPJO Act 2022 to remedy the unlawful discrimination identified in the *McCloud* judgment for NHS Pension Scheme members.
- 6.5 Regulation 3 of this instrument amends the Transitional Regulations to insert part of a table which was inadvertently omitted from the Prospective Regulations. Regulation 3 will have retrospective effect from 1 April 2022, the date on which the Prospective Regulations came into force.

7. Policy background

What is being done and why?

Amendments to the pensionable earnings bands in the member contribution structure – regulation 2 of this instrument

- 7.1 The Member Contributions Regulations are due to come into force on 1 October 2022 and will amend the 2015 Regulations to reform the member contribution structure.
- 7.2 The amendments in the Member Contributions Regulations had four aims:
 - (a) To change the way members' contribution rates are assessed so that they are based on actual pensionable pay rather than members' notional whole-time equivalent pay.
 - (b) To amend the structure for member contributions and the rates contained within it.
 - (c) To amend the structure so that pensionable earnings bands could be annually increased in line with Agenda for Change pay awards.
 - (d) To bring in the first phase of the changes to the member contribution structure, with a further phase to follow.
- 7.3 This instrument is further to the policy objective in 7.2 (c) above, to annually increase the pensionable earnings bands in the contribution tiers in line with annual Agenda for Change pay awards. Consequently, this instrument increases the member contribution pensionable earnings bands in the 2015 Regulations (by amending the Member Contributions Regulations) in line with the Agenda for Change pay award for England for 2022/23.
- 7.4 For officer members who have their rate set by regulation 30, there are two tables, one table for members who have their contribution rate based on their previous year's pensionable pay, and another table for members who have their rate based on their current pensionable pay.

- 7.5 The original intention behind having one table for members who have their rate based on their previous year's pensionable pay, and another table for members who have their rate based on their current pensionable pay, was to provide a mechanism to calculate rates at the start of the scheme year, even if the Agenda for Change pay award has not yet been determined and put into payment. It was originally intended that only the table in regulation 3(3) of the Member Contributions Regulations (which introduces paragraph (3A) of regulation 30 of the 2015 Regulations for members who have their contribution rate based on current pensionable pay) would be updated to uplift the pensionable earnings bands in line with the Agenda for Change pay award, so that members who receive a pay award would have their rates recalculated against the uplifted thresholds.
- 7.6 Following consultation, feedback was received about the administrative implications of having two contribution rate tables with different pensionable earnings bands, one applying to members who have their rate based on their previous year's pensionable pay, and another table for members who have their rate based on their current pensionable pay. It would also have meant that members whose pay did not increase during the scheme year could end up paying a higher contribution rate than others on the same salary whose pay had increased and so triggered a reassessment of their contribution rate. Without that reassessment, their contribution rate would not be reduced until the following scheme year.
- 7.7 Following this feedback, and in order to ensure parity between members, regardless of whether they have received a pay rise, regulation 2 makes amendments to the Member Contributions Regulations to uplift the pensionable earnings thresholds in both tables in regulation 30 of the 2015 Regulations for officer members and in Table 2 of regulation 31 of the 2015 Regulations for practitioner members.
- 7.8 Feedback was also received that the tier 1 upper boundary should be set at £13,246 instead of £13,231. This is because the tier 1 upper boundary is set with reference to the personal tax allowance of £12,570, assuming that the lowest contribution rate is 5.0%. The feedback highlighted that, from 1 October 2022, the minimum contribution rate will be 5.1%, and using the same approach the tier 1 upper boundary should be £13,246. Following this feedback, the tier 1 upper boundary in all three tables in regulation 2 of this instrument is increased from £13,231 to £13,246 and the tier 2 lower boundary is increased from £13,232 to £13,247.
- 7.9 This instrument does not amend the Member Contributions Regulations to update the pensionable earnings bands in Table 1 of regulation 31 of the 2015 Regulations, because practitioner member contribution rates are based on their estimated annualised pensionable earnings. Following the close of the scheme year, their actual annualised earnings are calculated and any underpayments are collected and overpayments are reimbursed. Table 1 exists in regulation 31 of the 2015 Regulations so that practitioner members may apply the correct contribution rate from the previous scheme year once their annualised pensionable earnings have been finalised.

Amendments to the Transitional Regulations – regulation 3 of this instrument

- 7.10 Regulation 3 of this instrument amends Schedule 1 (eligibility of pensioners) to the Transitional Regulations to include part of a table that was previously omitted from the Prospective Regulations.
- 7.11 This omission meant that one group of re-employed pensioners eligible to join the 2015 Scheme was inadvertently omitted from amendments to the Transitional

Regulations. This pensioner group is the 2008 Section tier 2 ill-health pensioners whose tier 2 pension has been permanently reduced to a tier 1 pension. This happens on the first anniversary of their return to NHS employment.

- 7.12 Consequently, regulation 3 of this instrument contains a technical amendment to correct this omission and include this group of 2008 Section tier 2 ill-health pensioners in the Transitional Regulations. It permits such pensioners to join the 2015 Scheme where the first anniversary of their return to NHS employment falls on or after 1 April 2022.
- 7.13 Regulation 3 of this instrument has retrospective effect from 1 April 2022, which is the date on which the Prospective Regulations came into force.

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 legislatively consolidated pension scheme regulations are good practice and intends to undertake a formal consolidation once Government business allows. In the interim period, the Department has informal full consolidations of NHS Pension Schemes and Injury Benefits regulations incorporating all the changes implemented up to and including those which came into force on 1 April 2022. These are available on the scheme administrator's website: <https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations>

10. Consultation outcome

- 10.1 The member contributions proposals and draft regulations were published for consultation between and 19 July 2022 and 12 August 2022, with a view to reaching agreement with those who appear likely to be affected by the regulations. 58 consultation responses were received. Respondents included the Scheme Advisory Board and Trade Unions.
- 10.2 The feedback on the proposal and associated regulations was mixed and a number of respondents explained that they disagreed with the proposals due to reasons which were related to previously consulted on policy, and not disagreement with the proposal to increase the pensionable earnings bands in the member contribution structure in line with the Agenda for Change pay award for England, which was the subject of this consultation.
- 10.3 Following consultation, the department determined that two changes were required to the draft regulations to address issues identified in the responses to the consultation (as set out at paragraphs 7.6 to 7.8 above). First, that both tables which determine member contribution rates for employed members will be the same (containing the uplifted tier thresholds), whether they base their contribution rate on their previous year's pensionable pay or their current pensionable pay. Second, that the upper boundary of tier 1 will be increased from £13,231 to £13,246, and the lower boundary of tier 2 will be increased from £13,232 to £13,247.
- 10.4 In accordance with section 22 of the Public Service Pensions Act 2013, the department has followed the procedure for making changes to the protected elements

of the NHS Pension Scheme within the protected period, including having regard to the desirability of not making a change to member contribution rates.

- 10.5 Increasing the pensionable earnings bands in the member contribution structure is either beneficial or neutral for all members and no members are disadvantaged. If this instrument were not to be made, then the pensionable earnings bands from the Member Contributions Regulations would come into force, which are lower than the pensionable earnings bands in this instrument.

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>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector, but these changes will impact the NHS workforce and members of the NHS Pension Scheme. By increasing the pensionable earnings bands in the member contribution structure in line with the Agenda for Change pay award in England, it reduces the likelihood that members will move up a tier and see their contribution rate increased solely because they receive a pay award. Increasing the pensionable earnings bands in the member contribution structure either benefits or has no impact on members.
- 12.3 The net impact of these changes on scheme contribution income, and required income against the 9.8% yield will be assessed at the next quadrennial actuarial valuation of the scheme. This will consider other factors which affect scheme costs.
- 12.4 A full Impact Assessment has not been prepared for this instrument.

13. Regulating small business

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

14. Monitoring & review

- 14.1 In accordance with section 7 of the 2013 Act, there is a Scheme Advisory Board comprising representatives of NHS employers, NHS trade unions and the scheme administrator. The Board 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 provide for a review pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (S.I. 2015/26) (Duty to review regulatory provisions in secondary legislation).
- 14.3 DHSC does not consider that the NHS Pension Scheme 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 Johanna Rhodes at the Department of Health and Social Care Telephone: 011325 45195 or email: Johanna.rhodes@dhsc.gov.uk can be contacted with any queries regarding this 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 Robert Jenrick MP (Minister of State for Health) at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.