

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE PENSION SCHEMES (REMEDIAL SERVICE) REGULATIONS 2023

2023 No. 985

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.

2. Purpose of the instrument

- 2.1 This instrument makes provision in respect of pension benefits for National Health Service staff in England and Wales. The purpose is to remedy discriminatory transitional arrangements, that were put in place by the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95) ('the Transitional Regulations') when the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) ('the 2015 Regulations') were introduced.
- 2.2 The transitional arrangements were identified as discriminatory across public service pension schemes following a Court of Appeal judgment in 2018. This instrument facilitates the second, retrospective part of the remedy in the NHS Pension Scheme in accordance with the Public Service Pensions and Judicial Offices Act 2022 (c. 7) (the "PSPJOA 2022"). See part 6 of this memorandum for further details.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) 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 (c. 25) ('the PSPA 2013'). As part of the reforms, members within 10 years of retirement were permitted to continue building pension

entitlement 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 the 1995 and 2008 sections of the NHS Pension Scheme (the ‘legacy scheme’), would close from 1 April 2022 and remaining members would join the reformed schemes for future pensionable service. 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. 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 the second part 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 were implemented.
- 6.5 The Public Service Pensions and Judicial Offices Bill was introduced into the House of Lords on 19 July 2021 and became an Act of Parliament on 10 March 2022. PSPJOA 2022 puts in place the framework and requirements 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. Schemes must also comply with Treasury Directions made under PSPJOA 2022, namely the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 (the ‘2022 Directions’).

- 6.6 The first and prospective part of the remedy closed the legacy public service pension schemes on 31 March 2022 and ensured equal treatment for all public service pension scheme members by moving all active members into the reformed public service pension schemes on 1 April 2022. Following a consultation, this part of the remedy was implemented for the NHS Pension Scheme through the National Health Service Pension Schemes (Amendment) Regulations 2022 (S.I. 2022/327), which came into force on 1 April 2022.
- 6.7 This instrument implements the second and retrospective part of the remedy for eligible NHS Pension Scheme members, as required by PSPJOA 2022 and the 2022 Directions.
- 6.8 A separate instrument (the National Health Service Pension Schemes (Partial Retirement etc.) (Amendment) Regulations 2023 (S.I. 2023/952) implementing the second of two phases of changes to introduce new retirement flexibilities to the 1995 Section of the NHS Pension Scheme has been laid before parliament shortly before this instrument. The provisions in that instrument are specific to the NHS Pension Scheme and do not relate to the discrimination identified in the McCloud judgment. As the provisions in this instrument are aligned with changes to other public service pension schemes to implement a consistent cross-government remedy under PSPJOA 2022, the retirement flexibility and remedy changes are contained in two separate instruments to provide clarity and aid understanding.

7. Policy background

What is being done and why?

- 7.1 The instrument puts in place the retrospective part of the remedy for eligible NHS Pension Scheme members, as required by PSPJOA 2022 and the 2022 Directions.
- 7.2 The policy intent of each regulation is explained in detail below unless the regulation only provides meanings of defined terms. In summary, the retrospective part of the remedy facilitated by these Regulations will remove the effect of the transitional protections. For NHS Pension Scheme members impacted by the discrimination, the remedy primarily returns members who moved to the 2015 Scheme back into the legacy scheme for their pensionable service (their ‘remediable service’) affected by the discrimination during the remedy period, from 1 April 2015 to 31 March 2022, this movement of service is referred to here as ‘rollback’. The remedy also offers a choice to eligible members of whether to receive legacy scheme benefits or equivalent 2015 Scheme benefits for their remediable service, both of which are payable from the legacy scheme. Further, the remedy facilitated by these Regulations covers the secondary consequences of this movement in pensionable service.

Explanations

Part 1 General Provisions

- 7.3 Regulation 1 provides that this instrument comes into force on 1st October 2023 and extends to England and Wales.
- 7.4 Regulation 2 provides definitions for a number of key terms in this instrument, including ‘remedy member’ which means a member who has pensionable service under the legacy scheme or the 2015 Scheme that is remediable service (see section 1 of PSPJOA 2022 for the meaning of ‘remediable service’).

Part 2 Remediable service

- 7.5 Regulations 3, 4, and 5 facilitate the recovery of overpaid or underpaid pension contributions as a consequence of either rollback or a member's election for 2015 Scheme benefits for their remediable service. These regulations will only apply to a limited group of members who fall within specific circumstances. Specifically, NHS Pension Scheme members who had breaks in pensionable service within the remedy period, were medical practitioners and non-GP providers, and whose pension contribution tier changes as a consequence of rollback or a subsequent election. Where contributions have been overpaid, the scheme must compensate the member by returning the overpaid contributions and where contributions have been underpaid, the member must pay any shortfall to the scheme. Regulation 3 facilitates this contribution adjustments on rollback providing members with the option to waive any refund due until they make their deferred choice (see explanation to regulation 12. Regulation 4 facilitates the adjustment at the point of an immediate choice for remedy members who are eligible to make an immediate choice election (see explanation to regulation 9. Regulation 5 facilitates the contribution adjustments at the point of a deferred choice for remedy members who are eligible to make a deferred choice election.
- 7.6 Regulation 6 requires the scheme manager to provide a remediable service statement (RSS) to, or in respect, of all remedy members, ensuring sufficient information is available to enable an informed immediate or deferred choice to be made about the benefits to be paid for remediable service. The RSS must be provided within 18 months of 1st October 2023 (or such later date as the scheme manager considers reasonable in all the circumstances) and annually thereafter to active members and in accordance with the requirements of section 29 of PSPJOA 2022 and direction 20 of the 2022 Directions.

Part 3 Elections

- 7.7 Regulation 7 makes provision about who may make an immediate or deferred choice election in relation to the remediable service of a deceased remedy member, or a remedy member who is incapable of looking after their own affairs (“a designated person”).
- 7.8 Regulation 8 confers a right on members to elect for opted-out service during the remedy period to be reinstated as pensionable service in order to become remediable service. This regulation also sets out the process for making such an election.
- 7.9 PSPJOA 2022 provides for remedy members who have taken benefits on or before 30 September 2023, or deceased remedy members on that date, to be able to make an immediate choice over which NHS Pension Scheme benefits they wish to receive for their remediable service. The immediate choice for these members will be whether they wish to receive equivalent 2015 Scheme benefits or legacy scheme benefits for remediable service. Where members wish to receive legacy scheme benefits, they will receive benefits from the section of that scheme in which they most recently accrued benefits. Regulation 9 sets out who is eligible to make an immediate choice election and allows the scheme manager to set out how that choice is to be made. This regulation also specifies that once an immediate choice election has been made, it is irrevocable. Regulation 9 allows the scheme manager to decide on behalf of a member to receive 2015 Scheme benefits where the member or designated person fails to

communicate with the scheme manager and it is determined that 2015 Scheme benefits are more beneficial to the member.

- 7.10 Regulation 10 specifies that retirement and bereavement benefits must be corrected and, where applicable, a balancing payment made after an immediate choice election for 2015 Scheme benefits has been made, or otherwise after the end of the immediate choice election period. An under or overpayment may occur as the 1995 and 2008 sections of the legacy scheme and 2015 Scheme have different accrual rates, different retirement lump sum rules, different normal pension ages and different bereavement benefit amounts.
- 7.11 Regulation 11 prevents a reduction to children's pensions that are already in payment as a consequence of an immediate choice election being made, or not being made, by a designated person of a different household.
- 7.12 PSPJOA 2022 provides for remedy members who are active or deferred on 30 September 2023 to make a deferred choice election. The deferred choice will be made at the point of retirement and the choice will be between 2015 Scheme equivalent benefits or legacy scheme benefits for remediable service. Regulation 12 sets out who is eligible to make a deferred choice election and allows the scheme manager to set out how that choice is made. This regulation also specifies that once a deferred choice election has been made, it is irrevocable. Where pension or bereavement benefits are put into payment before the remedy member is able to make their deferred choice, regulation 13 mirrors regulation 10 in requiring a benefit correction and balancing payment, where applicable.

Part 4 Voluntary contributions

- 7.13 PSPJOA 2022 provides for scheme regulations to vary rights to additional benefits from voluntary contributions in line with rollback and members' choice elections. Regulation 15 cancels an active or deferred (as at 30 September 2023) member's rights to 2015 Scheme additional pension bought during the remedy period and replaces those with new rights to additional pension in the legacy scheme. Regulation 16 provides options for the same members in respect of how additional contributions paid after the remedy period should be treated. Regulation 17 requires the scheme manager to vary the rights described in regulation 15 to those of an equivalent value in the 2015 Scheme if a member later elects for 2015 Scheme benefits to be paid in respect of their remediable service.
- 7.14 Regulation 18 entitles active and deferred members who paid early retirement reduction buy out ('ERRBO') contributions in the 2015 Scheme to a compensation payment equal to the ERRBO contributions the member paid during the remedy period. This compensation can be waived until the member's deferred choice decision point and will become payable again if the member chooses legacy benefits for their remediable service. Alternatively, the member could request a conversion of their ERRBO contributions to additional pension benefits in the legacy scheme. If the member elects for 2015 benefits to be paid in respect of remediable service, the ERRBO contributions may be applied to those benefits.
- 7.15 Regulations 19 and 20 mirrors regulation 15 where a remedy member originally bought legacy scheme additional pension but elects for 2015 benefits to be paid for remediable service so that the additional pension must be varied to a 2015 Scheme equivalent value. Regulation 19 requires the variation for deferred choice members (2023) and regulation 20 requires the variation for immediate choice members.

- 7.16 Regulation 21 parallels regulations 15 and 17 for immediate choice members.
- 7.17 Regulation 22 entitles immediate choice members to a compensation payment or the alternative benefits as described in regulation 18.
- 7.18 Regulations 23 and 24 makes provision to allow remedy members to enter into remedial voluntary contribution arrangements in the legacy scheme and set out the requirements and processes for doing so. Regulation 23 makes provision for new arrangements in accordance with section 25 of PSPJOA 2022, and regulation 24 makes provision for the re-instatement of cancelled arrangements.

Part 5 Divorce or dissolution of a civil partnership

- 7.19 Regulation 26 adjusts a 2015 Scheme pension debit in respect of remediable service shareable rights to a legacy scheme pension debit for active and deferred members to whom rollback applies.
- 7.20 Regulation 27 applies to immediate choice members where a valuation of pension benefits was provided before 1 October 2023 and an immediate choice election for equivalent 2015 Scheme benefits for remediable service is made. Where the remedy member has a 2015 Scheme pension debit in respect of their remediable service shareable rights, the scheme manager is first required to vary that debit to a legacy scheme debit. The scheme manager must then adjust the value of the remedy member's legacy scheme pension debit to a debit of equivalent value the member would have had in the 2015 Scheme on the transfer day.
- 7.21 Regulation 28 applies to immediate choice members where a valuation of pension benefits was provided before 1 October 2023 and the member chooses legacy scheme benefits for their remediable service. The scheme manager is required to vary 2015 Scheme pension debits in respect of remediable service shareable rights to legacy scheme pension debits of an equivalent value to a debit of the appropriate amount that the debit member would have had in the legacy scheme on the transfer day.
- 7.22 Regulation 29 applies to deferred choice members who on 1 October 2023 have a pension debit in respect of remediable service shareable rights in the legacy scheme. Where a deferred choice election for equivalent 2015 Scheme benefits for remediable service is made, the scheme manager must make an adjustment to the debit that mirrors regulation 27.
- 7.23 Regulation 30 makes a provision for providing a valuation of pension benefits after rollback. Where the member has not yet made their choice of benefits for remediable service, the scheme manager must calculate two valuations, one with the value of benefits for remediable service in the legacy scheme, the other in the 2015 Scheme, and provide the higher. Regulation 36 requires the scheme manager to create a corresponding pension credit where regulation 30 has applied.
- 7.24 Regulation 31 applies to immediate choice members where a legacy scheme valuation of pension benefits is provided on or after 1 October 2023 and an immediate choice election for equivalent 2015 Scheme benefits is made. The scheme manager must adjust the member's debit in the legacy scheme in respect of remediable service shareable rights to a debit of equivalent value to a debit they would have had in the 2015 Scheme on the transfer day.
- 7.25 Regulation 32 applies to immediate choice members where a legacy scheme valuation of pension benefits is provided on or after 1 October 2023 and an immediate choice for equivalent 2015 Scheme benefits for remediable service is not made. The scheme

manager must adjust the legacy scheme debit in respect of remediable service shareable rights to a debit of equivalent value to that they would have had in the legacy scheme on the transfer day.

- 7.26 Regulation 33 applies to a pension credit member who has a pension credit solely in the legacy scheme or the 2015 Scheme, in respect of all the pension debit member's remediable service shareable rights and the valuation of pension benefits was provided before 1 October 2023. The scheme manager must calculate a valuation of the pension benefits at the transfer day in the alternate NHS Pension Scheme. Where the alternate valuation is higher than the original valuation provided the relevant pension credit member will receive a 'top-up' to their pension credit.
- 7.27 Regulation 34 applies to a pension credit member who has a pension credit in both the legacy scheme and the 2015 Scheme. The scheme manager must calculate two revised valuations of pension benefits, one with all the pension debit member's remediable service in the legacy scheme and one with all remediable service in the 2015 Scheme. The specified percentage from the Pension Sharing Order is applied to each valuation and a corresponding legacy scheme pension credit and 2015 Scheme pension credit calculated. The pension credit member then has the option of choosing one of the pension credits.
- 7.28 Regulation 35 provides that pension credits in payment are corrected, and a balancing payment is made, where applicable, following the application of regulations 33 and 34.

Part 6 Transfers

- 7.29 Regulation 38 requires the scheme manager to vary a remedy member's legacy scheme transfer rights to an equivalent value of those that would have been secured in the 2015 Scheme where a member makes a deferred or immediate choice election. This regulation applies to members who transferred benefits into the legacy scheme during the remedy period in circumstances where the Public Sector Transfer Club (the 'club') terms did not apply.
- 7.30 Regulation 39 requires the scheme manager to treat transfer payments for deferred choice members as if they had been received in the legacy scheme where benefits were transferred into the 2015 Scheme during the remedy period and club terms did not apply. Regulation 40 requires the scheme manager to vary a member's transfer rights to equivalent 2015 Scheme rights where the member subsequently makes a deferred choice election for equivalent 2015 Scheme benefits paid for their remediable service. Regulation 41 mirrors regulations 39 and 40 for immediate choice members.
- 7.31 Regulation 42 ensures that if a period of remediable service in the Health Service Scheme for Scotland or Northern Ireland is transferred to the Health Service Scheme for England and Wales, that service will be treated as a period of remediable service in the scheme for England and Wales.
- 7.32 Regulation 43 requires the scheme manager to send a transferred-out remediable service statement in accordance with direction 6 of the 2022 Directions to members who have transferred out rights in respect of remediable service.
- 7.33 Regulations 44 and 45 apply in respect of transfer payments made that include a value in respect of a member's remediable service rights to an external scheme where the payment was not made on club terms. The regulations require the calculation of two

transfer values, one with remediable service in the 2015 Scheme, the other with remediable service in the legacy scheme. Regulation 44 applies to transfer payments made before 1 October 2023 and requires a ‘top-up’ payment where the original transfer value is lower than the higher of the two calculations. Regulation 45 applies to transfer payments made after 1 October 2023 and requires the scheme manager to pay the higher of the two values to the receiving scheme.

- 7.34 Regulations 46 and 47 apply to members who transfer remediable service in the legacy scheme into the 2015 Scheme on return from a break of five years or more on cash equivalent terms. The scheme manager must use any ‘top-up’ payment due to acquire further rights for the member in the 2015 Scheme. Where the transfer is made after 1 October 2023, the highest of two transfer values must be used to acquire rights for the member in the 2015 Scheme (as described at paragraph 7.33).
- 7.35 Regulation 48 applies to members who transfer remediable service rights from another public service pension scheme into the NHS Pension Scheme where the transfer rights are not subject to club terms. The scheme manager will calculate the value of the member’s remediable NHS benefits in respect of the transfer as benefits in the legacy scheme and benefits in the 2015 Scheme. The member will be able to compare the value of the two benefits to inform their deferred choice decision.
- 7.36 Regulations 49 and 50 apply to members who transfer benefits in respect of remediable service out of the NHS Pension Scheme on club terms. Where the transfer was made before 1 October 2023, the scheme manager must provide the receiving club scheme manager with the results of the two transfer calculations (described at paragraph 7.33) and any other information required to inform the member’s deferred choice decision in the receiving scheme. Where the transfer is made after 1 October 2023, the scheme manager will pay the higher of the two transfer values.
- 7.37 Regulations 51 and 52 apply to members who transfer benefits in respect of remediable service into the NHS Pension Scheme on club terms. The scheme manager must calculate two potential benefit credits (one if the transfer buys benefits in the legacy scheme and one if the transfer buys benefits in the 2015 Scheme). The member may then compare the value of the two benefits as part of their immediate choice or deferred choice decision making process. Transfers made before 1 October 2023 will be revisited and further information provided by the sending scheme will be used to also establish the two potential credits. The scheme manager must inform the member of the two potential credits in their immediate or deferred choice election remediable service statement.
- 7.38 Regulation 53 confirms that regulations 54 to 56 apply to all remediable rights transferred into the NHS Pension Scheme.
- 7.39 Regulation 54 provides that any remediable rights transferred into the 2015 Scheme are instead treated as having transferred into legacy scheme.
- 7.40 Regulation 55 requires the scheme manager to vary the value of benefits treated as transferred into the legacy scheme under regulation 54 so that they are of equivalent value to the benefits the member would have secured if the benefits had originally transferred to that scheme. Where the member subsequently makes an election for 2015 Scheme equivalent benefits for their remediable service, the scheme manager must vary the value of remediable rights in the legacy scheme so that they are of an equivalent value to the benefits the member would have secured if the benefits had transferred to the 2015 Scheme.

- 7.41 Regulation 56 provides for any benefits being paid in respect of a member's transferred in remediable rights to be treated as being paid and always having been paid from the legacy scheme.

Part 7 Taxation

- 7.42 Regulation 58 requires the scheme manager to pay a lifetime allowance charge, where the scheme manager becomes liable for a lifetime allowance charge in a private sector scheme in accordance with regulation 36 of the Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 (S.I. 2023/113) ("the 2023 Tax Regulations").
- 7.43 Regulation 59 allows the scheme manager to pay an amount to NHS England equal to a compensation amount paid from the 2019/20 Pensions Annual Allowance Charge Compensation Scheme ("PAACCS") where regulation 8 of the 2023 Tax Regulations applies and the annual allowance charge arising in respect of tax year 2019/20 has reduced following rollback. This scheme compensates clinicians in retirement for annual allowance charges for 2019/20 met by the NHS Pension Scheme "scheme pays" facility.
- 7.44 Regulation 60 requires the scheme manager to accept a scheme pays notice in accordance with specified provisions in direction 7 of the 2022 Directions where a member is unable to give an effective notice to the scheme administrator under section 237B(3) of the Finance Act 2004 in relation to a relevant tax year because the time limit in section 237BA of that Act has passed.

Part 8 Compensation

- 7.45 Regulation 61 sets out that the scheme manager may pay compensation under PSPJOA 2022 and in accordance with the 2022 Directions. The 2022 Directions allow for compensation to be paid, provided it is applied for and a number of principles are complied with, to remedy direct financial losses or tax losses that cannot be corrected through the tax system. Regulation 62 stipulates that the scheme manager must compensate a remedy member by way of adjusting a scheme pays debit, where the member has, as a consequence of rollback, overpaid an annual allowance tax charge via the scheme pays facility.

Part 9 Interest and payment, reduction or waiver of liabilities

- 7.46 Regulation 63 introduces this part of the Regulations which considers the calculation of interest and the process of paying amounts owed to or from the NHS Pension Scheme under or by virtue of chapter 1 of PSPJOA 2022 (i.e. amounts owed as a consequence of the remedy).
- 7.47 Regulations 64 and 65 cover interest. Regulation 64 requires the scheme manager to apply and calculate interest in accordance with directions 14-16 of the 2022 Directions where either the NHS Pension Scheme owes an amount to the member or the member owes an amount to the scheme. Regulation 65 disapplies the interest provisions of the existing NHS Pension Scheme Regulations for these amounts.
- 7.48 Regulation 66 sets out that the scheme manager may net off amounts of underpayments and overpayments where different amounts in relation to the remedy fall to be paid at approximately the same time in accordance with direction 19 of the 2022 Directions. This avoids multiple payments to and from the scheme being required at approximately the same time.

- 7.49 Regulation 67 sets out the payment process where a member owes a net amount. In such circumstances, the scheme manager must inform the member that an amount is owed. The member may then agree with the scheme manager as to how that amount might be paid, either by a single payment or via an instalment plan, or - where the member is a pensioner member or the amount does not relate to reinstated opted-out service - via a deduction to future benefits.
- 7.50 Regulation 68 sets out the high-level payment process where the scheme manager owes a net amount to a member. The scheme manager must pay the amount as soon as reasonably practical after either the amount owed is determined, or additional information received where required.
- 7.51 Regulation 69 sets out the provision whereby amounts owed by a member, personal representative, or beneficiary may be reduced or waived in accordance with section 18 of PSPJOA 2022 and direction 4 of the 2022 Directions.

Part 10 Immediate detriment remedy

- 7.52 Regulation 70 introduces Schedule 1 which makes provision where a member has obtained an immediate detriment remedy in advance of 1 October 2023. This is unlikely to apply to more than twenty members. Schedule 1 paragraph 1 explains the application of the Schedule. Paragraph 2 details which provisions of PSPJOA 2022 should apply to these remedy members. Paragraph 3 requires the scheme manager to refund overpaid contributions for immediate detriment remedy members to whom the specific circumstances described at paragraph 7.5 above apply. Paragraph 4 allows the scheme manager to net off any immediate detriment remedy payment from any amounts owed as a consequence of PSPJOA 2022. Paragraph 5 specifies the RSS content for these members. Paragraph 6 ensures the scheme administrator is reimbursed from the scheme for immediate detriment remedy payments it makes.

Part 11 Revocation of election to convert pensionable service in the legacy scheme

- 7.53 Regulation 71 confers a right to members who elected to move service between sections of the legacy scheme where the election took effect before the member joined the 2015 Scheme, to revoke that election. The regulation also sets out the high-level process for this revocation. This election to move service was known as a 'Choice 2 election'. It is anticipated that some of the members who made a Choice 2 election may not have done so had they had a different transitional protection status.

Part 12 Retirement Pensions

- 7.54 Regulation 72 waives increased employer costs that may be created where a member's immediate or deferred choice election causes a recalculation of the costs associated with retirements that are in the interests of the efficiency of the service.
- 7.55 Regulation 73 sets out the approach for dealing with the costs associated with premature retirement due to redundancy, where they change as a consequence of the remedy.
- 7.56 Regulation 74 applies to members who have partially retired before 1 October 2023 where the remedy changes the amount of partial retirement pension in payment. In these circumstances the member may vary the original percentage of the benefits claimed to a percentage determined by the scheme manager as being necessary to maintain the nominal amount of partial retirement pension in payment.

- 7.57 Regulation 75 applies to members who partially retire from 1 October 2023 but before they are able to make their deferred choice. Should this circumstance arise, members will be allowed to revisit their original percentage of benefits claimed when their remediable service statement becomes available.
- 7.58 Regulations 76 and 77 cover ill health retirement applications. Regulation 76 applies to members who made an ill health retirement application and whose NHS employment was terminated during the remedy period. The regulation requires the scheme manager to review these applications and determine whether they would have qualified for ill health benefits in the alternate scheme and notify the member of the outcome of the review and, where relevant, how they can elect for ill health benefits in the alternate scheme. Regulation 77 allows the scheme manager to consider ill health retirement applications made on or after the 1 October 2023 as having been made during the remedy period if satisfied that the member would have made such an application at that time were it not for the discrimination.

Part 13 Consequential amendments

- 7.59 Regulation 78 introduces Schedule 2. Paragraphs 1 and 2 of this Schedule clarify that nothing in earlier amendments to NHS Pension Scheme Regulations prevent a member's remediable service becoming legacy scheme service upon rollback. Paragraph 3 of the Schedule relates to the ill-health underpin (amendments to transitional regulation 27). The underpin arrangements at transitional regulation 27 have been extended so that they apply to all remedy members who made an application for ill-health retirement benefits under the 2015 Regulations before the end of the remedy period but whose 2015 Scheme ill health benefits did not become payable before the end of that period. The arrangements have been extended in this way so as to put all such remedy members in the same position.

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 This is a free-standing instrument that makes provision to implement the remedy as set out above, so this is not considered to be a suitable opportunity to consolidate other amendments made to related instruments that govern NHS pensions.

10. Consultation outcome

- 10.1 The proposals and draft instrument were published for public consultation on 14 March 2023. The public consultation closed on 6 June 2023. Details of how the department engaged with stakeholders on the consultation can be found in the consultation response document.
- 10.2 A total of 56 responses were received to the consultation. Respondents included the Scheme Advisory Board ('SAB'), the British Medical Association ('BMA'), the British Dental Association ('BDA'), the NHS Business Services Authority (the scheme administrator), the Association of Independent Specialist Medical Accountants ('AISMA') and 48 individual members and other organisations. In addition to the 56 consultation responses, the department also received technical feedback from the Government Actuary's Department ('GAD').

- 10.3 The majority of respondents agreed that the draft Regulations delivered the policy objectives and requirements set by PSPJOA 2022, and that the draft Regulations allowed members to be put as far as possible in the pension position they would have been in had the discrimination not occurred. Most respondents also provided feedback on individual draft regulations and the policy intent behind them.
- 10.4 Responses from organisations included comments, in particular, on the policies relating to reinstating opted-out service, voluntary contributions, divorce, tax adjustments, compensation and revocations of elections to convert pensionable service in the legacy scheme.
- 10.5 A number of amendments were made to the Regulations following consideration of the consultation responses, which are detailed in the consultation response. The consultation response document is available at:
<https://www.gov.uk/government/consultations/nhs-pension-scheme-mccloud-remedy-part-2-proposed-changes-to-scheme-regulations-2023>

11. Guidance

- 11.1 Pension Scheme information 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>
- 11.2 A range of information specifically about Parts 1 and 2 of the NHS Pension Scheme remedy are also provided on the website for both members and NHS employers. Each remedy member will also be provided with a letter which includes guidance on the remedy in parallel to their remediable service statements.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 A full [Impact Assessment](#)¹ was provided for the PSPJOA 2022. These regulations translate the policy requirements of this Act into the NHS Pension Scheme context. 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 There will be an administrative cost to the public sector to deliver these requirements for eligible NHS Pension Scheme members. The department estimates that the administrative delivery of the requirements of the Act, and these regulations, for NHS Pension Scheme members will cost the public sector a total of £18m, with these costs arising between 2021/22 and 24/25. The key components of the administrative costs include scheme administrator software development, increased scheme administrator staffing, and medical advice with respect to the review of ill health retirement applications. These administrative costs cannot be disaggregated to a regulation-by-regulation level given that the administrative solution has been designed and costed to deliver the requirements, which are heavily interdependent, in full.

¹ https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod_20220007_en.pdf

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 delivery of the requirements imposed on the scheme manager by these regulations will be monitored by the department and the NHS Pension Board whose role is to hold the NHS Pension Scheme's administrator to account for administration of NHS Pension Schemes.

14.3 The instrument does not include a statutory review clause pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (c. 26) (Duty to review regulatory provisions in secondary legislation). The department does not consider that the Regulations 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 Thomas Bolton at the Department of Health and Social Care (email: Thomas.Bolton@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Gavin Lerner, Director of Workforce at the Department of Health and Social Care, can confirm that this explanatory memorandum meets the required standard.

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