

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES PENSIONS (REMEDIAL SERVICE) REGULATIONS
2023

2023 No. 998

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence (MOD) 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 makes provision in respect of pensions payable in relation to members of the armed forces, as well as certain consequential amendments to redundancy and compensation schemes. The purpose is to remedy the discrimination that occurred as a result of transitional arrangements put in place when the Armed Forces Pension Scheme 2015 was introduced in 2015, as part of a wider programme of public service pension reform. The provisions of Part 1 of the Public Service Pensions and Judicial Offices Act 2022 (“the 2022 Act”) deliver core elements of the remedy, including the “rollback” of eligible pensionable service into the relevant legacy scheme. The Act requires schemes to deliver other aspects of the remedy through provision made in their regulations.
- 2.2 This instrument amends six legacy pension schemes and the AFPS 2015, and includes provision to allow members to exercise the choice of benefit model at the heart of the remedy, consequential provision to address the impact of the rollback of service, and necessary consequential amendments to other armed forces redundancy and compensation schemes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The MOD apologises to the Committee that this instrument is laid in breach of the 21-day rule.
- 3.2 The former Secretary of State for Defence resigned on Thursday 31st August, and a new Secretary of State for Defence was appointed on that day. The new Secretary of State for Defence required time to consider these regulations, given their impact on the Department and the affected service personnel, and so a delay arose before they could be signed and laid. This meant that MOD had to use the emergency SI registration process, and the processes were not completed in time to meet the agreed laying date.
- 3.3 This instrument must come into force by no later than 1st October 2023, as this is the date on which Part 1 of the 2022 Act will come into force in relation to the armed forces pension schemes (see section 131(2)(a) of the 2022 Act). The provision made in this instrument was the subject of a detailed public consultation between 6th March 2023 and 29th May 2023, and the Department will publish the Response to the

consultation on the same day as these regulations are laid. Although some amendments have been made to the proposals set out in the consultation document, these reflect improvements suggested by stakeholders. In the circumstances, a breach of the 21-day rule should not give rise to any unfairness.

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 the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom, and it applies to members of the armed forces pension schemes wherever they are in the world.

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 This instrument is made under powers in the Public Service Pensions Act 2013 (the 2013 Act) and the 2022 Act, and in accordance with HM Treasury directions made under that Act (Public Service Pensions Exercise of Powers Compensation and Information Directions 2022). It contains the provisions necessary to remedy the discrimination which occurred during the period 1st April 2015 to 31st March 2022.
- 6.2 The instrument amends the following armed forces pension schemes:
- Armed Forces Pension Scheme 1975 (AFPS 1975);
 - Armed Forces Pension Scheme 2005 (AFPS 2005);
 - Armed Forces Early Departure Payments Scheme 2005 (EDP 2005);
 - Reserve Forces Pension Scheme 2005 (RFPS 2005);
 - Full-Time Reserve Service Pension Scheme 1997 (FTRS 1997);
 - Non Regular Permanent Staff Pension Scheme 2011 (NRPS 2011); and
 - Armed Forces Pension Scheme 2015 (AFPS 2015).
- 6.3 This instrument also makes consequential amendments to the following armed forces schemes:
- Armed Forces (Redundancy, Resettlement and Gratuity Earnings Schemes)(No.2) Order 2010 (Resettlement Commutation);
 - Armed Forces Redundancy Scheme 2020 (AFRS 2020);
 - Armed Forces and Reserve Forces Compensation Scheme 2011 (AFCS).

7. Policy background

What is being done and why?

- 7.1 The Public Service Pensions Act 2013 (“the 2013 Act”) provided a framework to reform public sector pension schemes, by introducing new schemes and closing the older, legacy schemes. As part of this process, transitional arrangements were put in place to protect older members of the schemes: in 2018 the Court of Appeal found that these transitional protections constituted unlawful age discrimination in the

context of the judges and firefighters' schemes (*Lord Chancellor & Anor v McCloud & Ors, Secretary of State for the Home Department v Sargeant & Ors* [2018] EWCA Civ 2844). The Government accepted that the unlawful discrimination had occurred in all public service schemes with similar transitional arrangements. In 2020, the Government consulted publicly on options to both end the discrimination, and to provide a remedy. The 2022 Act provides for the remedy determined by the Government following that public consultation.

- 7.2 The 2022 Act brought the discrimination to an end on 1st April 2022, when all legacy public service schemes were closed to further accrual, thus ending the unlawful transitional arrangements (the prospective remedy). The Armed Forces Pensions (Amendment) Regulations 2023 (S.I. 2022/323) made consequential amendments to six legacy armed forces pension schemes and the reformed pension scheme to ensure that they reflected the provisions of the primary legislation.
- 7.3 The 2022 Act makes direct provision for some substantive elements of the remedy, and puts in place a framework for scheme regulations to deliver other elements on a scheme specific basis.
- 7.4 The 2022 Act also contains direct measures to remedy the discrimination which took place between 1st April 2015 and 31st March 2022 (remedy period), and requires schemes to make additional, consequential provision by way of regulations to implement the Government's remedy. In short, the 2022 Act returns (rolls back) affected members to their relevant legacy scheme for the remedy period, and they are treated as though they had never been members of the reformed scheme. However, to avoid disadvantaging those members who would be better off under the reformed scheme model, the remedy design offers affected members a choice between default legacy benefits (final salary) or benefits calculated on the reformed scheme model (career average revalued earnings) for the remedy period, to be made at the point at which pension benefits come into payment.
- 7.5 This instrument makes consequential amendments to existing scheme rules arising out of the remedy, and inserts a Remediable Service Schedule into each pension scheme. The Remediable Service Schedule in each case contains the rules required to implement the remedy in the context of the specific scheme.
- 7.6 The rules in this instrument are designed to implement the policies outlined in MOD's consultation document (see paragraph 10 below), which are required to deliver the remedy set out in the 2022 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 The Department has no plans to consolidate the armed forces pensions legislation at this time.
- 9.2 Copies of the instruments relating to Schedule 1 of the AFPS 75 can be found at www.gov.uk/government/publications/armed-forces-pension-scheme-1975-regulations. Hard copies can be obtained from Ministry of Defence, AF Remuneration - Pensions, Main Building, Level 1 Zone B, Whitehall, London SW1A 2HB.

9.3 Copies of the Defence Council Regulations relating to the RFPS 05, the FTRS 97 and the NRPS 11 can be found at www.gov.uk/government/publications/reserve-forces-pensionscheme-regulations. Hard copies can be obtained from Ministry of Defence, AF Remuneration - Pensions, Main Building, Level 1 Zone B, Whitehall, London SW1A 2HB.

10. Consultation outcome

10.1 The MOD ran a public consultation exercise on these measures between 6 March 2023 and 29 May 2023. Although the draft regulations were not published, a detailed consultation document, containing an explanation of the policy measures to be addressed in the legislation was provided and all Service Personnel, veterans, and other stakeholders were invited to comment. MOD held meetings with expert stakeholders, and gave a series of presentations to service personnel. A total of 409 responses were received: 404 from individuals and 5 from organisations (The Forces Pension Society, The White Ensign Association, The British Medical Association, The British Dental Association, The RAF Widows Association).

10.2 The Consultation documents can be found here: <https://www.gov.uk/government/consultations/armed-forces-pension-scheme-retrospective-remedy>. The MOD will publish its Response at the same time as this instrument is laid and it can be found at the same link. The majority of responses agreed that the proposals outlined would achieve the policy aim and MOD has proceeded to finalise this instrument on that basis, subject to minor changes to timelines and process.

11. Guidance

11.1 Scheme administrators will contact all members who are directly affected by the provisions in this instrument within 18 months of it coming into force.

11.2 Comprehensive guidance will be provided to members in the form of letters, online guidance booklets, videos, and briefings.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies

12.2 The impact on the public sector is limited to those members who have affected service during the remedy period.

12.3 An Impact Assessment for the 2022 Act was prepared by HM Treasury during the passage of the 2022 Act :<https://www.legislation.gov.uk/ukpga/2022/7/resources> . As this instrument is made under the specific powers in the 2022 Act, and in accordance with the detailed Treasury Directions, MOD has not carried out a further formal impact assessment.

12.4 The Government Actuary's Department estimates the cost of the remedy at £1.1Bn, using assumptions and methodology consistent with scheme funding arrangements. Costs will be realised over at least the next 30 years as pension benefits become payable and continue to be drawn. Remedy implementation costs are £21m for the period to FY 26/27. All costs are already captured within existing estimates and do not represent an additional funding requirement.

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 rules of the armed forces pension schemes are kept under regular review by the Ministry of Defence.

15. Contact

15.1 Gill Martin at the Ministry of Defence, Telephone: 07906 067426 or email: gill.martin959@mod.gov.uk can be contacted with any queries regarding the instrument.

15.2 Philip Bassingham-Searle, Head of Armed Forces Remuneration at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

15.3 Andrew Murrison MP, Minister for Defence People and Veterans at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.