

Education, Children and Young People Committee

24th Meeting, 2023 (Session 6), Wednesday 27 September 2023

Subordinate legislation

1. This note provides information about the [Teachers' Pensions \(Remediable Service\) \(Scotland\) Regulations 2023](#).
2. These regulations are being considered under the negative procedure.

Timeline for Consideration

3. The regulations were laid before the Scottish Parliament on 30 August 2023.
4. They were considered by the Delegated Powers and Law Reform Committee (DPLRC) at its meeting on 19 September 2023. That Committee published its [report](#) on 21 September.
5. In its report, DPLRC highlighted a number of drafting and cross-referencing errors in the instrument. DPLRC also highlighted that the Scottish Government had failed to comply with the laying requirements as the regulations were not laid at least 28 days before they were due to come into force, once recess dates are taken into account.
6. In its response, the Scottish Government accepted the issues set out in the DPLRC report and stated that it proposes to make corrections via the next amending instrument. The relevant sections of the DPLRC report and the Scottish Government correspondence are attached at [Annexe B](#).
7. The regulations will be considered by the Education, Children and Young People Committee at its meeting on 27 September 2023.
8. If the Committee wishes to produce a report on these regulations, it must do so by 23 October 2023.

Purpose of the regulations

9. This Instrument implements the remedy to the reforms to the Scottish Teachers' Pension Scheme made under the Public Service Pensions and Judicial Offices Act ("the PSPJO Act") in respect of pensions for teachers in

Scotland. The PSPJO Act requires schemes to make provision in regulations to deliver aspects of the remedy to address the impact of the rollback to the legacy scheme and to allow members to make a choice about their pension benefits for the period between 1 April 2015 and 31 March 2022.

10. A copy of the Scottish Government's Policy Note is included at [Annexe A](#).
11. The Policy Note states that occupational pensions policy is reserved to the UK Government, with HM Treasury the department responsible for public service pension policy. The Public Service Pensions Act 2013 (2013 Act) introduced reforms to public service pension schemes including those in devolved nations. The aim of the reforms was to implement the recommendations of the Independent Public Service Pensions Commission: Final Report, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced from 1 April 2015, characterised through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.
12. Transitional protection was provided for some scheme members, dependent on proximity to their NPA on 31 March 2012, to be either "fully protected" or "taper protected".
13. In 2018, following a successful challenge by members of the judicial and firefighters' pension schemes, the transitional protections were found to be discriminatory against younger members by the Court of Appeal, as protection was only offered to older scheme members. The UK government accepted this ruling had implications for all public service schemes that contained similar transitional protection arrangements and introduced legislation through the PSPJO Act to remedy the discrimination caused by these transitional protections.

Consultation

14. The Policy Note states that in accordance with the requirements of section 21 of the 2013 Act, a public consultation was undertaken from 23 May 2023 and closed on 23 July 2023. Three responses, from organisations representing members in the education sector, were received.
15. The Policy Note also states that prior to the public consultation a period of informal consultation was carried out from September 2022 to February 2023 with members of the Scottish Teachers' Pension Scheme Advisory Board (SAB). The SAB is made up of member and employer representatives and provides advice to Scottish Ministers on the Teachers' Pension Scheme in Scotland.

16. All three responses to the public consultation agreed that the draft regulations achieved the policy objectives and requirements set by the PSPJO Act.

Impact Assessments

17. An equality impact assessment has been carried out for this instrument and can be found on the SPPA website. The assessment found that offering all eligible members a choice of benefits and removing the transitional protections rectifies the age discrimination that was found by the Court of Appeal. Furthermore, the assessment found that the policy of giving all eligible members a choice of benefits for the remediable period equalised treatment for all members for that period and thus removes any indirect sex discrimination previously found in the transitional protections element of the pension reforms. The assessment found that there was insufficient data available to draw upon to assess the other protected characteristics.

Financial Effects

18. A full Impact Assessment was provided for the PSPJO Act which includes detail of the £17 billion estimated cost. These regulations translate the policy requirements of the PSPJO Act in the context of the Scottish Teachers' pension schemes. As such, it is considered that this policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these regulations.

Procedure

19. These regulations are being considered by the Education, Children and Young People Committee under the negative procedure.
20. This means that the regulations become law immediately, i.e. as soon as they have been laid before the Scottish Parliament. These regulations can, however, be annulled up to 40 days after this has happened.
21. Rule 10.4 of the Scottish Parliament's standing orders states that any Member of the Scottish Parliament can lodge a Parliamentary motion within the 40-day time period seeking an annulment of regulations.
22. All regulations considered under the negative procedure are scrutinised by both the Delegated Powers and Law Reform Committee (on various technical grounds) and by a lead committee (on policy grounds).
23. If a motion to annul is lodged, the lead committee will consider this and then hold a vote. If the motion is disagreed to, then the regulations will remain in their current form.
24. If, however, the majority of MSPs on the lead committee agrees the regulations should be annulled, then a further motion is lodged by the Parliamentary Bureau. This is then voted on by the whole Parliament.

25. If that is also agreed to (i.e. the majority of MSPs agrees with it), then Scottish Ministers must revoke (withdraw) the instrument. It will no longer be law and the Scottish Government must lay a new set of regulations before the Scottish Parliament.

26. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

25 The Committee is invited to consider the instrument.

**Jane Davidson,
Committee Assistant
Education, Children and Young People Committee
21 September 2023**

Annexe A

POLICY NOTE

THE TEACHERS' PENSIONS (REMEDIABLE SERVICE) (SCOTLAND) REGULATIONS 2023

SSI 2023/241

The above instrument was made in exercise of the powers conferred by sections 1(1) and (2)(d), 2(1) (as read with paragraph 4(b) of Schedule 2) and 3 of the Public Service Pensions Act 2013 (“the 2013 Act”) and sections 5(1) and (5), 6(1), 7(3), 8(1) and (3), 10(1), 11(1) and (5), 12(1) and (3), 18(1) to (3), (5), (6) and (8), 19(1), (4) and (5), 20(1), (4) and (5), 21, 22(1), (2) and (6), 24(1), 25(1) and (4), 26(1) and (2), and 29(1), (7) and (8) of the Public Service Pensions and Judicial Offices Act 2022 (“PSPJOA 2022”). The instrument is subject to negative procedure.

In accordance with section 3(5) of the 2013 Act, these Regulations are made with the consent of the Treasury.

This Instrument implements the remedy to the reforms to the Scottish Teachers' Pension Scheme under the Public Service Pensions and Judicial Offices Act (“the PSPJOA Act”) in respect of pensions for teachers in Scotland. The PSPJOA Act requires schemes to make provision in regulations to deliver aspects of the remedy to address the impact of the rollback to the legacy scheme and to allow members to make a choice about their pension benefits for the period between 1 April 2015 and 31 March 2022.

Policy Objectives

Occupational pensions policy is reserved to the UK Government, with HM Treasury the department responsible for public service pension policy. The 2013 Act introduced reforms to public service pension schemes including those in devolved nations. The aim of the reforms was to implement the recommendations of the Independent Public Service Pensions Commission: Final Report, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced from 1 April 2015, characterised through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.

Transitional protection provided for some scheme members, dependent on proximity to their NPA on 31 March 2012, to be either “fully protected” or “taper protected”. Members in these categories were allowed to remain in their legacy scheme

permanently, or for a set period before transitioning to the reformed CARE scheme before 31 March 2022.

In 2018, following a successful challenge by members of the judicial and firefighters' pension schemes, the transitional protections were found to be discriminatory against younger members by the Court of Appeal, as protection was only offered to older scheme members.

The UK government accepted this ruling had implications for all public service schemes that contained similar transitional protection arrangements and introduced legislation through the 2022 Act to remedy the discrimination caused by these transitional protections.

In implementation of the PSPJOA 2022, the purpose of this instrument is to complete the statutory arrangements of the 2015 Remedy as set out in that Act. References are made within the instrument to The Public Service Pensions (Exercise of Powers, Compensation and information) Directions 2022 (PSP Directions 2022). The remedy period is 1 April 2015 to 31 March 2022.

Part 1 details the introductory provisions, including citation, coming into force date and interpretation.

Part 2 makes provision requiring the scheme manager to provide Remediable Service Statements (RSS) to eligible active, deferred and pensioner members, or the beneficiaries of deceased members. The information contained on the RSS will allow for a member to make an informed choice of which retirement benefits they wish to receive for their remediable service. The timing and frequency of an RSS will depend on whether the member is due to make an immediate or deferred choice. Immediate choice is appropriate to those who are in receipt of pension benefits before the commencement date (1 October 2023) and deferred choice is appropriate to those who retire on or after the commencement date.

Part 3 allows, in Chapter 1, for members who opted out of the pension scheme to make an election for that service to be reinstated. The regulations detail how a member should apply and submit evidence in support of the application within specified timescales. Where an application is accepted, the regulations set out that an RSS will be issued to the member setting out details of any contributions owed to the scheme to reinstate the service and how they must pay the contributions due (as detailed in Part 8 of these regulations).

Chapter 2 of Part 3 makes provision for eligible members to be given an immediate choice for reformed scheme or legacy scheme benefits. Where a member has died, the immediate choice will be made by an eligible decision maker (further detailed in the schedule to the regulations and paragraph 24 of this policy note). In all cases an immediate choice decision is irrevocable.

The regulations provide for these members to make an immediate choice election for new scheme benefits, or not to make an election and choose legacy scheme benefits for the remedy period. Details of the timing and effect of the decision is also set out in this chapter. There is also provision within this chapter for the scheme manager to deem that an election has been made before the end of the

election period, in circumstances where the member or eligible decision maker has not communicated a decision, and where an election would result in a higher value of benefits being paid to the recipient(s).

Chapter 3 covers the deferred choice decision for reformed scheme or legacy scheme benefits. A deferred choice will be given to eligible active or deferred members at retirement and the choice may be revoked up to two weeks before the day on which the first payment is due to be made. Where a choice is not made, or is revoked, then no benefits will be payable.

Where a deferred choice member dies before making an election or before the benefits begin to be paid to the member an RSS will be issued to an eligible decision-maker to make a deferred choice. Where no choice has been made within the election period, the regulations allow the scheme manager to deem that an election has been made in cases where the value of the reformed scheme benefits are greater than the value of the legacy scheme.

Where a deferred choice member retires before the scheme is able to provide an RSS, the regulations allow for the scheme manager to pay the member legacy scheme benefits in relation to their remediable service in the first instance. The member will then be provided with an RSS as soon as is reasonably practicable where they will have a period of 12 months to make a choice.

Part 4 makes provision for divorce and dissolution arrangements for both pension sharing agreements and orders, put in place before, on or after the commencement date. The provisions set out that the calculation, or recalculation of a pension debit and the corresponding pension credit must take account of the effect of the remedy.

Part 5 makes provision for those who have elected to pay voluntary contributions to secure additional pension benefits or flexibilities during the remedy period. The scheme manager must determine the value of the pension rights secured through voluntary contributions arrangements as if they were secured in the alternative scheme. Where a member has secured pension rights by way of voluntary contributions to secure reformed scheme flexibilities, the scheme manager must inform the member of their rights to secure those pension rights in the alternative scheme or to extinguish the arrangement and receive compensation for the contributions paid. The provisions in this part also enable a member to retrospectively elect to purchase additional pension under the legacy scheme.

Part 6 makes provision for transfers in and out of the teachers' pension schemes in Scotland that include remediable service on both a cash equivalent basis or a Club basis (transfers between equivalent public service pension schemes). These provisions detail the requirements for the calculation or re-calculation of transfer values and the making and accepting of payments in relation to the transfer value of remediable pension rights. This Part also includes provision to vary the period where a member can apply to transfer pension rights into the scheme to ensure impacted members do not miss out on the opportunity to transfer due to the timing of the implementation of the remedy.

Where a member has transferred remediable pension right out of either the legacy or reformed scheme, the scheme manager must provide a transfer RSS detailing the value of the transferred-out rights in the alternative scheme.

Part 7 makes provision for special cases, including, ill-health retirement, child pension payments, members with excess teacher service, and premature retirement. Chapter 1 covers ill-health retirement and provides that members who have applied for ill-health retirement in relation to their remediable service should have their applications reassessed against the alternative ill-health retirement criteria that applied at the point of the original application.

Provision is made in Chapter 2 for the protection of the amount of pension payable to an eligible child of a deceased member. Where the eligible child does not live in the same household as the eligible decision maker and the eligible decision maker chooses a benefit design that would result in a reduction of the amount of child pension, the pension will not be reduced and no overpayment of benefits incurred.

Chapter 2 also provides that where a retired member has excess teacher service (service in addition to a full-time post that is pensionable in the reformed scheme but not in the legacy scheme), the rollback of this service to the legacy scheme is delayed until the point the member makes an immediate choice decision or the end of the immediate choice election period. The effect of this is to mitigate the risk of a double correction being required should the retired member make an immediate choice election for reformed scheme benefits.

Provision in Chapter 2 has been written to undertake that “Teachers’ Premature Retirement Compensation” is excluded from remedy period benefit calculations. This is compensation that some employers choose to pay to employees who are retiring prematurely, to offset actuarially reduced pension benefits.

Part 8, liabilities, and payment, makes provision about amounts owed or owing to a person or the pension scheme as a result of the provisions in the PSPJOA 2022 or in these regulations. These provisions include the calculation of interest, indirect compensation (where benefits are increased rather than members receiving direct compensation), the netting off of relevant amounts owed to and by a person, and the reduction and waiver of liabilities owed by a member to the scheme. In particular, the regulations introduce the requirement for the scheme manager to reduce some relevant amounts by tax relief amounts, and the discretion the scheme manager has to reduce or waive relevant amounts owed by a person in certain circumstances. This part also contains provision to allow deferral of payment of relevant amounts owed to a member until a choice is made about the member’s remediable service.

The Schedule sets out a framework to determine the eligible decision-maker in circumstances where a member has died before making their choice decision. The Schedule defines the circumstances where the eligible decision-maker may be a sole beneficiary such as the surviving adult, who may be the spouse, civil partner, or other qualifying surviving partner. In other circumstances there may be multiple beneficiaries therefore the schedule provides a route for the scheme manager to identify who the eligible decision-maker should be. This schedule also confirms that

where no eligible decision-maker can be identified then the scheme manager is the decision-maker.

Consultation

In accordance with the requirements of section 21 of the 2013 Act, a public consultation was undertaken from 23 May 2023 and closed on 23 July 2023. Three responses, from organisations representing members in the education sector, were received.

Prior to the public consultation a period of informal consultation was carried out from September 2022 to February 2023 with members of the Scottish Teachers' Pension Scheme Advisory Board (SAB). The SAB is made up of member and employer representatives and provides advice to Scottish Ministers on the Teachers' Pension Scheme in Scotland.

All three responses to the public consultation agreed that the draft regulations achieved the policy objectives and requirements set by the PSPJOA 2022. A summary of the consultation responses will be made available on the website of the Scottish Public Pensions Agency (SPPA): www.sppa.gov.uk in due course.

Impact Assessments

An equality impact assessment¹ has been carried out for this instrument and can be found on the SPPA website, in addition to the assessment carried out by the UK government for the Public Service Pensions and Judicial Offices Bill². The assessment found that offering all eligible members a choice of benefits and removing the transitional protections rectifies the age discrimination that was found by the Court of Appeal. Furthermore, the assessment found that the policy of giving all eligible members a choice of benefits for the remediable period equalised treatment for all members for that period and thus removes any indirect sex discrimination previously found in the transitional protections element of the pension reforms. The assessment found that there was insufficient data available to draw upon to assess the other protected characteristics of disability, religion or belief, sexual orientation, gender reassignment, race/ethnicity, pregnancy and maternity, and marriage and civil partnership.

A Fairer Scotland Duty Assessment was not carried out. The policy set out in this SSI is technical in nature and implements reserved UK legal changes. Accordingly, the Fairer Scotland Duty Assessment is not considered to be applicable here.

Financial Effects

In line with HM Treasury's Statement of Funding Policy, the cost of pensions paid under the Scottish Teachers' Pension Schemes are managed through UK Government-funded Annually Managed Expenditure (AME), with pensions forecasts submitted to the Office for Budget Responsibility. Financial transactions,

¹ <https://pensions.gov.scot/teachers/scheme-governance-and-legislation/consultations>

² <https://bills.parliament.uk/publications/42336/documents/588>

both income and expenditure, under these two schemes score as AME; this includes the McCloud corrective payments under the PSPJOA 2022 and these Regulations. On that basis no Business and Regulatory Impact Assessment is required for these Regulations.

In its initial consultation on public service pensions remedy, the UK Government estimated that removing the unlawful discrimination would cost on average around £2.5 billion for each year of the remedy period in additional future pension payments to those eligible members.

This equates to £17 billion across all of the relevant public service schemes. The additional costs for the Scottish teachers' schemes, estimated at £400 million³, will, in the same way as the other schemes, be factored into future employer contribution rates to apply from 1 April 2024

A full Impact Assessment⁴ was provided for the PSPJOA 2022 which includes detail of the £17 billion estimated cost. These regulations translate the policy requirements of the PSPJOA 2022 in the context of the Scottish Teachers' pension schemes. As such this policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these Regulations.

Scottish Public Pensions Agency

An Agency of the Scottish Government

August 2023

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069102/Teachers_Scotland_2016_Unpause_Report.pdf

⁴ https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod_20220007_en.pdf

Annexe B

Excerpt from Delegated Powers and Reform Committee on 19 September 2023, 53rd Report, 2023 (Session 6)

Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/241

31. This instrument is made under powers in the Public Service Pensions Act 2013 and the Public Service Pensions and Judicial Offices Act 2022.

32. The instrument makes changes to Scottish teachers' pension schemes which are necessary following a successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.

33. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.

34. Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than 4 days. The instrument breaches this requirement as it was laid on 30 August and comes into force on 1 October 2023.

35. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained that:

- As public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
- UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
- the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.

36. The Committee identified a number of drafting errors in the instrument:

1. in regulation 2(1) and paragraph 1(1) of the schedule, reference is made to “deferred choice election decision” rather than to the defined term “deferred choice decision”;
2. regulation 46(7) refers to “compensatable amount” whereas the defined term is “compensation amount”;
3. paragraph 1(1) of the schedule, refers to “immediate choice election” whereas the defined term is “immediate choice decision”;
4. and in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

37. In its response to the Committee, the Scottish Government suggested that points a– c above are clear in context. However, the Committee considered it would be clearer to use the defined terms. In relation to point d above, the Scottish Government advised that in most cases, a child’s status as the sole beneficiary of death benefits (as referred to in the relevant paragraph) would be as a result of the death of both of their parents, but to take account of circumstances where a child has a surviving parent who is not a beneficiary of death benefits, for instance due to divorce, this reference will be amended to also refer to “parent”.

38. The Committee also identified the following cross-referencing errors

1. in regulation 23, “legacy scheme cash equivalent” is defined by reference to regulation 24(2)(b) but should be to 24(2)(a); and “reformed scheme cash equivalent” is defined by reference to regulation 24(2)(a) but should be to 24(2)(b);
2. in regulation 55(1)(b), the reference to the Teachers’ Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 should be to the Teachers’ Pensions (Remediable Service) (Scotland) Regulations 2023;
3. in regulation 63(1)(c), the reference to regulation 623 should be to should be to regulation 62; and
4. regulations 64(2) & (5), the reference to regulation 622 should be to regulation 62.

39. The Scottish Government confirmed these are all errors. It proposes to make corrections via the next amending instrument, as set out in detail in its response.

40. A full copy of the correspondence can be found in the Annex.

41. The lead committee for this instrument is the Education, Children and Young People Committee.

42. The Committee draws the instrument to the attention of the Parliament under reporting ground (j) for failure to comply with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

43. The Committee is content with the Scottish Government's explanation provided for this breach of the laying requirements.

44. The Committee also draws the instrument to the attention of the Parliament on:

1. reporting ground (h) (the meaning could be clearer) in that:

- in regulation 2(1) and paragraph 1(1) of the schedule, reference is made to “deferred choice election decision” rather than to the defined term “deferred choice decision”;
- regulation 46(7) refers to “compensatable amount” whereas the defined term is “compensation amount”;
- paragraph 1(1) of the schedule, refers to “immediate choice election” whereas the defined term is “immediate choice decision”; and
- in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

and

2. the general reporting ground, in respect of the following cross-referencing errors:

- in regulation 23, the reference to regulation 24(2)(b);
- in regulation 55(1)(b), the reference to the Teachers' Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023;
- in regulation 63(1)(c), the reference to regulation 623; and
- in regulations 64(2) & (5), the reference to regulation 622.

The Committee notes the Scottish Government proposes to address these matters in the next amending instrument.