

# Criminal Justice Committee

## 25th Meeting, 2023 (Session 6), Wednesday, 4 October 2023

### Subordinate legislation

### Note by the clerk

### Purpose of the paper

1. This paper invites the Committee to consider the following negative instruments:
  - [The Police Pensions \(Remediable Service\) \(Scotland\) Regulations 2023 \(SSI 2023/239\)](#) [see **Annex A**];
  - [The Firefighters' Pensions \(Remediable Service\) \(Scotland\) Regulations 2023 \(SSI/242\)](#) [see **Annex B**].
2. 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.
3. These instruments breach this requirement as they were laid on 30 August and came into force on 1 October 2023.
4. The Scottish Public Pensions Agency explains the reasons for the breach in a letter to the Presiding Officer:
  - as public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
  - the 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.

3. If the Committee agrees to report to the Parliament on the instruments, it is required to do so by **23 October 2023**.

## **Delegated Powers and Law Reform Committee Consideration**

4. The Delegated Powers and Law Reform Committee considered both instruments at its meeting on 19 September 2023.
5. In its [report](#), the DPLR Committee highlights a number of drafting and cross-referencing errors in the instruments and raises various points which it considers could be clearer.
6. The Scottish Government has confirmed it proposes to amend all of the issues raised with the instruments via amending instruments, with the exception of the errors in the preambles, which it proposes to amend by correction slips.
7. The DPLR Committee's report also highlights that for both of the instruments, the Scottish Government has failed to comply with the 28 day laying requirements. However, it notes in the report that it is content with the explanation provided for this breach.
8. The relevant sections of the DPLR Committee's report are attached at **Annex C**.

## **Procedure for negative instruments**

9. Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
10. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
11. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
12. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

13. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
14. Each negative instrument appears on the Criminal Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
15. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

## **Guidance on subordinate legislation**

16. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

17. **The Committee is invited to consider the instruments.**

**Clerks to the Committee  
September 2023**

## Annex A

### Policy Note

## The Police Pensions (Remediable Service) (Scotland) Regulations 2023

### SSI 2023/239

The above instrument was made in exercise of the powers conferred by sections 1(1), 1(2)(g), (together with paragraph 7(a) of schedule 2) and 3(1), (2)(a) (together with paragraph 13 of schedule 3) and (c) and (3)(b) 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, 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), 29(1), (7) and (8) and 31(2) and (3) of the Public Service Pensions and Judicial Offices Act 2022 (“PSPJOA 2022”) and all other powers enabling them to do so. The instrument is subject to negative procedure.

This Instrument implements the remedy to the reforms to the Scottish police pension schemes under the Public Service Pensions and Judicial Offices Act (“the PSPJOA Act”) in respect of pensions for police officers 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.

Through implementation of the PSPJOA 2022, the purpose of this instrument is to complete the statutory arrangements of the 2015 Remedy as set out in the 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 to support 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 22 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 ten working days before the day on which the first payment is due to be made. 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 in place before or 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 in the reformed scheme during the remedy period. The scheme manager must inform the member of their rights to either receive immediate compensation for the contributions paid or to defer compensation until a choice of benefits is made. 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 police 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 the 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, and payment of annual allowance tax charges. 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 illhealth 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.

Provision is made in Chapter 2 for the joint liability amount of annual allowance tax charges to be paid by the scheme administrator if the time limit has passed.

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 4 May 2023 and closed on 13 July 2023. Thirteen responses, from organisations representing members and employers in the police sector were received.

Prior to the public consultation a period of informal consultation was carried out with members of the Scottish Police Pension Scheme Advisory Board (SAB). The SAB is made up of member and employer representatives and provides advice to Scottish Ministers on the desirability of changes to the Police Pension Scheme in Scotland.

A majority of the thirteen 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](http://www.sppa.gov.uk) in due course.

## **Impact Assessments**

An equality impact assessment has been carried out for this instrument and can be found on the SPPA's website<sup>1</sup>, in addition to the assessment carried out by the UK government for the Public Service Pensions and Judicial Offices Bill<sup>2</sup>. 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 in relation to the other protected characteristics of disability, religion or belief, sexual orientation, gender reassignment, race/ethnicity, pregnancy and maternity, and marriage and civil partnership, there were no findings that showed members to be adversely or otherwise impacted by the remedy.

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**

Like most public service pension schemes, the Scottish police schemes are unfunded, meaning there is no assets invested to meet future liabilities payments. Pension costs are managed through the Scottish Resource budget under the Justice and Veterans portfolio.

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 police schemes, estimated at £0.38 billion<sup>3</sup>, 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 Assessment<sup>4</sup> 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 firefighters' 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

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

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

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1068567/Police\\_Scotland\\_2016\\_Unpaue\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068567/Police_Scotland_2016_Unpaue_Report.pdf)

<sup>4</sup> [https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod\\_20220007\\_en.pdf](https://www.legislation.gov.uk/ukpga/2022/7/pdfs/ukpgaod_20220007_en.pdf)



## **Annex B**

### **Policy Note**

#### **The Firefighters' Pensions (Remediable Service) (Scotland) Regulations 2023**

#### **SSI 2023/242**

The above instrument was made in exercise of the powers conferred by sections 1(1) and (2)(f), 2(1) (together with paragraph 6(a) of schedule 2) and 3(1) and (2)(a) (together with paragraph 13 of schedule 3) and (c) 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), 29(1), (7) and (8) and 31(2) and (3) of the Public Service Pensions and Judicial Offices Act 2022 (“PSPJOA 2022”). The instrument is subject to negative procedure.

This Instrument implements the remedy to the reforms to the Scottish Firefighters' Pension Schemes under the Public Service Pensions and Judicial Offices Act (“the PSPJOA Act”) in respect of pensions for firefighters' 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.

Through implementation of the Public Service Pensions and Judicial Offices Act 2022, the purpose of this instrument is to complete the statutory arrangements of the 2015 Remedy as set out in the 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 to support 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 22 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 ten working days 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 weeks to make a choice.

Part 4 makes provision for divorce and dissolution arrangements for both pension sharing agreements and put orders in place before or 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 in the reformed scheme during the remedy period. The scheme manager must inform the member of their rights to either receive immediate compensation for the contributions paid or to defer compensation until a choice of benefits is made. 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 firefighters' 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 rights 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 and child pension payments. 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.

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 16 May 2023 and closed on 23 July 2023. Four responses, from organisations representing members and employers from the sector were received.

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

All four 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](http://www.sppa.gov.uk) in due course.

## Impact Assessments

An equality impact assessment has been carried out for this instrument and can be found on the SPPA's website<sup>5</sup>, in addition to the assessment carried out by the UK government for the Public Service Pensions and Judicial Offices Bill<sup>6</sup> 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 in relation to the other protected characteristics of disability, religion or belief, sexual orientation, gender reassignment, race/ethnicity, pregnancy and maternity, and marriage and civil partnership there were no findings that showed members to be adversely or otherwise impacted by the remedy.

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

Like most public service pension schemes, the Scottish firefighters' schemes are unfunded, meaning there is no assets invested to meet future liabilities payments. Pension costs are managed through the Scottish Resource budget under the Justice and Veterans portfolio.

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 firefighters' schemes, estimated at £0.09 billion<sup>7</sup>, 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 assessment<sup>8</sup> 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 firefighters' 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.

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<sup>5</sup> <https://pensions.gov.scot/firefighters/scheme-governance-and-legislation/consultations>

<sup>6</sup> <https://bills.parliament.uk/publications/42336/documents/588>

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1068445/Fire\\_Scotland\\_2016\\_Unpause\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068445/Fire_Scotland_2016_Unpause_Report.pdf)

<sup>8</sup> <https://bills.parliament.uk/publications/42336/documents/588>

## Annex C

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

### **Police Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/239)**

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

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

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.

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.

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.

## **CJ/S6/23/25/4**

In correspondence with the Scottish Government, the Committee raised a number of points concerning the provisions:

1. whether the references in regulation 10(c) and paragraph 1(1) of the schedule to an “immediate choice election” could be to a defined term;
2. whether the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term; and
3. whether in paragraph 3 of the schedule, where the eligible decision-maker is a guardian only, whether reference should also be made to a parent.

The Committee also identified a number of other drafting points in the instrument:

1. in the preamble, the reference to paragraph 7(a) of schedule 2 of the Public Service Pensions Act 2013 (which provides that scheme regulations for members of a police force may be made by the Secretary of State in or as regards England), should be to paragraph 7(b) (which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland);
2. in regulation 18(2) the reference to “regulation 23(3) and (4)” should be to regulation 22(3);
3. in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be a reference to “the end of the section 6 election period” in line with the defined term; and
4. in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) should be to regulations 6(2)(b), 8(2)(b), and 12(2)(b) respectively.

The Scottish Government confirmed it proposes to amend all of the above issues via an amending instrument, with the exception of the error in the preamble, which it proposes to amend by correction slip.

**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.**

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

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

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

- the references in regulation 10(c) and paragraph 1(1) of the schedule to an “immediate choice election” could be to a defined term;
- the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term; 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 that:

- in the preamble, the reference to paragraph 7(a) of schedule 2 of the 2013 Act should be to paragraph 7(b);
- in regulation 18(2) the incorrect cross-reference to “regulation 23(3) and (4)”;
- in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be a reference to “the end of the section 6 election period”; and
- in the schedule, paragraph 1(1), in the definition of “eligible decisionmaker, the incorrect cross-references to regulations 5(2)(b), 7(2)(b) and 11(2)(b).

The Committee notes the Scottish Government proposes to correct the error in the preamble by correction slip, and to address the other points raised by way of an amending instrument.

### **Firefighters’ Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/ 242)**

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

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



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.

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.

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.

The Committee identified two drafting errors in the instrument which it considered engaged the “defective drafting” reporting ground:

1. regulation 12(11) provides (in effect) that in particular circumstances where the amount of pension benefits that have been paid out on one basis exceeds the amount to which the person was entitled, “the beneficiary must pay an amount equal to the difference to the beneficiary”. The Scottish Government has confirmed that this is an error. They advised that the payee should be the scheme manager. The Committee considered that the “defective drafting” ground is engaged because the provision is clearly wrong; it is not obvious to the reader what the provision should say; and the dubiety concerns a matter of significance, namely who must pay money to whom.

2. the schedule of the instrument specifies who is eligible to make decisions in relation to the pension of deceased pension scheme members, in various different circumstances. Paragraph 11(2)(b)(ii) is intended to specify who the eligible person is when all of the following apply: there are multiple beneficiaries including at least one adult and at least one child, the deceased member has no personal representative, none of the beneficiaries is a “surviving adult”, and all the children are over 18. However, the provision ends without nominating a decision-maker. The

Scottish Government has confirmed that this is a drafting error and that the provision should specify the scheme manager as the decision-maker. The same drafting issue arises in paragraph 7(2)(b) of the schedule.

The Committee considered that the “defective drafting” ground is engaged because the provision does not work; it will not be obvious to the reader who the decision-maker should be; and that the error affects the operation of a significant provision which determines who can make a decision in relation to a deceased person’s pension.

The Committee also identified a number of other points on in the instrument which it considered could be clearer:

1. regulation 10(c) and paragraph 1(1) of the schedule refer to an “immediate choice election”, which is not a defined term, although “immediate choice decision” and “section 6 election” are defined;
2. the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to the defined term “deferred choice decision”;
3. regulation 54(1)(b) refers to “surviving partner”, but there is no definition of “surviving partner” or “partner” in the instrument or the parent Acts, whereas “surviving adult” appears in the schedule of the instrument, and “adult survivor” appears in one of the parent Acts (the Public Service Pensions and Judicial Offices Act 2022). The Scottish Government has proposed to clarify this by inserting a new definition of “surviving partner” at paragraph 1(1) of the schedule, as follows: “surviving partner” has the meaning given in regulation 76 of the 2015 Regulations”; and
4. in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

The Committee also identified the following errors which it considered engage the general reporting ground:

1. in the preamble, the reference to paragraph 6(a) of schedule 2 of the 2013 should be to paragraph 6(c) (paragraph 6(a) of schedule 2 of the 2013 Act provides that scheme regulations for fire and rescue workers may be made by the Secretary of State in or as regards England, it is paragraph 6(c) which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland);
2. in regulation 2(1), a cross-reference to Part 1 of schedule 2 of the 1992 Order, which the Scottish Government advised should be to Part D of that schedule;
3. in regulation 2(1), in the definition of “immediate choice member”, the reference to a member “with remedial service”, which should be to “remediable” service in line with the defined term in the parent Act; and similarly the references to “remedial service” in regulation 18(1) and “remedial service statement” in regulation 14(2)(a)(i);
4. In regulation 12(8)(b), the incorrect cross-reference to regulation 15;

5. in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be to “the end of the section 6 election period” in line with the defined term;

6. in regulation 62(2), the reference to regulation 63 should be to regulation 65;

7. in regulation 65(9), the reference to paragraph (5), which the Scottish Government has confirmed should be to paragraphs (6) and (7), and

8. in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) should be references to 6(2)(b), 8(2)(b) and 12(2)(b) respectively.

The Scottish Government confirmed it proposes to amend all of the above issues via an amending instrument, with the exception of the error in the preamble, which it proposes to amend by correction slip.

**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.**

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

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

**1. reporting ground (i) (defective drafting), in that:**

- **the drafting of regulation 12(11) appears to be defective given the error concerning to whom the money is to be paid; and**
- **the drafting of paragraphs 7(2)(b) and 11(2)(b)(ii) and 7(2)(b) of the schedule appears to be defective because these provisions fail to state who the eligible decision-maker is.**

**and**

**2. reporting ground (h) (the meaning could be clearer,) in that:**

- **the references in regulation 10(c) and paragraph 1(1) of the schedule to an “immediate choice election” could be to a defined term;**
- **the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term;**

- “surviving partner”, which is referred to in regulation 54(1)(b), is not defined; 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

**3. the general reporting ground, in that:**

- in the preamble, the reference to paragraph 6(a) of schedule 2 of the 2013 should be to paragraph 6(c);
- in regulation 2(1), the incorrect cross-reference to Part 1 of schedule 2 of the 1992 Order;
- in regulation 2(1) in the definition of “immediate choice member”, and in regulations 14(2)(a)(i) and 18(1), the reference to “remedial” service;
- in regulation 12(8)(b), the incorrect cross-reference to regulation 15;
- in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period”;
- in regulation 62(2), the incorrect cross-reference to regulation 63;
- in regulation 65(9), the incorrect cross-reference to paragraph (5); and
- in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the incorrect cross-references to regulations 5(2)(b), 7(2)(b) and 11(2)(b).

**The Committee notes the Scottish Government proposes to correct the error in the preamble by correction slip, and to address these other matters by way of an amending instrument.**