

Criminal Justice Committee

**14th Meeting, 2022 (Session 6), Wednesday,
20 April 2022**

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 \(Scotland\) Amendment Regulations 2022](#) (SSI 2022/101) [see **Annexe A**];
 - [The Firefighters' Pension Scheme \(Scotland\) Amendment Regulations 2022](#) (SSI 2022/103) [see **Annexe B**]
2. If the Committee agrees to report to the Parliament on the instruments, it is required to do so by **9 May 2022**.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered both of the instruments at its meeting on 29 March 2022.
4. In its [report](#), the DPLR Committee agreed to draw the instruments to the attention of the Parliament on reporting ground (j) for failure to lay the instruments in accordance with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
5. In correspondence with the Presiding Officer, the Scottish Government explained that these regulations are as a consequence of the 2022 Act and are required to come into force immediately to ensure legal certainty and fairness. If there is a delay, then there will be a period in which certain members can no longer accrue pension in the legacy scheme, but scheme rules would prevent those members from joining the new scheme.

6. The DPLR Committee is content with the explanations provided by the Scottish Government for failure to comply with the laying requirements.
7. A copy of the correspondence can be found in **Annexe C**.

Procedure for negative instruments

8. 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.
9. 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).
10. 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.
11. 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.
12. 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.
13. 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.
14. 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

15. 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>

16. The Committee is invited to consider the instruments.

Clerks to the Committee
14 April 2022

Annexe A

Policy Note

The Police Pensions (Scotland) Amendment Regulations 2022

SSI 2022/101

The above instrument was made in exercise of the powers conferred by section 1(1), (2)(g) 2 and 3 of, and Schedule 3 to, the Public Service Pensions Act 2013 (“the 2013 Act”). It is subject to negative procedure.

The Regulations implement reforms to the Police Pension Schemes under the Public Service Pensions and Judicial Offices Act (“the 2022 Act”) in respect of pensions for Police Officers in Scotland.

Policy Objectives

Occupational pensions policy is reserved to the UK Government. 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.

The purpose of the amendments in this instrument, in implementation of the 2022 Act, is to ensure that the pension schemes governed by The Police Pensions

Regulations 1987 (“the 1987 Scheme”) and the Police Pensions Regulations (Scotland) 2007 (“the 2006 Scheme”) will, except for limited purposes, be closed to the accrual of pension benefits with effect from 1st April 2022. Any members currently in pensionable service under those pension schemes will, on that date, begin to accrue benefits in the scheme established by the 2015 Regulations.

A further instrument is being prepared that will complete the statutory arrangements as set out in the 2022 Act.

The Amendments

This instrument achieves the purposes of closing the legacy schemes at 31 March 2022, moving all active members to the 2015 Scheme on 1 April 2022 and ensuring that rules around additional pension elections and transfers in to the existing scheme for transitional members are applied consistently to those previously classed as full protection members.

Regulation 1 establishes the title of the Regulations and the commencement date is set at 1 April 2022.

Regulation 2 defines the closing date of the legacy schemes as 31 March 2022 and the transition date for “full protection” members as 1 April 2022. This regulation also defines the date 31 March 2022 as the date at which full protection members cease to be full protection members of the legacy schemes.

Consultation

To comply with the requirements of section 21 of the 2013 Act, a public consultation was undertaken from 24 November 2021 and closed on 18 January 2022. Those consulted were Police pension scheme members, employers, related trade unions and relevant Scottish and UK Government Departments. Consultation responses showed general agreement with the purpose and nature of the amendments. Some respondents expressed disagreement with the nature and intention of the overarching 2015 Remedy that has been set out in the 2022 Act. 32 responses were received to the consultation and a summary of the consultation responses will be made available on the Scottish Public Pensions Agency’s website www.sppa.gov.uk.

Impact Assessments

An initial Equality Impact Assessment has been completed and was included with the public consultation. This assessment will continue to be reviewed and updated and a full assessment will be published with the second and final instrument.

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

CJ/S6/22/14/5

This policy introduces further reform to the pension scheme for police officers in Scotland, following court judgment and public consultation. 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

17 March 2022

Annexe B

Policy Note

The Firefighters' Pension Scheme (Scotland) Amendment Regulations 2022

SSI 2022/103

The above instrument was made in exercise of the powers conferred by section 1(1), (2)(f) 2 and 3 of, and Schedule 3 to, the Public Service Pensions Act 2013 (“the 2013 Act”). It is subject to negative procedure.

The Regulations implement reforms to the Firefighters' Pension Schemes under the Public Service Pensions and Judicial Offices Act (“the 2022 Act”) in respect of pensions for firefighters in Scotland.

Policy Objectives

Occupational pensions policy is reserved to the UK Government. 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.

The purpose of the amendments in this instrument, in implementation of the 2022 Act, is to ensure that the pension schemes governed by the Firemen's Pension

Scheme Order 1992 (“the 1992 Scheme”) and the Firefighters' Pension Scheme (Scotland) Order 2007 (“NFPS”) will, except for limited purposes, be closed to the accrual of pension benefits with effect from 1st April 2022. Any members currently in pensionable service under those pension schemes will, on that date, begin to accrue benefits in the scheme established by the 2015 Regulations.

A further instrument is being prepared that will complete the statutory arrangements as set out in the 2022 Act.

The Amendments

This instrument achieves the purposes of closing the legacy scheme at 31 March 2022, moving all active members to the 2015 Scheme on 1 April 2022 and ensuring that rules around additional pension elections and transfers in to the existing scheme for transitional members are applied consistently to those previously classed as full protection members.

Regulation 1 establishes the title of the Regulations and the commencement date is set at 1 April 2022.

Regulation 2 addresses the need to ensure that, where members of the 1992 Scheme are awaiting a decision on whether they are entitled to an ill-health award when they join the 2015 Scheme on 1 April 2022, the criteria used to determine entitlement to such an award reflect the criteria in the 1992 Scheme. This ensures that members in this position are treated fairly.

Regulation 3 ensures that the policy intention to close the legacy schemes is attained by amending schedule 2 of the 2015 Regulations as follows:

- a) the definitions of “closing date” and “transition date” in paragraph 1 are amended to insert dates in respect of those terms that apply to full protection members so that provisions which refer to those terms operate as intended in respect of such members;
- b) paragraph 3(3) is amended so that a scheme manager may only set a tapered protection closing date under that paragraph if such date is before 1 April 2022;
- c) paragraph 9(2) is amended so that protection ceases for a full protection member on the earlier of the day on which they leave pensionable service under the existing scheme, or 31 March 2022;
- d) paragraph 31(2) is amended so that no new elections to purchase additional service under the NFPS may be made after 31 March 2022;
- e) paragraphs 37 and 38 are omitted so that members who are awaiting a decision on whether they are entitled to an ill-health award under an existing scheme on 1 April 2022 transition to the 2015 Scheme on that date.

Consultation

To comply with the requirements of section 21 of the 2013 Act, a public consultation was undertaken from 24 November 2021 and closed on 18 January 2022. Those consulted were Firefighters' pension scheme members, employers, related trade unions and relevant Scottish and UK Government Departments. Consultation responses showed a general agreement with the purpose and nature of the amendments. Three responses were received to the consultation and a summary of the consultation responses will be made available on the Scottish Public Pensions Agency's website www.sppa.gov.uk.

Impact Assessments

An initial Equality Impact Assessment has been completed and was included with the public consultation. This assessment will continue to be reviewed and updated and a full assessment will be published with the second and final instrument.

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

This policy introduces further reform to the pension scheme for firefighters in Scotland, following court judgment and public consultation. 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

17 March 2022

Annexe C

Letter from the Scottish Government to the Presiding Officer

17 March 2022

Dear Presiding Officer,

Public Service Pensions Regulations – the 2015 Remedy

The Firefighters’ Pension Scheme (Scotland) (Amendment) Regulations 2022
The National Health Service Pension Schemes (Amendment) Regulations 2022
The Police Pensions (Amendment) (Scotland) Regulations 2022
The Teachers’ Pension Scheme (Scotland) (Amendment) Regulations 2022

The above named SSIs, were made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 (“the 2013 Act”) on 17 March 2022. They are being laid before the Scottish Parliament today, 17 March 2022 and come into force on 1 April 2022.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

These instruments provide the necessary regulations to begin to remove the discrimination identified by the Court of Appeal (known as the McCloud judgment), that was found in the transitional protections in the pension reforms in the 2013 Act. These SSIs represent the first of two pieces of subordinate legislation required for each pension scheme in order to fully remedy the discrimination and are required by the Public Service Pensions and Judicial Offices Act 2022 (“the 2022 Act”).

These instruments could not be made and laid sooner because they were dependent on the 2022 Act receiving Royal Assent. This was originally expected to be received on 3 March 2022 however due to unavoidable delay, Royal Assent was received on 10 March 2022.

Chapter 4 of Part 1 of the Act, contains the operative prospective remedy provision necessary to bring to an end the unlawful age discrimination identified in the McCloud judgment.

In particular, section 88(2)(c) of the Act has the effect of closing the legacy public service pension schemes to future accrual after 31st March 2022. These instruments make consequential provision for the relevant pension schemes. This provision must come into force immediately after the legacy pension schemes are closed to future accrual by the Act to ensure legal certainty and fairness. If there is any delay, then

there will be a period in which certain members can no longer accrue pension in the legacy scheme but scheme rules would prevent those members from joining the new scheme.

Consequently I must regrettably inform you that these four instruments will breach the 28 day rule. On 8 March 2022, Tom Arthur, Minister for Public Finance, Planning & Community Wealth, wrote to the Convener of the Delegated Powers and Law Reform Committee setting out that it would not be possible to meet the 28 day rule for these regulations. I attach a copy of that letter for information. For further supporting information, I also attach a copy of a letter sent by HM Treasury Legal Advisors to the Counsel to the Joint Committee on Statutory Instruments, setting out the reasons for breaching their 21 day convention.