

Local Government, Housing and Planning Committee

23rd Meeting, 2023 (Session 6)

Tuesday, 3 October 2023

SSI cover note for: Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023

SSI 2023/240

Title of Instrument: Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023

Type of Instrument: Negative

Laid Date: 30 August 2023

Circulated to Members: 31 August 2023

Meeting Date: 3 October 2023

Minister to attend meeting: No

Motion for annulment lodged: No

Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee? Yes

Reporting deadline: 23 October 2023

Recommendation

1. The Committee is invited to consider any issues which it wishes to raise on this instrument.
2. An electronic copy of the instrument is available at: <https://www.legislation.gov.uk/ssi/2023/240/contents/made>

3. Copies of the Scottish Government’s Explanatory and Policy Notes are included in **Annexe A**.

Purpose

4. The Policy Note explains that the purpose of this instrument is—

“To amend the Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 and the principal Scottish Local Government Pension Scheme Regulations 2018 (“the LGPS regulations”).”

5. The Policy Note further explains 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 introduced reforms to public service pension schemes including those in devolved nations.

6. Following the McCloud judgment, which identified that younger members had been subject to unlawful age discrimination in the scheme reforms, the UK Government introduced the PSPJOA 2022 requiring responsible authorities to bring forward legislation to remedy the discrimination. The extension of the underpin to all members active at 31 March 2012 was the Scottish Minister’s preferred option for addressing the difference in treatment in the LGPS, and the Scottish Public Pension Agency (SPPA) consulted on this approach in 2020. Most respondents also agreed with this approach, considering that the proposals satisfactorily remove the unlawful in the transitional protection arrangements.

Delegated Powers and Law Reform Committee consideration

7. At its meeting on 19 September 2023¹ the DPLR Committee considered the instrument and agreed to draw it 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.

8. However, the DPLRC Committee was content with the Scottish Government’s explanation for this breach of the laying requirements, as set out in correspondence to the Presiding Officer (see [annexe](#) to DPLR Report).

9. The DPLR Committee also identified erroneous references in regulations 2(4), 3(13), 3(15) and 13(4) of the instrument to “the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023” The Scottish Government confirmed that these are errors, and have arisen because they refer to

¹ [Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 19 September 2023 \(azureedge.net\)](#)

the draft title of the instrument rather than the final title of the instrument as laid (the final title being the “Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023”). The DPLR Committee noted that the Scottish Government stated that it proposes to correct these errors via a correction slip.

Procedure for Negative Instruments

10. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. 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). Under Rule 10.4, any member (whether 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. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

11. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee 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 correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

**Clerks,
Local Government, Housing and Planning Committee**

Annexe A

Scottish Government Explanatory Note

The Public Service Pensions Act 2013 (c. 25) (“the 2013 Act”) makes provision, and confers further powers to make provision (in the form of “scheme regulations” as defined in section 1 of that Act) about the establishment of public service pension schemes. The Local Government Pension Scheme (Scotland) Regulations 2018 (S.S.I. 2018/141, “the 2018 Regulations”) are the scheme regulations consolidating the Local Government Pension Scheme (Scotland) Regulations 2014, which established the successor local government pension scheme (“the 2015 Scheme”) to the pension scheme constituted by the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008, the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 and the Local Government Pension Scheme (Transitional Provisions) (Scotland) Regulations 2008 (“the 2009 Scheme”). The Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 (S.S.I. 2014/233, “the 2014 Regulations”) provide transitional protection (“the statutory underpin”) for 2009 Scheme members. Similar transitional protection was made under the 2013 Act for members of judicial pension schemes and members of firefighters pension schemes. The transitional protection for members of the judicial and firefighters schemes was subsequently found to unlawfully discriminate between members of the respective schemes on the basis of age. Although the statutory underpin was not subject to legal action, all schemes established under the 2013 Act are subject to review. These Regulations do this in relation to the 2015 Scheme.

The Public Service Pensions and Judicial Offices Act 2022 (c. 7) (“PSPJOA 2022”), at Chapter 3 of Part 1, makes provision, and confers powers for scheme regulations under the 2013 Act to make further provision, in relation to specified service (“remediable service”, as defined in section 77 of PSPJOA 2022) of members who benefitted from the statutory underpin or who did not by reason of their age. Section 85 of PSPJOA 2022 requires certain powers in chapter 3 of Part 1 to be exercised in accordance with Treasury Directions.

These Regulations are scheme regulations under the 2013 Act and in accordance with PSPJOA 2022 in relation to a member’s remediable service in the local government legacy schemes and the 2015 Scheme. They are, to the extent required by section 85 of PSPJOA 2022, made in accordance with Treasury Directions (in the form of the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022). These Regulations have retrospective effect, which is authorised by section 3(3)(b) of the 2013 Act.

Part 1 of these Regulations makes general provision.

Part 2 amends the 2014 Regulations in relation to the statutory underpin:

Regulation 2(2) amends regulation 1 of the 2014 Regulations and introduces the concept of the “final guarantee amount”. This is the amount by which a member’s

benefits under the 2015 Scheme (as assessed in accordance with the amendments made by these Regulations) are exceeded by the amount the member should have been entitled under the local government legacy schemes.

Regulation 2(3) omits regulation 4 of those regulations (which contained the original provision relating to the statutory underpin).

Regulation 2(4) inserts regulations 4A to 4T, which, by their effect, replace regulation 4:

- Regulation 4A makes provision in relation to the application of the replacement statutory underpin provisions to certain members (“eligible members”) and in respect of a certain period (“the underpin period”).
- Regulation 4B makes provision for eligible members who become entitled to a pension on the basis of retirement, redundancy, or ill health to have their pension account increased by the final guarantee amount on the day after they become so entitled.
- Regulation 4C makes provision for eligible members who become entitled to a pension on the basis of taking flexible retirement under regulation 29(7) of the 2018 Regulations to have their pension account increased by the final guarantee amount on the day after they become so entitled. It makes further provision relating to the ability of an eligible member taking flexible retirement to elect to take less than 100% of the pension to which they are entitled.
- Regulation 4D prevents eligible members who take a lump sum payment from having their pension account increased by the final guarantee amount relating to the pension account.
- Regulation 4E prevents eligible members who transfer to a different scheme from having a final guarantee amount determined in relation to their pension account.
- Regulation 4F prevents eligible members who take a repayment of contributions from having a final guarantee amount calculated in respect of those repaid contributions.
- Regulation 4G provides for an “underpin date” to be determined in respect of eligible members. The underpin date is the date in respect of which a provisional calculation of the member’s benefits under the 2015 Scheme and the 2009 Scheme in respect of the underpin period is made.
- Regulation 4H provides for a “final underpin date” to be determined in respect of eligible members. The final underpin date is the date in respect of which the final calculation of the eligible members benefits under the 2015 Scheme and 2009 Scheme is made, out of which the final guarantee amount is calculated.
- Regulation 4I contains the calculation of an eligible member’s provisional assumed benefits. This is the provisional calculation of the benefits a member is entitled to under the 2015 Scheme.
- Regulation 4J contains the calculation of an eligible member’s provisional underpin amount. This is the provisional calculation of the benefits a member should otherwise have been entitled to under the 2009 Scheme.

- Regulation 4K provides for the calculation of an eligible member’s “final assumed benefits” for the purpose of the statutory underpin. This is the final calculation of the benefits the person is entitled to under the 2015 Scheme.
- Regulation 4L provides for the calculation of an eligible member’s “final underpin amount” for the purpose of the statutory underpin. This is the final calculation of the benefits the person should otherwise have been entitled to under the 2009 Scheme.
- Regulation 4M makes provision for the calculation of a “survivor guarantee amount” and for that amount to be added to a survivor member’s pension in respect of a deceased eligible member’s entitlement to a final guarantee amount.
- Regulation 4N makes provision for the calculation of a “deferred guarantee amount” relating to an eligible member who is deceased and for that amount to be included in the calculation of a death grant payable in respect of the member.
- Regulation 4O makes provision in relation to the calculation of provisional assumed benefits and provisional underpin amount for eligible members who have a pension account that has been aggregated from two or more pension accounts.
- Regulation 4P makes provision for the calculation of the cash equivalent value of an eligible member’s relevant benefits (as defined in section 29 of the Welfare Reform and Pensions Act 1999 (c. 30)) where the eligible member is divorced or dissolves a civil partnership.
- Regulation 4Q empowers an administering authority to pay additional benefits under the 2015 Scheme, instead of an amount under section 82 of PSPJOA 2022, in respect of a compensatable loss that is a Part 4 tax loss.
- Regulation 4R prevents an administering authority from paying an amount under section 82 of PSPJOA 2022, or additional benefits under regulation 4Q, unless the eligible member concerned or their personal representatives have made an application. It makes provision for the contents of such an application, requires administering authorities to determine the amounts payable to the eligible member or their personal representatives, and for appeals against such determinations.
Regulation 4S provides that compensation under section 82 of PSPJOA 2022 or regulation 4Q may be paid from the pension fund concerned.
- Regulation 4T makes provision for the payment of interest in respect of the payment of an additional benefit under regulation 4Q.

Regulation 2(5) amends regulation 9 of the 2014 Regulations to provide that where a transfer payment is received into the 2015 Scheme, which includes a payment in respect of remediable service, in respect of a person from a different public service pension scheme, that payment entitles the person to benefits under the 2015 Scheme. So long as there has been no continuous break of more than 5 years in active membership since the remediable service was accrued, the transferred remediable service is included in the calculation of the provisional assumed benefits and the provisional underpin amount.

Regulation 3 makes consequential amendments to the 2018 Regulations, including the following:

Regulation 3(2) amends regulation 29 to provide that the enhancement of a member's pension received after their normal pension age, reduction, where the member receives their pension early, or adjustment, where the member reduces working hours or grade, does not apply to any final guarantee amount which has been added to the pension account in question.

Regulation 3(3) amends regulation 33 to provide that the pension used to calculate a member's commutation payments may under certain circumstances include a final guarantee amount or a survivor guarantee amount.

Regulation 3(4), (5), (7), (8), (9) and (10) exclude the final guarantee amount to which an eligible member may otherwise have been entitled from the pension the member would have been entitled to for the purpose of the calculation of survivor benefits.

Regulation 3(6) makes similar provision in relation to death grants.

Regulation 3(11) and (12) provides that compensation paid under section 82 of PSPJOA 2022 or additional benefits paid under regulation 4Q are liabilities for the purpose of actuarial valuations of a pension fund's liabilities.

Regulation 3(13) amends regulation 76 to disapply its provisions on the payment of interest in relation to sums in respect of which interest is payable under regulation 4T of the 2014 Regulations or regulation 14 of these Regulations.

Regulation 3(14) amends regulation 91 to provide that, where a non-Club Transfer out of the pension fund is applied for by an eligible member under paragraph (1) of that regulation, the value of the transfer is to be calculated in accordance with actuarial guidance issued by the Scottish Ministers, taking into account the member's provisional underpin amount and provisional assumed benefits.

Regulation 3(16) provides that an actuary determining the amount of a bulk transfer payment must take into account the member's provisional underpin amount and provisional assumed benefits.

Part 3 makes retrospective provision.

Regulation 4 makes general provision, including the persons to whom, or in respect of, the retrospective provision is made.

Regulation 5 makes provision in relation to members who retired or died before 1 October 2023. It is to be determined whether the person should be entitled to a final guarantee amount. If so, the amount is to be paid to the member's pension account or personal representatives.

Regulation 6 makes provision in relation to death grants in respect of members who died before 1 October 2023. Provisional assumed benefits and a provisional underpin amount are to be calculated in respect of the member and regulation 41 of the 2018 regulations is to be applied to recalculate the death grant, with any excess being paid to the original recipients of the death grant. Regulation 7 makes provision in relation to pensioner member death grants in respect of members who died before 1 October 2023. The death grant payable in respect of the person is to

be recalculated under regulation 44 of the 2018 regulations and the amount is to be paid to the original recipients of the death grant.

Regulation 8 makes provision in relation to survivor benefits in respect of members who died before 1 October 2023. Provisional assumed benefits and a provisional underpin amount are to be calculated in respect of the member and regulation 4M of the 2014 Regulations is to be applied to the person and any survivor guarantee amount is to be added to the original survivor member's pension account payable under regulation 39, 40, 42, 43, 45 or 46 of the 2018 Regulations.

Regulation 9 makes provision in relation to members who transferred into the fund before 1 October 2023 from certain schemes. Where that transfer results in the person being entitled to benefits or being credited pension under the 2015 Scheme, the transfer is to be treated as a transfer to which regulation 9(1A) and, as the case may be, (1B) of the 2014 Regulations applies.

Regulation 10 makes provision in relation to members who transferred out of the fund before 1 October 2023 under regulation 91 or 93 of the 2018 Regulations. Provisional assumed benefits and a provisional underpin amount are to be calculated in respect of the member and the transfer value is to be recalculated. Where a payment must be made, it is to be made to the trustees or manager of the new scheme for the benefit of the person.

Regulation 11 provides that where a person took a trivial commutation payment or lump sum under regulation 33(1) of the 2018 Regulations before 1 October 2023, it is to be determined whether the person is entitled to a final guarantee amount in accordance with regulations 4A to 4T of the 2014 Regulations.

Regulation 12 makes provision in relation to members who divorced or dissolved a civil partnership before 1 October 2023. The cash equivalent value of the person's relevant benefits (for the purpose of section 29 of the Welfare Reform and Pensions Act 1999) is to be recalculated in accordance with actuarial guidance issued by the Scottish Ministers. Where the recalculated amount exceeds the original calculation, the annual pension awarded to the member's spouse or civil partner is to be recalculated based on that amount.

Regulation 13 makes provision for a member with underpin dates (within the meaning of regulation 4G of the 2014 Regulations) that occur before 1 October 2023, but who do not have a final underpin date (within the meaning of regulation 4H of those Regulations) before that date. This regulation makes provision for the calculation of a provisional underpin amount and provisional assumed benefits in relation to the member and for the modification of the provision applying a final underpin date to the member.

Regulation 14 makes provision for the payment of interest in respect of sums payable under this Part of the Regulations.

No impact assessment has been produced for this instrument as no, or no significant, impact on the private or voluntary sectors is foreseen.

POLICY NOTE

**THE LOCAL GOVERNMENT PENSION SCHEME (REMEDIABLE SERVICE)
(SCOTLAND) REGULATIONS 2023**

SSI 2023/240

The above instrument was made in exercise of the powers conferred by sections 1(1) and (2)(c), 3 and 8(1)(a) and (2)(a), and paragraph 3(b) of schedule 2 and schedule 3 of, the Public Service Pensions Act 2013 and sections 78, 80(1), 81(1), 83(1), 84(1) and 129(1) of the Public Service Pensions and Judicial Offices Act 2022.

In accordance with section 21(1) of the Public Service Pensions Act 2013, the Scottish Ministers have consulted such persons or the representatives of such persons as appeared to the Scottish Ministers likely to be affected by these Regulations.

The instrument implements the final reforms to the Local Government Pension Scheme in Scotland in respect of the PSPJOA 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 in Scotland from 1 April 2015, characterised through a higher normal pension age (NPA) for all scheme members, the calculation of benefits on a career average revalued earnings (CARE) basis rather than a final salary basis, and the introduction of a cost control mechanism.

All Local Government Pension Scheme (Scotland) members were moved to the reformed CARE scheme on 1st April 2015. As part of the reforms, transitional protections were given to active members of the existing scheme on 31 March 2012 who were within 10 years of their normal retirement age at 1 April 2012. This protection provided that the pension payable in respect of their service from 1 April 2015 was underpinned against what they would have built up had they remained in the legacy final salary scheme. At a member's final salary normal pension age (usually 65) or at their date of leaving, if earlier, the administering authority would compare their career average pension against their final salary pension. If the equivalent final salary pension was deemed to be higher, the individual would receive the benefit of this underpin. and would be awarded an underpin amount to reflect that the higher pension.

Following the McCloud judgment, which identified that younger members had been subject to unlawful age discrimination in the scheme reforms, the UK Government introduced the PSPJOA 2022 requiring responsible authorities to bring forward legislation to remedy the discrimination. The extension of the underpin to all members active at 31 March 2012 was the Scottish Minister's preferred option for addressing the difference in treatment in the LGPS, and the Scottish Public Pension Agency (SPPA) consulted on this approach in 2020. Most respondents also agreed with this approach, considering that the proposals satisfactorily remove the unlawful in the transitional protection arrangements.

Specifically, in extending the underpin, the policy intention is to remove the condition that required a member to have been within ten years of their normal pension age on 1st April 2012 to be eligible for underpin protection.

To ensure the discrimination is removed in full, a number of supplementary changes are also being introduced, consistent with the requirement of the PSPJOA 2022. These changes will ensure the revised underpin works effectively and consistently for all members. These changes are technical in nature and explained in more detail in the explanatory note accompanying the instrument.

Consultation

To comply with the requirements of Section 21 of the 2013 Act, the SPPA conducted a 12 week technical consultation between 31 July 2020 and 23 October 2020.

The consultation received 25 responses and changes were made to the draft Regulations as a result of comments provided by Stakeholders. Given the read across all public service pension schemes and in particular the equivalent scheme for local government in England and Wales, proposals were adapted to ensure consistency and to reflect changes to other subordinate legislation required to deliver the requirements of the PSPJOA 2022. These changes were the subject of a further short technical consultation between 26 June 2023 and 31 July 2023. The consultation received one further response and changes have been made to address stakeholder comments. A summary of the consultation responses will be made available on the LGPS section of the Scottish Public Pensions Agency (SPPA): website in due course.

Impact Assessments

These Regulations have no new impact on business or the voluntary sector.

Financial Effects

These Regulations have had no new Business and Regulatory Impact Assessment (BRIA) conducted upon on them as the financial effects of these regulations remain unchanged. Scottish Ministers confirm that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business. The Scottish Local Government Pension Scheme is a funded pension scheme, meaning contributions and assets are invested to meet future liabilities. The

changes introduced by this instrument will be factored into the triennial scheme valuations undertaken by the 11 administering authorities that determine employer contribution rates.

Equality Impact Assessment

An Equality Impact Assessment¹ was conducted for these Regulations by the Government Actuary's Department on behalf of Scottish Ministers. The summary of the aims and desired outcome of the policy is to: a) equalise the underpin protection to all members of the Local Government Pension Scheme, and b) ensure there are no members negatively impacted by these regulatory changes.

The assessment found that the policy changes will not disproportionately benefit or harm the protected groups within the Scottish Local Government workforce and will equalise the terms on which all scheme members are offered underpin protection.

Scottish Public Pensions Agency
An Agency of the Scottish Government

August 2023

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

Annexe B

A letter from SPPA Head of Policy to the Presiding Officer, 30 August 2023

Dear Presiding Officer

Public Service Pensions Regulations – the 2015 Remedy

The Firefighters' Pension Scheme (Remediable Service) (Scotland) Regulations 2023

**The Police Pensions (Remediable Service) (Scotland) Regulations 2023
The Teachers' Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023**

The Local Government Pension Scheme (Scotland) (Transitional Protection Remedy) Regulations 2023

The above named SSIs were made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") on 30 August 2023. They are being laid before the Scottish Parliament on 30 August 2023 and come into force on 1 October 2023.

The National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023

The above named SSI is being made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") on 5 September 2023. It is being laid before the Scottish Parliament on 5 September 2023 and come into force on 1 October 2023.

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) of that Act, this letter explains why.

These instruments provide the necessary regulations 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 second 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"), which received Royal Assent on 10 March 2022.

The 2022 Act requires responsible authorities for public service pension schemes – in the case of the executively devolved schemes in Scotland, the Scottish Ministers – to introduce scheme-specific legislation by 1 October 2023. Occupational pensions, including public service pensions, are reserved to Westminster. As such,

remedial policy and legislative work to ensure the unlawful discrimination was removed was co-ordinated by HM Treasury and policy and legislation for Scotland was contingent on the coordinated agreement and the consistency with the drafting of the equivalent statutory instruments being introduced by other UK responsible authorities.

In addition, for 2015 remedy to be delivered required the UK Government to consider the interaction of retrospective changes to pension schemes with the pensions taxation legislation, to ensure individuals would be placed in the correct tax position following 1 October 2023. 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.

Lastly, 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.

Consequently I must regrettably inform you that these five instruments will breach the 28 day rule. I can confirm Tom Arthur, Minister for Community Wealth and Public Finance, has written to the Convener of the Delegated Powers and Law Reform Committee and the Minister for Parliamentary Business setting out that it would not be possible to meet the 28 day rule for these regulations.

Yours sincerely

Iain Coltman
SPPA Head of Policy