

PUBLIC SERVICE PENSIONS

FIREFIGHTERS' PENSION SCHEMES (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2022

TRANSITIONAL PROTECTION REMEDY (MCCLLOUD/SARGEANT) PHASE ONE – PROSPECTIVE REMEDY

Consultation Response Report

24 March 2022

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1. Introduction

- 1.1. This document is the post-consultation report for the consultation paper ‘Amendments to the Northern Ireland Firefighters’ Pension Schemes - McCloud/Sargeant Remedy: Phase One (Prospective) Consultation’, which was published 1 December 2021 and closed to responses on 11 January 2022. The report can be found at:

<https://www.health-ni.gov.uk/consultations/consultation-amendments-northern-ireland-firefighters-pension-schemes>

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2. Executive summary

- 2.1. Between 1 December 2021 and 11 January 2022, the Department of Health (as the Responsible Authority for the Firefighters’ Pension Schemes in Northern Ireland) consulted on proposed amendments to the Firefighters’ Pension Scheme (Northern Ireland) Regulations 2015 (“the 2015 scheme”) as part of the first phase of the McCloud Remedy.
- 2.2. The consultation sought views on proposed amendments to scheme rules which will move all members (including those formerly protected) to the 2015 scheme (‘the reformed scheme’) on 1 April 2022 and facilitate the closure of the Firefighters’ Pension Scheme (FPS) and the New Firefighters’ Pension scheme (NFPS) (the ‘legacy schemes’) to future accrual from 1 April 2022. It also consulted on other minor amendments to the NI Firefighters’ Pension Schemes to align with similar changes which have already been introduced to Firefighters pensions in GB. A draft set of regulations to ensure all members accrue benefits in the reformed scheme from 1 April 2022 and to address other minor amendments were published alongside the consultation.
- 2.3. The Department received one response to the consultation. The response was from the Fire Brigade Union (FBU) representing firefighter pension scheme members (union members). The FBU response provided an answer to four from five questions asked. Further detail is provided in section 5 of this report.

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- 2.4. Taking into account the response to the consultation, we are confident the amendments to the regulations will achieve the policy aim of implementing the first phase of the McCloud Remedy. All remaining legacy scheme members will be moved to the reformed scheme from 1 April 2022 and the legacy schemes will be closed to future accrual from 31 March 2022. This will ensure all members are treated equally in respect of any pensionable service accrued after 31 March 2022. The other minor amendments to the NI Firefighters' Pension Schemes are being made to align with similar changes which have been introduced to Firefighters pensions in GB.
 - 2.5. The Public Service Pensions & Judicial Offices Bill (PSPJO) which puts in place the framework to address the discrimination identified by the Court of Appeal, both prospectively and retrospectively, as well as the consequential effect of that remedy achieved Royal Assent on 10 March 2022. The provisions of the PSPJO are extended to Northern Ireland by means of a Legislative Consent Motion. The Department will continue the legislative process to ensure the changes come into effect by 1 April 2022.
 - 2.6. This document sets out the Department's response to comments received and should be read in conjunction with the consultation document.

3. Background

- 3.1. In 2015 the Department of Finance introduced reforms to public service pensions, meaning most public sector workers, including firefighters were moved into new pension schemes from 1 April 2015. The changes followed a fundamental structural review by the Independent Public Service Pension Commission, chaired by Lord Hutton of Furness.
- 3.2. As part of these changes, protection was provided to those members who were close to retirement, meaning that they would be allowed to remain in their legacy scheme or gradually transition to the relevant reformed public service pension scheme. This policy was referred to as transitional protection.
- 3.3. In December 2018, the Court of Appeal in England and Wales ruled that the 'transitional protection' offered to some members of the judges' and firefighters' schemes in the McCloud and Sargeant cases gave rise to unlawful discrimination.
- 3.4. The courts required that this unlawful discrimination be remedied by the government, and the government accepted that this applied across all of the main public service pension schemes.
- 3.5. Rulings of the Court of Appeal in England and Wales are not directly binding in Northern Ireland. However, the devolved public service schemes in Northern Ireland incorporate the same transitional protection arrangements as the schemes in Great Britain and the implications of the Appeal Court decision are such that all schemes must be treated as

affected by the 'McCloud/Sargeant' decisions and so require to be remedied.

- 3.6. In order to remedy the discrimination, the Department of Finance held a consultation to consider the potential options to remove the discrimination. Following the close of the consultation in November 2020, it was announced in February 2021 that affected members would receive a 'deferred choice' of which pension schemes benefits they would prefer to take at the point they retire in respect of any remediable service rendered between 31 March 2015 and 1 April 2022. This choice is whether the benefits should be modelled on the relevant legacy scheme or reformed scheme. This is known as the Deferred Choice Underpin (DCU) and the Retrospective Remedy. Where members are already receiving pensions, they will be given a choice as soon as practicable.
- 3.7. In addition, from 1 April 2022, all those who continue in service will do so as members of the reformed schemes, regardless of age, meaning all members will be treated equally in terms of which pension scheme they are a member. This is known as the Prospective Remedy.
- 3.8. This consultation addressed the elements of the Prospective Remedy as well as other minor amendments to align Firefighters' Pension Schemes in Northern Ireland to GB schemes.

4. Consultation Process

- 4.1. The proposals and draft regulations were subject to consultation which began on 1 December 2021 and closed on 11 January 2022. The consultation document was available on the Department's website. 'The consultation was targeted at the main stakeholders namely the Northern Ireland Fire and Rescue Service (NIFRS) and the Fire Brigades Union (FBU).'
- 4.2. As part of governance arrangements for the Firefighters' Pension Scheme, the consultation document was also provided to members of the Firefighters' Pension Scheme Advisory Board (SAB).
- 4.3. The Department welcomed any comments or views on the proposals and draft regulations.
- 4.4. The Department received one response to the consultation from the FBU. The FBU addressed four of the five questions raised in the consultation. The Department considered the FBU response and identified the main points of support and challenge raised. We have outlined the Department's response to these points in section 5.

Implementation of the second part of the remedy also requires changes to scheme regulations. A further set of draft regulations is under development and there will be an additional consultation in due course covering the retrospective phase (DCU). This will address those elements

of the remedy that will be retrospective in effect and relate to the remedy period (1 April 2015 to 31 March 2022).

5. Summary of responses

- 5.1. Question 1: As required by the PSPJO, the draft regulations seek to ensure that the legacy schemes are closed to future accrual from 31 March 2022 and that all members are in the 2015 Scheme in respect of any pensionable service from 1 April 2022. Are the draft regulations sufficient to meet this aim? Do you think there are any changes or additions required to the draft regulations to achieve the stated policy aims?**

Consultation Findings

It was the FBU's view that the proposed amendments achieve the desired effect of transferring protected members of the FPS and NFPS into the 2015 scheme from the 1 April 2022.

Department's Response

The Department welcomes this response and is content that the proposed changes will achieve the policy intention. The legislative amendments will come into effect on 1 April 2022.

- 5.2. Question 2: The government is proposing that the regulations will be drafted to make additional provision for ill-health retirements that straddle the transfer date. This provision would ensure that a protected member who applies for ill-health retirement before 31 March 2022, and which is determined in their favour after that date, is treated no less favourably than if the application had been determined on that date. Do you have any views on the proposals regarding ill-health retirement cases that straddle 1 April 2022? In particular, do you have any views on how the "underpin" should work or be provided for in the draft regulations?**

Consultation Findings

The FBU suggested that the position of firefighters who are "carrying" an existing injury but continue to work should be considered further, noting that the commonest cases in point were firefighters who suffered from post-traumatic stress disorder. In the FBU's view, the trigger for the underpin should be the date of the "index event" that leads to ill-health retirement in order to avoid a high number of firefighters seeking immediate referral or an unfairness to firefighters who had given time for treatment to work, but were penalised by not receiving any pension because they had persevered with their illness.

The FBU concluded that those whose injuries do not become apparent until after 1st April 2022 should not be disadvantaged if the “index event” were to pre-date the closure of the scheme.

Department’s Response

After considering the consultation responses, the Department is content to proceed with making changes to the reformed scheme to ensure that where an ill-health decision is pending on 1 April 2022, the member moving across to the reformed scheme will not be placed in a worse position than they would have been in had a decision been made on 31 March 2022 under the relevant legacy scheme.

Difficulties in making medical assessments on specific mental health conditions and difficulties associated with medical practitioners making future assessments on a member’s health in relation to certain medical conditions sit outside the scope of the consultation proposals. These matters have not been addressed, as they relate to the fundamentals of the existing ill-health arrangements and are not directly linked to, or created by, the ill-health retirement changes within the scope of this consultation.

- 5.3. Question 3: The regulations will need to ensure that provisions which allow arrangements for purchasing service in the legacy schemes by periodical contributions, entered into before 1 April 2022, can continue on and after that date and that additional benefit purchasing in the legacy schemes ceases on 31 March 2022. In your view, would existing provisions in the relevant reformed scheme regulations achieve these aims? Alternatively, would additional provisions be needed to achieve this outcome?**

Consultation Findings

There was concern raised from the FBU that the draft regulations do not address the position of RDS firefighters in relation to the O’Brien case and the purchasing of periods of “special” membership in the NFPS 2007 Scheme. The FBU concluded that it will address the questions that arise in the separate negotiations and consultations that follow from the O’Brien case.

Department Response

After considering the consultation response, the Department is content to proceed. Any issues that have arisen as part of the O’Brien case are outside the scope of this consultation and therefore are unable to be pursued in the absence of a further consultation with all interested parties.

- 5.4. Question 4: Are there any other areas which you think should be addressed in these regulations to ensure all members are moved to**

the relevant reformed scheme from 1 April 2022, and that the differential treatment, as identified by the Court of Appeal, is ended?

Consultation Findings

The FBU raised concerns that the interaction of the Firefighters' Pension Scheme (FPS) and the 2015 Scheme pension ages for members who have accrued service in the FPS has not been addressed. This concern relates to the case where a member of the legacy FPS scheme is moved to the reformed scheme on 1 April 2015 and so will not be able access any reformed scheme benefits until they reach age 55 or later.

Department response

After considering the response, the government is content that there are no further areas to be addressed to achieve the policy intention. Those who remain in employment after 31 March 2022 will accrue further pension benefits in the reformed scheme going forward, the proposed changes do not impact this.

The rationale for the remedy is based within the factual context of the court's ruling which identified the unlawful discrimination inherent in the transitional protections was between those who were in service on 31 March 2012, and thus received full transitional protection excepting them from the reforms, and those who were in service within the same period but did not qualify for that exception on the basis of their age. The removal of the unlawful discrimination identified by the courts requires all members to be treated at least as if the original discriminatory provision had not occurred. The remedy achieves this.

The legacy schemes were not intended to remain open indefinitely, and without the deployment of age based transitional protections which provided a limited temporary exception now deemed unlawful, all members would likely already have been placed in the reformed schemes for future service at their inception without unlawful difference in treatment by reference to their age or any other characteristic.

The introduction of reformed schemes does affect different scheme members in different ways. For some the effects are they will not accrue a full complement of legacy benefits in the old schemes before moving to the reformed arrangements. They will nevertheless continue to have access to a generous defined benefit pension for future service under the now more equitable and sustainable reformed CARE scheme model. Depending on their own career and personal life choices they can choose to remain in service until at least or beyond their new NPA within these schemes, and have options of accruing more benefits in total over a longer period of service. Alternatively if they wish, they can also choose to retire early with a combination of legacy and reformed scheme benefits, as long as there is an appropriate actuarial reduction to the CARE scheme

component to allow for the fact that their pension would now be in payment for a longer period of time.

Members may wish to seek independent financial advice to help them to understand the impacts and decide the best course of action.

5.5. Question 5: The draft regulations propose a number of additional amendments as outlined in paragraph 3.6 - 3.10 in the consultation document. Do you have any views on these additional amendments to the NI Firefighters' Pension Schemes?

Consultation Findings

No comment received on this question.

6. Conclusion and next steps

- 6.1. The Department is grateful for the response received to this consultation. To comply with the PSPJO Bill the Department will amend the 2015 regulations to implement the first phase of the remedy. The amending regulations will be laid before the Assembly and come into operation on 1 April 2022.
- 6.2. The Department will also continue work on phase two of the remedy, the retrospective remedy, including making preparations to implement the DCU, ahead of consulting formally on the relevant amendments to scheme regulations.