



Department of
Justice

An Roinn Dlí agus Cirt
Máinnstríe O tha Laa

The Police Pensions (Amendment) Regulations (Northern Ireland) 2022 Consultation Response

28 February 2022

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INTRODUCTION

The Department of Justice (DoJ) issued a consultation from 30 November 2021 October to 24 January 2022 regarding proposals to amend the Police Pensions Regulations (Northern Ireland) 2015.

The amendments are required to implement the Prospective Changes for the McCloud Remedy, including closing all police legacy schemes on 31 March 2022 and moving all active members to the 2015 scheme on 1 April 2022, and making consequential changes to the regulations as part of the Public Service Pensions and Judicial Offices Bill (PSPJO Bill).

In addition, to improve the operation of the 2015 pension scheme, a number of technical amendments were proposed to bring the scheme in line with changes already made to the 2015 England and Wales scheme.

Under section 21 of the Public Service Pensions Act (Northern Ireland) 2014 (2014 Act) the consultation sought the views of representatives of such persons as appear to the Department of Justice likely to be affected by these Regulations.

POLICY BACKGROUND

In 2011, the Government accepted the recommendations of Lord Hutton's report on public service pension reform. In March 2012, the Executive agreed to mirror this reform and not to adopt a different approach for Northern Ireland schemes.

In 2015, across the United Kingdom, the career average reforms were applied to all public service pension schemes (including the police scheme). However, following consultation with staff associations, transitional protection arrangements were agreed to allow certain older members to remain in their pre-2015 legacy pension schemes while other members were moved into the reformed scheme on 1 April 2015.

In 2018, the Department of Finance (responsible for public service pensions policy in Northern Ireland) advised of a legal ruling in England and Wales (McCloud judgment),

which found that the transitional protection arrangements gave rise to unlawful age discrimination against younger members in the judicial pension scheme, which must be remedied (McCloud Remedy) and that the Westminster government had accepted in 2019, that public service pension schemes with comparable transitional arrangements would also require a similar solution.

As a consequence of the McCloud ruling the Department of Finance decided on 25 February 2021 that public service pension schemes in Northern Ireland should apply a remedy to remove this unlawful discrimination in two phases: -

- Phase 1 - the prospective remedy, closes the legacy schemes on 31 March 2022 and transfers all active members into the 2015 scheme on 1 April 2022 to ensure the removal of the unlawful difference of treatment on the grounds of age. It is this part of the Remedy which is being addressed by the proposed amendment to the Police Pension Scheme Regulations before the Committee today.
- Phase 2 the retrospective remedy will allow eligible members a choice as to whether they accrue benefits in the 2015 scheme or legacy scheme between 1 April 2015 and 31 March 2022 (the 'remedy period'). Further legislation to implement Phase 2 by 1 October 2023 will be brought before the Justice Committee in due course.

RESPONDENTS TO THE CONSULTATION

A summary of responses received and the DoJ's responses to the specific points raised and its decision following the consultation are set out below.

The DoJ received 7 responses to the consultation from representatives of the persons who appear likely to be affected by the proposed changes including:

- the Police Scheme Advisory Board (PSAB)
- The Police Federation for Northern Ireland (PFNI)
- The Superintendent's Association of Northern Ireland (SANI)
- The Chief Police Officers Association (CPOSA)
- Northern Ireland Retired Police Officer's Association (NIRPOA)
- The Police Service of Northern Ireland (PSNI)
- Northern Ireland Policing Board (NIPB)

The Department, having taken note of all comments received, has reflected on these responses as part of its consideration of the next steps.

SUMMARY OF RESPONSES

The following summary of responses is based on the commentary provided those who responded to the consultation.

THE PROPOSED REGULATIONS AND TECHNICAL AMENDMENTS

The PSNI described the amendments as logical and necessary in order to fulfil the prospective element of the McCloud remedy and remove the unlawful discrimination. The NIPB and CPOSA concurred with this view.

The Police Federation for Northern Ireland (PFNI) did not support these amendments to the regulations which remove the age discrimination relating to McCloud by the transfer of members from legacy schemes to the 2015 scheme, stating that they believe officers have a legitimate expectation to remain in the legacy schemes until they retire. SANI and NIRPOA and SANI supported this position. Indeed, these staff associations believe these proposed amendments are contrary to section 23 of the Public Section Pensions Act (NI) 2014 of having an adverse impact on the members and breaches the employment contract of new recruits in 2012 by now closing the scheme to accrual.

There were no adverse comments received in respect of the proposed minor technical amendments to the Police Pensions Regulations (NI) regulations 2015, the purpose of which is to improve the operation of the scheme and provide consistency with other police pension schemes. The PFNI welcomed the benefit to make death gratuities automatic, rather than discretionary for members. SANI and NIRPOA concurred with this opinion.

DoJ Response

We note the respondents' concerns and note that under section 18 of the 2014 Act, the legacy schemes were required to close for future service from 1 April 2015, with exceptions to be provided for in regulations. In most schemes, this meant that members within 10 years of Normal Pension Age stayed in their existing schemes (known as "transitional protection") and members between 10 and 13.5 or 14 years of Normal Pension Age could

stay in their existing schemes for a period ranging from a few months to several years after 2015 until 31 March 2022 (known as “tapered protection”).

However, the McCloud judgment found that the application of this transitional protection was unlawful. As such (and as with other public service pension schemes) to allow members to remain in their legacy schemes past 31 March 2022 would result in the perpetuation of the age discrimination identified by the courts and would leave the Department at risk of further legal challenge and a financial penalty of £20m for each year delayed.

It should be noted that in a recent court case in December 2021 the Police Superintendents’ Association (EW) sought (amongst other issues) to permit officers to remain in their legacy schemes rather than the move to the 2015 scheme on 1 April 2022. The challenge was unsuccessful.

COMMENT ON THREE SPECIFIC AREAS OF POLICY INTENT

The Department invited comment on three specific areas of policy intent;

Policy Intent 1 – Legacy Scheme purchase of additional benefits

Legacy scheme purchase of additional benefits

4.3 To ensure that the existing provisions which allow arrangements for purchasing service in the legacy schemes by means of periodical contributions under the existing schemes can continue after 31 March 2022 and that no new legacy scheme arrangements can be entered into after 31 March 2021: -

- a. In both police legacy pension schemes, it is possible for members to purchase additional pensionable service, where they meet certain criteria. They do this by agreement with the scheme manager, and pay for it either as a lump sum or by way of periodical contributions over a period of years, until a set age (often NPA).*
- b. All such existing agreements will remain in force after 31 March 2022. This is because they do not involve continuing to accrue legacy scheme pensions after the closing date; rather, the scheme members concerned are paying in instalments for a previously-agreed enhancement to their pre-transfer service. These arrangements are therefore unaffected by the Bill or by the draft regulations.*
- c. It should be noted that members will only be permitted to “complete” arrangements entered into before 1 April 2022, subject to meeting any other relevant criteria (such as remaining in active service). Members will not be permitted to enter into*

arrangements to purchase additional service in the legacy schemes on or after 1 April 2022.

- d. In order to give effect to the policy that accrual ceases on 31 March 2022, consideration is being given to what provisions might be required to ensure that no new arrangements are entered into after 31 March 2022.*

Respondents' commentary

Most respondents believe that the proposed amendments are sufficient to ensure no new arrangements to purchase additional service can be entered into from 1 April 2022.

The PFNI and NIPB made comment that tapered protection members or transition members who are in scope of the Remedy may have potentially been deprived of an opportunity to elect an arrangement for purchasing service at some point between 1 April 2015 and 31 March 2022 under the relevant Legacy Scheme. Therefore, once these members are returned to their legacy scheme, they must also have the option available to them.

DoJ Response

The provisions in the existing legacy schemes relating to elections for the purchase of increased benefits made under the legacy schemes continue to apply after the members closing date but new elections will not be permitted to be made after that date. However, further consideration to the purchase of additional benefits is a matter which is to be examined in more detail under Phase 2 of the Remedy.

Policy Intent 2 – Ill-Health Retirement (IHR)

Here the Department sought to ensure that a protected member who applies for IHR before 31 March 2022 where the application is determined in their favour after that date is treated no less favourably than if the application had been determined on that date.

- a. Members who move to the reformed schemes and subsequently become subject to ill-health retirement from 1 April 2022 onwards will be assessed, and receive ill-health benefits, in accordance with the ill-health arrangements under the reformed scheme provisions.*
- b. There will be cases that will be in the process of being considered for ill-health retirement on the date that all active members will begin to accrue benefits in the reformed scheme - i.e. the ill-health process will begin on or before 31 March 2022 and will not conclude until 1 April 2022 or later.*
- c. For any ill-health cases that straddle 1 April 2022, the intended policy is that if the application is approved, members will receive an award paid from the reformed 2015 scheme, that is no less generous than if the award had been determined on 31 March 2022 under legacy scheme rules. This will mean that such members receive a 2015 Scheme ill-health pension calculated at the date they actually retire; but that if a legacy scheme ill-health pension calculated as at 31 March 2022 would have been higher, the 2015 Scheme pension must be increased by the difference between the two.*
- d. It is considered that this policy intent may already be achieved. Under the existing regulations, for members who make an application for ill-health retirement before they transition on 1 April 2022 to the reformed scheme, where that application is determined after the date of their transition, they will be in no worse position than if the application had been determined on 31 March 2022; because the existing transitional provisions in the 2015 Regulations take account of the legacy scheme ill-health pension in the calculation of the one-pot ill-health benefits for transition members under the 2015 regulations. Also, the test for ill-health retirement eligibility for members of the reformed scheme may be no more stringent than the test that applied under the legacy schemes.*
- e. These provisions currently apply in respect of "transition members". The changes that are proposed to be made to the 2015 Regulations will cause current full protection members to become transition members on 1 April 2022. This means that they will also benefit from the transitional provision on ill-health retirement without any specific amendment on this point.*
- f. These provisions also ensure that all ill-health benefits to be paid in respect of a transition member after they transition are paid out of the reformed scheme, albeit in some cases subject to the same rules as applied under the legacy schemes.*

g. However, further consideration will be given as to whether any further changes to existing regulations is needed to ensure that the policy intent set out above is correctly achieved.

Respondents' commentary

All respondents were supportive of the intention to ensure that members are treated no less favourably where their ill-health retirement (IHR) application straddles across 1 April 2022.

The PFNI and NIPB proposed that the Department should examine the regulations closely, providing clarity on the definition of what constitutes a case 'in progress' and the cut off points for consideration for an Ill-Health retirement application. SABNI concurred with this opinion.

The NIPB raises concerns about the cost of ill health retirement and the absence of information from the consultation on how these proposals will be met. That respondent stated that any associated costs dealt with under the legacy scheme must not be factored into the calculation of employers' costs under the costs control mechanism, otherwise officers who did not benefit at all from transitional protection will be paying for those who did.

DoJ Response

As part of Phase 2 of the remedy, further consideration will be given as to whether any further change to existing regulations is needed to ensure that the policy intent set out above is correctly achieved.

However, the handling of ill health retirements remains an operational issue for the NIPB as Scheme Manager. However, the Department understands that the handling of ill health retirements has been the subject of discussion by scheme managers and administrators at the UK wide police pension administrator's forum. The NIPB and the PSNI have access to this forum. It should be noted however that the cost of ill health retirements reduces the employer's contribution rate in the pension scheme valuation; currently resulting in an 0.8% offset from 35.8% to 35% employer's contribution rate.

Policy Intent 3 – Interaction of retirement ages between schemes

Interaction of retirement ages between schemes

4.5 *The legacy and 2015 police pension schemes allow a member to draw their pension at different ages.*

- a. *The 1988 scheme allows many members to draw their 1988 scheme pension before age 55. However, if they do retire before age 55, the rules of the 2015 scheme mean that, in relation to any pension accrued in the 2015 scheme only, they either have to wait until State Pension Age (rather than age 60) to take an unreduced 2015 pension, or wait until the age of 55 and take an actuarially reduced 2015 pension (the reduction being based on State Pension Age). Such reduction is to reflect that the pension is coming into payment early and will be paid for longer.*
- b. *This is a consequence of the changes to the public sector pension schemes introduced in 2015, arising from the move from a service-based to an age-based pension scheme, and is what occurs under the existing regulations. We have been made aware of concerns that the remedy exacerbates this.*
- c. *Due regard is being given to the interaction of retirement ages between schemes further consideration given as to whether any changes are needed to ensure any cohort of police pension scheme members are not unduly disadvantaged, especially having regard to the needs of members from protected groups where these are different from the needs of other members.*
- d. *Further work is necessary, including to understand the full implications of any potential change in approach to help mitigate this issue.*

Respondents' commentary

NIPB and PSNI referenced this area of policy intent and offered no further comment at this stage. The PFNI response raises concerns that the Government's decision to move from a pension based on service, to one based on age was not properly understood. This position was agreed by SABNI and NIRPOA.

PFNI also detailed what is commonly referred to as the 'Pensions Trap, where

"officers who, after transfer to the 2015 scheme, must stay beyond 30 years of pensionable service in order to accrue full benefits in the 2015 scheme. The longer they stay in service after thirty years of pensionable service the more their commutation entitlement reduces under the 1988 legacy scheme, resulting in a smaller lump sum on retirement.

PFNI furthermore advocated a potential solution in that,

“former Police Pension Scheme member aged under 55 who reaches 30 years’ combined membership (or a former scheme member who has over 25 years’ combined membership and is aged at least 50) whilst a member of the 2015 scheme to retire with an entitlement to a normal/ordinary pension from both schemes. However, the pension payable from the 2015 scheme would effectively be ‘suspended’ until at least age 55.

The member would cease payment of contributions and further accrual of benefits under the 2015 scheme at the point of retirement and elect to either take their 2015 scheme benefits from age 55 and before age 60 (with an actuarial reduction), or to take their 2015 scheme benefits from age 60 (with no actuarial reduction).”

DoJ response

The ‘pension trap’ is a term which relates to the unique transitional protection that police officers received. Unlike other pension schemes police officers were allowed transitional protection based upon both being within 10 years of their scheme retirement (age 50) pension age, but also to those with 20 years of service.

This issue has been very well ventilated during the passage of the Public Service Pensions and Judicial Offices Bill in parliament. The Department understands that HM Treasury and the Home Office continue to give consideration to this issue.

ADDITIONAL COMMENTARY

Cost cap mechanism

NIPB also raised queries regarding the scheme’s cost control mechanism (CCM).

DoJ response

CCM is the responsibility of the Department of Finance under s18 of 2014 Act. The NI Assembly agreed to a Legislative Consent Motion on 31 January 2022 which will allow for changes to the CCM following a Government Actuary review of the mechanism to be included in the PSPJO Bill. The specific reforms are a matter of Department of Finance. However, it is understood that the changes to the Cost Cap Mechanism are intended to -

- promote stability for how the mechanism will operate going forward
- protect the taxpayer from unforeseen costs; and
- to provide certainty to scheme members on benefits and contributions.

Equality Impact Assessment

PFNI expressed concern over the lack of an Equality Impact Assessment (EqIA) for this consultation and the timing of the Government Actuary Department Draft Screening Analysis. That respondent outlined expectations for the substantive finalised EQIA and intends to make further representation thereafter. SANI and NIRPOA concurred with this opinion.

DoJ response

The Department conducted a screening exercise on the proposed amendments to consider equality implications. The screening exercise took account of a GAD analysis that was shared with police stakeholders during the consultation and concluded that there were no significant implications for equality of opportunity and that an equality impact assessment was not required.

The PFNI consider that officers should be allowed to remain in their legacy scheme post 2015 based upon the full protection promise in 2012, they considered that a full EqIA should've been undertaken. Indeed, in December 2021 the PSA in England and Wales unsuccessfully challenged this issue in court. The government's position remains that to do so will "*perpetuate the discrimination identified by the courts or create a new discrimination.*"

The amending Statutory Rules will mean that all members are treated equally in respect of any pensionable services rendered after 31 March 2022.

OPTIONS FOR CONSIDERATION AND FINAL DECISION BY MINISTER

Having considered the responses to the consultation exercise, the Department developed 3 options for the way forward for consideration by the Minister.

- Option 1** maintain the existing scheme regulations.
- Option 2** delay the implement of these regulations until issues such as Immediate Detriment and Contingent Liabilities are resolved.
- Option 3** make the proposed regulation amendments, replicating pension reforms across all public sector schemes.

Evaluation of options

In addition to setting out the three options for the Minister's consideration, Departmental officials evaluated the positives and negatives associated with each potential solution and weighted the options for the Minister's final determination on her preferred way forward. The full detail of these considerations is not presented here but a summary of the outcomes is summarised below.

Option 1 – maintain the existing scheme regulations

This does not deliver either of the Government's objectives of removing unlawful discrimination, nor providing a sustainable, affordable pension structure. This option also has increase potential of further legal challenges due to inaction or failure to follow other government counterparts. It will also result in a charge of £20m for each year that the regulations are no in place.

It is therefore recommended that Option 1 should be discounted for this reason.

Option 2 – delay the implementation of the regulations until issues such as Immediate Detriment and Contingent Liabilities have been resolved.

This does not deliver either of the Government's objective of removing unlawful discrimination nor providing a sustainable, affordable pension structure. It also increases the potential of further legal challenges due to inaction or failure to follow other government counterparts. This option also the potential for significant repercussive costs and implications for Department of Justice if it failed to implement the proposed regulations before the 1 April 2022.

It should be noted that Immediate Detriment and Contingent Liabilities will be considered within the scope of the retrospective regulations of the remedy, due to be introduced before October 2023.

It is therefore recommended that Option 2 should be discounted for these reasons.

Option 3 – make the proposed regulation amendments.

Replicating pension reforms across all public sector schemes will largely deliver the Government's objective of removing unlawful discrimination by ensuring equal treatment amongst all members in the reformed 2015 Police Pension Scheme and providing a sustainable, affordable pension structure.

This option: -

- supports the 2012 fundamental aims of the Hutton pension reform by providing a fair, sustainable and affordable pension structure for tax payers.
- Maintains the interoperability between police pension schemes across the United Kingdom and reduce risk of legal action and to avoid allegations of discriminatory treatment between the jurisdictions; and
- Addresses the age discrimination identified by the courts and reduces the risk of repercussion and associated financial penalties.

It is therefore recommended that Option 3 should be offered for further consideration on that basis.

Recommendation

Having considered all options, Departmental officials invited the Minister to consider **Option 3** as the preferred option to remove the age discrimination identified by the courts in the McCloud Judgment by agreeing to the making of the Police Pensions (Amendment) Regulations (Northern Ireland) 2022.

Rationale

The rationale for the Department's position is as follows. All public sector pension schemes across the UK are in the process of bringing forward secondary legislation to put schemes measures in place to rectify discrimination and protect members. The Department has worked closely with the Department of Finance and the Home Office to ensure a consistent approach is taken across equivalent pensions schemes.

The proposed amendments to the 2015 scheme are fundamental to the removal of the transitional protection arrangements which give rise to unlawful age discrimination identified in the McCloud Judgment.

These regulations will put measures in place to ensure that from April 2022, all active scheme members would be transferred to the reformed schemes for future service. It remains that the police 2015 scheme, as with all reformed schemes offer a "generous pension provision and address the objectives of affordability and sustainability." Although the transitional arrangements had been found to be discriminatory, the schemes themselves had not.

The Department has noted concerns regarding Immediate Detriment and Contingent Liabilities and will address these in the next stage of the Remedy, along with other public service sector schemes.

The PSPJO Bill once enacted will ensure equal treatment for all members within each of the main public service pension schemes by continuing to reward public servants for their dedicated service, whilst being fairer – especially for lower earners – and more affordable to the taxpayer.

Department of Finance have advised that failure to implement the prospective regulations by 1 April 2022 and remove the age discrimination is estimated to be £20m for each year delayed. This would potentially increase unfunded pressures for subsequent years for the PSNI budget.

Any such delay also risks both repercussive and legal challenge from other stakeholders across the United Kingdom.

THE WAY FORWARD

Proposals for the Legislative Amendment

The Department of Justice will seek approval from the Department of Finance under section 3(5) of the 2014 Act to the making of these regulations.

Subject to the agreement of the Justice Committee and the enactment of Public Service Pension and Judicial Office Bill, officials will seek the Minister's agreement to the making of the Police Pensions (Amendment) Regulations Northern Ireland 2022.