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Dear Peter

LEGISLATIVE CONSENT MOTION – PUBLIC SERVICE PENSIONS & JUDICIAL OFFICES BILL

The Department updated the Committee on 21 May 2021 that Minister had circulated a draft Executive Paper for agreement to lay a Legislative Consent Motion (LCM) for the Public Service Pensions and Judicial Offices Bill. This Bill will legislate for a remedy for unlawful age discrimination in reformed public service pension schemes, arising from the McCloud judgment. It also carries related changes to judicial pension arrangements and terms of office. The Executive subsequently agreed in principle to the LCM at its meeting on 3 June 2021

The LCM was laid in the Assembly on 6 September 2021. Under Standing Order 42A it will now be referred to the Finance Committee for scrutiny.

The Public Service Pensions and Judicial Offices Bill is due to receive its second reading on 7 September 2021. The published Bill and associated documents can be found at: <https://bills.parliament.uk/bills/3032>

Officials are scheduled to provide evidence on the LCM at the Committee's meeting on 22 September 2021. In advance of that meeting a further briefing paper is attached (**ANNEX**). A copy of the LCM memorandum is also appended.

You may wish to bring this matter to the attention of the Committee.

Yours sincerely

Andy Monaghan

ANDY MONAGHAN
DEPARTMENTAL ASSEMBLY LIAISON OFFICER

BRIEFING PAPER: PUBLIC SERVICE PENSION SCHEMES: LEGISLATIVE CONSENT MOTION (LCM) – PUBLIC SERVICE PENSIONS AND JUDICIAL OFFICES BILL

Background

On 1 April 2015 reformed public service pension schemes were introduced under the Public Service Pensions Act (Northern Ireland) 2014. The reforms replaced final salary schemes with career average ‘CARE’ schemes with revised normal pension ages. In most schemes normal pension age was linked to State Pension Age. The reforms also included ‘transitional protection’ measures which in most schemes, allowed older members to remain in their legacy schemes and members who were between 10 and 13.5 years of their normal pension age could stay in their legacy scheme for an additional period before being moved to their reformed scheme. The rationale for this approach was to provide protection and certainty for this cohort which had least time to adjust to the reforms.

In December 2018 the Court of Appeal in England and Wales ruled that the transitional protection measures provided to some members in public service schemes in England and Wales discriminated unlawfully against younger members in the same schemes who did not receive the protection, and must now be remedied. The equivalent devolved schemes here contain the same age-based transitional protections and legal advice confirms a requirement to similarly remedy the discrimination that has occurred in schemes here since 2015, and to remove it for the future.

Consultation

The Department consulted from 19 August 2020 to 18 November 2020 on proposed changes to the transitional arrangements to the 2015 reformed public service pension schemes to remove the unlawful age discrimination identified by the courts.

The consultation proposed options to provide eligible individuals with a choice to have their pension entitlements in the period 1 April 2015 to 31 March 2022, (the remedy period) calculated under either the reformed, or the legacy (pre-1 April 2015) scheme rules. Views were requested on whether this choice should be made immediately or deferred until the point of retirement. Views were also requested on whether the related proposal to remove discrimination for the future by ensuring all scheme members accrued future service from 1 April 2022 in the reformed schemes, achieved equality of treatment.

Schemes in scope of the consultation were those established under the Public Service Pensions Act (Northern Ireland) 2014 for: Civil Servants; members of the Police Service; Teachers; Health Service Workers; and Firefighters. Separate consultations were progressed for the devolved judicial and local government schemes

The proposed changes will affect public service scheme members who were in scope of the original policy, i.e. in service on 31 March 2012 and have service in the

remedy period between 1 April 2015 and 31 March 2022. Over 130,000 individuals are in scope of the action to remove the discrimination since 2015 from devolved schemes. Under the proposed approach, all individuals in scope will be able to receive the benefits to which they are entitled, whether they are active, deferred or pensioner members, and regardless of whether they have lodged a legal claim or not.

Consultation outcome

Immediate choice (IC) & deferred choice underpin (DCU)

The majority of respondents to the consultation who expressed an explicit preference supported the deferred choice (DCU) option over the immediate choice (IC). DCU provides eligible members with more certainty about their actual benefit entitlements based on factual information about earnings, personal circumstances and future plans, at their chosen point of retirement. Conversely, many concerns were raised in the consultation that the IC option required members to take key decisions about their future benefit entitlements based on multiple assumptions about their future circumstances.

The Department's [response to the consultation](#) set out its rationale to proceed with the DCU.

The Department maintains that this individual choice on how remedy benefits are calculated is important. Whilst a simpler alternative approach of providing all members with legacy benefits for the remedy period would also resolve the discrimination, it would not take account of the fact that not all members are better off in the pre-reformed schemes. The DCU option protects the benefits that have already been accrued by those members who are better off in reformed schemes.

The DCU represents the fairest option to ensure members have appropriate choice, clarity and control concerning their remedy period entitlements, whilst also comprehensively removing the age-discrimination identified by the courts. This will enable individuals to make an informed decision about which scheme provides the most appropriate benefit package for their remedy period service, as if the discrimination had not occurred.

This choice will be available to all active, deferred or pensioner members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, in a public service scheme in scope of the consultation. This will also be irrespective of whether they have submitted a legal claim or not. Members who have already retired and/or received a pension award will be asked to make their choice as soon as practicable once the legislative and administrative arrangements are in place and their choice will be applied retrospectively back to the date their original award was made.

Pension provision for future service

On the question of ensuring equality of treatment after 31 March 2022 some respondents to the consultation agreed the proposal that all members only accrue service in the reformed schemes from the end of the remedy period was the fairest way to ensure the unlawful difference of treatment on grounds of age was removed. Other respondents considered that this approach would not completely remove discrimination and members who were previously transitionally protected should instead be allowed to remain in their legacy schemes indefinitely. However in most cases where respondents argued that previously protected members should retain their legacy scheme membership indefinitely, the reasoning provided did not demonstrate how this would better resolve the unlawful discrimination, rather than it through the continued use of an unlawful age based difference in treatment.

The Department's response set out its rationale to proceed with the approach that at the end of the remedy period on 31 March 2022, all active scheme members will accrue future service only in the reformed schemes. This ensures that all members are treated equally in respect of the scheme design available to them after the discrimination has been addressed. It would be unfair and would perpetuate the unlawful discrimination if some members, of the public sector schemes and not others, continue to be in the legacy schemes after April 2022 as this difference in treatment would still be attributable to an unjustified age-based criteria.

The case for reformed schemes remains valid. As responsible authority for public service pension policy the Department of Finance has an associated duty to keep arrangements under review and to take forward changes when necessary to do so for reasons of equality, to comply with legal challenge, or for effective cost management. The original 2015 reforms as approved by the Assembly in 2014 represent the outcome of such a review. As well as promoting fairness across scheme members the changes agreed by the Assembly were necessary to ensure that schemes remain sustainable and fit for purpose for the future. The reformed public service schemes are designed on the basis of a longer working life to cover the cost of a longer retirement across the wider public service workforce.

By 2022 the 10 year prescribed period for transitional protection will have expired and the majority of previously protected scheme members are expected to have retired or to do so in the coming years. Those who have chosen not to retire will have the same opportunities as other members of the reformed schemes to remain in service until at least or beyond their new scheme NPA, and have options to accrue more benefits in total over a longer period of service. They will continue to have access to a generous defined benefit, index linked, government backed pension arrangement with a significant employer contribution under the now more equitable and sustainable reformed CARE scheme model approved by the Assembly in 2014.

Position in Britain

A Treasury consultation for the comparable schemes established under Westminster legislation was undertaken in 2020 based on identical proposals to resolve the discrimination as those in the Department of Finance consultation. The Treasury

consultation response also announced its intention to proceed with a comparable remedy solution for DCU and reaffirmed the applicability of the reformed schemes for all service from 1 April 2022.

Given the analogous nature of pension provision between public service pension schemes here and in the similarly constituted comparable schemes in Britain a conjoined approach to core policy development in response to shared legal challenge across the schemes was taken to address the effects of the discrimination in a way which meets the requirements of the courts ruling for the similarly constituted public service schemes, and also mitigates the risk of future legal challenge across those schemes.

This approach ensures appropriate consistency of treatment across sectors where devolved scheme provisions are practically identical to those for the comparable schemes established under the equivalent Westminster primary legislation. This conjoined policy approach across analogous schemes guards against the risk of future legal challenge, to which an individual scheme, which might otherwise deviate from the core policy proposals underpinning the remedy, would be vulnerable.

Proposed next steps – Legislative Consent Motion (LCM)

The remedy provisions in the Public Service Pensions and Judicial Offices Bill reflect the shared policy objectives emerging from both the Treasury and Department of Finance consultations.

On 21 May 2021 the Minister of Finance wrote to Executive Colleagues seeking agreement for an Legislative Consent Motion. At the Executive meeting on 3 June 2021 the Executive agreed in principle to the proposal for an LCM for the Public Service Pensions and Judicial Offices Bill.

The Public Service Pensions and Judicial Offices Bill was introduced in the House of Lords on 19 July 2021. The second reading of the Bill occurs on 7 September 2021. The Bill will deliver the necessary changes required in primary legislation to remedy unlawful age-based discrimination for all similarly constituted public service pension schemes affected by the unlawful discrimination as well as related changes to judicial pension arrangements and terms of office.. The latest version of the Bill and associated documents can be found at: <https://bills.parliament.uk/bills/3032>

The main provisions in the Bill will:

- close off legacy schemes for future accrual from 31 March 2022,
- amend eligibility rules to enable in-scope members to be moved back to legacy schemes for the remedy period,
- provide deferred choice for active and deferred members to receive new scheme benefits,

- provide power to reduce or waive liabilities to pay back overpaid pension and lump sum benefits or contributions,
- establish procedures for eligible members (active, deferred and pensioners) of the main unfunded pension schemes to have a choice of the benefits they wish to take for the “remedy period” of 1 April 2015 to 31 March 2022,
- reaffirm the reformed schemes for all future service from 1 April 2022. When the remedy period ends, all those in service in main unfunded schemes will be members of the reformed pension schemes, ensuring equal treatment from that point on,
- establish a compensation scheme and enable payment of compensation for purpose of compensable losses incurred by members during the remedy period,
- ensure a waiver of all McCloud related cost cap ceiling breaches from 2016 scheme valuations to ensure no negative impacts for any employee benefits,
- confer powers for the Department of Finance to make regulations and directions,
- establish procedures to implement corresponding changes in the Judicial Pension Schemes and Local Government Pension Schemes to reflect their different arrangements,
- make provisions to transfer members of the judiciary into a further reformed pension scheme owing to the judges’ unique circumstances of appointment,
- make provisions for raising the mandatory retirement age of devolved judicial office holders from 70 to 75 and makes provision for judges sitting in retirement (including extending existing provision to sit in retirement to part-time, fee-paid judges and removal from sitting in retirement offices),
- make provisions for judicial pay protection (although these provision do not extend to Northern Ireland) and to allow for the payment of allowances where there is no existing statutory provision to do so; and
- establish a new UK Asset Resolution (UKAR) Limited pension scheme.

Local Government Scheme

In 2015 all LGPS(NI) members moved to the reformed scheme with pension age linked to state pension age and no members remained protected as members of the

legacy scheme. Those within 10 years of retirement did however receive age-based transitional protection in the form of an 'underpin' which would ensure their retirement pension cannot be less than it would have been in the 2009 Scheme. Due to these differences in the way the original 2015 transitional protections were introduced for the Local Government Pension Scheme (LGPS(NI)) the remedy response applied differs. Under the LGPS(NI) remedy the underpin arrangement will be extended to all eligible members with relevant service in the legacy 2009 Scheme but who did not originally qualify for the age-based underpin protection. This approach remains identical to that proposed for the equivalent scheme in Britain and will be implemented fundamentally in the same way under the provisions of the Bill.

Judicial Scheme

As part of the remedy for eligible members of the devolved judicial scheme they will be incorporated as part of a reformed GB scheme solution which will be operated by the Ministry of Justice. The devolved Judicial Pension Scheme has 56 registered members, only approximately 30 of which are affected by the age discrimination and in scope of the remedy. Since its introduction in 2015 the scheme already differs from the other devolved schemes in that, due to concerns around value for money, efficiency and economy of scale, it does not complete its own actuarial valuation but rather applies the outcome of the Ministry of Justice valuation for the existing scheme in Britain in order to determine appropriate contributions and cost controls for scheme members and employers. Governance and some administration functions for the scheme are also already linked with or shared with the Ministry of Justice scheme.

For the Judicial Scheme all members will still be given a choice to retain remedy period benefits in either the legacy or reformed scheme by way of an 'options exercise', and all members will also only accrue benefits in the reformed scheme from 1 April 2022. The reformed Judicial scheme will also be of the CARE scheme design and existing requirements for normal pension age linked to state pension age will also be retained. It should be noted that it is proposed that a new pension scheme for the judiciary will be created from April 2022 and it is proposed that the scheme will revert to its pre-2015 non-tax registered status..

Other provision

The Bill also includes an additional UK Asset Resolution (UKAR) measure which will establish the UKAR pension scheme as a new public service pensions scheme and defunding the existing Bradford & Bingley and Northern Rock Asset Management pension schemes, after that point the Westminster Government will bear the cost of paying the pensions directly. There are no impacts for devolved arrangements for this part of the Bill.

Rationale for LCM

The LCM will address the close timescales now required to implement the remedy solution by April 2022, and ensure the changes for devolved schemes are implemented to the same timescales as the similarly constituted schemes in Britain. This ensures members of the schemes here are not disadvantaged and mitigates the risks of future litigation should the NI changes be delayed or differ in terms of cost or design. The main provisions in devolved public service schemes are virtually identical to those in the equivalent schemes in Britain and the Department's consultation has not identified any justified rationale or realistic scope to deviate from the core policy approach developed in conjunction with the Treasury. The Department already has a number of other bills targeted for completion before Assembly dissolution in April 2022 and a standalone Bill would exert an additional strain on existing Departmental and Assembly legislative workloads for the remainder of the mandate whilst delivering no materially evident benefit for public service scheme members, but risks incurring their disadvantage and further costly legal challenge for scheme responsible Departments if it fails to deliver the required legislative changes necessary to address the discrimination.

Financial Implications

Removing unlawful discrimination back to 2015 in the devolved unfunded public service schemes is currently estimated to cost on average around £97million for each year of the remedy period. These estimates reflect the expected cost of members receiving benefits from whichever scheme provides the highest value to them for the remedy period and are in addition to those already arising from members receiving benefits from the scheme they are currently in. It is not anticipated that there will be any significant costs arising from reforms to retirement age for the devolved judiciary and associated matters.

<i>Scheme/Dept.</i>	<i>Annual cost (£m)</i>	<i>Equivalent % of pensionable pay, 2019-2023</i>
Health & Social Care (DoH)	20	2.1%
Teachers (DE)	25	5.3%
Civil Service (DoF)	20	5.3%
Police (DoJ)	20	15.9%
Fire (DoH)	5	17.8%
Local Government (DfC)	7	1.6%

Devolved Judiciary (DoJ)	0.13	-
Total	97	-

Cost Control

The cost of the remedy in each scheme will be addressed as part of its scheme valuation and cost control process. Within this process costs are shared between scheme members and employers. The Department of Finance has responsibility under sections 11 and 12 of the Public Service Pensions Act (Northern Ireland) 2014 to issue Directions to the devolved public service schemes on scheme valuations and cost control. The cost control process had been paused since March 2019 due to 'McCloud' related uncertainty about the design and cost of public service pensions from 2015 onwards, and which meant it was not possible to make accurate actuarial calculations about the cost cap mechanism. Following publication of the consultation response scheme actuaries are now able to more accurately assess the scheme liabilities arising from the McCloud remedy.

As the remedy choice increases the value of benefits to scheme members during the remedy period, these costs will be accounted for as an employee cost in the completion of 2016 scheme 'cost cap' valuations. However the Treasury has announced its intention that there should be no reductions to member benefits as a consequence of the McCloud impact on the cost cap calculations for the re-established 2016 valuations. The Public Service Pensions and Judicial Offices Bill includes provisions to waive the impact of any cost cap ceiling breaches that would otherwise negatively affect member benefits (by decreasing the accrual rate or increasing member contributions). Any breaches of the cost cap floor (resulting in increased benefits via increased accrual rates or decreased employee rates) will be honoured.

Devolved cost control policy for public service pensions reflects that of Treasury for the similarly designed and costed equivalent schemes in Britain and under the LCM this waiver will be applied for devolved schemes in the same way as for the schemes in Britain.

As the funding model for devolved public service pension schemes is relative to the design and cost envelope of equivalent schemes in Britain, also funded by the taxpayer under central Treasury policies, any alternative approach or change which would have the effect of providing a more generous or costly level of benefits to public service members in the devolved schemes here in comparison to their counterparts in Britain would require a bespoke funding provision from the block grant, and this would likely detract from existing budgets available for other important public services.

Equality screening

The Department set out its initial analysis of equality impacts of the remedy proposals in the screening document published alongside the consultation. This has

since been updated to take account of any additional issues raised in responses received to the consultation, and with focus on the proposal for DCU. The screening exercise concludes no unjustified adverse differential effects for s75 categories and that full EQIA is not required. The screening exercise is published at: <https://www.finance-ni.gov.uk/publications/response-consultation-proposed-changes-transitional-arrangements-2015-schemes>

Equality Screening has also been completed by the Department for Communities as part of its policy consultation for the Local Government Scheme, and by the Department for Justice for the devolved Judicial Scheme and on the proposed reforms to the retirement age of devolved judges. In each case no unlawful or unjustified adverse differential effects were identified and a full EQIA is not necessary.

Individual pension schemes will undertake further equality screening as part of their consultation processes on their scheme level implementation plans, including consultations on draft regulations. The Department of Finance will consider any specific impacts of the detailed working-out of the policy for each scheme at that stage.

TUS engagement

Formal consultation with TUS representing scheme members on this matter has been progressed at the Collective Consultation Working Group (CCWG), which is the established forum for consultation on public service pension policy. Employer and member interests of each scheme in scope of the proposed changes are represented at this forum. The group last met on 2 July 2021 and a next meeting is scheduled for 17 September 2021. Currently TUS has reserved its position on the use of an LCM in this devolved matter. However, it remains opposed to the McCloud costs being categorised as an employee cost in the 2016 Valuations.

Secondary legislation

Secondary regulations will also be required by the individual Departments with responsibility for the individual devolved schemes to implement the remedy at scheme level. To assist schemes in responding to the administrative challenges of installing new or revised processes and systems, and to complete required scheme level consultations and communications to members, the Bill allow scope for schemes to make secondary legislation for the retrospective element of the remedy between 1 April 2022 and 1 October 2023. The Department is supporting schemes on necessary progress for secondary legislation. The Department is also supporting the Department of Justice in its meetings of the Northern Ireland Public Service Pensions C