LEGISLATIVE CONSENT MEMORANDUM

PUBLIC SERVICE PENSIONS AND JUDICIAL OFFICES BILL

(Public service pensions: proposals to remedy unlawful age-based discrimination in public service pension schemes as a consequence of the 'McCloud' judgement; and changes to judicial pensions and terms of office in relation to retirement age, judicial pay and sitting in retirement (including removals from office).

Draft Legislative Consent Motion

1. The draft motion, which will be tabled by the Minister of Finance, is:

   "That this Assembly endorses the extension to Northern Ireland of provisions to implement the remedy solution for age discrimination in public service pension schemes, and associated measures on scheme cost control, and judicial pensions and terms of office, in the Public Service Pensions and Judicial Offices Bill as introduced in the House of Lords on 19 July 2021."

Background

2. This memorandum has been laid before the Assembly by the Minister of Finance under Standing Order 42A(2). The Public Service Pensions and Judicial Offices Bill was introduced in the House of Lords on 19 July 2021. The latest version of the Bill and its associated documents can be found at:

   https://bills.parliament.uk/bills/3032

Summary of the Bill and its policy objectives

3. In the 'McCloud' judgement in December 2018 the Court of Appeal in England & Wales ruled that transitional measures incorporated at the introduction of the reformed schemes in 2015, which had allowed older scheme members to remain in their legacy scheme arrangement unlawfully discriminated against younger scheme members, and must be remedied[1]. Legal advice confirms the identical transitional measures introduced for equivalent devolved schemes must be similarly remedied.

[1] https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-summary.pdf

4. The Public Service Pensions and Judicial Offices Bill will make the necessary changes required in primary legislation to remedy unlawful age-based discrimination in public service pension schemes as a consequence of the judgement. The Bill will implement a remedy solution, as set out in the Department of Finance response to its consultation on this issue, which addresses the discrimination which has occurred in the reformed schemes since 1 April 2015 and will remove it for the future. The Bill puts in place a framework within which unfunded schemes will be required to make provision to provide eligible members affected by the discrimination with a choice at the point of retirement about which set of benefits (legacy scheme or reformed scheme) they wish to receive for their pensionable service during the remedy period when discrimination occurred. This choice, known as a 'deferred choice underpin' (DCU) reflects the majority preference of those who responded to the Department of Finance consultation. The 'remedy period' is from the date of the introduction of reformed schemes on 1 April 2015 until 31 March 2022.

5. The Bill will also ensure equal treatment for all members of the main unfunded public service pension schemes by ensuring all future service from 1 April 2022 is accrued in the relevant reformed scheme.

6. The Bill contains enabling powers where needed so that details can be set out in scheme regulations to implement the remedy. The remedy provisions carried in the Bill will provide members of public service pension schemes with greater certainty and clarity on their benefit entitlements at the point of retirement. All public servants will still receive guaranteed pension benefits, but on a fairer basis without discrimination.

7. The Bill also directly provides for schemes to correct any overpayment or underpayment of pension benefits or member contributions already paid in relation to a member as a consequence of their choice of benefits for the remedy period.

8. Due to the way original 2015 transitional protections were introduced for the Local Government Pension Scheme (LGPS(NI)) the remedy response differs. In 2015 all LGPS(NI) members moved to the reformed scheme with pension age linked to state pension age; 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 for comparable service in the legacy 2009 Scheme. Under the LGPS(NI) remedy the underpin arrangement will be extended to all who met the original criteria other than, the now unlawfully age based requirement of, being within 10 years of retirement at

31 March 2012. Furthermore some criteria, e.g. the need to leave active service with an immediate entitlement to a pension, will be relaxed to ensure equity across the wider age range to which the underpin will now apply. The application of the 'underpin' will be modified slightly to ensure equity across all age groups.

9. The remedy for eligible members of the devolved judicial scheme will be incorporated as part of a new UK wide scheme solution which will be operated by the Ministry of Justice. It should be noted that prior to 2015 main pension provision for the eligible devolved judicial offices was made in the UK wide scheme established under the Judicial Pensions and Retirement Act 1993. 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. The small size of this scheme has raised concerns around value for money, efficiency and economy of scale. As a consequence, since its introduction in 2015 the scheme already differs from the other devolved schemes in that it does not complete its own actuarial valuation but rather applies the outcome of the Ministry of Justice valuation for the equivalent scheme in Britain in order to determine appropriate contributions and cost control for scheme members and employers. Governance and some administration functions for the scheme are already linked with or shared with the Ministry of Justice scheme.

10. 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 is proposed that the scheme will revert to its pre-2015 non-tax registered status. The Bill includes provisions to increase the age for mandatory retirement for judges from 70 to 75. The Bill also includes the power to extend existing provision to sit in retirement to part-time, fee-paid judges and to consolidate sitting in retirement policy into legislation for salaried judges. This provision will apply to the devolved judiciary, and will also apply to the courts judiciary. These provisions will also cover removal from sitting in retirement. The terms and conditions of appointment of the courts judiciary are an excepted matter and therefore the responsibility of the Lord Chancellor, however, removal from office is a devolved matter. Provision will also be made for the payment of allowances to members of the devolved judiciary where this arrangement is not currently available.

11. The approach taken for devolved schemes in the Bill is identical to that proposed for the equivalent schemes in Britain and will be implemented fundamentally in the same way under the provisions of the Bill.

12. 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; defunding the existing Bradford & Bingley and Northern Rock Asset Management pension schemes, after that point the government will bear the cost of paying the pensions directly. There are no impacts for devolved arrangements for this part of the Bill.

13. The Bill contains measures to:

- 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;
- make provision so that scheme managers may make indirect compensation and give member entitlements to additional benefits instead of cash compensation in certain circumstances;
- provide a waiver of 'McCloud' related cost cap ceiling breaches from 2016 scheme valuations to ensure no negative impacts for any employee benefits;
- allow election for retrospective provision to apply to opt-out service;
- vary the implementation date for retrospective remedy, if earlier than 1 October 2023;

- allow the immediate choice of new scheme benefits in respect of pensioner and deceased members where there is an election to choose alternative benefits;

- enable an award of additional credit due to pension credit members as a result of the remedy;

- make provisions for the transfer of benefits by members;

- make provisions for the treatment of voluntary contributions made by members;

- make provisions for various types of "special cases";

- confer powers for the Department of Finance to make regulations and directions;

- confer powers for the Department of Finance to set out in directions payments which would normally be unauthorised but, for the purposes of this Bill, schemes are permitted to make;

- make provisions for remediable service statements to be provided to members containing additional information about their benefit entitlements;

- confer powers for the Department of Finance to set out in directions that interest is applied where sums are owed to schemes or members;

- make provisions to dis-apply consent requirement to amend reformed schemes for the sole purposes of the McCloud remedy;

- make provisions for immediate detriment cases;

- enable powers to make consequential provision including to amend, repeal, revoke or otherwise modify provision made by an enactment;

- 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;

- make provisions for raising the mandatory retirement age of devolved judicial office holders from 70 to 75 and make provision for judges sitting in retirement (including removal from sitting in retirement offices);

- make provisions for judicial pay protection (although these provisions 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.

Provisions that deal with a Devolution Matter

14. Public Service Pensions is a devolved matter. Provision for the main public service employments is made under the Public Service Pensions Act (Northern Ireland) 2014, which introduced reformed schemes from 1 April 2015. These reforms were based on the recommendations of the Independent Public Service Pensions Commission in 2011 that active scheme members should move to new more sustainable and equitable Career Average Revaluated Earnings (CARE) schemes with normal pension age linked to State Pension Age (SPA), (A normal pension age of 60 was recommended for the schemes for police, fire and the armed forces)[2].

15. The Public Service Pensions and Judicial Offices Bill will implement the remedy for all devolved public pension schemes and includes provisions on the retirement age of devolved tribunal judges and the appointment to and removal from sitting in retirement offices, which is also a devolved matter. as is the payment of allowances to devolved tribunal judges.

Reasons for making the Provisions

16. The principal intent of these proposals is to ensure provisions to implement the remedy solution in the devolved public service schemes are made to fully address the age discrimination arising from the court ruling on 'McCloud'. It is

[2] Exceptions were agreed during the Act's passage that: normal pension age for the Firefighters Pension Scheme is made in secondary legislation within a age range of 55 to 60 years; that survivor pensions in the Police scheme be no longer terminated upon re-marriage, and that Department of Finance Directions on scheme valuations are to be subject to consultation before being finalised.

appropriate that public servants here in the devolved schemes should have discrimination addressed in the same way and to the same timescales as the rest of the similarly constituted public sector schemes in the UK.

17. The Bill will make the necessary changes required in primary legislation to ensure the unlawful age discrimination is timeously addressed for scheme members here and that they are not disadvantaged.

18. The proposals in relation to judicial offices will ensure that uniformity of provision is maintained for the devolved judiciary tribunals with their courts colleagues, whose terms and conditions of appointment and remuneration is an excepted matter under Schedule 2 of the Northern Ireland Act 1998 and is therefore the responsibility of the Lord Chancellor.

Reasons for utilising the Bill rather than an Act of the Assembly

19. The main provisions in the devolved public service schemes are virtually identical to those in equivalent public service schemes in Britain. The remedy solution for devolved schemes also proposes an identical remedy response to that proposed by the Treasury for the analogous public service schemes in Britain. The remedy solution in the Bill reflects the shared policy objectives that emerged from both the Treasury and Department of Finance consultations to address unlawful discrimination by April 2022. An LCM for the provisions for devolved schemes to be included in the Westminster Bill represents the most practical, efficient approach to ensure the unlawful age discrimination is timeously removed for affected scheme members here. The LCM will also ensure the devolved judiciary receive the same entitlements as their courts colleagues, in relation to the reforms to retirement age and associated matters, and will enable the reforms to take effect for all judiciary here at the same time.

20. An Assembly Bill could be used to implement these changes. However, in context of the very close timescales now faced to implement the prospective remedy solution by 1 April 2022 a standalone Bill would exert an additional strain on existing Assembly legislative workloads for the remainder of the mandate. If such a Bill was not completed before dissolution for elections in March/April 2022, it would fall and the unlawful age discrimination for the affected scheme members will not be resolved in the same way as for the comparable schemes in Britain.

21. In addition, 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 to address this matter. The remedy changes in the Bill are targeted and largely technical ones which will focus on the discriminatory elements of the transitional protections now identified by the courts as unlawful.

22. In summary, in the context of the legal imperative to remove the unlawful discrimination, an Assembly Bill will achieve no additional 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 to the satisfaction of the courts by 1 April 2022.

23. It is imperative that the provisions in primary legislation for devolved schemes are passed into law before April 2022. If this target date is not met, long term liabilities may increase by up to £97m for each additional year that the remedy window is open. Any failure of the primary legislation will also impact on the introduction of the secondary legislation.

24. An LCM is therefore the most effective means to ensure members of the public service schemes pensions here are treated fairly and to the same timescales as their counterparts in the similar constituted schemes in Britain. It will also ensure uniformity of provision is maintained between the devolved and courts judiciary in relation to retirement age reforms and associated matters.

Consultation

25. Between 19 August and 18 November of 2020, the Department of Finance consulted on options to address the unlawful discrimination which has occurred in the schemes since 2015 and to remove it for the future. The remedy proposals set out in the consultation were identical to those contained in a comparable consultation by Treasury for analogous schemes in Britain. The consultation encompassed devolved schemes for Civil Servants; Teachers; Health Service Workers; Police, and Firefighters. The policy proposal set out in the Department's response to the consultation was published on 25 February 2021[3].

26. Due to the aforementioned differences in the Local Government and Judicial scheme arrangements separate consultations were progressed by the Department for Communities and Department of Justice respectively. The Department of Justice consulted on proposals to reform the retirement age of the devolved judiciary from 14 October 2020 to 9 December 2020. A copy of the consultation and a summary of responses can be accessed at: https://www.justice-ni.gov.uk/consultations/mandatory-retirement-age-devolved-judicial-office-holders. The Local Government scheme underpin consultation was published at :https://www.communities-ni.gov.uk/consultations/consultation-proposed-changes-transitional-arrangements-2015-local-government-pension-scheme

27. In the case of both schemes the proposed remedy outcome remains fundamentally identical to the measures proposed for the equivalent analogous

[3] https://www.finance-ni.gov.uk/publications/response-consultation-proposed-changes-transitional-arrangements-2015-schemes

schemes in Britain. However, it should be noted that it is proposed that a new pension scheme for the judiciary will be created from April 2022.

28. As set out in the published Department of Finance response to the consultation the remedy will implement the DCU approach for the treatment of benefits accrued by eligible members during the 'remedy period' from 1 April 2015 to 31 March 2022. This means affected members will not need to make their decision whether to choose legacy or reformed scheme benefits for the remedy period until a point when they are about to retire. DCU was the overwhelming preference expressed in response to the consultation. It provides eligible members with more certainty about their actual benefit entitlements based on factual information about their earnings, personal circumstances and future plans at the most relevant point in time i.e. at retirement. This is in contrast, to the higher level of uncertainty and unavoidable assumption-making about these same circumstances the alternative option for an 'Immediate Choice' (IC) would inevitably involve and which, as the consultation sets out, would present an unacceptably high level of risk for members' making ill-informed or wrong decisions based on incomplete available information.

29. 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 is essential to ensure that all members are treated equally in respect of the scheme design available to them after the foregoing 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 such a difference in treatment would still be attributable to unjustified age-based criteria.

Human Rights and Equality

30. These changes are necessary to comply with implications of the courts legal ruling on McCloud and address an existing age-based inequality which is in breach of the non-discrimination rule for pension schemes under the Equality Age Regulations (NI) 2006.

31. The Department of Finance set out its initial analysis of equality impacts of the remedy proposals in the equality screening document published alongside the consultation on 19 August 2020. The screening exercise was subsequently updated to take account of any additional issues raised in responses received to the consultation. The screening exercise concludes no unjustified or unlawful adverse differential effects for s75 categories have been identified in the remedy proposal and a 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

32. 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. In each case no unlawful or unjustified adverse differential effects were identified and a full EQIA was not considered necessary.

33. Each of the individual devolved 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.

34. The Department of Finance has also co-ordinated devolved scheme input to the Treasury equality assessment for the Bill which is published on the bill webpage at: https://bills.parliament.uk/bills/3032

Financial Implications

35. Removing unlawful discrimination back to 2015 in the devolved public service schemes here is currently estimated to cost on average around £97million for each year of the remedy period. This equates to approximately £680 million in total. In the funded Local Government Scheme the estimate is £7m per year (£49m in total). Costs for the devolved Judicial scheme are estimated at £0.9m for the complete remedy period. It is not anticipated that there will be any significant costs arising from reforms to retirement age for the devolved judiciary and associated matters.

36. These estimates reflect the expected cost of members receiving benefits from whichever scheme provides the highest value to them for the remedy period. These costs are in addition to those already arising from members receiving benefits from the scheme they are currently in.

Scheme/Dept.	*Annual cost (£m a year)*	*Equivalent % of pensionable pay, 2019-2023*
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	*t*-
Total	**97 (p.a)**	**-**

37. 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. These valuations were paused in 2019 due to the McCloud ruling which raised uncertainty about future scheme design and the value to members of benefits during the period of discrimination (2015-2022). Following publication of the consultation response and further certainty on the remedy design scheme actuaries are now able to more accurately assess the scheme liabilities arising from the McCloud remedy.

38. To manage the cost implications of remedy Treasury has previously announced its intention that there should be no reductions to member benefits as a consequence of the McCloud impact on the re-established 2016 valuations. The Bill includes provisions to waive the impact of any ceiling breaches of the cost cap mechanism for the schemes, which would otherwise negatively affect member benefits (by decreasing the accrual rate or increasing member contributions). Any floor breaches of the mechanism in the finalised 2016 valuations will be honoured (where an increase in accrual rate or decrease in contribution rates may apply for scheme members).

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

40. 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 workers members 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.

Summary of Regulatory Impact

41. The provisions in the Bill impose no costs on business, charities, social economy enterprises or the voluntary sector. A Regulatory Impact Assessment is not considered necessary.

Engagement to date with the Finance Committee

42. The Department of Finance has briefed the Committee for Finance on its remedy proposals both in writing and in evidence to the Committee at its meetings of 4 November 2020 and 10 March 2021. The Committee has also heard evidence from Central TUS at its meeting on 23 April 2021. The Committee has to date not raised any objections in principle to the LCM proposal. Further briefing sessions are scheduled as part of the Committee's formal scrutiny of the LCM.

43. Department of Justice officials have also briefed the Justice Committee on changes proposed for the scheme. The Justice Committee has raised no objection in principle to proceeding with the proposed changes by way of LCM.

Conclusion

44. The view of the Minister of Finance is that in the interests of good government that so far as the provisions of the Bill deal with a devolution matter, they should extend to Northern Ireland. It is entirely appropriate that public servants who are members of the devolved schemes here should be treated in the same way as members in the similarly constituted and funded public service arrangements in Britain on this matter. The use of the LCM presents the most effective and efficient option for ensuring unlawful discrimination is swiftly removed and the same protections for scheme members, the public purse, and principles for value and proportionality in the public sector, are seen to be applied consistently and to the same timescale. The LCM will also ensure uniformity between the devolved judiciary tribunals and the courts judiciary in relation to proposed reforms to judicial retirement age and associated matters.

Recommendation/Decision Sought

45. The Assembly is asked to endorse this approach by means of a Legislative Consent Motion.

Department of Finance
6 September 2021