

**Official Response  
to the  
Teachers' Pension Scheme  
Transitional Protection  
Regulations Consultation**

**June 2023**

# Introduction

The Teachers' Pension Scheme (TPS) provides pension and other benefits to teachers in England and Wales. There is a legacy final salary scheme with two sections, with normal pension ages of 60 and 65 (depending on when the member joined), and a reformed career average scheme with a normal pension age equal to State Pension Age or 65 (whichever is higher).

The legacy scheme closed to any further accrual by any members on 31 March 2022. All active members of the TPS are now in the reformed scheme and it is this scheme that all new members will join.

As well as an annual pension payable from when a member reaches their scheme pension age, there are other provisions such as ill-health pension, death benefits including payment of a death grant in respect of those who die whilst they are still teaching and ongoing survivor pensions regardless of when the member dies. There are various scheme flexibilities which allow members to accrue more pension, convert some pension entitlement to a lump sum, retire early etc.

If an individual is employed by a participating employer in a predominantly teaching role (and roles akin to teaching such as lecturing), and is between the ages of 16-75, they are likely to be eligible for enrolment into the TPS.

The scheme covers a range of establishments in the education sector which includes academies, maintained schools, further education colleges and certain universities ('post-1992' universities). Independent schools do not automatically participate in the TPS, but they are eligible to apply to join.

Member and employer contributions fund the TPS, with the rules set out in regulations. The legacy scheme rules are set out in the Teachers' Pensions Regulations 2010 (the 2010 regulations) ([SI 2010/990](#)). The reformed scheme rules are set out in the Teachers' Pension Scheme Regulations 2014 (the 2014 regulations) ([SI 2014/512](#)).

The Department for Education (the Department) is consulting on a draft statutory instrument, referred to in this document as the draft regulations, which would introduce changes to the rules of the England and Wales TPS.

## Background and context

When reformed public service pension schemes were introduced in 2015, transitional protection arrangements allowed older workers to continue building pension in the legacy final salary schemes whilst younger workers were moved into reformed career average schemes. Following a legal challenge in the McCloud case, the Court of Appeal found that this difference in treatment in the transitional arrangements amounted to age discrimination. The Government has enacted the [Public Service Pensions and Judicial Offices Act 2022](#) (the Act) to implement changes to remedy the age discrimination that was identified.

The remedy consists of two parts or phases. The first part ensures equal treatment of all members from the end of the remedy period which was achieved by moving all remaining active members of the legacy scheme into the reformed scheme on 1 April 2022.

The second part of the remedy seeks to remove the difference in treatment that was caused by the transitional protection provisions by rolling back reformed scheme service during the remedy period to the legacy scheme and providing eligible members with a choice over the set of benefits (those that would have been accrued in the legacy scheme or the equivalent of those that would have been accrued in the reformed scheme) that they wish to receive for their service during the remedy period. The remedy period is 1 April 2015 – 31 March 2022, which is the period during which some members were treated differently according to their age.

Members who are eligible for the remedy are those who were members of the legacy scheme on or before 31 March 2012 (when the reforms were announced) and continued to be in pensionable service at some point during the remedy period without having had a disqualifying break in service. More detailed information concerning the scheme reforms and McCloud judgment is provided in subsequent sections of this document.

The Department is consulting on draft regulations making changes to the TPS rules which are necessary to implement the second phase of the remedy. The regulations contain consequential and procedural provisions as required by the Act.

## About Community

The Education and Early Years Section of Community represent and support people working in all sectors of education and early years from nursery to tertiary, including further and higher education. Formerly Voice the Union, our dedicated education and early years team are trained to provide support for whatever our members are facing at work.

We represent Nannies, Early Years and Childcare Professionals, Heads and Leaders, Tutors, Support Staff, Lecturers and Researchers, and Education Students across all stages and phases of learning as well as being a nationally recognised union for Teachers in the UK. We are a stakeholder to various Government groups including COSLA, Ofsted, STA, Ofqual and are a contributor to the annual teacher pay review.

We have members across thousands of schools, universities, colleges, and nurseries across the whole of the UK.

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This is the official response from Community on behalf of our members. It is a public document on behalf of the trade union and will be published on our website once the deadline for submission has passed.

## This official response was submitted by email:

To [tps.consultations@education.gov.uk](mailto:tps.consultations@education.gov.uk)

### Deadline

The consultation closes at 23:55 on 4 June 2023.

# The McCloud case

## Public service pension scheme reforms and the Court of Appeal judgment

In 2010, the then Chancellor of the Exchequer invited Lord Hutton of Furness to chair the Independent Public Service Pensions Commission (IPSPC). The IPSPC was tasked with undertaking a fundamental structural review of public service pension provision.

The IPSPC published its final report in 2011, setting out recommendations to reform public service pensions to better balance the interests of taxpayers, employers and members. The Government accepted the IPSPC's recommendations as the basis for discussions with public service workers, trades unions and other representative bodies.

In November 2011, the Government published a Command Paper setting out the Government's framework for reform of the public service schemes. Further discussions were undertaken with each of the workforces to develop scheme design proposals.

In April 2015, reformed schemes were introduced for the main workforces - teachers, the NHS, the armed forces, firefighters, police, judiciary and civil service - following similar reforms for local government workers in 2014. The reforms were implemented by regulations made under the [Public Service Pensions Act 2013](#).

As part of the reforms, members within 10 years of their scheme normal pension age (protected members) remained wholly in the legacy pension schemes. Members within 10-13.5 years of their scheme normal pension age (tapered protection members) remained partially in the legacy pension schemes and transitioned to the reformed schemes on a specific date between 1 April 2015 and 31 March 2022. Members more than 13.5 years from reaching their scheme normal pension age (unprotected members) moved to the reformed scheme on their first date of service from 1 April 2015. The transitional protection provided to protected and tapered protected members was not a recommendation of the IPSPC but was agreed following discussions with member representatives.

In December 2018 the Court of Appeal found in *Lord Chancellor and Secretary of State for Justice v McCloud, Secretary of State for the Home Department v Sargeant* [2018] EWCA Civ 2844 (referred to as the McCloud judgment) that transitional protection unlawfully discriminated against younger members of the judicial and firefighters' pension schemes, and also gave rise to indirect sex and race discrimination. On 27 June 2019 the Supreme Court refused the Government permission to appeal the Court of Appeal's judgment.

On 15 July 2019 the Chief Secretary to the Treasury made a Written Ministerial Statement setting out that the Government considered that the Court of Appeal's judgment had implications for all of the public service pension schemes and planned to come forward with proposals to remedy the discrimination accordingly.

## **The Remedy**

On 16 July 2020, the Government published a consultation containing two proposed options for retrospectively removing the discrimination suffered by members who were not eligible for transitional protection due to their age. The consultation also proposed that the legacy public service pension schemes would close to all remaining members on 31 March 2022. This was the 'prospective remedy' which is not the subject of this consultation.

The Government proposed that members should be given a choice of which scheme benefits they wish to receive during the period from when the reformed schemes were introduced to the date that the legacy schemes closed. This would apply equally to members who benefitted from transitional protection and those who did not. Amongst other issues, the consultation sought views on whether the choice should be made immediately (once the necessary legislative changes were made) or deferred until the point that a member's pension benefits become payable.

In February 2021 the Government published its response, confirming that the legacy schemes would close on 31 March 2022 and affected members would be given a choice of which pension benefits (legacy or reformed) they wish to receive when those benefits are paid. That choice will apply to all of their remediable service and members are not permitted to take a combination of legacy scheme and reformed scheme benefits for this period. This means that those with tapered protection will have a choice between legacy and reformed scheme and cannot retain 'mixed' benefits, otherwise there would continue to be a difference in treatment due to age.

In the Queen's Speech on 11 May 2021 the Government announced its intention to bring forward the legislation to implement retrospective changes to remedy the

discrimination that arose and to ensure equal treatment for all members within each of the main public service pension schemes by moving all members into the reformed schemes on 1 April 2022.

The Public Service Pensions and Judicial Offices Bill was introduced into the House of Lords on 19 July 2021 putting in place a framework to address the discrimination identified by the Court of Appeal, both retrospectively and prospectively, as well as the consequential effects of that remedy. Royal Assent was received on 10 March 2022.

## **The Public Service Pensions and Judicial Offices Act 2022**

The Act makes provision to remedy the discrimination arising from the transitional protection introduced into the public service pension schemes in 2015.

Certain elements of the remedy are achieved solely by provisions in the Act including who is eligible for the remedy and for reformed scheme service to be 'rolled back' to the legacy scheme. The Act also gives schemes the power to make provisions in regulations to deliver other aspects of the remedy.

### **Eligibility**

To be eligible for the remedy a member must have 'remediable service.' Section 1 of the Act sets out that for service to be 'remediable service': -

- a) it relates to a period when the discrimination arose (1 April 2015 - 31 March 2022);
- b) the member was eligible for transitional protection or would have been eligible for transitional protection but for the discriminatory requirement in the schemes;
- c) the member was, on or before 31 March 2012, a member of a legacy scheme;
- d) the member does not have a disqualifying break in service (breaks of more than 5 years).

Members with service that meets the criteria are eligible for the remedy. This includes active, deferred, retired and deceased members irrespective of whether they benefited wholly or partially from transitional protection.

## Rollback

From 1 October 2023 the unprotected and tapered protected members who accrued benefits between 1 April 2015 and 31 March 2022 in a reformed scheme will have that period of service returned to the relevant legacy scheme. This will result in all affected members having their remediable service in the legacy scheme.

As explained in paragraph 1 of this document, the TPS legacy scheme has two sections. The member's service will be returned to the section of the legacy scheme in which the member most recently had service - i.e. the section that the member was in immediately prior to moving to their reformed scheme from 1 April 2015.

The Act also makes provision for 'Excess Teacher Service' to be included in the definition of 'remediable service'. An explanation of Excess Teacher Service is included in paragraphs 179-187 and 300-309.

## Need for scheme specific regulations

The previous section has described how under the provisions of the Act, all service accrued from 1 April 2022 in the TPS is in the reformed scheme.

On 1 October 2023, members who are eligible for the remedy will have service between 1 April 2015 and 31 March 2022 'rolled back' to the legacy scheme.

When those members retire, they will be given a choice as to whether their remedy period service is to be treated as legacy or reformed scheme. This is because one scheme will not always be better than the other scheme for members – which is most beneficial will depend on each individual's circumstances up to retirement. For this reason, most members will make their choice at the point immediately before retirement so that their decision is based on all relevant information.

The Act also provides that those who have already taken retirement benefits before 1 October 2023 will be given their choice as soon as possible after this date. Beneficiaries of members who have died before this date will also be given a choice as soon as possible.

TPS regulations are needed to give effect to the requirements of the Act and to address other consequential matters arising from rollback and the member's choice of benefits. Regulations amend scheme rules to implement the remedy and provide authority for the administrator to apply the changes.



One set of regulations, the Teachers' Pension Scheme (Amendment) Regulations 2022, provided for the closure of the legacy scheme on 31 March 2022 and moved all remaining active members to the reformed scheme on 1 April 2022 (phase one). This followed an earlier consultation by the Department which was held from 30 November 2021 to 21 January 2022 which dealt with the prospective phase of the remedy. The consultation response was published on 17 March 2022.

A second set of regulations is needed for phase two, to allow the TPS to:

- Offer eligible members a choice over the set of benefits they wish to receive in respect of remediable service during the remedy period of 1 April 2015 to 31 March 2022.
- Deal with the consequential effects of rollback and member choices on issues such as scheme flexibilities, transfers and orders made during divorce/dissolution proceedings that arose during the remedy period.
- Correct any overpayment or underpayment of pension benefits or member contributions that arise as a consequence of rollback or a member's choice of retirement benefits.
- Address any special cases that arise, for example ill-health retirement reassessments or the protection of child pensions in payment.
- Facilitate the payment of appropriate compensation to address financial losses or tax losses arising from the discrimination or operation of the remedy.

This consultation relates to the second set of regulations.

## Consultation Questions

### Q.1

**Do you agree with the policy approach that is proposed in the consultation document for the TPS to address the identified discrimination with the transitional protection arrangements?**

The McCloud judgement reported that the protections introduced in 2015 discriminated against younger scheme members TPS. The resulting 'remedy' whereby they get the option to decide which scheme they accrue benefits for the period between 2015 and 2022 seems a logical solution since it allows members to make a choice based on their actual career and a known retirement date.

Having studied them, we believe that the proposals contained within the consultation document to address the discrimination identified are appropriate and should be implemented.

However, we do have concerns which we believe have not yet been addressed. We feel that the remedy period (1 April 2015 – 31 March 2022) may be insufficient and that this should be flexible to account for circumstances which are not yet apparent.

There is the question of accrued/or not accrued interest for those who had funds prematurely moved to the Career Average Scheme. This is especially an issue given the high interest rates in the national economy at present and the impact that this might have had upon any investment.

There are other issues that also need to be considered here, the wide range of protected characteristics and the way that they are impacted by the proposals – in particular age, length of service, age at time of pension and any gap in service that members may have. Similarly, is it right that all members are treated equally, if that leads to unequal outcomes?

We also feel that it is unfair that money which is currently within the legacy scheme no longer accrues any interest since this is to the detriment of those who are older, but have left the profession. This pension constitutes a sizeable investment for many and it is immoral that they should lose out due to the closure of the legacy scheme.

**Q.2****Do the draft regulations achieve the policy aims as described in the consultation document?**

Since the previous transitional arrangements lead to discriminatory outcomes it was important to remedy them and we believe that the proposals that are being consulted upon here do this.

It will be important to ensure there are no members accidentally left out of the arrangements – for example, do they catch those who have already begun to receive their pension? And how will this impact those who have chosen to receive a lump sum only to have their service all returned to the legacy scheme? Will there be any support afforded to those members affected to, for example, fund independent financial advice, in order to make the decision about how to proceed. And will arrangements be put in place should members have to make repayments of pensions already received?

We also have some concerns about the implementation of rollback since it is possible that because service will be returned to the section of the legacy scheme in which the member most recently had service - i.e. the section that the member was in immediately prior to moving to their reformed scheme from 1 April 2015, this may lead to some members who have retired in the interim, perhaps due to ill health, may find themselves suffering detriment and it will be important to consider the impact this policy may have on those 'caught' in between.

**Q.3****Are any other scheme regulations required to achieve the stated policy aims?**

Notwithstanding the concerns raised in our response to the previous questions, Community believe that the proposals contained within the consultation document are broadly sufficient to achieve the stated policy aims.

Most of the stated aims can be achieved within existing and proposed regulations. However, we note that with any scheme changes, there will be a need to be awareness of any unintended consequences arising from the legislation.

It will also be key for all affected scheme members to be contacted and therefore is incumbent upon all parties to ensure that all data is correct and up-to-date.

**Q.4****Are there any other comments regarding the draft regulations?**

As mentioned in our response to question 2, it is unclear how some aspects of the McCloud remedy will be implemented, and the impact that this may have on those transitional members who may already have begun to receive their pension.

In particular, we are curious about how 'converted pension' will be dealt with for retired members. If a member converted pension covering the remedy period from the career average but then decides to take those benefits as final salary or vice versa – will the conversion still apply? And what will be the impact of such a decision?

We have spoken with members who have taken their pension (Final Salary and Career Average) and converted some pension from their Career Average. However, later, following updates to the service record, it transpires that all the service is now Final Salary. The consequence of this change has been to negate the conversion, with members ending up having to repay the converted amount because the Career Average benefits, which were converted, no longer exist. We fear that it is entirely likely that circumstances such as these will prevail with the proposals.

We would like assurances that those currently caught up, will be afforded support to enable them to seek independent financial advice to unravel a situation not of their own making.

**Q5****Are there any further considerations and evidence that the Department should take into account when assessing equalities issues arising as a result of the proposed regulations?**

No

**Q6**

**Overall, do you agree with the draft regulations included in the consultation document?**

Yes, as long as the concerns about unintended consequences and protections under equalities legislation are met.

And, as previously mentioned, we would like assurances that there will be additional support and provision for scheme members to seek independent financial advice before any decisions are made by those affected by the remedy.



Department  
for Education

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