



Scottish Public  
Pensions Agency  
Buidheann Peinneanan  
Poblach na h-Alba

# **2015 Remedy – Local Government Pension Scheme (Scotland)**

## **Supplementary issues and scheme regulations**

## About This Consultation

### Overview

This consultation seeks views on changes to the Local Government Pension Scheme in Scotland (LGPS). This follows a consultation we undertook in 2020 on proposals to address discrimination found by the courts in the ‘McCloud’ case. As a result of the responses we received from that consultation, we have adapted our proposals and are seeking views on further questions and an updated draft of the scheme regulations (at annex A) to implement the remedy.

### Duration of Consultation

This consultation will run for five weeks from 26 June 2023 to 31 July 2023.

### How to respond

Please use the consultation response form and once completed send to [sppapolicy@gov.scot](mailto:sppapolicy@gov.scot) before midnight on the closing date.

If you are responding in writing, please make it clear which questions you are responding to.

Written responses should be sent to:

The LGPS Policy Manager

SPPA

7 Tweedside Park

Tweedbank

Galashiels TD1 3TE

When you reply it would be very useful if you confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:

- your name,
- your position (if applicable),
- the name of organisation (if applicable),
- an address (including post-code),
- an email address, and
- a contact telephone number

## Further information

If you are unable to access an electronic version of the document, please write to the above address and a paper copy will be provided.

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The Scottish Public Pensions Agency (SPPA) is an executive Agency of the Scottish Government and forms part of the legal entity of the Scottish Ministers (Framework Document).

This framework of statutory powers and responsibilities, as agreed with the Scottish Ministers, enables SPPA to undertake the role of data controller for the processing of personal data which is provided as part of your response to the consultation. Any response you send us will be seen in full by SPPA staff dealing with the issues which this consultation is about or planning future consultations.

The process allows informed decisions to be made about how SPPA exercises its public function.

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In order to show that the consultation was carried out properly, the SPPA intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response.

If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

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- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is the independent regulator for data protection.

For further details about the information the SPPA holds and its use, or if you want to exercise your rights under the GDPR, please refer to our Privacy Policy in the first instance or contact:

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Tweedbank  
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Tel: 01896 892 469

Website: <https://pensions.gov.scot>

The contact details for the Information Commissioner's Office are:

Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Tel: 01625 545 745 or 0303 123 1113

Website: <https://ico.org.uk>



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## 1. Background

1.1. The Public Service Pensions Act 2013 (the 2013 Act) introduced reforms to public service pension schemes. The aim of the reforms was to implement the recommendations of the [Independent Public Service Pensions Commission: Final Report](#)<sup>1</sup>, to make public service pensions, which due to increased workforce longevity had increasingly been paid for by taxpayers, more affordable and sustainable. New pension schemes were introduced, designed to make public service pensions sustainable through a higher normal pension age (NPA) for all scheme members, calculating benefits on a career average revalued earnings (CARE) basis rather than through final salary, and the introduction of a cost control mechanism.

1.2. The 2013 Act required responsible authorities, including devolved governments, to make regulations establishing the reformed schemes. The CARE schemes in Scotland were all introduced with effect from 1 April 2015. The final salary pension schemes (referred to as “legacy schemes”) were closed on 31 March 2015 and scheme members could no longer accrue any pension.

1.3. Following reform, members of the judicial and firefighters’ pension schemes challenged the transitional protection element of the reforms. This case, known as McCloud/Sargeant, was decided in December 2018 when the [Court of Appeal found](#) that the transitional protections unlawfully discriminated against younger members, as transitional protection was only offered to older scheme members. The Courts required that this unlawful discrimination be remedied by the government. In a [written ministerial statement](#) the UK government accepted the ruling had implications for all public service schemes that contained similar transitional protection arrangements, including the National Health Scheme (Scotland), and have since [consulted extensively](#) on the mechanism for the remedy.

1.4. In the Local Government Pension Scheme in Scotland (LGPS), we are addressing the McCloud discrimination by extending ‘underpin’ protection to the younger members of the scheme whom the courts found had been treated unlawfully. In the LGPS, the underpin is the means through which transitional protection was provided to older members.

1.5. All LGPS members were moved to the reformed, career average scheme on 1 April 2015, but for protected members, the pension payable was ‘underpinned’ against what they would have built up in the legacy final salary scheme<sup>2</sup>. At a member’s final salary normal pension age (usually 65) or at their date of leaving, if earlier, their administrator would compare their career average pension against their final salary pension. If the final salary pension would have been higher, they would be awarded an additional amount.

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<sup>1</sup> This is also known as ‘The Hutton Report’.

<sup>2</sup> In the equivalent LGPS in England and Wales, members moved to the CARE scheme on 1 April 2014.

1.6. The extension of the underpin was our preferred option for addressing the difference in treatment in the LGPS when we consulted on this matter in 2020<sup>3</sup>. Most stakeholders also agreed with this approach.

1.7. In the following sections of this consultation, we seek views on specific issues regarding the remedy and welcome responses from across the LGPS community on these. Some points were covered in our 2020 consultation, but we want to obtain further views before making final decisions (for example, in respect of aggregation and flexible retirement). Others are issues for the LGPS that we have not previously consulted on (for example, compensation and interest). **We are very grateful to officials in the Department of Levelling-up, Housing and Communities, who took the lead on developing these proposals and regulations.**

1.8. The policy matters we are seeking general views on are as follows:

- Aggregation – determining the rules applicable to decide whether a member with multiple LGPS memberships has underpin protection in some or all of these.
- Club transfers – determining the rules applicable to decide whether a member with previous membership of another public service pension scheme has underpin protection in respect of their LGPS membership.
- Flexible retirement – how the underpin should work in respect of flexible retirement, particularly for cases of ‘partial’ flexible retirement, where a member does not take all their accrued career average benefits.
- Divorce – how the scheme’s divorce and underpin calculations interact.
- Injury allowances – how a retrospective increase to a member’s pension arising from the McCloud remedy may impact any injury allowances payable.

1.9. In a few other areas, the policy approach has been determined and we are seeking technical comments and comments on implementation:

- Excess teacher service –retrospective admission to the LGPS of certain teachers who have multiple employments.
- Compensation –circumstances where a member may be paid compensation where they have suffered a loss relating to the age discrimination found in the McCloud case or the McCloud remedy.
- Interest –interest terms that will apply where payments are made later than would have been the case, due to the McCloud discrimination

1.10. We also attach draft regulations (annex A) intended to implement the McCloud remedy in the LGPS for your consideration and feedback.

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<sup>3</sup> [Consultations | SPPA \(pensions.gov.scot\)](https://www.pensions.gov.scot/consultations)

1.11. Since the PSPJOA 2022 achieved Royal Assent, HM Treasury have published the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022<sup>4</sup>, referred to as the PSP Directions in this document. Part 4 of these Directions covers the LGPS and is issued under the powers in section 85 of the PSPJOA 2022. The Directions provide a framework within which some aspects of the LGPS remedy we discuss in this document must be followed and the proposals within this document should be read with that in mind.

1.12. The McCloud remedy is an important project for scheme members and other beneficiaries affected and whilst much work has already been undertaken on this project so far, we are mindful that a significant amount of work lies ahead for LGPS administrators, software suppliers and advisors.

## Next steps

1.13. Following consideration of the comments received on this consultation, we will take steps to finalise the draft regulations which we hope can be laid before the Scottish Parliament in September 2023. The regulations will come into force on 1 October 2023.

1.14. SPPA will work with the Scottish Local Government Pension Scheme Advisory Board (SAB) remedy may require central guidance from the Scottish Ministers or the SAB.

## 2. The Consultation And Who We Want To Hear From

2.1. The provisions of the LGPS are set out in Regulations<sup>5</sup>, which are a form of secondary legislation. Provisions can be amended or replaced by new Regulations drawn up in accordance with the powers under, and requirements of, the PSPJOA 2022, the 2013 Act and the Superannuation Act 1972.

2.2. This consultation focuses on the proposed second set of regulations known as “the retrospective regulations.” These regulations will enact the various complex elements of pension remedy that will address the retrospective elements of the 2015 remedy as set out in the PSPJOA 2022.

2.3. We welcome views from all interested parties on the draft regulations and policy intent contained in this document. We are particularly interested in feedback from members of the LGPS and their representative bodies, including associated trade unions, and employers, and others who have an interest in LGPS pensions and wider public service pensions.

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<sup>4</sup> <https://www.gov.uk/government/publications/public-service-pensions-and-judicial-offices-act-2022-treasury-directions>

<sup>5</sup> Principally the Local Government Pension Scheme (Scotland) Regulations 2018 (as amended), which sets out the 2015 scheme,



### 3. Proposals

3.1. The following sections discuss aspects of the McCloud remedy on which we are seeking views in this consultation.

### 4. Aggregation

4.1. The LGPS regulations provide for separate pension accounts to be joined up in certain circumstances, a process known as aggregation. As the LGPS is locally administered, aggregation is an important part of the scheme rules. Where a member re-joins the scheme and chooses not to aggregate previous service, that service is generally preserved and payable on the basis it was accrued (for example, using the final salary at the time the member left active service in that record). Where a member chooses to aggregate, their records are combined and payable as one. Aggregation therefore helps to ensure that the LGPS can operate efficiently as a locally managed scheme with a central set of rules.

4.2. However, under the current rules governing the underpin, a member qualifies for underpin protection as an individual. This means a member could have active service in one LGPS record on 31 March 2012 and be protected in another subsequent period of membership, even if those periods are not aggregated.

4.3. The 2020 consultation included proposals for an aggregation requirement to bring the underpin rules more in line with the usual policy. This would have meant that a member only had underpin protection if they met the agreed qualifying criteria in a single pension account. Members would have been required to aggregate previous LGPS membership to gain underpin protection in a pension account if:

- they did not meet the qualifying criteria in that pension account.
- they would meet the qualifying criteria if they aggregated another period of membership with that pension account.

4.4. To ensure this approach is applied fairly between different groups of members, we had proposed that the underpin requirement would be retrospective. Members with unaggregated benefits would have been offered a second opportunity to choose to aggregate if this policy had been adopted.

4.5. It is also possible that some members may have elected to keep separate benefits because they had moved to a lower paid job. Introducing an aggregation requirement would mean these members having to choose between:

- maintaining the value of their deferred benefits by keeping them separate and not having underpin protection on their new benefits, and
- reducing the value of their benefits by aggregating, but keeping underpin protection, the value of which may not be known for some years.

4.6. Other concerns were raised about offering members a second opportunity to aggregate outside of the usual 12-month time limit. Respondents highlighted the administrative burden that this exercise would represent on top of the additional work that implementing the McCloud remedy will involve. Accurately identifying all members in scope may not be possible. Re-opening the aggregation window would also present a communications challenge. Administering authorities would need to communicate very complex information to members (and potentially survivors) to allow them to make an informed decision.

4.7. We are also concerned about the potential for unintended differences in treatment. In the 2020 consultation, we had proposed that the aggregation requirement would not apply where a pension was already in payment, to avoid administrators potentially needing to unwind and reduce pensions in payment. However, this approach could benefit pensioners who are more likely to be older than their active and deferred colleagues.

4.8. As a result, and following detailed consideration of these issues, we are now proposing not to have an aggregation requirement for determining whether members qualify for underpin protection. There would therefore not be a need for a new, one-off aggregation window. This approach would aim to reduce the administrative and communication complexities and prevent potential legal complexities in trying to implement this approach retrospectively. We consider that not requiring aggregation to qualify for underpin protection would also be in line with the approach to protection being adopted by other public service pension schemes.

4.9. However, where a member who qualifies for underpin protection leaves and re-joins the LGPS or holds concurrent posts and LGPS membership ends in one post, we propose that we will require aggregation for their underpin figures to be re-calculated when they next have an underpin date under the scheme rules.

4.10. The basic rules on aggregation and underpin protection that we are proposing are set out below:

- Underpin period – For qualifying members, the period during which a member will build up underpin protection. It covers active membership in the period from 1 April 2015 to the earlier of 31 March 2022 or a member's final salary normal pension age (which is usually 65).

- Underpin date – The date on which a member’s pension benefits in the underpin period are compared, to give an initial assessment of whether the career average or final salary benefits are better. The underpin date is the earlier of the date a member leaves active membership of the LGPS, or the date of their final salary normal pension age (usually 65).
- Final underpin date – The date on which a final assessment of the underpin takes place, based on the calculations undertaken at a member’s most recent underpin date. The final calculations will vary depending on the way a member is taking their benefits from the scheme. The final underpin date is usually the date the pension is taken from the scheme (for example, by retiring on age grounds, ill-health grounds or by transferring it to another scheme).

4.11. Our proposed rules on aggregation for underpin protection are:

- a) Where a member was in active service in the LGPS on or before 31 March 2012, and they do not have a disqualifying gap<sup>6</sup>, they will have underpin protection on their LGPS service in the underpin period<sup>7</sup>. This will be the case even if the service in the underpin period is in a different LGPS membership, unaggregated from the membership they were in on or before 31 March 2012.
- b) Where a member who has built up underpin rights in a membership during the underpin period, leaves and re-joins or has an active concurrent membership, the following will apply:
  - i. If they keep separate benefits, the provisional figures calculated on the underpin date remain ‘attached’ to the old pension account. If the new pension account started before the end of their underpin period (the earlier of 31 March 2022 and their final salary normal pension age) and there has not been a disqualifying gap, the member will have a further underpin date for the service built up in that pension account.
  - ii. If they aggregate their benefits but have a disqualifying gap (for example, because they would prefer to have a single pension in payment, rather than two), they will lose underpin protection on the service accrued in the underpin period under their old pension account.
  - iii. If the new pension account started before the end of their underpin period (the earlier of 31 March 2022 and their final salary normal pension age), then no underpin protection will accrue in respect of the new

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<sup>6</sup>A continuous break in active membership of a public service pension scheme of more than five years

<sup>7</sup> Service between 1 April 2015 and 31 March 2022, or to the member’s final salary normal pension age (usually 65) if earlier

service (as there has been a disqualifying gap). The member will not have another underpin date in the future.

- iv. If they aggregate without a disqualifying gap then, generally, the provisional figures calculated on the underpin date are 'wiped out'. New provisional figures based on the combined membership will be calculated on the member's next underpin date<sup>8</sup>.

4.12. We intend that it will be possible under the regulations for a member to have multiple sets of provisional underpin figures attached to the same pension account. For example, there will be two sets of provisional underpin figures attached to a pension account if a protected member:

- has two separate sets of deferred benefits that include membership built up in the underpin period that are later aggregated with a new pension account that starts when the member is over their final salary normal pension age, or
- remained an active member after taking flexible retirement before the end of the remedy period.

4.13. Whichever approach is taken on aggregation will raise complex issues and will be challenging administratively. On balance, we consider the approach we outline here to be the best way forward overall, but we welcome comments from across the LGPS community on this matter and how central guidance could support local implementation.

**Question 1** – Do you agree with the proposed rules about aggregation and underpin protection?

## 5. Club Transfers Into The LGPS

5.1. The Public Sector Transfer Club allows individuals to transfer benefits from one public service pension scheme to another, whilst maintaining any final salary linkage or in-service revaluation, where applicable. Members of other public service pension schemes will have built up benefits protected by the remedy that they wish

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<sup>8</sup> The previous underpin figures will not be 'wiped out' and will remain applicable where either of the following applies:

- The member re-joins the LGPS after their final salary normal pension age (usually 65), or
- The member holds multiple active pension accounts concurrently and membership ends in one or more of them after their final salary normal pension age.

to transfer to the LGPS, just as LGPS members may wish to transfer their benefits to other parts of the public sector.

5.2. Some LGPS members who had previous public service pension scheme membership in the underpin period will have made their Club transfer decision before the McCloud case had reached its conclusion or before the Government had set out details of the proposed remedy. For those who were not originally old enough to have underpin protection, they would not have considered the underpin in making their transfer decision and may have made a different decision on the basis of the remedy we are now implementing. The current underpin regulations require that a member must have transferred previous public service pension scheme membership into the LGPS to qualify for underpin protection on service built up in the LGPS, if the previous membership included active service on 31 March 2012 but the LGPS service did not.

5.3. After consideration of this, we are now proposing that members will not need to have transferred their previous service in another public service pension scheme into the LGPS to qualify for underpin protection in the LGPS. Instead, if an LGPS member had membership of another public service pension scheme on or before 31 March 2012 and did not have a disqualifying gap, they would have underpin protection on their LGPS service in the underpin period (even if the previous service was not transferred to the LGPS). This would resolve the issue we describe above, and it also would align with the approach being adopted by other public service pension schemes, as well as with our new proposals on aggregation within the LGPS.

5.4. This approach would create additional administrative complexities, as it will require LGPS administrators to know if their members had membership of other public service pension schemes in the period on or before 31 March 2012. In some cases, it may be possible to find this out from the information provided when the member joined the LGPS, however this may not be the case for all members. We welcome comments from respondents on the administrative challenges of this change.

**Question 2** – Do you agree with our proposed approach regarding Club transfers?

## **6. Flexible Retirement**

6.1. From age 55, a member who reduces their working hours or moves to a lower graded post may take flexible retirement, if their employer agrees. Flexible

retirement allows the member to ease into retirement by taking some or all of the pension they have built up, while remaining in employment. The day before the reduced pay or hours post starts will be a protected member's underpin date, unless they are already over their final salary scheme normal pension age.

6.2. The 2020 consultation included a proposal for underpin protection to stop when a member took flexible retirement after 31 March 2015, even if this was before the end of the underpin period. Concerns were raised about this approach, in that it was possible that those who took flexible retirement would have less underpin protection than those who had not flexibly retired.

6.3. After consideration, we are proposing to ensure the remedy applies equally across all protected members. A protected member will have a second underpin date if they:

- took flexible retirement between 1 April 2015 and 31 March 2022, and
- continued to build up pension in the underpin period after their flexible retirement and before they reached their final salary normal pension age.

6.4. Generally, the member's second underpin date will be their last day of active membership, or the day before they reach their final salary normal pension age<sup>9</sup>. A second set of provisional figures will be calculated, based on membership between the first flexible retirement date and the second underpin date.

6.5. We also considered 'partial' flexible retirement in the 2020 consultation. A member may choose not to take all of their benefits built up after 31 March 2015 when they take flexible retirement. We proposed that a member would get a proportion of any increase to their benefits as a result of the underpin (a final guarantee amount). That proportion would match the proportion of the member's benefits built up after 31 March 2015 that they are taking. The remainder would be payable when the member takes the remainder of their benefits.

6.6. Some respondents thought there should be a final salary link following flexible retirement. For cases of partial flexible retirement, we are proposing not to introduce a final salary link for the purposes of the subsequent underpin calculations, in relation to service accrued before the flexible retirement. Introducing a final salary link would make it less likely for a member who has moved

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<sup>9</sup>There is no limit to the amount of times a member can flexibly retire, so it is possible they could flexibly retire again, which would also give rise to a second underpin date.

to a lower graded post to receive a final guarantee amount when they take the remainder of their benefits after flexible retirement. Where a member has further underpin service after their flexible retirement, there will be a final salary link on that further service.

6.7. The proposed approach for protected members who take partial flexible retirement will be:

- a) Provisional underpin amount and assumed benefits are worked out on the underpin date – this will be the day before the member reaches their final salary normal pension age or the day before the reduction in hours or grade.
- b) Final underpin amount and assumed benefits are calculated on the final underpin date – the day before the reduction in hours or grade. These are based on the provisional figures calculated under (a) adjusted for inflation and

any actuarial adjustment for early or late retirement. If the final underpin amount is higher, the difference is the final guarantee amount.

- c) A proportion of the final guarantee amount is added to the flexible retirement pension account. The proportion should equal the proportion of benefits built up after 31 March 2015 that the member chooses to take.
- d) The member will have another final underpin date when they take the remainder of their benefits (or take flexible retirement again). The provisional figures calculated under (a) are used to calculate a further final underpin amount and assumed benefits. If the final underpin amount is higher, the difference is the second final guarantee amount.
- e) A proportion of the second final guarantee amount is added to the retirement pension account (or flexible retirement pension account). The proportion should equal the proportion of benefits built up between 1 April 2015 and the original flexible retirement date that the member is taking.

6.8. We recognise that the approach to underpin protection for members who take flexible retirement is complex. Members may have both:

- multiple underpin dates for the same pension account if the first flexible retirement occurred before 1 April 2022, and

- multiple final underpin dates in respect of the same benefits if the member takes partial flexible retirement.

6.9. We consider that this approach will deliver consistent protection to members who take flexible retirement and those that do not.

6.10. Members who take flexible retirement from 1 April 2022 (or after their final salary normal pension age) will not have multiple underpin dates, because they will not build up any remediable service after their flexible retirement.

**Question 3** – Do you agree with our proposal to extend underpin protection to the period after flexible retirement, if it is in the underpin period?

**Question 4** – Do you agree with our proposal for multiple final underpin dates if a member takes ‘partial’ flexible retirement?

## 7. Divorce

7.1. The current regulations and the 2020 consultation did not fully address how underpin calculations and divorce (or dissolution of a civil partnership) calculations will interact.

7.2. There are potentially two stages in the process when a member gets divorced or their civil partnership is dissolved. At the first stage, the administering authority provides the current cash equivalent value (CEV) of the member’s LGPS benefits. The value of the LGPS benefits may be offset against other assets or the court could award the former spouse or civil partner a share of the member’s pension. This is usually achieved by issuing a pension sharing order – the second stage of the process.

7.3. A valuation of benefits in relation to divorce or dissolution proceedings or a pension sharing order will not constitute a member’s underpin date nor final underpin date. If the member has already had an underpin date or final underpin date, any calculations in connection with divorce or dissolution proceedings will not change those dates.

7.4. Actuarial guidance issued by the Scottish Ministers sets out how calculations related to divorces and dissolutions are performed in the LGPS. This includes guidance on:

- Pension sharing following divorce



- Pension debits and
- Pension credits.

7.5. This guidance will be updated to reflect the McCloud remedy in due course. We believe that most of the changes needed to ensure the underpin is correctly addressed in divorce calculations will be delivered by changing the actuarial guidance. We therefore do not propose to make significant changes to the LGPS regulations to set out how the underpin should be reflected in divorce calculations (see draft regulation 4P). Draft regulation 10 in Part 3 outlines how the retrospective effect of our remedy would impact past divorce calculations.

7.6. We propose that the guidance is updated to deliver the following results when a CEV is calculated for a member in scope of McCloud remedy in relation to divorce or dissolution proceedings:

- **Pensioner member** - The CEV of their LGPS rights would be based on their pension in payment. That pension will include any final guarantee amount that the member is receiving. If the court does issue a pension sharing order, the final guarantee amount could be shared (depending on what the order provides).
- **Deferred member or an active member who is over their final salary normal pension age** – These members will have already had an underpin date. The CEV will be worked out in the same way as a non-Club transfer value is calculated. The member’s underpin protection will therefore be reflected in the CEV. The member’s final underpin calculations will take place as usual when they have their final underpin date under the normal rules of the scheme.
- **Active member who is under their final salary normal pension age** – These members will not have had an underpin date. The CEV will be calculated as if the calculation date was the member’s last day of service. Provisional assumed benefits and underpin amount will be worked out solely for the purpose of calculating the CEV. The member’s underpin calculations will take place as usual when they have their underpin date and final underpin date under the normal rules of the scheme.

7.7. The current regulations provide for any pension debit to be removed from the pension figures when working out a member’s assumed benefits and underpin

amount. For some members, this may result in one or both of these figures being negative. This could happen if the member has benefits that are excluded from the calculation of the assumed benefits and underpin amount, but that have been shared as a result of a pension sharing order. Such benefits could include additional pension purchased or awarded or certain transfers into the 2015 Scheme.

7.8. We therefore propose to remove pension debits from the calculation of provisional assumed benefits and underpin amounts completely. We believe this will mean:

- no change in the level of any final guarantee amount because the pension debit is the same on both sides of the calculation, so a change will not affect the difference between the assumed benefits and the underpin amount
- no negative assumed benefits or underpin amount and the associated challenges of explaining them to scheme members.

**Question 5** – Do you agree with our proposed method for calculating a CEV for a member with underpin protection?

**Question 6** – Do you agree with our proposal to remove pension debits from the calculation of the provisional assumed benefits and underpin amount?

## **8. Excess Teacher Service**

8.1. During the course of deliberations on the McCloud remedy, we have, along with the relevant UK Departments, considered how the remedy should be applied for a subset of teachers who have ‘excess teacher service’ and who may have periods of membership in both the Scottish Teachers’ Pension Scheme (STPS)<sup>10</sup> and the LGPS.

8.2. This issue arises as, under the legacy (final salary) STPS, where a teacher had a full-time employment and a part-time employment, the part-time employment was not pensionable in the STPS. Where the teacher’s employer was an LGPS employer, the teacher would have been eligible to join the LGPS in respect of that part-time employment.

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<sup>10</sup> The same principle could apply in respect of membership of the Teachers’ Pension Scheme in England and Wales.

8.3. Different rules apply under the reformed (career average) STPS introduced on 1 April 2015. Where a teacher has a full-time employment and a part-time employment at the same time, they are both pensionable in the reformed TPS.

8.4. In the PSPJOA 2022, where a teacher has a full-time employment and a part-time employment at the same time, and the part-time employment is pensionable in the LGPS (or would have been, if the member was in the TPS legacy scheme), the part-time employment is referred to as 'excess teacher service'. From 1 April 2015 to 31 March 2022, there were three different groups of members with excess teacher service:

- **Protected members** – teachers who were transitionally protected and who remained in the legacy STPS for their full-time contract. Their excess teacher service would have been pensionable in the LGPS.
- **Unprotected members** – teachers who were not transitionally protected and who moved to the reformed STPS for their full-time contract. Their excess teacher service would have been pensionable in the reformed STPS.
- **Taper protected members<sup>11</sup>** – teachers who moved to the reformed STPS at a date between 1 April 2015 and 31 March 2022. Their excess teacher service would have been pensionable in the LGPS up to their taper date. Their excess teacher service would have been pensionable in the reformed TPS after their taper date.

8.5. Under the STPS remedy to the McCloud discrimination, all members in scope of the remedy and who are in the STPS reformed scheme will have their reformed scheme service rolled back into the STPS legacy scheme for the remedy period on 1 October 2023. When a member retires, they will decide if they want to take the benefits built up in the remedy period as either legacy or reformed benefits. This is called a member's deferred choice. If a member has already taken payment of their

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<sup>11</sup> When designing transitional protection, some other public service pension schemes provided 'tapered protection'. Tapered protection applied where a member was nearing retirement, but was not old enough to qualify for full transitional protection. Tapered protection meant that a member remained in their legacy scheme for a period, but transitioned to the reformed scheme on their taper date. The LGPS did not provide tapered protection to any of its members. For more information on tapered protection and the policy approach the Government is taking on these members, see paragraphs 2.25 to 2.41 of HM Treasury's February 2021 response to their consultation on McCloud remedy for the wider public sector - <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>.

pension, they will have an immediate choice as soon as possible after 1 October 2023<sup>12</sup>.

8.6. When members with excess teacher service have their reformed scheme service rolled back to the legacy STPS for their full-time contract on 1 October 2023, their excess teacher service will not be pensionable in the TPS legacy scheme. The PSPJOA 2022 therefore provides<sup>13</sup> that their excess teacher service is pensionable in the LGPS, and members will be retrospectively admitted to the LGPS for the period they were in the TPS reformed scheme during the remedy period.

8.7. The UK Government took this decision following detailed discussions between the Department, the Department for Education and HM Treasury in developing the PSPJOA 2022. The remedy provided for under the PSPJOA 2022s ensures that there is a standard approach which treats members with excess teacher service consistently, whether they were originally transitionally protected or unprotected. It provides that, overall, the following will apply for members with excess teacher service:

- **Full-time contract** – Pensionable in the STPS for service from 1 April 2015 to 31 March 2022. If members are not already in the STPS legacy scheme, they will be rolled back to this scheme on 1 October 2023. Members will have a deferred or immediate choice (as appropriate) allowing them to choose between the reformed and legacy scheme for this contract.
- **Part-time contract(s)** – Pensionable in the LGPS for service from 1 April 2015 to 31 March 2022. If members are not already in the LGPS, they will be put into the LGPS on 1 October 2023. Members will be eligible for underpin protection in the LGPS if they meet the LGPS qualifying criteria<sup>14</sup>.

8.8. From 1 April 2022, all pension accrual in the STPS has been in the reformed scheme and all excess teacher service has ceased to accrue in the LGPS. Active members will have a standard right to a Club transfer from the LGPS to the STPS, if

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<sup>12</sup>For more information on how McCloud remedy is proposed to work in the TPS, further details are contained in their March 2023 consultation - <https://pensions.gov.scot/teachers/scheme-governance-and-legislation/consultations>

<sup>13</sup> S. 4(4) and 110(2) of the PSPJOA 2022

<sup>14</sup> If we implement the approach described in paragraphs 31 and 32, we expect all excess teacher service in the LGPS will qualify for underpin protection.

they wish. This option will be available to them for 12 months after the date they receive their remediable service statement<sup>15</sup> for their full-time STPS contract.

8.9. This is a unique and complex part of the McCloud project, and the administration of the remedy for this group is likely to be exceptionally challenging. The SPPA is working with DLUHC, the Department for Education, Teachers' Pensions, the Local Government Association (LGA) and with a group of LGPS administrators to consider this issue and the delivery of the remedy for this group in the coming years. These discussions will include the following topics, and any other relevant matters:

- how to identify affected members
- adjusting employee and employer contributions
- obtaining data to create LGPS member records
- adjustments where benefits are already in payment
- transfers back to the STPS after the remedy period.

8.10. Where relevant, communications regarding the process that will apply for this group will be shared with LGPS administrators via the LGA. We also intend to consider with the guidance working group whether statutory or SAB guidance would be helpful to support administrators in delivering the requirements of the PSPJOA 2022 for this group.

8.11. Our draft regulations do not include specific provisions relating to excess teacher service, on the basis that, when members are rolled back into the LGPS, the normal scheme provisions will apply to them in the usual way. However, we welcome comments from stakeholders on matters where specific regulations to deal with excess teacher service in the LGPS may be necessary.

**Question 7** – Do you have any comments on the approach being adopted for these members?

**Question 8** – Are there any areas where specific scheme regulations regarding excess teacher service would be necessary or beneficial?

## 9. Compensation

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<sup>15</sup> See paragraphs 8.1 and 8.2 of the TPS consultation document - <https://pensions.gov.scot/teachers/scheme-governance-and-legislation/consultations>

9.1. Under the PSPJOA 2022, LGPS administering authorities may pay compensation to or in respect of an LGPS member in certain circumstances. Compensation may take one of two forms:

- direct – where the compensation is a cash payment, and
- indirect – where the compensation is an additional benefit under the scheme.

9.2. The PSP Directions mentioned in paragraph 10 build on the Act, specifying the circumstances in which either type of compensation can be paid. Directions 33 to 34 cover direct compensation, whilst directions 35 and 36 cover indirect compensation. Broadly, compensation may be paid directly, or indirectly as additional benefits through the Scheme, where members have suffered:

- direct financial loss as a result of the identified discrimination<sup>16</sup>, or
- a ‘specified Part 4 tax loss’, covering circumstances where a member may have overpaid annual allowance or lifetime allowance charges as a result of the identified discrimination or the application of the remedy.

9.3. Our draft regulations include the following provisions regarding compensation:

- Draft regulation 4Q (Payment of indirect compensation) – Gives administering authorities a power to award members additional benefits where the qualifying criteria for indirect compensation are met. Under this, an administering authority would have to obtain advice from an actuary before determining what additional benefits to pay.
- Draft regulation 4R (Applications for compensation) – Provides that direct or indirect compensation may only be payable in respect of a member where an application has been made to the administering authority. Also details what must be included in such an application.

9.4. As s. 82 of the PSPJOA 2022 already gives administering authorities (referred to as ‘scheme managers’ in the Act) powers to pay direct compensation, the draft regulations do not restate the powers applicable for this type of compensation.

9.5. The draft regulations also provide that where direct or indirect compensation has been paid from the fund, they would be liabilities for the purposes of funding

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<sup>16</sup> Indirect compensation (additional scheme benefits) may not be awarded for this type of loss.

valuations (regulation 60 of the 2018 Regulations) and exit valuations (regulation 61B of the 2018 Regulations).

9.6. The SPPA recognises that as the decision-making power in respect of the award compensation is at the local level, there may be a need for central support for local administrators in determining how to approach this part of the remedy. There is also the potential for inconsistency in how this matter is approached between different administering authorities. Whilst there is a detailed legislative framework within which compensation applications must be approached, we will be considering the issue of compensation in the guidance working group (see paragraph 13) and whether it would be helpful for statutory or SAB guidance to build on the legislative requirements to provide more detail on the circumstances each may be applicable.

**Question 9** – Do you have any comments on the s approach to compensation?

## 10. Interest

10.1 The retrospective nature of our remedy to the McCloud discrimination will mean payments will be made by administering authorities to or in respect of some LGPS members later than would have been the case if the discrimination had not occurred. Applying appropriate interest on such payments is therefore important to ensure that members receive benefits of an equivalent value to those they would have originally received.

10.2. A standard approach will apply across the public sector in relation to interest for McCloud remedy payments. The PSP directions issued by HM Treasury set out a framework which local government scheme regulations must implement. An exchange of letters between HM Treasury and the Government Actuary's Department has been published outlining the basis of the Government's decisions on interest<sup>17</sup>. Draft regulation 4T and regulation 11 of Part 3 contain details of the interest terms that will apply where additional payments are due in respect of members as a result of the LGPS McCloud remedy, building on directions 37 to 40 of the PSP Directions. Where interest is payable under these provisions, the below table describes what interest rates should apply and for what period.

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<sup>17</sup> <https://www.gov.uk/government/publications/public-service-pensions-and-judicial-offices-act-2022-treasury-directions>

Type of payment	Interest applicable	Period applicable for
Retrospective addition to a member or survivor's pension in payment	Calculated as simple interest accruing on a day for day basis at the rate fixed, for the time being, by section 17(1) of the Judgments Act 1838 (see direction 38(4))	From the mid-point date to the date of payment of the addition (where the mid-point date is the day which falls half-way through the period beginning on the date when pension benefits were first underpaid and ending on the date of payment)
Retrospective addition to a lump sum (including pension commencement lump sum, death grant and trivial commutation payment)  Retrospective addition to a transfer out of the scheme	Calculated as simple interest accruing on a day for day basis at the rate fixed, for the time being, by section 17(1) of the Judgments Act 1838 (see direction 38(4))	From the date the original payment was made to the date of payment of the addition
Direct compensation for direct financial loss	Calculated as simple interest accruing on a day for day basis at the rate fixed, for the time being, by section 17(1) of the Judgments Act 1838 (see direction 38(4))	From the date the direct financial loss arose to the date of payment



Type of payment	Interest applicable	Period applicable for
Direct compensation for a Part 4 tax loss	Calculated in accordance with the provisions of the Taxes (Interest Rate) Regulations 1989 as if that amount were overpaid tax	From the date the loss arose to the date of payment
Indirect compensation	Rate applicable determined by reference to the additional benefit awarded – for example, if additional pension is awarded, the rate of interest for pensions would apply	Period applicable determined by reference to the type of additional benefit awarded – for example, if additional pension is awarded, the period applicable for pensions would apply

**Question 10** – Do you have any comments on the approach to interest?

## 11. Injury Allowances

11.1 We have considered the implications of underpin protection on members who qualified for an allowance under The Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 1998<sup>18</sup> (the 1998 Regulations). Our initial view is that no change to the LGPS regulations is required in relation to this group.

11.2 The 1998 Regulations contain provisions allowing for employees in local government to be awarded allowances where they have sustained an injury or contracted a disease in the course of carrying out their work. Under regulation 41 of the 1998 Regulations, where a member was receiving an allowance whilst remaining in work and has since begun to receive an LGPS pension, their employer may choose to pay them a further allowance, if the pension falls short of what they were receiving under regulation 40. The allowance can only be paid at a rate sufficient to cover the shortfall.

<sup>18</sup> SI 1998/192

11.3. Any backdated increase to the LGPS pension as a result of underpin protection could therefore mean the member has been overpaid their allowance under regulation 41. However, the total paid to the individual (pension plus injury award) since the date the pension started to date would not change. We therefore do not believe that any special provisions are required in relation to this group, and we have not proposed specific regulation changes to deal with this issue.

11.4. Funding for an injury pension will originate from an individual's employer, rather than the pension fund. It is therefore possible that, whilst the total amount payable to a member is accurate, the source of the payment would have been different. We propose that, where this occurs, an administering authority may wish to consider whether to re-visit funding for past payments if a member with a benefit payable under the 1998 Regulations benefits from a new or increased guarantee amount.

**Question 11** – Do you agree with the approach we have proposed for injury allowance payments?

## 12. Equalities

12.1. The Public Sector Equality Duty (PSED) requirements are set out in section 149 of the Equality Act 2010. The PSED requires a public authority to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

12.2. The equality duty covers nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (ethnicity), religion or belief, sex, and sexual orientation. The equality impact assessment in respect of the steps we are taking to address the McCloud discrimination is included with this consultation.

12.3. For the age and sex protected characteristics, our equalities analysis has been based on data provided by LGPS funds to the Government Actuary's Department as

at 31 March 2017. For the protected characteristics of race, disability, religion and marriage and civil partnerships, the SPPA has considered data from the Annual Population Survey in analysing. No quantitative analysis has been possible for the protected characteristics of sexual orientation, gender reassignment, pregnancy and maternity as we have not been able to identify suitable data. When the Government consulted on McCloud remedy in the LGPS in 2020, we sought views from stakeholders on whether other data sets were available to help us assess the impacts of our proposals on the scheme's membership. At the time, no suggestions were put forward but, reflecting the time that has since passed, question 13 below seeks further suggestions.

**Question 12** - Do you have any comments on our equality impact assessment?

**Question 13** – Are you aware of additional data sets that would help us assess the impacts of the LGPS 2015 remedy on the LGPS membership?

### 13. Draft Regulations

13.1. Draft regulations to implement the LGPS 2015 remedy are attached to this document (annex A).

13.2. The draft regulations include, at Part 3, a section describing how the remedy will have effect retrospectively in respect of those situations where members have already taken their benefits from the scheme (through a pension or in another way). Whilst we have made retrospective provision on other matters in the past without a similar section, Part 3 has been included for these regulations to provide additional clarity given that retrospection is such a major feature of the changes we are making.

13.3. The regulations are provided as an indicative draft only, and may be subject to further changes as a result of internal review. However, we welcome general comments on how effectively the regulations would implement the extension of the underpin, as well as specific suggestions for changes that would be beneficial.

**Question 14** – Do you have any comments on the draft regulations?

**Question 15** – Do you have any other comments you would like to make on 2015 remedy in the LGPS?

### 14. About This Consultation

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation may be published or disclosed in accordance with the access to information regimes. In certain circumstances this may therefore include personal data when required by law.

If you want the information that you provide to be treated as confidential, please be aware that, as an agency of the Scottish Government, the SPPA is bound by the information access regimes and may therefore be obliged to disclose all or some of the information you provide. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the SPPA.

The SPPA will at all times process your personal data in accordance with UK data protection legislation and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. A full privacy notice is included below.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.