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21 July 2023

Consultation: ‘McCloud’ remedy in the LGPS – supplementary issues and scheme regulations

Thank you for the consultation seeking views on supplementary ‘McCloud’ issues and the updated draft LGPS (Scotland) (Transitional Protection Remedy) Regulations 2023.

I respond on behalf of the Local Government Pensions Committee (LGPC).

The LGA is a politically led, cross-party membership organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. 331 councils in England including district, county, metropolitan, unitary, London boroughs and the City of London are members of the LGA. There are 22 Welsh unitary authorities in membership via the Welsh Local Government Association (WLGA). The LGPC is a committee of councillors constituted by the LGA, the WLGA and the Convention of Scottish Local Authorities (COSLA). The LGPC considers policy and technical matters affecting the Local Government Pension Scheme (LGPS) in Scotland, Wales and England.

I hope the content is helpful. Please do not hesitate to contact me if you have any questions about this response.

Yours faithfully



Joanne Donnelly
Head of Pensions

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

On balance, yes. Whilst the proposed approach will be administratively complex, the aggregation requirement approach consulted on in 2020 was also complex and contained differences in treatment for certain groups who are not able to aggregate previous benefits. Treating these groups differently could potentially have led to a further legal challenge.

The new approach means that the underpin protection will be applied consistently across protected members. There will be no need for a one-off aggregation window, which would have been a further administrative burden in addition to the work of implementing the McCloud remedy. Also, asking members to decide whether to aggregate benefits in light of the McCloud remedy would have been difficult to communicate and is inconsistent with how remedy is being implemented in the other public service pension schemes.

The new approach will require administering authorities to take account of membership held with other LGPS administering authorities when assessing if a member qualifies for underpin protection. As this information may not be currently available on the software systems this will be a significant and ongoing piece of work for administering authorities.

The consultation acknowledges the aggregation policy will raise complex issues and be challenging administratively. In our view, statutory guidance is needed for the policy to be implemented correctly and consistently. The guidance should set out examples and provide clarity on how multiple underpin dates attached to the same pension account will work.

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

We acknowledge that requiring a member to transfer previous public service pension scheme membership into the LGPS to qualify for underpin protection on service built up in the LGPS would have been out of sync with:

- the approach taken by other public service schemes, and
- the proposed policy on aggregation, which we support.

However, the other public service pension schemes adopted this approach in 2015, so will be in a much better place to extend the policy to younger members, whereas this will be a significant change for LGPS administering authorities. It will create additional administrative complexities as administering authorities will need to establish if their

members have membership in other public service pension schemes on or before 31 March 2012. It is very unlikely that this information will be recorded on pension software systems as the member elected not to transfer the membership to the LGPS on joining, or the benefits were not available to transfer. Administering authorities will need to:

- manually interrogate records
- write to members to ask them about earlier membership of other public service pension schemes
- confirm information with the administrators of other public service pension schemes, and
- perform a final check before paying any benefits to make sure that all eligible members are protected.

This is a significant undertaking and will add to the administrative burden; however, on balance we agree with the policy on the basis that it ensures the McCloud remedy is applied consistently across the public sector.

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?

Yes, on the basis that it ensures remedy is applied equally across all protected members.

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

Yes, although due to the complexity there will need to be comprehensive statutory guidance to ensure the policy is implemented correctly and consistently.

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

Yes. We agree that provisional and final underpin amounts, as appropriate, should be included when calculating CEVs for divorce purposes. As the CEV provides the current cash value of a member’s benefits at a particular date it is only right that these amounts should be included in the calculation.

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

Yes, we suggested this in our response to the 2020 consultation.

Question 7 – Do you have any comments on the approach being adopted for these members [excess teacher service]?

The consultation acknowledges that this is a unique and complex part of the Government's McCloud project and, in our view, this should have been reflected in the approach adopted. The approach is too complex, and a more workable solution should have been adopted for this relatively small group of members. The alternative solutions of providing an actuarially equivalent benefit or allowing more than full time membership in the legacy TPS scheme were discounted by Government which we think was misguided. Our concerns include:

- the data needed to calculate benefits in the LGPS is very different to the data that TPS holds. This means another retrospective data collection exercise will need to take place and inevitably not all the data will be available
- progress on agreeing the data collection process and the policy in general has been slow and will mean processing these cases will be delayed. This should be communicated to affected members by the TPS
- communicating the policy approach to members is going to be very challenging. Explaining that as part of McCloud remedy they will have some membership transferred to another pension scheme, but if they are still active, they can transfer it straight back will inevitably lead to confusion
- there are many differences in the two schemes that will make retrospectively adjusting benefits very challenging. These include different:
 - criteria for ill health and redundancy retirements
 - contribution rates
 - additional contribution rules
 - treatment of absences eg how child related leave and sickness count for pension build up.
- HMRC has not yet been able to consider the tax implications for this group of members because the legislation/guidance on the detail of the policy is not available
- undertaking this work will detract from implementing the McCloud remedy for LGPS members.

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

Due to the complexity, we think the legislation should be mostly high level. However, in our view the legislation should ensure:

- these members are not allowed to retrospectively transfer in other pension rights, as this would have been available to them in the TPS
- ensure these members cannot retrospectively opt out or join the 50/50 section in the LGPS
- ensure that they are not able to retrospectively buy additional pension.

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

We think the LGPS should have the power to provide indirect compensation other than in circumstances that relate to a Part 4 tax loss. See our comment on Amendment regulation 2(4), which inserts regulation 4Q into the 2014 Transitional Regulations. There will need to be statutory guidance on how to operate the compensation provisions.

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

We are not sure why such antiquated legislation has been used to determine the interest rate. It would have been helpful if the consultation document had set out the actual rates rather than solely referring to the legislation. We understand interest is only payable on arrears of pension from the mid-point to prevent administrators having to do complex monthly interest calculations – we support this approach.

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

Yes. We understand injury allowances are very rarely used so we expect there to be very few, if any, of these cases.

The consultation document, however, makes no mention of compensatory added years (CAYs). It would be helpful if you would confirm if the policy for CAYs is the same as for injury allowances ie – you will not make special provision in respect of revisiting CAYs due to McCloud recalculations.

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

No comment.

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?

No.

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

See our comments on technical matters related to the draft regulations at Annex A.

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

Transfers in

We are concerned about the proposed approach for protected / tapered protected members who transferred final salary benefits built up in the remedy period from another public service pension scheme to the LGPS.

We understand the transferred remediable service will change from final salary benefits to career average benefits with underpin protection. If the member also built up LGPS benefits in the underpin period, the pension they are entitled to may reduce. This is because the underpin compares the total CARE benefits with the notional final salary benefits, it does not look at the transfer credit in isolation.

We are concerned about changing the basis of the transfer credit retrospectively. Members will have made an election to transfer these rights into the LGPS on the basis that the transfer buys final salary benefits. They will now be told that the service credit will change to a CARE pension and their pension could potentially reduce.

We suggest that an alternative approach of providing a reverse underpin be considered for these members. We think it would be more equitable if the transferred remediable service remains as final salary benefits with a CARE underpin.

We are also concerned that this policy hasn't been explicitly mentioned in the consultation document, meaning that respondents may not be aware of it.

If the policy of converting transferred remediable service from final salary to career average benefits remains, we think it would be appropriate to permit indirect compensation for cases where a pension in payment reduces.

Applying the regulations to a period between 1 April 2015 and 31 May 2018

The Amendment Regulations cross reference the Local Government Pension Scheme (Scotland) Regulations 2018. The 2018 Regulations took effect, in the main, from 1 June 2018.

Between 1 April 2015 and 31 May 2018, the 2015 Scheme was set out in the Local Government Pension Scheme (Scotland) Regulations 2014. However, the Amendment Regulations do not mention the 2014 Regulations.

We understand that the intention is that references to the 2018 Regulations are to be read as the corresponding provision in the 2014 Regulations for events that took place between 1 April 2015 and 31 May 2018. We assume you are relying on regulation 102(2) of the 2018 Regulations to achieve this:

“Anything done under or by virtue of any regulation revoked by these Regulations if it could have been done under or for the purpose of these Regulations, is deemed to have been done under or by virtue of the corresponding provision of these Regulations...”

For example, when applying the Amendment Regulations, everything done under the 2014 Regulations is deemed to have been done under the corresponding provision of the 2018 Regulations.

Timing

We are also concerned that the regulations will be laid so close to the effective date of 1 October 2023. In our last response we suggested a lead in time of 12 months would be needed to implement remedy, but we will instead have a period of weeks. This means pension software will not be updated in time for 1 October 2023 and there will be very little time to get to grips with the detail. Administering authorities may need to manually calculate pension benefits for leavers from 1 October 2023 to avoid knowingly paying incorrect benefits.

It is imperative that the statutory guidance needed to implement the remedy is provided as near to 1 October 2023 as possible.

Annex A

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

Amendment regulation 2(2)(a), which amends regulation 1(4) of the 2014 Transitional Regulations

1. The amendment adds two definitions immediately after the last definition in regulation 1(4) (“public service pension scheme”). As a result, the amendment regulations also need to substitute the “.” at the end of the public service pension scheme definition with a “;”.

Amendment regulation 2(4), which inserts regulation 4A into the 2014 Transitional Regulations

2. Paragraph (2) says “remediable service (a)”. We believe the reference to “(a)” should instead be a reference to a footnote (footnote (e)) which signposts the reader to section 77 of the PSPJOA 2022.
3. Section 78(1) of the Public Service Pensions and Judicial Offices Act 2022 allows scheme regulations to “make provision under which the benefits payable under the scheme, so far as they are determined by reference to a member’s remediable service...are final salary benefits.” Paragraph (2) says that the underpin provisions apply to a person “who has remediable service in relation to the 2015 Scheme.” The LGPS regulations appear to allow the underpin provisions to apply to service that itself is not remediable service providing the member has remediable service elsewhere in the LGPS, contrary to section 78(1). For example, service built up after a disqualifying gap but within the underpin period could be protected by the underpin based on the current wording of 4A(2).

Amendment regulation 2(4), which inserts regulation 4B into the 2014 Transitional Regulations

4. The 2018 Regulations will shortly be amended to change the date on which revaluation applies to an active pension account. There is a risk that revaluation will not apply to any final guarantee amount where the member’s final underpin date is 31 March and their underpin date is in the same Scheme year. This is because paragraph (3) applies the final guarantee amount the day after the final underpin date, but the revaluation will apply only to the balance in the pension account on 31 March. The same issue applies to regulation 4C(3).

Amendment regulation 2(4), which inserts regulation 4C into the 2014 Transitional Regulations

5. Paragraphs (2) and (3) say that “the pension account is to be increased”. However, it is unclear what pension account is meant. Presumably, the intention is to increase the ‘flexible retirement pension account’, rather than the continuing ‘active member’s pension account’ or, if the member opts out on flexible retirement, the ‘deferred member’s pension account’?
6. The wording of paragraph (5) currently only applies to a member whose second final underpin date is when they take flexible retirement for the second time. However, the wording means that the incorrect proportion of any final guarantee amount may be paid. Changes are needed to ensure that:
 - this paragraph covers members whose second final underpin date occurs when they take flexible retirement, full retirement or a trivial commutation lump sum
 - the proportion of any final guarantee amount paid following the second final underpin date should match the proportion of benefits built up before the original flexible retirement that are taken.

Amendment regulation 2(4), which inserts regulation 4G into the 2014 Transitional Regulations

7. The underpin date is the member’s 2009 Scheme normal retirement age (or age 65) if they remain active beyond that date. Provisions may be required to ensure that the underpin date calculations are re-visited if a member completes a pension transfer of remediable service from another public service pension scheme or aggregates previous LGPS benefits after that date.
8. Sub-paragraph (c) sets out that an underpin date occurs immediately before a member takes flexible retirement. It is unclear whether an underpin date occurs where a member takes flexible retirement and elects to receive none of their CARE benefits. It appears that ‘retirement pension’ in sub-paragraph (c) (and in 4H(1)(b)) is meant to be interpreted as the member’s entire LGPS pension – which may include benefits built up before 1 April 2015. ‘Retirement pension’ in 4C(2) seems to mean the pension built up after 31 March 2015 only.

Amendment regulation 2(4), which inserts regulation 4H into the 2014 Transitional Regulations

9. Paragraph (2) applies when a member takes flexible retirement. It should not apply on the first occurrence of flexible retirement. It should instead apply after a flexible retirement date (where that date occurs after 31 March 2015).

Amendment regulation 2(4), which inserts regulation 4I into the 2014 Transitional Regulations

10. Paragraph (1) says that the provisional assumed benefits are calculated by assessing the “benefits the eligible member would have been entitled to under the 2015 Scheme”. We understand that the underpin provisions are to apply where a member leaves with no entitlement to benefits. The wording therefore needs to accommodate deferred refund cases.
11. Paragraph (1)(a)(i)(bb) sets out that ill health adjustments in respect of the underpin period are included. However, it is unclear what is included where the member previously received tier two benefits or the adjustment is calculated under the 1998 Scheme.
12. Paragraph (1)(a)(i)(dd) covers cases where “the eligible member or their Scheme employer elected to cover” a period of leave. The reference to cases where the employer makes the election is incorrect.
13. Paragraph (1)(d) provides that transfers of remediable service from another local government scheme, a chapter 1 scheme or judicial scheme are included. The regulations also amend regulation 9 of the 2014 Transitional Regulations. These amendments set out that the transfer is only included in underpin calculations where there has been no disqualifying break. However, paragraph (1)(d) makes no mention of this disqualifying break condition.
14. Paragraph (2) provides for APC contracts for lost pension to be included. The regulations suggest that, for members in the 50/50 section, the lost pension is not converted into the amount it would have been had the member been in the main section. Is this the intention?
15. For paragraph (2), we believe that the wording needs to make it clear that only lost pension for an absence during the underpin period is included. For example, if the absence overlapped the end of the underpin period, only the lost pension for the part before the end of the underpin period is included.

16. Where the member elects to use a certificate of protection, we understand administering authorities currently apply the protection to the CARE part of the underpin. We assume you intend for this to continue with the new regulations. Although new regulation 4I does not explicitly cover certificates of protection, our interpretation of regulation 4I is that, where the member is eligible and elects to use their certificate of protection, the protection also applies to the provisional assumed benefits calculation. For example, where the certificate was issued in relation to a reduction, the relevant multiplier is also applied to the pay used to calculate the provisional assumed benefits from the date of the reduction. Where the certificate was issued in relation to a pay restriction, the administering authority uses the relevant notional pay (ie pay assuming no restriction) when calculating the provisional assumed benefits.
17. It is also our interpretation that, for members who remain active beyond their 2009 Scheme normal retirement age, certificates of protections are not included when calculating the provisional assumed benefits as the protection at that point is notional. For example, it is unclear whether the member would elect to use the certificate and it is also unclear whether the member will leave by the 10-year deadline. Is our understanding correct? Is this the policy intent?

Amendment regulation 2(4), which inserts regulation 4J into the 2014 Transitional Regulations

18. Paragraph (1)(b)(ii) covers leave periods which were “covered by additional pension contributions under regulation 16.” This wording differs from the corresponding wording in Regulation 4I. Regulation 4I covers cases where the member “elects to cover” the leave. It is unclear why there is such a difference. For example, where the member elects to cover the leave but does not then pay the full amount, the member is captured under regulation 4I but would not be under this paragraph.
19. Paragraph (1)(b)(iii) provides for ill health adjustments under the 2009 Scheme to be included. There are slight differences between the ill health conditions in the 2009 and 2015 schemes. It would be helpful if the regulations could make it clear that where a member qualifies for tier one benefits in the 2015 scheme, they are treated for this purpose as qualifying for tier one benefits under the 2009 scheme. Similar amendments would also be needed for members who qualify for tier two.
20. Paragraph (2) includes an unpaid period ‘equal to the period of absence for which the additional contributions have been paid’ in the calculation of the provisional

underpin amount. A member pays contributions to buy additional pension, not to cover a period. We believe that a wording change is needed to refer to the proportion of the additional contributions that have been paid, and to apply that same proportion to the absence period. Further guidance may also be needed to set out the position for any cases where additional contributions have not been paid in full and the unpaid absence starts in the underpin period but ends after it.

21. Where the member elects to use a certificate of protection, we understand administering authorities also apply the protection to the final salary part of the current underpin. We assume you intend for this to continue with the new regulations. However, as regulation 4J only references calculating the final pay in accordance with regulations 9 to 11 of the Benefit Regulations, do you think the regulations need to be amended to specify this? Or can you rely on the wording in regulation 26(1) of the 2014 Transitional Regulations?
22. It is also our interpretation that, for members who remain active beyond their 2009 Scheme normal retirement age, certificates of protections are not included when calculating the provisional underpin amounts as the protection at that point is notional. For example, it is unclear whether the member would elect to use the certificate and it is also unclear whether the member will leave by the 10-year deadline. Is our understanding correct? Is this the policy intent?

Amendment regulation 2(4), which inserts regulation 4K into the 2014 Transitional Regulations

23. Paragraph (6) says that the reduction must be “in accordance with regulation 29(7)(a) of the 2018 Regulations.” The cross-reference should, however, be to regulation 29(8)(a) of the 2018 Regulations.

Amendment regulation 2(4), which inserts regulation 4L into the 2014 Transitional Regulations

24. Paragraph (2)(a) says “the eligible member’s final pay or, as the case may be, career average pay the Benefits Regulations ends”. The word ‘under’ needs to be added immediately after “career average pay”.
25. Paragraph (3) provides for an enhancement to be included where regulation 29(5) of the 2018 Regulations applies. Regulation 29(5) applies where the member draws their CARE benefits after their State Pension age (or after 65 if later). We believe that regulation 3(5) of the 2014 Transitional Regulations should be referenced here. That would mean that any enhancement that applies when a

member takes their benefits between age 65 and their State Pension age are included.

26. Paragraph (4) requires an “equivalent reduction” to the reduction applying under regulations 29(6) and (7) of the 2018 Regulations. The reductions applying to the CARE benefits are calculated by reference to, as the case may be, normal pension age under the 2015 Scheme and critical retirement age. However, when calculating the reductions to the final underpin amount, we understood that this is instead calculated by reference to, as the case may be, the normal pension age under the 2009 scheme and critical retirement age.

Amendment regulation 2(4), which inserts regulation 4M into the 2014 Transitional Regulations

27. Paragraph (2) requires a “proportion of a survivor’s guarantee amount is to be added to a survivor’s member’s pension account”. Where a member took partial flexible retirement, it is unclear whether the guarantee amount in respect of the relevant provisional benefits should be added to the survivor member’s account linked to the flexible retirement pension account or the survivor member’s account linked to the continuing active member’s pension account.
28. Paragraph (4)(a) requires that an enhancement is included for death in service cases. The enhancement is calculated by reference to the notional tier one ill health equivalent amount. This means that the enhancement may need to be modified where the member previously received tier one or two enhancements or where the ill health enhancement would have been calculated under the 1998 Scheme. This approach differs from that provided under regulations 39 and 40 of the 2018 Regulations, where no such modifications are considered when calculating death in service enhancements.
29. Paragraph (5)(b)(ii) says “the day before the date on which the member” attains normal pension age under the 2009 Scheme. This means that the date on which the member attains normal pension age is not included. The wording appears to try to align with the ‘underpin period’ definition set out in regulation 4A(3). However, in that regulation, the date the member attains normal pension age is included in the underpin period.
30. Paragraph (7) provides a formula to pro-rate the relevant survivor guarantee amount where there is more than one eligible child. This assumes that a separate account is set up for each child. However, we believe that this is incorrect. Our

understanding of regulations 40, 43 and 46 of the 2018 Regulations is that, in such cases, one survivor member's pension account is set up from which the pension is equally shared. Therefore, there is no need for the formula in paragraph (7) or the definition of "E" in paragraph (8).

Amendment regulation 2(4), which inserts regulation 4N into the 2014 Transitional Regulations

31. Regulation 4N provides for a deferred guarantee amount to be included in death grant calculations in respect of members who died in deferment. When calculating the deferred guarantee amount, the comparison is performed at the date of death, including revaluation between leaving and death. Normally, the basic total CARE death grant is revalued in line with pensions increase from the day after the member left the LGPS. As such increase was included when calculating the deferred guarantee amount, it is unclear whether that part of the death grant should be excluded when applying revaluation to the total CARE death grant.
32. Paragraph (2) requires a "deferred guarantee amount...is to be included". Where a member took partial flexible retirement and died while deferred, the member will have a flexible retirement pension account and a deferred member's pension account. The provisional benefits will, however, relate to both accounts. It is therefore unclear whether a deferred guarantee amount could be possible in these cases.
33. Paragraph (5)(a) says "...calculating the eligible member's final pay as the case may be, career average pay under the Benefits Regulations ends". This should instead say "calculating the eligible member's final pay **or**, as the case may be, career average pay under the Benefits Regulations ends".

Amendment regulation 2(4), which inserts regulation 4O into the 2014 Transitional Regulations

34. The regulation does not set out what happens if the member aggregates and does have a disqualifying break. We assume that the provisional benefits would be wiped out and no underpin calculations would apply to the aggregated account.
35. The regulation does not cover what happens if the member takes partial flexible retirement and then later aggregates the deferred member's pension account. Presumably, the provisional amounts should not be extinguished.
36. Paragraph (1)(b) refers to a disqualifying break, meaning a "continuous break in

active membership of a public service pension scheme of more than 5 years.” However, should this instead refer to a “disqualifying gap in service” as defined in section 77 of the Public Service Pensions and Judicial Offices Act 2022?

37. Paragraph (4) refers to “all inactive accounts”. However, should this just refer to the particular inactive account when determining whether to extinguish the previous provisional benefits?

38. Paragraphs (4) and (5) reference “the normal retirement age applicable to [the member] under the 2009 Scheme”. Some individuals were never members of the 2009 Scheme. These paragraphs should also refer to age 65 to cover those members who are protected because of previous membership of another public service pension scheme.

Amendment regulation 2(4), which inserts regulation 4P into the 2014 Transitional Regulations

39. This regulation references section 29 of the Welfare Reform and Pensions Act 1999. That section applies only for the purpose of valuations performed for implementing a pension sharing order. It does not cover the provision of a valuation earlier in the process. This regulation could be amended to provide for such a valuation. However, the methodology for divorce calculations is set out in guidance issued by the Scottish Ministers. As that guidance will be updated to reflect McCloud protection, and that guidance must be followed, this regulation may not be necessary at all.

40. The regulation refers to “retirement benefits”. However, the Welfare Reform and Pensions Act 1999 instead uses the term ‘relevant benefits’.

Amendment regulation 2(4), which inserts regulation 4Q into the 2014 Transitional Regulations

41. We understand that the circumstances in which a scheme can pay indirect compensation are limited by the provisions of the Public Service Pensions and Judicial Offices Act 2022. However, we have concerns that there may be circumstances where a member has suffered a loss other than a Part 4 tax loss and compensation through the payment of additional benefits may be appropriate. This could include a protected member who transferred final salary benefits built up in the remedy period from another public service pension scheme to the LGPS and whose LGPS pension is in payment. After remedy, the transferred remediable service will change from final salary benefits to career average benefits with

underpin protection. If the member also built up LGPS benefits in the underpin period, the pension they are entitled to may reduce. We expect such cases to be very small in number. However, we believe that it would be appropriate to permit indirect compensation in cases such as this to ensure that no member is made worse off as a result of the remedy.

42. In accordance with direction 35(3) of the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022, paragraph (4) requires that the administering authority obtain advice from an actuary before determining the amount of additional benefits to pay by way of indirect compensation. We are unsure why such advice would be necessary when it will be easy to identify the pension debit that is associated with a part 4 tax loss.

Amendment regulation 2(4), which inserts regulation 4R into the 2014 Transitional Regulations

43. The regulation refers to “compensation owed”. As such compensation is discretionary, we don’t believe that saying “owed” is correct.

Amendment regulation 2(5), which amends regulation 9 of the 2014 Transitional Regulations

44. Paragraph (a) says “...substitute” that is not remediable service”. The inverted comma needs to be immediately before “that”, rather than immediately after “substitute”.

45. The amended regulation says that the transferred-in remediable service is only included in underpin calculations where there has been “no continuous break of more than five years in active membership of a public service pension scheme.” Should the ‘disqualifying gap in service’ test, as set out in section 77(8) of the Public Service Pensions and Judicial Offices Act 2022 apply instead? We also recommend that the test should be referenced in regulations 4I(1)(d) and 4J(1)(d).

Amendment regulation 3(2), which amends regulation 29 of the 2018 Regulations

46. The amended regulation says that no actuarial adjustments should be made to any “final guarantee amount that has been added...under regulation 4B.” The regulation should also reference amounts added under 4C (flexible retirement).

47. We believe that a similar amendment may be needed for actuarial reductions under paragraph 1(3) and (4) of schedule 2 to the 2014 Transitional Regulations.

Amendment regulation 3(3), which amends regulation 33 of the 2018 Regulations

48. The amended regulation requires “any final guarantee amount calculated...under regulation 4B” to be included when calculating trivial commutation lump sums or small pot payments. The regulation should also reference amounts calculated under 4C (flexible retirement).
49. The amended regulation does not provide for including notional survivor guarantee amounts in the calculation.
50. The amended regulation does not provide for including any survivor guarantee amounts when calculating trivial commutation lump sum death benefits.

Amendment regulation 3(6), which amends regulation 41 of the 2018 Regulations

51. Paragraph (6)(b) inserts paragraph (3A) into the 2018 Regulations, however, we do not think this is needed as the draft LGPS (Scotland) (Amendment) Regulations 2023 also propose to insert a new paragraph (3A), which we understand will become law before these McCloud regulations.
52. The amended regulation ensures that any deferred guarantee amounts are included in death grant calculations for death in deferment cases. When calculating the deferred guarantee amount, the comparison is calculated as at the date of death. It is therefore unclear whether that part of the death grant should be excluded when applying pensions increase to the total death grant.

Amendment regulation 3(8), which amends regulation 43 of the 2018 Regulations

53. Paragraph (8)(d) says “sub-paragraph (10(f)). “)” needs to be added immediately after “10”.

Amendment regulation 3(10), which amends regulation 46 of the 2018 Regulations

54. Paragraph (10)(d) says “sub-paragraph (10(g)). “)” needs to be added immediately after “10”.
55. The amended regulation ensures that any “final guarantee amount that has been added to the pension under regulation 4B” is not included in any children’s pension for death on pension cases. The regulation should also reference amounts added under 4C (flexible retirement).
56. It is unclear why the amendment is needed as regulation 4M(9) achieves the same

outcome. If it is needed, similar amendments would also be needed to regulation 45.

57. Sub-paragraph (e) inserts paragraph (10A) into the 2018 Regulations. However, the draft LGPS (Scotland) (Amendment) Regulations 2023 also propose to insert a new paragraph (10A), which we understand will become law before these McCloud regulations.

Amendment regulation 3(11), which amends regulation 60 of the 2018 Regulations

58. The amended regulation refers to “compensation owed”. As such compensation is discretionary, we don’t believe that saying “owed” is correct.

Amendment regulation 3(12), which amends regulation 61 of the 2018 Regulations

59. The amended regulation refers to “compensation owed”. As such compensation is discretionary, we don’t believe that saying “owed” is correct.

Amendment regulation 3(16), which amends schedule 1 to the 2018 Regulations

60. The amendment inserts a definition of ‘final guarantee amount’ into the 2018 Regulations. However, the term will be defined in regulation 1(4) of the 2014 Transitional Regulations, rather than 4B(3).

Amendment regulation 4

61. Amendment regulation 4 sets out which members must have their benefits recalculated. Unless the member is deceased on 1 October 2023, one of the conditions is that the member must on 1 October 2023 have remediable service. This condition, however, appears to exclude people who transferred out their remediable service before 1 October 2023.

62. Paragraph (6) says that “final guarantee amount has the meaning given in regulation 4B(4) of the 2014 Regulations”. However, the term will instead be defined in regulation 1(4).

63. Amendment regulations 4 to 10 do not provide for the following recalculations:

- aggregations that occurred before 1 October 2023, in accordance with regulation 4O (multiple pension accounts)
- transfers in before 1 October 2023 of remediable service
- members who had an underpin date before 1 October 2023 but did not also

have a final underpin date (or did not die) before then.

64. Comments made under amendment regulations 5 to 10 also set out further situations where a recalculation is not covered.

Amendment regulation 5

65. Paragraphs (5) and (6) say that arrears of extra pension must be paid in “accordance with regulation 77 of the 2018 Regulations.” Regulation 77 allows administering authorities to pay all or some of the amount due to the member on death to the member’s personal representatives or any person appearing to be beneficially entitled to the estate, without needing to see the probate / letters of administration. We are not sure why paragraphs (5) and (6) explicitly refer to regulation 77, particularly as regulation 77 provides for a discretion. It is also unclear whether the arrears would count as an amount due to the member at death, as the member only became actually entitled to the extra amount after death. Assuming the arrears do fall within regulation 77, complications may arise. For example, if an administering authority has used regulation 77, but the arrears cause the £5,000 limit to be exceeded.

66. In accordance with paragraphs (3) and (4), should paragraphs (5) and (6) instead simply require the administering authority to pay the arrears without undue delay?

67. We are unclear about the effect of paragraph (7). We understand from HMRC that, where the member becomes entitled to an extra pension as a result of the remedy, a new benefit crystallisation event occurs. In respect of some of the extra pension, the member can elect to commute for lump sum under regulation 32 of the 2018 Regulations. When doing so, the original BCE will not be recalculated.

Amendment regulation 6

68. The regulation provides for recalculations of death grants paid under regulation 41. It does not provide for recalculations of death grants paid under regulation 44 (pensioner members).

69. The regulation applies where a death grant was paid before 1 October 2023. The regulation however does not capture cases where the member died before 1 October 2023, but the death grant was paid on or after then. The regulations setting out the death grant calculation in these cases would ordinarily be those that applied at the date of death (ie before the October 2023 changes). We understand that these cases should also be recalculated under the revised regulations.

70. The regulation does not cover situations where the death grant was not paid under regulation 41 because a death grant was instead paid under regulation 38.

Amendment regulation 7

71. Paragraph (4)(b) says that the comparison should include “the survivor member’s pension that has already been paid”. In our view, the comparison should instead be against the annual rate of the pension.

Amendment regulation 8

72. The regulation covers relevant members who “had a transfer out under regulation 91(2) of the 2018 Regulations before 1 October 2023”. The regulation therefore does not cover:

- transfers out calculated as at a date before 1 October 2023 but paid on or after then
- bulk transfers calculated as at a date before 1 October 2023 under regulation 98.

73. Paragraph (5) requires that any top-up transfer amount is paid to the scheme that received the original transfer. It is however unclear what happens if:

- that scheme can’t / won’t accept the top-up payment, or
- that scheme now appears to be a scam.

74. It is also unclear how the top-up payment would interact with the financial advice requirements. For example, where the top-up payment causes the total CETV to exceed £30,000.

Amendment regulation 9

75. The regulation provides for recalculating certain commutation payments paid before 1 October 2023. It however does not cover:

- commutation payments calculated as at a date before 1 October 2023 but paid on or after then
- commutation payments in respect of uncrystallised benefits
- trivial commutation lump sum death benefits.

76. Paragraph (3) requires the payment to be recalculated “where the member is entitled to a final guarantee amount”. However, would the payment also need to be

recalculated where a notional survivor guarantee amount would be payable notwithstanding that the member was not entitled to a final guarantee amount?

77. Paragraph (3) also says that the recalculation must be based on the pension the member was entitled to “at the time the original payment was made.” We think however that this should instead refer to the date used to calculate the original payment.

Amendment regulation 10

78. Paragraph (1)(a) says “between 1 April 2014 and 1 October 2023”. You need to change “2014” to “2015”.

79. The regulation means that where the court awarded the credit member a specified amount (rather than a percentage) and the recalculated cash equivalent value exceeds the original value, the credit member is very unlikely to have their benefits recalculated. This is because the amount awarded to the credit member will still be based on the specified amount. Note that the total cash equivalent value is only used instead if it is less than the specified amount (see section 29(3) of the Welfare Reform and Pensions Act 1999).

80. The regulation does not provide for recalculating:

- corresponding pension debits (for example, no debit appears to apply to the underpin additions included in the cash equivalent value), and
- recalculating the amount paid to a qualifying scheme where the person was not awarded LGPS benefits.

81. If provision is made to recalculate the amount transferred to a qualifying scheme, you will need to consider whether this can be done under section 80 of the Public Service Pensions and Judicial Offices Act 2022. This is because section 80 only applies where the member “has rights under the scheme”.

82. Paragraph (1) says that the regulation applies where the person was divorced, dissolved a civil partnership, between 1 April 2014 (though we presume you mean ‘2015’) and 1 October 2023. However, this condition would not capture cases where the divorce / dissolution occurred before 1 April 2015 but the sharing order’s effective date falls between 1 April 2015 and 1 October 2023. We believe that these cases would also need to be recalculated.

83. The regulation refers to “retirement benefits”. However, the Welfare Reform and

Pensions Act 1999 uses the term 'relevant benefits'.

84. Paragraphs (3) and (4) says "before the date on which their divorce was made final, or their civil partnership was dissolved...". We believe that this should instead refer to whether the final underpin date / underpin date occurred before the date on which the sharing order took effect. This is because the relevant benefits to be used in the cash equivalent value are calculated by reference to this date.
85. Paragraph (4) says "the provisional underpin amount and provisional assumed benefits calculated under regulations 4I and 4J respectively...". We believe that 'provisional assumed benefits' (calculated under 4I) should be referenced before 'provisional underpin amount' (calculated under 4J).
86. Paragraphs (5) and (6) refer to recalculating the "pension credit". Normally, this refers to the amount awarded to the ex-spouse / civil partner. For example, the percentage of the cash equivalent value or a specified amount (see the meaning of 'pension credit' in schedule 1 to the LGPS Regulations 2018). However, based on the context, it appears that paragraphs (5) and (6) intend to refer to the amount of annual pension awarded in the LGPS.
87. Paragraph (6) says that the extra pension is to be "added to the pension credit member's pension credit member account". Firstly, the LGPS Regulations 2018 simply refer to 'pension credit accounts'. Secondly, as pension credit accounts are transferred into retirement pension accounts on drawing benefits, we believe that it is incorrect for the addition to be added to the 'pension credit account'.
88. The regulation does not provide for recalculations where the credit member subsequently and before 1 October 2023, transferred out, trivially commuted or died.

Amendment regulation 11

89. Regulation 11 provides for interest payments to apply to additions made to pensions in payment as a result of the McCloud remedy. It seems to us that the interest provisions apply to instalments of the additional amount due before 1 October 2023 and instalments due on or after then. Should the interest provisions in regulation 11 only apply to the instalments due before 1 October 2023?
90. Paragraph (3)(a) says that the interest due on a top-up transfer amount must be paid to "the person". We think this should be reworded to make it clear that it should be paid to the scheme that received the original transfer.

91. Paragraph (5) says “though”, whereas it should instead say “through”.
92. Paragraph (5) has missed out payments made under regulation 5(7).
93. Paragraph (5)(b) says that the ‘relevant date’ for top-up death grants begins with when the “original payment was made”. However, this does not appear to consider that the original payment may have been paid late.
94. Paragraph (7) says that the “rate of interest payable under this regulation is to be calculated in accordance with direction 38”. As direction 38 also sets out the methodology, we believe that the paragraph should be reworded to reflect that the administering authority must calculate both the rate and methodology in accordance with direction 38.