



Scottish Public
Pensions Agency
Buidheann Peinneanan
Poblach na h-Alba

LGPS Scotland McCloud
implementation statutory guidance

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1. Introduction

1. **Background** - Since 2019, the government has taken steps to address unlawful age discrimination that the Court of Appeal found in the McCloud and Sargeant court cases in December 2018¹. In those cases, the Court of Appeal found that transitional protections given to older members of public service pension schemes when scheme benefit structures were being reformed unlawfully discriminated against younger scheme members.

2. In July 2019, the UK government confirmed² that steps would be taken to address the discrimination in all schemes that provided transitional protections. This included the Local Government Pension Scheme in Scotland (LGPS)³. In the LGPS, all members had moved to the reformed scheme in April 2015, but older members were given 'underpin protection' which meant their pension at 65 would not be any less than it would have been in the unreformed (or legacy) scheme.

3. In 2023, Scottish Ministers made regulations to address the McCloud age discrimination in the LGPS by extending underpin protection to the younger members who did not qualify originally due to their age. The regulations followed detailed work in the intervening years to consider how the difference in treatment should be rectified fairly, broad consultation with affected stakeholders and work to obtain the necessary legislative powers.

4. This statutory guidance sets out Scottish Ministers' views on issues related to the McCloud remedy in the LGPS.

5. **Purpose** – During our consultations on the LGPS McCloud remedy, respondents highlighted a number of areas where guidance on how to implement the remedy would potentially be beneficial. This guidance is intended to support administering authorities in the implementation of the LGPS McCloud remedy in the following ways:

- By providing Scottish Ministers' view on the approaches that should be taken for a number of key issues in order to achieve a consistent application of the remedy across the LGPS.
- By providing additional guidance on how certain technical issues that may arise should be approached.

¹ *McCloud and others v Lord Chancellor and Sargeant and others v Secretary of State for the Home Department [2018] EWCA Civ 2844*. Referred to as the 'McCloud' case hereafter.

² <https://questions-statements.parliament.uk/written-statements/detail/2019-07-15/HCWS1725>

³ Unless stated otherwise, all references to the LGPS in this document are to be read as being references to the LGPS in Scotland

6. **Topics** – This guidance covers the following topics:

- Overall approach to McCloud remedy – setting out Scottish Ministers’ views on how the LGPS McCloud remedy should be approached in key areas, including:
 - Governance
 - Data collection and verification
 - Identifying members in scope
 - Qualifying scenarios
 - Case prioritisation
- Technical matters – outlining technical issues where Scottish Ministers wish to provide certainty on how the remedy should be approached, including:
 - Transfers – Issues regarding retrospection
 - Multiple sets of underpin figures
 - Unpaid additional pension contributions
 - Deaths of beneficiaries before payments made
- Compensation – providing an overview of the legal framework for McCloud compensation, the conditions that must be met for direct or indirect compensation to be possible and examples of where compensation may be payable in an LGPS context.

7. **Definitions and using the guidance** – The LGPS McCloud remedy was implemented legislatively through the Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023 (‘the 2023 Regulations’), which came into force on 1st October 2023. The 2023 Regulations extend underpin protection to those members who were too young to qualify when it was originally introduced. This is mainly achieved through amendments to the regulations which originally provided for underpin protection, the Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 (‘the 2014 Regulations’). The 2023 Regulations were made using powers contained in Chapter 3 of Part 1 of the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA), which allow for the extension of the LGPS underpin to the members affected.

8. This document provides detailed and often technical guidance on the McCloud remedy for the benefit of administering authorities. It is expected that readers will have a working familiarity with the LGPS McCloud remedy and the issues the remedy raises. Terms used in this document, where not otherwise defined, should be taken to have the meaning contained in the overriding legislation, principally the PSPJOA and the 2023 Regulations.

9. **McCloud implementation phase** - In a number of places, this guidance refers to the 'McCloud implementation phase', which we define as follows:

For most members, the period up until a fund's annual benefit statements (ABSs) for 2024/25 are issued, which must take place by the end of August 2025. At the end of the implementation phase:

a) all retrospective amendments to members' pensions and other rights needed as a consequence of the 2023 Regulations should have been concluded, and

b) a fund's records for members who qualify for McCloud remedy but have not yet taken their pensions should be accurate (so that the annual benefit statements issued to members for the 2024/25 scheme year consider the McCloud remedy in full).

After the implementation phase, a fund's ongoing McCloud responsibilities will be part of their business as usual administration of their fund.

There may be circumstances where legislation allows an administering authority to determine that the McCloud remedy does not need to be reflected in the ABS of a specific member or a class of member until the ABSs for the 2025/26 scheme year are issued. For any members to whom such a determination is made, the McCloud implementation phase shall be regarded as extending to 31st August 2026.

Where the McCloud remedy applies to a member but they will not be due an annual benefit statement under the 2018 Regulations (e.g. because they are a pensioner), the work to apply the remedy to that person should ordinarily be concluded by 31st August 2025. If legislation does allow for flexibility to not reflect McCloud in member's ABSs until 31st August 2026 in certain cases, that flexibility should also be considered as applying to members who will not receive an ABS – i.e. it would be possible for administrators to determine the McCloud implementation phase extends to 31st August 2026 in specific cases. Decisions regarding these cases should be approached in a similar way as to those whom the ABS legislation applies to.

10. **Potential loss and contingent decisions** – In the course of Scottish Ministers' work on the LGPS McCloud remedy we have sought to ensure that LGPS members should not be worse off as a result of the changes made. We have also sought to identify and understand situations where a 'contingent decision' may occur – i.e. where a member may have reasonably taken an alternative decision had it not been for the discrimination identified by the Court of Appeal. Whilst Scottish Ministers understand there may be rare circumstances where it is theoretically possible for a loss to have occurred (either due to a contingent decision or otherwise), Scottish Ministers are of the view that, for the vast majority of LGPS members, the LGPS McCloud remedy can only lead to improvements in a member's rights or scheme benefits.

11. If an administering authority becomes aware of a case or cases where there is evidence:

a) that the remedy has worsened a member's position, or

b) that a member would have reasonably taken an alternative decision had it not been for the discrimination that could have been better for them,

they should inform the Scottish Public Pensions Agency, provided the situation cannot be resolved by using the powers to pay direct or indirect compensation (see section 11).

12. **Consultation** – Initial discussions on the content of guidance for LGPS England and Wales were held with a working group comprising LGPS stakeholders, including LGPS administrators. A consultation on a draft of that guidance was undertaken via email between 1 March 2024 and 12 April 2024. This sought the views of the Local Government Pensions Committee, members of the LGPS scheme advisory board, representatives of LGPS administrators, representatives of fund actuaries, and LGPS pensions administration software suppliers. The working group included representatives for LGPS Scotland.

13. Scottish Ministers have decided to adopt the LGPS England and Wales guidance for LGPS Scotland. Minor amendments have been made to reflect the different legislation for LGPS Scotland.

14. **Disclaimer** – Nothing in this guidance should be taken to modify, take precedence over or otherwise override any regulations or directions made prior to this guidance being issued.

2. Governance

15. Scottish Ministers first consulted on the McCloud remedy in July 2020 and therefore recognise that administering authorities have been working at a local level on the governance and administration of the remedy for some considerable time. This guidance is intended to build on and support administering authorities' local plans.

16. We acknowledge the significant administrative impact the McCloud remedy is currently placing on pensions and payroll administrators and continue to be grateful for the work authorities, their providers and their employers continue to do collecting data and putting in place systems to manage the administrative task. Recognising this, it is important that those responsible for decision making in LGPS funds ensure sufficient resourcing plans are in place to enable administrators to undertake the requirements of the remedy efficiently and effectively. Scottish Ministers remind administering authorities that administration costs relating to the McCloud remedy can be met from the pension fund.

17. Administrators should engage with and report progress on implementation of the McCloud remedy to both pension committees and pension boards on a regular basis during the McCloud implementation phase. Regular reporting will enable monitoring of progress and enable committees and boards to measure and assess both resourcing and progress.

18. Where an administering authority plans to deviate significantly from this statutory guidance, this should be discussed with both their pensions committee and pension board and agreement from the pensions committee should be obtained. The reasons for the decision should be recorded.

3. Data collection and verification

19. As the McCloud discrimination affects LGPS members' pension rights retrospectively, a major challenge of implementing the remedy contained in the 2023 Regulations is ensuring that administrators have the information they need to calculate the value of the underpin over the underpin period, which ran from 1st April 2015 to 31st March 2022 at the latest.

20. Under the career average 2015 Scheme, LGPS administrators do not need to hold some of the information that was needed under the 2009 Scheme to be able to accurately calculate a member's pension rights – for example, members' hours history and dates of service breaks. Many administering authorities therefore took the decision that, from the introduction of the 2015 Scheme on 1st April 2015, they would not request this information from their scheme employers for members who did not have underpin protection.

21. With the retrospective application of underpin protection to the large group of members who were affected by the McCloud discrimination, it is necessary for administrators to ensure they have sufficient data to calculate the value of a member's pension under the 2009 Scheme for the purposes of the calculation of provisional and final underpin amounts. This data is needed for the full underpin period, in many cases back to 1st April 2015.

22. This aspect of the McCloud project has been recognised for a number of years. In 2020, the scheme advisory board in England and Wales issued [McCloud data collection guidance for administrators](#). The guidance was also helpful for administrators in LGPS Scotland. In 2022, the Scheme Advisory Board in England and Wales established a working group of LGPS stakeholders to consider what actions LGPS administrators in England and Wales should take when they are unable to obtain full and accurate data for the McCloud project. In March 2023, [comprehensive guidance on McCloud data collection and verification](#) was issued by the Scheme Advisory Board in England and Wales. The Scotland Scheme Advisory Board is considering adapting and issuing the guidance for LGPS Scotland administrators.

4. Identifying members in scope

23. For many LGPS members, it will be possible for administering authorities to identify if they qualify for underpin protection based on the records they hold on their systems.

24. However, for a significant proportion of members, it will not be possible for administrators to do this. This is for two main reasons:

- **Membership on or before 31st March 2012** – For a member to have underpin protection they must have had pensionable service in a Chapter 1 legacy scheme, a local government legacy scheme or a judicial legacy scheme on or before 31st March 2012⁴. Under the 2023 Regulations, there is no requirement for that service to have been transferred to a member’s LGPS fund for the member to qualify for the underpin. So a member may have pre-1st April 2012 pensionable service in another LGPS fund or in another public service pension scheme which puts them in scope of underpin protection, but this is not known about by their administrator.
- **Disqualifying gaps in service** – Whether a member has had a ‘disqualifying gap in service’ at some point in their employment will affect how and whether the underpin applies to them. A disqualifying gap in service is a period longer than five years at no time during which the person is in pensionable service in one of the main public service pension schemes⁵. An administrator may not know if a member has had a disqualifying gap based on the information in their systems.
 - Broadly⁶, if a member had a disqualifying gap in service between the membership which included pensionable service on or before 31st March 2012 and their membership in the underpin period, they will not qualify for underpin protection on that membership in the underpin period.
 - If a member has a disqualifying gap in service after they have membership protected by the underpin, if they rejoin the LGPS and aggregate their underpin protected membership, their provisional underpin figures will be extinguished and they will not have further underpin calculations relating to that service.

25. The below table sets out an approach that we recommend administering authorities follow during the McCloud implementation phase to identify which of their members qualify for underpin protection. We hope that following this approach will minimise manual processing whilst ensuring there is a robust system so that any member in scope of underpin protection is identified and correctly categorised.

⁴ S.77(5) of the PSPJOA

⁵ The disqualifying gap test differs slightly between periods before a person’s membership in the underpin period and the period afterwards. The test for gaps after a member’s underpin membership falls under the LGPS regulations, where the test is whether a person had a continuous break in active membership of a public service pension scheme of more than five years.

⁶ S.77(8) of the PSPJOA provides that pensionable service in some other schemes, for example a Fair Deal scheme, may also prevent a break from being disqualifying.

26. Whilst we consider that a sequential approach will be, in general, the best way to work through these cases, there may be local reasons why two stages need to be conducted in tandem, or one stage commenced before the other is finished.

Stage	Description
1	Complete McCloud data collection and verification phase.
2	<p>Identify which of your members⁷ qualify for underpin protection based on the pensionable service history held on your system – i.e. the following criteria are met:</p> <ul style="list-style-type: none"> a. they have pre-2009 Scheme normal pension age (NPA) membership in the underpin period, b. they had LGPS membership prior to 1st April 2012 or had pre-1st April 2012 public service pension scheme (PSPS) membership (whether or not the previous service was aggregated or transferred⁸), and c. they do not have a disqualifying gap in service after the membership referred to in b)
3	Of the remainder of your members with pre-2009 Scheme NPA membership in the underpin period, rule out those who would have been too young to have had PSPS membership prior to 1 st April 2012.
4	<p>Of the remainder of your members with pre-2009 Scheme NPA membership in the underpin period, use the LGPS Database⁹ to assist in identifying which may also qualify as:</p> <ul style="list-style-type: none"> a. they have membership in the LGPS prior to 1st April 2012, and b. they do not have a disqualifying gap in service after the membership referred to in a). <p>It should be noted that the LGPS Database does not contain complete membership information and the information held may not be fully up to date for each fund. Administering authorities should take a cautious approach in using this information and should contact the other administering authority for more information.</p>
5	<p>Of the remainder of your members with pre-2009 Scheme NPA membership in the underpin period, write to these to seek details of their pensionable service history, specifically to find out if:</p> <ul style="list-style-type: none"> a. they have membership in the LGPS or another public service pension scheme prior to 1st April 2012, and b. they do not have a disqualifying gap in service after the membership referred to in a).

⁷ For the purposes of stages 2 to 5, former members (e.g. those who have transferred out or died) should be regarded as ‘members’ to determine whether they would have qualified for underpin protection. If so, their benefit entitlement will need to be retrospectively reviewed.

⁸ If the service is held in another PSPS or LGPS fund and was not transferred/ aggregated, you will need to contact the other administrator to verify the service and ensure there has not been a disqualifying gap.

⁹ The LGPS National Insurance Database operated and maintained by the Local Government Association

	Where prior membership is identified which meets these criteria, verify this service. This should be done by contacting the relevant LGPS administering authority or PSPS.
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27. **Communications** – In the process of identifying members in scope, good communications will be key so that members understand what they are being asked to check and they know why it is important. Communications should also include contact information so that, if a member has questions, they can contact a member of the pensions team and get additional support.

28. **Recording members in scope** – At the conclusion of the McCloud implementation phase, we expect that it will be recorded on all existing members' records whether they qualify for underpin protection in relation to each membership they hold. Software systems should include a McCloud indicator that can be used for this purpose. If the member moves to another LGPS fund now or in the future or transfers to another public service pension scheme, the status of the McCloud indicator should be included in the data supplied.

29. The McCloud indicator should record whether a member:

- qualifies for underpin protection,
- does not qualify for underpin protection, or
- if it has not yet been determined/ is currently unknown if they qualify for underpin protection.

Administrators may also wish to consider recording cases where a member's McCloud eligibility status may change before their final underpin date, so that this can be checked before final calculations are undertaken.

30. **New starters** - During and after the McCloud implementation phase, where a member joins an LGPS fund for the first time and transfers service in the period from 1st April 2015 to 31st March 2022 from another LGPS fund or from another public service pension scheme, it will be necessary to determine if they qualify for underpin protection in relation to the transferred service. It is already standard practice for new starters to be asked to provide details of prior pension scheme memberships, but this is more important where a member's potential underpin protection depends on the answer. It should be made clear to members why it is important that they respond with this information. Following verification of the member's McCloud status, administrators should update the McCloud indicator on their software to reflect this. If there is no reply from the member and there is insufficient information to know if the member does or does not qualify, the indicator should be left at 'unknown'.

31. **After McCloud implementation phase** – At the conclusion of the McCloud implementation phase, administrators should take a cautious approach and be aware that there may be cases which remain recorded incorrectly. This may in particular be a problem where members did not respond to communications you sent them to identify if they were in scope of the protections. There may also be cases where an event takes place which means a member no longer meets the McCloud

qualifying criteria or newly qualifies for McCloud (see section 5). After the McCloud implementation phase, annual benefit statements should:

- state whether a member is recorded as qualifying for underpin protection or not.
- include brief text explaining what underpin protection means and inviting the member to contact the fund if they believe they may not be in the right category.
- note that a member's qualification status may change where an event takes place that means that a member no longer qualifies or newly qualifies.

32. **At retirement/ benefit crystallisation** – See paragraph 49 regarding the steps that should be taken to verify member's protection status when final benefit calculations are being undertaken at a member's final underpin date.

5. Qualifying scenarios

33. S.77 of the PSPJOA sets out the conditions that must be met for a member to have remediable service in the LGPS. These conditions form the main qualifying criteria for a member to have underpin protection in the LGPS and are therefore an important foundation of the remedy being implemented by administrators.

34. The Scottish Public Pensions Agency have received a number of questions on how the underpin qualifying criteria apply to certain scenarios for members with deferred refunds and deferred benefits and in this section we summarise our views on these.

35. **Deferred refunds** – In the LGPS, members who leave the scheme with less than two years' qualifying service¹⁰ are entitled to a refund of their contributions. This is paid to the member upon their request, or automatically, in certain circumstances. Refunding contributions in this way is permitted under general pensions legislation¹¹ and is a common feature of major public service pension schemes.

36. Prior to April 2015, only members who left the scheme with less than two years' qualifying service were entitled to a refund of their contributions¹². If they had longer service, they would leave the scheme with a deferred or immediate entitlement to a pension.

37. Where a 2009 Scheme member or 2015 Scheme member is entitled to a refund of their contributions but hasn't yet received the refund, they have a 'deferred refund' account. This ensures their right to a refund is preserved. However, it does not entitle them to pension benefits from the scheme¹³. For example, if a member with a

¹⁰ As determined under regulation 3(6) of the 2018 Regulations

¹¹ Chapter 2 of Part 4ZA of the Pension Schemes Act 1993 which entitles members to a contribution refund where they have more than three months' service in a scheme and do not qualify for a deferred or immediate entitlement to a benefit in that scheme

¹² Regulation 41 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

¹³ However it should be noted that a member with a deferred refund can, in line with general pensions legislation, request that a cash transfer sum is paid to another pension scheme in respect of their deferred refund. This is provided for by regulation 91 of the 2018 Regulations which confirms that, where a member has

deferred refund account dies before that refund can be paid, no death grant would be payable and their survivors would not be entitled to survivor benefits from the scheme.

38. In Scottish Ministers' view, a deferred refund does not constitute pensionable service for the purposes of the conditions in s.77 as it is not service which 'qualifies a person to a pension or other benefits under that scheme' as per the definition of pensionable service in s.110(1) of the PSPJOA.

39. Practically, we consider this means a number of things:

- In respect of the third condition (the requirement for members to have pensionable service on or before 31st March 2012), it will not be sufficient for a member to have only had a right to a refund in a Chapter 1 legacy scheme, a judicial legacy scheme or a local government legacy scheme to meet the third condition. A member must have had service which gives them a right to a deferred or immediate entitlement to a pension.
- In respect of the fourth condition (disqualifying gaps in service), a period of membership which only gives a member a right to a refund in a Chapter 1 scheme, a judicial scheme or a local government scheme will not count as pensionable service for the purposes of determining whether there has been a disqualifying gap in service.

40. Where a member leaves a scheme with only a refund entitlement and subsequently the service is either a) aggregated with another LGPS fund, or b) transferred to another public service pension scheme, the service could become 'pensionable service' as defined in the PSPJOA. This would occur if when the two periods of service are combined, the member would have a right to a deferred or immediate entitlement to a pension for their total membership.

41. It should also be noted that the third condition (under s.77(5)) requires that pensionable service must be held in a legacy scheme. This means that if a member has a refund entitlement in a scheme and they subsequently a) aggregate that with local government legacy scheme membership, or b) transfer it into a Chapter 1 legacy scheme or a judicial legacy scheme, the service could become pensionable service under a Chapter 1, judicial, or local government legacy scheme (as appropriate). This would occur if when the two periods of service are combined, the member would have had a right to a deferred or immediate entitlement to a pension in that legacy scheme for their total membership.

42. However, if the refund service mentioned in paragraph 41 is combined with service in a Chapter 1, judicial or local government new scheme, that would not be sufficient for the member to meet the third condition, even if – considered together - the member would have a right to a deferred or immediate entitlement to a pension in their new scheme for their total membership. In that case, they would have 'pensionable service' as defined in the PSPJOA, but not 'pensionable service in a

a statutory right to a transfer under Chapters 1 or 2 of Part 4ZA of the Pension Schemes Act 2013, they can apply for such a transfer to be made.

Chapter 1 / judicial / local government legacy scheme' because the refund service was transferred or aggregated into a new scheme.

43. **Deferred benefits** – Where a member holds a deferred benefit in a scheme, they have pensionable service under that scheme for the purposes of section 77 of the PSPJOA. Scottish Ministers' view is that if they then transfer that service to a private sector pension scheme (or to any pension scheme which is not a Chapter 1 scheme, a judicial scheme or a local government scheme), the service would no longer constitute pensionable service under the transferring scheme for the purpose of the PSPJOA.

44. Practically, we consider this means the following:

- a) In respect of the third condition (the requirement for members to have pensionable service on or before 31st March 2012), the transfer of a defined benefit including service on or before 31st March 2012 to a private sector scheme will not mean a member then fails the third condition. Condition three is phrased so that it is met where a member was in pensionable service on or before 31st March 2012 – i.e. it is sufficient for a member to have had pensionable service in a relevant scheme in the past, but to no longer have pensionable service in that scheme at some point afterwards.
- b) In respect of the fourth condition (disqualifying gaps in service), the transfer of a defined benefit to a private sector pension scheme could mean that a member who did not have a disqualifying gap before the transfer would have one afterwards. If this occurred, this would lead the member to fail the fourth condition, for example, that a member with three consecutive periods of pensionable service without a disqualifying gap in service, could have a disqualifying gap in service if they subsequently transfer membership two to a private sector pension scheme. That could create a disqualifying gap in service between memberships one and three.

45. An example of how the situation in paragraph 44(b) could occur is set out below:

Membership	Scheme	Dates	Status
A	NHS Pension Scheme	01/04/2008 to 31/03/2011	Held as a deferred benefit in the NHS Pension Scheme
B	LGPS England and Wales fund	01/04/2013 to 31/03/2016	Held as a deferred benefit in LGPS England and Wales fund
C	LGPS Scotland fund	01/04/2017 to 31/03/2020	Held as a deferred benefit in LGPS Scotland fund

In this example, the member initially qualifies for LGPS Scotland underpin protection in membership C, as they meet the qualifying criteria for protection.

However, if they choose to transfer their service in membership B to a private sector pension scheme at some point in the future, membership C would no longer qualify for underpin protection. This is because there is now a disqualifying gap in service between memberships A and C and the member would fail condition four.

46. **Impacts** - The situations highlighted in this section mean there will be circumstances where a member may initially appear to meet the qualifying criteria for underpin protection under the 2023 Regulations but, at the time the member's benefits are taken, they no longer qualify. This is because they would no longer meet all four of the conditions in s.77. This could arise in the situation highlighted in paragraphs 44(b) and 45.

47. Similarly, there could be situations where a member may initially appear not to meet the qualifying criteria for underpin protection under the 2023 Regulations but, at the time the member takes their benefits, they do qualify. This could arise, for example, if the member has a disqualifying gap in service, but a subsequent aggregation or transfer of a deferred refund with another period of public service pensions membership, means the service becomes pensionable service (as defined) and the member no longer has a disqualifying gap.

48. These situations raise a number of challenges and Scottish Ministers' view is that communications should seek to ensure that members are aware that decisions taken in respect of one or more of their pensions records in the future may affect their underpin qualification.

49. To ensure members receive the correct pension, it will also be necessary for administrators to undertake checks at the point of a member's final underpin date to ensure that the underpin is correctly being applied or disapplied to the member at that time. This could be done in a number of ways but, if it cannot be done otherwise, should be done by contacting the administrators of other LGPS funds or schemes to check the status of other records that are held. This will not be necessary for all scheme members – only those where the administrator has reason to believe that the member has:

- a) other pensions entitlements, and
- b) the status of those other entitlements could affect whether the member qualifies for underpin protection.

50. At the end of the McCloud implementation phase, administering authorities should have sufficient information to determine which of their members they believe qualify for underpin protection under the 2023 Regulations at that point in time, and which they believe would not. In the period between then and a member's final underpin date, administering authorities should base their communications to that member and their calculations in respect of that member on their initial view. However, if they have reason to believe that a member's qualification status may have changed, they should investigate this and update their records accordingly. In the future, administering authorities may also wish to consider if it would be helpful to undertake an exercise to update their assessment of which of their members qualify for underpin protection or not.

51. Events taking place after a member's final benefit calculations have taken place (i.e. after their final underpin date or death) should not result in their McCloud qualification status being re-assessed or their benefits being re-calculated. Where a member dies after their final underpin date, their McCloud qualification status from

their final underpin date should be used for calculating any survivor benefits or death grants.

6. Case prioritisation

52. One of the issues raised in responses to the Scottish Public Pensions Agency's consultations on the McCloud remedy in the LGPS was how cases affected by the McCloud remedy should be prioritised. As a wide variety of cases will need to be dealt with, some respondents requested certainty on the order in which they should be approached.

53. Scottish Ministers agree that this is an important issue and this section summarises their views on this. A prior version of this guidance was issued as a separate note and circulated to administering authorities in October 2023.

54. Scottish Ministers' view is that McCloud cases should generally be approached in the following order.

Group 1	<p>New final underpin dates and deaths</p> <p>When an eligible member retires, they can rightly expect that the pension they will receive is accurate and complete. Efforts should be taken to ensure that when an eligible member retires on or after 1st October 2023, or otherwise has their final underpin date under regulation 4H of the 2014 Regulations, that the pension calculations undertaken by their administrator take into account their underpin rights, where applicable, straight away.</p> <p>The following situations should also be regarded as part of group 1:</p> <ul style="list-style-type: none">• Deaths on or after 1 October 2023 of eligible members.• Trivial commutations calculated on or after 1st October 2023, where the final underpin date or date of member's death was before that date. <p>Prioritising these cases will prevent the need for administrators to revisit these cases subsequently and potentially have to make retrospective amendments to calculated rights.</p> <p>We recognise that, on occasion, there may be circumstances in the period after the remedy comes into force which mean it will not be possible to fully take into account the 2023 Regulations straight away (for example, if the necessary data is unavailable from the employer). In such cases, administrators should clearly communicate that to affected members at the time and seek to rectify the situation as soon as they can afterwards.</p>
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	<p>Before calculating Group 1 cases, it may be necessary to recalculate past calculations. For example, if a member retired before 1 October 2023 and died on or after then, the member's pension would need to be recalculated to be able to correctly calculate the death grant.</p>
Group 2	<p>Cases falling under Part 3 of the 2023 Regulations</p> <p>The LGPS McCloud remedy has retrospective effect to 1st April 2015 and, for many eligible members, the underpin date or the final underpin date set out in the 2014 Regulations (as amended by the 2023 Regulations) will have already occurred. Part 3 of the 2023 Regulations sets out how the remedy should apply retrospectively for these eligible members, as well as in respect of eligible members who died before 1st October 2023.</p> <p>For these cases, administrators will need to review eligible members' entitlements and, where necessary, make additions to pensions or other benefits, including any applicable arrears.</p> <p>Within this group, cases should be considered in the following order:</p> <p>a) <u>Cases where a member or survivor pension is in payment</u></p> <ul style="list-style-type: none"> • These are cases where a member or survivor pension is currently being paid which includes membership in the underpin period. The fact that a pension is in payment means that a final underpin date under regulation 4H of the 2014 regulations has already taken place for the eligible member before 1st October 2023, or that the member has died before that date. • In these cases, the pension a member or survivor receives each month may not be accurate and it is important that administrators consider these cases promptly to ensure that the correct pension is paid as soon as possible in the future, including the payment of any arrears where applicable. • These cases fall under regulations 5 and 8 of Part 3 of the 2023 Regulations. <p>b) <u>Cases where payments have been made in the past but there is no ongoing liability</u></p> <ul style="list-style-type: none"> • These are cases where a member has had their final underpin date under regulation 4H before 1st October 2023, or has died, but the liability for the pension rights has otherwise been fully discharged by the administering authority. Cases in this group include:

	<ul style="list-style-type: none"> ○ Members and survivor pensions where a pension was in payment, but this is now no longer payable. ○ Cases where the liability was initially discharged through one of the following one-off payments: <ul style="list-style-type: none"> ▪ A transfer out ▪ A trivial commutation or small pot payment ▪ A death grant payment, where there is no related survivor pension ● For the cases in this group, there will be no ongoing inaccurate payments, but it's possible past payments will have been inaccurate and administrators should make efforts to consider these cases promptly so that any underpayments can be rectified. In approaching group 2b cases, administering authorities should be aware that delays to rectification may cause problems which should be considered. For example, if a member has died, progressing payments due promptly may ensure that this can be done before the estate is finalised. ● These cases fall under regulations 5, 6, 7, 8, 10 and 11 of Part 3 of the 2023 Regulations. <p>c) <u>Cases where a member's underpin date has taken place before or after 1st October 2023, but not their final underpin date</u></p> <ul style="list-style-type: none"> ● These are cases where an eligible member has had their underpin date under regulation 4G of the 2014 Regulations – i.e. they left active membership or reached their 2009 Scheme normal pension age (usually 65) - but they have not had their final underpin date. ● For the purposes of this note, this group includes both: <ul style="list-style-type: none"> ○ eligible members who had their underpin date before 1st October 2023, and ○ eligible members who have their underpin date on or after 1st October 2023 but before the conclusion of the remedy project. ● There will not have been any incorrect payments made for members in this group, but it will be possible for administrators to undertake the initial 'underpin date' calculation of benefits upon which final calculations will be based. These cases should be reviewed after the cases in groups 1, 2a and 2b.
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	<ul style="list-style-type: none"> • Cases where a member's underpin date was before 1st October 2023 fall under regulation 13 of Part 3 of the 2023 Regulations.
Group 3	<p>All other cases</p> <ul style="list-style-type: none"> • Eligible members who do not fall within groups 1 or 2 are those who are in scope of McCloud remedy, but who remain in active membership and have not yet had their underpin date. • Members in this group will be of lower priority than members in group 1 and group 2. However, it is important that administrators take steps to update group 3 members' records as soon as it is possible to do so, and should have plans to achieve this in time for the first annual benefit statements including McCloud remedy details. • If a member in group 3 becomes a member in group 1 (for example, they retire) or a member in group 2c (they have their underpin date), their case should be considered in line with our guidance on those groups.

55. **Software systems** – Pension administrators require capable software to administer their pensions fully and accurately. We are aware that in the early stages of the McCloud implementation phase, software systems may not be fully capable of delivering automated calculations for members who qualify for underpin protection. This could have an impact on the ability of administrators to progress cases and, potentially, to follow the prioritisation approach outlined above.

56. Where software is not available to progress a case or cases, where possible administrators should seek to progress payments for the non-underpin related elements of a member's pension (this will typically be the bulk of a member's overall rights). The lack of availability of software also does not automatically mean that the underpin element of a member's pension should be ignored until automated calculations are possible. Administrators should consider the feasibility of undertaking calculations manually, particularly if it is likely the underpin will form a significant part of a member's rights.

57. Where software development is taking place, software providers should be communicating regularly with their administrator clients on their development work, and on when they can expect updates to systems to be made. This information will help administrators to communicate with members affected, where necessary.

58. **Analysis** - Within each group, administering authorities should consider using tools and analysis to help identify the members who are most likely to have an increased pension or benefit arising from our new underpin provisions, and who are therefore most in need of having their case reviewed promptly.

59. **Timings** - For all eligible members, remedy work should be concluded by the end of the McCloud implementation phase.

60. **General comments on prioritisation approach** - We believe the approach outlined in this section is proportionate and reflects the relative urgency of different cases. The responsibility for administering the scheme lies with each administering authority and the administration of the McCloud remedy, which is complex and varied, should be approached flexibly. There may be circumstances where an authority feels it is right to deviate from the approach outlined above¹⁴ – for example, if it is more administratively efficient to take a different approach and members in a higher priority group would not be materially disadvantaged by doing this. This may be the case if an authority is bulk processing cases, where a number of lower priority cases could be dealt with at one time, and where the same bulk processing could not be used for higher priority cases.

61. There may also be case specific factors which need to be considered – such as in respect of sensitive cases where special care should be given, for example, after a member's death. There may also be situations where an administering authority does not have all the information necessary to progress a case at the same time as the other cases in that group. Overall, where an authority does take a different approach to that we have outlined here, they should consider this decision carefully, and review that decision at appropriate intervals.

62. The McCloud remedy project is wide-ranging and this section is principally concerned with the payment of benefits relating to the McCloud remedy. There are important parts of the project which will need to be progressed in parallel with the payment of benefits. This includes, but is not limited to, the following:

- Collection and verification of additional data required to undertake the McCloud remedy calculations.
- Checks to verify which members are in scope of the McCloud remedy from previous pensionable service which hasn't been transferred in or aggregated to that LGPS fund.
- Any tax impacts of the McCloud remedy, including recalculations of past annual allowance calculations.
- Recalculation of inward Public Sector Transfer Club transfers to reflect the McCloud remedy.
- Divorce estimates and implementation of pension sharing orders for eligible members.

63. We expect that administering authorities will have an overall plan for delivering the McCloud remedy that considers these aspects of the project, and will be working with partners, including software suppliers, to ensure that local plans can be met. In general, local plans should support the prioritisation approach outlined in this note.

¹⁴ As per paragraph 18, any significant deviations from this guidance should be recorded.

7. Transfers – issues regarding retrospection

64. Regulation 10 of the 2023 Regulations sets out how the remedy should be applied to certain members who qualify for underpin protection under the 2023 Regulations but whose rights have been transferred out of the LGPS. For these members, the retrospective application of the 2023 Regulations to their pension may mean that the original transfer paid out of the LGPS was lower than it should have been. Regulation 10 therefore provides that the following should apply:

- Regulation 10(3) - For individual transfers out that were Club transfers, the Club Memorandum should be followed¹⁵. LGPS actuarial guidance also contains supplementary information on Club transfers affected by the underpin.
- Regulation 10(4) and (5) – For individual transfers out that were not Club transfers, the transfer should be re-calculated in line with actuarial guidance. Where the recalculated transfer value is higher than the value of the transfer previously paid, the difference should be paid to the receiving scheme.
- Regulation 10(6) – For bulk transfers, the actuary of the LGPS administering authority and the other scheme should seek to agree whether an additional payment should be made to reflect the underpin. Where they agree a payment must be made, it should be made without undue delay.

65. The Scottish Public Pensions Agency is aware that there is an error in regulation 14 of the 2023 Regulations regarding the interest due for retrospective adjustments to Club transfers. The regulation requires interest to be paid on all top-up transfer payments (other than bulk transfers). For top-up Club transfer payments to chapter 1, judicial and other LGPS schemes, this conflicts with paragraph 4.41 of the Club Memorandum, which says not to pay interest. Scottish Ministers will amend the LGPS regulations to align with the Club memorandum.

66. A number of practical issues have been raised regarding how these cases are progressed, in particular for cases falling under regulation 10(4) (individual transfers that are not Club transfers).

67. Cases where the full difference cannot be paid to the receiving scheme for the benefit of the member

– We are aware of a number of issues which may prevent a member gaining the full benefit of a payment under regulation 10.

Examples include the following:

- Where the receiving scheme cannot or will not accept a further payment in relation to the member.
- Where the member has since transferred to another scheme, so paying an additional amount to the scheme that received the original transfer would not join the member's benefits up with their original LGPS rights, and may leave them with a small orphaned pension right.
- Where the member has since died.

¹⁵ In September 2023, the Public Sector Transfer Club memorandum was updated to set out how McCloud remedy should apply in relation to Club transfers, including those that have taken place in the past.

- Where the receiving scheme is applying a greater administrative charge to the member in respect of the additional payment being made than would have been paid if it had been part of the original transfer.
- In the case of a bulk transfer, where the actuaries are unable to agree an amount under regulation 10(7), but it appears to the administering authority that a further payment is due in respect of the member's rights under regulations 4A to 4T of the 2014 Regulations.

68. Where an administering authority identifies a situation where it appears that a member may be prevented from receiving the full benefit of a payment under regulation 10, the administering authority should consider if direct compensation under section 82 of the PSPJOA may be appropriate and should let the affected member know that they may wish to make an application for compensation.

69. We consider that direct compensation would potentially be applicable under the PSPJOA and the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022¹⁶ ('the 2022 Directions') in relation to the examples described in **annex B**. This is because the examples appear to be cases where a loss would be compensatable under s.82(3) of the PSPJOA (see the compensation section of this guidance for more details).

70. However, the following points should also be noted when considering compensation for these cases:

- in the first instance, the 2023 Regulations must be followed and, any payments that are possible under the 2023 Regulations should be made in accordance with the requirements they set out,
- a decision to pay direct compensation or not is one for each administering authority to take, following consideration of an application, and
- the 2022 Directions set out a number of general conditions which must apply for direct compensation to be payable, including in particular the matters covered in direction 33.

71. **The transfer advice threshold** – Since reforms to pensions access options were made in 2015, when certain conditions are met there has been a requirement for LGPS members to obtain appropriate independent advice before transferring their pension rights to schemes that offer flexible benefits¹⁷. Where a member's LGPS rights that are being transferred are valued at £30,000 or less, the requirement to take advice does not apply.

72. It is possible there may be an interaction between the advice requirement and the 2023 Regulations. In particular, a member may have transferred out in the past, with benefits valued at £30,000 or less and not been required to take appropriate independent advice. However, the effect of an additional payment under regulation 10 of the 2023 Regulations could mean that, overall, the member's transferred

¹⁶ as amended by the Public Service Pensions (Exercise of Powers, Compensation and Information) (Amendment) Directions 2024

¹⁷ More information is available on the Pensions Regulator's website - <https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/administration-detailed-guidance/db-to-dc-transfers-and-conversions>

benefits are over the £30,000 threshold. It has been queried what steps should be taken by an administering authority if this situation arises.

73. Scottish Ministers believe cases like this will be rare. If a member's benefits were originally valued at £30,000 or under, the annual pension is likely to be small, and it is unlikely that a member will have had the pay increases necessary during their time in the LGPS for their provisional underpin amount to have a higher value than their provisional assumed benefits (and therefore unlikely that an additional payment will be due under regulation 10). Where cases do arise, it is likely any additional payment will also be small.

74. However, we agree that it is possible that a small number of cases may arise. In such cases, we consider that an administering authority should continue to make the payment required under regulation 10. We do not believe there is a legal impediment to an administering authority doing this, as the additional payment under regulation 10 is a standalone amount which does not change the value of the original transfer made. This is a proportionate approach, which is intended to ensure that the member can get the full value of their LGPS benefits in their new scheme.

8. Multiple sets of underpin figures

75. The McCloud remedy set out in the 2023 Regulations is detailed and complex particularly as the underpin needs to work effectively for the range of different ways a member can take benefits from the scheme.

76. Whilst in general a member will have one set of underpin figures attached to each pension account, we believe there may be circumstances where a member could have two or more sets of underpin figures in the same pension account and that this is the right outcome to ensure that the remedy works effectively for those members. Two examples of situations where this could arise are set out below:

77. **Re-joiners after 2009 Scheme normal pension age (NPA)** – After a member's 2009 Scheme normal pension age (usually 65), they will not have any further underpin dates and the value of their provisional underpin figures from their last underpin date will be fixed until their final underpin date.

78. If a member re-joins the LGPS (post 3) after their 2009 Scheme NPA and has two prior LGPS memberships (posts 1 and 2) which include membership in the underpin period, which are not aggregated together and there has been no disqualifying gap in service, they will already have provisional figures for both posts 1 and 2. If the member chooses to aggregate both posts 1 and 2 with post 3, it has to be determined which of two options should apply:

Option A - the provisional figures from posts 1 and 2 should be combined together to form a single set of underpin figures, or

Option B - the provisional figures from posts 1 and 2 should continue to operate separately.

79. If the member had re-joined the LGPS in post 3 prior to their 2009 Scheme NPA and there had been no disqualifying gap in service, this question wouldn't arise as, in

line with regulation 4O(3) of the 2023 Regulations, the member's prior provisional figures from both posts 1 and 2 would be extinguished upon them being aggregated with post 3. The member would then have a further underpin date, to apply to all their remediable service, when they leave post 3 or reach their 2009 Scheme normal pension age.

80. For post-2009 Scheme NPA re-joiners, Scottish Ministers' view is that option B is correct and the provisional figures should continue to operate separately. In our view, option B better preserves the value of the underpin that was originally accrued in each post. We consider that option B also better reflects how the underpin works. As provisional underpin calculations do not change after a member's 2009 Scheme NPA, where a member aggregates service after this point it is appropriate to preserve the provisional values calculated before that date in final underpin calculations.

81. **Annex A** contains an example which demonstrates why we believe option B is the right approach.

82. **Flexible retirement** – The Local Government Association's McCloud technical guide has also highlighted two flexible retirement situations where we consider it is appropriate for a member to have multiple underpin values for one pension account:

- where the member does not take 100% of their accrued rights when they flexibly retire, and
- where the member took full flexible retirement prior to their 2009 Scheme NPA between 1st April 2015 and 31st March 2022.

The section of [the LGA guide](#) which details how final underpin calculations shall work for flexible retirement cases summarises these situations in more detail and the approaches that should be taken.

9. Unpaid additional pension contributions

83. The calculations of a member's provisional assumed benefits and provisional underpin amount under regulations 4I and 4J of the 2014 Regulations respectively include detailed rules to ensure the correct parts of a member's pension are included and excluded, as appropriate. One area that is particularly complicated is the treatment of additional pension contributions (APCs), as the rules vary depending on the reason the additional pension is being purchased.

84. For situations where a member had been on unpaid absence due to a trade dispute, or absent from work with permission, otherwise than because of illness or injury, child related leave or reserve forces service leave, but had made an election to buy back the lost pension under regulation 16 of the 2018 Regulations, the period of absence is to be included in a member's provisional assumed benefits and their provisional underpin amount¹⁸.

¹⁸ Regulation 4I(1)(a)(i)(cc) and (dd) in respect of a member's provisional assumed benefit, regulation 4J(1)(b)(ii) in respect of a member's provisional underpin amount.

85. Where a member fails to pay all of the additional contributions due after making such an election, the regulations provide¹⁹ that the underpin calculations should include only the proportion of pension covering the additional contributions paid. However, the regulations do not explicitly make clear what proportion should be included if the absence spanned the end of the underpin period.

86. In this scenario, Scottish Ministers' view is that only the additional pension equal to the proportion of the total contract that is paid should be used for the underpin. For example, if a member only paid for 50% of their lost pension, only 50% of the lost pension that relates to the underpin period should be included in the underpin calculations. We believe that pro-rating the pension purchased in this way is the right approach because additional pension bought under regulation 16 is not allocated to particular periods. Instead, the total pension lost is calculated and the member pays contributions to cover that period.

87. An example is contained in **annex A**.

10. Deaths of beneficiaries before payments made

88. Across the LGPS, it is possible there will be a small number of unfortunate cases where a member would have been due an increased payment or payments under the remedy contained in the 2023 Regulations, but has died since they originally retired from the scheme. In these cases, regulation 5(5) and (6) of the 2023 Regulations provide that the payments due should be made to the member's personal representatives without undue delay.

89. Similarly, there may also be a small number of cases where a person has died who would have been entitled to:

- an increased survivor benefit under regulation 8 of the 2023 Regulations, or
- an increased death grant under regulations 6 or 7 of the 2023 Regulations.

90. In these cases (and other similar ones that may occur under the 2023 Regulations), it has been queried what steps should be taken by the administering authority. In Scottish Ministers' view, steps should be taken to make the payments to the personal representatives of the person who is due the payment, in the same way as regulations 5(5) and (6) require.

91. If there are cases where a person's estate has been closed and receiving additional payments under the 2023 Regulations would require probate to be re-opened, this may cause further costs to be incurred. In that situation, the administering authority should consider if direct compensation under section 82 of the PSPJOA may be appropriate²⁰ and should let the personal representative know that they may wish to make an application for compensation. Direct compensation should also be considered if, for any other reason, full payment of benefits due in respect of a deceased member cannot be made for the benefit of beneficiaries.

¹⁹ Regulations 4I(3) and 4J(2), except where the member did not pay the full contributions because they retired on ill-health grounds or died (in which case the contributions are to be treated as fully paid).

²⁰ In these circumstances, the loss may amount to direct financial loss arising from a relevant breach of a non-discrimination rule.

11. Compensation

92. Under the PSPJOA, there are defined circumstances where compensation relating to the McCloud discrimination and/ or remedy can be paid to members. 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.

93. In our 2023 consultation, a strong theme in responses was the desire for national guidance and support on McCloud compensation. We believe this reflects a number of points, including that the McCloud compensation provisions are an entirely new feature of the LGPS and, additionally, many of the rules governing compensation are contained outside the LGPS regulations themselves.

94. Whilst we believe the circumstances where McCloud compensation needs to be paid in an LGPS context will be rare, we recognise that further clarity on the rules and the circumstances where compensation may be appropriate would be helpful. In this section, we summarise the following regarding McCloud compensation:

- The legal framework for compensation under the PSPJOA
- The difference between direct and indirect compensation and the conditions that must be met for either to apply.
- The application requirements that must be followed where a person wishes to apply for compensation.

We also provide examples of situations where direct and indirect compensation may be possible in an LGPS context.

95. In consultation responses, some respondents requested guidance to help administrators apply the requirements contained in direction 33 of the 2022 Directions to LGPS cases. Direction 33 covers a number of important parts of the framework within which compensation decisions must be taken. However, many are legal principles which will need to be considered for each case individually, and Scottish Ministers do not consider it would be appropriate for us to give guidance on this. Where necessary, administering authorities may wish to take local legal advice on how to apply the requirements in direction 33 to any particular compensation application.

96. **Legal framework** – The following paragraphs describe the legal framework that applies to McCloud compensation.

97. The PSPJOA provides for the following:

- **Section 82 (Power to pay compensation)** – gives administering authorities the power to pay compensation in respect of certain losses, defined as being ‘compensatable losses’. In this guidance, compensation under section 82 is referred to as ‘direct compensation’.
- **Section 83 (Indirect compensation)** – provides that scheme regulations may make provision allowing for indirect compensation to be paid where a member has incurred a ‘compensatable loss’ that is a ‘Part 4 tax loss’.

- Section 85(2)(c), (d) and (e) (Treasury directions) – requires that the powers in section 82 and 83 must be exercised in line with Treasury directions.

98. In December 2022, under section 85 of the PSPJOA, HM Treasury issued the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022²¹ ('the 2022 Directions'). As well as other matters, these directions set out how the powers to issue compensation in the LGPS must be exercised.

99. The 2022 Directions provide the following:

- Direction 33 (Power to pay compensation) – sets out a number of matters that must be taken into account by administering authorities in determining whether to pay direct compensation under section 82(1).
- Direction 34 (Compensatable losses: compensation) – sets out what conditions must be met for a loss to be a 'compensatable loss' under section 82, allowing direct compensation to be paid.
- Direction 35 (Indirect compensation) – requires scheme regulations to make certain provision regarding indirect compensation.
- Direction 36 (Compensatable losses: indirect compensation) – sets out what conditions must be met for a loss to be a 'compensatable loss' and a 'Part 4 tax loss' under section 83, allowing indirect compensation to be paid.
- Direction 42 (Process: application for compensation) – requires an application to the administering authority to be made before direct or indirect compensation can be paid. Also sets out certain information that must be included in an application.

100. The 2023 Regulations provide for the LGPS McCloud remedy. In respect of compensation, they provide for the following:

- New Regulation 4Q (Payment of indirect compensation) inserted into the 2014 Regulations – this regulation provides that an administering authority may pay additional benefits under the 2015 Scheme, instead of an amount under section 82 of PSPJOA 2022, where the member has a 'compensatable loss' which is a 'Part 4 tax loss' in accordance with direction 36.
- New regulation 4R (Applications for compensation) inserted into the 2014 Regulations – this regulation implements the application requirements set out in direction 42.
- New regulation 4S (Payment of compensation or indirect compensation out of the pension fund) inserted into the 2014 Regulations – Confirms that any direct or indirect compensation paid to a person may be paid from the local pension fund.

101. **Amounts** - Where an administering authority decides to pay compensation, the amounts awarded should be calculated having regard to the matters summarised in direction 33(1), in particular sub-paragraphs (h), (i) and (j). In general, the Scottish Public Pensions Agency's view is that compensation should be set at a rate sufficient to ensure

²¹ <https://www.gov.uk/government/publications/public-service-pensions-and-judicial-offices-act-2022-treasury-directions>, as amended by the Public Service Pensions (Exercise of Powers, Compensation and Information) (Amendment) Directions 2024

any compensatable loss has been addressed but that the member does not gain a financial advantage beyond that.

102. Where a case would otherwise meet the conditions for compensation to apply, but the potential compensation would be very small, administering authorities should consider direction 33(1)(d) – the principle of value for money – in determining whether to pay the cash amount or award the additional benefit. However, administering authorities should also be conscious that they must have regard to the other matters mentioned in direction 33(1) – in particular, the circumstances of the member (sub-paragraph (e)) and whether, if a claim was brought in litigation, it is more likely than not that compensation would be awarded (sub-paragraph (g)).

103. **Summaries – Annex B** contains summaries of the rules governing direct and indirect McCloud compensation in the LGPS and the conditions that must be met for compensation to be possible.

104. **Examples** – As noted, we anticipate cases of compensation to be rare in the LGPS, as the changes to the underpin made through the 2023 Regulations should be sufficient to provide a full and complete remedy to most of the members affected by the McCloud discrimination. However, there are circumstances where we believe a compensatable loss in the LGPS could arise. Examples of some of these circumstances are provided in **annex C**.

105. **Application and other procedural requirements** – In line with the approach contained in direction 42 of the 2022 Directions, regulation 4R of the 2014 Regulations sets out the requirements for applications for compensation. The key points are as follows:

- Direct or indirect compensation can only be paid following receipt of an application in such form and manner determined by the administering authority (regulation 4R(1)).
- An application can be made by the member or, if they are deceased, their personal representatives (regulation 4R(8)).
- Where the application is for indirect compensation and relates to a Part 4 tax loss under direction 36(3)(a) or (b) of the 2022 Directions, the application must also include certain information to verify the amount of compensation being claimed (regulation 4R(2)).

106. Regulation 4R also sets out other procedural requirements relating to compensation:

- **Information** - Where the administering authority receives an application for direct or indirect compensation to a person and has determined how much (if any) is due, the administering authority must provide the applicant with an explanation of how the relevant amounts (if any) were calculated (regulation 4R(3) and (4)).
- **Appeals** – An applicant may appeal against a compensation determination in writing, and must provide a reasoned explanation of a proposed alternative amount, supported by evidence the appropriate person considers relevant. Where an appeal is made, the administering authority must:

- consider this,
- inform the applicant of their decision providing an explanation for this, and
- provide a description of the scheme's dispute resolution arrangements (regulation 4R(5) and (6)).

107. **Other points** – Administering authorities should also be aware of the following points concerning compensation:

- **Valuations** – By virtue of regulation 60(5A) and 61(2B) of the 2018 Regulations respectively, direct and indirect compensation are to be regarded as scheme liabilities for the purposes of the scheme's triennial local valuations as well as exit valuations undertaken when a scheme employer becomes an exiting employer.
- **Pension fund costs** – Using the power contained in regulation 4S of the 2014 Regulations, the costs of direct and indirect compensation payments should be met from an administering authority's pension fund.

Annex A – Worked examples

Multiple sets of underpin figures

Regarding the issue discussed in paragraphs 75 to 81, the below simplified²² example illustrates why we believe option B is more appropriate.

Post 1: FTE £40,000

Provisional underpin amount - £4,000
Provisional assumed benefits - £3,500
Provisional guarantee amount - £500

Post 2: FTE £25,000

Provisional underpin amount - £1,000
Provisional assumed benefits - £1,300
Provisional guarantee amount - £0

Calculation of final guarantee amounts from posts 1 and 2 when aggregated with post 3

For simplicity, in this example, the final underpin figures are assumed to be the same as the provisional underpin figures.

Option A - Combining underpin figures from posts 1 and 2 together to calculate the final figures:

Final underpin amount – £5,000 (£4,000 + £1,000)
Final assumed benefits – £4,800 (£3,500 + £1,300)
Final guarantee amount - £200

Option B - Keeping underpin figures from posts 1 and 2 separate to calculate the final figures:

Final guarantee amount from post 1 - £500
Final guarantee amount from post 2 - £0
Total final guarantee amount - £500 (£500 + £0)

In this scenario, option B has preserved the underpin values from each of the member's prior memberships and gives the member the better overall outcome.

Unpaid APCs

Regarding the issue discussed in paragraphs 83 to 87, the below example illustrates the approach which we believe should be adopted.

²² For simplicity, this example doesn't consider the effects of pensions increase and the member's NPA in both the 2009 and 2015 Schemes is assumed to be 65, the same as in the 2009 Scheme. Late retirement increases have been ignored as they would be the same for both the provisional underpin amount and provisional assumed benefits. We do not believe these simplifications affect the purpose of these examples – to show the differences between the two calculation options outlined.

- A member is absent from work with permission from 1st January 2022 to 29th June 2022 (180 days), with the period from 1st January 2022 to 31st March 2022 (90 days) being in the underpin period.
- Upon returning to work, the member elects under regulation 16 to buy back their lost pension (£400).
- After paying for £200 (50% of the contract), the member leaves their job and doesn't pay the remainder of the contributions due.
- In this case, our view is that the following should apply in relation to the additional pension purchased:
 - £100 should be added to the provisional assumed benefits (50% of total relating to the underpin period, $90 \text{ days} / 180 \text{ days} \times £200 = £100$).
 - 45 days should be added to the service used to calculate the provisional underpin amount (50% of the total relating to the underpin period).

Annex B – Compensation summaries

Based on the combined framework contained in the PSPJOA, the 2022 Directions and the LGPS regulations, the below tables set out the main points concerning direct and indirect compensation in the LGPS.

Direct compensation

Element	Description	Legal references
Form	Cash payment	S.82(1)
Decision maker	Administering authority, following receipt of an application	S.82(1) Direction 42 Regulation 4R(1) and (3) of the 2014 Regulations
Purpose	To cover certain losses arising from: <ul style="list-style-type: none"> • Relevant breaches of a non-discrimination rule • Losses arising from the application of a provision contained in, or made under, Chapter 3 of Part 1 of the PSPJOA (the LGPS McCloud remedy). <p>Losses may include specified tax losses.</p>	S.82(3) to (5)
Payable to	Members who have suffered compensatable losses or, in the case of deceased members, their personal representatives	S.82(1)
Conditions	For direct compensation to be legally permissible ²³ , the following conditions must be met. <p><u>Losses following a relevant breach of a non-discrimination rule</u></p> <p>1) The member must have suffered a loss arising from a ‘breach of a non-discrimination rule’, which is ‘relevant’:</p> <ul style="list-style-type: none"> • A breach of a non-discrimination rule means a rule that was at any time included in a local government scheme by virtue of section 61 of the Equality Act 2010²⁴ • In this context, a breach is ‘relevant’ if the breach arose from the application of scheme regulations made before 1st April 2022 which 	S.82(3) to (5) Directions 33 and 34

²³ Even where direct compensation is legally permissible, an administering authority is not required to pay compensation to a member.

²⁴ Section 61 of the Equality Act 2010 includes the requirement that occupational pension schemes must be taken to include a non-discrimination rule.

	<p>allowed benefits to be payable as final salary benefits.</p> <p>2) The loss arising from a relevant breach of a non-discrimination rule must be</p> <ul style="list-style-type: none"> • a direct financial loss, or • a 'specified Part 4 tax loss'. A specified Part 4 tax loss is a tax loss that satisfies the requirements of direction 34(4). <p>3) The member or, if they are deceased, their personal representative, must have made an application for compensation, in such form and manner as specified by the administering authority, and which includes the information specified in regulation 4R of the 2014 Regulations.</p> <p>4) The administering authority must have satisfied itself that the requirements contained in direction 33 of the 2022 Directions are met in relation to the case before making their decision.</p> <p><u>Losses arising from the application of the LGPS McCloud remedy</u></p> <p>1) The member must have suffered a loss that is attributable to the application of a provision contained in, or made under, Chapter 3 of Part 1 of the PSPJOA (the LGPS McCloud remedy).</p> <p>2) The loss must be a 'specified Part 4 tax loss'. A specified Part 4 tax loss means a tax loss that satisfies the requirements of directions 34(4).</p> <p>3) The member or, if they are deceased, their personal representative, must have made an application for compensation, in such form and manner as specified by the administering authority, and which includes the information specified in regulation 4R of the 2014 Regulations.</p> <p>4) The administering authority must have satisfied itself that the requirements contained in direction 33 of the 2022 Directions are met in relation to the case before making their decision.</p>	
Interest terms	<p><u>Where the compensatable loss is a Part 4 tax loss</u> Rate - Interest must be calculated on the compensation payable in accordance with the provisions of the Taxes (Interest Rate) Regulations 1989 as if that amount were overpaid tax.</p>	Direction 38(1)

	<p>Period - Interest must be paid from the date direct financial loss occurred to the date of payment</p> <p><u>Where the compensatable loss is a direct financial loss</u></p> <p>Rate - Interest must be calculated as simple interest which accrues from day to day, and the rate applied must be the rate fixed, for the time being, by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892.</p> <p>Period - Interest must be paid from the date direct financial loss occurred to the date of payment</p>	<p>Direction 38(2), (4), 39(1)</p>
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Indirect compensation

Element	Description	Legal references
Form	Additional benefits under the LGPS, to be determined after taking actuarial advice.	S.83(1) Regulation 4Q(1) and (3) of the 2014 Regulations
Decision maker	Administering authority, following receipt of an application	Regulation 4Q(1)
Purpose	To cover specified Part 4 tax losses, where there has been a compensatable loss but the member has not been paid direct compensation in relation to that loss.	S.83(1)
Payable to	Members who have suffered compensatable losses	S.83(1)
Conditions	<p>For indirect compensation to be legally permissible²⁵, the following conditions must be met.</p> <p>1) The member must have suffered a loss arising from:</p> <ul style="list-style-type: none"> • a relevant breach of a non-discrimination rule²⁶, or • a loss that is attributable to the application of a provision contained in, or made under, Chapter 3 of Part 1 of the PSPJOA (the LGPS McCloud remedy). <p>2) The loss must be a specified Part 4 tax loss that satisfies the requirements of direction 36(3).</p>	<p>Directions 33 and 36</p> <p>Regulation 4R of the 2014 Regulations</p>

²⁵ Even where indirect compensation is legally permissible, an administering authority is not required to pay compensation to a member.

²⁶ See direct compensation table for the meaning of a relevant breach of a non-discrimination rule.

	<p>3) The member must have made an application for compensation, in such form and manner as specified by the administering authority, and which includes the information specified in regulation 4R of the 2014 Regulations.</p> <p>4) The administering authority must have satisfied itself that the requirements contained in direction 33 of the 2022 Directions are met in relation to the case before making their decision.</p> <p>5) The administering authority must have obtained actuarial advice before determining what additional benefit to pay to the member.</p>	
Interest terms	<p><u>Where an additional benefit has been put into payment for a member</u></p> <p>Rate - to be determined based on the type of benefit that has been awarded.</p> <p>Period - to be determined based on the type of benefit that has been awarded.</p> <p>Regulation 14 of the 2023 Regulations sets out the general interest terms for payments being made under the 2023 Regulations.</p>	<p>Regulation 4T of the 2014 Regulations</p> <p>Regulation 14 of the 2023 Regulations</p>

Annex C – Compensation examples

This annex contains examples of situations where we believe a compensatable loss in the LGPS could arise. In the below tables, the tax regulations concerning the McCloud remedy are the Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 ('the Tax Regulations 2023').

In respect of direct compensation:

Type of loss	Example
Where a loss occurs due to a relevant breach of a non-discrimination rule and this gives rise to a direct financial loss	In paragraph 67 we have highlighted cases where a member may not benefit from the full value of a transfer payment that would otherwise be payable. Direct compensation may be appropriate in these cases to ensure the member does not lose out.
Where a loss occurs due to a relevant breach of a non-discrimination rule and this gives rise to a specified Part 4 tax loss	<p>Tax regulations on the McCloud remedy provide that any increase in the value of a member's pension arising from the underpin is to be ignored in determining the value of a member's pension growth for the purposes of the annual allowance.</p> <p>Prior to these tax regulations being made, the underpin was taxable for annual allowance purposes, which means that, in the past, a member may have incurred an annual allowance charge, part or all of which related to the underpin.</p> <p>Where this has occurred, and the member paid the annual allowance charge as cash directly to HMRC, direct compensation may be appropriate to compensate them for the additional tax they paid which related to the underpin.</p> <p>This compensation may only be payable for tax years that are 'out of scope' – this applies to the tax years 2014/15 to 2018/19. HMRC will refund overpaid tax for later years.</p>

In respect of indirect compensation:

Type of loss	Example
<p>Where a loss occurs due to a relevant breach of a non-discrimination rule and this gives rise to a specified Part 4 tax loss</p>	<p>Tax regulations relating to the McCloud remedy provide that any increase in the value of a member's pension arising from the underpin is to be ignored in determining the value of a member's pension growth for the purposes of the annual allowance.</p> <p>Prior to these tax regulations being made, the underpin was taxable for annual allowance purposes, which means that, in the past, a member may have incurred an annual allowance charge, part or all of which may have related to the underpin.</p> <p>Where this has occurred, and the member paid the annual allowance charge by having a reduction to their annual rate of pension, indirect compensation may be appropriate (to increase their pension to the rate that it would have been without the pension debit that relates to the underpin addition).</p> <p>This compensation may only be payable for tax years that are 'out of scope' – this applies to the tax years 2014/15 to 2018/19. HMRC will refund overpaid tax for later years.</p>