

Explanatory Memorandum to The Firefighters' Pensions (Remediable Service) (Wales) Regulations 2023.

This Explanatory Memorandum has been prepared by the Department for Covid Recovery & Local Government and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Firefighters' Pensions (Remediable Service) (Wales) Regulations 2023. I am satisfied that the benefits justify the likely costs.

Hannah Blythyn MS
Deputy Minister for Social Partnership

6 September 2023

PART 1

1. Description

- 1.1 The Public Service Pensions and Judicial Offices Act 2022 (“the PSPJOA 2022”) makes provision to address age-based discrimination in public service pension schemes. The PSPJOA 2022 was made following a finding in the case of the Secretary of State for the Home Department & the Welsh Ministers v Sargeant & Others ([2018] EWCA Civ 2844) that transitional protections in reformed firefighters’ pensions schemes were unlawfully discriminatory on the basis of age. In the context of firefighters’ pensions in Wales, those provisions were set out in the Firefighters’ Pension Scheme (Wales) Regulations 2015¹, (“the 2015 Scheme”).
- 1.2 These regulations make provision to implement the second phase of the remedy set out in the PSPJOA 2022. They follow the first phase, which was implemented by the Firefighters’ Pension Scheme (Wales) (Amendment) Regulations 2022 (SI 2022/343 (W. 85)).

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 The Committee will wish to note that these regulations are the second set of regulations relating to firefighters’ pensions that Welsh Ministers have made under the PSPJOA 2022. The first regulations [“The Firefighters’ Pension Scheme \(Wales\) \(Amendment\) Regulations 2022”](#) made provision in relation to the transfer of all members from the 1992 Firefighter’s Pension Scheme, as set out in Firemen’s Pension Scheme Order 1992² and the 2007 Firefighters’ Pension Scheme, as set out in the Firefighters’ Pension Scheme (Wales) Order 2007³ to the reformed scheme (the 2015 Firefighters’ Pension Scheme) from 1 April 2022). The Explanatory Memorandum to those Regulations is available [here](#).
- 2.2 These Regulations come into force on 1 October 2023. However, they make retrospective provision in consequence of the retrospective reversion to legacy pension schemes for firefighters’ remediable service under section 2(1) of the PSPJOA 2022. Retrospective provision in these Regulations is made in accordance with section 3(3)(b) of the Public Service Pensions Act 2013 (“2013 Act”).
- 2.3 The making of certain provision in these Regulations under the 2022, is subject to requirements set out in the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022. The relevant provisions of these Regulations are made in accordance with those Directions.

¹ SI 2015 no.622 / W.50

² SI 1992 no.129

³ SI 2007 no.1072 / W.110

- 2.4 The Regulations are subject to the consent of the Treasury. This requirement was created by section 94 of the PSPJOA 2022, and was the subject of a statement under Standing Order 30 made by the Deputy Minister for Social Partnership on [12 August 2021](#).
- 2.5 The process for giving consent is a matter for the Treasury. In this case, consent has been signified by two of the Lords Commissioners of the Treasury signing their consent on the instrument.
- 2.6 In accordance with section 21 of the 2013 Act, the Welsh Ministers have consulted such persons (or the representatives of such persons) as appear to the Welsh Ministers likely to be affected by these Regulations.
- 2.7 As occupational pensions are a reserved matter, a legislative consent motion was not required in respect of any provisions in the PSPJOA 2022.

3. Legislative background

- 3.1 These Regulations make provision, consequential on the PSPJOA 2022, to deal with membership of firefighters' pension schemes during the "remedy period" (i.e., 1 April 2015 to 31 March 2022).
- 3.2 The powers of the Welsh Ministers to make these Regulations are conferred by sections 1 and 3 of the 2013 Act, as amended by the PSPJOA 2022. They are also made under sections 5, 6, 7, 8, 10, 11, 12, 18, 19, 20, 21, 22, 24, 25, 26, 29 and 31 of the PSPJOA 2022.
- 3.3 The provision made under the powers mentioned above is, where relevant, made in accordance with requirements of the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022.
- 3.4 In accordance with section 3(5) of the 2013 Act, the Regulations are made with the consent of the Treasury.
- 3.5 This instrument is subject to the negative resolution procedure.

4. Purpose and intended effect of the legislation

- 4.1 These Regulations make the necessary provisions to correct the position created by the Firefighters' Pension Scheme (Wales) Regulations 2015 which provided for transitional protection for certain cohorts of members of legacy schemes, which were found to unlawfully discriminate between members based on age. Legacy scheme members are those members of the 1992 Scheme, and the 2007 Scheme.
- 4.2 These Regulations make provision consequent on, and in relation to, the reversion (by section 2(1) of the PSPJOA 2022) of affected members into their legacy schemes for the remedy period and establish the mechanisms by which members can choose (at the point of retirement, or immediately

for those already retired) the scheme which applies to their service during the remedy period.

4.3 The UK and other devolved governments have consulted on similar proposals covering all other public sector workers in Wales and the rest of the UK.

4.4 These 2023 Regulations make amendments as follows:

Part 1 sets out the introductory provisions, including the date the regulations come into force and the interpretation of the terms used throughout.

Part 2 of these Regulations makes provision about when and to whom a remediable service statement is to be provided by the scheme manager, as well as the contents of the remediable service statement.

Part 3 makes provision about the principal decisions that may be made in relation to a member's remediable service—

- (a) Chapter 1 makes provision about when and how an election may be made for service in respect of which a member opted-out of a firefighters' pension scheme to be reinstated and treated as remediable service;
- (b) Chapter 2 makes provision about when and how a decision may be made, or be deemed to have been made, about whether the remediable service of a pensioner or deceased member (an "immediate choice member") is to be treated as service in the member's legacy scheme or in the 2015 scheme;
- (c) Chapter 3 makes provision similar to Chapter 2, but in relation to the remediable service of an active or deferred member.

Part 4 makes provision about cases in which the pension rights secured by virtue of a member's remediable service are at issue in proceedings relating to members who divorce or dissolve a civil partnership —

- (a) Chapter 1 makes provision about sharing the value of such rights under a pension sharing order where they are subject to a pension debit under section 29 of the Welfare Reform and Pensions Act 1999 (c. 30). It provides, in particular, for the calculation or, where appropriate, the re-calculation of the value of a pension debit and a pension credit in relation to the rights;
- (b) Chapter 2 makes provision about the calculation of the value of rights for the purposes of sharing those rights under an arrangement other than a pension sharing order.

Part 5 makes provision about lump sum voluntary contributions paid by a member during the period of their remediable service, and periodical contributions paid by a member under an arrangement which commenced during the period of their remediable service, to secure further pension rights, and retrospective arrangements to secure such further pension rights in respect of a member's remediable service —

- (a) regulation 30 makes provision under which compensation is to be paid in relation to voluntary contributions used to secure rights to 2015 scheme added pension during the period of their remediable service;
- (b) regulation 31 makes provision under which compensation is to be paid in relation to voluntary contributions used to secure rights to legacy scheme added years during the period of their remediable service where the benefits to be paid in relation to a member's remediable service are 2015 scheme benefits;
- (c) regulation 32 makes provision under which a member who has remediable service in the 2015 scheme may elect to enter into a retrospective arrangement to secure added years in the member's legacy scheme in respect of that remediable service.

Part 6 makes provision about transfers in and out of a firefighters' pension scheme of pension rights during the period of a member's remediable service—

- (a) Chapter 1 makes provision about, among other things, the provision of a remediable service statement to a person who has transferred out rights in respect of remediable service and in respect of whom a remediable service statement is not otherwise required to be provided;
- (b) Chapter 2 makes provision about transfers in and out of a firefighters' pension scheme on a cash equivalent basis, including provision about the calculation (and, where appropriate, the recalculation) of the value of a cash equivalent transfer value, and the making and accepting of payments in relation to the transfer value of rights secured by virtue of remediable service;
- (c) Chapter 3 makes provision similar to Chapter 2, but in relation to transfers in and out of a firefighters' pension scheme on a club basis;
- (d) Chapter 4 makes provision for—
 - (i) transfers into the 2015 scheme in respect of rights secured by virtue of remediable service to be treated as being transferred into the member's legacy scheme where the benefits which become payable in respect of the member's remediable service are legacy scheme benefits;
 - (ii) the conferring or variation of rights in a member's legacy scheme to reflect a change in the value of those rights by virtue of PSPJOA 2022 and these Regulations;
 - (iii) financial corrections of any pension benefits paid in respect of the transferred-in rights of an immediate choice member.

Part 7 makes provision about ill-health retirement—

- (a) regulation 53 makes provision about the cases in which a member who met the requirements for an ill-health retirement award in one firefighters' pension scheme is to be deemed as meeting the requirements in their alternative firefighters' pension scheme;
- (b) regulation 54 makes provision under which a member who has received an ill-health retirement award under the Firemen's Pension Scheme Order 1992 is to be assessed for eligibility for a higher tier award in the 2015 scheme.

Part 8 makes provision in relation to cases in which a person has already obtained a remedy in relation to their remediable service. Such persons are treated for the purposes of PSPJOA 2022 and these Regulations as if they were an immediate choice member who has elected to receive legacy scheme benefits in relation to their remediable service.

Part 9 makes provision about any amounts (“relevant amounts”) owed to or by a person as a result of PSPJOA 2022 or these Regulations—

- (a) Chapter 2 makes provision for the calculation of interest on relevant amounts, for the increase of benefits instead of the payment of a relevant amount, for the making of an application where a person wishes to claim compensation, and for the netting off of relevant amounts owed to and by a person;
- (b) Chapter 3 makes provision about the reduction and waiver of relevant amounts, in particular a requirement for the scheme manager to reduce some relevant amounts by tax relief amounts, the requirement for the scheme manager to waive amounts owed by relevant survivors and relevant separated persons, the discretion of the scheme manager to reduce or waive relevant amounts owed by a person to a scheme in certain circumstances, and the option to defer payment of certain relevant amounts owed to a member until an election is made in relation to the member’s remediable service;
- (c) Chapter 4 makes provision about when and how relevant amounts must be paid.

5. Consultation

5.1 Section 21(1) of the 2013 Act requires the authority responsible for making scheme regulations (in this case, the Welsh Ministers) to consult those who are likely to be affected by them, and/or their representatives, before making any regulations. Section 21(2) of the 2013 Act requires the Welsh Ministers to publish a statement indicating the persons that they would normally expect to consult under subsection (1) and to keep the statement up to date.

5.2 A statement complying with section 21(2) of the 2013 Act is published on the Welsh Government website, and is available [here](#).

5.3 A twelve-week consultation on the draft regulations ran from 31 March 2023 to 23 June 2023. The consultation was discussed at the Firefighters’ Pension Scheme Advisory Board for Wales⁴ and was drawn to the attention of organisations representing fire and rescue services staff in Wales, and relevant scheme managers and scheme administrators. The consultation was also circulated to a forum accessible to retired firefighters.

⁴ The members of the Board are, the three Fire and Rescue Authorities in Wales; the Fire Brigades Union; the Fire Leaders’ Association; the Fire Officers’ Association; and the Fire and Rescue Services Association. The Chair is independent of all of these organisations and of the Welsh Government.

5.4 All formal Welsh Government consultations on matters relating to firefighters' pensions, including on these and other scheme regulations, are publicly available and are not limited to specific organisations. Any organisation or individual can read and respond to them if they choose; we aim to draft consultation documents in ways that are accessible to individual scheme members as well as their employers and representative bodies.

5.5 The Welsh Government received eighteen responses to the consultation. Those responses came from the three Fire and Rescue Authorities ('FRAs') in Wales, representative organisations and trade unions representing FRA staff, the Firefighters Pension Scheme Advisory Board for Wales, Heywood Pension Technologies and from ten individuals.

5.6 The replies to the consultation have been considered. There was broad agreement that the draft regulations fulfilled the requirements set out in the PSPJOA 2022; to make provision for the consequences of returning members to their legacy schemes and the choice mechanism, to ensure that the correct scheme rules apply to pension entitlements, benefits, and contributions for the remedy period. However, there were several areas of comment:

- Practical implications around the timings included in our draft regulations to allow sufficient time for FRAs to be able to process the necessary decision being made.
- Opt-in eligibility for firefighters who opted out during the remedy period but subsequently opted back in; and RDS members who would not have been automatically re-enrolled because their salary is under £10,000 per annum.
- Treatment of ill-health retirement cases that occurred during the remedy period, in particular members who should have been entitled but the case was dismissed.
- Corrections required to address anomalies in drafting.

5.7 Amendments have been made to address the issues identified, where those were not otherwise provided for in the draft regulations.

5.8 The consultation documents and a summary of the responses are available at:

[Amendments to firefighters' pension schemes in Wales 2023 | GOV.WALES](#)

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

6.1 The options available to the Deputy Minister are as follows:-

Option 1. Do Nothing – The PSPJOA 2022 provides for the retrospective reversion of eligible remedy members’ remedy period service to legacy scheme benefits on 1 October 2023. Scheme regulations must be in place on that date to address the implications of the operation of the PSPJOA 2022, and as required by the PSPJOA 2022. Failure to make these implementing Regulations would result in a breakdown in the operation of certain aspects of firefighters’ pension schemes in Wales and place the Welsh Ministers in breach of their obligations as the responsible authority for firefighters’ pension schemes in Wales.

Moreover, these Regulations, together with PSPJOA 2022, provide remediation for those individuals who were subject to the transitional provisions of the 2015 firefighters’ pension scheme, which were found by the Court of Appeal to be unlawfully discriminatory on the basis of age.

Without these Regulations, the Welsh Government would be in breach of its obligations to remedy age discrimination in public sector pension schemes. It would also mean firefighters in Wales would be in a different and worse position than firefighters (and other public sector workers in Wales) in the rest of the UK.

Option 2. Do Something – The PSPJOA 2022 and subsequent Treasury Directions were prescriptive in setting out the details that schemes would need to include in retrospective remedy regulations.

The Welsh Ministers are obliged to implement scheme rules required by the PSPJOA 2022. However, there are areas where the responsible authority has power to exercise a discretion. The Welsh Government is the responsible authority for firefighters’ pensions in Wales, so decisions about some of the details of how the remedy is implemented in regulations for those schemes are matters for the Welsh Ministers.

Introducing regulations which merely complied with the mandatory requirements of the PSPJOA 2022 and Treasury Directions would comply with the obligations placed on the Welsh Ministers. However, it would not address the implications of distinctive features of firefighters’ pension schemes, such as differences in normal pension age and contribution rates for the different schemes.

Option 3. Make the Legislation using both the prescriptive and discretionary powers in the PSPJOA 2022. These Regulations will

ensure all affected members are placed in the position that they would have been in had the discrimination not occurred. These Regulations make provision for the natural consequences of the reversion to legacy schemes.

7. Costs and benefits

Costs

- 7.1 Firefighters' pensions are funded by employer and employee contributions, plus an Annual Managed Expenditure grant from the Treasury, which is used to top-up the difference between scheme income and expenditure.
- 7.2 The remedy will lead to increased payments to members of public service pension schemes over the next 5-6 decades but it is too early to make an assessment of those overall costs. There are several costs to consider:-
- i. **Overall Scheme costs** – increased member benefits and other scheme costs will be met through the FRAs' pension accounts. Any deficit between contributions received and benefits paid out will be funded by HM Treasury via Annually Managed Expenditure. Overall though, long term costs of remedy will be considered in future scheme valuations which will impact on employer contribution rates.
 - ii. **Member costs** – any increase in employee contributions will be balanced by the benefits members will receive in retirement.
 - iii. **Employer costs** – as set out above, the cost of remedy will be reflected in future valuations of the scheme, and be reflected in employer contribution rates.
 - iv. **Administration costs** - employers are likely to have some significantly increased administration costs because of new software requirements. This would need to be incorporated into FRA budget plans.
 - v. **Compensation costs** - section 23 of the PSPJOA 2022 provides for compensation scheme arrangements, in accordance with Treasury Directions. Compensation costs associated with correction to members pension benefits, contributions and interest, overpaid tax, and for financial losses will be funded by Treasury via Annually Managed Expenditure.

Benefits

- 7.3 The main benefits of the proposed amendments are to remove the unlawful discrimination that has taken place. All eligible members will be placed back into the position that they would have been in and will receive the pension rights that they would have been entitled to, had the discrimination not occurred. Essentially, all firefighters will be treated the same. The key benefits of our proposals include:

- All firefighters who were affected by discrimination will revert to their former “legacy” schemes for the remedy period of 1 April 2015 to 31 March 2022.
- A **choice mechanism** will be available to all members who are eligible for remedy. That includes younger scheme members who were not originally protected under the 2015 scheme transitional protection arrangements and older firefighters who were protected. Eligible members will be able to choose between legacy scheme and 2015 scheme benefits for the remedy period. Members who have not yet reached retirement will not have to choose which benefits they want to receive until they retire.
- Entitled members who were granted **Ill Health Retirement** during the remedy period will be reassessed against the criteria of their legacy scheme or 2015 Scheme as the case may be, and offered an immediate choice between the entitlements that result.

Summary

- 7.4 Option 3 is the only option which fully remedies the discrimination identified and provides for the consequences of members returning to their legacy schemes.

8. Competition Assessment

- 8.1 Not applicable.

9. Post implementation review

- 9.1 This will be undertaken through the Firefighter Pension Scheme Advisory Board for Wales, at which employer and employee representatives will have the opportunity to raise issues regarding the regulations themselves and their practical implementation.