

McCloud Factsheet

HMT have produced this factsheet to summarise what is meant by the key milestones in the project plan, and the expectation of scheme input within these. This version was updated in April 2021.

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1. Primary legislation

What is the Bill?

- 1.1 The core measures of the Bill will implement the response to the McCloud judgment, and other consequential amendments to allow for the implementation of effective remedy.
- 1.2 The Bill further includes measures relevant to implementing the remedy for the Judicial Pensions Scheme and Local Government Pensions Scheme, as well as further non-pensions judicial measures.
- 1.3 **Territorial application** – The Bill will engage the LCM process in Scotland, Wales and Northern Ireland as certain areas of pensions policy and judicial policy are devolved in Scotland, Wales and Northern Ireland. LCMs will therefore be sought from the Scottish Parliament, Senedd Cymru and NI Assembly.

What parts of the McCloud reforms will be legislated for through primary legislation?

Prospective

- Close legacy schemes to future accrual on 31/3/2022
- All active members accrue service in 2015 schemes from 1/4/2022

Retrospective

- Retrospectively move all eligible members to legacy schemes for the remedy period, i.e. 1 April 2015 to 31 March 2022. The Bill will set out that this needs to happen by 1 October 2023.
- Allow schemes to offer members a choice of receiving legacy scheme benefits or reformed scheme benefits for the remedy period (the DCU).
- Immediate detriment implications
- Consultation requirements
- Disapplying consent requirement to amend reformed schemes for the purposes of the McCloud remedy
- Power to set Interest rates
- Compensation scheme to manage any financial detriments incurred by members in 2023 or at retirement.
- Occupational pension scheme framework compatibility

- Enable MHCLG Ministers to make retrospective changes to local government pensions regulations to remove the discriminatory provisions from the Local Government Pension Scheme
- Waive any ceiling breaches of the cost control mechanism that arise from the 2016 cost control valuations

What other (non-McCloud) measures are included in the Bill?

Ministry of Justice

- Alongside measures to implement remedy in the judicial pension scheme, the Bill also includes measures relating to judicial pay allowances and the mandatory retirement age of judicial office holders.

What is driving the timetable set out in the project plan?

- 1.4 Obtaining Royal Assent by early 2022 is crucial to closing the remedy window by April 2022 and allowing sufficient time for scheme regulations to be approved (for the judicial scheme via an affirmative Statutory Instrument, and through scheme regulations on the prospective elements of the reforms).
- 1.5 If the April 2022 target date is not met, long term liabilities may increase by up to £2.5bn for each additional year the remedy window is open and any consequential delay in implementing the remedy for those that have suffered discrimination.
- 1.6 Minimum timescales for passage of a Bill is around two months in each House, but in practise it can be longer than this depending on the level of scrutiny a Bill receives and other competing priorities within the wider legislative/parliamentary programme. Taking account of recesses, introduction in the second session prior to summer recess (which usually starts mid/late July) should allow sufficient time to reach our target Royal Assent dates. Introduction dates are also dependent on a wide variety of factors ranging from the readiness of our Bill to the availability of slots within the wider legislative programme, and so are not fixed.
- 1.7 Any provisions in the Bill that delegate legislative powers will be scrutinised closely by Parliament and, in particular, by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). The role of the DPRRC is to report whether the provisions of any Bill inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny. The DPRRC is seen as being very influential in shaping the view of the upper house towards a Bill's provisions and it is therefore good practise to provide draft regulations upon entering the House of Lords before the DPRRC has produced its report. Scrutiny by the DPRRC is therefore driving the timetable for draft regulations set out in the project plan.

2. Secondary legislation (scheme regulations)

What should the secondary legislation consist of?

Prospective

- 2.1 The government has already consulted on the general prospective policy principles: closing legacy schemes to future accrual after 31 March 2022, and ensuring all those in service after this date do so as members of the reformed schemes.

2.2 The Bill will implement the policy on which the government has consulted, meaning that the consultations on scheme regulations will cover the consequential amendments to ensure that the legacy and reformed scheme regulations are amended to reflect this policy, and any other consequential changes, flowing from this.

Retrospective

2.3 We expect that the Bill will set out the framework for the retrospective remedy, containing some aspects of the remedy, plus enabling powers where needed so that details can be set out in scheme regulations. Changes needed to scheme regulations to be able to implement the retrospective remedy may include:

- Implementation date for retrospective remedy, if earlier than 1 October 2023
- Some details of the 'deferred choice underpin' mechanism
- Eligibility rules to enable in-scope members to be moved back to legacy scheme
- Elements of treatment of pensioner members who elect to choose alternative benefits
- Transfers
- Voluntary member contributions
- Details on compensation and arrears.

What are the timings for these regulations?

Prospective

2.4 Amendments required as part of the prospective policy should be developed and consulted on in autumn/winter 2021, so that they can be laid after the Bill receives Royal Assent (expected in early 2022), and prospective policy therefore implemented ahead of 1 April 2022.

Retrospective

- 2.5 Schemes have longer to draft and consult on retrospective regulations than prospective regulations, as these do not need to be made in advance of April 2022.
- 2.6 Schemes will have flexibility to consult on and introduce retrospective regulations until implementation in October 2023.

What do we mean when we say publish draft regulations during passage of the Bill?

- 2.7 Draft regulations necessary to implement the prospective remedy need to be ready for Parliamentary scrutiny during passage of the Bill, and so consultations on those regulations will have to take place in advance of April 2022.
- 2.8 There will also be a need to provide Parliament with the opportunity to consider the detail of the retrospective remedy provisions, in order to articulate how the powers in the Bill will be utilised. Therefore, where possible, draft regulations for the retrospective remedy should also be provided (albeit not necessarily in their final form). Where this is not possible, detailed policy statements should be provided instead.

Why do we need to consult on secondary legislation?

- 2.9 Departments will need to consult on the secondary legislation as this is one of the duties imposed by the Bill, which will state that before making any regulations, schemes will have to consult with those likely to be affected by them. This is in line with the existing legal requirement to consult when amendments are made to scheme regulations. However, this duty can be satisfied before the coming into force of the Bill.
- 2.10 As mentioned above with regard to the general prospective policy principles, the government has already consulted on these, so consultations will only need to cover the amendments to scheme regulations that departments are proposing are needed to implement that policy.

How does secondary legislation pass?

- 2.11 **Negative procedure:** Negative Statutory Instruments (SIs) do not need active approval by Parliament. Usually negative SIs are made (signed by the minister) before being laid in Parliament. They will automatically come into effect as law unless either House stops (annuls) them within a fixed period after they have been laid - usually 40 days, excluding days when both Houses are in recess or adjourned for more than four days. The motion to annul is called a prayer motion. However, it is very rare for such a prayer to be passed. Most of the amendments to scheme regulations will be subject to the negative procedure.
- 2.12 **Affirmative procedure:** Draft affirmative SIs laid in Parliament need to be approved by Parliament before they can be made (signed into law) and brought into effect as law. Most SIs subject to this procedure must be debated and approved by both Houses. Some SIs dealing with tax or financial matters only need approval from the House of Commons. Draft affirmative SIs can be stopped if either House votes against or rejects the government's motion calling for the SI to be approved. In the House of Lords, Members may propose an amendment to the government's motion, formally stating that the House declines to approve the instrument. The amendments to the judicial scheme will be subject to the affirmative procedure.

3. Implementation

What does prospective implementation in April 2022 mean?

- 3.1 All public servants who continue in service from 1 April 2022 onwards will do so as members of their respective reformed scheme.
- 3.2 Legacy schemes will be closed in relation to service after 31 March 2022, closing the remedy period, during which members in scope have a choice of benefits.

What does retrospective implementation by October 2023 mean?

- 3.3 The primary legislation will state that retrospective changes must be introduced by 1 October 2023. Scheme regulations will be able to specify an earlier date, which will require the consent of HMT, as some schemes have indicated that they may be ready earlier than that date (e.g. from 1 April 2023).
- 3.4 From the chosen date, affected members will be treated as having accrued service in the relevant legacy schemes for the duration of the remedy period (i.e. 1 April 2015 to 31 March 2022), and will, under the deferred choice underpin, be entitled to choose whether to retain those legacy scheme benefits, or receive equivalent reformed scheme benefits, at the point when they come to take their benefits.

4. Immediate detriment

What do we mean when we reference immediate detriment cases?

- 4.1 Unprotected members of the reformed schemes who retire or die between 1 April 2015 and the coming into force of the retrospective remedy, are collectively referred to as “immediate detriment” (ID) cases. This is because they have an entitlement to be treated as a member of the legacy scheme if they have been less favourably treated as a result of the discrimination and may suffer an immediate loss if they are not treated in this way. The specific circumstances where immediate detriment may arise are:
- Ill health retirements granted under the reformed schemes
 - Ill health retirements refused under the reformed schemes which may have been granted under the legacy schemes (including those where a member has subsequently died)
 - Death in service benefits payable from the reformed schemes
 - Dependants’ benefits payable as a result of death (in service, deferment or retirement) under the reformed schemes
 - Retirements from the reformed schemes.
- 4.2 The discrimination identified by the Court of Appeal is solely between transitionally protected members (the reverse McCloud group) as compared to those unprotected members who moved to a reformed scheme on or after 1 April 2015 (the McCloud group). **Protected members of the reformed schemes (reverse McCloud group) are not therefore currently in scope of immediate detriment.**

What is the legal basis for dealing with immediate detriment cases?

- 4.3 The declarations made by the employment tribunals rely on section 61 of the Equality Act 2010 as the legal basis for treating the claimants as satisfying the relevant provisions of the pension schemes that contain transitional protection, despite those claimants being younger than the provisions allow. Section 61 operates without the need for a tribunal order, so that where unprotected members have suffered less favourable treatment, the scheme rules are modified so that members are entitled to accrue service in their relevant legacy scheme from 1 April 2015.
- 4.4 HMT are working with schemes to develop processes to give effect to this entitlement for people in the immediate detriment category before legislation where possible, but as below this raises a number of complex issues.

What are the different cohorts of immediate detriment cases?

- 4.5 There are four main cohorts of immediate detriment cases.
- “Pipeline cases”: These are cases where people retire before 31 March 2022 (i.e. the end of the remedy period) and are able to be offered the choice of legacy or reformed scheme benefits at the point of retirement.
 - “Rectification cases”: These are cases where unprotected members retired from the reformed scheme between 1 April 2015 and 31 March 2022 and were not offered a choice of legacy or reformed scheme terms at the point of retirement.
 - “Post-2022 rectifications”: These are members who retire between 1 April 2022 and the point that the DCU takes effect in their scheme. Any service after 1 April 2022 will be in the reformed scheme however the member may still have suffered immediate detriment in respect of their legacy scheme service from 2015-2022.

- Deaths: These will include deaths of members in active service, deferred members and pensioners, including those who had received payments related to serious ill health conditions or who retired due to ill health.
- 4.6 We expect pipeline cases to be more straightforward and less likely to require more detailed guidance or legislative change to process. HMT is working to resolve the remaining issues to give schemes a full understanding of the consequences of processing “pipeline” ID cases ahead of legislation being in place. Due to unique circumstances in the Firefighters and Police schemes, informal guidance to employers on pipeline cases was issued last year and an update to that guidance will be issued shortly but as that guidance acknowledges, some uncertainties do remain to be resolved.
- 4.7 Cases where an individual has already retired (rectification cases) are more complex to resolve. In particular, there are likely to be more instances where changes need to be made to existing rules, either through the legislation to enact the McCloud remedy, or through changes to the tax system through the Finance Bill, where the required changes have a more widespread impact, to prevent problematic outcomes for individuals which are inconsistent with government policy, and/or to mitigate the administrative burden involved. At present, it is not clear that cases where an individual has already retired can consistently be processed under current legislation without adverse impacts. Even for cases that do not need legislative change, schemes and in some cases individuals will require further guidance or information to be provided on how the detail of cases should be processed, and on interpretation of existing rules where these do not provide immediate clarity, given the complexity and novelty of this situation. HMT is working through these complex issues with the aim of providing clarity to schemes and stakeholders on the extent to which rectifications will or will not be able to be processed before new legislation is in place.

Interaction with legislation?

- 4.8 Section 61 of the Equality Act 2010 applies where individuals have suffered less favourable treatment and can operate to disapply discriminatory provisions in scheme regulations as they apply to that individual. This means schemes can treat people as members of the legacy scheme without any changes to scheme regulations and ahead of a declaration being made by an Employment Tribunal in respect of any claimants in that scheme. The recent Employment Appeal Tribunal judgment in *Sargeant* confirmed this position.
- 4.9 However, while Section 61 gives schemes a legal basis to treat people as members of the legacy scheme, it does not necessarily provide a basis for resolving all of the consequences that might arise from this. We are working through the full implications of this. However, in general terms HMT expects the Bill to provide powers to schemes to recognise the position of members that have had their case settled in full or part under Section 61 (whether as an immediate detriment case or by virtue of any Court order) in order to prevent double recovery. Any issues that do require legislative change will need to be addressed through the remedy legislation and, where any required changes have a more widespread impact for tax purposes, the Finance Bill.

5. Tax

What will be going into the Finance Bill?

- 5.1 As announced at the Tax Policy and Consultations Day (see 3.8 in the [published document](#)), we will be making technical updates in the Finance Bill 2021/22, which will enable a fair and administratively easier resolution to cases in which pension members face tax charges due to

retrospective changes to their pension accrual, including the discrimination in the 2015 public service pension reforms (i.e. the McCloud case).

6. Provision Definition Documents (PDDs)

What is a provision definition document?

- 6.1 The aim of a provision definition document is to provide all policy detail alongside McCloud related business rules for a respective area, and as such provide a single view that can be shared with Software developers, Administration Staff, Legal representatives, Communication leads, Trade Unions etc.
- 6.2 This differs from a 'Policy Definition Document' which would not contain the 'translation to business rules' element that a Provision Definition Document does.

What is the process for pulling these together?

- 6.3 Usually, schemes would produce PDDs individually for their own stakeholders. However, producing these documents based on a range of outputs introduces the risk that some provisions may be missed or misinterpreted.
- 6.4 Given that all schemes will need to produce something similar this risk is magnified, and the prospect of an inconsistent cross-government implementation of the McCloud ruling becomes highly likely, in addition to schemes carrying out duplicative work.
- 6.5 HMT have therefore agreed to provide oversight to this process, with schemes each leading on a number of documents, and HMT providing assurance. This will result in a final set of 'core' approved PDDs, which schemes should then add their own scheme specific detail on to.