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## The Local Government Pension Scheme (Northern Ireland)

Consultation on draft statutory guidance for the  
implementation of the McCloud Remedy in the Local  
Government Pension Scheme (Northern Ireland)

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# **Local Government Pension Scheme (Northern Ireland)**

## **Draft statutory guidance on the implementation of the McCloud Remedy**

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# 1. Introduction

## Communications

- 1.1. 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.

## Background

- 1.2. In recent years, the government has been taking steps to address unlawful age discrimination that the Court of Appeal found in the McCloud and Sargeant court cases in December 2018<sup>1</sup>. 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.
- 1.3. In July 2019, the government confirmed<sup>2</sup> that steps would be taken to address the discrimination in all schemes that provided transitional protections. This included the Local Government Pension Scheme (Northern Ireland) (LGPS (NI)). In the LGPS (NI), 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.
- 1.4. In 2023, the Department made regulations to address the McCloud age discrimination in the LGPS (NI) 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.
- 1.5. This draft statutory guidance sets out the Department's views on a number of issues related to the McCloud remedy in the LGPS (NI). It is issued to the Scheme manager, the Northern Ireland Local Government Officers'

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<sup>1</sup> *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.

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

Superannuation Committee (NILGOSC) under regulation 2(3A) of the Local Government Pension Scheme Regulations (Northern Ireland) 2014 ('the 2014 Regulations'). The Scheme manager is expected to have regard to it when exercising relevant functions.

## Purpose

1.6. In the course of the work on the LGPS (NI) McCloud remedy, a number of issues on which guidance could be helpful have been identified. In our response to our 2023 consultation<sup>3</sup>, we set out our intent to discuss these issues with a working group and to conduct a technical consultation with those affected by the draft guidance. This draft guidance is intended to support the Scheme manager in the implementation of the LGPS (NI) McCloud remedy in the following ways:

- By providing the Department's 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 (NI).
- By providing additional guidance on how certain technical issues that may arise should be approached.

## Topics

1.7. This draft guidance covers the following topics:

- Overall approach to McCloud remedy – setting out the Department's views on how the LGPS (NI) McCloud remedy should be approached in a number of key areas, including:
  - Governance
  - Data collection and verification
  - Identifying members in scope
  - Qualifying scenarios
  - Case prioritisation
- Technical matters – outlining technical issues where the Government wishes 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

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<sup>3</sup> LGPS (NI) McCloud Remedy - Synopsis of responses and Departments response (communities-ni.gov.uk) - paragraph 15 refers

- 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 the context of the LGPS (NI).

## **Definitions and using the draft guidance**

- 1.8. The LGPS (NI) McCloud remedy was implemented legislatively through the Local Government Pension Scheme (Amendment No. 2) Regulations (Northern Ireland) 2023<sup>4</sup> ('the 2023 Regulations'), which came into operation on 1 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 (Amendment and Transitional Provisions) Regulations (Northern Ireland) 2014<sup>5</sup> ('the Transitional 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<sup>6</sup> (PSPJOA), which allow for the extension of the LGPS (NI) underpin to the members affected.
- 1.9. This document provides detailed and often technical guidance on the McCloud remedy for the benefit of the Scheme manager. It is expected that readers will have a working familiarity with the LGPS (NI) 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.

## **McCloud implementation phase**

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

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<sup>4</sup> S.R. 2023 No. 149

<sup>5</sup> S.R. 2014 No. 189

<sup>6</sup> 2022 c.7

*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 consider the McCloud remedy in full, unless the Scheme manager has exercised its discretion to issue a determination that disapplies this requirement under the Local Government Pension Scheme (Amendment) Regulations (Northern Ireland) 2024 (SR 2024 No. 159) for a member or group of members in relation to 2024/25 annual benefit statements.*

*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 the Scheme manager to determine that the McCloud remedy does not need to be reflected in the ABS of a specific member or group of members 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 2014 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. Where 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 the Scheme manager 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 to whom the ABS legislation applies.*

## Potential loss and contingent decisions

- 1.11. In the course of the Department's work on the LGPS (NI) McCloud remedy we have sought to ensure that LGPS (NI) 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 the Department understands there may be rare circumstances where it is theoretically possible for a loss to have occurred (either due to a contingent decision or otherwise), the Department is of the view that, for the vast majority of LGPS (NI) members, the LGPS (NI) McCloud remedy can only lead to improvements in a member's rights or Scheme benefits.
- 1.12. If the Scheme manager 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 Department, provided the situation cannot be resolved by using the powers to pay direct or indirect compensation (see section 11 on compensation).

## Consultation

- 1.13. Discussions on the content of this draft guidance were held with a working group chaired by the Department of Levelling up, Housing and Communities (DLUHC) and comprised of LGPS stakeholders from across the UK, including the representatives from both the Department for Communities (the Department) and the LGPS (NI) Scheme manager (the Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC)).
- 1.14. A consultation on this draft guidance is underway. This consultation seeks the views of the members of the LGPS (NI) Scheme advisory board, LGPS (NI) Scheme manager (NILGOSC), and LGPS (NI) employer and member representatives.

## **Disclaimer**

- 1.15. Nothing in this draft guidance should be taken to modify, take precedence over or otherwise override any regulations or directions made prior to this guidance being issued.

## **Acknowledgement**

- 1.16. This draft statutory guidance is based on equivalent statutory guidance issued by the Department for Levelling up, Housing and Communities (DLUHC) issued on 14 June 2024. The Department acknowledges the collaborative approach adopted by DLUHC in the development of this guidance. Thanks to colleagues in DLUHC for chairing the statutory guidance working group which developed this guidance and all those who participated in and contributed to the working group. The Department also acknowledges and thanks, the Scheme manager (NILGOSC) for participating in the working group and contributing to the development of the guidance.



## 2. Governance

- 2.1. The Department first consulted on the McCloud remedy 2020/2021 and therefore recognises that the Scheme manager has been working at a local level on the governance and administration of the remedy for some considerable time. This draft guidance is intended to build on and support the Scheme manager's plans.
- 2.2. 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 being done collecting data and putting in place systems to manage the administrative task. Recognising this, it is important that those responsible for decision making for LGPS (NI) fund ensure sufficient resourcing plans are in place to enable the Scheme manager to undertake the requirements of the remedy efficiently and effectively. Administration costs relating to the McCloud remedy can be met from the pension fund.
- 2.3. The Scheme manager should engage with and report progress on implementation of the McCloud remedy to the pension board on a regular basis during the McCloud implementation phase. Regular reporting will enable monitoring of progress and enable the pension board to measure and assess both resourcing and progress.
- 2.4. Where the Scheme manager plans to deviate significantly from this draft statutory guidance, this should be discussed with the pension board and agreement should be obtained. The reasons for the decision should be recorded in the pension board minutes.

### **3. Data collection and verification**

- 3.1. As the McCloud discrimination affects LGPS (NI) members' pension rights retrospectively, a major challenge of implementing the remedy contained in the 2023 Regulations is ensuring that the Scheme manager has the information it needs to calculate the value of the underpin over the underpin period, which ran from 1 April 2015 to 31 March 2022 at the latest.
- 3.2. Under the career average 2015 Scheme, the LGPS (NI) Scheme manager does not need to hold some of the information that was needed under the final salary 2009 Scheme to be able to accurately calculate a member's pension rights – for example, members' hours history and dates of service breaks. Some Scheme managers therefore took the decision that, from the introduction of the 2014 Scheme on 1 April 2014 in the LGPS (England and Wales) and on the equivalent 2015 Scheme on 1 April 2015 in the LGPS (NI), they would not request this information from their Scheme employers for members who did not have underpin protection.
- 3.3. With the retrospective application of underpin protection to the large group of members who were affected by the McCloud discrimination, it is necessary for Scheme managers 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 1 April 2015.
- 3.4. This aspect of the McCloud project has been recognised for a number of years and, in 2022, the Scheme Advisory Board in England and Wales established a working group of LGPS stakeholders to consider how LGPS Scheme managers should approach this. At its meeting on 9 March 2023, the LGPS (NI) Advisory Board considered the recommendation that this guidance is adopted by the Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC) in its preparation for the McCloud remedy. The adoption of this guidance was approved and it issued to NILGOSC on 27 April 2023. We anticipate that the LGPS (NI) Scheme manager will already be familiar with the content of this advice. Nonetheless, we recommend that the Scheme manager should consider following that guidance during the McCloud implementation phase. Where it is decided to take a different approach than that recommended in that guidance this should be carefully considered with the reasons recorded.

## 4. Identifying members in scope

- 4.1. For many LGPS (NI) members, it will be possible for the Scheme manager to identify if they qualify for underpin protection based on the records held by it on its systems.
- 4.2. However, for a significant proportion of members, it will not be possible for the Scheme manager to do this. This is for two main reasons:

### Membership on or before 31 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 31 March 2012<sup>7</sup>. Under the 2023 Regulations, there is no requirement for that service to have been transferred to a member's LGPS (NI) fund for the member to qualify for the underpin. So, a member may have pre-1 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 the Scheme manager.

### 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 Schemes<sup>8</sup>.

- Broadly<sup>9</sup>, if a member had a disqualifying gap in service between the membership which included pensionable service on or before 31 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 accrued underpin protection, if they rejoin the LGPS (NI) and aggregate their

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<sup>7</sup> S.77(5) of the PSPJOA

<sup>8</sup> 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.

<sup>9</sup> 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.

underpin protected membership, their provisional underpin figures will be extinguished and they will not have further underpin calculations relating to that service.

- 4.3. The below table sets out an approach that we recommend the Scheme manager follow during the McCloud implementation phase to identify which 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.
- 4.4. 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 (making use of the guidance on McCloud data collection and verification).
2	Identify which of your members <sup>10</sup> qualify for underpin protection based on the pensionable service history held on your system – i.e. the following criteria are met: <ul style="list-style-type: none"> <li>a. they have pre-2009 Scheme normal pension age (NPA) membership in the underpin period,</li> <li>b. they had LGPS membership prior to 1 April 2012 or had pre-1 April 2012 public service pension scheme (PSPS) membership (whether or not the previous service was aggregated or transferred<sup>11</sup>), and</li> <li>c. they do not have a disqualifying gap in service after the membership referred to in sub-paragraph b.</li> </ul>
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 April 2012.

<sup>10</sup>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.

<sup>11</sup> If the service is held in another PSPS or LGPS fund and was not transferred/ aggregated, you will need to contact the other Scheme manager to verify the service and ensure there has not been a disqualifying gap.

4	<p>Of the remainder of your members with pre-2009 Scheme NPA membership in the underpin period, use the LGPS Database<sup>12</sup>, where access to it is available, to assist in identifying which may also qualify as:</p> <p style="padding-left: 40px;">a. they have membership in the LGPS prior to 1 April 2012, and</p> <p style="padding-left: 40px;">b. they do not have a disqualifying gap in service after the membership referred to in sub-paragraph a.</p> <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. The Scheme manager should take a cautious approach in using this information and should contact the other Scheme manager 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> <p style="padding-left: 40px;">a. they have membership in the LGPS or another public service pension Scheme prior to 1 April 2012, and</p> <p style="padding-left: 40px;">b. they do not have a disqualifying gap in service after the membership referred to in sub-paragraph a.</p> <p>Where prior membership is identified which meets these criteria, verify this service. This should be done by contacting the relevant LGPS Scheme manager or PSPS.</p>

### **Recording members in scope**

4.5. 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.

4.6. The McCloud indicator should record whether a member:

- qualifies for underpin protection,

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<sup>12</sup> The LGPS National Insurance Database operated and maintained by the Local Government Association (England and Wales).

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

4.7. The Scheme manager 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.

### **New starters**

4.8. 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 1 April 2014 to 31 March 2022 from another LGPS fund or from another public service pension scheme in England and Wales, it will be necessary to determine if they qualify for underpin protection in relation to the transferred service. In Northern Ireland, this period runs from 1 April 2015 to 31 March 2022 due to the later introduction of the reformed public service pension Schemes on 1 April 2015. 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, the Scheme manager 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'.

### **After McCloud implementation phase**

4.9. At the conclusion of the McCloud implementation phase, the Scheme manager 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.

### **At retirement/ benefit crystallisation**

4.10. See paragraph 5.18 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

- 5.1. Section 77 of the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) sets out the conditions that must be met for a member to have remediable service in the LGPS (NI). These conditions form the main qualifying criteria for a member to have underpin protection in the LGPS (NI) and are therefore an important foundation of the remedy being implemented by the Scheme manager.
- 5.2. The Department has 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.

### Deferred refunds

- 5.3. In the LGPS(NI), members who leave the Scheme with less than two years' qualifying service<sup>13</sup> 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 legislation<sup>14</sup> and is a common feature of major public service pension schemes.
- 5.4. Prior to April 2015, only members who left the Scheme with less than three months' qualifying service were entitled to a refund of their contributions<sup>15</sup>. If they had longer service, they would leave the Scheme with a deferred or immediate entitlement to a pension.
- 5.5. 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 Scheme<sup>16</sup>. For example, if a member with a deferred refund account dies before that

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<sup>13</sup> As determined under regulation 3(5) of the 2014 Regulations

<sup>14</sup> Chapter 2 of Part 4ZA of the Pension Schemes Act (NI)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

<sup>15</sup> Regulation 41 of the Local Government Pension Scheme (Administration) Regulations (NI) 2009

<sup>16</sup> 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 108 of the 2014 Regulations which confirms that, where a member has a statutory right to a transfer under Chapters 1 or 2 of Part 4ZA of the Pension Schemes Act (NI) 1993, they can apply for such a transfer to be made.



refund can be paid, no death grant would be payable and their survivors would not be entitled to survivor benefits from the Scheme.

5.6. In the Department's view, a deferred refund does not constitute pensionable service for the purposes of the conditions in section 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 section 110(1) of the PSPJOA.

5.7. 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 31 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.

5.8. 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.

5.9. 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.

5.10. However, if the refund service mentioned in paragraph 5.9 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 Chapter 1 / judicial / local government legacy Scheme’ because the refund service was transferred or aggregated into a new Scheme.

### **Deferred benefits**

5.11. 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. The Department’s 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.

5.12. 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 31 March 2012), the transfer of a defined benefit including service on or before 31 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.

5.13. An example of how the situation in paragraph 5.12(b) could occur is set out below:

<b>Membership</b>	<b>Scheme</b>	<b>Dates</b>	<b>Status</b>
A	NHS Pension Scheme	01/04/2008 to 31/03/2011	Held as a deferred benefit in the NHS Pension Scheme
B	LGPS Scotland fund	01/04/2013 to 31/03/2016	Held as a deferred benefit in LGPS Scotland fund
C	LGPS (NI)	01/04/2017 to 31/03/2020	Held as a deferred benefit in the LGPS (NI) fund

5.14. In this example, the member initially qualifies for LGPS (NI) 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.

## **Impacts**

5.15. 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 Local Government Pension Scheme (Amendment No. 2) Regulations (Northern Ireland) 2023 ('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 section 77. This could arise in the situation highlighted in paragraphs 5.12(b) and 5.13.

5.16. 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.

5.17. These situations raise a number of challenges and the Department's 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.

- 5.18. To ensure members receive the correct pension, it will also be necessary for the Scheme manager 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 Scheme managers of other LGPS funds or PSPSs to check the status of other records that are held. This will not be necessary for all Scheme members – only those where the Scheme manager 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.
- 5.19. At the end of the McCloud implementation phase, the Scheme manager 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, the Scheme manager 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, Scheme managers 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.
- 5.20. 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 recalculated. 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

- 6.1. During the Department’s work on the McCloud remedy in the LGPS (NI) an important consideration was the prioritisation of cases affected by the McCloud remedy because a wide variety of cases will need to be dealt with.
- 6.2. This section summarises the Department’s views on this. A prior version of this guidance was issued as a separate note and circulated to the Scheme manager on 12 October 2023.
- 6.3. The Department’s view is that McCloud cases should generally be approached in the following order.

Group 1	<p><b>New final underpin dates and deaths</b></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 1 October 2023, or otherwise has their final underpin date under regulation 4H of the LGPS (Amendment and Transitional Provisions) Regulations (NI) 2014 (“the Transitional Regulations”), that the pension calculations undertaken by their Scheme manager 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"><li>• Deaths on or after 1 October 2023 of eligible members.</li><li>• Trivial commutations calculated on or after 1 October 2023, where the final underpin date or date of member’s death was before that date.</li></ul> <p>Prioritising these cases will prevent the need for the Scheme manager 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 operation 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, the Scheme manager 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><b>Cases falling under Part 3 of the 2023 Regulations</b></p> <p>The LGPS (NI) McCloud remedy has retrospective effect to 1 April 2015 and, for many eligible members, the underpin date or the final underpin date set out in the Transitional 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 1 October 2023.</p> <p>For these cases, the Scheme manager 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"> <li>• 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 Transitional Regulations has already taken place for the eligible member before 1 October 2023, or that the member has died before that date.</li> <li>• In these cases, the pension a member or survivor receives each month may not be accurate and it is important that Scheme manager 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.</li> <li>• These cases fall under regulations 5 and 8 of Part 3 of the 2023 Regulations.</li> </ul> <p>b) <u>Cases where payments have been made in the past but there is no ongoing liability</u></p>

- These are cases where a member has had their final underpin date under regulation 4H before 1 October 2023, or has died, but the liability for the pension rights has otherwise been fully discharged by the Scheme manager. Cases in this group include:
    - 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:
      - 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 the Scheme manager should make efforts to consider these cases promptly so that any underpayments can be rectified. In approaching group 2b cases, the Scheme manager 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.
- c) Cases where a member's underpin date has taken place before or after 1 October 2023, but not their final underpin date
1. These are cases where an eligible member has had their underpin date under regulation 4G of the Transitional 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.

	<p>2. For the purposes of this note, this group includes both:</p> <ul style="list-style-type: none"> <li>○ eligible members who had their underpin date before 1 October 2023, and</li> <li>○ eligible members who have their underpin date on or after 1 October 2023 but before the conclusion of the remedy project.</li> </ul> <p>3. There will not have been any incorrect payments made for members in this group, but it will be possible for the Scheme manager 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.</p> <p>4. Cases where a member’s underpin date was before 1 October 2023 fall under regulation 13 of Part 3 of the 2023 Regulations.</p>
Group 3	<p><b>All other cases</b></p> <ul style="list-style-type: none"> <li>• Eligible members who do not fall within group 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.</li> <li>• Members in this group will be of lower priority than members in group 1 and group 2. However, it is important that the Scheme manager 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.</li> <li>• 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 draft guidance on those groups.</li> </ul>

### Software systems

- 6.4. Scheme managers 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 the Scheme manager to progress cases and, potentially, to follow the prioritisation approach outlined above.

- 6.5. Where software is not available to progress a case or cases, where possible the Scheme manager 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. The Scheme manager 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.
- 6.6. Where software development is taking place, software providers should be communicating regularly with their Scheme manager clients on their development work, and on when they can expect updates to systems to be made. This information will help the Scheme manager to communicate with members affected, where necessary.

### **Analysis**

- 6.7. Within each group, the Scheme manager 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.

### **Timings**

- 6.8. For all eligible members, remedy work should be concluded by the end of the McCloud implementation phase, in time for the despatch of the 2024/25 annual benefit statements, which will be required to include McCloud remedy details, unless the Scheme manager has determined that this is not possible for a member or group of members, under its discretionary power contained in the Local Government Pension Scheme (Amendment) Regulations (NI) 2024 (SR 2024 No. 159).

### **General comments on prioritisation approach**

- 6.9. 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 the Scheme manager and the administration of the McCloud remedy, which is complex and varied, should be approached flexibly. There may be circumstances where the Scheme

manager feels it is right to deviate from the approach outlined above<sup>17</sup> – 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 the Scheme manager 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.

- 6.10. 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 the Scheme manager does not have all the information to progress a case at the same time as the other cases in that group. Overall, where the Scheme manager does take a different approach to that we have outlined here, they should consider this decision carefully, and review that decision at appropriate intervals.
- 6.11. 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 the LGPS (NI) 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.
- 6.12. We expect that the Scheme manager 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.

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<sup>17</sup> As per paragraph 2.4, any significant deviations from this draft guidance should be recorded.

## 7. Transfers – issues regarding retrospection

7.1. 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 (NI). For these members, the retrospective application of the 2023 Regulations to their pension may mean that the original transfer paid out of the LGPS (NI) 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 followed<sup>18</sup>. LGPS (NI) 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 (NI) Scheme manager 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.

7.2. The Department 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. The Department will amend the LGPS (NI) Regulations to align with the Club memorandum.

7.3. 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).

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<sup>18</sup> 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.

## **Cases where the full difference cannot be paid to the receiving scheme for the benefit of the member**

- 7.4. 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.
  - 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 Scheme manager that a further payment is due in respect of the member's rights under regulations 4A to 4T of the Transitional Regulations.
- 7.5. Where a Scheme manager identifies a situation where it appears that a member may be prevented from receiving the full benefit of a payment under regulation 10, the Scheme manager 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.
- 7.6. We consider that direct compensation would potentially be applicable under the PSPJOA and the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions (Northern Ireland) 2023<sup>19</sup> ('the 2023 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 section 82(3) of the PSPJOA (see the compensation section of this draft guidance for more details).
- 7.7. However, the following points should also be noted when considering compensation for these cases:

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<sup>19</sup> as amended by the Public Service Pensions (Exercise of Powers, Compensation and Information) (Amendment) Directions (Northern Ireland) 2024

- 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 Scheme manager to take, following consideration of an application, and
- the 2023 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.

### **The transfer advice threshold**

- 7.8. Since reforms to pensions access options were made in 2015, when certain conditions are met there has been a requirement for LGPS (NI) members to obtain appropriate independent advice before transferring their pension rights to schemes that offer flexible benefits<sup>20</sup>. Where a member's LGPS (NI) rights that are being transferred are valued at £30,000 or less, the requirement to take advice does not apply.
- 7.9. 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 benefits are over the £30,000 threshold. It has been queried what steps should be taken by the Scheme manager if this situation arises.
- 7.10. The Department believes 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 (NI) 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.
- 7.11. However, we agree that it is possible that a small number of cases may arise. In such cases, we consider that the Scheme manager should continue to make the payment required under regulation 10. We do not believe there is a legal impediment to the Scheme manager doing this, as

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<sup>20</sup> 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>

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 (NI) benefits in their new Scheme.

## 8. Multiple sets of underpin figures

- 8.1. 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.
- 8.2. 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:

### **Re-joiners after 2009 Scheme normal pension age (NPA)**

- 8.3. 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.
- 8.4. If a member re-joins the LGPS (NI) (post 3) after their 2009 Scheme normal pension age (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.
- 8.5. If the member had re-joined the LGPS (NI) 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 4Q(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.

- 8.6. For post-2009 Scheme NPA re-joiners, the Department's 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.
- 8.7. **Annex A** contains an example which demonstrates why we believe option B is the right approach.

### **Flexible retirement**

- 8.8. 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 1 April 2015 and 31 March 2022.
- 8.9. The section of the LGA guide<sup>21</sup> 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.

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<sup>21</sup> See <https://lgpsregs.org/resources/guidesetc.php>



## 9. Unpaid additional pension contributions

- 9.1. The calculations of a member's provisional assumed benefits and provisional underpin amount under regulations 4I and 4J of the Transitional 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.
- 9.2. 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 18 of the 2014 Regulations, the period of absence is to be included in a member's provisional assumed benefits and their provisional underpin amount<sup>22</sup>.
- 9.3. Where a member fails to pay all of the additional contributions due after making such an election, the regulations provide<sup>23</sup> 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.
- 9.4. In this scenario, the Department's 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 18 is not allocated to particular periods. Instead, the total pension lost is calculated and the member pays contributions to cover that period.
- 9.5. An example is contained in annex A.

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<sup>22</sup> 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.

<sup>23</sup> 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).

## 10. Deaths of beneficiaries before payments made

10.1. Across the LGPS (NI), 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 person's personal representatives without undue delay.

10.2. 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.

10.3. 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 Scheme manager. In the Department's 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.

10.4. 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 Scheme manager should consider if direct compensation under section 82 of the PSPJOA may be appropriate<sup>24</sup> 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.

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<sup>24</sup> In these circumstances, the loss may amount to direct financial loss arising from a relevant breach of a non-discrimination rule.

## 11. Compensation

11.1. 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.

11.2. In our response to our 2023 consultation, we set out our intent to conduct a technical consultation with those affected by this draft guidance. This draft guidance includes support on McCloud compensation provisions. These provisions are an entirely new feature of the LGPS (NI) and many of the rules governing compensation are contained outside the LGPS (NI) regulations themselves.

11.3. Whilst we believe the circumstances where McCloud compensation needs to be paid in an LGPS (NI) 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.

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

11.5. The Department does not consider that it would be appropriate to give guidance on direction 33. Direction 33 covers a number of important parts of the framework within which compensation decisions must be taken. Many are legal principles which will need to be considered for each case individually. Where necessary, the Scheme manager may wish to take legal advice on how to apply the requirements in direction 33 to any particular compensation application.

### **Legal framework**

11.6. The following paragraphs describe the legal framework that applies to McCloud compensation.

11.7. The PSPJOA provides for the following:

- **Section 82 (Power to pay compensation)** – gives the Scheme manager the power to pay compensation in respect of certain losses, defined as being ‘compensatable losses’. In this draft 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) (Department of Finance (DoF) directions)** – requires that the powers in section 82 and 83 must be exercised in line with DoF directions.

11.8. In February 2023, under section 85 of the PSPJOA, DoF issued the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions (Northern Ireland) 2023<sup>25</sup> (‘the 2023 Directions’). As well as other matters, these directions set out how the powers to issue compensation in the LGPS (NI) must be exercised.

11.9. The 2023 Directions provide the following:

- **Direction 33 (Power to pay compensation)** – sets out a number of matters that must be taken into account by Scheme managers 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 Scheme manager to be made before direct or indirect compensation can be paid. Also sets out certain information that must be included in an application.

11.10. The 2023 Regulations provide for the LGPS(NI) McCloud remedy. In respect of compensation, they provide for the following:

- **New Regulation 4Q (Payment of indirect compensation) inserted into the Transitional Regulations** – this regulation provides that the

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<sup>25</sup> [Public service pensions policy and legislation | Department of Finance \(finance-ni.gov.uk\)](#)

Scheme manager 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 Transitional 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 Transitional Regulations** – Confirms that any direct or indirect compensation paid to a person may be paid from the pension fund.

## Amounts

11.11. Where the Scheme manager 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 Department's view is that compensation should be set at a rate sufficient to ensure any compensatable loss has been addressed but that the member does not gain a financial advantage beyond that.

11.12. Where a case would otherwise meet the conditions for compensation to apply, but the potential compensation would be very small, the Scheme manager 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, the Scheme manager 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)).

## Summaries

11.13. **Annex B** contains summaries of the rules governing direct and indirect McCloud compensation in the LGPS (NI) and the conditions that must be met for compensation to be possible.

## Examples

11.14. As noted, we anticipate cases of compensation to be rare in the LGPS(NI), 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 (NI) could arise. Examples of some of these circumstances are provided in **annex C**.

## **Application and other procedural requirements**

11.15. In line with the approach contained in direction 42 of the 2023 Directions, regulation 4R of the Transitional 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 Scheme manager (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 2023 Directions, the application must also include certain information to verify the amount of compensation being claimed (regulation 4R(2)).

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

- Information - Where the Scheme manager receives an application for direct or indirect compensation to a person and has determined how much (if any) is due, the Scheme manager 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 Scheme manager 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)).

## Other points

11.17. The Scheme manager should also be aware of the following points concerning compensation:

- Valuations – By virtue of regulation 68(6A) and 70(2ZA) of the 2014 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 Transitional Regulations, the costs of direct and indirect compensation payments should be met from the Scheme manager's pension fund.

## Annex A – Worked examples

### Multiple sets of underpin figures

Regarding the issue discussed in paragraphs 8.1 to 8.7, the below simplified<sup>26</sup> example illustrates why we believe option B is more appropriate.

#### Post 1: Full Time Equivalent (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.

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<sup>26</sup>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.



## Unpaid APCs

Regarding the issue discussed in paragraphs 9.1 to 9.5, the below example illustrates the approach which we believe should be adopted.

- A member is absent from work with permission from 1 January 2022 to 29 June 2022 (180 days), with the period from 1 January 2022 to 31 March 2022 (90 days) being in the underpin period.
- Upon returning to work, the member elects under regulation 18 of the 2014 Regulations 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 2023 Directions and the LGPS (NI) regulations, the below tables set out the main points concerning direct and indirect compensation in the LGPS (NI).

### Direct compensation

Element	Description	Legal references
Form	Cash payment	S.82(1)
Decision maker	Scheme manager, following receipt of an application	S.82(1)  Direction 42  Regulation 4R(1) and (3) of the Transitional Regulations
Purpose	To cover certain losses arising from: <ul style="list-style-type: none"> <li>• Relevant breaches of a non-discrimination rule</li> <li>• 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).</li> </ul> <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 <sup>27</sup> , 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"> <li>• A breach of a non-discrimination rule means a rule that was at any time included in a local</li> </ul>	S.82(3) to (5)  Directions 33 and 34

<sup>27</sup> Even where direct compensation is legally permissible, the Scheme manager is not required to pay compensation to a member.

	<p>government pension scheme by virtue of paragraph 2 of Schedule 1 to Employment Equality (Age) Regulations (Northern Ireland) 2006<sup>28</sup></p> <ul style="list-style-type: none"> <li>• In this context, a breach is 'relevant' if the breach arose from the application of Scheme regulations made before 1 April 2022 which allowed benefits to be payable as final salary benefits.</li> </ul> <p>2) The loss arising from a relevant breach of a non-discrimination rule must be</p> <ul style="list-style-type: none"> <li>• a direct financial loss, or</li> <li>• a 'specified Part 4 tax loss'. A specified Part 4 tax loss is a tax loss that satisfies the requirements of direction 34(4).</li> </ul> <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 Scheme manager, and which includes the information specified in regulation 4R of the Transitional Regulations.</p> <p>4) The Scheme manager must have satisfied itself that the requirements contained in direction 33 of the 2023 Directions are met in relation to the case before making their decision.</p> <p><u>Losses arising from the application of the LGPS (NI) 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 (NI) 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>	
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<sup>28</sup> Paragraph 2 of Schedule 1 to Employment Equality (Age) Regulations (Northern Ireland) 2006 includes the requirement that occupational pension Schemes must be taken to include a non-discrimination rule.

	<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 Scheme manager, and which includes the information specified in regulation 4R of the Transitional Regulations.</p> <p>4) The Scheme manager must have satisfied itself that the requirements contained in direction 33 of the 2023 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> <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>  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 Order 42, rule 9(2) of the Rules of the Court of Judicature (Northern Ireland) 1980.</p> <p>Period - Interest must be paid from the date direct financial loss occurred to the date of payment.</p>	<p>Direction 38(1)</p> <p>Direction 38(2), (4), 39(1)</p>

### Indirect compensation

Element	Description	Legal references
Form	Additional benefits under the LGPS (NI), to be determined after taking actuarial advice.	<p>S.83(1)</p> <p>Regulation 4Q(1) and (3) of the Transitional Regulations</p>

Decision maker	Scheme manager, 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 permissible<sup>29</sup>, 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"> <li>• a relevant breach of a non-discrimination rule<sup>30</sup>, or</li> <li>• 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 (NI) McCloud remedy).</li> </ul> <p>2) The loss must be a specified Part 4 tax loss that satisfies the requirements of direction 36(3).</p> <p>3) The member must have made an application for compensation, in such form and manner as specified by the Scheme manager, and which includes the information specified in regulation 4R of the Transitional Regulations.</p> <p>4) The Scheme manager must have satisfied itself that the requirements contained in direction 33 of the 2023 Directions are met in relation to the case before making their decision.</p> <p>5) The Scheme manager must have obtained actuarial advice before determining what additional benefit to pay to the member.</p>	<p>Directions 33 and 36</p> <p>Regulation 4R of the Transitional Regulations</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>	Regulation 4T of the Transitional Regulations

<sup>29</sup> Even where indirect compensation is legally permissible, the Scheme manager is not required to pay compensation to a member.

<sup>30</sup> See direct compensation table for the meaning of a relevant breach of a non-discrimination rule.

	<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 14 of the 2023 Regulations</p>
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## Annex C– Compensation examples

This annex contains examples of situations where we believe a compensatable loss in the LGPS (NI) 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:

<b>Type of loss</b>	<b>Example</b>
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 7.4 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' –</p>

	this applies to the tax years 2014/15 to 2018/19. HMRC will refund overpaid tax for later years.
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In respect of indirect compensation:

<b>Type of loss</b>	<b>Example</b>
<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>



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