

## The McCloud case Q&A for administering authorities

This Q&A outlines the potential timescales and possible outcomes of the McCloud case and its impact on the cost cap process. Throughout it will refer to the 'cost cap' which is the Government's Employer Cost Cap process as required under the Public Service Pensions Act 2013. There are also references to the SAB cost management process which is both separate and additional to the cost cap. Further information on both these processes can be found back on the [Cost management page](#) of this site.

**At the end there is a question for administering authorities regarding the approach to the 2019 valuation. Please consider your view on this important matter and send your response to [robert.holloway@local.gov.uk](mailto:robert.holloway@local.gov.uk) by Friday 1st March 2019.**

### What is the McCloud case?

The case concerns the transitional protections given to scheme members, who in 2012 were within 10 years of their normal retirement age, in the judges and firefighters schemes as part of public service pensions reform. Tapered protections were provided for those 3-4 years younger. On 20th December 2018 the Court of Appeal found that these protections were unlawful on the grounds of age discrimination and could not be justified.

### What are the potential implications of the case?

If the protections are unlawful then those members who are found to have been discriminated against will need to be offered appropriate remedies to ensure they are placed in an equivalent position to the protected members. Such remedies will need to be 'upwards' - that is the benefits of unprotected members will need to be raised rather than the benefits of protected members being reduced.

### If the case is about the judges and firefighters schemes why could it apply to all public service schemes?

Protections were applied to all members within 10 years of retirement in all public service schemes, with the form that protection took varying from scheme to scheme. Although the case only relates directly to two schemes it is anticipated that the principles of the outcome could be accepted as applying to all public service schemes.

### Will there be a further appeal?

The Government has applied to the Supreme Court for permission to appeal. Normally a decision on whether to grant permission is received within 3 months of the application, so by mid-April 2019.

### Why has the cost cap process been paused due to McCloud?

Should the finding of the Court of Appeal stand then significant changes to public service schemes may be required. Depending on extent and cost of these changes there could be a material impact on the outcome of the cost cap process.

### What happens if the application to the Supreme Court is refused?

In this case the matter would be referred back to the Employment Tribunal for a remedy hearing. This would normally involve the submission of detailed evidence and could take 12 months or longer to reach a hearing. Once a Tribunal makes a finding on remedy, compensation will be awarded and the schemes amended as appropriate. Alternatively the parties might agree a remedy prior to any hearing and in any event we expect that the cost cap process will be re-run taking into account the remedy and any scheme amendments.

### If the application for permission to appeal to the Supreme Court is successful when would a hearing be held?

In normal circumstances this would not be before the end of 2019. It is hoped given the implications of the case that an earlier hearing could be arranged. However, the hearing date is at the discretion of the Supreme Court and will depend on matters such as the priority it attaches to the case, the Court's workload and the current cases timetable.

#### **What happens if the Supreme Court upholds the findings of the Court of Appeal?**

As with a rejection of the application for a hearing, the matter would be referred back to the Employment Tribunal for a remedy hearing. This would normally involve the submission of detailed evidence and could take 12 months or longer to reach a hearing. Once a Tribunal makes a finding on remedy, compensation will be awarded and the schemes amended as appropriate. Alternatively the parties might agree a remedy prior to any hearing and in any event we expect that the cost cap process will be re-run taking into account the remedy and any scheme amendments.

#### **What happens if the Supreme Court overturns the Court of Appeal judgment?**

In this case we would expect the cost cap process to restart and result in a similar outcome to those at present.

#### **When would any changes to schemes be effective from?**

In the case of remedies, if the Court of Appeal judgement stands, these could be backdated to the commencement of existing protections in April 2015 (2014 for LGPS). For cost cap changes the Government has stated its intention to apply these from April 2019.

#### **What LGPS protections could be in scope for McCloud?**

Unlike other public service schemes the LGPS moved all members into the CARE scheme whatever their age. However those active members who were within 10 years of their 2008 scheme normal pension age on 31st March 2012 were protected via the statutory underpin. Protected members who meet the criteria for the underpin to apply, will receive the better of their CARE pension or one calculated under 2008 scheme rules.

#### **What remedy could the Employment Tribunal process result in for the LGPS?**

The remedy either agreed prior to or by the Employment Tribunal is designed to compensate those members found to have been discriminated against and may or may not be exactly in line with the benefits of protected members. It would therefore be premature to speculate on the form any remedy might take should the Court of Appeal judgement stand.

#### **Would the SAB cost management process still run in the LGPS?**

Yes in any outcome, it is the intention that the SAB cost management process (taking into account any remedies as a result of McCloud) would still run prior to the completion of the cost cap. At this point the SAB may choose to resubmit the existing proposals or review the package taking into account the cost of any remedy and the impact of backdating.

#### **Will benefit changes have to be backdated to April 2019?**

The SAB is committed to bring forward improvements to benefits costed on the assumption of an April 2019 effective date. However it is concerned about the confusion amongst scheme members which may be caused by the backdating of benefit changes over a potentially significant period and in particular the impact on those who will have left the scheme, voluntarily or otherwise, after April 2019 and prior to the implementation of any scheme changes. The SAB is also acutely aware of the enormous challenge that would be faced by administering authorities and employers in potentially backdating scheme changes over such a significant period. It is therefore currently exploring legal and actuarial options to mitigate these challenges while meeting its obligation to bring forward changes that reflect in full the cost of benefit improvements from April 2019.

#### **Will any benefit changes from McCloud be taken into account in the 2019 LGPS valuations?**

That will depend on when the timing of the various potential outcomes and the availability of a confirmed set of changes. Although such changes could potentially be taken account of up to March 2020, realistically October 2019 is the cut-off date given the need for employers to set budgets for 2020-21. If the changes cannot be accounted for in the 2019 valuations, then depending on their extent and cost, an interim valuation may be needed to reset employer contribution certificates.

### **Question for LGPS administering authorities**

With regards to the 2019 valuations would you prefer:-

A) To receive guidance from the SAB designed to promote a consistency of approach on how McCloud and/or cost management should be taken account of as part of the 2019 triennial valuation exercise. Such guidance would take the form that;

- i. If there is no finalised outcome on McCloud/Cost cap (including a commitment by government to detailed benefit changes) by 31st August 2019 then the scheme benefit design used in the valuation should be as set out in current regulations.
- ii. Each administering authority would then, with their Actuary, consider how they approach (and reflect in their FSS) the risk around this matter in the same way as they would for other financial, employer and demographic risks.
- iii. Once the outcome of McCloud is known and appropriate benefit changes are made administering authorities would, if they deem appropriate, re-visit employer contributions under such guidance or provision in regulation as may be available at that time.
- iv. A consistent approach to delaying or method of estimating exit credits and payments

Or

B) To have no central guidance and instead leave it to each administering authority to determine their own approach to their valuation (including any potential cost from McCloud or cost cap) taking advice from their actuarial adviser.