



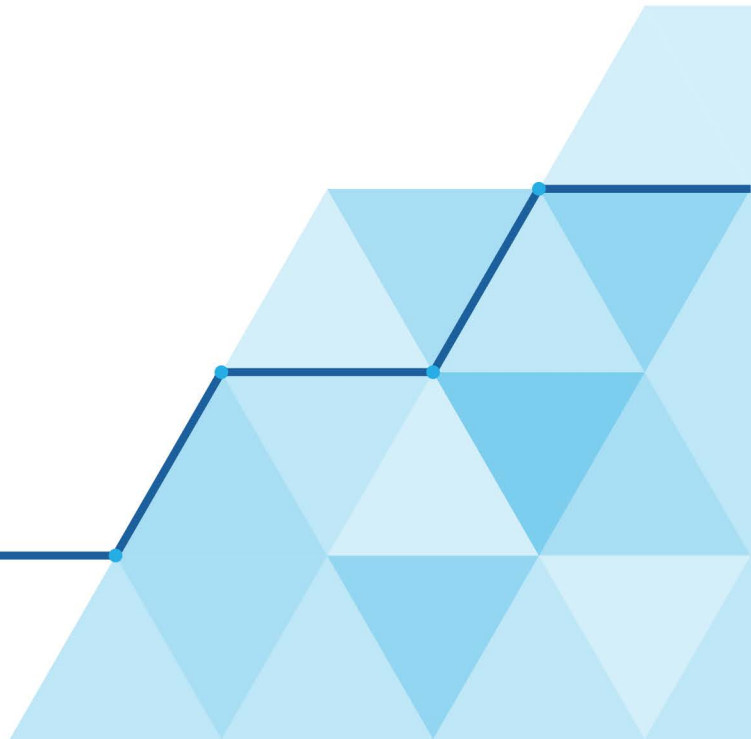
Ministry
of Justice

Judicial Pensions: Proposed *McCloud* Regulations

Consultation

This consultation begins on 16 December 2022

This consultation ends on 10 February 2023





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of Justice

Judicial Pensions: Proposed *McCloud* Regulations

A consultation produced by the Ministry of Justice.

About this consultation

To:	This consultation seeks views from the judiciary, in particular those affected by the discrimination identified in McCloud .
Duration:	From 16/12/22 to 10/02/23
Enquiries (including requests for the paper in an alternative format) to:	Email: mccloudconsultation@justice.gov.uk
How to respond:	Email: mccloudconsultation@justice.gov.uk
Response paper:	A response to this consultation exercise is due to be published in 2023 on https://www.gov.uk/government/consultations/draft-regulations-for-the-mccloud-remedy

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Judicial Pensions: Proposed *McCloud* Regulations
Consultation

Executive summary

This consultation seeks views on the draft regulations required to implement aspects of the *McCloud* remedy.

In 2018 the Court of Appeal held that the 2015 reforms to the judicial pension scheme were unlawfully discriminatory on the grounds of age. Since then, the government has taken steps to resolve the discrimination for affected judges. In July 2020, MoJ consulted on remedy proposals and confirmed in February 2021 that judges in scope of *McCloud* will participate in a formal options exercise. This will offer judges a choice of pension scheme membership for the relevant period, 1 April 2015 until 31 March 2022.

The framework for delivering the options exercise is set out in the Public Service Pensions and Judicial Offices Act 2022. The Act defines the eligibility requirements for the *McCloud* remedy, provides that judges who are in scope may choose between legacy scheme membership (including JUPRA and the fee-paid equivalent, FPJPS) and 2015 scheme membership (JPS 2015) for the relevant period, and provides the legislative basis for retrospectively treating judges as members of their chosen scheme.

The Act also confers powers to make regulations that address certain technical aspects of the remedy. As drafted, the regulations provide for the following:

- a remedy in respect of member options, such as voluntary contributions and partial retirement;
- repayment mechanisms where judges owe sums to the scheme or MoJ, including the ability to pay via deductions from lump sum and pension on retirement;
- the application of interest to amounts owed to, or by, judges, for example under or overpaid pension benefits;
- provision in respect of pension sharing orders in the case of divorce;
- a legislative basis to resolve outstanding issues for retired judges and *McCloud* claimants (referred to as 'immediate detriment judges'); and
- a legislative basis to resolve the pension entitlement of certain fee-paid judges (referred to as 'gap judges').

The draft regulations are annexed to this consultation document. It is these regulations that are the subject of this consultation, since all other aspects of the remedy have already been consulted on and have a legislative basis in the Act.

The draft regulations also include amendments relating to:

- indexation provisions in the Judicial Pension Scheme 2022; and
- dependant contribution rates in JUPRA.

About this document

1. This consultation seeks views on the draft regulations required to deliver the remedy.
2. As the draft regulations provide for a number of different scenarios in respect of individual circumstances, not all parts will be relevant to all judges. For example, only those subject to a pension sharing order in respect of the remedy period will be affected by the part dealing with pension credit members.
3. The consultation also seeks views on other amendments that do not directly relate to the *McCloud* remedy. The first is an amendment to the indexation calculation in the Judicial Pensions Regulations 2022, to align the approach with the indexation calculation that is used in the 2015 scheme, as well as in other public service career average revalued earnings (CARE) schemes. The second is an amendment to dependant contribution rates in JUPRA.

Timing and process

4. An official government response to this consultation is intended to be issued in early 2023 alongside an updated draft of the regulations. Subject to parliamentary timetabling, we aim to lay the regulations in spring 2023 with a view to running the options exercise in 2023 if the regulations are approved by Parliament.

Equalities impact

5. An equality statement has been published alongside this document, giving due regard to the public sector equality duty.¹ We consider that the proposals in the draft regulations will have a positive equalities impact because they had been designed to address the discrimination identified in *McCloud*.

¹ See s149 Equality Act 2010

Background

Overview of *McCloud*

6. In 2015 the government introduced extensive reforms to public service pension schemes to make them more affordable and sustainable. In the judicial context, judges were moved from their ‘legacy’ schemes, known as JUPRA (for salaried judges)² and its fee-paid equivalent, FPJPS,³ both final salary tax-unregistered schemes, to the 2015 scheme, known as JPS 2015,⁴ a tax-registered career average scheme with a lower accrual rate.
7. The reforms included transitional provisions for judges who were within 10 years of retirement. Those in service on 31 March 2012 and aged 55 or over on 1 April 2012 received ‘full protection’ and remained in their legacy schemes. A form of ‘tapered protection’ (also known as ‘mixed service’) was given to judges aged between 51 and a half and 55 on 1 April 2012: they were offered the choice of joining the 2015 scheme on its introduction or remaining in their legacy scheme for a period, before ‘tapering’ to the 2015 scheme at a later date. All other judges in service on 31 March 2012 were ‘unprotected’, which meant they joined the 2015 scheme on 1 April 2015, unless they opted out of pension scheme membership.
8. The transitional provisions were challenged by younger judges in the case of *McCloud and Others v MoJ and Another*. In 2018 the Court of Appeal held that the transitional protections constituted unlawful direct age discrimination.
9. The government accepted that the judgment had implications for all public service pension schemes that contained similar transitional protections, and committed to addressing the discrimination for all those affected.

Previous consultation

10. In July 2020 MoJ consulted on proposals to address the discrimination in the judicial pension scheme. Following consultation, the government decided that judges in scope of *McCloud* should take part in a formal ‘options exercise’, where they would be offered a retrospective choice of pension scheme membership for the relevant period – this being 1 April 2015, when the discrimination began, until 31 March 2022

² Created by the Judicial Pensions and Retirement Act 1993, for salaried judges

³ Created by the Judicial Pensions (Fee-Paid Judges) Regulations 2017, for fee-paid judges

⁴ Created by the Judicial Pensions Regulations 2015

(known as the remedy period). From 1 April 2022, all existing schemes were closed to future accrual, and judges eligible for a judicial pension were able to join the reformed pension scheme, known as Judicial Pension Scheme 2022.⁵

The Public Service Pensions and Judicial Offices Act 2022

11. The Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) provides the legislative framework for implementing the options exercise. It provides that eligible members may make a retrospective choice of legacy scheme or JPS 2015 scheme membership in respect of the remedy period.
12. Where a judge makes a scheme election,⁶ the PSPJOA treats them as having been in that scheme for the whole remedy period. It also:
 - confers powers to correct overpayments or underpayments of pension benefits and contributions as a result of the remedy;
 - clarifies what happens where a judge fails to make a scheme election; and
 - provides that the scheme may compensate judges for losses caused by the discrimination.

Eligibility

13. To be eligible for the options exercise, a judge must have ‘remediable service’. Section 39 of the PSPJOA sets out five conditions that must be satisfied for a period of service to be ‘remediable’:
 - The service must have taken place during the remedy period.
 - The service must be pensionable under a judicial scheme (or would have been pensionable if the judge had not opted out of the scheme).
 - The judge must also have been in pensionable service on or before 31 March 2012. This condition is satisfied by judicial service but also if the judge was a member of a non-judicial public service pension scheme on this date and then took up judicial office.
 - There must be no disqualifying gap in service, defined as a period of 5 years during which the judge did not have pensionable service.
 - The judge must have been aged under 55 on 1 April 2012.
14. Where all five conditions are satisfied, judges will be entitled to take part in the options exercise in respect of their service.

⁵ Created by the Judicial Pensions Regulations 2022

⁶ Where the judge has died, the legislation provides that the surviving adult or personal representative should make the scheme election.

15. Judges may choose either legacy scheme or JPS 2015 scheme membership in the options exercise, or if they previously opted out of the pension scheme, they may continue to do so in respect of the remedy period. Those with 'mixed service' will need to choose membership of one scheme for the whole remedy period – they will not be able to retain their tapered protection and split accrual across both schemes.

Information statements

16. Before the options exercise can begin, the PSPJOA requires that judges must be provided with a bespoke 'information statement' describing the benefits available to them in either pension scheme. This is to ensure they can make an informed decision. Following this, they will have three months to make a scheme election.
17. In advance of the options exercise, judges who are in scope are being asked to confirm their data through a 'preliminary information statement'. This is being done to ensure the data used to produce the comparison of benefits in the final information statement is as accurate as possible. All judges in scope are currently being contacted over the course of several months and being provided with details enabling them to access an online platform where they will be able to view and confirm or query their preliminary information statements.

Effect of scheme election

18. At the end of the 'election period', judges' remediable service will be treated as having always been in their chosen scheme. This has effect for the purposes of determining:
 - the benefits to which they are entitled;
 - the contributions they are required to pay; and
 - all other purposes (save in respect of some limited circumstances).⁷
19. The PSPJOA provides for retrospective adjustments to take place where judges make a scheme election that differs from their existing scheme membership, for example where a member of the 2015 scheme makes a legacy scheme election. In this scenario, past pension contributions would need to be adjusted to reflect the judge's chosen scheme. This will involve deducting unpaid tax in respect of tax relief received on the 2015 scheme contributions. This is because the legacy schemes are tax-unregistered, which means members do not receive tax relief on contributions. More information on this will be shared ahead of the options exercise.

⁷ Such as voluntary contributions or transfers into the scheme

20. Similarly, where pension benefits are already in payment, an adjustment may be needed to correct over or underpayments. For example, a judge who retired in the 2015 scheme but makes a legacy scheme election may be owed a shortfall in lump sum or periodic pension payments.

Compensation

21. As a result of the discrimination, judges may have suffered financial losses. The PSPJOA⁸ provides that the scheme manager may pay compensation in respect of such losses.

Regulation making powers within the PSPJOA

22. The PSPJOA provides the power to make regulations in respect of technical aspects of the remedy. This includes:
- member options such as additional contributions and transfers into the 2015 scheme;
 - pension sharing orders in the case of divorce;
 - payment mechanisms where sums are owed to the scheme or MoJ; and
 - the application of interest on sums owed to, or by, the scheme.
23. Provision is also made in the PSPJOA to make regulations in respect of judges who are not eligible to take part in the options exercise but are nonetheless affected by *McCloud* discrimination. This includes judges who will have already received their remedy, including *McCloud* litigants,⁹ as well as certain fee-paid judges known as ‘gap judges’.¹⁰ Both categories are discussed further below.

HM Treasury directions

24. A requirement of the PSPJOA is that scheme regulations made in respect of the *McCloud* remedy must be exercised in accordance with HM Treasury directions.¹¹ The directions also provide guidance on applying interest and paying compensation. The aim of this is to ensure a degree of consistency in administering the remedy across the public sector, while allowing schemes some flexibility in light of their differences and administrative processes.

⁸ See s59 PSPJOA

⁹ See ss67-68 PSPJOA

¹⁰ See s103 PSPJOA

¹¹ See s62 PSPJOA

Details of the proposed retrospective *McCloud* regulations

25. The draft regulations will be made using powers in the PSPJOA and the Public Service Pensions Act 2013. They will deliver certain technical aspects of the remedy to give effect to the choice made by each judge and will ensure that all judges can be returned to the position they would have been in but for the discrimination. As explained above, the regulations must be exercised in accordance with HM Treasury directions.
26. The draft regulations address the following areas:
- **Liabilities and amounts owed** – Part 6 makes provision for the payment of sums that may be owed to, or by, the scheme or MoJ as a result of the remedy.
 - **Provision around ‘special cases’ where a member has remediable service** – Part 2 makes provision in respect of certain member options, such as additional contributions, transfers into or out of the 2015 scheme, partial retirement and early retirement reduction buy-out.
 - **Provision where an immediate detriment remedy has been obtained** – Part 3 makes provision, where necessary, in respect of those who are not in the options exercise because they have already returned to legacy scheme membership, for example *McCloud* litigants and those who have retired before the options exercise.
 - **Certain fee-paid judges** – Part 4 makes provision, where necessary, in respect of certain fee-paid judges, also known as ‘gap judges’, who took up salaried office. These judges were treated as members of the 2015 scheme but, because of their date of birth and appointment date, they were not eligible for 2015 scheme membership but should have remained in the salaried legacy scheme in 2015. They are therefore not in scope of *McCloud* and will not participate in the options exercise. Regulations are needed to return them to the position they would have been in had they not been treated as members of the 2015 scheme.
 - **Pension credit members** – Part 5 makes provision for pension credit and debit members where a pension sharing order has been made in respect of a judge’s remediable service. Regulations address the benefits to which both pension credit and debit member are entitled as a result of the remedy.

Liabilities and amounts owed

27. As a result of the remedy, some judges may be owed an amount by the scheme, such as a refund of excess contributions or arrears of pension benefits. Likewise, judges may owe sums to the scheme, for example a shortfall in pension contributions or overpaid pension benefits.
28. The draft regulations provide for several flexible repayment mechanisms where judges owe sums to the pension scheme or MoJ. Judges will owe money to MoJ if they received the Transitional Protection Allowance (TPA) in lieu of joining the 2015 scheme and wish to make a legacy scheme election in the options exercise.
29. Section 54 of the PSPJOA provides that, in making a legacy scheme election, a TPA judge must repay the net amount of TPA received. Since the sums could be significant, providing for a range of repayment mechanisms in the regulations ensures there is adequate flexibility for affected judges.
30. Provision is also made in the draft regulations for the scheme to reduce or waive a liability owed to the scheme, and to net off where amounts are owed to or by a judge.
31. Finally, the draft regulations provide that interest will apply to sums owed to, or by, judges.

Amounts owed to a judicial scheme or MoJ

32. Where a judge owes an amount to the scheme or to MoJ, the starting point in the draft regulations is that the amount must be paid within six months of being notified of the obligation. However, the draft regulations offer judges several options to spread repayment over a longer period. These include:
 - instalments, e.g. a payment plan with fixed regular payments made directly to the scheme;
 - deduction from ongoing salary or fees;
 - deduction from lump sum on retirement; and
 - deduction from pension benefits.
33. Because fee-paid judges' fees may vary from month to month, the amount to be deducted each month from fees may be expressed as either a monetary amount or fixed percentage.
34. More information on each mechanism will be provided in the information statements as part of the options exercise.
35. Where the member leaves judicial office before paying a liability, where there is an agreement to do so through deduction from salary or fees, the draft regulations require that the remaining amount must be paid within six months of leaving office.

However, provision is made to extend this period where the scheme manager considers it just and equitable to do so.

Amounts owed to a person or to a representative of the deceased person

36. While most sums owed to a judge will be paid automatically as a result of making a scheme election, the draft regulations provide that some payments may only be made to the member on the making of an application, as required by the scheme manager. This is likely to apply where, for example, a member believes they are owed compensation. Before paying the compensation, the scheme manager may require an application supported by evidence of the loss, for example an invoice from an independent financial adviser in respect of accountancy costs caused by the discrimination.
37. Details of any application process will be provided as part of the options exercise.

Reduction or waiver of liability owed to a judicial scheme

38. The draft regulations provide that the scheme may reduce or waive a member's liability to repay an overpayment of pension benefits where they are satisfied that it would not be suitable to require the payment of the liability.

Reduction of liability to pay pension contributions by tax relief amounts

39. The draft regulations require the pension scheme to reduce a shortfall of pension contributions by an amount of tax relief. This will arise specifically where members make a 2015 scheme election and consequently owe contributions, since the 2015 contribution rate is higher than the legacy rates.
40. Because the 2015 scheme is tax-registered, member contributions also receive tax relief. The draft regulations provide that, rather than requiring the member to pay the contributions only to receive tax relief, the scheme must first reduce the shortfall by the amount of tax relief the judge would have received via the PAYE system, had the contributions been made at that time. Where the amounts are equal, a full waiver of the shortfall will be required.
41. Where the amount of tax relief exceeds the contributions shortfall, compensation will be paid to the judge in respect of the excess.

Interest

42. The PSPJOA provides the power for regulations to apply interest to amounts owed to, or by, judges as a result of the remedy. As drafted, the regulations provide that interest must apply to relevant amounts in accordance with directions set by HM Treasury. It is the directions which set out the relevant rates and details surrounding calculation periods.

Netting off

43. The draft regulations provide for netting off amounts that arise as a result of the remedy. The details surrounding the netting off process are set out in HM Treasury directions.

Provision around special cases where a member has remediable service

44. The draft regulations make provision in respect of a number of technical aspects of the remedy, including:
- voluntary contributions, specifically added pension within the 2015 scheme;
 - transfers out;
 - transfers in;
 - early retirement reduction buy-out;
 - partial retirement; and
 - Scheme Pays.

Voluntary contributions

45. The 2015 scheme allowed members to make additional contributions above their normal monthly contributions, in order to purchase additional benefits, for example Added Pension.
46. Since Added Pension does not exist in the legacy schemes, the draft regulations provide that members who make a legacy scheme election and who have made Added Pension contributions will be given the option of:
- receiving compensation for the net value of their contributions, i.e. the gross Added Pension rate less any PAYE tax relief;¹² or
 - having the contributions 'regularised', i.e. preserved in the 2015 scheme.
47. If a judge chooses compensation, all rights associated with the Added Pension payments would be extinguished. Where they opt for 'regularisation', they would remain a member of the 2015 scheme in respect of Added Pension only, despite being back in the legacy scheme for all other purposes. This choice will be presented to affected judges in the options exercise.
48. Where a judge fails to make a choice, the draft regulations will regularise the contributions in the 2015 scheme by default.

¹² Relief on member pension contributions at source via the Pay As You Earn system

Transfers out

49. The 2015 scheme allows members to transfer their benefits out of the judicial scheme to another pension scheme.
50. In cases where a judge has transferred out of the 2015 scheme, the draft regulations provide that they are not included in the options exercise. The draft regulations also provide that the scheme must instead calculate what the cash equivalent would have been had the member transferred out of the legacy scheme, rather than the 2015 scheme, and provide this calculation in a statement to the member.
51. Where this results in an excess (i.e. if the legacy scheme cash equivalent transfer value is greater than that provided under the 2015 scheme), the legacy scheme must pay the difference to the member, although no pension will be paid in respect of the difference.

Transfers in

52. The PSPJOA provides that making a legacy scheme election does not affect any transfers into the 2015 scheme that judges may have made from private pension schemes.¹³ This position was reached following consultation, which proposed that judges should be able to retain their transfers in the 2015 scheme despite making a legacy scheme election. Accordingly, the draft regulations make the necessary amendments to the 2015 scheme regulations to allow a member to retain their transfer in the 2015 scheme notwithstanding their legacy scheme election.

Early retirement reduction buy-out (ERRBO)

53. Under the 2015 scheme, judges were able to buy out the reduction that would apply if they claimed pension before their normal pension age.
54. The draft regulations will provide that where a judge has purchased ERRBO in the 2015 scheme and subsequently makes a legacy scheme election, the amount of the ERRBO should be reimbursed directly to the member. This is because it is not possible to make ERRBO payments in the legacy scheme.
55. The draft regulations make clear that reimbursement takes the form of net compensation, this being the indexed gross amount paid less an amount of PAYE tax relief received on the payment.

¹³ See s42(7) PSPJOA

Partial retirement for fee-paid judges

56. The draft regulations address partial retirement in two specific scenarios:
- where a member has taken partial retirement in respect of a fee-paid office in the 2015 scheme (JPS 2015) by reducing earnings to less than 80% and makes a legacy scheme election; and
 - where a member has taken partial retirement by retiring from a fee-paid office in the fee-paid legacy scheme (FPJPS) while continuing to hold judicial office and makes a 2015 scheme election.
57. No provision is made in respect of salaried office since there is no provision for partial retirement in the salaried legacy scheme (JUPRA). This means that if a member has taken partial retirement in salaried office in the 2015 scheme and subsequently makes a legacy scheme election, they will have been overpaid pension. The provisions of the PSPJOA that deal with correcting pension payments¹⁴ would apply to recover the overpayment.
58. The draft regulations provide that where a judge has taken partial retirement in the 2015 scheme, and the requirements for taking partial retirement under the fee-paid legacy scheme would have been met at that time, they will retrospectively be treated as having taken partial retirement in the legacy scheme. This will occur where the member has relinquished a fee-paid office.
59. Similarly, where a judge exercised the partial retirement option in the fee-paid legacy scheme, and the requirements for taking partial retirement under the 2015 scheme would have been met at that time, they will retrospectively be treated as having taken partial retirement in the 2015 scheme. This will occur where the member has reduced their hours below 80%.
60. Where the partial retirement rules of the chosen scheme are not satisfied, the member would need to repay overpaid pension, as above.

Scheme Pays

61. The draft regulations also provide for retrospective Scheme Pays where a judge makes a 2015 scheme election and as a result incurs an annual allowance tax charge in respect of a tax year within the remedy period. This allows the judge to request for the scheme to pay the charge on behalf of the judge and have a reduction to their pension on retirement.

¹⁴ See s51 PSPJOA

Provision where an immediate detriment remedy has been obtained

62. This part of the draft regulations makes provision in respect of ‘immediate detriment’ judges. These are judges in respect of whom an immediate detriment remedy has been obtained, defined in s68 of the PSPJOA as being where either:
- a determination has been made by a court or tribunal confirming the judge has rights in the legacy scheme, for example claimants in the *McCloud* litigation; or
 - the scheme manager has agreed that the judge has rights in the legacy scheme.
63. In both scenarios, the scheme manager must have either paid benefits or compensation in accordance with the agreement or taken steps to implement the determination or agreement, for example by altering pension records.
64. Judges in the second group are likely to have retired or died before the options exercise takes place. The intention here is that retiring judges or families of deceased judges should not have to wait until the options exercise for a remedy but should receive correct pension benefits and lump sums as soon as practicable.
65. The starting point of the PSPJOA is that its provisions do not apply to immediate detriment judges.¹⁵ This is because they will have already returned to legacy scheme membership.
66. However, s67 of the PSPJOA provides powers to make regulations for the purpose of putting immediate detriment judges, so far as possible, in the position they would have been in had there been no discrimination. This may involve applying relevant provisions of the PSPJOA, with or without modifications, to immediate detriment judges.
67. The draft regulations for immediate detriment judges broadly mirror the approach taken in the PSPJOA and other parts of these draft regulations for judges in scope of the main remedy who make a legacy scheme election. Since some payments will have already been dealt with outside the legislation, for example via a court order or settlement agreement between the member and the scheme, the draft regulations do not apply in relation to a payment that would otherwise arise under the regulations where a corresponding payment has already been made.

Information statements

68. The draft regulations require the scheme to provide immediate detriment judges with a bespoke information statement. Unlike all other judges (whose information statements are addressed in s64 of the PSPJOA), this statement does not need to

¹⁵ See s67 PSPJOA

describe the benefits that would be available in both the legacy scheme and 2015 scheme, since immediate detriment judges will already be back in their legacy scheme. Rather, it must contain any information relevant to their individual circumstances. For example, if an immediate detriment judge is yet to receive a remedy for Added Pension contributions, their information statement should provide the option of having them ‘regularised’ or receiving net compensation, as above.

Partnership pension accounts (PPA)

69. Unprotected and taper-protected judges were able to opt out of the 2015 scheme and instead join a PPA – a registered stakeholder pension scheme. Section 41 of the PSPJOA requires PPA judges eligible to make an election to transfer their PPA assets to the judicial legacy scheme then surrender them in exchange for legacy scheme benefits. This is to prevent these judges receiving double pension benefits (PPA and legacy scheme) in respect of the same period.
70. The draft regulations apply the same approach in respect of immediate detriment judges who opted out of the 2015 scheme in favour of PPA during the remedy period. They are required to transfer and surrender their PPA assets within three months of being notified of the requirement to do so.

Children’s benefits

71. Where a judge in scope of the main remedy has died and there is a surviving adult living separately from a dependent child, s48 of the PSPJOA provides that where the choice made in respect of the late judge’s remediable service would result in less valuable benefits in respect of the child than those available had an alternative scheme election been made, the scheme must pay the more valuable of the two. For example, where a legacy scheme election has been made in respect of the late judge, but the 2015 scheme would have paid the child greater benefits, the benefits payable in respect of the child under the legacy scheme must be determined as if a 2015 scheme election had been made (and vice versa).
72. A ‘child’ is defined as an individual who would have received benefits under either the legacy or 2015 scheme if such a scheme election had been made.¹⁶
73. The draft regulations make corresponding provision to s48, with modification, in order to protect children of late judges in relation to whose service an immediate detriment remedy has been obtained. This means that where an immediate detriment remedy has been obtained in relation to the remediable service of a deceased judge, and this results in the child receiving less valuable benefits than those available had a 2015 scheme election been made, the benefits payable in respect of the child under the legacy scheme must be determined as if a 2015 scheme election had been made.

¹⁶ See s48(3) and (6) PSPJOA

Partial retirement in fee-paid service

74. For fee-paid immediate detriment judges who took partial retirement under the 2015 scheme, the draft regulations adopt the same approach as for judges in scope of the main remedy (as set out separately in these regulations). That is, the partial retirement will be retrospectively permitted provided the other conditions for taking partial retirement under the legacy fee-paid regulations are met.
75. Additionally, the draft regulations include provisions to correct any receipt of pension and lump sum paid to a partially retired immediate detriment judge.

Effective pension age (EPA) contributions

76. Under the 2015 scheme, the EPA option enables contributions to be paid to secure a lower pension age than normal pension age (but no lower than 65). Since the normal pension age in the legacy schemes is 65, such contributions are of no benefit to a judge who returns to legacy scheme membership.
77. Section 53 of the PSPJOA applies in this case where a judge who makes a legacy scheme election has made EPA payments to the 2015 scheme. It requires the scheme to pay the judge compensation equal to the total amount of the contributions paid, minus the PAYE tax relief received. Rights associated with the EPA payments will also be extinguished.
78. The draft regulations adopt the same approach for immediate detriment judges who made EPA contributions, providing that they must receive compensation (net of PAYE tax relief) in respect of their EPA contributions.
79. The choice of regularising these contributions will not be available since the purpose of EPA is to reduce the member's retirement age towards 65, the age at which one can retire without actuarial reduction in the legacy scheme.

Pension benefits and contributions

80. Similar to judges in scope of the main remedy, a retrospective adjustment to pension contributions will need to be made for immediate detriment judges. In practice, this will involve deducting tax in respect of tax relief received on 2015 scheme contributions. This is because the legacy schemes are tax-unregistered, which means contributions do not attract tax relief.
81. Where pension benefits are already in payment, an adjustment may be needed to correct over or underpayments. Corresponding provision to the PSPJOA is made in the draft regulations to provide for this.

Certain fee-paid judges – ‘gap judges’

82. Section 103 of the PSPJOA makes provision in respect of certain fee-paid judges, also known as ‘gap judges’. This specific group of judges were aged 55 or over on 1 April 2012,¹⁷ in fee-paid service on 31 March 2012 and took up salaried office between 1 April 2012 and 1 December 2012. Historically, due to being in fee-paid service on 31 March 2012, they were not considered to have been in office on 31 March 2012¹⁸ and, therefore, despite their age on 1 April 2012, were not ‘fully protected’ from the 2015 pension changes. Accordingly, these judges were treated as members of the 2015 scheme.
83. As a result of the *O’Brien* and *Miller* litigation, it is now clear that these judges were in office on 31 March 2012 and, therefore, should have been treated as fully protected members of the judicial legacy scheme. This means they should not have been treated as members of the 2015 scheme and are therefore not in scope of the remedy.
84. The draft regulations provide the legislative basis to enable these judges to be returned to the position they would have been in had they always been recognised as full protection members of the judicial legacy scheme.
85. MoJ will begin the process of contacting affected ‘gap judges’ in early 2023 to arrange for their retrospective return to JUPRA, backdated to April 2015.
86. As with immediate detriment judges, the draft regulations require the scheme to provide an information statement to gap judges containing information considered relevant to their circumstances.
87. Provision in the draft regulations in respect of the following areas mirrors provision for immediate detriment judges: benefits for children, partial retirement, ERRBO, added pension, EPA, TPA, transfers out, transfers in and compensation.

¹⁷ Gap judges who were aged under 55 on 1 April 2012 are in scope of *McCloud* and will participate in the options exercise.

¹⁸ This is because the judicial pension arrangements for fee-paid judges were not in place at that time, although they were subsequently introduced with retrospective effect.

Pension credit members (PCMs)

88. The PSPJOA¹⁹ provides powers to make regulations in respect of pension credit members (ex-spouses or ex-civil partners) and members of the judicial pension scheme, i.e. the corresponding pension debit members (PDMs) who are, or may become, subject to a pension sharing order in respect of their remediable service.
89. The draft regulations protect the PCM's benefits and, with one exception, prevent them from being adversely affected by a scheme election that would otherwise lead to a reduction in their pension benefits.
90. Depending on when the pension sharing order in respect of remediable service was made, a PCM may have rights in a legacy scheme, the 2015 scheme or, where a PDM has mixed service, both. The PCM's rights will remain in their existing scheme(s) irrespective of the scheme election made in respect of the PDM.
91. However, the PCM will be entitled to the greater set of benefits, again irrespective of the scheme election that has been made in respect of the PDM. For example, if the PCM has rights in relation to the PDM's remediable service in the 2015 scheme but the value of those rights would be greater in the legacy scheme, the PCM will have their benefits in the 2015 scheme increased (with a 'pension credit') to reflect the benefits they would have been entitled to under the legacy scheme. Likewise, if the value of the benefits would be less under the legacy scheme, no reduction is to be applied to the PCM's 2015 scheme rights; rather, they would continue to receive their 2015 scheme entitlement.
92. The same applies where the PCM's rights are in the legacy scheme: the PCM remains in their existing legacy scheme and receives a credit in respect of any more favourable entitlement under the 2015 scheme irrespective of any election made by the PDM. No adjustment is made to the PCM's rights where 2015 scheme membership would result in less favourable entitlement.
93. The approach outlined above is intended to ensure that a PCM should not be worse off because of a scheme election made by a PDM. There is, however, an exception to this position, where a pension sharing order is based on mixed service, i.e. the legacy and 2015 schemes during the remedy period. The PSPJOA provides that judges may not retain mixed service during the remedy period and this approach extends to both PDMs and PCMs. The regulation making power under s57 PSPJOA in respect of PCMs therefore requires any such regulations to ensure that the PCM's

¹⁹ See s57 PSPJOA

benefits are calculated as if the PDM's remediable service were under only one scheme.²⁰

94. Essentially, PCMs will be entitled to the value of the more generous of the two relevant schemes for the period of remediable service, again irrespective of the scheme election made by the PDM. However, in some cases this may mean a PCM is entitled to less than they would be if they were allowed to retain their mixed service – in line with the position in respect of the corresponding PDM.
95. The draft regulations address various specific scenarios for PCMs and PDMs and require the pension manager to provide a statement to the PCM stating the benefits to which they would be entitled in each scheme.
96. After the PDM has made a scheme election, the draft regulations require their rights to be adjusted to reflect the chosen scheme.

Remedial voluntary contributions

97. Section 60 of the PSPJOA provides the power for the judicial scheme to make regulations that allow members to make 'remedial voluntary contributions'. Such provision is only permitted in respect of a member where the scheme manager is satisfied that it is more likely than not that, but for the discrimination, the judge would have entered into such arrangements during the period of their remediable service.
98. At this stage, we do not propose to provide for these arrangements in the regulations. This is because judges who were making voluntary contributions alongside their legacy scheme before transferring to the 2015 scheme, for example to the Judicial Additional Voluntary Contributions Scheme, were entitled to continue making such contributions after their transfer. Additionally, judges who transferred to the 2015 scheme were given the opportunity to make Added Pension and Effective Pension Age contributions to the 2015 scheme during the remedy period regardless of the discrimination.

²⁰ See s57(5) PSPJOA

Modifications and consequential arrangements

Indexation in JPS 2022

99. A feature of career average revalued earnings schemes, such as JPS 2015 and JPS 2022, is that pension accrual is ‘banked’ each year and subject to indexation so as to maintain its value over time. The JPS 2022 regulations 21, 24(2) and 39(2), as they stand, effectively provide that members receive one year less indexation when they come to retire in JPS 2022 compared to JPS 2015 and other public service pension schemes. JPS 2015 therefore provides the more generous approach to indexation. In effect, the JPS 2022 approach misses out the final index adjustment on the last 1 April of service.
100. This makes it inconsistent with other public service schemes. Changing the calculation in this way was not the MoJ’s intention so we are seeking to amend it retrospectively to 1 April 2022 via the draft regulations so that it is addressed as soon as possible.

Dependant contributions

101. The draft regulations also amend existing legislation to retrospectively amend the rate of dependant contributions payable by salaried judges with income above £150,000. The change will be backdated to 2016. This is to ensure equal treatment between judges in scope of the *McCloud* remedy and those not in scope who remained in the legacy scheme in 2015 (protected judges).
102. Judges in the latter group with income above £150,000 have not been charged the correct rate of dependant contributions since 2016. Effectively, protected judges were charged total contributions of 4.43%, rather than 6.23% as required by the relevant legislation (which would have included dependant contributions).
103. As the regulations stand, in resolving *McCloud* discrimination, we would be required to charge the full 6.23% to *McCloud* judges with income over £150,000 for the years in the remedy period. This would treat *McCloud* judges less favourably on the grounds of age, since they are younger than protected judges. Therefore, we propose amending the relevant contributions legislation, with retrospective effect, to ensure *McCloud* judges are charged at the same rate as protected judges, and to regularise the rates that protected judges have been charged.

Questionnaire

To return the completed questionnaire, please email: mccloudconsultation@justice.gov.uk

The department welcomes views on the following questions by 10 February 2023:

1. Do you have any views on the proposals outlined in this consultation document or the draft regulations?
2. Do you agree with the proposed approach to indexation in JPS 2022?
3. Do you agree with the proposed approach to dependant contributions?
4. Do you have any concerns that the proposals could result in individual groups being disproportionately affected by the proposals?

Thank you for participating in this consultation exercise.

How to respond

Please send your response by 10 February 2023 to: mccloudconsultation@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the email address above.

Publication of response

A paper summarising the responses to this consultation will be published in 2023. The response paper will be available on-line at <https://www.gov.uk/government/consultations/consultation-on-the-proposed-mccloud-regulations>.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.



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Alternative format versions of this report are available on request from mccloudconsultation@justice.gov.uk