



Ministry
of Justice

Draft Regulations for the *McCloud* Remedy

Response to consultation

This response is published on 12 May 2023

A decorative graphic in the bottom right corner consisting of a grid of light blue triangles of various sizes, with a dark blue line connecting some of the vertices.



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Draft Regulations for the *McCloud* Remedy Response to consultation

Response to consultation carried out by the Ministry of Justice.

This information is also available at <https://consult.justice.gov.uk/>

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Executive Summary

1. The consultation paper ‘Consultation on draft regulations for the *McCloud* Remedy’ was published on 16 December 2022. It invited comments on the draft regulations required to implement aspects of the *McCloud* remedy, and other associated amendments.
2. The consultation set out our proposed approach in respect of the following areas:
 - Provision around ‘special cases’ where a member has remediable service
 - Provision where an immediate detriment remedy has been obtained
 - Certain fee-paid judges (also known as ‘gap judges’¹)
 - Pension credit members
 - Liabilities and amounts owed
3. The consultation also set out amendments that do not directly relate to the *McCloud* remedy. The first was an amendment to the indexation calculation in the Judicial Pensions Regulations 2022 (JPS 2022). The second is an amendment to dependant contribution rates in JUPRA. The consultation period closed on 10 February 2023 and this report summarises the responses, including how the consultation process influenced the final policy content of the *McCloud* remedy regulations to be laid in Parliament.
4. A list of judicial and legal associations which provided responses is at Annex A.
5. A version of this document can be made available in the Welsh language. This can be requested at judicial_policy_correspondence@justice.gov.uk

¹ Gap judges are judges who were over 55 on 1 April 2012; in fee-paid service on 31 March 2012; took up salaried office between 1 April 2012 and 1 December 2012; and had not made a claim for a fee-paid pension within three months of the end of their fee-paid service.

Introduction and contact details

This document is the response to the 'Consultation on draft regulations for the *McCloud* Remedy'.

It covers:

- the background to the consultation response
- a summary of the responses to the consultation
- a detailed response to the specific questions raised in the consultation
- the next steps following this consultation.

If you have any questions about the consultation process or if you wish to receive a copy of this document in an alternative format, please contact the *McCloud* Remedy Team at judicial_policy_correspondence@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 above address.

Background

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 judicial ‘legacy’ schemes, known as Judicial Pension Act 1981 (JPA 81), Judicial Pensions and Retirement Act 1993 (JUPRA) (for salaried judges) and its fee-paid equivalent, Fee-Paid Judicial Pension Scheme (FPJPS), which were final salary tax-unregistered schemes, to the 2015 schemes known as Judicial Pension Scheme 2015 (JPS 2015) and Northern Ireland Judicial Pension Scheme (NIJPS), which are tax registered, career average schemes with a lower accrual rate.
7. Judges aged 55 or over on 1 April 2012 were ‘protected’ from the changes and remained in their respective legacy scheme. For those aged between 51½ and 55 on 1 April 2012, ‘tapered protection’ was available: these judges were given the choice to join the 2015 scheme on 1 April 2015 or ‘taper’ across on a later date determined by their date of birth (with the practical effect of retaining legacy benefits for a longer period of time). All other judges – those aged under 51½ on 1 April 2012 – were ‘unprotected’ and moved to the 2015 scheme on 1 April 2015 unless they opted out of pension scheme membership altogether.
8. In 2018, in the case of *Lord Chancellor and MoJ v McCloud and others (McCloud)*, the Court of Appeal held that providing transitional protection to older judges as part of the 2015 judicial pension reforms constituted unlawful direct age discrimination and indirect sex and race discrimination.
9. The government accepted that the Court of Appeal’s judgment had implications for all public service pension schemes that were reformed in 2015, as all contained transitional protections for older members. It committed to addressing the discrimination for all affected public servants regardless of whether they brought a claim. In July 2020 HM Treasury consulted on proposals to remove the discrimination from schemes established under the Public Service Pensions Act 2013. Given the unique nature of the judicial pension schemes, the Ministry of Justice (MoJ) consulted separately on how best to address the discrimination for affected judges.
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 the *McCloud* remedy 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 (known as the ‘remedy period’). From 1 April 2022, all pre-existing judicial

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 (JPS 2022).

11. The framework for delivering the options exercise is set out in the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA). The Act defines the eligibility requirements for the *McCloud* remedy, provides that judges who are in scope may choose between legacy scheme membership and 2015 scheme membership for the remedy period, and provides the legislative basis for retrospectively treating judges as members of their chosen scheme.
12. From 16 December 2022 to 10 February 2023, the MoJ consulted on the draft Judicial Pensions (Remediable Service etc.) Regulations 2023, which provide for technical aspects of the remedy. All other aspects of the remedy have already been consulted on and have a legislative basis in the PSPJOA. This paper summarises replies received and sets out the final position taken by MoJ.
13. In addition to the amendments made to address the consultation replies, some minor and technical amendments were made following internal reviews to ensure that the wording of the regulations aligned with the policy intent. Furthermore, we have added an additional amendment to the regulations that is unrelated to the *McCloud* remedy, amending The Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021. Judges impacted by this will be communicated with separately.

Summary of responses

14. A total of ten responses to the consultation paper were received. Of these, five were from individual judges, two from judicial associations, one from a Bar association and two from non-judicial individuals.
15. Careful consideration was given to all responses received, including any concerns raised. The following points were raised in the responses received.
 - Options available in respect of effective pension age (EPA) contributions
 - Clarifications around the treatment of the annual allowance tax charge (AATC)
 - Considerations around tapered protection
 - Comments regarding interest on payments
 - Amendment to the wording around indexation
 - Consideration of the dependant contributions approach for fee-paid judges
16. This document only covers the sections of the regulations on which responses were received or where amendments to the regulations are to be made.

Responses to specific questions

Do you have any views on the proposals outlined in this consultation document or the draft regulations?

Effective Pension Age (EPA) contributions & contributions to buy out the early payment reduction

17. The consultation outlined our proposed approach in respect of EPA and contributions to buy out the early payment reduction for immediate detriment² and gap judges. This provision is specifically for judges who are in the 2015 scheme and make a legacy scheme choice. The proposal was to adopt the same approach for these judges as is outlined in section 53 of the PSPJOA for all other judges. This sets out that judges will receive compensation (net of PAYE tax relief) in respect of their contributions and will then receive no benefits from making these contributions. Compensation is the only option available as the purpose of these contributions is to reduce the judge's pensionable age towards 65. The normal pension age in legacy schemes is 65 and so these contributions are of no benefit to a judge who returns to legacy scheme membership.
18. One respondent proposed that these contributions should be treated in the same way as added pension contributions. This would mean offering judges the option between compensation and regularisation through retaining active membership to EPA accounts. The respondent suggested that by not providing a choice, this would discriminate against younger judges.

Our response

19. Providing an option was something which was considered in the response to the original consultation on the PSPJOA. It was suggested that EPA should be regularised, however, following consultation with judges affected, it was decided at that time that EPA would be compensated instead of regularised. This was set out in the primary legislation in section 53 of the PSPJOA and the choice for regularising these contributions is not available and is not in scope of this consultation. Further information regarding EPA in the original consultation can be found in paragraphs 150–154 of the document, linked here: [Judicial Pensions: Response to *McCloud* - Response to consultation \(publishing.service.gov.uk\)](#).

² An immediate detriment judge is a judge who, following consultation in 2020, was agreed to not have to wait until the options exercise to receive a remedy, in order to prevent any financial detriment

20. What is in scope of this consultation is the approach for EPA and early payment reduction contributions for immediate detriment judges and gap judges. The proposed regulations mirror the approach taken in the PSPJOA for judges in scope of the main remedy who make a legacy scheme choice to ensure fair treatment.
21. It is our view that there is no reason, nor would it be appropriate, to treat EPA or early payment reduction contributions differently for immediate detriment and gap judges from judges in scope of the options exercise. We therefore maintain that compensation is the appropriate remedy.

Annual Allowance Tax Charge (AATC)

22. The consultation detailed the proposed approach for judges who make a 2015 scheme choice and incur an AATC as a result. Due to HMRC's 'four year rule', (which means it will only reassess the tax position for the previous four tax years), in practice, this applies to judges who tapered between 1 April 2019 and 29 September 2019 and judges who were due to taper but never did due to MoJ stopping the tapering of judges on 30 September 2019, where they make a 2015 scheme choice.
23. The Council of Circuit Judges requested clarity on compensation for AATC for individuals who were in the 2015 scheme who make a legacy scheme choice and therefore should not have incurred an AATC. The request focussed on whether this will be dealt with as compensation for losses under section 59 of the PSPJOA. Similar requests for clarification were requested from two other respondents.

Our response

24. The questions of judges making a legacy scheme choice was not included in the regulations as this was set out in the PSPJOA itself, however we have provided clarification here. All judges who incurred an AATC in any year of the remedy period who make a choice which means they should not have incurred an AATC will either be refunded their money by HMRC, or will receive compensation from the scheme.
25. HMRC have a 'four year rule' which provides statutory time limits for reassessing the tax position of previous years. In most cases a four year limit from the end of a given tax year will apply and so for the options exercise taking place in 2023/24, HMRC will reassess tax positions from 2019/20 onwards; these are called 'in scope' years.
26. Therefore, any AATCs paid in in scope years (2019/20 onwards) will be refunded directly from HMRC. Any AATCs paid in out of scope years (2015/16 – 2018/19) will be compensated by the scheme. This is set out in section 59 of the PSPJOA and direction 26(4) of the HMT directions which lists overpaid AATC as a compensatable loss.
27. Therefore, no change needs to be made to the draft regulations as all losses incurred as a result of overpaid AATC in remediable years will either be refunded by HMRC or

compensated by the scheme. Further detail regarding exactly how the member will receive compensation will be outlined in the options exercise.

Interest

28. The consultation set out that the regulations provide that interest must apply to relevant amounts in accordance with directions set by HM Treasury, in line with provisions in the PSPJOA. These directions set out the relevant rates and surrounding calculation period. This is to ensure a degree of consistency in administering the remedy across the public sector.
29. One respondent stated that they would like greater clarity on how interest would be applied, and another respondent expressed their opinion that interest should not be charged on any shortfall owing to the scheme, on the basis that the shortfall would only have arisen as a result of the unlawful discrimination.

Our response

30. Under section 61 and in accordance with section 62 PSPJOA, the regulations make provision for the calculation and payment of interest in accordance with Treasury directions. The detail can be found in the Directions at Part 3, Chapter 4. To the extent that the regulations apply the Directions more widely (for example, to immediate detriment and gap judges), there was a deliberate policy decision to mirror the approach to interest as set out in the directions across all groups to ensure consistency.
31. The purpose of the remedy is to put judges in the position they would have been in, but for the discrimination. This includes considering the position the member would currently be in had the payments been made on the date they originated. We therefore feel it is appropriate to apply interest to payments owed both to the judge and to the scheme. We are proceeding with these proposals.

Tapered Protection

32. For judges aged between 51½ and 55 on 31 March 2012, tapered protection was available. These judges were given the choice to join the 2015 scheme on 1 April 2015 or 'taper' across on a later date determined by their date of birth. This resulted in some of their remediable service being in the legacy scheme and some being in the 2015 scheme. In *McCloud*, the Court of Appeal held that transitional protection was unlawfully discriminatory; this included tapered protection.
33. One respondent commented that there should be an option to retain tapered protection.

Our Response

34. This was resolved as part of the PSPJOA, and so is not in scope of this consultation. The PSPJOA sets out that judges will get a binary choice between legacy or 2015

scheme membership for the entire remedy period. This was discussed in the initial consultation response and set out that maintaining an age-based system of tapered protection would perpetuate or even extend the discrimination. Therefore, we maintain that judges in scope of the *McCloud* remedy are not able to retain tapered protection.

Do you agree with the proposed approach to indexation in JPS 2022?

35. The consultation outlined an amendment to indexation in JPS 2022 in order to make it consistent with other public service schemes and the original policy intention.
36. All responses which commented on indexation agreed with the proposal in principle, however one respondent noticed an error in the wording of paragraph 8(2)(a) of the Schedule to the draft regulations, which insert a new paragraph (1) into regulation 21 of the JPR 22.

Our response

37. We have reviewed the wording of proposed new regulation 21 (now found at para 8(2)(a) of the Schedule) and have determined that the wording 'retirement adjustment index' was used in error. We have amended this to 'retirement index adjustment'. Otherwise, we will be progressing with the approach outlined in the consultation.
-

Do you agree with the proposed approach to dependant contributions?

38. The consultation proposed an amendment to Regulation 6 of the Judicial Pensions (Contributions) Regulations 1998 to retrospectively amend the rate of dependant contributions payable by salaried judges with income above £150,000 from the financial year 2016/17 onwards. 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. 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%, for the element of income over £150,000, as required by the relevant legislation (which would have included dependant contributions).

39. As the regulations stand, in resolving *McCloud* discrimination, we would be required to charge the full 6.23% to *McCloud* judges on 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, our proposal was to amend 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.
40. The Chancery Bar Association expressed their agreement with our approach but have queried why this was only being applied to salaried judges and not to fee-paid judges.

Our response

41. We investigated this and found only one year during the remedy period where fee-paid judges earning over £150,000 would be charged dependent contributions at a rate higher than the amended salaried contributions rate. In all other years of the remedy period where judges earned over £150,000, the dependant contributions rate is already aligned with the amended salaried contributions rate.
42. In order to provide parity with salaried judges, we have amended the draft regulations in order to amend the Judicial Pensions (Fee-Paid Judges) Regulations 2017 to ensure that in this one year (2016/17), fee-paid judges will not pay the existing dependant contribution rate of 1.8% on the element of income over £150,000, but will instead be charged 0%. We will ensure this is implemented so the affected judges have their dependant contributions set at the correct rate.

Do you have any concerns that the proposals could result in individual groups being disproportionately affected by the proposals?

43. Aside from the comments mentioned throughout this consultation response, no further equality impacts were identified.

Impact Assessment, Equalities and Welsh Language

Equalities

44. The Public Sector Equality Duty requires public authorities, including the Ministry of Justice, to have due regard to the need to achieve the objectives set out under s149 of the Equality Act 2010 of:
- (a) eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
 - (b) advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) fostering good relations between persons who share a relevant protected characteristic and persons who do not share it.
45. The Equality Statement that accompanied the consultation has been updated in light of the consultation responses to consider likely impacts on people with protected characteristics: disability, race, sex, gender reassignment, age, religion or belief, sexual orientation, pregnancy and maternity, marriage and civil partnership. This has been published alongside the consultation response

Welsh language

46. A version of this document can be made available in the Welsh language. This can be requested at judicial_policy_correspondence@justice.gov.uk

Conclusion and next steps

47. The government has amended the draft regulations based on feedback to this consultation and will proceed with laying the regulations in Parliament in order to progress the *McCloud* remedy.
48. Once these regulations have been scrutinised by Parliament and are in force, the MoJ will begin the options exercise. This will allow judges to make a retrospective choice of pension scheme membership backdated to 1 April 2015, when the discrimination began, until 31 March 2022. Further communications about this will be published and sent to those judges in scope of the options exercise in due course.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1__.pdf

Annex A – List of respondents

Judicial and legal associations

- Council of Circuit Judges
- Association of His Majesty's District Judges
- Chancery Bar Association



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