



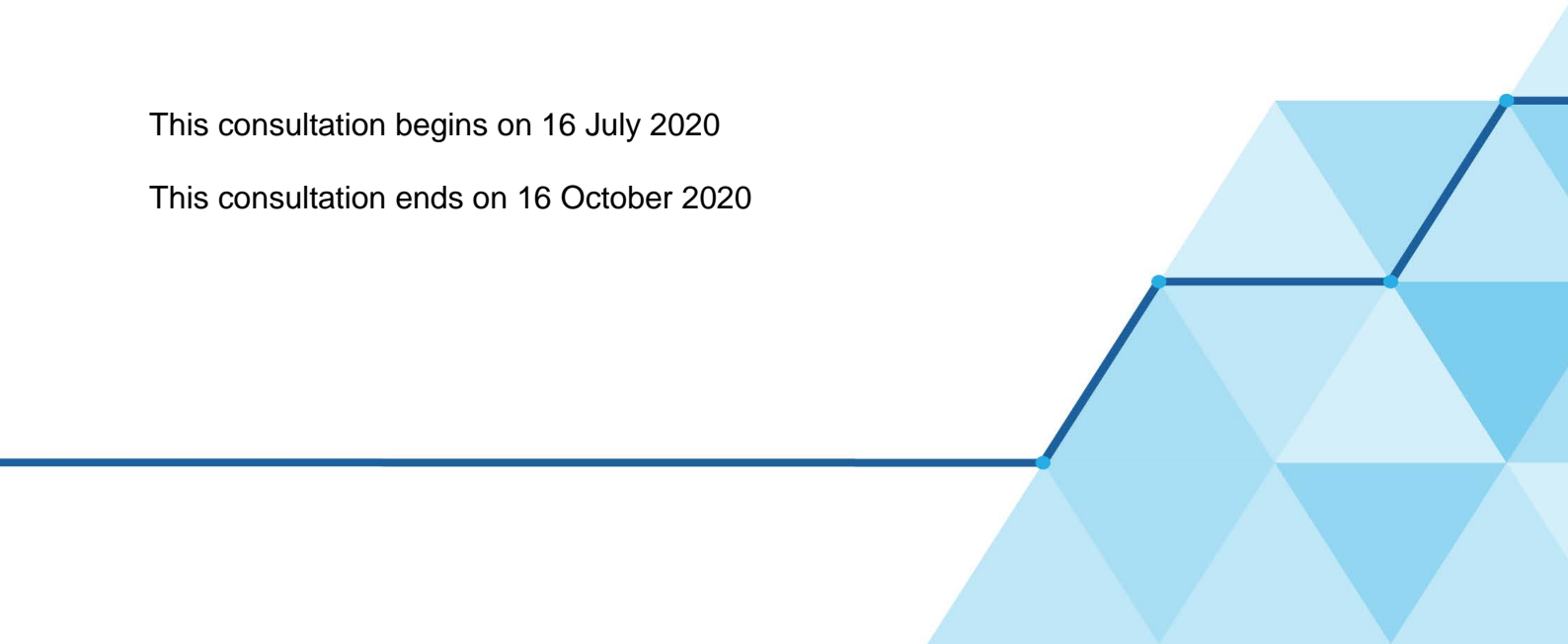
Ministry  
of Justice

# Judicial Pensions: Proposed response to *McCloud*

## Consultation

This consultation begins on 16 July 2020

This consultation ends on 16 October 2020





Ministry  
of Justice

## **Judicial Pensions: Proposed response to *McCloud* Consultation**

**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 the case of *McCloud*.
- Duration:** From 16/07/20 to 16/10/20
- Enquiries (including requests for the paper in an alternative format) to:** Email: [mccloudconsultation@justice.gov.uk](mailto:mccloudconsultation@justice.gov.uk)
- How to respond:** Responses to the consultation should be submitted via email to: [mccloudconsultation@justice.gov.uk](mailto:mccloudconsultation@justice.gov.uk)
- Response paper:** A response to this consultation exercise is due to be published at:  
<https://www.gov.uk/government/consultations/consultation-on-the-proposed-response-to-mccloud>

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**Judicial Pensions: Proposed response to *McCloud***  
Consultation

# Executive summary

In *McCloud*<sup>1</sup> the Court of Appeal held that transitional protections provided to older judges as part of the 2015 judicial pension reforms constituted unlawful direct age discrimination. From 1 April 2015, younger judges had been moved from their legacy schemes, Judicial Pension Scheme 1993 (JUPRA)<sup>2</sup> or the fee-paid equivalent, Fee-Paid Judicial Pension Scheme (FPJPS),<sup>3</sup> both of which were tax-unregistered final salary schemes, to New Judicial Pension Scheme 2015 (NJPS), a tax-registered career average scheme with a lower accrual rate. Judges closest to retirement were protected from the changes due to their age and remained in JUPRA/FPJPS. The Court held that such protection unlawfully discriminated against younger judges.

The Government's request for permission to appeal to the Supreme Court was rejected and the case was remitted to the Employment Tribunal to agree a remedy for claimants. The Employment Tribunal has since made declarations that claimant judges are entitled to be members of JUPRA/FPJPS from 1 April 2015.

The Government accepted that the Court of Appeal's judgment had implications for all public service pension schemes that were reformed in 2015,<sup>4</sup> as all contained transitional protections for older members. It has since committed to addressing the discrimination for all affected public servants regardless of whether they brought a claim. HM Treasury is therefore consulting on proposals to remove the discrimination from the majority of schemes established under the Public Service Pensions Act 2013.<sup>5</sup> Given the uniqueness of the judicial pension schemes, it is necessary to consult separately on how best to address the discrimination for non-claimant judges affected by *McCloud*. In order to be in

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<sup>1</sup> *Lord Chancellor and Secretary of State for Justice and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others*, [2018] EWCA Civ 2844

<sup>2</sup> References to JUPRA throughout this document include pre-1995 judicial pension schemes.

<sup>3</sup> FPJPS was implemented to remedy the discrimination identified in *O'Brien*. The courts found that eligible fee-paid judicial office holders were entitled to pension benefits that were no less favourable than those provided at the time to salaried judges by JUPRA. FPJPS was therefore designed to mirror JUPRA as far as possible and be no less favourable where it was not possible to mirror the arrangements under JUPRA. FPJPS was established under the Judicial Pensions (Fee-Paid Judges) Regulations in 2017 and provided pension benefits for both historic and future service. As such, it was not in place on 1 April 2015, but the practical effect is now that younger judges are entitled to FPJPS benefits until they became members of NJPS from that date.

<sup>4</sup> The Local Government Pension Scheme (LGPS) was reformed in 2014.

<sup>5</sup> HM Treasury's proposals cover schemes for NHS workers, teachers, firefighters, police, civil servants, and UK armed forces. The Ministry of Housing, Communities and Local Government is consulting separately in respect of the LGPS.

scope, judges must have been in office on 31 March 2012 and 31 March 2015 and a member, or entitled to be a member, of JUPRA/FPJPS on those dates.<sup>6</sup>

This consultation proposes that judges in scope of *McCloud* are given a choice whether to have retrospectively accrued benefits in either JUPRA/FPJPS or NJPS from 1 April 2015. The choice would be made via a formal ‘options exercise’ after the end of the remedy period, although judges who have retired or are due to retire before 2022 should be able to make their decision sooner.

The options exercise would follow the introduction of a reformed pension scheme that MoJ intends to introduce for all judges from 1 April 2022. This would ensure that all active members are treated equally in respect of pension design for service beyond the remedy period. The reformed scheme is the subject of separate proposals published alongside this consultation.

It is important to consult rather than return all judges who are in scope to their pre-2015 schemes because it is not necessarily the case that all judges will be better off if returned to JUPRA/FPJPS from 1 April 2015.

This document explains how past tax and contributions would be handled where judges opt to return to JUPRA/FPJPS. However, in light of ongoing *McCloud* Employment Tribunal hearings and discussions between parties – which will inform our approach in respect of non-claimants – aspects of our proposals may change subject to what is agreed or decided as part of that process.

## Interaction with other consultations

In addition to *McCloud*, MoJ is consulting concurrently on proposals to:

- introduce a reformed judicial pension scheme;
- provide a pension for fee-paid service prior to 2000 in light of the *O’Brien 2*<sup>7</sup> and *Miller*<sup>8</sup> judgments; and
- increase the judicial mandatory retirement age.

Respondents may wish to consider these consultations at the same time to understand where and to what extent possible dependencies may influence their response.

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<sup>6</sup> See also the ‘Members of public service pension schemes’ section below.

<sup>7</sup> *O’Brien v Ministry of Justice (Case C-432/ 17) [2018]*

<sup>8</sup> *Miller & Ors v Ministry of Justice [2019] UKSC 60*

# Introduction

## Background

1. In 2015 the Government introduced extensive reforms to public service pension schemes. The reforms followed the Independent Public Service Pensions Commission's final report,<sup>9</sup> published in March 2011, which set out a number of recommendations to make public service pension provision more affordable and sustainable, while at the same time adequate and fair. To that end, the Commission recommended increasing the normal pension age to a member's State Pension age (for most schemes); replacing final salary schemes with new schemes based on a career average design; and introducing a fixed cost ceiling to ensure cost control for the taxpayer. The Commission also recommended preserving pension rights already accrued to protect those in active service from a sudden change in their pension benefits.
2. In the judicial context, judges were moved from their legacy final salary schemes, JUPRA and FPJPS (JUPRA's fee-paid equivalent), both of which were tax-unregistered, to NJPS, a tax-registered career average scheme with a lower accrual rate. The change in tax status impacted judges uniquely, as the judicial schemes were the only public service schemes not formerly tax-registered:<sup>10</sup> therefore, not only were judges moved to a generally less beneficial scheme, they were also now subject to annual and lifetime limits on the tax-relieved benefits they could accrue. This was especially costly for high earners and those who had built up significant private pensions before joining the bench. In its Major Review of the Judicial Salary Structure in 2018 the Senior Salaries Review Body found that the reforms had a significant impact on judges' overall remuneration and were the main cause of unprecedented recruitment and retention challenges in senior judicial offices.<sup>11</sup>
3. Both the judicial scheme and wider public service schemes included transitional protection, whereby older members were exempt from the reforms and remained in their pre-2015 schemes. For judges, this meant those aged 55 or over on 31 March 2012 remained in JUPRA/FPJPS. For those aged between 51½ and 55 on 31 March 2012, 'tapered protection' was available: these judges were given the choice to join NJPS on 1 April 2015 or 'taper' across on a later date determined by their date of birth

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<sup>9</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207720/hutton\\_final\\_100311.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207720/hutton_final_100311.pdf)

<sup>10</sup> Although tax-registered schemes such as NJPS benefit from tax relief on contributions, JUPRA has lower contributions rates to account for the lack of tax relief.

<sup>11</sup> <https://www.gov.uk/government/publications/major-review-of-the-judicial-salary-structure-2018>



(with the practical effect of retaining JUPRA/FPJPS benefits for a longer period of time). All other judges – those aged under 51½ on 31 March 2012 – received no protection and moved to NJPS on 1 April 2015 unless they opted out<sup>12</sup> of pension scheme membership altogether.

4. The transitional provisions were challenged by younger judges in the case of *McCloud*. Claimants alleged that the protection extended to older judges amounted to direct age discrimination contrary to section 13 of the Equality Act 2010 (EA 2010) and the non-discrimination rule inserted into pension schemes by virtue of section 61 EA 2010. Claims were also brought for equal pay and indirect race discrimination (sections 67 and 19 EA 2010 respectively), claimants alleging that the 2015 reforms had a disproportionate adverse effect on women and black, Asian and minority ethnic (BAME) judges.
5. The Government accepted that the transitional provisions were discriminatory but maintained that objective justification could be found in their aim of protecting those closest to retirement from the financial effects of pension reform. Rejecting this argument, in December 2018 the Court of Appeal upheld the Employment Tribunal's finding that the Government's treatment of younger judges was not a proportionate means of achieving a legitimate aim. The Court was also satisfied that the equal pay and indirect race claims were made out. The transitional provisions were therefore unlawfully discriminatory.
6. The Government's request for permission to appeal to the Supreme Court was rejected and the case was remitted to the Employment Tribunal to determine a remedy for the claimants. On 15 July 2019 the Government issued a written ministerial statement explaining that it accepted that the Court of Appeal's judgment had implications for all schemes established under the Public Service Pensions Act 2013, as all had provided transitional protection arrangements for older members. The Government confirmed that it would take steps to address the difference in treatment across all schemes and for all affected members regardless of whether they had brought a claim.

## Removing the discrimination

7. HM Treasury is taking forward a consultation to address the discrimination in public service schemes for the armed forces, firefighters, police, NHS workers, teachers and civil servants. The Ministry of Housing, Communities and Local Government (MHCLG) is also consulting in respect of the Local Government Pension Scheme, where there were differences in how transitional protection was provided. Given the unique nature

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<sup>12</sup> Alternatively, judges could join a registered stakeholder pension scheme; see 'Partnership Pension Account' below.

of the judicial schemes, it is necessary to consult separately on our proposed model for removing the discrimination.

8. We propose that judges in scope of *McCloud* should be given a choice whether to have accrued benefits in JUPRA/FPJPS or NJPS and be members of their chosen scheme from 1 April 2015 until a reformed pension scheme is introduced in 2022.<sup>13</sup> It is important to consult because it is not necessarily the case that all judges would be better off if returned to JUPRA/FPJPS for the relevant period. For some, NJPS may represent the better option.

## Employment Tribunal

9. In the ongoing *McCloud* remedy hearings, the Employment Tribunal has declared that claimant judges are entitled to membership of JUPRA/FPJPS from 1 April 2015. Accordingly, MoJ has begun moving claimants who are active scheme members back to their respective schemes. Non-claimant judges in the same legal and factual position as claimants are, equally, entitled to have never left JUPRA/FPJPS.
10. The parties continue to discuss how outstanding issues, for example member contributions and options, should be handled, and further clarity may depend on the outcome of the pecuniary losses hearings, currently scheduled for 19–23 October 2020. Any approach agreed as part of that process would likely influence how these issues are to be addressed for non-claimants, and therefore the proposals contained in this document are subject to change to ensure a consistent approach.

## Economic impact

11. We have not carried out an economic impact assessment on our proposals at this stage. This is because the proposals considered in this paper are not likely to lead to additional costs or savings for businesses, charities or the voluntary sector, but are necessary steps to address the Court of Appeal's judgment. The expected costs and any associated administrative work to give effect to the proposals are outlined below.

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<sup>13</sup> The reformed scheme would be provided for via amendments to the Judicial Pensions and Retirement Act 1993 (JUPRA) to enable the provision of a modernised tax-unregistered section of the scheme for future benefit accrual.

## Equalities impact

12. When formulating policy proposals, the Government is required to have due regard to the Public Sector Equality Duty in the EA 2010.<sup>14</sup> The duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between people with different protected characteristics when carrying out their activities.
13. An equality statement has been published alongside this document and sets out our assessment of potential equality impacts of addressing the discrimination for judges in scope. As the proposals have been developed to respond to the *McCloud* judgment, we expect there to be positive equalities impacts and we do not consider that the design of the remedy leads to disproportionate impacts on individuals. To the extent there may be the potential for different impacts, in particular in relation to those judges who do not fall within the scope of these proposals, we consider that this can be objectively justified.

**Question 1:** Do you have any views about the implications of the proposals set out in this consultation on people with particular protected characteristics as defined in section 149 EA 2010? What evidence do you have on these matters? Is there anything that could be done to mitigate any impacts identified?

**Question 2:** Is there anything else you would like to add regarding the equalities impact of the proposals set out in this consultation document and the equality statement?

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<sup>14</sup> <https://www.gov.uk/guidance/equality-act-2010-guidance>

# Proposals

This section sets out our proposals for addressing the discrimination identified in *McCloud*.

## Remedy period

14. For the purposes of this consultation, the relevant period for judges' consideration is 1 April 2015 – at which point judges began moving to NJPS – until the introduction of the future reformed scheme, which is currently projected for 1 April 2022. We propose that judges in scope of the proposals should be given a choice of either JUPRA/FPJPS or NJPS membership for this period. Thereafter, the reformed scheme would equalise treatment across the judiciary in respect of pension designs offered for future accrual, since all judges, whether members of JUPRA/FPJPS or NJPS, will move to the reformed scheme from that point.<sup>15</sup>

## Scope

### Judges in office on 31 March 2012

15. In *McCloud* the courts identified unlawful age discrimination between the following groups:

- those who were in judicial service on 31 March 2012 and 31 March 2015 and were members (or, for fee-paid judges, entitled to be members) of JUPRA or FPJPS on those dates and were within ten years of normal pension age (65) on 31 March 2012, therefore benefiting from transitional protection (**protected members**); and
- those who were in service on 31 March 2012 and 31 March 2015 and were members (or, for fee-paid judges, entitled to be members) of JUPRA or FPJPS on those dates, and:
  - would reach normal pension age between 2 April 2022 and 1 September 2025, therefore benefiting from tapered protection (**taper-protected members**); or
  - were more than 13½ years from normal pension age on 31 March 2012, and so were not eligible for any form of protection (**unprotected members**).

16. MoJ must retrospectively remove the discrimination between the groups from 1 April 2015. We have previously clarified<sup>16</sup> that a judge will be in scope if first appointed to

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<sup>15</sup> This includes those who were protected from the 2015 reforms, as well as those who would be eligible for membership of a judicial pension scheme but have opted out.

<sup>16</sup> MoJ provided a judicial intranet statement in April 2020 providing an update on *McCloud* and outlining criteria for being in scope.

judicial office, whether fee-paid or salaried, before 1 April 2012 and a member of JUPRA, or entitled to be a member of FPJPS, on 31 March 2012. Specifically, this includes the following categories:

- judges who were in salaried office on 31 March 2012 and on 31 March 2015 – these judges are eligible for JUPRA membership from 1 April 2015;
- judges who were in fee-paid office on 31 March 2012 and in salaried office on 31 March 2015 – these judges are eligible for JUPRA membership from 1 April 2015;
- judges who were in fee-paid office on 31 March 2012 and 31 March 2015 but have taken salaried office at a later date – these judges are eligible for FPJPS membership from 1 April 2015 until the date of their appointment to salaried office, at which point they are eligible for JUPRA membership; and
- judges who were in fee-paid office on 31 March 2012 and 31 March 2015 and continue to be in fee-paid office to date – these judges are eligible for FPJPS membership from 1 April 2015.

17. Because judges appointed to office after 31 March 2012 were ineligible for transitional protection regardless of their age<sup>17</sup> – including those whose appointments were agreed but who had not accepted an offer before then – they were not subject to the unlawful discrimination identified in *McCloud*. Furthermore, those appointed after 31 March 2012 could reasonably be expected to have known that pension provision was likely to change when they entered service, given the widespread media scrutiny the reforms received at the time. Consequently, they are not in scope of these proposals and will continue to be members of NJPS, unless they have opted out, before transferring to the reformed scheme in 2022.

18. Protected judges, who remained in JUPRA/FPJPS because of their age, are not in scope of this consultation, as they were not subject to the discrimination identified in *McCloud*.

19. It should be noted that these proposals will apply to eligible members of the judiciary in England, Wales, Scotland and Northern Ireland for whose pension arrangements the UK Parliament has sole competency to legislate. There are therefore a number of judicial offices in Scotland and Northern Ireland to which these proposals will not apply.

### **Members of non-judicial public service pension schemes**

20. When the public service pension scheme reforms were introduced in 2015, the Government committed that any member who was eligible for protection under one public service pension scheme, and subsequently joined the pension arrangements of another public service scheme, would retain their protection rights. The protection rights were ‘portable’ between schemes, including where prior membership was of a

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<sup>17</sup> The exception is where a judge was a member of a non-judicial public service pension scheme on 31 March 2012 – see ‘Members of non-judicial public service pension schemes’.

non-judicial public service pension scheme. Such portability will be retained for the purposes of this consultation with the removal of the age requirement.<sup>18</sup>

### **Taper-protected judges**

21. Tapered protection was offered to judges who were aged between 51½ and 55 on 31 March 2012. These judges were not eligible for full protection and were given the choice to join NJPS on 1 April 2015 or remain members of JUPRA/FPJPS until their tapered protection closing date (between 31 May 2015 and 31 January 2022, determined by their date of birth), at which point they ‘tapered’ to NJPS. Thus, tapering was done on a sliding scale, with older taper-protected judges retaining JUPRA/FPJPS benefits for longer than their younger counterparts. On 30 September 2019 MoJ stopped the tapering of judges and those whose taper dates came after this point remained in JUPRA/FPJPS.
22. The effect of *McCloud* is that tapered protection was discriminatory and that this discrimination was unlawful. Maintaining tapered protection, or extending it to all members, would therefore perpetuate or indeed extend the discrimination, and would be extremely complex to administer. Consequently, taper-protected judges must decide whether to choose JUPRA/FPJPS or NJPS membership for the entire remedy period; they will not be able to split accrual across both schemes.<sup>19</sup> This is necessary to ensure that the remedy is implemented fairly for all in scope.
23. While it is possible that tapered protection may have been advantageous for some individuals, any advantage would have been as a result of a policy that has been found to give rise to unlawful age discrimination. We believe the proposed approach is necessary to address the discrimination.

### **Judges who opted out of NJPS**

24. MoJ is aware of judges having opted out of NJPS because of the impact of annual allowance and lifetime allowance charges. Because it is likely that these judges would have remained members of JUPRA/FPJPS but for the discrimination, those who opted out of NJPS and were members of JUPRA, or entitled to be members of FPJPS, on 31 March 2012 and 31 March 2015 are in scope of the consultation, subject to payment of member contributions arrears. See Annex A, ‘Member contributions and tax relief’.

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<sup>18</sup> Therefore, judges will be in scope if they were (a) members of a non-judicial public service pension scheme on 31 March 2012 and were members of JUPRA or eligible for FPJPS on 31 March 2015 or (b) if they were members of a non-judicial public service pension scheme on both 31 March 2012 and 31 March 2015 and were subsequently appointed to judicial office so long as there was not a gap of more than five years between leaving the non-judicial public service pension scheme and taking up judicial office. We are aware that there is a gap in the regulations for judges who were members of a non-judicial public service pension scheme on 31 March 2012, but who subsequently took up a fee-paid judicial appointment and we intend to bring forward amending regulations to rectify this.

<sup>19</sup> See Annex A, ‘Member contributions and tax relief’.

### **Transitional Protection Allowance**

25. When NJPS was introduced, unprotected and taper-protected judges were given a one-off option to opt out of the pension scheme and instead receive a Transitional Protection Allowance (TPA) if they satisfied the following criteria:

- the individual was not eligible for full protection;
- the individual had continuous membership of the judicial pension scheme since first being eligible to join it and was still an active member of the scheme on 31 March 2015;
- the individual could provide proof of having registered with HMRC for either enhanced protection under Finance Act 2004 or fixed protection under Finance Act 2011 and had not contacted HMRC to revoke such protection; and
- the individual had not taken any action which negated the validity of their protection, for instance joining a tax-registered pension scheme or making contributions to a tax-registered money purchase pension arrangement after 5 April 2006 (enhanced protection) or making contributions to, or building up benefits in, a tax-registered pension scheme after 5 April 2012 (fixed protection).

26. TPA is an additional sum paid equal to the 'actual' employer contribution that would have been paid by MoJ had the member joined NJPS. The option to receive TPA could only be exercised on 1 April 2015 and extinguished any rights to tapered protection.

27. Judges who opted for TPA and were in office on 31 March 2012 are in scope of *McCloud*, and we propose that they are given the choice of:

- returning to JUPRA/FPJPS from 1 April 2015, subject to TPA being recouped and contributions arrears being accounted for; or
- continuing to opt out of any judicial pension scheme and receive TPA until the end of the remedy period.

Where they elect to return to JUPRA/FPJPS, they would not forfeit either their enhanced or fixed protection.

28. Judges whose appointments were agreed before 31 March 2012, but who took up office after this point, were also eligible for TPA if they met the criteria. These judges are not in scope of *McCloud* and will continue to receive TPA or accrue benefits in NJPS until the reformed scheme is introduced.

### **Partnership Pension Account**

29. Unprotected or taper-protected judges were able to opt out of NJPS and instead join a Partnership Pension Account (PPA) – a registered stakeholder pension scheme. As with judges in receipt of TPA, judges who joined a PPA are in scope of *McCloud*. We are considering further the appropriate mechanism for where PPA judges choose JUPRA/FPJPS benefits for the remedy period.

### **“Gap” judges**

30. As discussed above, judges who were in fee-paid office on or before 31 March 2012 and remained in judicial service on 31 March 2015 are in scope of *McCloud*. This includes judges who were in fee-paid service on 31 March 2012, took up salaried office between 1 April 2012 and 1 December 2012<sup>20</sup> and had not made a claim for a fee-paid pension within three months of the end of their fee-paid service, the so-called “gap” judges. Prior to the Supreme Court judgment in *Miller*, these judges were not considered to have a valid claim for a fee-paid pension and were consequently moved to NJPS from 1 April 2015, regardless of their age.
31. Following *Miller*, MoJ accepts that claims in respect of fee-paid service from these gap judges were made in time and that they were entitled to be members of FPJPS on 31 March 2012. We recognise that the reason gap judges over the age of 55 on 31 March 2012 were moved to NJPS on 1 April 2015 was due to our position on time limits rather than *McCloud* discrimination. Nonetheless, we consider that gap judges’ entitlement is most appropriately resolved through the *McCloud* proposals, which means gap judges should be offered a choice of JUPRA or NJPS benefits for the remedy period.
32. As with all fee-paid judges, gap judges should consider the impact of aggregate fee-paid service (once service records are agreed and fee-paid pensions calculated for those who have retired) on their 20-year JUPRA/FPJPS entitlement.

### **Judges who retire or die during the remedy period**

33. The proposals extend to judges who retire or die during the remedy period. Where JUPRA/FPJPS membership represents the best option for such individuals or their dependants, any shortfalls in lump sum and pension payments owed on that basis would need to be paid. See Annex A, ‘Revisiting past cases’.
34. While the remedy model and ongoing litigation process should resolve the discrimination for all judges in scope, MoJ is aware that several judges who have already retired may be experiencing financial hardship as a result of not receiving their full JUPRA/FPJPS pension and lump sum. With that in mind, our proposals seek to provide a way for retired judges to elect to return to JUPRA/FPJPS earlier. See ‘Deciding during the remedy period’ below.
35. MoJ is also aware that several judges who have already retired have chosen not to take their pension in case this affects their right to full JUPRA/FPJPS benefits. This is not the case: retiring judges who take their pension based on current scheme

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<sup>20</sup> MoJ introduced a moratorium on 5 April 2013, which took effect from 2 December 2012 (or 1 February 2013 for Northern Ireland offices) and is still in place. The effect of the moratorium is that eligible fee-paid judges in service on 2 December 2012 are entitled to a pension for their fee-paid service regardless of whether they have brought a claim in the Employment Tribunal.



membership (e.g. NJPS) do so without prejudice to their lawful entitlement<sup>21</sup> to full JUPRA/FPJPS benefits and are encouraged to take their pension while their entitlement is being rectified.

**Question 3:** Please set out any comments on the proposed scope of the consultation, specifically on protected members, taper-protected members, TPA, and gap judges.

## Scheme comparison

36. It is expected that the majority of judges are likely to be better off in JUPRA/FPJPS because it is the more generous scheme for most judges in most circumstances: it has a more generous accrual rate, an automatic lump sum on retirement, more generous dependant benefits and is a final salary scheme. It also provides the benefits of a tax-unregistered scheme (in that members are not faced with annual allowance or lifetime allowance charges on their accrued judicial pension benefits), whilst compensating members for the tax consequences of a tax-unregistered scheme, with discounted member contribution rates and the payment of a Judicial Service Award upon retirement.
37. However, there are specific circumstances that could make NJPS the better scheme for some judges (and, in the wider public service context,<sup>22</sup> it is expected that many members will be better off during the remedy period in their respective reformed schemes). The most significant of these factors is that JUPRA/FPJPS has a 20-year service cap: members with 20 years' service cannot accrue further pension benefits. Because NJPS has no such limit, judges who would reach their JUPRA/FPJPS service cap before or during the remedy period may find they are better off opting for NJPS membership rather than exhausting their JUPRA/FPJPS entitlement. This will primarily depend on when a judge would reach their service cap: those who would reach 20 years early in the remedy period may be better off in NJPS, whereas those who reach it later may be better off in JUPRA/FPJPS.
38. Other factors are also relevant in determining where judges may be better off, including the age at which they retire; whether they have additional benefits in another registered pension scheme and the value of these benefits (which will impact on their annual and lifetime allowances); and the value they place on scheme features, for example the

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<sup>21</sup> For example, where a retired member incurs lifetime allowance charges, the portion of the charge paid in respect of NJPS benefits would be refunded where the member ultimately returns to JUPRA/FPJPS. See Annex A, 'Lifetime allowance'.

<sup>22</sup> NHS workers, teachers, firefighters, police, civil servants, and UK armed forces

younger retirement age and more generous dependant benefits of JUPRA/FPJPS compared with the more flexible benefits and wider definition of dependant of NJPS.

39. The following table provides an overview of the key differences between the schemes.<sup>23</sup>

<b>Feature</b>	<b>JUPRA/FPJPS (final salary)</b>	<b>NJPS (career average)</b>
<b>Tax status</b>	Tax-unregistered	Tax-registered
<b>Annual accrual rate</b>	1/40 <sup>th</sup> (2.5%) of judge's final salary <sup>24</sup> multiplied by total length of aggregated service to a maximum of 20 years	2.32% x pensionable earnings a year  (Accrued pension revalued each year in line with prices)
<b>Lump sum</b>	Automatic lump sum of 2.25 times the annual rate of pension, plus a Judicial Service Award <sup>25</sup> to offset tax due on lump sum	No automatic lump sum but lump sum available by commuting annual pension entitlement
<b>Retirement age</b>	65, or on completion of five years' service (if later)	The member's State Pension age
<b>Survivor benefits</b>	A surviving spouse's or civil partner's pension paid at half the rate of the member's pension; provision for pension in respect of a child dependant	A surviving adult (spouse, civil partner or nominated partner) pension paid at annual rate of three eighths of the member's pension; provision for pension in respect of a child dependant
<b>Ill-health retirement</b>	Pension payable immediately without reduction; if the member has not reached 65, the length of service upon which the pension is calculated will be enhanced by a period equal to one-half of the time remaining between the day after the date of retirement and the 65th birthday.	Pension payable immediately without reduction; if the member has not reached their State Pension age, the pension will be enhanced by half of the expected pension that the member would have accrued from the date of retirement and the date they reach their State Pension age.

<sup>23</sup> See scheme guides for more information.

<sup>24</sup> Regulation 7 of the Judicial Pensions (Fee-Paid Judges) Regulations 2017 sets out how the 'appropriate annual salary' is determined for pension purposes in FPJPS depending on whether the office held by the judge at retirement is fee-paid or salaried.

<sup>25</sup> The Judicial Service Award is only payable on earnings up to the Pension Cap.

## Options model

40. Our proposed model for addressing the discrimination is that all judges in scope are given a choice whether to have accrued benefits in JUPRA/FPJPS or NJPS for the remedy period. We propose offering this choice through a formal 'options exercise' following the end of the remedy period to coincide with the introduction of the reformed scheme. The decision to return to JUPRA/FPJPS would be backdated to 1 April 2015. We also propose that judges who have retired since 1 April 2015, or are due to retire before the end of the remedy period, should be able to make their choice earlier so that they can access their full JUPRA/FPJPS pension and lump sum.
41. Annex A contains technical details of how past contributions and tax, including the annual allowance charge, should be handled where judges elect to return to JUPRA/FPJPS.

### Options exercise

42. The options exercise would provide judges with clear communications on the options available to them and clear channels through which to engage with the exercise. Those in scope would be given a choice between:
- accruing benefits in JUPRA/FPJPS; or
  - accruing benefits in NJPS
- from 1 April 2015 until 31 March 2022.
43. The options exercise would follow the introduction of the reformed scheme, when treatment is equalised on a prospective basis, currently projected for April 2022. This would allow judges to consider, before making their election, the precise design of the future scheme, their own career and pay progression during the remedy period and, where applicable, when they will reach their 20-year service cap in JUPRA. These factors are potentially very important in informing which pension scheme is the better choice for the remedy period, and therefore it is sensible that judges should make an informed decision in the light of this information.
44. Additionally, this timeline would allow MoJ to develop a range of materials to assist judges in making their decision, including known pension, lump sum and survivor pension based on current salary at the end of the remedy period. We would also look to produce an online calculator so that individuals can project the pension benefits they might receive under either scheme in a range of scenarios.
45. In providing the materials described, MoJ would not be giving financial advice or recommending a particular option.

### Deciding during the remedy period

46. Engagement with the Scheme Advisory Board has made it clear that a significant proportion of judges are certain they want to return to JUPRA/FPJPS and do not want

to have to wait until the end of the remedy period to make that election. While this is understandable, for the reasons outlined above we believe it is important that all judges in scope of the consultation and who are still in active service beyond the remedy period should wait until the formal options exercise to make their decision. There is no disadvantage in doing so: all judges will receive their full pension entitlement through the options exercise.

47. This means that judges would continue to be members of NJPS until the end of the remedy period and will therefore be subject to annual allowance and lifetime allowance limits. Where judges who subsequently elect to return to JUPRA/FPJPS have not used Scheme Pays, they would receive a refund of annual allowance charges they have paid upfront (see Annex A, 'Annual allowance'), although both voluntary and mandatory Scheme Pays will continue to be available for the rest of the remedy period and any diminution of pension agreed to would be unwound on a member's return to JUPRA/FPJPS.
48. However, we understand that those who have retired since 1 April 2015 or are due to retire before the end of the remedy period may prefer to have their entitlement resolved earlier so that they can be paid any shortfalls in lump sum and pension payments to which they may be entitled under JUPRA/FPJPS. Therefore, where judges have retired or died since 1 April 2015, we propose that they should be able to return to JUPRA/FPJPS sooner than the options exercise (although they may choose to await the options exercise if they prefer). Where these judges (or their representatives) wish to do so, we could begin processing decisions after the end of the consultation.
49. Those who have retired or who plan to retire before the options exercise<sup>26</sup> would be provided with a statement comparing the benefits of either scheme, including potential shortfalls in lump sum and pension owed and surviving spouse, civil partner or unmarried partner pension benefits. Where judges have died during the remedy period, we would provide this information to the late member's family or legal representatives.
50. Although we would ideally resolve judges' entitlement as quickly as possible, the process may be more complicated for judges with fee-paid pensions due under *O'Brien 2* and *Miller*. The impact of fee-paid pension on their service cap may be an important factor in helping a judge choose the most beneficial scheme membership. As such, judges for whom this is relevant may wish to wait until their fee-paid pension is calculated before electing scheme membership for the remedy period.

### **Default option**

51. While we would seek to obtain a decision from all judges in scope of *McCloud*, it will be necessary to include a default option in the event that judges do not respond to the options exercise. We consider that the safest option in such a scenario would be to

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<sup>26</sup> This includes those who take ill-health and early retirement.

leave individuals in the scheme they are currently in rather than presume to know which option would be best for them (noting that judges may value different features of either scheme).

52. As described above, taper-protected judges would also need to make a choice between JUPRA/FPJPS or NJPS membership for the remedy period. For taper-protected judges who are in NJPS and do not respond to the options exercise, we propose that they should receive NJPS benefits for the duration of the remedy period.

**Question 4:** Do you agree with the proposed default option?

### **Other models considered**

53. MoJ has conducted technical discussions with the Scheme Advisory Board, pension administrators and HM Treasury to inform our proposed options model. These discussions have been extremely helpful in considering the merit of different models.

54. We explored several alternative options to address the *McCloud* judgment. These include:

- offering a deferred choice so that judges would make their decision of scheme membership at the point of drawing benefits (i.e. retirement);
- running a formal options exercise at the end of 2020; or
- returning all those in scope to JUPRA/FPJPS, with an option to opt-out.

55. We concluded that none of these approaches would adequately address the membership of all judges in scope. Specifically, the deferred choice option would be highly impractical for many judges, who wish to resolve their scheme membership sooner than retirement. Furthermore, it would prolong administrative processes for several decades until all members in scope have retired and would be highly complex to deliver operationally due to the schemes' different tax status.

56. Running a formal options exercise at the end of 2020 would not allow judges to make a fully informed decision as they would not, for example, at that point know of the exact design of the reformed scheme (intended to be introduced in 2022). Additionally, it would not be possible to produce sufficient resources by the end of 2020 to inform members' decisions.

57. Finally, returning all judges to JUPRA/FPJPS, with a short window to opt-out, would not allow judges sufficient time to calculate and compare their levels of entitlement in either scheme.

## Costs

58. On the basis that members choose the most financially beneficial option<sup>27</sup> for the remedy period, we estimate that the cost of these proposals will be approximately £130m. This is the cost of providing higher pension benefits and does not include the costs associated with member contributions, income tax relief, the Judicial Service Award, tax payable on JUPRA/FPJPS lump sums, annual allowance tax charges, or the administrative costs of delivering an options exercise. The cost is largely as a result of a projected increase in benefit accrual and does not include the current costs associated with judicial pension membership. The figure is a provisional estimate because there are several factors that could influence the total cost, including individual pay progression and the age at which members retire. The costs will be revised as actuarial assumptions are refined.
59. The outcome of MoJ's concurrent consultations on the reformed scheme and increasing the mandatory retirement age may have a bearing on the costs because both may inform judges' retirement plans.
60. These costs are necessary to address the *McCloud* judgment, which requires MoJ to address the discrimination. Because the costs are largely fixed, and we do not consider that the proposals will lead to additional costs or savings for businesses, charities, or the voluntary sector, we have not carried out an economic impact assessment.

**Question 5:** Please set out any further comments on the proposed options model.

## Next steps

61. Various elements of the proposals will require legislative change. The specific details of future legislation, including the timelines for these, will be developed following the responses to proposals set out in this paper.
62. We intend to respond to this consultation formally in early 2021.

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<sup>27</sup> Although, as explained above, there are other factors that judges will need to take into account when making their decision.

## Interaction with other consultations

63. The proposals addressed in this consultation paper have been developed in coordination with ongoing work surrounding judicial pensions and policy. MoJ is concurrently consulting on amendments to the Fee-Paid Judicial Pension Scheme (FPJPS), future reform of judicial pensions, and the judicial mandatory retirement age. While it is expected that interactions between consultations will be limited, respondents may find it useful to cross reference these consultations when providing a response.
64. Both HM Treasury and MHCLG are consulting separately on how to address the *McCloud* discrimination in other public service pension schemes.
65. We have considered the potential interactions between MoJ consultations below.

## Amendments to the Fee-Paid Judicial Pension Scheme

66. MoJ is consulting on amendments to FPJPS to allow for the accrual of pension benefits for pre-7 April 2000 fee-paid judicial service, where service continues up to or beyond that date, in the light of *O'Brien 2*. Following the related *Miller* litigation, the three-month time limit for *O'Brien* claims only runs from the date of a claimant's retirement from all judicial offices, and not from the end of each fee-paid appointment. We introduced a moratorium for *O'Brien* claims on 5 April 2013, taking effect from 2 December 2012.<sup>28</sup>
67. Respondents who fall within scope of the *McCloud* proposals and who will have additional fee-paid pension entitlement as a result of *O'Brien 2* and/or *Miller* may wish to consider the two consultation papers in parallel. As explained above, a key factor in a judge choosing JUPRA/FPJPS or NJPS benefits for the remedy period will be the point at which they reach their 20-year service cap.<sup>29</sup>
68. The consultation will be open for responses until 18 September 2020. The consultation paper can be found at <https://www.gov.uk/government/consultations/fee-paid-judicial-pension-scheme-amendments>.

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<sup>28</sup> Or 1 February 2013 for Northern Ireland offices.

<sup>29</sup> Reckonable pensionable service in both JUPRA and FPJPS is capped at 20 years. Only pensionable service in salaried office counts as service for the purposes of the service cap in JUPRA. Therefore, a judge with 20 years' salaried service in aggregate does not accrue further benefits in JUPRA, although the final salary link remains. The cap in FPJPS also includes any service in JUPRA. For example, a judge with 12 years' pensionable service in JUPRA may only accrue a further 8 years in aggregate in FPJPS. See Annex B, Example 1.

## Future reform of judicial pensions

69. MoJ is consulting on principles for a reformed pension scheme, intended to equalise the pension treatment of the judiciary prospectively, and address recruitment and retention issues. This will be introduced once the remedy period in respect of *McCloud* comes to an end, planned for April 2022. Upon the introduction of the reformed scheme in 2022, it is proposed that all eligible judges in service – including protected members – will become members of the reformed scheme.
70. The proposed scheme is relevant for future accruals following its introduction in 2022, but it is important to note that all pension benefits which have been previously accrued will be protected and those members with final salary benefits will retain that link going forward.
71. The consultation will be open for responses until 16 October 2020. The consultation paper can be found at <https://www.gov.uk/government/consultations/consultation-on-a-reformed-judicial-pension-scheme>.

## Judicial mandatory retirement age

72. MoJ is also consulting on proposals to increase the judicial mandatory retirement age (MRA). Current legislation sets the MRA for most judicial office holders at the age of 70. The Lord Chancellor has a constitutional duty to provide resources for the effective operation of courts and tribunals and this includes considering policies which may promote the appointment and retention of judicial office holders. The proposals in the consultation on the judicial MRA are intended to support the resourcing and operation of courts and tribunals, and they propose raising the mandatory retirement age to either 72 or 75.
73. Respondents may wish to consider the consultation in parallel as an increase in the MRA permitting a judge to serve longer and accrue additional pension could affect a judge's decision whether to accrue benefits in JUPRA/FPJPS or NJPS for the remedy period.
74. The consultation will be open for responses until 16 October 2020. The consultation paper can be found at <https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age>.



# Annex A: Technical details

## Statutory time limit for reassessing tax in previous years

1. There are statutory time limits for reassessing the tax position of previous years, and in most cases a four-year limit from the end of a given tax year will apply. Where a member returns to JUPRA/FPJPS, HMRC will in most cases only be able to collect any tax that is owed for the current tax year and the four full tax years immediately preceding the point at which the member's decision is made. Where an individual's benefits change for a tax year that falls outside the statutory time limits, HMRC would not be able to collect any additional tax due or refund the annual allowance charges paid. However, where a change of benefits retrospectively decreases tax liabilities outside of the four-year window, including in respect of the annual allowance charge, we propose that the Government would provide compensation for tax overpayments outside of the tax system.
2. The effect of this time limit on member contributions (including tax relief) and the annual allowance is discussed below.

## Member contributions and tax relief

3. Because NJPS is a tax-registered scheme, member contributions attract tax relief at the member's marginal tax rate. JUPRA/FPJPS, however, is tax-unregistered, which means contributions do not attract tax relief. The lower contribution rate of JUPRA/FPJPS broadly allows for this difference in tax status.
4. Where unprotected judges elect to return to JUPRA/FPJPS, member contributions made to NJPS from 1 April 2015 should be treated as having been made to JUPRA/FPJPS. Where taper-protected judges choose JUPRA/FPJPS membership from 1 April 2015, the contributions adjustment would take effect from the point at which the member tapered to NJPS (because they were already contributing to, and a member of, JUPRA/FPJPS until that point). Tax owed on the income used to pay JUPRA/FPJPS contributions, which do not attract tax relief, would need to be paid in respect of the previous four years.
5. Alternatively, where taper-protected judges choose to remain in NJPS, the contributions adjustment would take effect from 1 April 2015 so that the member becomes a member of NJPS for the entire remedy period and not just from the point of the taper.

6. Where judges who opted out of the judicial pension in 2015, and/or opted to receive TPA, wish to return to JUPRA/FPJPS, tax and contributions arrears would need to be accounted for. We are considering how such payments ought to be made. Potential options include: making an upfront payment; deducting from future salary/fees; or deducting from the retirement lump sum. We accept that repayments of TPA may be significant and therefore we may also consider introducing an equivalent of Scheme Pays for such payments.

**Question 6:** We are interested in members' views on how we should treat tax and contributions arrears where judges who opted out of the judicial pension in 2015 and/or opted to receive TPA wish to return to JUPRA/FPJPS.

## Annual allowance

7. The annual allowance (AA) is the maximum amount of tax-relieved pension savings that can be accrued in a year. The standard AA is currently £40,000, but for those on the highest incomes, it tapers down to a minimum level of £10,000 for tax years 2016/17 to 2019/20.<sup>30</sup>
8. For defined benefit pension schemes (such as the judicial schemes), liability for tax charges above the annual allowance is calculated using the value of pension accrued in a particular year. Where an individual's pension accrual in a single year exceeds the AA, a tax charge is due on the amount accrued above the AA, subject to the availability of any AA carried forward.
9. Because JUPRA/FPJPS is tax-unregistered, AA limits do not apply, unlike in NJPS. Judges who moved to NJPS on or after 1 April 2015 may have incurred additional tax liabilities because of the AA charge: some will have opted to pay this charge upfront, whereas others will have selected Scheme Pays, whereby the pension scheme pays the charge upfront on behalf of members with an agreed deduction from pension benefits on retirement.
10. Where judges elect to return to JUPRA/FPJPS, the AA position would be unwound and charges that have been paid upfront by judges would be refunded for all years of the remedy period. For the current tax year and four tax years prior to the decision, AA refunds would be paid by HMRC. For the years prior to this, compensation for the AA charge would be provided outside of the tax system. Where Scheme Pays has been used, the member would be unaffected and the scheme would be reimbursed.

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<sup>30</sup> The Finance Bill 2019–21 provides for a reduction in the minimum level to £4,000 from 2020/21. At the date of publication, the Bill is still being considered by Parliament.

11. For the rest of the remedy period, members' pension contributions will continue to receive tax relief subject to the AA limits on accruals. However, if they return to JUPRA/FPJPS, they will receive a refund through the options exercise (if they have paid the AA charge upfront). Therefore, pension savings statements – which inform members when they are approaching their AA limit – will also continue to be sent on the basis that the judge is a member of NJPS. Judges may wish to consider opting for Scheme Pays. Both mandatory and voluntary Scheme Pays will remain available throughout the remedy period.

## Revisiting past cases

12. Judges who retire during the remedy period are in scope of *McCloud*. This includes:

- unprotected judges who retired on NJPS benefits; and
- taper-protected judges who retired on NJPS benefits after tapering from JUPRA/FPJPS.

13. All should be given a choice whether to opt for JUPRA/FPJPS membership from 1 April 2015. Taper-protected judges should choose either JUPRA/FPJPS or NJPS for the entire remedy period, i.e. they cannot spread accrual across both schemes.

14. Where a retired member elects JUPRA/FPJPS membership, this would require adjusting the benefits they have received on retirement (e.g. lump sum and periodic pension) and continue to receive. Any shortfalls owed by MoJ would need to be paid to the member to reflect the change in membership; equally, overpayments by MoJ would need to be recovered.

15. As above, because of the statutory time limits for reassessing tax, where retired judges wish to return to JUPRA/FPJPS ahead of the 2022 options exercise, only the current tax year and four tax years preceding the point of their decision would be relevant when reassessing tax.

16. For all judges who have retired or will retire in the remedy period, we would provide them with a comparison of benefits available under both JUPRA/FPJPS and NJPS so that they can make an informed decision.

## Ill-health retirement

17. We would look to prioritise judges who have taken ill-health retirement since 1 April 2015. While both JUPRA/FPJPS and NJPS have broadly the same criteria for permitting ill-health retirement (and we therefore do not expect that judges have been refused retirement because of being moved to NJPS), depending on individual circumstances the ill-health pension may be better in either JUPRA/FPJPS or NJPS: JUPRA/FPJPS has a higher accrual rate and offers an automatic lump sum, but NJPS

offers greater ill-health enhancement because of the later retirement date (see Annex B, Example 3).

18. Depending on the individual circumstances of each case, ill-health retirement judges may wish to keep the benefits they are receiving or opt for JUPRA/FPJPS membership from 1 April 2015. Where the latter occurs, and shortfalls in pension or lump sum are owed, these would need to be paid; equally, overpayments by MoJ would need to be recovered.

### **Death during the remedy period**

19. In some cases, judges in scope of *McCloud* will, sadly, have died during the remedy period. Such cases will be treated as a priority, as with ill-health retirement members.

20. Where death has occurred since 1 April 2015, the late member's family or legal representatives would be provided with a comparison of the benefits available in either JUPRA/FPJPS or NJPS. This would include any shortfalls in lump sum or pension to which the late member would have been entitled in JUPRA/FPJPS as well as a comparison of the benefits and scheme features available to spouse/dependants, etc. The family or representative would then make an informed decision based on the information available.

21. Where a change in membership occurs, it may be the case that the late member is owed pensions arrears, in which case their estate may need to be reopened to assess possible inheritance tax implications. Any additional out-of-pocket expenses incurred, for example as a result of reopening a probate application, would be reimbursed where evidence is provided.

22. Although JUPRA/FPJPS includes provision for a spouse or civil partner pension, it does not provide a pension for an unmarried partner, unlike NJPS. Therefore, where an unmarried partner is in receipt of a late member's pension under NJPS, and the late member was in scope of *McCloud*, we propose not offering a choice in such a scenario, since the choice would be between receiving a pension and receiving nothing.

**Question 7:** Please set out any further thoughts on revisiting past cases.

### **Interest**

23. Given the likely need for retrospective adjustments to i) pensions in payment (or formerly in payment), ii) lump sums (and the Judicial Service Award), and iii) member contributions, it is acknowledged that it will be necessary to pay interest where MoJ owes money to the member or member's estate or dependants. We are considering

the appropriate level of interest to apply and will be guided by the approach taken in respect of claimants in the *McCloud* remedy hearings.

## Voluntary member contributions

### Added pension

24. Members of NJPS were able to make additional contributions to purchase added pension (a defined additional benefit). Because an equivalent right does not exist in JUPRA/FPJPS,<sup>31</sup> we propose that where members who purchased added pension elect to return to JUPRA/FPJPS, they would be made members of NJPS in respect of added pension only (i.e. not for pension accrual purposes). This would require amendments to the Judicial Pension Regulations 2015.

### Effective pension age

25. Under NJPS, the Effective Pension Age (EPA) option enables contributions to be paid to secure a lower pension age than normal pension age (but no lower than 65). Since the pension age in JUPRA/FPJPS is 65, such contributions are of no benefit to a JUPRA/FPJPS judge. Therefore, we propose that judges with EPA who wish to return to JUPRA/FPJPS should have their EPA converted into added pension in NJPS, using actuarial factors, then regularising this (again, so that judges would be members of NJPS in respect of added pension only). This would also require amendments to the Judicial Pension Regulations 2015.

### Additional voluntary contributions

26. Like most public service schemes, both JUPRA/FPJPS and NJPS operate separate Additional Voluntary Contribution (AVC) schemes alongside the main scheme, which permit members to pay additional contributions to build up a separate defined contribution pension pot with an external provider. AVCs are outside the scope of this consultation as they are unaffected by *McCloud*.

**Question 8:** Please set out any comments on the proposed treatment of voluntary member contributions that individuals have already made.

## Transfers

27. Some judges within scope of *McCloud* will have transferred benefits from a private pension scheme into NJPS. MoJ accepts that these transfers should be protected and

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<sup>31</sup> Though note that an added years scheme is available for those judges who were in service and contributing before 6 April 2006.

proposes regularising them. The Judicial Pensions Regulations 2015 could be amended so that judges who made transfers in can be members of NJPS in respect of these transfers (although, as with voluntary member contributions, they would not be members of NJPS for benefit accrual purposes). Transferring the benefits to JUPRA/FPJPS would not be permitted, because the transfer to a tax-unregistered scheme would incur an unauthorised payment charge.

**Question 9:** Please set out any comments on the proposed treatment of transfers from private pension schemes into NJPS.

## Lifetime allowance

28. The pensions lifetime allowance (LTA) is the maximum amount someone can accrue in a tax-registered pension scheme in a tax-efficient manner over their lifetime. The LTA is £1,073,100 for 2020–21. As with the AA, the LTA is not relevant to JUPRA/FPJPS, which is tax-unregistered. Where judges elect JUPRA/FPJPS membership from 1 April 2015 and have retired, they may have faced a LTA charge in respect of NJPS benefits; this portion of the charge would be refunded to all who have paid it.

## Annual benefit statement

29. Under section 14 of the Public Service Pensions Act 2013, schemes have been required to provide annual benefit statements (ABS) to active members since 2015. For judges who moved to NJPS on or after 1 April 2015, their ABS will currently show two sets of benefits: service up till 31 March 2015 (or a member's taper date) in JUPRA/FPJPS; and service thereafter in NJPS. Where they choose to return to JUPRA/FPJPS for the remedy period, subsequent ABS will show unbroken JUPRA/FPJPS membership. However, all ABS up until this choice is made will continue to show NJPS membership.

## Divorce

30. Depending on the outcome of divorce (marriage) or dissolution (civil partnership) proceedings, the courts may make a pension sharing order. In such circumstances, the judicial pension schemes will make the member's former spouse or civil partner a "pension credit member" of the scheme. Where a divorce or dissolution has been or will be finalised during the remedy period, i.e. before the options exercise, we realise that this could require changing the pension credit member's entitlement and the pension

debit that will apply to the judge's benefits. We are considering how we should deal with such cases.

**Question 10:** We are interested in members' views on how we should treat divorce cases.

## Recruitment and retention allowance

31. The recruitment and retention allowance (RRA) was introduced for certain senior salaried judges in June 2019 and was intended to address recruitment and retention issues associated with the pension reforms. In light of the changes to the annual allowance taper announced in the Budget on 11 March 2020, the RRA was stopped for all judges below the High Court<sup>32</sup> from 1 April 2020.
32. Given that judges in scope of *McCloud* are entitled to be treated as having never left JUPRA/FPJPS, we are considering what our approach should be in respect of the RRA that was paid to these judges in the financial year 2019/20.

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<sup>32</sup> Only High Court judges and above who are not in scope of *McCloud* continue to receive the RRA.

## Annex B: Worked examples

- This section contains examples to illustrate the choice of benefits available to members **in respect of service during the remedy period**. The examples covered are:
  - Example 1** – Salaried judge who does not reach their 20-year JUPRA service cap before or during the remedy period
  - Example 2** – Salaried judge reaching their 20-year JUPRA service cap at 4 years into the remedy period
  - Example 3** – Salaried judge taking ill-health retirement
- The examples focus primarily on comparisons of the annual pension amount that is built up in the judicial pension schemes and paid from retirement. The following are not considered:
  - Other member benefits, such as spouse pensions, dependant benefits, deferred benefits, death benefits and available member options;
  - Pre-retirement differences, such as member contributions, income tax relief on contributions, and annual allowance tax charges;
  - Tax payable on the JUPRA/FPJPS lump sum, the Judicial Service Award, and any lifetime allowance tax charges in NJPS.
- Whilst the examples compare the annual pension the member would receive at retirement, the member's choice would also be influenced by their individual circumstances and tax arrangements.
- The main features of the schemes are:

JUPRA/FPJPS	NJPS
1/40 <sup>th</sup> (2.5%) of final pensionable pay for each year of service	2.32% of revalued pensionable earnings each year
Payable unreduced from age 65	Payable unreduced from State Pension age
2.25 x annual rate of pension as lump sum	

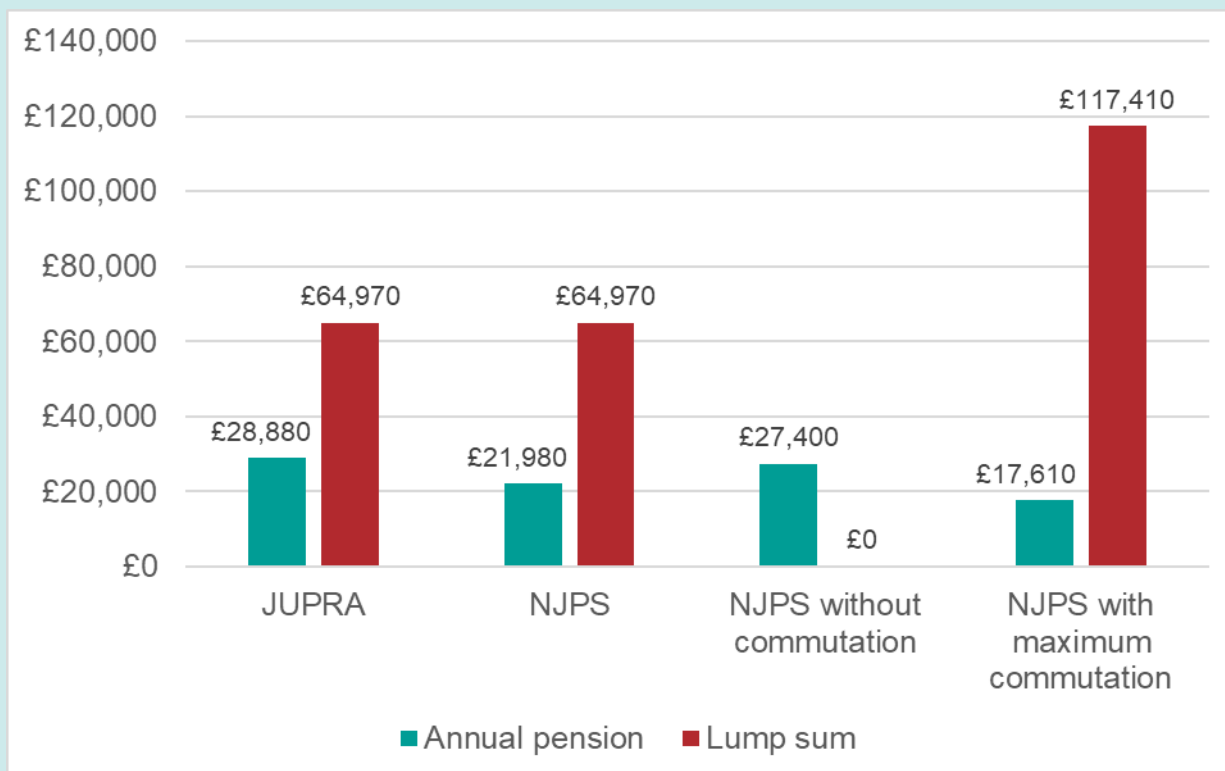
- Unless stated otherwise, the following assumptions have been applied to all examples:
  - The remedy period is 1 April 2015 to 31 March 2022;
  - The judge was aged 50 at 31 March 2012 and therefore has a State Pension age of 67 and moved to NJPS on 1 April 2015;
  - The judge remains in active service until retirement;
  - The judge does not reach their 20-year JUPRA service cap before or during the remedy period (except in Example 2);



- For JUPRA/FPJPS benefits, the final salary link is retained for benefits built up during the remedy period;
  - Actual consumer price index increases to date have been used for pension increases and in-service revaluation where applicable; thereafter, future increases are based on long-term assumptions of increases of 2% per year.
  - The member receives no promotional salary or fee increases during or after the remedy period;
  - For the purpose of comparison, NJPS calculations are based on a member commuting pension to provide a lump sum equal to the automatic lump sum available in JUPRA/FPJPS.
6. Based on the assumptions and approaches used, in the majority of cases benefits built up over the remedy period are potentially more beneficial under JUPRA/FPJPS than NJPS. The exception is where the member reaches the 20-year JUPRA service cap before or during the remedy period, in which case they may find they are better off in NJPS.
7. However, a member's choice between JUPRA/FPJPS and NJPS may be driven by wider considerations. For example, NJPS offers more flexible benefits, including the ability to retire with a reduced pension from age 55, a late retirement uplift where the member retires after their State Pension age, and dependant benefits for unmarried partners and spouses of post-retirement marriages.

### Example 1 – Salaried judge who does not reach their 20-year JUPRA service cap before or during the remedy period

If they had a salary of £130,000 in 2015, experience future annual salary increases in line with inflation and retire at 67 (2029), their choice of pension in respect of service during the remedy period would be the following amounts at retirement.



At retirement their final salary is £165,020. With an accrual rate of 1/40 (2.5%) in JUPRA, their pension in respect of the 7-year remedy period is  $2.5\% \times £165,020 \times 7 = £28,880$ . The member also receives an automatic lump sum of 2.25 times their annual rate of pension.

The NJPS pension is evaluated using the salary in each year the member is in service, with an accrual rate of 2.32%. This lower accrual rate results in a lower NJPS pension at retirement. This reduces further if the member chooses to commute some of their pension for a lump sum (or opts for maximum commutation<sup>33</sup>). NJPS has no automatic lump sum.

<sup>33</sup> Maximum commutation under NJPS allows the member to commute up to 35.7% of their NJPS pension subject to a maximum of 25% of their lifetime allowance. Where the member commutes 35.7% of their pension, the lump sum represents 25% of the value of their crystallised benefit. More information can be found in the HMRC pension tax manuals: <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm063240>.

This shows that JUPRA benefits are more financially beneficial than those of NJPS for any judge who does not reach their 20-year JUPRA service cap before or during the remedy period.

Were this judge to retire early, for example at 65, the NJPS figures would be actuarially reduced, unlike JUPRA benefits which may be taken from 65.

Conversely, if this judge were to retire after their State Pension age of 67, NJPS benefits would receive a late retirement uplift, unlike JUPRA benefits. If salary increases remain in line with inflation, the member would receive higher benefits in NJPS if they choose to retire after 70. However, if future salary increases were greater than inflation, the annual pension under JUPRA could still be greater than NJPS.

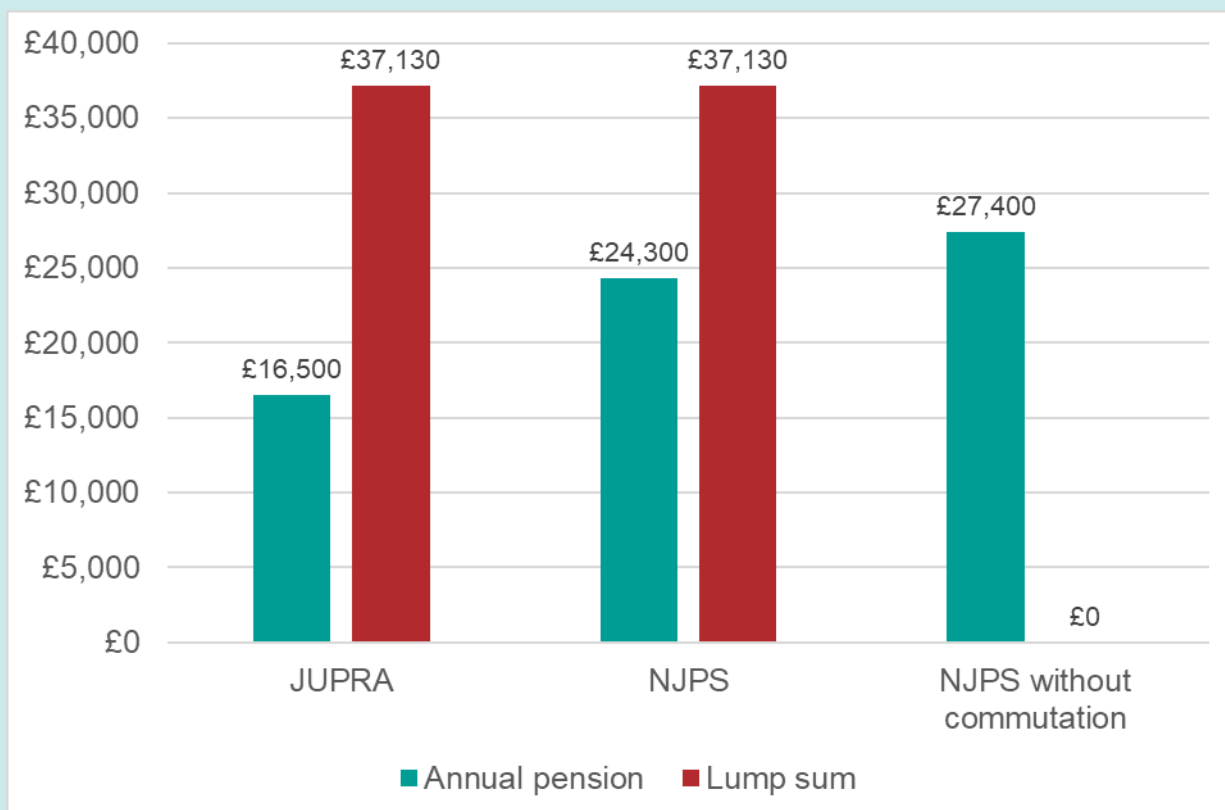
A fee-paid pension, calculated on a pro-rata basis, would also be more beneficial in FPJPS than NJPS. N.B. To calculate the impact of fee-paid service on the service cap, divide the number of fee-paid days by an annual divisor for the office.<sup>34</sup> For example, a judge with 56 days' pensionable fee-paid service in a year in an office with a divisor of 215 accrues 26% of a JUPRA/FPJPS year.

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<sup>34</sup> The annual divisors for fee-paid offices are set out in the Schedule to the Judicial Pensions (Fee-Paid Judges) Regulations 2017.

### Example 2 – Salaried judge reaching their 20-year JUPRA service cap at 4 years into the remedy period

If they reach their 20-year JUPRA service cap 4 years into the remedy period (2019), had a salary of £130,000 in 2015, experience future annual salary increases in line with inflation and retire at 67 (2029), their choice of pension in respect of service during the remedy period would be the following amounts at retirement:



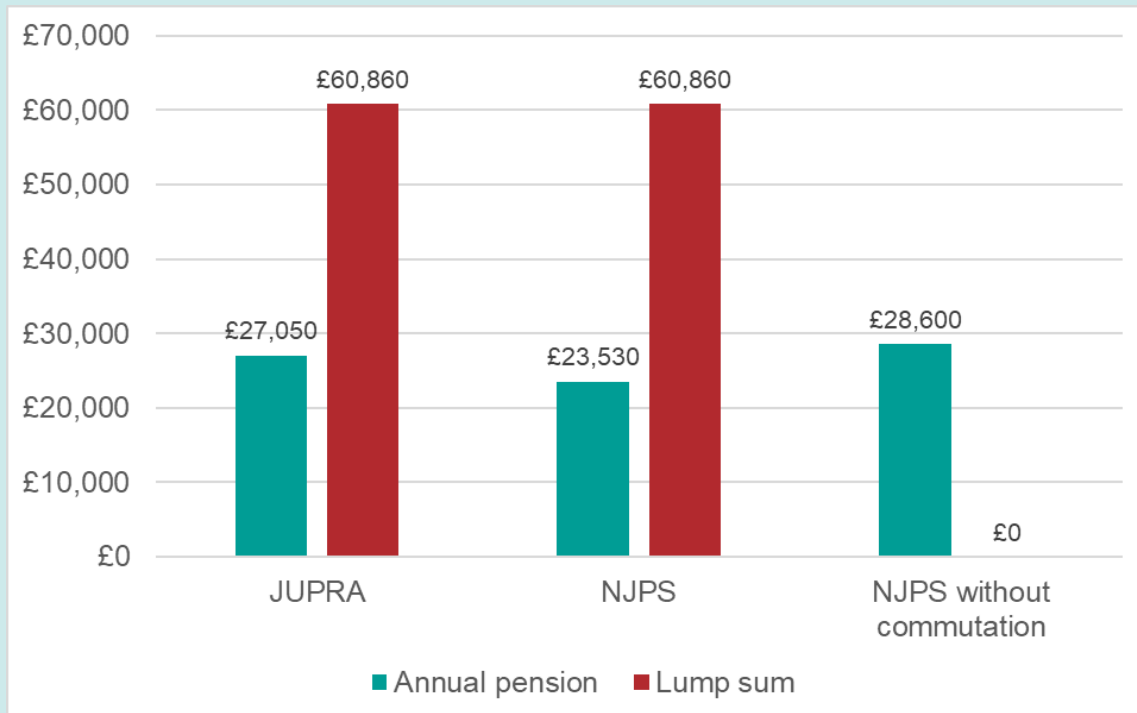
Their final salary at retirement is £165,020, as in Example 1. However, because the member reaches the 20-year service cap 4 years into the remedy period, the accrued JUPRA pension in respect of the remedy period is  $2.5\% \times £165,020 \times 4 = £16,500$ . They also receive an automatic lump sum of 2.25 times their annual rate of pension.

In NJPS there is no service cap, so the member accrues pension for all 7 years of the remedy period. Therefore, the pension accrued over the remedy period (without commutation) is the same as that in Example 1. With commutation, the extra years of accrual result in a substantially higher pension in NJPS than JUPRA, despite the lower accrual rate.

If the member reaches the service cap before 4 years of the remedy period have elapsed, then the benefits built up in NJPS are even greater than those in JUPRA because less pension would be built up in JUPRA during the remedy period. For example, if this member had reached the JUPRA 20-year service cap 2 years into the remedy period, their JUPRA pension would be half that shown above but there would be no change to their NJPS pension. However, annual allowance charges and the impact on a member's lifetime allowance are not considered here.

### Example 3 – Salaried judge taking ill-health retirement

If they had a salary of £130,000 in 2015, experience annual salary increases in line with inflation and take ill-health retirement at 57 (in 2019), their choice of pension in respect of service during the remedy period would be the following amounts at retirement, taking account of ill-health enhancement:



In this example the member retires 4 years into the remedy period. The salary at the point of ill-health retirement is £135,240. Under JUPRA, the member receives an enhancement to their service of half a year from age 57 up to the normal pension age of 65. This gives them an accrued pension in respect of their remedy period service of  $\frac{1}{40} \times £135,240 \times (4 + \frac{8}{2}) = £27,050$ . The member also receives an automatic lump sum of 2.25 times their annual pension.

NJPS has a similar enhancement, but up to a member's State Pension age, which for this member is 67. This extra two years of enhancement gives the member a higher pension in NJPS. However, if they choose to commute some of this pension for a lump sum, the annual pension falls below their JUPRA pension. Note that this does not consider the impact of annual or lifetime allowance charges.

## Annex C: List of consultees

This consultation is aimed at members of the judiciary, salaried and fee-paid who are entitled to be a member of a judicial pension scheme, and pension industry professionals as well as anyone with an interest in public service pensions in England and Wales, Scotland and Northern Ireland.

This consultation will run from 16 July 2020 to 16 October 2020. Details of how to respond to the consultation are highlighted later in the document. Copies of the consultation papers are being sent to:

### United Kingdom

- President of UK Supreme Court
- Senior President of Tribunals
- The United Kingdom Association of Women Judges

### England and Wales

- Association of Fee-Paid Judges
- Association of Her Majesty's District Judges
- Association of High Court Judges
- Association of High Court Masters
- Association of Members of the Immigration & Asylum Tribunal
- Association of Regional Medical Members
- Association of Salaried Tribunal Judges for Health, Education and Social Care
- Association of the Special Educational Needs Tribunal
- Chamber President for War Pensions & Armed Forces Compensation Chamber
- Chartered Institute of Legal Executives (CILEx)
- Council of Appeal Tribunal Judges
- Council of Employment Judges
- Council of Her Majesty's Circuit Judges
- Council of Her Majesty's District Judges (Magistrates' Courts)
- Council of Immigration Judges
- Council of Tribunal Members Association
- Council of Upper Tribunal Judges
- Employment Appeal Tribunal Lay Members Committee
- Forum of Tribunal Membership Associations
- Judicial Appointments Commission
- Judicial Pensions Committee (England)
- Lord Chief Justice of England and Wales

- Mental Health Tribunal Members' Association
- President of Welsh Tribunals
- Salaried Tribunal Judges' Association
- The Bar Council (England and Wales)
- The Coroners' Society (England and Wales)
- The Law Society (England and Wales)

### **Northern Ireland**

- Council of Employment Judges
- First Minister and Deputy First Minister of Northern Ireland
- Judges' Council (Northern Ireland)
- Judicial Pensions Committee (Northern Ireland)
- Lord Chief Justice of Northern Ireland
- Northern Ireland Judicial Appointments Commission
- Office of the President of the Appeals Tribunal for Northern Ireland
- Office of the President of the Industrial and Fair Employment Tribunals Northern Ireland
- The Bar Council of Northern Ireland
- The Law Society of Northern Ireland
- Tribunal Presidents' Group
- Secretary of State for Northern Ireland

### **Scotland**

- Judicial Appointments Board for Scotland
- Judges' Council (Scotland)
- Judicial Council for Scotland
- Lord President of the Court of Session
- Part Time Sheriffs' Association
- President of the Lands Tribunal (Scotland)
- Sheriffs' Association
- Sheriffs Principal
- Summary Sheriffs' Association

Please note that this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this consultation.

# Glossary

**Accrual rate:** The rate, as a proportion of pensionable earnings, at which pension builds up for each year of membership.

**Accrued pension:** The amount of pension built up in the final salary or career average scheme up to the current date.

**Active scheme members:** Members paying contributions and accruing benefits in a scheme.

**Career average scheme:** A defined benefit scheme that gives scheme members a pension based on pensionable pay/fees earned in each scheme year. Amounts of pension earned in previous years have index-linking applied in order to maintain their value.

**Commutation:** Commutation allows a member to exchange an amount of annual pension in return for a retirement lump sum. The rate at which pension is given up for a lump sum is known as the commutation rate.

**Consumer Prices Index (CPI):** An index of inflation published by the Office for National Statistics. This is the current basis for determining cost of living increases for public service pensions.

**Defined benefit pension scheme:** A pension scheme where the pension is related to a member's salary or some other value fixed in advance. Final salary and career average schemes are examples of defined benefit pension schemes.

**Fee-Paid Judicial Pension Scheme (FPJPS):** Following the *O'Brien* litigation in 2013, this pension scheme was established for eligible fee-paid judges. This scheme offers benefits in line with the scheme for salaried judges (JUPRA).

**Final salary scheme:** A defined benefit scheme that gives members a pension based on their final salary, the accrual rate and the period of service.

**Legacy schemes:** Refers to the judicial pension schemes open to membership prior to the Public Service Pensions Act 2013, primarily JUPRA and FPJPS.

**Miller judgment:** In December 2019, the Supreme Court held that the three-month time limit for claims to be made in relation to *O'Brien 1* and *O'Brien 2* only runs from the date of a claimant's retirement from all judicial offices, and not from the end of each fee-paid appointment.



**Non-discrimination rule:** Section 61 of the Equality Act 2010 requires that every occupational pension scheme is treated as containing a statutory non-discrimination rule making it unlawful for the trustees or managers, or an employer whose employees are or may be members of the scheme, to discriminate against a member or prospective member when operating the scheme.

**Normal pension age (NPA):** The age at which pension benefits would be payable in full, i.e. without actuarial adjustment.

**O'Brien judgment:** Decision by the Supreme Court (*O'Brien v Ministry of Justice* [2013] UKSC 6) in February 2013 that fee-paid judges had been treated less favourably than relevant salaried judges, contrary to the Part-Time Work Directive with respect to pension provision. This led to the establishment of the FPJPS, which mirrored as far as possible the arrangements for salaried judges set out in JUPRA.

**O'Brien 2 judgment:** Judgment by the Court of Justice of the European Union in the case of *O'Brien v Ministry of Justice* (Case C-432/17), concluding that part-time work undertaken before the deadline for transposing the Part-Time Work Directive on 7 April 2000 must be taken into account for the purposes of calculating a retirement pension.

**Reckonable service:** Service which counts toward pension benefits, including options for members to purchase 'added pension' contributions.

**Scheme Advisory Board:** The Scheme Advisory Board is a group which sits at the request of the Responsible Authority to consider the desirability of any potential changes to schemes.

**State Pension age (SPA):** The age at which the State Pension would normally become payable.

**Tax-registered:** Members receive tax relief on contributions to tax-registered schemes, but are subject to annual and lifetime limits on the tax-relieved benefits they can accrue. Conversely, contributions to tax-unregistered schemes do not attract tax relief and accruals in the scheme do not count towards annual or lifetime limits.

# Questionnaire

We would welcome responses to the following questions set out in this consultation paper:

**Question 1:** Do you have any views about the implications of the proposals set out in this consultation on people with protected characteristics as defined in section 149 EA 2010? What evidence do you have on these matters? Is there anything that could be done to mitigate any impacts identified?

**Question 2:** Is there anything else you would like to add regarding the equalities impact of the proposals set out in this consultation document and the equalities statement?

**Question 3:** Please set out any comments on the proposed scope of the consultation, specifically on protected members, taper-protected members, TPA, and gap judges.

**Question 4:** Do you agree with the proposed default option?

**Question 5:** Please set out any further comments on the proposed options model.

**Question 6:** We are interested in members' views on how we should treat tax and contributions arrears where judges who opted out of the judicial pension in 2015 and/or opted to receive TPA wish to return to JUPRA/FPJPS.

**Question 7:** Please set out any further thoughts on revisiting past cases.

**Question 8:** Please set out any comments on the proposed treatment of voluntary member contributions that individuals have already made.

**Question 9:** Please set out any comments on the proposed treatment of transfers from private pension schemes into NJPS.

**Question 10:** We are interested in members' views on how we should treat divorce cases.

**Thank you for participating in this consultation exercise.**

# How to respond

## How to respond

Please send responses to the consultation via email 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 above address.

## Representative Groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## 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.

If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public').

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.

For more information see the Ministry of Justice [Personal Information Charter](#).

## **Publication of Response**

A paper summarising the responses to this consultation will be published in early 2021. The response paper will be available online at <https://www.gov.uk/government/consultations/consultation-on-the-proposed-response-to-mccloud>.



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