Response to *McCloud*: Equality Statement

February 2021

A. Introduction

1. This equality statement aims to identify the potential equality impacts of addressing the discrimination identified in *McCloud*[1]. It was initially published alongside the Ministry of Justice consultation, 'Judicial Pensions: Proposed response to *McCloud*[2]', and has been updated in light of responses to the consultation. It should be read alongside the government's official response to the consultation published on 25 February 2021.

2. The assessment of impacts has been undertaken to enable ministers to fulfil the requirements placed on them by the public sector equality duty, in accordance with section 149 of the Equality Act 2010[3] (EA 2010).

3. The consultation asked the following questions:

   - 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 of the 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?

B. Background

4. In 2015 the government introduced extensive reforms to public service pension schemes. In the judicial context, judges were moved from their legacy final salary schemes, primarily the Judicial Pension Scheme 1993 (JUPRA[4]) and the fee-paid equivalent, Fee-Paid Judicial Pension Scheme (FPJPS), both of which were tax-unregistered, to the New Judicial Pension Scheme 2015 (NJPS), a tax-registered career average scheme with a lower accrual rate. This change in tax status was a unique feature of the judicial reforms, as JUPRA and FPJPS were the only public service schemes not formerly tax-registered. This meant that judges were not only 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

[1] *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.

[2] The consultation was published on 16 July 2020 and closed to responses on 16 October 2020. The consultation document can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901337/judicial-pensions-proposed-response-to-McCloud.pdf

[3] https://www.gov.uk/guidance/equality-act-2010-guidance

[4] References to JUPRA throughout this document include pre-1995 judicial pension schemes.

costly for higher earners and those who had built up significant private pensions before joining the bench.

5. The Senior Salaries Review Body's Major Review of the Judicial Salary Structure, published in 2018[5], found that the reforms had a significant impact on judges' overall remuneration, and were the cause of unprecedented recruitment and retention challenges, particularly at the senior tiers of the judiciary.

6. Both the judicial and wider public service reforms included transitional protection, whereby older members could remain in their pre-2015 schemes until retirement. For judges, this meant those aged 55 or over on 1 April 2012 ('protected members') remained in JUPRA/FPJPS. For those aged between 51½ and 55 on 1 April 2012, a form of 'tapered protection' was provided: these judges ('taper-protected members') were given the choice to join NJPS on 1 April 2015 or 'taper' across on a later date determined by their date of birth, with the practical effect of retaining JUPRA/FPJPS benefits for a longer period of time. All other judges – those aged under 51½ on 1 April 2012 – received no protection ('unprotected members') and moved to NJPS on 1 April 2015.

7. The transitional provisions were challenged by younger judges in *McCloud*. Claimants alleged that the protection extended to older judges amounted to direct age discrimination contrary to section 13 of the EA 2010 and the non-discrimination rule inserted into pension schemes by virtue of section 61 of the EA 2010. Claims were also brought for equal pay and indirect race discrimination (sections 67 and 19 of the EA 2010 respectively), claimants alleging that the 2015 reforms had a disproportionate adverse effect on women and minority ethnic judges.

8. In December 2018 the Court of Appeal upheld the lower courts' 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. 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. The government confirmed that it would take steps to address the difference in treatment across all public service pension schemes, since all reformed schemes included transitional protections for older members.

9. HM Treasury took forward a consultation to address the discrimination for all affected members in public service schemes for the armed forces, firefighters, police, NHS workers, teachers and civil servants. The government's response to that consultation was published on 4 February 2021[6]. Given the unique nature of the judicial schemes, a separate consultation for non-claimant judges affected by *McCloud* was deemed appropriate.

[5] Major Review of the Judicial Salary Structure 2018, gov.uk/government/publications/major-review-of-the-judicial-salary-structure-2018

[6] The response document can be found at: https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes

C. Public sector equality duty

10. Section 149 of the EA 2010 requires public authorities, in the exercise of their functions, to have due regard to the need to:

    a) eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act;

    b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and

    c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

11. There are nine protected characteristics that fall within the EA 2010: sex, race, disability, age, sexual orientation, religion and belief, gender reassignment, marriage and civil partnership, pregnancy and maternity.

D. Data

12. Because the unlawful transitional protections were based on age, this is the most relevant characteristic for our analysis. There may also be indirect impacts on sex and race because the judiciary is becoming more diverse over time.

13. We acknowledge that we do not have comprehensive data in respect of each protected characteristic across the judiciary. Tracking data within the fee-paid judiciary also carries the risk of double or triple counting multiple office holders. We have nevertheless analysed the potential equality impacts of the proposals in respect of age, sex and race, taking into account the available information. Where the data sets are incomplete, we have used a representative sample.

E. MoJ consultation

14. The consultation proposed that judges in scope of *McCloud* should take part in a formal 'options exercise' through which they would make a retrospective choice whether to have accrued pension benefits in JUPRA/FPJPS or NJPS for the remedy period, i.e. from 1 April 2015, when the discrimination began, until 31 March 2022, when a new, reformed judicial pension scheme is scheduled to come into operation. Thereafter all judges would join the new pension scheme. We also proposed that judges who retire during the remedy period should be able to make their decision earlier to ensure the correct pension and lump sums can be paid.

15. Judges would be in scope of the proposals if they were in one of the following groups[7]:

    - In salaried office on 31 March 2012 and on 31 March 2015 – these judges are eligible for JUPRA membership from 1 April 2015.

[7] Judges will also be in scope if they were aged under 55 on 1 April 2012 and i) they were an active member of a non-judicial public service pension scheme on or before 31 March 2012 and in eligible judicial office on or after 31 March 2015, or ii) they were a member of a non-judicial public service pension scheme on both 31 March 2012 and 31 March 2015 and were subsequently appointed to eligible judicial office. In both cases there must not have been a gap of more than five years between leaving the non-judicial public service pension scheme and taking up eligible judicial office. This is referred to as portable eligibility.

- 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.
- 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.
- 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.

16. We proposed that protected judges – those aged 55 or over on 1 April 2012 – and those who were appointed to judicial office after 31 March 2012 are not in scope of the remedy since they were not subject to the discrimination identified in *McCloud*. Protected judges remained in JUPRA/FPJPS rather than being moved to NJPS, and those appointed after 31 March 2012, were ineligible for transitional protection regardless of their age.

17. We received a total of 33 responses to the consultation. Of these:
    - 15 were sent on behalf of judicial associations; and
    - 18 were sent by individual judges.

18. Several respondents suggested that judges should be free to return to JUPRA/FPJPS earlier than 2022, or alternatively that MoJ should return all individuals in scope to JUPRA/FPJPS immediately with an option to opt out.

19. Having carefully considered all responses, we remain of the view that the options exercise proposal is the most appropriate remedy model for those who remain in active service until the end of the remedy period. First, it is not the case that all judges are better off being returned to JUPRA/FPJPS. Allowing judges to consider their own career and pay progression within the remedy period before making their election would enable them to make an informed decision. This is especially important for those awaiting confirmation of fee-paid pension entitlement under *O'Brien* / *Miller*, for whom the position may not be immediately clear, given the impact of the 20-year JUPRA/FPJPS service cap.

20. Second, and linked to this, there are significant data requirements to the exercise. Information on fee-paid judges currently in NJPS was previously stored on pay alone (as required for NJPS pension calculations), without capturing a record of their sitting days. As FPJPS entitlement is based on sitting days rather than pay, the service records are currently not in the correct format. We will be undertaking a significant and resource-intensive exercise to 'convert' fees into service days, which will not be completed in time for an earlier return of judges with fee-paid service (the majority of those in scope). We have recruited additional resources to complete the process and expect the majority of the work to be completed in early 2022.

21. Third, we currently estimate that there are approximately 2,300 fee-paid judges and 550 salaried judges in scope of *McCloud* – processing their individual choices of scheme membership will be a large-scale and complicated exercise, involving primary

and secondary legislation. It is therefore important we plan and run the process smoothly.

F. Next steps

22. The government will bring forward new legislation to address the discrimination by giving those in scope a choice of retrospective scheme membership and thereafter introduce the reformed scheme for the entire judiciary. Subject to parliamentary timetables and approval, we anticipate that the reformed scheme would commence on 1 April 2022, with the options exercise taking place later that year. Further legislation will be required to amend relevant scheme regulations, which will be the subject of further consultation.

23. In light of consultation responses, we have considered the equality impacts of our remedy model both on those in scope of *McCloud* and those out of scope.

G. Judges in scope

Direct discrimination

24. Section 13 of the EA 2010 provides:

'Direct discrimination

(1) A person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim…'

Age – remedy design

25. The Court of Appeal held that the 2015 reforms constituted unlawful direct discrimination on the grounds of age because older judges could remain in JUPRA/FPJPS due to their age. Because the ongoing *McCloud* litigation is resolving the discrimination for claimant judges, the policies set out in the government's response to consultation are intended to provide a remedy for non-claimant judges in scope of the judgment. The options exercise will allow all judges in scope to choose to return to JUPRA/FPJPS, backdated to 1 April 2015. It therefore remains our view that the design of the options exercise does not treat anyone less favourably because of a protected characteristic, e.g. age.

26. While respondents welcomed the proposal to allow judges to return to JUPRA/FPJPS, several stressed that they should be free to do so earlier than 2022 and that waiting till the options exercise might cause financial detriment because it would prevent judges being able to contribute to tax-registered pension schemes and reduce their tax liability until then. When considered alongside MoJ's decision to stop tapering judges to NJPS in late 2019, three respondents asserted that any delay for unprotected judges, and taper-protected judges who did taper, could amount to less favourable treatment on the grounds of age. This is because those who did not taper were older than those who did (and unprotected judges), so remaining in JUPRA/FPJPS on account of their

age enabled them to make contributions to tax-registered schemes and reduce their tax liability.

27. We acknowledge these concerns and, as set out in more detail in the government response document, we plan to address financial losses related to increased tax liability in full via the options exercise for all judges in scope by way of compensation. For these reasons, we do not consider that the options exercise proposal gives rise to direct discrimination in respect of those in scope.

Age – tapered protection

28. The consultation proposed that taper-protected judges should choose either JUPRA/FPJPS or NJPS membership for the remedy period, i.e. they would not be able to split accrual across schemes. While we expect this to have a positive impact on most taper-protected members (since most will be better off in JUPRA/FPJPS or NJPS for the entire remedy period rather than being a member of JUPRA/FPJPS until their taper date and NJPS thereafter), we recognise that there may be some individuals for whom retaining tapered protection would have been advantageous. Several respondents commented that requiring these judges to choose either JUPRA/FPJPS or NJPS rather than retain the taper may cause them unfair disadvantage.

29. We acknowledge this concern and have considered our reasoning for this position. It remains our view that any advantage conferred on this group was not the intended effect of tapered protection, but rather is as a result of a policy that has been identified as giving rise to unjustified age discrimination. We consider that retaining tapered protection for some judges risks treating judges who were not taper-protected less favourably. This less favourable treatment would be on account of age, since tapered protection was only given to those aged between 51½ and 55 on 1 April 2012. We therefore remain of the view that it is necessary to remove the taper entirely so that taper-protected judges must make a choice between JUPRA/FPJPS or NJPS for the remedy period.

30. The government has considered alternative options to test whether it would be possible to construct an alternative system of tapered protection not based on age. However, any such system would be much more complex and, since it would be a different system, members in any case would not necessarily be in the same position as under the original age-based taper. This was not therefore considered to be a viable or appropriate option.

31. We recognise that removal of tapered protection changes the expected position for previously taper-protected judges, including the position in relation to pension for past years of service, and in some cases for judges who have already retired. However, we consider that it is not right to perpetuate an advantage that has been found to give unjustifiably differential treatment on grounds of age. The fact that those with tapered protection will be over a certain age reflects the discriminatory nature of the tapered protection, and we do not consider the removal of that unjustified discrimination itself to be a discriminatory act.

32. To the extent that removal has a retrospective effect, the government considers that it is justified for the reasons above, especially bearing in mind that all those who were subject to tapered protection will have the choice of JUPRA/FPJPS or NJPS

membership for the remedy period, and that any additional advantage beyond that was incidental. This ensures everyone in scope of the remedy is treated equally.

Indirect discrimination

33. Section 19 of the EA 2010 provides:

'Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.'

Race and sex

34. In addition to the finding of direct age discrimination, the Court of Appeal was satisfied that the indirect race and equal pay claims were made out because the increased number of women and BAME judges in the younger age group meant they were disproportionately adversely affected by the reforms. In removing the direct age discrimination, the options exercise will also remove any indirect discrimination on the grounds of race and sex. For the same reasons as described above in relation to age, we do not consider that the proposed remedy results in unfavourable treatment on the grounds of race or sex.

H. Judges out of scope

35. As noted above, the consultation proposed that protected judges and those who were appointed to judicial office[8] after 31 March 2012 are not in scope of the remedy, since they were not subject to the discrimination identified in *McCloud*. This means that they will remain in their respective schemes until the introduction of the reformed judicial pension scheme. We have considered the equality impacts of this in the following paragraphs.

[8] Or a post in which they were members of a non-judicial public service pension scheme.

Direct discrimination

Age

36. Protected judges are those who remained in JUPRA/FPJPS because they had been appointed on or before 31 March 2012 and were within ten years of retirement on 1 April 2012. They were therefore not subject to the discrimination identified in *McCloud*. Consequently, we proposed not including them in scope of the remedy.

37. While in most cases protected judges are better off remaining in JUPRA/FPJPS, since it provides benefits that are more generous than those of NJPS, for some protected judges NJPS membership may have been preferential depending on when they reach their service cap of 20 years and other elements of their personal circumstances. Therefore, not including them in scope could arguably amount to less favourable treatment on the grounds of age.

38. Respondents agreed with the proposal not to include protected members, for the reasons given in the consultation. We therefore remain of the view that it is reasonable not to widen the scope of the remedy to include protected members since, unlike younger judges, they were not subject to the unlawful discrimination identified in *McCloud*. Rather, they have had certainty regarding their pension provision and remained in a scheme with objectively favourable terms not afforded to others. Moreover, the options exercise has been designed to extend these terms to others, enabling both unprotected and taper-protected judges to be treated in the same way as protected judges, i.e. as though they never left JUPRA/FPJPS.

Indirect discrimination

Age

39. When NJPS was introduced, in order to be eligible for transitional protection and remain in JUPRA/FPJPS, a judge must have been (i) in service on or before 31 March 2012 and on or after 1 April 2015 and (ii) within ten years of normal pension age on 1 April 2012. The Court of Appeal held that the second criterion was unlawfully discriminatory on the grounds of age (directly) and race and sex (indirectly).

40. The consultation therefore proposed that unprotected and taper-protected judges will be in scope of *McCloud* if they were in service (a) on or before 31 March 2012 and (b) on or after 1 April 2015, and (c) a member of JUPRA, or entitled to be a member of FPJPS, on those dates. This includes those with a qualifying break in service of less than five years.

41. While several respondents agreed with the proposed scope criteria, it was suggested that the requirement to have been in office on or before 31 March 2012 could be challenged on the grounds that those who took up office after this date were disproportionately likely to be younger, female, and from BAME backgrounds. As shown in Table 1, those not in scope are disproportionately younger.

Table 1: Age distribution of judges in scope of proposals

	40 years and under	Between 40 & 49 years	Between 50 & 59 years	60 years and above
In scope	0%	8%	48%	43%
Total	5%	20%	33%	42%

Source: Judicial office data (Judicial diversity statistics), April 2019 and scheme membership data, March 2020

42. Specifically, respondents challenged the suggestion in the consultation that widespread media coverage of future pension reforms meant that those appointed after 31 March 2012 could reasonably be expected to have known that pension provision would change when they entered service.

43. While we understand the concerns that have been raised regarding scope, it is important to note that the unlawful discrimination identified in *McCloud* was between protected judges who were in service by 31 March 2012, on the one hand, and unprotected and taper-protected judges who were also in service on that date, on the other hand. It is the latter two groups to which the government must retrospectively provide a remedy, to remove the discrimination.

44. Because those appointed after 31 March 2012 were not subject to the unlawful discrimination, the government does not consider it appropriate to extend the choice of scheme membership to these members. While we acknowledge that more recent appointees may be disproportionately younger, we maintain that changes to pension arrangements or other terms and conditions of appointment by their nature impact differently on those who join or leave judicial service at different times. We therefore remain of the view that the limited impacts on younger judges are justified in the context of removing earlier discrimination in a manner which is affordable and respects the rationale for having transitional protection at all.

45. Moreover, we remain of the view that by 1 April 2012 new joiners would have been aware that there was a strong likelihood changes would be made to the pension scheme. There were clear indications long before 1 April 2012 that change was afoot.

46. The Independent Public Service Pensions Commission led by Lord Hutton published its final report in March 2011, setting out a range of recommendations on making public service pensions more sustainable. The government accepted the recommendations in principle shortly thereafter, leading to a Green Paper and parliamentary announcement on 2 November 2011, in which the 31 March 2012 cut-off was first publicly mentioned.

47. We therefore consider that while it is arguable that maintaining the 31 March 2012 criterion has the potential to lead to indirect discrimination, the reasons for doing so are justifiable.

Race and sex

48. Similarly, those who took up office after 31 March 2012 may be disproportionately female or from BAME backgrounds. This may be in part due to concerted efforts to improve judicial diversity in recent years, as reflected in the increase from 4.2% to 8% in the proportion of BAME judges in the courts between 2012 and 2020. However, to the extent that maintaining the 31 March 2012 criterion may lead to the potential for indirect discrimination on the grounds of race or sex, the above justification in respect of age would also apply.

I. Conclusion

49. The policies contained in the government's response to the consultation seek to give effect to the decision in *McCloud* by retrospectively removing the discrimination for all affected judges in scope. These judges are entitled to have never left JUPRA/FPJPS and will be able to return to their respective scheme from 1 April 2015 if they believe they have suffered less favourable treatment (or alternatively may wish to remain in NJPS for the remedy period). The remedy will therefore simultaneously address the direct age discrimination and indirect race and sex discrimination identified in *McCloud*. We have carefully considered the issues raised in the consultation responses and do not consider that the design of the remedy leads to any groups within scope being treated less favourably on the grounds of particular protected characteristics.

50. To the extent that the remedy has the potential to treat those out of scope less favourably, we have also carefully considered the responses to the consultation and remain of the view that our approach can be objectively justified. We will continue to monitor potential equality impacts through the passage of the legislation and the implementation of the options exercise.