

Judicial Pensions – Proposed Response to McCloud: Equality Statement

July 2020

A. Introduction

1. This equality statement accompanies the Ministry of Justice’s consultation titled ‘Judicial Pensions: Proposed response to *McCloud*’. It considers the potential equality impacts of addressing the discrimination identified in *McCloud* in respect of the judiciary. The assessment of impacts has been undertaken to enable Ministers to fulfil the requirements placed on them by the Public Sector Equality Duty (PSED), in accordance with section 149 of the Equality Act 2010 (EA).¹
2. We have sought, wherever possible, to use available evidence to assess the equality impacts of the proposals set out in the consultation document, although the data we hold in some areas is insufficient to draw clear conclusions. The consultation document asks the following questions on equality impacts:
 - 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? 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?
3. We will continue to monitor the equality impacts of our proposals post-consultation, taking account of any further evidence the consultation exercise brings to light.

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, Judicial Pension Scheme 1993 (JUPRA) and the fee-paid equivalent, Fee-Paid Judicial Pension Scheme (FPJPS), both of which were tax-unregistered, to New Judicial Pension Scheme 2015 (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: 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 higher earners and those who had built up significant private pensions before joining the bench. The Senior Salaries Review Body’s Major Review of the Judicial Salary Structure, published in 2018, found that the reforms had a significant impact on judges’ overall remuneration and were the cause of unprecedented recruitment and retention challenges in senior judicial offices.²
5. Both the judicial scheme and the wider public service schemes 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 31 March 2012 (protected members) remained in JUPRA/FPJPS. For those aged between 51½ and 55 on 31 March 2012, a form of ‘tapered protection’ was offered: these judges (taper-protected members)

¹ <https://www.gov.uk/guidance/equality-act-2010-guidance>

² <https://www.gov.uk/government/publications/major-review-of-the-judicial-salary-structure-2018>

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 31 March 2012 – received no protection (unprotected members) and moved to NJPS on 1 April 2015.

6. The transitional provisions were challenged by younger judges in *McCloud*.³ Claimants alleged that the protection extended to older judges amounted to direct age discrimination contrary to section 13 EA and the non-discrimination rule inserted into pension schemes by virtue of section 61 EA. Claims were also brought for equal pay and indirect race discrimination (sections 67 and 19 EA respectively), with claimants alleging that the 2015 reforms had a disproportionate adverse effect on women and black, Asian and minority ethnic (BAME) judges.
7. 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. 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.
8. HM Treasury is taking 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. Given the unique nature of the judicial schemes, a separate consultation for judges was deemed appropriate.⁴

C. Policy

9. Our proposal is that taper-protected and unprotected judges who are 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. Thereafter, the reformed scheme would equalise treatment across the judiciary for future accrual, since all judges, whether members of JUPRA/FPJPS or NJPS, would move to the future reformed scheme from that point.⁵
10. Judges in scope of the remedy include:
 - those 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;
 - those 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;
 - those 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

³ *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

⁴ The Ministry of Housing, Communities and Local Government is also consulting separately on addressing the discrimination in the Local Government Pension Scheme.

⁵ 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.

Judicial Pensions: Proposed response to McCloud
Equality Statement

- those 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.

11. Protected judges, and those who were appointed to judicial office after 31 March 2012, are not in scope of this consultation, 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.

D. Public Sector Equality Duty

12. Section 149 EA⁶ 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.
13. There are nine protected characteristics that fall within the EA: sex, race, disability, age, sexual orientation, religion and belief, gender reassignment, marriage and civil partnership, and pregnancy and maternity.
14. Because the transitional protections that were found to be unlawful were based on age, this is the most relevant characteristic for our proposals. There may also be indirect impacts on sex and race because the judiciary is becoming more diverse over time. We have little data on the remaining characteristics – as discussed in section E – but, in any event, do not consider that they are likely to be disproportionately affected. We have therefore focused our analysis on the characteristics of age, sex and race, using available judicial diversity data. We have discussed our analysis in sections F and G below.

E. Data sources

15. As noted above, we consider that age, sex and race are the most materially relevant to our proposals and have evaluated any potential equality impacts using the available judicial diversity data.⁷
16. For the following reasons, we were not able to conduct analysis on the remaining protected characteristics:
- **Disability** – this is recorded and reported by the Judicial Appointments Commission (JAC). However, until recently, Judicial Office (JO) only collected this information on a non-mandatory basis by self-declaration. It is therefore not currently possible to differentiate between those without a disability and those who previously chose not to declare. JO has changed the way it collects this information to provide improved data in the future.
 - **Gender reassignment** – no data was available at the time of our assessment. The JAC has recently revised its candidate equalities monitoring form to collect information, but data will not be reported until 2021 at the earliest. JO will include

⁶ And the Equality Act 2010 (Specific Duties) Regulations 2011

⁷ Judicial diversity statistics: <https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>

this as a field for judicial office holders to self-record during the current reporting year.

- **Marriage and civil partnership** – no data was available at the time of our assessment. The JAC does not record this information. JO will include this as a field for judicial office holders to self-record during the current reporting year.
- **Pregnancy and maternity** – no data was available at the time of our assessment. The JAC and JO do not record this information.
- **Religion or belief** – no data was available at the time of our assessment. The JAC record and report this information at an aggregate level (i.e. for all exercises during a financial year). JO will include this as a field for judicial office holders to self-record during the current reporting year.
- **Sexual orientation** – the JAC records and reports this information at an aggregate level (i.e. for all exercises during a financial year). JO will include this as a field for judicial office holders to self-record during the current reporting year.

17. 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.

18. We will review this equality statement following the publication of new diversity statistics in September 2020 and taking account of consultation responses. We have considered the equality impacts of our proposals first on those judges in scope in respect of the design of the proposals, and then on judges out of scope.

F. Judges in scope

Direct discrimination

19. Section 13 of the EA 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...”

20. Because the ongoing *McCloud* litigation will resolve the discrimination for claimant judges, the proposals outlined in the consultation document are intended to provide a remedy for non-claimant judges who are in scope of the judgment. The Court of Appeal held that the 2015 reforms constituted unlawful direct discrimination on the grounds of age because older judges were protected on the basis of their age. Our proposals would extend this protection to all judges in scope and the proposed approach, as set out in the consultation document, would not treat anyone less favourably because of a protected characteristic, e.g. age. We therefore consider that our remedy model does not pose direct discrimination issues in respect of those in scope.

Age – Taper-protected judges

21. Our proposals would remove the discrimination identified in *McCloud* for taper-protected members, who will need to choose either JUPRA/FPJPS or NJPS membership for the remedy period (i.e. they will not be able to split accrual across schemes). We expect that

this will have a positive impact for most taper-protected members, since most will be better off in JUPRA/FPJPS for the entire remedy period rather than being a member of JUPRA/FPJPS until their taper date and NJPS thereafter.

22. Yet there may be some individuals for whom retaining their 'taper date' would have been advantageous (depending on when these members reach 20 years in JUPRA/FPJPS). However, any advantage was not the intended effect of tapered protection, and it would have been as a result of a policy that has been identified as giving rise to unjustified age discrimination. Furthermore, retaining the taper for those members for whom it would be beneficial would risk 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 31 March 2012. We therefore consider 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.

Indirect discrimination

23. Section 19 of the EA 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."

Age

24. While the remedy will treat all judges in scope equally (in that all will have a choice of scheme membership backdated to 1 April 2015), the choice to return to JUPRA/FPJPS, a tax-unregistered scheme without annual or lifetime allowance limits, is likely to confer a greater benefit to those in more senior judicial offices. Naturally, these office holders are disproportionately older. However, we do not consider that this gives rise to discrimination of younger judges, since the remedy is merely seeking to return those in scope to the position they were in prior to being subject to the unlawful discrimination in 2015. On that basis, older judges who moved to NJPS in 2015 will, generally, derive a greater benefit from returning to JUPRA/FPJPS, since they were most impacted by the discrimination.

Race and sex

25. 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 proposals will also remove any indirect discrimination on the grounds of race and sex resulting from the transitional protections.
26. The judicial diversity statistics illustrate that more senior judicial office holders in the courts have a lower representation of women but do not suggest a clear trend for the relationship

between judicial offices and women in tribunals or BAME judges.⁸ As set out above, the remedy is merely seeking to return those in scope to the position they were in prior to being subject to the unlawful discrimination in 2015. We therefore do not consider that the greater benefit conferred to more senior, and disproportionately male, judicial office holders to result in any further indirect discrimination.

G. Judges out of scope

27. As noted above, protected judges, and those who were appointed to judicial office after 31 March 2012, are not in scope of this consultation, 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, currently projected for 2022. We have considered the equality impacts of this below.

Direct discrimination

Age

28. Protected judges are those who were within ten years of retirement on 31 March 2012 and therefore remained in JUPRA/FPJPS rather than transferring to NJPS. They were therefore not subject to the discrimination identified in *McCloud*. Consequently, they are not in scope of the remedy. While in most cases these 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 be preferential depending on when they reach their JUPRA service cap of 20 years. Therefore, not including protected members in scope could arguably amount to less favourable treatment on the grounds of age.

29. However, we consider 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* but rather they remained in a scheme with objectively favourable terms not afforded to others. The proposed remedy model has been designed to extend these terms to others, enabling both unprotected and taper-protected members to have never left JUPRA/FPJPS.

Indirect discrimination

Age

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

31. To be in scope of *McCloud*, judges must satisfy the first criterion of having been in office on 31 March 2012.⁹ Table 1 shows that those not in scope are disproportionately younger. While it is arguable that not including in scope those appointed after 31 March 2012 may amount to indirect discrimination of younger judges, since they are less likely to be able to satisfy the requirement of having been in office on that date, we consider that there is justification for taking this approach. Firstly, those appointed on or after 1 April 2012 were

⁸ Judicial diversity statistics, April 2019: <https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>

⁹ Those whose appointments were agreed but who had not accepted an offer before 31 March 2012 are also not in scope.

not subject to the discrimination identified by the court, because, regardless of their age, they were not eligible for transitional protection. Secondly, they could reasonably be expected to have known that they would join or be moved to a reformed scheme when they entered judicial service, given the widespread coverage in the media at the time of the proposed pension changes that resulted in the 2015 reforms.

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 scope¹⁰	0%	8%	48%	43%
Total¹¹	5%	20%	33%	42%

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

Race and sex

32. 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 7% in the proportion of BAME judges in the courts between 2012 and 2019.¹² However, to the extent that there is *prima facie* indirect discrimination on the grounds of race or sex, the above justification in respect of age would still apply.

H. Conclusion

33. The proposals contained in the consultation document 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. The remedy will therefore simultaneously address the direct age discrimination and indirect race and sex discrimination identified in *McCloud*. In addition, we do not consider that the design of the proposals results in direct or indirect discrimination.

34. To the extent that the remedy treats those out of scope less favourably, we consider that this can be objectively justified.

35. We will continue to monitor potential equality impacts after the consultation exercise and taking into account consultation responses.

¹⁰ This is based on a sample of 707 non-claimant judges in scope of the proposals. This data is from scheme membership data, March 2020.

¹¹ Total judges in courts and tribunals in England and Wales. This data is from Judicial Office data (judicial diversity statistics), April 2019. We anticipate that the judicial diversity statistics will be broadly similar between April 2019 and March 2020, which will allow a fair comparison between the in-scope judges and this total. We will update this analysis with the 2020 judicial diversity statistics as soon as they are available.

¹² Judicial diversity statistics, April 2019: <https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>