

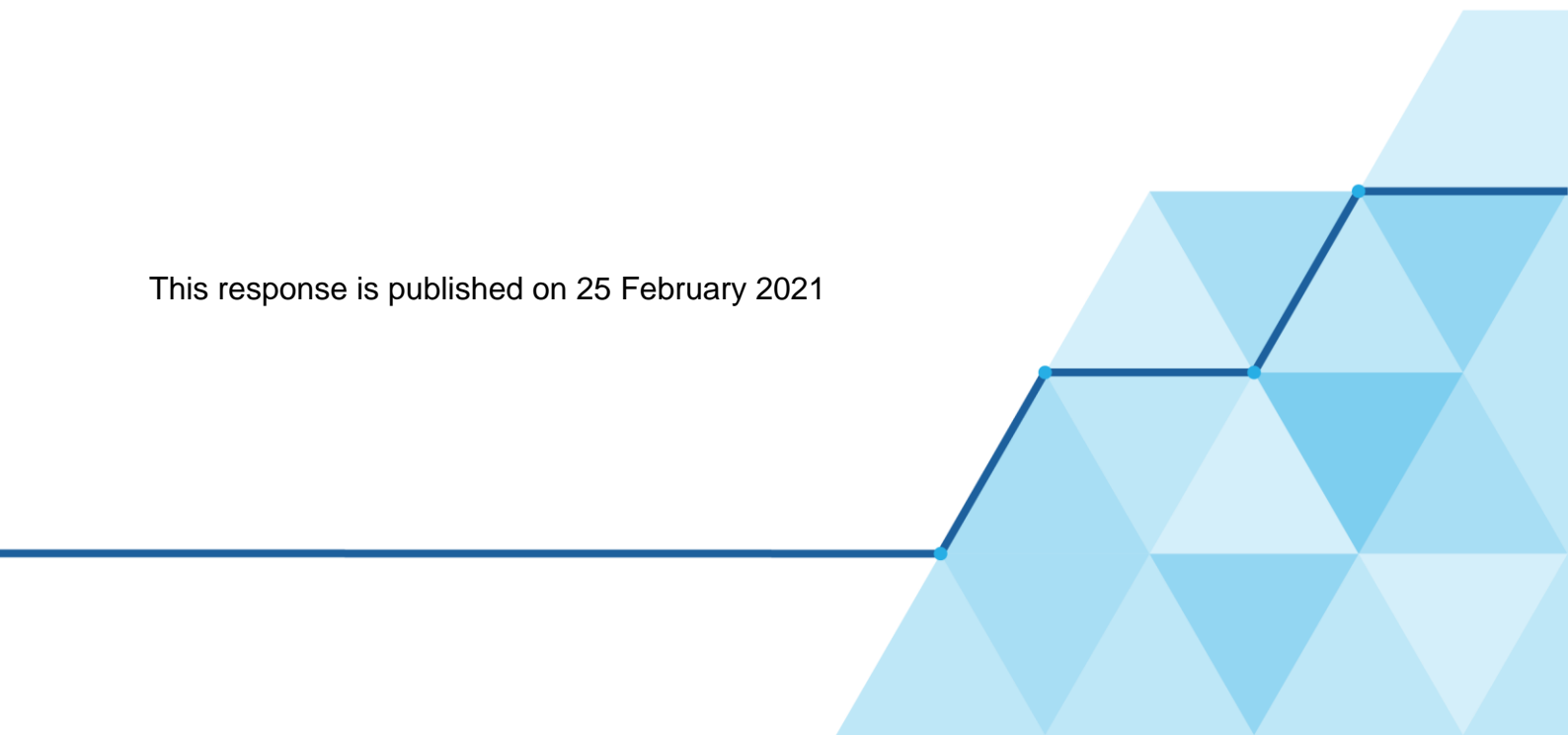


Ministry  
of Justice

# Judicial Pensions: Response to *McCloud*

## Response to consultation

This response is published on 25 February 2021







Ministry  
of Justice

## **Judicial Pensions: Response to *McCloud***

Response to consultation

Response to consultation carried out by the Ministry of Justice.



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## Introduction and contact details

This document is the post-consultation report for the consultation paper 'Judicial Pensions: Proposed response to *McCloud*', which was published on 16 July 2020 and closed to responses on 16 October 2020.

It covers:

- the background to the consultation;
- a summary of consultation responses;
- the government response to specific questions and issues raised by respondents; and
- next steps.

If you have any questions about the consultation process or if you wish to receive a copy of this document in an alternative format, please email the Ministry of Justice at **[mccloudconsultation@justice.gov.uk](mailto:mccloudconsultation@justice.gov.uk)**

## Executive summary

The consultation, 'Judicial Pensions: Proposed response to *McCloud*', was published on 16 July 2020. It invited comments on the Ministry of Justice's proposals for addressing the discrimination identified in the case of *McCloud*<sup>1</sup>, which held that the 2015 judicial pension reforms unlawfully discriminated against younger judges by offering transitional protection to those closest to retirement.

The consultation set out the criteria for being in scope of the *McCloud* judgment and proposed that affected judges should participate in an 'options exercise' in 2022. This would allow them to make a retrospective choice of pension scheme membership backdated to 1 April 2015, when the discrimination began, until 31 March 2022, after which all judges would move to a reformed pension scheme. The choice available in the options exercise would be between the pre-2015 scheme, Judicial Pension Scheme 1993 (JUPRA) (or its fee-paid equivalent, Fee-Paid Judicial Pension Scheme (FPJPS)) and the 2015 scheme, New Judicial Pension Scheme 2015 (NJPS). The options exercise would also deal with the technical details of the choice, for example in respect of past tax and contributions.

We received a total of 33 responses to the consultation: 15 from judicial associations and 18 from individual judges. While respondents generally welcomed the steps being taken to address the discrimination, there were concerns about the proposal for an options exercise. Many respondents felt that where judges wish to return to JUPRA/FPJPS, they should be able to do so before 2022.

Having carefully considered all responses, we remain of the view that running an options exercise in 2022 is the best way of addressing the discrimination. It would allow judges to consider, before making their decision, their own career and pay progression during the remedy period, including the impact of the JUPRA/FPJPS 20-year service cap. While most judges are better off returning to JUPRA/FPJPS, some may find they are better off choosing NJPS membership.

Returning judges to JUPRA/FPJPS – and backdating this decision to 1 April 2015 – will also be a large-scale exercise, with significant legislative and data requirements. It is therefore important the process is planned and run smoothly.

Judges will be in scope of *McCloud* if they were aged under 55 on 1 April 2012 and in service on or before 31 March 2012 and on or after 1 April 2015, and eligible for a judicial

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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



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pension on those dates. Periods of service should be continuous, subject to a qualifying break in service of less than five years.

Those who have already retired or are set to retire before the options exercise will be able to make their choice sooner. This will ensure the correct pension and lump sums can be put into payment as close to retirement as possible.

This document also explains how past tax and contributions will be handled where judges retrospectively change pension scheme membership.

The government will bring forward legislation when parliamentary time allows in order to address the discrimination identified in *McCloud* and subsequently equalise treatment across the judiciary by moving all judges to a new reformed pension scheme. 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.

Annex A contains a list of judicial and legal associations that provided a response.

## Background

1. The consultation paper, 'Judicial Pensions: Proposed response to *McCloud*' (the consultation), was published on 16 July 2020 and closed to responses on 16 October 2020. It invited comments on our proposals to address the discrimination identified in *McCloud*.
2. In *McCloud* the Court of Appeal held that providing transitional protection to older judges as part of the 2015 judicial pension reforms constituted unlawful direct age discrimination. 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 aged 55 or over on 1 April 2012 were protected from the changes and remained in JUPRA. For those aged between 51½ and 55 on 1 April 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 (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 – were 'unprotected' and moved to NJPS on 1 April 2015 unless they opted out of pension scheme membership altogether<sup>4</sup>.
3. The Court held that transitional protection unlawfully discriminated against younger judges. Claims for equal pay and indirect race discrimination also succeeded on the basis that the 2015 reforms had a disproportionate adverse effect on women and judges from an ethnic minority background.
4. The government accepted that the Court of Appeal's judgment had implications for all public service pension schemes that were reformed in 2015, as all contained transitional protections for older members. It has since committed to addressing the discrimination for all affected public servants regardless of whether they brought a

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<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> Alternatively, judges could choose to join the Partnership Pension Account.

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claim. In July 2020 HM Treasury consulted on proposals to remove the discrimination from schemes established under the Public Service Pensions Act 2013<sup>5</sup>. Given the uniqueness of the judicial pension schemes, MoJ consulted separately on how best to address the discrimination for affected judges.

5. Noting that the *McCloud* litigation process is providing a remedy for claimant judges, the consultation exercise is concerned with addressing the discrimination for non-claimants in scope of the *McCloud* judgment. This paper summarises responses received to the proposals on both the scope and the shape of the remedy and sets out the final position taken by MoJ.

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<sup>5</sup> HM Treasury's consultation covered schemes for NHS workers, teachers, firefighters, police, civil servants and UK armed forces. The Ministry of Housing, Communities and Local Government consulted separately in respect of local government schemes.

## Summary of responses

6. 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.
7. Careful consideration was given to all responses received, including any concerns raised and, where relevant, alternative proposals suggested by respondents. We outline the government's position below.

# Responses to the consultation

## Equalities impact

8. An equality statement was published alongside the consultation, giving due regard to the public sector equality duty<sup>6</sup>. We considered that the remedy proposals would have a positive equalities impact because they had been designed to remedy the discrimination identified in *McCloud*. The equality statement has been updated in light of consultation responses.
9. Questions 1 and 2 of the consultation sought views on i) whether the proposals impact on people with particular protected characteristics and ii) additional equalities impacts respectively.
10. In total, 14 respondents provided answers to these questions. The majority of responses are discussed in later sections; this section focuses solely on equality impacts.
11. One concern was the requirement to have been in office on 31 March 2012 in order to be in scope. It was suggested that this criterion could be challenged on the grounds that those who took up office after this date were disproportionately likely to be younger, female and from ethnic minority backgrounds.
12. The Association of Her Majesty's District Judges, however, agreed with the proposal that those who joined from 1 April 2012 should not be in scope, on the grounds that those appointed to office after this date did not suffer age discrimination because they were put into NJPS regardless of their age. More generally, they added that they:  
*"have not identified any possible discrimination with these proposals at this time."*
13. The Council of Her Majesty's District Judges (Magistrates' Courts) wrote:  
*"Assuming that the consultation document will ensure all judges appointed before 1 April 2012 and within scope of the JUPRA/FPJPS pension schemes will be entitled to remain a member of those schemes until 2022, we can see no difference in treatment being afforded to any particular category of persons and as such discrimination / equality impact appears to be equal."*

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<sup>6</sup> Section 149 of the Equality Act 2010

*Our response*

14. Having carefully considered responses, we remain of the view that the requirement to have been in office on 31 March 2012 in order to be in scope of *McCloud* is objectively justified. Further discussion of this point is set out in paragraphs 20–31 under ‘Scope’.
15. A detailed assessment of potential equalities impacts is set out in the updated equality statement published alongside this document.

## **Remedy period**

16. The consultation proposed that the remedy period would begin on 1 April 2015, when the discrimination began, and end on 31 March 2022, following which the reformed judicial pension scheme would be introduced.
17. No respondents commented on the length of the remedy period.

*Our response*

18. The government will move forward with the proposal as outlined in the consultation. Subject to parliamentary timetables and approval, judges in scope of *McCloud* will be given a choice of either JUPRA/FPJPS or NJPS membership in respect of the period between 1 April 2015 and 31 March 2022.

## **Scope**

19. Question 3 of the consultation asked respondents to set out their views on the proposed scope of *McCloud* remedy.

### ***Judges in office on 31 March 2012***

20. The consultation proposed that ‘unprotected’ and ‘taper-protected’ judges will be in scope of the *McCloud* proposals if they were in service on or before 31 March 2012 and on or after 1 April 2015, and eligible for a judicial pension on those dates. Periods of service should be continuous, subject to a qualifying break in service of less than five years.
21. The Sheriffs’ Association set out several concerns surrounding the proposed cut-off date of 31 March 2012.
22. First, they took issue with the suggestion that those appointed after this date 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:

*“It is not a good reason for excluding this group from the scope of the proposal. There may have been some public discussion at the time that would cause interested parties to anticipate that contribution levels might be increased but the nature and extent of the changes could not be anticipated.”*

23. Second, they disagreed with the requirement that one must have been entitled to be a member of JUPRA/FPJPS by 31 March 2012, since this would exclude certain judges in Scotland:

*“Those apparently not in scope include members who served in Scottish Tribunals (including the Mental Health Tribunal for Scotland) from as long ago as 2007 and those who served as full time Advocates Depute (High Court Prosecutors drawn from the practising Bar). Such service does not apparently qualify such members to come within scope. This differentiation amongst colleagues has significant adverse consequences for those who are not in scope as defined in the consultation paper. It is perceived as unfair and anomalous.”*

24. Third, in their view, the 31 March 2012 cut-off was unfair to several judges who were placed in a ‘pool’ of successful applicants in 2011:

*“Our members who were part of the pool selected in 2011 that entered service after 31 March 2012 did so as the direct result of their success in the 2011 JABS recruitment competition... It is unfair and anomalous to treat this group differently from others who were part of the same pool selected several months prior to 31 March 2012.”*

25. One respondent made similar points to those made by the Sheriffs’ Association, adding that the 2012 cut-off may discriminate on the basis of age, sex and race.

26. As outlined above, the Association of Her Majesty’s District Judges agreed that those who joined after 31 March 2012 should not be in scope.

#### *Our response*

27. 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 (those who remained in JUPRA/FPJPS), on the one hand, who were in service by 31 March 2012 and unprotected and taper-protected judges, on the other hand, who were also in service on that date. It is the latter two groups to which the government must retrospectively provide a remedy, to remove the discrimination<sup>7</sup>.

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<sup>7</sup> This includes fee-paid judges who, as a result of *O’Brien / Miller*, were entitled to a judicial pension as at 31 March 2012 (*O’Brien v Ministry of Justice* [2013] UKSC 6; *Miller and others v Ministry of Justice* [2019] UKSC 60).

28. 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.
29. 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. 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.
30. As to the Sheriffs' Association's second point, it is our view that the rationale described in the above paragraphs also applies to judges who were not entitled to a judicial pension on 31 March 2012. Such judges who subsequently took up a pensionable appointment after 31 March 2012 could reasonably be expected to have known that pension provision was likely to change.
31. The government will move forward with the proposal as outlined in the consultation. Unprotected and taper-protected judges will be in scope of *McCloud* remedy if they were in service on or before 31 March 2012 and on or after 1 April 2015, and eligible for a judicial pension on those dates. Periods of service should be continuous, subject to a qualifying break in service of less than five years. Judges can also be in scope via portable eligibility, described in paragraphs 35–37 below.

### ***Protected members***

32. The consultation proposed that 'protected' members – those who remained in JUPRA/FPJPS in 2015 because of their age – are not in scope because they were not subject to the discrimination identified in *McCloud*.
33. Two respondents, the Council of Appeal Tribunal Judges and the Association of Her Majesty's District Judges, expressly agreed with the proposal not to include protected judges in scope for the reasons given in the consultation.

### ***Our response***

34. The government will proceed accordingly: only those previously unprotected or taper-protected will be given a choice of pension scheme membership for the remedy period.

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

35. The consultation also proposed that judges who were aged under 55 on 1 April 2012 will be in scope i) if 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) if 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.

36. Only one respondent commented on portability, questioning whether it extended to their particular circumstances. We have responded to the judge directly.

*Our response*

37. As proposed, individuals will be in scope if they meet the conditions set out in paragraph 35.

***Tapered protection***

38. Tapered protection was offered to judges who were aged between 51½ and 55 on 1 April 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. Older taper-protected judges therefore retained JUPRA/FPJPS benefits for longer than their younger counterparts.
39. The consultation proposed that taper-protected judges must choose JUPRA/FPJPS or NJPS membership for the entire remedy period, i.e. they would not be able to split accrual across both schemes.
40. The Salaried Tribunal Judges Association for the Health Education and Social Care Chamber commented on this proposal, saying:
- “it is not satisfactory for those judges who tapered into NJPS and choose to remain in the NJPS to be deprived of the benefit of the taper. In our view this would remove a provision specifically designed to provide interim protection and may unfairly disadvantage some judges. Accordingly, judges should be allowed to choose to retain the taper, whilst remaining in the NJPS.”*
41. Similarly, the Tribunals Forum expressed concern that:
- “taper-protected members may face a difficulty if forced to elect between either being in JUPRA for the whole period or in NJPS for the whole period. That is because many of them may in the seven-year period have achieved the maximum 20 years contributions and so would lose out accrual of pension which they could have undertaken using the unused Annual Allowance that would have been available to them as members of JUPRA.”*

42. The Council of Her Majesty's Circuit Judges stated that:

*"We note the MoJ's Equality Impact Assessment identifies an adverse effect on a few Taper Judges. Whilst we understand MoJ's position that this result does not discriminate against those with protected characteristics, those judges affected are concerned that the proposed remedies have an adverse effect on them."*

43. Finally, whilst they accepted the discriminatory nature of tapered protection, the Council of Appeal Tribunal Judges commented that:

*"there is now a cohort of Judges who, through no fault of their own, are going to have to make a decision as to whether to opt to be in JUPRA/FPJPS or NJPS for the entire remedy period."*

#### *Our response*

44. As was set out in the consultation, the effect of *McCloud* is that tapered protection was discriminatory and that such discrimination was unlawful. Maintaining an age-based system of tapered protection would therefore perpetuate or even extend such discrimination. 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, even if it were possible, any such system would be much more complicated for schemes and members 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. Consequently, we remain of the view that taper-protected judges' choice should be between JUPRA/FPJPS or NJPS membership for the entire remedy period. This is necessary to ensure that the remedy is implemented fairly for all in scope.

45. We recognise that for a small number of individuals who reach the 20-year service cap<sup>8</sup> within the remedy period it may have been advantageous to retain the taper. However, any advantage would have been as a result of a policy that has been found to give rise to unlawful age discrimination. We maintain that the binary choice of either JUPRA/FPJPS or NJPS, which is being extended to all judges in scope, is appropriate to address the discrimination.

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

46. The consultation proposed that judges who were eligible for, but opted out of, NJPS should be in scope, subject to having been in office on the required dates. No respondents disagreed with this proposal, although the Tribunals Forum suggested

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<sup>8</sup> JUPRA/FPJPS has a 20-year service cap; members with 20 years' service cannot accrue further pension benefits.

that a specific consultation with those who opted out should be undertaken given their low number and potentially complex financial situation.

47. It was also brought to our attention that judges may have reduced their working hours in 2015 to mitigate the impact of NJPS membership. It was suggested that where a judge in these circumstances is prepared to make up the shortfall in JUPRA/FPJPS contributions for the period of reduced hours, they should be able to receive full JUPRA/FPJPS benefits.

*Our response*

48. In the case of judges who opted out of NJPS, it remains our view that they would have been likely to have remained members of JUPRA/FPJPS but for the discrimination. Therefore, as proposed, they will be given the opportunity to re-join JUPRA/FPJPS for the remedy period. With this in mind, we do not feel it is necessary to conduct a further consultation as suggested by the Tribunals Forum.
49. On the issue of reduced hours, we take the view that it would be inappropriate to pay pension benefits for time not served. Doing so would place some judges in a better position than others for whom MoJ paid contributions pro rata to the days served.

***Transitional Protection Allowance***

50. When NJPS was introduced, unprotected and taper-protected judges who met certain criteria were given a one-off option to opt out of NJPS and instead receive a Transitional Protection Allowance (TPA). TPA is an additional sum paid equivalent to the 'actual' employer contribution that would have been paid by MoJ had the member joined NJPS.
51. The consultation proposed that judges who opted for TPA and were in office on 31 March 2012 are in scope of *McCloud* and should be given the option of returning to JUPRA/FPJPS from 1 April 2015, subject to TPA being recouped and member JUPRA/FPJPS contribution arrears being paid.
52. Five respondents agreed that TPA judges should be in scope, including the Council of Appeal Tribunal Judges who described the proposal as 'sensible'.
53. Two respondents in a joint response agreed that TPA repayment should not be mandatory, i.e. it should be open to judges whether or not to re-join JUPRA/FPJPS. This response also suggested that the choice could be exercised for any number of years of the remedy period rather than the entire period – the reason being that it might be difficult to repay seven years of TPA payments. Such a proposal would entitle the TPA judge to JUPRA/FPJPS benefits only for those years where TPA had been repaid and member contributions paid.

54. One response suggested that judges should be able to continue receiving TPA beyond 2022 rather than join the reformed judicial pension scheme at that point.
55. Other responses focused on the amount of TPA to be repaid as well as the mechanism for repayment, which are discussed below in paragraphs 105–107 and 119–126 respectively.

*Our response*

56. The government remains of the view that judges should be free to retain TPA for the duration of the remedy period or alternatively elect to return to JUPRA/FPJPS with effect from 1 April 2015.
57. We do not consider that TPA should continue as an option post-2022, since the rationale for TPA – providing an alternative to membership of a tax-registered scheme – would not apply to the reformed scheme, which will be tax-unregistered. This position is explained in more detail in the government response to the consultation on the reformed judicial pension scheme, published alongside this document.
58. While we recognise the potential difficulty in repaying TPA and making up JUPRA/FPJPS contributions for the remedy period, we do not agree with the suggestion that judges should be able to do so for only a limited number of years. As with all judges in scope of *McCloud*, any choice must be made in respect of the entire remedy period (1 April 2015 – 31 March 2022). We do, however, propose to make repayment as flexible as possible. More details are included in paragraphs 119–126 under ‘Payment mechanism’.

***Partnership Pension Account***

59. The consultation proposed that unprotected or taper-protected judges who were eligible for, but opted out of, NJPS and instead joined a Partnership Pension Account (PPA) should be in scope of *McCloud*.
60. We received two comments on this proposal – both felt there was insufficient information in the consultation to provide an informed response and suggested that an additional consultation should be undertaken once a detailed proposal was ready.

*Our response*

61. Given the complexities involved with PPA, at the time of publishing the consultation we were not in a position to propose a technical solution for enabling PPA judges to return to JUPRA/FPJPS. We have since developed proposals and, noting the suggestion of a further consultation, have written to affected judges in scope, inviting their views. Since no substantive comments were received, we plan to proceed accordingly. The technical details of the proposal are set out in paragraph 108 under ‘PPA’.

### **Gap judges**

62. The consultation proposed that judges who were in fee-paid service on or before 31 March 2012, then took up salaried office between 1 April 2012 and 1 December 2012, and had not made a claim for a fee-paid pension within three months of the end of their fee-paid service<sup>9</sup> (so-called ‘gap’ judges), should be offered a choice of JUPRA/FPJPS or NJPS benefits for the remedy period. Following *Miller*, we accepted 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.
63. All those who commented on this point agreed with the proposal.

### *Our response*

64. As proposed, gap judges’ pension entitlement will be resolved through the *McCloud* proposals, which means those who were aged under 55 on 1 April 2012 will be offered a choice of JUPRA/FPJPS or NJPS benefits for the remedy period. While we did not receive any responses on this point, on further reflection we consider that because gap judges aged 55 or over on 1 April 2012 were moved to NJPS on 1 April 2015 due to our position on time limits rather than *McCloud* discrimination, they are effectively ‘protected’ judges and should be returned to JUPRA membership from 1 April 2015. We will, however, resolve any wider issues for these judges such as member contributions and tax losses through the *McCloud* remedy.

## **Options model**

### **Options exercise**

65. The consultation proposed a model for addressing the discrimination that would allow all judges in scope to be given a retrospective choice whether to have accrued benefits in JUPRA/FPJPS or NJPS for the remedy period. It proposed offering this choice through a formal ‘options exercise’ following the end of the remedy period and introduction of the reformed pension scheme. MoJ would provide a range of materials to assist judges in making their decision, including a comparison of benefits available in either scheme.

### **Deciding during the remedy period**

66. We also proposed that judges in scope who retire during the remedy period should be able to make their choice earlier so that they can access their correct pension and

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<sup>9</sup> MoJ introduced a moratorium on 5 April 2013, with the effect that eligible fee-paid judges who were still 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. The Department of Justice introduced an equivalent moratorium for Northern Ireland offices with effect from 1 May 2013 which covered eligible fee-paid judges who were still in service on 1 February 2013.

lump sum. This option would also be available to dependants of deceased judges in scope.

67. Many respondents felt that all judges should be able to return to JUPRA/FPJPS earlier than 2022. Several respondents argued that without the option of an immediate return to JUPRA/FPJPS, judges may suffer financial loss. Others felt that non-claimant judges were being placed in a worse position than *McCloud* litigants who, as a result of declarations in the Employment Tribunal, have already returned to JUPRA/FPJPS.
68. One respondent argued that:  
*“Any delay in the opportunity for a judge to return to JUPRA/FPJPS at an earlier date is detrimental to them in the sense that it both prejudices their flexibility to either make additional pension contributions to any private pension which they have or alternatively to commence taking benefits from any private pension arrangements.”*
69. Three judges also set out an additional equalities concern with the proposals, namely that MoJ’s decision in late 2019 to stop the tapering of judges to NJPS meant that older, taper-protected judges who remained in JUPRA have been treated favourably when compared with younger, ‘unprotected’ judges and those who had already tapered to NJPS. Those judges who did not move, they argue, are at a financial advantage as they have been able to make additional pension contributions to tax-registered schemes and reduce their tax liability.
70. One judge argued that by delaying the return to JUPRA, individuals would be detrimentally affected by the impact of having to repay tax arrears for additional years, commenting that:  
*“In my view the statement that there is no disadvantage to waiting until the formal options exercise is misconceived. It appears to assume all judges who would want to go into JUPRA will have unlimited resources available to pay a sudden and sizeable tax liability, rather than making it manageable. It has focused only on the outcome pension entitlement - saying that this is full, but not thinking about how this will be paid for by the individual in tax terms.”*
71. Similarly, the Sheriffs’ Association also expressed concerns:  
*“It is also said that there is ‘no disadvantage’ to waiting (paragraph 46), but that is not the point: affected sheriffs have been unlawfully discriminated against. That was finally determined more than 15 months ago. The remedy for the vast majority is to put them back into JUPRA - and to do so as soon as possible. Therefore, the Association submits that an election/default to JUPRA for eligible judges could and should be earlier than April 2022.”*

72. The Association of Her Majesty's District Judges was concerned that a delay would result in judges knowingly submitting 'false' tax returns in the remedy period, writing:  
*"This will require all members to knowingly complete false tax returns and to consider each year whether the tax to be paid is to be paid by them or through 'scheme pays'."*
73. Another respondent suggested MoJ should return all judges in scope to JUPRA/FPJPS immediately with an option to opt out, writing that this:  
*"would be in the interests of the vast majority of judges in scope of McCloud. The current proposals continue the discrimination for at least another 18 months for those in scope judges who do not wish to sue MoJ."*
74. The Council of Her Majesty's Circuit Judges mirrored many of the points made above, stating:  
*"The view of the majority of members who are in scope to return to JUPRA and who responded to our survey is that they would prefer to make their election at the end of 2020 rather than be forced to wait until 2022 to do that. Reasons cited included the need for certainty, the ability to plan their tax and financial affairs and that they do not wish to have to continue to deal with the Annual Allowance tax charge for another two years."*

*Our response*

75. While we recognise the strength of feeling around returning to JUPRA/FPJPS at the earliest opportunity, we remain of the view that a structured options exercise is the best way of facilitating this for judges who remain in active service until the end of the remedy period. First, because it is not the case that all judges are better off in JUPRA/FPJPS, we consider that it is important for judges to have a clear understanding of their own position before making the choice of pension scheme membership. As set out in the consultation, an options exercise held in 2022 would allow judges to consider, before making their election, their own career and pay progression during the remedy period and, where applicable, when they will reach their 20-year service cap in JUPRA/FPJPS. 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. A judge who would reach the 20-year service cap during the remedy period may, depending on when it is reached, be better off electing NJPS membership for the entire remedy period.
76. To ensure judges are able to make an informed decision, MoJ will provide each judge with a bespoke options pack comparing the benefits available in JUPRA/FPJPS and NJPS in respect of the remedy period.
77. 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) rather than the sitting days of fee-paid judges. 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 resource to complete the process and expect the majority of the work to be completed in early 2022.

78. 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.
79. For these reasons we have decided against returning all individuals in scope to JUPRA/FPJPS immediately with an option to opt out.
80. However, we acknowledge the concerns raised – both in the litigation process for *McCloud* claimants and in responses to the consultation – about possible financial consequences of waiting until 2022 to return to JUPRA/FPJPS. We understand that some judges may experience financial loss because remaining in NJPS until 2022 prevents them contributing to other tax-registered schemes. We recognise that there are two aspects to this loss:
  - a. Personal allowance – Some judges with income between £100,000–£125,000 (Salary Group 7 judges) could have made contributions to tax-registered schemes if they were in JUPRA/FPJPS to reduce their taxable income to £100,000 and take advantage of 60% effective tax relief on those contributions (because of the abatement of the personal allowance on income above £100,000). The fact that judges will remain members of NJPS until 2022 means that when they retrospectively return to JUPRA/FPJPS they will have lost the opportunity to make those contributions in the relevant year and retain the benefit of 60% effective tax relief.
  - b. Annual allowance – Because NJPS is a tax-registered scheme, remaining in NJPS until 2022 will contribute towards an individual’s annual allowance. Where judges ultimately return to JUPRA/FPJPS via the options exercise, they will return to a tax-unregistered scheme and will have lost the opportunity to maximise their annual allowance through investing in non-judicial tax-registered pension schemes during the remedy period.
81. We plan to address both losses in full via the options exercise. Where judges incur financial losses as a result of the discrimination, such as those described above,



MoJ will provide compensation accordingly – for example, covering the difference in tax liability. An illustrative example of this is set out in Annex B.

82. Full details of the evidence that will be required to claim for such a loss, as well as the actions expected of judges to mitigate their loss, will be outlined as part of the options exercise.
83. We have also considered the equalities concerns raised by respondents. We are satisfied that by addressing all losses sustained in full there will be no financial disadvantage in judges remaining in NJPS until 2022. For this reason, we do not consider that the options exercise proposal gives rise to discrimination.
84. Regarding the concern with tax returns, where an individual knows that in 2022 they will be opting for different scheme membership for the remedy period, and doing so will change their tax treatment, they should continue to complete their tax self-assessment on the basis of their current situation (for example, NJPS membership). They should then notify HMRC once the change in tax position has occurred. Full details of the steps that will need to be taken will be included as part of the options exercise.
85. Regarding the concern of having to pay arrears, we refer readers to paragraphs 119–126 below under ‘Member contributions and tax’, which provide detail on the adjustment of past tax and pension contributions.

***Default option***

86. The consultation proposed that in the event judges do not respond to the options exercise the default position would be to leave them in the scheme they are in as at 31 March 2022.
87. We received 18 responses to this point, of which 14 disagreed with the proposal and four broadly agreed.
88. Most respondents who disagreed suggested that the default position should instead be JUPRA/FPJPS membership since it was likely to be the more beneficial scheme for the vast majority of judges.
89. Two of these respondents, the Tribunals Forum and the Council of Her Majesty’s District Judges (Magistrates’ Courts) added that, in their view, the proposal would not properly address the discrimination, the latter writing:

*“To fully comply with the Court of Appeal judgment, it seems to us that the default option should be the other way – i.e. to switch the member back into the JUPRA/FPJPS for the duration of the remedy period.”*

90. Of the four respondents that supported the proposal, three did so on the basis that MoJ would have actively sought to engage every member and support them in making an informed choice. The Council of Appeal Tribunal Judges, for example, stated that a default option:

*“would appear to be sensible always provided that all efforts had been made by the Ministry of Justice to ensure that all affected Judges had been contacted in an appropriate and timely manner.”*

91. The Council of Her Majesty’s Circuit Judges also conditionally supported the proposal stating:

*“The options exercise will need to be properly resourced to ensure that information sent to judges is accurate and timely.”*

*Our response*

92. We are committed to running a fully resourced options exercise and will make every effort to obtain a positive decision from all judges in scope of *McCloud*. We therefore do not anticipate needing to rely on the default option.
93. We do recognise that JUPRA/FPJPS is likely to be the most financially beneficial option for most judges. However, our reason for proposing that the default should leave judges in the scheme they are in was because we could not presume to know which option would be best for an individual judge, given that different judges may value different features of either scheme.
94. Additionally, since any return to JUPRA/FPJPS would change a judge’s tax position, we do not consider it is right to do that in the absence of a positive election.
95. Therefore, as proposed, in the unlikely event judges do not respond to the options exercise, they will be left in the scheme they are currently in. Taper-protected judges who do not respond to the options exercise will become members of NJPS for the entire remedy period if they have already moved to that scheme, while those who have not moved from JUPRA/FPJPS will remain members of those schemes.

***Options exercise timing***

96. The consultation proposed that the options exercise would follow the introduction of the reformed scheme, which, subject to parliamentary timing and approval of the legislation, is set to commence in April 2022.
97. The Sheriffs’ Association stated:
- “There does not appear to be any specification as to the length of time judges are going to have to decide which scheme benefits them more. A timetable should be provided setting out when judges affected are going to get the relevant figures*

*allowing judges a reasonable period of time to consult with accountants etc. before making a decision as to remedy.”*

*Our response*

98. As proposed, the options exercise will occur after the introduction of the reformed scheme in April 2022, subject to parliamentary time and approval of the necessary legislation. We understand that judges will want time to understand their options before making a decision and we will therefore allow a reasonable period of time for individuals to make their decision.

# Technical details

## Member contributions and tax

### *Contributions to NJPS*

99. The consultation explained that there are statutory restrictions on HMRC's ability to collect taxes from previous years: in most cases, when the remedy is implemented, only the current tax year (at that time) and four full preceding tax years will be in scope of tax correction. While this remains the position, we are now able to provide more clarity on the mechanics of how past member contributions to NJPS and their tax treatment would be adjusted as part of the options exercise (on the basis that it takes place in the 2022/23 tax year) where judges elect to return to JUPRA/FPJPS:
- a. The years of the remedy period in scope of the adjustment are 2018/19, 2019/20, 2020/21 and 2021/22.
  - b. For these tax years member contributions to NJPS require adjustment to achieve the same position as if the contributions had been made to JUPRA.
  - c. An adjustment to the member's pension contribution rate would need to be made by our payroll administrator via the payroll system to reflect the true rate and the fact that contributions to JUPRA/FPJPS (tax-unregistered) do not attract tax relief unlike those to NJPS (tax-registered).
  - d. Therefore, as part of this adjustment we will deduct the tax owed in respect of tax relief received on NJPS contributions and pay this to HMRC<sup>10</sup>.
  - e. The balance of the NJPS contributions (the amount left after the deduction of tax owed) will count towards the contributions that should have been made to JUPRA/FPJPS.
  - f. If after this process a judge has overpaid JUPRA/FPJPS contributions, we will provide a refund to the judge accordingly. Similarly, where a shortfall arises in respect of member contributions to JUPRA/FPJPS, the judge will need to pay this. Payment options are discussed below in paragraphs 119–126 under 'Payment mechanism'.
100. As set out in the consultation, for years out of scope of the adjustment, 2015/16, 2016/17 and 2017/18, tax relief received by judges in respect of their NJPS contributions could not be recovered by HMRC (although we would still treat NJPS contributions as having been made to JUPRA/FPJPS). Because judges will not need

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<sup>10</sup> Where HMRC charge interest for late payment of tax, we will compensate individuals by reducing the amount owed to JUPRA/FPJPS by the amount charged.

to pay tax in respect of the income represented by their contributions to NJPS in these out of scope years, we do not plan on refunding excess contributions for these years, i.e. the pension contributions will be preserved. Most judges should not suffer financial detriment as a consequence of this arrangement, but in the event that the preservation of contributions leaves a judge in a net worse-off position<sup>11</sup>, we will compensate accordingly. This reflects the agreement reached with claimants in the *McCloud* litigation process.

101. Annex B contains examples of how this process would work in two different salary groups.

### ***Tapered protection***

102. Where taper-protected judges who transferred to NJPS wish to return to JUPRA/FPJPS, naturally the process set out in paragraphs 99–100 would only take place in respect of in-scope years spent in NJPS.

103. Where NJPS is chosen, judges will be required to make up any shortfall in contributions to NJPS prior to seeking tax relief in respect of in-scope years spent in JUPRA/FPJPS. Payment options are discussed below in paragraphs 119–126 under ‘Payment mechanism’.

104. Full details on how individuals’ tax position will be adjusted, including for out of scope years, will be included as part of the options exercise.

### ***TPA***

105. Two judges, in a joint response, commented that repayment of TPA should be the net amount because:

*“judges who received the TPA did not benefit from it as a gross amount, but only after paying tax at 45%. It would be unfair to require them to repay more than the actual benefit they have received as the price of being restored to the pension entitlements under the JUPRA scheme which they lost in the period 2015 to 2022.”*

### ***Our response***

106. Having considered the above response, we agree that where TPA recipients elect to return to JUPRA/FPJPS they should repay the amount of TPA they received ‘net’ of the income tax charged on the payment. Repayment options are discussed in paragraphs 119–126 under ‘Payment mechanism’.

107. Full details on how individuals’ tax position will be adjusted as a result of this process will be provided as part of the options exercise.

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<sup>11</sup> This is possible for judges earning slightly over £150,000.

## **PPA**

108. Where PPA members elect to return to JUPRA/FPJPS, the following steps will be taken to avoid ‘double compensation’, i.e. to ensure they receive only JUPRA/FPJPS benefits for the remedy period:
- a. PPA benefits that relate to contributions paid into the PPA (whether they currently remain in the PPA or have been transferred to NJPS) will either be transferred to JUPRA/FPJPS **or** surrendered for benefits in JUPRA/FPJPS.
  - b. Any pension benefits in the PPA that relate to transfers in from pension schemes other than NJPS, or excess contributions above the JUPRA/FPJPS level will be retained by the member in PPA<sup>12</sup>. If the transfer was made from NJPS it will be returned to NJPS.
  - c. Member contributions paid into the PPA, net of tax relief, will go towards contribution arrears due to JUPRA/FPJPS.
  - d. Any shortfall in contributions to JUPRA/FPJPS will need to be paid by the member to the scheme – this will be the case for most PPA members since the PPA contribution rate, net of tax relief, is lower than the JUPRA/FPJPS contribution rate<sup>13</sup>.

## **Annual allowance**

109. As a result of the statutory restrictions on HMRC’s ability to adjust the tax position in relation to previous years, where a judge elects to return to JUPRA/FPJPS, in most cases only the tax year in which the choice is made, and four full preceding tax years will be in scope of tax correction. This means that annual allowance tax charges (AATC) paid upfront by the member will only be refunded by HMRC in ‘in-scope’ years. For earlier, ‘out of scope’ years, MoJ will compensate judges outside the tax system for the full amount of the charge.
110. If the individual originally used Scheme Pays<sup>14</sup> to meet the AATC, the associated pension debit will be amended as appropriate, and schemes will receive the refund. Both mandatory and voluntary Scheme Pays will remain available for the rest of the remedy period so that members do not have to pay the AATC upfront.

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<sup>12</sup> Individuals will, subject to the relevant PPA rules, be able to transfer these benefits to another scheme of their choice.

<sup>13</sup> Flexible options to pay any shortfall are outlined in the ‘Member contributions and tax’ section, paragraphs 119-126.

<sup>14</sup> Scheme Pays is a process that allows an individual to pay an AATC from their pension scheme. This means the scheme pays the AATC directly to HMRC on their behalf and it is recovered from their regular pension payments on retirement.

### ***Retirement and death***

111. The consultation proposed that where a judge in scope of *McCloud* retires or dies during the remedy period, they or their family or legal representatives should be able to exercise the choice of re-joining JUPRA/FPJPS before the options exercise.
112. The Association of Her Majesty's District Judges agreed that retired and deceased members should be prioritised as soon as possible following the consultation and suggested that out of pocket expenses for reopening a deceased member's estate should include professional fees. The Council of Her Majesty's Circuit Judges stated that sufficient resources should be made available to minimise delays in resolving past cases.
113. As above, several respondents felt that it should be open to all judges to exercise their choice during the remedy period.

### *Our response*

114. Judges who have retired since 1 April 2015 or who will retire before the end of the remedy period, i.e. before the reformed pension scheme comes into operation, and wish to return to JUPRA/FPJPS, will be given the opportunity to do so as close to their retirement date as possible to ensure correct lump sums and pensions can be put into payment. The tax adjustment in paragraphs 99 and 100 will be carried out to the same timetable. We will seek to contact judges ahead of their retirement date to facilitate this and have already begun communicating with those who have retired on grounds of ill-health.
115. Where a retired judge with no dependants returns to JUPRA, we will refund dependant contributions for the period in which the member had no dependants.
116. As proposed, in the case of deceased judges in scope of *McCloud*, the late member's family or legal representatives will be provided with a comparison of the benefits available in JUPRA/FPJPS and NJPS. This would include any shortfalls in lump sum or pension to which the late member would have been entitled in the alternative scheme as well as a comparison of the benefits and scheme features available to spouse/dependants, etc. The family or representative would then be able to make an informed decision based on the information available. Again, we will proactively communicate with dependants to make them aware of the options available to them.
117. We recognise the complex and difficult nature of retrospectively adjusting a deceased member's benefits. Therefore, as proposed, additional expenses incurred where evidenced, for example from reopening a probate application, as a result of the remedy would be reimbursed. This does not extend to inheritance tax payments that may become due or may increase as a result.

118. One respondent also asked how situations where there are multiple survivors<sup>15</sup> would be treated, given survivor benefits differ across the schemes. We are not aware of any cases at this time where there is a conflict between different beneficiaries' interests. Given the timetable for the options exercise, it is possible that no such cases will arise. However, to cover the possibility that it might, we are considering our approach to ensure fairness between beneficiaries.

### ***Payment mechanism***

119. Question 6 of the consultation asked for 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.

120. The consultation proposed that where judges owe money, including repayment of TPA and payment of JUPRA/FPJPS contribution arrears, several options could be available to facilitate this, including:

- a. making an upfront payment;
- b. deduction from future salary or fees; and
- c. deduction from retirement lump sum.

121. In the case of TPA repayment, we were also considering the introduction of an equivalent to Scheme Pays<sup>16</sup> given the significant sums involved.

122. Of the 10 respondents that addressed repayment options, all favoured a flexible approach. Some of these suggested that the TPA Scheme Pays option should be extended to general contribution arrears rather than just repayment of TPA.

### ***Our response***

123. We can confirm that individuals will be able to choose from a combination of the following options (as part of the options exercise) to pay contribution arrears:

- a. making an upfront payment in full;
- b. paying the amount in instalments (by way of deduction from future salary or fees); and
- c. having the amount deducted from lump sum on retirement.

124. We have carefully considered the introduction of a Scheme Pays style mechanism for making repayments. Although not completely analogous to Scheme Pays, we can confirm TPA recipients and others who opted out of NJPS membership will be able to

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<sup>15</sup> Spouses, registered civil partners, children or (in the case of NJPS), cohabittees eligible to benefit under the scheme.

<sup>16</sup> Scheme Pays allows an individual to pay an annual allowance charge from their pension scheme. The scheme pays the annual allowance charge directly to HMRC on the individual's behalf and the charge is recovered from their regular pension payments on retirement.



make payments via deduction from ongoing pension. This mechanism will be made available to these groups of judges because the sums they owe are likely to be substantial, which means it may not be reasonable for them to make repayments through options a, b and c at paragraph 120, above. (The mechanism will not be extended to all arrears, as we feel that the three options outlined at paragraph 120 are appropriate for the comparably small amounts of money that will be owed.)

125. TPA recipients and those who opted out of NJPS membership will therefore be able to choose one or a combination of a, b and c, with the option of deductions from future (regular) pension payments available to supplement these options, i.e. judges will not (given the potential size of the sums owed) be able to make all of their repayments via these deductions from ongoing pension alone.
126. Full details, including the tax implications of each payment option, will be provided as part of the options exercise.

#### ***Late repayment of tax***

127. The Association of Her Majesty's District Judges expressed concern about the impact of potential penalties for late repayment of tax.

#### ***Our response***

128. We are working closely with HMRC to ensure that the tax position of each affected judge is properly rectified. In the unlikely event that penalties are imposed as a result of late payment of tax due to *McCloud* discrimination, MoJ would indemnify judges for this charge. We also understand that such a penalty would not affect the question of whether a judge's tax affairs are in good order.

#### ***Amending self-assessment tax returns***

129. As a result of the remedy, it may be necessary for some individuals to amend past tax returns. We will provide clear guidance on this as part of the options exercise.

## **Independent financial advice**

130. Four responses concerned independent financial advice (IFA). The Council of Appeal Tribunal Judges, the Association of Her Majesty's District Judges and an individual judge all stated that IFA should be made available to support judges in making their decision in the options exercise.
131. The Salaried Tribunal Judges Association for the Health Education and Social Care Chamber instead commented on the historic costs associated with the discrimination, stating:

*"All or the vast majority of Judges will have incurred some additional expense in dealing with the additional complexities introduced by the NJPS, the change of*

*scheme, and the RRA. Some will have incurred substantial expenditure. All will have suffered some distress. Most will have taken up time – some of them, a considerable amount of it, reading, understanding and explaining to others the various impacts. We note that there are no proposals to make any payments to compensate for any of this.”*

#### *Our response*

132. MoJ will make available a range of information in the options exercise that will be tailored to an individual’s circumstances – for example, comparing pension and lump sum in both JUPRA/FPJPS and NJPS in respect of service during the remedy period. We recognise that some individuals may wish to seek financial advice to support their decision in the options exercise, but we do not consider it necessary to compensate judges for IFA costs associated with this.
133. We recognise, however, that judges may have incurred IFA costs as a result of the move from JUPRA to NJPS, given the unique tax implications of transferring to a tax-registered scheme. Where judges are able to adduce evidence of such sums, we will provide compensation through the options exercise, subject to a cap of £500 plus VAT.

### ***Lifetime allowance***

134. Where judges who have retired elect JUPRA/FPJPS membership and have incurred a lifetime allowance (LTA) charge in respect of NJPS benefits, the consultation proposed that the portion of the charge related to NJPS should be refunded.
135. Several respondents commented that enhanced or fixed protection<sup>17</sup> lost as a result of joining NJPS should be restored where a judge elects to return to JUPRA/FPJPS.
136. The High Court Judges’ Association said:
- “Unwinding’ a Judge from the NJPS into JUPRA will, or should, erase any LTA losses that NJPS membership caused. This is not addressed in the paper but may be implicit in what is proposed. This would mean that a Judge who took fixed protection before joining the NJPS and who lost that protection upon joining the NJPS should be entitled to restoration of that fixed protection if they opt to be put back into JUPRA for the remedy period.”*

#### *Our response*

137. For the current tax year and four tax years preceding the point of decision to opt for JUPRA/FPJPS membership, the government will take steps to reflect the fact that any pension benefits paid from NJPS are no longer to be treated as having been

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<sup>17</sup> As defined by the Finance Act 2004 (enhanced protection) and Finance Act 2011 (fixed protection)

made from that scheme. Individuals may also be required to amend their self-assessment tax returns.

138. Where judges have paid a LTA charge upfront, we will provide full details of how to claim it back. This will result in the relevant LTA charge being refunded by HMRC.
139. For years outside the statutory time limit for correcting the tax position, compensation for the LTA charge will be provided outside of the tax system by MoJ.
140. Where an individual can adduce evidence that they held enhanced or fixed protection before joining NJPS, this will be restored on reinstatement to JUPRA/FPJPS. TPA recipients will **not** forfeit either their enhanced or fixed protection by electing to have never left JUPRA/FPJPS. Details of what evidence will be required, and the process for submitting it, will be included as part of the options exercise.

## **Interest**

141. The consultation recognised that it would be necessary to pay interest where MoJ owes money to a member or member's estate.
142. In line with HM Treasury's approach to *McCloud* remedy across other public service pension schemes, interest will also be applied where members owe sums to MoJ. The appropriate rates will be set centrally after consultation with the Government Actuary.

## **Voluntary member contributions**

143. The consultation made the following proposals regarding additional contributions, specifically Added Pension (AP) and Effective Pension Age (EPA), where members elect to return to JUPRA/FPJPS:
  - AP – AP would be regularised so that the judge would be made a member of NJPS in respect of AP only, i.e. not for pension accrual purposes.
  - EPA – The judge would have their EPA converted into AP in NJPS, using actuarial factors, and this would be regularised as a standalone NJPS pension (again, so that the judge would be a member of NJPS in respect of AP only).
144. Seven respondents addressed these proposals.
145. Two of these stated that a refund of contributions plus interest should be available as an alternative to regularisation.

146. Two felt that MoJ should allow members to take the benefits of EPA as AP at age 65 (the age at which benefits can be taken under JUPRA/FPJPS), rather than the NJPS normal pension age (a member's State Pension age).
147. One respondent added that an option should be available to allow EPA contributions to be applied to the reformed judicial pension scheme for the purpose of taking benefits under that scheme earlier than normal pension age.
148. The Council of Immigration Judges suggested that judges should have the option to put AP contributions towards the equivalent JUPRA/FPJPS additional contribution options, writing:
- “We would also suggest that those members who have made voluntary contributions to the NJPS are also given the option of using these contributions to exercise any options that would have been open to them, had they remained members of JUPRA/NJPS [sic] from April 2015 onwards. This could for example include the right to take advantage of the JAYS/JASSPS, where the member was in service at the appropriate time.”*
149. The Council of Appeal Tribunal Judges supported the proposals without further comment.

***Further correspondence with affected judges***

150. In light of these responses – and the litigation process for *McCloud* claimants – we reconsidered our approach to AP and EPA. We wrote to affected judges to propose that additional contributions should be refunded rather than regularised.
151. We received eight responses from affected judges.
152. None objected to our EPA proposals.
153. The majority of respondents on AP disagreed with the proposal to refund, favouring the original proposal of regularisation.

*Our response*

154. Given that no affected judges disagreed with the EPA position, individuals will be given a refund of these contributions plus interest.
155. For AP, we plan to give judges a choice between regularisation, as originally proposed, whereby they remain a member of NJPS for AP purposes only, and a refund plus interest.
156. While we have carefully considered the Council of Immigration Judges' suggestion, we do not believe it would be appropriate to covert these contributions to JAYS/JASSPS, because since 2006 JUPRA members have not been able to start

making new JAYS/JASSPS contributions. We believe that by providing a choice of regularisation or refund plus interest for AP, we are offering an appropriate remedy.

## Transfers

157. The consultation proposed that where a judge chooses JUPRA/FPJPS, benefits transferred from private pensions schemes into NJPS could be regularised so that affected judges would be made members of NJPS in respect of these transfers (as with additional contributions, they would not be a member of NJPS for benefit accrual purposes). Question 9 of the consultation asked respondents to set out any comments on this proposal.
158. The Council of Her Majesty's District Judges (Magistrates' Courts), Council of Her Majesty's Circuit Judges, Council of Appeal Tribunal Judges and an individual judge supported the proposal.
159. The Association of Her Majesty's District Judges stated, however:
- "We are concerned that the proposal offered means that the pension created by this transfer cannot be accessed without an actuarial reduction until the member reaches State Retirement Age. For those members who choose to return to JUPRA, they should be allowed, if they chose, to take this NJPS pension at 65 without any financial penalty."*

### *Our response*

160. Given that all respondents agreed with the main proposal, individuals will become members of NJPS in respect of benefits transferred from private pensions<sup>18</sup>.
161. It is our view that it would not be appropriate to allow regularised benefits in NJPS to be taken at 65 (or before normal pension age (NPA)) without an actuarial reduction. These transfers were made voluntarily, in full knowledge of the conditions on the resulting benefits. Specifically, the annual pension offered for the transfer took account of the fact that it would be payable at NPA. If it were to be payable in full at 65, the annual pension offered would have been lower. Therefore, offering an unreduced pension at 65 would represent an unfair financial windfall for these members. The full value of any regularised transfers in will therefore be available from a member's State Pension age. However, as with all NJPS benefits, a judge may retire earlier and take their pension at an actuarially reduced amount.

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<sup>18</sup> Where PPA members choose JUPRA/FPJPS benefits any PPA benefits will be transferred to JUPRA/FPJPS or surrendered to avoid double compensation – as set out as set out in paragraph 108.

## Divorce

162. The consultation recognised that where divorce (marriage) or dissolution (civil partnership) proceedings are finalised during the remedy period, this could require changing a pension credit member's entitlement and the pension debit that will apply to the judge's benefits. Question 10 of the consultation asked for members' views on how divorce cases should be treated.

163. Seven responses were received.

164. Five respondents suggested that those going through divorce proceedings should be able to elect their scheme membership before the options exercise. The Association of Her Majesty's District Judges argued:

*"For those members who are involved in divorce proceedings, there is a realistic possibility that the proceedings will not be capable of conclusion until the member has elected whether to return to JUPRA or remain in NJPS. We believe that members involved in such proceedings should be allowed to make their election before the commencement of the reformed scheme."*

165. The Council of Her Majesty's District Judges (Magistrates' Courts) felt that the complexities outlined in the consultation were accurate but did not comment further on how these should be dealt with.

### *Our response*

166. We accept that the interaction between the *McCloud* remedy and divorce proceedings will be complex. However, for the reasons outlined in the 'Options model' section above, we maintain that the options exercise remains the best way of managing the complicated, large-scale process of giving effect to judges' decisions and adjusting the retrospective period.

167. It is therefore our position that, even where there are divorce proceedings, judges should still await the options exercise to make their decision regarding retrospective scheme membership.

168. In line with the position expressed by HM Treasury, this choice would be exercised by the scheme member not the ex-spouse or civil partner, on the basis that the scheme member has been subjected to the discrimination. We are working through the details of how the pension entitlement of the ex-spouse or civil partner will be treated but can provide assurance they will not be placed in a worse financial position as a result of the choice of the scheme member.

## Recruitment and retention allowance

169. In 2019 we introduced a temporary recruitment and retention allowance (RRA) as an interim response to the serious recruitment and retention problems at senior tiers of the judiciary, which had been highlighted by the Senior Salaries Review Body (SSRB) in its 2018 Major Review. The RRA was paid to salaried High Court, Circuit and Upper Tribunal judges and above who were eligible for membership of NJPS.
170. The RRA was stopped for all judges in scope of *McCloud* in April 2020, at the same time that we confirmed which judges were in scope of the remedy.
171. The consultation explained that we were considering what our approach should be in respect of the RRA that was paid to these judges. We have concluded that the justification for paying the RRA to these judges in 2019/20 stands. It was urgently needed at the time it was paid to resolve pressing recruitment and retention issues and was necessary for the effective running of the justice system. This rationale has not been invalidated by subsequent developments and, as such, we do not propose to take any further action in respect of the RRA paid to judges in scope of *McCloud*.

# Impact assessment, equalities and Welsh language

## Impact assessment

172. In the consultation we said that we had not carried out an economic impact assessment because:

- our proposals are intended to implement the remedy required under *McCloud* rather than set out policy choices;
- our proposals are not likely to have an economic impact on businesses, charities, or the voluntary sector.

173. We consider that these reasons remain valid in light of the consultation responses, which means that no further assessment is required at this stage. We will review the position before formally introducing legislation.

## Equalities

174. Section 149 of the Equality Act 2010 requires public authorities, including MoJ, to have due regard to:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- fostering good relations between persons who share a relevant protected characteristic and persons who do not share it.

175. The equality statement that accompanied the consultation has been updated in light of the consultation responses to consider potential impacts on judges with particular protected characteristics.

## Welsh language

176. We will provide a Welsh translation of the executive summary.



## Next steps

177. The government will bring forward new primary legislation to provide requisite powers to deliver the remedy.
178. By legislating in this way, the government's intention is to ensure certainty and provide a clear legal framework for giving effect to the remedy resulting from the *McCloud* litigation. This will also ensure that the changes apply to claimants and non-claimants as well as deal with consequential issues.
179. Further legislation will be required to amend relevant scheme regulations. This will be the subject of further consultation.

# Consultation principles

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

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf)

## Annex A – List of respondents

### Judicial and legal associations

- Association of Her Majesty's District Judges
- Association of Pension Lawyers
- 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
- High Court Judges' Association
- Judicial Pension Committee
- Salaried Tribunal Judges' Association for the Health Education and Social Care Chamber
- Senators of the College of Justice
- Sheriffs' Association
- Tribunals Forum
- The Law Society of England and Wales
- UK Association of Fee Paid Judges

## Annex B – Illustrative examples

### Moving from NJPS to JUPRA

In order to illustrate the mechanics of how past member contributions to NJPS and their tax treatment would be adjusted as part of the options exercise, we have produced two examples of judges in different salary groups:

- A Salary Group 3 judge, the typical situation where the difference between JUPRA and NJPS contributions is in line with tax relief.
- A Salary Group 7 judge earning between £100,000 and £125,000; in this case the effective marginal tax rate is 60%, so tax relief exceeds the difference between JUPRA and NJPS contributions.

In the examples we have assumed that:

- the salary scales and tax bands for year 2021/22 are the same as 2020/21;
- the member remains in the same salary group for all the remedy years, 2015/16 to 2021/22;
- the member has no taxable income other than their judicial pay, and they have no tax relief (such as Gift Aid donations) other than NJPS contributions; and
- members will pay correct tax and pension contributions from tax year 2022/23.

We have also not factored interest charged by HMRC (for late payment of tax) into these examples. Where interest is charged, we will compensate individuals by reducing the amount owed to JUPRA/FPJPS by the amount charged.

#### ***Salary Group 3 Judge***

- a. Judge A earns between £200,000 – 225,000 and moved to NJPS in 2015. As part of the options exercise he chooses JUPRA benefits for the remedy period. This means he will be returned to JUPRA membership for the remedy period, 1 April 2015 – 31 March 2022.

*2018/19 – 2021/22*

- b. For tax years 2018/19 to 2021/22, which are in scope of tax reassessment, the member contributions and tax paid by Judge A will be reassessed and adjusted via the payroll system.
- c. Judge A paid £69,613 in member contributions to NJPS. This figure attracted tax relief of £31,326.
- d. He owes £38,309 in JUPRA contributions.

- e. Because JUPRA contributions do not attract tax relief, the £31,326 tax relief in respect of NJPS contributions is deducted from the £69,613 and paid directly to HMRC by the payroll system.
- f. The remaining £38,287 is treated as JUPRA contributions. Judge A owes £22 in JUPRA contributions.

*2015/16 – 2017/18*

- g. Tax years 2015/16 to 2017/18 are out of scope of the tax reassessment. Therefore, tax relief in respect of NJPS contributions cannot be recovered.
- h. Judge A paid member contributions to NJPS of £49,435. This figure attracted tax relief of £22,246.
- i. JUPRA contributions equal £27,205.
- j. Because the £22,246 tax relief cannot be recovered, MoJ will not refund the £22,230 excess NJPS contributions (the amount remaining after JUPRA contributions have been taken); the position is preserved. This process leaves Judge A £16 better off because the tax relief not being recovered exceeds the excess contributions not being refunded.

**Salary Group 7 Judge**

- a. Judge B earns between £100,000 – £125,000 and moved to NJPS in April 2015. As part of the options exercise she chooses JUPRA benefits for the remedy period. This means Judge B will be returned to JUPRA membership for the remedy period, 1 April 2015 – 31 March 2022.

*2018/19 – 2021/22*

- b. For tax years 2018/19 to 2021/22, which are in scope of tax reassessment, the member contributions and tax paid by Judge B will be reassessed and adjusted via the PAYE system.
- c. Judge B paid £33,256 in member contributions to NJPS. This figure attracted tax relief of £19,954.
- d. Judge B owes £19,954 in JUPRA contributions.
- e. Because JUPRA contributions do not attract tax relief, the £19,954 tax relief in respect of NJPS contributions is deducted from the £33,256 and paid directly to HMRC by the payroll system.
- f. The remaining £13,302 is treated as JUPRA contributions. Judge B owes £6,652 in JUPRA contributions.

*2015/16 – 2017/18*

- g. Tax years 2015/16 to 2017/18 are out of scope of the tax reassessment. Therefore, tax relief in respect of NJPS contributions cannot be recovered.

- h. Judge B paid member contributions to NJPS of £23,616. This figure attracted tax relief of £13,665.
- i. JUPRA contributions equal £14,170.
- j. Because the £13,665 tax relief cannot be recovered, MoJ will not refund the £9,446 excess NJPS contributions (the amount remaining after JUPRA contributions have been taken); the position is preserved. This process leaves Judge B £4,219 better off because the tax relief not being recovered exceeds the excess contributions not being refunded.

## **Loss of opportunity**

We acknowledge that some judges may experience financial loss as a result of remaining in NJPS until 2022, since this reduces their ability to contribute to other tax-registered schemes. We have produced the following example to illustrate how we plan to address such losses as part of the options exercise. The circumstances described are illustrative, not exhaustive, and we will continue to develop plans to address related types of loss to ensure judges are compensated for losses caused by *McCloud* discrimination.

- a. Judge C is a judge with income between £100,000 – £125,000. She made contributions to a tax-registered pension scheme while in JUPRA (i.e. before 2015) to reduce her taxable income to £100,000 and take advantage of 60% effective tax relief on those contributions (because of the abatement of the personal allowance on income above £100,000).
- b. From 2015/16 Judge C has been a member of NJPS. As part of the options exercise she chooses JUPRA membership. However, this means she has missed the opportunity to make contributions in the remedy period and receive 60% effective tax relief.
- c. These contributions (2015/16 – 2021/22) would have totalled £73,774 as follows:
  - 15/16 - £6,040
  - 16/17 - £7,100
  - 17/18 - £8,171
  - 18/19 - £10,335
  - 19/20 - £12,542
  - 20/21 - £14,793
  - 21/22 - £14,793
- d. Judge C's tax position will be adjusted in tax year 2022/23 when the options exercise takes place. She has an available annual allowance (AA) of £160,000 comprising £40,000 for the current tax year and £120,000 'carry forward' from the previous three

years, i.e. she has no taxable income other than her judicial pay and has no tax relief (such as Gift Aid donations) other than NJPS contributions.

- e. Judge C may now contribute £73,774 to a tax-registered pension scheme of her choice, £21,311 representing out-of-scope contributions and £52,463 representing in-scope contributions she would have invested in the remedy period.
- f. Judge C will receive £29,509 in tax relief at 40%, £8,524 representing tax relief that should have been received in out-of-scope years and £20,985 representing tax relief that should have been received in in-scope years.
- g. Had these contributions been made during the remedy period, however, Judge C would have received £44,265 in tax relief by retaining the benefit of her personal allowance abatement and consequent 60% effective tax relief rate; £12,787 in respect of the out-of-scope years and £31,478 in respect of the in-scope years.
- h. MoJ will compensate Judge C for her loss in the in-scope period (2018/19 – 2021/22) of £10,493 (£31,478 – £20,985). Losses in the out-of-scope period will not be compensated for because, as a Salary Group 7 judge, she has already benefited from our preservation of contributions and tax by a similar amount (see paragraph ‘j’ in the relevant example above).
- i. Judge C would have sufficient AA remaining to make contributions in respect of tax year 2022/23 and could therefore make these contributions and receive the correct tax relief.

Note: Where an individual would otherwise exceed their AA in that first tax year (2022/23), they can make contributions in the subsequent tax years to ‘catch up’ on missed contributions.







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