EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (REMEDIABLE SERVICE ETC.) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice (the MoJ) and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These Regulations form part of the remedy following the 2018 Court of Appeal decision, in McCloud v MoJ, that the transitional protections for older judges in the '2015 schemes', which includes Judicial Pension Scheme 2015 (JPS 2015) and Northern Ireland Judicial Pension Scheme 2015 (NIJPS), constituted unlawful direct age discrimination, and indirect race and sex discrimination.

2.2 MoJ is remedying the discrimination by offering most affected judges a choice of pension scheme for the 'McCloud 'remedy' period' (1 April 2015 to 31 March 2022). The 'McCloud remedy' will be as an 'options exercise' for in scope judges to make a choice between either the relevant 'legacy' pension schemes or 2015 schemes. The legacy schemes were the Judicial Pensions Act 1981 (JPA 1981), Judicial Pensions and Retirement Act 1993 (JUPRA), and the Fee Paid Judicial Pension Scheme (FPJPS). Chapter 2 of the Public Service Pensions and Judicial Offices Act (PSPJOA) provides powers for MoJ to offer this choice. The PSPJOA also defines the eligibility requirements for the McCloud remedy and provides the powers for retrospectively treating judges as members of their chosen scheme. Section 8 of this memorandum sets out the wider policy background to these Regulations.

2.3 These Regulations are required to implement additional, technical aspects of the McCloud remedy provided by the PSPJOA. These are explained in the legislative context section of this memorandum.

2.4 There are also associated amendments to the Regulations that may impact judges in scope of McCloud but which are not made as a direct result of the discrimination. These address indexation in the Judicial Pension Scheme 2022 (JPS 2022); dependant contributions for judges with an income over £150,000; and extend a deadline in the Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021 (2021 Regulations to allow certain judges to pay contributions in respect of pensionable service before 1 April 2021 by way of a lump sum.

2.5 This instrument is subject to the affirmative procedure as provided for by section 29(2A) of JUPRA and section 24(1)(c) of the Public Service Pensions Act 2013 (PSPA).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These Regulations are retrospective in nature. They provide for adjustments to take place where a judge makes a scheme choice that differs from their existing scheme membership, for example where a member of the JPS 2015 makes a legacy scheme choice. Section 3(3)(b) of the Public Service Pensions Act 2013 (PSPA) is the enabling power that allows the scheme Regulations to have retrospective effect.

3.2 A requirement of the PSPJOA is that scheme Regulations made in respect of certain elements of the McCloud remedy must be exercised in accordance with The Public Service Pensions (Exercise of Powers, Compensation, and Information) Directions 2022 (HM Treasury Directions). Section 62 PSPJOA sets out the powers that are to be exercised in accordance with the directions. The directions provide, amongst other things, a methodology on applying interest, calculating tax and paying compensation. The aim of the directions is to ensure a degree of consistency in administering the remedy across the public sector, whilst allowing schemes some flexibility in light of their differences and administrative processes.

3.3 In addition, the Regulations also include associated amendments in relation to:

- Indexation - an amendment to JPS 2022 rectifies the indexation calculations in the scheme in order to align the calculations with 2015 scheme and other public sector career average schemes and to reflect the initial policy intention.
- Dependant contributions – salaried judges who were protected from the 2015 reforms, and therefore stayed in JUPRA were, from the 2016/17 financial year, charged 0%, instead of the full rate of 1.8%, for dependant contributions on earnings over £150,000. These Regulations amend the Judicial Pensions (Contributions) Regulations 1998 and the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (FPJPS) in order to regularise the position for those judges and to ensure equal treatment between protected and unprotected, and salaried and fee-paid judges in this regard.
- Payment of contributions by lump sum – an amendment to the 2021 Regulations extends the deadline for affected judges to pay contributions in respect of pensionable service before 1 April 2021 in FPJPS by way of lump sum. The window for judges to make such payments will be extended to run until 31 March 2025, with the possibility of a further extension by the administrators in individual cases.

4. Extent and Territorial Application

4.1 This instrument extends to the whole of the United Kingdom.

4.2 The territorial application of this instrument is to the United Kingdom.

5. European Convention on Human Rights

5.1 The Rt Hon Alex Chalk MP, Lord Chancellor and Secretary of State for Justice, has made the following statement regarding Human Rights:

"In my view the provisions of the Judicial Pensions (Remediable Service etc.) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The PSPJOA provides the legislative framework for implementing the remedy for affected public servants, including judges (see Part 1, Chapter 2). Section 39 of the PSPJOA sets out the eligibility for the McCloud remedy and defines 'remediable service'. The remedy period is outlined in section 39(5). Sections 40 and 44 provide that judges with remediable service may make a retrospective legacy or 2015 pension scheme choice in respect of the remedy period between 1 April 2015 to 31 March 2022 period. Section 67 provides powers to make provision for 'immediate detriment' judges and section 103 provides powers to make provision for 'certain fee-paid judges.

7. Policy background

What is being done and why?

Transitional protections in the 2015 scheme and McCloud v MoJ

7.1 In 2015 the government introduced extensive reforms to public service pension schemes to make them more affordable and sustainable. In the judicial context, from 1 April 2015, younger judges were moved from their legacy scheme to the 2015 scheme. The legacy schemes were the Judicial Pensions Act 1981 (JPA 81), Judicial Pensions and Retirement Act 1993 (JUPRA), and once it was introduced, the fee-paid equivalent, the Fee Paid Judicial Pension Scheme (FPJPS). Salaried judges appointed between 31 March 1995 and 31 March 2015 usually participated in JUPRA, but the legacy schemes also include JPA 81 and FPJPS.

7.2 All the legacy schemes were tax-unregistered final salary schemes, whereas the 2015 schemes were tax-registered career average schemes with a lower accrual rate.

7.3 The Regulations that introduced the new 2015 scheme included transitional provisions that protected judges who were within 10 years of retirement from membership in the new scheme, meaning they were permitted to remain in their legacy schemes.

7.4 Judges who were in pensionable service under an existing public sector scheme on 31 March 2012 and aged 55 or over on 1 April 2012 were protected from the scheme changes and remained in the legacy schemes. Judges in such service and aged between 51½ and 55 on 1 April 2012 had 'tapered protection' available to them. Tapered judges were given the choice to join the 2015 schemes on 1 April 2015 or 'tapered' across to the 2015 scheme on a later date determined by their date of birth (with the practical effect of retaining legacy scheme benefits for a longer period). All other judges in service on 31 March 2012 aged under 51½ on 1 April 2012 were 'unprotected' and moved to the 2015 scheme on 1 April 2015 unless they opted out of pension scheme membership altogether.

7.5 The transitional provisions were challenged by younger judges in the case of *McCloud v MoJ*. In 2018 the Court of Appeal held that the transitional protections constituted unlawful direct age discrimination, and indirect race and sex discrimination. The government accepted that the judgment had implications for all public service pension schemes that contained similar transitional protections and committed to addressing the discrimination for all public servants affected.

7.6 As a result, the public service wide pension remedy is led by HM Treasury, including the provision of the remedy for the judiciary. HM Treasury consulted on proposals to remove the discrimination from the majority of schemes established under the Public

Service Pensions Act 2013. It enacted primary legislation, the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) to provide powers to deliver the remedy. The remedy for the judicial scheme is set out in Chapter 2.

How is the McCloud discrimination being remedied?

7.7 In July 2020, MoJ consulted on proposals to address the discrimination in the judicial pension scheme specifically. Following this, the Lord Chancellor decided that judges affected by the McCloud discrimination should take part in a formal 'options exercise', where they would be offered a retrospective choice of pension scheme membership for the relevant period – this being 1 April 2015, when the 2015 scheme opened and the discrimination began, until 31 March 2022, when the scheme closed. This is referred to as the 'remedy period'. From 1 April 2022, all existing schemes were closed to future accrual, and judges eligible for a judicial pension were able to join the reformed pension scheme, known as JPS 2022.

7.8 The PSPJOA provides for the options exercise to be conducted, powers to pay compensation, make corrections for pensions contributions and benefits and make rules on unauthorised payments. It also contains powers to provide a remedy in immediate detriment cases and for certain fee-paid judges.

7.9 This memorandum accompanies the Regulations made under those powers. The Regulations address the following areas:

- 'Special cases' where a member has remediable service – Part 2 applies to judges in scope of the McCloud remedy who have not obtained an immediate detriment remedy (see below). Part 2 makes provision in respect of certain member options, such as additional contributions, transfers into or out of the 2015 scheme, partial retirement, and early retirement reduction buy out.
- Certain fee-paid judges – Part 4 makes provision, where necessary, in respect of certain fee-paid judges, also known as 'gap judges', who were in office on 31 March 2012 and held salaried office between 1 April 2012 and 1 December 2012 (1 February 2013 for judges in Northern Ireland) and were aged 55 or over on 1 April 2012. These judges were treated as members of the 2015 scheme, but are now, following the outcome of litigation, recognised as members of FPJPS for their fee-paid service and with full protection entitling them to salaried legacy scheme membership under JUPRA from 1 April 2015 to 31 March 2022. They are, therefore, not in scope of McCloud and will not participate in the options exercise. Section 103 PSPJOA empowers scheme Regulations to make relevant provisions to return them to the position they would have been in had they been recognised as fully protected members of a judicial legacy scheme at the time.
- Pension credit members - Part 5 makes provision for pension credit members. These are former spouses or civil partners of judges who have become a member of a judicial pension scheme through a pension sharing order upon dissolution of their marriage or civil partnership. Section 57 PSPJOA requires scheme Regulations to provide for the adjustments of the respective pension benefits of pension credit and pension debit members as a result of the remedy.
- Liabilities and amounts owed - Part 6 makes provision for the payment of sums that may be owed to, or by, the scheme or MoJ as a result of the remedy.

The Regulations also detail netting off, reduction or waiver of liability, mechanisms available for repayments, and interest.

- Miscellaneous amendments - Part 7 introduces the Schedule which makes provision for amendments by virtue, and in consequence, of PSPJOA 2022, as well as amendments for other purposes. Most notably, the Regulations set out the amendments for:
    - Indexation in JPS 2022 - this amendment to JPS 2022 rectifies the indexation calculations in order to align the calculations with other public sector schemes and the initial policy intention.
    - Dependant contributions - these amendments to JUPRA and FPJPS ensure that salaried and fee-paid judges all pay the same level of dependant contributions (0%) on sums earned over £150,000 from 2016 onwards.
    - Eligible offices for fee-paid judges – the 2021 Regulations came into force and added 13 offices on 1 April 2021 to the eligible offices schedule in FPJPS. It also made provision enabling affected judges to pay contributions into FPJPS retrospectively for pensionable service prior to 1 April 2021 by way of lump sum. This amendment extends the period in which that lump sum payment can be made so that it runs to 31 March 2025, with the possibility of a further extension by the administrators in individual cases.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union and does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The MoJ has no plans to consolidate the legislation at this time.

10. Consultation outcome

10.1 A consultation on the details of the draft Judicial Pension (Remediable Service etc.) Regulations 2023 was published on 16 December 2022 and closed on 10 February 2023. The consultation was addressed to all judges affected by the discrimination of McCloud, as well as other interested parties e.g. judicial associations, and devolved administrations.

10.2 We received 10 responses to the consultation which gave critical feedback on various aspects of the McCloud remedy, such as retaining tapered protection and treating effective pension age contributions the same as added pension. Nevertheless, the responses were broadly supportive of the overall remedy approach. The government response will be published ahead of the making of these Regulations. These documents can be found at the following link: https://www.gov.uk/government/consultations/consultation-on-the-proposed-response-to-mccloud.

10.3 We have kept relevant officials in the devolved administrations in Scotland, Northern Ireland, and Wales apprised of the development of the amendment Regulations, particularly in relation to the offices whose jurisdictions are in those countries and their views have been reflected in our drafting.

11. Guidance

11.1 Guidance is not required for this statutory instrument.

12. Impact

12.1 These Regulations has no economic impact on business, charities, or voluntary bodies.

12.2 The impact of these Regulations on the public sector is limited, as the Regulations are targeted at members of the judiciary who are in-scope of McCloud Remedy. PSPJOA gives power to these Regulations, and has a wider effect on the public sector, however these Regulations are only delivering the technical aspects of the PSPJOA.

12.3 An impact assessment has not been prepared because no impact on business is foreseen and the pension pay out falls below the public sector threshold for producing one. The impacts are expected to be low. The cost to deliver the McCloud remedy overall is estimated by MoJ to be £170m spread over a number of years, until the last judge in scope of McCloud has passed away.

12.4 The equality impact of these Regulations has been reviewed, in line with the public sector equality duty under s149 of the Equality Act 2010, and has been published alongside the response to consultation. The equality statement can be found at the following link: https://www.gov.uk/government/consultations/draft-regulations-for-the-mccloud-remedy.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Judicial Pensions Board (JPB), established under Part 3 (Governance) of the JPR 2015, will have oversight of the overall judicial pension scheme arrangements, including these Regulations (Judicial Pensions (Remediable Service etc.) Regulations 2023). The JPB is responsible for assisting the Lord Chancellor as the scheme manager to administer the Judicial Pension Scheme.

14.2 The MoJ has pension teams that support the Lord Chancellor as scheme manager and oversee contractual arrangements with the third party scheme administrator.

15. Contact

15.1 Kavneet Jolly at the MoJ (email: judicial_policy_correspondence@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Andrew Waldren, Deputy Director for Judicial Pay and Pensions Policy at the MoJ (email: andrew.waldren@justice.gov.uk) can confirm that this explanatory memorandum meets the required standard.

15.3 The Rt Hon Alex Chalk KC MP, Lord Chancellor and Secretary of State for Justice at the MoJ can confirm that this explanatory memorandum meets the required standard.