EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (REMEDIABLE SERVICE ETC.) (AMENDMENT) REGULATIONS 2024

2024 No. 79

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice (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 amendment Regulations amend the Judicial Pensions (Remediable Service etc.) Regulations 2023 ('the 2023 Regulations') which form part of the remedy following the 2018 Court of Appeal decision in McCloud v MoJ. In that case it was ruled that the transitional protections for older judicial members 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 judicial members a choice of pension scheme for the '*McCloud* remedy period' (1 April 2015 to 31 March 2022). For most eligible members, this will take the form of an 'options exercise' where the choice will be between either the relevant 'legacy' pension schemes or 2015 pension 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).

2.3 Chapter 2 of the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) provides powers for MoJ to deliver the *McCloud* judicial remedy. The 2023 Regulations were made under powers in the PSPJOA, in order to implement additional, technical aspects of the McCloud remedy.

2.4 In addition to making further provision in relation to the options exercise, the 2023 Regulations also made provision in relation to members who were not in the options exercise, specifically 'immediate detriment judges' who include both litigant judges who received a remedy in the Employment Tribunal, and non-litigant judicial members who have separately agreed a remedy with the scheme manager, and 'relevant fee-paid judges' (defined in section 103(3) of the PSPJOA), also known as 'gap judges'. These judges are different from those in the options exercise, in that they are treated as never having been in the 2015 schemes, but as having always remained in their legacy schemes.

2.5 In some cases, however, judicial members purported to make payments to the 2015 schemes while they were unlawfully treated as being members. Due to the operation of anti-discrimination rules, those payments were not in fact received by the schemes. The 2023 Regulations sought to ensure that, notwithstanding the fact that members had never left their legacy schemes, those payments could be treated as having been made, for the purpose of providing members with a remedy in respect of those

payments. These amending Regulations seek to address concerns that the 2023 Regulations did not fully achieve this policy intention, and to put beyond doubt MoJ's ability to deliver the full remedy to these individuals.

2.6 This instrument is subject to the affirmative procedure as provided for by 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 amendment Regulations intend to deliver the original policy intent of the 2023 Regulations. A consultation on the 2023 Regulations was open from December 2022 to February 2023. We had replies from judges and judicial associations, which were broadly supportive of our approach. These amendment Regulations have been further consulted on with representatives of the judiciary and the devolved governments.

3.2 This SI will come into force the day after the day on which it is made. Early commencement is considered justified in this case, where the amendments made by the SI are technical in nature and do not impose any onerous duties or requirements upon the public.

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 QC 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.) (Amendment) 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 judicial members (see Part 1, Chapter 2). The 2023 Regulations provide for certain technical aspects of the remedy and make specific provision for immediate detriment judicial members (including litigants), and gap judges.

6.2 These amendments to the 2023 Regulations are to recognise that these groups of judicial members were never in the 2015 scheme and will enable MoJ to deliver a full remedy to those groups, in line with the original policy intention.

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 judicial members were moved from their legacy scheme to the

2015 scheme. The legacy schemes were the Judicial Pensions Act 1981 (JPA 1981), Judicial Pensions and Retirement Act 1993 (JUPRA), and once it was introduced, the fee-paid equivalent, the Fee-Paid Judicial Pension Scheme (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 judicial members who were within 10 years of retirement from membership into the new 2015 scheme, meaning they were permitted to remain in their legacy schemes.

7.4 Judicial members 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 also protected from the scheme changes and remained in the legacy schemes. Members in such service and aged between 51½ and 55 on 1 April 2012 had 'tapered protection' available to them. Tapered members 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 members 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 judicial members 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 members 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 remedy period, being 1 April 2015, when the 2015 scheme opened and the discrimination began, until 31 March 2022, when the scheme closed. From 1 April 2022, all existing schemes were closed to future accrual, and members eligible for a judicial pension were able to join the reformed pension scheme, the Judicial Pension Scheme 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 gap judges.

7.9 To be able to implement technical aspects of the remedy, the MoJ made the Judicial Pensions (Remediable Service etc.) Regulations 2023, which came into force in July 2023.

What amendments are being made?

7.10 The amendment Regulations make changes to the wording of the 2023 Regulations to ensure the deliverability of the original policy intention for immediate detriment members (including litigants) and gap judges.

7.11 Judicial members in these categories are considered never to have left their legacy schemes. However, during the period they were unlawfully treated as being in the 2015 schemes, they may have made payments purporting to be to the 2015 scheme. These include transfers in from private pension schemes, added pension payments, and effective pension age payments, among others. These types of payments could not have been made to the legacy scheme, so the 2023 Regulations seek to provide a remedy in relation to those payments. This usually takes the form of either compensation or regularisation.

7.12 The amendment Regulations make technical amendments to the 2023 Regulations to make it clear that these groups of judicial members never had membership in the 2015 scheme, and therefore no payments could have been received by the scheme. The amendments ensure that, despite that, MoJ are fully able to implement the remedy for these groups, through regularisation of those payments or by way of compensation, as provided for in the 2023 Regulations.

7.13 Once these amendment Regulations are in force, the legislation will reflect the policy intention as stated in the 2022 consultation, to ensure consistency and fairness for all affected members, specifically in relation to immediate detriment judicial members (including litigants), and gap judges.

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 MoJ consulted on the draft version of the 2023 Regulations, and the consultation response can be found here: https://www.gov.uk/government/consultations/draft-regulations-for-the-mccloud-remedy/consultation-on-draft-regulations-for-the-mccloud-remedy.

10.2 These amendment Regulations have been consulted on with relevant devolved governments and also with senior judicial representatives.

11. Guidance

11.1 Guidance is not required for this statutory instrument.

12. Impact

12.1 This SI has no economic impact on business, charities, or voluntary bodies.

12.2 The impact of this SI on the public sector is limited, as the amendment Regulations are targeted at specific members of the judiciary: immediate detriment members (including litigants) and gap judges. The PSPJOA gives power to this SI, and has a wider effect on the public sector, however the Regulations in this SI 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 this SI has been reviewed, in line with the public sector equality duty under s149 of the Equality Act 2010 and given that this SI is an amendment to meet the original policy intent of the 2023 Regulations, the equality impacts have not changed. The equality statement for the 2023 Regulations was published and can be found at the following link: https://www.gov.uk/government/consultations/draft-regulations-for-the-mccloud-remedy/outcome/equality-statement.

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 amendment Regulations (The Judicial Pensions (Remediable Service etc.) (Amendment) 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.