EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (REMEDIABLE SERVICE ETC) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2024

SR 2024 No. 106

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department of Justice (DoJ) to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under the Public Service Pensions Act (Northern Ireland) 2014 (the 2014 Act) and the Public Service Pensions and Judicial Offices Act 2022 (the 2022 Act) and is subject to the negative resolution procedure.

1.3. The Assembly procedure for making these Regulations would ordinarily be by the draft affirmative procedure. However, the 2014 Act under which the Regulations are made allows the use of the negative procedure if the Pension Board for that scheme has stated that it considers the Regulations to be "minor or wholly beneficial". The Department has obtained the agreement of the Northern Ireland Judicial Pension Scheme Pension Board that the proposed amending regulations are "minor or wholly beneficial". Consequently, the Department intends to make the amending Regulations by the negative procedure.

2. Purpose

2.1. The Statutory Rule will amend the Judicial Pensions (Remediable Service Etc.) Regulations (Northern Ireland) 2023 (S.R. 2023 No. 107) ("the 2023 Regulations"). The Judicial Pensions Regulations (Northern Ireland) 2015 ("the 2015 Regulations") created a new Northern Ireland Judicial Pension Scheme (NIJPS) for eligible devolved judicial office holders in Northern Ireland (tribunals judiciary) which came into effect on 1 April 2015 ("the 2015 Scheme"). The NIJPS has since been closed to further accruals from 1 April 2022 as a UK wide pension scheme for eligible members of the judiciary being set up as a result of the Public Service Pensions and Judicial Offices Act 2022 ("the 2022 Act"). The 2022 Act effected reforms to judicial pensions across the UK by providing remedies for the age discrimination (identified in *McCloud v Ministry of Justice*) which is present in all the 2015 judicial pension schemes in the UK, including the NIJPS. The Statutory Rule makes technical amendments to the 2023 Regulations which are described below in more detail.

2.2. The amending 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.

2.3. 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 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.

2.4. The amending 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, DoJ 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.

2.5. Once these Regulations are in operation, 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.

3. Background

3.1. DoJ is remedying the discrimination identified in *McCloud* 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 scheme. 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).

3.2. Chapter 2 of the 2022 Act provides powers for the DoJ to deliver the *McCloud* judicial remedy. The 2023 Regulations were made under powers in the 2022 Act, in order to implement additional, technical aspects of the *McCloud* remedy.

3.3. 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 are judges who have received a remedy for the age discrimination in McCloud as a result of legal proceedings or a decision of the pension scheme manager. Whilst 'gap judges' are a small group of judges who held fee paid office and then moved to a salaried office within timescales identified in the 2022 Act. 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.

3.4. 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 DoJ's ability to deliver the full remedy to these individuals.

3.5. The provisions of these Regulations seek to maintain parity with amendments that the Ministry of Justice in England and Wales has made to its 2023 Regulations. It is considered necessary to ensure parity between the schemes so that the devolved tribunals judiciary enjoy the same treatment in relation to pension matters as their Northern Ireland courts colleagues (who are members of the equivalent England and Wales 2015 judicial pension scheme because their remuneration remains a matter for the Lord Chancellor to determine under Schedule 2 of the Northern Ireland Act 1998) as well as their GB judicial colleagues.

4. Consultation

4.1 These amending Regulations intend to deliver the original policy intent of the 2023 Regulations. A consultation on the 2023 Regulations was carried out between 20 January 2023 and 20 March 2023 with pension scheme members, judicial associations and bodies. The Department did not receive any responses. These amending Regulations have been further consulted upon with members of the NIJPS in December 2023 and no responses were received.

5. Equality Impact

5.1. The Department has concluded that the proposals do not have any adverse impact on any section 75 group and that an equality impact assessment is therefore not necessary.

6. Regulatory Impact

6.1. There is no impact on business, charities, social economy enterprises or the voluntary sector. A regulatory impact assessment is not, therefore, necessary.

7. Financial Implications

7.1. The Government Actuary's Department (GAD) has calculated that the costs of the *McCloud* remedy are £0.7 million to the Northern Ireland Judicial Pension Scheme over the period 2015 to 2022. This cost reflects a projected increase in benefit accrual for pension scheme members. This is a provisional estimate because several factors could influence the total costs, including an individuals' pay progression, and the age at which scheme members might retire. GAD also estimates that there is a cost of £0.2 million falling to legacy pension schemes (that is to say, predecessor schemes to the Northern Ireland Judicial Pension Scheme) in relation to Judicial Service Awards, which are lump sums payable under legacy pension schemes only as and when individuals retire. The estimates do not included costs associated with member contributions, income tax reliefs, tax payable on lump sums, annual allowance tax charges or the administrative costs in assisting in the delivery of the options exercise.

8. Section 24 of the Northern Ireland Act 1998

8.1. It is the view of the Department that the draft Regulations are in compliance with section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1. Not applicable.

10. Parity or Replicatory Measure

10.1. The Regulations replicate those that the Ministry of Justice have made in January 2024.

11. Additional Information

11.1. Not applicable.