



Department of
Justice

An Roinn Dlí agus Cirt
Máinnystrie O tha Laa

Proposed response to McCloud

Response to Consultation

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Introduction and Contact Details

This document is the response to the consultation, issued by the Department of Justice (DoJ), on the Northern Ireland Judicial Pensions proposed response to *McCloud*. The consultation ran from 14 October 2020 to 9 December 2020.

It set outs:

- The background to the consultation;
- further detail on some of the issues raised in the consultation; 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 Department of Justice at AToJ.Consultation@justice-ni.x.gsi.gov.uk

This report is also available on the Department of Justice website.

Executive summary

The consultation paper, 'Judicial Pensions: Proposed remedy to *McCloud*', was published on 14 October 2020. It invited comments on the Department's proposals for addressing discrimination identified in the case of *McCloud*, which held that transitional protections given to older judges in the 2015 judicial pension reforms were unlawfully discriminatory on the grounds of age.

The consultation set out the criteria for being in scope of the *McCloud* judgment and proposed that the affected judges would 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, Northern Ireland Judicial Pension Scheme 2015 (NIJPS). The options exercise would also deal with the technical details of the choice, for example in respect of past tax and contributions.

We received no responses to the consultation and therefore remain of the view that the initial proposal of 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 JUPRA/FPJPS 20-year service cap. While most judges may be better off returning to JUPRA/FPJPS, some may find they are better off choosing NIJPS membership. Returning judges to JUPRA/FPJPS- and backdating this decision to 1 April 2015 will be a significant exercise with legislative and data implications.

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 pension on those dates. Periods of service should be continuous, subject to 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.

We are progressing work for the legislation required to implement the remedy.

Background

1. The consultation paper on our proposed response to *McCloud* was published on 14 October 2020. It invited comments on the Department's proposals to address the discrimination identified in *McCloud*. Since the *McCloud* litigation process will provide a remedy for claimant judges, the consultation's remit is limited to non-litigants in scope¹ of the *McCloud* judgement.
2. In *McCloud*² the Court of Appeal held that transitional protections provided 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, the Judicial Pension Scheme 1993 (JUPRA) or the fee-paid equivalent, Fee-paid Judicial Pension Scheme 2015 (FPJPS),³ both of which were tax-unregistered final salary schemes, to tax-registered career average schemes with lower accrual rates, including to the Northern Ireland Judicial Pension Scheme 2015 (NIJPS). Judges aged 55 and 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 NIJPS 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 years on 1 April 2012 – were 'unprotected' and moved to NIJPS on 1 April 2015 unless they opted out of the pension scheme membership altogether.⁴

¹ It is proposed that a judge will be in scope of the *McCloud* remedy if in pensionable public office (judicial office for most), before 1 April 2012 and still in office on 31 March 2015.

² 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

³ 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) Regulation 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 NIJPS on that date.

⁴ Alternatively, judges could choose to join the Partnership Pension Account.

3. The Court held that transitional protection unlawfully discriminated against younger judges. The UK 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 claim.
4. Rulings of the Court of Appeal in England and Wales are not directly binding here as this is a separate legal jurisdiction. However the devolved public service schemes in Northern Ireland incorporate the same transitional protection arrangements as the schemes in Britain. Legal advice confirms the implications of the Appeal Court decision is such that all schemes must be treated as affected by the *McCloud* decisions and so require to be remedied. HM Treasury consulted on proposals to remove the discrimination from the majority of schemes established under the Public Service Pensions Act 2013.⁵ The Department of Finance therefore similarly consulted on proposals to remove the discrimination from the majority of schemes established under Public Service Pensions (Northern Ireland) Act 2014. Given the uniqueness of the judicial pension schemes, it was necessary to consult judges separately on how best to address the discrimination for judges affected by the judgment.
5. These proposals mirror the approach proposed by the Ministry of Justice (MoJ) in relation to its 2015 Judicial Pension Scheme, upon which the NIJPS is based. The options exercise will follow the introduction of a new Reformed Judicial Pension Scheme that MoJ intends to introduce for all judges from 1 April 2022. The Department anticipates similar arrangements being made in Northern Ireland in order to equalise treatment prospectively across the judiciary.

⁵ HM Treasury's proposals cover schemes for NHS workers, teachers, firefighters, police, civil servants, and UK armed forces. The Ministry of Housing, Communities and Local Government is consulting separately in respect of local government schemes.

Detail

Remedy Period

6. The consultation document proposed that the remedy period would begin on 1 April 2015, when the discrimination occurred, and end on 31 March 2022, following which the reformed pension scheme would be introduced. Judges in scope of *McCloud* will be given a choice of either JUPRA/FPJPS or NIJPS membership in respect of the period between 1 April 2015 and 31 March 2022. Thereafter, all judges, whether in scope of *McCloud* or not, will move to the reformed scheme, equalising treatment across the judiciary for future accrual.

Scope

7. The consultation document proposed that a judge will be in scope if first appointed to judicial office, whether fee-paid or salaried, before 1 April 2012 and a member of JUPRA, or entitled to be a member of FPJPS on 31 March 2012, and a member/entitled to be a member of JUPRA/FPJPS on 31 March 2015.
8. Because those appointed after 31 March 2012 were not subject to the unlawful discrimination, we do not consider it appropriate to extend the choice of scheme membership to these members. Furthermore, we remain of the view that by 1 April 2012 new joiners should 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 Hutton Report was published in March 2011 and the UK Government accepted the recommendations in principle soon after, leading to a Green Paper and parliamentary announcement on 2 November 2011, in which the 31 March 2012 cut-off was first publicly mentioned.

Protected members

9. The consultation document proposed that 'protected' members- those who remained in JUPRA in 2015 because of their age- are not in scope because they were not subject to the discrimination identified in *McCloud*. The remedy will therefore be provided to previously unprotected and taper-protected judges, but not protected members.

Members of non-judicial public service pension schemes

10. The consultation document also proposed that a judge will be in scope if they were (a) members of non-judicial public service pension scheme on 31 March 2012 and were members of JUPRA or eligible for FPJPS membership on 31 March 2015 or (b) if they were members of a non-judicial public service pension scheme on both 31 March 2012 and 31 March 2015 and were subsequently appointed to judicial office so long as there was not a gap of more than five years between leaving the non-judicial public service pension scheme and taking up judicial office. This is referred to as portable eligibility.
11. Individuals will therefore be in scope if they meet the conditions set out above (paragraph 10).

Tapered protection

12. Tapered protection was offered to judges who were aged between 51½ and 55 on 31 March 2012. These judges were not eligible for full protection and were given the choice to join NIJPS on 1 April 2012 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. The consultation proposed that taper-protected judges must choose JUPRA/FPJPS or NIJPS membership for the entire remedy period, i.e. they would not be able to split accrual across both schemes.
13. As was set out in the consultation document, the effect of *McCloud* is that tapered protection was discriminatory, and that this discrimination was unlawful. Maintaining an age-based system of tapered protection would

perpetuate or even extend such discrimination. It would be extremely challenging to develop and extend to the wider membership some form of tapered protection that was not based on age. Even if this was possible, it would be extremely complicated for schemes and members who would have an extremely complicated decision to make. Consequently, we remain of the view that the choice for taper-protected judges is between JUPRA/FPJPS or NIJPS membership for the entire period; they will not be able to split accrual across both schemes. This is necessary to ensure that the remedy is implemented fairly for all in scope.

14. We recognise that for a small number of individuals who reached the 20-year service cap⁶ 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 NIJPS, which is being extended to all judges in scope, is appropriate to address the discrimination.

Judges who opted out of NIJPS

15. The consultation document proposed that judges who were eligible for but opted out of NIJPS because of the impact of annual allowance and lifetime allowance charges are in scope, subject to having been in office on the required dates.
16. For judges who opted out of NIJPS, it is clear that the vast majority, if not all, would have remained members of JUPRA/FPJPS. Therefore, as proposed, they will be in scope and be given the opportunity to re-join JUPRA/FPJPS for the remedy period.

Transitional Protection Allowance

17. When NIJPS was introduced, unprotected and taper-protected judges who met certain criteria were given a one-off option to opt out of the pension scheme and instead receive a Transitional Protection Allowance (TPA). TPA is an

⁶ JUPRA/FPJPS has a 20-year service cap; members with 20 years' service cannot accrue further pension benefits.

additional sum paid equivalent to the 'actual' employer contribution that would have been paid by DoJ had the member joined NIJPS.

18. The consultation document proposed that judges who opted for TPA and are in scope of *McCloud*, should be given the choice of:
 - returning to JUPRA/FPJPS from 1 April 2015, subject to TPA being recouped and pension arrears being paid; or
 - Continuing to opt out of any judicial pension scheme and receive TPA until the end of the remedy period.
19. We remain 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. We do not think that TPA should remain as an option post-2022, since the rationale for TPA- providing an alternative membership of a tax-registered scheme- would no longer apply in the reformed scheme, which will be tax-unregistered.

Partnership Pension Account

20. The consultation document proposed that unprotected or taper-protected judges who were eligible but opted out of NIJPS and instead joined a Partnership Pension Account (PPA) are in scope of *McCloud*. We plan to proceed accordingly and the technical detail is set out under 'Member contributions and tax relief' below.

Gap judges

21. The consultation document 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 service⁷ (so called gap-judges) should

⁷ MoJ introduced a moratorium on 5 April 2013, which took effect from 2 December 2012. This took effect from 1 May 2013 for Northern Ireland, and is still in place. The effect of the moratorium in Northern Ireland is that eligible fee-paid judges in service on 2 May 2013 are still entitled to a pension for their fee-paid service regardless of whether they have brought a claim or not.

be offered a choice of JUPRA or NIJPS benefits for the remedy period. 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 or NIJPS benefits for the remedy period. However because gap-judges aged 55 or over on 1 April 2015 were moved to NIJPS 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 issues through the *McCloud* remedy.

Options model

22. The consultation proposed a model for addressing the discrimination whereby all judges in scope would be given a retrospective choice whether to have accrued benefits in JUPRA/FPJPS or NIJPS for the remedy period. It proposed offering this choice through a formal ‘options exercise’ following the end of the remedy period to follow the introduction of the reformed pension scheme. We also proposed that judges who retire during the remedy period should be able to make their choice earlier so that they can access their correct pension and lump sum. This option would also be available to dependants of deceased judges in scope.

23. 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. We consider that it is better for judges to have a clear understanding about the future scheme and their own position before making the choice. As set out in the consultation, an options exercise held in 2022 would allow judges to consider, before making their election, the precise design of the future scheme, their own career and pay progression during the remedy period and, where applicable, when they will reach their 20-year service cap in JUPRA. For example, a judge who would reach the 20-year service during the remedy period may, depending when it is reached, be better off electing NIJPS membership for the entire remedy period.

24. There may be concerns about possible financial consequences of waiting until 2022 to return to JUPRA/FPJPS. We understand that some judges may experience loss because of being unable to reduce tax liability by contributing to other tax-registered schemes. We recognise that there are two aspects to this loss:
- a. Personal allowance- some judges with income between £100k-£125k (Pay Group 7 judges) could have made contribution to registered schemes if there were in JUPRA to reduce their taxable income to £100k and take advantage of 60% tax relief on those contributions (because of the abatement of the personal allowance on income above £100K). The fact that judges have technically been and will remain, members of NIJPS until 2022 means that when they return to JUPRA, they will have lost the opportunity to make those contributions in the relevant year and benefit from the 60% tax relief.
 - b. Annual allowance- remaining in NIJPS until 2022 can contribute towards an individual's annual allowance because NIJPS is tax-registered. Where judges ultimately return to JUPRA via the options exercise, they will return to an unregistered scheme and will have lost the opportunity to maximise their annual allowance through investing in non-judicial registered pension schemes during the remedy period.
25. We plan to address both losses via the options exercise. 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. Regarding concerns 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, NIJPS membership). They should then notify HMRC once the tax 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.

Default option

26. The consultation proposed that, in the event that judges do not respond to the options exercise the default position would be to leave them in the scheme they are currently in as at 31 March 2022. We are committed to running a well administered options exercise that will make every effort to obtain a positive decision from all judges in scope of *McCloud*. We therefore do not anticipate having to rely on the default option.

27. We do recognise that JUPRA/FPJPS is likely to be the most financially beneficial option for most options, However, our reason for proposing to leave judges in the scheme they are in (NIJPS) as the default 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. Additionally, since any return to JUPRA would change a judge's tax position, we do not consider it is right to do that in absence of a positive election.

28. Therefore, as proposed, in the unlikely event that 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 NIJPS 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

29. The consultation proposed that the options exercise would provide those in scope a choice between accruing benefits in JUPRA/FPJPS; or accruing benefits in NIJPS from 1 April 2015 until 31 March 2022. The options exercise will occur after the introduction of the reformed scheme in April 2022, subject to 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 relief

Contributions to NIJPS

30. There could be various statutory restrictions on HMRC's ability to collect taxes from previous years. In most cases, only the current year and four full preceding years are in scope of tax reassessment. While, this remains the position, we are now able to provide more clarity on the mechanics of how past tax and contributions would be adjusted in 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 NIJPS 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 NIJPS (tax-registered).
 - d. Therefore, as part of this adjustment we will deduct the tax owed in respect of tax relief received on NIJPS contributions and pay this to HMRC⁸.
 - e. The balance of the NIJPS contributions (the amount left after the deduction of tax owed) will count towards the contributions that should have been made to JUPRA/FPJPS.

⁸ 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.

- 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 43-46 under 'Payment mechanism'.
31. 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 NIJPS contributions could not be recovered by HMRC (although we would still treat NIJPS contributions as having been made to JUPRA/FPJPS). Because judges will not need to pay tax in respect of the income represented by their contributions to NIJPS 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 judges in a net worse-off position⁹, we will compensate accordingly.
32. Annex B contains examples of how this process would work in two different salary groups.

Tapered protection

33. Where taper-protected judges who transferred to NIJPS wish to return to JUPRA, naturally the process set out in paragraph 30-31 would only take place in respect of in-scope years in NIJPS. Where NIJPS is chosen, judges will be required to make up any shortfall in contributions to NIJPS prior to seeking tax relief in respect of in-scope years spent in JUPRA/FPJPS. Payment options are discussed below in paragraphs 43-46 under 'Payment mechanism'.

TPA

34. 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.

⁹ This is possible for judges earning slightly over £150,000.

Repayment options are discussed in paragraphs 43-46 under the 'Payment mechanism' section.

PPA

35. 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 in the PPA (whether they currently remain in the PPA or have been transferred to NIJPS) 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 NIJPS, or excess contributions above the JUPRA/FPJPS level will be retained by the member in PPA¹⁰. If the transfer was made from NIJPS it will be returned to NIJPS.
 - c. Member contributions paid into the PPA, net of tax relief, will go towards contributions arrears due to JUPRA/FPJPS.
 - d. Any shortfall in contributions to JUPRA or 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 net of tax relief rate is much lower than the JUPRA/FPJPS contribution rate.¹¹

Annual Allowance

36. 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

¹⁰ Individuals will, subject to the relevant PPA rules, be able to transfer these benefits to another scheme of their choice.

¹¹ Flexible options to pay any shortfall are outlined in the 'Member contributions and tax section'

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, the judge will be compensated outside the tax system for the full amount of the charge.

37. If the individual originally used Scheme Pays¹² 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.

Retirement and death

38. 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
39. 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. We will seek to contact judges ahead of their retirement date to facilitate this.
40. 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.
41. 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 NIJPS. This would include any

¹² Scheme Pays is a process that allows an individual to pay an annual allowance charge from their pension scheme. This means the scheme pays the annual allowance charge directly to HMRC on their behalf and the charge is recovered from their regular pension payments on retirement.

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.

42. We recognise the complex and difficult nature of retrospectively adjusting a late member's benefits. Therefore, as proposed, any additional expenses incurred where evidenced, for example from reopening a probate application, as a result of remedy would be reimbursed. This does not extend to inheritance tax payments which may become due or which may increase as a result.

Payment mechanism

43. 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; or
 - c. deduction from retirement lump sum.
44. Although not completely analogous to Scheme Pays, TPA recipients and other who opted out of NIJPS membership will be able to 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 43 above. (The mechanism will not be extended to all arrears, as it is thought the three options outlined at paragraph 43 are appropriate for the comparably small amounts of money that will be owed.)
45. TPA recipients and those who opted out of NIJPS 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.

46. Full details, including the tax implications of each payment option, will be provided as part of the options exercise.

Independent financial advice

47. A range of information will be made available 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 NIJPS in respect of service during the remedy period. Some individuals may wish to seek financial advice to support their decision in the options exercise, but it is not considered necessary to compensate judges for IFA costs associated with this.
48. However judges may have incurred IFA costs as a result of the move from JUPRA to NIJPS, given the unique tax implications of transferring to a tax-registered scheme. Where judges are able to adduce evidence of such sums, compensation will be provided through the options exercise, subject to a cap of £500 plus VAT.

Lifetime Allowance

49. Where judges who have retired elect JUPRA/FPJPS membership and have incurred a lifetime allowance charge (LTA) in respect of NIJPS benefits, the consultation proposed that the portion of the charge related to NIJPS should be refunded.
50. For the current tax year and four tax years preceding the point of decision to opt for JUPRA/FPJPS membership, we will take steps to reflect the fact that any pension benefits paid from NIJPS is no longer to be treated as having been made from that scheme. Individuals may also be required to amend their self-assessment tax returns. 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

51. 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.
52. Where an individual can adduce evidence that they held enhanced or fixed protection¹³ before joining NIJPS, this will be restored on reinstatement to JUPRA/FPJPS. TPA recipients will **not** forfeit either their enhanced or fixed protection by electing to return to JUPRA/FPJPS. Details of what evidence will be required, and the process of submitting it, will be included as part of the options exercise.

Interest

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

Voluntary member contributions

54. 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 NIJPS in respect of AP only, i.e. not for pension accrual purposes.
 - EPA – The judge would have their EPA converted into AP in NIJPS, using actuarial factors, and this would be regularised as a standalone NIJPS pension (again, so that the judge would be a member of NIJPS in respect of AP only).
55. On reflection it has been decided that in regards to EPA, individuals will be given a refund of these contributions plus interest. For AP, we plan to give

¹³ As under the Finance Act 2004 (enhanced protection) or Finance Act 2011 (fixed protection)

judges a choice between regularisation, as originally proposed, whereby they remain a member of NIJPS for AP purposes only, and a refund plus interest.

Transfers

56. The consultation proposed that where a judge chooses JUPRA/FPJPS, benefits transferred from private pension schemes into NIJPS could be regularised so that affected judges would be made members of NIJPS in respect of these transfers (as with additional contributions, they would not be a member of NIJPS for benefit accrual purposes).
57. Individuals will become members of NIJPS in respect of benefits transferred from private pensions¹⁴. It is our view that it would not be appropriate to allow regularised benefits in NIJPS to be taken at 65 (or before normal pension age (NPA)) without an actuarial reduction. These transfers were made voluntarily, in the 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 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 members State Pension Age. However, as with all NIJPS benefits, a judge may retire earlier and take their pension at an actuarially reduced amount.

Divorce

58. 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.
59. We accept that the interaction between the *McCloud* remedy and divorce proceedings will be complex. However, for the reasons outlined in the 'Options

¹⁴ 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 in paragraph 35.

model' section above, we maintain that the options exercise remains the best way of managing the process of giving effect to judge's decisions and adjusting the retrospective period.

60. It is therefore the position that, even when there are divorce proceedings, judges would still await the options exercise to make their decision regarding retrospective scheme membership.

Next Steps

61. We therefore remain of the view that the initial proposal of running an options exercise is the best way of delivery a remedy. We consider that it is important for all judges to have a clear understanding about their own position before making a choice

62. We are progressing work for the legislation required to implement the remedy.

Annex A- Illustrative examples

Moving from NIJPS to JUPRA

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

- A Salary Group 3 judge, the typical situation where the difference between JUPRA and NIJPS 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 NIJPS 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 NIJPS 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, individuals will be compensated 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 NIJPS in 2015. As part of the options exercise 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 NIJPS. This figure attracted tax relief of £31,326.

d. Judge A owed £38,309 in JUPRA contributions.

e. Because JUPRA contributions do not attract tax relief, the £31,326 tax relief in respect of NIJPS 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 NIJPS contributions cannot be recovered.

h. Judge A paid member contributions to NIJPS 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, DoJ will not refund the £22,230 excess NIJPS contributions (the amount remaining after JUPRA contributions have been taken); the tax 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 NIJPS in April 2015. As part of the options exercises they choose 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 NIJPS. This figure attracted tax relief of £19,954.

d, Judge B owed £19,954 in JUPRA contributions.

e. Because JUPRA contributions do not attract tax relief, the £19,954 tax relief in respect of NIJPS 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 tax reassessment. Therefore, tax relief in respect of NIJPS contributions cannot be recovered.

h. Judge B paid member contributions to NIJPS 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, DoJ will not refund the £9,446 excess NIJPS 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 NIJPS 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. They 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 NIJPS. 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. They have 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 NIJPS 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 have 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. DoJ will compensate Judge C for the loss in the in-scope period (2018/19 – 2021/22) of the £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, they have already benefitted 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 year (2022/23), they can make contributions in the subsequent tax years to 'catch up' on missed contributions.