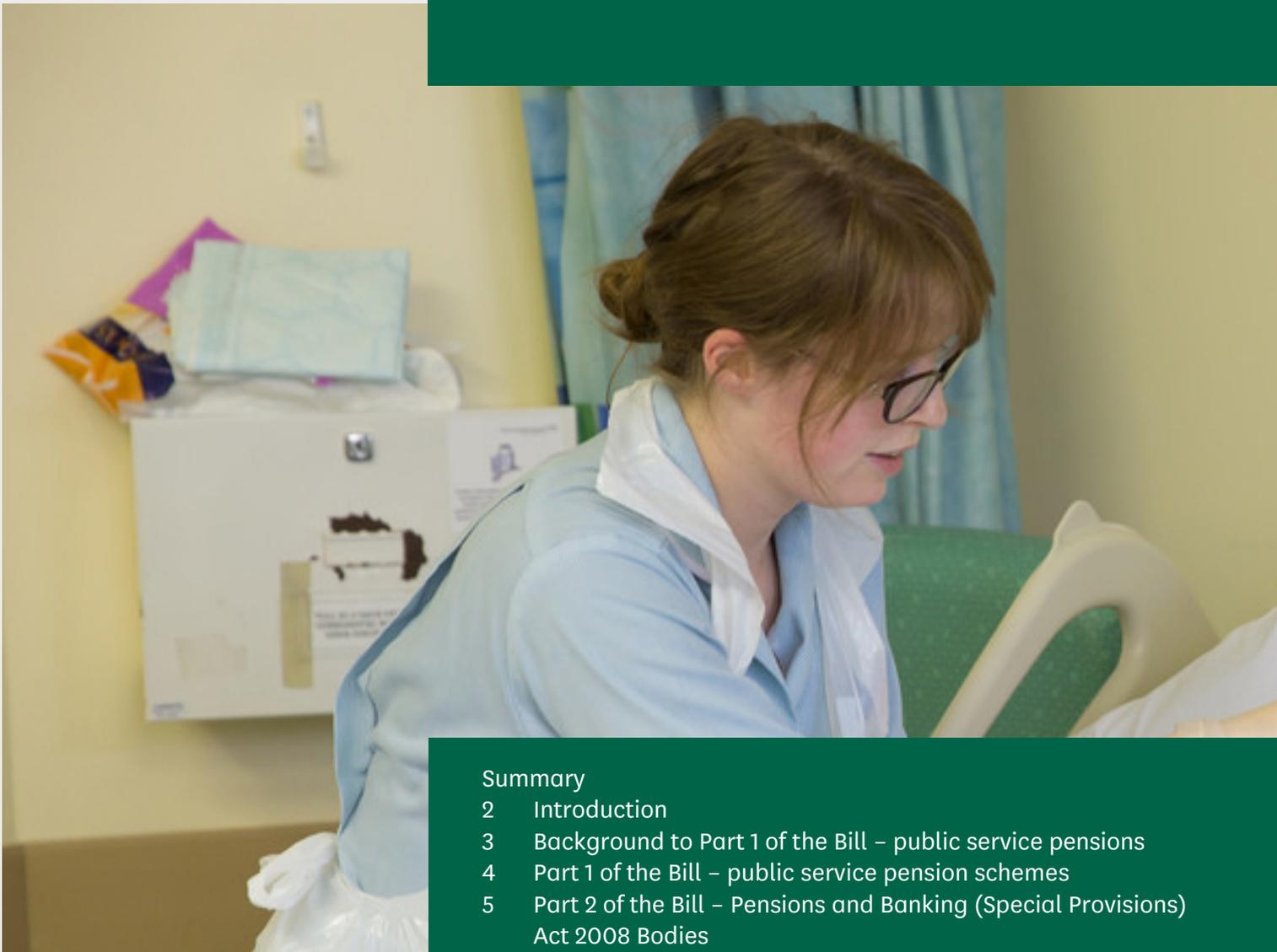


**Research Briefing**

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# Public Service Pensions and Judicial Offices [HL] Bill 2021-22



## Summary

- 2 Introduction
- 3 Background to Part 1 of the Bill – public service pensions
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# Summary

## 1.1

### The Bill

The [Public Service Pensions and Judicial Offices \[HL\] Bill](#) has been through its House of Lords stages and is scheduled to have its second reading in the House of Commons on 5 January 2022. Its [aims include](#) “[consolidating and strengthening] a common UK legal framework for pensions across all the main public services” and “[addressing] resourcing challenges facing the judiciary.” It has four parts:

- **Part One** would remove unlawful discrimination that arose when existing (‘legacy’) public service pension schemes were closed to certain members in 2014 to 2016 and provide for all scheme members to build up benefits in the new schemes from April 2022.
- **Part Two** would enable the Treasury to establish new public service pension schemes for the members for two existing pension schemes which provide benefits to former staff members of Bradford and Bingley and Northern Rock, two companies taken into public ownership as a result of the 2007-2008 financial crisis.
- **Part Three** would increase the mandatory retirement age for judges from 70 to 75 and make changes to their allowances.
- **Part Four** would provide for regulation-making powers, for the Bill to extend to England and Wales, Scotland and Northern Ireland, and for the dates from which parts of the Bill come into force.

## 1.2

### Part 1 – public service pensions

Part 1 is the biggest part, comprising 92 out of the Bill’s total of 114 clauses.

It is needed because in December 2018, the Court of Appeal found in [Lord Chancellor v McCloud, Secretary of State for the Home Department v Sargeant \(699KB, PDF\)](#) that transitional protection arrangements in the schemes for the judges and firefighters were unlawfully discriminatory on grounds of age.

The transitional protection arrangements were put in place when new schemes were introduced on 1 April 2015 (in most cases) under the [Public Service Pensions Act 2013](#). In contrast to most of the old schemes (‘legacy’ schemes in the Bill), the ‘new’ schemes had higher pension ages and provided pension benefits based on an individual’s salary in each year of service, rather than their final salary. Active scheme members (those in service and

building up pension benefits) on 1 April 2015 were moved to the new schemes, except for those covered by transitional arrangements for those ‘closest to retirement’.

Having been denied leave to appeal the Court of Appeal’s judgment, the Government said in July 2019 that [the discrimination would need to be addressed across public service schemes](#). Consultation followed on what form the remedy should take, with separate consultation for the main [public service schemes](#), [local government](#) and the [judiciary](#).

## What does the remedy involve?

The [remedy](#) would apply to those in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than five years. It would work in different ways for different types of schemes:

- Eligible members of the main public service schemes (for teachers, NHS, civil service, police, firefighters and armed forces), would be returned to the relevant legacy scheme for the period during which the discrimination occurred (i.e., between 1 April 2015 and 1 April 2022 – the ‘remedy period’) but would be given a choice, either shortly benefits come into payment (or as soon as practicable for members already receiving a pension), of whether to receive benefits from the legacy or new scheme for that period. Going forward, the legacy schemes would be closed and, from 1 April 2022, all those in active service would build up benefits in the ‘new’ (2015) schemes.
- For the [judiciary](#), eligible members would be able to make their choice in an ‘options exercise’, to take place soon after the Bill becomes law. Serving members of the judiciary from 1 April 2022 would be transferred to a new scheme to build up benefits from that point on (in this case not the 2015 scheme, but one subject to further reform).
- Because the transitional arrangements worked differently in the Local Government Pension Scheme (LGPS), the [remedy would also work differently](#). Eligible younger scheme members would be given the same treatment their older colleagues were given when their scheme was reformed. From 1 April 2022, all members in active service would build up benefits on the basis of new scheme rules.

## Some issues debated in the House of Lords

### Why is so much detail left to regulations?

Significant detail regarding the remedy is left to regulations and Directions. At Committee Stage on [11 October 2021](#), for example, Peers questioned [how the Government intended to use these powers](#) in some areas and how it would be accountable to Parliament.

In his speech on Second Reading on 7 September 2021, the Minister, Viscount Younger of Leckie, explained that [the Bill provided an overarching framework](#). Given the complexity of the pension schemes, which were tailored to fit each workforce's individual requirements, the detail needed to be in regulations to avoid unintended consequences.

### What support would scheme members get to make their decision?

The Government estimates that around [3 million people are in scope of the remedy](#) and, of those, approximately 2 million will also be in scope of the changes to pension provision from 1 April 2022 onwards.

In [Committee stage debate on 11 October 2021](#), Peers noted the complexity of the legislation and the decisions some scheme members would have to make. They raised the importance of them having “accessible, timely, easy-to-understand and easy-to-access information” to help them to understand what has happened and what it means for them. The Minister recognised this and pointed to **clause 29**, which would require schemes to provide regular statements to members.

Implementing the remedy would also be a significant administrative challenge for schemes. In recognition of this, the Government have given them [until October 2023 to fully deliver the retrospective changes](#) (639KB, PDF) needed for the remedy period, including resolving the cases of members who have retired or died since April 2015. The remedy period would still end on 31 March 2022 and all members would build up benefits in the reformed schemes from that date. This is provided for in **clause 119**.

### How would scheme members build up pension rights from April 2022?

Peers raised the effect that having to transfer to the 2015 scheme in April 2022, will have on some legacy members (as proposed in **clause 80**).

At Committee stage on 11 October 2021, Labour Peer, Lord Davies of Brixton, said [there was concern among some in the police service](#) that the Government's “binding commitment” over the nature of the scheme they belonged to, had been broken. For some members of the police and firefighters' schemes, there was a so-called ‘pension trap’, meaning that a member making financial decisions based on one pension scheme could find the value of their benefits from the alternative scheme reduced as a result.

Responding for the Government, Viscount Younger of Leckie said he understood the concern but that the [Government should be able to make changes to the rules](#) under which public servants build up pension rights in future and that the 2015 schemes were appropriate for this. He rejected Lord Davies' suggestion that the Government should compensate members affected by the ‘pensions trap’, on the basis that this risked introducing more discrimination as other members would not get this (c351).

In a [consultation published on 9 November 2021](#), the Home Office said further work was needed to “understand the full implications of any potential change in approach to help mitigate this issue” (para 3.6).

### Who will pay the costs for the remedy?

Treasury officials told the Public Accounts Committee in April 2021 that ultimately, the costs of the remedy would be [“borne by members, but the cost control mechanism will manage that cost”](#) (Q72).

The cost control mechanism referenced was introduced under section 12 of the [Public Service Pensions Act 2013](#) to protect the taxpayer against unexpected increases in pension costs and the value of member benefits. It’s designed to operate symmetrically, so that if valuations showed that costs had risen or fallen by more than two percent above or below a target rate, steps would have to be taken to bring them back to target. It applies to ‘member costs’, such as increases in life expectancy or salaries.

The Government said on 6 September 2018 that initial results of the first post-reform valuations indicated that [members should get “improved pension benefits for employment over the period April 2019 to March 2023.”](#) In [January 2019](#), the Government put this on hold due to uncertainty about the value of public service pensions following the McCloud judgment. In July 2020, it said work on the 2016 valuations could proceed and that [the cost of the remedy would count as a ‘member cost’](#).

In February 2021, the Government said that, in light of its concerns that the cost control mechanism was not working as intended, it had decided it would [not be appropriate to reduce benefits](#) in schemes where there had been a breach of the cost ceiling, due to the inclusion of the remedy. This is provided for in **clause 86** of the Bill. However, classing the remedy as a member cost means that members are less likely to see the benefit improvements or contribution rate reductions originally expected, based on initial results of the 2016 valuations.

Opposition Peers raised concerns about the scope for parliamentary scrutiny over the decision to class the remedy as a member cost. In a debate on 29 November 2021, the Minister said the Government had “received pre-action protocol letters on behalf of some trade unions which have indicated that [they may issue judicial review proceedings.](#)”

## 1.3

### Mandatory retirement age for judges

In debate on the mandatory retirement age (MRA) for judges, there was some Opposition and Crossbench resistance to raising this up to 75.

Amendments were debated at both Committee and Report Stage in the Lords to constrain the MRA to 72, along the lines called for by senior judiciary. One such [Report Stage amendment](#) was defeated on a division.

## 2 Introduction

The Public Service Pensions and Judicial Offices [HL] Bill was introduced in the House of Lords on 19 July 2021. It had its [Second Reading](#) in the House of Lords on 7 September 2021. It went through its Committee Stage in one day, on [11 October 2021](#). Report Stage was on 29 November 2021 and Third Reading on 6 December. It was introduced into the House of Commons ([Bill 211, 2021-22](#)) the following day. Second Reading is scheduled for 5 January 2022.

It consists of four parts, including 120 clauses and four schedules:

- **Part One** would implement a remedy to age discrimination identified by the Court of Appeal in [Lord Chancellor v McCloud, Secretary of State for the Home Department v Sargeant \(699KB, PDF\)](#) (the McCloud judgment) in December 2018.
- **Part Two** would enable the Treasury to establish new public service pension schemes for members and beneficiaries of two pension schemes which provide benefits to former members of staff for two companies (Bradford and Bingley and Northern Rock) taken into public ownership as a result of the 2007-2008 financial crisis.
- **Part Three** would increase the mandatory retirement age for judges from 70 to 75 and make changes to their allowances.
- **Part Four** would set out procedure for regulations and for the Bill to extend to England and Wales, Scotland and Northern Ireland. As it includes matters within the competency of the devolved legislatures, [legislative consent motions](#) are being sought.

The provisions of the Bill extend and apply to England and Wales, Scotland and Northern Ireland. Because it engages the Sewel Convention (under which the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the devolved assemblies), the consent of devolved legislatures was sought.<sup>1</sup> By the time of the Bill's Third Reading in the House of Lords on 6 December 2021, the Northern Ireland Executive had passed a legislative consent motion, the Welsh Senedd was in the process of considering one, and the Scottish Government was considering bringing one forward.<sup>2</sup>

Information produced by the Government to support the debates included: [Impact Assessment](#), December 2021; [Equality Impact Assessment](#), December 2021; [Policy Statement – Chapters 1 and 4](#), October 2021; [Delegated Powers Memorandum](#), December 2021.

<sup>1</sup> [Bill 211-EN](#) para 81-48 and Annex A

<sup>2</sup> [HL Deb 6 December 2021 c1652](#)

## 3 Background to Part 1 of the Bill – public service pensions

### 3.1 The public service pensions landscape

Public service pension schemes are occupational pension schemes for employees of central or local government, a nationalised industry or other statutory bodies. Most are established by statute.<sup>3</sup> They are defined benefit (DB) schemes, which means they provide benefits based on specified factors such as salary, length of service and the rate at which benefits build up under scheme rules.<sup>4</sup> There are different schemes for different public services, and they cover different parts of the UK:

- The Armed Forces scheme is UK-wide.
- The civil service has separate schemes for Great Britain and Northern Ireland.
- The rules for the schemes for local government, police and firefighters are set nationally for England and Wales,<sup>5</sup> Scotland and Northern Ireland, but the schemes are managed and administered locally by the Local Government Pension Scheme (LGPS) administering authorities, police authorities and fire and rescue authorities respectively.
- There is a scheme for NHS and Teachers for England and Wales, with separate schemes in Scotland and Northern Ireland.

Most of the main public service schemes operate on a pay-as-you-go (PAYG) basis, under which contributions from employers and employees are paid to the relevant government department which pays benefits to pensioners, netting off the contributions received, with any remaining difference between payments and receipts either being met by, or paid to, the Exchequer.<sup>6</sup> The exception is the LGPS, which is funded. This means that contributions are paid to a fund which is invested and used to provide resources to pay benefits.

For more detail, see [Public Service Pensions: Fact and Figures](#), Commons Library Briefing Paper CBP 8478.

<sup>3</sup> [Public Service Pensions Act 2013](#). Some schemes in the wider public sector are set up by trust deed

<sup>4</sup> The other main type of scheme is defined contribution (DC) in which contributions are made to a fund that is invested and used to provide an income in retirement

<sup>5</sup> Although in the case of the firefighters, there are separate schemes for England and Wales

<sup>6</sup> NAO, [Public service pensions](#), HC 1242, March 2021

## 3.2

### The 2011-15 reforms

Reforms to public service pensions introduced under the last Labour Government had the aim of improving financial sustainability and reflecting changes in life expectancy, working practices and the private sector, including increases in the pension age generally only for new entrants (or existing members who opted to move to the new schemes).

In June 2010, the Coalition Government established an Independent Public Service Pensions Commission, chaired by former Labour Secretary of State for Work and Pensions, Lord Hutton of Furness, to look at “the long-term affordability of public service pensions, while protecting accrued rights.” It also announced its intention to switch from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI) as the measure of prices for increasing public service pensions in payment.<sup>7</sup>

The Commission’s interim report published in October 2010 recommended an increase in member contribution rates as the most effective way to make short-term savings and said there was a strong case for doing so - “to better meet the real costs of providing these pensions, the value of which has risen in recent years with most of these extra costs falling to taxpayers.”<sup>8</sup> In response, the Government announced that it would increase member contribution rates by an average of 3.2 per cent across public service schemes by 2014/15, except for the armed forces.<sup>9</sup>

In its final report, published in March 2011, the Commission recommended replacing the existing schemes with new ones, with pension entitlement based on career average earnings rather than final salary. There should also be increases in the pension age, linking it to the State Pension age in all schemes except those for the ‘uniformed services’ (armed forces, police and firefighters), which would have a normal pension age of 60.<sup>10</sup>

The Government accepted the Commission’s recommendations as the basis for negotiation with the trade unions. It announced final proposed agreements for reform of most public service schemes over the period March to October 2012.<sup>11</sup>

The Government then legislated in the [Public Service Pensions Act 2013](#) for a framework for the new schemes to be introduced for future service from 2015 (2014 for local government). Key features of the new schemes are that they provide pension benefits based on career average revalued earnings rather

<sup>7</sup> HM Treasury, [Budget 2010](#), HC 61, June 2010, para 1.42-3

<sup>8</sup> [Independent Public Service Pensions Commission: interim report](#), October 2010, Chapter 8

<sup>9</sup> HM Treasury, [Spending Review 2010](#), October 2010, para 1.94

<sup>10</sup> [Independent Public Service Pensions Commission: final report](#), March 2011. The normal pension age is the age at which members still in active service can generally draw an unreduced pension. Those who left service before reaching normal pension age can draw their pension at deferred pension age, which for members of the schemes for the uniformed services is linked to the State Pension age

<sup>11</sup> [HM Treasury press release, Discussions concluded on public service pension details](#), 9 March 2012

than final salary, and that individuals have a normal pension age linked to their State Pension age. There is an exception for the schemes for firefighters, police and armed forces, which have a normal pension age of 60.<sup>12</sup>

An important feature of the reforms was a commitment by the Government that the reforms would be “sustained for at least 25 years.”<sup>13</sup> This was provided for in [section 22](#) of the 2013 Act, which requires an ‘enhanced consultation and report process’ before certain changes can be made within 25 years of 1 April 2015.<sup>14</sup>

## Impact

According to a March 2021 report by the National Audit Office (NAO), these reforms in combination with reductions in public sector employment, are expected to reduce expenditure on public service pensions from a peak of 2.1% of Gross Domestic Product (GDP) in 2022-23, to around 1.5% of GDP from 2064-65 onwards.<sup>15</sup> In terms of how the costs of public service pensions were met, the NAO found that:

- Public service employees were contributing substantially more – both individually and in total – to their pensions as a result of the 2011-2015 reforms. There was some evidence to suggest that those in lower age and income groups were more likely to view contributions as unaffordable and opt out;<sup>16</sup>
- While the taxpayer’s proportion of total pension funding remained similar to 10 years ago, employer contributions had risen significantly in 2019-20, largely as a result of a change to the discount rate the government used to estimate the current cost of future benefits to be paid out.<sup>17</sup>

For more detail, see [Public Service Pensions: the 2015 reforms](#), Commons Library Briefing Paper, CBP 5768.

## The transitional arrangements

The Independent Public Service Pensions Commission was asked to ensure that its recommendations protected accrued rights.<sup>18</sup> In its final report, the Commission said this was “a prerequisite for reform both to build trust and confidence and to protect current workers from a sudden change in their pension benefits or pension age.” It recommended protecting the “final salary link” for past service (meaning that entitlement to benefits at retirement would be calculated based on salary at that point, rather than at the point

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<sup>12</sup> See footnote 10 above

<sup>13</sup> [HC Deb 20 December 2011 c1201](#)

<sup>14</sup> See [Public Service Pensions Bill](#), House of Commons Library RP 12/57, October 2012, p59

<sup>15</sup> NAO, [Public service pensions](#), HC 1242, March 2021, para 2.2-3

<sup>16</sup> Ibid para 19

<sup>17</sup> Ibid para 14

<sup>18</sup> [Independent Public Service Pensions Commission: Interim Report](#), 7 October 2010,

the legacy schemes closed in 2015).<sup>19</sup> Protecting accrued rights in this way would mean that existing members in their 50s should experience limited change to the benefit they would expect to build up. Special protections for members over a certain age should therefore not be necessary. In addition, age discrimination legislation meant it was “not possible in practice to provide protection from change for members who are already above a certain age.”<sup>20</sup>

The Government accepted the Commission’s recommendation regarding the ‘final salary link.’ It said, in addition, its objective was that those with 10 years or less to pension age on 1 April 2012 should see “no change in when they retire, nor any decrease in the amount of pension they receive at their current Normal Pension Age.”<sup>21</sup>

In a statement to Parliament on 2 November 2011, the then Chief Secretary to the Treasury, Danny Alexander, said that he had listened to arguments that “those closest to retirement should not have to face any change at all.”<sup>22</sup> He wrote to the then TUC General Secretary, Brendan Barber, to say he had accepted that there should be transitional protection for those ‘closest to retirement’ i.e.: within ten years of normal pension age on 1 April 2012, with tapering of transitional protection over a further three to four years.<sup>23</sup>

Section 18 of the [Public Service Pensions Act 2013](#) provided that no benefits could be provided under the existing schemes after 31 March 2015 but that regulations could provide for exceptions for people who were members of the scheme immediately before 1 April 2012. Most schemes offered two forms of transitional protection:

- Full protection - active scheme members within ten years of normal pension age on 1 April 2012 could stay in their existing scheme until retirement; and
- Tapered protection - those between 10 and 13.5 or 14 years of normal pension age on that date could stay in their existing schemes for a period ranging from a few months to several years after 2015.<sup>24</sup>

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<sup>19</sup> [Independent Public Service Pensions Commission: Final Report](#), 10 March 2011, recommendation 4

<sup>20</sup> Ibid para 7.34

<sup>21</sup> HM Treasury, [Public Service Pensions – good pensions that last](#), November 2011, Foreword

<sup>22</sup> [HC Deb 2 November 2011 c927](#)

<sup>23</sup> See letter referred to in [Lord Chancellor and Secretary of State for Justice v McCloud and Mostyn. Home Secretary and Welsh Ministers v Sargeant. 2018 EWCA Civ 2844](#), para 8

<sup>24</sup> All schemes have tapered protection except the Armed Forces Pension Scheme and Local Government Pension Scheme (which is outside of the scope of this consultation, apart from the issue of transfer between the LGPS and the other schemes (see paragraph A.57 below)). Tapered protection was usually for members who were from 10 to 13.5 years of their NPA on 1 April 2012, but for police and firefighters the period was between 10 and 14 years. HM Treasury, [Public Service Pensions – changes to the transitional arrangements to the 2015 schemes](#). Consultation, July 2020, para 1.12

## 3.3

## McCloud/Sargeant

Judges and firefighters made claims in Employment Tribunals on the grounds that the transitional protection offered to older members constituted unjustified direct age discrimination and indirect race and sex discrimination. In particular, they argued that younger members were treated less favourably than older members who were given transitional protection.<sup>25</sup>

In December 2018, the Court of Appeal ruled in [Lord Chancellor and Secretary of State for Justice v McCloud and Mostyn, Home Secretary and Welsh Ministers v Sargeant \(pdf 699KB\)](#)<sup>26</sup> that the transitional provisions in the judges' and firefighters' pension schemes had "given rise to unlawful direct age discrimination. In neither case could the admitted direct age discrimination be justified."<sup>27</sup> Regarding equal pay and indirect race discrimination claims were concerned, it said:

[...] we are satisfied that these claims are made out in the Judges' case. The only difference in the firefighters' case is that, had it been necessary (and we see no reason why it should be) we would have remitted the question whether the disadvantage was sufficiently substantial in the circumstances to establish a prima facie case of indirect discrimination, both in the equal pay and the race claims.<sup>28</sup>

The matter was remitted back to the Employment Tribunal to determine a remedy for the claimants.<sup>29</sup>

On 18 November 2019, The Employment Tribunal issued an interim order relating to firefighters.<sup>30</sup> This meant that those members of the old firefighters pension scheme, who had been transferred to the 2015 scheme, were entitled to be treated as though they had been members of the legacy scheme after 1 April 2015.<sup>31</sup> The Fire Brigades Union described this as a "landmark victory with implications across the public sector." It said that "the claimants, members of the 1992 and 2006 firefighters' pension schemes, are now entitled to be treated as if they have remained members of their original pension scheme, with benefits including a retirement age of between 50 and 55."<sup>32</sup>

The Employment Tribunal also declared that the claimant judges in McCloud were entitled to membership of the relevant legacy scheme (the Judges

<sup>25</sup> [Ms V McCloud & Others v Lord Chancellor and Secretary of State for Justice, Employment Tribunal, Case No: 2201483/2015 & Others, 2202075/2015 & Others](#), November 2016; [Ms R Sargeant and Others v London Fire and Emergency Planning Authority and Others: 2202235/2015](#), January 2018

<sup>26</sup> [Lord Chancellor and Secretary of State for Justice v McCloud and Mostyn, Home Secretary and Welsh Ministers v Sargeant \[2018 ECWA Civ 2844\]](#)

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> [HCWS1725 15 July 2019](#)

<sup>30</sup> [Fire and Rescue Services National Employers Circular EMP/8/19](#), November 2019

<sup>31</sup> Home Office, [Sargeant Factsheet](#), 20 December 2019; For the impact on the Police Pension Scheme, see Home Office, [McCloud/Sargeant factsheet](#), December 2019

<sup>32</sup> [FBU press release, 18 December 2019](#)

Pension Scheme 1993 or the Fee-Paid Judicial Pension Scheme) from 1 April 2015.<sup>33</sup>

Similar Employment Tribunal claims were made by other groups, such as police officers, prison officers and Ministry of Defence Police.<sup>34</sup> The Government said in July 2020 that it had agreed in a number of Employment Tribunal cases, that claimants should be entitled to membership of the appropriate legacy scheme.<sup>35</sup>

On 18 November 2019, The Employment Tribunal issued an interim order relating to firefighters.<sup>36</sup> This meant that those members of the old firefighters pension scheme, who had been transferred to the 2015 scheme, were entitled to be treated as though they had been members of the legacy scheme after 1 April 2015.<sup>37</sup>

The Employment Tribunal also declared that the claimant judges in McCloud were entitled to membership of the relevant legacy scheme (the Judges Pension Scheme 1993 or the Fee-Paid Judicial Pension Scheme) from 1 April 2015.<sup>38</sup>

Similar Employment Tribunal claims were made by other groups, such as police officers, prison officers and Ministry of Defence Police.<sup>39</sup> The Government said in July 2020 that it had agreed in a number of Employment Tribunal cases, that claimants should be entitled to membership of the appropriate legacy scheme.<sup>40</sup>

## Consultation on the wider remedy

In July 2019, having been denied leave to appeal, the Government accepted that the difference in treatment would need to be remedied across public service pension schemes, regardless of whether individuals had made a claim.<sup>41</sup> Separate consultation followed for the schemes in the first three chapters in Part 1 of the Bill because of differences in the way the remedy would need to be implemented in each case. Different consultations were also conducted by the different legislatures where relevant. However, the remedy

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<sup>33</sup> [Judicial Pensions: Proposed response to McCloud. Consultation](#). MoJ, July 2020, Intro, para 9

<sup>34</sup> [Home Office/police pension schemes/McCloud and Sargeant factsheet; Cabinet Office: Civil superannuation account 2017-18](#), December 2018, para 1.57

<sup>35</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), July 2020, p8-9

<sup>36</sup> [Fire and Rescue Services National Employers Circular EMP/8/19](#), November 2019

<sup>37</sup> Home Office, [Sargeant Factsheet](#), 20 December 2019; For the impact on the Police Pension Scheme, see Home Office, [McCloud/Sargeant factsheet](#), December 2019

<sup>38</sup> [Judicial Pensions: Proposed response to McCloud. Consultation](#). MoJ, July 2020, Intro, para 9

<sup>39</sup> [Home Office/police pension schemes/McCloud and Sargeant factsheet; Cabinet Office: Civil superannuation account 2017-18](#), December 2018, para 1.57

<sup>40</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), July 2020, p8-9

<sup>41</sup> [HCWS 1275 15 July 2019](#)

in all cases will be within the framework of the Bill, subject to legislative consent motions.<sup>42</sup>

HM Treasury published its consultation on the remedy for members of the schemes in Great Britain covered by **Chapter 1 of Part 1 of the Bill** (NHS, Teachers, Firefighters, Police, Civil Service and armed forces) on 16 July 2020 and published its response in February 2021.<sup>43</sup> The Department for Finance in Northern Ireland launched its consultation on 19 August 2020 and responded in February 2021.<sup>44</sup>

The Ministry of Justice launched its [consultation](#) on the remedy for members of the judicial pension schemes (**Chapter 2**) in July 2020 and responded in February 2021.<sup>45</sup> The consultation related to eligible members of the judiciary in England, Wales, Scotland and Northern Ireland for whose pension arrangements the UK Parliament has sole competency to legislate.<sup>46</sup>

The Ministry for Housing Communities and Local Government launched its consultation on amendments to the statutory underpin for the Local Government Pension Scheme (LGPS) (**Chapter 3**) in England and Wales in July 2020.<sup>47</sup> On 13 May 2021, the Government confirmed that the underpin protection would apply to all LGPS members who met the revised qualifying criteria. Further details would be in a response to consultation which has not yet been published.<sup>48</sup> The Scottish Public Pensions Agency launched its [consultation](#) in July 2020.<sup>49</sup> The Department for Communities in Northern Ireland launched its [consultation](#) on 11 November 2020.<sup>50</sup>

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<sup>42</sup> [Bill 211](#) - Clause 119

<sup>43</sup> [HCWS 380 16 July 2020](#); HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), CP 253, July 2020; [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021

<sup>44</sup> Department for Finance NI, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), 19 August 2020; [Public service pensions: changes to the transitional arrangements to the 2015 schemes. Response to consultation](#), Feb 2021

<sup>45</sup> MoJ, [Judicial Pensions: Proposed response to McCloud. Consultation](#), 16 July 2020; [Judicial Pensions: Proposed response to McCloud. Government response to consultation](#), 25 Feb 2021

<sup>46</sup> MoJ, [Judicial Pensions: Proposed response to McCloud. Consultation](#), 16 July 2020

<sup>47</sup> MHCLG, [LGPS E&W amendments to the statutory underpin](#), July 2020

<sup>48</sup> [HCWS 13 May 2021 c26WS](#); Gov.UK, LGPS, [Amendments to the statutory underpin](#)

<sup>49</sup> [LGPS Scotland. Addressing discrimination - amendments to the statutory underpin](#), July 2020

<sup>50</sup> Department for Communities NI, [Consultation on the proposed changes to the transitional arrangements in the 2015 Local Government Pension Scheme in Northern Ireland](#), November 2021

## 4 Part 1 of the Bill – public service pension schemes

### 4.1 Introduction

**Part 1** of the Bill would provide for the remedy to the direct age discrimination identified by the Court of Appeal in McCloud regarding the transitional arrangements for the 2015 schemes. Part 1 is divided into four chapters.

The remedy would involve giving eligible members a choice, for service between 1 April 2015 and 1 April 2022 (referred to in the Bill as ‘remediable service’), whether to receive benefits from the relevant ‘new scheme’ (introduced on 1 April 2015 under the Public Service Pensions Act 2013) or ‘legacy scheme’ (one closed to future service from 1 April 2015, except for those scheme members covered by the transitional protection arrangements found to be unlawful by the Court of Appeal).

The remedy would work in different ways for different types of schemes:

- Eligible members of ‘**Chapter 1 schemes**’ (for teachers, NHS, civil service, police, firefighters and armed forces), would be returned to the relevant legacy scheme for the period during which the discrimination occurred (i.e., between 1 April 2015 and 1 April 2022 – the ‘remedy period’) but would be given a choice, either shortly benefits come into payment (or as soon as practicable for members already receiving a pension), of whether to receive benefits from the legacy or new scheme for that period. Going forward, the legacy schemes would be closed and, from 1 April 2022, all those in active service will build up benefits in the ‘new’ (2015) schemes.<sup>51</sup>
- For the judiciary, eligible members would be able to make their choice in an ‘options exercise’, to take place soon after the Bill becomes law. Serving members of the judiciary from 1 April 2022 would be transferred to a new scheme to build up benefits from that point on (in this case not the 2015 scheme, but one subject to further reform).<sup>52</sup>
- Because the transitional arrangements worked differently in the Local Government Pension Scheme (LGPS), the remedy would also work differently. Eligible younger scheme members would be given the same

<sup>51</sup> For an overview, see [Public servants – important choice for your pension](#), HM Treasury, July 2020

<sup>52</sup> MoJ, [Consultation on the proposed response to McCloud](#), Gov.UK

treatment their older colleagues were given when their scheme was reformed. From 1 April 2022, all members in active service would build up benefits on the basis of new scheme rules.<sup>53</sup>

**Chapter 4 of Part One** deals with some cross cutting issues such as the cost control mechanism, regulation-making powers etc.

## Financial Impact

Implementing the remedy represents a significant challenge for public service pension schemes, affecting millions of members. Around 3 million individuals are in scope of the remedy and, of those, approximately 2 million will also be in scope of the changes to pension provision from 1 April 2022 onwards.<sup>54</sup> The Government estimates the resulting increase in scheme liabilities as follows:

4492. The Treasury estimates that the liabilities of the unfunded public service pension schemes (for the NHS, teachers, armed forces, police, firefighters and civil service, but excluding the judiciary) will increase by around £17 billion as a result of the retrospective changes made by the Bill in relation to the period between 1 April 2015 and 31 March 2022. The estimate includes the public service pension schemes in Scotland and Wales, but not Northern Ireland.<sup>55</sup>

For the schemes in Northern Ireland, the estimated increase in liabilities is £680 million.<sup>56</sup>

## Commencement

Under **clause 119**, Part 1 of the Bill, in so far as it confers a power or is necessary to make regulations or give directions, would come into force on the day on which the Act is passed.

So far as it does not come into force on the day the Act is passed, **Part 1, Chapter 1** would come into force on 1 October 2023, or such early day as Treasury regulations (or an order of the Department of Finance in Northern Ireland) would specify.<sup>57</sup>

So far as it does not come into force on the day the Act is passed, **Part 1, Chapter 2** (schemes for the judiciary) would come into force on such day as the Lord Chancellor may specify by regulations.<sup>58</sup>

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<sup>53</sup> [McCloud Court Case: FAQs for LGPS members](#), LGPS members' site (viewed December 2021)

<sup>54</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes](#), July 2020, para 1.22

<sup>55</sup> [Bill 211-EN](#) para 492-4

<sup>56</sup> *Ibid*

<sup>57</sup> *Ibid* para 485

<sup>58</sup> *Ibid* para 486

So far as it does not come into force on the day the Act is passed, **Part 1, Chapter 3** (schemes for the local government) would come into force on such day as the Treasury regulations may specify.<sup>59</sup>

So far as it does not come into force on the day the Act is passed, **Part 1, Chapter 4** would come into force on 1 April 2022, to ensure the legacy schemes close from that date.<sup>60</sup>

## Retrospective changes

The Government's impact assessment explains that the "key novel or contentious element of this Bill are the powers for retrospective changes to benefit entitlements", which are necessary to remove previous discrimination:

Retrospective changes are sometimes seen to be controversial with stakeholders because they argue the removal of accrued pension rights without consent is unlawful. However, these retrospective changes are required for affected members, for example to remove previous discrimination, write off existing overpayments of benefits, or to allow for continued payment of higher amounts in cases where to do otherwise would lead to hardship even though the reduction would be in response to removing discrimination.<sup>61</sup>

Although for most scheme members, having a choice about which scheme benefits are most beneficial is expected to have a broadly positive impact, there are a small number for whom this is not the case. These are some of the individuals covered by 'tapered protection', who built up benefits from legacy and new scheme over the remedy period and for whom this mix of benefits is more advantageous than having either legacy or new scheme benefits for some of the remedy period. Under the terms of the Bill, they will lose this advantage.<sup>62</sup>

The Government argues that this loss of the right to receive a mix of benefits is justified on grounds that "it would not be right to continue to give members an advantage which it has been decided arose from unjustifiably discriminatory treatment on grounds of age." Where a member has already retired, schemes will take "a proportionate approach to the recoupment of any overpaid benefits, including insuring that any overpayment can be collected over time."<sup>63</sup>

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<sup>59</sup> Ibid para 487

<sup>60</sup> Ibid para 488

<sup>61</sup> [Public Service Pensions and Judicial Offices Bill: Assessment of Impacts](#), December 2021, p10

<sup>62</sup> Clause 6(7) and 10(5)

<sup>63</sup> HM Treasury, [Public Service Pensions and Judicial Offices Bill: Equality Impact Assessment](#), July 2021, para 3.14-7

## The member journey

The HM Treasury policy note sets out how the aspects of the remedy would affect members in chronological order, including some illustrative examples.<sup>64</sup> The following is a simplified overview:

- On 1 October 2023, or such earlier date as the Treasury or Department of Finance in Northern Ireland may appoint, members who have remediable service in a new scheme would instead be **members of the legacy scheme for the ‘remedy period’** (1 April 2015 to 1 April 2022).
- Within 18 months, scheme managers would be required to provide members with a **‘remediable service statement’** (or such longer period as the scheme manager considers reasonable.) This would include information about the benefits available to them for the remedy period under both new and legacy scheme and when and how they may elect new scheme benefits.
- Active members would receive a statement annually after that and deferred members can request one annually; pensioner members, and representatives of a deceased member, would receive a one-off statement.

### Contributions

- Where an active or deferred member with service in a new scheme is retrospectively treated as being a member of a legacy scheme, there would be situations in some schemes where members have paid incorrect contributions because of differences in the contribution rates or the definitions of pay on which contributions are payable.
- If they have overpaid contributions, they would receive compensation that places them in the position they would have been had they paid the correct rate of contributions at the relevant time. If they have underpaid, they would be required to pay them. (In both cases, interest applies.)
- If the active or deferred member later makes a choice for new scheme benefits, a further adjustment might be made at that stage.
- For pensioner or deceased members, there would be a single correction of contributions after the immediate choice of benefits has been made.

### Tax treatment of contributions

- In the event of a member having to pay additional contributions in respect of an underpayment, they would receive tax relief on those contributions at the point they are made. If that resulted in less tax relief than the individual would have received had they paid those contributions in the relevant remedy period years, they would be able to apply for compensation for the additional amount they would have received.

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<sup>64</sup> HM Treasury, [Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), Oct 2021, p9-21

- In the event of a member having overpaid contributions, they would receive compensation from the scheme, less an amount to reflect the excess tax relief they received.

### **Immediate choice election**

- Once a remediable service statement has been provided to a pensioner (or in respect of a deceased member), they would be able to elect to receive, for the remedy period, legacy scheme benefits or new scheme design benefits (i.e., the benefits they would have been entitled to under new scheme rules). The election would need to be made within a year of receiving the statement, or such longer period as considered reasonable. Whether a choice is made for legacy or new scheme design benefits for the remedy period, the benefits would be payable from the legacy scheme.
- If the individual did not elect for new scheme design benefits, they would be eligible for legacy scheme benefits in respect of their service in the remedy period.

### **Deferred choice election**

- For those in active service on or after 1 October 2023, the choice to receive legacy or new scheme design benefits for the remedy period, would be made close to the point when benefits are paid.

### **Benefit corrections**

- Where the benefits payable to a pensioner or deceased member changed as a result of an immediate choice, any benefits already paid may need to be corrected. This would apply to both lump sums and pension benefits, which are treated separately for these purposes.
- Any additional pension payments (other than lump sum payments) to the member would be taxed at their marginal rate in the year they are paid. Where this marginal rate is higher than it would have been had the additional payments been made in the year to which they relate, the member would be able to ask HMRC to apply the relevant previous marginal rate.

### **Scheme design differences**

There are other differences in scheme design which the member may wish to factor into their decision. These include differences in the normal pension age, benefit accrual rate, rules on abatement and death benefits.

## 4.2

## Main issues raised in commentary and Lords debate

Apart from the Minister, Government Whip, Viscount Younger of Leckie, the main participants in debates in the Lords on Part 1 of the Bill were Shadow spokesperson for Home Affairs and Justice, Lord Ponsonby of Shulbrede; Liberal Democrat Work and Pensions spokesperson, Baroness Janke and Labour Peer and member of the Finance Committee, Lord Davies of Brixton. Issues they raised in debate included:

- How the Government would use its power to make regulations and Treasury directions under the Bill and the opportunities for scrutiny by Parliament;<sup>65</sup> and
- The importance of members having adequate information and guidance to make an informed decision between new and legacy scheme benefits.<sup>66</sup>

Debate on the following issues was restricted by the fact of ongoing litigation:

- The impact on some members of the police pension schemes of moving to the 2015 schemes for future service from April 2022;<sup>67</sup> and
- The inclusion of the cost of the remedy as a member cost, to be taken into account over the period covered by the 2016 scheme valuations.<sup>68</sup>

These issues are discussed in more detail below.

### Use of Regulations and Directions

Opposition peers asked for more detail of the Government's intentions in some areas, as much is left to regulations.<sup>69</sup> In his Second Reading speech, the Minister explained that the Bill provided an overarching framework, building on the [Public Service Pensions Act 2013](#). However, the details would need to be in scheme regulations. This is because of the complexity of public service pension provision, with different schemes "tailored to fit each workforce's individual requirements." Given the level of detail involved, these measures would come before Parliament as statutory instruments for further scrutiny.<sup>70</sup>

In its memorandum to the House or Lords Delegated Powers and Regulatory Reform Committee, the Government said this approach was necessary to reduce "the risk of unintended consequences as a result of primary legislation

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<sup>65</sup> [HL Deb 11 October 2021 c336-41](#)

<sup>66</sup> Ibid c356-9

<sup>67</sup> Ibid c345-51

<sup>68</sup> Ibid c360-366

<sup>69</sup> [HC Deb 11 October 2021 c336GC](#)

<sup>70</sup> [HL Deb 7 September 2021 c778](#)

attempting to account for the particularities of each set of scheme regulations.”<sup>71</sup>

Scheme regulations would be provided for in **Clause 37**. Amendments to scheme regulations would be provided in **Clause 84**, which would permit “consequential, supplementary, incidental or transitional provision in relation to any provision of this Bill to scheme regulations, or equivalent amendments to primary legislation (passed before or in the same session as the Bill).”

In its memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee, the Government explained that the power in clause 84 was “essential to ensure there are no unintended consequences which would prevent the remedy, and the closure of legacy schemes on 31 March 2022, from being fully implemented.” However, insofar as it permitted amendments to Acts, it was “a Henry VIII power.”<sup>72</sup>

The UK Parliament website explains that the Committee pays “particular attention to any proposal in a Bill to use a Henry VIII clause because of the way it shifts power to the executive.”<sup>73</sup> However, in its report, published on 13 September 2021, the Committee said there was “nothing in this Bill which we would wish to draw to the attention of the House.”<sup>74</sup>

The way in which the Government proposes to use **Directions** was also questioned by Peers. At Committee Stage on 11 October 2021, Lord Ponsonby asked how proper oversight of directions would be ensured:

Significant details are then to be written in at a later stage through not only regulations but Treasury directions. While regulations are the appropriate vehicle for much of the detail, the question is a simple one: how do we action the legislation to allow the remedy to be established while also allowing oversight and proper engagement on the next steps which are to come?<sup>75</sup>

In response, the Minister said that Treasury directions were intended to ensure consistency.<sup>76</sup> In a letter to Peers following Second Reading, he had explained that Treasury Directions were intended to “set out to schemes how they should exercise a particular power, rather than creating a new power.” The purpose was to ensure consistency in cases where Treasury Ministers thought this necessary or appropriate.<sup>77</sup>

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<sup>71</sup> [HM Treasury Memorandum to the Delegated Powers and Regulatory Reform Committee](#), December 2021

<sup>72</sup> [Public Service Pensions and Judicial Offices Bill – Delegated Powers memorandum](#), December 2021

<sup>73</sup> [UK Parliament/Glossary/Henry VIII clauses](#)

<sup>74</sup> House of Lords Delegated Powers and Regulatory Reform Committee, [6<sup>th</sup> Report of Session 2021-22](#), HL Paper 65, 13 September 2021, p17

<sup>75</sup> [HL Deb 11 October 2021 c349GC](#)

<sup>76</sup> Ibid c350GC

<sup>77</sup> [Dear colleagues letter from Viscount Younger of Leckie, 16 September 2021](#)

## Complexity for schemes and members

In a March 2021 report the four main unfunded schemes (for teachers, NHS, civil service, and armed forces) the National Audit Office said that allowing members to make a deferred choice, just before benefits are expected to come into payment, was supported by their representatives on grounds that it was “the fairer option for members because it gives them more time to consider the factors involved and greater certainty about the implications of their decisions.” Nonetheless, it would require members to make a complex financial decision:

The government announced that it will support members in making their choice, by requiring schemes to provide annual information statements of the accrued benefits under both the legacy and the reformed scheme. Nonetheless, to implement the proposed remedy, around three million scheme members will need to make a complex financial decision regarding their pension.<sup>78</sup>

It would also represent an administrative challenge for schemes, effectively requiring them to run two sets of benefit calculations over the next 30 years. It would also “require new systems so members are well informed to make their decisions and can record their choices.” Schemes would need to manage this process at the same time as managing other scheme administration developments, such as pension dashboards.<sup>79</sup>

In its response to the consultation on the remedy in February 2021, the Government said it had taken into consideration concerns raised on the “administrative challenges posed by the delivery of the remedy” and recognised that if schemes did not have “time to build proper processes and systems to deliver the remedy, the risk of mistakes being made is considerably greater, which will have a detrimental impact on members.” It would therefore give schemes until October 2023 to deliver the retrospective changes to members’ service in the remedy period.<sup>80</sup> This is provided for in **clause 119**.

In debate at Committee Stage, Baroness Janke highlighted the complexity of the decision scheme members would have to make:

It does not sound too challenging to say that members get to retirement then make whichever choice is best for them, but actually lots of complicated decisions requiring support and high levels of knowledge need to be taken. For example, in some cases, members may have built up rights that fall due at different ages. If there is no single retirement age, when do they have to make their choice? In some cases, a higher pension may be owed at the time under one set of rules but, as retirement continues, it may turn out that the other set

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<sup>78</sup> NAO, [Public service pensions](#), HC1242 2019-21, 19 March 2021, para 3.5

<sup>79</sup> Ibid; For more on pension dashboards, see Commons Library Briefing Paper CBP [8407](#)

<sup>80</sup> [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), February 2021, para 2.78

of rules would have given a bigger total pension. Again, help needs to be given.<sup>81</sup>

She asked what the Government intended to provide in the way of support systems to enable members to make the best choices.<sup>82</sup>

The Minister said the Government recognised the importance of “providing members with clear, accessible and accurate information.” He pointed to the requirement on schemes in **clause 29** to provide remediable service statements:

To break this down, first, for active members statements will be provided on an annual basis and enable members to see how the two sets of benefits compare as their careers progress and they get closer to retirement. Secondly, for deferred members, a one-off statement will be provided initially but the member will be able to request up to one further statement per year. For pensioner members, and in respect of deceased members, a one-off statement will be provided, ensuring that these members have the information they need to make an immediate choice in respect of their remediable service.<sup>83</sup>

In addition, schemes would “develop further guidance and tools where appropriate; we expect that some will choose to provide retirement calculators, for example.”<sup>84</sup>

In most cases, affected individuals would not have to correct their tax position due to the remedy. Where there was interaction with the tax system, HMRC would provide additional guidance.<sup>85</sup>

## Transition to the 2015 scheme

Peers raised the impact on members of some legacy schemes – in particular, the police and firefighters – of having to transfer to the 2015 scheme for future service in April 2022 as proposed in **clause 80**.<sup>86</sup>

In Committee stage debate, Lord Davies explained that there was concern among some in the police service that “a binding commitment had been given by the Government on the nature of the scheme to which they belong, and they believe that that binding promise has been broken.” He referred to ongoing legal action on that point.<sup>87</sup> In fact, an application for judicial review by the Police Superintendent’s Association of the Government’s decision to close legacy pension schemes and move all members to reformed pension

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<sup>81</sup> [HL Deb 11 October 2021 c376GC](#)

<sup>82</sup> Ibid

<sup>83</sup> Ibid c358GC

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> [HL Deb 7 September 2021 c781 \[Lord Davies\]; c782 \[Baroness Janke\]; c785 \[Lord Hendy\]; c788 \[Lord McKenzie\]; c794 \[Lord Ponsonby\]](#)

<sup>87</sup> [HL Deb 11 October 2021 c345](#)

schemes from 1 April 2022, was rejected by the High Court on 15 December 2021.<sup>88</sup>

Lord Davies went on to discuss a particular issue affecting some members of legacy schemes for the police and firefighters. This was the so-called ‘pension trap’ – where “an officer who makes financial decisions based on one pension will find their contributions from the alternative scheme reduced as a consequence.”<sup>89</sup>

The cause of this pensions trap is that in some legacy schemes for police and firefighters, such as the Police Pension Scheme 1987, a member may take their benefits after a certain number of years’ service, even where they have not yet reached the age of 55 (the minimum pension age in the 2015 scheme). Two members may therefore have joined the scheme on the same date (but at different ages) and achieve the requisite number of years’ service at the same time (but at different ages). Where those members have also accrued benefits in a new scheme, the older member is more likely to have reached age 55 and therefore be able to access benefits from both schemes simultaneously.<sup>90</sup>

At Committee stage, Lord Davies explained how this could result in financial loss to scheme members in certain circumstances. He took the example, of someone who entered the Police Pension Scheme 1987 in 2003, aged 21. At that point, they “still had the reasonable expectation of retiring at 51, after 30 years of service, with a full pension.” Assuming a final salary of £42,000, a full pension would be two thirds of that (£28,000). However, in 2022, at age 40, they would be told that they are now in the new scheme, from which benefits are not payable until age 60. This would mean that when they reach age 51 (when they had expected to draw their full pension), they could take their 1987 scheme benefits unreduced but only if they retired. If they drew their benefits from the 2015 scheme at the same point, these would be significantly reduced to reflect the fact they are being paid early, meaning a significantly lower pension than they had expected. The alternative would be to keep working but this would mean giving up the benefits they would have got from the 1987 scheme for each additional year of work (now an estimated £18,000 a year because only service to April 2022 is in the legacy scheme). Lord Davies said:

It cannot be right that a member is placed in the situation that the benefits they reasonably expected are lost and, overall, the value of their pension benefits is declining rather than increasing, even though they are continuing to work and continuing to pay contributions.<sup>91</sup>

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<sup>88</sup> [R \(Police Superintendents’ Association\) v HM Treasury \[2021\] EWHC 3389 \(Admin\)](#). For an explanation, see [Administrative Court dismisses JR challenge to police pension reform, Monkton Chambers 15 December 2021](#)

<sup>89</sup> [HL Deb 11 October 2021 c345; Amendment No. 15; HL Deb 11 October 2021 c348’ HL Deb 11 October 2021 c348](#) [Lord Ponsonby]

<sup>90</sup> HM Treasury, [Public Service Pensions and Judicial Offices Bill, Equality Impact Assessment](#), July 2021, para 3.39

<sup>91</sup> [HL Deb 11 October 2021 c346-7](#)

He called on the Government to find a solution.<sup>92</sup>

In response, the Minister said he understood the concern but that the Government should be able to make changes to the rules under which public servants build up pension rights in future:

I can reassure noble Lords that the Home Office is engaging with police stakeholders on these matters. However, it is the Government's view that it will be appropriate for future pension accrual to occur in a scheme with different retirement provisions, for the reasons set out by the noble Lord, Lord Hutton, in his report.<sup>93</sup>

In response to Lord Davies' suggestion that the Government should compensate members affected by the 'pensions trap', the Minister said this risked introducing more discrimination:

The effect would be that instead of allowing transitionally protected members to continue in service in legacy schemes, they would now be receiving the benefit of financial compensation. Non-transitionally protected members would not receive such compensation, so there would still be an unfair difference in treatment.<sup>94</sup>

In a consultation published on 9 November 2021, the Home Office said further work was needed to "understand the full implications of any potential change in approach to help mitigate this issue."<sup>95</sup>

## Meeting the costs

Another issue raised on a number of occasions in debate in the Lords was the Government's decision that – as HM Treasury officials put it in evidence to the Public Accounts Committee in April 2021 – ultimately, the costs of the remedy would be "borne by members, but the cost control mechanism will manage that cost."<sup>96</sup> In debate at Committee stage, Lord Ponsonby said:

I particularly ask the Minister to respond to the point made by the cross-party Public Accounts Committee that this is the Treasury's mistake, yet, in the words of the committee: "The Treasury now wants pension scheme members to pay the estimated £17 billion cost to put that right."<sup>97</sup>

## Background

The cost control mechanism was included as part of the reforms in the 2013 Act. The reforms were designed to manage the costs and risks to the Exchequer of providing public service pensions. Basing benefits on career average earnings rather than final salary, removes from the Exchequer much

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<sup>92</sup> Ibid

<sup>93</sup> Ibid c351

<sup>94</sup> Ibid c351

<sup>95</sup> [Consultation on Police Pension Scheme prospective remedy](#), Home Office, 9 November 2021

<sup>96</sup> [Public Service Pensions](#), Public Accounts Committee, 6<sup>th</sup> report 2021-22, June 2021, Summary, ch 1, para 8; [Oral evidence 22 April 2021, Q72](#)

<sup>97</sup> [HL Deb 11 October 2011 c362GC](#)

of the ‘salary risk’ and linking the normal pension age to the State Pension age (except for the ‘uniformed services, where it is 60) removes much of the longevity risk.<sup>98</sup> However, as an added safety valve, the Independent Public Service Pensions Commission recommended that the Government should set a cap on costs, with a mechanism to reduce them if the cap was exceeded.<sup>99</sup>

The Government legislated in section 12 of the [Public Service Pensions Act 2013](#) for a ‘cost control mechanism’, which would operate symmetrically, so that if valuations showed that costs had risen or fallen by more than two percent above or below a target rate, steps would have to be taken to bring them back to target. It applies to ‘member costs’, such as increases in life expectancy or salaries.

Initial results of the first post-reform valuations indicated that members should get “improved pension benefits for employment over the period April 2019 to March 2023.”<sup>100</sup>

On 30 January 2019, the Government paused the operation of the cost control mechanism in relation to the 2016 valuations due to uncertainty about scheme costs following the Court of Appeal judgement in *McCloud v Ministry of Justice*. It said that if the Government was successful in appealing the Court of Appeal judgment, it would “implement the changes to employee benefits as planned.” If defeated, “employees will be compensated in a way that satisfies the judgment.”<sup>101</sup>

Trade unions representing public servants objected to the pause. The TUC said the Government should “stick to its own rules and deliver what it pledged.” The 2016 valuation had showed public sector pensions to be cheaper than expected. Under the agreed rules, this “should mean lower contributions or improved pensions for members.”<sup>102</sup>

On 16 July 2020, the Government lifted the pause, as progress in determining the *McCloud* remedy meant costs were now more certain. However, it said that the cost of the remedy would count as a ‘member cost’ in the completion of the 2016 valuations.<sup>103</sup>

On 7 October 2021, the Government published amending directions for completion of the 2016 valuations.<sup>104</sup> A letter from the Government Actuary confirmed that the amending directions reflected the Government’s

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<sup>98</sup> [Independent Public Service Pensions Commission: Final Report](#), Mar 2011, para 4.25

<sup>99</sup> [Independent Public Service Pensions Commission: Interim Report](#), October 2010, recommendation 12

<sup>100</sup> [HC Deb 6 September 2018 c13WS](#)

<sup>101</sup> [HCWS1286 30 January 2019](#)

<sup>102</sup> [Government must not break public sector pension pledge says TUC](#), TUC, 30 January 2019

<sup>103</sup> [HCWS 380 16 July 2020](#)

<sup>104</sup> [The Public Service Pensions \(Valuations and Employer Cost Cap\) \(Amendment\) Directions 2021](#)

policy intention that the entire impact of the McCloud remedy should be taken into account at this set of valuations.<sup>105</sup>

### Debate in the Lords

The issue was raised in debate on the Bill in the House of Lords. At Committee Stage on 11 October, Labour Peer, Lord Davies of Brixton, moved an amendment that had two purposes – firstly, to require the calculation of the employer cost cap to be set in accordance with regulations rather than Treasury Directions and, secondly, to remove the cost of the remedy from the cost cap mechanism.

Lord Davies argued that the decision to include the cost of the remedy as a member cost and to take it into account in full at the 2016 valuation should be made by regulations, so that it was subject to Parliamentary scrutiny:

[...] the application of the cost of the remedy in that way could deny members the potential of benefit improvements and/or reductions in their contributions. That in itself is a vastly important decision and not one that should be made in the context of directions.<sup>106</sup>

For the Government, Viscount Younger of Leckie argued that the remedy increased the value of schemes to their members and it was therefore right to classify it as a ‘member cost’. Failure to capture that would “mean that members’ benefits are changed based on an incomplete and inaccurate assessment of the value of these pension schemes,” which would represent an “unacceptable risk to the taxpayer.” He said it was reasonable to capture the full impact of the remedy at the 2016 valuations because the remedy period would end by the end of the implementation period for this set of valuations, in 2022/23. Capturing the cost over four years would more closely align “those who benefit from remedy with those who pay for it.”<sup>107</sup>

Lord Davies returned to the issue at Report Stage on 29 November 2021, when he moved an amendment to remove “from the calculation of the employer cost cap the effect of changes in the cost of connected schemes, including the cost of rectifying the unlawful discrimination.”<sup>108</sup> Again, he argued that the issues should be subject to Parliamentary scrutiny as there was a direct impact on benefits received. Members should not have to bear the cost of the remedy, given that it resulted from a mistake by the Government.<sup>109</sup> Chair of the Secondary Legislation Committee, Lord Hodgson, supported the call for greater Parliamentary scrutiny of this important issue, which needed to be debated and discussed.<sup>110</sup>

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<sup>105</sup> [Letter from Government Actuary to HM Treasury, 6 October 2021](#)

<sup>106</sup> [HL Deb 11 October 2021 c360-2GC](#)

<sup>107</sup> Ibid c363

<sup>108</sup> [HC Deb 29 November 2021 c1179](#)

<sup>109</sup> Ibid

<sup>110</sup> Ibid c1181

The Minister responded that the Government had “received pre-action protocol letters on behalf of some trade unions which have indicated that they may issue judicial review proceedings to challenge the Government’s decision to include the costs of remedy in the cost-control mechanism at the 2016 valuations.” He could not comment on the specifics of live or threatened litigation. Regarding the use of Directions, the Government had power under Section 12 of the PSPA 2013 to set out in Her Majesty’s Treasury’s directions what costs must be taken into account as part of the cost-control valuations. In response to arguments that members should not have to pay for mistakes of the Government, he said:

When the cost-control mechanism was established, it was agreed that it would consider only costs that affect the value of a scheme to members. Addressing the discrimination identified in the McCloud and Sargeant judgments by giving members a choice of scheme benefits for the remedy period involves increasing the value of schemes to members. The costs associated with this should therefore be taken into account as part of the cost-control element of the 2016 valuations process. However, any ceiling breaches that occur will be waived, no member will see a reduction in benefits as a result of the 2016 valuations, and any floor breaches that occur will be honoured.<sup>111</sup>

Lord Davies objected that the decision to make this a member cost was inequitable because it would impact on those who gained no benefit from the remedy, because they joined after 1 April 2012.<sup>112</sup> He also questioned the decision to take the costs into account in full over the four years covered by the 2016 valuation, when typically pension costs were spread over a longer period.<sup>113</sup>

The Minister’s response was that it was “right to capture the full impact of remedy at the 2016 valuations given the remedy period will end by the end of the implementation period for this set of valuations.” It also more closely aligned those who would benefit from the remedy with those who would pay for it. A long spreading period “would likely exacerbate intergenerational unfairness.” He referred to the Government Actuary’s (GA) advice on this point.<sup>114</sup>

### Future changes to the cost control mechanism

Following a review of the cost control mechanism by the Government Actuary (GA), to see whether it was working as intended and “delivering the Government’s objective to protect taxpayers and workers from unforeseen changes in pension costs”<sup>115</sup>, the Government has said it will legislate for changes in the mechanism. The changes will include:

- applying the mechanism only to changes in costs in the new schemes,

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<sup>111</sup> Ibid c1185

<sup>112</sup> Ibid

<sup>113</sup> [HL Deb 11 October 2021 c359GC](#)

<sup>114</sup> Ibid c364GC; [Cost control mechanism: Government Actuary’s Review – final report](#), June 2021

<sup>115</sup> [Cost control mechanism: Government Actuary’s Review – final report](#), June 2021

- widening the margin by which costs can change without triggering the mechanism, and
- introducing an ‘economic check’, to avoid a situation in which benefits are increased in response to a reduction in ‘member costs’, at the same time as employer contributions are increasing due to changes in economic assumptions.<sup>116</sup>

In debate on 11 October 2021, Lord Ponsonby noted that “at the same time as we are having complex discussions on the immediate impact of the 2016 valuations on members, there is little or no information about how the Government plan to deal with this issue in the long term.”<sup>117</sup>

On 29 November 2021, the Minister said that the Government was “currently working through our options and we will legislate for changes to the mechanism when parliamentary time allows. While a precise date has not been set—I am sorry I cannot give that date—the aim is to implement any changes in time for the 2020 valuations.”<sup>118</sup>

The background is explained in more detail in [Public Service Pensions – the cost control mechanism](#), Commons Library Briefing Paper, CBP 6971.

## 4.3

## Amendments in the Lords

No opposition amendments to the clauses in Part 1 of the Bill were pushed to a vote and the Government made no amendments at Committee stage.<sup>119</sup>

The Government made a “large number of amendments” to the Bill at Report Stage on 29 November 2021.<sup>120</sup> Government Whip, Viscount Younger of Leckie, said he recognised that this was unusual but that the implementation of the remedy was a “complex and technical matter”, covering 40 pension schemes, each of which had their own layers of detail and complexity. Furthermore, what was being attempted was unprecedented – “retrospective changes on this scale have not previously been required for occupational pension schemes.”<sup>121</sup> The Government amendments to deal with issues that had arisen from discussions with stakeholders since the Bill had been introduced to Parliament. They fell into the following groups:

- Amendments intended to ensure the Bill provided an effective remedy for instances in which the scheme member had died.

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<sup>116</sup> HM Treasury, [Public Service Pensions: cost control mechanism consultation. Government response to the consultation](#), October 2021, para 3.39

<sup>117</sup> [HL Deb 11 October 2021 c362GC](#)

<sup>118</sup> [HL Deb 29 November 2021 c1184](#)

<sup>119</sup> [Minutes of Proceedings for Committee stage on 11 October 2021](#)

<sup>120</sup> [HL Deb 29 November 2021 c1139-1: Minutes of Proceedings for Report Stage on 29 November 2021](#)

<sup>121</sup> Ibid

- Amendments to ensure the remedy applied correctly to members who had been subject to a “Fair Deal” arrangement, on a compulsory transfer from the public sector to the private sector.
- A technical change to Clause one, to ensure that all affected members of the firefighters’ schemes were included in the scope of the remedy.
- Amendments to the way in which the remedy applied to the Armed Forces Pension Scheme, to reflect the nature of that scheme.
- Amendments to allow the Lord Chancellor to consider the needs of the family court, in which magistrates sit, when making decisions about reappointing retired magistrates.
- Amendments to allow a decision made by a member of the civil service or judges’ schemes to participate in partnership pension accounts (a defined contribution pension scheme) to be reversed so that they could be reinstated in the main judicial or civil service scheme.
- Amendments to deal with multiple periods of service in different schemes, so that the remedy would apply to each period of service affected.
- Amendments to ensure scheme regulations can provide an accurate remedy for people with less straightforward circumstances.
- An amendment to capture that all cases where a person has obtained an ‘immediate detriment remedy’ (where a scheme has taken action to correct a member’s position in advance of the legislation).
- Amendments to deal with tax-related consequences of the remedy.<sup>122</sup>

The amendments had the shared objective of “ensuring that members affected by the discrimination identified by the courts are able to receive a comprehensive remedy in line with the overall approach set out in the Government’s consultation response, on a fair and equal basis.”<sup>123</sup>

Responding for the Liberal Democrats, Baroness Janke said she understood the complexity of what the Government was trying to achieve:

Considering the scale, complexity and magnitude of the Bill, together with the millions who will be affected by it, I understand that these amendments try to cover a variety of contexts and circumstances to provide a comprehensive remedy to the previous discrimination. I recognise that the whole range of contexts and circumstances means that many will require fine detail. I hope these will, in many ways, support the millions of public sector workers who have suffered discrimination as a result of earlier circumstances.<sup>124</sup>

For Labour, Lord Ponsonby welcomed amendments:

We have no objection to the amendments. They are largely technical and clarifying in nature. For example, they would ensure that the Bill operates as intended when a member of one of the affected pension schemes dies. I also accept that adding these amendments now will ensure that the Bill will start

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<sup>122</sup> Ibid

<sup>123</sup> [HL Deb 29 November 2021 c1141](#)

<sup>124</sup> Ibid c142

its scrutiny in the House of Commons with these points clarified, which we welcome.<sup>125</sup>

Further government amendments may follow in the Commons.<sup>126</sup>

## 4.4

# Part 1, Chapter 1 of the Bill– the main unfunded schemes

## Overview

Chapter 1 of Part 1 of the Bill (**clauses 1 to 38**) would provide for the remedy for public service pensions schemes other than judicial schemes and local government schemes.<sup>127</sup>

Eligible members would have choice whether they build up benefits in the relevant reformed or legacy scheme for the ‘remedy period’ - 1 April 2015 to 31 March 2022. The main question for the consultation was when that choice would be made. There were two options:

- An **immediate choice** - where the choice would be made as soon as possible after the policy is implemented; or
- A **deferred choice underpin** - where the choice would be made at the point benefits are drawn and, up until then, members would be treated as having been in their legacy scheme for the remedy period.<sup>128</sup>

The choice would be offered to all affected members, whether or not they originally received transitional protection. ‘Eligible members’ are those in service on or before 31 March 2012 and still serving on or after 1 April 2015, including those who are currently active, deferred or retired, and those with a qualifying break in service of less than 5 years.<sup>129</sup>

In its response to the consultation in February 2021, the Government said it would proceed with the **deferred choice underpin**. Most respondents to the consultation had supported this option, primarily because members would have greater certainty on their benefit entitlements at the point that they made the decision.<sup>130</sup>

In recognition of the administrative challenge this would represent for schemes, the Government decided to give them until October 2023 to fully

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<sup>125</sup> Ibid

<sup>126</sup> Ibid

<sup>127</sup> Clause 33

<sup>128</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes](#), CP 253, July 2020, Executive Summary

<sup>129</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, Executive Summary

<sup>130</sup> Ibid

deliver the retrospective changes needed for the remedy period, including resolving the cases of members who have retired or died since April 2015. The remedy period would still end on 31 March 2022 and all members would build up benefits in the reformed schemes from that date.<sup>131</sup>

### Future service from April 2022

The Government said it still believed that “the reformed schemes initially introduced in 2015 provide an appropriate level of public service pension provision” and that it would legislate to close the legacy schemes to future service from April 2022. From that date all members would build up benefits in the relevant reformed scheme.<sup>132</sup>

This would ensure that all active members were treated equally in respect of the pension scheme designs offered for future service and would all be in the reformed schemes from that date. The final salary link for members with prior service in final salary schemes would be retained (meaning that benefits in the legacy final salary schemes would be based on pensionable pay on or near their retirement rather than at the point they move to a reformed scheme). The increased pension age was the main issue raised by respondents to the consultation in relation to the transfer to the reformed schemes from April 2022.<sup>133</sup> For more detail, see [Public service pensions: response to McCloud](#), Commons Library Briefing Paper CBP 9177.

## What is remediable service

**Clause 1** would identify those periods of pensionable service that are eligible for the remedy. It provides that the member must have:

- Service in the period when the discrimination arose. In most cases, this is between 1 April 2015 (the ‘closing date’ for legacy schemes under [section 18 of the Public Service Pensions Act 2013](#)) and 1 April 2022,<sup>134</sup>
- Been eligible for transitional protection, or would have been but for the discriminatory requirements for this; and
- Been a member of a legacy scheme on or before 31 March 2012 (or, in the case of certain schemes for firefighters, eligible to be a member of such a scheme);<sup>135</sup> and

<sup>131</sup> Ibid, para 2.78-9

<sup>132</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes](#), CP 253, July 2020, Executive Summary, para 3.7-12

<sup>133</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para 2.14-5

<sup>134</sup> The exception is the ‘Agency schemes’, relating to the Secret Intelligence Service or Security Service, where the closing date was 1 April 2016

<sup>135</sup> The specific reference to the firefighters’ scheme was added at Report Stage in the Lords. It was needed to “reflect the fact that the eligibility criteria in certain schemes for firefighters were slightly different to those provided in all other arrangements” ([HL Deb 29 November 2021 c1139](#))

- Not have a ‘disqualifying break’ in service of more than five years.<sup>136</sup> A break in service relating to a period in a private sector scheme due to a compulsory transfer of employment to which the Fair Deal policy applies, is not a disqualifying break.<sup>137</sup>

### Issues raised in consultation

Some respondents to the earlier Government consultation opposed the exclusion from the remedy of members who joined after 31 March 2012 but before 1 April 2015, arguing that this could “lead to indirect sex, race and age discrimination as those joining later are more likely to have been women, from minority ethnic groups and younger.”<sup>138</sup>

However, the Government said it would not extend protection to members who could not reasonably have expected it, the proposed introduction of the reformed schemes having been well publicised at the time. Furthermore, they were not subject to the unlawful discrimination identified by the Court of Appeal in *McCloud* because transitional protection was not available to anyone who joined after 31 March 2012. It said that changes to pension arrangements or other terms and conditions of employment “by their nature impact differently on those who join or leave an employment at different times.”<sup>139</sup>

### Remediable service to be treated as pensionable in legacy scheme

The remedy involves first returning those with remediable service in a new scheme to the relevant legacy scheme. They can later elect to receive new scheme benefits under **clause 6 or 9**.

This is provided for in **clause 2**, which would provide that where a person has remediable service in a new scheme, that is retrospectively treated as pensionable service under the relevant legacy scheme (i.e.: the scheme of which they would have been a member between April 2015 to 31 March 2022 but for age the discrimination).<sup>140</sup> This would apply for the purpose of determining which scheme is required to pay benefits and how they should be calculated.<sup>141</sup> It would not apply to:

- The liability to pay contributions because this could give rise to complex tax issues if this changed retrospectively. Instead, there is

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<sup>136</sup> Clause 1 (6) and (7); HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), July 2020, para 2.18. This is in line with the existing principle that those with a break in service of less than 5 years should be deemed to have had continuous service

<sup>137</sup> Clause 1 (7) (b); [Bill 211-EN](#), para 95

<sup>138</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para 2.4

<sup>139</sup> *Ibid*, para 2.5

<sup>140</sup> [Explanatory Notes to the Public Service Pension Schemes and Judicial Offices \[HL\] Bill 44, 2021-22](#), para 96

<sup>141</sup> Clause 2 (3)

provision in **clauses 13 to 15** to correct for any (notional) overpayment or underpayment of contributions.<sup>142</sup>

- Benefits that relate to additional voluntary contributions or transfers in, which are covered in **clauses 18 and 19**.

## Treatment of benefits already paid

**Clause 3** would provide for benefits already paid to a pensioner or deceased member in relation to ‘remediable service’ (between 1 April 2015 and 1 April 2022), to be treated as paid by the relevant legacy scheme. The purpose is to avoid the need for administrative complexities related to tax, to allow for any overpayment or underpayment of benefits to be calculated and provide clarity as to where costs fall.<sup>143</sup>

## Meaning of relevant legacy scheme

The purpose of **clause 4** is to ensure members would be moved back to the correct legacy scheme, and to the correct section of that scheme (as many have more than one section). It provides that the appropriate scheme or section would usually be that of which they were last a member. In the case of an individual who opted out:

- Where they opted out on or before the ‘closing date’ and there was a rule to prohibit them from re-joining, the relevant legacy scheme will be the one they would have been entitled to join on the closing date.
- Where they opted out of a Chapter 1 scheme after the closing date but re-joined a Chapter 1 new scheme before 1 April 2022 and the rules of the legacy scheme prohibited them from re-joining, the relevant legacy scheme is the one they would have been entitled to join when they joined the new scheme.
- If they had had not previously participated in a legacy scheme, the appropriate legacy scheme is the one they would have been entitled to join on 31 March 2012.<sup>144</sup>

## Elections for opted-out service

Under **Clause 5**, where an individual opted out of a legacy or new scheme during the remedy period, scheme regulations would need to make allowance for that service to be re-instated.

This is to ensure that members who would have had remediable service but opted out (for example, because they considered the new scheme to be unsuitable) are able to re-join their legacy scheme provided they meet the

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<sup>142</sup> [Bill 211-EN](#), para 100

<sup>143</sup> *Ibid* para 103-4

<sup>144</sup> *Ibid* para 106

criteria in regulations. The reason is that members may have taken a decision to opt out that they would not have taken had the discriminatory arrangements not been in place (for example, an individual who opted out might not have done so had remaining in the legacy scheme been an option for them).<sup>145</sup>

Regulations under **clause 5(5)** may set conditions for re-instatement, for example, allowing reinstatement only where the member can demonstrate that they opted out as a consequence of the discrimination.

Where an individual opted out into a [partnership pension account](#) (a [defined contribution](#) pension scheme for members of the Civil Service Pension Scheme), regulations may provide for reinstatement in the legacy scheme, only where the individual transfers in their rights in the partnership scheme.<sup>146</sup>

Any such regulations would need to set a deadline for members to elect to have their service re-instated and for this to be no more than a year after they have been sent their ‘remediable service statement’ under **clause 29** or such later time as the scheme manager considers reasonable. Once made, an election would be irrevocable.<sup>147</sup>

## Immediate election for new scheme benefits: pensioner and deceased members

**Clause 6** would require regulations to be made allowing a pensioner or deceased member with remediable service in a legacy scheme to choose new scheme benefits. This choice would be ‘immediate’ because benefits are already in payment.

If benefits from a new scheme are already in payment and they elect new scheme benefits, they would not be transferred back to the legacy scheme under clause 2 (1). This is “to avoid double correction of members’ pension benefit and to avoid unnecessary revisions to tax returns.”<sup>148</sup>

Under **clause 6(7)** the election for new or legacy scheme benefits would apply to the whole period of remediable service. This means members could not retain a mixture of rights from the legacy and new scheme.<sup>149</sup>

Under **clause 7** the election must take place within a year of a ‘remediable service statement’ being sent to the member or in respect of them, or such later time as the scheme manager considers reasonable in the circumstances. It would be treated as taking effect immediately before the

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<sup>145</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p24

<sup>146</sup> [Bill 211-EN](#), para 110

<sup>147</sup> [Bill 211-EN](#) para 106

<sup>148</sup> [Bill 211-EN](#) para 115

<sup>149</sup> *Ibid* para 117

person became entitled to benefits or, if the member died before becoming a pensioner, immediately before their death.

**Clause 8** would provide a power for schemes to deem an election to have been made if no decision has been communicated by the end of the election period. Under clause 8(3) regulations can specify conditions to be met, including in relation to the value of benefits payable. This would allow an election to be deemed to have been made, where it is clear this would lead to a better outcome for the member.

**Clause 9** would provide that where a person has remediable service in an employment or office that is pensionable under more than one legacy scheme, an election under Clause 6 would apply in all of those schemes.<sup>150</sup>

### Issues raised in consultation

The majority of respondents to the consultation who expressed a view, supported a retrospective choice to those already retired, while stressing the importance of it being an informed choice. There were concerns among employers and administrators about the administrative complexities that would be involved.<sup>151</sup>

## Deferred election for new scheme benefits: active and deferred members

**Clause 10** would require schemes to make regulations allowing active and deferred members to elect to receive new scheme benefits for remediable service. Where they have multiple employments that are pensionable separately, they would make a choice in relation to each. If no election is made, benefits from the legacy scheme continue to be payable.

Under **clause 10(5)** the election would apply to all of the members' remediable service. This means members with 'tapered protection' will not be able to retain a mixture of benefits from the legacy and new scheme for this period.<sup>152</sup>

Under **clause 11**, scheme regulations must set a deadline for elections to be made. This must be no earlier than one year before the day the member is reasonably expected to become entitled to new scheme benefits. The choice would take effect immediately before the pension comes into payment. In the case of a deceased member, the choice would be treated as having effect immediately before their death.

Regulations under **clause 11(5)** may specify how elections are to be made, who can make one on behalf of a deceased member and how and when an election may lapse or be revoked. Under **clause 11(6)**, an election cannot

<sup>150</sup> Ibid para 123

<sup>151</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para A.2-7

<sup>152</sup> [Bill 211-EN](#) para 127

lapse or be revoked after new scheme benefits have come into payment. Under **clause 11(7)**, where an election lapses or is revoked, the election is treated as never having had effect.

**Clause 12** would enable regulations to make provision for a choice to be deemed to have been made where certain conditions are made, including those relating to the value of benefits payable. This would, for example, enable a scheme to deem an election to have been made where it is clear this would lead to a better outcome for the member.<sup>153</sup>

**Clause 13** would provide that where a person has remediable service in more than one legacy scheme, an election for new scheme benefits applies to all those schemes.<sup>154</sup>

## Pension benefits and lump sum benefits: pensioner and deceased members

**Clause 14** would provide for the treatment of overpaid and underpaid pension benefits and lump sums to pensioner or deceased members of legacy schemes for the remedy period. Corrections may be needed if the amount of entitlement changes, either when a member is returned to the legacy scheme under **clause 2**, or when they elect new scheme benefits under **clause 6**, or both.

Under **clause 14(3) and (4)**, if a pensioner or deceased member has been overpaid pension benefits, the difference must be repaid to the scheme. If they have been underpaid, the scheme pays them the difference. Subclauses **14(5) and 14(6)** make equivalent protection for lump sums.

The reason for treating lump sum and pension benefits separately is that they are treated differently for tax purposes. For example, lump sums paid to pensioner members and in relation to those who die before age 75, are usually exempt from tax.<sup>155</sup>

Under- and overpayments of lump sums can occur because the rules are different in legacy and new schemes: legacy schemes generally provide an automatic lump sum, whereas new schemes give the option to exchange part of the pension to a lump sum.

Where a pensioner member, or the representative of a deceased member, becomes entitled to receive benefits from an alternative scheme to that from which they have already been paid, they will need to make a decision about any lump sum payable. Where they choose a lower lump sum, they will need

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<sup>153</sup> Ibid para 134

<sup>154</sup> Ibid para 135

<sup>155</sup> Ibid para 140

to repay the difference. However, they may be able to opt for an equivalent or larger lump sum.<sup>156</sup>

## Member contributions

Currently, the rate of contributions that pension scheme members pay to their scheme is set in regulations. In some schemes, it is the same in the relevant legacy and new schemes but in others – primarily the police and firefighters’ schemes – it is different. This means that moving from one scheme to another may require a balancing payment or refund to ensure that the right level of contributions has been paid.<sup>157</sup>

**Clause 15** would provide for the correction of any **overpayment or underpayment of contributions by a pensioner or deceased member in relation to the remedy period**. By virtue of **clause 2(4)**, contribution liabilities are unaffected. However, there may be a notional under- or overpayment of contributions, compared to what the individual would have paid had they been a member of the alternative scheme throughout. Where there has been an overpayment, the scheme must compensate the scheme member. Where there has been an underpayment, the pensioner or representative of the deceased member, must make a payment to the scheme (but see **clause 18** which provides for liabilities to be reduced or waived).

**Clause 16** would provide for the correction of under or overpayment of contributions **by active or deferred members in relation to the remedy period at the point they are returned to the legacy scheme under clause 2(1)**. This means they are put in the same position with respect to contributions as if they had always been in that scheme.<sup>158</sup>

**Clause 17** would provide for any further correction of contributions needed at the point an active or deferred member chooses to receive new scheme benefits under **clause 10**. Again, this is to ensure that they are put in the same position with respect to contributions that they would have been, had they always paid contributions on the basis of new scheme membership.<sup>159</sup>

## Power to reduce or waive liabilities

**Clause 18(1)** would provide for legacy scheme regulations to make provision to reduce or waive a liability for an overpayment of benefits made to or in respect of a pensioner or deceased member. HM Treasury explains that the ability to reduce or waive an overpayment will be particularly important in cases where the remedy results in a pensioner member’s benefits being

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<sup>156</sup> Ibid para 140

<sup>157</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), CP 253, July 2020, Annex, para A.7

<sup>158</sup> Ibid para 154

<sup>159</sup> [Bill 211-EN](#) para 161

overpaid for a reason other than their own choice. For example, where a pensioner member with tapered protection had their entitlement reduced:

For pensioner members the impact of this is more immediate because their pension in payment will be reduced from the date on which their immediate choice is made. They will also need to repay any amounts overpaid up to that point. To mitigate any potential hardship or undue burden on a member that could result, this clause provides a power to make regulations allowing scheme managers to reduce or waive an amount that needs to be repaid, for example overpaid benefits or an overpaid lump sum.<sup>160</sup>

Schemes would also be able to offer flexibility regarding repayments (a payment plan) under **clause 26 (1)(b)**.<sup>161</sup> Active or deferred members with tapered protection are not covered by **clause 18(1)** because, although they may receive a lower lump sum and/or pension in payment than they anticipated, no payment has yet been made.<sup>162</sup>

Under **clause 18(2) to (4)**, a liability for an underpayment of pension contributions (following a correction under clauses 15, 16 or 17) can be reduced or waived. This can include reducing the amount owed to reflect tax relief, to ensure they are put in the “correct net position with respect to contributions and tax relief.”<sup>163</sup>

Under **clause 18(5) to (7)** the liability on a scheme to pay compensation to a member can be reduced or waived, in particular, to reflect tax relief amounts. This power “allows scheme managers to reduce the amount of compensation owed from the scheme to the member to reflect the excess tax relief the member has received, putting them in the correct net position.”<sup>164</sup>

**Clause 18(8)** would provide for scheme regulations to make provision to reduce or waive, with the member’s agreement, compensation due from the scheme in relation to overpaid contributions at the point of moving back to the legacy scheme under clause 2. This is to avoid double correction of contributions where the member envisages electing new scheme benefits.<sup>165</sup>

At Committee stage in the Lords, the Minister explained how this clause would allow contribution under and overpayments to be managed:

First, the clause provides that contributions owed by or to a member may be reduced to reflect tax relief that was paid or due on those contributions. The purpose of this is to ensure the member is placed in the correct position net of tax. Secondly, it provides that contributions owed by the scheme to a person under Clause 14 may by agreement be waived. This is to ensure that members

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<sup>160</sup> Ibid, para 3.10

<sup>161</sup> HM Treasury, [Policy Statement. Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p27

<sup>162</sup> Ibid

<sup>163</sup> [Bill 211-EN](#) paras 166 to 168; HM Treasury, [Policy Statement. Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p28

<sup>164</sup> HM Treasury, [Policy Statement. Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p28

<sup>165</sup> Ibid para 168

who become legacy scheme members under Clause 2(1) and owe contributions as a result, can have that liability waived until they make a choice under Clause [10] whether to receive legacy benefits or instead elect to receive new scheme benefits. Where a member knows they want to receive new scheme benefits, this will allow them to avoid having to pay legacy contributions in the interim period. Corresponding provision is also made for amounts owed by the scheme to the member to be reduced or waived with the member's consent.<sup>166</sup>

The clause was “part of a package of measures intended to mitigate such circumstances,” including those in **clause 23** (power to pay compensation) and **clause 25** (remediable arrangements to pay voluntary contributions to legacy schemes). The Government expected schemes to “look at each individuals’ circumstances on a case-by-case basis, subject to any provision in Treasury directions” under Clause 27 (3).<sup>167</sup>

The Minister explained why the details were left to scheme regulations:

As a general point, there are 17 new public service pension schemes in the scope of Chapter 1 of the Bill. For each of those schemes there are connected legacy schemes. Pension provision for these workforces has evolved considerably over several decades. In view of the complex landscape [...] that has resulted from this, it is particularly important that schemes have flexibility to deal with some of the more specific circumstances in which members find themselves.<sup>168</sup>

## Pension sharing on divorce

On divorce or dissolution of a civil partnership, a court can make a ‘pension sharing order’, for the capital value of the pension to be divided between the two parties, in a proportion determined by the court. The scheme member’s pension is reduced by a ‘pension debit’ and the ex-spouse or civil partner is granted a ‘pension credit.’ In public service pensions, the pension credit member is given rights in the scheme (in the private sector, they have the option to transfer it to another scheme).<sup>169</sup>

**Clause 19(1) to (4)** would provide for scheme regulations to be made to adjust the pension benefits of both pension credit and pension debit member, to reflect a retrospective change following the application of the remedy. The scheme may make provision to adjust a pension credit on the assumption that an election is either made or not made. This is to “enable the scheme to award the higher pension credit, based on the higher value of the legacy or new scheme benefits, and to reflect the fact that the pension credit may be accessed prior to the point where a pension debit member is able to make their election.”<sup>170</sup>

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<sup>166</sup> [HL Deb 11 October 2021 c338GC](#)

<sup>167</sup> Ibid

<sup>168</sup> [HL Deb 11 October 2021 c338GC](#)

<sup>169</sup> For more on the background, see [Pension sharing on divorce](#), Commons Library briefing paper, CBP 430, November 2020, section 2.2

<sup>170</sup> [Bill 211-EN](#) para 173

As scheme members with ‘mixed’ service (meaning that due to tapered protection, they have remediable service in both the new and legacy scheme) are not able to retain that, **clause 19(5)** would require scheme regulations to include provision that a pension credit may only be based on the value of legacy or new scheme benefits but not both.<sup>171</sup>

Only divorces that took place on or after the start of the remedy period on 1 April 2015 would be affected by the remedy. Where a divorce has not yet taken place, two or more sets of transfer values would need to be calculated for the remedy period: one based on legacy scheme benefits and the other on new scheme benefits. The transfer value provided to the court for divorce proceedings would be the higher of the two.<sup>172</sup>

The Bill makes no provision for the other methods for dealing with pensions on divorce or dissolution of a civil partnership (e.g. pension offsetting and attachment orders). HM Treasury explain this is because these approaches “inherently involve more uncertainty than pension sharing orders, meaning it is more difficult to justify any interference with an ex-spouse’s or former civil partner’s benefits following a member’s selection of which set of benefits they wish to receive.”<sup>173</sup>

## Voluntary contributions

### Background

Both new and legacy schemes contain provisions allowing members to make additional contributions to enhance pension benefits. In older legacy schemes, these were ‘added years’ from around 2007 onwards this gradually changed to ‘added pension.’<sup>174</sup> The new schemes for civil servants, teachers and NHS provided an option to buy-out some or all of any reduction to pension if benefits are taken before normal pension age.<sup>175</sup> The option was provided because of the pension age in the new schemes is linked to the State Pension age and therefore higher than in the legacy schemes, where it is 60 or 65.

**Clause 20** would make provision with respect to rights to additional pension benefits, or entitlement to earlier payment of benefits, obtained by making additional voluntary contributions during the remedy period.

**Clause 20(2)** would allow schemes to adjust any rights gained from **voluntary contributions in a legacy scheme, where a member elects to**

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<sup>171</sup> Ibid para 174

<sup>172</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p30-1

<sup>173</sup> Ibid

<sup>174</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), CP 253, July 2020, Annex A, para A14-18

<sup>175</sup> For example, [Alpha Scheme Guide](#), section 2.C (effective pension age); [NHS Pensions/increasing your benefits/early retirement reduction buy-out](#); [Teachers’ Pensions/increasing your pension/buy-out](#)

**receive new scheme benefits.** In particular, the rights could be varied so that they are of an equivalent value to those the member would have secured had to the voluntary contributions been paid to that scheme.

**Clause 20(4) and (5)** would provide for rights to additional benefit, or early payment of benefit, in a **new scheme to be extinguished and for the member to receive alternative benefits in the legacy scheme, or compensation.** The Explanatory Notes say that “this allows the voluntary contributions made by the member to be honoured.” There are three permitted options:

- benefits of an equivalent value to the extinguished rights;
- benefits that are the same as those that would have arisen had the voluntary contributions been made to that scheme; or
- compensation for the voluntary contributions made. Where compensation is provided, the amount can be reduced to reflect tax relief, in order to place the member in the net position they would in, had they not made the voluntary contributions.<sup>176</sup>

Respondents to the consultation expressed concern that those who had bought rights to an earlier pension age in a new scheme might lose that, particularly that all active scheme members are to move to the new schemes for future service from 1 April 2022.<sup>177</sup> The Government said it was “considering ways to ensure that members may retain rights in the schemes in which they made voluntary member contributions, specifically in respect to EPA and ERRBO.”<sup>178</sup> The Explanatory Notes state that the policy is that the “original benefit purchased would apply (i.e. the buy-out of actuarial reduction on early retirement) would apply if the member elects new scheme benefits.”<sup>179</sup>

Under **clause 20(5)(d)**, regulations would be required to make provision for an amount of voluntary contributions (minus tax relief) paid by a member who is now deceased, to be paid to their representatives.

## Transfers

When a member leaves a pension scheme, they may be eligible to transfer rights out to another scheme. When they join, they may be able to transfer rights in, including from another public service scheme.<sup>180</sup> The Government’s consultation considered whether a member transferring benefits built up over the remedy period should have to make their choice between new or legacy scheme benefits at the point of transfer, or at the point they expect to receive benefits. It looked separately at transfers in and outside of the [Public Sector](#)

<sup>176</sup> [Bill 211-EN](#), para 177

<sup>177</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes, Government response to consultation](#), CP 373, Feb 2021, para A.43-6

<sup>178</sup> Ibid

<sup>179</sup> [Bill 211-EN](#), para 178

<sup>180</sup> [Pension Schemes Act 1993](#), part 4ZA, chapter one

[Transfer Club](#) (an arrangement which protects the value of pension rights as people change jobs within the public sector).<sup>181</sup> It concluded that:

- A member undertaking a ‘Club transfer’ would not be required to make their choice at the point of transfer, but at the point they take their benefits relating to the remedy period. Any decision would relate to all service in respect of the period from 1 April 2015 to 31 March 2022, whether that arose from service in employment in the receiving scheme, or service arising from a Club transfer.<sup>182</sup>
- A member who opted to transfer their benefits outside of the Public Sector Transfer Club would not be expected to make a choice between legacy and new scheme benefits at the point of transfer. In such a situation, the scheme would calculate two transfer values, one on each set of benefits, and pay across the highest of the two.<sup>183</sup>

**Clause 21** would provide that regulations may make provisions about transfers in and out of the scheme.

**Clause 21(1)(a)** would provide for regulations to make provision about the transfer out of remediable service. This is to “allow schemes to reflect, when calculating the transfer value, that members with remediable service are able to choose whether to receive new scheme benefits or legacy when calculating the transfer value.”<sup>184</sup>

**Clause 21(1)(b) to (d)** would make provision of transfers in from another public service scheme. HM Treasury’s policy note explains that:

3.40 The policy approach is to provide that where members move between public service pension schemes they will retain a choice in relation to any period of remediable service. The member will be able to choose whether to receive legacy benefits (based on the legacy benefits transferred from the exporting scheme) or new scheme benefits (based on the new scheme benefits from the exporting scheme). This will ensure that the benefits of the deferred election approach are maintained where a member moves between public service schemes, rather than requiring them to make their decision at the point they transfer their benefits.<sup>185</sup>

**Clause 21(1)(e)** would allow schemes to make provision for a transfer into a Chapter 1 scheme during the remedy period. The scheme will be able to provide rights in the legacy scheme rather than the new scheme where the transfer was originally to the new scheme, or to vary the rights to reflect an election for new scheme benefits.

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<sup>181</sup> For details and rules, see [Public Sector Transfer Club](#) on the Civil Service Pensions website.

<sup>182</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes](#), *Government response to consultation*, CP 373, Feb 2021, A.106

<sup>183</sup> [Public sector pensions: changes to the transitional arrangements for the 2015 schemes](#), HM Treasury, July 2021, para A.56

<sup>184</sup> [Bill 21-EN](#) para 182

<sup>185</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, para 3.40

## Debate in the Lords

At Committee Stage in the Lords, the Minister explained:

The approach taken by the Bill is to ensure that members are placed in the position they would have been absent the discrimination that arose. In relation to transfers, this means that where members move between public service pension schemes they will be able to retain a choice in relation to any period of remediable service. The member will be able to choose whether to receive legacy benefits based on the legacy benefits transferred from the exporting scheme or new scheme benefits based on the new scheme benefits from the exporting scheme.<sup>186</sup>

He said that it was important that the approach taken by this clause took a “permissive, rather than mandatory approach to scheme regulations.” Schemes needed to be able to make regulations that were “legally and practically operable, in view of existing process and requirements in scheme regulations.”<sup>187</sup>

## Powers to make provision about special cases

**Clause 22** would provide for further regulations to be made in relation to members with remediable service. Clause 22(2) describes specific examples of the types of provision that scheme regulations may need to make. They include provision about:

- Members who have mixed service i.e. tapered protection. This power may be exercised in conjunction with the power to reduce or waive liabilities (clause 18), powers to pay compensation (clause 23) and powers to allow payment by instalments, with interest (clause 26).
- Members whose schemes offered the option of “buying out” the actuarial reduction that would have been applied if the member retired before pension age. This is to allow equivalent arrangements to be provided in the legacy scheme in relation to remediable service.
- Members who are partially retired. This is to allow for the fact that there are different arrangements in different workforces for this.
- Benefits payable to or in respect of a member in respect of whom an annual allowance tax charge has been paid through ‘scheme pays’ (meaning the scheme settles a tax charge and there is a corresponding reduction in the member’s pension entitlement). Where the remedy results in a lower tax charge (or no tax charge) the scheme would be able to provide indirect compensation through an uplift in benefits.<sup>188</sup>

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<sup>186</sup> [HL Deb 11 October 2021 c339GC](#)

<sup>187</sup> Ibid

<sup>188</sup> HM Treasury, [Policy Statement. Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p 40-1

This provision could be used to deal with scheme specific issues that arise due to the remedy, for example, relating to ill-health retirement.<sup>189</sup>

## Power to pay compensation

In its response to the consultation in February 2021, the Government said there was a clear view from respondents that the remedy, taking into account its interaction with the tax system, should put individuals back in the position they would have been had the discrimination not happened. There was concern about the potential for individuals to receive large and unanticipated tax demands with no means of meeting them.<sup>190</sup>

Situations where compensation may be needed to put members as far as possible, back in the position they would have been absent the discrimination, include “unintended results due to the interaction of the remedy and the normal operation of the tax system (for example, due to statutory time limits.”<sup>191</sup>

**Clause 23** would provide a power for scheme managers to pay compensation in respect of losses incurred by a member as a result of the discrimination or the remedy.

**Clause 23(2)** would allow schemes to make regulations for an employer to reimburse the scheme for compensation paid to a member.<sup>192</sup>

**Clause 23(3) to (6)** would provide that compensation is payable to an individual who meets any of the following three conditions, and the loss is ‘of a description specified in Treasury directions’:

- The loss is attributable, or reasonably regarded as attributable, to a relevant breach of the non-discrimination rule.
- The loss is attributable to the application of Chapter 1 of this Act.
- The member is a ‘relevant member’ and the loss is a ‘Part 4 tax loss’ attributable to remediable service in a Chapter 1 scheme.

Under **clause 23(7)**, a ‘relevant member’ would be a member who was a pensioner or deceased member of a Chapter 1 scheme immediately before section 2(1) came into force and in respect of whom an election for new scheme benefits has been made.

**Clause 23(8) and (9)** would provide that a loss is a loss of any kind, in particular, a Part 4 tax loss i.e.: a loss due to a member incurring a tax

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<sup>189</sup> Ibid

<sup>190</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes, Government response](#), CP 373, Feb 2021, para 2.87-90

<sup>191</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p 40-1

<sup>192</sup> [Public Service Pensions and Judicial Offices Bill, Delegated Powers Memorandum](#), December 2021, para 83

charge, or increased charge, under Part 4 of the Finance Act 2004, or not being entitled to relief, or being entitled to less relief under that Part. The purpose is to ensure that “members can receive compensation where HMRC’s statutory time limits do not allow for correction of the amount of tax paid.”<sup>193</sup>

In response to questions raised by Baroness Janke at Second Reading, the clause was intended to prevent “double recovery” in circumstances where the scheme manager and the employer were the same body, for example, in relation to firefighters:

On the prevention of double recover in situations, for example, in the firefighters’ scheme, where a member has received compensation from an employer rather than a scheme manager [...] Clause [23], in particular Clause [23 (13) (a)], is designed to prevent double recovery by setting out that a scheme manager cannot pay compensation in respect of “compensatable losses” insofar as the member has already received compensation in respect of those losses.<sup>194</sup>

It would achieve this is combination with clause 28, which would disapply clauses 2 to 30 in relation to a person who had benefitted from an “immediate detriment remedy”, which included situations where the scheme manager had agreed with a person that they had rights arising as a result of the discrimination and had taken steps to implement that agreement.<sup>195</sup>

The approach to paying compensation in different circumstances is explained further in HMRC’s policy note. A summary is set out below.

### Annual allowance

The Annual Allowance (AA) is a limit on the amount of pension benefits and individual can build up in a particular year. The standard amount in 2021/22 is £40,000. In defined benefit schemes, such as public service schemes, this is measured by looking at the increase in benefit entitlement build up in a particular year and multiplying it by a factor of 16.

To reduce the likelihood of individuals breaching the AA, they can carry forward unused annual allowances from the previous three years. However, if they still breach the AA, any excess will result in an annual allowance tax charge at the individual’s marginal rate of income tax. Members can ask the scheme to pay the charge on their behalf in exchange for a reduction of benefits (known as ‘scheme pays’).<sup>196</sup>

Annual allowance tax charge (AATC) adjustments may be required at the point certain members are returned to their legacy schemes in 2023, and/or at the point when they retire, if they chose new scheme benefits. The Government says that, for the majority of members, being returned to the

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<sup>193</sup> [Bill 211-EN](#) para 191

<sup>194</sup> [Dear colleagues letter from Viscount Younger of Leckie, 16 September 2021](#)

<sup>195</sup> Ibid

<sup>196</sup> FA 04, Part 4; Gov.UK, [Tax on your private pension contributions/annual allowance](#)

legacy scheme, “will result in lower AATCs and refunds of tax and compensation being due.”<sup>197</sup>

For an individual who chooses new scheme benefits at retirement, any increase in entitlement would accrue in a single year, shortly before they retirement. This could trigger an AA liability than the individual might have faced had they always received new scheme benefits for the remedy period.

Because this would be a direct result of the of the design of the remedy, which concentrates the increased benefit entitlement in a single year, the Government does not intend individuals to bear the cost of it.<sup>198</sup> It is taking the necessary steps to address this, with provisions in clause 11 of the [Finance \(No 2\) Bill 2021/22](#) to would enable “additional annual allowance to be available so that an individual will not pay more annual allowance charge than they would have done if they had accrued their chosen benefits in the relevant tax years.”<sup>199</sup>

### Lifetime allowance

The [lifetime allowance \(LTA\)](#) is a limit on the tax-free saving an individual an individual can build up over a lifetime. In 2021/22, the LTA is £1,073,100. In defined benefit schemes, such as public service schemes, this is measured by looking at the annual pension to be paid in the first year, plus the lump sum, and multiplying it by a factor of 20. Savings above the LTA are taxed at 55% if taken as a lump sum, 25% if paid as a pension.<sup>200</sup>

HM Treasury explains that the remedy will in some case result in an individual facing new or additional LTA charges. If they have their pension reassessed within statutory time limits, the normal processes will apply. This means that if additional charges are payable, they will usually be paid by the scheme to HMRC. If a refund of overpaid LTA charges is due, it will be paid by HMRC to the scheme, who will then adjust the member’s benefits. If an overpaid LTA charge cannot be corrected within statutory time limits, the member will receive compensation equivalent to the LTA charge.<sup>201</sup>

### Underpaid contributions

Compensation may be payable in respect of tax relief on additional contributions, where the more would have been payable had the contributions been paid in the relevant remedy years.<sup>202</sup>

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<sup>197</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p 44

<sup>198</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes, Government response](#), CP 373, Feb 2021, para 2.85

<sup>199</sup> HMRC, [Taxation of public service pension reform remedy](#), 27 October 2021

<sup>200</sup> For more detail, see [Pension tax relief: the annual and lifetime allowances](#), Commons Library Briefing Paper, CBP 5901, March 2021

<sup>201</sup> HM Treasury, [Policy Statement, Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), October 2021, p 45

<sup>202</sup> Ibid

## Compensation relating to court or tribunal proceedings

Compensation may be payable in relation to financial or other losses claimed in ordered by a tribunal or court. In the event of large numbers of claimants in a particular scheme being affected, a broader compensation facility could be set up under clause 90.<sup>203</sup>

## Indirect compensation

**Clause 24** would allow scheme managers to increase member benefits rather than provide compensation. For example, they may have paid a tax charge using ‘scheme pays’, where the amount of benefits they would have received is reduced at retirement. This clause would allow those benefits to be reinstated.<sup>204</sup>

## Remedial arrangements to pay voluntary contributions to legacy schemes

At Committee Stage in the Lords, Lord Davies raised the issue of people who would have acted differently had the discrimination not occurred – for example, individuals who paid additional voluntary contributions (AVCs) in one scheme but would not have paid them in the other, or vice versa. The Minister said he would consider this further.<sup>205</sup> He returned to the issue at Report stage, amending the Bill “so that scheme regulations may allow members to enter into remedial voluntary contributions arrangements where they would have done so had the discrimination not arisen.”<sup>206</sup>

**Clause 25** would provide for scheme regulations for a Chapter 1 legacy scheme to make provision giving members with remediable service the facility to enter into new arrangements to pay voluntary contributions.

Regulations may permit a member to enter into such an arrangement only if they can “show that it is more likely than not that they would have entered into similar arrangements, but for the unlawful discrimination.” The amount can be adjusted to reflect the tax relief that would have been paid had the contributions been paid in the relevant remedy year.

**Clause 25(6)** prevents scheme regulations from permitting new voluntary contributions later than a year after the member received their first remediable service statement, or such longer period as the scheme manager considers reasonable.<sup>207</sup>

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<sup>203</sup> Ibid

<sup>204</sup> [Bill 211-EN](#) para 194

<sup>205</sup> [HL Deb 11 October 2021 c342-4GC](#)

<sup>206</sup> [HL Deb 29 November 2021 c1149](#)

<sup>207</sup> [Bill 211-EN](#) para 193-200

## Interest and process

The July consultation considered whether interest should be payable on amounts owed due to the remedy, whether by individuals to schemes or vice versa. The Government explained how it proposed to deal with different scenarios:

- A pensioner owed a back-payment of benefits would receive a single cash payment, with interest applied.<sup>208</sup>
- A pensioner whose election resulted in them having been overpaid pension, for example, because their election resulted in a higher lump sum and lower pension, would have their lump sum adjusted to recoup the overpayment. In other cases, they would be given the opportunity to repay any overpayment upfront, or over time, with interest.<sup>209</sup>
- In some cases, the remedy would result in a member having underpaid contributions. They would be given the opportunity to pay these upfront, or over time through a repayment plan. Interest would apply.
- If a member had overpaid contributions, a refund would be provided in cash, with interest.<sup>210</sup>

A “strong majority” of respondents to the consultation said scheme members should not be charged interest on underpaid contributions, arguing that the remedy was a result of errors made by the Government.<sup>211</sup> However, in its response, the Government said that a reasonable rate of interest on sums owed by both schemes and members was needed to ensure “fair and equal treatment” of scheme members.<sup>212</sup>

The response to consultation also said that rates of interest would be prescribed centrally to “ensure consistency and to recognise that the issue of owed contributions – and refunds will remain for decades.” It would consult the Government Actuary on the appropriate rate of interest to add to sums owed to and by members.<sup>213</sup>

**Clause 26** would make provision about how interest is calculated and paid, both on amounts owed by a member to the scheme, or vice versa, and the process by which amounts are paid.

**Clause 26(3)** would allow provision to be made for matters, such as enabling payment by instalments, netting off underpayments against overpayments and conferring rights of appeal.<sup>214</sup>

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<sup>208</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), CP 253, July 2020, para A.4

<sup>209</sup> Ibid para A.5

<sup>210</sup> Ibid para A11-12

<sup>211</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para A.23

<sup>212</sup> Ibid para A.31-2

<sup>213</sup> Ibid para A.34

<sup>214</sup> [Bill 211-EN](#) para 201-2

## Treasury directions

**Clause 27** sets out the regulation-making powers that must be exercised in accordance with Treasury directions (for England, Wales and Scotland, and for Northern Ireland, by the Department of Finance).

Under **clause 27(3)**, Treasury directions may provide for the circumstances to be taken into account in determining the amounts due from a member to the scheme.

**Clause 27(4)** would provide for the Treasury to consult the Government Actuary before making, varying or revoking directions about the calculation and payment of interest. Respondents to the consultation were “supportive of central direction to ensure consistency across and within schemes in the way the remedy is implemented).<sup>215</sup>

## Rules that prohibit unauthorised payments

Under pension tax rules, registered pension schemes can only make payments of certain types. For example, lump sums can only be paid in certain circumstances, one example being the ‘pension commencement lump sum’, sometimes referred to as the 25% tax-free lump sum.<sup>216</sup> An unauthorised payment can result in a charge of up to 55% for the member and a scheme sanction charge.<sup>217</sup>

The remedy provided in this Bill may result in schemes having to make unauthorised payments – for example, where a further payment is made in respect of an underpaid lump sum originally paid at retirement, the passage of time since could mean that the additional payment is unauthorised.<sup>218</sup>

**Clause 28** would provide for Treasury directions to override scheme rules that prevent an ‘unauthorised payment’ being made where such a payment is permitted or required under the Bill.

The Delegated Powers Memorandum states that the reason for allowing this to be done by Treasury Directions is to allow flexibility:

The exact nature of the payments that schemes may make in consequence of Chapter 1 of the Bill may depend on the precise amendments made to scheme regulations, and interactions between schemes and HMRC. For the avoidance of unintended consequences that may arise in this novel context, it is therefore preferable to take a power to achieve this. It is also possible that the types of payments to be authorised will change over time; therefore, the list needs to

<sup>215</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para 190

<sup>216</sup> [Finance Act 2004](#), Part 4, Chapter 3, s164 and 166

<sup>217</sup> *Ibid*, s208-9 and 239; HMRC guidance, [Pension Schemes and unauthorised payments](#), September 2014

<sup>218</sup> HM Treasury, [Public service pensions: changes to the transitional arrangements for the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para 192

be easily amendable to prevent charges applying where they should not, and vice versa.<sup>219</sup>

## Remediable service statements

Under the [Public Service Pensions Act 2013 \(s14\)](#), schemes are required to send annual statements to members, including the details of the pension benefits they had earned in the scheme and any other information specified in a Treasury direction.<sup>220</sup>

In its July consultation document, the Government said it proposed requiring schemes to include in statements information about the member's entitlement under both new and legacy scheme for the remedy period, as well as any entitlement under the legacy scheme for years before 2015 and under the reformed scheme for years after 2022. While recognising that this would be complex, it was the best approach.<sup>221</sup>

The information is needed to enable members to make an informed decision about whether to elect to retain legacy benefits, receive new scheme benefits or opt in to receive benefits in respect of remediable service.<sup>222</sup>

Under **clause 29(5)**, a remediable service statement must include a description of: a description of benefits currently available under the legacy scheme in respect of the remedy period; a description of the benefits that would be available if an election for new scheme benefits were made; and a description of when and how any election could be made.

Under **clause 29 (6)**, Treasury directions may specify further the information to be provided, how it should be provided and who it should be provided to. They may also require a remediable service statement to be combined with the statement schemes are already required to provide under section 14 of the 2013 Act.

**Clauses 29(7) to 10** would require remediable service statements to be provided within 18 months of clause 2 (1) coming into force, or such later date as the scheme manager considers reasonable, and then annually for advice members. After the initial statement, deferred members may request a statement once every twelve months.<sup>223</sup>

## Equality Act 2010

**Clause 30** disapplies the [Equality Act 2010 \(s61\)](#) (and the [Employment Equality Act Regulations \(Northern Ireland\) 2006](#), Sch 1, para 2) for the purpose of determining whether a member's remediable service is

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<sup>219</sup> [Public Service Pensions and Judicial Offices Bill – Delegated Powers Memorandum](#), HM Treasury, December 2021, para 100

<sup>220</sup> [Public Service Pensions Act 2013](#), s14

<sup>221</sup> *Ibid* para A.56-69

<sup>222</sup> [Bill 211-EN](#) para 206

<sup>223</sup> *Ibid* para 210

pensionable in a new or legacy scheme. Section 61 (and Sch 1 (2) of the Northern Ireland regulations) provide that occupational pension schemes must be taken to have a non-discrimination rule. They apply where an individual has suffered less favourable treatment and can operate to disapply discriminatory provisions in scheme regulations as they apply to that individual.<sup>224</sup>

The purpose is to avoid confusion of unintended consequences, for example, where section 61 might otherwise be interpreted as meaning that a member was already in a legacy scheme before the coming into force of clause 2. This clause does not apply to persons who have received an ‘immediate detriment remedy’ (see below). This is in order to ensure the Bill does not over-ride or interfere with any remedy provided under section 61.<sup>225</sup>

## Immediate detriment cases

**Clause 31** sets out how Chapter 1 would apply to those who have benefited from an “immediate detriment remedy’ (i.e.: they have already received either full or partial remedy for the discrimination identified by the Court of Appeal before the Bill and scheme regulations come into force). The intention is:

[...] to ensure that the remedy that those in this position have already received is respected, and appropriate alternative provision may be made by scheme regulations to address their individual circumstances in order to ensure that the discrimination is rectified. In particular, the intention is to ensure that these persons are not compensated twice, that the Bill does not override any prior court or tribunal orders, and that there is provision for scheme regulations to make provision to correct or ‘top up’ any aspects of the remedy already provided to ensure consistent and fair treatment.<sup>226</sup>

**Clause 31(1)** sets out that **clauses 2 to 30** do not automatically apply to those who have benefited from an immediate remedy.

**Clause 31(2)** would allow scheme regulations to be made to put individuals who have benefitted from an immediate remedy, as far as possible, in the position they would have been in had there been no discrimination.<sup>227</sup> The purpose of **clause 31(3)** is to allow scheme regulations to apply particular provisions of the Bill to immediate detriment cases. In some cases, this may require provision that differs from that which will apply to other persons with remediable service

Under **clause 32** a person who has benefitted from an immediate remedy is one who has received either full or partial remedy for the discrimination identified by the Court of Appeal prior to this Bill and scheme regulations coming into force in relation to their scheme.

<sup>224</sup> [Chapters 1 and 4 of the Public Service Pensions and Judicial Offices Bill](#), HM Treasury, Oct 2021, p54

<sup>225</sup> Ibid

<sup>226</sup> Ibid para 200

<sup>227</sup> [Bill 211-EN](#) paras 215

## Interpretation

Under **clause 33**:

- ‘Chapter 1 new scheme’ is a defined benefit pension scheme made under the [Public Service Pensions Act 2013](#) (s1) or the [Public Service Pensions Act \(Northern Ireland\) 2014](#) (s 1) that is not a scheme for holders of judicial office or local government workers. In other words it covers the schemes for civil servants, teachers, health service workers, fire and rescue workers, members of police forces and the armed forces.
- A ‘Chapter 1 legacy scheme’ is an existing scheme within the meaning of the 2013 Act (2014 Act for NI) that is not a scheme for holders of judicial office or local government workers.<sup>228</sup>

Under **clause 34**, ‘new scheme benefits’ means benefits that are payable to or in respect of a member as if their remediable service were pensionable in a Chapter 1 new scheme. This means in accordance with the rules of the new scheme, even though they will in fact be paid from the legacy scheme.<sup>229</sup>

Under **clause 35**, ‘legacy’ and ‘new scheme contributions’ and are those that would have payable had the service, at the time it took place, been pensionable in the legacy or new scheme respectively.

Under **clause 36**, ‘opted-out service’ is service which, had the person not opted out, would have been remediable service under the conditions set out in clause one, had the individual not opted-out.

**Clause 37** would provide that the definition of scheme regulations is the same as that in the [Public Service Pensions Act 2013](#) and the [Public Service Pensions Act \(Northern Ireland\) 2014](#). This means that the power to make regulations under this Bill is to be exercised by the responsible authority for the new schemes as defined in section 2 and Schedule 2 of 2013 and 2014 (NI) Acts.

## 4.5

## Part 1, Chapter 2 of the Bill- judicial pensions

### Background

The new scheme introduced for judges under the [Public Service Pensions Act 2013](#) was the Judicial Pension Scheme 2015.<sup>230</sup> Transitionally protected judges were able to remain in their pre-existing scheme - for most serving salaried judges, this was the scheme established under the Judicial Pensions and

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<sup>228</sup> Section 18 and Schedule 5

<sup>229</sup> [Bill 211-EN](#) paras 226-7

<sup>230</sup> [Judicial Pensions Regulations 2015 \(SI 2015/182\)](#)

Retirement Act 1993 (JUPRA).<sup>231</sup> Information about JUPRA is in the [Scheme Guide](#).<sup>232</sup>

In common with reforms across public service schemes, the 2015 Act was different from the legacy schemes in providing pension benefits based on career average revalued earnings (CARE), rather than final salary, and having a pension age linked to their State Pension age.<sup>233</sup> However, unique to the judges' schemes, there was also a difference in the way schemes are treated for tax purposes. The 1981 and 1993 schemes are not registered for tax purposes, while the 2015 scheme is.<sup>234</sup>

The reason the 1981 and 1993 schemes are not registered for tax purposes was explained as follows by the then Lord Chancellor, Lord Falconer, in 2005:

I have concluded that, as administrator of the judicial pension schemes, it would be in the best interests of the members that, for the future, the schemes should not be registered schemes for the purposes of the Finance Act 2004.

The principal effect will be that lump sum benefits payable from, and members contributions payable to, the schemes will cease to attract tax relief from 6 April 2006. Income tax will, of course, also continue to be payable on pension benefits. Judicial pension benefits will consequentially not be taken into account for the purposes of the registered pension schemes provisions of the Finance Act 2004 as they will not receive the preferential tax treatment afforded to such schemes.<sup>235</sup>

He said the proposed changes would serve to “maintain the overall remuneration package and for the serving judiciary and to protect the principle of judicial independence in so doing.” There would be no net cost to the Exchequer. The Government would not proceed with previously proposed legislation for judicial pensions.<sup>236</sup>

When the Coalition Government was consulting on how judges' pensions should be reformed in 2015, it decided that the new Judicial Pension Scheme (NJPS) would be registered for tax-purposes and therefore subject to pension tax legislation. This means benefits built up in that scheme are measured against the annual and lifetime allowances.<sup>237</sup>

Judges who were not covered by full transitional protection, and so would not be able to remain in one of the existing tax un-registered schemes, but who had registered with HMRC to protect their lifetime allowance, were given a one-off option to opt out and receive a ‘transitional protection allowance’

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<sup>231</sup> SI 2015/182 reg 166, Sch 2

<sup>232</sup> MoJ, [Judicial Pension Scheme 1993 – Scheme Guide](#), September 2014

<sup>233</sup> [Public Service Pensions Act 2013](#), s8-10

<sup>234</sup> MoJ, [New Judicial Pension Scheme 2015 - consultation](#), June 2014, p24 and 27

<sup>235</sup> HL Deb 15 December 2005 cc WS151-152; For more on the background, see Judicial Pensions Bill 2005-06, Commons Library Briefing Paper SN-3308, December 2005

<sup>236</sup> Ibid

<sup>237</sup> MoJ, [New Judicial Pension Scheme 2015 - consultation](#), June 2014, para 124

(TPA).<sup>238</sup> This was a monthly payment equal to the employer contribution that would have been paid had they been a member of the scheme.

An individual who opted for the TPA from 31 March 2015, could no longer build up pension benefits under the judicial pension schemes, nor pay any member contributions.<sup>239</sup> An alternative option was membership of a [Partnership Pension Account](#). This is a tax-registered [defined contribution scheme](#), similar to the partnership scheme already on offer to civil servants.<sup>240</sup>

## McCloud

As discussed in section 2.3 above, in December 2018 the Court of Appeal ruled in [Lord Chancellor and Secretary of State for Justice v McCloud and Mostyn, Home Secretary and Welsh Ministers v Sargeant \[2018 EWCA Civ 2844\]](#) that the transitional provisions in the judges' and firefighters' pension schemes gave rise to unlawful age discrimination. The Court of Appeal remitted the discrimination claims back to the Employment Tribunal to determine a remedy.<sup>241</sup> It determined that the claimant judges were entitled to be members of JUPRA/FPJPS from 1 April 2015.<sup>242</sup>

On 17 July 2020, the Ministry of Justice issued a consultation on a proposal to give those non-claimant judges in scope of McCloud a choice whether to have retrospectively accrued benefits in either a legacy scheme (JUPRA/FPJPS) or JPS 2015 for the remedy period (April 2015 to April 2022).<sup>243</sup> A separate consultation was needed to that being undertaken by HM Treasury for other public service pension schemes, because judges were uniquely affected by a change in tax status as a result of the 2015 reforms:

The change in tax status impacted judges uniquely, as the judicial schemes were the only public service schemes not formerly tax-registered: therefore, not only were judges moved to a generally less beneficial scheme, they were also now subject to annual and lifetime limits on the tax-relieved benefits they could accrue. This was especially costly for high earners and those who had built up significant private pensions before joining the bench. In its Major Review of the Judicial Salary Structure in 2018 the Senior Salaries Review Body found that the reforms had a significant impact on judges' overall remuneration and were the main cause of unprecedented recruitment and retention challenges in senior judicial offices.<sup>244</sup>

Following consultation, the Government decided on a different approach to the remedy for the judges compared to that for members of the main public service pension schemes dealt with in Chapter One of the Bill.<sup>245</sup> The main

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<sup>238</sup> MoJ, [Judicial pension reform: New Judicial Pension Scheme 2015 consultation](#), November 2014, para 152-6

<sup>239</sup> Ibid para 24-6

<sup>240</sup> [Civil Service Pensions website – partnership account](#)

<sup>241</sup> 'Unions seek meeting after government loses final challenge to '£4bn' pension ruling,' [Civil Service World, 2 July 2019](#); Treasury facing £4bn bill after pensions ruling', *Financial Times*, 27 June 2019

<sup>242</sup> MoJ, [Consultation on the proposed response to McCloud](#), July 2020, p3

<sup>243</sup> Ibid

<sup>244</sup> MoJ, [Consultation on the proposed response to McCloud](#), July 2020, p3

<sup>245</sup> Ibid; MoJ, [Judicial Pensions – response to McCloud. Response to consultation](#), Feb 2021

difference is that affected members of the judicial schemes will make their decision in an ‘options exercise’, to take place after the remedy period has ended, once the necessary legislative and data requirements are in place. This choice will take retrospective effect so that they will be treated as having been a member of their chosen scheme throughout the remedy period.<sup>246</sup>

The reason for not offering a choice at retirement, as for the Chapter One schemes, was that it would be “highly impractical for many judges, who wish to resolve their scheme membership sooner than retirement. Furthermore, it would prolong administrative processes for several decades until all members in scope have retired and would be highly complex to deliver operationally due to the schemes’ different tax status.”<sup>247</sup>

### Future service

In addition, the MoJ said it intended to introduce a [reformed judicial pension scheme](#) in April 2022.<sup>248</sup> Most of the features of the new scheme would be in line with the 2013 Act reforms, but it would be non-registered for tax purposes. In response to concerns raised in the consultation, judges would have the temporary option of paying reduced contributions and building up benefits at a lower rate.<sup>249</sup>

The reformed judicial pension scheme - the Judicial Pension Scheme 2022 - would be made in secondary legislation under the existing power in section 1 of Public Service Act 2013 (although amendments to the 2013 Act under the current Bill are needed to enable this).<sup>250</sup> The MoJ launched a consultation on draft regulations for a Judicial Pension Scheme 2022 on 23 July 2021, which ran until 8 October.<sup>251</sup> The Government’s response to this consultation was published on 16 December 2021.<sup>252</sup>

### Expected impact

The remedy is expected to result in an increase in liabilities for the judges’ pension schemes of £130 million. The newly designed, reformed judicial pension scheme is estimated to cost an additional £35 million per annum, compared to the cost of all judges accruing pension in the Judicial Pension Scheme 2021 from April 2022 onwards.<sup>253</sup>

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<sup>246</sup> [MoJ measures in the Public Service Pensions and Judicial Offices Bill](#), Oct 2021

<sup>247</sup> MoJ, [Judicial Pensions – response to McCloud. Response to consultation](#), Feb 2021, para 55

<sup>248</sup> MoJ, [Consultation on a reformed Judicial Pension Scheme](#), July 2020; [Consultation response](#), Feb 2021

<sup>249</sup> Ibid

<sup>250</sup> Gov.UK, [Consultation outcome. Judicial Pension Scheme 2022: Scheme Regulations](#), Updated 20 December 2021

<sup>251</sup> MoJ, [Judicial Pension Scheme 2022: Consultation on draft scheme regulations](#), July 2021

<sup>252</sup> MoJ, [Judicial Pension Scheme 2022: Government response to the consultation on draft scheme regulations](#), December 2021

<sup>253</sup> [Bill 211-FN para 493-4](#)

## Remediable service

**Clause 39** would define ‘remediable service’, which a member must have to be eligible for the remedy. They must meet five conditions:

- Service in the period beginning with 1 April 2015 and ending on 1 April 2022;
- That service was pensionable in a judicial pension scheme, or would have been but for the fact the person opted out;
- Been a member of a legacy scheme on or before 31 March 2012; and
- Not have a ‘disqualifying break’ in service of more than five years.
- The person was under the age of 55 on 1 April 2012.

Not in scope of the remedy, because they were not subject to the discrimination identified in McCloud are:

- Protected judges, who remained in the legacy schemes because of their age; and
- Judges appointed to office after 31 March 2012, who were ineligible for transitional protection regardless of their age.<sup>254</sup>

## Legacy scheme elections

**Clause 40** would provide for a judge with remediable service, who has not made a 2015 scheme election, to make a legacy scheme election. An election would take place at the end of the ‘election period’ and once made is irrevocable.<sup>255</sup> Under **clause 69**, the ‘election period’ would last three months from a date to be determined by the Lord Chancellor or Department for Justice in Northern Ireland.

Under **clause 41** a judge with service in a Partnership Pension Account would be required to comply with requirements regarding the transfer of any assets in that account into the legacy scheme before making an election. This is to “ensure they do not receive double compensation.” The same requirements would apply to a person with remediable service in a fee-paid rather than judicial office.<sup>256</sup>

Under **clause 42**, when a person elects legacy scheme membership, any remediable service in the 2015 scheme, or any period of opted out service, would be treated as service in the legacy scheme. It would be treated as if it had always been in the legacy scheme for the purpose of determining pension benefits and contributions.

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<sup>254</sup> [Judicial Pensions: Proposed response to McCloud. Consultation](#), July 2020, para 17 and 18

<sup>255</sup> [Bill 211-EN para 241-3](#)

<sup>256</sup> *Ibid* para 247

**Clause 42(7)** would permit a person to make a legacy scheme election while being able to retain certain member rights in the 2015 scheme, such as transfers of external pension benefits or added pension.<sup>257</sup>

Under **clause 43**, the relevant legacy scheme would be the scheme of which a person was a member most recently before 1 April 2015. Whether they were not a member on that date, the relevant salary scheme is JUPRA.

## 2015 scheme elections

Under **clause 44**, a 2015 scheme election could be made by a judge with remediable service in a judicial office. It would not be permitted to be made if they opted out of a 2015 scheme, since they already had the option to join (although there is an exception for judges who opted out to join the PPA scheme, provided part of their remediable service is in a legacy scheme). A judge who has made a legacy scheme election cannot make a 2015 scheme election. The election would take place at the end of the election period and is irrevocable.<sup>258</sup>

Under **clause 45**, the effect of making a 2015 scheme election would be that the individual's remediable service is treated as if it had always been pensionable in the 2015 scheme for the purpose of determining benefits and contributions and (unless provided for otherwise) for all other purposes.

## Other provisions regarding elections

Under **clause 46**, if the scheme member is deceased, the election could be made by an adult survivor (a surviving spouse, civil partner, or other adult entitled to a survivor's pension from the scheme in which the deceased judge most recently had pensionable service).

In most cases, members who do not make an election will retain their existing rights. **Clause 47** would provide that where a member with mixed service does not make a choice, they are considered to have made a 2015 scheme election.

Under **clause 48**, where a child and adult beneficiary live in separate households, the child would be entitled to receive the most favourable pension, regardless of the choice made by the surviving adult. This is necessary due to potential conflicts of interest arising from different entitlements in the legacy and 2015 scheme.

Under **clause 49**, benefits already paid in respect of remediable service would be treated as having been paid from the scheme that the member elects.

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<sup>257</sup> Ibid para 249-51

<sup>258</sup> Ibid para 253-6

Under **clause 51(2) and (3)**, where the result of an election is that the scheme member has been underpaid pension benefits, the scheme would be required to pay them the difference. If they have been overpaid, they would be required to pay the difference to the scheme. Clause 51(4) and (5) would apply the same principle to lump sum benefits.

## Pension contributions

The contribution rate is higher in the 2015 scheme than the legacy schemes. In the 2015 scheme, members' contribution rate is tiered between 4.6% and 8.05% of pay.<sup>259</sup> In the 1993 scheme (JUPRA), they are tiered between 2.76% and 4.83% of pay.<sup>260</sup>

Under **clause 50**, following an election, contributions already paid would be treated as having been paid to the scheme the member elected. Where a member of the 2015 scheme elects the legacy scheme for remediable service, they would owe tax relief to HMRC. This is because the 2015 scheme was tax-registered whereas the legacy schemes were not.<sup>261</sup>

The effect of **clause 52(2) and (3)** would be that where a judge has overpaid contributions, the scheme would have to refund any excess falls relating to a tax year in which HMRC can enforce PAYE corrections (i.e. the tax year in which the election is made and the last four full preceding tax years). Because judges will not need to pay underpaid tax in years for which HMRC is unable to enforce the PAYE correction, the Bill provides that the scheme would not refund contributions overpaid by the scheme member in respect of those years.

Under **clause 52(4)**, the judge (or if deceased, their personal representative), would need to pay any shortfall in contributions to the scheme. Under **clause 52(5) and (6)**, in calculating the contributions made, account is taken of any contributions made to a Partnership Pension Account (less any tax relief) up to the level of contributions that would have been paid to the judge's legacy scheme.

## Effective pension age payments

Members of the 2015 scheme had the option to pay contributions to secure a pension age that was lower than the normal pension age in that scheme (linked to the member's State Pension age) but not lower than 65. Under **clause 53**, a member of the 2015 scheme who has paid these contributions but then opts for the legacy scheme – where the pension age is 65 – would receive compensation equal to the value of those contributions.<sup>262</sup>

<sup>259</sup> [SI 2015/182](#), reg 124

<sup>260</sup> [Guide to the Judicial Pension Scheme 1993](#), November 2014, p6

<sup>261</sup> *Ibid* para 278

<sup>262</sup> *Ibid* para 283-4

## Transitional protection allowance

Transitional Protection Allowance (TPA) was an annual amount equal to the employer contribution to the 2015 scheme. Judges could make a one-off option to receive it instead of membership of the 2015 scheme.<sup>263</sup>

**Clause 54** would require a judge who makes a legacy scheme election to repay any TPA they have received, net of any tax paid. Because the amount owed by some judges joining the legacy scheme for the remedy period could, including any TPA and underpaid member contributions, be considerable,<sup>264</sup>

**Clause 55** aims to provide flexibility, enabling liabilities to be repaid by means of a reduction in scheme member's pension benefits. Where an amount is due to the employer, the scheme must reimburse them.<sup>265</sup>

## Power to reduce or waive liabilities

**Clause 56** is the judicial scheme equivalent of **clause 18**. It would provide a power to reduce or waive an amount owed by an individual in respect of an overpayment of pension benefits or lump sums, or in respect of a underpaid contributions. The policy intention is that schemes should be able to write off amounts where repaying them would cause particular difficulty or hardship.<sup>266</sup>

In addition, **Clause 56(3)** would enable an amount for underpaid contributions to be reduced to reflect the tax relief that would have been payable had the contributions been paid to the relevant scheme and at the relevant time.

## Pension credit members

**Clause 57** is the judicial scheme equivalent of clause 19. It would enable the amount credited to a former spouse or partner following a pension sharing order to be adjusted to reflect any change to the scheme member's entitlement as a result of the remedy. Where the judge had mixed service, the ex-spouse or civil partner's pension credit would need to be determined under either the 2015 or legacy scheme, not both.<sup>267</sup>

## Powers to make provision about special cases

**Clause 58** is the judicial scheme equivalent of clause 22. It would enable technical aspects of the remedy – such as the treatment of voluntary contributions or transfers in – to be addressed. The power to make

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<sup>263</sup> Ibid para 285-6

<sup>264</sup> [Measures in the Public Service Pensions and Judicial Offices Bill](#), Ministry of Justice, Oct 2021, para 21

<sup>265</sup> [Bill 211-EN](#) para 289-90; [Policy statement. Ministry of Justice Measures in the Public Service Pensions and Judicial Offices Bill](#), October 2021, p6

<sup>266</sup> [Policy statement. Ministry of Justice Measures in the Public Service Pensions and Judicial Offices Bill](#), October 2021, p8

<sup>267</sup> Ibid p9

regulations under this clause would have to be exercised in accordance with Treasury directions.<sup>268</sup>

## Power to pay compensation

**Clause 59** would provide a power for the manager of a judicial scheme to pay compensation in respect of losses incurred by members (or in the case of deceased members, their personal representatives) as a result of the scheme having breached a non-discrimination rule or due to the application of the remedy. The loss would have to be of a kind specified in Treasury Directions.<sup>269</sup> The Government states that there will be some type of losses where the policy position is that the scheme member should be able to recover the cost of paying contributions from the relevant employer. This will be provided for in regulations.<sup>270</sup>

## Remediable arrangements to pay voluntary contributions

The judicial scheme equivalent of clause 25, **clause 60** would make it possible for scheme regulations to make provision giving judges with remediable service the facility to enter into new arrangements to pay voluntary contributions. This may be subject to conditions – for example, that they would have entered into such an arrangement but for the discrimination and may only be made available for a limited period. The amount of contributions payable may be reduced to reflect an amount of tax relief that would have been available if the contributions had been made at the relevant time but is not now.<sup>271</sup>

## Miscellaneous

**Clause 61** is the judicial scheme equivalent of clause 26. It would provide for interest to be applied to an amount paid by a judge to their scheme or by the ‘employer’ or scheme to the judge.

**Clause 62** is the judicial scheme equivalent of **clause 27**, listing the regulation-making powers in Chapter 2 that must be exercised in accordance with Treasury directions.

**Clause 63** is the judicial scheme equivalent of clause 28 and would enable unauthorised payments to be made in accordance with Treasury directions where scheme rules would not otherwise allow.

**Clause 64** would require information statements to be sent to a member who has the option to make an election for legacy or 2015 scheme benefits for the

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<sup>268</sup> Ibid p10

<sup>269</sup> [Bill 211-EN](#) para 296

<sup>270</sup> Clause 59 (2); [Policy statement, Ministry of Justice Measures in the Public Service Pensions and Judicial Offices Bill](#), October 2021, p11

<sup>271</sup> [Bill 211-EN](#) para 299-300

remedy period. Any such statement would need to contain a description of the benefits that would be available for the judge's remediable service from both schemes and other relevant information, such as the right to make remedial voluntary contributions under clause 60.

**Clause 65** would enable the Lord Chancellor and the Northern Ireland Department of Justice to delegate any of their respective functions under Chapter 2 of the Bill.

**Clause 66** would provide that, for the purpose of determining for the purposes of Chapter 2 of this Bill, whether any service is pensionable under a particular scheme, the non-discrimination rule in [Equality Act 2010](#) (s61) (and the [Employment Equality Act Regulations \(Northern Ireland\) 2006](#) (Sch 1, para 2) are to be disregarded.<sup>272</sup> Under **clause 66 (2)**, to the extent that either of these has effect for determining that any remediable service is not pensionable under JPS 15, or pensionable under a legacy scheme, it ceases to have effect at the end of the election period.

**Clause 67** is the judicial equivalent of clause 31. It would provide that nothing in clauses 40 to 66 would apply if a person has already benefitted from an **immediate detriment remedy**. In those cases where the court determination is insufficient to return the member to the position they would have been in but for the discrimination, regulations may address this by applying the provisions in clauses 40 to 66 with or without modification.<sup>273</sup> Under **clause 68**, an immediate detriment remedy would include where an election has been made or judge's entitlement determined by a court or tribunal.

**Clauses 70 to 75** define terms in Chapter 2 of the Bill.

**Clause 76** would ensure that fee-paid judges (and ex-fee-paid judges) can meet the conditions for service in a fee-paid office to be considered remediable service.

## 4.6

### Part 1, Chapter 3 of the Bill – local government pensions

#### Background

The Local Government Pension Scheme (LGPS) is a statutory public service pension scheme. There are separate schemes for England and Wales, Scotland and Northern Ireland. They operate on a funded basis (i.e. contributions are made to a fund which is invested and from which benefits

<sup>272</sup> As discussed in relation to clause 30 above, s61 of the Equality Act 2010 provides that occupational pension schemes must be taken to include a non-discrimination rule. It therefore applies where individuals have suffered less favourable treatment and can operate to disapply discriminatory provisions in scheme regulations as they apply to that individual.

<sup>273</sup> Ibid para 311-12

are paid at retirement). These funds are managed and administered at local level – there are 88 funds in England and Wales, eleven in Scotland and one in Northern Ireland.

The schemes in Great Britain were reformed under the [Public Service Pensions Act 2013](#), with new schemes introduced in April 2014 in England and Wales ([LGPS 14](#)), and in 2015 in Scotland ([LGPS 15](#)). The scheme in Northern Ireland was reformed under the [Public Service Pensions \(Northern Ireland\) Act 2014](#). In each case, key elements were:

- The move to a scheme based on career average revalued earnings (CARE) rather than final salary. Benefits build up at a rate of 1/49th of pay for each year of service, compared to 1/60th under the legacy scheme.
- The move from a pension age of 65 to one linked to the member’s State Pension age.
- Changes to tiered contribution rates, plus the introduction of a 50/50 section where members have flexibility to pay half the contributions for half the pension accrual for a period of time, whilst still retaining full life cover and ill-health cover.<sup>274</sup>

All active members were moved into the new schemes when they were introduced and the same rules in relation to contributions and benefits apply to all members in the same way.

Transitional protection was provided by means of a ‘statutory underpin’ for service rendered up to the member’s normal pension age in the previous scheme, providing protected members with the higher of their pension under the reformed, career average scheme and the pension they would have been entitled to under the previous final salary scheme.<sup>275</sup> Benefits built up in the legacy scheme were protected by a ‘final salary link’, so that benefits are based on final salary on leaving the scheme rather than at the date of reform.<sup>276</sup>

In December 2018, the Court of Appeal ruled in [McCloud](#) that the transitional arrangements for the schemes for the judges and the firefighters introduced under the 2013 Act constituted unlawful discrimination. In [July 2019](#), the Government accepted that the discrimination would have to be remedied across public service schemes, including the LGPS.<sup>277</sup>

Consultation followed on what form this should take. For the LGPS, the proposal was to extend underpin protection to younger qualifying members

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<sup>274</sup> [LGPS Regs 2013 \(SI 2013/2356\)](#); [LGPS \(Scotland\) Regulations 2014 \(SI 2014/164\)](#); [LGPS \(Northern Ireland\) Regulations 2014 \(SI 2014/188\)](#).

<sup>275</sup> [LGPS \(Transitional Provisions, Savings and Amendments\) Regulations 2014 \(SI 2014/525\)](#), reg 4; [LGPS \(Transitional Provisions and Savings\) Regulations Scotland 2015 \(SI 2015/233\)](#); [LGPS \(Amendment and Transitional\) Regulations \(Northern Ireland\) 2014 \(SI 2014/189\)](#).

<sup>276</sup> [Public Service Pensions Act 2013](#), s20 and Sch 7; [Public Service Pensions Act \(Northern Ireland\) Act 2014](#), s20 and Sch 7

<sup>277</sup> [HCWS 1275 15 July 2019](#)

who joined before 31 March 2012. From April 2022, all LGPS members would accrue benefits on a career average basis, without underpin protection, to apply a fairer system to all future service.<sup>278</sup>

On 13 May 2021, the Minister of State for Local Government in England and Wales confirmed that underpin protection would apply to all LGPS members who meet the revised qualifying criteria.<sup>279</sup> Further details would be provided in the Government's response to the consultation. At the time of writing, it was still analysing feedback.<sup>280</sup>

The Government estimates the increase in liabilities for the LGPS (England and Wales) to be £1.8 billion.<sup>281</sup>

For more on the background, see [Local Government Pension scheme: response to McCloud](#), Commons Library Briefing Paper CBP 9257.

## The Bill

### Meaning of remediable service

**Clause 77** is the LGPS equivalent of clause 1. A member has “remediable service” if: they have pensionable service between 31 March 2014 (31 March 2015 for LGPS Scotland and NI) and 31 March 2020; on 31 March 2012 was in pensionable service in a local government legacy scheme or other relevant public service scheme and there are no disqualifying gaps in service (or more than five years).

### Power to pay equivalent to final salary benefits

**Clause 78** would allow LGPS regulations to be made to provide that member benefits for remediable service can be equivalent to final salary benefits. The Explanatory Notes say:

This is the core power that will allow LGPS regulations to be amended to remove the discriminatory provisions, by giving younger qualifying members equivalent protection to their older colleagues. In this context, a final salary benefit broadly means that a benefit has been calculated by reference to a member's pensionable earnings when a member's pensionable service ends, or when the member would have attained their Normal Pension Age applicable to the local government legacy scheme (usually 65).<sup>282</sup>

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<sup>278</sup> MHCLG, [LGPS E&W amendments to the statutory underpin](#), July 2020; SPPA, [LGPS Scotland. Addressing discrimination- amendments to the statutory underpin](#), July 2020

<sup>279</sup> [HCWS26 13 May 2021](#)

<sup>280</sup> See Gov.UK [LGPS: amendments to the statutory underpin](#)

<sup>281</sup> [Bill 211-EN](#), para 492-4

<sup>282</sup> [Bill 211-EN](#) para 325

## Meaning of local government scheme

Under **clause 79**:

- A **local government ‘new scheme’** means a scheme for local government workers set up under [s1](#) of the Public Service Pensions Act 2013 and [s1](#) of the Public Service Pensions Act 2014.
- A **local government ‘legacy scheme’** means an existing scheme within the meaning of the Public Service Pensions Act 2013 ([Sch. 5, para 16 or 17](#)) or Public Service Pensions Act 2014 ([Sch. 5, para 3](#)) other than the schemes for local government and holders of judicial office.

## 4.7

## Part 1, Chapter 4 of the Bill – general

### Closure of existing schemes

In its July 2020 consultation, the Government said it believed that “the reformed schemes initially introduced in 2015 provide an appropriate level of public service pension provision” and it would therefore close legacy schemes for future service, for all members from April 2022.<sup>283</sup> In support of this, the Government pointed to the fact that all fully protected members would now have reached the pension age in their legacy scheme (full protection having applied to those within ten years of pension age on 1 April 2012). Those who continued to work beyond pension age could build up benefits in the reformed scheme from 1 April 2022. To the extent that this change had an impact on such a member’s pension it “may be beneficial, for example due to higher accrual rates in the reformed schemes.”<sup>284</sup>

In its response to the consultation, the Government said that the main issues raised by respondents related to higher normal pension ages (NPA) under the reformed schemes.

Respondents from some workforces, mainly firefighters and police, argued that they believed the reforms also discriminated on the basis of sex.<sup>285</sup> For example, the Fire and Rescue Services Association (FRSA) were concerned generally around the effect of increased NPAs for female employees, very few of whom would be able to meet fitness standards to normal pension age due to genetics.

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<sup>283</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Consultation](#), July 2020, para 3.8; See [Public service pensions: the 2015 reforms](#), Commons Library Briefing Paper, CBP 5768

<sup>284</sup> *Ibid*, para 3.11-2

<sup>285</sup> For more on the background, see [Public Service Pension age](#), Commons Library Briefing Paper CBP 6581

There was also concern about indirect age discrimination, as younger members would have to work for longer.<sup>286</sup> Concerns raised specifically in relation to the police are discussed in [section 4.3](#) above.

**Clause 80** would amend provisions in existing legislation to close the legacy schemes to further build-up of benefits from 1 April 2022.<sup>287</sup> This is because the Government decided that from that date all members of public service pension schemes should build up benefits in a new scheme, subject to narrow exceptions set out in clause 81.

**Clause 80(2)(b) and (3) to (6)** would provide that the closure of the legacy schemes (from 1 April 2015 in most cases) originally provided for under the 2013 Act (2014 in NI), did not apply and is retrospectively treated as never having applied in relation to a member's remediable service in a legacy scheme.

**Clause 80(2)(c)** would repeal the existing provisions in the 2013 and 2014 Acts,<sup>288</sup> under which schemes put in place the transitional arrangements found to be unlawful in McCloud. **Clause 81** would enable transitional provisions in limited circumstances:

- In connection with transitional protection only to the extent that it existed in scheme regulations prior to 1 April 2022 and in respect of service between 1 April 2015 and 31 March 2022.
- In connection with a transfer in by a Fair Deal employee, or by one that has built up benefits in an unreformed public sector scheme. In such a case, if rights have been built up on or after 1 April 2022 in a scheme broadly equivalent to a legacy scheme, they can be awarded credit in a legacy scheme.
- In connection with 'weighted accrual.' To the extent that a member's accrual rate in a legacy scheme is dependent on their length of service (regardless of the scheme in which that service is pensionable), the accrual rate can continue to be adjusted on the same basis. Further accrual would be permitted in the legacy scheme only to the extent that it derived from the longer service.<sup>289</sup>

**Clause 82** would close those judicial schemes not already covered by clause 81. It would also close the legacy scheme for certain employees of the Secret Intelligence Service. As discussed in relation to clause 87 below, a new

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<sup>286</sup> HM Treasury, [Public service pension schemes: changes to the transitional arrangements to the 2015 schemes. Government response to consultation](#), CP 373, Feb 2021, para 2.14-8

<sup>287</sup> [Public Service Pensions Act 2013](#) (ss18 and 31); [Public Service Pensions \(Northern Ireland\) Act 2014](#) (ss 18 and 32); [Judicial Pensions and Retirement Act 1993](#)

<sup>288</sup> [Public Service Pensions Act 2013](#), s18 (5) to (8); [Public Service Pensions \(Northern Ireland\) Act 2014](#), s 18 (5) to (9)

<sup>289</sup> [Bill 211-EN, para 335](#)

scheme for these employees was introduced from 1 April 2016 under the 2013 Act.<sup>290</sup>

**Clause 83** would provide that no new arrangements to pay voluntary contributions to a legacy scheme<sup>291</sup> may be entered into after 31 March 2022, except for arrangements entered into under clause 25 or 60 (remedial arrangements to pay voluntary contributions).

## Scheme regulations

**Clause 84** would enable the responsible authority for each scheme to make regulations needed to implement the remedy and the closure of legacy schemes. As this would confer powers to amend primary legislation by passing regulations, it would be a Henry VIII power. In its Memorandum to House of Lords the Delegated Powers and Regulatory Reform Committee, the Government explained why it believed this to be necessary:

166. Clause 84(3) expands an existing power in section 3 of the PSPA 13 which provides responsible authorities with the power to make provisions in scheme regulations in accordance with the requirements set out in the rest of that Act. The amendment to that power here permits consequential, supplementary, incidental or transitional provision in relation to any provision of this Bill to scheme regulations, or equivalent amendments to primary legislation (passed before or in the same session as the Bill). This power is essential to ensure there are no unintended consequences which would prevent the remedy, and the closure of legacy schemes on 31 March 2022, from being fully implemented. Insofar as it permits amendments to Acts, this power is a Henry VIII power.<sup>292</sup>

In its report, published on 13 September 2021, the Committee said there was “nothing in this Bill which we would wish to draw to the attention of the House.”<sup>293</sup>

## Establishment or restriction of schemes

**Clause 85** would provide for governance and valuation frameworks to work as intended where a scheme established under the 2013 Act (2014 for NI) is closed and a new one established. This clause was introduced as a Government amendment at Report Stage in the Lords.

The Minister explained that under current plans this would apply to the Judicial Pension Scheme 2015, which was to be closed and replaced by a new scheme for judges. The new clause would ensure that the 2015 scheme once closed would not be subject to valuation and an employer cost cap would not

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<sup>290</sup> [The Civil Service \(Other Crown Servants\) Pension Scheme Regulations 2016 \(SI 2016/326\)](#)

<sup>291</sup> This also applies to the 2015 judicial pension schemes and a scheme for certain secret service employees

<sup>292</sup> [Public Service Pensions and Judicial Offices Bill – Delegated Powers memorandum](#), December 2021

<sup>293</sup> House of Lords Delegated Powers and Regulatory Reform Committee, [6<sup>th</sup> Report of Session 2021-22](#), HL Paper 65, 13 September 2021, p17

need to be set. These arrangements would instead apply to the new scheme.<sup>294</sup>

## Cost control mechanism

The **cost control mechanism** was put in place under the 2013 Act to provide protection to the taxpayer against unexpected cost increases.

**Clause 86** would provide that ceiling breaches above the upper margin at the employer cost cap are not rectified at the 2016 valuations (2017 local government).

The background to this clause and debate in the Lords is discussed in [section 3.2 above](#).

## Other provisions

**Clause 87** would amend [section 18](#) of the Public Service Pensions Act 2013 to make it clear that 31 March 2016 was the closing date for legacy pension schemes for civil servants employed by the Secret Intelligence Service and the Security Service ('the Agencies'). A new scheme was introduced from 1 April 2016 by the [Civil Service \(Other Crown Servants\) Pension Scheme Regulations 2016 \(SI 2016/236\)](#), made under the 2013 Act. It operates 'by analogy' to the Civil Service Pension Scheme, adopting with certain modifications, the rules contained in it.<sup>295</sup>

**Clause 88** would enable new **judicial offices** to be added, by Order, to a judicial pension scheme set up under the 2013 Act (2014 for NI). It would also enable the inclusion of devolved judicial office holders in Scotland and Northern Ireland, and for relevant pensionable service to be backdated to a date before the inclusion of the judicial office in the scheme.<sup>296</sup>

**Clause 89** would amend [section 26](#) of the 2013 Act (2014 for NI), which enables scheme managers and employers to make payments towards the provision of pensions and benefits other than those provided through a scheme under section 1 of the 2013 Act. This enables the provision of the Civil Service Partnership Scheme, for example.

**Clause 92** would allow provision to be made in respect of certain **fee-paid judges**, enabling them to be put in the position that they would have been had they always been treated as members of that legacy scheme.<sup>297</sup>

**Clause 90 and 91** would enable a **compensation scheme** to be established by HM Treasury and the Department for Finance in Northern Ireland. In debate in the Lords, the Minister explained that there was "no intention to

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<sup>294</sup> [HL Deb 29 November 2021 c1150](#)

<sup>295</sup> [Report on proposed amendments to the Civil Service \(Other Crown Servants\) Pension Scheme Regulations 2016](#). Cabinet Office 5 March 2020

<sup>296</sup> [Bill 211-EN](#), para 361-2

<sup>297</sup> [Public Service Pensions and Judicial Offices Bill - Delegated powers memorandum](#), para 208-11

create such a scheme” but the clause provided the powers to set up a scheme if this was considered appropriate or necessary to cover a loss of a sort not already provided for under the legislation.<sup>298</sup> HM Treasury explained in its delegated powers memorandum that:

202. Differences in contributions, tax and/or benefits between legacy and new schemes are the main reasons why we expect schemes may need to compensate members, where members have overpaid. These are dealt with in Clauses 14 to 18. There are also specific powers for scheme managers to pay compensation under Clauses 23 and 59. However, it is possible that members may have suffered other losses as a result of the discrimination identified by the courts. This Clause gives the Treasury the power to set up a scheme to calculate and pay compensation for these purposes.<sup>299</sup>

**Clause 93** would allow HMRC to exchange information with relevant authorities in order to process any claims for compensation under the Bill. It includes provisions for the conditions of such data use.

**Clause 94** would provide that restrictions in the Pensions Act 1995 (that prevent a pension or right to a future pension from being assigned to another person, exchanged or surrendered) and in the Armed Forces Act 2006 (which prohibit pension or pay from being assigned) and thus would conflict with the operation of the remedy do not apply to the operation of Part 1 of the Bill.<sup>300</sup>

**Clauses 97 and 98** provide definitions of terms used in Part 1 of the Bill.

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<sup>298</sup> [HL Deb 11 October 2021 c353GC](#)

<sup>299</sup> HM Treasury, [Public Service Pensions and Judicial Offices Bill. Delegated Powers Memorandum](#), December 2021

<sup>300</sup> [HL Deb 29 November 2021 c1140](#)

## 5 Part 2 of the Bill – Pensions and Banking (Special Provisions) Act 2008 Bodies

Bradford and Bingley and Northern Rock plc were taken into Government ownership during the financial crisis in 2008. B&B and NRAM represent the assets and liabilities of those banks that remain in Government ownership in 2021. UKAR is the Government owned company that has the responsibility for the orderly winding down of B&B and NRAM.<sup>301</sup>

UKAR is also the sponsor of the NRAM Pension Scheme and the Bradford and Bingley Staff Pension Scheme (“the BBS Pension Scheme”). UKAR has disposed of the remaining assets in B&B and NRAM as well as the companies themselves. The intention is that UKAR itself will now be wound down. To do this, the Government needs to make provision for the pension liabilities for which UKAR and its subsidiaries are responsible.<sup>302</sup>

**Part 2 of the Bill** would enable the Treasury, via regulations, to establish new public pension schemes for the members of the Bradford & Bingley Staff (BBS) and the Northern Rock Asset Management (NRAM) Pension Schemes, and to transfer the assets and liabilities of those schemes to the Exchequer.

The Government considers that this “represents the most efficient and value for money way for the Government to manage these remaining liabilities resulting from this necessary intervention in the financial sector.”<sup>303</sup>

**Clause 99** would allow the Treasury to make regulations to establish such schemes and to transfer qualifying accrued rights to the new schemes.

**Clause 100** would provide further detail on the provisions that may be included in new public schemes: for example, the type of benefits that may be included in a new public scheme; the circumstances in which amounts payable under the new scheme may be increased, as well as provision for payment or receipt of transfer values. It would allow regulations to be made to treat a new public scheme as an occupational pension scheme for legislative purposes. Amendments to a new public sector scheme, made by affirmative regulations, can have retrospective effect.

<sup>301</sup> [Public Service Pensions and Judicial Offices Bill. Delegated Powers Memorandum](#), December 2021, p4; [Policy statement: Public Service Pensions and Judicial Offices Bill. Part 2. Pensions and Banking \(Special Provisions\) Act 2008 Bodies](#), October 2021, p1

<sup>302</sup> [Public Service Pensions and Judicial Offices Bill. Delegated Powers Memorandum](#), December 2021

<sup>303</sup> [Policy statement: Public Service Pensions and Judicial Offices Bill. Part 2. Pensions and Banking \(Special Provisions\) Act 2008 Bodies](#), October 2021, p1

**Clause 101** would ensure that the transfer to a new scheme does not adversely affect members' rights. It would also allow the Treasury to determine how and by whom [money purchase benefits](#) would be valued prior to the transfer, for the purpose of meeting the requirements in this clause.

**Clause 102** puts in place requirements that must be satisfied before the Treasury may make regulations to amend the new public schemes, in order to protect members and their survivors.

**Clause 103** would allow the Treasury to make regulations to transfer the assets and the liabilities of the BBS and NRAM pension schemes to the Exchequer for their disposal.

**Clause 104** would allow the Treasury to make regulations to transfer to the Treasury the liability to pay pensions and or other benefits paid to individuals in connection with their previous service at B&B or Northern Rock to Government, excepting benefits arising under the BBS or NRAM pension schemes.

**Clause 105** would confer powers on the Treasury to modify tax law in relation to the pension schemes and persons in the scope of Part 2 of the Bill. This would include a power to treat the new public schemes as registered pension schemes.

**Clause 106** would enable the Treasury to make regulations that facilitate the transfer of information required for the establishment and administration of the new public schemes.

**Clause 107** would require the Treasury to consult with the Trustees of the BBS and NRAM pension schemes before making certain regulations under this Part of the Bill. It would also make certain provision about the procedural requirements for regulations made under Part 2.

## 6 Part 3 of the Bill – Judicial offices

**Part 3** of the Bill and **Schedules 1 to 3** would increase the mandatory retirement age for judicial office holders (judges, magistrates, tribunal members and coroners) from 70 to 75 and make changes to their allowances.

### 6.1 Overview

Between July and October 2020, the UK Government [carried out a consultation](#) on whether to raise the mandatory retirement age (MRA) for a range of different judicial office holders.<sup>304</sup> For the vast majority of these offices, across the three territorial jurisdictions of the UK (England and Wales, Scotland, and Northern Ireland) the MRA is 70 years.<sup>305</sup> The age at which lay justices (also known as magistrates) must vacate office is also 70 years.

The headline outcome of the consultation is that the UK Government will legislate to raise the MRA for the affected judicial offices from 70 to 75, including raising the age limit for lay magistrates to 75. This is the most significant change that would be made by Part 3 of this Bill.

Having raised the MRA to 75, the Government will no longer need powers to allow certain judicial office holders to continue to sit between the ages of 70 and 75. The legislation makes consequential amendments to reflect this. Transitional arrangements will also be put in place to deal with those magistrates under the age of 75 who were recently, or will very soon be, forced to retire under the existing MRA.

Additionally, this legislation reforms the arrangement that currently allows some retired judges to serve on an ad hoc fee-paid basis, known as “sitting in retirement”.

Judges can be subdivided into “salaried” judges (those judges who are no longer practising lawyers and are paid an annual salary whether full or part-time) and “fee-paid” judges (those who work as judges on a more irregular basis and who are paid a fee for their services).

<sup>304</sup> MoJ, [Judicial Mandatory Retirement Age: Consultation on the mandatory retirement age for judicial office holders](#), 16 July 2020

<sup>305</sup> The MRA for those appointed to judicial office before 1995 is sometimes higher because of transitional arrangements in the [Judicial Pensions and Retirement Act 1993](#). This is why many judges in the last three decades or so have instead retired typically at the age of 72 or 75, whereas more recent appointees to the same positions have been required to retire at 70.

Currently, “sitting in retirement” is not available to fee-paid judges on the same basis as it is available to salaried judges who retire. This legislation levels that playing field, enabling more (former) judicial office holders to draw their pension while continuing to support the courts and tribunals system where there is a pressing business need for additional capacity.

The Government hopes, in the long run, not to have to rely to as great an extent on judges “sitting in retirement”, because of the increase to the MRA and improved recruitment and retention of judicial office holders. However, in the interim, enabling more office holders to draw their pension while sitting in retirement is seen as an important “flexibility” to meet business need.<sup>306</sup>

## 6.2 Existing authority to serve beyond age 70

Currently, there is limited flexibility for judicial office holders in the UK to continue to sit beyond their statutory MRA.<sup>307</sup>

For those appointed to sit in the lower courts and tribunals, the MRA of an office holder can be extended by up to one year at a time until they reach the age 75. This can only happen in England and Wales if the Lord Chancellor and the Lord Chief Justice determine that it is in the public interest.<sup>308</sup> Such a decision is typically taken based on a pressing business need.

This flexibility is not available for those appointed to the UK Supreme Court, from the High Court, Court of Appeal or Supreme Court in England, Wales and Northern Ireland, or for the Court of Session or High Court of Justiciary upwards in Scotland. However, [section 9 of the Senior Courts Act 1981](#) and the [section 20E of the Judiciary and Courts \(Scotland\) Act 2008](#) both enable former senior judges to sit on an ad hoc basis until the age of 75 where business need requires it (on a fee-paid basis).

Similarly, [section 39 of the Constitutional Reform Act 2005](#) enables the UK Supreme Court to run a “supplementary panel” which typically includes a handful of recently retired Supreme Court justices under the age of 75.

There is even less flexibility for lay justices (magistrates) to serve beyond the age of 70. The automatic rule is that they are entered onto the “supplemental list” at that age unless very narrow and short-term exceptions apply. Entry onto the supplemental list prevents a magistrate from continuing to serve,

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<sup>306</sup> [Bill 211-EN](#), para 46

<sup>307</sup> If a judge or lay magistrate is presiding over active proceedings when they reach the legal obligation to retire, they can continue to sit for the purposes of concluding those proceedings. See [section 27 Judicial Pensions and Retirement Act 1993](#) and [section 13 Courts Act 2003](#).

<sup>308</sup> Slightly different arrangements apply for tribunal appointments and for judicial appointments in Scotland and Northern Ireland. For example, extending the appointment of a UK tribunal judge or a Sheriff in Scotland would be a decision for the Senior President of Tribunals or the Lord President of the Court of Session respectively, rather than the Lord Chief Justice for England and Wales. See [sections 26 \(4-6\) and \(12\) Judicial Pensions and Retirement Act 1993](#)

and removal from the list (i.e. reinstatement as a lay justice) is only possible if someone is below the age of 70.

## 6.3 Policy context

### Why is there a mandatory judicial retirement age (MRA)?

More so than for other public functions, it is vital that judicial office holders can exercise their functions independently of political or other influence. This usually means that, on appointment, they are granted a form of security of tenure and cannot be removed at the whims of a Minister, or other judicial office holders, save in clearly defined and exceptional circumstances to do with their conduct or ability.

This poses difficulties, however, when office holders reach an advanced age. It is difficult to devise a system that independently, fairly, effectively and proportionately ensures judicial office holders remain sufficiently healthy and capable of carrying on their functions. Widespread and regular individual assessments of the ongoing capacity of judges have been regarded as a disproportionate response to this dilemma.<sup>309</sup>

In that context, a mandatory retirement age (MRA) serves as a safeguard or proxy. It is a less intrusive means of ensuring that the judiciary, on the whole, remains fit and able. There are other countries which appoint some or all of their judges “for life” without a retirement clause. The most notable example of this is federal judicial appointments in the United States of America.<sup>310</sup>

An MRA has also been regarded, in UK policy-making, as an important component in efforts to diversify the judiciary and legal profession. The legal profession generally, and the senior judiciary especially, are regarded as being among the least diverse professions in UK society, when benchmarked against demographics of race, sex, gender or age.<sup>311</sup>

The primary mechanism by which efforts have been made to improve this situation have focussed on judicial recruitment. One of the challenges that a higher MRA presents is that it keeps more incumbents in their posts for longer. This means there are fewer vacancies to fill: especially in more senior

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<sup>309</sup> MoJ, [Judicial Mandatory Retirement Age Consultation](#), 16 July 2020, para 41

<sup>310</sup> Three US Supreme Court Justices have died in office in the 21<sup>st</sup> century: Chief Justice William Rehnquist at age 80 (in 2005), Associate Justice Antonin Scalia at age 79 (in 2016) and Associate Justice Ruth Bader Ginsburg at age 87 (in 2020). The current bench includes Associate Justices Breyer (82), Clarence Thomas (73) and Samuel Alito (71) all of whom are over the UK’s MRA of 70. Three Associate Justices have retired in the 21<sup>st</sup> century beyond the age of 75: Associate Justices Stevens, O’Connor, and Kennedy.

<sup>311</sup> The MoJ has an annual statistic publication, [Diversity of the judiciary: Legal professions, new appointments and current post-holders](#). The most recent edition of this was published on 15 July 2021.

positions. Further, the incumbents that most benefit from a higher retirement age in the short term are themselves older and more likely to be white and/or men. Part of the reason a retirement age of 70 years was preferred to 72 or 75 years in the 1990s and early 2000s was a desire to accelerate more diverse recruitment.

## Why consult on reforming the MRA?

There have been growing concerns in recent years about the overall capacity of the judiciary. Growing caseloads, even prior to the Coronavirus pandemic, lead to substantial backlogs, including in the Court of Appeal (as noted in [the Briggs Review](#)).<sup>312</sup> There is a concern that, if judges are forced to retire by the MRA of 70, the pressures on the courts will become yet more acute. Most judges who benefited from the transitional arrangements in the 1993 Act (which allowed them to retain retirement ages of 72 or 75) have also since retired or are approaching retirement.

The Government has stated concerns about losing the expertise and experience of judges prematurely. It has suggested that the current MRA, set over a quarter of a century ago, may no longer be appropriate in light of increased life expectancy and developments in work patterns in comparable professions.

The Government noted in its consultation response that, since 2016, “we have seen shortfalls in some recruitment exercises, particularly for the High Court, Circuit and District benches.”<sup>313</sup>

One recruitment challenge has been that experienced lawyers in their mid-60s, who might have considered a judicial career in the years immediately before retirement, are unable to demonstrate that they could provide a reasonable minimum level of service. This is usually understood to mean being able to sit for at least five years. The MRA makes it more difficult for them to meet this condition when the Judicial Appointments Commission (or its devolved equivalents) are recruiting.

The consultation carried out by the UK Government in 2020 was intended to ascertain how far any reforms to the MRA should go. The Government suggested two possible models for retirement reform: one around a modest raising of the MRA to 72, and a more significant departure through raising it to 75.

Over and above the main principle, the Government sought views on how best to implement transitional arrangements for magistrates and included questions on the extent to which the MRA should be consistent for all judicial office holders.

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<sup>312</sup> Lord Justice Briggs, [Civil Courts Structure Review: Final Report](#), July 2016, para 2.9

<sup>313</sup> MoJ, [Judicial Mandatory Retirement Age: Response to Consultation](#), 8 March 2021, para 17

## Consultation responses

There was a mixed picture in responses to the consultation. Most respondents favoured an increase in the MRA. Of the heads of the UK's respective judiciaries, only the Lord President of the Court of Session in Scotland opposed outright the raising of the MRA. He did so citing concerns about public perception around the demographics and fitness of the judiciary outweighing perceived benefits of retaining experience and expertise.

All of the judicial associations and other professional bodies who responded seemed to favour an increase in the MRA. The House of Commons Justice Committee in its submission, by contrast, opposed raising the MRA, predominantly but not exclusively on diversity grounds.

The senior judiciary, notably including the President of the Supreme Court, Lord Chief Justice of England and Wales, Senior President of Tribunals, Chief Coroner of England and Wales, Lord Chief Justice of Northern Ireland and the Lord President of the Court of Session, and the Law Society for England and Wales, all preferred raising the MRA only to 72 rather than to 75.

On the other hand, the Magistrates' Association and the Bar Council, and the majority of individual respondents, supported raising the MRA up to the higher level of 75 years of age.<sup>314</sup>

The main reason some key respondents had for opposing an increase of the MRA to 75 was a concern about the impact it would have on judicial diversity. The Government acknowledged those concerns in its consultation response, but has argued this would be mitigated by the changes making the judicial profession more attractive. It said:

... raising the MRA could ...have a positive impact by attracting a greater number of applicants to judicial office, particularly those who may be considering a judicial career later in life. This higher MRA will also allow [judicial office holders] greater opportunity to develop and progress their careers, which would not only contribute to bolstering the pool of judicial expertise but could also improve the diversity of the senior judiciary in the longer term.<sup>315</sup>

## 6.4

## The Bill

### Raising the MRA

**Clause 109 and Schedule 1** would raise the MRA for most judicial offices.

Schedule 1 would amend more than 40 separate pieces of primary legislation. They all either set, or make provision consequential on, the retirement age for judicial or related offices. In the vast majority of cases, the amendments

<sup>314</sup> MoJ, [Judicial Mandatory Retirement Age: Response to Consultation](#), 8 March 2021, p30

<sup>315</sup> MoJ, [Judicial Mandatory Retirement Age: Response to Consultation](#), 8 March 2021, para 76

simply involve the deletion of references to “seventy” or “70” and replacing them with “75”.

One notable exception to this general trend in Schedule 1 concerns [section 4 of the Public Passenger Vehicles Act 1981](#). Under that Act at the moment, traffic commissioners must retire at the age of 65 (or in limited cases, between the ages of 65 and 66). The mandatory retirement age for this post is being brought into line with other judicial offices and will be 75.

The more complex amendments in Part 1 of Schedule 1 relate almost exclusively to the Judicial Pensions and Retirement Act 1993. Schedule 1 will:

- repeal the provisions in section 26 that enable the MRA to be extended by up to a year at a time (because they are redundant if the MRA becomes 75);
- enable coroners and traffic commissioners to continue to sit past the MRA to dispose of active cases (previously this discretion only applied to other types of judicial office holder); and
- “refresh” and clarify Schedule 5 of the 1993 Act (which lists the judicial offices to which the MRA applies).

## Part 2 of Schedule 1

**Paragraph 43 of Schedule 1** confirms that the new retirement age applies across the board, regardless of whether someone was appointed to a judicial office before or after this Act is brought into force.

Simply raising the “retirement” age of lay justices (magistrates) when this Act comes into force would be of no assistance to those who turned 70 at some point in the last 4-5 years: they would not be reinstated as lay justices. Paragraphs 44 and 45 therefore make transitional provision for lay justices in England and Wales and Northern Ireland respectively.

In England and Wales, if someone served as a lay justice, vacated office by reason of age at 70 years, and is under the age of 75, they will be able to apply to be reinstated. The process by which an application of this sort may be made is not set out in the legislation, but it is anticipated further details will be forthcoming from the Ministry of Justice or HM Courts and Tribunals Service.

With the Lord Chief Justice’s agreement, the Lord Chancellor would be able to reinstate a lay magistrate for a “temporary period” where it would be expedient for disposing of business in the magistrates’ court or the family court.<sup>316</sup> There is complete flexibility as to how long the “temporary period” would be, subject only to the requirement that it cannot go beyond the 75<sup>th</sup> birthday of the individual in question.

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<sup>316</sup> In Northern Ireland the reinstatement is to be done by decision of the Northern Ireland Judicial Appointments Commission.

## Part 3 Schedule 1

The final part of Schedule 1 repeals provisions which are no longer necessary, or which no longer have any legal effect, as a consequence of the changes made elsewhere in the Schedule.

## Judicial allowances

At the moment, the Lord Chancellor has the power to pay allowances to some, but not all, judicial office holders falling under his responsibility. As the Explanatory Notes to the Bill explain:

There are inconsistencies within current legislation in that the Lord Chancellor has a statutory power to determine provision of an allowance to some, but not all, judicial office holders for which the Lord Chancellor has the power to determine salary.<sup>317</sup>

Some of these powers have a common law underpinning, whereas others are statutory. **Clause 110 and Schedule 2** would bring greater consistency and uniformity to the Lord Chancellor's power to pay allowances to judicial office holders for which he has responsibility, and standardise similar powers of Scottish Ministers and the Northern Ireland Departments to do the same for certain judicial office holders under devolved responsibility.

The rationale behind having, and making greater use of, allowances is, as the Government explained, that:

Allowances have been used to recognise work undertaken outside of a judge's core work of hearing cases, such as providing leadership or significant support to other judges and courts administrative staff, to address temporary recruitment and retention problems, or to recognise temporary periods of additional responsibility. Allowances are useful as, unlike judicial salaries which are subject to statutory protection, they can be removed when the need for them falls away, for example, a judge stops undertaking leadership responsibilities, and so will be used to make temporary and ad-hoc payments where appropriate.<sup>318</sup>

Schedule 2 amends 17 Acts and four Northern Ireland Orders in Council. The changes mostly supplement existing statutory powers to pay a salary or fee with a power also to pay allowances. Some other changes remove references to powers to pay allowances merely for "travel and subsistence", enabling them also to be paid for other purposes.

## Sitting in retirement

### The current law

At the moment, a salaried judge (whether full or part time) can take early retirement from their post, draw on their judicial pension, and continue to

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<sup>317</sup> [Bill 211-EN](#) para 41

<sup>318</sup> *Ibid* para 40

serve on an ad hoc basis as a fee-paid judge in retirement until the age of 75, where business need requires it. This is known as the “sitting in retirement” policy.

As the Ministry of Justice’s [Judicial Mandatory Retirement Age Consultation](#) explains, fee-paid judges (who sit as a judge on an ad hoc basis) are not normally able to draw on their pension while sitting in retirement because of limitations in the existing statutory framework.<sup>319</sup>

### **New standardised post of judge “sitting in retirement”**

**Clause 110** of this Bill addresses this by creating a specific category of judicial appointment for all judges that sit in retirement. For each judicial office listed in Schedule 3, there will be an equivalent “sitting in retirement” post with essentially the same powers and status as the ordinary post.

The intention is that salaried and fee-paid judges would be able to apply to these posts on the same basis as one another, and that they would be able to draw on their judicial pension while serving, until the age of 75.

### **Eligibility for appointment to a sitting in retirement office**

**Clause 112** sets out the qualification and eligibility requirements for someone to “sit in retirement” and specifies for each judicial office which appointing authority may appoint them to that position. In simple terms, a judge must:

- have been qualified for (and previously assumed) an equivalent salaried post; and
- otherwise meet eligibility requirements set out in regulations by the Lord Chancellor (or equivalent devolved minister).

Provided someone meets those criteria, the relevant “appointing authority” may appoint them if it is expedient to dispose of business in the relevant court or tribunal. This is usually the relevant head of the judiciary or tribunals system in the given part of the UK to which the appointment applies, but in Northern Ireland is sometimes its Judicial Appointments Commission.

The relevant appointing authority must secure the consent of the Lord Chancellor (or devolved equivalent Minister or Department) before making an appointment to a sitting in retirement office.

Under subsections (9) and (10) respectively, the Lord Chief Justice for England and Wales and the Lord Chief Justice for Northern Ireland can delegate their functions under clause 112 to another judicial office holder.

### **Powers and terms of appointment when sitting in retirement**

The new role of a judicial office holder sitting in retirement will have, in substance, the same powers as the normal salaried or fee-paid judge

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<sup>319</sup> MoJ, [Judicial Mandatory Retirement Age Consultation](#), 16 July 2020, para 29

carrying on the same role. For the purposes of court or tribunal proceedings they are simply a judge like any other.

**Clause 113** stipulates, however, that the terms of appointment, removal and disqualification are not the same for “sitting in retirement” appointments, and that different arrangements apply as regards to tenure, oaths to be taken, and remuneration and allowances. This is necessary and inherent in the nature of a “sitting in retirement” office.

### **Discipline and removal from office when sitting in retirement**

In a similar vein, **clause 114** treats “sitting in retirement” judges slightly differently from their non-retired counterparts. They may be removed from office not just on the grounds of “inability or misbehaviour”, but also by any additional grounds specified in their terms of appointment. Some sitting in retirement appointments may be terminated by the relevant head of the judiciary acting alone, but more senior such appointments will also require the consent of the Lord Chancellor.

The additional specified grounds for removal might include, for example, that adequate salaried recruitment had since been made to cover the relevant court, such that the business need for “sitting in retirement” no longer arose.

### **List of “sitting in retirement” judicial roles**

**Schedule 3** sets out offices in respect of which “sitting in retirement” equivalents may be created by “relevant national authorities” under clause 112. The relevant national authorities making appointments are:

- the Lord Chancellor (for non-devolved judicial appointments);
- the Welsh Ministers (for devolved tribunal appointments in Wales); and
- the Northern Ireland Department of Justice (for devolved judicial appointments).

Schedule 3 does not include judicial appointments falling under the responsibility of the Scottish Ministers. Those are expressly excluded from this policy. In Scotland, employment judges and judges of unified tribunals would be covered by the “sitting in retirement”.

The Schedule 3 list can be modified. This is done by way of an affirmative statutory instrument under powers in clause 115. Regulations can be made by a “relevant national authority” provided that they first consult with the “relevant office holder”. Depending on the appointment to be added or removed from the Schedule 3 list, the “relevant office holder” is:

- the Lord Chief Justice for England and Wales;
- the Senior President of Tribunals;
- the Lord Chief Justice for Northern Ireland; or
- the President of the Welsh Tribunals.

## 6.5

### Devolution implications

The retirement age of many judicial offices in the courts and tribunals is devolved matter in Scotland and Northern Ireland. The same is true for judicial appointments to devolved tribunals in Wales. Separate consultations were conducted by the Scottish Government, Northern Ireland Executive and Welsh Government to that extent.<sup>320</sup> They received broadly very similar evidence, and, so far as those administrations have published their own responses, they appear to be supportive of the UK Government's proposed changes. A common feature of those consultation responses was the perceived advantage of keeping the MRA consistent across different jurisdictions throughout the UK.

The “sitting in retirement” provisions of the Bill do not apply to devolved judicial office holders in Scotland. This is because the arrangements for sitting in retirement would be determined by the Scottish government and provided by in legislation enacted by the Scottish Parliament.

To the extent that this Bill's proposals affect the MRA and judicial appointments to devolved courts and tribunals, legislative consent has been sought for this legislation in Scotland, Northern Ireland and Wales.

## 6.6

### Debate in the Lords

#### Restricting the rise in the MRA to 72 rather than 75

When the Lords considered the Bill, there was some Opposition and Crossbench resistance to raising the MRA fully up to 75. Amendments were debated at both Committee and Report Stage to constrain the MRA to only 72, along the lines called for by most of the senior judiciary. One such Report Stage amendment was defeated on a division.<sup>321</sup>

#### Arguments for an MRA of 72

Those arguing for an MRA of 72 predominantly grounded their arguments in a need for greater diversity, especially in relation to both gender and BAME representation. Their concern was that there simply would not be enough vacancies, with an MRA of 75, to enable the diversity gap to be bridged except in the longer-term. For example, Lord Etherton said at Report Stage:

There can be no doubt that an increase in the age of retirement from 70 to 75 in one go will have a severely adverse effect on inclusion and diversity in our

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<sup>320</sup> The [Scottish Government's consultation](#) ran from November to December 2020. It published [an analysis paper on the responses](#) in March 2021. The [Welsh Government's consultation](#) ran from September to November 2020. The [Northern Ireland Department of Justice consultation](#) ran from October to December 2020.

<sup>321</sup> [HL Deb 29 November 2021 \[Public Service Pensions and Judicial Offices Bill \[HL\]\] cc1207-8](#)

most senior courts. It will diminish, almost to a vanishing point, opportunities for appointment and advancement for a number of years. That is why, as the noble Lord, Lord Ponsonby, has pointed out, all the most senior judges were in favour of an increase in the judicial MRA to 72 rather than 75.<sup>322</sup>

The former Lord Chief Justice, Lord Thomas, also preferred an MRA of 72 on diversity grounds:

Why are we setting an older retirement age, which—I regret to say—will largely benefit men to the detriment of advancing ethnic minorities and women? That is a question that each and every one of us must be prepared to answer publicly.<sup>323</sup>

An additional argument, about the continuing ability of more elderly judges to serve was also a factor. Lord Ponsonby, himself a magistrate, suggested that a higher MRA would place more pressure on existing judicial appraisals:

It is my experience [regularly appraising other magistrates] that some colleagues experience a mental decline. As a magistrate, it is a sensitive issue to appraise these colleagues. Of course, one has to be robust, but it is not unusual to find oneself appraising a colleague who has been a long-standing friend and having to have a frank discussion with them about some level of mental decline.<sup>324</sup>

### Arguments for an MRA of 75

Those who preferred an MRA of 75 included the Government and, notably, two former UK Supreme Court Judges. They made essentially five arguments.

Firstly, Viscount Younger, speaking for the Government, insisted that the diversity impact between an MRA of 72 and one of 75 was marginal. It would, he said, only very slightly slow the rate of improvement in this area, rather than reverse improvements already made. He also pointed out that most judges will in practice retire before the age of 75 anyway; this was an upper limit not a target for service.<sup>325</sup>

Secondly, as Lord Brown of Eaton-under-Heywood (a former Supreme Court Justice) argued, the recruitment challenges were a comparatively more acute and urgent problem, warranting greater retention of judges of advancing age.<sup>326</sup>

Thirdly, as Lord Hope (another former Supreme Court Justice) pointed out, it would be easier for more judges to provide the length of service necessary to receive a full judicial pension if the MRA was higher. This, he said, would make the judiciary a more attractive proposition for those already earning higher incomes as barristers or solicitors.<sup>327</sup>

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<sup>322</sup> [HL Deb 29 November 2021 c1193](#)

<sup>323</sup> *Ibid* c1200

<sup>324</sup> *Ibid* c1192

<sup>325</sup> *Ibid* c1204

<sup>326</sup> *Ibid* c1196

<sup>327</sup> *Ibid* c1197

Fourthly, the Government said the amendments would limit the advantages realised by new “sitting in retirement” posts. Moreover, they may necessitate the reintroduction of annual “extensions” of service beyond the MRA. This would undermine the simplification brought about by the new scheme.<sup>328</sup>

Fifthly, Lord Hope also noted that the judicial MRA was something Governments were typically very slow to revisit (this being the first major change since legislation passed in 1993). If these reforms were to prove to be too modest, he suggested, there was a risk that the matter would not be revisited swiftly enough to address the urgent short-term recruitment and retention challenges.<sup>329</sup>

## Reinstatement of retired magistrates in family courts

Under the Bill as introduced in the Lords, transitional arrangements would apply for magistrates between the ages of 70 and 75. If a lay justice had been forced to step down at the age of 70, but was not yet 75, they would be able to be reinstated, by the Lord Chancellor, to dispose of business in the magistrates’ courts.

**Amendments 203 and 204** were moved by the Government and made by the House of Lords at Report Stage. They were not debated. The amendments modify the wording of **paragraph 44 of Schedule 1** of the Bill as introduced. These changes mean that a magistrate between ages 70 and 75 would also be able to be reinstated for the purposes of disposing of business in the family courts, not just the criminal cases with which the magistrates courts are predominantly concerned.

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<sup>328</sup> *Ibid* c1203

<sup>329</sup> *Ibid* c1197

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