Public Service Pensions and Judicial Offices Bill [HL]
HL Bill 44 of 2021–22

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On 7 September 2021, the House of Lords is scheduled to debate the second reading of the Public Service Pensions and Judicial Offices Bill [HL].

The bill contains provisions in a variety of areas. First, for all public service pensions, it seeks to remedy unlawful discrimination that arose when existing public schemes were closed to certain members between 2014 and 2016. It proposes separate remedies for judicial schemes, local government schemes and all other public sector schemes.

The remedies follow a series of consultations. They are expected to cost around £17 billion. It is not yet clear who will bear these costs.

Other measures in the bill that change the reformed pension schemes brought in between 2014 and 2016 include reforming the 'cost control mechanism' (CCM). This was intended to protect both member benefits and the cost to the taxpayer from unforeseen changes in pension scheme costs. The reforms are aimed at striking a fairer balance between scheme members and taxpayers than was initially the case and making the CCM more stable.

Finally, the bill contains a number of provisions that aim to improve recruitment and retention in the UK judiciary. Some of these relate to the judicial pension scheme. The Government proposes to introduce further reforms, for example to make the scheme exempt from pension tax-free contribution limits and to improve accrual rates.

Other measures are unrelated to pensions. They include:

- reforming the system of judicial allowances;
- increasing the mandatory retirement age for the judiciary; and
- widening the scope for judges to sit after they have retired.

The House of Commons Public Accounts Committee has criticised the Government for being overly focused on the cost of public pensions to the taxpayer. The committee argued there should be greater consideration of the benefits of pensions, such as in recruiting and retaining staff and in reducing the future cost of welfare benefits. It also argued for further evaluation of the 2014 to 2016 reforms.

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1. Overview of the bill

The Public Service Pensions and Judicial Offices Bill [HL] is a government bill introduced into the House of Lords on 19 July 2021. It is due to have its second reading on 7 September 2021.

In the May 2021 Queen's Speech, the Government said the bill had two main purposes:[1]

- ensure equal treatment for all members within each of the main public service pension schemes; and
- reform the pension arrangements and increase the mandatory retirement age for the judiciary and to put judicial allowances on a firmer legal footing.

The bill's explanatory notes said that its measures fell into five groups, which would aim to:

- Address discrimination that arose when existing public service pension schemes were closed to certain members between 2014 and 2016.
- Deliver changes to public service pension schemes to ensure that all eligible public service workers have access to high quality defined benefit schemes on a fair and equal basis.
- Ensure there are no reductions to members' benefits following completion of the cost control element of the 2016 valuations.
- Improve the terms for judicial resourcing to support the effective functioning of the judiciary, to meet future demands.
- Confer powers upon the Treasury to establish a new UK Asset Resolution (UKAR) Limited pension scheme.[2]

2. Policy background

2.1 Public sector pensions

Around 25% of pensioners, and 16% of the working population, are members of one of the four largest public sector pension schemes.[3] In 2019/20 the four schemes made pension payments of £33.5 billion.

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[1] Prime Minister's Office, *Queen's Speech 2021—Background Briefing Notes*, 11 May 2021, p 123.

[2] Explanatory Notes, p 5.

[3] House of Commons Public Accounts Committee, *Public Sector Pensions*, 11 June 2021, HC 289 of session 2021–22, p 4. The four largest schemes provide benefits for the armed forces, the civil service, the NHS and teachers.

The total cost of public sector pensions was £44.3 billion in 2019/20.[4]

2.2 Reforms between 2014 and 2016

In 2010, the Coalition Government commissioned an independent review of public sector pension provision.[5] The commission reported in March 2011.[6]

Between 2014 and 2015, the Coalition Government implemented the main recommendations of the commission by introducing new pension schemes for public sector employees in the UK.[7] Changes included moving from a final salary to a career average calculation for pension benefits and introducing higher normal retirement ages.[8]

The reforms were intended to reduce the cost of public sector pensions to the taxpayer. The Government estimated they would save £400 billion over a 50-year period and reduce annual costs from 2.0% of GDP in 2019/20 to 1.5% in 2064/65.[9]

The Government also said the reforms would make the system more progressive by increasing benefits for some lower paid workers.[10] It argued that, even after the reforms, public sector pensions would remain "among the very best available".

Following discussions between the Coalition Government and trade unions, those within ten years of retirement had the option to remain in the legacy schemes, rather than being required to join the new schemes. This was intended to recognise that such workers had the least time to prepare for the new pension arrangements.[11] It was known as transitional protection.

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[4] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Government Response to Consultation*, 16 July 2020, CP 373, p 6.

[5] HM Treasury, 'Chancellor announces John Hutton to chair commission on public service pensions', 20 June 2010.

[6] HM Treasury, 'Independent Public Service Pensions Commission: final report by Lord Hutton', 10 March 2011.

[7] Many of the schemes applied only in certain parts of the United Kingdom. Although the finding of discrimination applies to all jurisdictions, in some cases the remedy chosen is a decision for Scottish and Welsh ministers: HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, pp 10–11.

[8] Further details of other changes can be found at: ibid, p 19.

[9] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, p 7; and House of Commons Public Accounts Committee, *Public Sector Pensions*, 11 June 2021, HC 289 of session 2021–22, p 4.

[10] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, p 3.

[11] ibid, p 2.

The new pensions were implemented by regulations made under the Public Service Pensions Act 2013 (PSPA 2013).

2.3 Finding of discrimination: the *McCloud* case

In December 2018, the Court of Appeal found that the transitional protection for workers nearer to retirement was discriminatory against younger scheme members.[12] It also found the transitional arrangements gave rise to indirect sex and race discrimination. The judgment is known as *McCloud*.[13] The Supreme Court later denied the Government leave to appeal.

In July 2019, the Government said that it would bring forward proposals to remedy the discrimination.[14] Although the judgment related only to two smaller schemes, for firefighters and the judiciary, the Government accepted that it applied across all public sector schemes.

2.4 Government consultation (July 2020)

In July 2020, the Government published a consultation on proposed changes to remedy the discrimination identified in *McCloud*.[15] It described the issues as "complex".[16]

Because some people were better off in the new schemes, the Government said that it did not want simply to return to the legacy schemes—although this would have been one option to remedy the discrimination.[17] It therefore proposed an approach whereby all members could choose between the legacy and the reformed schemes in respect of their service for the period 1 April 2015 to 31 March 2022 (the 'remedy period'). From 1 April 2022 onwards, all members would move to the reformed schemes.

For the remedy period, the consultation set out two possible approaches. These differed only in when the scheme member would make the choice of which scheme they wished to be in for the remedy period.[18]

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[12] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, p 3.

[13] *Lord Chancellor and Secretary of State for Justice v V McCloud and Others and N Mostyn and Others* [2018] A2/2018/0635 etc.

[14] House of Commons, 'Written Statement: Public Service Pensions', 15 July 2019, HCWS1725.

[15] There were separate consultations for the judicial and local government pension schemes because of the unique arrangements within those schemes.

[16] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, p 2.

[17] ibid, p 2.

[18] ibid, p 4.

The first was the "immediate choice" option, in which the choice would need to be made shortly after 2022.

The second was the "deferred choice underpin" (DCU) approach. Here, the decision would not be made until the member retired or took their pension benefits. For scheme members who had already retired (or the dependents of deceased members receiving benefits), but who had service during the remedy period, the decision would need to be made as soon as the scheme could facilitate it.

The Government set out the benefits and drawbacks of each option.[19] It said the immediate choice option would provide relative certainty for the majority of members at a much earlier stage. However, it required members, when making the decision, to make assumptions about factors such as their future earnings, career paths and family circumstances. Therefore, they might select the option that was ultimately less beneficial for them. Conversely, at the point of decision in the DCU approach, the member would have greater certainty over the benefits they would receive under each scheme. The Government also argued the DCU approach would be more "challenging" to design and administer in the longer term.

The Government estimated that the cost of the remedy would be around £17 billion.[20] It is not yet clear to what extent the taxpayer and/or the pension scheme members will bear these costs. In evidence to the House of Commons Public Accounts Committee, HM Treasury suggested that the public sector would ultimately bear the cost, but also that "ultimately, the costs will be borne by members".[21] HM Treasury then stated that "we do not want members to be put in a worse position than they would have been prior to the *McCloud* remedy being implemented". The allocation of costs will operate through the cost control mechanism (see section 2.8.1 below).

2.5 Consultation response

The consultation response, published in February 2021, reported that a "significant majority" of respondents backed the DCU approach, presenting "strong and convincing arguments" to support this view.[22] On that basis, the Government committed to this approach.

The response stated that, overall, the Government considered the new pension arrangements, with the remedy applied, to be fair and preferable to

[19] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Consultation*, 16 July 2020, CP 253, p 24.

[20] ibid, p 31.

[21] House of Commons Public Accounts Committee, *Oral Evidence: Public Sector Pensions, HC 947*, 22 April 2021, Q71–72.

[22] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Government Response to Consultation*, 16 July 2020, CP 373, p 2.

the legacy schemes.[23] It therefore confirmed that the legacy schemes would close on 31 March 2021, with all members moving to the new schemes from the following day.

The Government committed to making the necessary changes to implement the remedy via primary legislation so that they could take effect before the intended implementation date of 1 April 2022.[24] The Government said that legislating in this way was necessary to implement the DCU approach and to avoid any further uncertainty.

2.6 Retrospectivity

The changes to public pension schemes that the court found were discriminatory took effect between 2014 and 2015. The measures in the bill that remedy the discrimination will therefore have retrospective effect.

2.7 Local government and judicial schemes

The July 2020 consultation stated that different approaches would be taken to remedy the schemes for local government workers and the judiciary.[25] The Government carried out separate consultations for these schemes.[26] The bill includes measures to implement the conclusions from these consultations.

2.8 Other measures in the bill

In addition to implementing measures designed to remedy the discrimination found in *McCloud*, the bill contains a number of other measures. The background to these is summarised in sections 2.8.1 to 2.8.6 below.

2.8.1 Cost control mechanism

The 'cost control mechanism' (CCM) was a measure introduced into public sector pensions in the new schemes that took effect between 2014 and 2015. The Government said the aim of the CCM was to "protect both the value of member benefits and the cost to the taxpayer from unforeseen changes in pension scheme cost".[27]

[23] HM Treasury, *Public Service Pension Schemes: Changes to the Transitional Arrangements to the 2015 Schemes: Government Response to Consultation*, 16 July 2020, CP 373, p 6.

[24] ibid, pp 6–7.

[25] ibid, p 11.

[26] For local government workers: Ministry of Housing, Communities and Local Government, 'Local Government Pension Scheme—amendments to the statutory underpin', 16 July 2020; and House of Lords, 'Written Statement: Local Government Pensions', 13 May 2021, HLWS23. For the judicial scheme: Ministry of Justice, 'Consultation on the proposed response to McCloud', 16 July 2020.

[27] Explanatory Notes, p 8.

The CCM operates by reducing member benefits if scheme costs rise by more than a specified amount; or, conversely, by increasing benefits if costs fall by more than a specified amount. It was planned to be first used for the 2016 pension scheme valuations.

Preliminary results from CCM calculations raised concerns that the original design of the CCM made it "too volatile".[28] In addition, the Government said the *McCloud* judgment had a "potentially significant and uncertain impact" on the CCM.[29] The Government therefore paused the CCM and asked the Government Actuary to review its operation.[30]

In July 2020, the Government lifted the pause on the CCM and began reassessing the CCM element of the 2016 valuations.[31] It said this followed clarification, through the courts, of the impact of *McCloud*. The calculation would also take account of the remedy provisions envisaged in the bill.

The Government Actuary's review was published in May 2021.[32] It found that some of the early results of CCM calculations seemed "perverse", particularly because the mechanism did not take into account all the costs of providing a pension. It made detailed recommendations to reform the operation of the CCM.[33]

On 24 June 2021, the Government issued a consultation on proposed changes.[34] It said these were intended to establish "a fairer balance of risks between taxpayers and scheme members and create a more stable mechanism". They included:[35]

- removing any allowance for legacy schemes in the calculation;
- increasing the extent to which costs are allowed to vary, without benefits being adjusted; and
- taking into account changes in long-term economic assumptions.

The consultation closed on 19 August 2021. The Government has not yet published its conclusions.

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[28] HM Treasury, 'Public service pensions: cost control mechanism consultation', 24 June 2021, p 2.

[29] House of Commons, 'Written Statement: Pensions', 30 January 2019, HCWS1286.

[30] ibid.

[31] House of Commons, 'Written Statement: Public Service Pensions Consultation and Update', 16 July 2020, HCWS380.

[32] HM Treasury and Government Actuary's Department, 'Cost control mechanism: Government Actuary's review: final report', 27 May 2021.

[33] ibid, pp 5–8.

[34] HM Treasury, 'Public service pensions: cost control mechanism consultation', 24 June 2021.

[35] ibid, p 2.

In the meantime, the Government has decided that there should be no reductions to pension benefits as a result of CCM calculations in the 2016 valuations. The bill contains provisions that would implement this decision. Reductions in scheme costs could still trigger increases in benefits.

2.8.2 UK Asset Resolution pension schemes

The bill contains a set of measures intended to establish one or more new public sector pension schemes to manage the pension assets and liabilities of UK Asset Resolution (UKAR).

UKAR is the government-owned holding company that manages the businesses previously part of Northern Rock (NRAM) and Bradford and Bingley (B&B) banks.[36] These banks were taken into public ownership during the financial crisis.

The Government has been returning the assets of these banks back to the private sector, with the final sale taking place in February 2021.[37]

Two public sector pension schemes pay the pension benefits for former employees of these companies. As part of the final sale, the liability for the payment of the pensions moved from B&B and NRAM to UKAR.[38] HM Treasury has guaranteed the assets of the schemes will be sufficient to meet the liabilities.

The provisions in the bill are intended to meet the Government's aim to wind down UKAR. They would provide HM Treasury with the power to transfer the assets and liabilities of the existing schemes to government and to set up new public pension schemes to manage these pensions.

2.8.3 Changes to judicial schemes to improve recruitment and retention

The Government introduced a new pension scheme for members of the judiciary via regulations in 2015.[39]

In 2018, the Senior Salaries Review Body reported "significant and escalating recruitment and retention problems at all levels of the judiciary".[40] It said the

[36] UK Asset Resolution, 'Welcome to UKAR', accessed 2 August 2021.

[37] HM Treasury, 'Government completes final £5 billion sale of Bradford & Bingley plc and NRAM Limited', 26 February 2021.

[38] Explanatory Notes, p 12.

[39] The legislation was the Judicial Pensions Regulations 2015, made under the Public Service Pensions Act 2013: Ministry of Justice, 'Consultation on a reformed judicial pension scheme', 4 March 2021.

[40] Explanatory Notes, p 9.

main cause was a combination of the new pension scheme being tax registered—meaning that members are subject to annual and lifetime allowance limits on pension tax relief—and later changes to pension and tax thresholds.[41]

In June 2019, the Government responded by introducing a temporary recruitment and retention allowance for senior salaried judges.[42] It also committed to developing a longer-term solution, including changes to the pension scheme.

Following another consultation, the Government committed to introducing a new judicial pension system, to come into effect in 2022.[43] The Government stated this would retain many of the features of the new scheme, such as moving to career average rather than final salary pensions. However, it would also make the judicial scheme tax-unregistered, and have a higher accrual rate than the scheme introduced in 2015.[44]

On 23 July 2021, the Government issued a further consultation on the details of the scheme.[45] This consultation closes on 8 October 2021.

The new scheme will be established through regulations made under the Public Service Pensions Act 2013.[46] However, the bill includes measures to amend the 2013 act to facilitate the scheme's introduction. One example is that it would close legacy pension schemes to accrual of pension benefits from 1 April 2022. Another is that it would remove the prohibition in the 2013 act on including Scottish or Northern Ireland devolved offices within the definition of the judiciary.

2.8.4 Judicial mandatory retirement age

The bill also proposes other changes to the framework governing judicial offices. Again, these are intended to ease problems of recruitment and retention in the judiciary.

One of the reforms is to increase the mandatory retirement age (MRA) in place for judicial officers from 70 to 75.

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41 Senior Salaries Review Body et al, 'Major review of the judicial salary structure 2018', 26 October 2018, pp 20–1.

42 Ministry of Justice, *Government Response to Report No.90 by the Senior Salaries Review Body: Major Review of the Judicial Salary Structure*, 5 June 2019, p 4.

43 Ministry of Justice, 'Consultation on a reformed judicial pension scheme', 4 March 2021.

44 Explanatory Notes, p 10.

45 Ministry of Justice, 'Judicial pension scheme 2022: scheme regulations', 23 July 2021.

46 Explanatory Notes, p 15.

Judicial officers, such as judges, non-legal members of tribunals, magistrates and coroners, are required to vacate office on reaching the MRA. The Government states the advantages of an MRA include:[47]

- helping to preserve public confidence in the health and capacity of those appointed;
- protecting judicial independence by avoiding the need for individual assessments and the possibility of judicial office holders being removed at the whim of the executive;
- supporting judicial resource planning; and
- promoting the diversity of the judiciary by ensuring a steady flow of new appointments.

The current MRA is 70 years old.[48] It was set in 1993. The Government states that, since that time, the structure and operation of courts and the resourcing needs of the judiciary tribunals have developed. In addition, average life expectancy in the UK has increased significantly.

In 2020, the Government consulted on raising the MRA in England to either 72 or 75.[49] In the consultation response, the Government said the majority of responses favoured increasing the MRA to 75, but there were "a number" of respondents that favoured 72, or no increase at all.

In the bill, the Government proposes increasing the MRA to 75. It states this will "enable our courts and tribunals to retain for longer the expertise of experienced judicial office holders and to attract a greater number of talented and diverse applicants".[50]

Currently, some judicial office holders can have their office extended on an annual basis past the MRA (of 70) up to the age of 75. This provision would no longer be necessary with an MRA of 75 and the Government does not propose to allow annual extensions above the new MRA.[51] However, the scope for office holders to continue sitting to finish a case that began before their retirement age will remain. It will also be extended to other office holders, such as coroners, traffic commissioners and magistrates.

The bill would also make provision for the reinstatement of retired magistrates, aged less than 75, where this is necessary to meet business needs.

[47] Explanatory Notes, p 11.
[48] Ministry of Justice, *Judicial Mandatory Retirement Age: Response to Consultation*, 8 March 2021, p 10.
[49] Ministry of Justice, 'Consultation on judicial mandatory retirement age', 16 July 2020.
[50] ibid.
[51] Explanatory Notes, pp 57–8.

The Scottish, Welsh and Northern Ireland governments have conducted separate consultations and have also decided to raise the MRA for judicial office holders, where their MRA is a devolved matter, to 75.[52]

2.8.5 Judicial allowances

The bill's second proposal to improve recruitment and retention in the judiciary is to reform the system of judicial allowances.[53] These are used to compensate office holders for temporary additional duties, such as providing leadership or taking on additional responsibilities. They can also be used to address temporary recruitment and retention issues.

Currently, the Lord Chancellor has statutory powers to determine allowances for some, but not all, judicial office holders. The bill is intended to correct these inconsistences by putting residual common law powers on a statutory footing. The Government also states that it will ensure "sufficient flexibility in judicial remuneration".[54]

2.8.6 Sitting in retirement

The bill's third proposal to improve staffing levels in the judiciary is to introduce greater flexibility for office holders to return to sitting after they have retired, where there is a "business need".

Under existing policy, if there is a "business need" a salaried judge may retire from their office, draw their pension and continue to sit as a fee-paid judge. However, the same option is not available for fee-paid judges.[55] The bill would remedy this by providing a new judicial office to which both salaried and fee-paid office holders can apply on retirement.

The Government states this will provide "an important flexibility" to meet temporary shortages.[56] It says the need for sitting in retirement should, in time, reduce with the changes to judicial pensions and the increase in the MRA proposed elsewhere in the bill.

3. Bill provisions

The bill is split into four parts. The largest part, part 1, would enact remedies for the discrimination identified by the Court of Appeal in *McCloud*. It is split into four chapters. Chapter 1 deals with all public sector schemes except those for the judiciary and local government. Chapters 2 and 3 would

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52 Explanatory Notes, p 11.
53 ibid, p 10.
54 ibid.
55 ibid.
56 ibid.

make provision for judicial and local government schemes respectively. Chapter 4 makes other general provisions relating to the remedy process.

Part 2 would make provisions relating to the UK Asset Resolution (UKAR) pension schemes.

Part 3 would make further changes to the rules relating to judicial offices, not related to pension schemes.

Part 4 contains final miscellaneous provisions, including in relation to regulations and directions, extent, commencement and the short title of the bill.

3.1 Part 1, chapter 1: remedies for pension schemes except judicial and local government schemes (clauses 1 to 35)

Clause 1 details the periods of service that are remediable to address the discrimination identified by the court. The start date varies according to the pension scheme. The end date is 31 March 2022 in each case. The bill would allow for breaks in service of up to five years during the qualifying period.

Clause 2 states that for anyone with remedial service in a new scheme, that would be treated retrospectively as service under the legacy scheme. It would also make further provisions; for example, to avoid complex tax implications of the retrospective move between schemes.

Similarly, clause 3 would ensure that any benefits paid from a new pension are retrospectively treated as payments from a legacy pension.

Clause 4 would define the appropriate legacy scheme to which members would 'move back' to facilitate the remedy.

Clause 5 deals with members who opted out of either a legacy scheme or a new scheme in the affected period. It would allow such service to be reinstated in the scheme. The clause would allow schemes to restrict the right to rejoin but sets out when this is permissible. For example, schemes would be entitled to allow reinstatement where the member can demonstrate that they opted out as a consequence of the discrimination that arose.

Clauses 6 to 8 would require schemes to allow members with pension benefits in payment to make their choice of scheme, or 'election', as soon as practicable ('immediate choice' elections). The clauses make various related provisions. For example, clause 7 would specify the time period by which a beneficiary must respond to the request for an election. This would be one year, or later if the scheme manager considers it reasonable. Clause 8 sets out the process if a beneficiary does not respond in this timescale.

Clauses 9 to 11 would make similar provisions for members not yet receiving benefits ('deferred choice' elections). They would require pension schemes to make arrangements for a member to make the decisions within a period of a year before the first payments to that member are expected to be made. Clause 10 would allow these decisions to take effect just before benefits become payable. Clause 11 would specify the process schemes should follow if a member does not respond to the request for an election.

Clauses 12 to 16 would allow corrections of any overpaid or underpaid pension benefits or contributions. This would help to meet the principle that whichever scheme a member elects to join for the remediable period, they would be treated as if they had always been in that scheme.

Overpaid or underpaid benefits might arise for members already receiving scheme benefits; for example, if the member was actually moved to the reformed scheme but elects to be treated as having been in the legacy scheme. The bill proposes that beneficiaries would have to return any overpayments to the scheme, or would receive compensation for any underpayments. The bill treats regular pension payments and lump sums separately to allow for their different tax treatments.

Similarly, members already receiving benefits and those still accruing them might have overpaid or underpaid contributions. Again, the bill's approach is that members would have to make up any underpaid contributions to the scheme, or would receive compensation for any overpayments.

Notwithstanding this principle, clause 16 would allow schemes to reduce or waive payments owed by members who are assessed as needing to repay overpaid benefits or top up underpaid contributions. The Government provided an example of when schemes may wish to use this waiver and write off part of the liability, eg a pensioner member who has been overpaid their pension benefit and for whom reimbursing the pension scheme would cause hardship.[57]

Conversely, clause 16 would also allow schemes to reduce or not pay compensation calculated as being payable to members. The Government said this was particularly intended to correct situations related to tax relief.[58] For example, a member who overpaid contributions may also have received too much tax relief.

Clause 17 deals with payments due from a pension scheme to a member's ex-spouse or former civil partner ('pension credit member'), where a

[57] Explanatory Notes, p 27.
[58] ibid, pp 27–8.

divorce or dissolution order awarded them a percentage of the value of the pension. The bill would award payments to the pension credit member in proportion to the change in payments to the member.

Clause 18 would allow schemes to adjust the value of benefits to reflect past additional voluntary contributions. The Government's intention is that rights resulting from such contributions should reflect what the member would have secured under the scheme they elect to join, if the voluntary contributions had been paid to that scheme.[59] The clause allows the scheme to provide the benefits accruing from voluntary contributions in several different ways; for example, through actuarially equivalent rights or via compensation.

Clause 19 deals with transfers of pension rights into, and out of, public service schemes from or to other pension schemes. It would require schemes to allow members to choose whether to receive new or legacy scheme benefits when calculating the transfer value.

Clause 20 would provide schemes with the power to make further provision in relation to members' remediable service in certain other specified situations. These include partial retirement and 'mixed service', which describes a member who has different retirement ages for different periods of service because of a career break.[60]

Clauses 21 and 22 would permit schemes to provide compensation for any losses incurred by a member as a result of the discrimination identified by the court or the remedies proposed by the bill. The Government gave an example of a tax loss where statutory time limits would now prevent the member recovering the loss from HM Revenue and Customs.[61]

Clause 23 would provide for interest to be paid on amounts owed by schemes to members or by members to schemes. It would allow the interest to be paid in a number of forms. These could include payment by instalments or netting off amounts owed by a scheme to a member against amounts owed by the member to the scheme.

Clause 24 states that certain powers in the bill would only be exercisable through HM Treasury directions. The Government says respondents to the consultation supported central directions "to ensure consistency across and within schemes in the way the remedy is implemented".[62]

[59] Explanatory Notes, p 29.

[60] Teachers' Pensions, *What is Mixed Service?*, accessed 3 August 2021.

[61] Explanatory Notes, p 31.

[62] ibid.

Clause 25 would override any scheme rules that prevent an unauthorised payment being made, where such a payment is permitted or required by this bill.

Clause 26 would make provision for the information that schemes should provide to members to enable them to make an informed choice under the remedy system. For example, schemes would have to set out the benefits available under the different options and when, and how, a decision must be made. The clause also states that HM Treasury directions can be made to require further information to be provided.

Some members of certain public sector pension schemes have already received a remedy for the discrimination identified by the court. These could include members of the judiciary and firefighter schemes who were parties to the court action. Clauses 28 and 29 are intended to ensure that, for such members, the bill does not override any prior court or tribunal orders. In addition, they would allow scheme regulations to correct or 'top up' the remedy already provided to ensure consistent and fair treatment.

Clauses 30 to 35 provide definitions of terms used elsewhere in chapter 1.

3.2 Part 1, chapter 2: remedies for judicial pension schemes (clauses 36 to 72)

As described in section 2.7 above, the Government consulted on a separate remedy for pension schemes for members of the judiciary. The Government states this is necessary because of the "unique nature of judicial office and the judicial legacy schemes".[63] The approach set out in the consultation outcome and the bill is that members of the scheme with remediable service will make their choice through an "options exercise", anticipated to take place in autumn 2022.

In the original consultation, the Government considered the merits of a deferred choice scheme, as will be implemented for members of other public sector pension schemes. It rejected this option for the judiciary, saying:

> The deferred choice option 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.[64]

[63] Explanatory Notes, p 8.

[64] Ministry of Justice, *Judicial Pensions: Proposed Response to McCloud: Consultation*, 16 July 2020, p 18.

Nevertheless, the remedy arrangements for the judicial schemes set out in clauses 36 to 72 of the bill are similar in many respects to those for non-judicial schemes in clauses 1 to 36. Therefore, the remainder of this section focuses on areas where the provisions for the judicial schemes may vary from those for the non-judicial schemes.

Clause 36, which defines remediable service for the judiciary in a similar way to clause 1 for other public sector pension scheme members, includes the condition that judges aged 55 or over on 1 April 2012 are not eligible for remedies. This is because they were "protected" members who never left the legacy scheme.

The bill notes that judges were able to opt out of the 2015 reformed scheme and instead join a stakeholder pension scheme known as a partnership pension account (PPA). Clause 36 would make provision that time as a PPA member counts as remediable service in the same way as opting out of the judicial pension altogether.

Clause 38 would permit members of the PPA to join the options exercise if they first transfer their PPA entitlements back into the legacy scheme. The options exercise would provide members with a decision between joining their legacy scheme (a "legacy scheme election") or the reformed scheme (a "2015 scheme election"). Clause 41 would state that those who do not make a decision will retain their current rights, unless they have service in both a legacy scheme and the reformed scheme/PPA. In this case, they will be considered to have elected to join the reformed scheme.

The arrangements envisaged for payments due from a pension scheme to a member's ex-spouse or former civil partner are different to those for members of non-judicial pension schemes. The scheme member's payments would be adjusted according to their choice in the options exercise. However, clause 54 would provide that the pension credit member's payments be adjusted according to whichever option is more valuable to the pension credit member, as long as it is not to the detriment of the scheme member.[65]

3.3 Part 1, chapter 3: local government schemes (clauses 73 to 75)

The principle underlying the proposals for local government schemes in England and Wales is that all members should receive an "underpin" for the remedy period. This would provide them with the higher of their pension under the reformed scheme or the pension they would have been entitled to under the legacy scheme.[66] Previously, this underpin had only been

[65] Explanatory Notes, p 40.

[66] House of Lords, 'Written Statement: Local Government Pensions', 13 May 2021, HLWS23.

available for members who were within ten years of their normal pension age on 1 April 2012.[67]

The underpin would operate through additional checks being made by the schemes.[68] Therefore, unlike the judicial and other non-judicial schemes, members would not need to make any choices or elections themselves.

The bill's provisions in this area, contained in clauses 73 to 75, are simpler than those for judicial and other non-judicial schemes. They operate by permitting regulations to be made that implement the proposed remedy.

Clause 73 defines remediable service in a similar way to clauses 1 and 37.

Clause 74 would allow the local government pension scheme regulations to be made. The bill specifies that the regulations would permit schemes to provide member benefits in relation to remediable service that are equivalent to final salary benefits.

Clause 75 provides definitions for terms used in this chapter.

3.4 Part 1, chapter 4: general provisions (clauses 76 to 92)

Chapter 4 includes a number of general provisions, many of which would apply across all public sector pension schemes. For example, clause 76 would close the legacy pension schemes to further accruals from 1 April 2022. As a result, all members of public service pension schemes would have to accrue pension benefits in a new scheme from that date.

The clause would also ensure that the provisions in the Public Service Pensions Act 2013 to close the legacy schemes at the time the new schemes were introduced do not apply. This would have the retrospective effect of reopening the legacy schemes for the period up to 1 April 2022.

Clause 79 contains a general power that would permit scheme authorities to amend scheme regulations, for both new and legacy schemes, to make consequential changes arising from part 1 of the bill. It would also remove, for the purposes of the remedies, the usual requirements when scheme authorities propose retrospective changes to rules. These would otherwise require scheme authorities to consult members and lay a report before Parliament.

Clause 80 contains the provisions relating to the cost control mechanism discussed in section 2.8.1 above. Specifically, they would ensure there are no

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[67] Ministry of Housing, Communities and Local Government, *Local Government Pension Scheme: Amendments to the Statutory Underpin*, 16 July 2020, p 4.

[68] ibid, p 9.

reductions to pension benefits as a result of CCM calculations in the 2016 valuations. Reductions in scheme costs could still trigger increases in benefits.

Clause 81 would make specific provisions relating to the pension scheme in place for staff of the Secret Intelligence Service.

Clause 82 would permit judicial schemes to take account of an office holder's past service where that office is subsequently added to those included in the judiciary.

Clauses 84 and 85 provide HM Treasury and the Department of Finance in Northern Ireland with the power to make regulations to set up a compensation scheme. The scheme would manage compensation arising from clause 21 and the equivalent clause for the judicial schemes, clause 56.

Clause 87 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 90 would provide a power for the Government to amend, repeal or revoke primary and secondary legislation where consequential upon part 1 of the bill, exercisable by statutory instrument (SI). Changes to primary legislation would require affirmative SIs and changes to secondary legislation would require negative SIs.[69]

Clauses 91 and 92 provide definitions of terms used in part 1. Clause 91 includes a detailed definition of a 'member' of a pension scheme.

3.5 Part 2: UK Asset Resolution pension schemes (clauses 93 to 102)

As described in section 2.8.2 above, these clauses would establish new public pension schemes for former employees of Northern Rock and Bradford and Bingley.

Clause 93 would provide HM Treasury with the power to make regulations to establish such schemes and to transfer into them the assets and liabilities of the existing schemes.

Clause 94 provides further detail on the scheme's proposed activities; for example, to pay benefits and receive and pay out transfer values. It would ensure the scheme is treated as an occupational pension scheme for

[69] For definitions of these terms and further information on procedure in relation to statutory instruments, see: UK Parliament, 'What is secondary legislation?', accessed 10 August 2021.

legislative purposes. It would also allow that amendments to a new public sector scheme, made by affirmative regulations, can have retrospective effect.

Clause 95 would ensure that the transfer to a new scheme does not adversely affect members' rights. It would also allow the Government to determine how and by whom a member's rights prior to the transfer are valued, for the purpose of meeting the requirements in this clause.

Clause 96 would specify that HM Treasury cannot exercise its rights to amend a new public pension scheme if those amendments would or may affect a member's existing rights. However, this would not apply in certain circumstances; for example, if affected members provide their consent.

Clause 101 would require the Government to consult the trustees of the existing schemes before establishing the new schemes, or before transferring assets and liabilities between them.

3.6 Part 3: judicial offices: changes not related to pension schemes (clauses 103 to 110)

Part 3 contains the provisions that affect judicial offices but do not concern changes to judicial pension schemes.

Clause 103 and schedule 1 would raise the mandatory retirement age for judicial office holders from 70 to 75, as described in section 2.8.4 above. They also specify transitional provisions that would allow magistrates between the age of 70 and 75 to apply to return to the bench, subject to business need.[70]

Clause 104 and schedule 2 would make the changes to the system of judicial allowances described in section 2.8.5 above.

Clause 105 would create the new judicial offices allowing for office holders to sit in retirement, as described in section 2.8.6 above. Schedule 3 contains a list of posts for which sitting in retirement would be possible. It also specifies which body has the authority to make appointments for each sitting in retirement post. Clause 106 contains the criteria that must be met before a sitting in retirement office is created, including that there is a business need. The appointee must also be suitably qualified for the office and have previously held specific judicial offices.

Clauses 107 and 108 propose that, by default, the conditions of employment for sitting in retirement officeholders would be the same as for their pre-retirement equivalents. However, in specified areas the conditions of

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[70] House of Commons, 'Written Question: Magistrates: Retirement', 19 July 2021, 35708.

employment may differ. These include remuneration, tenure of office, appointment and removal from office. Clause 108 sets out in more detail the proposed procedures for discipline and removal from office.

Clause 109 would allow the appropriate national authority (for example, the Lord Chancellor) to add new offices to the list in schedule 3 by making regulations.

Clause 110 and schedule 4 contain consequential amendments related to sitting in retirement.

3.7 Part 4: final provisions (clauses 111 to 114)

Clause 111 sets out procedural provisions about regulations made under the bill.

Clause 112 sets out the bill's territorial extent, commencement and short title. The bill overall extends to England, Scotland, Wales and Northern Ireland. However, many of the provisions extend only to parts of the United Kingdom. Further, some of the provisions would be implemented differently or separately in England, Scotland, Wales and Northern Ireland. This is because the devolved governments have powers in relation to various aspects of the schemes in their jurisdictions and because of the structure of the judiciary across the United Kingdom.[71] The position for each individual provision is set out in detail throughout the bill and its explanatory notes.[72]

The Government has stated that it believes the bill engages the Sewel Convention that the UK Parliament does not legislate on devolved matters without the consent of the devolved legislature.[73] Accordingly, it has said it will seek consent for the relevant measures.

Clause 113 sets out the commencement provisions. Different parts of the legislation would come into force on different dates and many would be brought into force by regulations.

4. External commentary

In June 2021, the House of Commons Public Accounts Committee published a report on public sector pensions.[74] It concluded that HM Treasury focuses on the affordability of pensions for the taxpayer. However, the committee commented on its "lack of curiosity about other important issues", despite

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[71] House of Commons Library, *Public Service Pensions: Facts and Figures*, 11 May 2021, p 4.

[72] For example: Explanatory Notes, pp 16–18 and 67–71.

[73] ibid, p 16.

[74] House of Commons Public Accounts Committee, *Public Sector Pensions*, 11 June 2021, HC 289 of session 2021–22.

these being part of HM Treasury's policy for public service pensions. The committee said these other issues include:

- the effectiveness of pensions as a means of recruiting and retaining staff;
- the impact on employers of increasing pension costs;
- the effect on people working in the public sector; and
- the potential knock-on impacts on other areas of public expenditure; for example, on means-tested benefits.[75]

The committee also criticised the remedy schemes, saying that the Government wanted scheme members to meet the £17 billion costs despite these being needed to correct a Government "mistake". Overall, it said the Government should do more to evaluate the 2011 to 2015 reforms.

The committee called on the Government to consider how pensions can help to support, recruit and retain staff. It also suggested the Government should address the "stark differences" in the pensions received by different groups of members.

It has been reported that a group of police officers have criticised the *McCloud* remedy on the grounds that it, itself, could give rise to "deeply unfair" outcomes and possible age and sex discrimination.[76] For example, the group argued that female workers who took extended maternity leave will lose the ability to work additional years under the legacy schemes. This could mean they have a greater percentage of their service on the less attractive 2015 scheme when compared with male counterparts.

The group also suggested that, despite Government assurances, the remedy proposals do not protect accrued pension rights for police officers.

5. Read more

- House of Commons Library briefings:
  - *Public Service Pensions: Facts and Figures*, 11 May 2021
  - *Public Service Pensions: The 2015 Reforms*, 6 July 2021
  - *Public Service Pensions: The Cost Control Mechanism*, 6 July 2021
  - *Public Service Pensions: Response to McCloud*, 6 July 2021

[75] House of Commons Public Accounts Committee, *Public Sector Pensions*, 11 June 2021, HC 289 of session 2021–22, p 3.

[76] Benjamin Mercer, 'Police slate "deeply unfair" ramifications of McCloud remedy', Pensions Expert, 10 May 2021.

    - *Judges' Pension Schemes*, 14 April 2021
    - 'Judicial retirement: plans to move from 70 to 75', 12 March 2021
    - *Local Government Pension Scheme: Response to McCloud*, 11 June 2021.

- HM Treasury, *Public Service Pensions and Judicial Offices Bill: Comms Briefing*, 20 July 2021
- Civil Service Pension Scheme, '2015 remedy: McCloud', 8 June 2021
- Prospect, 'What is the McCloud judgement?', 2 March 2021

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