



Ministry  
of Justice

# Policy Statement

Ministry of Justice measures in the Public  
Service Pensions and Judicial Offices Bill

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# Introduction

1. This Policy Statement relates to the Public Service Pensions and Judicial Offices Bill (PSP&JO) as introduced in the House of Lords on 19 July 2021 (HL Bill 44). It is intended to supplement the Explanatory Notes and Delegated Powers Memorandum for this Bill. It does so by providing further detail as to the policy intent and practical application of certain clauses, particularly where clauses confer powers to make regulations, in Chapter 2 (and one clause in Chapter 3) of Part 1 of the Bill, as well as clauses contained in Part 3.
2. To note, separate Policy Statements have been produced for other Chapters of the Bill, for example in respect of the retrospective remedy provisions relating to public service pension schemes and local government schemes.
3. The provisions of Chapter 2 of the Bill are intended to provide a retrospective remedy for the unlawful discrimination that was identified by the courts in the case of *McCloud* in respect of the 2015 reforms to the judicial pension.
4. Part 3 of the Bill relates to judicial offices. It makes provision to raise the mandatory retirement age of judicial office holders from 70 to 75 and for a new sitting in retirement office, and also provides the Lord Chancellor with the statutory power to pay allowances for judicial office holders.
5. This document might best be read alongside the Bill. It is not, and is not intended to be, a comprehensive description of the Bill.

## Background

### *Judicial Pensions*

6. In 2015 the government introduced extensive reforms to public service pension schemes to make them more affordable and sustainable. In the judicial context, judges were moved from their final-salary legacy schemes to the career-average 2015 judicial scheme. The reforms included transitional protection for judges within 10 years of retirement. This allowed older judges to remain in their legacy schemes.
7. Transitional protection was challenged by younger judges in the case of *McCloud*. Claimants alleged that the protections extended to older judges amounted to direct age discrimination contrary to section 13 of the Equality Act 2010. In 2018, the Court of Appeal held that the transitional provisions were unlawfully discriminatory on the grounds of age.

8. The Ministry of Justice has committed to address the discrimination for all affected judges who are affected. Accordingly, Chapter 2 of the Bill provides that judges who are in scope of the *McCloud* judgment should be given a choice of pension scheme membership for the relevant period, 1 April 2015 – 31 March 2022, known as the ‘remedy period’. This choice will be made in an ‘options exercise’ once the necessary legislative and data requirements are in place.

#### *Judicial Offices*

9. Part 3 of the Bill makes provision to raise the mandatory retirement age (MRA) of judicial office holders from 70 to 75 and includes a transitional provision to enable magistrates between the age of 70 and 75, on commencement of the new MRA, to apply to return to the bench, subject to business need.
10. Under existing legislation, whilst salaried judges have the opportunity to apply to sit in retirement, this option is not equally available to fee-paid judges. The Bill makes provision for a new sitting in retirement office to which both salaried and fee-paid judicial office holders can apply on retirement.

#### *Judicial Allowances*

11. Part 3 of the Bill provides the Lord Chancellor with the statutory power to pay allowances for all judicial office holders where their salaries or fees are already determined by the Lord Chancellor. Allowances can provide additional flexibility to tackle recruitment and retention challenges, such as with the recruitment and retention allowance introduced in June 2019 for High Court, Circuit and Upper Tribunal Judges. They can also be used to remunerate judges for temporary periods of leadership, such as the leadership allowance paid to Circuit Judges who had been in specific leadership posts since October 2020. These uses for allowances are not exhaustive. The statutory power to pay allowances currently exists for some, but not all, judicial office holders and this Bill will ensure that the power can be applied consistently, expanding the Lord Chancellor’s ability to use allowances to compensate the judiciary.

# Effect of Chapter 2 remedy

12. The judicial remedy in Chapter 2 will offer affected members of the judicial schemes a choice of legacy scheme or 2015 scheme benefits. This approach differs from the remedy in Chapter 1 of the Bill (covered in a separate Policy Statement). Whereas Chapter 1 schemes will offer members a choice at the point of retirement, Chapter 2 sets out that affected members of the judiciary will make their decision in an 'options exercise' – this is in recognition of the fact that respondents to the MoJ *McCloud* consultation favoured making an earlier choice than at retirement. The options exercise will be held after the remedy period has ended, once the necessary legislative and data requirements are in place. A judge's choice of scheme will take retrospective effect so that they will be treated as having been a member of their chosen scheme throughout the remedy period.
13. Judges who retire before the options exercise will be able to make their choice earlier so that they can be put into their chosen scheme and receive their correct pension and lump sum entitlements under that scheme.
14. To ensure that judges who participate in the options exercise can make an informed decision, the Bill requires that they be provided with a statement describing the benefits available to them in both the 2015 and legacy schemes for the relevant period. MoJ intends to provide each judge with a bespoke 'options pack' setting out this comparison of benefits as well as other relevant information to help inform their choice.
15. The Bill establishes that the choice made in the options exercise takes retrospective effect so that members are treated as having been a member of their chosen scheme during the remedy period for all purposes, including benefits, contributions and tax liability. Where a judge elects different scheme membership from their current scheme, adjustments will be needed to any benefits or lump sums already paid out as well as to past pension contributions to reflect this retrospective change of position. The Bill provides for the recovery of sums owing and the repayment of sums owed.
16. For those who return to the legacy scheme, which is unregistered for tax purposes, this also means ensuring the correct level of tax has been paid, since the judge will retrospectively become a member of a tax-unregistered scheme, contributions to which do not attract tax relief - unlike the 2015 scheme, which is tax-registered.
17. For many members the adjustment of contributions and tax will likely be a net neutral exercise because the net 2015 scheme contribution rate (i.e. gross amount less tax relief) is broadly equivalent to the gross legacy scheme contribution rate.

Where, however, it does not balance out, judges may either owe a tax shortfall or be entitled to a refund of overpaid contributions. Illustrative examples and guidance will be set out in the bespoke options packs.

# Elements of Bill where detail will be in scheme regulations

## PSP&JO Bill Part 1, Chapter 2: Judicial Schemes

### HM Treasury Directions

18. Clause 58 of the Bill provides that specified powers in Chapter 2 must be exercised in accordance with directions issued by HM Treasury (or the Department of Finance in Northern Ireland). These specified powers include most of the regulation making powers in Chapter 2 as well as the power to pay compensation. This measure is aimed at ensuring consistency and fairness across the different schemes. The directions will be published on the gov.uk website and circulated to the relevant responsible authorities as required.

### Clause 52: Power to reduce benefits

#### Legislative Approach

19. This clause provides a power to make judicial scheme regulations to reduce benefits payable to a person by an amount equivalent to a liability owed by that person to the scheme or to the person's employer.

20. When the 2015 scheme was introduced, some judges opted out of the scheme and were eligible to receive an allowance known as 'transitional protection allowance' instead. This was equivalent to the 'actual' employer pension contribution and was paid in lieu of pension entitlement for the relevant period. Had these judges been entitled to remain in the legacy scheme, it is highly likely they would not have opted out of pension scheme membership.

21. Under the Bill, these judges will be able to elect legacy scheme membership for the remedy period. Any judge who makes this election will need to repay the transitional protection allowance received and pay the contributions they are liable for in

the legacy scheme for the remedy period. For some judges these amounts could be considerable.

22. Clause 52 therefore aims to provide flexibility for affected members, enabling regulations to allow schemes to reduce pension benefits in lieu of paying liabilities owed to scheme.
23. While the principal provisions of the salaried legacy salaried judicial schemes are set out in primary legislation, they are supplemented by regulations on areas of technical detail. Therefore, a limited power to make the required technical changes to those regulations is appropriate.
24. The power must be exercised in accordance with HM Treasury directions

### **Approach to the Secondary Legislation**

25. The regulations will provide for schemes to reduce benefits in lieu of paying liabilities owed (akin to a Scheme Pays type mechanism). It is expected that the regulations will provide for the mechanism by which deductions from ongoing pension will be calculated and implemented.

## **Clause 53 Powers to reduce or waive liabilities**

### **Legislative Approach**

26. This is the judicial scheme equivalent of chapter 1, clause 16. Clause 53 provides a power to make regulations that reduce or waive an amount owed by a person under clause 48 (pension benefits and lump sum benefits). Clause 48 requires judicial scheme members to repay any benefits or lump sum payments that have been overpaid as a result of electing retrospective change of scheme membership. Clause 53(1) confers power for scheme regulations to enable some or all of such amounts to be reduced or written off. Clause 53(2) applies the same principle to contributions owed under clause 49 (pension contributions), conferring power for scheme regulations to reduce or write off contributions' shortfalls.
27. Clause 53(3) enables regulations allowing the scheme to reduce a contributions shortfall to take account of the fact that the judge would have received tax relief on the contributions if these had actually been paid at the relevant time or had been paid into the correct scheme at the relevant time. This ensures judges are not left worse off as a result of being unable to receive tax relief on their contributions. This scenario is likely to arise where judges with mixed service (also known as 'tapered protection') choose 2015 scheme instead of legacy scheme membership for the remedy period, as only contributions to the 2015 scheme attract tax relief. For such cases, an underpayment of contributions would arise because contributions in the legacy schemes are lower than for the 2015 scheme, but the scheme would be able

to reduce the obligation to pay the contribution shortfall by the amount of tax relief lost.

28. The power must be exercised in accordance with HM Treasury directions

### **Approach to the Secondary Legislation**

29. Regulations made under clause 53 must be made in line with HM Treasury Directions, as set out in clause 58(2)(b). This will ensure consistency with the corresponding provision at clause 16 in respect of chapter 1.

30. The policy intention is that schemes should be able to write off amounts where repaying them would cause particular difficulties or hardship for a member. The regulations will make provision enabling schemes to reduce or write off amounts. It is expected that this will include setting out the factors that a scheme manager should take into consideration in deciding whether to reduce or waive an amount owed, as well as the process that must be followed.

31. The regulations will also enable an amount to be written off where the reduction is being provided as a form of compensation, for example where the reduction in amount owed equals the amount the person would have received in tax relief.

## **Clause 54 Pension credit members**

### **Legislative Approach**

32. This is the judicial scheme equivalent of chapter 1, clause 17 and makes provision for the scheme to make regulations so that the remedy can be applied to an ex-spouse or civil partner, where a pension sharing order is in place between a judge and their ex-spouse or civil partner following divorce or dissolution of a civil partnership. Like clause 17, it does not amend or interfere with existing law in relation to divorce, nor the way courts decide how to split assets upon a divorce.

33. The Bill does not make specific provision in relation to pension offsetting or pension attachment orders, but it does address the situation of pension sharing orders.

34. Pension sharing orders for divorces or dissolutions of civil partnerships generally award the member's ex-spouse or civil partner a percentage of the value of the pension at the time of the divorce. The value is expressed as a Cash Equivalent Transfer Value (CETV). The ex-spouse or partner then becomes entitled to a pension equivalent to the amount of the CETV.

35. As a result of the remedy, it is possible that the value of the pension at the time of the divorce would have been different had the judge remained as a member of the alternative scheme during the remedy period. This means that, even if the



percentage quoted in the pension sharing order remains the same, the actual amount credited to the ex-spouse or partner may have been different. The regulation making power under clause 54(1) enables the responsible authority to award any additional credit due to the ex-spouse or partner as a result of the remedy. The clause also provides that the scheme may make provision in respect of the corresponding pension debit member.

36. Specific provision is made where the judge has mixed remediable service (tapered protection), which means they have successive membership of the legacy and 2015 scheme in the remedy period. Because those with mixed service must choose one scheme or the other, clause 54(5) requires that any regulations made under clause 54(1) must provide that the ex-spouse or partner's credit must also be determined under either the 2015 or the legacy scheme, not both. This is in order to ensure that the ex-spouse or partner is treated in a way that is consistent with the approach to tapered protection across other public service schemes.

37. The power must be exercised in accordance with HM Treasury directions.

### **Approach to the Secondary Legislation**

38. It is expected that the regulations will include the following:

- Adjusting the benefits of the judge and their ex-spouse or civil partner where either a legacy scheme or 2015 election is made.
- Provision setting out the basis on which any additional credit will be calculated.
- Where a judge had tapered protection, providing the scheme with the ability to reduce the ex-spouse or partner's credit so that it aligns with the higher of the CETVs that would have been used had the judge been in either the legacy scheme or the 2015 scheme for the whole remedy period (i.e. removing tapered protection).
- Provision for information to be provided to ex-spouses or civil partners explaining any changes to their pension credit, where applicable.

## **Clause 55 Further powers to make provision about special cases**

### **Legislative Approach**

39. This is the judicial scheme equivalent of chapter 1, clause 20. Clause 55 provides a power to make regulations that address matters not dealt with through specific provision elsewhere. These provisions will primarily address technical aspects of the remedy, such as member options where judges have made voluntary contributions or transfers in that need regularising as a result of a change of scheme.

40. The majority of rules governing such technical matters are set out in detailed scheme rules. Because the details can vary between schemes, the most effective way of

ensuring that schemes can implement the remedy as intended in respect of special cases is to provide for powers to make the necessary technical amendments to existing scheme regulations.

41. The power must be exercised in accordance with HM Treasury directions

### Approach to the Secondary Legislation

42. It is expected that the regulations will cover:

- **Transfers in:** Some members who elect legacy scheme membership may have transferred in pension from a non-judicial scheme to the 2015 scheme. Under clause 39(7), where a member chooses to return to their legacy scheme, any transfer in will remain in the 2015 scheme. Therefore, the regulations will need to regularise the transfer in as a standalone pension in the 2015 scheme (meaning the member will become a type of deferred member of the 2015 scheme in respect of the transfer in only) and provide for it to be payable from the member's normal pension age (NPA), which is their State pension age. It is intended that the regulations will retain the actuarial reduction that would apply where the benefits are taken before NPA.
- **Added Pension (AP):** Members of the 2015 scheme were able to make additional contributions to purchase added pension. As for transfers in, clause 39(7) provides that any added pension will not transfer across where a member makes a legacy scheme election. Clause 55(2)(c) confers power for regulations to make provision to address this. It is intended that judges with added pension in the 2015 scheme, who elect to return to their legacy scheme, will be able to choose whether to receive a tax-free compensation payment of the value of their added pension contributions net of tax relief plus interest (with their rights in the scheme then being extinguished), or remain members of the 2015 scheme for this purpose only (as a type of deferred member). As with transfers in, the latter option would effectively be regularising the added pension and it is intended that the regulations will provide that it can be taken unreduced from a member's NPA (and actuarially reduced if taken beforehand).
- **Mixed Service:** One of the effects of McCloud is that tapered protection was discriminatory and that such discrimination was unlawful. Maintaining an age-based system of transitional protection would therefore perpetuate or even extend such discrimination. Therefore, taper-protected judges' choice will be between membership in the legacy scheme or in the 2015 scheme for the entire remedy period. However, for a small number of individuals who reach the 20-year service cap within the remedy period, it may have been advantageous to retain the taper protection. There may therefore be some judges who are placed in a worse financial position by the operation of the remedy. Clause 55(2)(d) enables regulations to make provision about the benefits payable to or in respect of a member with mixed remediable service and it is intended that provision will enable schemes to adopt a flexible approach in respect of

individuals with tapered protection where significant hardship would be experienced by having to choose one scheme or the other.

## Clause 56: Power to pay compensation

### Legislative Approach

43. Clause 56 permits the scheme manager to compensate members for losses attributable to the unlawful discrimination or to the remedy provided by chapter 2, provided the loss is of a description specified in HM Treasury directions. The payments should put the individual in the net position they would have been in but for the discrimination. The payments will therefore need to be tax-free.
44. Although the power to pay compensation is included in the Bill, there will be some types of losses where the policy position is that the scheme manager should be able to recover the costs of paying this compensation from the relevant scheme employer, whereas for other losses the nature of the compensation is such that it will be for the scheme manager to directly meet the costs. The Bill therefore provides a power for scheme regulations to make provision for the recovery of any amount paid by the scheme manager as compensation from an employer. While judges are office holders and not employees, the definition of 'employer' in the Bill includes the person responsible for the remuneration of an officeholder to whom a scheme relates (see clause 92).
45. The power must be exercised in accordance with HM Treasury directions

### Approach to the Secondary Legislation

46. Regulations may define the type of compensation that schemes can recover from the employer. A limited power is the most effective way of determining which compensation payments should be charged to an employer and to which scheme.

## Clause 57: Interest and process

### Legislative Approach

47. This is the judicial scheme equivalent of chapter 1, clause 23. Clause 57 provides a power to make regulations that require interest to be applied to sums owed to or by the scheme. As the remedy period spans seven years, interest will be added to amounts payable by schemes or by members to take account of inflation over time. To ensure that a reasonable and fair rate is used and to minimise unfairness that could arise as a result of schemes using different amounts, the amount will be

set by HM Treasury in directions, following consultation with the Government Actuary.

48. The clause also allows regulations to be made in order to set out the process where members owe sums to the scheme, or where sums are owed by the scheme to a member. Individuals who owe sums will be able to choose from one or a combination of the following options:

- making an upfront payment in full,
- paying the amount in instalments (by way of deduction from future salary or fees), or
- having the amount deducted from their lump sum on retirement.

### **Approach to the Secondary Legislation**

49. Content of regulations made under clause 57 may include the following:

- Establishing the types of payments to which interest should be added.
- Providing for any procedural requirements in relation to the payment of sums owed by a scheme to a member.
- Providing for any procedural requirements in relation to the payment of sums owed by members to the scheme.
- Providing flexibility on payment methods where judges owe sums to the scheme (for example, payment instalment plans or a Scheme Pays type mechanism).

## **Clause 58: Treasury directions**

### **Legislative Approach**

50. This is the judicial scheme equivalent of chapter 1, clause 24, and requires a number of specific regulations making powers in relation to judicial schemes to be exercised in accordance with HM Treasury directions. The clause provides HM Treasury (and the Department of Finance in Northern Ireland – see clause 71) with the power of providing directions to ensure consistency across public service schemes' respective implementation of the remedy. The intention is for the relevant scheme authority to make regulations in line with the provisions and procedures of their existing schemes, whilst achieving consistency, where possible, with other schemes through the HM Treasury direction.

51. Clause 58(2) sets out the specific powers that are subject to HM Treasury direction. These include regulation making powers and the power at clause 56 for scheme managers to pay compensation. Clause 56(3) requires any compensation payment to

be of a type specified in HM direction. This is so as to ensure that the types of compensation payments are consistent across the different schemes.

### Approach to the Secondary Legislation

52. In relation to the judicial schemes, it is expected that HM Treasury will make directions in respect of the following powers:

- Power in section 52 to make regulations to reduce benefits.
- Power in section 53 to make regulations to reduce or waive liabilities
- Power in section 54 to make regulations in relation to pension credit members.
- Powers in section 55 to make provision about special cases.
- Power in section 56 to pay compensation.
- Power in section 56 to make regulations to require an employer to reimburse compensation paid by a scheme manager.
- Power in section 57 to make regulations in relation to interest and process for payment of sums owed and owing. Directions may include the types of payment to which interest should be applied, and the rate of interest to be applied. HM Treasury must first consult with GAD in relation to any directions relating to the calculation and payment of interest.

## Clause 59(2): Scheme rules that prohibit unauthorised payments

### Legislative Approach

53. This is the judicial scheme equivalent of chapter 1, clause 25. While it does not confer a regulation making power on the judicial schemes, it provides a power for HM Treasury to make directions in respect of payments made by schemes that would otherwise be unauthorised.

54. Under section 164 of the Finance Act 2004, registered pension schemes may only make payments to members of the types listed in that section. A payment that is not of a listed type is "unauthorised". Where "unauthorised" payments are made, a tax charge applies. As it is possible that some of the payments that schemes are required to make to members under chapter 2 of the Bill could be considered to be unauthorised and in breach of scheme rules, this clause provides a power for the HM Treasury to specify in directions descriptions of payments which would normally be unauthorised but, for the purposes of this Bill, schemes are permitted to make.

55. The clause also makes an exception so that a payment required in respect of transfers from a partnership pension account (clause 38), which would ordinarily be unauthorised, may also be made without needing to be specified in HM Treasury directions.

### Approach to the Secondary Legislation

56. N/A

## Clause 63(2) Application of Chapter to immediate detriment cases

### Legislative Approach

57. This is the judicial scheme equivalent of chapter 1, clause 28. Some members of the judicial schemes may have benefited from what is known as an 'immediate detriment remedy', which means they will have already made an election in respect of scheme membership before the options exercise or, alternatively, had a court order determine their entitlement to be returned to legacy scheme membership (see clause 64).
58. Clause 63(1) provides that nothing in clauses 37 to 62 applies in relation to a person's remediable service if that person has benefited from an immediate detriment remedy. However, in some circumstances a court determination or the operation of existing legislation may not suffice to fully return the member to the position they would have been in but for the discrimination and so clause 63(2) confers power for regulations to make specific legislative provision to address this. The provision that can be made includes any of the provisions in clause 37 to 62, with or without modifications.

### Approach to the Secondary Legislation

59. The policy intention is to ensure that any individual who has benefited from an immediate detriment remedy is returned, so far as possible, to the position they would have been in but for the discrimination.
60. It is expected that the regulation making power will be used to make technical amendments to scheme rules to achieve this where a court order or existing legislation does not fully do so. This is expected, for example, in relation to the regularisation of member options such as transfers in or added pension.

## Clause 86(1) Power to make provision in relation to certain fee-paid judges

### Legislative Approach

61. This clause enables provision to be made for the purpose of ensuring certain judges, who transferred to the 2015 scheme but whom it is recognised should have remained in their legacy scheme as full protection members, are put in the position (so far as possible) that they would have been in had they remained in their legacy scheme for the remedy period. This specific group of judges (defined in subsection (3)) were aged 55 or over on 1 April 2012, in fee-paid service on 31 March 2012 and took up salaried office between 1 April and 1 December 2012 (or 31 January 2013 for judges in schemes in Northern Ireland). Due to the government's interpretation of the time limit for bringing a claim under the Part-time Workers (Prevention of Less Favourable

Treatment) Regulations 2000 (the 2000 Regulations), they were moved to the 2015 scheme regardless of their age. As a result of the Supreme Court's judgment in the case of Miller, the government accepts that their claims under the 2000 Regulations were brought in time and that these judges were entitled to be members of the fee-paid legacy scheme on 31 March 2012. Accordingly, it is accepted that these judges should have remained in their legacy scheme.

62. While provision is not needed to return these judges to their legacy scheme there is currently no provision enabling schemes to make any necessary technical adjustments arising as a result. This clause confers power for regulations to make such provision.

### **Approach to the Secondary Legislation**

63. It is expected that regulations will enable technical matters to be addressed such as retrospectively adjusting pension benefits paid, contributions and tax liabilities and regularising any member options purchased in the 2015 scheme.

64. Provision will mirror, where possible, the provision for the retrospective judicial remedy in chapter 2.

## **PSP&JO Bill Part 3: Judicial Offices**

### **Clause 103: Retirement date for holders of judicial offices etc**

65. This Clause makes provision to change the retirement date for judicial office holders.

#### **Legislative approach**

66. At present, a statutory mandatory retirement age (MRA) of 70 applies for most judicial office holders across the UK. In 2020, the UK Government undertook a consultation on increasing this age. The governments of Scotland, Northern Ireland and Wales consulted on increasing the MRA for judicial office holders within their devolved competence. Government responses to each consultation were published in 2021, confirming the intent to increase the MRA to 75. This Bill legislates to increase the mandatory retirement age for offices in scope of the measure to 75.

67. Clause 103 introduces Schedule 1 which makes amendments to existing legislation to increase the judicial mandatory retirement age from 70 to 75.

#### **Approach to the Secondary Legislation**

68. N/A

### **Clause 104: Allowances for Judicial Office Holders**

69. This clause makes provision to enable the Lord Chancellor to make a determination of allowances to judicial office holders.

#### **Legislative approach**

70. Clause 104 will provide the Lord Chancellor with the power to pay allowances for all judicial office holders for whom he has the power to determine remuneration.

71. Allowances could then be introduced as determined by the Lord Chancellor to support the effective administration of the justice system including by addressing recruitment and retention issues in the judiciary, or to provide additional compensation to judicial office holders who undertake leadership responsibilities outside of their core work.

#### **Approach to the Secondary Legislation**

72. Clause 104 introduces Schedule 2, which makes amendments to existing legislation to add in the power for the Lord Chancellor to determine allowances where such provisions did not previously exist in statute.

### **Clause 105: Sitting in retirement offices**



73. This Clause makes provision to create new sitting in retirement judicial offices.

#### **Legislative approach**

74. At present, the powers which provide for salaried judges to sit in retirement by being appointed to the equivalent fee-paid office, without a new selection exercise, are found in multiple pieces of judicial appointment related legislation including s85, s94A, s94B and Schedule 14 of the Constitutional Reform Act 2005.

75. The new policy will correct the differential treatment between salaried and fee-paid judges by providing powers for eligible fee-paid judicial office holders to be appointed to sit in retirement, requiring creation of new 'sitting in retirement' judicial offices and the appropriate powers to make appointments to these offices. The provision of new judicial offices is required for two reasons: 1) to provide for fee-paid judges to sit in retirement in a separate fee-paid office, without undergoing a selection exercise; and 2) to ensure operability with pension scheme rules. These new offices are being created by Clause 105 together with Schedule 3.

#### **Approach to the Secondary Legislation**

76. Clause 105 makes the necessary provision to create new sitting in retirement judicial offices. It does this by reference to Schedule 3. Schedule 3 contains a list of original judicial offices in respect of which sitting in retirement offices will be created (for further reference see Schedule 3 policy statement). Each sitting in retirement office will have the name of the original office followed by the words "(sitting in retirement)". Clause 105 does not make provision for which judicial office holders are eligible to apply to a sitting in retirement office.

### **Clause 106: Appointment to sitting in retirement office**

77. This Clause makes provision concerning the appointment of persons to a sitting in retirement office.

#### **Legislative approach**

78. As new offices are required, new appointment powers and eligibility criteria are also required. Among other things, Clause 106 makes the necessary provision to provide for appointment to the newly created sitting in retirement offices. Providing new appointment powers allows the specific requirements of sitting in retirement appointments to be prescribed. As with appointment to other judicial offices through selection exercises run by the Judicial Appointments Commission (or NIJAC in Northern Ireland), appropriate concurrence is required. This means the appointing authority (which will usually be the appropriate senior judge) must obtain the agreement of a prescribed person or department as stipulated within this Clause.

That person will be either the Lord Chancellor, the Department of Justice in Northern Ireland or the Welsh Ministers as appropriate. Maintaining this concurrence requirement with sitting in retirement appointments ensures consistency is maintained with the procedural requirements of pre-retirement appointments.

79. Whilst the appointment power itself is provided for in primary legislation, secondary legislation will be required to set out eligibility to apply to sitting in retirement office.
80. Clause 106(4) creates a delegated power for regulations to specify the description of an “eligible person”. Under this Clause, an “eligible person” is a person, in relation to each sitting in retirement office, that is eligible to apply to that office. Regulations made under this power will be able to set out with greater specificity the requirements of an individual office holder to be an eligible person for appointment that would not be possible in primary legislation. We believe this to be of particular importance in the case of 1) non-legal members of tribunals (professional and lay members) and 2) leadership judges. Not all non-legal members will be eligible to sit in retirement as not all are entitled a judicial pension, the receipt of which is one of the core elements of sitting in retirement. In the case of leadership judges, the policy position is that they are to be appointed to the sitting in retirement equivalent of the statutory office that underpinned their pre-retirement leadership office. This would mean for example, that a Chamber President in the Upper Tribunal will be eligible to sit in retirement in the statutory underpinning office – Judge of the Upper Tribunal.

### **Approach to the Secondary Legislation**

81. The delegation of power by Clause 106(4) is a delegation to the Department of Justice in Northern Ireland, the Welsh Ministers or the Lord Chancellor as appropriate, to determine which existing judicial office holders will be eligible to apply to a sitting in retirement office. Whether the Department of Justice in Northern Ireland, the Welsh Ministers or the Lord Chancellor is the appropriate regulation maker will be dependent on the sitting in retirement office in question and more particularly the Part under which it sits in Schedule 3 to the Bill:
- Where the corresponding original office is listed in Parts 1, 2, 3 or 6 of Schedule 3, the Lord Chancellor will be delegated the power;
  - Where the corresponding original office is listed in Part 4 of Schedule 3, the Department of Justice in Northern Ireland will be delegated the power; and
  - Where the corresponding original office is listed in Part 5 of Schedule 3, the Welsh Ministers will be delegated the power.
82. The power itself allows for the prescribing of regulations by the delegated authority with the specified concurrence. However, it should be noted that the power delegated to the Department of Justice in Northern Ireland to prescribe regulations for the original offices listed in Part 4 of Schedule 3 is not subject to a requirement

for concurrence. These offices are those which will be appointed by the Northern Ireland Judicial Appointments Commission as the Department of Justice in Northern Ireland determined concurrence is not required in respect of those offices. For other offices the concurrence requirement will ensure appropriate consideration is sought from the relevant appointing authority to the sitting in retirement office.

83. The regulation will set out each sitting in retirement office and the persons eligible to be appointed to that office.

## **Clause 107: Appointment to sitting in retirement offices: further provision**

### **Legislative approach**

84. As new judicial offices are being created, it is necessary to ensure that further provision is made to provide a legal basis for remuneration and the terms of service. Clause 107 makes the necessary provision to support the appointment power to new sitting in retirement offices provided for in Clause 106. Clause 107 sets out conditions relating to the new sitting in retirement office, including the legal standing of the office holders, application of the mandatory retirement age and providing a statutory basis for terms of appointment.

### **Approach to Secondary Legislation**

85. N/A

## **Clause 108: Discipline and removal from office**

### **Legislative approach**

86. Clause 108 ensures that existing rules and statutory provisions relating to discipline and removal from office apply to the new sitting in retirement offices created by Clause 105. This is important to maintain public confidence that the new office holders will be subject to the same discipline provisions etc. These provisions are also intended to retain elements important to judicial independence including safeguards relating to removal from office.

87. Clause 108 makes provision to apply existing rules and statutory provisions relating to discipline and removal from office to the new sitting in retirement offices created by Clause 105. This is to ensure that judicial office holders sitting in retirement are subject to the same rules as their pre-retirement counterparts. To ensure judicial independence, removal from office is subject to safeguards as laid out in the Clause. A person appointed to a sitting in retirement office may only be removed from office

on a qualifying ground and with the appropriate concurrence. A qualifying ground is defined in Clause 108(3) as inability, misbehaviour or any other grounds as specified in the judicial office holder's terms of appointment.

## Approach to the Secondary Legislation

88. N/A

## Clause 109: Power to add new offices

### Legislative Approach

89. Clause 109 creates a delegated power to allow new judicial offices to be added to Schedule 3 through regulations. This is important as it will provide for sitting in retirement provisions to be amended in line with any future changes to judicial offices, such as changes in title of a given judicial office, including a sitting in retirement office for any new judicial offices.
90. The power created under Clause 109 is given to the appropriate authority. It will be the Department of Justice in Northern Ireland or the Welsh Ministers where the provision to add the office would be under the devolved competence of the Northern Ireland Executive or the Welsh Government. In all other cases, the appropriate authority will be the Lord Chancellor,
91. The Scottish Government decided that judicial offices within the devolved competence of the Scottish Government would not be included in the sitting in retirement provisions. Consequently, Clause 109(1) together with Clause 109(3) make clear that an 'excluded Scottish office' cannot be added through this power. An excluded Scottish office is one that would be added to Part 6 of Schedule 3 and would be within the legislative competence of the Scottish Parliament if it were included in an Act of that Parliament.
92. Where the office in question is to be added to Parts 1, 2, 3 or 5 of Schedule 3, there is a consultation requirement with the relevant member of the senior judiciary before the making of any regulations under Clause 109. Which member of the senior judiciary requires to be consulted is determined by which Part of Schedule 3 the office will be added to:
- Where the office is to be added to Part 1, the Lord Chief Justice;
  - Where the office is to be added to Part 2, the Senior President of Tribunals;
  - Where the office is to be added to Part 3, the Lord Chief Justice of Northern Ireland; and
  - Where the office is to be added to Part 5, the President of Welsh Tribunals.

## Approach to the Secondary Legislation

93. The powers made under Clause 109 are provided to ensure that sitting in retirement can appropriately respond to changes in judicial office. The regulation making power is tightly drawn and serves a very specific purpose. Any regulation made under Clause 109 will be drafted to only add a judicial office to the correct Part of Schedule 3, the other provisions of the Bill pertaining to sitting in retirement will then apply. Regulations made under this provision will not and cannot be used for any other purpose.

## Clause 110: Consequential etc provision

### Legislative approach

94. The existing legislative framework for the making of sitting in retirement appointments is highly complex and spans across several Acts. As one of the reasons for legislating for these changes to sitting in retirement is to remove differential treatment between salaried and fee paid office holders, it is necessary for amendments to be made to existing pieces of legislation to remove that differential treatment and to ensure that the new sitting in retirement policy operates as intended. Clause 110 introduces Schedule 4 which makes consequential amendments necessary for the operation of measures within Part 3 of the Bill.

95. Given the interaction with a number of existing legislative provisions through the measures in Part 3 of the Bill, provision of a delegated power to make further consequential amendments is required, as a safeguard against any other existing statutory provision that may be identified in future that impedes the intended operation of the relevant policies, by allowing such a provision to be amended as is necessary to give effect to the new policy.

96. The power is granted to the Lord Chancellor or to Department of Justice in Northern Ireland, the Welsh Ministers (where the provision to add the office would be under the devolved competence of the Northern Ireland Assembly or the Senedd Cymru respectively).

### Approach to the Secondary Legislation

97. As this power is will only to be used to make consequential amendments it is not possible to define what may be required in such regulations. There are however certain guiding principles for the use of this power.

98. The power created under Clause 110 is narrowly drawn and may only be used for the specific purpose of making consequential amendments necessary for measures within Part 3 of the Bill. Insofar as the power permits amendments to Acts, this power is a Henry VIII power.

99. Any regulations which amend, repeal, revoke or otherwise modify primary legislation are subject to the affirmative procedure. Any other regulations made under Clause 110 are subject to the negative procedure.

## **Schedule 1: Retirement date for holders of judicial offices etc**

### **Legislative approach**

100. As the current mandatory retirement age is listed in multiple statutes, multiple amendments must be made in order to give effect to the new mandatory retirement age of 75. This is done through the amendments to existing legislation found at Part 1 of Schedule 1.

101. Part 2 of Schedule 1 makes transitional provision in relation to lay magistrates in England and Wales (Paragraph 44) and Northern Ireland (Paragraph 45). Part 3 of Schedule 1 will repeal spent provisions.

### **Approach to the Secondary Legislation**

102. The power created under Schedule 1, Paragraph 45 is conferred on the Department of Justice in Northern Ireland. It is narrowly drawn and extends an existing power (that under Section 4(7) Justice Act (Northern Ireland) 2015) to apply to the transitional provisions. The power may only be used for this purpose, and it is necessary to ensure consistency with eligibility for lay magistrates not appointed under the transitional power. The Department of Justice in Northern Ireland intend to consult further on the criteria in relation to recently retired Lay Magistrates and provide the Northern Ireland Assembly with an opportunity to consider the matter.

## **Schedule 3: Judicial Offices**

### **Legislative approach**

103. Schedule 3 lists the original judicial offices in respect of which a sitting in retirement equivalent is created, with those new offices being created by Clause 105. Schedule 3 sets out in six parts the original judicial offices in respect of which sitting in retirement equivalents will be created. It consists purely of a list with the Parts being separated by the relevant appointing authority. Clause 105 then operates with reference to Schedule 3 to create the new sitting in retirement offices.

104. Careful consideration was given to which judicial offices should be included in Schedule 3 to ensure that the differential treatment between fee-paid and salaried judicial office holders was being corrected. The starting point for inclusion in the measure was access to a judicial pension by the pre-retirement office holder, however in some instances further assessment of the office was undertaken to

ensure that, where a judicial office was being included or excluded from the measure, it was appropriate to do so.

105. Schedule 3 does not set out which office holders are eligible to sit in retirement. This will be done by the eligibility regulations created using the power provided for at Clause 106(4). Nor is Schedule 3 a list of the new sitting in retirement offices per se – it is simply the list of offices in respect of which a sitting in retirement equivalent will be created.

#### **Approach to the Secondary Legislation**

106. N/A

### **Schedule 4: Consequential etc amendments in connection with Part 3**

#### **Legislative approach**

107. Schedule 4 makes multiple technical changes or repeals to existing legislation to ensure that the new sitting in retirement policy operates as intended. Given the complexity of the existing legislative framework for sitting in retirement, there may be certain provisions which may not have been addressed in Schedule 4. This power is therefore necessary to ensure that the policy will operate as intended.

108. Part 1 of Schedule 4 makes amendments to primary legislation, Part 2 makes a single amendment to secondary legislation – the Access to Justice Act 1999 (Destination of Appeals) Order 2016 whilst Part 3 repeals spent provisions.

#### **Approach to the Secondary Legislation**

109. N/A