

## **PUBLIC SERVICE PENSIONS AND JUDICIAL OFFICES BILL**

### **Memorandum from Her Majesty's Treasury to the Delegated Powers and Regulatory Reform Committee**

#### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Public Service Pensions and Judicial Offices Bill (“the Bill”). The Bill was introduced in the House of Lords on 19 July 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **B. PURPOSE AND EFFECT OF THE BILL**

2. In 2015, further to an independent review of public service pensions chaired by Lord Hutton, the Government introduced reformed pension schemes for the main public service workforces (for the NHS, teachers, armed forces, police, firefighters, civil service, judiciary and local government workers). The Government agreed, following discussions with trade unions, to allow active members of pre-existing public service unfunded<sup>1</sup> pension schemes (in each case, a “legacy scheme”) who were close to retirement to remain in those schemes, rather than requiring them to start to accrue pension benefits in a new scheme. This was known as transitional protection. Other members who were between 10 and 13.5 years of their normal pension age could stay in their legacy scheme for an additional period before being moved to their reformed scheme. This was known as tapered protection.<sup>2</sup>

3. In December 2018 the Court of Appeal found that the transitional protection in the judicial and firefighters’ pension schemes unlawfully discriminated against younger members and gave rise to indirect sex and race discrimination. The Government’s request for permission to appeal to the Supreme Court was refused in June 2019. In July 2019 the Government confirmed that it accepted that the Court of Appeal’s judgment had implications for the other public service schemes that had similar transitional arrangements.

4. In July 2020 the Government consulted on proposals to allow all eligible members of the main public service unfunded pension schemes a choice between legacy and new scheme benefits in respect of any pensionable service between 1 April 2015 and 31 March 2022 (the remedy period), so that they are able to opt for the benefits (new scheme or legacy scheme) of greatest value to them. Eligible active and deferred members of the main public service unfunded pension schemes will be able to make this choice close to the time that their pension benefits are paid when it is clearer

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<sup>1</sup> Most of the public service pension schemes are unfunded. There are no investments and the schemes operate on a pay-as-you-go basis. The public authorities responsible for meeting the costs of the schemes use pension contributions of employees and employers to help offset the cost of payments to current pensioners. The Local Government Pension Schemes are funded schemes, where employer and employee contributions are used to create investment assets in a pension fund, with those assets and associated returns used to pay for current and future pensions.

<sup>2</sup>All schemes except the Armed Forces Pension Scheme and Local Government Pension Schemes had tapered protection. In the police and firefighters’ schemes, tapered protection was for those between ten and fourteen years from normal pension age.

which option is most beneficial for them. Some members with relevant service are already in receipt of pension benefits in relation to the affected period. This group will be able to choose which benefits they wish to receive in relation to their affected service once the legislation comes into force and where there is a change in entitlement as a result, any change will apply retrospectively. Separate arrangements are being made in the funded Local Government Pension Schemes, because the transitional arrangements in those schemes were made in a different way.

5. This Bill puts in place a framework within which schemes, other than the judiciary and local government, will be required to make provision to allow eligible members to choose which set of benefits (legacy scheme or new scheme) they wish to receive for any pensionable service during the remedy period.

6. The Bill also directly provides for schemes to correct any overpayment or underpayment of pension benefits or member contributions already paid in relation to a member as a consequence of their choice. It will also ensure equal treatment for all members of the main unfunded public service pension schemes by placing them in the relevant 2015 reformed scheme from 1 April 2022 (although the judiciary will join a newly designed, reformed scheme at that point), providing guaranteed pension benefits to reward public servants for their dedicated service but in a way that ensures that they are affordable and sustainable into the future.

7. For the judiciary, remedy will be provided by way of a different form of 'options exercise'. This will allow judges to make a retrospective choice of pension scheme membership backdated to 1 April 2015, when the discrimination began, until 31 March 2022, after which all judges will move to a new pension scheme. Subject to parliamentary timetables and approval, we anticipate the options exercise taking place in autumn 2022.

8. A different approach was adopted for reforming the Local Government Pension Schemes (LGPS), where all members still accruing benefits were moved to reformed schemes either on 1 April 2014, for the LGPS England and Wales, or 1 April 2015, for the LGPS for Scotland and Northern Ireland. In those schemes, older members in service on 31 March 2012 were provided with an underpin that applied at the earlier of their date of leaving active membership and their Normal Pension Age (usually 65). This gave them the higher of the pension payable under the reformed scheme and the pension that would have been payable under the legacy scheme in relation to any service from the date they moved to their reformed LGPS scheme.

9. For these LGPS schemes there will be no change to the provision for service to be under reformed schemes. However, the underpin will be extended to all those members qualifying for treatment as active members as at 31 March 2012 and who subsequently had service in the reformed scheme. However, the underpin will not apply to service after 31 March 2022 or for service rendered after the member's Normal Pension Age.

10. For the main public service pension schemes (the non-judicial schemes), where the Bill refers to the "new scheme", this refers to the reformed 2015 schemes, introduced following an independent review of public service pensions, and made under the Public Service Pensions Act 2013. In respect of the judiciary, the scheme made under the Public Service Pensions Act 2013 is referred to in the Bill as the "judicial 2015 scheme" rather than "new scheme". This is to avoid confusion with the

newly designed, reformed scheme which will provide for future accruals for the judiciary from April 2022. The pre-2015 public service pensions schemes are in each case referred to as the "legacy scheme".

11. The Bill also includes bespoke measures related to the cost control mechanism (CCM). The CCM aims to protect both the value of member benefits and the cost to the taxpayer from unforeseen changes in pension scheme costs. The CCM was introduced alongside the reformed schemes in 2015, following a recommendation by the Independent Public Service Pensions Commission in 2011, and subsequent discussions with trade unions. The CCM assesses certain elements of scheme costs and compares these costs to a base level (the "employer cost cap"), set at the first valuation. If the costs measured in the CCM have decreased/increased by more than the specified margins below/above the employer cost cap, then member benefits are increased/reduced to bring costs back to target. The upper and lower margins have been specified in Treasury Regulations as a percentage of pensionable pay. So, there is effectively a corridor either side of the employer cost cap, with margins representing the 'ceiling' and 'floor'.

12. The mechanism was first tested at the 2016 valuations. However, the cost control element of the 2016 valuation process was paused in light of the Court judgment regarding transitional protection. The potentially significant and uncertain impact arising from the court judgment made it impossible to assess the value of the schemes to members with any certainty. Additionally, in 2018, the Government announced that it would ask the Government Actuary (GA) to conduct a review of the mechanism. This reflected a concern that the CCM may not be operating in line with its original objectives.

13. In July 2020, the Government announced that this pause would be lifted, the GA's review should proceed, and the 2016 valuation completed. The Government also announced the legislative remedy should be taken into account when completing the cost control process, as the remedy affects the value of schemes to members.

14. Now that the pause has been lifted and the Government is completing the cost control element of the 2016 valuations, taking account of the remedy, early estimates indicate that some schemes may breach the ceiling, which would lead to significant reductions in benefits under existing legislation.

15. The Government decided that there should not be reductions to member benefits as a result of the 2016 valuations, particularly based on a mechanism that may not be working as intended. The Bill therefore includes measures to waive the impact of any ceiling breaches that may occur once the results of the 2016 valuations have been finalised, so no member will see a reduction in their benefits. Any floor breaches that occur will be honoured. This means that when results have been finalised and implemented, any benefit improvements that are due will be delivered.

16. The measures on judicial pay will introduce powers which provide the Lord Chancellor with the ability to determine allowances to judicial office holders, enabling greater pay flexibility and providing options to recognise judicial office holders taking on temporary additional responsibilities where needed for the effective administration of justice.

17. Raising the judicial mandatory retirement age, which was set for most judicial office holders at age 70 over 25 years ago, to age 75 will help retain judicial expertise for longer and attract a greater number of candidates from diverse backgrounds. There are a number of related measures which will help to further support judicial resourcing and provide greater fairness across the judiciary. This includes a measure introducing a comprehensive scheme for the policy known as “sitting in retirement”, broadening access to fee-paid judges.

18. The Bill will also provide for a newly designed, reformed judicial pension scheme to respond to the recruitment and retention issues that have emerged following the 2015 pension changes. The Senior Salaries Review Body identified these changes as a major cause of this problem. Further, judges’ unique circumstances mean that many take significant pay reductions to join the judiciary and they are appointed on the understanding that they will not return to private practice after they have retired. Members of the judiciary will therefore be transferred into a newly designed, reformed scheme in April 2022. This has been designed to ensure that we can recruit and retain the right number and calibre of judges which is vital to the effective running of the legal system.

19. Finally, the Bill makes provision for the pension liabilities of UK Asset Resolution (“UKAR”) and its subsidiaries, Bradford and Bingley plc (“B&B”) and NRAM Limited (“NRAM”). B&B and Northern Rock plc were taken into Government ownership during the financial crisis in 2008. B&B and NRAM represent the assets and liabilities of those banks that remain in Government ownership in 2021. UKAR is the Government-owned company that has the responsibility for the orderly winding down of B&B and NRAM. It is also the sponsor of the NRAM Pension Scheme and the Bradford and Bingley Staff Pension Scheme (“the BBS Pension Scheme”). UKAR has disposed of the remaining assets in B&B and NRAM as well as the companies themselves. The intention is that UKAR itself will now be wound down. To do this, the Government needs to make provision for the pension liabilities for which UKAR and its subsidiaries are responsible.

20. The Bill will give the Treasury the power to establish a new public pension scheme that will replace the NRAM Pension Scheme and the BBS Pension Scheme and transfer the assets currently in those schemes to the Treasury. A small number of pensions are paid directly by B&B and NRAM. The Bill will give the Treasury the power to transfer the liability to pay those pensions to the Government. The Bill also gives the Treasury the power to modify the application of certain taxes in relation to the establishment of the schemes and the transfer of rights, assets and liabilities. The Bill gives the Treasury a power to make regulations requiring persons specified in the regulations to provide information necessary to implement and administer the new arrangements.

### **C. DELEGATED POWERS**

21. The detailed rules for how public service pension schemes should be set up and operated are generally set out in secondary legislation, known as scheme regulations. In the case of legacy schemes, many of these scheme regulations are made under the Superannuation Act 1972 (and for Northern Ireland schemes under the Superannuation (Northern Ireland) Order 1972), though there are also cases where scheme regulations are made under other powers, for example for the uniformed services. For the judiciary, while more recent schemes are set out in secondary

legislation, the core provisions of the older schemes were set out in primary legislation, supplemented by secondary legislation.

22. Scheme regulations for the new schemes are made under the Public Service Pensions Act 2013 (PSPA 13).<sup>3</sup> The public services within scope of this Bill are set out in section 1 of the PSPA 13, and cover the following: civil servants, the judiciary, local government workers, teachers, health service workers, fire and rescue workers, members of police forces and the armed forces. In Northern Ireland, the new schemes are set up using powers in the Public Service Pensions Act (Northern Ireland) 2014 (PSPA (NI) 2014), and cover the workforces set out in section 1 of that Act.<sup>4</sup> Where this memorandum refers to existing provisions in PSPA 13 comparable provisions exist for the devolved schemes under PSPA (NI) 2014, unless otherwise indicated. Under Clause 35(1) and Clause 71 of the Bill references to new Treasury directions at Parts 1 and 2 of the Bill, are references to directions which will be given by the Department of Finance for the devolved schemes established under PSPA(NI) 2014.

23. The scheme regulations are technical, and include details such as who is eligible to be a member of the scheme, at what age they may retire, provisions for ill health retirement and death in service, the rate at which a pension accrues, the nature of the benefits to be paid to the member on retirement, and additional flexibilities such as voluntary contributions. While there are commonalities across all of the schemes, the different nature of the workforces they provide for mean that there are also differences, in some cases significant, in the content of the scheme regulations for each scheme. Therefore, to ensure that Government is providing the most effective framework for the implementation of the pensions remedy, and for moving all members into the new schemes from 1 April 2022, the Bill takes the approach of expanding the purposes for which scheme regulations can be made under section 3 of the PSPA 13, to include provision made under Part 1 of this Bill. This reduces the risk of unintended consequences as a result of primary legislation attempting to account for the particularities of each set of scheme regulations. Scheme regulations are defined in Clause 34 with regard to Chapter 1, and amendments relating to scheme regulations are set out in Clause 79.

24. For the judiciary, the Bill sets out who falls within the scope of the provisions, the options available (legacy scheme election or 2015 scheme election), the default if no election is made (where this is not simply the status quo) and the effect of making a scheme election. However, while this establishes the key principles for the judicial remedy, the Bill also provides for the technical changes that will be needed to fully implement the remedy to be made by scheme regulations under sections 1 and 3 of the PSPA 13. Scheme regulations for the judiciary are defined in Clause 70 and the provisions of Clause 79 relating to scheme regulations apply equally to judicial scheme regulations.

25. These powers to amend scheme regulations are already limited in their purpose, i.e. they must be used to make the necessary changes to implement the pensions remedy and related changes provided for through this Bill, and not to make unrelated

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<sup>3</sup> For the LGPS England and Wales 2014 scheme, some regulations were made under the Superannuation Act 1972, but provisions under the PSPA 13 treat those as if made under the PSPA 13.

<sup>4</sup> PSPA (NI) 2014 covers pension schemes relating to civil servants, holders of judicial office, local government workers, teachers, health service workers, fire and rescue workers and members of the police service in Northern Ireland.

policy changes. In several cases the power is even more restricted in how it can be used. This ensures schemes have the greatest possible clarity on how the remedy should be implemented.

26. Relating to the increase in the mandatory retirement age (MRA) of judicial office holders from 70 to 75, there is an order-making power to enable the Department of Justice in Northern Ireland to make provision for the eligibility criteria for the re-appointment of retired lay magistrates who are younger than the new MRA of 75. There are also a number of regulation-making powers for the Lord Chancellor, NI Department of Justice, and the Welsh Ministers to set out the eligibility for appointment to a “sitting in retirement office” listed in Schedule 3, and to enable the “appropriate national authority” to add new offices to Schedule 3. In addition, the Bill extends the Lord Chancellor’s existing power to alter the judicial titles of certain courts judges to the equivalent “sitting in retirement offices”.

27. Careful consideration has been given to the inclusion of each power in the Bill, and powers have only been included where it is regarded as absolutely necessary.

### **Clause 5(1) Election for retrospective provision to apply to opted-out service**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme (under Clause 34(2) combined with Clause 5(1))

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

#### Context and Purpose:

28. This Clause sets out that scheme regulations must be made enabling legacy schemes to re-admit members who are, in principle, eligible for the remedy, i.e. they meet all of the criteria regarding remediable service in Clause 1 apart from the second condition (that their service is pensionable under a Chapter 1 scheme), but would have met that condition had they not opted out (this definition of opted-out service is provided at Clause 33). Under Clause 34(2), this power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme (and can be exercised by amending the Chapter 1 legacy scheme).

29. This Clause ensures that eligible members who opted out of either their new or legacy scheme (for example, because they considered the new scheme to be unsuitable) are able to elect for their opted-out service to be reinstated if they wish, subject to satisfying any conditions provided in scheme regulations under Clause 5(5) and (6). This also applies to members of the civil service pension scheme who opted to participate in a partnership pension scheme rather than opting out of participating in a pension scheme entirely. Once they have re-joined, after transferring and surrendering their partnership scheme rights relating to their employment, the same provisions and processes will apply to them, as to other eligible members; for example, they will be able to elect which set of benefits - new or legacy - they wish to receive for the remedy period. Elections for opted-out service to be reinstated as pensionable service, must be made before the end of the election period, which is defined in Clause 5(4) as the period of one year beginning with the day on which the

member is first sent a remediable service statement, or such later time as the scheme manager considers reasonable in all the circumstances.

Justification for taking the power:

30. While HMT will provide guidance to schemes on when they may re-admit a member who previously opted out of a scheme, the documentation each scheme requires for a member to be able to opt out varies. This means that while a member of one scheme might easily be able to demonstrate that they chose to opt-out as a result of being moved to a new scheme, and that they would not have done so if they had been able to remain in the legacy scheme (for example because of a field in a form they completed at the time), a member of another scheme where a different form was required may not have this same evidence. It is therefore important that schemes have the discretion to determine why, how and when a member may be readmitted.

Justification for the procedure:

31. The negative resolution procedure is proposed as this is a narrowly drawn power, which only allows those whose service would have qualified as “remediable service” but for the fact that they had opted out to have the relevant service reinstated as pensionable service. It cannot be used for any other purpose. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 of the PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

**Clause 6(1) Immediate choice to receive new scheme benefits**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme (under Clause 34(2) combined with Clause 6(1)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

Context and Purpose:

32. Pensioner and deceased members with remediable service are eligible for the retrospective remedy. However, what is a deferred choice for active and deferred members needs to be an immediate choice for members who have already retired with benefits in payment or died by the time the remedy is implemented, as the “benefit crystallisation event” that would otherwise trigger an election as to which set of benefits the member wishes to take has already taken place. Those pensioner members, and survivors of deceased members (or authorised representatives of the survivor or deceased member), therefore need to be able to make a choice as to whether to receive new scheme as opposed to legacy scheme benefits for the remedy period as soon as possible.

33. This power requires the responsible authority for a Chapter 1 new scheme to make regulations to allow such an election to take place (under Clause 34(2), the power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme, although the power can be

exercised by amending the Chapter 1 legacy scheme). Clauses 7(1) and (2) set a time limit by which an election must have been made, and when such an election takes effect. If no election to receive new scheme benefits is made within the time period provided for in Clause 7, the pensioner or deceased member's survivor(s) will receive legacy scheme benefits (subject to Clause 8). Clause 7 sets out further provision for how and when an election may be made or revoked, as well as who may make an election in respect of a deceased member.

Justification for taking the power:

34. This is a key element of the retrospective remedy. However, as the requirements in scheme regulations are different for each scheme, it is important that schemes can enable a choice to be made for pensioner and deceased members in a way that is practical and effective for that scheme to administer. A power has therefore been given which allows schemes to make regulations setting out the procedure and timings for this choice.

Justification for the procedure:

35. The negative resolution procedure has been proposed here as regulations made under this power are limited in their purpose, i.e. to ensure that a decision as to which set of benefits to receive for the remedy period can be made for pensioner and deceased members. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation, however where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

**Clause 8(1) Power to deem election by virtue of section 6 to have been made**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

Context and Purpose:

36. This provision extends the power in Clause 6(1) to allow the responsible authority for a new scheme to make regulations providing for where a member or their beneficiary fails to communicate to the scheme, before the end of the election period, whether or not an election is to be made (under Clause 34(2), the power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme). It is possible that where a pension is already in payment, the member (if they are a pensioner) or survivor (where a member is deceased) does not engage with the process of making an immediate choice, as per Clause 6, before the end of the election period specified under Clause 7(2). Without this power the member or their survivor will automatically become entitled to legacy scheme benefits in relation to any period of remediable service.

37. Regulations made under this power will allow a scheme to determine, in the absence of engagement from a member or their beneficiary, an alternative default



where, for example, the default position would not appear to be in the best interests of the member or their survivor. Clause 8(3) accordingly provides that scheme regulations may include conditions that are to be, including relating to the value of the benefits payable under either option.

Justification for taking the power:

38. The majority of the rules governing the payment of benefits by schemes to members and other individuals, such as members' beneficiaries or survivors, are set out in scheme regulations. The benefit designs of the pension schemes also vary between workforces and are set out in scheme regulations. Further, the differences between the legacy schemes and the new scheme within a workforce will also vary, which means that different members are likely to prefer different outcomes (legacy scheme benefits or new scheme benefits). The Bill specifies a default position in the absence of an election; however, given the variations across and within schemes, permitting the responsible authority for a Chapter 1 new scheme to make regulations will allow for different outcomes at scheme and individual level.

Justification for the procedure:

39. The negative resolution procedure has been proposed here as regulations made under this power are limited in their purpose, i.e. to ensure that it is clear what should happen where a member fails to make a choice as to which set of benefits they wish to receive for the remedy period. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

**Clause 9(1) Deferred choice to receive new scheme benefits**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

Context and Purpose:

40. This is a power to require the rules of Chapter 1 legacy schemes to implement another core element of the retrospective pension remedy – the deferred choice for those who are active or deferred members. Under Clause 34(2), the power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme, although the power can be exercised by amending the Chapter 1 legacy scheme. Chapter 1 legacy schemes must ensure that an election may be made by an active or deferred member to take new scheme benefits for the remedy period. Where an election is made, new scheme benefits will be paid to the member, but these new scheme benefits will be paid from the legacy scheme rather than the new scheme itself.

41. Such regulations may include a number of key elements including those set out in Clause 10, e.g. the timing of such an election, when and how an election may lapse

or be revoked and who may make an election in respect of a deceased member. In terms of timing, Clause 10(3) sets out that the election is to be made before the end of the election period. The end of the election period will be defined in scheme regulations, as per Clause 10(1). If the member does not communicate an election to the scheme by the end of the election period, Clause 11 (power to deem election by virtue of section 9 to have been made) will apply.

42. Clause 10 sets out further requirements for regulations made using the power in Clause 9(1), in particular that they must specify the end of the period in which an election can be made under the regulations. This ensures that the choice is indeed deferred to the point at which the member takes their benefits - in most cases when they are about to retire - but that there is also clarity both for members and schemes around the deadline by which a member must have made their decision.

43. Clause 10(4) also sets out that regulations made under Clause 9(1) can include provision about how and when an election may be revoked and about who may make an election in respect of a deceased member. It is possible that an active or deferred member with remediable service may die before they become entitled to the payment of their pension benefits. Therefore, it is important that there is clarity over who is able to make an election in relation to that member's service. While we generally expect elections made under section 9 to be irrevocable, it is possible that there may be some limited instances where it is necessary for the election to be revoked, for example if a member makes an election because they are coming up to retirement, but then chooses not to retire at that moment after all. It is important here that both the scheme and the member know what procedure should apply here.

#### Justification for taking the power:

44. This is a key element of the retrospective remedy. However, as the requirements in scheme regulations are different for each scheme, it is important that schemes can enable a choice to be made for active and deferred members in a way that is practical and effective for that scheme to administer. A power has therefore been proposed which allows schemes to make regulations setting out the procedure and timings for this choice.

#### Justification for the procedure:

45. The negative resolution procedure has been proposed here, as, although a key element of the retrospective pensions remedy, the purpose of these regulations is limited, i.e. for members to be able to make an election regarding which set of benefits they wish to receive for the remedy period. It cannot be used for any other purpose.

46. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

### **Clause 11(1) Power to deem election by virtue of section 9 to have been made**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

## *Power exercised by: Regulations*

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

### Context and Purpose:

47. This provision extends the power in Clause 9(1) to allow the responsible authority for a new scheme to make regulations providing for where a member or their beneficiary fails to communicate to the scheme, before the end of the election period, whether or not an election is to be made (under Clause 34(2)). The power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme). This power is equivalent to the power at Clause 8 that relates to pensioner and deceased members.

48. While it is less likely that an active or deferred member will fail to engage with the decision-making process than a retired or deceased member (as they will need to communicate with the scheme in order for their pension to be put into payment when they retire), it is still possible that the member will not make a decision. Without this power the member or their survivor will automatically become entitled to legacy scheme benefits in relation to any period of remediable service. Regulations made under this power will allow a scheme to provide an alternative outcome where, for example, the default position would not appear to be in the best interests of the member or their survivor. Clause 11(3) accordingly provides that scheme regulations may include conditions that are to be applied, including relating to the value of the benefits payable under either option.

### Justification for taking the power:

49. The majority of the rules governing the payment of benefits by schemes to members and other individuals, such as members' beneficiaries or survivors, are set out in scheme regulations. The benefit designs of the pension schemes also vary between workforces and are set out in scheme regulations. Further, the differences between the legacy schemes and the new scheme within a workforce will also vary, which means that different members are likely to prefer different outcomes (legacy scheme benefits or new scheme benefits).

50. The Bill specifies a default position in the absence of an election; however, given the variations across and within schemes, permitting the responsible authority for a Chapter 1 new scheme to make regulations will allow for different outcomes at scheme and individual level.

### Justification for the procedure:

51. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensure that it is clear what should happen where a member fails to make a choice as to which set of benefits they wish to receive for the remedy period. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

## **Clause 16(1) Powers to reduce or waive liabilities**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

### Context and Purpose:

52. Clause 16 provides a power for schemes to reduce or waive a liability to pay back overpaid pension and lump sum benefits that are owed to a person by a scheme (Clause 16(1)) as a result of corrections made under Clause 12. This power is particularly important where, for example, the remedy provided by the Bill means that a pensioner member's benefits have been overpaid for a reason other than the member's own choice. The policy approach is that members are entitled to the benefits they would have received absent the discrimination and subject to the sums that they should have contributed being paid. However, where repaying these overpaid amounts would cause particular difficulties or hardship for the member, schemes will be able to write off some or all of that amount.

53. Clause 16(2) provides equivalent power in relation to pension contributions owed by a member to the scheme as a result of Clauses 13, 14, or 15. In some cases, a member's tax relief amounts on contributions may differ because they are paying their contributions shortfalls in different years than they would have, had they always been in the scheme they ultimately decide to receive benefits from in relation to the remedy period. This power enables schemes to reduce contributions charges under Clauses 13-15 by the amount of the tax relief that the member has been unable to access. Conversely, when a member is owed compensation for 'overpaid' contributions, Clause 16(5) allows schemes to reduce the amount of that compensation to reflect excess tax relief that has been received by the member. To ensure that these powers are applied consistently, Clause 24(1), combined with Clause 24(2)(a), requires it to be exercised in accordance with Treasury directions.

### Justification for taking the power:

54. It is important that schemes are able to make regulations that best suit the circumstances of their members, and the existing rules of the scheme, because each member's circumstances are different, and the reasons why liabilities may need to be reduced or waived might differ between schemes, or indeed this power may be needed by some schemes and not by others.

### Justification for the procedure:

55. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensure that schemes are able to write off some or all of an amount owed by members to schemes where repaying overpaid amounts would cause hardship for the member. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1), combined with Clause 24(2)(a), requires it to be exercised in accordance with Treasury directions. Where this power

is used to amend primary legislation, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

### **Clause 17(1) Pension credit members**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme.

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

#### Context and Purpose:

56. Pension sharing orders for divorces or dissolutions of civil partnerships generally award the member's ex-spouse 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/civil partner then becomes a member of the pension scheme in their own right and is known as the pension credit member, with a pension equivalent to the credit. As a result of the remedy, it is possible that the value of the pension at the time of the divorce/dissolution would have been different had the member always been a member of the alternative scheme for 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 pension credit member may have been different.

57. This power therefore enables the responsible authority for a Chapter 1 new scheme to amend provisions in a legacy scheme or a Chapter 1 new scheme (as the pension credit member may have credits in a legacy scheme, a new scheme or both depending on their particular divorce settlement) to award any additional credit due to the pension credit member as a result of the remedy. However, it does not give schemes the power to amend the pension sharing order itself.

58. This is an important part of the Government's commitment in its consultation response<sup>5</sup> that where the alternative CETV would have been higher, the pension credit member's benefits will be increased in proportion with the increase in CETV to reflect the additional amount. As members with remediable service that is mixed will not be able to retain that mixed service under the remedy, Clause 17(5) clarifies that the pension credit member's credit must be determined under one or the other of a Chapter 1 new scheme and a Chapter 1 legacy scheme, but not both. To ensure that this power is applied consistently, Clause 24(1), combined with 24(2)(b), requires it to be exercised in accordance with Treasury directions. Under Clause 17(4)(a), the debit deducted from the pension debit member's pension will reflect the choice of benefits the pension debit member makes.

#### Justification for taking the power:

59. The majority of the rules governing the payment of benefits by schemes to members, including pension credit members and other individuals (such as members' beneficiaries or survivors), are set out in scheme regulations. These can vary between schemes, therefore the most effective way of ensuring that schemes are

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<sup>5</sup> See paragraph A.112 of the 'Public service pension schemes: changes to the transitional arrangements to the 2015 schemes, Government response to consultation' - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958635/Public\\_Sector\\_Pensions\\_Consultation\\_Response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958635/Public_Sector_Pensions_Consultation_Response.pdf)

able to implement the remedy as intended in respect of pension credit members is by ensuring that the responsible authorities for Chapter 1 new schemes can make regulations to do so.

Justification for the procedure:

60. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensuring that the responsible authority for a Chapter 1 new scheme can award any additional credit due to the pension credit member as a result of the remedy. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used. Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1) requires it to be exercised in accordance with Treasury directions.

**Clause 18(1) Voluntary contributions**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

Context and Purpose:

61. In many of the public service pension schemes, it is possible for members to make additional voluntary contributions, over and above their normal monthly contributions, to purchase additional benefits. These could take the form of, for example, added pension or earlier payment of benefits with no or reduced reductions for early payment. Some members who have purchased options in the scheme in which they currently are may choose to take benefits from the alternative scheme. Some members will have purchased options in the new scheme, but the Bill now provides that they are treated as though they were always members of the legacy scheme during any period of remediable service. While in some cases, both legacy and new schemes make provision for the same or very similar additional benefits that can be purchased through voluntary contributions, in some cases there is no direct equivalent.

62. This power therefore allows the responsible authority for a new scheme to make regulations setting out how voluntary contributions and any benefits purchased as a result should be dealt with. In making such regulations, the responsible authority for the scheme can include provision under which the rights to additional benefits or earlier payment of benefits are extinguished. Where such provision is made, the scheme regulations must include provision as set out in Clause 18(6), i.e. that:

- (a) the member receives rights of an equivalent value to what they had in the original scheme under the alternative scheme;
- (b) the member is given rights in the alternative scheme equivalent to what their voluntary contributions would have bought them, had those contributions always been paid to the alternative scheme; or

- (c) the member receives compensation equivalent to the voluntary contributions, less any tax relief received on those contributions.

63. The first two options provide for the Government's acknowledgement in the consultation response, that many members who had made voluntary contributions may wish to retain some form of additional benefit rather than having their contributions refunded. However, where converting the voluntary contributions under options (a) and (b) is not possible or suitable, option (c) permits the scheme to pay the member compensation reflecting the contributions paid instead (accounting for tax relief). To ensure that this power is applied consistently, Clause 24(1), combined with Clause 24(2)(c) requires it to be exercised in accordance with Treasury directions.

Justification for taking the power:

64. The rules governing the purchasing of additional benefits through voluntary contributions are set out in scheme regulations. These do vary between schemes and a scheme will need to be able to determine the type of equivalent benefits or alternative benefits where a member's existing benefits change. Therefore, the most effective way of ensuring that schemes are able to implement the remedy as intended in respect of voluntary contributions is by ensuring that the responsible authorities for Chapter 1 new schemes can make regulations to do so.

Justification for the procedure:

65. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensure that schemes are able to deal with differences between new and legacy schemes insofar as they apply to voluntary contributions, so that members are able to retain an equivalent to the additional benefits they had purchased in the alternative scheme or receive a refund of their contributions. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used. Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1) combined with Clause 24(2)(c) requires it to be exercised in accordance with Treasury directions.

### **Clause 19 (1) Transfers**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Procedure (affirmative if amending primary legislation)

Context and Purpose:

66. This power allows the responsible authority for a Chapter 1 new scheme to make provisions about transfers. Clause 2(5) of the Bill provides that any rights under a Chapter 1 scheme in respect of a transfer into the scheme are not affected by Clause 2(1). Clause 19(1)(a) provides that schemes may make provision about transfers out

of the scheme in relation to remediable service. Where a member has a right to make a choice, whether to receive legacy benefits or new scheme benefits, in relation to a period of remediable service the schemes will make provision about how that is reflected in the calculation of a cash equivalent transfer value from the scheme. Clauses 19(1)(a)–(c) provide that scheme may make provision about cases where a member has transferred benefits from another Chapter 1 scheme and those benefits relate to a period of pensionable service that would otherwise have been remediable service. This will allow schemes to provide members with a choice of legacy benefits or new benefits in relation to that transfer. Clause 19(1)(e) provides for scheme regulations to make provision about other transfers in made during the remedy period, for example to make provision to allow a transfer made to a new scheme to remain in place after the member’s remediable service in the new scheme is no longer such service as a result of Clause 2(1).

67. The comparative value of legacy and new schemes in different workforces vary, therefore the service that arises from the transfer cannot simply be treated as remediable service in the receiving scheme. Schemes will instead carry out scheme specific calculations to determine the rights that would arise in the legacy scheme and the new scheme as a result of the transfer and the member will receive one or other, in line with their decision to receive legacy scheme benefits or new scheme benefits for their remediable service.

Justification for taking the power:

68. The schemes have individual factors and calculations for converting a transfer received from another pension scheme. There is also an arrangement known as the “Transfer Club” whereby members who transfer benefits between Chapter 1 schemes are awarded benefits in the receiving schemes on terms that ensure they receive like for like benefits, to support movement of staff between public service workforces and within the UK. This approach also requires scheme specific conversion factors and calculations to operate correctly. Therefore, the most effective way to ensure that pension schemes can ensure correct outcomes for their members is to permit Chapter 1 new schemes to set regulations around transfers in and out of their schemes, updating existing provision that is already in scheme regulations.

Justification for the procedure

69. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensure that schemes are able to deal with differences between new and legacy schemes insofar as they apply to transfers between schemes, so that members receive the benefits that they are entitled to and the transfer provisions take account of any remediable service in other public service pension schemes.

**Clause 20 (1) Further powers to make provision about special cases**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Procedure (affirmative if amending primary legislation)

Context and Purpose:



70. This provision gives a responsible authority for a Chapter 1 new scheme the power to make provision for various types of “special case”.

71. In relation to mixed service, previously referred to as tapered protection, the Government has been clear that maintaining this would be to maintain or even extend the discrimination identified by the courts. Members with mixed service must therefore choose either legacy or new scheme benefits for the entire remedy period. Many members will find that either legacy or new scheme benefits will be more valuable to them than the mixed service they previously had. For the small number of members who might be worse off as a result of having to choose one set of benefits for the whole remedy period, Clause (20(2)(a)) allows schemes to make provision.

72. In some schemes, provisions exist whereby members are able to “buy out” the actuarial reduction that would apply if the member were to retire earlier than normal pension age. As set out in relation to voluntary contributions, direct equivalents may not exist in the member’s alternative scheme, therefore schemes need to be able to ensure that such provision can be made where the member opts for benefits from the alternative scheme (Clause 20(2)(b)).

73. The clause also allows provision to be made about the benefits payable to or in respect of a person who has partially retired (Clause 20(2)(c)). The Bill already makes provision in respect of such members – they will be pensioner members and able to make an immediate choice about their benefits under Clause 6. However, further provision is allowed here as there are different arrangements in different workforces about eligibility for partial retirement and benefit entitlements of partially retired members. Schemes may therefore need to make further provision in relation to these scheme specific matters.

74. Finally, Clause 20(2)(d) allows for provision to be made about the benefits payable to or in respect of a person in relation to whom an amount of tax has been paid by the scheme manager of a Chapter 1 scheme on behalf of a member through ‘scheme pays’. A requirement of scheme pays is that when a scheme settles a member’s tax charge, there is a corresponding reduction in pension entitlement. The intention is for this power to be used to ensure that this corresponding reduction in pension entitlement accompanying any taxes that have been settled using scheme pays, is accounted for when members’ pension entitlements are changed under the remedy.

75. To ensure that this power is applied consistently, Clause 24(1) in combination with Clause 24(2)(e), requires it to be exercised in accordance with Treasury directions.

Justification for taking the power:

76. The power to make provision about special cases is necessary to reflect the different provisions in existing scheme regulations concerning matters such as the right, if any, to buy out an actuarial reduction on retirement, about eligibility for and entitlement to partial retirement benefits and for the scheme operation of scheme pays provisions. For members with mixed service, whether, and the extent to which, members will benefit from legacy scheme benefits or new scheme benefits compared to mixed benefits will depend on the scheme designs of the relevant Chapter 1 schemes. Whether special provision is needed for this group will therefore depend on the detailed existing provisions of the schemes. In addressing these matters,

responsible authorities for Chapter 1 new schemes need to have powers to address scheme specific circumstances.

Justification for the procedure:

77. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to ensure that schemes are able to implement the remedy effectively as regards these 'special cases'. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1) combined with Clause 24(2)(e) requires it to be exercised in accordance with Treasury directions. Where this power is used to amend primary legislation, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

**Clause 21(2) Power to pay compensation**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Procedure (affirmative if amending primary legislation)

Context and Purpose:

78. The Bill provides that scheme managers may pay compensation in respect of compensatable losses incurred by members. Most compensatable losses will be for the schemes to pay, for example, where the loss is attributable to the value of pension rights payable from the scheme. Other losses would normally fall to the employer to pay, for example losses attributable to a breach of the non-discrimination rule. The power at Clause 21(2) allows scheme regulations to make provision for a scheme employer to reimburse the scheme where it is considered that the employer rather than the pension scheme should meet the cost.

Justification for taking the power:

79. Scheme regulations make provision about scheme employers' obligations to the schemes, for example to pay employer contributions in relation to their employees, to pay costs relating to the administration of the scheme and recovery of costs incurred because of a failure by the employer to comply with the employer's obligations under the scheme. The power at Clause 21(2) extends the scope of the existing powers to allow schemes to recover costs that would have, except for the Bill, fallen to scheme employers rather than the scheme.

Justification for the procedure:

80. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to require scheme employers to reimburse the scheme for costs that arise in compensating members for losses incurred as a result of the discrimination, as a consequence of the remedy or as a result of incurring additional tax charges that would not have arisen absent the discrimination. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making

any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1) combined with Clause 24(2)(e) requires it to be exercised in accordance with Treasury directions. Where this power is used to amend primary legislation, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

### **Clause 22(1) Indirect compensation**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Procedure (affirmative if amending primary legislation)

#### Context and Purpose:

81. There may be instances where, for example, a member has paid a tax charge using 'scheme pays' which results in the amount of benefits they would have received being reduced at retirement. In such circumstances, this Clause provides a power for Chapter 1 legacy scheme regulations to make provision so that scheme managers can give members entitlements to additional benefits instead of cash compensation. These additional benefits will be paid when the member retires. Under Clause 34(2), the power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme.

#### Justification for taking the power:

82. It is important that schemes are able to make regulations that best suit the circumstances of their members, and the existing rules of the scheme. This is because each member's circumstances are different, and the circumstances in which compensation is not accessible may be different between schemes. Accordingly, schemes need to exercise this power in different circumstances, or indeed this power may be needed by some schemes and not by others.

#### Justification for the procedure:

83. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, in that they can only be used to make provision where a member has incurred a compensatable tax loss but, instead of being entitled to compensation under Clause 21 in respect of that loss, is entitled to additional benefits. The power therefore cannot be used by schemes as a general power to compensate or provide members with other additional benefits. Furthermore, this power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used. Finally, as set out above, to ensure that this power is applied consistently, Clause 24(1), combined with Clause 24(2)(h), requires it to be exercised in accordance with Treasury directions.

### **Clause 23(1) Interest and Process**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

Context and Purpose:

84. Where sums are owed to schemes or members, for example relating to contributions or benefits, this power allows regulations to be made which will set out the process for such sums to be paid. As the remedy period spans seven years, interest will be added to amounts payable by schemes or members, as in the latter case their comparators in the scheme will have been paying the correct level of contributions throughout, so would not have had the benefit of the additional money over time.

85. This power will allow interest to be calculated and paid. To ensure that a reasonable and fair rate is used and to minimise unfairness that could arise as a result of schemes using different rates or adopting different processes, regulations under this section will be exercised in accordance with Treasury directions and, in the case of regulations that relate to the calculation and payment of interest, following consultation with the Government Actuary (under Clauses 24(1), 24(2)(i) and 24(4)).

Justification for taking the power:

86. The rate of interest to be applied to payments by members to schemes or from schemes to members may need to be varied from time to time, for example to take account of changes to rates of inflation. In view of this, and given that the applicable interest rate is a technical matter in respect of the remedy, the rate will be set using regulations.

Justification for the procedure:

87. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to setting out the process by which sums are to be paid to schemes or members and to providing the rate of interest that will apply to payments occurring as a result of the remedy. Before making any regulations under Chapter 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used. Finally, as set out above, to ensure that this power is applied consistently, Clauses 24(1), 24(2)(i) and 23(4) require it to be exercised in accordance with Treasury directions after consultation with the Government Actuary.

**Clause 24 Treasury directions**

*Power conferred on:* The Treasury in relation to England, Wales and Scotland, the Department of Finance in relation to Northern Ireland

*Power exercised by:* Treasury Directions or Department of Finance directions

*Parliamentary Procedure:* N/A

### Context and Purpose:

88. Clause 24 sets out that the powers in relation to Clauses 17, 18, 19, 21(1), 21(2) and 23 must be exercised in accordance with Treasury directions. This ensures that, where Treasury ministers (or in relation to Northern Ireland the Department of Finance), who are responsible for policy on public service pensions, consider that a consistent approach is necessary or desirable, the Treasury, or in relation to Northern Ireland the Department of Finance (under Clause 35(1)), may give directions to schemes.

89. For example, Clause 24(2)(i) relates to the power to make scheme regulations concerning interest to be calculated and paid on amounts owed to or by members. The Government intends to take a consistent approach in setting interest rates across the schemes and will consult the Government Actuary in setting the rate. Clauses 24(2)(b)-(d) are concerned with pension credit members, voluntary contributions and transfers. Whilst schemes have different provisions in respect of these matters and will need scheme specific provisions to address them within their schemes, the Government wants there to be consistency in the approach taken. So, for example, members of all workforces will continue to be able to move between public service employers whilst retaining the value of their accrued pension benefits.

90. Clauses 24(2)(a), (e) and (f) are concerned with matters relating to payments made to members, either by way of compensation, adjusting liabilities or in relation to special cases. The Government wants to ensure that a consistent approach is taken overall, so that a member of one workforce is treated in the same way as a member of another workforce, for example in relation to compensation for costs incurred in relation to legitimate costs incurred in resubmitting tax self-assessment information. However, it will be for the schemes to prescribe the process for members to apply for such compensation from the scheme.

### Justification for taking the power:

91. There is significant precedent for the use of Treasury and Department of Finance directions in this way<sup>6</sup> and, as set out above, it allows schemes the option to make regulations that work best for them, while ensuring that if a particular outcome is desirable, it is achieved. In relation to Chapter 1 schemes under Clause 30(2)(b), (i.e. a scheme under section 1 of PSPA (NI) 2014 which is not a scheme for judicial office holders or local government workers) and Clause 30(3)(b) (i.e. an existing scheme within the meaning of the Public Service Pensions (Northern Ireland) Act 2014 PSPA (NI) 2014), the Department of Finance in Northern Ireland may make directions. This is consistent with the approach taken in relation to other aspects of public service pensions, for example directions in relation to valuations and the employer cost cap, where it is the Department of Finance rather than the Treasury who may make such directions in relation to Northern Ireland.<sup>7</sup>

### Justification for the procedure:

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<sup>6</sup> For example, in the making of Directions relating to scheme valuations, under s11(2) of the PSPA 13, or for increasing public service pensioners' Guaranteed Minimum Pensions when they would not otherwise be increased, under s59A of the Social Security Pensions Act 1975.

<sup>7</sup> For example, 'The Public Service Pensions (valuations and Employer Cost Cap) (Amendment) Directions (Northern Ireland) 2019' – <https://www.finance-ni.gov.uk/publications/public-service-pensions-valuations-and-employer-cost-cap-amendment-directions-northern-ireland-2019>

92. Treasury directions are intended to set out to schemes how they should exercise a particular power, rather than creating a new power. As these directions are aimed at schemes as opposed to scheme members and the wider public, where it is more likely that regulations would be used, the aim will therefore be achieved by directions rather than through regulations.

### **Clause 25(2) Scheme rules that prohibit unauthorised payments**

*Power conferred on:* The Treasury in relation to England, Wales and Scotland, the Department of Finance in relation to Northern Ireland

*Power exercised by:* Treasury Directions or Department of Finance directions

*Parliamentary Procedure:* N/A

#### Context and Purpose:

93. Under section 164 of the Finance Act 2004, registered pension schemes may only make payments to members of the types listed in that section. 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 a member under Chapter 1 of this Bill could be considered to be unauthorised, Clause 25(2) provides a power for the Treasury to set out in directions payments which would normally be unauthorised but, for the purposes of this Bill, schemes are permitted to make. In relation to Northern Ireland, Clause 35(1) confers this power on the Department of Finance.

#### Justification for taking the power:

94. The exact nature of the payments that schemes may make in consequence of Chapter 1 of the Bill may depend on the precise amendments made to scheme regulations, and interactions between schemes and HMRC. For the avoidance of unintended consequences that may arise in this novel context, it is therefore preferable to take a power to achieve this. It is also possible that the types of payments to be authorised will change over time; therefore, the list needs to be easily amendable to prevent charges applying where they should not, and vice versa.

#### Justification for the procedure:

95. This power is limited in purpose in that it only permits the Treasury or the Department of Finance in Northern Ireland to make directions for the purposes of setting out the types of payments, which would normally be unauthorised, schemes are able to make as a result of Chapter 1 of the Bill only. The power is also limited in terms of who it applies to i.e. the direction will be to schemes rather than employers, members, or the general public.

### **Clause 26(1) Remediable service statements**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure (affirmative if amending primary legislation)

#### Context and Purpose:

96. Pension schemes, including public service pension schemes, are currently required to provide active members with an annual statement setting out the benefits under the scheme which they have accrued to date. For deferred members, schemes must provide this information on request. Clause 26 requires scheme regulations to make provision requiring the scheme manager to provide members of the public service schemes with additional information – about their entitlements in relation to Clause 5, 6 or 9 of the Bill. Clause 5 is concerned with opted-out service and whether a member wishes to elect for that service to be reinstated as pensionable service or not. Clauses 6 and 9 are concerned with a member's election to receive new scheme benefits rather than legacy scheme benefits, either immediately for deceased and pensioner members or in future for deferred and active members. As the decision as to which set of benefits to take for the remedy period is an important one, based on complex information and many variable factors that are particular to the individual as well as to their legacy and new scheme, it is important to ensure that members fully understand their options and have good quality information available to them on which to make this decision.

97. Clause 26 sets out that scheme regulations for a Chapter 1 legacy scheme must require the scheme manager to provide members with remediable service with a statement setting out the two sets of benefits available to them and how and when an election with regard to the benefits can be made. Under Clause 34(2), the power is to be exercised by the responsible authority for the Chapter 1 new scheme that is connected with the Chapter 1 legacy scheme.

98. For active members, Clause 26(8)(a) requires that provision is made for a statement to be issued annually so members can see the value of both sets of benefits over time. For deferred and pensioner members, the requirement will be a one-off, to inform members' decisions in relation to their remediable service, though deferred members will be able to request further statements in recognition of the fact that they may have many years to go until they retire. Clause 26(6) sets out further requirements for remediable service statements that may be set out in Treasury directions to ensure further consistency in terms of the information a member receives. In relation to Northern Ireland, by virtue of Clause 35(1), the Department of Finance is responsible for setting out further requirements for remediable service statements insofar as public service pension schemes in Northern Ireland are concerned. These requirements may include specifying particular information over and above that set out in Clause 26(5), information to be included in a specified form, and information to be provided to a specified person or in a specified manner.

Justification for taking the power:

99. The detailed procedures for preparing and providing annual benefit statements to members will vary between schemes and as schemes may wish either to align with existing processes for annual benefit statements or create a new process, the most effective way of doing so is by allowing the responsible authority for the Chapter 1 new scheme, who will administer remediable service statements, to set out the detailed requirements for the scheme in regulations.

Justification for the procedure:

100. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose. The provision of a statement setting out the benefits available to a member for the remedy period is an important tool for members

to be able to understand the two sets of benefits available to them for the remedy period and to make the best decision for their circumstances.

101. However, much of the detail that will be contained in regulations made under this provision will be technical in nature and aimed at scheme administrators, as they know the requirements and correct procedures to follow in preparing members' remediable statements. Where the Treasury, or in relation to Northern Ireland the Department of Finance, considers it necessary to provide schemes with further direction in terms of requirements for remediable service statements, it may do so through directions, under Clause 26(6). Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

### **Clause 28(2) Application of Chapter to immediate detriment cases**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative (affirmative if amending primary legislation)

#### Context and Purpose:

102. In relation to some members, particularly claimants in employment tribunals and those who retire before the remedy is implemented, schemes may have taken action, in response to a determination by a tribunal or court or on the basis of the non-discrimination rule contained in section 61 of the Equality Act 2010,<sup>8</sup> to correct those members' pensions. These members are considered to have benefited from an immediate detriment remedy.

103. To avoid those members being compensated twice as a result of their position being corrected both under this Bill and under section 61 of the Equality Act 2010, and to avoid interference with those members' accrued crystallised rights, Clause 28(1) sets out that nothing in Clauses 2 to 27 applies in relation to a person's remediable service if that person has benefitted from an immediate detriment remedy, i.e. the scheme has already taken action to remedy the discrimination identified by the Court of Appeal. However, in such cases, the court determination or operation of the non-discrimination rule may not alone have been sufficient to fully return the member to the position they would have been absent the discrimination and it may be necessary for schemes to make provision, for example around general administration, accrual, pension input amounts, membership of a specific scheme, and the date on which the member's benefits crystallised to fully achieve that.

#### Justification for taking the power:

104. This power is essential to ensure that schemes are able to make technical amendments to scheme regulations and provision to ensure that the position of those who have benefited from an immediate detriment remedy is correct, including for tax purposes. The changes required may vary from scheme to scheme and are likely to be detailed and technical because of the unique circumstances of some members. In

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<sup>8</sup> For the devolved schemes in Northern Ireland the non-discrimination rule is contained at paragraph 2 of Schedule 1 to the Employment Equality (Age) regulations (Northern Ireland) 2006.



some circumstances this may simply mean that particular sections of the Bill need to be applied to members in this position, and in others that certain modifications to those Bill provisions as they apply to these members are necessary in order to achieve a consistent outcome. To ensure that those who have benefited from an immediate detriment remedy are therefore not disadvantaged in any way, it is important for schemes to have this power.

Justification for the procedure:

105. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. ensuring that the discrimination identified by the Court of Appeal can be fully remedied in respect of those who have benefited from an immediate detriment remedy and that where this requires schemes to make amendments to scheme regulations for example, they are able to do so. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). It is unlikely that this power will need to be used to amend primary legislation; however, where this is the case, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

**Clause 52(1) Power to reduce benefits in lieu of paying liabilities owed to scheme**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and Purpose:

106. This power provides that judicial scheme regulations may reduce benefits payable to a person by an amount equivalent to a liability owed by that person to the scheme. Provision is needed because certain judges who opted out of the judicial 2015 scheme were eligible for a transitional protection allowance which was paid in lieu of pension scheme membership. Under the Bill, these judges will be able to elect for legacy scheme membership for the remedy period. Any judge making this election will need to both repay the transitional protection allowance received and pay the contributions they are liable for in the legacy scheme. For some judges these amounts could be considerable. We are therefore providing judges with additional flexibility in payment by providing the ability for the legacy schemes to make the upfront repayment of the transitional protection allowance in return for reduced pension benefits.

Justification for taking the power:

107. The detailed rules setting out the level of pension benefits to which members are entitled and reductions where the scheme meets certain liabilities are currently dealt with in scheme regulations. While the principal provisions of the 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 proposed.

Justification for the procedure:

108. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

### **Clause 53(1) Powers to reduce or waive liabilities**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

#### Context and Purpose:

109. This is the judicial scheme equivalent of Chapter 1, Clause 16.

110. Subsection (1) provides that judicial pension scheme regulations may provide for the reduction or waiver of an amount owed under section 48, which deals with situations where pension and lump sum benefits have already been paid from the 'wrong' scheme (i.e. a person has retrospectively elected different scheme membership after they have begun receiving their judicial pension). This is particularly important where, for example, the remedy means that a pensioner member's benefits have been overpaid. Where repaying these overpaid amounts would cause particular difficulties or hardship for the member, the powers will enable the scheme to be able to write off some or all of that amount.

111. Subsections (2) – (4) apply the principle to contributions, for example allowing the scheme to reduce a contribution shortfall to take account of the fact that the judge would have received tax relief on the contributions if they 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 (for example, those which are now considered judicial 2015 scheme contributions and would have received tax relief had they been made at the right time and into the right scheme).

112. This scenario is likely to arise where judges with mixed service, accruing legacy scheme benefits until their tapered protection end date and 2015 benefits thereafter choose to take 2015 benefits for the whole remedy period. For these cases, an underpayment of contributions would arise because contributions in the legacy schemes are lower than for the 2015 scheme. Previous Clauses provide that the effect of judges making a 2015 scheme election is that they have a liability to pay contributions to the 2015 scheme and that any contributions made to their legacy scheme are to be treated as having been made on a year by year basis to the 2015 scheme. This Clause provides that the amount these judges will owe as a result of Clause 49 can be reduced by the tax relief that would have been received had the contributions actually been paid at the relevant time into the correct scheme, but the judge will still be considered to have satisfied the obligation to pay the correct

contribution rate. This ensures persons are not left worse off as a result of not being able to receive tax relief on their contributions (which are now considered 2015 scheme contributions and would have received tax relief had they been made at the right time into the right scheme).

Justification for taking the power:

113. The detailed rules setting out the level of judicial pension benefits due and contributions owed are currently dealt with in scheme regulations. While the principal provisions of the legacy salaried judicial schemes are set out in primary legislation, they are supplemented by regulations on areas of technical detail, including the level of contributions. Therefore, a limited power to make the required technical changes to those regulations is proposed.

Justification for the procedure:

114. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

**Clause 54(1) Pension credit members**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and Purpose:

115. This is the judicial scheme equivalent of Chapter 1, Clause 17.

116. Pension sharing orders for divorces or dissolutions of civil partnerships generally award the member's ex-spouse 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 then becomes a member of the pension scheme in their own right and is known as the pension credit member, with a pension equivalent to the credit. 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 member always been a member of the alternative scheme for 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 pension credit member may have been different. This power therefore enables the responsible authority to award any additional credit due to the pension credit member as a result of the remedy. However, it does not give the responsible authority the power to amend the pension sharing order itself.

117. This is an important part of the Ministry of Justice's (MoJ) commitment in its consultation response that ex-spouses/civil partners 'will not be placed in a worse financial position as a result of the choice of the scheme member'.

118. Because members who have mixed remediable service (i.e. successive membership of both the legacy and 2015 scheme) will not be able to retain their mixed service, Clause 54(5) clarifies that the pension credit member's credit must be determined under either the 2015 or the legacy scheme, not both. To ensure that this power is applied consistently with the approach to other public service schemes, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

Justification for taking the power:

119. The detailed rules governing the payment of benefits by schemes to members, including pension credit members and other individuals (such as members' beneficiaries or survivors), are set out in scheme regulations. Therefore, a limited power to make the required technical changes to those regulations is proposed.

Justification for the procedure:

120. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

**Clause 55(1) Further powers to make provision about special cases**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and Purpose:

121. This is the judicial scheme equivalent of Chapter 1, Clause 20.

122. This clause provides the judicial schemes with a power to make provisions designed to respond to particular individual circumstances of a technical nature that arise as a result of adjusting a member's service. For example, judges who now make a legacy scheme election may have purchased added pension or made transfers in while they were treated as members of the 2015 scheme. Clause 39(7) makes clear that the legacy scheme election does not transfer these benefits to the legacy scheme. However, detailed amendments will be needed to the 2015 scheme regulations to provide for the treatment of these benefits in the schemes. Judges may also have made transfers out of the scheme, the value of which may be affected by a scheme election and provision will need to be made address this. As with the equivalent power in Chapter 1, Clause 20, provision is also needed to address the issues raised by judges with mixed service, those who retired with an 'early retirement buy-out, and the benefits payable to or in respect of a person who has partially retired.

Justification for taking the power:

123. The majority of rules governing member options are set out in scheme regulations and the approach needed to address the issues described above will be extremely technical. Further, the details can vary between schemes; therefore, the most effective way of ensuring that schemes are able to implement the remedy as intended in respect of special cases is by ensuring that the responsible authorities can make regulations to do so.

Justification for the procedure:

124. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

**Clause 56(2) Power to pay compensation**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and Purpose:

125. This is the judicial scheme equivalent of Chapter 1, Clause 21.

126. The Bill provides for scheme managers of judicial schemes to pay members compensation in respect of losses incurred either as a result of the scheme having breached the non-discrimination rule (by virtue of relevant equality legislation), or by application of the provisions of the Chapter, in both cases where the loss is of a description specified in Treasury directions. While it will be for the scheme manager to pay the compensation, 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).

Justification for taking the power:

127. We expect that many members will need to be compensated for losses incurred due to the discrimination identified by the Court of Appeal and there will be a range of losses for which compensation may be available. While we are aware of various types of compensation given the claims brought in the Employment Tribunal, there may be other losses which judges may seek to claim under the Bill provisions, of which we are not yet aware. A limited power is the most effective way of determining which compensation should be charged to an employer and to which scheme.

Justification for the procedure:

128. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

**Clause 57(1) Interest and process**

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and purpose:

129. This is the judicial scheme's equivalent of Chapter 1, Clause 23.

130. Where sums are owed to members or the scheme, for example relating to contributions or benefits, this power allows schemes to set instalment plans, provide which amounts owed to a person by a scheme may be paid only on the making of the application, make arrangements for 'netting off' amounts owed by an individual against amounts owed to that individual, and confer rights of appeal. It also allows regulations to be made which will set out the process for such sums to be calculated and paid.

131. As the remedy period spans seven years, interest will be added to amounts payable by schemes or 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 Treasury directions, following consultation with the Government Actuary. To ensure that this power is applied consistently, Clauses 58(1) and (4) require it to be exercised in accordance with Treasury directions made after consultation with the Government Actuary.

Justification for taking the power:

132. This power covers a number of matters of technical detail. For example, the detail of payment by instalments will need to take account of various circumstances of the person and relates to matters generally covered in scheme regulations. Therefore, a limited power to make the required technical changes to those regulations is proposed.

133. The rate of interest to be applied to payments by members to schemes and vice versa may need to be varied from time to time, for example to take account of changes to rates of inflation. In view of this and given that the applicable interest rate is a technical matter, it is proposed that the rate will be set using regulations.

Justification for the procedure:

134. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13). Finally, as set out above, to ensure that this power is applied consistently, Clause 58(1) requires it to be exercised in accordance with Treasury directions.

### **Clause 58 Treasury directions**

*Power conferred on:* The Treasury; The Department of Finance in relation to Northern Ireland

*Power exercised by:* Treasury directions or Department of Finance directions

*Parliamentary Procedure:* N/A

#### Context and Purpose:

135. This is the judicial scheme's equivalent of Chapter 1, Clause 24.

136. Subsection (1) sets out that the powers listed in subsection (2) must be exercised in accordance with Treasury directions. This ensures that where it is beneficial for a consistent outcome to be achieved or approach to be taken when schemes exercise the powers in the clauses listed, the Treasury, or, in relation to Northern Ireland the Department of Finance (see Clause 71, "Treasury directions"), may give the scheme directions as to the outcome to be achieved or approach to be taken. Schemes still have the option to make regulations that work in line with their existing legislation and administrative processes, while achieving this consistency.

#### Justification for taking the power:

137. There is significant precedent<sup>9</sup> for the use of Treasury directions in this way and, as set out above, it allows schemes the option to make regulations that work best for them, while ensuring that if a particular outcome is desirable, it is achieved. In relation to Northern Ireland, the Department of Finance in Northern Ireland may make directions. This is consistent with the approach taken in relation to other aspects of public service pensions, for example directions in relation to valuations and the employer cost cap, where it is the Department of Finance rather than the Treasury who may make such directions in relation to Northern Ireland.<sup>10</sup>

#### Justification for the procedure:

138. Treasury directions are intended to set out to schemes how they should exercise a particular power, rather than creating a new power. It is proposed, therefore, that this aim will be achieved by directions rather than through regulations. As these directions are aimed at schemes as opposed to scheme members and the wider

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<sup>9</sup> For example, in the making of directions relating to scheme valuations, under s11(2) of the PSPA 13, or for increasing public service pensioners' Guaranteed Minimum Pensions when they would not otherwise be increased, under s59A of the Social Security Pensions Act 1975.

<sup>10</sup> For example, 'The Public Service Pensions (valuations and Employer Cost Cap) (Amendment) Directions (Northern Ireland) 2019' – <https://www.finance-ni.gov.uk/publications/public-service-pensions-valuations-and-employer-cost-cap-amendment-directions-northern-ireland-2019>

public where it is more likely that regulations would be used, this aim will therefore be achieved by directions rather than through regulations.

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

*Power conferred on:* The Treasury; The Department of Finance in relation to Northern Ireland

*Power exercised by:* Treasury directions or Department of Finance directions

*Parliamentary Procedure:* N/A

#### Context and Purpose:

139. This is the judicial scheme equivalent of Chapter 1, Clause 25.

140. Under section 164 of the Finance Act 2004, registered pension schemes may only make payments to members of the types listed in that section. 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 a member under Chapter 2 of this Bill could be considered to be unauthorised and in breach of scheme rules, Clause 59(2) provides a power for the Treasury to set out in directions payments which schemes are permitted to make.

141. Subsections (3) and (4) make an exception so that a payment required in respect of transfers from a partnership pension account (see Clause 38 of the Bill), which would ordinarily be unauthorised, does not have to be specified in directions in order to be made.

#### Justification for taking the power:

142. The exact nature of the payments that the scheme may make in consequence of Chapter 2 of the Bill may depend on the precise amendments made to scheme regulations, and interactions between schemes and HMRC. For the avoidance of unintended consequences, it is therefore preferable to take a power to achieve this. It is also possible that the types of payments required will change over time, and therefore the list should be easily amendable, to prevent charges applying where they should not.

#### Justification for the procedure:

143. This power is limited in purpose in that it only permits HM Treasury to make directions for the purposes of setting out the types of payments, which would normally be unauthorised, schemes are able to make as a result of Chapter 2 of the Bill only. The power is also limited in terms of who it applies to, for example. the direction will be to schemes rather than employers, members or the general public.

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

*Power conferred on:* Responsible authority for a judicial scheme

*Power exercised by:* Regulations



*Parliamentary procedure:* Affirmative Procedure (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

Context and Purpose:

144. This is the judicial scheme equivalent of Chapter 1, Clause 28.

145. In relation to some members, particularly claimants in the Employment Tribunal and those non-claimants who by the time the remedy is implemented have already retired, schemes may have taken action in response to a determination by a tribunal or court or on the basis of the non-discrimination rule in section 61 of the Equality Act 2010 to correct those members' pensions. These members are considered to have benefited from an immediate detriment remedy.

146. To avoid those members gaining an additional benefit as a result of their position being corrected both under this Bill and under section 61 of the Equality Act 2010, Clause 63(1) sets out 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, i.e. the scheme has already taken action to put the member in the position they would have been in absent the discrimination identified by the Court of Appeal. However, in such cases, the court determination or operation of the non-discrimination rule may not alone have been sufficient to fully return the member to the position they would have been in absent the discrimination and it may be necessary for schemes to make provision for example around general administration, accrual, membership of a specific scheme, liability to contributions and member options to fully achieve that.

Justification for taking the power:

147. This power is essential to ensure that schemes are able to make technical amendments to scheme regulations and provision to ensure that the position of those who have benefited from an immediate detriment remedy is correct, including for legal and tax purposes. The changes required are likely to be detailed and technical because of the unique circumstances of some members. In some circumstances this may simply mean that particular sections of the Bill need to be applied to members in this position, and in others that certain modifications to those Bill provisions as they apply to these members are necessary in order to achieve a consistent outcome. To ensure that those who have benefited from an immediate detriment remedy are therefore not disadvantaged in any way, it is important for schemes to have this power.

Justification for the procedure:

148. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13).

**Clause 65 Meaning of “the election period”**

*Power conferred on:* the relevant authority

*Power exercised by:* N/A

*Parliamentary procedure:* None

Context and Purpose:

149. The Bill provides that judges with remediable service within scope of Chapter 2 of the Bill will have a three-month period in which to make either a legacy scheme election or a 2015 scheme election. The function of determining the start date is conferred on the relevant authority (being the Lord Chancellor or the Department of Justice in Northern Ireland – see Clause 68), who also has discretion to extend the period in respect of a particular individual where it is just and equitable to do so (subsection (2)). Although this is not a power to make delegated legislation, we note this function for completeness.

Justification for taking the power:

150. As set out in Clause 60, the relevant authority must send information statements to judges in scope of the options exercise setting out the benefits they will receive if they make a legacy scheme election, a 2015 scheme election or if they do nothing. Collecting and sending out this information is time consuming and dependent on receiving information from third-party suppliers. The three-month period cannot start until the information statements have been sent out, but similarly needs to start as soon as possible to tie in with the annual self-assessment tax process. It is not therefore possible to set out the start date for the options exercise in the Bill.

151. MoJ has publicly committed to aim to undertake the options exercise in autumn 2022. The relevant authority is provided with the function of setting the start date of the options exercise to ensure the efficient operation of the options exercise to a timescale suitable for both MoJ and the judiciary. While it is expected that three months will be sufficient time for most judges to reach a decision, there may be particular personal circumstances of individual judges where more time is needed. It is therefore important that the relevant authority has discretion to extend the three-month period.

Justification for the procedure:

152. This is a narrow and limited function. As described above, it is important both that the date for the start of the election period can be quickly set to ensure administrative efficiency and that the relevant authority has discretion to extend the period to accommodate particular individual circumstance. These functions are essentially administrative in nature and it is considered that no parliamentary procedure is required.

**Clause 74(1) Power to pay benefits equivalent to final salary benefits**

*Power conferred on:* Responsible authority for a local government new scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure

Context and Purpose:

153. This power allows Local Government Pension Scheme (LGPS) regulations to make provision that benefits determined by reference to a member's remediable service are equivalent to final salary benefits. This power would give responsible authorities the capacity to remove the discriminatory provisions from LGPS

regulations, where transitional protection was different from that provided in other schemes. All active LGPS members have participated in the new, career average scheme since 1 April 2014, under regulations deemed to be made under PSPA 13 provisions. Older members were entitled to an underpin calculation upon leaving service, whereby their career average pension would be compared against what they would have had in the final salary scheme, with the member receiving an addition to their career average pension if that would have been higher. The policy intent is that the *McCloud* discrimination should be removed from the LGPS schemes by giving younger relevant members equivalent underpin protection, and this power would enable responsible authorities to make regulations that provide for this protection.

Justification for taking the power:

154. The majority of the rules setting out how public service pension schemes should operate are set out in secondary legislation. LGPS scheme regulations already include the detailed provisions (particularly regulation 4 of SI 2014/525 for LGPS England and Wales, regulation 4 of SSI 2014/233 for LGPS Scotland and regulation 4 of SR 2014/189 for LGPS Northern Ireland) governing underpin protection in the LGPS, and there is therefore precedent that the provisions regarding the amended underpin are also set out in scheme regulations. This power is limited to providing that certain defined members can receive benefits equivalent to final salary benefits for the period up to 31 March 2022, and scheme regulations must otherwise comply with the normal requirements of the PSPA 13.

Justification for the procedure:

155. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose. This is a narrowly drawn power which gives responsible authorities a power to provide that certain qualifying members may have benefits equivalent to final salary membership for service up to 31 March 2022. This power will be used to amend regulations which themselves have been made under the negative resolution procedure. Before making any regulations under this Clause, the responsible authority must consult those likely to be affected by the regulations, or their representatives, under section 21 of the PSPA 13. Where this power is used to amend primary legislation, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used.

### **Clause 79(3) Amendments relating to scheme regulations**

*Power conferred on:* Responsible authority for a Chapter 1 new scheme, responsible authority for a Chapter 1 legacy scheme, responsible authority for a judicial scheme

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure in respect of the judicial schemes and where not minor or wholly beneficial or to the extent that it amends primary legislation, otherwise negative procedure

Context and Purpose:

156. Clause 79(3) expands an existing power in section 3 of the PSPA 13 which provides responsible authorities with the power to make provisions in scheme regulations in accordance with the requirements set out in the rest of that Act. The amendment to that power here permits consequential, supplementary, incidental or transitional provision in relation to any provision of this Bill to scheme regulations, or

equivalent amendments to primary legislation (passed before or in the same session as the Bill). This power is essential to ensure there are no unintended consequences which would prevent the remedy, and the closure of legacy schemes on 31 March 2022, from being fully implemented. Insofar as it permits amendments to Acts, this power is a Henry VIII power.

157. Clause 79(8) and (15) specifically provides that the requirement to seek the consent of those who might suffer significant adverse effects as a result of changes to scheme regulations does not apply where the changes made under any provision contained in Part 1 of the Bill, or under the power to make consequential, supplementary, incidental or transitional provision in relation to any provision of Part 1 of the Bill.

158. An equivalent amendment is made to the Public Service Pensions Act (Northern Ireland) 2014 by Clauses 79(12) meaning that the power to make scheme regulations in section 3 of that Act can also be used to make consequential, supplementary, incidental or transition provision for the purposes of this Bill.

Justification for taking the power:

159. The majority of the rules governing how individual public service pension schemes can operate are set out in scheme regulations. Therefore, responsible authorities require the necessary powers provided by Clause 79(3) to amend their regulations in consequence of the provisions of this Bill, and specifically to implement the remedy and to move all members to the new schemes from 1 April 2022, in line with the requirements of this Bill.

160. The Bill is taking steps to address the discrimination identified by the Court of Appeal, which includes making retrospective changes to pension entitlements during the remedy period. The usual approach to discrimination would be to level up treatment, so that where a person suffered discrimination, they would be afforded the better treatment already afforded to their comparator. If the Government took that approach in relation to the discriminatory transitional protection all members would move to the legacy pension schemes. However, that would not be the best outcome for many members who are in scope of the remedy. Whether a person is better off receiving legacy scheme benefits or new scheme benefits in relation to their remediable service will depend on a number of factors such as their pay, career progression, age at retirement and health.

161. The Government has therefore taken the decision to provide members with the option to elect to receive new scheme benefits rather than legacy scheme benefits, so they may choose the benefits that are better for them. Further provision is made by the Bill to ensure that members can be placed in the position that they would have been but for the discrimination – for example to compensate members for any loss attributable to the discrimination that arose. The Bill and scheme regulations therefore provide members with a complete remedy for the discrimination that arose. Some members may choose to receive benefits that are different to those available in the scheme they were a member of prior to the Bill. For example, the new pension schemes may provide benefits in relation to unmarried partners that are not available under some legacy schemes. A member may decide to choose a lower pension for themselves, in order to receive a higher pension for their dependants. As explained in relation to Clause 20, there may be a small number of individuals who had mixed service and who have a lower entitlement now they are only able to choose to receive

legacy scheme benefits or new scheme benefits in relation to their remediable service, but Clause 20(2)(a) provides that schemes may make provision about such members.

162. Section 23 was concerned with retrospective provision that could have significant adverse effects and requires the responsible authority to first obtain the consent of those likely to be affected before such provision could be made. If Section 23 of PSPA 13 and PSPA(NI) 14 were to continue to apply, it is likely that it would technically be triggered in relation to the circumstances set out above, and in consequence could prevent the Government from implementing a full and complete remedy to the discrimination identified by the Court of Appeal.

Justification for the procedure:

163. This power will be generally used to amend regulations which themselves have been made under the negative resolution procedure, therefore the provision proposed is consistent with the procedures which already apply under section 3 of the PSPA 13. Where the power is used to amend regulations for a judicial scheme, the regulations will be made under the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Furthermore, before making any regulations the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13).

164. It is specified in Clause 79(3) and (4) and 79(12) and (13) that the types of changes to be made using this power are limited to consequential amendments in relation to primary legislation passed before or in the same session as this Bill or secondary legislation or consequential, supplementary, incidental or transitional provision amending an existing scheme (whether set out in primary or secondary legislation). The changes that can be made using these powers are therefore limited only to those that are needed for the effective implementation of this Bill. Where this power is used to amend primary legislation, section 24(1)(a) of the PSPA 13 requires the affirmative procedure to be used. Section 21 of PSPA (NI) 2014 applies the requirement to consult those likely to be affected by regulations made under section 3, and section 24 requires the affirmative procedure to be used, where regulations made under section 3 of that Act are used to amend primary legislation.

**Clause 79(6) Amendments relating to scheme regulations**

*Power conferred on:* The Treasury

*Power exercisable by:* Treasury Order

*Parliamentary procedure:* Negative procedure

Context and Purpose:

165. Under section 3(5) of the PSPA 13, scheme regulations require the consent of the Treasury before being made, unless the exceptions in subsection (6) apply. These exceptions reflect where responsibility for public service pensions is devolved along with the funding of these pensions. Clause 79(5) removes section 3(6)(b) of the PSPA 13, containing the exception for scheme regulations of the Welsh Ministers relating to fire and rescue workers. This removes an exception for the Welsh pension scheme for fire and rescue workers from requiring Treasury clearance for changes to scheme rules, thereby aligning the scheme with other devolved public service pension

schemes that are funded by UK AME. Instead, Clause 79(6) inserts a new provision permitting the Treasury to make a Treasury Order to add, vary or remove exceptions to the requirement in section 3(5) of the PSPA 13.

Justification for taking the power:

166. Funding arrangements for pension schemes can and have changed over time, and it is sensible for Treasury consent requirements to remain aligned with the funding arrangements for devolved pension schemes and the resulting upfront fiscal risks for UK taxpayers. This can currently only be done through primary legislation, which increases the risk of misalignment between scheme funding arrangements and Treasury consent requirements.

Justification for the procedure:

167. Under section 24(2) PSPA 2013, regulations made under the PSPA 2013 are subject to the negative procedure and section 3(5) requires Treasury consent before regulations are made unless an exception applies. This power would determine whether the list of exceptions requires amending.

### **Clause 80 Amendments relating to employer cost cap**

*Power conferred on:* The Treasury; The Department of Finance in relation to Northern Ireland

*Power exercisable by:* Treasury Directions or Department of Finance directions

*Parliamentary procedure:* N/A

Context and Purpose:

168. The cost control mechanism assesses certain costs of providing defined benefit public service pension schemes. If the cost of providing a defined benefit scheme made under section 1 of the PSPA 13 has decreased/increased by more than the specified lower/upper margins, as a percentage of pensionable pay compared to a base level (officially known as the “employer cost cap” and set in the relevant scheme regulations on introduction of the scheme), then the PSPA 13 allows for scheme regulations (for a scheme made under section 1 of the PSPA 13) to make provision regarding the procedure to be followed to bring the cost of the scheme back to the target level (a process known as “rectification”). The target level (officially known as the “target cost”) is the same as the base level pursuant to Treasury regulations made under the PSPA 13 or by the Department of Finance under PSPA (NI) 2014. All defined benefit public service pension schemes made under section 1 of the PSPA 13 made provision about the procedure to be followed to reach agreement with employers and members (or the representatives thereof) about how to achieve the target cost in the event that costs decreased/increased by more than the margins compared to the employer cost cap (and the steps to be taken to achieve the target level in the event that agreement is not reached).

169. So, in effect, there is a corridor either side of a target cost, with upper and lower margins representing the ‘ceiling’ and ‘floor’. The details about when and how the cost control element of scheme valuations should take place are set out in Treasury directions or Department of Finance directions, which also specify which costs are to be measured and how. The cost control element of the 2016 valuations (the first time the cost control mechanism will be tested) is due to be completed for all public service

pension schemes. The increased value of schemes to members following the legislative remedy will be taken into account. As a result, once the 2016 results are finalised, early estimates indicate that some schemes may breach the ceiling. This would ordinarily trigger the procedure set out in scheme regulations to reduce member benefits and bring those schemes back to the target cost.

170. Clause 80(3) inserts additional provisions into s.12 PSPA 13, the effect of which is to waive retrospectively the obligations contained in the Treasury, or Department of Finance, regulations and scheme regulations – in respect of the 2016 valuations only - to bring a scheme back to the target cost where there would otherwise be a breach of the “ceiling”. Equivalent provision in relation to Northern Ireland is made by Clause 80(6). This means that there will be no reductions of member benefits following completion of the cost control element of the 2016 valuations.

171. Clause 80(2) also expands the Treasury’s existing power to make directions about the cost control mechanism, to include a certification process. Under that, the scheme actuary must issue a certificate that states the cost of the scheme (measured in the cost control mechanism in accordance with Treasury directions), allowing for any steps to be taken by a scheme (whether in agreement with employers/members and/or their representatives, or not), triggered by a breach of the ceiling or floor, to bring costs back to the target cost. Clause 80(5) confers an equivalent power on the Department of Finance in Northern Ireland in respect of devolved schemes in Northern Ireland. This power will enable Treasury Directions to help ensure that the steps to be taken to rectify a breach are likely to achieve that aim.

Justification for taking the power:

172. The provisions in Clause 80(3) and (6) are required to ensure no members have their pension benefits cut as a result of any ceiling breaches which occur after the 2016 valuation process is finalised. The Government decided that member benefits should not be reduced based on a mechanism that may not be working as intended and that the Government Actuary had therefore been asked to review. Clause 80(2) and (5) also specifically provides the Treasury, and the Department of Finance in Northern Ireland, with a narrow and limited power to ensure that any actions that schemes may take in future (from the 2020 valuations onwards) to bring costs back to target following a breach have been assessed by the scheme actuary to bring costs back to the target cost, as measured in accordance with Treasury directions. This power would formalise the planned processes needed to give stakeholders confidence that rectification actions were suitable to meet the aim of returning the costs back to the target cost and to ensure consistency across schemes regarding the process by which actions to bring costs back to target are assessed as suitable.

Justification for the procedure:

173. The details around how the cost control element of scheme valuations should operate are set out in Treasury Directions, and Directions by the Department of Finance for devolved schemes in Northern Ireland. Therefore, it is proposed that any changes to this procedure should also be made through Treasury or Department of Finance Directions.

**Clause 82: Amendments relating to the judiciary**

*Power conferred on:* Lord Chancellor or the Department of Justice for judicial schemes. The Lord Chancellor where he is the appropriate minister in relation to the

definition of the judiciary or the Secretary of State for Scotland where he is the appropriate minister in relation to the definition of the judiciary

*Power exercised by:* Regulations and Order

*Parliamentary Procedure:* Affirmative Procedure for amendments to scheme regulations unless minor or wholly beneficial (see section 24(1)(c) PSPA 2013 and section 24(1)(c) PSPA (NI) 2014), Negative Procedure to add judicial offices to the definition of the judiciary in the PSPA 2013

Context and Purpose:

174. Clause 82(1) and (2) insert a new section '25A' into the PSPA 13 that enables the judicial scheme regulations under sections 1 and 3 of the PSPA 13 to take into account past service of a holder of a judicial office subsequently added to the scheme (by an order made under paragraph 2(1) of Schedule 1 to the PSPA 13). Specifically, the regulations may make provision under which any right or obligation of a scheme member is determined by reference to service which takes place before as well as after the order comes into force. This is for the purposes of, for example, enabling that judicial office holder to accrue pensionable benefits in the judicial scheme and to enable the collection of member contributions for that past service. This ensures that MoJ can add new judicial offices to the scope of the new scheme after the scheme comes into force. In doing so, MoJ has the discretion so that a member's past service in that office can accrue pensionable benefits. This is to ensure that there are no gaps for a person holding a judicial office in respect of their relevant judicial service prior to addition to the scheme.

175. Clause 82(3) removes the prohibition on including devolved Northern Irish and Scottish judicial offices within the definition of the judiciary for the purposes of the PSPA 13 and therefore within the scope of the new judicial pension scheme.

176. The amendment of this provision in paragraph 2(2) of Schedule 1 to the PSPA 13 will enable devolved judicial offices to be included in the newly designed, reformed judicial pension scheme. The Lord Chancellor or the Secretary of State for Scotland (depending on who is the appropriate minister for the purposes of paragraph 2(1) of Schedule 1 to the PSPA 13) may specify a devolved judicial office in the definition of the judiciary in that Act in response to a request from the Scottish Ministers or the Department of Justice. It is the intention that the judicial offices which are currently included in the Northern Ireland Judicial Pension Scheme 2015 will now be included in the newly designed, reformed judicial pension scheme.

177. Clause 82(4) and (5) make equivalent provision to the PSPA (NI) 2014 to that made by Clause 82(1) and (2) to the PSPA 2013.

Justification for taking the power:

178. The powers included in Clause 82(1) and (2) are supplementary to existing powers in the PSPA 13 to specify a judicial office within the definition of the judiciary (paragraph 2(1) of Schedule 1) and to make scheme regulations in respect of the judiciary (section 3(1)). It is proposed that these supplementary powers should be exercised in the same manner as the existing power to make scheme regulations. If used, these supplementary powers will set out the technical details of how pensions and other benefits are to be determined by reference to service before the holder of the judicial office has been added to the definition of the judiciary and therefore the



scheme. This allows the judicial office holder to accrue pension and other benefits for any service prior to inclusion in the scheme. It means the scheme regulations may also make provision for the pension contributions that a member should pay to the scheme in respect of past service.

179. This same analysis applies to the provision made by Clause 82(4) and (5) in respect of the PSPA (NI) 2014.

180. Clause 82(3) only extends an existing power to add judicial offices to the definition of the judiciary in the PSPA 13 in respect of devolved Northern Irish and Scottish judicial offices. It is not a new power in and of itself. As outlined in Clause 82(3), it is proposed that devolved judicial offices should be added to the new scheme, by expanding the existing order making power to specify judicial offices for the purposes of the definition of the judiciary. It is not proposed, for example, that the NI devolved judicial offices should be included in the scheme by listing those offices in primary legislation. That would be out of step with the existing means of defining the judiciary in the PSPA 13 which is achieved through an order made under paragraph 2(1) of Schedule 1. This separate order made under this power will be the only piece of legislation that lists all of the eligible judicial offices for the scheme. This power ensures that the list of judicial offices can be updated in the future for devolved judicial offices.

Justification for the procedure:

181. It is proposed that the power under Clause 82(2) and (5) will be exercised in the same manner as the current power to make scheme regulations under the PSPA 13 and PSPA (NI) 2014. That is that the scheme regulations for the judiciary are subject to the affirmative procedure unless the scheme board considers that the regulations are wholly minor or beneficial. It is proposed that this supplementary power should also be subject to that same procedure to ensure consistency.

182. The order making power currently in Schedule 1 to the PSPA 13 which is amended by Clause 82(3) is subject to the negative procedure. It is proposed that the existing procedure should be maintained for the expansion of that power to include devolved judicial offices. Adding a judicial office is a technical and beneficial amendment for prospective members to the scheme. This is also a very narrowly defined power as it is limited to only adding devolved judicial offices to the scheme which will be at the request of the relevant devolved administration.

**Clause 84(1) Power of Treasury to make scheme for compensation**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Procedure

Context and Purpose:

183. Differences in contributions, tax and/or benefits between legacy and new schemes are the main reasons why we expect schemes may need to compensate members, where members have overpaid. These are dealt with in Clauses 12 to 16. There are also specific powers for scheme managers to pay compensation under Clauses 21 and 56. However, it is possible that members may have suffered other

losses as a result of the discrimination identified by the courts. This Clause gives the Treasury the power to set up a scheme to calculate and pay compensation for these purposes.

Justification for taking the power:

184. While it is clear that the compensation scheme envisaged by Clause 84 must be used to compensate members for losses that have arisen either as a result of the discrimination identified by the Court of Appeal or as a result of the operation of the remedy, it is not possible for schemes or the Treasury to envisage every type of claim that might arise. Setting out the details of the scheme in secondary legislation therefore means that it can be amended without requiring primary legislation to ensure that legitimate claims for relevant losses can be dealt with.

Justification for the procedure:

185. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to the setting up of a compensation scheme for the Treasury to compensate individuals where they have incurred losses that have arisen as a result of the discrimination identified by the Court of Appeal or as a result of the operation of the remedy.

**Clause 85(1) Power of Department of Finance to make scheme for compensation**

*Power conferred on:* Department of Finance in Northern Ireland

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure

Context and Purpose:

186. Public service pensions are a devolved matter in relation to Northern Ireland. To ensure that those affected by the Court of Appeal judgment who are members of Northern Irish public service pension schemes are able to be compensated in the same way as those in England, Wales and Scotland as set out in Clause 84(1), a power is needed for the Department of Finance in Northern Ireland to be able to make regulations to make a scheme for compensation.

Justification for taking the power:

187. As above in relation to Clause 84(1).

Justification for the procedure:

188. The negative resolution procedure has been proposed here as regulations made under this power are limited in purpose, i.e. to the setting up of a compensation scheme for the Department of Finance in Northern Ireland to compensate individuals where they have incurred losses or expenses that have arisen as a result of the discrimination identified by the Court of Appeal or as a result of the operation of the remedy.

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

*Power conferred on:* Responsible authority for a judicial scheme

## *Power exercised by: Regulations*

*Parliamentary Procedure:* Affirmative procedure (Negative if minor or wholly beneficial and do not amend primary legislation – see s.24 PSPA 2013 and s.24 PSPA (NI) 2014)

### Context and Purpose:

189. Subsection (1) provides a power to make provisions for the purpose of ensuring certain judges, who MoJ now accept have service in a relevant legacy scheme from April 2015, are put in the position, so far as possible, that they would have been in had they always been treated as members of that scheme. This specific group of judges (defined in subsection (3)) were aged over 55 on 1 April 2012, in fee-paid service on 31 March 2012 and moved to salaried service in a defined time period shortly thereafter. Due to MoJ's interpretation of the time limit for bringing a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, they were moved to the 2015 scheme in April 2015 regardless of their age. Subsequently, the Supreme Court's judgment in the case of *Miller*<sup>11</sup> held that time limits run from when a judge ceases to hold all judicial offices rather than from a particular fee-paid office. The effect of this judgment is that these judges are eligible for legacy scheme membership from April 2015.

190. While provision is not needed to return these judges to their relevant scheme, the mechanisms to deal with rectifying individual circumstances, for example, pension benefits paid, contributions liability and member options that may have been purchased in the 2015 scheme, are complex. The Bill provisions permit the scheme to set out these mechanisms to provide certainty as to the approach, including regulations that correspond with some of the powers in Chapter 2 in respect of judges with remediable service.

### Justification for taking the power:

191. The issues intended to be dealt with using this provision are complex matters relating to, for example, pension benefits, contributions liability and member options which are currently largely dealt with in scheme regulations. For some of the salaried legacy schemes, while the principal scheme provisions are in primary legislation, they are supplemented by secondary legislation on more detailed matters. Therefore, a limited power to make the required technical changes to those regulations is proposed.

### Justification for the procedure:

192. Due to the constitutional position of the judiciary, judicial pension scheme regulations, and amendments to these, are generally made using the affirmative procedure unless they are minor or wholly beneficial and do not amend primary legislation. Before making any regulations under Part 1 of the Bill, the responsible authority must consult those likely to be affected by the regulations, or their representatives (under section 21 PSPA 13).

## **Clause 90 Power to make consequential provision**

### *Power conferred on: The Treasury*

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<sup>11</sup> *Miller and others v Ministry of Justice* [2019] UKSC 60

*Power exercised by: Regulations*

**Parliamentary Procedure: Affirmative procedure for regulations that amend, repeal or revoke primary legislation, negative procedure in all other cases**

Context and Purpose:

193. This power permits the Treasury to make regulations that are consequential upon Part 1 of the Bill, including to amend, repeal, revoke or otherwise modify provision made by an enactment. The steps taken by this Bill to address discrimination retrospectively that arose in relation to pensionable employment during the period between 1 April 2015 (1 April 2014 in relation to local government in England and Wales) and 31 March 2022 are novel and complex. It is important that any consequential matters can be addressed which could otherwise prevent, limit or conflict with the changes made by the Bill. Insofar as it permits consequential amendments to primary legislation, this power is a Henry VIII power.

Justification for taking the power:

194. The framework of pension legislation and related provision does not, on the whole, envisage retrospective changes to members entitlements being made. These provisions exist for good reason – to protect the interests of members of pension schemes and the related pension funds on which (in schemes other than the public service schemes) their entitlement relies. Pension provision in relation to the public service pension schemes has developed over many decades, and relevant provisions from the 1970s continue to apply to some legacy public service pension schemes, alongside other matters such as the Pensions (Increase) Act 1971, which determines how public service pensions in payment are to be uprated, usually annually. The Government has considered these matters carefully in developing the approach taken in the Bill and has dealt with any consequential matters that have been identified. However, there is a strong possibility that the novel approach the Bill has necessarily taken will require further consequential changes to existing statute. This power is therefore considered necessary to ensure that such matters can, if they arise, be addressed to ensure the statute book overall remains coherent and consistent.

Justification for the procedure:

195. This power can only be used to make consequential amendments that arise as a direct result of Part 1 of this Bill. These changes will be by their nature technical. In line with usual practice, it is proposed that the affirmative procedure should apply in respect of changes to primary legislation, whilst the negative procedure should apply for changes to secondary legislation.

**Clause 93: Establishment of new public scheme and transfer of rights**

*Power conferred on: The Treasury*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative procedure unless amendments to the new schemes are subject to the consent requirements under Clause 96 or have retrospective effect, in which case affirmative procedure*

### Context and Purpose:

196. Clause 93 provides that the Treasury may make regulations:

- to establish new public schemes to provide for pensions or other benefits to be payable to or in respect of persons who are or have been members of the BBS Pension Scheme and the NRAM Pension Scheme;
- to transfer qualifying accrued rights from the BBS Pension Scheme and the NRAM Pension Scheme to the public schemes and discharge the BBS Pension Scheme and NRAM Pension Scheme trustees of their liabilities in respect of the qualifying accrued rights; and
- to describe or specify the qualifying time for the transfer of benefits from the BBS and NRAM schemes to new public schemes.

Clause 93 is modelled based on sections 16 and 17 of the Postal Services Act 2011 which enables the Secretary of State or the Minister for the Civil Service to make secondary legislation that establishes a new public scheme to provide pensions or other benefits to members of the Royal Mail Pension Plan (“the RMPP”) and to transfer qualifying accrued rights from the RMPP to the new public scheme.

197. Subsection (1) confers a power on the Treasury to make regulations establishing new public schemes that will provide pensions or other benefits to or in respect of those who are or who have been members of the BBS Pension Scheme and NRAM Pension Scheme. The new public scheme will need to make provision for persons other than members who are entitled to benefits under the scheme (for example, the spouse or civil partner of a member who will be entitled to benefits on the member’s death). For this reason, the drafting of subsection (1) enables payments to be made in respect of current members and in respect of those members who died before the new public scheme was established.

198. Subsection (2) confers a power on the Treasury to make regulations transferring qualifying accrued rights from the BBS Pension Scheme and the NRAM Pension Scheme to the new schemes. Subsection (3) enables the Treasury to make regulations that discharge the trustees of those schemes of their liabilities in respect of the qualifying accrued rights which are transferred to the new scheme. The power to transfer accrued rights may be exercised without any requirement to obtain the approval or consent of anyone; however, Clause 101(1) provides that the Treasury must consult the relevant trustees before making regulations which establish a new public scheme or transfer qualifying accrued rights to a new public scheme.

199. In addition to these two main powers there are a number of ancillary or consequential matters which may be included in regulations made under Clause 93.

200. Clause 94(1) makes it clear that regulations may make provision:

- For pensions or other benefits to be payable to or in respect of some or all persons described in Clause 93(1);
- For defined benefit pensions, defined contribution pensions or both;
- For increasing payments in respect of qualified accrued rights; and
- For the payment and receipt of transfer values.

201. The new scheme will not fall within the existing definition of ‘occupational pension scheme’ or ‘public service pension scheme’ under section 1(1) of the Pension Schemes Act 1993, as it will not have been established by an employer for its employees. As a result, pensions legislation would not apply to the new scheme in the same way as it applies to other schemes in the public sector. Clause 94(2)(a)

addresses this issue and regulations to be made may provide that the new scheme be treated as an 'occupational pension scheme' for the purpose of any legislation specified in the regulations. This is based on section 17(5) of Postal Services Act 2011.

202. Some benefits in the BBS Pension Scheme and the NRAM Pension Scheme are contracted-out benefits. Clause 94(2)(a) and (b) enables the Treasury to provide for the new scheme to be treated as a contracted-out scheme for the purposes of any enactment that provides for contracted-out pensions within the meaning of Part 3 of the Pensions Act 1993. This is to ensure that the legislation on contracting-out continues to apply to those who had contracted-out benefits under the BBS Pension Scheme and the NRAM Pension Scheme. This is based on section 17(6) of the Postal Services Act 2013.

203. Clause 94(3) provides that regulations under Clause 93(1) amending a new public scheme may have retrospective effect. Such powers are common in public service pensions legislation. For example, it may be necessary to adjust schemes to accommodate changes in law or where the Government does not want to delay the benefit of a particular change but needs time to consider the consequences and method of making the change. (For a recent example, see section 3(3)(b) of the Public Service Pensions Act 2013.) Regulations that have retrospective effect will be subject to the affirmative procedure under Clause 101(3)(b).

204. Clause 94(4) provides that regulations may confer functions on the Treasury or another person and may provide for that person to exercise discretion in dealing with a matter. This would enable the Treasury, or the person administering the scheme, to make their own decisions within a framework set by scheme regulations. Section 3(3)(c) of the Public Service Pensions Act 2013 enables regulations to confer discretion on Ministers and scheme managers of public service pension schemes within the scope of that Act.

205. The Treasury may delegate the administration of the new scheme to another person (Clause 94(6)). This would enable Treasury to delegate the administration of the scheme to those with the correct expertise, e.g. a professional pension scheme administrator. Similar provision is contained in section 17(8) of the Postal Services Act 2011.

Justification for taking the power:

206. It is proposed that taking a power to make regulations to establish the new public scheme is the optimal way to give effect to this policy. The new scheme will need to have clearly defined rules, which will need to be set out comprehensively. These rules are likely to run to approximately a hundred pages and will be detailed and technical in nature – for example, setting out member entitlements in various scenarios in order to maintain existing benefit entitlements. Placing these rules on the face of the Bill would significantly increase the length of the Bill, possibly requiring a large amount of Parliamentary time to consider the detailed provisions. The length and technical nature of the scheme rules therefore make them best suited to consideration as part of a statutory instrument.

207. The Government is working with UKAR and the trustees of the BBS Pension Scheme and the NRAM Pension Scheme to gain a clear understanding of the current

scheme rules. It will not be possible to draft regulations setting out the new public scheme rules before that work is completed.

208. It may be necessary to make changes to the regulations in future to reflect developments in pensions law or court decisions. Establishing the scheme by regulations would allow for any necessary changes to be made promptly without seeking new primary legislation.

209. The precise timing of the transfer is dependent on the successful procurement of a suitably qualified administrator for the new scheme and the new administrator completing its preparations to take on the members. As the precise date of the transfer is not yet known, it is impossible to put a definition of the “qualifying time” on the face of the Bill. Taking this power will allow the Treasury to specify a time for the transfer when it is known.

210. We note that section 17 of the Postal Services Act 2011 took a similar power to establish a new public sector scheme by regulations.

Justification for the procedure:

211. The power is narrow in scope and application – it allows for schemes to be established only to pay benefits to members of the BBS Pension Scheme and the NRAM Pension Scheme, and their dependants. It would not be possible to use this power to provide for another scheme to pay pensions relating to another entity. The regulations will set out the scheme rules but will not have implications for wider pensions law or the operation of other civil service pensions.

212. Clause 95(1) and (2) provide that when making regulations under clause 93 that transfer qualifying accrued rights to a new public scheme the Treasury must ensure that the provision of pensions or other benefits contained in the new public scheme is, in all material respects, at least as good immediately after the regulations are made as they were immediately before that time. This is based on section 20(2) of the Postal Services Act 2011. Clause 95 (1) and (3) requires that the value of any money purchase rights after transfer is at least equivalent to the value of the entitlements prior to the transfer. These provisions protect the qualifying members of the BBS Pension Scheme and the NRAM Pension Scheme.

213. Clause 101(1) provides that the Treasury must consult the relevant trustees before making the regulations that establish the new scheme or regulations that transfer the qualifying accrued rights to the new public scheme. Clause 101(2) defines the relevant trustees. The trustees are required to act in the best interests of the beneficiaries of the scheme. This provides further protection to the members of the BBS Pension Scheme and the NRAM Pension Scheme and their survivors whose rights are transferred to a new public scheme. The approach is based on section 25(1) of the Postal Services Act 2011.

214. Regulations that have retrospective effect are subject to the affirmative resolution procedure under Clause 101(3)(b).

215. Clause 96 provides that amendments to the scheme regulations that would or might adversely affect qualifying accrued rights are subject to the consent or procedure requirements. Clause 96 (2) and (4) provides that these requirements are, respectively, those described in regulations for the purposes of obtaining the consent of interested persons and for steps to be taken. The rationale and justification for

setting out the consent and procedure requirements in regulations are explained later in this note. Regulations that make amendments that would engage the consent requirements are subject to the affirmative resolution procedure under Clause 101(3)(a).

216. Given the narrow scope of the power and the protections in place for qualifying members of the BBS Pension Scheme and NRAM Pension Scheme it is proposed that members will be properly protected if these powers are enacted through regulations. It is proposed that the affirmative resolution procedure applies for those amendments that do have retrospective effect or trigger the consent requirements, and the negative resolution procedure applies in other cases.

#### **Clause 95(4) Protection against adverse treatment: transfer of rights**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* negative procedure

##### Context and Purpose:

217. Clause 95 sets out the requirements that must be met when transferring the rights of the members of the BBS and NRAM pension schemes. For money purchase rights the protection is that the value of any rights or entitlements under the new scheme must be at least equivalent to their value prior to the transfer.

218. Subsections (4) and (5) provide that the Treasury may make regulations about the determination of rights and entitlements for the purposes of subsection (3), including specifying the person by whom the valuation may be made and the manner in which the valuation may be determined. Subsections (5)(b) and (6) enable the Treasury to make provision for the date or period in which the transferring rights are valued, which must be no more than 3 months before the date of transfer.

##### Justification for taking the power:

219. Members of the BBS and NRAM schemes with money purchase benefits have their contributions invested by a third party, with the value of the investments at the time of retirement determining the pensionable benefits. As these investments change over time, it is not possible to determine with certainty who will be best placed to perform the valuation or the method by which the assets should be valued. It is also likely that the funds will be invested in a range of assets. Different valuation methods would be required to value listed stocks than would be used to value an option contract or a corporate bond. Taking a power to specify the valuer and methodology in regulations will allow the Government to determine the best valuer and methodology at the time of the transfer and to set out the various methods that will be employed.

##### Justification for the procedure:

220. The negative resolution procedure has been proposed here as this is a narrow power that can only be used to determine the valuation method and valuer of rights as relate to the transfer of money purchase benefits to new public schemes.



## **Clause 96(1) Protection against adverse treatment: amendment of new public schemes**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* negative procedure

### Context and Purpose:

221. Clause 96 sets out restrictions on the exercise of the powers of the Treasury to make regulations under Clause 93. Clause 96(1)(a) provides that regulations that make amendments to the new public schemes that would, or might adversely subsisting rights may only be made when the consent requirements or procedure requirements are satisfied. Subsection (2) provides that the consent requirements are those specified or described in regulations made by the Treasury. Subsection (4) provides that the procedure requirements are requirements for steps to be taken before amending the new public scheme which are specified or described in regulations made by the Treasury.

222. Clause 96(1)(b) provides that other amendments to the new public schemes may only be made where the consultation requirements have been met. Subsection (3) provides that the consultation requirements are those specified by the Treasury in regulations. Where the consent requirements apply, the Treasury must obtain the consent of the interested persons or their representatives. Where the consultation requirements apply, the Treasury must consult the interested persons or their representatives. The interested persons are defined in subsection (7) as those who appear to the Treasury to be likely to be affected by the amendment. The subsisting rights are defined in subsections (5) and (6).

### Justification for taking the power:

223. In relation to amendments that would or might adversely affect the subsisting rights, the Treasury intends to make regulations that give the equivalent level of protection that applies to such amendments to the BBS Pension Scheme and the NRAM Pension Scheme under sections 67 to 67I of the Pensions Act 1995. This is the approach that was adopted in section 20(7) of the Postal Services Act 2011 that established a new public scheme for certain members of the Royal Mail Pension Plan. The new public schemes will be in place for many years, and the consent requirements and the procedure requirements may need to be amended over the lifetime of the scheme. It is therefore proposed that those requirements should be set out in regulations, rather than on the face of the Bill.

224. The consultation requirements may also need to evolve over the lifetime of the scheme, and it is therefore proposed that the detailed provisions should be set out in regulations, rather than on the face of the Bill.

### Justification for the procedure:

225. The Treasury may not make regulations that amend the new public scheme until regulations have been made that set out the consent requirements, the procedure requirements, and the consultation requirements. This will provide protection to members of the new public schemes and their survivors.

226. The regulations that set out those requirements are procedural provisions and so the negative procedure is proposed.

227. We note that the power taken in section 20(7) of the Postal Services Act 2011, which provided for the consent mechanism for adverse changes to the Royal Mail Statutory Pension Scheme to be set out in regulations, is also subject to the negative procedure.

### **Clause 97(1): Transfer of assets and liabilities**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure

#### Context and Purpose:

228. Clause 97(1) allows the Treasury to make regulations that transfer the assets and liabilities of the BBS Pension Scheme and the NRAM Pension Scheme to a nominee of the Treasury or a company established by the Treasury for the purpose of holding the assets or the liabilities pending their disposal. When the new public schemes have been established, and qualifying accrued rights have been transferred to the new public schemes, the assets held by BBS Pension Scheme and the NRAM Pension Scheme will not be needed to meet the schemes' pensions liabilities, as the schemes will have no such liabilities. The assets and liabilities of the schemes will be transferred to the Government, which will have assumed responsibility for the pensions payable to or in respect of those who were formerly members of the BBS Pension Scheme and the NRAM Pension Scheme.

#### Justification for taking the power:

229. Clause 97(2) provides that the assets and liabilities of the BBS Pension Scheme and the NRAM Pension Scheme may only be transferred to the Government after regulations have been made under Clause 93.

#### Justification for the procedure:

230. The negative resolution procedure has been proposed here. Clause 97(2) prohibits regulations from being made unless the regulations establishing the new public scheme have been made. Clause 101(1)(b) provides that the relevant trustees must also be consulted before regulations are made that transfer the assets and liabilities of those schemes to the Government. This provides protection to members of the BBS Pension Scheme and the NRAM Pension Scheme, and their survivors.

231. We note that a power taken in section 21(1) of the Postal Services Act 2011, which provided for an order to transfer assets from the Royal Mail pension scheme to the Government, was subject to the negative procedure.

### **Clause 98 Transfer of other pensions and benefits**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

## *Parliamentary Procedure: Negative procedure*

### Context and Purpose:

232. Clause 98(1) allows the Treasury to make regulations to transfer the liability to pay a pension or other benefit from B&B, NRAM or UKAR to the Treasury. Currently, a small number of pensions are paid directly to former Northern Rock or B&B staff (or their spouses). This power will allow those liabilities to be transferred from UKAR or its subsidiaries to the Treasury, ensuring the long-term security of the pensions and removing long-dated liabilities from UKAR's balance sheet.

233. The power is restricted to liabilities relating to pensions or other benefits earned in respect of service with Northern Rock, B&B or another entity. Other entities could include building societies that were taken over by B&B or Northern Rock prior to their nationalisation.

234. Some of the liabilities to pay pensions and other benefits may be within the meaning of occupational pension schemes under section 1(1) of the Pension Schemes Act 1993. Any such arrangement will remain an occupational pension scheme on transfer to the Treasury, but the application of the law may need to be amended as the liability has moved to the Treasury. Clause 98(3) and (4) allow the Treasury to make regulations to modify or disapply law that applies to occupational pension schemes. Subsection (5) allows the Treasury to use regulations to provide that any liabilities transferred to be treated as a type of occupational pension scheme and to modify any relevant laws that apply to such a scheme.

### Justification for taking the power:

235. B&B and NRAM are currently liable for the payment of these pensions or other benefits. Liability is expected to transfer to UKAR during the passage of the Bill. Taking a power to make regulations makes sure that the transfer will be able to take place, even if the liability changes hands.

236. At the time that the power to transfer the liability to pay pensions or other benefits is exercised, the Treasury will need to determine whether the arrangements in question are occupational pension schemes, and, if so, how the legislation on such schemes may need to be modified. .

### Justification for the procedure:

237. The negative resolution procedure has been proposed here as this power is limited to a transfer of liabilities from B&B, NRAM or UKAR and only liabilities relating to pensions or other benefits paid reflecting past service with NRAM, B&B or other entities.

## **Clause 99 (1) and (3): Taxation**

*Power conferred on:* The Treasury

*Power exercised by:* Regulations

*Parliamentary procedure:* Subject to annulment in pursuance of a resolution of the House of Commons

### Context and Purpose:

238. The powers in Clause 99 are intended to enable the Treasury to make modifications to tax law so that those in scope of the clause do not incur a liability to pay tax that would not have arisen but for the exercise of powers under Part 2 of the Bill.

239. Clause 99(1) allows the Treasury to make regulations to vary the way in which relevant taxes would impact on the new scheme, members of the new scheme; survivors of members of the new public scheme who have rights or entitlements under the scheme or a company established to hold the BBS and NRAM pension schemes' assets or liabilities.

240. The BBS Pension Scheme and the NRAM Pension Scheme are registered pension schemes. Clause 99(2) provides that regulations may make provision for a new public scheme to be treated as a registered pension scheme for the purposes of Part 4 of the Finance Act 2004.

241. Clause 99(3) enables the Treasury to make regulations to vary the way in which relevant taxes would impact the BBS Pension Scheme, the NRAM Pension Scheme; members of those schemes or their survivors, UKAR and persons in respect of whom there is a qualifying liability under Clause 98.

242. Clause 99(5) enables regulations under this Clause to have retrospective effect, except where the regulations make provision for withdrawing a tax relief or charging a relevant tax.

Justification for taking the power:

243. The amendments that will need to be made to tax law will only be identifiable at the time at which regulations are made under Clauses 93, 97 and 98.

244. As the transfer of the members' benefits will take place sometime after the Royal Assent of this Bill, a power is being taken to disapply specified taxes with respect to the transfer so that the instrument can reflect the latest tax law. It is possible that any disapplication provided for on the face of the Bill could be out of date or incorrect by the time of the transfer. Correcting provisions on the face of the Bill would require further primary legislation and would significantly delay the transfer of members' benefits to the new scheme. Providing for the relevant taxes to be disapplied by regulations provides us with the ability to reflect any changes to tax legislation between the Assent of the Bill and the transfer to the new scheme.

245. Furthermore, the mechanics of transferring members of the BBS and NRAM pension schemes and the assets of those schemes to the new public schemes may incur tax liabilities for the members of the BBS and NRAM pension schemes and the new schemes, the BBS and NRAM pension schemes and the new schemes. In order to ensure that those persons are not adversely affected this power will be used to ensure that the entire process will be tax neutral for the persons and bodies involved.

246. A similar power was taken in section 23(1) and (3) of the Postal Services Act 2011 to facilitate the transfer of members of the Royal Mail Pension Plan to a new Government scheme.

Justification for the procedure:

247. The purpose of these provisions is to enable the Treasury to make regulations to make sure that those in scope of Clause 99 do not incur tax liabilities that would not have arisen but for the exercise of powers under this Part of the Bill. Clause 99 would enable modifications to be made to the application of primary legislation; however, annulment in pursuance of a resolution of the House of Commons is still proposed because the purpose of the Clause 99 is to keep the tax position as close to possible as it would have been but for the exercise of powers under this Part of the Bill.

248. We note that the powers taken in section 23(1) and (3) of the Postal Services Act 2011 were also subject to annulment in pursuance of a resolution of the House of Commons.

### **Clause 100 Information**

*Power conferred on:* The Treasury

*Power exercisable by:* Regulations

*Parliamentary Procedure:* Negative, unless making provision for the amount of a financial penalty then affirmative

#### Context and Purpose:

249. Clause 100 (1) allows the Treasury to make regulations requiring specified persons to provide documents or other information specified in the regulations to the Treasury. Regulations under subsection (1) may only make provision for information that the Treasury reasonably requires for the purposes of making regulations under Part 2 of the Bill; for establishing or administering a new public scheme, including transferring qualifying accrued rights to such a scheme; or for administering arrangements under which a qualifying liability arises.

250. Clause 100(3)(a) and (b) provide that regulations may make provision for the time when information must be provided and the form and manner in which it is provided. Clause 100(3)(c) enables the Treasury to make regulations imposing a financial penalty upon a person who, without reasonable excuse fails to provide information to the Treasury. Clause 101(4) provides that regulations that make provision for the amount of the financial penalty will be subject to the affirmative procedure.

#### Justification for taking the power:

251. Clause 100(1) and (3) enable the Treasury to make detailed provisions about the documents and information that the Treasury reasonably requires for the purposes specified in subsection (2); the persons who must provide that information; the time in which it must be provided; and the form and manner in which it must be given. It is proposed that regulations should be used to make detailed provisions such as these.

252. The provision to set out enforcement measures is necessary to ensure compliance with the regulations requiring information to be provided. The circumstances under which a financial penalty may be imposed are set out on the face of the Bill; however, as the persons upon whom the penalty may be imposed is to be specified in regulations, similarly, the level of the penalty that may be imposed

and the rights of appeal that are to apply should also be specified in regulations to ensure that the penalty and appeals mechanism are reasonable.

Justification for the procedure:

253. The negative resolution procedure has been proposed here as this power is narrow in its application: regulations may only be made in respect of information that is reasonably required for the purposes specified in subsection (2).

254. The circumstances under which a penalty may be imposed for failure to provide information specified in the regulations are set out on the face of the Bill and the negative resolution should therefore apply, except for regulations that specify the financial penalty that may be imposed, where the affirmative procedure will apply.

**Clause 106(4) Appointment to sitting in retirement offices**

*Power conferred on:* Northern Ireland Department of Justice, Welsh Ministers, Lord Chancellor (as appropriate)

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

Context and Purpose:

255. Clause 106 provides that an “eligible person” may be appointed to a “sitting in retirement office” listed in Schedule 3. Clause 106 (4) provides a power for regulations to specify the description of an “eligible person” in relation to each “sitting in retirement office”. In each case, as set out in Clause 106 (3) an “eligible person” will be a holder (or former holder) of an existing judicial office, although additional eligibility requirements (such as the holding of a particular qualification) may also be specified.

256. Regulations regarding “sitting in retirement offices” which fall within the competence of the Northern Ireland or Welsh legislatures may be made by the Northern Ireland Department of Justice or Welsh Ministers, respectively. Regulations in respect of all other offices listed in Schedule 3 may be made by the Lord Chancellor.

257. Regulations under this power will be made to commence alongside the sitting in retirement clauses, as they are essential to the operation of these clauses.

Justification for taking the power:

258. This power is necessary to maintain flexibility over the eligibility criteria for sitting in retirement offices. This will ensure, for example, that changes to eligibility criteria can be made in response to any future changes in judicial offices, without the necessity for further primary legislation. The use of the power also allows for a description of office holders who may be appointed to each “sitting in retirement office” in greater detail than would be usual in primary legislation. For example, it is intended that holders of leadership offices, such as Chamber Presidents in the Upper Tribunal, will be eligible to sit in retirement in the underlying office, i.e. Upper Tribunal Judge. There are a large number of such leadership offices across the courts and tribunals system, as well as other instances where the “sitting in retirement office” may differ slightly from the pre-retirement office. We have been in close contact with the senior judiciary in considering and determining these details.

259. The overall power is narrowly drawn and can only be used for the purpose outlined above. In particular, it can only be used to specify holders, or former holders, of judicial offices as eligible for appointment to sitting in retirement offices. This ensures that all appointees to “sitting in retirement offices” will have previously been selected through existing procedures intended to protect judicial independence, such as those carried out by the Judicial Appointments Commission or the Northern Ireland Judicial Appointments Commission. As an additional safeguard, subsection 1(b) ensures that a person may not be appointed to a “sitting in retirement office” if they do not qualify for appointment to the “original office”. As this is a new power in respect of new judicial offices, it does not remove any existing role of Parliament.

260. The power is largely exercisable by the Lord Chancellor, given his constitutional role in maintaining the effective resourcing of the judiciary (as set out in the Lord Chancellor’s Oath in section 6A Promissory Oaths Act 1868). Accordingly, this power will be added to the protected functions of the Lord Chancellor in Schedule 7 Constitutional Reform Act 2005. However, as the measure also incorporates some judicial offices wholly within the devolved competence of Wales and Northern Ireland, the power will be exercisable by the Welsh Ministers and the Northern Ireland Department of Justice in respect of those offices.

Justification for the procedure:

261. It is proposed that regulations made under this power are subject to the negative procedure. The Government considers that the Parliamentary scrutiny granted by the negative procedure should apply, given that regulations will not create any new judicial offices, and are subject to the statutory safeguards set out on the face of the Bill and described above. The regulations will set out the secondary matter of which persons will be eligible for each “sitting in retirement office”. As an additional safeguard of judicial independence, regulations made by the Lord Chancellor and Welsh Ministers can only be made with the concurrence of the relevant members of the senior judiciary.

**Clause 109(1) Power to add new offices**

*Power conferred on:* Lord Chancellor, the Northern Ireland Department of Justice, Welsh Ministers

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative resolution

Context and Purpose:

262. Clause 109 (1) will enable the “appropriate national authority” to amend Schedule 3 by adding judicial offices to the list in that Schedule. This has the effect of creating a new “sitting in retirement office” for that office, to which retired officeholders may be appointed (as set out by Clauses 105 and 106).

263. The “appropriate national authority” differs depending on legislative competence in relation to the “original office”, as set out by Clause 109 (2). Judicial offices which fall within the competence of the Northern Ireland or Welsh legislatures for appointments purposes may be added by the Northern Ireland Department of Justice or Welsh Ministers, respectively. Other judicial offices (i.e. those for which

appointment legislation is reserved) may be added by the Lord Chancellor. For the avoidance of doubt, this power does not permit judicial offices which fall within the competence of the Scottish Parliament to be added to Schedule 3.

Justification for taking the power:

264. Taking this power will allow the sitting in retirement measure to respond to any future changes in judicial offices and allow Schedule 3 to be kept up to date. The power in Clause 109 is subject to the constraint that there must be an “original office” on which the “sitting in retirement office” may be based, meaning that this power cannot be used to create a standalone judicial appointment. The power is a reserve power and would only be used where required – for example where an entirely new office is created, or where other offices are identified where sitting in retirement should be allowed.

Justification for the procedure:

265. Clause 109 (5) provides that amendments made under Clause 109 will be subject to the affirmative procedure; subsections (3) and (4) further provide that such amendments can only be made (in most cases) after consultation with members of the senior judiciary. This is in line with the long-established practice that powers to amend primary legislation using secondary legislation should be made via the affirmative procedure to ensure proper levels of Parliamentary scrutiny. It is proposed that use of the affirmative procedure should apply in this case, since additions to Schedule 3 will create a new judicial office. This will allow both Houses to consider whether the creation of such an office should be allowed in each case.

### **Clause 110 Consequential etc provision**

*Power conferred on:* The Lord Chancellor, the Northern Ireland Department of Justice, Welsh Ministers

*Power exercisable by:* Regulations

*Parliamentary procedure:* For changes to primary legislation, Affirmative procedure, for changes to secondary legislation, Negative procedure

Context and Purpose:

266. This clause provides for the power to make consequential provision in connection with the sitting in retirement provisions (Clauses 105 to 109) of the Bill. Such provision may include repealing, revoking or otherwise amending primary or secondary legislation (including Acts of Parliament passed before or in the same session as the Bill). This power is essential to ensure there are no unintended consequences which would prevent the sitting in retirement provisions from becoming fully operational. The power is granted to the Northern Ireland Department of Justice and Welsh Ministers for changes which would be within the legislative competence of the Northern Ireland Assembly or the Senedd Cymru, respectively; the Lord Chancellor will have the power to make all other consequential amendments. Insofar as it permits amendments to Acts, this power is a Henry VIII power.

Justification for taking the power:

267. Given the extent and complex nature of legislation relating to judicial appointments and deployment, it is possible that further minor consequential amendments may need to be made to ensure that this measure can operate correctly.



Schedule 4 contains some changes to other enactments which are required as a consequence of the sitting in retirement measures, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. This power is essential to ensure that the Government is able to implement the provisions of this Bill fully and effectively and are not prevented from doing this by being unable to make minor changes to existing legislation.

Justification for the procedure:

268. This power can only be used to make amendments that arise as a direct result of this Bill. These changes will be by their nature technical. In line with usual practice, it is proposed the affirmative procedure should apply in respect of changes to primary legislation, whilst the negative procedure should apply for changes to secondary legislation.

**Clause 111(1) Regulations and directions**

Power conferred on: This provision relates to all powers conferred on the Lord Chancellor, the Treasury, the Department of Finance in Northern Ireland and Responsible authorities by the Bill

Power exercisable by: Regulations

Parliamentary procedure: The procedure to be followed is established in each of the powers to which this provision relates

Context and Purpose:

269. Clause 111(1) provides that regulations made under any provision of the Bill may make consequential, supplementary, incidental, transitional or saving provision and different provision for different cases or purposes.

Justification for taking the power:

270. Clause 111(1) clarifies that the changes that can be made using the powers in the Bill are limited only to those that are needed for the effective implementation of this Bill. It is essential that regulations can deal with the matters listed.

Justification for the procedure:

271. No procedure is specified in relation Clause 111(1), rather the procedure to be followed is established in each of the powers to which this provision relates.

**Clause 113 Commencement**

Conferred on: The Lord Chancellor, the Treasury and the Department of Finance in Northern Ireland

Power exercisable by: Regulations in relation to the Lord Chancellor and the Treasury (Clause 113(10)), by order in relation to the Department of Finance in Northern Ireland (Clause 113(11))

Parliamentary procedure: N/A

Context and Purpose:

272. Clause 113 contains standard powers for the relevant Executive persons to bring provisions of the Bill into force by commencement regulations.

273. Clause 113(2) provides that the Treasury, the Department for Finance in Northern Ireland and the Lord Chancellor may by regulations appoint that specified Chapters and Clauses of Part 1 to the Bill come into force on a specified day. Clause 113(2)(a) confers power for the Treasury to determine by regulations that Chapter 1, and Clauses 91 and 92 so far as they apply for the purposes of that Chapter, come into force in relation to a relevant Chapter 1 new scheme or Chapter 1 legacy scheme on a day earlier than 1 October 2023. Clause 113(2)(b) confers equivalent power to the Department of Finance in Northern Ireland to make an order in relation to their Chapter 1 new schemes and Chapter 1 legacy schemes. Clause 113(2)(c) confers power on the Lord Chancellor to make regulations to appoint that Chapter 2, and Clauses 91 and 92 so far as they apply for the purposes of that Chapter, come into force on a given day. Clause 113(2)(d) provides power for the Treasury to determine by regulations when Chapter 3, and Clauses 91 and 92 so far as they apply to that Chapter, come into force. Clause 113(4)(c) provides the Lord Chancellor with power to determine by regulations when Clauses 105-110 come into force. Clause 113(6) provides that the above regulations and orders (under Clause 113(2) and (4)) may appoint different days for different purposes. Clauses 113(7), (8) and (9) provide that the Treasury, Lord Chancellor and Department of Finance for Northern Ireland may make transitional or saving provision in connection with the coming into force of any provision of the Bill, including power to make different provision for different purposes.

Justification for taking the power:

274. Some Parts, Chapters, or Clauses of the Bill will need to be commenced at different times. The powers for the Treasury and Department for Finance in Northern Ireland at Clause 113(2)(a) and (b) allow for commencement of Chapter 1 to be brought forward from the commencement date in the Bill, where schemes are ready to implement that Part earlier than 1 October 2023. This power will enable the Lord Chancellor, the Treasury and the Department for Finance in Northern Ireland to make regulations to commence particular provisions for when they are needed.

Justification for the procedure:

275. As is usual with commencement powers, regulations or orders made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions of the Bill to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force when required.

**Schedule 1, Paragraph 45: Power to make further provision about eligibility criteria for re-appointment of retired lay magistrates**

*Power conferred on:* The Department of Justice in Northern Ireland

*Power exercised by:* Order made by Northern Ireland Statutory Rule

*Northern Ireland Assembly Procedure:* Affirmative procedure

Context and Purpose

276. Currently, unlike other members of the devolved judiciary in Northern Ireland, there is no facility to extend the appointment of lay magistrates beyond the age of 70.

In conjunction with the general increase in Mandatory Retirement Age to 75, it is considered that re-appointment of recently retired Lay Magistrates may permit the magistrates courts to benefit from continued access to this resource, up to the new mandatory retirement age. Paragraph 45(1) allows for such re-appointment on a transitional basis.

277. Section 4(7) Justice Act (Northern Ireland) 2015 allows the Northern Ireland Department of Justice to make provision regarding eligibility for appointments of lay magistrates by Order. Orders made under this section must be laid before the Northern Ireland Assembly in draft form for approval (as set out in section 102(6) and (7) Justice Act (Northern Ireland) 2015). Paragraph 45(2)(b) extends this power to permit the specification by Order of eligibility criteria for recently retired Lay Magistrates under paragraph 45(1).

#### Justification for taking the power

278. The existing power under section 4(7) Justice Act (Northern Ireland) 2015 is intended to promote diversity amongst Lay Magistrates and ensure that appointments are reflective of the society which Lay Magistrates will serve. To ensure consistency, the reappointment of recently retired Lay Magistrates is provided for in the same way by an extension of the underlying power. The Department wishes 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.

#### Justification for the procedure

279. In line with the existing power in section 4(7) Justice Act (Northern Ireland) 2015, it is proposed that an Order specifying eligibility for reappointment of recently retired Lay Magistrates under paragraph 45(2)(b) will attract the affirmative procedure in the Northern Ireland Assembly, allowing the Assembly to consider and approve a draft of the Order.