EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (AMENDMENT) REGULATIONS 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Rt Hon Shabana Mahmood MP Lord Chancellor and Secretary of State for Justice at the MoJ confirms that this Explanatory Memorandum meets the required standard.

2.2 Andrew Waldren, Deputy Director for Judicial Pay and Pensions Policy, at the MoJ confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Christopher Jackson at the MoJ email: christopher.jackson8@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 Judicial Pensions (Amendment) Regulations 2024 (the **2024 regulations**) will amend the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (the **FPJPS regulations**), the Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2023 (**the 2023 FPJPS Amendments**), the Judicial Pensions Regulations 2022 (the **JPS22 regulations**), the Judicial Pensions Regulations 2015 (the **JPS15 regulations**) and the Public Service Pensions Act 2013 (Judicial Offices) Order 2015 (the **Judicial Offices Order**).

4.2 The FPJPS regulations establish the Fee-Paid Judicial Pension Scheme (**FPJPS**). The JPS15 and JPS22 regulations establish the Judicial Pension Scheme 2015 (**JPS15**) and the Judicial Pension Scheme 2022 (**JPS22**) respectively. The 2024 regulations will make a range of amendments to improve, and where necessary, correct the running of these schemes in line with legislation and the policy intention.

4.3 In particular, the 2024 regulations seek to:

- Add a number of judicial offices into Schedule 1 to the FPJPS regulations and the Schedule to the Judicial Offices Order (in respect of JPS15 and JPS22) where their eligibility for a judicial pension has been established.
- Amend the provisions in the FPJPS regulations that constitute its voluntary Fee-Paid Judicial Added Benefits Scheme, to simplify its structure, make some clarifications and corrections, and include updated actuarial factors for determining cost and conversion values for added units of benefit.

- Provide for the inclusion of a cost control mechanism (CCM) in the JPS22 regulations, pursuant to an obligation to do so in primary legislation.
- Extend a number of deadlines for member elections in the FPJPS regulations.
- Insert provisions to ensure that judicial offices added to the Judicial Offices Order, where applicable, have access to retrospective entitlements in JPS15 and JPS22.
- Make a number of technical amendments to the FPJPS regulations and the JPS22 regulations, including the correction of typographical errors and cross-references.
- Extend the powers to reconcile amounts paid to judges, in respect of their new, pre-2000 entitlements, with their formal entitlements for that period.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the whole of the United Kingdom.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the whole of the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The 2024 regulations make technical amendments to the FPJPS regulations, including the following:

- Amendments to contributions calculations under regulations 55, 55A and 62(3ZA) to reflect the fact that a higher contribution rate for those fee-paid judges whose salaried comparator would have been entitled to a 15-year pension arrangement under JPA81 should only apply where the office was first held before 31 March 1995.
- Amendments to dependants' contributions repayment provisions, to bring all dependants' contributions in respect of the scheme's "initial pre-commencement" period into scope of the broader repayment provisions and to remove a 7 April 2000 backstop that should have been removed by the FPJPS amendments.
- Amendment to the small pension commutation provision to correct a cross-reference under Regulation 69A(7).

5.2 A fee-paid office must have a 'relevant salaried comparator' to be eligible for a FPJPS pension. Eligible offices are set out in Schedule 1 to the FPJPS regulations. Some of these offices are subject to a service limitation date (SLD). This is the point after which the relevant salaried judge first became eligible for a judicial pension, and so sets the date after which the corresponding fee-paid office should also be entitled to a judicial pension under the FPJPS regulations.

5.3 The 2024 regulations will add the following offices and their SLDs to Schedule 1 to the FPJPS regulations now that their entitlements to a fee-paid pension have been established:

- First-tier Tribunal Judge (Health, Education and Social Care Chamber) Primary Health Lists.
- Legal Chair Agricultural Land Tribunal Wales.
- Deputy Legal Chair Agricultural Land Tribunal Wales.
- Judge of the Consumer Credit Appeal Tribunal.
- Judge of the Estate Agents Appeal Tribunal.

5.4 Fee-paid offices with a SLD may also receive a "service credit" in FPJPS. This reflects the fact that their salaried counterparts may have had alternative public sector pension entitlements before they became entitled to a judicial pension (such as civil service arrangements). As such, a service credit day "multiplier" is applied to fee-paid judges' sitting days on or before their SLDs to determine their applicable FPJPS credit. However, in some cases, this multiplier should be 0.00 because the fee-paid office had no relevant salaried comparator before the SLD. In this respect, the 2024 regulations specify a service credit multiplier of 0.00 for:

- Judge of the Consumer Credit Appeal Tribunal.
- Judge of the Estate Agents Appeal Tribunal.

5.5 The FPJPS regulations include a number of options that members may exercise where they meet any eligibility criteria, including:

- The option to purchase additional pension benefits via three additional benefit schemes, or vary existing benefits.
- The option to elect to have benefits calculated under the post-1995 previsions rather than the pre 1995 provisions.
- The option to pay contributions for the initial pre-commencement period by lump sum.

5.6 The 2024 regulations extend deadlines relating to the above options. In relation to the first two options, this will allow the scheme manager/administrator sufficient time to engage with eligible so that they can make informed choices.

5.7 The deadline for lump sum contributions relating to the initial pre-commencement contributions period is also being extended as the relatively short deadline following the 2023 FPJPS Amendments has now expired, and we are aware that there are still members who would like to make a lump sum payment.

5.8 The 2024 regulations make a number of changes to the additional benefit schemes within FPJPS, primarily the Fee-Paid Judicial Added Benefits Scheme (FPJABS) which is available for members with pre-1995 entitlements. These amendments, which are largely technical and actuarial in nature, improve the operation of the schemes. The changes to the FPJABS scheme better reflect the original intention to mirror the provisions available to relevant salaried comparator.

5.9 The existing FPJABS provisions broadly mirror provisions for salaried judges in The Judicial Pensions (Additional Voluntary Contributions) Regulations 1995. However, the resulting unit cost provisions have proved unduly complex, difficult to interpret, and potentially ambiguous. The amendments improve the structure and clarity of the scheme provisions in particular by removing unnecessary references to pro-rating values.

5.10 A key change will be to schedule new values for personal benefits and family benefits percentage figures used to calculate the cost of units, in place of references to figures set out in Schedule 3 of the Judicial Pensions (Additional Voluntary Contributions) Regulations 1995. These changes, taken together, mirror the provisions available to relevant salaried judges. They address actuarial advice that the existing personal benefits and family benefits percentage figures (drawn from the 1995 regulations) are unduly low (generous) when used for the cost of FPJABS units.

5.11 In addition, the 2024 Amendments now schedule revised service credit figures for use in the conversion of FPJABS units of added benefit into FPJAYS added years and

vice versa – replacing those previously set out in the Judicial Pensions (Transfer Between Judicial Pension Schemes) Regulations 1995.

5.12 We have identified the need to extend the powers to reconcile the amounts that have been paid out to judges, in respect of their new pre-2000 FPJPS entitlements, with their formal entitlements for this period.

5.13 Prior to the 2023 FPJPS Amendments coming into force, these O'Brien 2 Payments in Lieu were set up as payments by MoJ, in anticipation of judges receiving their formal entitlements under those regulations.

5.14 After the 2023 FPJPS Amendments entered into force, payments continued to be made - albeit as approximated (and not yet reconciled) pension payments to judges from the scheme itself.

5.15 As the 2023 FPJPS Amendments do not currently allow for the reconciliation of these approximated pensions payments, the 2024 Regulations will insert the necessary powers.

5.16 The 2024 regulations also insert within JPS22 an "employer cost cap" provision to comply with obligations in section 12(1) and section 12(1A) of the PSPA. The employer cost cap is designed to ensure a fair balance of risk with regard to the cost of the scheme between members and the Exchequer. This could not be included when JPS22 was first established because the first scheme valuation, upon which it depended, was not complete at that time.

5.17 For JPS22, the employer cost cap is defined in section 12(1) of the PSPA as "…a rate, expressed as a percentage of pensionable earnings of members of the scheme, to be used for the purpose of measuring changes in the cost of the scheme". The basis for the level of the cost cap for JPS22 is set out in The Public Service Pensions (Valuations and Employer Cost Cap) Directions 2023 issued by HM Treasury.

5.18 The 2024 regulations also make two technical amendments to JPS22:

- They amend regulation 84, which sets out the calculation of the annual rate of surviving adult's pension, payable on the death of an active member. In order for the calculation underpinning this regulation to function correctly, the amendment inserts a de minimis value where there would otherwise be a "divide by 0" error (occurring where a judge may have been an active member of JPS22 for a period of time but have no pensionable earnings).
- They correct two erroneous cross references in the commutation supplement provisions set out in regulation 62.

5.19 Finally, as JPS22 is not presumed to work retrospectively, the 2024 regulations provide when appropriate for offices added to the Judicial Offices Order to have retrospective benefit entitlements (dating back to a point on or after 1 April 2022), and corresponding contribution liabilities, by providing for an "entitlement start date" to be specified. As a retrospective contributions liability is imposed, there is also provision for the member to opt out of the scheme for the retrospective entitlement period.

5.20 The 2024 regulations insert an equivalent provision into the JPS15 regulations in respect of entitlement start dates between 1 April 2015 and 31 March 2022. This is the only amendment to the JPS15 regulations included in the 2024 regulations.

5.21 The 2024 regulations add the office of "Member (Chair only) First-tier Tribunal (Social Entitlement Chamber) Criminal Injuries Compensation" to the schedule to the Judicial Offices Order, so that members of this office may accrue a judicial pension.

The entitlement start date for the office is 1 April 2015 in respect of JPS15 and 1 April 2022 in respect of JPS22.

What was the previous policy, how is this different?

5.22 Currently there is no employer cost cap within JPS22, the addition of one is a statutory requirement.

5.23 Regulation 84 JPS22 has a "divide by 0" error where a judge may have been an active member of JPS22 for a period of time but have no pensionable earnings and there are two erroneous cross references in the commutation supplement provisions set out in regulation 62.

5.24 The FPJPS regulations have a number of deadlines that in the current regulations may not give the scheme manager/administrator sufficient time to engage with eligible so that they can make informed choices or members to make a lump sum payment.

5.25 A number of offices and their SLDs had not had their entitlements to a fee-paid pension established so were not added to Schedule 1 to the FPJPS regulations.

5.26 An April 2000 backstop is still included in the FPJPS amendments.

5.27 The existing personal benefits and family benefits percentage figures (drawn from the 1995 regulations) are unduly low (generous) when used for the cost of FPJABS units.

5.28 The 2023 FPJPS Amendments do not currently allow for the reconciliation of these approximated pensions payments.

5.29 Offices added to the Judicial Offices Order do not have retrospective benefit entitlements (dating back to a point on or after 1 April 2022), and corresponding contribution liabilities.

5.30 The JPS15 regulations in respect of entitlement start dates between 1 April 2015 and 31 March 2022 do not have an equivalent provision.

6. Legislative and Legal Context

How has the law changed?

6.1 The Judicial Pensions and Retirement Act 1993 (**JUPRA**) created a pension scheme for salaried judges. Before the coming into force of JUPRA, pensions were payable to certain salaried judges under the Judicial Pensions Act 1981 (**JPA81**).

6.2 Section 18A of JUPRA confers powers to establish a scheme for the payment of pensions to, or in respect of, fee-paid judges. It also provides for the scheme to make provision for payments to, or in respect of, a person in relation to the person's service before the scheme commenced. The powers may be exercised by the Lord Chancellor in relation to offices for which she is the appropriate Minister within the meaning of section 30 of JUPRA, and the Secretary of State for Scotland in relation to judicial offices for which he is the appropriate Minister within the meaning of section 30 of JUPRA. The FPJPS Regulations were made in exercise of that power, and this instrument amends them using the same power.

6.3 FPJPS is a defined benefit, final salary type pension scheme. It is not registered for tax purposes, although the additional benefits schemes within the principal scheme are tax registered.

6.4 FPJPS commenced on 1 April 2017 following a decision in February 2013 by the Supreme Court in O'Brien v Ministry of Justice [2013] UKSC 6 (**O'Brien 1**) that fee-

paid judges had been treated less favourably than relevant full-time salaried judges because they had not been entitled to a pension. This initially only provided for service after 7 April 2000, the date by which the United Kingdom was required to transpose the European Union Council's Part-Time Work Directive (97/81/EC) (PTWD) into domestic law.

6.5 Following a judgment in November 2018 by the Court of Justice of the European Union in O'Brien v Ministry of Justice (Case C-432/17) (**O'Brien 2**) that part-time work undertaken before the deadline for transposing the PTWD must be taken into account, the 2023 FPJPS Amendments came into force on 1 April 2023. These amended the FPJPS regulations to take into account eligible service before 7 April 2000.

6.6 Consequently, the FPJPS regulations now mirror salaried judicial pension entitlements under, as applicable, JPA81 and JUPRA. In order to take into account service prior to 7 April 2000, the 2023 FPJPS Amendments included new provisions to mirror the arrangements for salaried judges prior to 31 March 1995 under JPA81. They also included provisions to mirror the transitional arrangements for salaried judges when JUPRA commenced. FPJPS now allows for pensions to be calculated under "Pre 1995 provisions" that mirror the salaried arrangements under JPA81; and "Post 1995 provisions" that mirror the salaried arrangements under JUPRA. Part 2A of the FPJPS regulations sets out eligibility for either the Pre 1995 or Post 1995 provisions to apply in respect of pension benefits for a particular fee-paid office held by a member.

6.7 JPS22 commenced on 1 April 2022 in order to address recruitment and retention issues identified by the Senior Salaries Review Body (**SSRB**) in 2018.

6.8 JPS22 was established under section 1 of the PSPA and is therefore consistent with the modernised pension provisions and governance requirements that were brought into force by the PSPA for most public service pension schemes.

6.9 The Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) closed existing judicial pension schemes to accrual for future service after 31 March 2022. JPS22 is currently the only judicial pension scheme in which members can accrue pension benefits.

6.10 Section 12 of the PSPA requires pension schemes to include an employer cost cap which must be in force within one year of the scheme's first valuation. This is referenced in Paragraph 11.1 below.

6.11 Eligible judicial offices for JPS22 are set out in the Schedule to the Judicial Offices Order.

6.12 The Judicial Offices Order specifies those judicial offices which comprise the judiciary for the purposes of the PSPA. A person holding a judicial office specified in this instrument is eligible to be included in a judicial pension scheme made under that Act, being JPS15 and JPS22.

Why was this approach taken to change the law?

6.13 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 A consultation on the draft 2024 regulations was published on the 5 February 2024. There were six responses to this consultation. Overall, the responses to the

consultation were mainly of a technical nature, asking for clarification on details of amendments, specifically respondents mainly wanted more details on the operation of the Cost Control Mechanism and the assumptions it used. We have addressed these queries and provided further detail in the government response. None of the responses asked for an amendment to be made the SI. A number of targeted consultations were produced on judicial pensions eligibility for the following judicial offices prior to the development of the 2024 regulations. No major concerns were raised and the MoJ committed to adding or amending the following offices:

- First-Tier tribunal Judge (health, education and Social Care) Primary Health Lists – SLD 18 January 2010.
- Legal Chair Agricultural Land tribunal Wales – SLD 30 June 2013.
- Deputy Legal chair Agricultural Land Tribunal Wales – SLD 30 June 2013.

8. Applicable Guidance

8.1 The Judicial Pensions Board (JPB) was established under Part 3 (Governance) of the JPS15 regulations, and continues to have oversight of the Judicial Pension Scheme (JPS), including FPJPS and JPS22. The JPB is responsible for assisting the Lord Chancellor (as the scheme manager) to administer the JPS.

8.2 Scheme Guides for FPJPS, JUPRA, JPS15 and JPS22 are available on the scheme administrator's website. The MoJ regularly reviews and updates guidance in line with amendments.

8.3 The MoJ is proactively communicating with judicial office holders who are affected by these amendments.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because the impact on the public sector is expected to be minimal. The costs will be borne by the JPS and factored into scheme valuations and employer contribution rates going forward. Extending deadlines in the FPJPS regulations may have an interest cost where members are owed arrears in respect of any election they make. We expect interest costs would fall from 2024-25 to 2026-27 and would be absorbed by the department's centrally managed budget.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this only amends the Judicial pensions scheme.

9.3 The legislation does not impact small or micro businesses.

9.4 The MoJ published an equality statement regarding these amendments alongside its consultation on 5 February 2024.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is that the JPS is subject to regular actuarial valuations. As a result of the 2024 amendments, JPS22 will also include

provisions triggering potential changes to the scheme if the costs of the scheme move outside of specified margins, in common with other public service pension schemes.

10.2 The JPB will continue to oversee the governance of the JPS.

10.3 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 The 2024 regulations contain provisions to comply with a commitment: namely, the "employer cost cap" requirements set out in the Public Service Pensions Act 2013 (PSPA), being the primary legislation under which the JPS22 regulations were established. Under section 12(1) of the PSPA the JPS22 regulations must set a rate, expressed as a percentage of pensionable earnings of members of the scheme, to be used for the purpose of measuring changes in the cost of the scheme. Under section 12(1A), this must be done within a year of the completion of the first valuation for JPS22 (as separately required under s11 of the PSPA). The first valuation for JPS22 was completed on 7 February 2024, meaning that the requirement must be met by 6 February 2025.

11.2 The 2024 regulations also insert provisions into both JPS22 and JPS15 to enable members, where applicable, to accrue retrospective entitlements in these schemes as outlined at paragraph 5.19 above. The power is section 3(3)(b) of the PSPA 2013.

11.3 The 2024 regulations also contain a provision which derives from a previous commitment in relation to the extension of the deadline in regulation 11C of the FPJPS regulations. The change means we will have time to engage with the retired members, and personal representatives of deceased members, who are eligible to choose the FPJPS provisions applicable to their pension benefit calculations.

11.4 The 2024 regulations correct several errors in the JPS22 and FPJPS regulations and accordingly the 'free issue' procedure is being used.

12. European Convention on Human Rights

12.1 The Rt Hon Shabana Mahmood MP, the Lord Chancellor and Secretary of State for Justice has made the following statement regarding Human Rights:

"In my view the provisions of the Judicial Pensions (Amendment) Regulations 2024 are compatible with the Convention rights.".

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").