EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (FEE-PAID JUDGES) AMENDMENT REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice (the 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. Purpose of the instrument

2.1 These Regulations (the **amendment Regulations**) amend the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (the **FPJPS Regulations**) which established the Fee-Paid Judicial Pension Scheme (**FPJPS**).

2.2 At present, FPJPS only provides pension benefits for eligible fee-paid service on or after 7 April 2000, the date on which the Part Time Workers Directive, under which less favourable treatment should have been eliminated, came into force (**PTWD**). These amendments provide pension benefits for eligible fee-service before 7th April 2000, and set out associated contribution liabilities following judgments in the cases of:

- O'Brien v Ministry of Justice (Case C-432/17) (O'Brien 2); and
- Miller and others v Ministry of Justice [2019] UKSC 60.

2.3 The amendment Regulations also make changes required as a result of:

- the closure of FPJPS to further accruals on 31 March 2022 further to the Public Service Pensions and Judicial Offices Act 2022;
- the commencement of the reformed judicial pension scheme for all judges, established by the Judicial Pensions Regulations 2022 (**JPS22**) on 1 April 2022; and
- the remedy required following the judgment in McCloud [2018] EWCA Civ 2844 (**McCloud**).

2.4 In addition, the amendment Regulations prospectively negate a restriction on FPJPS members taking partial retirement in respect of fee-paid offices they ceased to hold before 1 April 2017 and regularise payments that have previously been made otherwise than in accordance with that restriction.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The FPJPS Regulations and the amendment Regulations are retrospective in nature. Section 18A of the Judicial Pensions and Retirement Act 1993 (**JUPRA**) provides for:

- the appropriate minister to establish a scheme for the payment of pensions and other benefits to or in respect of fee-paid judges (section 18A(1)); and

- the scheme to make provision for payments to or in respect of a person in relation to the person's service before the scheme is established (section18A(2)).

3.2 In a number of instances the FPJPS Regulations confer discretions on the Treasury, and on the scheme administrator and the amendment Regulations confer similar discretions. For example, FPJPS Regulation 24 provides for a pension to be 'payable at such intervals, not exceeding 3 months, as the Treasury may determine' and a similar provision is included in provisions inserted by amendment regulation 12.

3.3 Subsection 6(a) of section 18A of JUPRA provides that regulations under that section may, in particular, include provision corresponding or similar to any provision made by Part 1 of JUPRA. The discretions are conferred in that context. For example, section 2(6) of JUPRA provides for pension payments to salaried judges to be payable at such intervals, not exceeding three months, as the Treasury may determine which is similar to the provisions for FPJPS referred to in the preceding paragraph.

3.4 The amendment Regulations correct three minor errors in the FPJPs Regulations and accordingly the 'free issue' procedure is being used. The corrections are:

- A correction to the paragraph that FPJPS Regulation 4(3) is subject to.
- The addition of a missing term in the formula in FPJPS Regulation 16(3).
- Transposing two calculation steps in FPJPS Regulation 18(5) so that the provisions in paragraphs 6 and 7 of that regulation are referenced correctly.

3.5 These minor errors have not to date affected any pension entitlement calculations for FPJPS members.

4. Extent and Territorial Application

4.1 This instrument extends to the whole of the United Kingdom.

4.2 The territorial application of this instrument is to the United Kingdom.

5. European Convention on Human Rights

5.1 The Rt Hon Dominic Raab MP, 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 (Fee-Paid Judges) (Amendment) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 JUPRA creates 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. Those powers may be exercised by the Lord Chancellor in relation to offices for which he 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 that fee-paid judges had been treated less favourably than relevant full-time salaried judges because they had not been entitled to a pension. Pension benefits under FPJPS presently only accrue for fee-paid judicial service on or after 7 April 2000, the date by which the United Kingdom was required to transpose the PTWD into domestic law.

6.5 In November 2018, the Court of Justice of the European Union handed down judgment in the O'Brien 2 litigation, concluding that part-time work undertaken before the deadline for transposing the PTWD must be taken into account for the purposes of calculating a retirement pension. Following this decision, the MoJ wrote to the Employment Tribunal confirming to all affected fee paid judicial office holders its approach to claims for pre-7 April 2000 service. Since then the MoJ has kept the Employment Tribunal apprised of progress on amending the FPJPS Regulations and making interim payments in lieu of pensions through regular updates.

6.6 The amendment Regulations amend FPJPS to provide pension benefits for eligible fee-paid service before 7 April 2000. It was originally intended that the amendment Regulations should come into force on 1 April 2022, to coincide with the closure of FPJPS and its replacement by JPS22. However, it proved necessary to defer these amendments in the context of the resources required for the introduction of JPS22.

6.7 The Public Service Pensions and Judicial Offices Act 2022 closed the following schemes to accrual for future service after 31 March 2022:

- FPJPS;
- JUPRA; and
- the scheme established by the Judicial Pensions Regulations 2015 (**JPS15**).

7. Policy background

What is being done and why?

7.1 The FPJPS Regulations provide pension benefits for eligible fee-paid judicial service from 7 April 2000 to 31 March 2022 on a basis that mirrors the pension benefits for salaried judges under JUPRA. We are amending them to provide the remedy required by the judgment in the O'Brien 2 litigation.

7.2 Once amended, the FPJPS Regulations will also provide pension benefits for eligible fee-paid judicial service before 7 April 2000. To achieve this, the amendment Regulations:

- Insert new provisions for pension benefits to be calculated on a 'pre-1995' basis that reflects the provisions for salaried judges under JPA81, and rules to determine whether benefits for a particular offices are to be calculated under those provisions or the existing 'post-1995' provisions.
- Provide reckonable service adjustments for cases where fee-paid service before 31 March 1995 falls to be calculated under the existing 'post-1995' provisions, that mirror the provisions in the Judicial Pensions (Transfer Between Judicial Pension Schemes) Regulations 1995 for relevant salaried judges.

- Set out contributions liabilities for service before 7 April 2000 and entitlements to refunds where excess contributions have been paid.
- Provide windows for transfers into FPJPS and for the purchase of additional benefits by eligible members in the context of the changes to the principal FPJPS scheme.
- Include arrangements for the commutation of small FPJPS pensions.
- Update the schedule of eligible offices for FPJPS, including service limitation dates for offices where required.
- Include new schedules to: specify accrual factors for use in pension calculations under the pre-1995 provisions; and set out all of the applicable contribution rates for FPJPS.

7.3 The amendment Regulations also regularise payments that have previously been made otherwise than in accordance with a restriction on FPJPS members taking partial retirement in respect of fee-paid offices they ceased to hold before 1 April 2017. The partial retirement provision set out in Part 4 of the FPJPS Regulations allowed fee-paid judges to draw pension benefits (or have deferred benefits) from one fee-paid office while remaining in judicial office, but only where they ceased to hold the office in respect of which partial retirement is being taken on or after 1 April 2017. There is a significant risk that the 1 April 2017 restriction caused indirect age discrimination which cannot be objectively justified, because it meant that partial retirement was more likely to have been available to younger judges than older judges. Data from the FPJPS administrator indicates that 114 judges who ceased to hold a fee-paid office before 1 April 2017, and remained in judicial office, have been treated as having taken partial retirement, and paid pension benefits, otherwise than in accordance with the 1 April 2017 restriction.

7.4 In providing pension benefits for eligible fee-paid service before 7 April 2000, it has been necessary to include provisions that mirror arrangements under JPA81, and the legislation that applied in respect of some judicial offices in Scotland and Northern Ireland. These arrangements applied to salaried judges before the establishment of common pension arrangements for salaried judges from 31 March 1995 under JUPRA. The required provisions are set out in new Parts 2A and 2B for the FPJPS Regulations.

7.5 The amendment Regulations provide a fresh one-year notice window for eligible members (with fee-paid service between 31 March 1995 and 5 April 2006) to purchase additional benefits (or vary existing purchases) in the Fee-Paid Judicial Added Years Scheme (FPJAYS) and the Fee-Paid Judicial Surviving Adult's Pension scheme (JASAPS). In addition, the amendment Regulations include new Parts relating to additional benefits:

- Part 14A provides for a Fee-Paid Judicial Added Benefits Scheme (FPJABS) to mirror the Judicial Added Benefits Scheme available to salaried judges who had reckonable service under JPA81 provisions between 31 March 1995 and 5 April 2006; and
- Part 14B provides for the variation of existing purchases and the conversion of benefits between FPJABS and FPJAYS where, subsequent to a purchase, the relevant benefit provisions for the associated office(s) change between pre-1995 and post-1995 provisions.

7.6 Unlike the principal FPJPS scheme, FPJAYS, JASAPS are registered for tax purposes and FPJABS will be following its introduction. Part 12 of the FPJPS Regulations which sets out the Fee-Paid Judicial Additional Voluntary Contribution Scheme (money purchase) is not being updated and there will be no new members of this scheme. However, members of JPS22 can access additional voluntary contribution arrangements going forward.

7.7 Some judges who are in scope for McCloud will be able to choose to have pension benefits for fee-paid service between 1 April 2015 and 31 March 2022 calculated under FPJPS instead of JPS15 and this has been provided for in the amendment Regulations. McCloud relates to age discrimination in the transitional arrangements associated with the introduction of JPS15.

7.8 Regulation 3 in the FPJPS Regulations defines "judicial office" as: an office specified in column 1 of the Schedule ("a specified office"), an office which has been replaced by a specified office, or an office specified in Schedule 1 to JUPRA.

7.9 The amendment Regulations update the Schedule in a number of respects:

- The Schedule is now renamed Schedule 1 to reflect the inclusion of two new schedules for pre-1995 accrual factors and contributions rates.
- Twenty additional fee-paid offices have been added to Schedule 1 where eligibility for FPJPS has been confirmed.
- Each office on Schedule 1 has been allocated to one of four tables reflecting the arrangements applicable to that office under the pre-1995 provisions.
- Service limitation dates have been added where applicable.

7.10 Service limitation dates equate to the date after which a relevant salaried judge first became eligible for a judicial pension. The amendment Regulations provide for a credit of reckonable service for service before the limitation date, commensurate with the non-judicial pension benefits that the relevant salaried judge would have received. The amendment Regulations also clarify the status of service before a limitation date as qualifying judicial service for some purposes of the FPJPS Regulations.

7.11 The amendment Regulations also provide for a refund of excess contributions where liabilities associated with a member's fee-paid service mean that contributions are payable in respect of more than 20 reckonable years in aggregate across the FJPPS and JUPRA arrangements.

7.12 In addition, the amendment Regulations update, where necessary, text included in the FPJPS Regulations to reflect its closure to further accruals on 31 March 2022. For example, the death in service lump sum provision has the reference to active membership immediately before death removed.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union and does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The MoJ has no plans to consolidate the legislation at this time.

10. Consultation outcome

10.1 A consultation on amendments to FPJPS to provide for eligible fee-paid judicial service before 7 April 2000 was published on 24 June 2020 and closed on 18 September 2020. The consultation was addressed to the President of the UK Supreme Court, the Senior President of Tribunals, the Minister of Justice Northern Ireland, the Cabinet Secretary for Justice Scottish Government, and judicial associations in England & Wales, Scotland, and Northern Ireland.

10.2 We received 106 responses to the consultation which were broadly supportive of the remedy approach set out in the consultation document. The government response was published on 10 December 2020. These documents can be viewed using the following link:

https://www.gov.uk/government/consultations/fee-paid-judicial-pension-scheme-amendments

10.3 Following the consultation and government response we:

- Refined our draft arrangements for pre-1995 provisions.
- Derived an approach to refund excess contributions across FPJPS and JUPRA.
- Expanded our proposals for a window during which additional benefits will be able to be purchased by eligible judges, or existing purchases varied.
- Included a facility for commutation of small FPJPS pensions that reflects similar facilities in tax registered schemes.
- Considered particular points raised in relation to office eligibility.
- Reviewed sitting in retirement provisions for fee-paid judges, which have since been updated through Part 3 of the Public Service Pensions and Judicial Offices Act 2022.

10.4 We have kept relevant officials in the devolved administrations in Scotland, Northern Ireland, and Wales apprised of the development of the amendment Regulations, in particular in relation to the offices whose jurisdictions are in those countries and their views have been reflected in our drafting.

10.5 We did not refer to the amendment to the partial retirement provision in the FPJPS Regulations (see paragraphs 2.4 and 7.3 above) in our June 2020 consultation because the issue was not identified until after the government response to the consultation had been published. However, we will write to all of the judges who would be affected by the negating of the 1 April 2017 restriction setting out that:

- the amendment will regularise, and not be detrimental to, their existing pension settlement;
- they do not need to take any action; and
- they can raise any queries or concerns with the FPJPS administrator and MoJ.

10.6 We will also provide information on the amendment to the judicial pensions committee and to judicial associations.

11. Guidance

11.1 The Judicial Pensions Board (**JPB**), established under Part 3 (Governance) of the Judicial Pensions Regulations 2015, has oversight of the overall judicial pension

arrangements including FPJPS. The JPB is responsible for assisting the Lord Chancellor as the scheme manager to administer the Judicial Pension Scheme.

11.2 Updated scheme guidance for FPJPS is being produced to include the amendment changes and will be made available before 1 Apr 2023.

11.3 The MoJ will communicate with eligible office holders and judicial associations to inform them of the changes to FPJPS.

12. Impact

12.1 An impact assessment has not been prepared for this instrument. There is no economic impact on business, charities or voluntary bodies.

12.2 The cost to the public sector of making the amendment Regulations is estimated to be £559m. This is the estimated incremental liability that has been recognised in the judicial pension scheme accounts as at 31 March 2022 to provide pension benefits for eligible fee-paid service before 7th April 2000. The judicial pension scheme had total liabilities of £6.8bn at 31 March 2022.

12.3 The incremental liability associated with the amendment Regulations will be taken into account in future valuations of the judicial pension scheme by the Government Actuary's Department and may be a factor in future changes to the employer's contribution rate, presently set at 51.1% of pensionable pay. Any change to employer's contribution rates would need to be taken into account for employment cost budgeting by the MoJ and other departments with responsibility for judicial offices.

12.4 Judges with eligible fee-paid service before 7th April 2000 will be required to pay member contributions towards the cost of their benefits in line with the amounts that relevant salaried judges would have paid, and this is provided for in the amendment Regulations.

12.5 As noted in paragraph 2.3 above, the amendment Regulations make some changes to FPJPS required by the McCloud remedy. These are to ensure that FPJPS membership criteria and reckonable service provisions are consistent with the McCloud remedy, but they do not, of themselves, entail any additional costs.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The JPB oversees the governance of FPJPS in the context of the overall Judicial Pension Scheme arrangements.

14.2 The MoJ has pension teams that support the Lord Chancellor as scheme manager and oversee contractual arrangements with the third party scheme administrator.

15. Contact

15.1 Paul Darby at the MoJ (email: paul.darby5@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Simon Masterson, Deputy Director for Judicial Pay and Pensions Policy at the MoJ (email: simon.masterson@justice.gov.uk) can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Dominic Raab MP, Lord Chancellor and Secretary of State for Justice at the MoJ can confirm that this Explanatory Memorandum meets the required standard.