EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (FEE-PAID JUDGES) REGULATIONS 2017

2017 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 These Regulations make provision for a pension scheme for the benefit of those people who have held eligible fee-paid judicial office in the period between 7 April 2000 and 31 March 2015 ("the principal scheme").

2.2 The Regulations also establish the Fee-Paid Judicial Added Voluntary Contributions Scheme, the Fee-Paid Added Years Scheme and the Fee-Paid Judicial Added Surviving Adult's Pension Scheme to enable members of the principal scheme to pay voluntary contributions towards the costs of additional benefits under one of more of these additional schemes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 These Regulations are being made under a new power inserted into the Judicial Pensions and Retirement Act 1993 (c.8) ("the 1993 Act") by the Pension Schemes Act 2015 (c.8). The Regulations establish a pension scheme for eligible fee-paid judicial office holders which provides benefits for those office holders which are comparable to the pension benefits available for salaried judges under the scheme established by the 1993 Act and Regulations made under the 1993 Act, including the Judicial Pension (Transfer of Accrued Benefits) Regulations 1995 (S.I. 1995/637), the Judicial Pension (Miscellaneous) Regulations 1995 (S.I. 1995/632) and the Judicial Pensions (Additional Voluntary Contributions) Regulations 1995 (S.I. 1995/639).

5. Extent and Territorial Application

5.1 This instrument extends to the United Kingdom.

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

6. European Convention on Human Rights

6.1 The Lord Chancellor and Secretary of State for Justice, The Right Honourable Elizabeth Truss MP, has made the following statement regarding Human Rights:

There is currently a judgement from the Employment Tribunal (*McCloud v MoJ*) in which the tribunal found that transitional provisions in the Judicial Pensions Regulations 2015 were not lawful under EU equality law and under the Equality Act 2010. The Lord Chancellor is currently appealing that judgment. Given that eligibility for the FPJPS established by this instrument depends on the claimant not being eligible for the scheme established by the 2015 Regulations, and therefore reflects the transitional provisions in the 2015 Regulations and given the similarities between the obligations under EU law and the provisions of article 14 of the Convention, the Lord Chancellor cannot, at the present time, certify that this legislation is compatible with the Convention Rights. The Lord Chancellor nevertheless considers that it is right to make these regulations now in light of the importance of providing a remedy to the claimants in *O'Brien v MoJ*. If the appeal against the employment tribunal judgment is ultimately unsuccessful steps will be taken to remove that incompatibility.

7. Policy background

What is being done and why

7.1 The UK courts and tribunals found, in the case of *O'Brien v MoJ* and related cases, that a historic lack of pension and other specified benefits amounted to less favourable treatment of some fee-paid judicial office holders in comparison to salaried judges doing the same or broadly similar work. This less favourable treatment was on grounds of their part-time status. In particular, they found that eligible fee-paid judicial office holders were entitled to pension benefits that were no less favourable than those provided at the time to salaried judges by the scheme established under the 1993 Act.

7.2 This led to a commitment by the Ministry of Justice to implement a retrospective remedy – a Fee-Paid Judicial Pension Scheme – in respect of reckonable fee-paid service from 7 April 2000. This is the date when the Part Time Workers Directive, under which less favourable treatment should have been eliminated, came into force.

7.3 In line with wider public service pension reform, a new judicial pension scheme was established on 1 April 2015. The Judicial Pension Scheme 2015 (JPS 2015), established by the Judicial Pensions Regulations 2015, is for serving salaried and fee-paid office holders who were first appointed to judicial office on or after 1 April 2015 and for judicial office holders who were appointed prior to 1 April 2015 and do not have transitional protection allowing them to remain in their existing scheme.

7.4 The Fee-paid Judicial Pension Scheme (FPJPS), created by this instrument, therefore needs to provide pension benefits for eligible current and former judicial office holders in respect of their service from 7 April 2000 to 31 March 2015 and for service beyond that date in respect of those entitled to transitional provision. To achieve this, the department used the Pension Scheme Act 2015 to insert new section 18A into the 1993 Act, which confers a power on the Lord Chancellor to create a scheme for eligible fee-paid judicial office holders.

Consolidation

7.5 None.

8. Consultation outcome

8.1 The Ministry of Justice conducted a public consultation on the draft Regulations during the period 15 September 2016 to 31 October 2016. The questions in the consultation focussed on whether the Regulations provide the appropriate remedy for fee-paid judicial office holders in respect of their pensions. The consultation was aimed at both former and serving members of the judiciary in the United Kingdom and key stakeholders including the devolved administrations.

8.2 73 responses were received from individuals and judicial associations raising over 150 points on the draft regulations. The key themes and outcomes arising were:

- Requirement to retire from all eligible offices before the payment of any pension. The draft Regulations have been amended to allow members to take partial retirement from a judicial office while continuing to accrue benefits in another.
- Concern that the membership of the Additional Voluntary Contribution (AVC) scheme was restricted, so that if a judge was already contributing to another scheme prior to 6 April 2006 that judge would be ineligible to join the scheme. This restriction has been removed.
- Eligibility to transfer benefits in to and out of the scheme: The draft Regulations restricted the timing of transfers in and out of the scheme with reference to the pension age for the individual, consistent with the age limits in the Salaries scheme. To ensure that individuals who have passed that age before the scheme came into operation are able to take this option the regulations have been amended to allow transfers for individuals who are within one year of pension age at the date of the Supreme Court judgment 6 February 2013. It should be noted that the age limit on transfers applies equally to transfers in the salaried scheme.
- Eligibility for membership of the scheme: A number of respondents who are not eligible for pension rights under FPJPS have expressed their view that they should be entitled to membership of the scheme. Schedule 1 lists the offices that have been determined as eligible for pension rights in FPJPS in decisions of the Employment Tribunal (and subsequent appeals) or by consent. MOJ will continue to maintain that position.

8.3 The Ministry of Justice also issued a further consultation specifically relating to the method for calculating the cost of purchasing judicial added years for a retired member of the scheme. This change did not alter the policy intention in the original consultation. There were 4 responses, none of which commented on the change to the method of calculation but asked for further clarification on other aspects of the AVC policy.

8.4 The Ministry of Justice issued its Response to both consultations in February 2017.

9. Guidance

9.1 The Judicial Pension Board which was established in April 2015 will have oversight of the FPJPS once it is established. The Board is responsible for assisting the Lord Chancellor as the Scheme Manager to administer the judicial pension schemes.

9.2 A scheme guide will be available on the Judicial Pension Board website: www.gov.uk/government/groups/judicial-pension-board. This is a dedicated source of

information for all the judicial pension schemes. The scheme administrator for the FPJPS will also write to each judge individually about their options under the scheme.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is significant cost associated with these regulations. The costs of providing the benefits under the fee-paid Judicial Pension Scheme established by these Regulations will be accounted for within the Judicial Pension Scheme (JPS) annual accounts. These accounts are separate from those of the Ministry of Justice.

10.3 As part of the annual accounts process, a valuation of the pension liability owed to eligible fee-paid judiciary is completed by the Government Actuary Department (GAD). As at 31 March 2016, a pension liability of £578m was calculated by MoJ having obtained advice from GAD and accounted for within the JPS accounts. The next valuation of the pension liability will take place as at 31 March 2017, prior to the proposed implementation of the scheme from April 2017.

10.4 An Impact Assessment has been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 Once the Regulations have been made and the scheme is implemented, the Judicial Pension Board will oversee the governance of the fee-paid pension scheme as set out in these Regulations.

13. Contact

13.1 Surinder Sawali at the Ministry of Justice, Telephone: 020 3334 3142 or email: surinder.sawali@justice.gsi.gov.uk can answer any queries regarding the instrument.