EXPLANATORY MEMORANDUM TO

THE JUDICIAL OFFICES (SITTING IN RETIREMENT – PRESCRIBED OFFICES AND DESCRIPTIONS) REGULATIONS 2022

2022 No. 798

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 This statutory instrument defines which holders or former holders of judicial offices are eligible for appointment to the new sitting in retirement judicial offices created by section 123 of and Schedule 1 to the Public Service Pensions and Judicial Offices Act 2022.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is across the United Kingdom.

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

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Prior to the commencement of the relevant provisions in the Public Service Pensions and Judicial Offices Act 2022 ('the Act'), there was no single legislative provision governing sitting in retirement. Instead, various pieces of legislation, primarily sections 94A, 94B of and schedule 14 to the Constitutional Reform Act 2005 and section 9(1) of the Senior Courts Act 1981, provided for certain judges to sit in retirement. The Act creates a suite of new 'sitting in retirement' judicial offices. These offices are for judicial office holders who have retired and allow them to sit after their retirement.

6.2 Section 124(4) of the Act gives the Lord Chancellor the power to make regulations, with appropriate concurrence, to determine which judicial office holders or former judicial office holders are eligible to be appointed to the offices listed in Parts 1, 2, 3 and 6 of schedule 3 to the Act.

7. Policy background

What is being done and why?

7.1 Sitting in retirement is the policy that currently permits salaried judges to retire from salaried office, be appointed to a fee-paid office subject to business need (without a JAC exercise) and sit in that office (claiming fees and accruing a new judicial pension) whilst drawing judicial pension from their pre-retirement office.

7.2 The changes to sitting in retirement made in the Act are necessary to correct existing differential treatment between salaried and fee-paid judges as sitting in retirement is not currently available to fee-paid judges. This statutory instrument is necessary to implement the primary legislation: it governs eligibility to apply to sit in retirement.

7.3 From implementation, all retirement appointments will be to one of the new sitting in retirement offices, with eligibility to apply to these offices determined by these regulations.

7.4 Schedule 1 of this statutory instrument sets out which pre-retirement judicial offices a judge needs to have held to be eligible to apply for a given sitting in retirement office. This largely follows the pattern of holders of a given pre-retirement office being eligible to apply to the equivalent sitting in retirement office.

7.5 The governing principle underlying eligibility is that appointment will normally be to the direct equivalent of the pre-retirement office. There are two exceptions to this principle, as set out below.

7.6 The first exception is that no sitting in retirement equivalents of leadership offices have been created by the Act. As a matter of policy, it was determined that leadership judges should not sit in retirement in a leadership capacity. Therefore, these regulations provide for leadership judges to be eligible to sit in retirement in the sitting in retirement equivalent of the statutory office which underpins their leadership appointment. For example, a Regional Employment Tribunal Judge is eligible under these regulations for appointment to sit in retirement as an Employment Judge (sitting in retirement).

7.7 The second exception relates to leadership, specialist or ceremonial offices where, by virtue of those appointments, an *ex-officio* appointment is held. Examples of this include Chamber Presidents and Deputy Chamber Presidents of the First-tier Tribunal and the Upper Tribunal, who are *ex officio* judges of the Upper Tribunal (see section 5(1)(i) of the Tribunals, Courts and Enforcement Act 2007). These regulations provide for their eligibility to sit in retirement to be determined by reference to their *ex-officio* appointment.

7.8 Subject to limited exceptions, the Act has not created sitting in retirement office correlates for non-legal members (as they are unable to accrue a judicial pension in their pre-retirement capacity). The exceptions to this are salaried non-judicial members, non-judicial members of the First-tier Tribunal who sit as Chairmen in the Property Chamber (Residential Property) and non-judicial members of the Upper Tribunal who sit as Chairmen in the Lands Chamber and are Members or Fellows of the Royal Institution of Chartered Surveyors.

7.9 Row 20 of Table 1 of schedule 1 to the regulations determines eligibility for appointment to the office of Lord Justice of Appeal (England and Wales) (sitting in retirement). In this row it is stated that a Supreme Court Justice is eligible to apply to

this office. The eligibility of a Supreme Court Justice is qualified by regulation 4(1). The effect of regulation 4(1) is that only a Supreme Court Justice who was qualified for appointment to the Supreme Court on the basis of criteria relevant to England and Wales (as set out in section 25 and section 60(1) of the Constitutional Reform Act 2005) will be eligible to sit in retirement in the Court of Appeal in England and Wales.

7.10 Row 14 of Table 3 of schedule 1 to the regulations determines eligibility for appointment to the office of Lord Justice of Appeal (Northern Ireland) (sitting in retirement). In this row it is stated that a Supreme Court Justice is eligible to apply to this office. The eligibility of a Supreme Court Justice is qualified by regulation 4(2). The effect of regulation 4(2) is that only a Supreme Court Justice who was qualified for appointment to the Supreme Court on the basis of criteria applicable to Northern Ireland will be eligible to sit in retirement in the Court of Appeal in Northern Ireland.

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 Ministry of Justice has no plans to consolidate the legislation at this time.

10. Consultation outcome

10.1 Sitting in retirement was noted as a related matter in the consultation on increasing the judicial mandatory retirement age, published on 16 July 2020. No specific question was asked in relation to sitting in retirement. The overarching policy approach to sitting in retirement was further detailed in the response to the above noted consultation, published on 8 March 2021.

10.2 Specifically in respect of this instrument, no consultation was carried out due to its administrative and technical nature.

11. Guidance

11.1 As these regulations only give power to the Lord Chancellor, to be exercised in respect of specific judicial offices with the concurrence of members of the senior judiciary, no guidance is necessary.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full impact assessment has not been prepared for this instrument because there is no impact on private sector business or charities, and there is no public sector impact *per se* as the regulations only determine eligibility to apply for judicial offices or make a technical change as to who can make an appointment. There will be a very small public sector economic cost to set up and process administration of sitting in retirement.

13. Regulating small business

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

14. Monitoring & review

14.1 No specific monitoring or review will be undertaken, beyond that which is already undertaking as part of MoJ's routine data collection.

14.2 This instrument does not include a statutory review clause.

15. Contact

15.1 Matthew Edwards at the Ministry of Justice Telephone: 07583 679053 or email: Matthew.Edwards3@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jane Sigley, Deputy Director for Judicial Resourcing and Diversity at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Lord Chancellor at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.