EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (AMENDMENT) REGULATIONS 2017

2017 No. 508

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 amend the Judicial Pensions Regulations 2015 ("the 2015 Regulations") as follows:

- To take account of the creation of the Fee-Paid Judicial Pension Scheme (FPJPS) which will come into being on the making of the Judicial Pensions (Fee-Paid Judges) Regulations 2017, and ensure parity of treatment between individuals with entitlement in the existing Judicial Pensions and Retirement Act 1993 scheme (JUPRA) and those with entitlements under the FPJPS in respect of their pension entitlements under the 2015 Regulations.
- To amend a drafting error in regulation 1(3) of the 2015 Regulations.
- To enable the Lord Chancellor to determine the eligibility of particular Scottish fee-paid judicial office holders to join the pension scheme created by the 2015 Regulations.
- To remove negligence as a basis for forfeiture or set off.
- To make a correction to the definition of index adjustment for revaluation purposes.
- To apply full and tapering protection to those judges who were in fee-paid office on 31 March 2012 but who have subsequently been appointed to salaried office.

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 and it is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

4.1 The Judicial Pensions Regulations 2015 (S.I. 2015/182) established a scheme for the payment of pensions and other benefits to members of the judiciary. The Regulations were made under the Public Service Pensions Act 2013 (c.25). These Regulations amend the 2015 Regulations.

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:

6.2 There is currently a judgment 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 these regulations extend the transitional provisions in the 2015 Regulations to an additional class of judicial office holders who would not otherwise benefit from transitional provision 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 to ensure that this class of judicial office holder is not unlawfully treated less favourably by reason of their previous fee-paid/part-time status. If the appeal against the ET judgment in *McCloud v MoJ* is ultimately unsuccessful steps will be taken to remove that incompatibility.

7. Policy background

7.1 The 2015 Regulations were made under the Public Service Pensions Act 2013 to create a career average pension scheme for judicial office holders as part of the government's wider reform of public sector pensions. This is the first time the 2015 regulations have been amended. The amendments made by these regulations include provisions covering 6 key elements.

The first is to take account of the making of the Judicial Pensions (Fee-Paid Judges) Regulations 2017 which will, subject to parliamentary approval, create the FPJPS and ensure parity of treatment between individuals with entitlement in JUPRA and those with entitlements under the FPJPS as required by the judgments of the courts and the Employment Tribunal in the case of *O'Brien v MoJ*. In some circumstances former membership of a closed public sector pension scheme can affect entitlements under the scheme created by the 2015 regulations, or in respect of, a member of that scheme. In order to ensure parity of treatment between those who formerly held salaried office (and were therefore members of JUPRA) and those who formerly held fee-paid office, the references to JUPRA and other pre-existing schemes need to be expanded to include the FPJPS.

7.2 In order to ensure that the pensions payable in respect of members of the 2015 scheme who have already died or retired are calculated by reference to the entitlements which they would have had if the FPJPS had been in force, these regulations provide for such people's pension entitlements to be calculated as though the FPJPS and the consequential amendments to the 2015 scheme made by these regulations had been in force when they died or retired.

7.3 Secondly, the amendment which corrects a drafting error in regulation 1(3) of the 2015 regulations has been made to insert a Schedule number which was accidentally

omitted. Where such an error has been made the department must decide whether to apply the free issue procedure. In this instance the department has decided not to do so. In reaching this decision the department has considered: the length of these regulations and the proportion of the new provisions compared to the single correcting provision; the significance and nature of the new provisions compared to the single correcting provision; and that the new provisions and the correcting provision are aimed at the same audience. The department has sought the view of the S.I Registrar and he has agreed with the department's decision.

7.4 Thirdly, these regulations also include provisions relating to specific Scottish fee-paid judicial offices. In the interest of efficient and cost effective administration the Scottish Government asked that the offices should be included in the 2015 scheme rather than creating a separate pension scheme. The 2017 Regulations enable the Lord Chancellor to determine the eligibility of particular Scottish fee-paid judicial office holders to join the 2015 scheme. This mechanism for determining eligibility is required as the offices could not be added to the 2015 scheme by order under Schedule 1 to the Public Service Pensions Act 2013.The Lord Chancellor intends to make such a determination which, as permitted by section 25 of the Public Service Pensions Act 2013, will have retrospective effect from 1 April 2015.

7.5 In addition to this, following a consultation to address concerns that the provisions in the 2015 regulations which permitted forfeiture as a result of negligence took no account of judicial immunity and the potential that they would infringe judicial independence, the 2017 regulations remove the reference to negligence in the forfeiture provisions of the 2015 scheme. The removal of negligence as a ground for forfeiture applies retrospectively in accordance to the commitment provided in the consultation.

7.6 This instrument also corrects the definition of "index adjustment" to allow for the correct revaluation of members' pensions. The original policy intention, as set out when the regulations were first consulted on, was that the index adjustment applied to an individual's pension account should reflect the change in prices in the previous scheme year. However the draft regulations accompanying the 2014 consultation provided that the index adjustment should reflect the change in prices in "*that [current] scheme year*". This was an error which has left the regulations unworkable – since as currently drafted, the opening balance of a member's pension account is required to be revalued using a figure that would not be available at the time the indexation was to be applied. The amendment has retrospective affect in relation to pensions accrued in 2015/16 and based on the change in the CPI at the rate of -0.1% for 2015/16. The 2016 annual benefit statements provided to each scheme member of the scheme included notification of this change.

7.7 Lastly, these regulations provide full and tapering protection to eligible judges who were holding fee-paid office on 31 March 2012 but who were subsequently appointed to salaried office to be consistent with the full and tapering protection provided for salaried judges.

Consolidation

7.8 No consolidation is applicable to this instrument.

8. Consultation outcome

8.1 The provisions contained in this instrument have been developed over a period of time through various consultation exercises. A joint public consultation on the proposed Judicial Pensions (Fee-Paid Judges) Regulations 2017 and those provisions of these regulations which are consequential on the creation of the FPJPS took place from 15 September to 31 October 2016. 73 responses to the overall consultation were received, with no substantial comments received on the proposed consequential amendments.

8.2 The MoJ consulted separately with the Sheriffs' Association, the Part-time Sheriffs' Association, the Part-time Summary Sheriffs' Association, the Judicial Office for Scotland and the Secretary of State for Scotland on the proposal to add the 4 Scottish fee-paid judicial offices to the 2015 JPS which was requested by the Scottish Government. The consultation ran from 12 October to 9 November 2016. No comments were received.

8.3 The MoJ consulted on the removal of negligence as a basis for forfeiture or set off from 23 March 2015 to 5 May 2015. 12 responses were received focusing primarily on concerns that the relevant provisions of the 2015 regulations were a breach of judicial independence and the definition of negligence was too imprecise.

8.4 The MoJ also consulted on the amendment to the definition of "index adjustment" in the 2015 regulations from 24 January 2017 to 8 February 2017. No material responses were received.

8.1 There was no separate consultation on the application of the full and tapering protection to judges who were fee-paid but who have subsequently been appointed to salaried office but the policy was included in the consultation on the New Judicial Pension Scheme 2015 (16 June 2014 to 8 September 2014). In addition the MoJ published a statement in March 2015 confirming the position on protections for this group. This amendment ensures that the Ministry of Justice meets the legal obligation to treat fee-paid judges no less favourably than their salaried counterparts in respect of full and tapering protection. The full and tapering protections now included in this instrument were not included in the 2015 Regulations as there was no statutory power to do so at the time.

8.2 We have also consulted HM Treasury as two HM Treasury Commissioners are required to consent to the making of this instrument. They are content with the instrument as drafted.

9. Guidance

9.1 The 2015 scheme guide will be updated to reflect the changes and the interaction between the FPJPS and the 2015 scheme. It will be made available on the Judicial Pension Board website: www.gov.uk/government/groups/judicial-pension-board. This is a dedicated source of information for all of the judicial pension schemes.

10. Impact

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

10.2 There is no significant impact on the Ministry of Justice or the public sector as a result of this instrument.

10.3 An Impact Assessment has not 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 FPJPS is created the Judicial Pensions Board will oversee the governance of the fee-paid pension scheme along with that of the 2015 scheme.

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.