EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS AND FEE-PAID JUDGES' PENSION SCHEMES (CONTRIBUTIONS) (AMENDMENT) REGULATIONS 2020

2020 No. 386

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 To make provision for the contributions payable by members of two judicial pension schemes from 1st April 2020. These are:

- the Judicial Pension Scheme 2015 (JPS 2015), established by the Judicial Pensions Regulations 2015 (SI 2015/182) (JPR 2015), and
- the Fee-Paid Judicial Pension Scheme 2017 (FPJPS 2017), established by the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (SI 2017/522) (JPFPJR 2017).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

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

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

5. European Convention on Human Rights

5.1 Robert Buckland 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 and Fee-Paid Judges' Pension Schemes (Contributions) (Amendment) Regulations 2020 are compatible with the Convention rights."

5.2 The JPR 2015 and JPFPJR 2017 contain transitional provisions. The Employment Tribunal (McCloud v MoJ) found in 2017 that those transitional provisions are not lawful under EU equality law and under the Equality Act 2010. The Court of Appeal upheld that judgment in 2018 and the government's application for permission to appeal to the Supreme Court was refused in June 2019. Her Majesty's Government is working to address the discrimination identified by the Court of Appeal and, in any

event, the provisions of this current instrument do not affect those transitional provisions or widen the scope of any potential discrimination.

6. Legislative Context

6.1 These regulations amend the JPR 2015 and JPFPJR 2017. The JPS 2015 was established by the JPR 2015, made under section 3 of the Public Service Pensions Act 2013 (the 2013 Act). The JPS 2015 was implemented in line with wider reforms to public sector pension schemes and is open to both salaried and fee-paid judges. The JPR 2015 came into force on 1st April 2015 and regulation 124 made provision for member contributions for the period from April 2015 to the end of March 2019.

6.2 The FPJPS 2017 was established by the JPFPJR 2017, made under section 18A of the Judicial Pensions and Retirement Act 1993. The FPJPS 2017 was implemented to provide fee-paid judges with a pension following the judgments in the case of O'Brien v MoJ and related cases. The JPFPJR 2017 came into force on 1st April 2017 and regulation 63 made provision for member contributions for the period from April 2017 to end of March 2019. Both the JPR 2015 and JPFPJR 2017 were amended last year (SI 2019/781) to make provision for member contributions from April 2019 to March 2020.

7. Policy background

What is being done and why?

7.1 When the JPS 2015 and FPJPS 2017 were established, the relevant member contribution rates and earning thresholds were fixed for a set period (four years for the JPS 2015, two years for the FPJPS 2017). During this period, the contribution rates remained unchanged and the earning thresholds were uprated yearly, except for the £150,001 band. By the end of this period it was expected that rates and earning thresholds would be reviewed in light of the outcome of an actuarial valuation of both schemes[1].

7.2 In 2019, the part of the valuation assessing the value of pensions to members (the cost control mechanism) was paused due to the uncertain impact of the Court of Appeal's December 2018 judgment in the McCloud case, which found that the transitional protection offered to some judges as part of the 2015 pension reforms was unlawfully discriminatory. This has potentially significant but uncertain impacts for the judicial pension schemes and public service pensions more widely. Ahead of the expiry of the initial period set for contributions in the JPR 2015 and JPFPJR 2017 on 31st March 2019, a short-term measure was made which rolled over the existing member contribution rates and earning thresholds for one year, until 31st March 2020.

7.3 Since then, the Supreme Court has refused the government permission to appeal against the Court of Appeal's decision in McCloud, and the matter has now been remitted to the Employment Tribunal for consideration of how the difference in treatment should be remedied. While work is being progressed to give effect to this decision, and one element of the valuation remains paused (the cost cap mechanism) it

[1] The government conducts periodic actuarial valuations of public service pension schemes under Her Majesty's Treasury Directions. These valuations measure the costs of paying scheme benefits, and will inform the future contributions to be paid so that contributions are commensurate with a scheme's liability to pay benefits as they fall due.

is not possible at this stage to assess with certainty the value of the JPS 2015 and FPJPS 2017.

7.4 After 31st March 2020, the member contributions rates in JPR 2015 and JPFPJR 2017 will expire. It is necessary to put in place further interim arrangements for these two schemes. Failure to make such provisions will have an adverse impact on the effective operation of the schemes.

7.5 This instrument maintains existing contribution rates from 1st April 2020 onwards. This approach will provide greater certainty for affected scheme members by setting out the rates which are expected to apply beyond the 2020-21 financial year.

7.6 This instrument also sets revised earning thresholds (except for the £150,001 salary band) for the year April 2020 to March 2021. As the Consumer Price Index (CPI) rose by 1.7% in the year to September 2019, earning thresholds for contribution rates for members will increase by 1.7% from 1st April 2020. In future years these thresholds will continue to be uprated every year on 1st April using the CPI rate of the previous September. The resultant earning thresholds will be rounded up to the nearest pound. If the CPI rate is negative, or amounts to zero, the earning thresholds will remain unchanged.

7.7 Taking account of the wider public service pensions context, when the Ministry of Justice is in a position to reassess the member contribution rates and earning thresholds, it will bring forward further provisions.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

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

10. Consultation outcome

10.1 Under section 22 of the 2013 Act, member contribution rates in certain schemes are listed as a "protected element". These elements cannot be altered during the protected period (until 1st April 2040) unless the responsible authority, here the Lord Chancellor, consults with the persons (or representatives of those persons) affected with a view to reaching agreement, and an accompanying report is laid before Parliament. The MoJ is making this change to a protected element of the JPS 2015 to ensure that employee contributions can continue to be deducted from 1st April 2020 onwards, and to ensure the effective operation of the overall scheme.

10.2 The Ministry of Justice conducted a consultation from 25th October to 22nd November 2019, targeted at the judiciary and judicial associations, on the proposal to continue with the same level of member contribution rates and to revise the earning thresholds.

10.3 The Ministry of Justice received ten responses to the consultation. The responses came from representative judicial organisations and individual salaried and fee-paid courts and tribunals judges. Of the ten responses received, three agreed with the proposal, one adopted a neutral stance and two responded by raising an issue outside the scope of the consultation. The other four respondents did not support some aspects of the proposal, principally due to wider uncertainty around public sector pensions -

notably the ongoing work to provide a remedy to address the unequal treatment identified in the recently concluded McCloud litigation, and the relevant decision by HM Treasury to pause one element of the actuarial valuation process. Against this backdrop, and until there is greater certainty, we remain of the view that our proposal represents a pragmatic and rational approach to setting contribution rates and thresholds. The MoJ does not consider that the points raised by the respondents represent sufficient cause to not proceed with the proposed approach. We have been clear in our communications with affected judges that we intend to revisit the question of appropriate levels of contribution rates and thresholds once these wider issues have been resolved. These points were addressed in the consultation response issued on 6th January 2020 in addition to individual engagement with the consultees.

10.4 The Lord Chancellor also consulted the Secretary of State for Scotland, as required under paragraph 2(2) of Schedule 2 to the 2013 Act, who is content with the proposal.

11. Guidance

11.1 The Judicial Pensions Board (JPB) has oversight of these pension schemes. The JPB is responsible for assisting the Lord Chancellor as the scheme manager to ensure lawful administration of the schemes. Further information and scheme guides are available on the Judicial Pension Board website: https://www.gov.uk/government/groups/judicial-pension-board#publications.

12. Impact

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

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

12.3 For scheme years from 1st April 2020, we are proposing to retain the member contribution rates and revise the earnings thresholds as detailed in paragraph 7.6 of this memorandum. For both schemes, the cost of accruing pension scheme benefits will remain the same for most members, but will be reduced for some members (as they will pay contributions at a lower rate than they would have done if no changes were made to the earnings thresholds). An Impact Assessment has not been prepared for this instrument.

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 these pensions schemes and keeps this under review as part of the overall Judicial Pension Scheme.

14.2 The regulations do not include a statutory review clause.

15. Contact

15.1 Nadia Anna Mandl at the Ministry of Justice: Telephone: 07547969166 or email: nadia.mandl@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sarah Jennings, Deputy Director for Judicial Pay and Pensions at the Ministry of Justice can confirm that this explanatory memorandum meets the required standard.

15.3 Robert Buckland MP, Lord Chancellor and Secretary of State for Justice can confirm that this explanatory memorandum meets the required standard.