

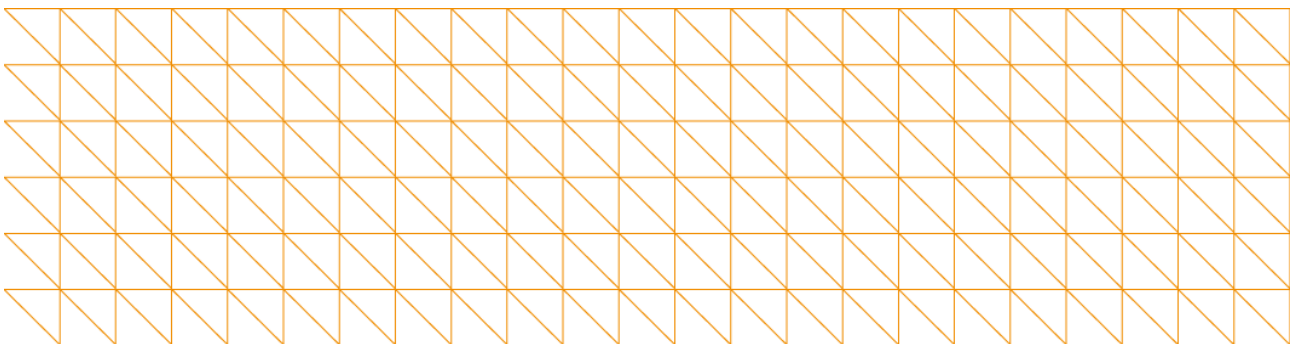


Ministry
of Justice

Fee-paid Judicial Pension Scheme

Response to consultation

23 March 2015





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Response to consultation carried out by the Ministry of Justice.

This information is also available at <https://consult.justice.gov.uk/>

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Introduction and contact details

This document is the post-consultation report for the consultation paper on the design of the Fee-paid Judicial Pension Scheme.

It includes:

- the background to the consultation;
- a summary of the responses to the consultation;
- a detailed response to the specific questions raised; and
- a summary of the key points of the scheme.

Further copies of this report and the consultation paper can be obtained by contacting **Luke Fusi** at the address below:

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This report is also available at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested from judicialpensionreview@justice.gsi.gov.uk.

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Background

1. The consultation paper on the design of the Fee-paid Judicial Pension Scheme (FPJPS) was published on 19 September 2014. It invited comments on the proposed design of the FPJPS.
2. In light of the O'Brien and Miller judgments in respect of fee-paid pension entitlement, the department is implementing a Fee-paid Judicial Pension Scheme (FPJPS) for reckonable fee-paid service from 7 April 2000 to 31 March 2015 for eligible fee-paid judges.
3. The FPJPS is being designed so as to remedy the department's previous failure to provide specified fee-paid judges with a pension entitlement that is comparable to that of their salaried comparators. The Tribunal found that the lack of pension entitlement amounted to discrimination against part-time workers.
4. The pension scheme for eligible fee-paid judges will mirror the current scheme for salaried judges, established by the Judicial Pensions and Retirement Act 1993 (JUPRA), as far as possible, on a pro-rata basis.

Timing

5. As things currently stand, eligible fee-paid judges will qualify to be members of the pension scheme in respect of service from 7 April 2000. The date from which pensions are payable under the scheme and eligibility to join the scheme are subject to litigation and have not been finalised.
6. There are a number of eligible fee-paid judges who were appointed after 7 April 2000. The outcome of the litigation will not affect their entitlement to a pension for their eligible fee-paid service after that date. To ensure these judges are not without pension provision longer than is necessary, the department will establish the FPJPS as soon as possible.
7. The department will, by regulations, establish the FPJPS for eligible fee-paid judges in England and Wales, Scotland and Northern Ireland. These regulations will be in alignment with this consultation response.
8. From 1 April 2015, serving judges will join the Judicial Pension Scheme 2015 in respect of both salaried and fee-paid service, subject to any applicable transitional provisions.

Consultation

9. The department consulted on its proposed design of the FPJPS to allow potential scheme members the opportunity to comment on the proposed method through which the department aimed to achieve this mirrored pension scheme for eligible fee-paid judges.
10. This was a formal 12-week consultation, open to all members of the judiciary, and members of the public.

11. The consultation closed on 12 December 2014 and this report summarises the responses. This report sets out how the consultation process influenced the final shape of the department's proposals for the establishment of the FPJPS.
12. The department received 51 responses in response to this consultation. The majority of these (51%) were submitted by either active or retired fee-paid judges. In addition to this, 8 responses were received from associations representing fee-paid judges.
13. When referencing specific responses, the report highlights whether these came from an association or Judge or otherwise. We have provided a breakdown of individual responses in the table below, and a list of respondents is provided at Annex A.

<i>Breakdown of individual responses</i>	
Group	Number of individual responses
Heads of Jurisdiction	4
Fee-paid Judges	26
Salaried Judges	9
Judicial or Legal Associations	8
Other	4
Total	51

14. This consultation response summarises the issues raised by respondents, along with the department's position on each of these areas. The document then sets out the steps the department now intends to take to implement the FPJPS.

Summary of responses

15. This section summarises the responses the department received to the consultation by theme and sets out the department's position on each of these issues.

Eligibility under the scheme

16. The schedule of fee-paid offices determined as eligible for a pension has evolved over the past year in light of ongoing litigation. To aid consultees, a schedule of eligible fee-paid judicial offices as at 19 September 2014 was provided alongside this consultation. As highlighted within the schedule, and in the consultation document itself, the list of eligible offices was subject to change.
17. Of the 51 responses, 16% commented on the determination of eligibility for a pension under the scheme.
18. One respondent noted:
"This is for legal office holders only. Medical and other specialist office holders are not included. This appears to be unfair for working the same commitment."
19. A lay member of Employment Tribunal and Justice of the Peace stated:
"My responsibilities are the same as the Employment Judge in decision making, similarly I perform the same role as a District judge in the adult court. In the Family Court I am referred to as a family judge."
20. A judicial association commented:
"The provisions [on combined accrual of pension benefits for fee-paid and salaried service] should apply to salaried judges who were in post on the 1 April 2012 and all "pipeline" judges... If this amendment is not made it is considered that there would be discrimination against serving salaried judges post the O'Brien decision."

Government position

21. The Government is designing FPJPS with the intention of providing a pension to those fee-paid judges who have brought (or could bring) a successful Tribunal claim for less favourable treatment under the part-time worker regulations, in relation to their lack of pension entitlement. Therefore the outcome of litigation determines eligibility for the scheme.
22. An element of a successful Tribunal claim is that the fee-paid judge can identify a salaried judge who was engaged in the same or broadly similar work as the claimant and who had a pension entitlement. A schedule of fee-paid judicial offices determined or agreed to be eligible for a pension was published in the Annex to the consultation document. This list has not yet been finalised and remains subject to change pending ongoing litigation. Any office that is determined as eligible for a pension will be able to accrue pension benefits under this scheme.
23. A copy of the updated schedule of fee-paid offices that are determined or agreed to be eligible for a pension has been included at Annex B to this consultation response and

now represents the eligible offices as at 2 March 2015. This schedule of fee-paid judicial offices remains subject to change pending ongoing litigation. To date, the Employment Tribunal has found that the following office holders are not entitled to a pension:

- medical members in the social entitlement, mental health and war pensions jurisdictions.
 - valuer members and professional members in the residential property jurisdiction;
 - and lay members in the employment jurisdiction.
24. For an individual to bring a successful part-time worker pension claim in relation to a particular judicial office, they must have made an eligible claim for a pension upon leaving that fee-paid office. Under the regulations, claims must have been made within three months of leaving the fee-paid office unless it is just and equitable to extend time. Judicial office holders will be admitted to FPJPS in relation to a particular office if they made a claim within three months of appointment to a particular office terminating, if they would have been in time to make such a claim on 1 March 2013 (even if they did not do so), or if the Tribunal decides that it would be just and equitable to extend time in their circumstances. Irrespective of a former fee-paid judge's career path after leaving a particular fee-paid office, if they did not or could not make an eligible claim, they are not eligible for a fee-paid pension under this scheme in relation to that office. It should be noted that litigation on time limits is still ongoing. On 5 April 2013, the department announced a moratorium in fee-paid judicial pension cases. The effect of the moratorium is that if a person left an eligible fee-paid judicial office on or after 2 December they are treated as if they had issued a pension related claim, and that claim had been stayed.
25. The Government intends to conduct a further consultation on the draft regulations for FPJPS and this consultation will also include the list of salaried comparators for eligible fee-paid members.

Approach to legislative establishment

26. The FPJPS is designed so as to remedy the failure to provide eligible fee-paid judicial office holders with a pension entitlement that is comparable to that of their salaried comparators. The scheme is to mirror the current scheme for salaried judges, established by the Judicial Pensions and Retirement Act 1993 (JUPRA), as far as possible, on a pro-rata basis.
27. To achieve this, the department has used the Pension Schemes Act 2015 to insert new Part 1A in JUPRA, which confers a power on the Lord Chancellor to create a scheme for members of the fee-paid judiciary.
28. This route to establishment would allow pensions to be paid to fee-paid judges in line with the benefits applicable to the salaried comparators, under JUPRA.
29. 43% of the 51 respondents commented on the approach proposed by the department to remedy the failure to provide pensions for fee-paid judges, ensuring equal treatment.

30. A Judge commented:

“The proposed new scheme falls far short of the legal requirement either to include part time fee paid judges in the scheme established by the 1993 Act or to establish a scheme which would mirror the provisions of the 1993 Act scheme with an interface to transfer service in the new scheme to the 1993 Act scheme when a judge moves from part time fee paid to full or part time salaried service.”

31. Another Judge stated:

“It is not clear why the government chose to create a new scheme rather than extend JUPRA to fee-paid judges by amending existing legislation.”

Government position

32. Eligible fee-paid judges are entitled under the regulations to a pension that is pro rata the pension of their salaried comparator, unless that would be inappropriate. The Tribunal has stayed the pension claims whilst the Government designs a pension scheme that meets this requirement. There is no obligation on the Government to use any particular legislative mechanism to achieve this objective.
33. The department’s preferred approach in establishing the FPJPS was to establish a separate scheme for fee-paid judges under JUPRA. The department is committed to establishing a scheme for fee-paid judges in a timely manner, particularly given that a large number of fee-paid judges have already been without a pension for a significant period of time. The department chose its proposed route to legislative establishment as it was the most straightforward and efficient possible option.
34. After careful consideration of the consultation responses, the department acknowledges that it would be possible to amend JUPRA to allow fee-paid judges to accrue benefits under the same scheme as the salaried judiciary. However, amending JUPRA in this way would require a complex and lengthy legislative process, which would result in further delay before serving and former judges would be given the pension to which they are entitled for their fee-paid service.
35. Regulations made under the power in new Part 1A of JUPRA will be subject to the affirmative regulations procedure to ensure a greater degree of Parliamentary scrutiny than the negative procedure.

Portability of transitional protection

36. Judges who are eligible for a pension under the FPJPS or JUPRA may be eligible for transitional protection when the NJPS is introduced on 1 April 2015. The details of eligibility for transitional protection were set out in the June 2014 consultation on the NJPS, and subsequently in the department’s response to that consultation, published in November 2014.
37. 12% of respondents to the consultation on the FPJPS commented on the eligibility requirements for transitional protection, with particular reference to former fee-paid judges who have subsequently been appointed to salaried judicial office. The department’s position on eligibility for transitional protection was covered in detail in the response to the consultation on the NJPS, but the position is repeated here for completeness.

Government position

38. To ensure no less favourable treatment, transitional protection will apply to the fee-paid judiciary in exactly the same manner as to the salaried judiciary. As such, all fee-paid judges who are eligible to join the FPJPS, and were within ten years of their normal pension age of 65 as at 1 April 2012, will see no change in when they can retire, nor any decrease in the amount of pension they will receive at retirement.
39. In addition to this, all fee-paid judges eligible for a pension in respect of fee-paid service who were within 10 and 13 ½ years of their normal pension age as at 1 April 2012 will be eligible for 'tapering protection', which will allow them to continue accruing benefits under the FPJPS for an age-related period beyond 1 April 2015.
40. If a judge is eligible for a pension in respect of fee-paid service, and qualifies for transitional protection in respect of that service, they will be eligible for transitional protection. This is true irrespective of separate past or future fee-paid appointments that judge may have, subject to the five-year eligibility requirement, detailed in the response on the NJPS. Where a judge has moved between two offices that are both eligible for a pension, this will not affect their entitlement to a fee-paid pension.
41. If a judge is eligible for transitional protection, it is possible for this to be 'ported' between judicial pension schemes. However, in the case of fee-paid judiciary, a judge's fee-paid service must be pensionable in order for it to attract transitional protection.
42. Any judge who is:
- eligible for a pension in respect of fee-paid service,
 - qualifies for transitional protection in respect of that service, and
 - has subsequently been appointed to salaried office,
- will be treated as a protected member of the salaried scheme.
43. Eligibility for a fee-paid pension is determined by reference to the following criteria:
- Left eligible fee-paid office on or after 2 December 2012, and as such covered by the Lord Chancellor's moratorium on fee-paid pension claims dated 5 April 2013; or
 - Left eligible fee-paid office before 2 December 2012 and made a legal claim for a pension within three months of leaving that fee-paid office.
44. If a judge does not meet the above criteria, they will not be eligible for a fee-paid pension and their fee-paid service will not attract transitional protection.
45. Therefore, if a judge was sitting in an eligible fee-paid office as at 1 April 2012 and was subsequently appointed to salaried office between 1 April 2012 and 2 December 2012 and did not make a legal claim for a pension within three months of leaving fee-paid office, they will not be eligible for a fee-paid pension. Irrespective of their age, the judge's fee-paid service will not attract transitional protection.
46. The Government acknowledges the points raised by respondents in relation to this matter. Whether or not judges were treated unlawfully by being denied a fee-paid pension is in issue in the litigation brought against the MoJ. The MoJ announced a

moratorium in fee-paid judicial cases on 5 April 2013, and the effect of this was that any Judge who left fee-paid office from 2 December 2012 onwards would be treated as if they had issued a pension related claim, and that claim had been stayed.

47. Judges who left fee-paid service from 2 December 2012 onwards, and who meet the age criteria for transitional protection, will attract protection for this fee-paid service. The same is true for all judges who left fee-paid service before 2 December 2012, who meet the age criteria for transitional protection and who made a legal claim within three months of leaving fee-paid office. If a judge in this position is subsequently appointed to salaried office, they will be treated as a protected member of the salaried scheme. This will be subject to the five-year time limitation on transitional protection. This means that if a judge leaves active service for more than five years, their transitional protection will no longer be valid upon their return to office.
48. The Government's position on the determination of judges being 'out of time' for purposes of pension claims is subject to ongoing litigation, and any change in this will impact on the provisions for the portability of transitional protection in this respect.

Calculation of the pension, including reckonable service

49. In the consultation document, the department outlined its proposal for the calculation of a pension under the scheme. The proposed method was designed to mirror the calculation of a pension under the salaried scheme as much as is possible. Under JUPRA, the annual pension payment is calculated with respect to the pensionable pay of the judge at retirement. To ensure no less favourable treatment, the principle of the calculation will also apply in respect of fee-paid pensions under the FPJPS.
50. All reckonable fee-paid service from 7 April 2000 up until 31 March 2015 will be pensioned under the FPJPS, except where transitional provisions apply. A judge's reckonable service was defined as the total number of reckonable pensionable days in office.
51. 31% of respondents to the consultation commented on the department's proposals to calculate a member's pension. These comments primarily focused on the proposed calculation method, and the department's approach to the definition of reckonable service.
52. One respondent commented that:
"The calculations in the worked example are unnecessarily complicated."
53. A Judge also noted:
"It should be expressly stated that "reckonable pensionable days" includes each day sitting hearing oral and/or paper cases, interlocutory days, days or parts of days spent writing statements of reasons, training days, days when entitled to and paid sick pay, and days when entitled to and paid holiday pay."
54. Another respondent commented:
"It is not stated explicitly whether this includes service before 7 April 2000."

55. A judicial association commented:

“Paragraphs 25 and 69 [that fee-paid judges will accrue separate pension entitlements in respect of each pensionable fee-paid office in which they sit] describe a scheme which does not properly reflect JUPRA and which does not fully implement the equal treatment principle.”

56. A judicial association also added:

“Definition will be required to clarify what is an appointment and if this is different if the appointment is by way of JAC competition, assignment between chambers or courts or “cross-ticketing” within a chamber or court.”

Government position

57. The calculation proposed by the department in this consultation is in line with the approach agreed by the Tribunal. Whilst the department acknowledges that it may be possible to reach the same outcome utilising a different method, it considers that it would be appropriate to remain in line with the approach agreed by the Tribunal to ensure that no less favourable treatment is witnessed.

Reckonable service

58. The pension calculation includes all reckonable service accrued throughout a career, or from 7 April 2000, whichever is the later. The department can confirm that all time that is determined as pensionable (be it sitting days, training days, writing up days etc...) will be treated as reckonable pensionable days.

Final Salary Link for fee-paid service to be pensioned at the higher salaried rate

59. The proposed design of the FPJPS, establishing a separate scheme for fee-paid judges under JUPRA was designed to ensure that fee-paid judges would not be subject to any less favourable treatment in respect of the pension provision of their salaried comparators.
60. As was proposed in the consultation, the department's approach remains that a fee-paid judge who is subsequently appointed to salaried office should receive two pension payments on retirement: one in respect of their fee-paid service, and one in respect of their salaried service.
61. However, in light of the responses to this consultation, the department acknowledges that in the instance of a fee-paid judge subsequently being appointed to a salaried office at a higher salary grouping, the provision of two separate pension payments in this way is not sufficient to meet its legal requirements.
62. In light of this, the department is proposing to establish a final salary link in FPJPS, so that the Full Time Equivalent (FTE) salary used to calculate the pension for fee-paid service will be the salary from the later grouping, rather than the FTE salary paid to the judge's salaried comparator for that fee-paid office.
63. By way of example, a person (P) serves for 3 years as a Deputy District Judge before being appointed as a Recorder for the following 3 years. P is then appointed as a Circuit Judge. Under the new proposal, a final salary link will ensure that the pension payable under FPJPS in respect of the 3 years service as a DDJ (as well as the 3

years' service as a Recorder and his later service as a Circuit Judge) will be calculated using a Circuit Judge's salary as at the date of retirement.

64. The same applies where a fee-paid Judge is subsequently appointed to a fee-paid office at a higher level of remuneration. Using the example in the previous paragraph, if P retired when he was a Recorder (without ever having a salaried appointment), all of his service as a DDJ and as a Recorder would be calculated using a Circuit Judge's salary. This is because it is established that a Recorder's full-time comparable worker is a Circuit Judge and therefore a Recorder's pension is calculated by reference to the final salary of a Circuit Judge.

Pensions payable to those holding more than one fee-paid office

65. Fee-paid appointments are treated individually as they can, and often are, held concurrently by judges, a necessary distinction from salaried judges. Salaried judges can sit in different offices during a given year, for instance, a Circuit Judge may sometimes sit as a High Court Judge. However, the judge would only ever be remunerated as a Circuit Judge.
66. Fee-paid judges can sit in more than one fee-paid office concurrently. As such, the situation is necessarily different from the salaried judiciary. Each distinct eligible fee-paid office in which a member sits concurrently will be treated separately and pensioned at its respective levels. This will eliminate the possibility of under or over payment of pensions for fee-paid judges who sit in more than one office at any given time.
67. However, a fee-paid judge who remains only in fee-paid office, who retains multiple offices, for example a Deputy District Judge who also sits as a Recorder, will not benefit from the final salary link for periods where offices are held concurrently. This is because there is no comparable situation for salaried judges. Although salaried judges can be deployed to sit in different jurisdictions, including some occupied by judges on higher salaries, they do not get an uplift in pay or pension when they do so.

20-year limit to reckonable service and contributions

68. The FPJPS has been designed to mirror the provisions in the equivalent scheme for salaried judges. As such, there is a 20-year limit upon reckonable service for the purposes of calculating a pension. If a judge was to have mixed service in both the FPJPS and JUPRA, the 20-year limit will be applicable to the combined service under both schemes.
69. Once a judge has reached the 20-year cap in reckonable service, they will no longer accrue future pension benefits.
70. In response to this consultation, 24% of the total responses offered comment on the approach to the 20-year limit on accrual of pension benefits.
71. One judge commented:
- "It is not clear how [the 20-year cap on accrual] impacts on member contributions and, in particular, whether a judge... would be required to pay 20 years worth of contributions to JUPRA in spite of [already] having paid for the 4 years under FPJPS."*

72. Another judge commented:

“Any arrangement which provides for separate periods of contribution liability for [fee-paid judges] and salaried judges would discriminate unlawfully against those who move from part time fee paid to salaried office.”

Government position

73. As stated in the consultation document, accrued benefits under the FPJPS will be capped at 20-years of reckonable service. After a judge has reached this limit, he or she will no longer be able to accrue additional pension benefits. In line with this, after a judge has paid contributions up to the 20-year limit, they will no longer be charged pension contributions. This is in line with the approach for salaried judges.
74. To clarify, if in the case of a judge having mixed service between the FPJPS and JUPRA schemes, once their combined reckonable service has reached the 20-year limit, they will cease accruing pension benefits, and in addition, will cease paying member contributions. Further, a judge can obtain the maximum 20 years of reckonable service over a total period of more than 20 years e.g. by sitting at half the number of days a salaried judge would over a period of 40 years.

Recovery of Historical Member contributions

75. At present, the FPJPS will cover pensionable service for eligible fee-paid judges dating back to 7 April 2000. When calculating an eligible fee-paid judge’s pension entitlement over this period, the department will have to consider the recovery of the historical member contributions. These are due because the eligible fee-paid judge is entitled to the same benefits as their full-time comparator, on a pro-rata basis.
76. Member contributions have been paid by salaried judges in respect of pension benefits for dependants throughout the period since 7 April 2000, and are equal to 1.8% of pensionable pay. In addition to this, personal pension contributions have been paid by judges since 1 April 2012, and these have risen on a staggered basis up to 3.2% of pensionable pay by 1 April 2014. The contributions recovered from fee-paid judges will be in line with the rates paid by the salaried judiciary over the equivalent period.
77. The department proposed to recover historical member contributions by subtraction from the member’s automatic lump sum upon retirement. However, another option proposed in the consultation was to allow members to pay an additional contribution rate in the future to repay the deficit, and preserve their lump sums on retirement.
78. The approach to the recovery of historical member contributions was one of the areas upon which the department specifically asked for comment in the consultation. 35% of the respondents offered comments on this topic, and the majority were content with the department’s approach to this issue.
79. One respondent noted:
- “I feel a third option should be available for the payment of historic member contributions... namely for a member of the new scheme to be able to pay a lump sum on the creation of the scheme, to clear historic member contributions, either in part or in full.”*

80. A judicial association noted:

"We have no strong preference because it will depend on individual circumstances"

81. In addition, another respondent commented:

"I note that at paragraphs 52-55 the consultation refers to recovering past contributions. It does not, however, mention the National Insurance differences between the fee paid and salary related judges (the latter would have paid reduced rate National Insurance and been contracted out of the State Second Pension). Is the intention to try to remedy this difference or simply to accept it?"

Government position

82. The department remains of the opinion that the most convenient, and beneficial approach for prospective members would be to allow the extent of the historical contributions to be offset against the lump sum that would be payable on retirement. The value of the contributions is not to be indexed against inflation, so there will be no financial impact dependent on the time of the payment.

83. However, given the responses received that outlined alternate proposals, the department is minded to ensure as much flexibility as is practical in the payment of these historical contributions. Upon the launch of the pension scheme, all prospective members will be provided the option to pay a lump sum payment at the outset to preserve their lump sum, to pay higher member contributions to cover the cost, or to have the value of their deficit subtracted from the automatic lump sum that will be payable on retirement.

84. The value of the member contributions recovered will be as set out in the schedule included in the consultation document. This is in line with the rates of member contributions paid by salaried judges over the period.

85. In respect of the issue raised on the status of National Insurance Contributions (NICs) over the period of contributions to be recovered, the department can confirm, following advice from Her Majesty's Revenue and Customs, that if a judge retrospectively joins the scheme from a point after April 2000 then the NICs will have to be changed from contracted-in to contracted-out. As the rate of contracted-out NICs is less than the rates for contracted-in, this change will result in a refund of National Insurance payments to both the member and the employer, and the resulting refund will be the difference between the two rates.

86. Judges should note that the change to the rate of NICs paid will reduce the level of State Pension paid. For any judges already receiving their State Pension, their rates of pension have been determined using the higher rate of contracted in NIC. If they decide to join the scheme, their State Pensions will have been overpaid, and any overpayments will be recovered by HMRC.

Historical JAVCS contributions

87. Members of JUPRA are able to top-up their benefits through tax-registered 'Added Voluntary Contribution' arrangements, known as the Judicial Added Voluntary Contribution Scheme (JAVCS). In line with this, the FPJPS will include arrangements for the JAVCS.

88. The limit on annual contributions in the JAVCS for salaried judges is 15% of pension-capped pensionable earnings, inclusive of dependent pension contributions. To compensate for the fact that prospective fee-paid scheme members have not been able to pay into the scheme since their appointment until the establishment of the scheme, the department proposed to allow new members to contribute as much of their earnings as is desired during the first 12 months of the scheme's establishment.
89. This proposal was one of the specific areas upon which the department requested comment from respondents in the consultation. 24% of the respondents provided comments on this area.
90. One judge commented that due to HMRC requirements on the scheme:
"The max contributions for 2015-16 will be very small compared to the historic position for which this 12 month window is being offered as compensation"
91. Five other respondents noted similar issues, with one adding:
"It would seem sensible to spread this over at least 2 tax years to reduce the likelihood that the annual allowance will be breached."
92. A judicial association commented that:
"We welcome this provision save that the 12 month time limit for making additional contributions is not generous and some judges may struggle to take advantage of this provision... We would suggest that a 5-year time limit would be more appropriate."

Government position

93. After consideration of the points raised in response to this consultation, the department accepts that due to the potential adverse tax consequences of only allowing a 12-month period for contributions may disadvantage some potential members who wish to contribute a large amount to the JAVCS from the outset of the scheme. In line with this, the department is content to allow an unlimited proportion of earnings to be contributed into the JAVCS over the first three years of the scheme's establishment.

Calculation of member contributions

94. Under JUPRA, up until 31 March 2015, all salaried judges have been required to pay the same rate of contributions. As part of the changes to judicial pension arrangements from 1 April 2015, the department is implementing a contribution structure for salaried judges that fluctuate based on annual earnings.
95. As part of a recent consultation on the NJPS, the department asked consultees their views on the method of calculating member contributions for those judges who do not sit on a full time basis. This was to be either the 'actual earnings' approach, which would set contribution rates against the earnings actually earned in a year, or the whole time equivalent approach, which would set contribution rates against the annual earnings of that judge's salaried comparator.
96. In response to this consultation, 12% of respondents commented on the method of calculating member contributions.

97. One Judge stated:

"It would be grossly unfair to fee-paid judges (and salaried part-time judges) to base their contribution level on the salary of the full-time equivalent."

98. Another Judge commented:

"If the contribution percentage is the same for fee paid judges irrespective of their earnings, this will be unfair to the fee paid judges."

Government position

99. For eligible fee-paid service up to 31 March 2015, contributions are to be in line with the rate paid by salaried judges.

100. Under the JUPRA scheme for salaried judges, Judges working on a salaried part-time basis pay the same rate of member contributions as their full-time counterparts, however, these are set against their reduced salary. In respect of the recovery of historical contributions for fee-paid judges under the FPJPS, this policy will also be applied.

101. For service beyond 2015, under all schemes for salaried judges, the department is implementing a contribution scale that is based on the annual rate of pensionable earnings. The rates that members will have to contribute under the FPJPS for service beyond 1 April 2015 were outlined in the Annex to this consultation.

102. As was stated in the response to the consultation on the New Judicial Pension Scheme, published 21 November 2014, the department is minded to adopt the actual earnings approach to member contributions under the NJPS. This will also be the case under JUPRA, and the FPJPS. All member contributions for fee-paid judges will be set against their individual annual rate of pensionable earnings. As such, members will pay contributions in line with the pensionable earnings actually earned by the individual, rather than a notional figure in line with the earnings of their salaried comparator.

Medical retirement enhancement

103. Under the JUPRA scheme for salaried judges, a scheme member who retires at any time after appointment for reasons of ill health is entitled to the immediate payment of a pension and lump sum based on his or her actual service. In addition to this, if the scheme member has not reached his or her 65th birthday before the date of retirement, the length of service upon which the pension is calculated will be enhanced by a period equal in length to one-half of the time remaining between the day after the date of retirement and the 65th birthday.

104. The department proposed to use the average service for the past 3 years to calculate the enhancement. This is different from JUPRA due to the inherent unpredictability of year-to-year fee-paid service. To reflect this point, it was proposed to take the average annual service of the last three years, and then give half of that average for each year between the member's date of retirement and their 65th birthday.

105. 27% of the respondents to this consultation commented on the proposals for medical retirement enhancement under the FPJPS.

106. One Judge stated:

“The best of the last 3 years remains appropriate”

107. However, there was some opposition to the proposed approach, with one Judge commenting:

“If the last 3 years of service for the fee paid member is unrepresentative of the member’s total service, especially if it has been less per annum than earlier service, would it be fairer for any enhancement to be based on an average of total past service?”

108. Another Judge also stated:

“I would prefer enhancement calculated on the basis of my 9 [total] years of service.”

Government position

109. The department proposed to use the average of the last three years, instead of only the last 12 months on principles of fairness. It would not be fair, for instance, to use only the service in the last 12 months to extrapolate forward for enhancement purposes. Especially in respect of medical retirement, as judges in this position may be more likely to sit less frequently up until the point of retirement.

110. 10% of respondents to this consultation noted that it may be fairer to use the average service over a longer period, back to appointment, as the enhancement factor rather than only using the last three years.

111. As mentioned above, the department proposed to use the average of the last three years on principles of fairness. After further consideration of this point, reflecting on the responses of consultees, the department is happy to use the average service of a judge’s career, rather than the last three years, as the enhancement factor.

Judicial Added Years Scheme

112. The Judicial Added Years Scheme (JAYS) provided judges with the opportunity to purchase added years (or part years) of qualifying service in judicial office. The benefits secured under JAYS are paid as part of the judicial pension.

113. By purchasing added years, a judge will, therefore, increase the length of service by reference to which the level of his or her personal pension is calculated at retirement, and this will accordingly increase the level of the lump sum on retirement, and the rate of any contingent surviving spouses’ and children’s pensions payable under the scheme.

114. In response to this consultation, two consultees commented on the department’s approach to JAYS. One respondent queried the eligibility to purchase JAYS, in particular with reference to judges who may have already retired from service. Another respondent commented:

“At what cost will the lump sum payments [to] purchase years or part years given the changes in daily fee rates over the years?”

Government position

115. Taking into account comments made, the only requirement for a person wishing to purchase JAYS is that they must be an active member of the FPJPS upon its establishment, and have been in service on or before 5 April 2006. JAYS may be purchased upon the establishment of the scheme.
116. With regards to the calculation of costs for the purchase of JAYS, this is to be assessed by the scheme actuary, the Government Actuary's Department. The value of the JAYS will be calculated in a manner that is cost neutral to the scheme and in line with pensionable earnings received by the member.

Equalities impacts

117. The FPJPS has been designed to mirror the equivalent scheme for salaried judges as far as is possible. This scheme is designed to remedy the department's previous failure to provide specified fee-paid judicial office holders with a pension entitlement that is comparable to their salaried comparators.
118. At present, this scheme will apply to all eligible fee-paid judicial office holders in respect of reckonable fee-paid service from 7 April 2000 until 31 March 2015, except where transitional provisions apply. This is to ensure equal treatment with salaried judges. The eligibility of specified judicial offices for a pension under this scheme is being determined in the course of ongoing litigation.
119. The transitional provisions referenced above are to be applied as part of the implementation of the NJPS, which will be open to both salaried and eligible fee-paid judicial office holders from 1 April 2015. The transitional provisions ensure that those closest to retirement will not be affected by the reforms to public service pension arrangements, and is being applied equally across all reformed public service schemes, including the scheme for the salaried judiciary. To ensure no less favourable treatment for fee-paid Judges, this is to be applied in the same manner as for the salaried judiciary.
120. As part of the consultation on the design of the FPJPS, the department specifically asked for comment on any equalities issues that will result in individual groups being disproportionately affected by the implementation of this scheme.

121. 27% of respondents provided comment on potential equalities impacts.

122. One Judge commented:

"Yes clearly. There is a far better representation of younger judges, women, and those from the BME community in the fee paid judiciary in comparison with the salaried judiciary (particularly the senior salaried judiciary). Any less favourable treatment in comparison with the JUPRA scheme (whose benefits have mostly accrued to white, older, privately educated barristers) is indirectly discriminatory (as well as having been historical less favourable treatment on by reason of part-time worker status.)"

123. One respondent commented:

"Yes. Non-legal judicial office holders will be at a disadvantage."

124. In addition, another respondent stated:

“We are concerned that from 1 April 2015, serving judicial office holders including fee paid judges will be transferred to the New Judicial Pension scheme, based upon their age as at 1 April 2012. This appears to conflict with age discrimination legislation. We submit that all fee paid judges should remain in the FPJPS and only new appointees from 1 April 2015 should be transferred to the NJP[S].”

Government position

125. The FPJPS has been designed to mirror the scheme for salaried judges as far as is possible, and the department does not consider that any fee-paid judges, of any background, are to be treated less favourably than their salaried counterparts by virtue of the implementation of this scheme.

126. The eligibility of scheme members to bring claims has been established in the course of ongoing litigation proceedings. At present, non-legal judicial office holders have not been determined as eligible to bring claims and MOJ does not propose to treat them as eligible for a pension under this scheme. Any judicial office holders that are determined as eligible for a pension in respect of their fee-paid service will be able to accrue pension benefits under this scheme, irrespective of their background.

127. In respect of the implementation of the NJPS, and the application of transitional protection, and the equalities impacts therein, this was covered in the department’s response to the consultation on the NJPS that was published on 21 November 2014, and this is available at the below link.

<https://consult.justice.gov.uk/digital-communications/judicial-pension-scheme-2015-consultation>

128. In addition, the department in this response outlined its position with respect of the setting of member contributions using the actual earnings approach. The department does not consider this policy results in any equalities impacts.

129. The department takes seriously its legal duties in respect of equalities and equal opportunities and is committed to ensuring no less favourable treatment based on background. The department will continue to monitor this in respect of the implementation of the Fee-paid Judicial Pension Scheme.

Conclusion and next steps

130. The department has provisions within the Pension Schemes Act 2015 to allow the Fee-paid Judicial Pension Scheme (FPJPS) to be created in line with the proposed approach in this consultation response.

131. The department will take steps to lay regulations to bring the Fee-paid Judicial Pension Scheme into effect. These regulations will be laid under the Judicial Pensions and Retirement Act 1993, subject to the affirmative resolution procedure.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

Annex A – List of respondents

Lord Chief Justice of England and Wales

Senior President of Tribunals

Lord President of the Court of Session

Lord Chief Justice Northern Ireland

Association of Women Solicitors

Bar Council of England and Wales

Council of Appeal Tribunal Judges – Associate Members' Sub-Committee

Council of Circuit Judges

Council of Employment Judges

Council of Immigration Judges

Forum of Tribunal Associations

United Kingdom Association of Part Time Judges

Annex B – Eligible Fee-paid Judicial Offices (as of 2 March 2015)

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

Judicial Offices – England & Wales, Scotland and Northern Ireland

Lord Justice of Appeal (Sitting in Retirement)

High Court Judge (Sitting in Retirement)

Deputy High Court Judge

Deputy District Judge of the Principal Registry of the Family Division

Deputy Supreme Court Master/Registrar

Deputy Circuit Judge

Deputy Circuit Judge (Sitting in Retirement)

Recorder

Deputy District Judge

Deputy District Judge Magistrates' Court

Temporary Assistant Judge Advocate General

Temporary High Court Judge

Deputy Statutory Officer

Deputy County Court Judge

Deputy Social Security and Child Support Commissioners for Northern Ireland

Deputy Coroner (Northern Ireland)

First-tier Tribunal Judge (where a legal qualification is a requirement of appointment)

Upper Tribunal Judge (where a legal qualification is a requirement of appointment)

Surveyor member (Chair only) Upper Tribunal Lands

Judge Employment Tribunal (where a legal qualification is a requirement of appointment)

Legal Chair Competition Appeal Tribunal

Legal Chair Reserve Forces Appeal Tribunal

Deputy Chair Copyright Tribunal

Member (Chair only) First-tier Tribunal (Property Chamber) Residential Property

Legal Chair Residential Property Tribunal Wales

Judge Mental Health Review Tribunal Wales (where a legal qualification is a requirement of appointment)

Judge Special Educational Needs Tribunal Wales (where a legal qualification is a requirement of appointment)

Part-time Sheriff

Appointed Person Appeal Tribunal

Legal Chair Industrial and Fair Employment Tribunals (Northern Ireland)

Legal Chair Appeals Tribunal Service (Northern Ireland)

Annex C – Summary of Key Points of the FPJPS

FPJPS is being designed so as to remedy the failure to provide specified fee-paid judges with a pension that is comparable to that of their salaried comparators. FPJPS will mirror the pension scheme for salaried judges, established by the Judicial Pensions and Retirement Act 1993 (JUPRA), on a pro-rata basis, as far as possible.

The key elements of both JUPRA and FPJPS are as follows:

- Provided a scheme member retires having completed at least 5 years' service and is aged at least 65 a pension is immediately payable.
- A pension scheme design based on a 'final salary' model.
- Automatic lump sum on retirement at a rate of 2.25 times annual pension.
- Service award payment on retirement equal to the tax paid on the automatic lump sum payment.
- 20-year restriction on the number of reckonable accruing years in service.
- An annual accrual rate of 2.50% of pensionable earnings (1/40).
- Revaluation of deferred and retired scheme members' benefits in line with the index set under the Pensions Increase Act 1971 (currently in line with CPI).
- Normal Pension Age of 65 years of age.
- Scheme is not registered for tax purposes.
- Pension for surviving spouses and surviving civil partners of 50% of member's pension and pensions for children.

Due to the specific nature of fee-paid service the following elements of FPJPS differ from JUPRA.

- Final salary link in FPJPS- for a fee-paid judge who then is subsequently appointed to salaried office, this latter office will be used to calculate the pension for fee-paid service.
- However, fee-paid judges who remain only in fee-paid office, who retain multiple offices, for example a Deputy District Judge who also sits as a Recorder, cannot have the higher paid office as the final salary link. This is because there is no comparable situation for salaried judges.
- Historic contributions will be recovered by a variety of means; by a lump sum at the outset; by paying higher contributions; or have the value of the deficit subtracted from the automatic lump sum that will be payable on retirement.
- FPJPS will allow an unlimited proportion of earnings to be contributed into the Judicial Added Voluntary Contribution Scheme (JAVCS) over the first three years of the schemes establishment.
- The medical retirement enhancement factor will be the average service of a judge's career rather than the last three years.
- Eligible members in post pre-April 2006 will be able to purchase Judicial Added Years (JAYS). Lump sum payments may be paid over the first 12 months.

- Pensionable pay is calculated by using salaried comparators multiplied by reckonable service divided by service credits.

Annex D – Equality Statement

Policy objective

1. The objective is to deliver a Fee-paid Judicial Pension Scheme as a legal remedy in light of the O'Brien and Miller rulings. This Equality Statement considers the impact of the proposals put forward to deliver against this objective, namely the legitimate aim to provide such a remedy as required by litigation. The three categories of judges who are not eligible to join FPJPS are-
 - A. Those who have not made a claim;
 - B. Those who have made a claim out of time; and
 - C. Lay members (non-legally qualified).

Equalities duties

Section 149 of the Act

2. Under section 149 of the Act when exercising its functions, a public authority is under a legal duty to have due regard to the need to:
 - eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act;
 - advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
 - foster good relations between different groups.
3. Paying 'due regard' needs to be considered against the nine "protected characteristics" under the Act – namely race, sex, disability, sexual orientation, religion or belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.
4. To ensure we comply with our duty, the department has to investigate and consider how policy proposals are likely to impact with reference to all of the protected characteristics and, where a potential disadvantageous effect is identified, how that is either mitigated or justified by reference to the objectives of the policy.

The forms of prohibited conduct

5. There are several types of prohibited conduct set out in Chapter 2 of the Act, which include:
 - direct discrimination (defined in section 13 of the Act);
 - indirect discrimination (defined in section 19); and
 - breach of a non-discrimination rule (see section 61).

Direct discrimination

6. As the requirement is to remedy the department's historic failure to provide specified fee-paid judges with a pension entitlement that is comparable to that of their salaried comparators, the department does not consider that there is any direct discrimination on the grounds of any of the protected characteristics in establishing this scheme.

Indirect discrimination

7. In introducing a pension scheme where eligibility has been limited, we acknowledge the potential for judges with protected characteristics to make up a higher proportion of those categories not eligible to join the FPJPS. For example, it may be assumed that those claimants in category 2 are likely to be older as it is more likely that they will have been retired when they issued a claim that was ruled out of time. However, we do not consider these judges will suffer a particular disadvantage when compared to others subject to the same eligibility rules. In any event we consider the proposals to be a proportionate means of achieving the legitimate aim of an affordable and fair pension scheme that addresses less favourable treatment that has arisen in respect of the fee-paid judiciary. The proposals therefore do not amount to unlawful indirect discrimination.
8. Data held on the characteristics of the fee-paid judiciary, both those with a legal comparator and those classed as lay members, does not allow us to make a full assessment of the potential for indirect discrimination.

Discrimination arising from disability and the duty to make reasonable adjustments

9. There is no data at present on disability within the judiciary and so the department cannot rule out the possibility of discrimination arising from disability. It is possible that a judge with a disability may not have been able to issue a claim but the evidence does not exist to be certain about such an assertion. Under our existing obligations, the department will continue to make reasonable adjustments within the meaning of the Equality Act for members of the judiciary.

Harassment and victimisation

10. The department does not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act as a result of these proposals.

Advancing equality of opportunity

11. The proposals might potentially discourage new non-legal entrants to the judiciary and thereby impact on the duty to advance equality of opportunity. However, we have no information on this and to date there has been an increasing number of applications for all judicial posts. In addition, there are a number of policies in place to improve the diversity of the judiciary, not least the provisions outlined in the Crime and Courts Act 2013.

Fostering good relations

12. We have considered this objective but do not think it is of particular relevance to the proposals.

Duty not to discriminate against holders of public office and against members of an occupational pension scheme

13. In addition to the general duty to have due regard to the matters specified in section 149 of the Act, there are other duties under the Act which the Department must comply with.

These include:

- section 50 under which the Department is under a duty not to discriminate against a person it appoints as a public office holder in the way any benefit is received; and
 - section 61 under which a non-discrimination rule is included in an occupational pension scheme and sections 64 to 71 of the Act which provides for equal pay for equal work.
14. For the reasons set out above, and in this consultation response, the Government considers that the proposals are not unlawful.

Monitoring

15. The department is also committed to improving judicial diversity while still appointing the best candidates on merit. The department will continue to work with Judicial Office and the Judicial Appointments Commission to analyse trends in judicial selection data in respect of diversity.



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