

Title: The Judicial Pensions (Fee-Paid Judges) Regulations 2017 IA No: MoJ032/2016 Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies:	Impact Assessment (IA)
	Date: 22/02/2017
	Stage: Final
	Source of intervention: Domestic
	Type of measure: Secondary legislation
	Contact for enquiries:
Summary: Intervention and Options	RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year	In scope of One-In, Two-Out?	Measure qualifies as
£0	N/A	N/A	N/A	N/A

What is the problem under consideration? Why is government intervention necessary?

The UK courts and tribunals considered the terms and conditions of current and former fee-paid judicial office holders in a number of cases, including *O'Brien v MoJ* and related litigation. They found 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 similar work. This less favourable treatment was on the grounds of their part-time status. As a result of these decisions it is necessary for the government to make arrangements to compensate eligible judges for the historic, and in some cases ongoing, lack of pension provision.

What are the policy objectives and the intended effects?

The ruling led to a commitment by the Ministry of Justice (MoJ) to implement a retrospective remedy – a Fee-Paid Judicial Pension Scheme (FPJPS) – in respect of reckonable fee-paid service from 7 April 2000 (the date when the Part-Time Work Directive came into force and under which less favourable treatment is unlawful). The purpose of the FPJPS is to provide benefits that are no less favourable than those provided to salaried judges under the scheme created by the Judicial Pensions and Retirement Act 1993 (JUPRA). The FPJPS will provide pension benefits to eligible current and former fee-paid judicial office holders in respect of their service from 7 April 2000 to 31 March 2015 and also in respect of service from 1 April 2015 for those entitled to transitional protection.

What policy options have been considered, including any alternatives to regulation?

- Option Zero - Do Nothing. This is not a feasible option as it would be unlawful not to comply with the ruling to provide a pension scheme for eligible fee-paid judges.
- Option One – Implement a FPJPS which complies with the legal requirements. The FPJPS will be established by the Judicial Pensions (Fee-Paid Judges) Regulations 2017 which are designed to mirror the JUPRA scheme for salaried judges as far as possible.

Will the policy be reviewed?

Once the Regulations have been made and the scheme is implemented, the existing Judicial Pension Board will oversee the governance of the fee-paid pension scheme.

Does implementation go beyond minimum EU requirements?			No.		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro	< 20	Small	Medium	Large
	N/A	N/A	N/A	N/A	N/A
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:	Non-traded:	
			N/A	N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:  Date: 23/02/2017

Summary: Analysis & Evidence: Policy Option 1

Description: Implement a Fee-Paid Judicial Pensions Scheme

FULL ECONOMIC ASSESSMENT

Price Base Year 2016-17	PV Base Year N/A	Time Period Years one year – steady state	Net Benefit (Present Value (PV)) (£m) £0		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant	Total Cost (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

HM Treasury would face the cost of meeting the retrospective liabilities from the establishment of the FPJPS. As at 31 March 2016, a liability of £578m (in respect of eligible fee-paid judges' service between 7 April 2000 and 31 March 2015, or 31 March 2016 for those with transitional protection) has been included within the Judicial Pension Schemes (JPS) annual accounts. These costs will be paid out over future years as judges retire. From 1 April 2017, the cost of funding the FPJPS (with reference to future pensionable service) will be shared between the UK Government and other responsible departments or administration. The JPS does not have authority to pay the Judicial Service Award (JSA) liability so the responsible Departments will do so. As at 31 March 2016, the retrospective JSA liability of £44m was accounted for within the MoJ's annual accounts. Future liabilities will be accounted for within the MoJ's annual accounts and other responsible departments or administrations. The JSA for retired judiciary will become payable from the date when the FPJPS is implemented.

Other key non-monetised costs by 'main affected groups'

None

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant	Total Benefit (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Fee-paid Judges would benefit from the retrospective pension entitlements from the establishment of the FPJPS. The Net Present Value of this would be equal to that of the liabilities described in the monetised costs box above. As this would amount to a transfer of resources, this benefit does not feature in the NPV of the preferred option.

Other key non-monetised benefits by 'main affected groups'

Eligible fee-paid judicial office holders will benefit from no longer being subject to less favourable treatment with a lack of a retrospective pension scheme, in comparison to salaried judges who do the same or similar work. Former and current eligible fee-paid judges would have a statutory scheme established by regulations for pension and other ancillary benefits. They would also benefit insofar as they would not need to have their entitlements determined through further litigation.

The MoJ and wider government will meet its legal obligations by implementing an appropriate remedy. The risk of further litigation would be reduced or, in some instances, removed completely. This would also reduce the risk of further litigation costs for the MoJ.

Key assumptions/sensitivities/risks

N/A

The value of the retrospective pension liability depends on actuarial calculations which are subject to change. The next assessment of the pension liability in respect of all schemes will take place as at 31 March 2017.

Litigation remains ongoing in relation to pension entitlement in respect of fee-paid service prior to 7 April 2000. The MoJ does not want to delay commencement of the FPJPS until that is resolved. If the legal position changes, the MoJ will make provision to comply with its obligations. Litigation is also ongoing in respect of some fee-paid judicial office holders who the MoJ believes are not entitled to pension benefits equivalent to the JUPRA scheme. The MoJ however does not want to delay commencement of the FPJPS until this litigation is resolved. Once that litigation has been resolved, consideration will be given as to how to provide an appropriate remedy for those entitled to another form of pension benefit; their position is not within scope of this impact assessment.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of	Measure qualifies
Costs: N/A	Benefits: N/A	Net: N/A	No	N/A

Signed by the responsible Minister:

Date:

Evidence Base

A. Problem Under Consideration

1. The UK courts and tribunals have considered the terms and conditions of current and former fee-paid judicial office holders in a number of cases, including the cases of *O'Brien* and *Miller*.
2. Mr O'Brien initially brought a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the 2000 Regulations"), which sought to transpose the Part Time Work Directive (97/81/EC) into EU law. Mr O'Brien claimed that the Ministry of Justice's (MoJ) failure to pay him a pension upon retirement equivalent, pro rata, to that of his full-time salaried judicial counterpart was in breach of the 2000 Regulations as properly interpreted under EU law.
3. The UK Supreme Court found, in *O'Brien v Ministry of Justice* [2013] UKSC 6, that judges were workers for the purposes of the Directive and the 2000 Regulations had to be interpreted accordingly. It also found that there was no objective justification for treating fee-paid judges (who are part-time judges) less favourably than comparable full-time workers in respect of their pensions on a pro rata basis and that Mr O'Brien was entitled to a pension on terms equivalent to those applicable to a circuit judge. That case and further litigation has established that similar obligations are owed to other eligible fee-paid office holders. Prior to this no judicial pension scheme had existed for fee-paid judges.
4. These legal rulings led to a public commitment by the MoJ to meet its legal obligations by implementing a FPJPS in respect of eligible reckonable fee-paid service from 7 April 2000 onwards.
5. The MoJ conducted a public consultation on the draft regulations to create the Fee-Paid Judicial Pension Scheme (FPJPS) from 15 September to 31 October 2016. The questions in the consultation focused on the whether the regulations provide the appropriate remedy in light the legal rulings in these cases. The consultation was aimed at both former and serving members of the judiciary in the United Kingdom and key stakeholders including the devolved administrations. In addition a further consultation was issue on 24 January 2017 and ended on 8 February 2017 in relation in relation to one draft regulation for the Fee-paid Judicial Added Year Scheme for retirement members.
6. 77 responses to the consultation were received from individuals and judicial associations raising over 150 points relating to 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 the payment of a pension when an individual leaves one judicial office and continues to accrue benefits in another.
 - Ability to contribute to an Additional Voluntary Contribution scheme. The draft Regulations have been amended to remove the limitation judges who were already contributing to another scheme prior to 6 April 2006 would not be eligible to join the scheme.
 - 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. 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 were within one year of pension age at the date of the Supreme Court judgment of 6 February 2013.
 - Eligibility for membership of the scheme: A number of respondents who are not eligible for pension rights under FPJPS 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. This reflects decisions of the Employment Tribunal (and subsequent appeals). MOJ will continue to maintain that position.
7. This impact assessment (IA) is therefore focused on the proposed FPJPS to be established and the regulations as amended following public consultation.

B. Policy Rationale and Objectives

8. Conventional economic approaches to government intervention are based on efficiency or equity arguments. In terms of the former, the government may consider intervening if there are strong enough failures in the way markets operate (e.g. the existence of monopoly) or if there are significant failures in existing government interventions (e.g. outdated or costly regulations). In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. The government may also intervene for reasons of equity or fairness and for re-distributional reasons (e.g. reallocating resources from one group in society to another).
9. In this instance, the policy rationale is equity: to ensure that the MoJ meets its legal obligations as set out above. The MoJ intends to implement a remedy by establishing the FPJPS 2017, subject to parliamentary approval of the draft regulations.

C. Groups Affected

10. The groups most affected by the options assessed in this IA are as follows:
 - **Eligible fee-paid judicial office holders** within the United Kingdom.
 - **HM Treasury** who provide budget allocations to the overall Judicial Pension Scheme (JPS), as well as Departments and other bodies that appoint fee-paid judges.
 - **The Judicial Pension Scheme** whose liabilities would include the annual cost of benefits accruing for each additional year of pensionable service undertaken by eligible fee-paid judges.
 - **Government Departments** who appoint and are responsible for eligible fee-paid judges would be responsible for meeting employer contributions and the payment of the Judicial Service Award (JSA). This includes the MoJ, the devolved administrations and where applicable other departments in respect of any eligible fee-paid offices for who they are responsible.

D. Options Considered

11. In order to meet the policy objectives, the following options have been considered:
 - **Option 0: Do nothing: Maintain the existing pension arrangements.**
 - **Option 1: Implement a Fee-Paid Judicial Pensions Scheme**

Option 0

12. Under this option, no pension provision would be made for Fee-Paid Judicial office holders. However, following the Supreme Court judgements described above, this option would be unlawful and would result in further litigation costs for the MoJ and the associated claims for damages.

Option 1

13. Under this option, the MoJ would implement a pension scheme for eligible fee-paid judges (the FPJPS) to mirror, as far as possible, the current scheme for salaried judges, established by the Judicial Pensions and Retirement Act 1993 (JUPRA), on a pro-rata basis.
14. Subject to Parliamentary approval, the draft regulatory provisions required to establish the FPJPS – the Judicial Pension (Fee-Paid Judges) Regulations 2017 - would make provision for a pension scheme for the benefit of eligible judicial office holders who have held a fee-paid judicial office in the period between 7 April 2000 and 31 March 2015, and would establish the Fee-Paid Judicial Added Voluntary Contributions Scheme, the Fee-Paid Judicial 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 or more of these additional schemes.

15. From 1 April 2015 a new Judicial Pension Scheme (JPS 2015) came into force for both newly appointed salaried and fee-paid judges and existing office holders to whom transitional protection did not apply or ceased to apply.
16. The FPJPS (along with the 1981, 1993 and 2015 pension schemes) would be accounted for and administered by the overall JPS. The JPS prepares its own annual accounts and is managed separately by the Lord Chancellor although it does not form part of the MoJ. The costs associated with the FPJPS would include the annual cost of benefits accruing for each additional year of pensionable service undertaken by eligible fee-paid judges, employer contributions costs and the cost of the Judicial Service Award incurred by the appointing Departments and other bodies.
17. The cost of the benefits accruing for each additional year of pensionable service (i.e. the increase in the pension liability) would be accounted for by the JPS and reflected in their annual accounts based on an assessment undertaken by the Government Actuary's Department (GAD). The cost would be included in the annual budgetary allocations process between the Government and the JPS.

E. Cost and Benefit Analysis

18. This IA attempts to identify both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact on society might be from implementing each of these options. The costs and benefits of each option are compared to the 'do nothing' option where the current judicial pension arrangements remain in place. As this involves comparing this option to itself, its costs and benefits are zero as is its Net Present Value (NPV).
19. To the extent that Option One leads to a redistribution of income from HM Treasury (and taxpayers more generally) to members of the proposed FPJPS, this would represent a transfer rather than the use of economic resources. This would mean that the NPV of Option One would necessarily be zero. However, to show the impacts of this option, we have included these costs in the analysis below.

Option One - Implement a Fee-Paid Judicial Pensions Scheme

Costs of Option 1

HM Treasury

20. Under this option, the Government would face a cost from having to meet the retrospective pension liabilities which would arise.
21. As at 31 March 2016, a pension liability of £578m (in respect of eligible fee-paid judges' service between 7 April 2000 and 31 March 2015, or 31 March 2016 for those with transitional protection) was calculated by MoJ having obtained advice from GAD and included within the JPS annual accounts. These costs will be paid out over future years as judges retire. The next assessment of the pension liability in respect of all schemes will take place as at 31 March 2017.

Other Government Departments

22. The cost of funding the FPJPS (with reference to future pensionable service) will be shared between the UK Government and devolved administrations (Scotland, Ireland and Wales) for the eligible fee-paid judges for whom they are responsible. The employer contribution rate is currently 38.45% (which includes 0.25% for administration costs) of pensionable pay. This will be an ongoing cost for the relevant department or administration.
23. The JSA was created to equalise the tax position of fee-paid judiciary with that of their salaried comparators. The JPS does not have authority to pay the JSA liability and this is the responsibility of the responsible department or administration. As at 31 March 2016, a service award liability of £44m was accounted for within the MoJ's annual accounts. The service award for retired judiciary will become payable from the date on which the FPJPS is implemented. HM Treasury have provided funding to the MoJ to cover the cost of this retrospective liability up to 31 March 2017. The relevant employer will be responsible for the cost and payment of the JSA going forward.

24. The implementation and ongoing operation of the FPJPS would not bring forward any further cost implications outside of those explained above.

Benefits of Option 1

Fee-paid Judicial Office Holders

25. Overall Fee-paid judicial office holders will benefit from no longer being subject to less favourable treatment in comparison to salaried judges who do the same or similar work. Former and current eligible fee-paid judges would have a statutory scheme established by regulations for pension and also other ancillary benefits. They would also benefit insofar as they would have a pension scheme, and would not need to have their entitlements determined through litigation compared to those under Option 0 to do nothing.

Other Government Departments

26. The MoJ and wider government will meet its legal obligations by implementing an appropriate remedy. The risk of further litigation relating to unfavourable terms for the fee-paid judiciary in comparison to the salaried judiciary would be reduced or, in some instances, removed completely. This would also reduce the risk of further litigation costs for the MoJ.

F. Risks and assumptions

27. The financial cost of meeting the above liabilities has been measured in line with international accounting standards and may increase or reduce due to changes in actuarial assumptions, or following the outcome of ongoing litigation, detailed below.

Ongoing Litigation

28. Litigation remains ongoing in relation to pension entitlement in respect of fee-paid service prior to 7 April 2000. However, the MoJ does not want to delay commencement of the FPJPS until that is resolved. If the legal position changes, the MoJ will make provision to comply with its obligations.
29. Litigation is also ongoing in respect of some fee-paid judicial office holders who the MoJ believes are not entitled to pension benefits equivalent to the JUPRA scheme. The MoJ however does not want to delay commencement of the FPJPS until this litigation is resolved. Once that litigation has been resolved, consideration will be given as to how to provide an appropriate remedy for those entitled to another form of pension benefit; their position is not within scope of the measures set out in this impact assessment.
30. There is currently a judgement from the Employment Tribunal (*McCloud v MoJ*) in which the ET finds 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. The Lord Chancellor, 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 ET judgment is ultimately unsuccessful steps will be taken to remove that incompatibility.

G. Wider Impacts

31. An Equalities Statement has been completed and is attached

H. Implementation

32. It is intended that the FPJPS is implemented from April 2017, subject to Parliamentary approval of the regulations.
33. The FPJPS will be administered by the authorised Pension Administrator.

I. Monitoring & Evaluation

34. For monitoring and review purposes, once the FPJPS is implemented, the Judicial Pension Board will oversee the governance as set out in the FPJPS Regulations.

J. Specific Impact Tests

Small and Micro Business Assessment (SaMBA)

35. The FPJPS has no impact on businesses of any size including small or micro businesses.