

## Equality Statement

### **Introduction**

This equality statement accompanies the Ministry of Justice (MoJ) consultation response document, 'Judicial Pensions (Amendment) Regulations 2024'. In line with the public sector equality duty, under s149 of the Equality Act 2010 (EA 2010), it considers potential equality impacts of the draft regulations.

### **Background**

The Fee-Paid Judicial Pension Scheme (FPJPS) commenced on 1 April 2017 following a decision in February 2013 by the Supreme Court in *O'Brien v Ministry of Justice* [2013] UKSC 6 that fee-paid judges had been treated less favourably than relevant full-time salaried judges because they had not been entitled to a pension. FPJPS initially only provided pension benefits for eligible fee-paid service on or after 7 April 2000, the date on which the Part Time Work Directive (PTWD), under which less favourable treatment should have been eliminated, came into force.

In November 2018, the Court of Justice of the European Union handed down judgment in the case of *O'Brien v Ministry of Justice* (Case C-432/17) – the *O'Brien 2* litigation, concluding that part-time work undertaken before the deadline for transposing the PTWD must be taken into account for the purposes of calculating a retirement pension. Following this decision, the Judicial Pensions (Fee Paid Judges) Amendment Regulations 2023 (the FPJPS Amendments) came into force on the 1 April 2023 to provide pension benefits for eligible fee-paid service pre-7 April 2000.

On 1 April 2015, most public service workers were moved into reformed pension schemes with respect to service from that date. In line with this wider public service pension reform, the Judicial Pension Scheme 2015 (JPS15) was established for eligible fee-paid and salaried judicial office holders. However, in December 2018 the Court of Appeal found unlawful discrimination on the grounds of age, race and sex in the case of *Lord Chancellor and the Ministry of Justice v McCloud (& ors)*, in respect of members of judicial schemes who were subject to transitional provisions that moved them into JPS 15 on 1 April 2015 or at a later date (depending on their age). The MoJ has separately implemented a remedy to this discrimination.

On 1 April 2022 a new Judicial Pension Scheme, the Judicial Pension Scheme 2022 (JPS22) was implemented to address recruitment and retention issues in the judiciary caused by JPS15. JPS22 is now the only scheme open to accruals.

Further information about the equalities impact of these schemes can be found in the 2020 consultation on the FPJPS Amendments,<sup>1</sup> and the explanatory memorandums to The Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021<sup>2</sup> and the FPJPS Amendments.<sup>3</sup>

### **Public Sector Equality Duty**

Section 149 of the EA 2010 requires public authorities, in the exercise of their functions, to have due regard to the need to:

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<sup>1</sup> [\[Title\] \(publishing.service.gov.uk\)](#)

<sup>2</sup> [The Judicial Pensions \(Fee-Paid Judges\) \(Amendment\) Regulations 2021 - Draft Explanatory Memorandum \(legislation.gov.uk\)](#)

<sup>3</sup> [The Judicial Pensions \(Fee-Paid Judges\) \(Amendment\) Regulations 2023 - Explanatory Memorandum \(legislation.gov.uk\)](#)

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

There are nine protected characteristics in the Act: sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, marriage and civil partnership, and pregnancy and maternity.

### **Proposals**

The principal amendments of the 2024 Amendments will facilitate (amongst other things):

- the correction of a number of technical issues in FPJPS and JPS22.
- the inclusion of further judicial offices in FPJPS and JPS22.
- the inclusion of a cost control mechanism (CCM) in JPS 22 as required to be in force by the Public Service Pensions Act 2013 (PSPA 13) within 1 year beginning with the day on which the scheme's first valuation is completed.
- the extension of deadlines for member elections in the Judicial Pensions (Fee-paid Judges) Regulations 2017 (the FPJPS regulations).
- The extension of the powers to reconcile the amounts that have been paid out to judges beyond 2023 in respect of their new, pre-2000 FPJPS entitlements with their formal entitlements for this period.

The responses to the consultation and the additional amendments did not create any additional equalities impacts.

### **Equalities considerations**

The draft regulations do not directly discriminate within the meaning of the Equality Act 2010 since they will not treat any member of the judiciary less favourably because of a protected characteristic.

We do not consider that the draft regulations will be indirectly discriminatory within the meaning of the Equality Act 2010.

For most of the 2024 Amendments, no particular disadvantage to members of the judiciary with protected characteristics has been identified. We have set out below where there is potential for a disadvantage to arise.

Whilst we have identified some impacts that relate to the protected characteristic of age, we consider that the 2024 Amendments are nonetheless positive with respect to equal treatment. The following paragraphs of the consultation on the draft 2024 Amendments (the "**Consultation**") highlight the impacts identified:

#### Cost of purchasing added units of benefit under the Fee-Paid Judicial Added Benefits Scheme

*Change from use of a pro-rated salary value to a weighted salary value [consultation paragraphs 78 to 81]*

At present, some retired fee-paid judges would pay a higher cost for each added unit of benefit purchased under the Fee-Paid Judicial Added Benefits Scheme (FPJABS) than salaried judges would

historically have paid under the equivalent Judicial Added Benefits scheme (JABS). This discrepancy would be removed by our proposed replacement of the pro-rated salary value (PRS) in the FPJABS provisions with a weighted salary value (WS). Since the fee-paid judges now eligible for FPJABS will tend to be older than the salaried judges were when they purchased JABS this would be a positive equalities effect.

*Revised schedule of personal and family benefits percentage figures [consultation paragraphs 85 to 91]*

At present the formulae used to calculate the cost of FPJABS added units of benefit rely on personal and family benefits percentage figures set out in Schedule 3 to the Judicial Pensions (Additional Voluntary Contributions) Regulations 1995 (the AVC regulations). We propose to replace these with figures that will be included within a new schedule (Schedule 4) to the FPJPS regulations. This change reflects actuarial guidance and will address an existing anomaly that makes the cost of FPJABS units unduly low for some eligible members in comparison to JABS and FPJAYS (as defined above). As such, the existing position tends to favour relatively older judges purchasing FPJABS over relatively younger judges who might be more likely to purchase added years under the Fee-Paid Judicial Added Years Scheme (FPJAYS) and so the change should therefore have a positive equalities impact overall by addressing this disparity.

We note there may be some detrimental impact for members with service in offices in Tables 2 and 3 in Schedule 1 to the FPJPS regulations, comprising unretired members and retired members who sat on a very high proportion of days (more than 80% of the office divisor value) [per my comment, what is the discrimination here?]. However, we consider that any potential indirect discrimination on the grounds of age [?] to be objectively justified because the changes will set FPJABS unit costs for all eligible members at an appropriate level. The new schedule will also set out percentage figures for older judges which were not required in the AVC regulations.

Conversion of additional benefits units/years

*Revised schedule of service credit figures [consultation paragraphs 92 to 97]*

At present the formulae used to convert FPJABS units into FPJAYS added years (and vice versa) rely on service credit figures set out in Schedule 1 to the Judicial Pensions (Transfer Between Judicial Pension Schemes) Regulations 1995 (the Transfer regulations). We propose to replace these with figures that will be included within a new schedule (Schedule 5) to the FPJPS regulations. This change reflects actuarial guidance. For a very small number of relatively younger members, the revised figures will mean a slightly less favourable FPJABS to FPJAYS conversion rate in some circumstances. However, as above, we consider any potential indirect age discrimination to be objectively justified because the changes will mean that conversion rates will, going forward, be set at the appropriate rate for members of all ages. The new schedule will also set out percentage figures for older judges which were not required in the Transfer regulations.

Cost of purchasing added years under the Fee-Paid Judicial Added Years Scheme

*Exclusion of the 1.25 multiplier in regulation 107(3)(b) [consultation paragraphs 98-101]*

The FPJPS Amendments provided for a multiplier value of 1.25 to be applied to qualifying fee-paid days in specific circumstances: see paragraph 99 in the consultation. We propose to exclude the 1.25 multiplier from the definition of "B" in regulation 107(3)(b) of the FPJPS regulations, which relates to reckonable service and which feeds into the wider calculation of the required FPJAYS contribution by retired members. The current inadvertent inclusion of the multiplier tends to reduce the amount of

the contribution payable by relatively older retired members compared to unretired members (and the salaried judges who historically purchased added years). Our proposed amendments to FPJAYS will ensure that the calculations of FPJAYS added years for retired judges are consistent with those for unretired members. The change should therefore have a positive equalities impact.

**Discrimination arising from disability and duty to make reasonable adjustments.**

Following the consultation, we do not currently expect that the members will require reasonable adjustments in respect of these proposals, but we will consider any such requests on a case by case basis.

**Harassment and victimisation:** We do not consider there to be a risk of harassment or victimisation in implementing our draft regulations.

**Advancing equality of opportunity:** We consider that the proposals may impact positively on the duty to advance equality of opportunity in relation to age.

**Fostering good relations:** We do not consider that these proposals are relevant to this obligation.

**Data**

The exact number of judges who will be affected by the proposed amendments cannot be determined. However, the information below sets out approximate numbers for the categories of judges who may be affected.

The Diversity of the Judiciary: 2023 Statistics<sup>4</sup> (set out in Table 3.1) presents overall figures on the fee-paid judiciary. An ad hoc breakdown by age group is set out in Table 1 below. It should be noted, however, that this takes the fee-paid judiciary as a whole and therefore includes judges who also only have service in the JPS15 and JPS22 schemes. Therefore, the percentage of judges in each category with respect to FPJPS may vary slightly from that set out in Table 1. It should also be noted that there may be some devolved offices covered by FPJPS which may not be captured in the data.

Table 1: Proportion of fee-paid judges in post as at 1 April 2023 in Courts & Tribunals in England and Wales by age group – see also Notes 1 to 3 below.

Age group	Under 40	40-49	50-59	60-69	70 and over
Percentage fee-paid judges	9%	29%	30%	27%	5%

Note 1: The statistics include all Tribunals administered by HMCTS and exclude other tribunals.

Note 2: The statistics also include office holders in First-tier and Upper Tribunals in Scotland/Northern Ireland in jurisdictions that have a GB/UK-wide remit.

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<sup>4</sup> [Diversity of the judiciary: 2023 statistics - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics)

Note 3: Please see the footnotes for Diversity of the judiciary 2023 statistics: Table 3.1: Primary appointment of Judges and Non-legal Members in Courts and Tribunals in England and Wales: age and contract type by appointment for further notes.

It is expected that the age range of those affected by the FPJABS, FPJAYS and reconciliation changes will more likely fall within the 60-69 and 70 and over categories.

The Judicial Pensions Scheme Annual Report and Accounts state that as at the 31 March 2023 there were 5,966 members of FPJPS. It is expected that the majority of FPJPS members (an expected excess of 90%) would be eligible to purchase either FPJABS or FPJAYS. The age demographic of these specific members is not recorded however these members would have been included in Table 1 statistics.

The Government Actuary's Department suggests that the average age difference between judges entitled to benefits under FPJPS pre-1995 provisions (who may be eligible to purchase FPJABS), and those entitled to benefits under post-1995 provisions (who may be eligible to purchase FPJAYS) is around 10 years. This is a significant factor justifying the approach set out above.

## **Conclusion**

Overall, we consider that our proposed amendments will have a positive equalities effect, in particular by:

- Providing retrospective pension entitlements for several further eligible fee-paid offices.
- Extending several time limits in FPJPS to ensure that affected members can make informed choices concerning the benefits available to them deriving from the O'Brien litigation.
- Providing for the cost control mechanism to cover the JPS15 and JPS22 schemes.

We have, however, identified where there is potential for disadvantage to arise relating to the protected characteristic of age in certain limited circumstances which we assess to be objectively justified as outlined for the reasons set out in the relevant sections above.

Based on these assessments we consider that the limited impacts are objectively justified, and the overall package of proposed amendments is consistent with the requirements set out in s149 of the Equality Act 2010.