

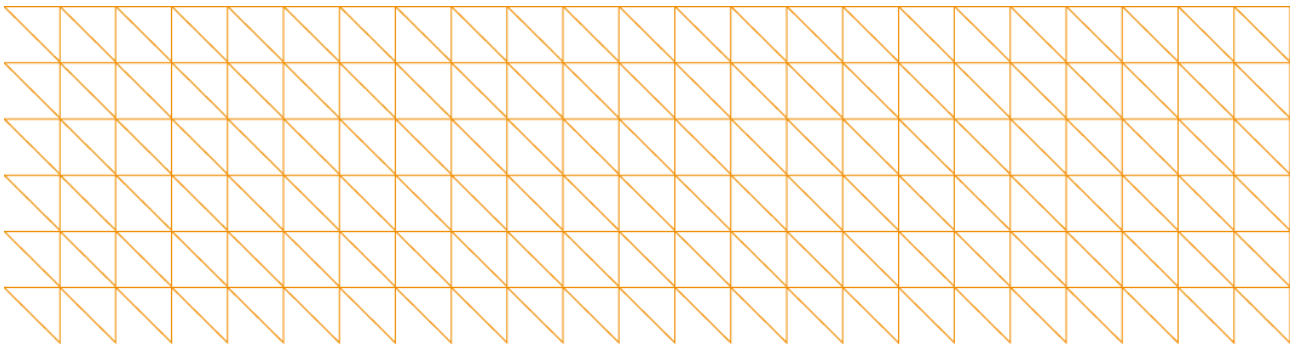


Ministry
of Justice

New Judicial Pension Scheme

Response to consultation

21 November 2014





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Response to consultation carried out by the Ministry of Justice.

This information is also available on the Ministry of Justice website: www.gov.uk/moj

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Introduction and contact details

This document is the post-consultation report for the consultation paper on the New Judicial Pension Scheme (NJPS). The consultation paper was published on 16 June 2014 and it invited comments on the proposed design of the NJPS.

This document will cover:

- the background to the reforms;
- a summary of the responses to the consultation;
- a detailed response to the specific topics; and
- the next steps following this consultation.

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

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This report is also available on the Ministry's website: www.gov.uk/moj.

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. At the time of the Emergency Budget in 2010, the coalition government announced the establishment of an independent review of the provision of public service pensions. This review was to be undertaken by an Independent Commission, led by Lord Hutton of Furness, and formed a key part of the Coalition's Programme for Government¹.
2. The objective of this Independent Commission was to conduct a fundamental structural review of public service pension provision and to make recommendations on pension arrangements that are sustainable and affordable in the long term, fair to both the public service scheme members and the taxpayer and consistent with the fiscal challenges ahead, while protecting accrued rights. There were seventeen public service pension schemes in the United Kingdom included in the scope of this review, and the judicial pension scheme was one of these².
3. The Independent Public Service Pensions Commission (IPSPC) set out a clear and urgent case for change. The Commission concluded that, "*the current public service pension system has been unable to respond flexibly to changes in demographics over the past few decades...and long-term structural reform is needed, as these issues cannot be dealt with through provision of traditional final salary defined benefit schemes*"³.
4. The Commission found in its final report, published in 2011, that there should be a fairer sharing of risk between taxpayers and scheme members than exists within existing schemes. The final report also noted that allowing all current members to continue to accrue further benefits in current schemes would be unfair and inequitable to the new members coming behind them. It was stated at this time that the new public service pension schemes should be implemented by the end of this current Parliament, in 2015⁴.
5. The Government's response to this review, the 2011 HM Treasury paper '*Public Service Pensions: Good pensions that last*', adopted many of the recommendations of the IPSPC and outlined the preferred design of the reformed public service pension schemes. This preferred design was aimed to ensure that future generations of public servants will continue to receive pensions amongst the very best available⁵.
6. This response included a guarantee that benefits already accrued before the date of the implementation of the new schemes would be protected fully, along with the preservation of the final salary link on retirement for members who remained in the schemes.
7. The Government also made a commitment, which went beyond the recommendations of the IPSPC, that all public service scheme members within 10 years of their normal pension age would be extended protection from the reforms. The intention was to mitigate the effects of introducing reformed schemes on those who are closest to retirement. This group would have less opportunity, compared to younger persons, to make financial and

¹ Coalition Programme for Government, 21 May 2010, p.26

² HM Treasury Press Release "Chancellor announces John Hutton to chair commission on public service pensions", 20 June 2010

³ Independent Public Service Pensions Commission: Interim Report, 7 October 2010

⁴ Independent Public Service Pensions Commission: Final Report, 11 March 2011

⁵ HM Treasury, Public Service Pensions: Good pensions that last, 2 November 2011

lifestyle adjustments to mitigate the impact of scheme changes. This was to be applied consistently across the public service.

8. In July 2012, the Chief Secretary to the Treasury announced to Parliament that the Government was to take forward legislation on the reforms to public service pensions, in the form of the Public Service Pensions Bill⁶. This Bill received Royal Assent on 25 April 2013 and provided for the basic framework of scheme designs for all of the reformed public service schemes. This included the strengthening of scheme governance arrangements, the employer cost cap mechanism, open and transparent administrative requirements, and provisions for transitional members.
9. The Government believes that the reforms to public service pensions constitute a fair balance of costs and benefits between public service pension scheme members and other taxpayers. The reform of public service pensions comes in the context of a difficult macroeconomic climate, and is justified by the need to address rising longevity and the rising costs of public service schemes, the risks and costs of which have so far fallen mainly on the taxpayer. The new pension schemes will still constitute a pension of real value in excess of what could be purchased on the private market with commensurate investment.

Initial consultation on the reforms

10. Later in July 2012, the Lord Chancellor made a written ministerial statement announcing that judicial pensions were to be reformed along with the rest of the public service and consulted with the judiciary on the proposals for future provision of judicial pensions. The three options presented to the judiciary at this time included having judicial membership of the reformed civil service pension scheme; a standalone scheme in line with Government's preferred scheme design, outlined in *'Public Service Pensions: Good pensions that last'*; or a reformed judicial pension scheme analogous with the reformed civil service scheme, but open only to judicial office holders.
11. This letter included detailed outlines of each of the potential options, including features such as transitional protection, member contributions, benefits for dependents and the changes to the State Pension Age.
12. The preferred approach of the Government at this time was to have judicial membership of the reformed civil service scheme, as this would offer most benefits to the judiciary and the taxpayer. However, after listening to the concerns and views of the judiciary that were raised in this consultation – over half of the active judiciary took the time to respond to this consultation – the Government agreed to provide a standalone judicial pension scheme that was analogous with the reformed civil service arrangements, but open only to judicial office holders.
13. During this period of consultation, concern was also raised amongst the judiciary that it was unconstitutional to seek to make potentially adverse changes to the pension terms of sitting Judges. After extensive deliberation on this point, the Lord Chancellor stated his position that whilst the Government takes seriously the independence of the judiciary, it does not consider that in the particular context of difficult economic circumstances and

⁶ In a written statement to the House of Commons, The Chief Secretary to the Treasury Danny Alexander MP discussed public service pensions. HC 4 July 2012, c 53WS

changes to pension provision across the public sector, the broader constitutional principle of judicial independence was being infringed by these reforms.

14. However, in acknowledgement of this concern, the Lord Chancellor did commit that the scheme regulations would be subject to the affirmative procedure in Parliament. This will secure a debate and a vote on the regulations in both Houses of Parliament. This is different from all other reformed schemes. Furthermore, any future amendment to the scheme regulations must also be subject to the affirmative procedure, except in instances where an amendment is determined as minor or wholly beneficial by the Judicial Pension Board. This is provided for in the Public Service Pensions Act 2013.
15. In addition to this concern, a number of Judges at this time also noted the potentially damaging impact, unique to the judiciary, of the tax-registered status of the proposed new scheme. The existing judicial pension schemes were an anomaly agreed by a previous Government in that they were not registered for tax purposes, where as the reformed scheme would be.
16. The consistency of treatment across the public service is an important principle in these reforms, as far as is appropriate. In circumstances where individual scheme memberships are sufficiently different from the rest of the public service, the Government has departed from this general principle of consistency. After consideration of the points raised at this time, the Lord Chancellor agreed that the fact the judicial pension schemes were not registered for tax purposes was a sufficient distinction from the other reformed schemes to depart from the principle of consistency of treatment of all public servants.
17. In line with this, the Lord Chancellor agreed to create alternate provisions for Judges that had taken out protections meaning they could not join the new, tax-registered scheme. Judges in this position would be able to opt for an additional allowance in lieu of joining the new pension scheme. This was to be known as the Transitional Protection Allowance (TPA), and would be equivalent to the amount the department would contribute if the Judge was a member of the new scheme. This was to be unique to the judiciary to reflect the tax status of the existing judicial pension scheme.

Announcement and subsequent consultation

18. The decision on the approach to the New Judicial Pension Scheme (NJPS), and the creation of the TPA, was announced by the Lord Chancellor on 5 February 2013, in a written ministerial statement⁷ and a letter to all Judges. The written ministerial statement to Parliament also included explanations of the transitional provisions under the new scheme. The letter to all Judges from the Lord Chancellor summarised the responses above and outlined the proposed scheme design, and its impact on individual Judges. The Government also published an Equality Impact Assessment at the time of the announcement.
19. The regulations to bring this standalone judicial pension scheme into effect were to be made under the Public Service Pensions Act 2013, along with each of the other reformed schemes. This Act also established a requirement that before any scheme was to make regulations, they were to consult with those persons likely to be affected, or their representatives.

⁷ In a Written Ministerial Statement to the House of Commons, the Lord Chancellor and Secretary of State for Justice Chris Grayling MP announced the proposals for a reformed judicial pension scheme. HC 5 February 2013, c10WS

20. In the time between the announcement and the launch of this second consultation in June 2014, the department has been working to develop a scheme design and regulations that were analogous with the reformed civil service scheme, taking into account the judicial membership wherever possible. The details of this proposed scheme, along with an explanation of the transitional provisions to members of the judiciary, both salaried and fee-paid, formed the basis of this consultation. Building from the initial consultation in 2012, the Government wanted to hear views from the judiciary on the reforms as a whole, as well as a number of specific topics in particular.

Responses to this consultation

21. This was a formal, 12-week public consultation, open to all members of the judiciary, both salaried and fee-paid, as well as members of the public. This consultation was extended by three weeks to allow for comment on the proposed Partnership Pension Account (PPA).

22. There were 84 individual responses to this consultation. Of these responses, over 70% were from individual members of the judiciary. Within the responses from Judges, 60% of these were from salaried members of the judiciary, and 40% from members of the fee-paid judiciary.

23. Twelve of this number was received from Judicial or Legal Associations on behalf of their respective memberships. These have been registered as single responses for the purposes of this consultation. In addition, one response was received from a firm of solicitors on behalf of 186 Judges, 185 of which were unnamed. This has been registered as a single response for the purposes of the statistics. However, when a group of named, identifiable Judges have responded collectively, these have been registered as if each of the named Judges has responded individually.

24. When referencing specific responses, it is highlighted whether this came from an association or Judge or otherwise. The breakdown of individual responses is provided 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
Salaried Judges	37
Fee-paid Judges	23
Judicial or Legal Associations	12
Other	8
Total	84

25. This formal Government response will summarise the wide range of topics raised in response to the consultation on the NJPS, along with the Government's position on each of these topics. This document will then cover the next steps toward the implementation of the New Judicial Pension Scheme from 1 April 2015.

Summary of responses

26. This section outlines the wide range of responses received to this consultation on the New Judicial Pension Scheme (NJPS), and the Government's position on each of these topics.

General comments

Constitutionality of the reforms

27. When the department first consulted the judiciary on these reforms in July 2012, a number of respondents commented that it was unconstitutional and illegal for a Government to reduce the total remuneration package for sitting Judges. In addition, a Judge's pension provision was included within the scope of their total remuneration package. The Government's position on these issues was clarified in the Lord Chancellor's announcement of the reforms in February 2013.

28. 11% of the individual responses to this consultation commented again that the issue of the constitutionality of these reforms to judicial pensions, and the legal position with regards to the executive reducing the remuneration of a sitting Judge. This included a number of representative judicial associations.

29. A Judge noted:

"I remain of the view that the Government's decision to move Judges appointed prior to notice of the proposed changes from the Judicial Pension Scheme 1993 into the 2015 Scheme was unfair, unlawful, unconstitutional and discriminatory."

30. A judicial association also commented:

"The association wishes to restate its opposition to the changes to the judicial pension scheme which it regards as unfair, unconstitutional and disproportionately affecting the pensions of those subject to the new scheme."

Government position

31. The Government acknowledges the concerns raised by respondents to this consultation with regards to the constitutionality of these reforms; however, after further consideration of the points raised, the Government reaffirms its position from February 2013. The Government takes seriously the independence of the judiciary, and recognises that there is a longstanding practice that the total remuneration package offered to the judiciary, including pension provision, should not be reduced for serving Judges. This forms part of a broader constitutional principle that an independent judiciary must be safeguarded.

32. However, these reforms must be set in the particular context of difficult economic circumstances, where an independent body has examined the continuing affordability of public sector pensions and the proposed changes to judicial pensions are a part of a series of changes across the public sector of substantially the same nature. The Government

does not consider that, entirely correctly, the changes are, or could reasonably be perceived as being, targeted at Judges and changes to pension provision across the public sector do not infringe the broader constitutional principle of judicial independence

33. In acknowledgement of the concerns raised by the judiciary on this point, the Government has committed that the scheme regulations will be subject to the affirmative procedure in Parliament. This will secure a debate and a vote in both Houses of Parliament. This represents a divergence from all other reformed public service schemes. Furthermore, any future amendment to the scheme regulations must also be subject to the affirmative procedure, except where it is determined as minor or wholly beneficial by the Judicial Pension Board. This has been provided for in the Public Service Pensions Act 2013. The Government does not consider that the principle of judicial independence is being infringed by these reforms.

Application of the reforms only to those appointed after 1 April 2012

34. In the response to the final report of the Independent Public Service Pension Commission, the Government accepted the Commission's recommendation that the reforms to public service pensions would apply to existing scheme members, not only new starters as had been the case in the past. This would also be true for the judiciary in the same manner as for the rest of the public service. This represents a divergence from past reforms to judicial pensions, for instance in 1993 and the establishment of the Judicial Pension Scheme under the Judicial Pensions and Retirement Act 1993 (JUPRA), which was only applicable to those appointed on or after 31 March 1994.
35. Of the 84 responses to this consultation, 49% of all respondents stated that the application of these reforms was unfair and should be limited only to members of the judiciary who were appointed after 1 April 2012.

36. One judicial association commented:

"We strongly object to the fact that this scheme applies to Judges either salaried or fee paid whose appointments pre-date 1 April 2012. All salaried and fee paid Judges in this category should remain in the current Judicial Pension Scheme (JUPRA) and the scheme that is being drawn up to mirror JUPRA for the fee-paid Judges following the decision in O'Brien."

37. Another judicial association stated:

"The Association recognises that this consultation relates to the new scheme (NJPS), but restates its position that the new scheme should apply only to those whose appointments post-date 31st March 2012."

38. Another Judge agreed:

"The New Judicial Pension Scheme should not apply to those appointed, regardless of the date of commencement, prior to 1 April 2012."

Government position

39. Lord Hutton and the Independent Public Service Pension Commission were tasked with undertaking a fundamental structural review of public service pension provision and making recommendations on how public service pensions can be made sustainable and affordable in the long term. The Independent Commission was clear in its final report that pension reform should not be restricted to only new starters. The reforms to public service

pensions could not achieve its stated aim of a legitimate, sustainable and fair approach to public service pensions if the reforms were restricted in this manner. The judicial pension scheme was included in the scope of the Independent Commission's review.

40. The Commission's final report stated that as the current public service pension schemes have not adequately taken into account financial pressures surrounding increased longevity, fundamental reform is needed and *"allowing current members to continue to accrue further benefits in the present schemes for many decades would be unfair and inequitable to the new members coming behind them"*⁸.
41. When deciding upon the implementation of transitional protection in the judicial pension schemes, the MoJ did consider the views raised by Judges in the 2012 consultation. The issue of applying the reforms only to Judges appointed after 2012 was considered at this time and this was detailed in the Equality Impact Assessment published in 2013.
42. After further consideration of this point, the Government remains of the view that there is no justification for treating the judiciary differently from the rest of the public service in this regard. The Government does not consider that the fact that previous reforms to judicial pensions have only been limited to new starters should warrant that these reforms be limited in the same manner. It is a central tenet of the current public sector pension reforms that, except to the extent considered appropriate for protection of those closest to retirement, the reforms will apply to serving scheme members, including the judiciary. This rationale of applying the reforms to all members, rather than just new starters is being applied to all reformed public service schemes in a consistent manner. It would not be fair to make special provisions in the case of younger Judges, without making similar provisions for younger members of other public service pension schemes.
43. This position of not restricting the reforms to only new starters is based on the need to minimise risks to the taxpayer arising from factors such as increasing life expectancy and time spent in retirement. To do otherwise and restrict the reforms to only Judges appointed after 1 April 2012 would represent a significant financial risk that could undermine the legitimate aim of these reforms. Protecting all Judges in post at 1 April 2012 from the reforms would not generate the necessary future cost savings to achieve the aim of these reforms. It would also not meet the Government's aim of balancing interests between taxpayers and scheme members in relation to the present and future costs of public service pension commitments.
44. Only applying the reforms to new appointees will also place an unfair burden upon the members of the new scheme who will have to accept the consequences of any resulting cost cap breach, in higher contributions or a reduced accrual rate, caused by the greater expense. This will in effect create an intergenerational transfer of wealth from younger Judges to older Judges.
45. It is the Government's position that there can be no question of protecting the judiciary from the reforms in ways that the Government are not seeking to do for other groups across the public sector. To achieve the legitimate aim of the reforms, they must not be limited only to new starters. In addition, as outlined in the previous section, the Government does not consider that reforming the pensions of existing Judges amounts to a breach of the constitutional principle of judicial independence.

⁸ Independent Public Service Pension Commission: Final report, 10 March 2011

Judicial recruitment and retention

46. Of the 84 responses to this consultation, 31% of the responses commented on the potential negative impact on judicial recruitment and retention as an unintended consequence of these reforms. Not only as a result of the changes to the design of the scheme, but also because of the move to a tax-registered scheme that will decrease the attraction of judicial office for sections of the eligible pool.

47. An active member of the judiciary noted that these reforms will result in some Judges:

“...delaying their application for an appointment in order to build up their available assets for pension purposes.”

48. Another Judge also noted that:

“The existing generous pension provision was an important set off against the significant decline in earnings resulting from an appointment. It meant that reasonable living standards could be anticipated during retirement from a reasonable retirement income taking account of pension provision made before appointment. This set off will be seriously eroded under the new registered scheme.”

49. A High Court Judge commented that:

“If there are difficulties in attracting a sufficient number of the most successful practitioners, [the High Court] will no longer be seen as so prestigious, and it will cease to be seen as a natural aspiration for the ablest lawyers.”

50. Beyond the impact on the eligible pool of potential appointments, other consultees raised the issue that these reforms may impact on the retention of existing Judges. On this point, a number of Judges commented that the impact of the registration of the new scheme for tax purposes might leave active Judges with:

“a stark choice...to continue to work with an effective substantial reduction in remuneration or resign.”

Government position

51. At this point, it is the department's view that there is no evidence to indicate that the number, or quality, of applicants for judicial office has fallen as a result of these reforms.

52. In 2011/12, the Judicial Appointments Commission (JAC) handled more applications and made more recommendations than in any previous year. In 2012/13, the overall number of applications received was lower than in previous years, which, as was noted in the JAC Annual Report for that year, may in part have been due to the specialist nature of the smaller exercises run and the JAC message that candidates should only apply when they are ready to do so. However, the ratio of applications to number of recommendations remained steady: in 2012/13, it was 7.78 (compared to 7.36 in 2011/12), meaning the JAC attracted a similar proportion of applications in relation to the number of roles available as the previous year⁹.

⁹ Judicial Appointments Commission: Annual Report 2012/13

53. In 2013/14, as stated in the JAC Annual Report for that year, according to management information collated by the JAC, there were 35 selection exercises in total, a similar number to 2012/13. More applications were received and recommendations made than in any other year. The ratio of applications to recommendations decreased slightly to 6.94 to one¹⁰.
54. In overall terms, the JAC continues to receive applications from many more candidates than there are vacancies to fill and has continued to receive sufficient applications to be able to recommend good quality candidates, particularly for salaried legal posts.
55. Furthermore, whilst judicial retirements have risen over the past few years, the vast majority of these retirements have been Judges who would have been eligible for transitional protection. These Judges would not have been affected by these reforms, so it is not possible to draw a conclusion that any increase in retirements has been as a direct result of these reforms to pension arrangements.
56. The Government acknowledges that not enough time has passed since the announcement in the Hutton Report that the judicial pension scheme was in the scope of these reforms, to draw substantive conclusions of any impacts on judicial recruitment. However, as outlined above, there is no evidence at this stage to indicate that the number, or quality, of judicial applicants has fallen as a result of these reforms. The Government will continue to monitor closely the situation regarding judicial appointments through data collected by the Judicial Appointments Commission.

Salaried Judges serving in an additional fee-paid capacity

57. If a salaried Judge sits in an additional fee-paid office on top of their salaried commitments, the Judge is not paid for this additional service even where it would otherwise be payable at a higher rate. As this additional service is not subject to additional payment, it would not be determined as additional pensionable service.
58. 6 responses to this consultation noted that the design of the career average scheme placed salaried Judges at a disadvantage in this regard. It should be noted that four of these responses were received from judicial associations. One association raised the issue that as fee-paid service is now to be pensionable, a fee-paid Judge can sit in multiple offices, and receive a pension for each of them under the new scheme, whereas a salaried Judge cannot, even if the fee-paid office is payable at a higher rate, and are as such disadvantaged in comparison.
59. A judicial association commented that:
- “At the moment salaried Judges who also hold the equivalent of a fee-paid appointment that would attract a higher salary do not receive that uplift... This would mean that a fee-paid Judge in the position of holding two or more judicial appointments would be in a better position than a salaried judge.”*
60. The association went on to suggest that:
- “...service in the Upper Tribunal, or as a Recorder (or in any other position that would attract a higher rate of pay), should be taken into account in the calculation of pension benefits accruing to the particular judge, notwithstanding the absence of payment of a higher salary for days sat in another jurisdiction.”*

¹⁰ Judicial Appointments Commission: Annual Report 2013/14

Government position

61. The principle of remuneration for salaried Judges who sit in additional fee-paid capacity is covered by judicial terms and conditions, and is not related to these reforms. Additional fee-paid service by salaried Judges under JUPRA is not treated as pensionable at present, nor has it been in the past.
62. If judicial terms and conditions change in the future so that salaried Judges are paid for service in an additional fee-paid capacity, and this additional service were pensionable, this would be included in pension calculations under the career average scheme. However, this is not a matter to be determined in a consultation on these reforms to pension arrangements.

Fee-paid judicial offices that are eligible for a pension

63. In light of the O'Brien and Miller judgments in respect of fee-paid pension entitlement, the Government is required to provide pensions for eligible fee-paid Judges for service from 7 April 2000 to 31 March 2015 and into the future. All eligible fee-paid service beyond 1 April 2015 will be pensioned under the NJPS, except where transitional provisions apply.
64. 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 16 June 2014 was provided alongside this consultation. As highlighted with the schedule, and in the consultation document itself, this schedule was subject to change.
65. 14% of responses to this consultation raised concerns over the schedule of fee-paid judicial offices determined as eligible for a pension, which was published alongside the consultation document at Annex A, citing a number of potential omissions and discrepancies.

Government position

66. The Government published an updated schedule of fee-paid judicial offices determined as eligible for a pension along with a separate consultation on the Fee-paid Judicial Pension Scheme on 19 September 2014. A copy of this schedule has been included at Annex B to this consultation response. This list has been amended since the July 2014 update, and now represents the judicial offices determined as eligible for a pension as at 19 September 2014. This schedule remains subject to change pending ongoing litigation.

Transitional provisions

Transitional protection and age discrimination

67. The Government's proposals for transitional protection were introduced in the 2011 HM Treasury command paper *'Public Service Pensions: Good pensions that last'*.
68. The Government's objective of these reforms was to provide a long-term solution that ensured the present and future provision of affordable, flexible, and sustainable pension schemes across the public sector. However, when implementing these reforms to public service pensions, the Government was committed to doing so in a manner that was fair to both scheme members and taxpayers. It is in this context that the Government decided to go against the recommendation of the Hutton Report to move all current public service pension scheme members to new pension arrangements from 1 April 2015¹¹.
69. The Government instead proposed to protect those closest to retirement from the reforms. Members within ten years of their normal pension age would see no change in when they could retire, nor any decrease in the amount of pension they were due to receive at retirement. This was to be known as 'transitional protection'. The reasoning behind this policy was that those closest to their normal pension age would have less opportunity, when compared to those younger than them, to make financial and lifestyle adjustments to mitigate the impact of scheme changes. For instance, younger members would be better able to build up significant investments than those closest to retirement, should they wish to do so, because they have more time in which to do so.
70. The framework for establishing transitional protection was outlined in Section 18 of the Public Service Pension Act 2013; however, the details and scheme-specific provisions were to be provided for in the regulations of each reformed scheme.
71. On top of this commitment to protect those closest to retirement, the Government also committed to extend an additional protection to those within 13 ½ years of normal pension age, allowing these members to stay in their current arrangements for a period beyond 31 March 2015. This 'tapering protection' was intended to remove the creation of a 'cliff-edge' of protection where two existing scheme members who are very close in age receive entirely different treatment under the transitional provisions. These transitional provisions outlined by the Government were to apply to all reformed pension schemes across the public service in the same manner.
72. For the judiciary, this was outlined in detail in the July 2012 consultation of salaried Judges, at which time a number of respondents said that these reforms were discriminatory on the grounds of age. The department analysed these responses after the period of consultation in its Equality Impact Assessment. This was published alongside the Lord Chancellor's announcement of the reforms in February 2013.

¹¹ Independent Public Service Pension Commission: Final Report, 2011; Recommendation 5

73. 58% of all responses to this consultation commented on the transitional provisions, in particular saying that they amounted to unlawful direct discrimination on age. These responses included a number of judicial associations, as well as a firm of solicitors writing on behalf of 186 members of the judiciary.

74. One Judge noted that:

“To do this by reference to whether you were 55 on that date is obviously unfair, breaches the Equality and Human Rights Acts and, most damning of all, is unprincipled.”

75. A judicial association commented that:

“We repeat our previously expressed view that the changes involve unjustified direct age discrimination...It would have been proportionate and legitimate to limit the changes to newly appointed judges.”

76. A group of High Court Judges in the unprotected group stated that:

“It could be argued that our older colleagues are being treated more favourably because they had the advantage of more years in private practice and therefore had the opportunity to build up larger private pension funds than us. We are being discriminated against not on the usual basis that we are older than the group not being discriminated against, but rather because we are younger than the group not being discriminated against. Thus the comparators have less need than we do for the existing scheme to continue, yet they are the beneficiaries of the discrimination.”

77. A firm of solicitors on behalf of 186 Judges also noted:

“The proposal to treat members of the judiciary (namely the Under 55 Group) differently on the grounds of their age is unlawful age discrimination unless it can be justified. The aim of the reforms is the saving of cost. The simple saving of cost is not a legitimate aim and the proposed reforms are unlawful.”

Government position

78. The Government accepts that, because of transitional protection, these reforms will impact differently on Judges according to their proximity to normal pension age. Whilst it is the Government's aim of these reforms to ensure the long-term sustainable provision of good quality pensions to all public servants into the future, transitional protection is designed to protect those closest to retirement who do not have sufficient opportunity to react to changes in their pension. Transitional protection represents an additional cost to the Government, but is in line with the principle of fairness, with respect to both scheme members and taxpayers.

79. The Government recognises that, as a group, older scheme members will benefit from the transitional and tapering protections. This group as a whole is also likely to have accrued more benefits in the existing schemes and in line with this, the Government also recognises that these Judges will have, in that respect, least to lose from the reforms themselves. The effect is likely to be that older members will receive pension benefits that are worth more than those received by younger members of the scheme. This is true across all reformed public service pension schemes.

80. The scope of transitional protection has been determined as being those within 10 years of retirement age to ensure fair treatment in respect of expectation and plans for retirement. This group is, by definition, closer to their retirement, and as such are more vulnerable as they have much less opportunity to effect any changes in this regard. Without transitional

protection, all scheme members would be affected by the reforms, and those scheme members closest to retirement age would be impacted more immediately than their younger counterparts would. The Government considers that transitional protection in this respect is in line with the principle of fairness in these reforms.

81. The IPSPC clearly stated that the reforms to public service pensions could not achieve its stated aim of a legitimate, sustainable and fair approach to public service pensions if the reforms were restricted to only new starters and all existing members could remain in their current schemes. In addition, the Commission stated that protecting all existing members in such a way would be unfair and inequitable to new members coming behind them¹². The proposed design and application of transitional protection is to ensure fairness between the competing interests of scheme members and taxpayers.
82. While younger members outside of the protected group are likely to be more affected by the changes, it is the Government's view that these members are further from retirement and will therefore have more opportunity to mitigate the potentially negative impacts of the reforms through long-term financial planning and saving, should they wish to do so.
83. During this consultation, a number of Judges commented that the unique nature of the judicial career path meant that Judges were being disproportionately disadvantaged by these reforms in comparison to the rest of the public service. This is due to the fact that salaried Judges are not in a position to return to practice after assuming judicial office, and as such, younger salaried Judges are not in a position to take account of the reforms in the same way as other public servants. As such, the policy to apply transitional protection to the judiciary was not appropriate.
84. It is true that the undertaking given by salaried Judges not to return to practice may make it more difficult for some Judges than for other public service pension scheme members to find alternative employment should they wish to do so. However, the Government's view is that a member having the opportunity to mitigate the effects of the pension changes does not necessarily have to mean leaving their current employment. Members may equally make financial and lifestyle adjustments to mitigate the impact of scheme changes, for example enabling them to build up investments. Younger members will have more time to do so than older members, so it is correct that the transitional protections reflect that. In this respect, the justification for transitional protection in general applies to Judges just as much as it does to other public service scheme members.
85. It is also right to observe that, due to the particular demographics of the salaried judiciary, the proportion of scheme members who are eligible for transitional protection is much higher than in other public service schemes, leading to a relatively smaller proportion of members being unprotected, and thus affected by these reforms.
86. This point was raised in response to the Lord Chancellor's consultation in 2012, and was referenced again in response to this consultation. It was said that the different age demographics of the scheme membership should warrant a departure from the principle of applying transitional protection consistently across all reformed public service schemes. At the time of the initial consultation, an alternative "cost-neutral" proposal was provided to reflect the point that the proportions of protected members in the scheme were sufficiently different from those in other schemes to warrant a divergence from the consistent application of transitional protection. This proposal involved extending transitional

¹² Independent Public Service Pension Commission: Final Report, 2011; p.9

protection from the reforms to all existing Judges regardless of age, and only applying the reforms to new starters. It was proposed that the additional cost of this would be covered through additional member contributions for all scheme members. This cost was estimated to be around an additional 3.8% in member contributions for all Judges.

87. This alternative proposal was considered at the time of the 2012 consultation, and was rejected because the Government did not believe that the higher average age of the judiciary should warrant a divergence from the cross-Government policy. In addition, this proposal did not meet the Government's objective of protecting from change those closest to retirement; rather it would have placed an additional and excessive burden on this group in higher contributions for the benefit of those who have more time to adapt to the proposed changes. It would also, through the operation of the employer cost cap, mean that the risk of future changes to the cost of the scheme would be borne entirely by Judges in the NJPS.
88. This proposal was referenced again in this consultation, with a slightly wider scope, including all current active members of the judiciary. The Government has considered this proposal, and also requested the scheme actuary, the Government Actuary's Department (GAD), to provide a provisional assessment on the proposal.
89. The provisional GAD assessment on the proposal to maintain all Judges appointed up to 31 March 2015 in JUPRA until retirement, ensuring cost neutrality to the department, indicates that the required rate of member contributions from 1 April 2015 would be considerably higher. It would be in the region of 13% for all members of JUPRA, and above 20% for all new members in the NJPS.
90. In light of this, the Government reaffirms its existing position that it does not consider that this alternative proposal would meet the objectives of fairness, or protecting those closest to retirement. It would instead place an additional and excessive burden on all members of the judiciary, including those closest to retirement and all new starters from 1 April 2015 onwards.
91. Furthermore, consistency of treatment across the public service schemes – though not an inflexible rule – is nonetheless an important objective.
92. A Judge who is 14 years from retirement (and therefore does not benefit from transitional protection) is no more affected by the changes than, for example, a nurse who is 14 years from retirement. Both will have entered their respective professions with expectations about the pension they would receive. Both may receive a less valuable pension than they expected. Even though Judges are unique in giving an undertaking not to return to practice, both the Judge and the nurse may, as a matter of reality, find it difficult to obtain other employment given their skills and qualifications. Both can use the time remaining to them before retirement to make whatever financial and lifestyle changes they consider appropriate to adjust to changed pension expectations.
93. The Government would need a compelling reason to accord special treatment to Judges that was not accorded to other public service scheme members. It has shown an open mind to the question whether such a compelling reason has in fact been shown. In relation to tax treatment, it has accepted that Judges are in a special position – because the current judicial pension scheme has historically been unregistered for tax purposes. It has also accepted the arguments for a different rules on medical retirement (so as to align with existing scheme rules). The Government considers that these concessions in respect of concerns specific to the judiciary are reasonable, and in line with the principle of fairness.

94. In respect of transitional protection, however, the Government does not consider that the judiciary are in a sufficiently different position from members of other public service schemes that it would be justifiable to extend transitional protection to all (rather than merely the majority) of Judges in post when the reforms were announced.

95. In addition to transitional protection, the Government has applied all other protection policies equally to all members, regardless of age, or any other protected characteristics. The accrued pension rights that all members have built up in their existing schemes will be untouched. In addition, members will continue to have their pre-reform accrued benefits linked to their final salary on retirement, instead of to their salary at the point at which they moved into the new scheme.

Transitional protection and indirect discrimination

96. In introducing the policy on transitional protection outlined above, the Government recognises that, within the judiciary, there are lower proportions of women and individuals from a Black, Asian or Minority Ethnic (BAME) background in the protected group than there are in the taper group ('part-protected') or the unprotected group. This is because those judicial pension scheme members who are women and those from a BAME background tend to be younger, which reflects, at least in part, more recent recruitment drives seeking to increase the diversity of the judiciary.

97. The two tables below provide details on the ethnic and gender breakdown of the salaried judiciary, using available information from 31 March 2014. Table 1 shows that the proportion of BAME Judges in the unprotected group is higher than the proportion of white Judges in the same group. Table 2 shows that the proportion of female Judges in the unprotected group is also higher than the proportion of male Judges in the same group.

Table 1: Ethnicity breakdown of salaried judiciary¹³

	Unprotected	Part-protected	Protected	Total
BAME	36 37%	18 19%	43 44%	97
White	375 23%	218 13%	1054 64%	1647
Not Stated	30 16%	25 13%	135 71%	190
Total	441 23%	261 13%	1232 64%	1934

Table 2: Gender breakdown of salaried judiciary

	Unprotected	Part-protected	Protected	Total
Female	190 36%	104 20%	233 44%	527
Male	251 18%	157 11%	999 71%	1407
Total	441 23%	261 13%	1232 64%	1934

¹³ The information in Tables 1 and 2 is based on an extract from the Judicial Office database as at 31 March 2014.

98. In response to this consultation, 33 respondents argued that the Government's proposals on transitional protection amounted to unlawful indirect discrimination against women and those members of the judiciary from BAME backgrounds. This represented 40% of all responses received, and included one judicial association, as well as a firm of solicitors representing 186 members of the judiciary.

99. A judicial association commented:

"Transferring judges appointed without notice of the proposals from the JPS 1993 to the NJPS is discriminatory by virtue of age and gender, given the profile of the 25% most affected by its provisions."

100. One member of the public stated:

"It is extraordinary that the impact on younger judges, and the indirect discrimination on the named groups, is not given more consideration."

101. A firm of solicitors on behalf of 186 Judges noted:

"It is acknowledged at paragraph 27 of the Equality Impact Assessment that there is a higher proportion of females and those from a BME background in the Under 55 Group. As such, the proposed changes will have a disproportionate adverse effect on these groups which... cannot be justified."

Government position

102. The Government accepts that, because of transitional protection, these reforms will impact differently on Judges according to their proximity to normal pension age. The Government also accepts that policies in respect of transitional protection may have the potential to indirectly discriminate against those Judges with protected characteristics.

103. The scope of transitional protection has been determined as being those within 10 years of retirement age to ensure fair treatment in respect of expectation and plans for retirement. An additional 3.5 years of tapering protection has also been extended to avoid a 'cliff-edge' effect in protection. The protected group is, by definition, closer to their retirement, and as such are more vulnerable as they have much less opportunity to effect any changes in regards to their pension and individual financial position. The policy of transitional protection is being applied to all public service pension scheme members in a consistent manner. While each public service pension scheme has its own particular demographics, consistency of treatment across the public service schemes is an important objective.

104. While the Government does accept the potential impact on the judiciary given its own particular demographics, it does not consider that the justification of transitional protection is less pressing in the case of the judiciary than in the case of the other public section schemes as a result. The Government does not feel that there is sufficient justification to deviate from the principles of fairness to those closest to retirement, or the consistent treatment of public servants across the public service, in this instance. It is the Government's view that members will continue to receive a high quality pension with a guaranteed payment in retirement that is protected against inflation regardless of their gender, race or background.

Wider equalities impacts

105. The Government is also of the view that there are features of the proposed reformed scheme that have positive impacts from an equalities perspective, for instance the provision of adult dependant pension to a partner (where there is no spouse or civil partner). Additionally, as a result of these reforms, such pensions for adult dependants will be paid for life and will not cease upon remarriage or a new civil partnership as is the case under the current arrangements. These reforms will ensure equality of treatment between opposite sex and same sex (not married or civil partnered) surviving partners.
106. The new scheme also does not limit the number of years of reckonable service, as is the case under the current arrangements. This will ensure that pension provision under the NJPS will fully recognise all judicial service, instead of capping service at 20 years. This will most likely benefit women since they live longer on average than men. The new scheme will also allow for a late retirement adjustment for those working beyond retirement age, and provide for the opportunity to take partial retirement to promote more flexible working patterns.

Portability of transitional protection

107. In line with its commitment to implement these reforms in a fair and equitable manner, the Government proposed to ensure that no public service pension scheme member would lose any transitional protection solely by virtue of moving between public service pension schemes. As such, if any public service pension scheme member eligible for transitional protection moves between public service schemes, they will not lose any of their protections.
108. This 'portability' of transitional protection is proposed to apply to any transition between the schemes for salaried and eligible fee-paid Judges, in both directions.
109. In response to this consultation, 28% of all respondents raised concerns that provisions for the portability of transitional protection were unfair, in that a number of Judges appointed to salaried office in recent years, and into the future would be eligible for transitional protection, whereas a number of Judges appointed to office before them would not be.
110. A group of Judges noted:
- "There will be some judges who have been appointed after us, and indeed at a time when they will have had notice of the proposed changes, who can continue to benefit from the existing JPS – simply because they qualify by virtue of their ages. It cannot possibly be said that they could not have made alternative arrangements."*

Government position

111. When implementing these reforms to public service pensions, the Government remains committed to doing so in a manner that is fair to both scheme members and taxpayers. As such, the Government has proposed transitional protection, which will apply to all public service pension schemes equally.
112. At the same time as these reforms, as a result of a Supreme Court judgment, the Ministry of Justice (MoJ) is in the process of establishing the Fee-paid Judicial Pension Scheme (FPJPS), which will allow for pension accrual for eligible fee-paid Judges for service between 7 April 2000 and 31 March 2015. As the MoJ is required by law to ensure no less favourable treatment for eligible fee-paid Judges, the transitional provisions will be

applicable to eligible fee-paid Judges in this scheme in the same manner as for the salaried judiciary. As such, eligible Judges, either salaried or fee-paid would be able to 'port' protection between the two schemes, in both directions.

113. The Government acknowledges the view of certain respondents that some Judges appointed to salaried office in the past few years, and into the future, may be extended protection that is not being extended to Judges who were appointed to salaried office at an earlier date. However, the extension of transitional protection to eligible fee-paid Judges and the ability to 'port' that protection on appointment to salaried office is a feature of the MoJ's legal obligation to ensure no less favourable treatment as well as the Government's commitment to protect those closest to retirement.
114. It remains the Government's position that if a Judge is eligible for a pension for a period of fee-paid service and meets the age requirements of transitional or tapering protection, on subsequent appointment to salaried office they will be treated as a protected member of the salaried scheme¹⁴, and vice versa.

Eligibility of fee-paid Judges for portability

115. 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.
116. In addition to points raised above on the portability of transitional protection, and a number of requests for clarification on the eligibility of fee-paid service, the Government is providing a clarification on the requirements for eligibility.

Government position

117. 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.

118. 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.

119. If a Judge does not meet the above criteria, they will not be eligible for a fee-paid pension, and as such, their fee-paid service will not attract transitional protection.

¹⁴ This is made simpler by the fact that the schemes for both fee-paid and salaried Judges (FPJPS and JUPRA) have the same normal pension age, meaning that if a member is eligible for protection in one scheme, the same protection is applicable in the other scheme. This is not necessarily true for members of other public service schemes, for which the normal pension ages may differ. A member must be eligible for protection in both schemes to be able to 'port' any protection.

120. 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. As such, irrespective of their age, the Judge's fee-paid service will not attract transitional protection.
121. The Government acknowledges the points raised by respondents in this matter. Whether or not a Judge is entitled to a fee-paid pension is a feature of 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.
122. 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.
123. 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.

The application of the reforms is arbitrary

124. Across the public service, reformed schemes are being implemented from 1 April 2015. All existing schemes will close to new members, subject to the operation of transitional provisions as at 31 March 2015. Eligibility for transitional protection is determined by the appointment history and the proximity to retirement age of a member of the judiciary as at 1 April 2012.
125. In response to this consultation, four Judges (5% of all respondents) stated that the dates decided upon for these reforms to take effect, and also the eligibility of the transitional provisions, are unfair and arbitrary in application and effect.
126. One Judge commented:

"Why is the 1st April 2012 being chosen and not a later date when the new provisions were introduced?"

Government position

127. It was a recommendation of Lord Hutton's IPSPC that the reforms to public service pension arrangements be implemented by the end of this current fixed-term Parliament in 2015. In line with this recommendation, the Public Service Pensions Act 2013 provided for all existing schemes to close, subject to the operation of transitional provisions from 31 March 2015.
128. The Government published its response to the IPSPC on 2 November 2011 in the HM Treasury paper *"Public Service Pensions: Good pensions that last"*. It was in this paper that the Chief Secretary of the Treasury Danny Alexander MP announced the Government's commitment to protecting those public service pension scheme members

closest to retirement through transitional protection, and outlined the qualification criteria. These criteria were set as at the beginning of the next financial year on 1 April 2012. The judicial pension scheme was included in the scope in the IPSPC review, and this statement from the Chief Secretary was made in respect of each of the pension schemes within the review.

129. After further consideration, the Government does not believe that there is sufficient justification to depart from the principle of applying the reforms consistently across all reformed public service schemes. As stated in the consultation document, the policies surrounding transitional protection, including eligibility criteria, are the responsibility of HM Treasury, and apply in a uniform manner across all of the public service.

Taxation issues

Tax registration of the NJPS

130. Since the introduction of the Finance Act 2005, the existing judicial pension scheme has not been registered for tax purposes. This represented an anomalous position given that all other public sector pension schemes covered by the reforms were registered. As such, any benefits accrued under this scheme were not to be considered for calculations towards the Annual and Lifetime Allowances.
131. As part of these reforms, the Government is aligning the status of tax registration in the reformed judicial pension scheme. The Government has committed to preserving all accrued rights, and as such, the existing JUPRA scheme will remain unregistered for tax. However, the NJPS is to be registered for tax purposes, along with every other reformed public service scheme. This was announced at the launch of the initial consultation on the reforms to judicial pensions in July 2012.
132. In response to this consultation, 45% of all respondents raised a concern about the tax-registered status of the New Judicial Pension Scheme (NJPS). It should be noted that these responses included a number of judicial associations.
133. A High Court Judge noted:
“The very people whom one is hoping to attract to apply for an appointment are those people for whom delivering remuneration through a registered pension scheme makes no financial sense.”
134. A number of other existing Judges commented:
“This is in effect a raid on our private pensions and penalises anyone who had the prudence to save for their old age while in practice. Lumping together a person’s private savings with the notional fund under the JPS in this way is unfair because we had no way of knowing when we accepted appointment that this would happen.”
135. A judicial association added:
“We are also concerned about the tax treatment, and consequences, of the NJPS... the impact of the annual and lifetime allowances, and the possibility that they will change in the future, is causing understandable uncertainty and anxiety.”

Government position

136. Each of the reformed public service pension schemes, including the reformed civil service arrangements to which the standalone judicial pension scheme is to be analogous, is to be registered for tax purposes. That the existing judicial pension scheme is not registered is an anomaly that was agreed by a previous Government. Given the particular context of unprecedented pressure on the national finances at the time of the reforms, it was agreed that all reformed schemes must be registered, regularising the anomalous position.
137. The Government acknowledges that certain existing scheme members may have taken out protections upon joining salaried judicial office meaning that it is not possible to enter the NJPS. After listening to the concerns of the judiciary in the 2012 consultation, the

Government acknowledged this point, and proposed to mitigate this problem by departing from the cross-Government policy and implementing an allowance, unique to the judiciary, which will provide an alternative option. This would be available to those Judges for whom the mere act of joining a tax-registered scheme would not be possible, due to existing protections already in place. This allowance, paid alongside salary or fee, known as the Transitional Protection Allowance (TPA), is available to all those Judges eligible to join the new scheme with these existing protections in place, and who were in service, or had their appointment agreed, by 1 April 2012. The TPA would be equivalent to the employer contribution the department would have paid, had the members joined the new scheme.

138. The Government acknowledges the potentially significant impact of the registering of the new scheme for tax purposes. However, this is a consequence of the historical position of the judicial pension schemes, which were an anomaly, not the reforms themselves. The TPA is designed to mitigate the impact of this change. The Government has also committed in the reforms to protect all accrued rights of members in the existing, unregistered scheme, including the preservation of the automatic lump sum and service award payments.

Transitional Protection Allowance conditions

139. The Transitional Protection Allowance (TPA) is to be a payment alongside salary or fee, and as such is to be subject to tax and National Insurance Contributions (NICs) in the same manner as a salary or fee payment would be.
140. Two respondents to this consultation brought up the level of the TPA payment stating that it did not represent a fair amount, as it was not equivalent to what they would have received if they were a member of the scheme. This is because members of the NJPS are not required paid tax and NICs on the employer contribution.
141. One respondent noted:
- “Either the TPA should be set at an equivalent gross level to the contributions for members of the NJPS, but it should not then be subject to tax and NICs: or the level of the TPA should be ‘grossed up’ to allow for the payment of tax and NICs on receipt.”*
142. This respondent went on to add:
- “The effect of the proposals... will be that Judges who cannot join the NJPS and who are forced to opt for the TPA are not able to make the same level of alternate arrangements to those who join the NJPS. This will result in manifest inequalities in pension provision and benefits among the judiciary.”*

Government position

143. As mentioned above, the TPA represents a departure from the principle of consistency of treatment of public servants, and is unique to the judiciary to reflect the fact that the existing judicial pension scheme is not registered for tax purposes. The TPA is to be an additional payment alongside salary or fee at the time of the payment, and will be treated as ‘earned income’ for the purposes of tax and National Insurance.
144. The Government acknowledges the points raised in reference to this issue; however, the provision of the TPA has been agreed at Cabinet Committee level, and it was designed so that the contribution from the department would be equivalent to the employer contribution that would have been paid had the member been able to join the NJPS. This is irrespective of any taxes or NI contributions paid upon receipt of the payment.

145. The position of the Government is that the TPA is an alternative for those Judges for whom it is not possible to join a tax-registered scheme. This is a unique option available to the judiciary in respect of the anomalous tax position of the predecessor scheme. This payment is to be paid outside of the pension framework, as 'earned income' alongside salary or fee, and subject to the relevant considerations.

Transitional Protection Allowance eligibility

146. As stated earlier in this section, a person's eligibility for transitional, or tapering, protection is determined by their age, and their appointment history. The date applicable for eligibility for these protections is 1 April 2012. If a Judge was in an eligible office, either salaried or fee-paid, immediately before¹⁵ this date, and meets the requirements on proximity to normal pension age¹⁶, they would be eligible for protection. This is a policy of HM Treasury, and is applicable to all public service schemes.

147. The Transitional Protection Allowance (TPA), is an additional feature of the NJPS, unrelated to transitional protection. This is unique to the judiciary, for those Judges for whom it is not possible to join a tax-registered scheme.

148. In response to this consultation, 24% of all responses cited that the divergence between the two eligibility criteria was unfair. Firstly, if a Judge was eligible for the TPA, due to being a pipeline Judge, this should be extended to transitional protections in the same manner. In addition, a number of responses cited that it was unfair not to extend the offer of the TPA into the future, instead of insisting on a one-off, irrecoverable decision as at 1 April 2012.

149. A judicial association stated:

"All "pipe line" judges, if they are aged between 51 years and 6 months and 55 years at 1 April 2012, should be placed into Group B [tapering protection] with the ability to be in the current scheme before joining the NJPS and then if eligible opt for TPA."

150. A group of Judges eligible for tapering protection commented:

"The scheme [should be] amended to enable judges in our position to take the Transitional Protection Allowance at the end of the Tapering Relief period or thereafter"

151. Another association noted:

"The [association] sees the sense in treating 'pipeline judges' in the same manner as already appointed judges. They have been offered, and accepted, judicial office on the basis of the pension provision in place under the pre-existing judicial pension arrangements. They will very probably have commenced termination of their private practices in anticipation of their appointment. Accordingly they should be treated in the same manner as their already appointed peers, and the effectively arbitrary date of their actual appointment should not change their position."

¹⁵ 'Immediately before' being 23:59 on 31 March 2012

¹⁶ As at 1 April 2012 are within 10 years of normal pension age (aged over 55) for transitional protection, or within 13.5 years of normal pension age (aged over 51 years 6 months) for tapering protection

Government position

152. The TPA is unrelated to transitional protection. Transitional protection is a Government policy and the intent of this policy is to protect those public service pension scheme members who are closest to retirement. The TPA is an additional provision that the department is offering, unique to the judiciary, for those Judges for whom it is not possible to join a tax-registered scheme. The eligibility criteria for this are as a result of an administrative agreement with HM Treasury.
153. Opting for the TPA would be in lieu of joining the NJPS, and this option is only available for those eligible Judges in a qualifying judicial office, or whose appointment to that office had been agreed as at 1 April 2012, and who meet the following criteria:
- The individual is not eligible for full protection;
 - The individual has had continuous membership of the judicial pension scheme since being first eligible to join it and are still active members of the scheme at 31 March 2015;
 - The individual can provide proof of having registered with Her Majesty's Revenue and Customs (HMRC) for either Enhanced Protection (EP) under the Finance Act 2004 or Fixed Protection (FP) under the Finance Act 2011, and has not contacted HMRC to revoke such Protection; and
 - The individual has not taken any action which negates the validity of their Protection (for instance, joining a registered pension scheme or making contributions to a registered money purchase pension arrangement after 5 April 2006 (EP) or making contributions or building up benefits in a registered pension scheme after 5 April 2012 (FP)).
154. Opting for the TPA is a one-off, irrevocable decision as at 1 April 2015, and by electing for this option, a Judge is extinguishing any rights to transitional protection. There is no eligibility requirement for this on the proximity to normal pension age; this is not a consideration in the policy intent. The policy to implement the TPA is to ensure an alternative is available for those Judges who cannot join the NJPS from 1 April 2015, due to existing protections they may have in place. This cannot be taken in conjunction with any protection, or at the end of a period of tapering protection in the future.
155. As the TPA is a unique policy for the judiciary, the department sought agreement to set the qualification provisions, to include all specified 'pipeline' Judges, whose appointment had been agreed by 1 April 2012, but had not yet assumed office. This provision was agreed by the relevant Cabinet Committee on this basis. The transitional protection provisions are applicable in the same manner across the public service equally.
156. The Government considers the TPA to be a generous alternative for Judges for whom it is not possible to join the NJPS. Transitional protection is a means to implement these reforms in a fair manner, protecting those closest to retirement. The motivation and intent behind each policy is different, and as a result, the eligibility requirements differ accordingly. The eligibility requirements for the TPA are as a result of an administrative agreement, whereas as the eligibility requirements for transitional protection are statutory. The Government does not consider that the existence of the TPA and the specific qualifying criteria applicable is a justification to depart from the principle of applying transitional protection consistently across all reformed public service schemes.

Limiting pensionable earnings

157. The tax-registered status of the NJPS means that the all benefits accrued under this scheme will be considered for the Annual and Lifetime Allowances.

158. In response to this consultation 6% of responses cited that due to the means employed by the Government in remunerating Judges, registering the scheme for tax purposes was inappropriate. This is due to the fact that by virtue of their pensionable earnings, a number of salaried Judges would breach their Annual Allowance solely as a result of being a member of the scheme.

159. One High Court Judge noted:

“anyone who is able flexibly to plan their own retirement provision will not choose to make further contributions to registered schemes once they have reached the relevant limits.”

160. This Judge added an example of an alternative method which to:

“...mitigate some of the damage of the current proposals... allow a member of the NJPS to limit their accrual each year to the Annual Allowance with a commensurate reduction in contributions.”

Government position

161. The Chancellor of the Exchequer announced the reduction in the Annual Allowance from £50,000 to £40,000 in the 2012 Autumn Statement. This was to protect the public finances from the growing cost of tax relief for pension savings, which was predicted to rise to £35 billion in 2015-16¹⁷.

162. The Government is committed to offering flexibility to scheme members as part of the reforms, and as such has offered the Partnership Pension Account to prospective members of the NJPS, which will be designed to reflect the Government’s proposed policies on freedom and choice in pensions. However, it would not be fair or desirable to the taxpayer to allow Judges to limit their pensionable earnings to enable certain Judges to avoid tax charges. Taxation policy remains the responsibility of HM Treasury.

¹⁷ HM Treasury 2012 Autumn Statement, 18 December 2012

Scheme design

Method of calculation of member contributions

163. The judicial pension schemes have been subject to personal pension contributions from members since 2012. For the salaried judiciary working on a full time basis, these rates have been set equally for all members. For Judges working on a salaried part time basis, these have been set pro-rata against salary actually earned by the Judge.
164. The New Judicial Pension Scheme (NJPS) allows for a tiered member contribution rate based on pensionable earnings, in line with the contributions paid in the reformed civil service scheme with which the NJPS is to be analogous.
165. The NJPS will also allow for the inclusion of a large number of fee-paid Judges who do not sit on a full time basis. As such, the department asked consultees to comment on the most appropriate method to calculate the rate of contributions for these Judges not working on a full time basis, either based on the salary or fee actually earned by the Judge, or the equivalent rate of pensionable earnings of the Judge's whole time equivalent.
166. Of the 84 respondents to this consultation, 24% provided a response to this question, with the remaining respondents offering no comment, no answer, or leaving responses blank. Of the 20 responses, there was no consensus as to how to assess contributions, with 11 in favour of the whole time equivalent approach, and 9 in favour of the actual earnings approach. It should be noted that a number of associations commented on this question.
167. Those in favour of the actual earnings approach noted that:
- This was a much fairer and more equitable approach than the whole time equivalent approach, as this would ensure contributions are assessed in the same manner as benefits; and
 - Implementing the whole time equivalent approach would result in non-full time members of the judiciary contributing a disproportionately high rate for the benefits they are due to receive.
168. For example, one association stated that:
- “Clearly, the ‘actual earnings’ approach should be adopted because it would be unfair for fee paid Judges and salaried judicial office holders to make contributions based upon a notional salary.”*
169. Another Judge commented that:
- “There are a number of fee-paid members who have little other work. If their contributions are set at 7.25% [in line with the Whole Time Equivalent] this would be a significant dent in their take-home pay, and run counter to the principle that the higher paid should pay a higher percentage.”*
170. Those respondents in favour of the whole time equivalent approach often cited that this approach would help mitigate against any potential future pressure on the employer cost cap calculations.

171. A judicial association noted:

“Calculation on ‘actual earnings’ would make it more probable that the cost cap would bite. This would be detrimental to all potential members. In view of this, the contributions should be based on full-time equivalent earnings.”

172. In addition to this point, a member of the public stated:

“Whole time equivalent is a more usual method of calculation for part time staff.”

Government position

173. If the whole time equivalent approach was adopted instead of the actual earnings approach, those Judges not sitting on a full-time basis would be paying a disproportionately high amount in member contributions for the benefits they would be due to receive on retirement. These benefits are assessed on actual pensionable earnings, and it does follow that contributions should be assessed on the same basis.

174. The Government does accept that electing to force non-full time members to pay contributions in line with Judges who earn significantly more than them could, in theory, provide a downward pressure on the employer cost cap. However, this would be because lower earners are paying a disproportionately high amount for the benefits they receive. The issues surrounding the fee-paid judiciary and the employer cost cap are detailed in the section titled Scheme Governance.

175. Under current pension arrangements for salaried Judges, those Judges sitting on a Salaried Part-Time Working basis have their member contribution rates assessed under the actual earnings approach. In addition, the reformed civil service scheme will be using actual earnings to calculate contributions for non-full time civil servants. Without a consensus response to this question, the Government is minded to continue the existing principle set for the calculation of member contributions, and use the ‘actual earnings’ method.

Qualifying period for benefits

176. Under the existing scheme for salaried Judges, there is no qualifying period for medical retirement benefits. However, as part of these reforms, a two-year qualifying period for medical retirement benefits was proposed under the NJPS. There is a qualification period for pension benefits under JUPRA of five years, except in some age-related circumstances. Under the NJPS, this qualification period for pension benefits is being aligned with the reformed civil service scheme and will be two years.

177. In response to this consultation, 13% of all respondents stated that implementing a qualifying period for benefits was not appropriate for the judicial scheme. It should be noted that a number of these responses were from judicial associations.

178. A judicial association commented:

“It is considered that all benefits should be available to members without the need to serve a qualifying period. There may be a rationale for having a qualifying period where the members are likely to move as their career progresses. This is not the case with judges... [as] the demographic is such that Judges tend to be older when they take up judicial appointment.”

179. The association went on to add:

“Judicial office for salaried judiciary is a lifetime appointment. The numbers involved [in removing the qualifying period] are likely to be small and so the cost would be nominal for the reassurance it would give to members.”

Government position

180. The Government accepts that the implementation of a two-year qualifying period for medical retirement benefits is a divergence from existing practice in the judicial scheme; however, this does bring the scheme into alignment with schemes across the public service.

181. Lord Hutton and IPSPC were clear in the Commission’s final report that one of the key drivers for these reforms is to manage risk to both the taxpayer and to scheme members. Having no qualifying period for benefits is an assumed risk for the scheme. Whilst the Government accepts that certain salaried Judges are required to undertake pre-appointment checks prior to assuming office, which include a medical check, the same is not true for the fee-paid judiciary. Judges working in a fee-paid capacity will constitute the majority of the membership of the NJPS, and the Government is of the view that waiving qualifying periods entirely for all members of the scheme represents a disproportionate risk to the taxpayer, and to scheme members. After further consideration of the points raised during this consultation, the Government does not believe that there is sufficient justification for the judicial scheme to depart from the approach to qualification for medical benefits in the reformed civil service scheme.

182. However, minded of the unique nature of the judicial career path, the department has inserted a discretion into the regulations to allow the Judicial Pension Board to make a recommendation to the Scheme Manager to waive this qualifying period in respect of ill health benefits if deemed appropriate. Members of the judiciary will be represented in equal numbers to departmental representatives on the Judicial Pension Board.

Indexation of pension benefits

183. Benefits under the NJPS are to be revalued annually. At the end of each scheme year, the balance of benefits accrued in a member’s pension pot will be subject to an increase, at a rate set out by an HM Treasury Order that reflects the Secretary of State for Work and Pensions’ annual review of the general level of prices.

184. In response to this consultation, 5 respondents commented that the proposed method of revaluation may not be appropriate, and sought further clarity. It should be noted that these responses included one judicial association.

185. A judicial association commented:

“The proposal would appear to be that indexation is a matter for the Treasury. The issue of indexation is significant because, if there is no indexation during the period of the relevant pension, this could significantly erode its value. We would invite clarification as to how indexation will be implemented.”

Government position

186. The Government’s proposed approach to revaluation is in line with approaches used across the public service, including the existing JUPRA scheme. Under JUPRA, whilst benefits are not revalued every year, as they will be under the NJPS, they are uprated in line with the rate outlined in the Pensions (Increase) Act 1971.

187. It is common practice across Government for the rate of indexation to be set in line with the HM Treasury Order that reflects the Secretary of State for Work and Pensions' annual review of prices, the Consumer Price Index. This is the approach taken in the reformed civil service arrangements and the arrangements under the existing scheme for salaried Judges. The Government does not feel it appropriate to make extra provision in scheme regulations to diverge from the rest of the public sector on this point. The Government does not consider that special protections for the judiciary in this context would be fair to the other members of public service pension schemes, or the taxpayer. After consideration, the Government does not believe that there is sufficient justification to depart from the principle of applying the reforms consistently across all reformed public service schemes.

Annual benefit statements

188. One of the central tenets of these reforms, as highlighted by the IPSPC final report is to ensure a more open and transparent approach to public service pensions. To aid in this, each scheme is to ensure that all scheme members are provided with annual benefit statements outlining the status of each member's pension account, without being requested.

189. 6 respondents commented that the annual benefit statements provided to scheme members should include updates on annual and lifetime allowances.

190. One judicial association commented:

"The information in the annual statement should not only include the amount that is 'banked' for the member's pension but should also include the running total for the Lifetime Allowance as well as details of the amount for the current year for the purposes of the Annual Allowance. This will enable Judges to be aware of where their individual pension pot sits in relation to both the annual allowance and the lifetime allowance and the need to consider taking advice if nearing the cap for either."

Government position

191. The Government recognises that the tax-registered status of the NJPS will represent a change for members of the judicial pension scheme. As such, the Government can see the benefit for members in providing annual updates on considerations for Annual and Lifetime Allowances along with the annual benefit statements that will be sent to all members. The Government is happy to work with the new scheme administrator to ensure that this is captured as part of the new scheme requirements.

Lump sum commutation rate

192. In a divergence from the final salary JUPRA scheme, pensions paid under the NJPS will not include an automatic lump sum on retirement. However, all accrued benefits have been preserved, including the final salary link, and pensions in the future paid under JUPRA will include this automatic lump sum. In addition, in line with the approach taken in the civil service scheme, it was proposed that the NJPS will have the opportunity for members to commute a portion of their pension for a lump sum payment on retirement, and this is paid at a rate of £1 of pension for £12 of lump sum.

193. A judicial association commented that a commutation rate of 12:1 was not particularly favourable, and that a more favourable rate would be 18:1. This was endorsed by four other individual responses to this consultation.

Government position

194. The ratio of 12:1 for a commuted lump sum under the NJPS was outlined in the 2012 consultation on features of the new scheme, and again in the formal announcement of the reforms in February 2013. This is in line with the approach taken in the reformed civil service scheme, and is in accordance with Her Majesty's Revenue and Customs (HMRC) limits and regulations.
195. A commutation ratio of 12:1 has been in place in the civil service scheme in each of the last three iterations of the scheme, and the Government considers this offer for commutation a fair and sustainable approach to allow flexibility for Judges in retirement. The Government does not consider that making special provisions for the judiciary in the context of a more beneficial commutation rate would be fair to the other members of public service pension schemes, or the taxpayer. The Government does not believe there is any justification to implement a more beneficial rate of commutation for the judiciary than in the reformed civil service scheme,
196. In addition, as part of these reforms, the Government are offering the Partnership Pension Account for those Judges who wish to save for retirement more flexibly. The Government's reforms on Freedom and Choice in Pensions, announced at the 2014 Budget, will apply to the Partnership Pension Account.

Retirement provisions

197. In reforming judicial pensions, provisions for retirement have been made more flexible under the NJPS. For instance, there will be capacity for Judges to buy out the actuarial reduction applicable under the early retirement provisions.
198. In addition, Judges will be able to take partial retirement in the NJPS; this is not possible under the current JUPRA arrangements. This will allow Judges to continue to sit in their judicial office after drawing down their pension under the NJPS. Also, the provisions for late retirement have been amended, to allow for a Late Retirement Addition to be paid to Judges, to recognise that they are working beyond pension age.
199. 5 respondents to this consultation offered positive comments on the changes made to the flexibility of retirement provisions under the new scheme. This included a number of judicial associations.
200. One Judge noted on the late retirement provisions:

"The methodology here is very welcome... the chance to continue working and build extra years, together with some recognition for the delay in taking the pension."

201. However, one judicial association commented on late retirement:

"Whilst this also appears to be a positive feature of the NJPS there are reservations as to how this will work in practice. The Government position is to encourage people to work longer however the imposition of a Lifetime cap and an Annual Cap may be counter productive to many judges who will realise that working beyond retirement is not worthwhile from the point of view of taxation."

Government position

202. The Government is content with the proposals under the new scheme, which will increase the flexibility of retirement provisions. The Government considers that these new considerations for partial retirement, late retirement, and the early retirement buy out will increase the flexibility of the new scheme, and allow Judges to receive a good quality pension in retirement, in a manner that is in line with their personal circumstances. The Government also considers that the late retirement additions will make it easier for Judges to work beyond pension age if they so desire, benefiting the overall quality of the judiciary.

Benefits for dependants

203. Under the existing JUPRA scheme, benefits for dependants are set at 50% of the scheme member's pension upon the death of the member. However, for the NJPS, these benefits will be set at 37.5% of the member's pension.

204. 13% of all responses to this consultation stated that it is unfair and wrong of the Government to reduce the rate of benefits for dependants as part of these reforms. A number of judicial associations responded in line with this.

205. One judicial association commented:

"We see no logic, justification or fairness in reducing dependants' benefits from 50% in JUPRA to three eighths in the NJPS."

206. In addition to this, another judicial association noted:

"The dependants' benefits are less than the previous scheme (37.5% rather than 50% of the member's benefits) against a background of an assurance that such benefits in the new scheme would match those of the existing scheme. The higher level should be reinstated."

207. Four respondents, including a number of judicial associations did acknowledge the positive effect of the qualification criteria of the new proposals for surviving adults and eligible children.

208. One judicial association commented that:

"Certain aspects of the NJPS are welcomed. In particular... the change to the definition of eligible child [and] the possibility of a pension for a surviving adult and the fact that this is paid for life."

209. With regards to the eligibility for surviving adults, the judicial association went on to add that:

"Judge's partners should not necessarily be precluded from receiving death benefits if 'prevented from marrying'. It is the length of the relationship and financial dependence or inter-dependence that should be relevant."

Government position

210. The proposed benefits for dependants upon the death of a scheme member in the standalone NJPS were outlined at the outset of the consultation in July 2012. As the reformed scheme was to be in line with the reformed civil service arrangements, the rates were set at a lower rate than the existing scheme, in line with the reformed civil service scheme.

211. One of the alternative options available at the time of this consultation was a standalone scheme in line with the Government's preferred scheme design. This design included no change in benefits for dependants. However, in lieu of this option, the judiciary responded in favour of implementing a standalone scheme in line with the reformed civil service scheme, and a lower rate of benefits for dependants. After further consideration of the points raised in this consultation, the Government does not consider there to be sufficient justification to depart from the existing policy, which is in line with the reformed civil service scheme.
212. All benefits accrued under JUPRA will remain protected, including the dependants' benefits accrued in respect of service under JUPRA. The Government accepts that the rate of benefits for dependants in the NJPS is lower than the rate applicable under JUPRA; however, it should also be noted that the qualification for benefits has been widened as a result of the reforms for both surviving adults and children. In addition, for surviving adults, any dependants' benefits do not void on remarriage or entering into a new relationship as they would under JUPRA. The Government considers that the proposed benefits for dependants are suitable and appropriate for members of the NJPS.

Scheme governance

Employer cost cap

213. One of the key objectives of public service pension reform is to ensure a fair balance of risks between scheme members and the taxpayer. To achieve this, the Independent Public Service Pensions Commission (IPSPC) recommended that the Government, on behalf of the taxpayer, establish a mechanism to control future costs of providing public service pensions.
214. The IPSPC concluded that an employer cost cap was necessary because previous reforms to public service pensions have proven insufficient in terms of sustainability. These previously reformed schemes have not proven flexible or able to respond to changes in demographics, and fundamental structural form is necessary to ensure sustainability of pension provision for public servants into the future.
215. The approach is to be replicated across all of the reformed public service schemes and is designed to provide backstop protection for the taxpayer against unforeseen risks in the future, which will share risks and costs between scheme members and Government fairly.

Actions required upon breach of the employer cost cap

216. Each scheme must lay out a procedure through which any actions in the event of a future breach of the employer cost cap can be determined. It was proposed that for the New Judicial Pension Scheme (NJPS), this would be exercised through the Judicial Pension Scheme Advisory Board (JPSAB), whose remit is to advise upon the desirability any future changes to the scheme.
217. In the event of a breach, the proposal laid out in the consultation document was for the JPSAB to make a recommendation of action to the Lord Chancellor, as Responsible Authority for the scheme. The Lord Chancellor if minded to accept the recommendation would seek clearance from HM Treasury and the relevant Cabinet Committee before enacting the change to member contributions, the accrual rate, or a combination of the two.
218. Of the 84 responses to this consultation, seven offered comment on the actions proposed upon breach of the employer cost cap with the remaining 77 respondents offering no comment, no answer, or leaving responses blank.
219. There was no fundamental disagreement with the proposed approach outlined in the consultation document.
220. One association noted:
- “The actions... appear reasonable to the [association]. It would be difficult to legislate in more detail for such unpredictable situations.”*
221. Another respondent adding:
- “This is a balanced way to share the risk of increased longevity and changing member profiles.”*

222. However, a number of respondents wanted further assurances on the recommendations made by the JPSAB, with one association commenting that:

“Assurance also should be given that regardless of how the costs move in relation to valuation contributions by members should not be greater than those of members of the PCSPS and were indicated in July 2012.”

223. In addition, one Judge commented that:

“In the event of a breach of the employer cost cap where costs have increased it is necessary to consider first an increase in the employer costs cap. This will take in consideration any increase in available department funds.”

Government position

224. The employer cost cap has been designed to control the costs of each individual public service scheme. The employer cost cap has been set on an individual scheme-by-scheme basis, to avoid cross-scheme subsidy across the public sector. It is fair that scheme members in one scheme should not be affected by changes in another scheme.

225. The action that is taken in response to a breach in the cost cap by a scheme is to be determined by the JPSAB, upon which there is equal representation between the department and the scheme membership. This is true for the judiciary, as it is for each other public service pension scheme respectively. Any decision this board recommends will be specific to the judiciary and not constrained by the actions of any other public service pension scheme.

226. The Government would not propose to reduce the scheme-specific employer cost cap if a future valuation indicated a reduction in the cost in the scheme, in the same way it would not propose to increase it if such an outcome occurred. As outlined by the IPSPC, the employer cost cap is designed to *“act as an upper limit on the amount that the Government would commit to pensions over the long term to each scheme.”*¹⁸ This is required to ensure a fair sharing of risk between the taxpayer and the scheme member.

227. After consideration of the points raised in this consultation, the Government is minded to proceed with the proposed method for action in the event of a future breach of the cost cap, with a commitment to review the process at regular intervals, after consultation with the JPSAB, and the Heads of Jurisdiction to assess the suitability of the approach.

The default option for action upon breach of the employer cost cap

228. Each reformed public service pension scheme is required to nominate a default option in the scheme regulations to use in the event the JPSAB cannot come to a decision on what actions to take to bring the cost of the scheme back to the employer cost cap.

229. In practice, this can be either the accrual rate of the scheme, or the rate paid through member contributions. In the consultation document, the department proposed to use the accrual rate as the default option in breach of the cost cap.

230. Of the 84 responses to this consultation, nine respondents offered a response to this question with the remaining 75 respondents offering no comment, no answer, or leaving

¹⁸ Independent Public Service Pensions Commission; Final Report, 2011

responses blank. Seven of the nine respondents were in favour of setting the scheme accrual rate as the default option, and two in favour of member contributions.

231. One judicial association noted that:

“The default position to return the scheme to the cap being a change in the rate of accrual may be preferable to members than an increase in contributions.”

232. In addition, another judicial association commented:

“[A] sudden increase in contributions would be likely to impose too great an immediate strain on the resources of scheme members.”

233. However, one member of the public stated that:

“...it becomes harder to change pension income the closer one gets to retirement, whereas disposable income tends to be at its highest in years just ahead of retirement.”

Government position

234. The Government is content to agree with the majority of respondents with regards to the nomination of the default option as the accrual rate. Whilst doing so would result in the risk borne by the member, either negative or positive, being shifted until retirement and the payment of pension benefits; the majority of respondents have noted that this is preferable to the immediate increase, or reduction, of member contributions and in turn, take home pay.

235. The default option for action upon breach of the cost cap is to be stated in the regulations. This will only come into effect if the JPSAB cannot reach a consensus agreement for action.

Employer cost cap tolerance

236. As part of the employer cost cap mechanism, each scheme is to establish a two percent tolerance range around the employer cost cap, within which the employer cost may fluctuate without necessitating an amendment in the scheme accrual rate or member contributions. This is primarily to avoid minor and insubstantial amendments to scheme design after each future valuation.

237. 5% of all responses to this consultation noted that the implementation of a 2% range of tolerance in each direction around the employer cost cap was not appropriate in the NJPS.

238. A judicial association stated that:

“Given the size of the judicial schemes relative to the other public sector schemes, and their unique membership, the NJPS is likely to be more sensitive to changes over time... In our view, the margin should be set at a percentage of the cost cap, rather than as a nominal sum.”

239. Another judicial association commented that:

“The disadvantage of a smaller scheme is that it is more exposed to the volatilities resulting from unforeseen matters. We would urge the Government to consider revising the margins that trigger a reconsideration of future arrangements from 2% percentage points to a higher figure such as 4%.”

240. However, another respondent noted that the department should:

“Reduce the trigger percentage change to 1%.”

Government position

241. The implementation of the two percent tolerance around the employer cost cap was outlined initially in the 2012 HM Treasury paper *‘Establishing an employer cost cap in public service pension schemes’*, and subsequently in the 2014 paper *‘Public Service Pensions: actuarial valuations and the employer cost cap mechanism’*. The mechanism is also provided for in the HM Treasury regulations¹⁹ on the employer cost cap, which set the framework for the mechanism to operate.
242. The employer cost cap is being implemented to ensure that future costs of public service pensions remain sustainable in the long term. The tolerance range is there to limit the need to implement insubstantial changes to scheme regulations after every valuation.
243. Whilst it is true that the NJPS is to be one of the smallest reformed public service schemes, this is unavoidable as long as the judiciary have their own standalone pension scheme. The Lord Chancellor announced this approach after listening the views of the judiciary during the first consultation on the reforms in 2012. Consequently, the scheme may be particularly sensitive to external shocks and changes due to this small sample size.
244. However, increasing the tolerance from 2% will represent a divergence from the rest of the public service schemes. It could also result in prolonged periods in which the cost of the scheme may be significantly above the employer cost cap, which would not be an optimal position for the taxpayer. Conversely, it could also result in a situation where the cost of the scheme is significantly below the employer cost cap for a prolonged period. This would be similarly unfair to the scheme members. This is against the policy intent of the employer cost cap mechanism that is intended to be flexible to changes in circumstances.
245. In light of the responses to this consultation, the Government is minded to continue with the employer cost cap approach as outlined in the HM Treasury regulations that are applicable to every other reformed scheme. The cost cap is designed to control the cost of the scheme, and the engagement of the cost cap mechanism as necessary is a part of this. The Government is content that having a 2% range around the cost cap is an appropriate tolerance to balance the risks of insufficient or overgenerous contributions from scheme members or taxpayers for an extended period, and the risk of frequent insubstantial changes to scheme design after each valuation.

Employer cost cap and the fee-paid judiciary

246. The initial actuarial valuation of the scheme for the purposes of the cost cap was based on the membership data as at 1 April 2012, as is the case for each of the reformed public service pension schemes. As fee-paid Judges had not been determined as eligible for a pension at this point, any data concerning the fee-paid judiciary has not been factored into this actuarial calculation.

¹⁹ The Public Service Pensions (Employer Cost Cap) Regulations 2014

247. However, the next scheme valuation that will be completed in 2019 will be based on the scheme membership data as at 1 April 2016, within which fee-paid Judges in the schemes will be included.
248. One-fifth of all responses to this consultation commented on the issue of the future inclusion of fee-paid Judges into the NJPS, and the potentially negative impact this would have on future actuarial valuations, in respect of the employer cost cap. It should be noted that a number of these responses were from judicial associations.
249. A judicial association commented:
- “It is noted that the employer cost cap figure has been provisionally assessed to be 25.7%. It is essential that this figure correctly reflects the cost of providing benefits to potential members from the beginning of the scheme including the fee-paid judges.”*
250. Another judicial association added that:
- “No attempt has been made to quantify or allow for [the inclusion of fee-paid judges] but, clearly, it would be sensible to base the initial employer cost cap (and, indeed, assessment of the starting past service liabilities) on the membership, including the O’Brien judges.”*

Government position

251. Frequent actuarial valuations of schemes are a fundamental component of these reforms, to ensure longevity and a fair sharing of risk between scheme members and taxpayers. To ensure the establishment of a new scheme ahead of the end of this Coalition Government, each scheme was to complete a scheme valuation, using data from 1 April 2012. As part of this an ‘employer cost cap’ would be set as a benchmark for future valuations.
252. At 1 April 2012, fee-paid Judges had not been determined eligible for a pension, and thus there was no data available for their inclusion in the cost cap data, nor was there any perceived requirement at that point. Furthermore, even now, due to ongoing litigation, uncertainty still exists over the exact numbers of fee-paid Judges who will be eligible to join the scheme.
253. As is stated in the final scheme valuation report of the Government Actuary’s Department that is published alongside this consultation response, the impact of the inclusion of fee-paid Judges on the employer cost cap calculation is uncertain at this point and is subject to a number of complicating factors. However, as stated in the GAD report, there will not be a substantial impact in either direction solely by virtue of the inclusion of fee-paid Judges.
254. Furthermore, all historical costs relating to the pensionable status of fee-paid Judges are designated as ‘past service costs’ and as such, are not applicable in calculations for the employer cost cap. As such, all financial costs as a result of payments made for fee-paid service prior to 31 March 2015 will be irrelevant for the purposes of the employer cost cap.
255. A detailed explanation on the approach to fee-paid Judges in the actuarial calculations for the employer cost cap, as well as other inputs, is available in the GAD final actuarial report published alongside this formal Government response.
256. The MoJ reaffirms its commitment to ensure no less favourable treatment for eligible members of the fee-paid judiciary in respect of pension entitlement, and as such, they will be treated as equal members of the NJPS in all aspects, including the employer cost cap. It is imperative that the costs and benefits of the NJPS accurately reflect the cost of the scheme. This is true for both scheme members and taxpayers.

Judicial Pension Board discretionary decisions

257. As part of the strengthened governance arrangements of the reformed schemes, each scheme is to implement a Board to oversee the efficient administration and governance of the scheme. This is provided for in the Public Service Pensions Act 2013.

258. It was proposed in the consultation to extend a number of discretionary decisions to the Judicial Pension Board from the Lord Chancellor as Scheme Manager. The Judicial Pension Board would be able to make a recommendation to the Scheme Manager in respect of these individual decisions. If the Scheme Manager did not take that recommendation, he would be required to provide in writing an explanation to the Board. The specific discretions that the department proposed to extend to the Judicial Pension Board were outlined in the consultation document, and the department sought specific comment on these.

259. 7 responses commented on the suitability of the proposed discretionary decisions of the Judicial Pension Board.

260. One Judge noted:

“The discretionary decisions appear to cover the usual and expected issues.”

261. A judicial association commented:

“There are no other discretionary decisions that we would submit that the Board considers. We agree that it would be sensible that the Board and the Scheme Manager agree procedures or protocols for the Scheme Manager to deal with certain discretions within set tolerances or limits.”

262. Another association noted:

“The [association] agrees with the list of suggested discretions...for which the Scheme Manager would have to obtain a recommendation from the Judicial Pension Board (“JPB”). However, the draft regulations as currently worded appear to require the Scheme Manager to seek the recommendation of the JPB for the exercise of any discretion. The problem ... is that it could easily encompass a number of actions which are not suitable for such oversight, such as withholding payment from a beneficiary.”

263. In addition to this point on the decisions of the Judicial Pension Board a judicial association did comment on the membership of board, noting:

“It is [the association’s] view that members should elect board members rather than “election” by nomination.”

Government position

264. In response to the comment on the suitability of actions to be overseen by the Judicial Pension Board, the Government is content to make an amendment to its policy. In the event of actions that are determined as not suitable to be overseen by the Judicial Pension Board, the Government are content that the Board and the Scheme Manager may agree to disapply the requirement for an initial recommendation from the Judicial Pension Board. This is highlighted in Regulation 4(6). The Government also agrees that it would be appropriate to set limits and thresholds for decisions that can be taken by the Judicial Pension Board, and is content to amend its proposals to reflect this.

265. The Government is content to proceed on the basis of the agreed list of discretions in the consultation document and outlined here, committing to further review in the future.

266. It is the Government's position that the nature of the judicial representation on the Judicial Pension Board is a matter for the judiciary.

Internal Dispute Resolution Procedure

267. Under the existing judicial pension scheme, there is no formal procedure for the resolution of internal disputes. As part of these reforms that are coinciding with the implementation of a new third party administrator that will work on judicial pensions, the department proposed a new, formal Internal Dispute Resolution Procedure (IDRP).

268. The proposed procedure was a two-stage process to support disputes between both interested persons and the scheme administrator, and interested persons and the Scheme Manager. The first stage of this procedure would allow a person to appeal a decision to the administrator, after which they would receive a written explanation. Subsequently, if a person wished to appeal this decision, they could appeal to the Scheme Manager, who would defer to the Judicial Pension Board for a recommendation.

269. Of the 84 responses to this consultation, 6 respondents offered comment on the proposed Internal Dispute Resolution Procedure (IDRP). There were no fundamental dissenting comments to the proposal.

270. One member of the public noted:

"Overall [the IDRP] is a good system."

271. A Judge added:

"No adverse views in the light of [the proposal being in line with other public service pension schemes]."

272. However, one association commented:

"We consider that there should be a mediation clause so that the parties are obliged to appoint a mediator to undertake ADR prior to the appeal."

Government position

273. In light of the responses received in this consultation, the Government is content to implement the proposed IDRP in the NJPS initially as proposed. This approach was designed to be in line with common practice across pension schemes, in particular the public service. The Government, along with the Judicial Pension Board will commit to review this procedure over its implementation period, and into the future, to ensure suitability and that disputes are being managed in a proportional and efficient manner, in particular whether the use of a mediator would be appropriate.

Partnership Pension Account

274. At the conclusion of the initial 12-week consultation period, the Government issued an update to the proposed Partnership Pension Account (PPA). This update provided details of the proposed contribution rates under the new scheme, and replaced the existing information stated in the initial consultation document.
275. The proposed PPA is a standalone, money purchase scheme independent of the career average scheme. The PPA may be taken in lieu of the career average scheme, if the member chooses.
276. This is being offered at the same time as the NJPS, as this is the approach for the reformed civil service pension scheme

Departmental contributions

277. In the update on the PPA, the department confirmed agreement to make an employer contribution of 16% of a Judge's pensionable pay into their PPA, on top of 3% matching contributions from the Judge. This will result in an employer contribution of 19% into the PPA. This is higher than the highest achievable rate in the equivalent civil service scheme. In addition, this rate is available to all members, irrespective of age. This represents a divergence from the tiered age structure under the civil service.
278. 7 responses to this consultation referenced the rate of contributions in the PPA, including three judicial associations.
279. One judicial association noted that on the topic of the departmental contributions to the PPA:
- "This proposal appears to discriminate against and disadvantage anyone who chooses to opt for the PPA"*
280. Another association added:
- "It is unclear to [the association] why it is therefore proposed by MOJ to contribute 19% to the PPA and not 25.7%, as in the NJPS."*

Government position

281. The reason for the delay in the confirmation of the scheme design was due to the fact that the 'partnership' account in the civil service scheme was being revised, and the department had to wait until this was finalised before announcing the details of the design, including the employer contributions.
282. The update to the PPA explicitly highlighted that *"the information in this document supersedes the information in the original consultation document and where there is any contradiction between the two the information in this document should be used"*, and this clarification was also noted on the consultation home page.
283. As indicated in the consultation update, the employer contribution into this scheme is to be set at 19%, marginally above the highest possible employer rate in the equivalent civil service scheme. In addition, this contribution is applicable to all Judges, regardless of their

age. This is a divergence from the civil service partnership scheme which utilises a sliding scale of contributions on the basis of age. Minded of the unique judicial career path and demographics, the department will offer all judges, regardless of their age, the same level of employer contribution into their PPA.

284. The PPA is a standalone pension scheme, and is separate from the NJPS career average scheme. It offers different benefits from the career average scheme, for instance it allows a member to invest in particular funds to suit their own lifestyle, circumstances, and risk appetites. Members are also under no obligation to contribute to the levels of the career average scheme; member contributions are set to a minimum of 3% in the PPA, but a member may contribute more if they wish, in line with their own preferences.
285. This scheme will also be more flexible than the career average scheme in terms of drawdown, as this scheme will allow the member to draw pension benefits in line with their own personal circumstances. Under the NJPS career average scheme, a member can only draw pension benefits on an unreduced basis after normal pension age, which in the NJPS is 65 years of age.
286. The Government considers the proposed employer contributions are fair and are in line with equivalent schemes across the public sector.

Leaving the scheme

287. Four respondents to this consultation commented that the act of joining the PPA should not be classified as 'leaving the scheme' for pension calculation purposes and final-salary linking.
288. A judicial association noted:
- "Whilst having this option is generally welcomed opting out of the NJPS should not be treated as leaving the predecessor schemes".*

Government position

289. The PPA is a standalone money-purchase scheme that is distinct from the NJPS. By opting for the PPA, the member would have to formally opt out of joining the career average scheme, or opt out directly, and would from that point onwards accrue benefits under a different pension scheme. This is entirely consistent with schemes across the public sector.
290. The Government has committed to protect accrued rights in these reforms, and as part of this, has committed to protect the final salary link for those members who have to move into a reformed scheme. To join the PPA, the member must formally opt out of the reformed NJPS, and as part of this, the protection of their final salary link. The Government does not agree that the taxpayer should be liable for the accrual of a member's benefits under two pension schemes for the same period of work, which the act of allowing a member to maintain their final salary link would amount to.

Administration charges

291. One judicial association questioned the approach to administration charges under the PPA:

“It is also unclear what the administration charges are that will be paid to Prudential, and whether these will be deducted from the individual’s account. In relation to the NJPS, the Government will bear all such charges but what is the position in relation to the PPA?”

Government position

292. In line with the approach taken by the civil service partnership account, all administration charges are deducted from the member’s account. For the PPA, these ‘annual management charges’ are set by the third party provider, Prudential, and will be set at 0.7% of the fund. This is in line with industry best practice.

293. Whilst the approach to administration charges is different from the career average scheme, for which the administration charge is covered by the department, this approach is in line with common practice across the public service.

294. This is to reflect that the individual holds the personal relationship with the third party provider, Prudential, rather than the department. It is not for the department to pay any administration charges that arise out of this relationship. This is also the approach taken under the current judicial pension scheme for the Judicial Added Voluntary Contribution Scheme, for which the annual management charges are deducted from the individual’s fund.

Annual tax charges

295. In response to this consultation, 5 responses raised a potential issue of annual tax charges applicable under the PPA.

296. A judicial association commented:

“There needs to be clarification on what “scheme pays” arrangements would apply in respect of any tax incurred by way of annual charge arising from the PPA contribution each year.”

Government position

297. After discussions with the new scheme administrator, Prudential, the department can confirm that a ‘scheme pays’ facility will be available in the PPA. Further details on this point will be made available in a scheme booklet that will be sent to potential members with the options exercise materials.

Changes to the regulations

298. As part of the department's ongoing consultation with HM Treasury on the regulations to bring the New Judicial Pension Scheme (NJPS) in to effect²⁰, there have been a number of additions and modifications made, on top of what has already been highlighted in this response.
299. The vast majority of these changes are related to drafting and are minor and technical in nature; however, the department has made a small number of substantive changes that are highlighted below.

Forfeiture

300. At Part 11 Chapter 3, the regulations have been amended to provide for forfeiture or set off in circumstances where a monetary obligation or monetary loss arises out of a member's criminal, fraudulent or negligent behaviour. This brings NJPS into alignment with other public service schemes; mirroring the circumstances in which an occupational pension may be subject to forfeiture or set off as provided for in section 93 of the Pensions Act 1995 (c. 26). However, it remains the case that forfeiture or set off can only occur when the Lord Chancellor (or Secretary of State for Scottish Judges) and the relevant head of jurisdiction agree that it is appropriate to do so and the extent to which forfeiture or set off should apply. The MoJ recognises that this is an extension to the power and the Lord Chancellor and Secretary of State propose to write to the heads of jurisdiction providing assurance that consideration as to the exercise of this power will only be considered in the most serious cases.

Provisions for transitional members

301. Part 8 of Schedule 2 modifies the effect of provisions relating to contracting-out of the additional state pension under the Pension Schemes Act 1993 for members joining or transferring to the NJPS during the period from 1st April 2015 to 5th April 2016. Certain procedural requirements in the Occupational Pension Schemes (Contracting Out) Regulations 1996 are disapplied to an election to contract-out the NJPS, as long as it meets certain requirements in the 1993 Act.
302. Part 9 of Schedule 2 modifies the effect of other provisions of the 1993 Act, in their application to certain persons who join the NJPS whilst still being non-accruing members of an existing scheme. Those members are to be treated as if they are in ongoing pensionable service under one scheme, not two. Part III of the 1993 Act concerns contracting-out. Part IV of the 1993 Act concerns members of occupational pension schemes who leave before retirement age. The non-accruing members of the existing scheme are to be treated as if their existing scheme service does not terminate, nor their contracted-out service cease, when they join the NJPS; only when they leave the NJPS. The modifications apply for the purposes of preserved benefit; revaluing benefits; protecting increases in guaranteed minimum pensions; and cash equivalent values and contribution refunds. Specified provisions in the Occupational Pension Schemes (Transfer Values) Regulations 1996, which were made under Chapter 4 of Part IV of the 1993 Act, are also modified.

²⁰ This process was outlined in paragraph 28 of the consultation document.

Amendments to Judicial Pensions and Retirement Act 1993 and the Judicial Pensions Act 1981

303. There are no enhancements to ill-health or survivor pensions under Judicial Pensions Act 1981; however, there such enhancements are applicable in the judicial pension scheme under the Judicial Pensions and Retirement Act 1993 (JUPRA). The department has inserted into the regulations an amendment to section 2(7A) of JUPRA, precluding the payment of an enhancement on ill-health retirement under JUPRA when one is paid under NJPS.

Conclusion and next steps

304. The department will now take steps to lay the regulations in Parliament to bring the NJPS into effect. These regulations will reflect the policies outlined in this response.
305. As mentioned earlier in the document, the NJPS regulations will be laid in Parliament subject to the affirmative procedure.
306. In addition to these regulations, the department has also sponsored a number of amendments in the DWP Pension Schemes Bill. These amendments will create a power for the Lord Chancellor to create a pension scheme for eligible fee-paid Judges, and will also ensure the effective interface between the NJPS and the fee-paid scheme.

Options exercise

307. A number of Judges will have an option to make in respect of their individual pension provision ahead of 1 April 2015. To process these options, the department is to launch an 'options exercise' for both salaried and eligible fee-paid Judges in the near future.
308. Firstly, in November, all active salaried Judges should receive an individual letter from the department outlining their personal situation, and the options available to them in respect of pension provision. For the majority of salaried Judges, this letter will outline that they are to be unaffected by the reforms, due to the application of transitional protection.
309. Each options letter will include a summary of the personal information held by the department, a detailed explanation of the options available to the Judge specifically, and a returning form where appropriate.
310. To ensure that the April 2015 payroll reflects the chosen option of a Judge, it would be helpful if responses to this options exercise were registered with the department before 28 February 2015. The options exercise will close on 31 March 2015 and Judges should ensure responses are with the department by this date. Each option letter outlines the default position if a response is not registered with the department. Materials for the options exercise will also be hosted on the Judicial Intranet.
311. A similar exercise will also be run for eligible fee-paid Judges over the coming months.
312. The New Judicial Pension Scheme is set to launch on 1 April 2015.

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.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Annex A – List of respondents

Lord Chief Justice

Lord President of the Court of Session

Lord Chief Justice Northern Ireland

Senior President of Tribunals

Association of HM District Judges

Association of Part Time Judges

The Bar Council

Council of Appeal Tribunal Judges

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

Council of HM Circuit Judges

Council of HM District Judges (Magistrates' Court) of Northern Ireland

Council of Employment Judges

Council of Immigration Judges

Intergenerational Foundation

Senators of the College of Justice

Sheriff's Association

Tribunals Forum

Annex B – Eligible fee-paid judicial offices as at 19 September 2014

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

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

Part-time Sheriff

19 September 2014

Annex C – Equality statement

Policy objective

1. The objective is to deliver a reformed Judicial Pension Scheme by April 2015, consistent with the objectives set out for Public Service Pensions by the Government in November 2011, while taking into account the particular needs of the judiciary. This Equality Statement builds on the initial Equality Impact Assessment (EIA) first published in February 2013. This was also published alongside this consultation, and a link is available alongside the consultation response. This Equality Statement considers the impact of the proposals put forward to deliver against this objective, namely a Judicial Pension Scheme that is affordable and sustainable, fair to both the judiciary - including ensuring we comply with our equality duties - and the taxpayer.

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).

Summary

Direct discrimination

6. This subject was covered in the body of this consultation response (p.14) and the position is reaffirmed here. The Government accepts that, because of transitional protection, these reforms will impact differently on Judges according to their proximity to normal pension age. Whilst it is the Government's aim of these reforms to ensure the long-term sustainable provision of good quality pensions to all public servants into the future, transitional protection is designed to protect those closest to retirement who do not have sufficient opportunity to react to changes in their pension. Transitional protection represents an additional cost to the Government, but is in line with the principle of fairness, with respect to both scheme members and taxpayers.
7. The Government recognises that, as a group, older scheme members will benefit from the transitional and tapering protections. This group as a whole is also likely to have accrued more benefits in the existing schemes and in line with this, the Government also recognises that these Judges will have, in that respect, least to lose from the reforms themselves. The effect is likely to be that older members will receive pension benefits that are worth more than those received by younger members of the scheme. This is true across all reformed public service pension schemes.
8. The scope of transitional protection has been determined as being those within 10 years of retirement age to ensure fair treatment in respect of expectation and plans for retirement. This group is, by definition, closer to their retirement, and as such are more vulnerable as they have much less opportunity to effect any changes in this regard. Without transitional protection, all scheme members would be affected by the reforms, and those scheme members closest to retirement age would be impacted more immediately than their younger counterparts would. The Government considers that transitional protection in this respect is in line with the principle of fairness in these reforms.
9. The IPSPC clearly stated that the reforms to public service pensions could not achieve its stated aim of a legitimate, sustainable and fair approach to public service pensions if the reforms were restricted to only new starters and all existing members could remain in their current schemes. In addition, the Commission stated that protecting all existing members in such a way would be unfair and inequitable to new members coming behind them²¹. The proposed design and application of transitional protection is to ensure fairness between the competing interests of scheme members and taxpayers.
10. While younger members outside of the protected group are likely to be more affected by the changes, it is the Government's view that these members are further from retirement and will therefore have more opportunity to mitigate the potentially negative impacts of the reforms through long-term financial planning and saving, should they wish to do so.
11. During this consultation, a number of Judges commented that the unique nature of the judicial career path meant that Judges were being disproportionately disadvantaged by these reforms in comparison to the rest of the public service. This is due to the fact that salaried Judges are not in a position to return to practice after assuming judicial office, and as such, younger salaried Judges are not in a position to take account of the reforms in the

²¹ Independent Public Service Pension Commission: Final Report, 2011; p.9

same way as other public servants. As such, the policy to apply transitional protection to the judiciary was not appropriate.

12. It is true that the undertaking given by salaried judges not to return to practice may make it more difficult for some judges than for other public service pension scheme members to find alternative employment should they wish to do so. However, the Government's view is that a member having the opportunity to mitigate the effects of the pension changes does not necessarily have to mean leaving their current employment. Members may equally make financial and lifestyle adjustments to mitigate the impact of scheme changes, for example enabling them to build up investments. Younger members will have more time to do so than older members, so it is correct that the transitional protections reflect that. In this respect, the justification for transitional protection in general applies to Judges just as much as it does to other public service scheme members.
13. It is also right to observe that, due to the particular demographics of the salaried judiciary, the proportion of scheme members who are eligible for transitional protection is much higher than in other public service schemes, leading to a relatively smaller proportion of members being unprotected, and thus affected by these reforms.
14. This point was raised in response to the Lord Chancellor's consultation in 2012, and was referenced again in response to this consultation. It was said that the different age demographics of the scheme membership should warrant a departure from the principle of applying transitional protection consistently across all reformed public service schemes. At the time of the initial consultation, an alternative "cost-neutral" proposal was provided to reflect the point that the proportions of protected members in the scheme were sufficiently different from those in other schemes to warrant a divergence from the consistent application of transitional protection. This proposal involved extending transitional protection from the reforms to all existing judges regardless of age, and only applying the reforms to new starters. It was proposed that the additional cost of this would be covered through additional member contributions for all scheme members. This cost was estimated to be around an additional 3.8% in member contributions for all judges.
15. This alternative proposal was considered at the time of the 2012 consultation, and was rejected because the Government did not believe that the higher average age of the judiciary should warrant a divergence from the cross-Government policy. In addition, this proposal did not meet the Government's objective of protecting from change those closest to retirement; rather it would have placed an additional and excessive burden on this group in higher contributions for the benefit of those who have more time to adapt to the proposed changes. It would also, through the operation of the employer cost cap, mean that the risk of future changes to the cost of the scheme would be borne entirely by judges in the NJPS.
16. This proposal was referenced again in this consultation, with a slightly wider scope, including all current active members of the judiciary. The Government has considered this proposal, and also requested the scheme actuary, the Government Actuary's Department (GAD), to provide a provisional assessment on the proposal.
17. The provisional GAD assessment on the proposal to maintain all Judges appointed up to 31 March 2015 in JUPRA until retirement, ensuring cost neutrality to the department, indicates that the required rate of member contributions from 1 April 2015 would be considerably higher. It would be in the region of 13% for all members of JUPRA, and above 20% for all new members in the NJPS.

18. In light of this, the Government reaffirms its existing position that it does not consider that this alternative proposal would meet the objectives of fairness, or protecting those closest to retirement. It would instead place an additional and excessive burden on all members of the judiciary, including those closest to retirement and all new starters from 1 April 2015 onwards.
19. Furthermore, consistency of treatment across the public service schemes – though not an inflexible rule – is nonetheless an important objective.
20. A judge who is 14 years from retirement (and therefore does not benefit from transitional protection) is no more affected by the changes than, for example, a nurse who is 14 years from retirement. Both will have entered their respective professions with expectations about the pension they would receive. Both may receive a less valuable pension than they expected. Even though judges are unique in giving an undertaking not to return to practice, both the judge and the nurse may, as a matter of reality, find it difficult to obtain other employment given their skills and qualifications. Both can use the time remaining to them before retirement to make whatever financial and lifestyle changes they consider appropriate to adjust to changed pension expectations.
21. The Government would need a compelling reason to accord special treatment to judges that was not accorded to other public service scheme members. It has shown an open mind to the question whether such a compelling reason has in fact been shown. In relation to tax treatment, it has accepted that judges are in a special position – because the current judicial pension scheme has historically been unregistered for tax purposes. It has also accepted the arguments for a different rules on medical retirement (so as to align with existing scheme rules). The Government considers that these concessions in respect of concerns specific to the judiciary are reasonable, and in line with the principle of fairness.
22. In respect of transitional protection, however, the Government does not consider that the judiciary are in a sufficiently different position from members of other public service schemes that it would justifiable to extend transitional protection to all (rather than merely the majority) of judges in post when the reforms were announced.
23. In addition to transitional protection, the Government has applied all other protection policies equally to all members, regardless of age, or any other protected characteristics. The accrued pension rights that all members have built up in their existing schemes will be untouched. In addition, members will continue to have their pre-reform accrued benefits linked to their final salary on retirement, instead of to their salary at the point at which they moved into the new scheme.

Indirect discrimination

24. This subject was covered in the body of this consultation response (p.18) and the Government's position is reaffirmed here. In introducing the policy on transitional protection outlined above, the Government recognises that within the judiciary, there are lower proportions of women and individuals from a Black, Asian or Minority Ethnic (BAME) background in the protected group than there are in the taper group ('part-protected') or the unprotected group. This is because those judicial pension scheme members who are women and those from a BAME background tend to be younger, which reflects, at least in part, more recent recruitment drives seeking to increase the diversity of the judiciary.

25. The two tables below provide details on the ethnic and gender breakdown of the salaried judiciary, using available information from 31 March 2014. Table 1 shows that the proportion of BAME Judges in the unprotected group is higher than the proportion of white Judges in the same group. Table 2 shows that the proportion of female Judges in the unprotected group is also higher than the proportion of male Judges in the same group.

	Unprotected	Part-protected	Protected	Total
BAME	36 37%	18 19%	43 44%	97
White	375 23%	218 13%	1054 64%	1647
Not Stated	30 16%	25 13%	135 71%	190
Total	441 23%	261 13%	1232 64%	1934

	Unprotected	Part-protected	Protected	Total
Female	190 36%	104 20%	233 44%	527
Male	251 18%	157 11%	999 71%	1407
Total	441 23%	261 13%	1232 64%	1934

26. The Government accepts that, because of transitional protection, these reforms will impact differently on Judges according to their proximity to normal pension age. The Government also accepts that policies in respect of transitional protection may have the potential to indirectly discriminate against those Judges with protected characteristics.
27. The scope of transitional protection has been determined as being those within 10 years of retirement age to ensure fair treatment in respect of expectation and plans for retirement. An additional 3.5 years of tapering protection has also been extended to avoid a 'cliff-edge' effect in protection. The protected group is, by definition, closer to their retirement, and as such are more vulnerable as they have much less opportunity to effect any changes in regards to their pension and individual financial position. The policy of transitional protection is being applied to all public service pension scheme members in a consistent manner. While each public service pension scheme has its own particular demographics, consistency of treatment across the public service schemes is an important objective.

²² The information in Tables 1 and 2 is based on an extract from the Judicial Office database as at 31 March 2014.

28. While the Government does accept the potential impact on the judiciary given its own particular demographics, it does not consider that the justification of transitional protection is less pressing in the case of the judiciary than in the case of the other public section schemes as a result. The Government does not feel that there is sufficient justification to deviate from the principles of fairness to those closest to retirement, or the consistent treatment of public servants across the public service, in this instance. It is the Government's view that members will continue to receive a high quality pension with a guaranteed payment in retirement that is protected against inflation regardless of their gender, race or background.
29. The Government is also of the view that there are features of the proposed reformed scheme that have positive impacts from an equalities perspective, for instance the provision of adult dependant pension to a partner (where there is no spouse or civil partner). Additionally, as a result of these reforms, such pensions for adult dependants will be paid for life and will not cease upon remarriage or a new civil partnership as is the case under the current arrangements. These reforms will ensure equality of treatment between opposite sex and same sex (not married or civil partnered) surviving partners.
30. The new scheme also does not limit the number of years of reckonable service, as is the case under the current arrangements. This will ensure that pension provision under the NJPS will fully recognise all judicial service, instead of capping service at 20 years. This will most likely benefit women since they live longer on average than men. The new scheme will also allow for a late retirement adjustment for those working beyond retirement age, and provide for the opportunity to take partial retirement to promote more flexible working patterns.

Discrimination arising from disability and the duty to make reasonable adjustments

31. There is still no data at present on disability within the judiciary and so the department cannot rule out the possibility of discrimination arising from disability. 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

32. 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

33. It has been suggested that these pension proposals might potentially discourage new 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 judicial posts. The impact of these reforms on judicial recruitment was considered again in the body of this consultation response. 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

34. 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

35. 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.

36. 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;

37. For the reasons set out above, and in this consultation response, the Government considers that the proposals are not unlawful.

Monitoring

38. The department is committed to supporting the recruitment and retention of the right people for judicial office. The department will continue to monitor closely any potential impact of these reforms in respect of judicial appointments through data collected by the Judicial Appointments Commission.

39. 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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