

JUDICIAL PENSIONS REFORM: EQUALITY IMPACT ASSESSMENT

This Equality Impact Assessment relates to the Ministry of Justice's Judicial Pensions Reform. It should be read alongside the recently announced Written Ministerial Statement (and accompanying communications). We are publishing this EIA since it delivers on our pre-existing commitment to do so and summarises how we have complied with our equality duties in the development of the Judicial Pensions proposals

Aims, Objectives and Outcomes

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 Impact Assessment considers the impact of the proposals put forward to deliver against this objective, namely a Judicial Pension Scheme that is affordable and sustainable, fair both to the judiciary - including ensuring we comply with our equality duties - and the taxpayer. The outcome of this objective is a new Judicial Pension Scheme, the details of which are set out in the proposals for reform that are discussed below.

Public Service Pensions Reform

2. The Government set up the Independent Public Service Pensions Commission in June 2010, chaired by Lord Hutton. This commission was tasked with conducting a fundamental structural review of public service pension provision and to make recommendations to the Chancellor and the Chief Secretary on pension arrangements that are sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer and consistent with the fiscal challenges ahead, while protecting accrued rights. Lord Hutton published his final report in March 2011 and made 27 recommendations on how the reform of public service pensions should be done. The Government accepted these recommendations as the basis for consultation with those affected.

2015 Scheme Design

3. The Government set out its proposals for the reform of public service pensions in its publication "Public Service Pensions: good pensions that last", published on 2 November 2011¹. This set out the Government's proposals for long term reform based on three main drivers for reform identified by Lord Hutton and their own objectives.

4. The Hutton drivers are:

- Longevity – people are living longer. Current pension provision is no longer affordable because people are spending longer in retirement. This is the main risk to the sustainability of public service pensions;

¹ Cm 8214

- Flexibility – pension provision no longer reflects the way the modern labour force lives and works; and
- Fairness – the predominantly final salary scheme designs currently in place mean that lower-paid public service workers are subsidising the pensions of the highest paid.

The Government set out its objectives that any reformed pension scheme should:

- Ensure a good level of retirement income for public service workers
- Have a reasonable degree of certainty;
- Be affordable and sustainable, with cost risk managed and shared effectively;
- Provide a fair balance of cost and benefits between public service workers and other taxpayers;
- Aid recruitment and retention of the right people in the right jobs;
- Protect those closest to retirement;
- Have a clear legal framework and governance structure – and be widely understood by workers; and
- Stand the test of time – no more reform for at least 25 years.

5. *Good pensions that last* set out the Government’s preferred approach to future pension scheme design. However, the Government recognised that different scheme designs might be more appropriate for different public Service workforces.

Judicial Pension Scheme proposals

6. The Ministry of Justice published its initial proposals for judicial pension reform on 20 July 2012. In brief, the proposed approach was for the judiciary to participate in the Civil Service pension arrangements from April 2015. Comments were received from more than half of the salaried judiciary and a number of discussions have been held with the Heads of Jurisdiction and the Judicial Pensions Committee. The Ministry of Justice published revised proposals on 5 February 2013. While these retained a link to the Civil Service terms, they incorporate two important changes. First, the judges should have their own new pension scheme from April 2015 and participate in its governance and development. Second, a “transitional protection allowance” is proposed to mitigate the impact, for those most affected, of moving from tax-unregistered to tax-registered pension arrangements. This Equality Impact Assessment examines the arrangements described in the proposals. A copy of the summary of the features of the proposed scheme is at Annex A.

7. During its deliberations, the Ministry of Justice has considered options put forward by the Judicial Pensions Committee and by individuals. These options have not been pursued as the Ministry of Justice considers that they do not comply with the Government’s objectives for reform.

Equality Impact Assessment Scope

8. This Equality Impact Assessment (EIA) focuses on the impact of key elements of the proposed reforms scheme design and will consider whether there are any significant impacts on the “protected” characteristics as defined by the Equality Act

2010. We have been able to consider the characteristics of age, ethnicity and gender, but are unable to consider the characteristics of disability, marriage & civil partnership, pregnancy & maternity, religion, sexual orientation and gender reassignment due to a lack of available data.

9. Furthermore, due to the lack of availability of comprehensive data, the salaried judiciary in Scotland and Northern Ireland who are currently within scope of these pension proposals are not covered in the analysis in this EIA. If further information becomes available it will, of course, be given careful consideration.

10. The proposals for transitional protection mean that only 26% of the current members in the Judicial Pension Scheme (as at 1 April 2012) will in future have two separate elements of pension benefits. The pension for these people will be made up of any benefits built up under the 2015 scheme plus the benefits they have earned in their current scheme up to the point they move to the 2015 scheme. The Government has committed to protecting benefits in current pension arrangements and basing them on their final salary at the point at which they leave or retire (not on their salary at the point when they move to the 2015 scheme).

11. The increase in employee contributions introduced from April 2012 is not within the scope of this Equality Impact Assessment. The choice of price index used for the uprating of pensions in payment is also not within scope, as this is not a change from the current arrangements in place in the Judicial Pension Scheme. The current Judicial Pension Schemes are not within the scope of this Equality Impact Assessment, except where there is an interaction with the 2015 scheme, as their benefits have not changed.

Taking forward the reform – impact on the current workforce

12. Lord Hutton's recommendations were made on the basis that all current public service employees and office holders would move to new pension arrangements, but with service built up in current pension arrangements being protected fully (i.e. keeping its current pension age and, where appropriate, a final salary link). Concerns were expressed that, for those closest to retirement, there would be insufficient time to adjust to a change in circumstances due to a possible change in retirement income and a change in the age at which some of this income could be paid unreduced. This effect is directly related to older members of the scheme, given that younger members will have more time to adjust to any changes in their circumstances before retirement

13. In *Good pensions that last* the Government gave a commitment that those public service workers who, as of 1 April 2012, have ten years or less to their current pension age, would see no change in when they can retire or any decrease in the amount of pension they receive at their current Normal Pension Age. The proposal for the judicial scheme includes transitional protection arrangements that deliver this commitment. In addition, in order to avoid a cliff-edge impact on those members who fall just outside the 10-year group (the "unchanged group"), taper protection arrangements are also included. In practice, this means that there are three distinct groups within the judiciary which are determined by their age, as set out below.

14. More generally, and as noted above, for all those who are currently in the judicial scheme there will be no impact on any benefits that have been built up in their current pension arrangements up to 2015. Therefore, where this assessment considers the impact on the current workforce it will be in respect of the benefits that they would have earned under their current pension arrangements had they remained in that scheme (unchanged) after 2015 and what they will receive under the 2015 scheme.

Transitional Protection – unchanged group

15. The proposals set out the transitional protection arrangements for those members of the judicial scheme at 1 April 2012 who are closest to retirement. Scheme members who, as of 1 April 2012, are within 10 years or less of their current normal pension age of 65 will see no change to their pension arrangements. They will remain members of their existing pension schemes up to and including the point at which they draw their pension rights and all current pension scheme rules will continue to apply; they will experience no change in the benefits they earn as a result of introducing the 2015 scheme. It is estimated that as at 1 April 2012 there were around **1453** members of the judiciary in England and Wales in this group. This group will not have the option to move into the new scheme even though, for some individuals, this option could be beneficial.

Transitional Protection – taper group

16. Judicial Pension Scheme members who fall outside the unchanged group by no more than 3.5 years² will have the opportunity to remain in their current pension scheme arrangements for a period beyond 2015, before transferring to the new scheme. People in this group can choose to remain in their current scheme for two months after April 2015 for every full month that, at 1 April 2012, they are aged more than 51 years 6 months. The Equality Impact Assessment will consider any relevant issues raised for this taper protection. We estimate that, as at 1 April 2012, there were **249** members of the judiciary in England and Wales in this group.

2015 Transfer group

17. Judicial Pension Scheme members who are not within either of the two groups described above will move to the 2015 scheme at the point of introduction on 1 April 2015 for any further pension accrual after this date. The Equality Impact Assessment will consider any relevant issues raised for this group. It is estimated that there were **260** members of the judiciary, as at 1 April 2012, in England and Wales are in this group.

Equality duties

18. A summary of the equality duties is Annexed to the end of this document.

² The taper group comprises those aged between 51 years 6 months and 55 years as at 1 April 2012

(i) Public Sector Equality Duty

19. Among those duties section 149 of the Equality Act 2010 requires a public authority, when exercising their functions, to have 'due regard' to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the EA Act;
- Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

20. Paying 'due regard' needs to be considered against the nine "protected characteristics" under the EA Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

21. This document summaries the consideration given, on the basis of the data we have, by the Ministry of Justice, to the likely impacts of the proposed changes to the Judicial Pension Scheme ('JPS') on individuals with protected characteristics and the measures taken to ensure we have complied with our duties under EU law and the Equality Act 2010 ("the Act")

Direct discrimination

22. These reforms impact differently on different judges according to age. The Government proposes in the transitional arrangements to mitigate the effects of this change on those nearest to retirement who have the least time to plan. In particular the Government proposes to:

- protect fully from the reforms the older judges (those 55 and over as at as at 1 April 2012 ie the Unchanged Group) who have the least amount of time to adjust to the changes in their circumstances before retirement by making no change to the provision for their pensions; and
- Avoid a cliff edge impact on those just outside the unchanged group by providing transitional protection in the form of "tapering relief" for those aged between 51½ and 55 at 1 April 2012.

23. Those more than 13½ years from normal pension age as at 1 April 2012 (and those who join the scheme after 1 April 2012) ie the 2015 Transfer Group, will, as a general rule, be better positioned to take account of the proposed reforms in their retirement planning, and, the Government initially proposed no transitional arrangements. However, the Government accepts that some of those in the 2015 Transfer Group in particular would be adversely affected by the proposals³. In the light of this and the representations about the impact on some people of moving from a tax-unregistered pension scheme to one which operates within the tax registration arrangements, a non-revocable option of taking a transitional protection allowance from April 2015 in lieu of pension scheme membership is now proposed, for

³ See below under the heading "Age impacts"

members meeting certain eligibility criteria. The judges in the Taper Group would have to make this decision in 2015 and give up the tapering relief.

24. Overall we consider that the proposed changes to the JPS will achieve the legitimate aim of an affordable, flexible, sustainable scheme while protecting those nearest to retirement who are least able to make adjustments. The transitional protection allowance option is intended to mitigate the effect of the tax changes on judges who would move into the new scheme (including those in the taper group).

25. Having considered a number of alternatives (set out below in this document) it is considered the proposals to treat JPS beneficiaries differently according to their age - to protect the expected incomes of those closest to retirement and offer qualifying members of the scheme who will have to move to the 2015 scheme at some point an option of taking a transitional protection allowance in 2015 means that the proposals - including the transitional arrangements - do not amount to unlawful direct discrimination on the grounds of age, as they are a proportionate means of achieving the Government's aim of an affordable, flexible, sustainable and fair JPS and go no further than is reasonably necessary to do so.

Indirect discrimination

26. In introducing this policy we recognise that there are lower proportions of women and individuals from a Black, Asian or Minority Ethnic (BAME) background in the Unchanged Group than there are in the Taper Group and the 2015 Transfer Group (see Tables 1 & 2 below). This is because those JPS 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.

27. We acknowledge that the proposals may, in the sense that there is a higher proportion of females and those from a BAME background in the Taper and 2015 Transfer Group than in the Unchanged Group, have the potential to indirectly discriminate against people with those characteristics. However, we do not consider these judges will suffer a particular disadvantage when compared to others subject to the same policy e.g. white male judges in the Unchanged and Taper Groups. In any event we consider the proposals to be a proportionate means of achieving the legitimate aim of an affordable, flexible, sustainable and fair JPS. The proposals therefore do not amount to unlawful indirect discrimination.

28. We have no data to assess the impact in relation to an individual's disability, sexual orientation, gender identity, marriage or civil partnership status, pregnancy or maternity or religion or belief. However, as with women and individuals from a BAME background we do not consider that these judges will suffer a particular disadvantage. Further we consider the proposals to be a proportionate means of achieving the legitimate aims of an affordable, flexible, sustainable and fair JPS. The proposals therefore do not amount to unlawful indirect discrimination.

29. There are features of the proposed new scheme that have positive aspects from an equalities perspective as, for instance, it provides adult dependant pension to a partner (where there is no surviving spouse or civil partner) and these pensions are paid for life rather than ceasing on remarriage / new relationship. This will ensure

equality of treatment between opposite sex and same sex surviving (not married or civil partnered) surviving partners as well as most likely benefiting women since they live longer on average than men. Furthermore, the new scheme does not limit the years of reckonable service that can be accrued, thus giving full recognition for service given. The proposed new scheme terms also allow for a late retirement adjustment, for those who choose to work on beyond their new scheme normal pension age.

Discrimination arising from disability and the duty to make reasonable adjustments

30. There is no data at present on disability within the judiciary and so we cannot rule out the possibility of discrimination arising from disability. Under our existing obligations we will continue to make reasonable adjustments within the meaning of the Equality Act for members of the judiciary.

Harassment and victimisation

31. We do 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

32. 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. In addition, there are a number of policies in place to improve the diversity of the judiciary and progress is being made.

Fostering good relations

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

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

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

These include:

- section 50 under which the Department is under a duty not to discriminate against a person it appoints as a public office holder in the way any benefit is received; and
- section 61 under which a non-discrimination rule is included in an occupational pension scheme and sections 64 to 71 of the Act which provides for equal pay for equal work;

35. For the reasons set out above the Government considers that the proposals are not unlawful.

Analysis of equalities impacts, limitations and assumptions

36. In order to ensure we comply with our duties under EU law and the Act we have first considered, in so far as we are able, the extent to which our proposals, taking account of the transitional provisions, may have a differential impact on those with protected characteristics.

37. However, the data we have is limited. In particular, we have no information about the ethnicity of the salaried judiciary in Scotland and Northern Ireland, who are currently within scope of these proposals. For this reason, we have omitted these groups from our current analysis.

38. A lack of relevant data means we are also unable to identify the potential for the proposals to have impacts in relation to disability, sexual orientation, gender reassignment, religion and belief, pregnancy and maternity, and marriage/civil partnership.

39. The group which we are able to consider the possible impact of these proposals against are the population of the salaried judiciary, in England and Wales, in post at April 1st 2012 – which we refer to as the “affected pool”. There were 1,962 people within the affected pool at that date. (⁴There were 181 members of the judiciary serving in Scotland at that date, of whom 36 were women. In Northern Ireland, there were 66 members of the judiciary, of whom 14 were women).

Analysis

40. We have presented the population of the affected pool by age and compared the other available protected characteristics (race and sex) of those in the unchanged, taper and 2015 transfer Groups.

Age Impacts

41. There are 1,962 judges in the affected pool who would, without any transitional provisions, be affected by these proposals. Of which:

- those aged 55 years and older as at 1 April 2012 ie the Unchanged Group, account for the largest proportion - 1,453 or 74 per cent of judges in the affected pool;
- those aged between 51.5 and 55 years at that date, ie the Taper Group, account for a further 249 or just under 13 per cent of the affected pool; and

⁴ Source - MoJ Pensions Database

- those aged younger than 51.5 years old at that date ie the 2015 Transfer Group account for a further 260 or just over 13per cent of the affected pool.

Financial impacts on the affected pool

42. All of the impacts of the proposed changes we have identified are, primarily, financial.

43. Those most affected by the proposals will be those in the 2015 Transfer Group. Those in the Taper Group will also be affected but less so as they are entitled to the transitional protection on a tapering basis (see below).

44. The Government accepts that those in the 2015 Transfer Group would be most affected by a move to a new JPS as they could be financially affected by:

- the switch from final salary to career average salary as the basis of calculation of benefits;
- a slightly reduced accruals rate;
- the non-payment of an automatic lump sum 2.25 times of the initial annual pension at normal pension age;
- a higher pension age;
- a late retirement adjustment (as well as an early retirement adjustment);
- the switch to a tax-registered pension scheme and
- an “employer” contribution cap.

45. The precise financial impact of these changes will vary according to the individual circumstances of the judge concerned.

46. However, a key concern expressed by some judges after the Government published proposals in July 2012 was about the tax implications of moving from the current JPS to the Civil Service Pension Scheme. The former is unregistered for tax purposes whereas the latter would not be. This would have had significant negative implications for some judges in the 2015 Transfer Group. This is dealt with below under mitigation and justification.

Other impacts

47. The Government also accepts that that those judges in the Taper and 2015 Transfer Group, are unlike some other public workers affected by change to their pensions in other walks of life, in that it is not open to a judge to resign and go back and practice as a solicitor or barrister. However, members of these Groups have longer before retirement to arrange alternative financial provision for themselves in the light of the Government’s proposals.

48. It has also been suggested that there is a possible impact on recruitment and retention of members of the judiciary. We have no information to suggest this would be the case nor what equalities impact that might imply. The recent trend has been that more people are applying for judicial office⁵. But the Government is committed to monitoring the impact of the proposed changes on the judiciary and on recruitment and retention.

Impacts on judges of Black, Asian or Minority Ethnic (BAME) ethnicity and female judges

Race Impacts

49. Table 1 shows that a greater proportion of judges of Black, Asian or Minority Ethnic (BAME) ethnicity are in the 2015 Transfer Group of judges (31 per cent) and Taper Group of judges (17 per cent) compared to judges of white ethnicity (13 per cent and 12 per cent respectively). As the ethnicity of 10 per cent of the pool is unknown, conclusions about race impacts remain tentative.

Table 1: Ethnicity breakdown of salaried judges

| Ethnicity | Under 51.5 yrs (unprotected) | Between 51.5 & 55 years (part-protected) | Over 55 years (protected) | All judges |
|-------------------|---|---|--------------------------------------|-------------------|
| BME | 29 31% | 16 17% | 48 52% | 93 |
| White | 219 13% | 209 12% | 1,249 74% | 1,677 |
| Not Stated | 12 6% | 24 13% | 156 81% | 192 |
| Total | 260 13% | 249 13% | 1,453 74% | 1,962 |

Source: Judicial Office

Potential Sex Impacts

50. Table 2 shows that a greater proportion of women are in the 2015 Transfer Group of judges (25 per cent) and the Taper Group (20 per cent) compared to the proportion of men who are in also in these groups (9 per cent and 10 per cent respectively):

⁵ The Judicial Appointments Commission Annual Report for 2011/12 report refers to highest number of applications and selections

Table 2: Gender breakdown of salaried judges

| Gender | Under 51.5 yrs (unprotected) | Between 51.5 & 55 years (part-protected) | Over 55 years (protected) | All judges |
|---------------|---|---|--------------------------------------|-------------------|
| Female | 122 25% | 99 20% | 268 55% | 489 |
| Male | 138 9% | 150 10% | 1,185 80% | 1,473 |
| Total | 260 13% | 249 13% | 1,453 74% | 1,962 |

Source: Judicial Office

Mitigation and justification

Mitigation of the effect of introducing a reformed JPS on the affected pool as a whole

51. Reform of the JPS in one form or another was unavoidable given the unprecedented pressures on national finances. In the Government's view there can be no question of protecting the judiciary from the reforms in ways which are not seeking to do for other high paid groups across the public service. But the Government has listened to the representations made by the judiciary and altered its proposals in a way which recognises the issues raised following publication of its proposals in July 2012.

52. Concerns have been expressed that the pension reforms mean that the judiciary is suffering a disproportionate loss in comparison to others in the public sector. This is as much a product of the higher point from which the judges' scheme starts as it is a product of the reforms themselves. The current judicial pension scheme is amongst the most generous in the public sector. Furthermore, the scheme has also – for a number of years – been unregistered for tax purposes, an anomalous position which the Government is now seeking to regularise through its pension reforms.

53. Taken overall, the Government considers that the plans for judicial pension reform compare favourably with the approach taken for other groups of high paid public servants.

54. It should be noted that all judges will continue to build up service under the current JPS until at least 31 March 2015 (and, for some of those in the Taper Group, until year 2022), with that service continuing to be pensioned under the current, final salary, scheme. Inevitably, the impact of the protections will vary from one individual to another and will be affected not only by the characteristics of the individual but also by the characteristics of the individual's career and life choices.

55. The aim of the transitional provisions is to reduce the impact for those least able to put themselves in a position to make changes.

Transitional Protection – the Unchanged Group

56. The Government gave a commitment that members of the public service pension schemes who, as of 1 April 2012, have ten years or less to their current pension age, would see no change in when they can retire or any decrease in the amount of pension they receive at their current Normal Pension Age.

57. Members of this Group – some 74% of the judiciary as at 1 April 2012 - will remain members of their existing pension schemes up to and including the point at which they draw their pension rights and all current pension scheme rules will continue to apply; they will experience no change in the benefits they earn as a result of introducing the 2015 scheme.

58. However, judges will pay the increased contributions planned to be phased over the next two years. Future changes to this scheme could be possible, depending on the outcome of future actuarial valuations.

Transitional Protection – the Taper Group

59. The Government also accepts that, as with other public service workers, there would be “a cliff edge” if only those within 10 years of retirement were the only ones to be protected from the full impact of the changes. The proposals therefore include tapered transitional protection arrangements for those in the Taper Group. We estimate that 13% of the judiciary fall into this category.

60. Members in this Group will therefore also be able to choose to stay in the current JPS scheme for a period beyond April 2015, the length of which will be calculated according to age. Judges would then move to the new scheme. This group will also be able to choose to opt for the transitional protection allowance, in lieu of further pension scheme membership, from April 2015 (provided that they meet the eligibility criteria).

Transitional protection - the 2015 Transfer Group

61. The justification for moving younger members of the judiciary into the new scheme from April 2015 are set out above. The ways in which members of this Group will be affected is set out above under “impacts”. We estimate that 13% of the judiciary fall into this category.

62. However, and as identified above, one of the most significant ways some (but by no means all) members of the 2015 Transfer Group and the Taper Group could be impacted negatively concerns the effect of moving from the current JPS scheme - which is unregistered for tax purposes - to the new JPS, which in common with public service pension schemes generally, will be registered for tax.

63. We recognise that some judges, expecting that they would continue in a tax-unregistered scheme for the balance of their career, may have taken steps to protect their pre-judicial pensions from Lifetime Allowance tax under the Enhanced Protection arrangements of the Finance Act 2004 or the Fixed Protection

arrangements of the Finance Act 2011. For such individuals, the mere act of joining a tax-registered scheme could unpick the protections they had put in place, effectively ruling out the possibility of further pension saving.

64. The Government proposes to mitigate this problem by allowing judges in this position, provided that they have had membership of a Judicial Pension Scheme throughout their judicial career and have also not made any contributions to a tax-registered pension since the effective date of their Enhanced or Fixed Protection, a non-revocable option of taking a transitional protection allowance from April 2015 in lieu of pension scheme membership.

65. This allowance, which will only be available to those judges in post or whose appointment had been agreed on or before 1 April 2012 who meet the conditions above and who have the relevant HM Revenue and Customs certificate documentation for Enhanced or Fixed Protection, and who are unable to remain in the current scheme, will be subject to income tax and National Insurance contributions. The level of the allowance will be announced in due course before 2015 (when eligible judges will need to decide whether or not to take this option) but is currently expected to be around 20% of pay.

66. While the precise effect of this mitigation cannot be estimated as the MOJ do not hold information on Judges' pre judicial pension arrangements, it should reduce the potential effect of the proposed changes on judges in the 2015 Transfer Group and Taper Group.

Other options which have been considered and rejected

(i) Extension of transitional protection

67. An alternative proposal which the Government considered was that full transitional protection should be extended to all judges in office at 1 April 2012, with the costs (over and above those associated with the Government's proposed approach) being met by increased contributions by the members of the judicial pension scheme.

68. The Government rejected this proposal for a number of reasons:

- Lord Hutton is clear that pension reform should not, on this occasion, be restricted to new entrants. While, in the past, successive Governments have tended to proceed on this basis it is a central tenet of the current reforms that, except to the extent considered appropriate for protection of those closest to retirement, they will apply to serving public servants. The alternative proposal ran contrary to the uniform approach advocated by Lord Hutton based on the need to minimise risks arising from wage inflation and increased life spans. In essence, this proposal would apply to people who are now in their early 40's who would be subject to retirement at 70 and it would be difficult to predict with accuracy what their future salaries might be during that extended period.

- The additional employee contributions would be higher than under the Government's proposed scheme and would be expected to increase over time as the make-up of the affected pool changed (reflecting retirements and deaths). The proposal does not meet the Government's objective of protecting from change those closest to retirement, rather it places an additional and excessive burden on this group for the benefit of the minority who have more time to adapt to the proposed changes.

(ii) The JPC scheme design

69. The Judicial Pensions Committee (JPC) presented an alternative design for the new scheme. Their alternative did not include proposals for changes to the transitional protections. The design reflected the Government's proposals for career average pension and a pension age reflecting State Pension Age. The design proposed improvements to dependants' benefits, to the scheme accrual rate and to the basis of revaluation during service.

70. The Government rejected this proposal on the basis that, as acknowledged by the JPC, the cost would be somewhat greater than that of the approach proposed in July 2012 (an estimated 37% of pay as against an estimated 30.9% of pay) and hence inconsistent with its pension reform programme.

Responding to views from our Stakeholder Engagement Exercise

71. We received over 1300 responses to our Summer 2012 consultation from interested parties.

72. The main equalities issues raised by respondents were that the proposals were considered likely to be discriminatory on the grounds of age, race and gender. The responses suggested that the proposed JPS could have an adverse affect on these protected characteristics within the 2015 Transfer Group who would have received no transitional relief.

73. We have indicated above how we have considered such impacts and the option the Government is proposing to offer members of the judiciary in the 2015 Transfer Group.

74. In addition, there has been ongoing dialogue with the judiciary on pension reform since the Hutton Review. Most of the correspondence on pension reform has been between the Lord Chancellor and the Heads of Jurisdictions - the Lord Chief Justice of England and Wales, the Lord Chief Justice of Northern Ireland and the Lord President of the Court of Sessions. The Lord Chancellor has discussed the issues with the Lord Chief Justice of England and Wales on a regular basis, as has the Permanent Secretary of the Ministry of Justice. Both the current Lord Chancellor and his predecessor have met with the Judicial Pensions Committee on a number of occasions to hear the views of the Committee and have responded to letters from the JPC.

Summary of Equality Duties

A. EU law

Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation.

Articles 2 and 3 concern various forms of discrimination in the employment context. Article 6 in particular concerns the possible justification of difference of treatment on the grounds of age.

B. Domestic law

(i) Section 149 of the Act

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.

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.

To ensure we comply with our duty MoJ 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

There are several types of prohibited conduct set out in Chapter 2 of the Act, which include:

- direct discrimination (defined in section 13 of the Act);
- indirect discrimination (defined in section 19); and
- breach of a non-discrimination rule (see section 61).

Direct discrimination

Direct discrimination is defined in section 13(1) of the Act which provides that:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

In respect of age, section 13(2) of the Act provides that:

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Indirect discrimination

Indirect discrimination is defined in section 19 of the Act, in particular in subsections (1) and (2), which provide as follows:

'(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

'(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -

(a) A applies, or would apply, it to people with whom B does not share the characteristic,

(b) it puts, or would put, people with whom B shares the characteristic at a particular disadvantage when compared with people with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.'

Advancing equality of opportunity

Section 149(3) of the Act provides that:

'(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'

Fostering good relations

Section 149(5) provides:

'(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.'

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

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

These include:

- section 50 under which the Department is under a duty not to discriminate against a person it appoints as a public office holder in the way any benefit is received; and
- section 61 under which a non-discrimination rule is included in an occupational pension scheme;

However, where the protected characteristic is age, in accordance with section 13(2) of the Act, no discrimination will occur if any differential treatment on that ground is a proportionate means of achieving a legitimate aim.

The Government is also required to ensure that it provides equal pay for equal work in accordance with sections 64 to 71 of the Act.

Summary of features of the proposed New Judicial Pension Scheme

- Stand-alone tax-registered scheme with terms initially “by analogy” to the Civil Service scheme
- Pension builds up on a “career average” basis – each year earn pension of 2.32% of that year’s pay
- Pension built up in the new scheme increases each year (before and after retirement) at the same rate as provided for in pensions increase legislation – current practice is Consumer Prices (CPI)
- Scheme has Normal Pension Age (NPA) equivalent to State Pension Age (SPA)
- Pension can be drawn before NPA – subject to actuarially-neutral early retirement reduction
- Pension can be drawn after NPA – subject to actuarially-neutral late retirement enhancement
- No limit to years of pensionable service
- Lump sum is available as an option on retirement – each £1 of pension given up buys £12 of lump sum. Lump sum is tax-free subject to HMRC limits.
- Death-in-service lump sum of 2 times pay – tax free subject to HMRC limits
- Pension for widow, widower, civil partner or unmarried partner – based on 3/8ths of individual’s pension calculated before any commutation of pension for lump sum. On death in service, service is enhanced to that achievable at NPA (subject to a maximum enhancement equivalent to 10 years).
- Medical retirement possible – pension brought into payment without early retirement reduction
- Member contributions to mirror those of the Civil Service scheme – still to be finalised but could be 7.35% for most judges and 9% for higher judiciary. Contributions attract tax relief.
- Scheme generally applies to service from 1 April 2015.
- Judges, who meet the eligibility criteria¹, may opt not to build up new scheme service but, instead, receive a transitional protection allowance paid alongside salary.
- Judges who, at 1 April 2012, were both (a) in service and (b) aged between 51½ and 55 may opt for “tapering protection” and delay admission to the new scheme. If this option is chosen, the new scheme start date will be delayed by 2 months for every full month that the judge is older than 51 years 6 months on 1 April 2012.
- Judges who, at 1 April 2012, were both (a) in service and (b) aged over 55 will not be eligible for membership of the new scheme – they will therefore continue in their existing scheme.
- Service in the 1993 scheme, built up prior to moving into the new scheme (or opting out) will continue to reflect “final salary” even though service will cease to accrue at 31 March 2015 (or a later date for those with tapering protection). Any service restrictions in the 1993 scheme will cease to apply.
- Consequential changes will be made to the 1993 scheme to ensure that, when taken together with the new scheme, provisions which relate to service in both schemes deliver the correct level of benefits.

¹ Judges must be in service at 1 April 2012 (or whose appointment had been agreed at that date), have had continuous membership of a judicial pension scheme from appointment until 31 March 2015, be in possession of a valid HMRC Enhanced Protection or Fixed Protection certificate and have made no contributions to a tax-registered pension after 5 April 2006 (Enhanced Protection) or 5 April 2012 (Fixed Protection)