

## **EXPLANATORY STATEMENT**

**Issued by the Authority of the Minister for Finance and the Public Service**

*Judges' Pensions Act 1968*

*Judges' Pensions Amendment Regulations 2018*

The *Judges' Pensions Act 1968* (the Act) establishes the Judges' Pensions Scheme (JPS), which provides superannuation benefits for office holders who fall under the definition of 'Judge' in that Act.

Commonwealth judges who are members of JPS are not subject to Division 293 tax, which reduces the superannuation tax concessions of very high income earners. However, there are a small number of non-judges that have been granted the same status as judges for the purpose of membership of the JPS. These non-judge members, and any future non-judge members, are subject to Division 293 tax.

The Act allows non-judge members of the JPS to request that a lump sum amount be paid from the scheme to meet their Division 293 tax liability and, as a consequence, accept a permanent reduction in their JPS pension. The pension is reduced to offset the member's Division 293 tax liability that has been assessed by the Australian Taxation Office.

The *Judges' Pensions Amendment Regulations 2018* (the Regulations) amend the *Judges' Pensions Regulations 1998* to prescribe the relevant age factors which are required to calculate this pension reduction under the Act.

The changes will align with arrangements for Division 293 tax purposes in other Commonwealth government defined benefit superannuation schemes.

Section 21 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The authority to prescribe the age factors for Division 293 purposes in the Regulations derives from subsection 17AN(4) of the Act. The authority to amend the *Judges' Pensions Regulations 1998* derives from subsection 33(3) of the *Acts Interpretation Act 1901* which provides, among other things, that where an Act confers power to make regulations the power shall, unless the contrary intention appears, be construed as including a power, exercisable in like manner, to amend the regulations. No such contrary intention appears in the Act.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations are exempt from sunseting by item 36 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Consultation was considered unnecessary as the Regulations are of a minor or machinery nature and do not substantially alter existing arrangements.

A Regulation Impact Statement was not prepared for the Regulations because the amendments only affect members of the JPS and will have a nil or minor impact on business, community organisations and individuals. The Office of Best Practice Regulation has confirmed that a RIS is not required.

Details of the amendments are set out in Attachment A.

A statement of Compatibility with Human Rights is at Attachment B.

The Regulations commence on the day after they are registered.

**Details of the Judges' Pensions Amendment Regulations 2018**

**Section 1 – Name of Regulation**

This section provides that the name of the instrument is the *Judges' Pensions Amendment Regulations 2018* (the Regulations).

**Section 2 – Commencement**

This section provides that the instrument will commence the day after it is registered.

**Section 3 – Authority**

This section provides that the instrument is made under the *Judges' Pensions Act 1968* (the Act).

**Section 4 – Schedule(s)**

This section provides for the operation of Schedule 1 to the instrument, which amends the *Judges' Pensions Regulations 1998*.

**Schedule 1 – Amendments**

**Item 1** adds a new Part 1B to the *Judges' Pensions Regulations 1998*. The new Part 1B provides the age factor to be used to calculate the reduced pension when a member requests a lump sum amount (the “release authority lump sum”) be paid from the Judges' Pension Scheme to meet their Division 293 tax liability.

Subsection 17AN(2) prescribes the formula to calculate the reduced pension payable under the Act where a member elects to offset their Division 293 tax liability from their pension that would have otherwise been payable under the Act. Generally, under the Act, a pension is payable to a member on retirement or due to permanent disability or infirmity. The formula specified under section 17AN(2) of the Act is:

$$\left[ 1 - \left( \frac{\text{Release authority lump sum}}{\text{Age factor}} \div \text{Basic rate} \right) \right] \times 100$$

New regulation 3B in Part 1B of the Regulations provides a table, which specifies the age factor to be used in the formula specified under section 17AN(2) of the Act. The relevant age factor for the member will be based on:

- whether the member's retirement is due to permanent disability or infirmity or not due to permanent disability or infirmity; and
- the member's age at their last birthday before or on retirement.

The age factors have been determined by an Actuary, and reflect assumptions regarding life expectancies which were adopted in the 2017 Long Term Cost Report for the scheme.

A note has been included in new Part 1B of the Regulations to clarify that Division 293 tax is not payable by a Justice of the High Court or a justice or judge of a court created by the Parliament. As such, the Regulations will not be applicable to members in the Judges' Pensions Scheme holding these judicial positions as there is no Division 293 tax liability to be offset for these members.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the  
Human Rights (Parliamentary Scrutiny) Act 2011*

***Judges' Pensions Amendment Regulations 2018***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

*Overview of the Legislative Instrument*

The *Judges' Pensions Act 1968* (the Act) allows members of the Judges' Pensions Scheme (JPS) to request that a lump sum amount be paid from the scheme to meet their Division 293 tax liability and, as a consequence, accept a permanent reduction in their JPS pension. The pension is reduced to offset the member's Division 293 tax liability that has been assessed by the Australian Taxation Office.

This Legislative Instrument amends the *Judges' Pensions Regulations 1998* to prescribe the relevant age factors under the Act to work out this pension reduction.

*Human rights implications*

This Legislative Instrument does not engage any of the applicable rights or freedoms.

*Conclusion*

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Senator the Hon Mathias Cormann  
Minister for Finance and the Public Service**