

## EXPLANATORY MEMORANDUM TO

### The Health and Social Care Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations (Northern Ireland) 2022

S.R. 2022 No. 196

#### 1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Health (DoH) to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under Articles 12(1), (2) and (3), 14(1) and (2) of, and Schedule 3 to, the Superannuation (Northern Ireland) Order 1972 and sections 1(1) and (2)(e), 2(1) and 3(1), (2) and (3), and 18(5) of, and paragraph 5 of Schedule 2 and Schedule 3 to, to (4) of, and paragraph 5 of Schedule 2 and Schedule 3 to, the Public Service Pensions Act (Northern Ireland) 2014<sup>(1)</sup> and is subject to the negative resolution procedures.

#### 2. Purpose

- 3.1. The Statutory Rule will rectify discrimination in the current regulations that have been identified by a number of court judgements / tribunal rulings. It will also reform final pay controls in the 1995 regulations.

#### 3. Policy Background – What is being done and why

- 3.1. Changes to survivor benefits introduced by the Social Security Act 1986 resulted in the HSC Pension Scheme providing survivor benefits to widowers (male survivors of opposite sex marriages) based on the female spouse's service from 1988 onwards. Service before 1988 was disregarded, however female members were given a time-limited opportunity to purchase survivor benefits for service before 1988.
- 3.2. With the introduction of same sex civil partnerships in 2005, the HSC Pension Scheme provided survivor benefits which were in line with those paid to widowers i.e. based only on service from 1988 onwards. However, as with widowers, members were given a time-limited opportunity to purchase survivor benefits for service before 1988.
- 3.3. Following the Supreme Court judgment in the case of Walker v Innospec [2017 UKSC 47] the Westminster government decided that surviving same sex spouses and civil partners of public service pension scheme members should receive benefits equivalent to those received by widows (female survivors of opposite-sex marriages) where the entitlement of benefits is based on service that includes pre 1988 service. This draft rule extends automatic cover for pre-1988 service to same sex civil partners and same sex

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<sup>(1)</sup> 2014 c.2 (N.I.) section 3 was amended by section 94(11) to (14) of the Public Service Pensions and Judicial Offices Act 2022 (c. 7)

spouses. This dates from 5 December 2005 when civil partnerships were introduced (existing civil partnerships can be converted to a marriage for 3 years from December 2020).

- 3.4. In June 2020, the Employment Tribunal in Goodwin v Secretary of State for Education [1308506/2019], concluded that a female member in an opposite-sex marriage was treated less favourably than a female member in same sex marriage or civil partnership, and that treatment amounted to direct discrimination on the grounds of sexual orientation.
- 3.5. Following this ruling the Westminster government concluded that changes were required to the Teachers' Pension Scheme to address the discrimination. Furthermore they directed that this difference in treatment needs to be remedied in those other public service schemes, such as the HSC Pension Scheme, where the husband or male civil partner of a female scheme member is in similar circumstances. Accordingly, this draft rule equalises the position of female members in opposite sex marriages or civil partnerships with that of female members in same sex marriages or civil partnerships where the entitlement to benefits arose on or after 5 December 2005.
- 3.6. In order for an unmarried cohabiting partner to qualify for a scheme survivor pension, the regulations currently state that the surviving unmarried cohabiting partner must be nominated to receive the pension **before** the scheme member's death and they must also be in a financially interdependent and cohabiting relationship for at least two years immediately before the scheme member's death.
- 3.7. In February 2017 in the Supreme Court judgment in the case of Brewster, Re application for Judicial Review (Northern Ireland) [2017 UKSC8], the Court found that the essence of entitlement to benefit is that the couple have lived together for a sufficiently long period of time and that one is financially dependent on the other, and that being required to make a nomination added nothing to the objective enquiry as to whether an unmarried cohabiting partner satisfies these conditions.
- 3.8. In response to this judgment, HM Treasury determined that public service pension schemes should remove the requirement for an unmarried cohabiting partner to have been nominated by the scheme member, as a condition of eligibility for receiving a survivor pension. The judgment does not call into question the requirement that the member and cohabiting partner are financially interdependent for a period of at least two years. This draft rule removes the requirement for scheme members to nominate a cohabiting partner to receive survivor benefits.
- 3.9. In the 1995 Regulations only, pension benefits are calculated by taking the member's pensionable pay figure in each of the last 3 years and selecting the highest year.
- 3.10. Introduced as part of a suite of new control provisions in 2015, regulation 11A of the 1995 Regulations introduced an 'allowable amount' which limits the pensionable pay increases permitted in the last three years before retirement.
- 3.11. A pay increase is considered 'excessive' if the annual percentage increase in pay for one or more of a member's final 3 years' service prior to

retirement exceeds the rate of the Consumer Price Index (CPI) plus 4.5%. The employer is charged an 'excess employer contribution', known as a final pay control charge, for the cost of pension benefits calculated on pay increases above the allowable amount.

- 3.12. A final pay control charge is issued by HSC Pension Service to the employer who awarded the excess pay increase to the retiring member, ensuring the employer meets the cost of paying the excess pension and lump sum and not the Pension Scheme, members or other employers. The member's increased pension benefits are unaffected by the final pay control charge issued to their employer.
- 3.13. Some employers have expressed concerns that they had been charged for large pay increases which were the result of promotions and which those employers did not think properly fell within the policy intention.
- 3.14. Similar concerns had led the Department of Health and Social Care (DHSC) to review the Final Pay Control Charge for the NHS Pension Scheme for England & Wales and, after careful consideration of their work the Department increased the allowable amount to CPI + 7%. DHSC also included certain exemptions to the final pay control regulations.
- 3.15. For the 1995 Regulations this draft rule increases the allowable amount to CPI + 7% and mirrors the exemptions to the final pay controls introduced for the NHS Pension Scheme in England & Wales.
- 3.16. In the review carried out for the NHS Pension Scheme in England & Wales analysis showed that 7% is the point beyond which the volume of cases falls significantly such that pay increases in excess of this can be considered exceptionally large. Therefore, increasing the allowable pay increase to 7% + CPI would not only remove a significant number of cases from the scope of the regulations, but also better serve the original policy intention, which was to capture excessive pay increases
- 3.17. The Department also proposes that employers who have had a charge notified on or after 1 April 2021 can apply, within 6 months of amendments to Regulation 11A coming into operation, to have the charge redetermined under the amended regulations.
- 3.18. The proposed amendments to final pay controls are non-contentious and beneficial to members and employers, so any challenge to their introduction is unlikely.
- 3.19. A number of other minor miscellaneous and technical amendments are also included in the statutory rule to improve the operation of scheme regulations.

#### **4. Consultation**

- 4.1. The changes introduced by this statutory rule have been subject to statutory consultation which commenced on the 3 February 2022 and ended on the 31 March 2022.

- 4.2. Among those consulted were HSC Trade Unions representatives; All HSC Employers; HSC Pension Service (Scheme Administrators); Scheme Advisory Board; Pension Board; DoF and the Government Actuary Department.
- 4.3. Two responses were received, 1 from an individual respondent and one from a member representative body.
- 4.4. The individual respondent stated that no changes were required to the proposed amendments.
- 4.5. The employer representative body broadly agreed with the proposed amendments, However, they argued that the proposed amendments in relation to survivor benefits prolong and exacerbate existing inequality and discrimination because a male survivor of a female member (either her widower or civil partner) would have a lower pension than the female survivor of an otherwise comparable female member (if she had pre-6 April 1988 service). They also state that their belief is the fairest approach to address these inequalities is to amend the regulations so that all pensionable service is considered and that benefits should be provided regardless of the date of death.
- 4.6. The consultation response document is available on the Department of Health website at <https://www.health-ni.gov.uk/consultations/draft-health-and-social-care-pension-schemes-additional-voluntary-contributions-and-injury-benefit>.

## **5. Equality Impact**

- 5.1. These regulations rectify discrimination in the current regulations that have been identified by a number of court judgements / tribunal rulings. An Equality Screening/Impact Assessment (EQIA) was carried out by the Department, and this has been published on the Departments website.

## **6. Regulatory Impact**

- 6.1. A regulatory impact assessment has not been produced for this rule as it is not anticipated that there will be any adverse impact on business, charities social economy or voluntary bodies.

## **7. Financial Implications**

- 7.1. None from this legislation.

## **8. Section 24 of the Northern Ireland Act 1998**

- 8.1. Consideration has been given to the human rights implications of these regulations. They are considered compatible with section 24 of the Northern Ireland Act 1998.

## **9. EU Implications**

- 9.1. None

## **10. Parity or Replicatory Measure**

- 10.1. Similar legislation has been introduced for the NHS Pension Schemes in England & Wales.

## **11. Additional Information**

11.1. Not applicable.