

EXPLANATORY MEMORANDUM TO

**THE NATIONAL HEALTH SERVICE PENSION SCHEMES, ADDITIONAL
VOLUNTARY CONTRIBUTIONS AND INJURY BENEFITS (AMENDMENT)
REGULATIONS 2019**

2019 No. 418

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument amends six statutory instruments relating to pensions benefits provided for National Health Service staff.
- 2.2 Key changes implemented by this instrument include:
 - A new contribution rate of 20.6% for employers from 1 April 2019 and renewal of current employee contribution rates so that those rates continue to apply beyond 31 March 2019;
 - Providing civil partners and same-sex spouses with the same survivor pension rights as widows;
 - Extending existing forfeiture rules so that the Secretary of State may suspend pension benefits if a member or other beneficiary is charged or convicted with an offence that may lead to all or part of those benefits being forfeited;
 - Updating provisions relating to ‘contracting-out’ from the second state pension;
 - Exempting from controls on final pay, any pay increases which result from a nationally agreed Agenda for Change pay award;
 - Removal of the requirement to nominate unmarried cohabiting partners for survivor benefits; and
 - Miscellaneous and consequential amendments to scheme rules, in particular relating to the provision of a statement of estimated pensionable income/contributions, and the calculation used in determining the relevant contribution rate for certain members.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 12(1) of the Superannuation Act 1972 confers a power to make regulations having effect from a date earlier than the date of their making.
- 3.2 Section 3(3) of the Public Service Pensions Act 2013 confers a power to make regulations having effect from a date earlier than their making. Section 3(3) refers the reader to section 23.

- 3.3 Section 23 of the Public Service Pensions Act 2013 provides the consultation procedures to be followed when retrospective provisions are included within scheme regulations that will have a significant adverse effect in relation to the pension payable to or in respect of members of the scheme, or where there is a significant adverse effect in any other way in relation to scheme members, for example on injury benefits as opposed to pension benefits. For the reasons set out at paragraphs 3.4 to 3.7 below, the Department is of the view that none of the retrospective provisions will have a significant adverse effect for the purposes of section 23. Accordingly, the consultation requirements of that section are not relevant.
- 3.4 Amending regulations 14 to 17, 20, 21(a) and (c), 32(2), 33(2), 38 and 40(4) have effect from 5th December 2005. These regulations implement retrospective improvements to the survivor pensions due to civil partners and same-sex spouses.
- 3.5 Amending regulations 3(3), 10, 12, 13, 18, 19, 21(b), 22 to 26, 32(3), 33(3), 34 to 36, 37(2), 40(5), 50, 51, 54, 55(2), 67, 68, 71, 72(2), 96 to 98, 100 to 105 have effect from 1 April 2008. Amending regulations 57 and 74 have effect from 1 October 2009. Amending regulations 58 and 75 have effect from 1 April 2010. Amending regulations 86, 87, 90, 91(2) and 107 have effect from 1 April 2015. These regulations remove the requirement that a formal nomination must have been made by a member in order for a qualifying partner to receive a survivor pension on the member's death.
- 3.6 Amending regulations 40(3)(b) and 63(a) have effect from 1 April 2014 and amending regulations 82 and 83 have effect from 1 April 2015. These regulations provide a new definition relating to how the number of days of pensionable service (NDPS) is calculated for dentist performers (and in the 2015 regulations, practitioners and non-GP providers). The amendments clarify that "NDPS" is calculated by reference to the number of days of pensionable service worked in the scheme year. These changes are retrospective and reflect how the calculation is carried out. No one will be detrimentally affected by this change to the calculation of relevant days.
- 3.7 Amending regulation 6 has effect from 1st April 2018. This amendment does not affect the pension payable to or in respect of a member. Rather, it excludes an increase in pensionable pay that is made as a result of the national Agenda for Change framework agreement (adopted in June 2018), from being treated as an increase to final pay which may result in an additional charge being levied on the authorising employer.
- 3.8 Section 12(4) of the Superannuation Act 1972 provides that where provisions may in respect of certain members place those members in a worse position than they would have been in had the provision not applied in respect of their pension, they may elect that the provision does not apply to them. Part 8 sets out that option. The Department is of the view that the provisions in respect of the suspension of pension amending regulations 37(3), 55(3), 72(3), and 91(3) may be relevant in this respect.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.9 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Part 2 of the instrument amends the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) (the “1995 Section”). Part 3 of the instrument amends the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) (the “2008 Section”). Part 4 of the instrument amends the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) (the “2015 Scheme”). Part 5 of the instrument amends the National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 (S.I. 2000/619) (the “AVC Regulations”). Part 6 of the instrument amends the National Health Service (Injury Benefits) Regulations 1995 (S.I. 1995/866) (the “Injury Benefit Regulations”). Part 7 of the instrument amends the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95) (the “Transitional Regulations”). Part 8 of the instrument sets out the options available to persons detrimentally affected by the instrument.

7. Policy background

Scheme valuation and change to the employer contribution rate

- 7.1 The instrument implements a new employer contribution rate following results of the quadrennial actuarial valuation. Valuation is an actuarial assessment of the cost of past and future pension benefits accruing within the scheme. The valuation report concludes that the employer contribution rate should be increased from the current 14.3% to 20.6%. Amending regulations 5, 47, 64 and 80 change the employer contribution rate to 20.6%. Similar changes are expected in employer contribution rates applicable in other public service schemes and the Government is in the process of allocating funding to relevant Departments to help with these increased costs.
- 7.2 Part of the valuation process involves the operation of a cost control mechanism introduced in April 2015. In September 2018, the Government announced that provisional valuation results indicated this mechanism would be engaged thereby triggering a process to reset costs by improving the value of the scheme for members. However, in December 2018, the Court of Appeal handed down a judgment in the cases of McCloud and Sargeant ([2018] EWCA Civ 2844) that may increase the cost of pension benefits for some members from 1 April 2015. The Court in that case held that the “transitional protection” afforded to older members when major reforms were introduced to public service pension schemes in 2015 amounted to unlawful discrimination. The Government is seeking permission to appeal this decision. If this is unsuccessful, the judgment will require steps to be taken to compensate employees who were transferred to new public service schemes, such as the 2015 NHS Scheme. However, whilst the legal process is ongoing, the substantial potential impact of the judgment means it is now impossible to assess with certainty the value of current

public service pension arrangements. As a result, the Government announced on 30 January 2019, in a Written Ministerial Statement by the Chief Secretary to the Treasury, that the cost control mechanism element of scheme valuations would be paused pending the outcome of the final appeal.

- 7.3 The Statement explains that if the Government is successful in appealing the judgment, the cost cap process will resume with scheme improvements implemented retrospectively from 1 April 2019 as envisaged. If the Government is unsuccessful then steps will need to be taken to compensate members who were transferred to the new schemes. Irrespective of whether or not the judgment stands, the cost of NHS pension benefits is set to become more expensive from 1 April 2019 and the employer contribution rate should reflect this.
- 7.4 Accordingly, the Treasury issued new valuation Directions to implement the cost control mechanism pause. HMT valuation Directions set a range of assumptions and technical approaches that the scheme actuary must use in their valuation calculations. Based on those Directions, the Government Actuary's Department issued a final valuation report that recommend a new employer rate of 20.6%.

Renewal of member contribution rates

- 7.5 The instrument also relates to the contributions made by members of the scheme, and in particular extends the current rates which are due to expire on 31 March 2019. A review of member contributions has been carried out by the Scheme Advisory Board (SAB) to consider the current approach and assess whether it remains appropriate or requires amendment. The SAB is a statutory board comprising member and employer representatives constituted to advise the Secretary of State on the merits of making changes to the NHS Pension Scheme. The review considered whether the rate payable by a member should be determined using whole-time equivalent or actual earnings, whether contributions should be tiered according to member earnings, the range and number of such tiers, and whether tier boundaries should be indexed.
- 7.6 The SAB unanimously agreed that a future contribution structure should seek to limit the impact of 'cliff edges' where a member pays a higher contribution rate having moved into another contribution tier by virtue of an annual pay increase, and that it would be appropriate to determine contribution rates based on actual rather whole-time equivalent pay.
- 7.7 However, the SAB made a majority recommendation that the existing contribution rates be retained for a further two years until 31 March 2021 to allow further discussion on how to proceed with such changes including for some trade unions to seek formal mandate from their membership, and to allow time for suitable administrative preparation and communication to members/employers. The Secretary of State accepted this recommendation. Accordingly, the member contribution rates applicable for the scheme year 2018 to 2019 would continue to apply for future scheme years by virtue of amending regulations 4 and 40(3)(a), 45, 46 and 63(b), and 78 and 79.

Entitlement for survivors of civil partners and same-sex spouses

- 7.8 As a result of a legal judgment in *Walker v. Innospec Ltd* [2017] UKSC 47, public sector schemes, including the NHS Pension Scheme, are amending their rules to provide the same survivors' benefits for same-sex couples (whether married or in civil partnerships) as those for widows.

- 7.9 Mr Walker was a pensioner member of a contracted-out private sector pension scheme (the 'scheme') who brought a claim in the Employment Tribunal under the Equality Act 2010. Mr Walker claimed that a scheme rule that restricted payment of survivor's benefits to the survivors of opposite-sex marriages constituted direct and indirect sexual orientation discrimination. The scheme rule relied on an exemption in the Equality Act 2010 the effect of which at the time of the Employment Tribunal hearing was to permit schemes to discriminate on grounds of sexual orientation between opposite-sex married couples and same-sex civil partners in respect of benefits accrued, or payable, in respect of service prior to 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force).
- 7.10 The Employment Tribunal found in favour of Mr Walker, but the Employment Appeal Tribunal and the Court of Appeal upheld his employer's appeal. The Supreme Court allowed Mr Walker's appeal finding that the exemption (which was in paragraph 18 of Schedule 9 to the Equality Act 2010) is not compatible with EU law insofar as it authorises a restriction on payment of benefits based on periods of service before 5 December 2005 and it should therefore be disapplied.
- 7.11 The amendments brought about by this instrument provide that survivors of civil partners and same-sex spouses will have the same pension benefits as widows.
- 7.12 The NHS Pension Scheme has already equalised benefits between male and female same-sex couples in the 2008 Section and the 2015 Scheme, and in respect of service from 6 April 1988 in the 1995 Section. Therefore, the amending regulations only amend the 1995 Section. The amendments apply with retrospective effect to civil partners from 5 December 2005 (the date civil partnerships were introduced) and 13 March 2014 (the date marriage for same-sex couples was introduced). Whilst the amendments apply directly to regulations providing pensions for surviving civil partners, the 1995 Section contains provisions that ensure that the amendments will apply equally to survivor pensions for same-sex spouses (regulation A4 introduced with effect from 13 March 2014 refers).
- 7.13 Amending regulation 14 removes paragraphs (3) to (5) of regulation G10. Regulation G10 provides for a surviving civil partner's pension. Paragraphs (3) to (5) provide for a member's service before 6th April 1988 to be disregarded when calculating the amount of a surviving civil partner's pension due. As a consequence, those paragraphs also describe some limited circumstances when service before 6th April 1988 is not disregarded, for example for the purposes of paying an initial short-term pension to a surviving civil partner at the same rate as the member's pension. Once these paragraphs are removed, the remaining paragraphs of regulation G10 provide for a surviving civil partner or a surviving same-sex spouse to receive a pension calculated and paid in the same way as those provided to widows.
- 7.14 Amending regulation 15 removes in its entirety regulation G11 (dependent surviving civil partner's pension). Regulation G11 provides for a member to nominate their civil partner or same-sex spouse to receive a dependent survivor's pension in respect of any service the member has before 6th April 1988 ("the earlier service"). In order to qualify for a dependent survivor's pension for this earlier service, a civil partner or same-sex spouse must be permanently unable to earn a living because of ill health and wholly or mainly dependent on the member. If a nomination is accepted, and the member dies before their civil partner or same-sex spouse, a survivor pension for the member's earlier service is payable. At retirement the member's lump sum is reduced unless the member has opted to pay additional voluntary contributions to purchase

back a full lump sum. Since the proposed amendment to regulation G10 will ensure that any service the member may have before 6th April 1988 will be routinely included in any surviving civil partner or same-sex spouse pension due under that regulation, regulation G11 is unnecessary and can be removed.

- 7.15 Amending regulations 16, 17 and 40(4) remove in their entirety regulation G12 (purchase of surviving civil partner's pension in respect of service prior to 6th April 1988), regulation G13 (increased surviving civil partner's pension) and paragraph 16A (increased surviving civil partner's pension) of Schedule 2 respectively. Together these regulations provided a time limited facility allowing members to purchase a survivor pension in respect of any service the member has before 6th April 1988 by taking a reduced lump sum on retirement. They include a further facility for the member to then purchase back their full lump sum by paying additional voluntary contributions. Since the proposed amendment to regulation G10 will ensure that any service the member may have before 6th April 1988 will be routinely included in any surviving civil partner or same-sex spouse pension due under that regulation, regulations G12, G13 and paragraph 16A of Schedule 2 are unnecessary and can be removed.
- 7.16 Amending regulations 20 and 21(a) and (c) remove references to "regulation G10" (surviving civil partner's pension) and "civil partners" from regulations G16 (purchase of surviving partner's pension in respect of service before 6th April 1988) and G17 (increased surviving partner's pension). Regulations G16 and G17 provided a further time-limited opportunity for members with service before 6th April 1988 to purchase an additional civil partner's, same-sex spouse's, nominated partner's or widower's pension in respect of that earlier service in the same way as described for regulations G12 and G13 above. Since the proposed amendment to regulation G10 will ensure that any service the member may have before 6th April 1988 will be routinely included in any surviving civil partner or same-sex spouse pension due under that regulation, references to "civil partners" and "regulation G10" are also unnecessary and can be removed.
- 7.17 As a further consequence of the draft amendments described above, paragraph (5A) of regulation Q1 (right to buy additional service) and paragraph (2A) of regulation Q5 (paying for unreduced retirement lump sum by single payment) are removed by amending regulations 32(2) and 33(2) respectively. Regulation Q1(5A) deals with purchases of additional service taken out before 6th April 1988 in circumstances where a survivor pension becomes payable under regulation G10. Regulation Q5(2A) deals with the time limits that apply for purchasing an unreduced lump sum by a single payment as a consequence of nominating a same-sex spouse or civil partner to receive a dependent survivor pension under Regulation G11. Neither paragraphs are necessary given the other amendments described above.
- 7.18 Amending regulation 38 removes a cross reference to regulation G11(2) from regulation U1A (determinations by medical practitioners). As noted at paragraph 7.14 above regulation G11 has been removed so this reference is unnecessary.

Forfeiture of pension benefits

- 7.19 Where a member of the NHS Pension Scheme or other beneficiary is convicted of certain offences, the pension scheme regulations give the Secretary of State power to direct that part, or all, of their pension benefits be forfeited.

- 7.20 There are also provisions in the regulations which allow the Secretary of State to defer making a transfer value payment in circumstances where, in the Secretary of State's opinion, disciplinary or court proceedings may lead to all or part of the member's benefit being forfeited.
- 7.21 Currently, the forfeiture powers only apply where a member or beneficiary is convicted of a relevant offence and the Secretary of State has directed forfeiture. Before this happens, the practice is for the Secretary of State to seek representations from the member or beneficiary which are considered by the Secretary of State when reaching any decision to forfeit. This takes time and means that a member may claim benefits before the outcome of court proceedings is known or before the Secretary of State directs forfeiture. As a consequence, a member or beneficiary may then receive substantial pension and lump sum payments from the public purse, notwithstanding the fact that the member has been convicted of serious relevant offences.
- 7.22 The amendments brought about by this instrument will give the Secretary of State the power to make a decision suspending the right to, or the payment of, benefits pending a forfeiture decision, where a member has been charged with or convicted of relevant offences. This will mean that the member no longer has the right to the pension and therefore not only will any pension in payment be suspended, the right to transfer that pension, for example on divorce, will also be suspended pending a forfeiture decision.
- 7.23 Amending regulations 37(3), 55(3), 72(3) and 91(3) insert new provisions which apply where a member or other beneficiary is either charged or convicted of a relevant offence on or after 1st April 2019 and, in the opinion of the Secretary of State, the charge or conviction relates to an offence that may lead to all or part of the benefits in question being forfeited. In these circumstances the Secretary of State may make a decision to suspend a member's or other beneficiary's rights to or payment of benefits (a "suspension decision"). Where a suspension decision is made, it continues to apply until the date of any direction of the Secretary of State directing forfeiture or until the date of the Secretary of State's decision not to direct forfeiture.
- 7.24 Where a suspension decision is invoked, the member or beneficiary will be informed and invited to make representations as to why the suspension should be lifted in whole or in part.
- 7.25 If the Secretary of State does not subsequently direct forfeiture or directs forfeiture of an amount less than the amount suspended, the amendments provide that the Secretary will pay to the member the amount suspended or the difference, together with interest.

Contracting out

- 7.26 The Pensions Act 2014 made various amendments to the Pension Schemes Act 1993 and a new set of regulations, the Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015, provided for the end of contracting-out with effect from 6th April 2016 and the preservation/protection of contracting-out rights earned by members up to that date. This means that, with effect from that date, salary related pension schemes, like the NHS Scheme, could no longer "contract-out" their members from the State Second Pension.
- 7.27 To support the transition and especially the associated administrative processes during the three-year period up to 6th April 2019, some of the existing contracting-out provisions remained in place pursuant to the Pensions Act 2014 (Savings) Order

2015. That transitional period is now coming to an end so it is necessary to make further changes to the pension scheme regulations to ensure that the NHS Scheme operates correctly in tandem with the new legislation.

- 7.28 A definition of the "2016 Order" to be used as a shortened reference to the "Pensions Act 2014 (Contributions Equivalent Premium) (Consequential Provision) and (Savings) (Amendment) Order 2016" is inserted into each set of NHS Scheme regulations (amending regulations 3(2), 43(3)(a), 59(2) and 94(a)). This definition supports amendments made to ensure that Scheme Regulations allowing for the payment of Contributions Equivalent Premiums ("CEPs") are correctly aligned with the 2016 Order. CEPs are payments made to HMRC on behalf of members to buy state scheme rights back in respect of a member who had contracted-out service in the NHS Scheme but did not qualify for scheme benefits when leaving. In such circumstances a refund of scheme contributions is usually due. Where such a member's service ended before 6th April 2016 a CEP could be paid under section 55 of the Pension Schemes Act 1993. Where service ended after that date, a CEP can be paid for the portion of service that was contracted out under article 3 of the 2016 Order. The references to the payment of CEPs in the Scheme regulations are amended so that they refer to this legislation (amending regulations 11, 28, 29, 31, 44, 48, 52, 53, 60, 65, 69, 70, 77, 84, 88, and 89). Section 55 of the Pension Schemes Act 1993 will no longer be in force from 6th April 2019 and no further CEPs will be paid under that section in the future. However, the Regulations make certain provision in circumstances where a CEP may have been paid at any time in the past, for example, in relation to survivor benefits that may become due. Therefore, it is necessary to retain references to section 55 so that the regulations work correctly regardless of when and under which legislation a CEP was paid.
- 7.29 The definition of "section 9(2B) rights" are rights attaching to contracted out service between 6th April 1997 and 5th April 2016. The definition and related references are updated in each set of regulations (amending regulations 3(7), 49, 66, 85, and 94(c)) so as to refer to the updated definition of that term in the Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015.
- 7.30 A new definition of "contracting out requirements" which links to regulations 18 and 25 of the Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015 is inserted into the 1995 Section. Regulation 18 of those regulations provides cover for the commutation on serious ill health grounds of contracted out rights for service between 6th April 1997 and 5th April 2017. Regulation 25 of those regulations provides cover for contracted-out service up to 6th April 1997. This revised definition is used in regulations that deal with commutation on grounds of serious ill and enables those provisions to be streamlined (amending regulations 3(4), 7 to 9, and 30).
- 7.31 The definition of "contracting out conditions" used in regulation K1 is updated to include a reference to section 12E of the Pensions Schemes Act 1993 (amending regulation 27). The term "contracting-out requirements" is no longer used in the 2008 Section and therefore the definition is deleted (amending regulations 43(3)(c) and 59(3)).

Exempting Agenda for Change pay increases from Final Pay Control charges

- 7.32 Final pay controls protect the scheme from the increased cost of paying pensions inflated by excessive late career pay rises and is only relevant to members with final

salary pension benefits. Consequently, final pay control charges are only provided for by the 1995 Section. The way the controls work is that the scheme can claim back monies from an employer where there has been a pay increase shortly before retirement in certain circumstances. The aim however is not to cover mandatory, nationally agreed pay increases such as those in relation to the Agenda for Change pay deal.

7.33 The Agenda for Change pay deal provides increases to pay of at least 6% for all NHS employees over 3 years. The initial pay increases awarded under the Agenda for Change pay deal have been backdated to 1 April 2018. NHS employees who receive a pay increase under the Agenda for Change pay deal and then retire shortly afterwards may (unless these amendments are made) fall within the scope of the Final Pay Control regulations and their employer would subsequently be liable for a charge under the 1995 Section.

7.34 Amending regulation 6 inserts into the list of exceptions to a final pay control charge, a new provision that exempts an increase in pensionable pay that is pursuant to the Agenda for Change framework agreement which was adopted on 27 June 2018.

Removal of the requirement to nominate unmarried co-habiting partners for survivor benefits

7.35 Following a legal judgment in Denise Brewster, Re Application for Judicial Review (Northern Ireland) [2017] UKSC 8 (the “Brewster case”), this instrument removes the requirement to nominate co-habiting partners for survivor benefits. These amendments will have retrospective effect for members who have pensionable service on or after 1 April 2008 so that surviving partner pensions are paid to survivors without the need for a nomination to be made, provided that qualifying criteria are met.

7.36 On 8 February 2017, the Supreme Court handed down its decision in the Brewster case. The case related to an unmarried co-habiting partner (Ms Brewster) being refused a survivor pension under the Local Government Pension Scheme Northern Ireland on the basis that the relevant scheme regulations required a cohabiting surviving partner to have been nominated by the member. Ms Brewster had not been nominated.

7.37 The Supreme Court found 'that the essence of entitlement to the benefit is that the couple have lived together for a sufficiently long period of time and that one is financially dependent on the other or that they are financially interdependent'. Further, that being required to make a nomination added nothing to the objective inquiry as to whether an unmarried partner satisfied these other conditions. It also found that the requirement of a nomination resulted in less favourable treatment on the basis of the unmarried status of the co-habiting partner when compared with married couples and those in a civil partnership (where there was no nomination requirement). The Court dis-applied the nomination requirement, having found it to be unlawful, and held that the partner was entitled to receive a survivor's pension.

7.38 In response to the judgment, HMT Ministers determined that public service pension schemes would waive the nomination form requirement for new claims and pay survivor pensions in qualifying cases from the date of the member's death, regardless of when a claim is made.

- 7.39 Accordingly, a number of amendments are being made by this instrument which will remove the requirement for a qualifying partner to be nominated by the scheme member in order to receive a survivor pension following the member's death. Amendments made to the 1995 and 2008 Section will have retrospective effect from 1 April 2008, the date survivor pensions for nominated partners were introduced. Amendments made to the 2015 Scheme will have retrospective effect from 1 April 2015, the inception date for that scheme.
- 7.40 Amending regulations 18, 51, 68 and 87 reproduce the existing qualifying criteria for a surviving partner pension but the requirement for a formal nomination to have been made is removed.
- 7.41 New terminology is also introduced by amending regulations 10, 12, 13, 21(b), 22-26 32(3), 33(3), 34 to 36, 37(2), 40(5), 50, 54, 55(2), 67, 71, 72(2), 86, 90, and 91(2). References to 'nominated partner's pensions' and 'nominated partners' are removed. In their place, the benefit is now appropriately referred to as a "surviving scheme partner's pension" and the beneficiary is referred to as a "surviving scheme partner".
- 7.42 Amending regulations 57, 58, 74 and 75 remove provisions from the 2008 Section that allow a nomination for a partner pension made under the 1995 Section to also be effective under the 2008 Section.

Other related changes made to the 1995 Section

- 7.43 In the 1995 Section, survivor pensions for nominated partners and widowers are generally based on the member's service from 6th April 1988. However, an additional survivor pension based on the member's service before that date may be paid if certain qualifying criteria are met.
- 7.44 The qualifying criteria found in regulation G15 include the requirement that the nominated partner is permanently incapable of earning a living through ill health and is wholly or mainly dependent on the member. The partner must also meet the qualifying criteria to be a nominated partner whilst the member is still active in the scheme (the couple have lived together as if they were husband and wife or civil partners for a continuous period of at least two years, both are free to marry or form a civil partnership and one is financially dependent on the others or that they are financially interdependent).
- 7.45 If the member and their partner's application is accepted, the member's lump sum is usually reduced at the time of payment. If the member dies before their nominated partner, both a nominated partner's pension and a dependent's nominated partner pension are paid.
- 7.46 Amending regulation 19 makes changes to regulation G15 to take account of the removal of the requirement that a qualifying partner must be 'nominated' in order to receive a surviving partner pension. Revised regulation G15 provides for a "dependent surviving scheme partner's pension" in respect of service before 6th April 1988 to be paid in the same circumstances as a "dependent nominated partner's pension" is currently paid. In line with current provision, the qualifying criteria outlined at paragraph 7.44 must be met by the member and their partner for a continuous period of two years ending with the member's last day of pensionable employment. However, the requirement that a "nomination" is in place is removed.

- 7.47 Consequential amendments are also made to the AVC Regulations, the Injury Benefit Regulations and the Transitional Regulations through amending regulations 96 to 98, 100 to 105 and 107.

Miscellaneous amendments

- 7.48 Historically, the requirement for employers to provide certain statements of estimated contributions was mandatory. Amending regulations 39, 56(3), 73(3) and 81 provide the future provision of such statements will be at the request of the scheme administrator instead of mandatory.
- 7.49 Amending regulations 40(3)(b), 63(a), 82 and 83 provide a new definition of “NDPS” so that it clearly reflects the number of days of pensionable service in the scheme year, previously it stated that the number of days of pensionable service would be from member’s first day of work to the end of the scheme year. The new definition reflects current practice.
- 7.50 Amending regulations 3(5), 43(3)(d), 59(4) and 94(b) amend the definition of NHS standard sub-contract and refer to the latest guidance.
- 7.51 In accordance with relevant regulations, all GMS/PMS practices, APMS contractors and GDS/PDS must provide the host Board (NHS England or Local Health Board) with a statement of the annual estimated pension contributions due no later than one month before the start of the Scheme year. Amending regulations 40(6), 73(2) and 93(2) allow the host Board to determine the estimated pensionable income and to deduct member contributions at the maximum contribution percentage rate specified in the Regulations where the statement has not been provided. Where it subsequently transpires that pension contributions have been deducted at a higher rate than would have been due if the statement had been provided, adjustments can be made during the scheme year.
- 7.52 Amending regulations 3(6), 43(3)(e) and 59(5) amend the definition of “officer” in the 1995 Section and 2008 Section to be consistent with the 2015 Scheme and clarify that “officer” does not include a GP performer, a dentist performer or a person engaged under a contract of services.
- 7.53 Amending regulation 3(8) omits the definition of “CCT” (Certificate of Completion of Training) in the 1995 Section because this definition is no longer used in the 1995 Section.
- 7.54 Amending regulations 40(2), 61, 62 and 92 amend provisions concerned with pensionable earnings to clarify that certain payments (in respect of health-related functions exercised under section 75 of the National Health Service Act 2006), are pensionable if they are made by an employing authority or a local authority.
- 7.55 Amending regulation 41 corrects a minor error in amendments made to a provision in the 1995 Section concerning the payment of a supplementary charge on the late payment of employer contributions.
- 7.56 Amending regulation 43(2) corrects a minor numbering error.
- 7.57 Amending regulation 43(3)(b) inserts a definition of “the health service” into the 2008 Section.

- 7.58 Amending regulation 56(2) amends paragraph (2) of regulation 2.J.14 to clarify that the GMS, PMS, or APMS contractor must provide the host Board with a statement of estimated pensionable earnings for any non-GP provider.
- 7.59 Amending regulation 73(4) makes a separate correction to paragraph (15) of regulation 3.J.14 to clarify that such a statement is required 1 month before the beginning of each scheme year, and not 2 months after the end of each scheme year as currently stated.
- 7.60 Where a GP or non-GP Provider has failed to pay over their Scheme contributions, Schedule 12 of the 2015 Scheme allows the administrator to recover these arrears from their NHS pension benefit, usually at retirement. Amending regulation 93(3) streamlines the recovery of arrears by replacing the requirement for ‘member consent’ to be obtained for recovery from benefits with a simpler duty to notify the member.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The Department recognises that formal consolidated regulations are good practice and intends to undertake a formal consolidation once Government business allows. In the interim period, the Department has produced informal full consolidations of NHS Pension Scheme regulations incorporating all the changes implemented up to and including those which came into effect on 1 April 2019. These are available on the scheme administrator’s website: <https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations>

10. Consultation outcome

- 10.1 The proposals and draft SI were published for consultation on 18 December 2018. The consultation closed on 28 January 2019. Almost 1,500 responses were received, the majority of which were from individuals. Most organisational responses were from GP surgeries and Medical Centres. Responses were also received from Trade Unions, Community Interest Companies, Foundation Trusts, Hospices, NHS organisations, Social Enterprises, Universities, other representative organisations and a private provider.
- 10.2 The majority of responses received raised concerns about the financial impact of the 6.3% increase to the employer contribution rate, and the availability of funding to meet the cost. Some respondents were disappointed that the existing employee contribution structure would be retained.
- 10.3 Respondents generally welcomed equalising the entitlements of survivors of same-sex partners with those of widows and the exemption of Agenda for Change pay increases from the Final Pay Control policy. Some respondents were concerned that suspension of pension benefits could cause financial hardship. There were also concerns raised by some respondents about the removal of a historic exemption that benefitted locum GPs.
- 10.4 The consultation response document will be made available on www.gov.uk

11. Guidance

- 11.1 Guidance is provided via a range of resources including factsheets, online videos and scheme guides on the scheme administrator's website:
<https://www.nhsbsa.nhs.uk/nhs-pensions>

12. Impact

- 12.1 There is a marginal impact on the public sector, business, charities and voluntary bodies. Whilst the employer rate is increasing to 20.6%, alongside the Long-term Settlement for NHS England announced in June 2018, the Government committed to provide additional funding to meet the full costs to the NHS in England arising from this scheme valuation. Organisations that receive funding from within NHS England's funding mandate are in scope of this commitment to the NHS. This includes statutory public bodies such as NHS Trusts and Clinical Commissioning Groups. GP practices and dentists are considered within scope of the NHS commitment. We also recognise that some non-NHS organisations are permitted access to the NHS pension scheme on the basis that they receive funding from the NHS for the delivery of NHS services, including hospices, charities, social enterprises, community interest companies and independent providers. Whilst individual circumstances may vary, such organisations mostly deliver NHS services or functions commissioned and funded by the NHS on the basis of 'level-playing field' with other providers. Consequently, these are also included within scope of the funding being provided to NHS England to take account of these costs to the NHS. Employers that are outside this scope will receive funding support for the unforeseen costs in 2019-20. This principally applies to the non-NHSE Arm's Length Bodies of the Department of Health and Social Care and Local Authorities. For these organisations, the unforeseen cost will be funded, however they will have to manage the impact of the foreseen cost pressure, an expected 2.5% increase in employer contributions from 1 April 2019. For university medical schools, support will be provided towards pension costs to reflect that a combination of both NHS and other sources (including non-NHS) funding usually contributes towards overall costs. In line with this, university medical schools will have to manage an element of the foreseen cost.
- 12.2 An Impact Assessment has not been prepared for this instrument. Where costs to organisations arise as a result of the employer rate increase, these are fully or partially mitigated by additional funding provided by the Treasury.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 In accordance with section 7 of the Public Services Pensions Act 2013, there is a Scheme Advisory Board comprising representatives of NHS employers, NHS trade unions and the scheme administrator. The Board discusses changes to the NHS Pension Schemes and provides advice to the Secretary of State for Health and Social Care where requested on scheme policy.
- 14.2 The instrument does not provide for a review pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (S.I. 2015/26) (Duty to review regulatory provisions in secondary legislation).

14.3 The Department does not consider that the NHS Pension Scheme Regulations amended by this instrument make regulatory provision in relation to a qualifying activity or amend any regulatory provision relating to that activity for the purpose of section 28 of the Small Business, Enterprise and Employment Act 2015. They regulate only the activities of public bodies. The exempting provision of section 29(3)(b) of the same Act therefore applies.

15. Contact

15.1 Johanna Rhodes at the Department of Health and Social Care (email: johanna.rhodes@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Tim Sands, Deputy Director for NHS Pay, Pensions and Employment Services at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Stephen Hammond MP (Minister of State for Health) at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.