

EXPLANATORY MEMORANDUM TO
THE EQUALITY ACT (AGE EXCEPTIONS FOR PENSION SCHEMES)
(AMENDMENT) ORDER 2019

2019 No. 879

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Some occupational pension schemes pay a reduced rate pension to take account of the State Pension the member receives when they reach State Pension age (currently between 60 and 65). The purpose of this amending Order is to enable these schemes to continue doing this in line with increases to the State Pension age (rising to 68).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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)

- 3.2 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 extent of this instrument is Great Britain.
- 4.2 The territorial application of this instrument is Great Britain.
- 4.3 The Department for Communities will be making corresponding provisions in Northern Ireland.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Currently the Equality Act (Age exceptions for pension schemes) Order 2010¹ (“the 2010 Order”) provides an exception to the age related equality obligations and permits schemes to take account of the State Pension when calculating pension payable where the member has a State Pension age between 60 and 65. The proposed amendment to the 2010 Order allows schemes that take into account the State Pension when

¹ <http://www.legislation.gov.uk/ukxi/2010/2133/contents/made>

calculating the pension payable to continue to rely on this exception where the member has a State Pension age greater than age 65.

- 6.2 As State Pension ages increased beyond age 65 after 5 December 2018, there is a requirement to amend the 2010 Order to maintain the status quo. This amending Order therefore proposes to substitute the word “65” in the existing 2010 Order with “State Pension age” to reflect the fact that the State Pension age is increasing beyond 65.

7. Policy background

What is being done and why?

- 7.1 When the State Pension was introduced in 1948, it was recognised that some employees in the public and private sectors already had occupational pensions. In order to ensure that employers and their employees did not have to increase their pension contributions, some employers took account of some or all of the State Pension when calculating the occupational pension payable. The aim was to provide, overall, the same level of benefits, although the effect was to reduce the level of occupational pension to below what might otherwise have been expected based on a person’s final salary. This process is known as “integration” or “clawback”.
- 7.2 The age at which the deduction of the State Pension from the occupational pension takes place will depend on the individual and the age at which they are entitled to claim their State Pension.
- 7.3 The Equality Act 2010 (“Equality Act”) requires every occupational pension scheme to have a non-discrimination rule read into it, prohibiting a “responsible person” from discriminating against, harassing or victimising a member or person who could become a member of the scheme on the basis of a protected characteristic (age is one of the protected characteristics). In the context of the Equality Act, “responsible persons” include the trustees or managers of a pension scheme and employers whose employees may be members of the pension scheme.
- 7.4 It is not a breach of a non-discrimination rule to use a practice, action or decision which is specified in the 2010 Order. Schemes are permitted to reduce the amount of occupational pension in payment by the rate of the State Pension (or the rate of occupational pension in payment where the State Pension is greater than the rate of that payment) where the reduction occurs between ages 60 and 65.
- 7.5 As the State Pension age is increasing incrementally to 68 after 5 December 2018, an amendment is required to enable schemes to continue to rely on the 2010 Order after that date to enable benefits to be reduced at the point State Pension becomes payable.
- 7.6 The amending order will maintain the status quo both for schemes and members. Members will continue to receive what the rules of their scheme always intended.

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 An informal consolidation text of the instrument is available to the public free of charge via the National Archive's website: legislation.gov.uk.

10. Consultation outcome

- 10.1 Due to the technical nature of this amending Order, an informal consultation with the pensions industry took place in advance of the formal consultation on this draft amending Order. This is because there has been demand by the pension industry for these changes. There were two responses from experts in the pension industry. Their informal responses enabled the Department for Work and Pensions to make minor and technical changes to ensure the 2010 Order to enable schemes that operate integration to continue to do so.
- 10.2 A consultation on this ran for two weeks from 16 to 30 January 2019. There were 6 responses from experts in the pensions industry.
- 10.3 There was broad agreement on the proposed changes. However a number of issues were raised concerning the fact that it is not possible to apply the changes retrospectively, and proposals were made about how these should be addressed.
- 10.4 Arguments were put forward for the changes to the Order to be applied retrospectively, but DWP explained that in order for provisions to have retrospective effect, the primary legislation under which the secondary legislation was made must contain an expressed provision allowing for retrospective effect. The 2010 Order was made under section 61(8) of the Equality Act 2010.² As section 61(8) does not contain such provision, the Department is unable to legislate with retrospective effect.
- 10.5 There was also a question as to whether the changes to legislation were absolutely required as the legislation (Schedule 4, paragraph 14(1)(c) of the 2010 Order appeared to already work effectively for some schemes. DWP explained that whilst paragraph 14(1)(c) does enable schemes that pay an additional amount before State Pension age to continue the practice of applying an adjustment at State Pension age, this was not possible for schemes that operate integration but do not pay any additional pension before State Pension age (as provided for by paragraph 14(1)(a)). Therefore, a change to paragraph 14(1)(a) is necessary to allow such schemes to continue to rely on the exception at paragraph 14(1)(a) of the 2010 Order.
- 10.6 It was suggested that schemes could rely on section 13(2) or 19(2) of the Equality Act 2010 to continue their practice of integration on account of "objective justification". Sections 13(2) and 19(2) provide that a rule is not discriminatory (direct for section 13 and indirect for section 19) if the rule was proportionate in achieving a legitimate aim. Schemes would however need to justify to the tribunal or courts that their practice of integration is proportionate and achieving a legitimate aim.
- 10.7 We have addressed the respondents' comments in the Government's response to the consultation, published on gov.uk³.

² <http://www.legislation.gov.uk/ukpga/2010/15/contents>

³ <https://www.gov.uk/government/consultations/the-draft-equality-act-age-exception-for-pension-schemes-amendment-order-2019>

11. Guidance

- 11.1 The Government's response to the consultation on this amending Order provides information for schemes on how to interpret this amending Order. DWP do not intend to provide any further guidance as this information is deemed to be sufficient.

12. Impact

- 12.1 The impact on business is to protect both pension schemes and their sponsoring businesses from additional costs which would arise from voluntarily paying higher pensions for a period which had not been actuarially anticipated. The legal alternatives for pension schemes would be to reduce occupational pensions at age 65, leading to possible hardship to people whose State Pension age was later; to bear the cost of starting payment at age 65 even when the State Pension age was later; or significantly re-order scheme rules.
- 12.2 We estimate the proposed change will provide a saving of £60.2m (over 10 years) to business, as a result of being able to continue to apply integration at state pension age. This estimate has been rated as fit for purpose by the Regulatory Policy Committee. There is a corresponding and equal cost to members as a result of schemes being able to apply integration at state pension age, in line with scheme rules.
- 12.3 The impact for charities or voluntary bodies is similar where they have, or sponsor, a pension scheme.
- 12.4 There is no, or no significant, impact on the public sector.
- 12.5 An Impact Assessment has been prepared for this instrument and will be made available alongside the legislation on www.legislation.gov.uk. The Impact Assessment sets out options available to schemes if the proposed legislation was not introduced including applying the adjustment to the pension at the latest permitted age – with associated costs to members; and not applying the adjustment at all with associated costs for pension schemes

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 Small businesses will also benefit from this measure as outlined at paragraph 12.1 where they sponsor a defined benefit scheme.
- 13.3 Excluding small businesses (i.e. small businesses sponsoring a defined benefit scheme(s)) from this amending Order would exclude them from being able to benefit from this measure. This would adversely affect sponsoring businesses of the affected schemes because they would no longer be able to continue to rely on the age related equality exceptions in the 2010 Order. This in turn could affect the sustainability of these schemes.

14. Monitoring & review

- 14.1 Guy Opperman MP, Parliamentary Under-Secretary of State for the Department for Work and Pensions, has made the following statement under section 28(2)(b) of the Small Business, Enterprise and Employment Act 2015⁴. Having had regard to the Statutory Review Guidance for Departments published under section 31(3) of the

⁴ <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

Small Business, Enterprise and Employment Act 2015, in my view, it is not appropriate to make provision for review in the Equality Act (Age exceptions for pension schemes) (Amendment) Order 2019.

- 14.2 Given the technical and permissive nature of these amendments, there are no plans to monitor or review the instrument. The Department for Work and Pensions will, however, continue to work closely with stakeholders, including industry bodies and employer organisations, to keep these policies under review and should any issue arise with these policies, it will assess the evidence and, if appropriate, consider whether any changes may be necessary.

15. Contact

- 15.1 Richard Jordan at the Department for Work and Pensions (Telephone: 0207 449 7379 or email: Richard.jordan1@dwp.gsi.gov.uk) can answer any queries regarding the instrument.
- 15.2 Jo Gibson, Deputy Director of Private Pensions Policy, at the Department of Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Guy Opperman MP, The Parliamentary Under-Secretary of State for the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.