

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE PENSION SCHEMES AND INJURY**  
**BENEFITS (AMENDMENT) REGULATIONS 2021**

**2021 No. 631**

**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 This instrument amends four statutory instruments relating to pensions and injury scheme benefits provided for National Health Service staff. These are:
- The National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) ('The 1995 Section')
  - The National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) ('The 2008 Section')
  - The National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) ('The 2015 Scheme')
  - The National Health Service (Injury Benefits) Regulations 1995 (S.I. 1995/866) ('The Injury Benefits Regulations').
- 2.2 Key changes implemented by this instrument include:
- reforming the final pay control provisions of the 1995 Section;
  - equalising the entitlement to survivor pensions for male survivors of female scheme members following the Employment Tribunal decision in *Goodwin v Secretary of State for Education*;
  - removing certain amendments to the 1995 Section made by the Civil Partnership (Opposite-sex Couples) Regulations 2019 ('the Civil Partnership Regulations') which are no longer relevant;
  - ensuring that payments and allowances under the New to Partnership Payments Scheme introduced in 2020 are treated as non-pensionable earnings for both General Practitioners (GP) and non-GP providers;
  - making miscellaneous amendments and minor corrections to the NHS Pension Schemes Regulations and the Injury Benefits Regulations.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 As a result of this instrument containing corrections, having consulted with the SI Registrar, this instrument is being published under the free issue procedure.
- 3.2 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.

- 3.3 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.
- 3.4 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. Section 7 below sets out the policy background to the changes and further details, including the retrospective nature of the amendments. The Department is of the view that none of the retrospective provisions will have a significant adverse effect for the purposes of section 23. The amendments to the final pay controls have no effect on pensions payable to members. Any charges are met by the employer. The changes as a result of *Goodwin* are wholly beneficial to relevant members and provide for no reduction to pensions payable. Accordingly, the consultation requirements of that section are not relevant.
- 3.5 Regulations 3(2), 4 and 33(3) of this instrument have effect from 2nd December 2019, the date the Civil Partnership (Opposite-sex Couples) Regulations 2019 (S.I. 2019/1458) came into force. Regulations 3(3), 14(b), 19(c) and 30(3) have effect from 1 April 2021. The NHS Commissioning Board's 2021/22 guidance to the NHS Template sub-contract applies to new sub-contracts commencing from this date. Regulations 6 to 10 have effect from 5 December 2005, the date on which same-sex civil partnerships were introduced under the Civil Partnership Act 2004 (the '2004 Act').
- 3.6 Regulations 11, 16 to 18 and 21 to 23 of this instrument have effect from 1 April 2008, the effective date of the 2008 Section. Regulations 12(2)(a) and 19(a) have effect from 1st April 2014, the effective date of the change to regulation 2.A.1 (interpretation: general) made by the National Health Service Pension Scheme (Amendment) Regulations 2014 (S.I. 2014/570). Regulations 12(2)(b) and (3), 14(a), 15, 19(b), 20 and 28 have effect from 1 April 2020, the date the New to Partnership Payment (N2PP) Scheme was introduced by NHS England and NHS Improvement.
- 3.7 Regulations 25 to 27, 29 and 30(2) of this instrument have effect from 1st April 2015, the effective date of the 2015 Scheme. Regulation 32 has effect from 1 May 2012, the date section 52 of the Welfare Reform Act 2012 came into force. Regulation 33(2) has effect from 1st April 2008, as intended by regulation 1(2) of the date the NHS Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019 ('the 2019 Amendment Regulations') (S.I. 2019/418). 1 April 2008 is the date that survivor pensions for unmarried partners were introduced to the scheme.
- 3.8 Section 12(4) of the Superannuation Act 1972 provides that where provisions may place certain members in a worse position than they would have been in had the provision not applied, such members may elect for the provision to not apply to them. Part 6 of this instrument provides for that option.

*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 negative resolution procedure and does not amend primary legislation, no statement is required.

**6. Legislative Context**

- 6.1 Part 2 of this instrument amends the 1995 Section. Part 3 of this instrument amends the 2008 Section. Part 4 of this instrument amends the 2015 Scheme. Part 5 of this instrument amends the Injury Benefits Regulations. Part 6 of this instrument sets out the options available to persons detrimentally affected by the instrument. Para 2.2 above outlines the purpose of these amendments and further detail is provided below.

**7. Policy background**

*What is being done and why?*

*Amendments to the 1995 Section – Part 2 of this instrument.*

*Reform of the Final Pay Control charges*

- 7.1 Final pay controls protect the NHS pension scheme from the increased cost of paying retirement pensions which have been inflated by excessive late career pay rises and are relevant to the final salary pension benefits of members of the 1995 Section of the NHS pension scheme. Employers, in certain circumstances, are charged an ‘excess employer contribution’ for the cost of pension benefits calculated on pensionable pay increased beyond the allowable amount provided for in regulation D3 of the 1995 Section. The benefits payable to scheme members are unaffected.
- 7.2 A pay increase is considered excessive if the annual percentage increase in pay for one or more of a member’s final three years’ service prior to retirement exceeds the rate of the Consumer Price Index plus 4.5%.
- 7.3 The NHS Pension Scheme’s Advisory Board (SAB) recently carried out a review of the final pay control provisions. 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 SAB analysed various options for reform.
- 7.4 The SAB concluded that the final pay controls policy still served an important purpose and therefore should be retained but that some reform was appropriate. This instrument takes forward two of the SAB recommended proposals for change.

- 7.5 First, regulation 5(2) increases the percentage figure relevant to the calculation of the “allowable amount” in regulation D3 from 4.5% to 7%. The amendment reduces the number of retirement awards falling to be considered for a charge, whilst maintaining the original policy intention of charging employers where final salary pay rises are excessive.
- 7.6 Second, amendments to regulation D3(19) extend the types of pensionable pay increases that are exempt from final pay control charges. Increases in pensionable pay due to an increase in the national minimum wage or awarded under the ‘Framework agreement on the reform of Agenda for Change’ are already exempt from charges. Regulation 5(6) inserts paragraphs (19C) to (19G) to further exempt pay increases, such as those in line with NHS terms and conditions approved by the Secretary of State, those resulting from a national Clinical Excellence Award (CEA), increases due to promotion on the basis of fair and open competition, due to a change in profit sharing arrangements for non-GP providers and due to the ending of salary sacrifice arrangements, from charges.
- 7.7 Since an increase in a scheme member’s pensionable pay as a result of a national award recommended by the Advisory Committee on CEAs is to be exempt from a final pay control charge, regulations D3(7) to (11) of the 1995 Section relating to CEAs are no longer required and are removed by regulation 5(3) of this instrument.
- 7.8 Regulation 5(4) inserts paragraphs (12A) to (12G) into regulation D3 to provide a means by which an employer who has been notified of a liability to pay an excess employer contribution on or after 1st April 2018 may apply for the charge to be redetermined by the Secretary of State under the revised final pay control provisions. Employers have up to 6 months from the date the regulation comes into force to apply.
- 7.9 Regulations 5(5) and (7) make consequential amendments to paragraphs (17) and (21) of regulation D3 respectively in relation to salary sacrifice arrangements and CEAs.

Entitlement for male survivors of female scheme members

- 7.10 As a result of an Employment Tribunal (ET) judgment in *Goodwin v. Secretary of State for Education* [1308506/2019], public sector schemes, including the NHS pension scheme, are amending their rules to equalise the position of female members in opposite-sex marriages or civil partnerships with that of female members in same-sex marriages or civil partnerships.
- 7.11 *Goodwin* followed the judgment in the case of *Walker v. Innospec Ltd* [2017] UKSC 47 which led to public sector schemes amending their rules to provide the same survivors’ benefits for same-sex couples (whether married or in civil partnerships) as those for widows. The 2019 Amendment Regulations implemented these changes from 1 April 2019. The changes extended automatic survivor benefit cover in respect of membership accrued before 6 April 1988 to same-sex civil partners and same-sex spouses.
- 7.12 The amendments brought about by this instrument provide female members in an opposite-sex marriage or civil partnership with the same survivor benefit provision as female members in a same-sex marriage or civil partnership. Amendments are only required to the 1995 Section of the NHS Pension Scheme as the rate of survivor benefits in the 2008 Section and the 2015 Scheme are already equalised. The

amendments are made with retrospective effect to 5 December 2005, the date same-sex civil partnerships were introduced under the 2004 Act.

- 7.13 Regulation 6 of this instrument amends regulation G7 of the 1995 Section (widower's pension) to provide for any pensionable service the member may have before 6 April 1988 to be routinely included in any surviving widower's pension due under that regulation if the member died on or after 5 December 2005.
- 7.14 Regulation 7 amends regulation G8 (dependent widower's pension) so that the provision for a female member to nominate her husband to receive a dependent widower's pension on her death no longer applies to female members who die on or after 5 December 2005.
- 7.15 Similarly, regulation 8 of this instrument amends regulation G9 of the 1995 Section relating to the purchase of an increased widower's pension. This provision no longer applies to female members who die on or after 5 December 2005 and who leave a widower or a surviving civil partner.
- 7.16 Regulations 9 and 10 remove references to "regulation G7" (widower's pension) from regulation G16 (purchase of surviving partner's pension in respect of service before 6th April 1988) and G17 (increased surviving partner's pension) respectively. Regulations G16 and G17 provided a time-limited opportunity for members with service before 6 April 1988 to purchase additional survivor pension cover in respect of that earlier service. Since the amendment to regulation G7 will ensure that any service before 6 April 1988 will be routinely included in any opposite-sex spouse or civil partner pension due under those regulations, references to "regulation G7" are unnecessary and can be removed.

*Entitlement for survivors of opposite-sex civil partners*

- 7.17 Survivor pensions for same-sex civil partners were first introduced as a scheme benefit in the 1995 Section of the Scheme from 5 December 2005, the date the 2004 Act came into force.
- 7.18 The Civil Partnership Regulations extended civil partnerships to opposite-sex couples with effect from 2 December 2019. These Regulations altered the basic definition of 'civil partnership' in the 2004 Act so that it includes both same-sex and opposite-sex couples. The 1995 Section adopts the definition of 'civil partner' and 'civil partnership' set out in the 2004 Act, which means that any references to civil partners or civil partnerships in those regulations now includes both same-sex and opposite-sex couples.

*The effect of the Civil Partnership Regulations on the 1995 Section*

- 7.19 The Civil Partnership Regulations amended the 1995 Section so that opposite-sex civil partners were treated in the same way as opposite-sex married couples. This meant that female surviving civil partners of male members were entitled to the same benefits as female surviving spouses of male members (widows). Male surviving civil partners of female members, on the other hand, were entitled to the same benefits as male surviving spouses of female members (widowers). These changes had effect from 2 December 2019.
- 7.20 Following the government's decision to equalise the benefits payable to surviving male spouses and civil partners of female members (paragraphs 7.10 to 7.16 above), the amendments to the 1995 Section made by the Civil Partnership Regulations need

to be removed. Those amendments equalised the survivor entitlements of opposite-sex civil partners with those of opposite-sex spouses in the 1995 Section.

- 7.21 Regulations 3(2) and 4 remove amendments to regulation A2 (interpretation) and regulation A4 (treatment of same-sex marriages and opposite-sex civil partnerships) of the 1995 Section made by the Civil Partnership Regulations with retrospective effect to 2 December 2019.

***Amendments to the 1995 Section, 2008 Section and 2015 Scheme – Parts 2, 3 and 4 of this instrument.***

***New to Partnership Payment (N2PP) Scheme***

- 7.22 The N2PP Scheme was introduced by NHS England and NHS Improvement from 1 April 2020 as part of the recruitment and retention initiatives outlined in the update to the GP contract agreement 2020/21-2023/24.<sup>1</sup> Under the Scheme, new partners to general practice receive a one-off payment of up to £20,000, plus a £3,000 business training allowance to support their establishment as a partner. Payments are pro-rata if the recipient works on a part-time basis.
- 7.23 One-off and non-regular payments, such as bonuses, are already non-pensionable in respect of officer members. Regulations 12(2)(b) and (3), 14(a), 15, 19(b), 20 and 28 of this instrument amend the 1995 Section, the 2008 Section and the 2015 Scheme to ensure that payments and allowances received by GPs and non-GP Provider members from the N2PP Scheme are also treated as non-pensionable. The amendments have retrospective effect from 1 April 2020.

***Miscellaneous amendments***

- 7.24 The instrument makes some miscellaneous amendments and minor corrections to the NHS Pension Schemes Regulations and Injury Benefits Regulations.
- 7.25 Regulations 3(3), 14(b), 19(c) and 30(3) of this instrument update the definition of NHS standard sub-contract in the 1995 Section, 2008 Section and the 2015 Scheme with the latest guidance from NHS England.
- 7.26 Regulations 11, 18, 23 and 26 of this instrument replace references to “nominated partner” with “scheme partner” or “surviving scheme partner” in the Schemes’ provisions relating to the forfeiture of pension benefits. These amendments were implemented by the 2019 Amendment Regulations following the Supreme Court’s decision in *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC8 but were subsequently quashed by the judgment handed down in *R (on the application of British Medical Association) v Secretary of State for Health and Social Care* [2020] EWHC 64 (Admin). The amendments are still required and are re-enacted by this instrument.
- 7.27 Regulations 12(2)(a) and 19(a) amend the definition of “locum practitioner” in the 1995 Section and Part 3 of the 2008 Section to the equivalent definitions in Part 2 of the 2008 Section and Schedule 15 of the 2015 Scheme to ensure that a “locum practitioner” includes persons engaged under a contract of services by the National Health Service Commissioning Board as well as a Local Health Board.
- 7.28 Regulation 30(2) introduces a definition of “Dental Performer” in the 2015 Scheme. An equivalent definition (defined as “dentist performer” already exists in the 1995

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<sup>1</sup> <https://www.england.nhs.uk/wp-content/uploads/2020/03/update-to-the-gp-contract-agreement-v2-updated.pdf>

and 2008 Sections. Regulation 27 makes a related amendment to Schedule 5 of the 2015 Scheme to clarify that a ‘dental performer’ is a ‘dental practitioner’ for the purposes of the 2015 Scheme.

#### *Corrections*

- 7.29 Regulations 16 and 21(2) of this instrument amend provisions in the 2008 Section relating to early retirement due to ill-health to provide for service to be increased by an ill-health enhancement period (referred to in the provisions as “tier 2”) where the member has not had any breaks in service of over 12 months. Regulation 21(3) further amends these provisions to ensure that the increase to pensionable earnings correctly applies where a member has only practitioner service.
- 7.30 Regulations 17, 22 and 29 remove incorrect references to increases under the Pensions Increase Act 1971 from provisions in the 2008 Section and the 2015 Scheme to ensure that such increases, relating to the lump sum payable on the death of a pension credit member, are not applied twice.
- 7.31 Regulation 25 amends the 2015 Scheme definition of the guarantee date relating to the transfer of pension benefits from the 2015 Scheme so that the guarantee date is correctly set as being within the period of 10 days ending with the date on which the member is provided with a statement of entitlement (in respect of a transfer value payment).

#### *Amendments to the Injury Benefits Regulations*

- 7.32 Regulation 32 of this instrument inserts a reference to section 1B of the Welfare Reform Act 2007 into regulation 4 of the Injury Benefits Regulations to clarify that an employment and support allowance payable under that section is also an accountable benefit when determining the amount of NHS Injury Benefits allowance payable.
- 7.33 Regulations 33(2) of this instrument corrects regulation 7 of the Injury Benefits Regulations by substituting paragraph (3) to provide for the re-instatement of a discontinued partner pension on hardship grounds, omitted in error from an amendment to regulation 7 made by the 2019 Amendment Regulations. Regulation 33(3) amends paragraph (3A) of regulation 7 following the introduction of the Civil Partnership Regulations to clarify that the civil partnership referred to in this paragraph is a civil partnership formed with a person of the same sex.

### **8. European Union Withdrawal and Future Relationship**

- 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 Schemes and Injury Benefits regulations incorporating all the changes implemented up to and including those which came into effect on 1 July 2021. These are available on the scheme administrator’s website: <https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations> and at: <https://www.nhsbsa.nhs.uk/about-injury-benefits-scheme>

## **10. Consultation outcome**

- 10.1 The proposals and draft instrument were published for consultation on 28 January 2021. The consultation closed on 8 April 2021. 35 consultation responses were received. Respondents included NHS organisations, Trade Unions, GP surgeries and medical centres and medical accountants.
- 10.2 Respondents were supportive of the proposed changes to the NHS Pension Schemes Regulations and Injury Benefit Regulations. Respondents broadly welcomed the changes equalising the entitlement to survivor pensions, although a few expressed disappointment that the amendments did not go further. Overall, the response to the reform of the final pay control policy received a positive reception. Some respondents proposed additional amendments to those in the consultation. Two further changes to the final pay control policy were considered and are included in the changes.
- 10.3 The consultation response document is available at:  
<https://www.gov.uk/government/consultations/changes-to-the-nhs-pension-scheme-regulations>

## **11. Guidance**

- 11.1 Pension scheme 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 no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is from the changes relating to survivor benefit entitlements, which are expected to marginally increase the cost of pension rights payable from the NHS pension scheme. The net impact of this on the contributions made by participating employers will be assessed at the next quadrennial actuarial valuation of the scheme, in concert with other factors that affect scheme costs.
- 12.3 An Impact Assessment has not been prepared for this instrument because the instrument relates to amendments to existing pension and injury benefits provisions.

## **13. Regulating small business**

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

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is by way of the Scheme Advisory Board (SAB) comprising representatives of NHS employers, NHS trade unions and the scheme administrator. The SAB 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. The SAB recently carried out a review of the final pay control provisions and a further review of the policy will be undertaken two years after the amendments to regulation D3 take effect.
- 14.2 The instrument does not include a statutory review clause 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). The Department does not consider that the NHS Pension Schemes 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 Pensions policy at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Helen Whately MP (Minister of State for Care) at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.