

EXPLANATORY MEMORANDUM TO
THE TEACHERS' PENSIONS (MISCELLANEOUS PROVISIONS) (AMENDMENT)
REGULATIONS 2021

2021 No. 805

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education 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 two statutory instruments relating to the Teachers' Pension Scheme (TPS).
- 2.2 Changes implemented by this instrument include:
- equalising pension entitlement for male survivors of female scheme members following the Employment Tribunal declaration in *Goodwin v Secretary of State for Education*;
 - amending the participation rules for independent schools to allow 'phased withdrawal'; and
 - minor amendments to scheme rules to provide clarification where ambiguity exists and to ensure scheme regulations provide for the longstanding policy intention.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Regulation 2(2) rectifies an error in an amending provision in SI 2014/2651 in a way that is possible now only because of the power in section 12 of the Superannuation Act 1972 to include retroactive provision. Regulation 2 of those Regulations states that SI 2010/990 is amended in accordance with provisions that include regulation 22 and the original regulation 22 of those Regulations reads as follows:

"Amendment to Schedule 2 (Pensionable employment), Part 3 (Employments Pensionable on Election with Employer Consent)

22. In Schedule 3—

(a) at the end of paragraph 2(aa), insert—

“(ab) in a Multi-Academy Trust; or”;

(b) after paragraph 25, insert—

“26. Teacher employed in the Lycée Français Charles de Gaulle de Londres.”.

- 3.2 The reference to Schedule 3 rather than Schedule 2 is a clear error given that Schedule 3 has no paragraph 2(aa) whereas Schedule 2, mentioned in the heading, does. The

heading itself is misleading as it fails to refer to Part 1 of the Schedule, within which paragraph 2(aa) falls, but refers to Part 3 within which paragraph 25 falls, although it is normally assumed that a heading is not operative. It is the Department's view that both issues could have been rectified by the issue of a correction slip further to paragraphs 3.5 to 3.15 of the Committee's First Special Report of Session 2017–19 (Transparency and Accountability in Subordinate Legislation). However, one was not issued at the time and it now seems preferable to replace the text by amendment as part of this instrument. The power in this case to include retrospective provision means that the rectifying replacement can be treated as having taken place just before the coming into force date of regulation 22. It also allows for the removal of the inconsistency between "at the end of" in paragraph (a) and "after" in paragraph (b).

3.3 There initially appears to be an incongruity in applying retrospection to regulation 12, as that regulation amends Schedule 5, which enables members to pay to cover periods of non-qualifying service to count towards family benefits payable upon their death. However, this is explained by the fact that Schedule 5 operates together with Schedules 8 and 9 to enable family benefits to be payable. The changes effected by regulation 12 do not require any further action by individuals under Schedule 5 and female members who paid contributions to cover periods of service now covered as a result of regulations 13 and 14 will receive a refund of those contributions.

3.4 As this instrument includes some correcting provisions and having complied with the requirement of paragraph 4.7.6 of Statutory Instrument Practice to consult with the SI Registrar, this instrument is being published under the free issue procedure.

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)

3.5 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.

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 The TPS is governed by the Teachers' Pensions Regulations 2010 (SI 2010/990) (the 2010 regulations) which provide for final salary schemes with normal pension ages (NPA) of 60 and 65, and the Teachers' Pension Scheme Regulations 2014 (SI 2014/2651) (the 2014 regulations) which provide for a career average scheme.

6.2 Amendments to the 2010 regulations are required to equalise survivor benefit rules following the Goodwin Employment Tribunal case, of which further details are provided in the next section. The 2014 regulations are unaffected as survivor benefits have always been equal in the career average (CARE) scheme.

- 6.3 Amendments to the 2010 regulations and the 2014 regulations are required to amend the participation rules for independent schools, which was confirmed in a separate consultation response published in November 2020.
- 6.4 Part 2 of this instrument amends the 2010 regulations. Part 3 of this instrument amends the 2014 regulations.

7. Policy background

What is being done and why?

Survivor benefits for female scheme members in an opposite-sex marriage or civil partnership

- 7.1 As a result of an Employment Tribunal (ET) claim in *Goodwin v. Secretary of State for Education* [1308506/2019], it was accepted that certain provisions of the TPS rules are discriminatory on the grounds of sexual orientation contrary to the non-discrimination rule in section 61 of the Equality Act 2010 and that they should therefore be amended to provide clarity and certainty. This is due to the differing survivor benefits payable in respect of a female member in an opposite-sex marriage or civil partnership compared to if she was in a same-sex marriage or civil partnership.
- 7.2 The *Goodwin* claim followed the judgment in the case of *Walker v. Innospec Ltd* [2017] UKSC 47 which led to the public sector pension schemes amending their rules to provide the same survivors' benefits for same-sex couples, whether married or in civil partnerships, as those payable to a widow of a male scheme member.
- 7.3 The 2010 regulations were amended on 1 September 2019 so that service from 1 April 1972, rather than 6 April 1988, would automatically count towards the survivor pension payable to a same-sex spouse or civil partner.
- 7.4 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 2010 regulations as survivor benefits in the CARE scheme are already equalised.
- 7.5 Regulation 12 of this instrument amends Schedule 5 to the 2010 Regulations to amend the period of non-qualifying service for family benefits for which additional contributions could be paid by the member to cover.
- 7.6 Regulation 13 amends Schedule 8 so that the period of adult pension qualification service for an affected female member, who dies on or after 5 December 2005, is based on pensionable service from 1 April 1972 (or 5 April 1978 if the marriage or civil partnership took place after leaving the TPS). 5 December 2005 is the date that same-sex civil partnerships became available in the United Kingdom and therefore the date from which the identified discrimination could have occurred from.
- 7.7 Regulation 14 amends Schedule 9, which determines the amount of family benefit service that applies to a survivors' pension. The amendment maintains the existing provision where a female scheme member with a male spouse has died before 5 December 2005.

Phased Withdrawal of Independent Schools

- 7.8 Independent schools in England and Wales can choose to participate in the TPS and if they do so they must enrol all eligible teachers. They are free to leave the TPS at which point all teachers become deferred members.
- 7.9 In April 2019, the Department published the quadrennial scheme valuation following a report from the Government Actuary. That valuation report confirmed that the employer contribution rate, paid by all scheme employers, would increase from 1 September 2019. At the same time, the Department published its 'Funding increases to teachers' pensions employer contributions' consultation response, which confirmed that independent schools would not be eligible for funding for those increased costs.
- 7.10 In response, the Independent School Bursars Association (ISBA) and the Independent Schools Council (ISC) wrote to the department to express concerns raised by some of the independent schools that they represent, that the increase could create financial difficulties and some would be unable to afford to remain in the TPS. They asked the Department to consider the phased withdrawal proposal whereby independent schools could freeze participation so that active members at that school immediately prior to phased withdrawal could continue to participate and accrue further pension benefits, but new employees would no longer be eligible. Following consultation (see section 10 below for more details) the Department agreed to amend rules for independent schools which no longer wish to participate in the TPS, as unlike other scheme employers, the alternative is that they can withdraw completely which would result in all employees at that school becoming ineligible.
- 7.11 Regulation 4 amends regulation 7 of the 2010 regulations which relates to persons with a financial interest in accepted schools (participating independent schools) not being eligible to be in the TPS, to also include phased withdrawal schools. Regulation 6 amends regulation 13 which covers eligibility of independent schools to participate in the TPS and creates a separate guarantee to distinguish between the guarantee required from an accepted school and a phased withdrawal school.
- 7.12 Regulation 7 inserts a new regulation 13A which provides for accepted phased withdrawal schools. Included in the regulation is a definition of an accepted phased withdrawal teacher which also covers rights of continuing participation for those who were in the scheme at the phased withdrawal school immediately prior to phased withdrawal. The option to become an accepted phased withdrawal school will apply to all accepted schools, the vast majority of which are independent schools.
- 7.13 Regulation 9 amends Schedule 1 to add certain terms relating to phased withdrawal to the glossary of expressions. Regulation 10 amends Schedule 2 to the effect that a person who meets the definition of a phased withdrawal teacher who is employed at a phased withdrawal school is in an eligible employment for the TPS.
- 7.14 Regulations 18 and 19 make the equivalent changes to the 2014 regulations.

Miscellaneous and minor amendments

- 7.15 Regulations 5 and 8 amend regulations 8 and 27 of the 2010 regulations to clarify what counts as pensionable service when contributions are outstanding. Regulations 16 and 17 make equivalent changes to the 2014 regulations.

- 7.16 Regulation 11 amends Schedule 4 to the 2010 regulations, to match regulation 82 of those regulations, in specifying those in respect of whom sums are payable following death.
- 7.17 Regulation 20 amends Schedule 3 to the 2014 regulations so that transitional protection includes those mixed-service members (those with service in the NPA60 and NPA65 sections of the final salary scheme) who have taken some, but not all of their final salary benefits.
- 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 There are no imminent plans to consolidate amendments to the 2010 and 2014 regulations. The 2010 regulations were mainly a consolidation exercise; the 2014 regulations came into force in 2015 and there have not been many amendments to those regulations. The Department will continue to review and expects to consolidate at the appropriate time.
- 10. Consultation outcome**
- 10.1 The draft SI and consultation document were published on 7 April 2021. The consultation closed on 1 June 2021. 46 responses were received, the majority of which were from individuals. Responses were also received from TPS member and employer representatives.
- 10.2 Respondents broadly welcomed the changes equalising the entitlement to survivor pensions, although some disappointment was expressed that the amendments did not go further.
- 10.3 As with all policy issues, the phased withdrawal proposal was initially discussed with the TPS Scheme Advisory Board (SAB). 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 TPS. The SAB had mixed views on the likely effects of the proposal, although it was generally accepted that the intention is to retain TPS membership for as many teachers as possible.
- 10.4 A separate consultation was held on the phased withdrawal proposal to gather further views, for which the response was published on 11 November 2020 - <https://www.gov.uk/government/consultations/teachers-pension-scheme-independent-schools-proposal>. The majority of responses welcomed the phased withdrawal proposal, particularly amongst respondents from the independent schools' sector.
- 10.5 Some respondents however opposed the phased withdrawal amendments, particularly the member representatives. Ultimately, they were concerned that more teachers would be denied access to the TPS than if phased withdrawal was not introduced and that this would impact new teachers, movement of teachers between the state and independent sectors and affect scheme finances. The Department has decided to make provision for phased withdrawal having concluded that it will help to retain more teachers in the TPS for longer than if it was not introduced.

- 10.6 Those same views were reflected in the responses to the consultation published on 7 April 2021, although it was agreed that the draft SI achieved the stated policy aims.
- 10.7 There were no specific comments on the other minor amendments. Some suggestions were received regarding the drafting of the statutory instrument and these were duly considered.
- 10.8 The full consultation response document has been published on <https://consult.education.gov.uk/school-employment-division/teachers-pension-scheme-regulations-draft-amendmen/>.

11. Guidance

- 11.1 Guidance on these amendments will be available on the Teachers' Pensions website. Resources on the site include factsheets, videos, calculators and modellers. The website is supported by ongoing digital communications to both members and employers and through direct engagement with employers through the provision of training resources. Members and employers are informed of relevant updates through a series of email campaigns and by working with key partners. The website can be accessed at www.teacherspensions.co.uk.
- 11.2 The scheme administrator will be contacting those members and survivors who are directly affected by the amendments to survivor benefits following the Goodwin case.
- 11.3 Guidance will be provided for independent schools which may be considering phased withdrawal. The scheme administrator will provide further guidance regarding employer responsibilities and members' rights where an independent school does elect for phased withdrawal.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies. Independent schools participate in the TPS voluntarily and have the option to leave at any time. The phased withdrawal policy provides more flexibility for those independent schools that would otherwise leave the scheme following the increase to the employer contribution rate.
- 12.2 The impact on the public sector is from the change relating to survivor benefit entitlement, which is expected to marginally increase the cost of pension provision from the TPS in terms of overall liabilities. The net impact of this on the contributions made by participating employers will be assessed at the next actuarial valuation of the scheme, alongside 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 provision. In addition, the main impact is as a result of the need to address discrimination in scheme rules which must be implemented.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that the phased withdrawal policy was proposed by the ISBA and ISC. It does not create any new burdens on those independent schools but provides them with some

flexibility to manage financial pressures if they choose to adopt phased withdrawal. The Department consulted on the phased withdrawal policy and received 645 responses. There were no concerns expressed that this policy created a new burden for independent schools.

14. Monitoring & review

- 14.1 Monitoring will be carried out by the scheme administrator to ensure that arrangements are working as expected. It is anticipated that any other issues would be raised by the Teachers' Pensions SAB.
- 14.2 The regulation does not include a statutory review clause pursuant to the Small Business, Enterprise and Employment Act 2015, as it would be disproportionate in relation to independent schools as specified in section 31 (2) of that Act, due to the impact being less than +/- £5 million annually.

15. Contact

- 15.1 Kevin Connolly at the Department for Education (Telephone: 07384 905984 or email: kevin.connolly@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Kate Copley, Deputy Director for Teacher Rewards and Incentives at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Nick Gibb, Minister of State for School Standards at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.