EXPLANATORY MEMORANDUM TO

THE OCCUPATIONAL PENSION SCHEMES (AMENDMENT) (EQUAL TREATMENT) (NORTHERN IRELAND) REGULATIONS 2023

2023 No. [XXXX]

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 His Majesty.

2. Purpose of the instrument

2.1 This instrument restates law that was initially preserved to ensure legislative continuity after the UK left the EU - commonly known as retained EU law. It restates the right to equal pay between men and women where sex discrimination has arisen in an occupational pension scheme because of legislation on Guaranteed Minimum Pensions. It also restates retained EU law on non-discrimination on grounds of sexual orientation (as expressed in the Framework Directive[1]) in relation to benefits payable to the surviving spouses and civil partners of members of occupational pension schemes. In doing so, it restates the law as explained in two court cases concerning retained European Union (EU) law, which have until now not been reflected in legislation.

2.2 To support the equalisation of pensions between men and women, the instrument removes the requirement for there to be an opposite sex comparator in an occupational pension scheme in order for a member to show that there is sex discrimination because of legislation about Guaranteed Minimum Pensions. The instrument also amends legislation that permits occupational pension schemes to restrict survivor benefits for survivors of same sex civil partnerships and marriages.

2.3 This legislation is being made because, under the Retained EU Law (Revocation and Reform) (REUL) Act[2] 2023, after 31st December 2023, retained EU law rights that had a direct effect in the UK will cease to apply.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Northern Ireland.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078
[2] Retained EU Law (Revocation and Reform) Act 2023 (legislation.gov.uk)

5. European Convention on Human Rights

5.1 The Minister for Pensions, Laura Trott MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Occupational Pension Schemes (Amendment) (Equal Treatment) (Northern Ireland) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 At present the Equal Pay Act (Northern Ireland) 1970[3] makes provision for an equality clause to operate in respect of the terms under which someone is employed and requires the use of an opposite sex comparator to detect inequality. The Pensions (Northern Ireland) Order 1995[4] requires an opposite sex comparator to be identified in an occupational pension scheme for the equal treatment rule to apply in relation to Guaranteed Minimum Pensions. The Pensions (Northern Ireland) Order 2005[5] makes the same provision in relation to the Pension Protection Fund (PPF).

6.2 The Court of Justice of the European Union judgment in the Allonby[6] case determined, on the basis of the directly effective right to equal pay, that it was not necessary to identify a real-life comparator to be able to demonstrate discrimination between men and women where that discrimination was caused by legislation. Instead, a notional or statistical comparator can be used.

6.3 The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003[7] permit occupational pension schemes to restrict survivor benefits for survivors in same sex civil partnerships or marriages, so that only the member's pensionable service from 5th December 2005 onwards counts towards the survivor benefits.

6.4 The UK Supreme Court found, on the basis of EU equality law, in the Walker[8] case, that legislation could not allow occupational pension schemes to restrict the survivor benefits in this way.

European Union Withdrawal Act 2018

6.5 Section 4 of the European Union (Withdrawal) Act 2018[9] ("EUWA") preserved the directly effective right to equal pay and directly effective rights in the Framework Directive in UK law.

Retained EU Law (Revocation and Reform) Act 2023

6.6 Under section 2 of the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act") retained EU law rights preserved by section 4 of EUWA will sunset at the end of 2023. The REUL Act contains powers that allow the effect of this retained EU law to be reflected in UK legislation.

[3] https://www.legislation.gov.uk/apni/1970/32/contents
[4] https://www.legislation.gov.uk/nisi/1995/3213/contents
[5] https://www.legislation.gov.uk/nisi/2005/255/contents
[6] https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:62001CJ0256 C-256/01 Allonby v Accrington and Rossendale College and others [2004] ICR 1328
[7] https://www.legislation.gov.uk/nisr/2003/497/contents/made
[8] https://www.supremecourt.uk/cases/docs/uksc-2016-0090-judgment.pdf Walker v Innospec Ltd and others [2017] UKSC 47
[9] https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

6.7 These Regulations are made using the restatement powers at sections 11 and 13 of the REUL Act to make changes to the Equal Pay Act (Northern Ireland) 1970, the Pensions (Northern Ireland) Order 1995, the Pensions (Northern Ireland) Order 2005 and the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, to bring them in line with this retained EU law, including as explained by these two court judgments.

The Occupational Pension Schemes (Amendment) (Equal Treatment) (Northern Ireland) Regulations 2023

6.8 The Regulations amend, in relation to occupational pension schemes, provisions in the Equal Pay Act (Northern Ireland) 1970 and the Pensions (Northern Ireland) Order 1995 on equality in terms of sex (the equal treatment rule). The Regulations amend provisions in Chapter 3 of Part III of the Pensions (Northern Ireland) Order 2005 on sex equality for members of schemes who are entitled to payments from the PPF. The Regulations also amend the exception to the prohibition on sexual orientation discrimination for benefits dependent on marital status in relation to occupational pension schemes, contained in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

Sex equality changes

6.9 The Regulations restate retained EU law on the right to equal pay between men and women where discrimination arises from the legislation on Guaranteed Minimum Pensions. They do this by:

a) inserting section 1B and amending section 6 of the Equal Pay Act (Northern Ireland) 1970, and amending articles 62, 63 and 66 of the Pensions (Northern Ireland) Order 1995 to introduce an alternative sex equality rule and clause where a person is treated less favourably in relation to their occupational pension than if they were of the opposite sex. No real-life opposite sex comparator is required to demonstrate unequal treatment under these alternative provisions. Instead, it is enough to show that a person would have been treated more favourably if they were the opposite sex; and
b) amending article 155 of the Pensions (Northern Ireland) Order 2005 to introduce the same test for unequal treatment where members are entitled to payments from the PPF.

6.10 These amendments apply where the discrimination itself arose as a result of the effects of the Guaranteed Minimum Pensions legislation, and have the effect of removing the requirement for there to be an opposite sex comparator in these circumstances.

Sexual orientation equality changes

6.11 The Regulations restate retained EU law rights to non-discrimination on the grounds of sexual orientation, as expressed in the Framework Directive and recognised by the Supreme Court in the Walker case. In particular, they address the provision of survivor benefits where the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 otherwise permit an exception to the prohibition on sexual orientation discrimination in occupational pension schemes based on when the member accrued rights or was in pensionable service. The Regulations do this by amending regulation 28 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 so that it reflects the Framework Directive rights with which the legislation is incompatible. This applies to benefits payable to survivors who were

in a same sex marriage or civil partnership (a "same sex legal relationship") or opposite sex civil partnership[10].

7. Policy background

What is being done and why?

7.1 A change to domestic legislation needs to be made before 31st December 2023, because, as a result of the Retained EU Law (Revocation and Reform) Act 2023, after this date retained EU law rights preserved by section 4 of EUWA, including as explained in decisions made by the European Court of Justice and the UK Supreme Court, will be lost.

7.2 The REUL Act provides the Government with powers in relation to retained EU law, including allowing laws to be revoked, replaced, restated or updated. It allows the Government to restate secondary retained EU law in two areas of equality policy. These are the right to equal pay between men and women as decided in the judgment of the European Court of Justice in Allonby and non-discrimination on grounds of sexual orientation as decided in the judgment of the UK Supreme Court in Walker. Commitments have been made to reflect both judgments in legislation, which is currently read in light of the Allonby and Walker judgments.

Allonby court case

7.3 The European Court of Justice's Allonby judgment in 2004 established that the directly effective right to equal pay requires that an opposite sex comparator is not necessary to demonstrate sex inequality, where sex discrimination arises as a result of provisions in legislation. This judgment therefore nullified the requirements for an opposite sex comparator in order for the requirement to equalise pensions for the unequal effect of Guaranteed Minimum Pensions legislation, as set out in articles 62, 63, 64 and 65 of the Pensions (Northern Ireland) Order 1995 and in section 6 of the Equal Pay Act (Northern Ireland) 1970, to apply (and in equivalent provisions on pension compensation provided by the Pension Protection Fund (PPF) in article 155 of the Pensions (Northern Ireland) Order 2005).

Walker court case

7.4 The UK Supreme Court's Walker judgment in 2017 established that the Framework Directive requires that survivors of same sex legal relationships have the same rights as survivors of opposite sex legal relationships to survivor benefits from the member's occupational pension scheme, regardless of when the member was in pensionable service in the scheme. This judgment therefore effectively disapplied provisions in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 which permit occupational pension schemes to restrict survivor benefits for survivors of a same sex legal relationship to benefits based on pensionable service since same sex legal relationships became possible in the UK following the introduction of civil partnerships.

[10] Civil partnership was extended to opposite sex couples by the Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019.

Changes required to the Equal Pay Act (Northern Ireland) 1970, Pensions (Northern Ireland) Order 1995 and the Pensions (Northern Ireland) Order 2005

7.5 Whilst the Government has accepted the position in both Allonby on equalising pensions between men and women and Walker on survivor benefit rights in same sex legal relationships, they are not yet reflected in domestic legislation. The rights which they addressed formed part of UK law while the UK was a member of the EU, and their effect in UK law was retained by the European Union (Withdrawal) Act 2018. However, this will change on 1st January 2024 under the REUL Act unless the necessary amendments are made to the relevant legislation to preserve the effect of this law. This instrument restates the law from 1st January 2024, which will provide certainty to pension schemes and their members.

Sex equality

Current position

7.6 Members of defined benefit occupational pension schemes who were contracted out of the additional State Pension between 1978 and 1997 accrued Guaranteed Minimum Pension (GMP) rights in place of the additional State Pension. The additional State Pension was the element of the old State Pension that was earnings related, and schemes took the responsibility for paying members a GMP which was of broadly similar value to the State Pension foregone. Because GMPs are linked to the old State Pension system, which had different retirement ages for men and women, GMPs are subject to different rules depending on a scheme member's sex. For example, women can receive their GMP at age 60 while men can receive their GMP at age 65.

7.7 The European Court of Justice's Barber[11] judgment in 1990 established that pensions were a form of deferred pay and subject to the requirements of what is now Article 157 of the Treaty on the Functioning of the European Union on equal pay, and, as such, it is unlawful to discriminate between men and women in relation to occupational pensions. The requirement to equalise occupational pensions for the unequal effect of the GMP legislation was confirmed by the England and Wales High Court's Lloyds[12] judgment in October 2018. Affected occupational pension schemes are therefore required to equalise members' overall pensions, including for the effect of the unequal sex-based GMP rules. The GMP equalisation obligation only applies to service on and after the date of the Barber judgment, 17th May 1990, which means that in practice the obligation applies to pension rights accrued between 17th May 1990 and 5th April 1997.

7.8 Articles 62, 63 and 66 of the Pensions (Northern Ireland) Order 1995 require schemes to equalise in respect of pensionable service on and after 17th May 1990 where an opposite sex comparator can be used to demonstrate sex-based inequality. Article 155 of the Pensions (Northern Ireland) Order 2005 makes the same requirement of the PPF, which pays compensation based on accrued pension rights where it has taken on responsibility for paying compensation to members of a scheme. The Allonby judgment was not itself concerned with GMPs, but established that, in relation to the judgment in Barber, an opposite sex comparator is not required to demonstrate sex inequality where sex discrimination arises as a result of provisions in legislation. The Government therefore made a Written Ministerial Statement in January 2010[13]

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0262
[12] https://www.bailii.org/ew/cases/EWHC/Ch/2018/2839.html
[13] https://hansard.parliament.uk/commons/2010-01-28/debates/10012850000017/PensionSchemesAndEquality

clarifying that in respect of legislation in Great Britain section 171 of the Pensions Act 2004 and, what are now, sections 64 and 66 to 68 of the Equality Act 2010 were nullified in as far as they required an opposite sex-comparator in order for pensions to be equalised for the unequal impact of the GMP legislation, and stating that it intended to bring forward amending legislation to reflect this. The Government, and all subsequent Governments, stated that pension schemes and the PPF needed to proceed accordingly. However, the amendments were not made due to time pressures. It was not considered to be a pressing requirement to amend the legislation, because the Allonby judgment's explanation of the directly effective right to equal pay was itself considered to be sufficient because of the supremacy of EU law over domestic legislation. Although pensions are a devolved matter, in general Northern Ireland's pensions policy and legislation operate in line with corresponding pension provision in Great Britain in line with section 87 of the Northern Ireland Act 1998. In effect there is a single pension system and regulatory regime across the United Kingdom. Therefore, in order to maintain parity across the United Kingdom the same position was adopted in Northern Ireland.

Changes being made

7.9 The REUL Act has changed this position. This aspect of the EU law on the directly effective right to equal pay in the context of sex inequalities arising from the GMP legislation now needs to be incorporated into domestic legislation to ensure that the requirement for pension schemes to equalise pensions for the period 17th May 1990 to 5th April 1997, without the need for an opposite sex comparator, is put beyond doubt. Similarly, changes are required to put beyond doubt that the PPF is required to equalise compensation without the need for an opposite sex comparator, where the discrimination arose in relation to pensionable service between 17th May 1990 and 5th April 1997 as a result of the effects of GMP legislation.

Survivor benefits for same sex couples

7.10 The Regulations amend the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 in relation to survivor benefits payable to survivors of same sex legal relationships by occupational pension schemes. The Regulations give effect to the UK Supreme Court decision in the Walker case in legislation.

Current position

7.11 In 2017 the Supreme Court ruled that, on Mr Walker's death, his husband would be entitled to a spouse's pension calculated on all the years of his service in his employer's pension scheme, not just his pensionable service from 5th December 2005 (when the UK created a form of legal recognition for same sex partnerships comparable to marriage). This was because the limitation was incompatible with the Framework Directive.

7.12 At present the legislation permits schemes to restrict survivor benefits for survivors of same sex civil partnerships and marriages. The Walker judgment disapplied this limitation in GB legislation in relation to periods of service before December 2005.

7.13 Currently reliance is placed on the judgment, to disapply the sexual orientation exception in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 to the extent which it otherwise permits a limit on the pensionable service that is used to determine survivor benefits for surviving same sex spouses and civil partners by reference to the introduction of civil partnerships in 2005.

Changes being made

7.14 The Regulations will restate the rights addressed in the Walker judgment by amending this exception to reflect the judgment. This means that when the REUL Act comes into force schemes will continue to be required to calculate benefits for survivors of same sex legal relationships based on pension rights in the same way as survivors of opposite sex marriages. This also applies to opposite sex civil partners.

7.15 Whilst the judgment in the Walker case was a UK judgment it concerns EU law on sexual orientation discrimination contained in the Framework Directive. Framework Directive rights preserved by section 4 of EUWA will cease to form part of UK law as a result of the REUL Act 2023.

7.16 The amendment will mean that occupational pension schemes will continue not to be able to restrict survivor benefits by reference to the introduction of civil partnerships in December 2005. This restatement should also give certainty to pension schemes and members.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union and does not trigger the statement requirements under the European Union (Withdrawal) Act 2018[14].

8.2 These regulations are made using the restatement powers at sections 11 and 13 of the Retained EU Law (Revocation and Reform) Act 2023 to make changes to the Equal Pay Act (Northern Ireland) 1970, the Pensions (Northern Ireland) Order 1995, the Pensions (NI) Order 2005 and the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 to bring them in line with retained EU law rights, as explained by two court judgments.

9. Consolidation

9.1 This Regulation does not amend another statutory instrument, consolidation is therefore not necessary.

10. Consultation outcome

10.1 There is no statutory duty on the Secretary of State to consult on these Regulations. A formal consultation[15] had been conducted in 2012 on the changes proposed on removing the requirement for an opposite sex comparator in a pension scheme to achieve sex equality, where that sex discrimination arises because of Guaranteed Minimum Pensions (GMPs). Some consultation respondents did not agree with the Department's interpretation of the Allonby judgment and suggested that the judgement only concerned access to schemes, not the level of benefits provided by schemes. However, the position remained unchanged and these regulations reflect the proposals as set out in 2012 - that the judgment in Allonby means that where legislation is the single source for the discrimination in question, only a notional

[14] https://www.legislation.gov.uk/ukpga/2018/16/contents

[15] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220480/draft-ops-and-pfea-regs-2012.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/188342/draft-ops-and-pfea-regs-2012-interim-response.pdf

comparator is required, and that the requirement for an opposite sex comparator was therefore nullified.

11. Guidance

11.1 Trustees and scheme administrators of pension schemes are aware of the obligation to equalise pensions for the effect of unequal GMPs and the requirement on survivor benefits for same sex couples, and there is no change to the overall effect of the law from these Regulations. No guidance is therefore necessary.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because there is no new impact on pension schemes in the private sector, as schemes have already been required to comply with the outcome of the two court cases for several years.

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 (employing up to 50 people).

13.3 Removing small businesses (i.e. small schemes) from this requirement would adversely affect scheme members, as it could mean that men or women could be discriminated against in schemes and could result in discrimination against couples in same sex legal relationships.

14. Monitoring & review

14.1 As this instrument is made under the Retained EU Law (Revocation and Reform) Act 2023, no review clause is required.

15. Contact

15.1 Gabrielle Park at the Department for Work and Pensions email: Gabrielle.E.Park@dwp.gov.uk can be contacted with any queries regarding the instrument.

15.2 Fiona Frobisher, Deputy Director for Defined Benefit Pension Policy, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Laura Trott MBE, the Parliamentary Under Secretary of State at the Department for Work and Pensions, can confirm that this Explanatory Memorandum meets the required standard.