EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (GRADUATED RETIREMENT BENEFIT) (MARRIED SAME SEX COUPLES) REGULATIONS 2014

2014 No. 76

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The Marriage (Same Sex Couples) Act 2013 (the "MSSCA") amended the Social Security Contributions and Benefits Act 1992[1] to enable surviving same sex spouses to qualify for Category B state pension (state pension based on the National Insurance contributions of a spouse or civil partner) on the same basis as surviving civil partners and widowers.

2.2 This instrument amends the Graduated Retirement Benefit (GRB) regulations to make equivalent provision for surviving same sex spouses in respect of inheritable GRB and maintain alignment between the GRB scheme and the principal state pension scheme.

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

3.1 The statutory basis of the GRB scheme is in sections 36 and 37 of the National Insurance Act 1965 which are continued in force by the Social Security (Graduated Retirement Benefit) (No.2) Regulations 1978 (SI 1978/373).

3.2 Regulations made under the powers at section 62 of the Social Security Contributions and Benefits Act 1992 allow sections 36 and 37 of the 1965 Act to be amended for certain purposes. Paragraph 14 of Schedule 4 to the MSSCA inserted new powers at section 62 to enable section 37, which provides for GRB inheritance, to be extended to surviving same sex spouses. As this instrument amends primary legislation as preserved in regulations, Parliamentary Counsel was asked to review the draft.

4. Legislative Context

4.1 This instrument is one of three which amend social security legislation to ensure that benefit rules will apply to same sex spouses as intended. The other two, which amend legislation of more than one government department, are the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provision and Scotland) Order 2014 and the Marriage (Same Sex Couples) Act 2013 (Consequential Provisions) Order 2014. Further amendments will be needed as a consequence of the measures in the MSSCA enabling married people to change legal gender without ending their marriage, which the Government aims to implement by the end of 2014.

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[1] Social security legislation is reproduced in consolidated form in the Law Relating to Social Security – see paragraph 7.13

4.2 GRB is a form of earnings-related state pension based on graduated contributions which employees earning above a certain level paid between 1961 and 1975, when the scheme was wound up. Benefits built up in the scheme are preserved and paid as an increase of the main state pension. As noted in section 3 above, although the scheme is closed, the rules can be amended in order to maintain alignment between GRB and the principal state pension scheme. The powers to do this are at section 62 of the Contributions and Benefits Act 1992.

4.3 The GRB provisions were most recently amended by the Social Security (State Pension and National Insurance Credits) Regulations 2009 in order to give widowers and surviving civil partners reaching state pension age on or after 6 April 2010 the same access to inherited GRB as widows. Until that date, a widower or surviving civil partner could inherit half the deceased spouse's or partner's GRB only if both parties were pensioners at the date of bereavement. This amendment brought GRB inheritance into line with the main state pension provisions for a surviving spouse or civil partner.

4.4 Section 11(1) and (2) of, and Schedule 3 to, the Marriage (Same Sex Couples) Act provide generally for marriages of same sex couples to be treated in the law of England and Wales in the same way as marriages of opposite sex couples, and for references in the law to marriage and related terms to be read in such a way as to achieve that effect. Schedule 4 contains provisions producing a different result where that is required. In this case, as with the main state pension provisions, treating same sex spouses the same as opposite sex spouses would not produce the required result because women who reached state pension age before 6 April 2010 whose husbands die under pension age can inherit GRB when widowed men and surviving civil partners in the same situation cannot.

4.5 Part 5 of Schedule 4 accordingly provides for male and female same sex spouses to qualify for Category B pensions on the same terms as widowers and civil partners, subject to an exception for the widows of transsexual women who legally changed gender during the marriage. In these circumstances the widows will retain the same entitlement as the widow of a man to ensure they are not disadvantaged by their spouse's gender change. Paragraph 14 of the Schedule inserted new powers in section 62 of the Benefits Act to enable the GRB provisions to be amended to extend GRB inheritance to surviving same sex spouses in the same way. New subsections (3) and (4) will modify the way in which the inheritance provisions, as amended, will apply to the widows of transsexual women, in line with the main Category B provisions.

4.6 The measures contained in this instrument are the first use of these powers.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

5.2 If the Bill currently before the Scottish Parliament to enable same sex couples to marry in Scotland becomes law, the amendments made by this instrument will be extended to Scotland. In the meantime, Article 5 of the Marriage (Same Sex Couples) Act 2013 (Consequential Provision, Contrary Provision and Scotland) Order will enable the members of a same sex couple married in England and Wales to be treated as civil partners for the purposes of any benefit decisions that fall to be made while living in Scotland. The practical effect is that they will have the same outcome as same sex spouses in England or Wales. The exception referred to in paragraph 4.5 will be added when the further amendments

mentioned in paragraph 4.1 are made. Paragraph 2 of Schedule 2 to the MSSCA provides the equivalent of Article 5 for Northern Ireland.

6. European Convention on Human Rights

The Minister of State for Pensions, Mr Steve Webb, has made the following statement regarding Human Rights:

In my view the provisions of the Social Security (Graduated Retirement Benefit) (Married Same Sex Couples) Regulations 2014 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The overall purpose of the MSSCA is to make marriage of same sex couples possible in English and Welsh law, and to provide that same sex married couples are generally treated in the same way as opposite sex married couples.

7.2 However, married and widowed men currently have slightly more limited access to Category B state pension and inherited GRB than married women and widows. Civil partners are subject to the same restrictions as married and widowed men.

7.3 This is due to the fact that provision for a state pension based on a spouse's National Insurance was originally available only to married women and widows, reflecting married women's historical economic dependence on their husbands. Similarly, when the GRB scheme was implemented in 1961, widows were able to inherit half their late husband's GRB, but there was no equivalent provision for widowers.

7.4 This changed in 1979, when men widowed over pension age were first able to qualify for Category B pension (comprising basic state pension and inherited additional state pension[2]), provided their wives were also over pension age when they died. GRB inheritance was also extended to widowers on the same condition.

7.5 The Pensions Act 1995 removed the remaining inequalities between men and women in the state pension scheme. As well providing for women's state pension age to increase from 60 to 65 to bring it into line with men's it also enabled married men and widowers to qualify for Category B pensions on the same basis as married women[3] and widows and provided regulation-making powers to make the equivalent changes to inheritable GRB.

7.6 In order to give women affected by the rise in state pension age time to prepare, the reforms took effect from 6 April 2010. Accordingly, access to inheritable state pension for a man who was widowed under pension age, or whose wife died when under state pension age, was to apply only to widowers reaching state pension age on or after that date. Similarly, married men are only able to qualify for the "married person's" lower rate Category B pension if their wives were born after 5 April 1950, meaning the first possible date of entitlement was 6 May 2010. The 1995 Act changes were partly superseded by the

[2] Additional state pension built up between 1978, when it was introduced as the successor to GRB, and 2002 is known as SERPS and as State Second Pension since 2002.

[3] Category B pension for a married person or civil partner comprises basic state pension of up to 60% of the full rate when both members of the couple reach state pension age. There is no GRB scheme equivalent.

Welfare Reform and Pensions Act 1999 that replaced women-only widow's benefits with bereavement benefits payable to widows and widowers from April 2001. Entitlement to Category B state pension for a person widowed under state pension was also equalised from the same date.

7.7 As a result, when civil partnerships were introduced in 2005, there were still residual differences in treatment between married and widowed men and women, affecting:

- men who reached state pension age before 6 April 2010, who were widowed over pension age but whose wives died while still under state pension age; and
- married men whose wives were born before 6 April 1950.

7.8 In order to avoid creating a difference in treatment between male and female civil partners, which would conflict with our obligations under Council Directive 79/7/EEC, civil partners were given the same access to derived and inheritable state pension, including GRB, as married men and widowers.

7.9 For the same reason, the Government has adopted the same approach in extending these provisions to members of a same sex married couple. Accordingly, the Category B provisions have been amended to align the conditions of entitlement for same sex spouses with those of married and widowed men and civil partners and surviving civil partners.

7.10 This instrument makes corresponding amendments of the GRB provisions to enable a surviving same sex spouse to inherit GRB subject to the same conditions as a widower or surviving civil partner.

7.11 This means that in the case of a person who reached state pension age before 6 April 2010 but whose spouse or partner dies while under state pension age, only widows of men will, as now, be able to inherit GRB (subject to the exception noted in paragraph 4.5 above for women whose spouses change legal gender from male to female during the course of the marriage, whose pre-existing position will be protected.) In all other circumstances, the rules will apply equally to surviving spouses (male and female) and civil partners.

7.12 In practice, the impact on individuals will be slight as the sums involved are small. The average (mean) amount of weekly GRB in payment to men and women in GB who reached state pension age within the last five years is just under £5 for a man and just over £1 for a woman, of which a survivor may inherit half. Younger contributors, who will have fewer years in the scheme, will have less (the last person who could have contributed to the GRB scheme will reach state pension age in 2023): the restriction on entitlement affecting older pensioners who survive a younger spouse will therefore have only a minimal effect. Furthermore, if the Government's proposals for reforming the state pension become law[4], inheritance within the state pension scheme, including GRB inheritance, will be phased out for people reaching state pension age on or after 6 April 2016.

- ***Consolidation***

7.13 These Regulations will be published in due course in the 'Law Relating to Social Security' (referred to as "The Blue Books") which are regularly updated and are available to the public at no cost via the internet at: http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/thelawrelatingto-social-security/.

[4] See https://www.gov.uk/government/policies/making-the-state-pension-simpler-and-fairer

8. Consultation outcome

As these regulations will be made within six months of the relevant enactment coming into force, they have not been referred to the Social Security Advisory Committee and no specific consultation has been undertaken on this instrument. However, the Government carried out a consultation prior to introduction of the Act which ran for 13 weeks and closed on 14 June 2012. This was followed by the publication of the Government response, "Equal marriage: The Government's response". Both the consultation and response documents are available at https://www.gov.uk/government/consultations/equal-marriage-consultation.

9. Guidance

Information for customers in leaflets and on line will be revised to explain how the changes introduced by the MSSCA will affect entitlement to benefits and state pensions. Guidance has also been issued to staff in the Department for Work and Pensions to ensure they are familiar with the changes.

10. Impact

10.1 There is no impact on business or civil society.

10.2 The impact on the public sector arising from the measures in this instrument is negligible. Additional benefit expenditure arising from extending GRB inheritance to surviving members of same sex married couples would arise only if more same sex couples seek legal recognition through marriage than would have otherwise formed civil partnerships; however, as explained in paragraph 7.12 above, the value of any inheritable amounts is low and therefore any consequential cost increase would be insignificant. The cost of administering the overall changes in the Department for Work and Pensions has been estimated at £80,000 and is reflected in the Impact Assessment for the MSSCA available at https://www.gov.uk/government/publications/marriage-same-sex-couples-bill. .

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There are no plans to monitor the changes introduced by this instrument. As explained at paragraph 7.12 above, if Parliament approves the Government's proposals for reforming the state pension, GRB inheritance will be phased out for people reaching state pension age from 6 April 2016 and for pre-2016 pensioners, the impact of the difference in treatment will diminish over time as the likelihood of a man aged at least 65 (or 60, for a woman) by April 2010 being predeceased by a spouse under pension age decreases.

13. Contact

Helen Gadd at the Department for Work and Pensions Tel: 020 7449 7142 or email: [Helen.Gadd@dwp.gsi.gov.uk can answer any queries regarding the instrument.