

Explanatory Memorandum to The Firefighters' Pension Schemes and Compensation Scheme (Wales) (Amendment) Regulations 2020

This Explanatory Memorandum has been laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of **The Firefighters' Pension Schemes and Compensation Scheme (Wales) (Amendment) Regulations 2020**. I am satisfied that the benefits justify the likely costs.

Hannah Blythyn MS
Deputy Minister for Housing and Local Government
14 December 2020

PART 1

1. Description

The Firefighters' Pension Schemes and Compensation Scheme (Wales) (Amendment) Regulations 2020 ("the Regulations") amend the following:-

- the Firemen's Pension Scheme Order 1992 ("the 1992 Order") which sets out, in Schedule 2, the Firefighters' Pension (Wales) Scheme ("the 1992 Scheme"),
- the Firefighters' Pension Scheme (Wales) Order 2007 ("the 2007 Order") which sets out, in Schedule 1, the New Firefighters' Pension Scheme (Wales) ("the 2007 Scheme"),
- the Firefighters' Compensation Scheme (Wales) Order 2007 ("the 2007 Compensation Order") which sets out, in Schedule 1, the Firefighters' Compensation Scheme (Wales) 2007 ("the 2007 Compensation Scheme"), and
- the Firefighters' Pension Scheme (Wales) Regulations 2015 ("the 2015 Order") which sets out the Firefighters' Pension Scheme (Wales) 2015 ("the 2015 Scheme").

The 1992 Scheme and the 2007 Compensation Scheme currently provide surviving civil partners and same sex spouses with entitlement to a survivors' pension based on pensionable service from 6 April 1988. Following the Supreme Court judgment in the case of Walker v Innospec¹, the Regulations amend these provisions to remove the 1988 limitation date, which will bring the benefits payable to surviving civil partners and same sex spouses in line with those payable to surviving widows of opposite sex marriages and comply with the ruling. The amendments are backdated to 5 December 2005, the date that civil partnerships were introduced.

In addition, the Regulations also remove the provisions that equate opposite sex civil partnerships with same sex marriages or civil partnerships, in the 1992 Scheme. Following the introduction of the Civil Partnership (Opposite-sex Couples) Regulations 2019, which allow civil partnerships to be formed by opposite sex couples, this provision is no longer appropriate. The amendment is backdated to 13 March 2014, the date that same sex marriages were introduced.

Following the Supreme Court ruling in the case of McLaughlin², in which it was held that denying benefits payable to (or on behalf of) children based on their parents' marital status was unlawful, the Regulations amend the 2007 Compensation Scheme to remove the provisions that discriminate against children of unmarried scheme members. The proposed amendment also eliminates differential treatment currently applied to dependent, step and adopted children. This regulation is backdated to the date from which the original provision had effect (1 April 2006).

¹ [2017] UKSC 47 ([Walker v Innospec Limited and Others](#))

² [2018] UKSC 48 ([Siobhan McLaughlin for Judicial Review \(Northern Ireland\)](#))

The Regulations also amend the 1992 Scheme and the 2007 Scheme to clarify that where a firefighter has an entitlement to two pensions, the amount of the first pension is up-rated annually (as if subject to the Pension (Increase) Act 1971) from the date that the firefighter ceased to earn the higher rate of pay until retirement.

The Regulations amend the 1992 Scheme and 2007 Scheme in relation to pension sharing on divorce. On divorce from a pension scheme member, under pension sharing provisions, spouses or civil partners of scheme members can be awarded part of their pension as a credit. Amendments have been made to update the out of date statutory reference and ensure that pension credit members (those who have rights under the 1992 Scheme or 2007 Scheme which are attributable, directly or indirectly, to a pension credit under a pension order following divorce or nullity of marriage) continue to commute their benefit as permitted by overarching legislation (trivial commutation lump sum limit in paragraph 7 of Schedule 29 to the Finance Act 2004). On divorce from a pension scheme member, Current provisions of the 1992 Scheme and 2007 Scheme do not take account of changes to the related legislation on pension sharing.

The Regulations also make amendments to update the 2007 Scheme to include special commutation factors (that is, the rates at which pension can be exchanged for a lump sum) up to age 75, instead of age 65.

The Regulations amend the 2015 Scheme to clarify that members of the 1992 Scheme with protected rights transferring to Wales from England, Scotland or Northern Ireland continue to be entitled to remain as members of that Scheme.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

Certain regulations make retrospective provision – these are set out in regulation 1(3) of this statutory instrument (namely, regulations 3, 4, 5, 7, 8, 11, 12 and 14). The following provisions in the enabling legislation permit regulations made under those provisions to have retrospective effect—

- (a) section 12 of the Superannuation Act 1972, as applied by section 16(3) of that Act in relation to orders made under section 26 of the Fire Services Act 1947,
- (b) section 34(3) of the Fire and Rescue Services Act 2004, and
- (c) section 3(3)(b) of the Public Service Pensions Act 2013.

This is to ensure that certain provisions can be applied to pensions already in payment or being accrued.

3. Legislative background

The powers of the Welsh Ministers in relation to the 1992 Scheme to make these Regulations are conferred by section 26(1), (2) and (5) of the Fire Services Act

1947; section 12 of the Superannuation Act 1972, as applied by section 16(3) of that Act.

In respect of the 2007 Scheme and the 2007 Compensation Scheme, the powers of the Welsh Ministers to make these Regulations are conferred by section 34(1) to (4) of the Fire and Rescue Services Act 2004.

The powers of the Welsh Ministers in relation to the 2015 Scheme to make these Regulations are conferred by sections 1(1) and (2)(f), 2(1), 3(1) to (3) and 18(5)(a) and (6) of, and Schedules 2 (paragraph 6(b)) and 3 (paragraphs 1 to 4) to, the Public Service Pensions Act 2013.

This instrument is subject to the negative resolution procedure.

4. Purpose and intended effect of the legislation

Regulation 3 makes amendments to the 1992 Order in relation to split pensions. Currently, both the 1992 Scheme and 2007 Scheme allow a “two pension” option if a firefighter has a reduction in pensionable pay when taking up a different role. This enables pension rights before the reduction in pay to be “preserved”. The amendments made by **regulations (a), (c) and (d)**, ensure that a firefighter is not disadvantaged by the provision which allows for two pensions to be awarded, calculated separately, after a significant reduction in pay. This clarifies that two pensions should not be awarded if their total is lower than the single pension. Other minor updates to Rule B5A of the 1992 Scheme are also being made. **Regulation 3(b)** clarifies that where a firefighter has an entitlement to two pensions under the 1992 Order, the amount of the first pension is uprated annually (as if subject to the Pensions (Increase) Act 1971) from the time of the reduction in pay until retirement.

Regulation 4 amends the 1992 Order to bring the benefits payable to survivors of civil partnerships and same sex marriages into line with the benefits payable to survivors of opposite sex marriages under the 1992 Scheme. In addition, the regulations also remove the provisions that equate opposite sex civil partnerships with same sex marriages or civil partnerships, which is no longer appropriate following the introduction of the Civil Partnership (Opposite-sex Couples) Regulations 2019 (which allow civil partnerships to be formed by opposite sex couples).

Regulation 5 amends an out of date statutory reference in the 1992 Order in relation to commutation of small pension credits. This ensures that pension credit members can continue to commute their benefit as permitted by the trivial commutation lump sum limit as set out in the Finance Act 2004.

Regulation 7 amends the 2007 Order in relation to split pensions. The amendment clarifies that where a firefighter has an entitlement to two pensions under the 2007 Scheme, the amount of the first pension is uprated annually (as if subject to the Pensions (Increase) Act 1971) from the date that the firefighter ceased to earn the higher rate of pay until retirement.

Regulation 8 amends an out of date Statutory Reference in the 2007 Order in relation to commutation of small pension credits. This ensures that pension credit members can continue to commute their benefit as permitted by the trivial commutation lump sum limit as set out in the Finance Act 2004.

Regulation 9 substitutes the table of commutation factors within Annex ZA of the 2007 Order to include special commutation factors up to age 75 years. The commutation factors as at 31 March 2014 (up to age 65) have been replicated in the substituted table and have not changed.

Regulation 11 amends the 2007 Compensation Order to bring the benefits payable to survivors of civil partnerships and same sex marriages into line with the benefits payable to survivors of opposite sex marriages under the 2007 Compensation Scheme.

Regulation 12 amends the 2007 Compensation Order to remove some of the limitations applied to dependent, step and adopted children, as well as to children of unmarried parents. It also amends the heading of rule 3 of the 2007 Compensation Scheme and clarifies a cross-reference in rule 3(5)(a).

Regulation 14 makes an amendment to the 2015 Regulations to clarify that protected members of the 1992 Scheme transferring to Wales from England, Scotland and Northern Ireland continue to be entitled to remain as members of that Scheme.

5. Consultation

Section 34(5) of the Fire and Rescue Services Act 2004 requires the Welsh Ministers to consult either those who are likely to be affected by them, or the representatives of those persons, before making any amendments.

Section 21(1) of the Public Service Pensions Act 2013 requires the authority responsible for making the regulations to consult either those who are likely to be affected by them, or the representatives of those persons, before making any regulations.

A 12 week consultation ran from 10 July 2020 to 02 October 2020 inviting stakeholder views on the proposed amendments. The consultation was brought to the attention of key stakeholders such as the Fire and Rescue Authorities and Trade Unions via the Firefighters' Pension Scheme Advisory Board for Wales' meetings.

There were no responses to the consultation exercise. This may be due to the technical nature of the proposed amendments and the fact that the Regulations seek only to confer benefits. Accordingly, there is no summary of the consultation responses to publish. Welsh Government lawyers have concluded that no amendments were necessary to the draft Regulations which were published (in

both English and Welsh) alongside the Welsh Government's consultation document.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has been considered, but has not been conducted in this instance as the Regulations will not introduce any additional costs to charities, and the private or third sector.

The changes to scheme rules which implement the Walker and McLaughlin judgments will increase pension benefits for survivors of same-sex relationships, and survivors who are adopted or step-children. We do not know (and have no way of knowing) exactly how many firefighters are in same-sex relationships, or are unmarried or adoptive parents. However, if these numbers are broadly similar to those in the population as a whole, then the impact on Fire and Rescue Authorities (FRAs) is not expected to be significant. Costs will be taken into account in future pension scheme valuations and will be reflected in any required changes to overall scheme benefits, employer and employee contribution rates.