

# Draft Occupational Pension Schemes and Pension Protection Fund (Equality) (Amendment) Regulations 2012

Consultation on draft regulations and possible equalisation method  
January 2012

# Contents

- Introduction..... 2
  - About this consultation ..... 2
  - How to respond to this consultation ..... 2
  - How we consult..... 3
- Equality and Defined Benefit Occupational Pension Schemes..... 6
  - Introduction ..... 6
  - The proposed legislative changes..... 8
  - Simplification Review ..... 8
  - Draft regulations..... 8
  - Equalisation method ..... 9
  - Other issues..... 10

## **Introduction**

This consultation concerns amendments to the Equality Act 2010 and the Pensions Act 2004 to reflect development in the case law of the Court of Justice of the European Union. These developments in European law mean that, where a pension scheme is equalising its benefits as between men and women, it has to assume a notional comparator where the inequality is a result of the Guaranteed Minimum Pension (GMP) provisions in the Pension Schemes Act 1993.

## **About this consultation**

### **Who this consultation is aimed at**

This consultation is particularly aimed at trustees and managers of contracted-out defined benefit schemes and their advisers.

### **Purpose of the consultation**

The purpose of this consultation is to seek comments from scheme trustees and other interested parties on whether the draft Regulations achieve their intended outcome; to reflect the European law position on equal treatment of men and women as it applies in the field of occupational pensions, in so far as any differences result from the GMP provisions in the Pension Schemes Act 1993.

We are also seeking the views of scheme trustees and other interested parties on a possible method schemes could use to equalise for the effect of the GMP provisions.

### **Scope of consultation**

This consultation applies to England, Wales and Scotland.

### **Duration of the consultation**

The consultation period begins on 20 January 2012 and runs until 12 April 2012.

## **How to respond to this consultation**

Please send your consultation responses to:

Pam Bryson  
7th Floor  
Caxton House  
Tothill Street  
London  
SW1H 9NA

**Consultation on the Draft Occupational Pension Schemes and Pension Protection Fund (Equality) (Amendment) Regulations 2012**

Fax 0207 449 7127  
Email Equality.Regulations@dwp.gsi.gov.uk

Please ensure your response reaches us by 12 April 2012.

When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled. We will acknowledge your response.

We have sent this consultation document to a large number of people and organisations who have already been involved in this work or who have expressed an interest. Please do share this document with, or tell us about, anyone you think will want to be involved in this consultation.

**Queries about the content of this document**

Please direct any queries about the subject matter of this consultation to:

Pam Bryson  
7th Floor  
Caxton House  
Tothill Street  
London SW1H 9NA  
Phone 0207 449 7406  
Fax 0207 449 7127  
Email pam.bryson@dwp.gsi.gov.uk

**How we consult**

**Freedom of information**

The information you send us may need to be passed to colleagues within the Department for Work and Pensions, published in a summary of responses received and referred to in the published consultation report.

All information contained in your response, including personal information, may be subject to publication or disclosure, if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information provided, or remove it completely. If you want the information in your response

## Consultation on the Draft Occupational Pension Schemes and Pension Protection Fund (Equality) (Amendment) Regulations 2012

to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this.

To find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Central Freedom of Information Team  
The Adelphi  
1-11, John Adam Street  
London WC2N 6HT

[Freedom-of-information-request@dwp.gsi.gov.uk](mailto:Freedom-of-information-request@dwp.gsi.gov.uk)

The Central Fol team cannot advise on specific consultation exercises, only on Freedom of Information issues. More information about the Freedom of Information Act can be found at <http://www.dwp.gov.uk/freedom-of-information>

### The consultation criteria

The consultation is being conducted in line with the Government Code of Practice on Consultation – [Government Code of Practice on Consultation](#). The seven consultation criteria are:

- **When to Consult.** Formal consultation should take place at a stage when there is scope to influence the outcome.
- **Duration of consultation exercises.** Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.
- **Clarity of scope and impact.** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
- **Accessibility of consultation exercises.** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.
- **The burden of consultation.** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- **Responsiveness of consultation exercises.** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- **Capacity to consult.** Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.

### Feedback on the consultation process

We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

**Consultation on the Draft Occupational Pension Schemes and Pension Protection Fund (Equality) (Amendment) Regulations 2012**

Roger Pugh  
DWP Consultation Coordinator  
1<sup>st</sup> floor, Crown House  
2, Ferensway  
Hull HU2 8NF

Phone 01482 584681

[roger.pugh@dwp.gsi.gov.uk](mailto:roger.pugh@dwp.gsi.gov.uk)

In particular, please tell us if you feel that the consultation does not satisfy the consultation criteria. Please also make any suggestions as to how the process of consultation could be improved further.

If you have any requirements that we need to meet to enable you to comment, please let us know.

We will publish the responses to the consultation in a report on the consultations section of our website <http://www.dwp.gov.uk/consultations/>. The report will summarise the responses and the action that we will take as a result of them.

# Equality and Defined Benefit Occupational Pension Schemes

## Introduction

1. In the past, occupational pension schemes often structured their scheme rules to reflect the state pension system in order to ensure retiring employees received all of their pension income at the same time. For instance, it was common for women to receive their occupational pension at age 60 and men at age 65; the age at which their state pension was payable.
2. On 17 May 1990 the Court of Justice of the European Union ruled that occupational pensions were a form of deferred pay and, as such, it was unlawful to discriminate between men and women in relation to occupational pensions (the *Barber* judgment). It was subsequently decided by that Court that the *Barber* judgment applied to any pension that accrued from the date of the judgment going forward. Thus there can be “pre-*Barber*” accruals up to and including 16 May 1990, which do not need to be equalised and “post-*Barber*” accruals from 17 May 1990, which do need equalising.
3. The Government reflected this judgment in domestic legislation – Section 62 of the Pensions Act 1995. That Section imported an equal treatment rule into a scheme, requiring any rule that treated one sex less favourably than another to be read as though it did not treat that sex less favourably. By Section 171 of the Pensions Act 2004 a duty was placed on the Pension Protection Fund to ensure that compensation was paid on an equal basis to men and women.
4. The obligations on schemes formerly contained in Section 62 of the Pensions Act 1995 have since been replaced by equivalent provisions in the Equality Act 2010: Sections 64, and 67 to 70. The obligation on the Pension Protection Fund is still in Section 171 of the 2004 Pensions Act.
5. In line with equal pay requirements, these equal treatment rules applied only where there was an opposite sex comparator: an individual of the opposite sex who is in like work, or work rated as equivalent, who was treated more favourably.

## The Guaranteed Minimum Pension

6. From 6 April 1978 a person could accrue entitlement to an earnings-related addition to their basic state pension called the State Earnings Related Pension Scheme (SERPS). An employer could contract its scheme out of SERPS if it was designed to provide a pension at least as good as a statutory minimum, known as the Guaranteed Minimum Pension (GMP).
7. The GMP rules, contained in Part III of the Pension Schemes Act 1993, broadly reflect the SERPS rules and specifically provide for different payments to men and women. For example, men and women have different

payment ages (60 for women and 65 for men). The result of the application of these different entitlement ages is that the GMP accrues differently for men and women, because accrual is based on the working life of the employee, which is thus shorter for women than for men.

8. The GMP rules were abolished from 6 April 1997. However past accruals remain and a scheme must still provide a pension at least as good as the GMP for any time a person was a member of that scheme, up to and including 5 April 1997.
9. Most scheme members accrue benefits in excess of the GMP minimum. However, the different GMP payment ages for men and women can still result in a difference of treatment. Moreover, the rates at which the GMP accrues to men and women can have an effect on the overall amount paid, where the scheme applies different rates of revaluation and/or indexation on that part underpinned by the GMP and the balance.
10. Successive Governments have maintained the position that schemes are under an obligation to equalise overall scheme benefits accruing from 17 May 1990 including, in respect of accruals from 17 May 1990 to 5 April 1997, any inequality resulting from the GMP rules, where an opposite sex comparator existed in the scheme.

### **The Allonby judgment**

11. Since *Barber* the Court of Justice of the European Union has reconsidered the issue of equal treatment between the sexes in a line of case law concluding in the case of *Allonby*<sup>1</sup>. The Government understands the Court's conclusion in those cases, most clearly expressed at paragraph 84 of *Allonby* that:

“Where state legislation is at issue, the applicability [of the requirement that men and women are treated equally] vis-a-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex...”

to mean that, as inequality resulting from the GMP rules results from state legislation, the requirement to remove any unfavourable treatment resulting from those rules is not subject to the requirement that an opposite sex comparator exists.

### **The current situation**

12. The Government understands the current situation is that contracted-out schemes which hold GMP liabilities are already under an obligation to:
  - a. equalise pensions for the effect of the GMP rules for any accruals from 17 May 1990 to 5 April 1997 (inclusive), apart from where the limited exceptions in the Equality Act 2010 (Sex Equality Rule)(Exceptions) Regulations 2010 apply. This flows from *Barber* and current domestic legislation; and

---

<sup>1</sup> See cases C-171/88 Rinner-Kuhn and C-256/01 Allonby



- b. assume a comparator exists for the purposes of this exercise. This flows from *Allonby* itself which imposes EU law obligations directly on schemes.

## **The proposed legislative changes**

13. These draft Regulations are, therefore, only changing domestic legislation to reflect the development of the jurisprudence of the Court of Justice of the European Union, thereby codifying a scheme's existing obligations in EU law into UK law.
14. Following the Written Statement in January 2010 made by the then Minister for Pensions Reform, the Department received a number of representations regarding its interpretation of the effect of *Allonby* on ongoing occupational pension schemes. The Government has given prolonged and detailed consideration to all the arguments put to it, in order to satisfy itself that a change in legislation is necessary, and has decided that such a change is required.

## **The Pension Protection Fund**

15. The Government is also amending the specific equal treatment rule that applies to the Pension Protection Fund (PPF) in Section 171 of the Pensions Act 2004. This is because it believes the case law described above applies equally to the PPF compensation payments.

## **Simplification Review**

16. The Government is currently considering the simplification of contracting-out rules in the light of work being done on options to reform State Pensions set out in the Green Paper "*A state pension for the 21st Century*" (Cmd 8053). However, any changes which arise from this work will not have any effect on those who are pensioners at the date of change.

## **Draft regulations**

17. These draft regulations amend:
  - a. The Equality Act 2010:
    - Sections 64 and 67 are amended so that the sex equality rule operates without the need to find an opposite sex comparator, where any difference in treatment between men and women results from the application of the GMP provisions; and
    - Section 66 is amended so that, to the extent the sex equality clause applies, it also applies without the need to find an opposite sex comparator where the difference in treatment between men and women results from the application of the GMP provisions.

- b. The Pensions Act 2004
- Section 171 is amended so that the Section 171 equality rule is applied without the need for the opposite sex comparator, where the PPF's payment functions are or become less favourable to a person on the grounds of sex as a result of the GMP provisions.

For the draft Regulations, see –

[www.dwp.gov.uk/consultations/2012/pensions-equality.shtml](http://www.dwp.gov.uk/consultations/2012/pensions-equality.shtml)

**Question 1: do you think the draft Regulations achieve the intended outcome?**

## **Equalisation method**

18. The Government appreciates that a degree of uncertainty has existed for some time over equality and the GMP and wishes to offer schemes as much help as is practicable in providing equalised benefits.
19. Some commentators have suggested that the Government should sponsor a test case in order to obtain a definitive answer to the issue of whether there is an obligation to equalise for the effect of any inequality resulting from the GMP rules and, if so, how it should be achieved.
20. The Government has considered this as an option but does not consider it is an appropriate way forward. It believes such a test case would only prolong the uncertainty around this issue and, given the clarity of the legal obligation to equalise for the effect of GMPs, would not take the matter any further forward. In terms of how schemes should achieve equality, the Court of Justice of the European Union is unlikely to give a generally applicable answer.
21. The Government has, however, included in this consultation, a description of a possible method of equalising for the effect of the GMP which the Government is considering publishing. It is not the Government's intention to place any obligation on schemes to use this method. If published, it would not be legal advice to schemes on how to equalise, or be a definitive statement on how to equalise for the effect of the GMP rules. However, schemes would know it had been considered by a wide range of pension professionals.

For this possible method, see –

[www.dwp.gov.uk/consultations/2012/pensions-equality.shtml](http://www.dwp.gov.uk/consultations/2012/pensions-equality.shtml)

**Question 2: do you have any comments on the proposed methodology?**

**Question 3: the Government would be interested in whether respondents think publication would be of assistance to schemes.**

**Question 4: The Government would be interested in any other suggestions as to what it could do to assist schemes in dealing with their equalisation duties.**

## **Other issues**

**Question 5: The Government would be interested in whether anyone thinks there could be an adverse impact on the position of disabled people from these changes.**

**Question 6: The Government would be interested in whether anyone thinks there could be an adverse impact on the position of men or women from these changes.**