



Scottish Public
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Buidheann Peinnseanan
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NHS Pension Scheme consultees

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14 January 2021

Dear Colleague

Consultation on changes proposed by The National Health Service Superannuation and Pension Schemes (Scotland) (Miscellaneous Amendments) Regulations 2021

Please find enclosed for comments, a draft of The NHS Superannuation and Pension Schemes (Scotland) (Miscellaneous Amendments) Regulations 2021. I would be grateful if you would distribute this letter and attachments as widely as possible.

These Regulations amend The NHS Superannuation Scheme (Scotland) Regulations 2011, The NHS Superannuation Scheme (2008 Section) (Scotland) Regulations 2013, The NHS Pension Scheme (Scotland) Regulations 2015 and The NHS Pension Scheme (Scotland) (Additional Voluntary Contributions) Regulations 2018 and The NHS (Scotland) (Injury Benefits) Regulations 1998. The amendments are effective from 1 April 2021.

1. Changes to the pay/earnings bands

Revised employee contribution tables (Amendments to the 1995 Section, 2008 Section and 2015 Scheme Regulations)

1.1 The member contribution rates were set in 2015 on the basis that the pay/earnings bands set out in each tier are increased each year in line with national NHS pay awards in Scotland. This ensures that the tiers remain in line with annual increases in individual members pay. This draft SSI will therefore insert into regulations an amended member contribution table at the appropriate points to reflect the pay uplift from 1 April 2020. Please note the table inserts new pay/earnings bands only and does not increase the percentage of contributions payable.

<i>Band</i>	<i>Column 1 Pensionable earnings band</i>	<i>Column 2 Contribution percentage rate</i>
1	Up to £20,605	5.2%
2	£20,606 to £24,972	5.8%
3	£24,973 to £31,648	7.3%
4	£31,649 to £64,094	9.5%
5	£64,095 to £89,731	12.7%
6	£89,732 to £119,560	13.7%
7	£119,561 and above	14.7%

2. Entitlement for survivors of civil partners and same-sex spouses

2.1 Amendments are required to the NHS Pension Schemes (Scotland) to provide civil partners and same sex spouses with the same pension benefits as widows. This is due to a Supreme Court judgment in the case of *Walker v. Innospec Ltd* [2017] UKSC 47. The judgement is available at: [Walker \(Appellant\) v Innospec Limited and others - The Supreme Court](#)

Walker v Innospec Ltd

2.2 The claim in *Walker v. Innospec Ltd* was brought via an Employment Tribunal under the Equality Act 2010 by Mr Walker who was a pensioner member of a contracted-out private sector pension scheme (the 'scheme'). Mr Walker claimed that a scheme rule that restricted payment of survivor's benefits to the survivors of opposite-sex marriages constituted direct and indirect sexual orientation discrimination. The scheme rule relied on an exemption in the Equality Act, the effect of which was to permit schemes to discriminate on grounds of sexual orientation between opposite-sex married couples and same-sex civil partners in respect of benefits accrued in respect of service prior to 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force).

2.3 The Employment Tribunal found in favour of Mr Walker, but the Employment Appeal Tribunal and the Court of Appeal upheld his employer's appeal. The Supreme Court allowed Mr Walker's appeal finding that the exemption (which was in paragraph 18 of Schedule 9 to the Equality Act) is not compatible with EU law insofar as it authorises a restriction on payment of benefits based on periods of service before 5 December 2005 and it should therefore be disapplied.

Changes required to public sector schemes

2.4 As a result, public sector schemes, including the NHS Pension Schemes (Scotland), must amend their rules to provide the same survivors' benefits for same-sex couples (whether married or in civil partnerships) as those for opposite-sex married couples. The NHS Pension Schemes should also provide back-dated survivor benefits based on all relevant service to surviving same-sex spouses or civil partners where their right to claim a survivor's pension arose on or after 5 December 2005.

Draft amending regulations

2.5 Survivor benefits for civil partners and same sex spouses in the 2008 Section of the NHS Superannuation Scheme (Scotland) and the NHS Pension Scheme (Scotland) 2015 are based on a percentage of the member's benefits for all their service. This is the same as the survivor benefits provided for opposite sex spouses. Therefore, we do not need to make any changes to those provisions. However, in the 1995 Section of the NHS Superannuation Scheme (Scotland) survivor benefits for civil partners and same sex spouses are based on a percentage of the member's benefits for service from 6th April 1988 only. Changes to those provisions are required.

2.6 SPPA have already taken administrative action to disapply the provisions which restricted survivors' benefits for same-sex couples (whether married or in civil partnerships) and to identify and recalculate any survivors pension in payment under these rules. Accordingly, the draft regulations propose amending scheme regulations with retrospective effect where the right to claim a survivor's pension arose on or after 5 December 2005.

3. Removal of requirement to nominate unmarried co-habitees for survivor benefits

3.1 Amendments are also required to the NHS Pension Schemes (Scotland) to remove the scheme rule requiring an unmarried co-habiting partner to have been nominated to receive survivor pension benefits upon death of the member. This is due to a Supreme Court decision in the case of *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC 8. The judgment is available at: <https://www.supremecourt.uk/cases/uksc-2014-0180.html>.

3.2 The NHS Pension Schemes provide various pension entitlements upon the death of a scheme member. Survivor pensions for widowers were first introduced as a scheme benefit from 6 April 1988. Survivor pensions for civil partners were introduced from 5 December 2005 and for same-sex married couples from 16 December 2014. Survivor pensions for qualifying unmarried partners were first introduced as a scheme benefit from 1 April 2008.

3.3 In order to qualify for this benefit, an unmarried co-habiting partner must have been nominated to receive the pension before the member's death and to have been in a financially interdependent and co-habiting relationship for at least two years before the member's death. The validity of the nomination is tested at death.

3.4 In response to the *Brewster* judgment, HM Treasury have determined that public service pension schemes remove the nomination form requirement for new claims and pay survivor pensions in qualifying cases from the date of the member's death, regardless of when the claim is made.

3.5 The judgment does not call into question the remaining qualifying criteria, namely that for a continuous period of at least two years ending with the member's death, the member and the partner were:

- Living together as if they were married or civil partners
- Not prevented from marrying or entering into a civil partnership;
- Financially interdependent or the partner was financially dependent on the member, and;
- Neither were living with a third person as if they were married or civil partners



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3.6 The scheme currently relies on section 3 of the Human Rights Act 1988 to set aside the unlawful nomination requirement when considering claims. However, to provide legal certainty, it is proposed to remove the unlawful provisions from scheme regulations. Accordingly, the draft regulations propose amending scheme regulations with retrospective effect for members who have service on or after 1 April 2008 so that surviving partner pensions are paid to survivors who meet the qualifying criteria set out above but without the need for a nomination to be made.

The consultation will close on **28 January 2021**. We intend to publish a summary of consultation responses in due course and would like to be able to include any response you make in that summary. However, if you ask us not to publish your response to this consultation, we will regard it as confidential, and we will treat it accordingly.

Respondents should also be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and will have to respond appropriately to any relevant request made to the SPPA under that Act for information concerning this consultation exercise.

Yours faithfully

Greg Walker
Policy Manager



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Copies to:

Chief Executives NHS Boards
HR Directors NHS Boards
The NHS (Scotland) Advisory Board
The NHS (Scotland) Pension Board
SPPA Technical Working Group
NHS Trade Unions and Professional Organisations
Scottish General Practitioners Committee
Institute of Health Service Management
Scottish Practice Nurse Association
Women's National Committee
SGHD Directorate of Primary Care
SGHD Health Workforce Directorate
SGHD Finance
NHS Retirement Fellowship
Home Office, Police and Firemen's Pension Schemes
Department of Health and Social Services, Northern Ireland
NHS BSA Pensions Division
Department for Children, Schools and Family
Cabinet Office
Department for Communities and Local Government
DWP
GAD (for information only)
HM Treasury
Savings, Pensions, Share Schemes HMRC
SGLD
SPPA Scheme Managers
Standard Life

CONSULTATION RESPONSE FORM

CONSULTATION on The NHS Superannuation and Pension Schemes (Scotland) (Miscellaneous Amendments) Regulations 2021

1. Name/Organisation

Organisation Name

Title

Surname

Forename

2. Postal Address

<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
Postcode	Phone	<input type="text"/>
Email		

3. Permissions - I am responding as... (please complete either sections (a), (b) and (d) or sections (c) and (d):

Individual or **Group/Organisation**

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please state yes or no: _____

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please state yes to one of the following:

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please state yes or no:

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please state yes or no:

ABOUT YOU

I am responding ...

- as a scheme member
- on behalf of an Employer Organisation
- on behalf of a Trade Union/Staff Association
- other (please specify)

What is your gender?

- I am female
- I am male

I am employed as...

- an administrator
- a Dentist
- a Doctor
- a General Practitioner
- a junior Doctor
- a manager
- a nurse
- I'm retired

- other (please specify)

What is your working pattern?

- I work part-time
- I work full- time
- Not applicable

CONSULTATION COMMENTS

Please use this space to provide any comments on the amendments.

Comments:

Please e-mail your response to SPPAPolicy@gov.scot or send via mail to:

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Galashiels
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The closing date for receipt of comments is **28 January 2021**.