

Explanatory Memorandum to The Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016

This Explanatory Memorandum has been prepared by the Department for Education and Public Services and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016.

Carl Sargeant
Cabinet Secretary for Communities and Children
25 November 2016

1. Description

At present, firefighters who are members of the Firefighters' Pension (Wales) Scheme 1992 are obliged to pay pension contributions until they reach age 50. However, their pensions can only reflect a maximum of 30 years' service. Those who joined the Fire Service between the ages of 18 and 20 and accrue 30 years pensionable service thus have to continue paying contributions beyond that point, and until they reach age 50, even though they cannot accrue any further pension benefits in return. This Order corrects the anomaly. It provides that contributions need not be paid after reaching 30 years' service, and also provides for refunds of any contributions paid after reaching 30 years' service

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The provision in article 2(2) of the Order is a retrospective provision in exercise of the powers in sections 12 and 16 of the Superannuation Act 1972.

Where a person might be disadvantaged by a retrospective provision of a statutory instrument that amends the Scheme, section 12(4) of the Superannuation Act 1972 imposes a requirement that the statutory instrument must give such an individual the option of electing that the provision should not apply to them. If there is unlikely to be a detriment then it is not necessary to include such a provision. The Welsh Government does not consider that any such detriment applies here and accordingly no such provision is required.

3. Legislative background

The powers of the Welsh Ministers in relation to the Firefighters Pension (Wales) Scheme are contained in section 26 of the Fire Services Act 1947.

- The powers of the Secretary of State under section 26 became the powers of the National Assembly for Wales by article 2(2) of SI 2006/1672 and subsequently were vested in the Welsh Ministers under GOWA 2006.
- The Firefighters' Pension Scheme was established under section 26 of the Fire Services Act 1947 and set out in the Firefighter's Pension Scheme Order 1992 (the 1992 Order).
- Despite the repeal of section 26 by the Fire and Rescue Services Act 2004, the Scheme was preserved by order under sections 36(1) and 62 of that Act and in relation to Wales the Scheme was named the Firefighters' Pension (Wales) Scheme (2004/2918). The Scheme subsequently closed to new members after 31 March 2006.

Sections 12(1) and 16(3) of the Superannuation Act 1972 authorise retrospective effect for a provision of an order under section 26.

This amendment to the 1992 Order seeks to prevent scheme members from being in a position whereby they have reached maximum pensionable service (and thus accrued the maximum possible pension) but have to continue to pay employee pension contributions before they are able to retire at age 50.

This amendment to the Scheme follows an agreement signed by the UK Government (the Department for Communities and Local Government) in November 2015 to settle a case before the High Court. The Fire Brigades Union represented employees in this case. While that agreement does not formally bind the Welsh Ministers, the Scheme in Wales is identical to that in England on this point and the Welsh Government considers that the settlement agreed between the two parties in England should similarly be applied to affected firefighters in Wales.

This instrument is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

Article 2(2) of the instrument amends rule G2 of the Scheme to ensure that any firefighters who are members of the Scheme and have reached their maximum 30 years pensionable service before they can retire at age 50 will no longer have to pay employee pension contributions.

Article 2(3) of the instrument amends rule LA1 of the Scheme to provide that the payments to be made to affected members are paid from the fire and rescue authority's pension fund account. This practice of allowing employees not to make contributions to a work-related pension scheme is often known as a "contributions holiday".

Article 3 of the instrument makes provision about the repayment of contributions paid during the period 1 December 2006 to 31 December 2016. Paragraphs (1) and (2) oblige a fire and rescue authority to make a payment described as "the required amount" to a firefighter who has made pensions contributions that by virtue of article 2 are no longer payable. Paragraph (3) sets out that this "required amount" should be in the form of a lump sum equal to the net contributions paid (after deducting the tax that the individual would have paid had they received the contributions as income), plus compound interest at the Bank of England base rate that applied over the period from when the contribution was made to the time of the repayment. This is then uprated to reflect that these payments constitute "unauthorised payments" under the Finance Act 2004, and will, therefore, attract a personal Unauthorised Payment Charge of 40% which will be settled between the member and HMRC. Interest is to be calculated on a daily basis, allowing for the Bank of England base rate in force on each day. For practical reasons, interest is calculated from the start of the month of the original contribution to the end of the month before the repayment is made.

Where a member entitled to the repayment of contributions has died before payment is made, the lump sum will be paid to their personal representatives.

5. Consultation

The Welsh Government conducted a public consultation inviting stakeholders to register their views on a number of proposed changes to the Firefighters' Pension Scheme (1992) and New Firefighters' Pension Scheme (2007) in 2011-12. The Welsh Government's consultation began on 31 October 2011 and closed on 23 January 2012. The consultation included proposals in relation to a pensions contribution holiday, i.e. to amend the 1992 Scheme to include an exemption from payment of pension contributions between the age of 48 and 50 for those members who had accrued 30 years contributions.

The Welsh Government received four responses from the Association of Principal Fire Officers, the Fire Officers Association, South Wales Fire and Rescue Authority, and a member of the public in relation to these proposals. There was broad support for the proposals although issues raised included:-

- concerns about disadvantage which might occur with regard to the assessment of average pensionable pay in the case of death or ill-health retirement taking place after age 48 but before age 50.
- The need for clarification over the potential impact on 'deferred' membership.
- The need for clarity on the funding of repayments.

The Welsh Government stated in the Explanatory Memorandum to the Firefighters' Pension (Wales) Scheme (Amendment) Order 2014 that the contributions holiday proposals were still under consideration and steps were being taken to seek a declaration from the Courts on a UK wide basis in order to provide legal certainty on the position on whether this was discriminatory on the grounds of age.

Following discussions, the case was settled between the UK Government (the Department for Communities and Local Government) and the Fire Brigades Union on 30 November 2015 in the form of a signed agreement approved by the High Court by order, under the terms of the agreement the UK Government agreed to implement a contributions holiday for all those affected. The agreement provides specific details regarding the provision to be made both in terms of arrangements for a break in contributions, and in the retrospective repayment of contributions already made. Although the Welsh Government was not party to the agreement, the provisions in the 1992 Firefighter Pension Scheme are the same in Wales and England. It is therefore likely that the current provisions in Wales are also discriminatory on grounds of age. As such the intention is that the agreement reached between the two parties in England should be similarly applied to affected firefighters in Wales by amending the Welsh Scheme. We are aware that the Scottish Government has made substantively identical proposals to change the Scheme for firefighters in Scotland too.

The agreement approved by the court order clearly sets out what needs to be done to address a historic anomaly which exists across the UK. It should be implemented

as soon as possible, so that those who are due refunds can receive them without delay. Furthermore, this matter has already been discussed with the Firefighters' Pension Scheme Advisory Board for Wales. This Board includes representatives of the three employing Fire and Rescue Authorities in Wales and key staff representative bodies. At its meeting on 3 October 2016 the Board agreed that no further consultation was required, indicating that this would merely further delay resolution of the issues for firefighters. The Cabinet Secretary for Communities and Children therefore makes this Order without further consultation.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has been considered, but has not been conducted in this instance as the Order will not introduce any material additional costs to charities, and the private or third sector. The impact on Fire and Rescue Authorities (FRAs) is minimal; and there will be no costs at all to any other organisation. Retrospective payments and interest will be met by the Treasury via Top Up Grant to Fire and Rescue Authorities through Annually Managed Expenditure. Welsh Government will meet the costs of unauthorised tax payments. The Government Actuary's Department estimates employee contributions to the pension fund will be £90,000 less between 2016 and 2022, but the small figures involved are unlikely to result in any significant impact on the overall employee yield.

The proposed Order has no impact on the Welsh Ministers' statutory duties in relation to equality of opportunity or sustainable development under sections 77 to 79 of the Government of Wales Act 2006.

7. Equality Impact Assessment

An Equality Impact Assessment and Welsh Language Impact Assessment have been completed and can be accessed by request to fire@wales.gsi.gov.uk

8. Competition Assessment

Not Applicable

9. Post implementation review

The Welsh Government will work with Fire and Rescue Authorities and employee representative bodies to ensure the impact of these regulatory amendments are fully understood. This will include the provision of guidance and a calculator developed by the Government Actuary's Department to support accurate calculation of repayments to individual members of the 1992 Scheme who are affected by the changes.