

Explanatory Memorandum to The Firefighters' Pension Schemes and Compensation Scheme (Wales) (Amendment) Order 2018

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 Schemes and Compensation Scheme (Wales) (Amendment) Order 2018**.

Alun Davies

Cabinet Secretary for Local Government and Public Services

10 May 2018

1. Description

The Firefighters' Pension Schemes and Compensation Scheme (Wales) (Amendment) Order 2018 ("the Order") amends the following:-

- The Firemen's Pension Scheme Order 1992 ("the 1992 Order"), which governs the Firefighters' Pension (Wales) Scheme 1992 ("the 1992 Scheme");
- The Firefighters' Compensation Scheme (Wales) Order 2007 ("the Compensation Order"), which governs the Firefighters' Compensation Scheme (Wales) ("the Compensation Scheme");
- The Firefighters' Pension Scheme (Wales) Order 2007 ("the 2007 Order"), which governs the Firefighters' Pension Scheme 2007 ("the 2007 Scheme"); and
- The Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016

The 1992 Scheme and the Compensation Scheme currently provide that any surviving partner loses her or his entitlement to survivor's benefits on remarriage or formation of a new civil partnership. The Order amends these provisions to allow the surviving spouse or civil partner of a firefighter who dies or has died from an injury received in the exercise of duty, or travelling to or from duty to retain her or his entitlement to a survivor's benefit if s/he remarries or forms a civil partnership on or after 1 April 2015. In addition, benefits withdrawn prior to 1 April 2015 due to operation of the schemes are to be reinstated with effect from that date.

Following the Supreme Court ruling in the case of Brewster¹, the Order amends the 2007 Order to remove the requirement that a surviving cohabiting partner be nominated as a condition for eligibility for a survivor's pension.

The Order also amends minor errors and ambiguities within the 1992 Scheme, the 2007 Order and the Firefighters' Pension (Wales) Scheme (Amendment and Transitional Provisions) Order 2016..

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

The provisions in the Order are retrospective as detailed in article 1(2) – (5).

¹ [2017] UKSC 8. Ms Brewster was in a cohabiting relationship with Mr McMullan, a member of the Northern Ireland local government pension scheme. Following his death, she was refused a survivor's pension on the basis that he had allegedly not completed the requisite nomination form in her favour, despite her relationship with him otherwise complying with the scheme rules. The Court held that the requirement to complete a nomination form was an unreasonable and unlawful infringement of Ms Brewster's human rights, and declared that the requirement in the Regulations that she and Mr McMullan should have made a nomination be disapplied, and that she was entitled to receive a survivor's pension under the scheme.

3 Legislative background

In addition to the 1992 Scheme, there are two further principal pension schemes for firefighters. These are: the 2007 Scheme governed by the 2007 Order and the 2015 Scheme governed by the Firefighters' Pension Scheme (Wales) Regulations 2015. The 2007 Scheme was closed to new firefighters on 31 March 2015, and the 1992 Scheme had already closed to new firefighters in April 2006. There is no need for the survivor benefit provisions to be reformed in the 2007 or 2015 Schemes, because under the applicable provisions, survivor benefits are not terminated on remarriage or on the formation of a new civil partnership. Survivors of firefighters who are not members of an occupational pension scheme can nevertheless be eligible for compensation under the Compensation Order.

The powers of the Welsh Ministers in relation to the Firefighters Pension (Wales) Scheme 1992 are contained in section 26 of the Fire Services Act 1947 and the power to give retrospective effect is conferred by sections 12 and 16 of the Superannuation Act 1972. In respect of the Compensation Scheme and the 2007 Pension Scheme, the powers of the Welsh Ministers are contained in sections 34 and 62 of the Fire and Rescue Services Act 2004 and the power to give retrospective effect is conferred by section 34(3) of that Act.

This instrument is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

Article 2 of the Order amends the 1992 Order to allow surviving spouses and civil partners of a firefighter who died from an injury received in the exercise of duty, or travelling to or from duty, to retain their entitlement to a survivor's benefit under Part C of the 1992 Scheme, should they remarry or enter into a new civil partnership on or after 1 April 2015. The Order also provides that a pension or gratuity which had been withdrawn under the 1992 Scheme prior to 1 April 2015 should be reinstated with effect from that date. In addition, Article 4(3) of the instrument revokes rule 5 of Part 3 of the Compensation Scheme to allow, with effect from 1 April 2015, a person entitled to a pension or gratuity under that scheme to retain it following marriage, remarriage or formation of a civil partnership. Benefits withdrawn prior to 1 April 2015 due to operation of the scheme are to be reinstated with effect from that date.

The Compensation Scheme superseded corresponding provisions of the Firefighters' Pension Scheme 1992. Article 4(2) of the Order amends the transitional arrangements in Article 4 of the 2007 Compensation Scheme Order so that equivalent provisions will apply to special and augmented awards under rules C2 and C3 of the 1992 Scheme that relate to determinations or decisions made before 1 April 2006 relevant to whether death has been occasioned by a qualifying injury.

Articles 2(2), 2(4), 2(5) and 3 of the Order also make unrelated amendments to the 1992 and 2007 Orders. These include an amendment by article 2(4)(b) to clarify that under Part G of the 1992 Scheme a firefighter below the age of 50 who has reckoned 30 years' pensionable service is treated as an employee of the fire and rescue authority for the purposes of annual employer contributions and that where such a firefighter has arrangements for additional pension benefits the firefighter must pay contributions in relation to these until attaining the age of 50, when the requirements in rule G2(1) of the 1992 Scheme will apply. Related to this, article 5 amends the transitional provision made by the Firefighters' Pension Scheme (Amendment and Transitional Provisions)(Wales) Order 2016 to ensure that, following the implementation of that Order, firefighters continue to pay contributions in relation to additional pension benefit as appropriate, and that fire and rescue authorities pay the appropriate level of employer contributions. Amendments made by article 2(4)(b) of this Order have effect from 1 December 2006 and those introduced by Article 5 take effect from 31 December 2016.

In addition, following the Supreme Court ruling in the case of Brewster, article 3 of the Order removes the requirement in the 2007 Scheme that a surviving cohabiting partner must have been nominated by the scheme member as a condition of eligibility for a survivor's pension. Under the amending provisions a person who can show that s/he was in a qualifying relationship with a deceased scheme member at the time of death will be eligible to receive such benefits, regardless of any prior nomination, in the same way as spouses and civil partners are. This provision will have retrospective effect from 6 April 2006 when the 2007 Scheme came into effect .

Article 3 also makes a number of unrelated amendments to the 2007 Scheme in order to correct errors in cross references.

5. Consultation

Section 34 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. The Welsh Government conducted a 12 week consultation from the 27 September to 21 December 2017 inviting stakeholder views on amendments to the various firefighter pension schemes and the 2007 Firefighters' Compensation scheme.

The Welsh Government received three consultation responses from North Wales Fire and Rescue Authority, South Wales Fire and Rescue Authority and Mid and West Wales Fire and Rescue Authority.

In respect of proposed amendments to allow surviving spouses and civil partners of qualifying firefighters to retain their benefits should they remarry or enter into a new civil partnership, the Welsh Government provided four potential options for how to make the changes retrospective, as follows :-

Option 1 - introduce a provision that would reverse the existing provision completely with no qualifying date. This would mean all those who had had their benefits withdrawn would have them restored and backdated to the point of withdrawal.

Option 2 - introduce a provision permitting survivors who remarry or enter into a civil partnership on or after a specified date in the past (1 April 2015) to retain their entitlement to survivors' benefits, and in addition reinstate lost benefits to all survivors who had remarried or entered into a civil partnership before that date, with those benefits being reinstated as from 1 April 2015.

Option 3 - allow survivors who remarry or enter into a civil partnership on or after a specified date in the past (1 April 2015) to retain their entitlement. Those who had remarried or entered into a new civil partnership before that date would receive nothing.

Option 4 - allow survivors who remarry or enter into a civil partnership on or after a specified date in the future (say 1 July 2018) to retain their entitlement to pension benefits. Those who have already remarried or entered into a new civil partnership would receive nothing.

All three FRAs agreed that Option 2 would provide the most balanced approach between fairness and cost effectiveness. This was also the Welsh Government's preferred option. One FRA, however, raised concerns that re-instating benefits only from a set date (in this case 1 April 2015) would not provide consistency with the recent Supreme Court rulings in the cases of Walker² and Brewster, both of which had in effect provided for full backdating.

Option 1 in the original consultation document had provided for full retrospection of survivor benefits to the point of withdrawal, provided the cost burdens on the Fire and Rescue Authorities were limited or manageable. The Welsh Government has subsequently reviewed the cost implications of complete retrospection and has concluded that adopting this approach at a time when budgets for front line services are under significant pressure would not be feasible. The Welsh Government has therefore continued with the proposals to adopt Option 2 as set out in the consultation document.

It is important to note that the judgments in the cases of Brewster and Walker held that the affected pension schemes had discriminated unlawfully on the grounds of marital status and sexual orientation, respectively. As such, the scheme rules were held by the Court to be, and always to have been, unlawful. There have been no claims of unlawful discrimination nor judgments holding that the scheme rules are unlawful as regards survivors who remarry or form new civil

²² [2017] UKSC 47. Mr Walker is gay, and had sought confirmation that his husband (who had previously been his civil partner) would receive a survivor's pension in the event of his death. The administrator of his pension scheme declined on the grounds that Mr Walker's pensionable service ended before the Civil Partnerships Act 2004 came into force, and before Mr Walker entered into such a partnership. The Court held that this decision amounted to unlawful discrimination on grounds of sexual orientation, and ordered that Mr Walker's husband would be eligible for a survivor's pension based on all the years of Mr Walker's service.

partnerships. The Welsh Government has introduced amendments to the 2007 Order purely to remove what we believe is harsh treatment of survivors of firefighters who have died whilst on duty.

No particular issues were raised as part of the consultation about the other proposed amendments

The consultation document explained that there would be no consultation following the Supreme Court ruling in the case of Brewster given that the Welsh Government are merely reflecting the judgment of the Supreme Court.

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 additional costs to charities, or the private or third sector. The impact on Fire and Rescue Authorities (FRAs) is expected to be minimal. There are very few known historic cases covered by this Order, and the costs of reinstating pensions in those cases are likely to be very modest indeed. Those costs will be met from the pension fund (or, in the case of payments under the Compensation Scheme, from FRA core funding) in the normal way.

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.