



Department  
for Work &  
Pensions

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

Interim Government response to consultation on  
draft regulations and possible equalisation method

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## Introduction

1. On 20 January 2012, the Government began a public consultation<sup>1</sup> on draft Regulations designed to amend UK domestic legislation so that it reflects the current legal position, following the “Allonby” judgment of the Court of Justice of the European Union<sup>2</sup>. The draft Regulations would not create a new obligation, merely provide clarification, as European case law applies to pension schemes regardless of whether that case law is put into domestic legislation.
2. The draft Regulations were proposed to amend the Equality Act 2010 and the Pensions Act 2004 (in relation to payments made by the Pension Protection Fund) so that, where any inequality arose from the application of the Guaranteed Minimum Pension (GMP) legislation, the requirement to equalise pensions for men and women as set out in the Pensions Act 2004 and Equality Act 2010 would not be subject to the requirement that an opposite sex comparator exists.
3. Schemes are required to treat men and women equally in relation to their pension rights, a position that successive Governments have held from the date of the “Barber” judgement (17 May 1990)<sup>3</sup>, and those requirements were first reflected in section 62 of the Pensions Act 1995. Under the draft Regulations, only members of schemes which contracted-out on a salary-related basis between 17 May 1990 and 5 April 1997 would be affected.
4. At the same time, in response to representations from the pensions industry, the Government consulted on a possible method of equalisation for the effects of GMP legislation. The method that was published with the consultation document was a suggested method – because as occupational pension schemes have different scheme rules, not one method would suit all - and was just one way that schemes could consider equalising for the effects of GMP legislation.

## Issues arising from the consultation

5. The consultation ended on 12 April 2012. The Government received 65 responses from various sources, including pension lawyers, actuaries, scheme trustees and sponsoring employers. The Government is grateful to those who responded to the consultation. A list of respondents is at Annex A.
6. Due to the wide-ranging and technical nature of the responses, it has not been possible to provide conclusive answers to every issue raised by respondents. The issues that have not been addressed in this interim response will be included in the full Government response to the consultation at a later date. The “Next Steps” section at the end of this document proposes an alternative way to resolve the subject of equalisation.

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<sup>1</sup> <http://www.dwp.gov.uk/consultations/2012/pensions-equality.shtml>

<sup>2</sup> See cases C-171/88 Rinner-Kuhn and C-256/01 Allonby

<sup>3</sup> *Barber v Guardian Royal Exchange Assurance Group* (Case C-262/88 [1990] ICR 616)

### **The need to equalise pensions and calls for a test case**

7. Whilst the consultation did not ask for comments on either the need to equalise pensions for the effect of the GMP or the use of a notional comparator when doing so, the majority of respondents focused on these two issues.
8. Many respondents voiced strong opinions against the requirement to equalise, stating that there was no clear legal duty to do so. Twenty-eight respondents suggested that a test case, sponsored by the Government, would provide clarity for the requirement to equalise.

### **The “Allonby” judgement**

9. A number of respondents did not agree with the Department’s interpretation of the “Allonby” judgement, and some suggested that the judgement only concerned access to schemes, not the level of benefits provided by schemes.

### **The GMP as a replacement or substitute for SERPS**

10. Some commentators believed that equalisation was not necessary because the GMP was a replacement for the State Earnings Related Pension Scheme (SERPS), which itself is unequal. In addition, respondents quoted the “Birds Eye Walls” case<sup>4</sup> in support of the argument against the need to equalise pensions because any inequalities would not have to be rectified as they are intended to integrate with SERPS.

## **Government response**

### **The need to equalise pensions and calls for a test case**

11. Article 157 of the Treaty on the Functioning of the European Union provides that: “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.” The judgment in “Barber” said that occupational pensions were deferred pay and, as such, had to be equal as between men and women. The effect of the judgment was limited to accruals from 17 May 1990.
12. The Department has always taken the view that this requires a scheme to ensure the overall pension paid to a member is equal compared to a member of the opposite gender with same pension history and, where relevant, this includes equalising for the effect of the GMP rules. Occupational pension scheme members are not entitled to a GMP amount plus a scheme excess amount; they have an entitlement to a single pension amount. The GMP rules are calculation factors which need to be taken into account when reaching the overall pension. The fact that the scheme pension equals or exceeds the amount of a GMP merely acts to demonstrate that the conditions for contracting-out have been met. This

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<sup>4</sup> *Birds Eye Walls v Roberts* (Case C-132/92, [1994] ICR 338)

position is supported in case law (see “Barber”, “Marsh & McLennan”<sup>5</sup> and “Bridge”<sup>6</sup>).

13. Paragraph 20 of the consultation document explained that Government had already considered the request to sponsor a test case, and had decided that this would not be an appropriate way forward. The Government’s view has not changed since publication of the consultation document in January 2012.

### **The “Allonby” judgement**

14. The Department’s position is that the judgement in the case of “Allonby” means that, where legislation is the single source for the discrimination in question, the pool of comparators is everyone affected by the legislation. As the GMP legislation is the single source of the discrimination, the pool of comparators is everyone in the country who was a member of a contracted out scheme after 17 May 1990. It is not unreasonable to presume that there will be an opposite sex comparator in that pool.

15. As for the suggestions made about the judgement only concerning access to schemes, not the level of benefits provided by schemes, there is nothing in the judgement in the case of “Allonby” to suggest the Court of Justice of the European Union was drawing this type of distinction.

### **The GMP as a replacement or substitute for SERPS**

16. The GMP has never been a replacement or substitute for SERPS. Providing a pension scheme which offers benefits that are at least as good as the GMP rules is a condition that an employer would have had to meet before it would be allowed to pay lower National Insurance Contributions (NICs). This is borne out by:

- the NICs rebate being paid to the employer and employee (not the scheme);
- the rebate being paid whether or not the employer and / or the employee are paying contributions into the scheme;
- a GMP in payment can be higher than SERPS;
- entitlement to state benefit is based on rules in place at the time a claim is made, but entitlement to a GMP is built up over time.

17. In the case of “Birds Eye Walls”, benefits provided by an employer which were apparently discriminatory were allowed because they were designed to offset discrimination by the state. However, the Government does not think this means that discriminatory benefits provided by a scheme are acceptable where they reflect and reinforce discrimination by the state.

## **Consultation question 1: “Do you think the draft regulations achieve the intended outcome?”**

18. Six respondents agreed that the draft regulations would achieve the intended outcome, some of whom qualified their agreement, for instance, if it was just the

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<sup>5</sup> *Marsh & McLennan Companies UK Limited v Pensions Ombudsman* [2001] IRLR 505

<sup>6</sup> *Bridge Trustees Limited v Yates* [2010] ICR 921

intention to remove the requirement for a comparator when equalising GMPs. Twenty-one respondents did not agree, or believed that the regulations went further than intended, and resulted in something more than equality for members. Some respondents used the terms “gold-plating” or “equality plus”, as rather than make pension benefits equal, there seemed to be a “double uplift” to pension benefits. Nineteen organisations suggested that either the legal interpretation of the “Allonby” ruling or agreement with the requirement to equalise GMPs would determine whether the draft regulation met its intention. Nineteen respondents did not reply to this question.

## **Government response**

19. The Government is in no doubt that the draft regulations merely reflect the outcome of recent judgements in European case law, and will be laid in the future. This action has been delayed so that the Government can give further consideration to providing statutory guidance for schemes on GMP conversion. The intention is to consider including in the guidance how schemes might equalise GMPs as part of the conversion process. This could potentially offer schemes a simpler way to achieving equalisation.

## **Consultation question 2: “Do you have any comments on the proposed methodology?”**

20. Respondents commented widely on the methodology, pointing out that it did not advise how complex cases should be dealt with, for example: divorced members; deceased members; instances where the scheme had made discretionary increases above the statutory minimum in the past; and cases of employer liquidation. They also commented that it seemed an expensive and administratively complex method to use.

## **Government response**

21. Given the range of comments relating to complex cases, the Government is still considering whether any further advice might be provided for dealing with those types of situations.

## **Consultation question 3: “Would publication of the methodology be of assistance to schemes?”**

22. Thirty-eight respondents did not want the Government to publish the methodology, many because they did not believe there was a requirement to equalise, others because the methodology was too costly and complex. Another reason given against publication was that it would not allow alternative equalisation methods to emerge in future.

## **Government response**

23. The Government is not placing any obligation on schemes to use the method published with the consultation, nor does it comprise legal advice to schemes on

how to equalise. The method should not be treated as a definitive statement of how equalisation should be carried out. It simply describes one way of equalising for the effect of the GMP legislation which the Government believes meets the equalisation obligation derived from EU law, codified in the Equality Act 2010. The Government does not assert that the methodology included in the consultation the only way that equalisation can be achieved. Taking into account the strong representations in response to the consultation, the Government will not make a final publication of that methodology.

#### **Consultation question 4: “What could the Government do to assist schemes in dealing with their equalisation duties?”**

24. In response to this question, there were requests that Government change the GMP legislation, including removing anti-franking, and change the GMP to make it gender-neutral. In addition, some respondents said that trustees should be allowed to set the date at which the GMP becomes payable, and the survivor requirement in conversion cases should be abolished. There was also a request for the Government to prescribe a suitable actuarial basis for GMP conversion for schemes.
25. A number of suggestions were also put forward to assist schemes in equalising pensions. Among these were: to raise the overall value of benefits for the gender with the lower actuarial value up to the higher actuarial value of the other gender; convert GMPs into scheme benefits; use a method based on the value of member benefits requiring a one-off calculation and not a year-on-year exercise; give members the option of being treated as a man or woman at the point at which the GMP comes into payment.

#### **Government response**

26. The Government is giving further consideration to some of the suggestions put forward by respondents, and investigating the consequences of those proposals.

#### **Consultation question 5: “Could there be an adverse impact on the position of disabled people from these changes?”**

27. Fifty-two respondents made no comment on this question and twelve thought that there would not be any adverse impact. One respondent thought that there could be an impact, but this was not quantified.

#### **Consultation question 6: “Could there be an adverse impact on the position of men or women from these changes?”**

28. Forty-nine respondents made no comment, and two could not identify any adverse impacts in terms of gender. A general comment was that the

methodology seemed to have been designed to specifically avoid any adverse impact on men and women.

29. There was a mixed response as to whether men or women would benefit from the changes. But respondents did express views about the impact on schemes regarding the potential cost of equalising and how this could divert good provision for members (i.e. schemes would have to fund administration costs), so both men and women could possibly receive lower pension benefits.

## **Pension Protection Fund**

30. Separately, on 5 December 2012, the Pension Protection Fund (PPF) announced that it had completed a pilot project for its method of calculating compensation for men and women to ensure they are treated equally, as required by the Pensions Act 2004. That methodology will apply to all schemes in PPF assessment from 1st June 2013.<sup>7</sup>

## **Next Steps**

31. Following the consultation, the Government is considering the responses in detail and looking, in particular, at proposals for how the GMP conversion process might be used to equalise scheme benefits for the effect of the GMP. The Government may provide statutory guidance on GMP conversion, which would incorporate advice on GMP equalisation as part of the conversion process.
32. The Government would welcome assistance from the pensions industry on this subject and would like industry representatives to work with the Department in preparing the outline of the guidance. The Government is currently deciding the best way to progress this work.
33. A full response to the consultation will be published at a later date. The Government will delay the laying of the Occupational Pension Schemes and Pension Protection Fund (Equality) (Amendment) Regulations whilst any guidance on GMP conversion is being considered. However, the Government does intend to lay the amending regulations which were consulted on at a future date.

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<sup>7</sup>[http://www.pensionprotectionfund.org.uk/TechnicalGuidance/Pages/Guaranteed\\_Minimum\\_Pension.aspx](http://www.pensionprotectionfund.org.uk/TechnicalGuidance/Pages/Guaranteed_Minimum_Pension.aspx)



## List of Respondents

## ANNEX A

ABP (Pension Trustees)	Occupational Pension Schemes Joint Working Group
Allied Domecq Pension Fund	Osborne Clarke
Aon Hewitt	Pension Insurance Corporation Limited
Association of British Insurers	Pensions Administration Standards Association
Association of Consulting Actuaries	Pension Management Institute
Association of Pension Lawyers	Punter Southall
Atkin Trustees Limited	Railways Pension Trustee Company Limited
Aviva	Rolls Royce
Barclays Bank	Royal Bank of Scotland
Barnett Waddingham	Royal London Group
British Airways	Sacker & Partners LLP
Buck Consultants	Saul Trustee Company
Capita Hartshead	Scottish Widows
Commerzbank	Smiths Industries Pension Trustees
DHL Group Retirement Plan	Society of Pension Consultants
DLA Piper	Tesco
Engineering Employers Federation	The Hundred Group of Finance Directors
Eversheds	The Pensions Trust
First Actuarial	TI Pension Trustee Limited
Ford Motor Company	Towers Watson
Independent Pension Trustee Group	Travers Smith
Jardine Lloyd Thompson	Trustees Aviva Staff Pension Scheme
Law Debenture	Trustees Former Dock Workers Pension Fund
Law Society of Scotland	Trustees GE Capital Pension Plan
Legal & General	Trustee GE Pension Plan
Linklaters	Trustee Nationwide Pension Fund
Lloyds Banking Group	Trustee RAC (2003) Pension Scheme
Lucida PLC	Wing, C
Macfarlanes LLP	Wragge & Co
May, Roger of Royds LLP	Xafinity
Mayer Brown	
Mercers	
Metlife	
National Association of Pension Funds	
Northcliffe Trustees Limited & DMGT Pension Trustees	

