

# **The Teachers' Pensions (Miscellaneous Provisions) (Amendment) Regulations 2021**

**Government consultation response**

**July 2021**

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## Introduction

1. The Department for Education (the department) published for consultation a draft statutory instrument proposing amendments to the regulations which set out the rules for the Teachers' Pension Scheme (TPS) in England & Wales.
2. The consultation was to gather views on the proposals which covered the following areas:
  - to provide female members in an opposite-sex marriage or civil partnership with the same survivor pension rights as female members in a same-sex marriage or civil partnership; and
  - to amend participation rules relating to accepted schools to allow for the phased withdrawal of such schools that might otherwise leave the TPS outright with immediate effect.

There are other minor amendments to ensure consistency in regulations.

3. The draft regulations were subject to a public consultation which began on 7 April 2021 and ended on 1 June 2021. A document describing the proposals was published on the [www.gov.uk](http://www.gov.uk) website alongside the draft amendments, with responses invited through the consultation platform or by email or post.
4. Key stakeholders were notified of the consultation. Prior to publication of the consultation document, the proposals had been discussed with the Teachers' Pensions Scheme Advisory Board (SAB). This is a statutory board, comprising member and employer representatives, whose purpose is to provide advice to the Secretary of State for Education on the desirability of potential changes to the TPS rules.
5. The department requested comments and views on the draft regulations and whether they would achieve the stated policy aims.

## Overall summary of responses received and the government's response

6. A total of 46 responses were received through the consultation platform and by email, the majority of which were from representatives of independent schools, academy trusts and individuals. Replies were also received from organisations which represent workers in the education sector, and from employer representatives. Responses from organisations included:
  - a. The Association of School and College Leaders (ASCL);
  - b. The Independent Schools Council (ISC) / The Independent Schools' Bursars Association (ISBA);
  - c. The Local Government Association (LGA);
  - d. The National Association of Schoolmasters Union of Women Teachers (NASUWT);
  - e. The National Education Union (NEU).
7. Some respondents expressed views on topics which were outside of the scope of the consultation. This document sets out the department's response to comments received on the changes that were subject to consultation.

## Main findings from the consultation

8. All respondents who answered the question agreed that the draft regulations generally achieve the stated policy aims, although there were some suggestions regarding the drafting that the department has considered and accepted where appropriate (36 respondents).
9. All respondents who answered the question welcomed the proposed changes to regulations to provide female members in an opposite-sex marriage or civil partnership with the same survivor pension rights as female members in a same-sex marriage or civil partnership (40).
10. All of the respondents who commented on whether the draft regulations achieve the stated policy aims of phased withdrawal agreed that this was the case (34). All respondents who commented also agreed with the proposed protections for certain existing staff of an independent school, although several respondents would have liked protections to go further. Some of the member representatives reiterated that they do not support the overall policy.

## Entitlement for female members with a surviving male spouse or civil partner

11. The consultation covered proposed amendments to regulations to provide survivor benefits in respect of female members in an opposite-sex marriage or civil partnership that are equal to those payable in respect of female members in a same-sex marriage or civil partnership.

## Background and consultation proposal

12. As a result of the Supreme Court judgment in the case of Walker v. Innospec Ltd [2017] UKSC 47, which had implications for all public service pension schemes, survivor benefits under the TPS were equalised for same-sex couples, whether married or in a civil partnership. This meant that the same-sex survivor of a TPS member has the same rights as a widow of a male scheme member. This was achieved by amending the Teachers' Pensions Regulations 2010 (the 2010 regulations) on 1 September 2019.
13. Amendments were made retrospectively, effectively to 5 December 2005 as this is the date from which a same-sex civil partnership could have been formed or recognised in the UK under the Civil Partnership Act 2004, and therefore the date from which there could have been eligibility for TPS survivor benefits to be paid to a same-sex partner.
14. Following the September 2019 amendments, a claim was brought to the Employment Tribunal by Mrs Goodwin ([Case Number 1308505/2019](#)) under section 61 of the Equality Act 2010 (requiring occupational pension schemes to have a non-discrimination rule read into them) alleging that the 2010 regulations directly discriminate on the grounds of sexual orientation. This was because as a female member of the scheme, the benefits payable to a surviving opposite-sex spouse would be lower than would be the case if she were in a same-sex marriage or civil partnership. After consideration of the issues the department accepted that the rules are discriminatory in this regard and breach the non-discrimination rule. A declaration by consent was made by the Employment Tribunal to that effect.
15. When agreeing the declaration in the Goodwin case, the department stated that it was intended to make amendments to the 2010 regulations to address the discrimination admitted in the claim. The amendments to TPS rules that were consulted on are to provide equal survivors' benefits to the opposite-sex spouse or civil partner of a

female member as would be paid to a same-sex spouse or civil partner of a female member.

16. Regulations have therefore been drafted so that benefits payable to an eligible survivor will be based on pensionable service accrued by the member from 1 April 1972 where the marriage or civil partnership took place before the member left pensionable service, or from 5 April 1978 where it took place after the member left pensionable service. Under current rules, a survivor's pension for the opposite-sex spouse or civil partner of a female member would be based on pensionable service from 6 April 1988.
17. The proposed changes would apply retrospectively to cases where a female member, with an eligible opposite-sex spouse or civil partner, has died since 5 December 2005 which is the date from which there could have been a difference in treatment on the grounds identified.

## Consultation findings

18. The changes to provide a surviving male spouse or civil partner of a female member with the same pension benefits that would be provided to a female spouse or civil partner of a female member were welcomed by all of the respondents who commented.
19. Two respondents expressed disappointment that the changes were limited to cases where the female member died after 5 December 2005.
20. The LGA requested clarification about the effect of the survivor benefit changes on those female members who were awarded premature retirement compensation by their employer and whether guidance will be issued for employers which may be affected.

## Government response

21. The department welcomes the support received for the changes to regulations that were proposed and will proceed with the amendments.
22. The discrimination that was identified in the Goodwin claim was discrimination on the grounds of sexual orientation. As same-sex civil partnerships were introduced from 5 December 2005, this is the date from which the discrimination could have occurred and is therefore the appropriate eligibility date to use for this change. As a result, survivor

benefits will be equalised for all members of the scheme who are in a marriage or civil partnership, whether active or retired.

23. The scheme administrator has taken steps to identify from TPS records the members and survivors who are affected by this change, and will be updating information on the [Teachers' Pensions website](#) regarding likely timescales for necessary remedial work to take place. The scheme administrator will soon begin contacting those who have been identified.
24. The department recognises that there may be a small number of cases where female members were awarded discretionary premature retirement compensation by their employer. Where entitlement to a survivors' pension has been created in respect of such a person following the Goodwin case where there was previously no entitlement (because there was previously not sufficient qualifying service for survivor benefits), there may also be an entitlement to a proportion of the discretionary compensation, which is payable by the employer to survivors in cases where the member has died whilst in receipt of such compensation.
25. The department will liaise with the LGA over the approach to notifying all employers where this scenario is identified by the scheme administrator.

## Phased withdrawal of independent schools

26. The consultation also covered whether amendments to regulations regarding participation rules for independent schools met the objectives specified in the Teachers' Pension Scheme: independent schools phased withdrawal consultation.

## Background and consultation proposal

27. In November 2020 the department published its response to the [phased withdrawal consultation](#). The consultation concerned a proposal to amend TPS rules so that independent schools in England and Wales, which are accepted schools, could opt out of TPS participation for future employees whilst allowing existing staff to remain as active members. Unlike other scheme employers, independent schools participate in the TPS voluntarily and are therefore free to leave but, currently, if they do leave then all members employed by them cease participation immediately.
28. The consultation response confirmed that phased withdrawal would be introduced. However, throughout the development of the proposal and taking account of views given during the consultation, a number of protections were included in the draft regulations to address potential equalities issues that were identified. This includes:
- A teacher who opted out of the TPS would be eligible to be re-enrolled where that election to opt-out took effect prior to the date that the school became a phased withdrawal school;
  - A teacher who is a deferred member immediately prior to the phased withdrawal date due to a period of non-pensionable family leave, non-pensionable sick leave or unpaid leave, none of which lasted more than 5 years, would be eligible to be re-enrolled immediately upon their return to the same employer;
  - A teacher who leaves pensionable service after their school is accepted for phased withdrawal, due to family leave or sick leave which lasted no more than 5 years, would be eligible to be re-enrolled upon their return to the same employer.
29. The draft regulations also covered a new type of guarantee from an independent school that elects for phased withdrawal, to distinguish from the guarantee required from accepted schools.



## Consultation findings

30. Responses to this section agreed that the draft regulations achieve the stated policy aims and the majority of respondents expressed overall support for the proposal.
31. All respondents were supportive of the protections that are included for existing teachers at an independent school that elects for phased withdrawal.
32. The joint ISC/ISBA response stated that the increase to the TPS employer contribution rate from September 2019 put many independent schools under financial pressure. They understand that in addition to those independent schools that have already left the TPS outright, a further 120+ are considering their position in the scheme, pending the outcome of the phased withdrawal proposal. They reiterated their belief that the proposal will help to retain access to the TPS for more teachers than if phased withdrawal was not introduced.
33. Six respondents, including some of the member representative organisations restated their objections to the phased withdrawal policy.
34. The other responses were as follows:
  - There was a query relating to the guarantee requirements of independent schools and the terminology used in the 2010 and 2014 regulations.
  - One respondent stated that independent schools should be kept in the scheme due to concerns over the potential impact on teachers moving between sectors.
  - The impact of opting out of the TPS at a phased withdrawal school will need to be carefully communicated and there needs to be clarity for members who lose access to the scheme about what happens to their accrued TPS benefits.

## Government response

35. Whilst the extension of protections for existing teachers at a school that opts for phased withdrawal were welcomed, the department acknowledges that not all respondents support the phased withdrawal policy. Throughout the development of the policy, careful consideration has been given to the potential equalities impacts and where possible mitigations have been included.

36. The proposal was amended to extend the period in which a current employee of a phased withdrawal school can return to active membership from a period of family leave or sick leave to up to five years based on member representatives' suggestions. The department believes that this is a reasonable timescale and is consistent with the period allowed for other breaks in service in TPS rules.
37. Whilst some of the potential impacts outlined may not be eliminated, particularly in respect of teachers taking up a new employment, the department considers that phased withdrawal is justifiable on the basis that it is intended to reduce the number of independent schools leaving the TPS entirely. As independent schools participate in the TPS voluntarily, the alternative course for an employer that does not want to fully participate in future may be to leave outright. The effect on a new employee would be exactly the same - they would not have access to the TPS and therefore would be in no different a position than if phased withdrawal was not introduced. Nearly 60% of independent schools do not participate in the TPS at this time.
38. The department notes the concerns of several respondents regarding employers inducing opt-outs of the current workforce and changing conditions through the dismissal and re-engagement of staff on different terms. The objective of the phased withdrawal policy is to retain current staff in the TPS who would otherwise lose access. Any examples identified that involve inducements to opt-out that contravene pension autoenrollment rules should be reported to the Pensions Regulator.
39. The ISC/ISBA consultation response recognises that the TPS is an excellent defined benefit scheme for teachers. The department believes that access to the TPS is a key consideration for many teachers deciding where to work and independent schools will need to be mindful of the overall remuneration offered to staff in order to recruit and retain high-quality teachers. We expect that independent schools will seek to retain TPS membership for as many of their teachers as possible.
40. Independent schools joining the TPS need to provide a guarantee in respect of member and employer contributions, although those independent schools already in the scheme at the time that those requirements were introduced did not have to do so retrospectively. A guarantee ends when an accepted (fully participating) school ceases to be an accepted school. To avoid confusion regarding the status of the guarantee for an accepted school, this will become known as a Type A

guarantee in the regulations. A separate guarantee, Type B, has been created and will apply to an accepted phased withdrawal school. The same guarantee arrangements that applied to an independent school when it was an accepted school will apply if it becomes a phased withdrawal school.

41. The department agrees with the comments that the impact of opting out of the TPS by a phased withdrawal teacher will need to be carefully communicated. The scheme administrator is working on guidance for employers and teachers at a school that is considering phased withdrawal, setting out employer obligations and how members may be affected. Teachers with prior service in the TPS who lose access at a phased withdrawal school will become deferred members. They retain all of their accrued benefits up to the point of becoming deferred - further information is available on the [Teachers' Pensions website](#). A deferred member will be eligible to re-join the TPS if they take up eligible employment with another participating employer, or if their phased withdrawal school reverts to full participation in the TPS.
42. The department will proceed with the amendments as outlined in the consultation, subject to minor drafting changes to regulations 6, 7 and 18 that ensure terminology is consistent with the existing regulations.

## Miscellaneous minor amendments

43. There were other minor amendments as follows:

- Clarification of the longstanding policy approach as to what counts as pensionable service when contributions are outstanding;
- Correction of a reference in the 2010 regulations to a death grant nominee that should refer to the beneficiary;
- Clarification in the 2014 regulations that transitional protection should include mixed-service members who have taken some, but not all, of their Final Salary benefits after 1 April 2012.

## Consultation findings

44. Most respondents who commented on this section agreed with the proposed changes.

45. One of the responses suggested some minor amendments to the wording of the regulations.

## Government response

46. The department has considered the comments regarding the draft regulations and has made some alterations to regulations 11, 16 and 17 as a result.

47. The amendments are minor changes to ensure consistency with existing terminology and do not affect the policy as described in the consultation document.

## Public Sector Equality Duty

48. The April 2021 consultation document explained the legal obligation on the department to consider how its policy decisions impact differently on different people. When making decisions about policies, the department must have due regard to the need to eliminate discrimination and to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
49. The document set out the department's ongoing assessment of the equality impacts of the proposed amendments to the TPS regulations and respondents were asked to highlight any other issues that were identified.
50. The department considers that equality between members will be enhanced as a result of equalising entitlement for survivor benefits in respect of a female member in an opposite-sex marriage or civil partnership with a female in a same-sex marriage or civil partnership.
51. Some respondents have expressed equality impact concerns relating to the phased withdrawal of independent schools. The concerns are addressed in paragraphs 35-38 above and the department believes that in addition to the protections and mitigations that are included in the policy, the approach to some independent schools leaving the TPS is justifiable. This is because as independent schools are already able to leave outright, the effect on those teachers who would no longer be able to benefit from TPS membership due to that school adopting phased withdrawal would be no different.
52. Those teachers who would not be eligible for the TPS due to an accepted school opting to become a phased withdrawal school would be eligible in any new employment with a different participating employer.
53. Other changes are minor and are not thought to adversely affect any group.

## Government's Overall Response

54. The department appreciates the work that respondents have put into considering and commenting on the issues involved. The department has looked closely at all of the comments raised and considers that the draft regulations should now form the basis of the final regulations, subject to some minor amendments to the drafting which does not affect any of the policies described in the consultation.

## Next Steps

55. The draft regulations will now form the basis of the final regulations. The aim is to complete work on these and make and lay before Parliament in July 2021. The amendments will come into force on 1 August 2021.
56. The phased withdrawal policy and implications will be communicated to independent school employers and members who may be affected.
57. Information for those members and survivors who are affected by the Goodwin case will be updated as progress with the rectification work continues.



Department  
for Education

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