

# Teachers' Pension Scheme—changes affecting survivors' benefits and phased withdrawal of independent schools now in force

**Pensions analysis:** On 8 July 2021, the Department for Education (DfE) published its response to its consultation on draft amendments to the Teachers' Pension Scheme (TPS) regulations. The draft amendments were in respect of two areas, at a high level (1) a change to equalise survivor benefits between same sex couples, following the decision of the Employment Tribunal in *Goodwin v Secretary of State for Education*, Case Number 1308505/2019, and (2) a change to participation rules for independent schools to allow phased withdrawal, announced in November 2020. The consultation ran from 7 April 2021 to 1 June 2021 and the DfE decided to adopt the amendments as drafted with minor tweaks to ensure consistency in the regulations. Respondents (independent schools, academy trusts and individuals, employer representatives) on the whole, supported the changes. The Teachers' Pensions (Miscellaneous Provisions) (Amendment) Regulations, SI 2021/805 (New Regulations) came into force on 1 August 2021 and remain law. Gillian McCue, a legal director at Blake Morgan LLP, considers the changes and the implications for the TPS, its employers and scheme members.

This analysis was first published on Lexis®PSL on 16 November 2021 and can be found [here](#) (subscription required).

## What was the background to the consultation?

The consultation was to gather views on the following two proposals:

- 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
- to amend participation rules relating to accepted (ie independent) schools to allow for the phased withdrawal of such schools that might otherwise leave the TPS outright with immediate effect

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.

## Survivor rights

- 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 (TPS regs 2010), [SI 2010/990](#) on 1 September 2019
- amendments were made retrospectively, 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
- following the September 2019 amendments, a claim was brought in the Employment Tribunal by Mrs Goodwin (*Goodwin v Secretary of State for Education*, [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 TPS regs 2010, [SI 2010/990](#) 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 (ie a male) 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

- when agreeing the declaration in the *Goodwin* case, the department stated that it was intended to make amendments to the TPS regs 2010, [SI 2010/990](#) to address the discrimination admitted in the claim
- legislation was therefore drafted so that benefits payable to an eligible survivor would 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 previous 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
- the changes 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

#### **Phased withdrawal of independent schools**

- the increase to the TPS employer contribution rate from 16.4 per cent to 23.6 per cent (ie 43% rise) from September 2019 put many independent schools under financial pressure. In addition to those independent schools that have already left the TPS outright (about 60% do not participate in the TPS), a further 120+ are said to be considering their position in the scheme
- the objective of the phased withdrawal policy is to retain current staff in the TPS who would otherwise lose access, because the school will withdraw completely
- in other words, the proposal to amend the TPS rules was so that independent schools in England and Wales, which are accepted schools, could opt out of TPS participation for future employees while 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, prior to the amending legislation, if they did leave then all members employed by them would cease participation immediately
- the New 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
- 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. 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
- protections included in the New Regulations:
  - a teacher who opted out of the TPS would be eligible to be re-enrolled in TPS 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 five 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 five years, would be eligible to be re-enrolled upon their return to the same employer

## **What was the outcome to the consultation?**

### **Survivor rights**

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

### **Phased withdrawal of independent schools**

Independent schools in England and Wales, which are accepted schools, can opt out of TPS participation for future employees while allowing existing staff to remain as active members.

## **What are the next steps?**

The resulting amendments came into force on 1 August 2021 and remain law.

### **Survivor rights**

- there needs to be a rectification exercise. 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

### **Phased withdrawal of independent schools**

- the phased withdrawal policy and implications will be communicated to independent school employers and members who may be affected
- the TPS scheme administrator is working on guidance for employers and teachers at those schools that are considering phased withdrawal, setting out employer obligations and how members may be affected

## **What are the implications?**

### **Survivor rights**

- the Local Government Association (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. DfE will liaise with the LGA over the approach to notifying all employers where this scenario is identified by the scheme administrator
- the DfE 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 while in receipt of such compensation

## Phased withdrawal of independent schools

- potential impact on teachers moving between sectors. Schools and teachers need to think about the overall package on offer
- 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
- concerns around employers inducing opt-outs of the current workforce and changing conditions through the dismissal and re-engagement of staff on different terms
- 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 be known as a Type A guarantee in the New 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
- independent schools in the TPS account for nearly 10% of TPS active members. Should these schools decide to leave the TPS under a phased withdrawal—and unlike with the Local Government Pension Scheme (LGPS) there is no exit debt to pay, this will place additional financial liability on the remaining employers in the TPS which are mostly local authorities. This could impact on long term viability of the TPS
- how will the *McCloud v Ministry of Justice* [\[2018\] EWCA Civ 2844](#) judgment, which will create additional liabilities, be dealt with? Will phased withdrawal employers be liable as well?
- schools leaving the TPS are also likely to want to leave the LGPS (the scheme for their support staff) and in that scheme there likely will be an exit debt to pay thereby raising further affordability issues for schools
- finally, you might be wondering how the changes impact academies. Although academies, in line with independent schools, can set their own pay and conditions currently they are under a statutory obligation to join their teaching staff into the TPS (and support staff into the LGPS). Therefore, they cannot make use of phased withdrawal as the regime stands currently

*Interviewed by Banita Kalia*

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