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Recipients of Pensions on Death

The Government recently announced it will legislate to extend the right to enter into civil partnerships to opposite sex couples.

This follows on from the Supreme Court judgment in June, which ruled the Government's failure to either abolish civil partnerships (on the coming into force of the Marriage (Same Sex Couples) Act 2013) or extend it to opposite sex couples, was incompatible with the European Convention on Human Rights.

In the light of recent court cases and the consequent publicity given to this matter, trustees of occupational pension schemes should ensure they are familiar with the provisions in their scheme rules regarding marriage and civil partnerships, as well as more generally, what the conditions are for potential recipients who are in committed relationships but not married or in a civil partnership.

In this issue: [Background](#) | [The Opposite Sex Couple Challenge](#) | [The Direction of Travel](#) | [Impact on Occupational Pension Schemes](#) | [Actions for Trustees](#)

Background

Historically the law in the UK did not recognise relationships between couples of the same sex. This changed in 2004 with the introduction of the Civil Partnership Act 2004. "Marriage" was still not permitted, but same sex couples were permitted to enter into a civil partnership which legally and financially was similar to marriage.

Nearly ten years later, the Marriage (Same Sex Couples) Act 2013 (the 2013 Act) allowed couples of the same sex to marry. With the introduction of the 2013 Act, Parliament took a conscious decision not to abolish same sex civil partnerships, or extend the right to enter into civil partnerships to opposite sex couples. Thus, opposite sex couples could marry, but same sex couples could marry *or* enter into a civil partnership. This inconsistent treatment of different forms of relationship inevitably led to a legal challenge by an opposite sex couple.

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The Opposite Sex Couple Challenge

In *R v Secretary of State for International Development, Rebecca Steinfeld and Charles Keidan* successfully challenged the Government's failure to extend civil partnerships to opposite sex couples. They were in a committed long-term relationship which they wished to formalise but had a genuine ideological objection to marriage. They considered a civil partnership would reflect their values and recognise the equal nature of their partnership.

The Supreme Court accepted that not being able to enter into a civil partnership breached Article 8 (the right to respect for private life) of the European Convention on Human Rights. The Court also rejected the Government's claim that it needed time to make a final decision on the future of civil partnerships once social attitudes to them became clearer following same sex marriages taking root. Tolerance of discrimination while the Government determined how best to remedy it cannot be treated as a legitimate aim. Accordingly, the Court held that the Government, on introducing the 2013 Act, should either have abolished civil partnerships or extended them to opposite sex partners.

The Direction of Travel

Two other Supreme Court cases in 2017 dealt specifically with the recipients of pensions on the death of members of pension schemes.

Equal pension rights for same-sex couples

In July 2017, in the case of *Walker v Innospec*, the Supreme Court held the Equality Act 2010 was directly discriminatory and breached the European Union's 2000 Framework Directive. The Equality Act 2010 provided a statutory exception to the non-discrimination rule implied into occupational pension schemes. The exception was set up to prevent or restrict access to benefits to a same sex spouse where the right to the benefit accrued before 5 December 2005.

The Court said Mr Walker, during his working life, had paid precisely the same into the pension scheme as a heterosexual man would have paid and been paid the same salary as a heterosexual man. There was no reason for the company to anticipate that it would not become liable to pay a survivor's pension to his lawful spouse. The fact the spouse was male rather than female made no difference.

Conditions for paying pensions to cohabitants

Earlier in 2017, the Supreme Court ruled in favour of Denise Brewster who was denied a survivor's pension under her late partner's public sector pension scheme, because he had failed to nominate her as his cohabiting partner – a condition under the scheme rules. If they had been married, or in a civil partnership, such a nomination would not have been necessary. Unfortunately, although they had become engaged just two days before he died and had been living together for 10 years, they were not married when he died.

Impact on Occupational Pension Schemes

Many pension schemes provide for a spouse's pension as a right (including same sex marriages and civil partners – on the same basis as opposite sex marriages following the Walker case). Where pensions are provided for other surviving dependants this is usually on a discretionary basis, with trustees determining whether an adult partner meets the financial (inter/mutual) dependency provisions under the Finance Act 2004.

Trustees could be asked by a member during his/her lifetime to consider his/her partner for any dependants' pension that's not provided as a right under the scheme rules, but it would not be binding on the trustees. They would still exercise any discretionary power they have under their fiduciary duties. It is unusual for members to have to complete a nomination form as one of the conditions for payment, but there may be some schemes with this requirement.

The aforementioned legal cases (and the Government's announcement at the Conservative party conference about heterosexual civil partnerships) have attracted a lot of media attention with many national newspapers reporting on the stories. Trustees may have already received questions from members with partners (i.e. not a legal spouse or civil partner); particularly if they had never appreciated that their partner may not receive a pension as of right. Partners of deceased members are also more likely to make claims against occupational pension schemes where no death or survivors benefits are paid to them.

Actions for Trustees

If they haven't already done so, trustees should consider taking the following actions in the light of these cases:

- Check the provisions of the pension scheme rules for same sex marriages and civil partnerships following the outcome in the Walker case (taking legal advice as appropriate).
- Examine the terms and conditions for any other survivors' pensions in the pension scheme rules.
- Remember that different provisions may apply depending on when a member left pensionable service.
- Check with the Scheme Actuary in respect of any funding implications if the provisions were extended to include partners / cohabitants (where they do not currently include them).
- Check that member literature is consistent and clear, including standard communications when illustrating or settling benefits, booklets and newsletters.
- Consider how to respond to member questions about pensions for their partners / cohabitants, either general or specific.
- Finally, check trustee discretionary powers for lump sums too – do not assume that all lump sums are payable under the discretionary trust provisions. In some instances the lump sum may go directly to the member's legal personal representatives.

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