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Recipients of Pensions on Death

From 2 December 2019, the right to enter into civil partnerships will be extended to opposite-sex couples in England and Wales, with the first ceremonies taking place on 31 December 2019.

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This follows on from the Supreme Court judgment in June 2018, 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.

Three other court cases since 2017 have specifically dealt with the provision of pension on the death of a pension scheme member.

In the light of these 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.

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Background

Historically the law in the UK did not recognise relationships between couples of the same sex. This changed from 5 December 2005 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 from 13 March 2014. 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.

The opposite-sex couple challenge

In *R v Secretary of State for International Development* in June 2018, 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 legislation for opposite-sex civil partnerships in England and Wales is made by new regulations (The Civil Partnership (Opposite-sex Couples) Regulations 2019), which amend other legislation, including the Civil Partnership Act 2004. For Scotland, legislation will provide for what they are calling 'mixed-sex' or 'different sex' civil partnerships.

Other legal cases affecting pensions on death

Two other Supreme Court cases in 2017, and a Court of Appeal judgement in July 2019 dealt specifically with the recipients of pensions on the death of members of pension schemes. The two latter cases relate to public sector schemes and do not directly affect private sector 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 his employer 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 February 2017 in the case of *re Brewster*, 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.

In July 2019 in the case of *Langford v The Secretary of State for Defence*, the Court of Appeal ruled that it was unlawful to prevent the surviving partner of a deceased member of the Armed Forces

Services Pension Scheme from receiving a pension because she remained married to another person. Like the Brewster case, the scheme rules had conditions relating to the payment of the pension to cohabiting partners. Mrs Langford had lived together with Air Commodore Green, a member of the pension scheme, for 15 years before his death. During that time, she had remained married to her husband although they had been estranged for 17 years. Mrs Langford and Air Commodore Green had announced that they would marry once she had secured a divorce, but he died in 2011 before she had divorced her husband.

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.

At least two of the aforementioned legal cases (together with the change in the law for opposite-sex civil partnerships) have attracted 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. Legal advice is recommended to ensure trustees are able to comply with the law which may be overriding. Changes may need to be made to the trust deed and rules and may be required to benefits that have already been paid.

Area to be considered	Comments
Trust deed and rules	<p>Check the provisions of the pension scheme rules for references to ‘marriage’ and ‘civil partnership’. Civil partners (whether same sex or opposite sex) and married couples (whether same sex or opposite sex) should be entitled to the same benefits. This means that the pension on death should be calculated by reference to the member’s full period of pensionable service.</p> <p>There are distinctions that could apply. For instance, in respect of guaranteed minimum pensions (GMPs), where a same-sex spouse and a civil partner are only entitled to the widower’s GMP (i.e. for post-1988</p>

Area to be considered	Comments
	<p>contracted-out service) on the same basis as for a male spouse of a female member.</p> <p>Some pension schemes may restrict death benefits where the date of the marriage or civil partnership was after the member left pensionable service or retired. Any restrictions cannot be discriminatory on the grounds of the gender of either the member or the recipient of the survivor's pension.</p> <p>Examine the terms and conditions for any other survivors' pensions in the pension scheme rules. Ensure it is clear when and how a pension may be payable to a survivor who is not a spouse or civil partner. Would this only occur where there is not a spouse or civil partner, or where the member is not living with their spouse or civil partner? Is it a member's right or a trustees' discretion?</p> <p>Where there are earlier versions of the trust deed and rules it may be possible that different provisions apply depending on when a member ceased to be in pensionable service. Check that this is understood by the administrators and remember to be aware of this when drafting member literature.</p>
Funding	<p>Usually actuarial assumptions provide that a percentage of members will be married and do not distinguish between same-sex and opposite-sex marriages.</p> <p>Check with the Scheme Actuary to see if there are any funding implications as a result of the extension of civil partnerships to opposite-sex partners.</p> <p>If it hasn't been considered already, confirm with the Scheme Actuary any changes following the inclusion of post December 2005 service for same-sex spouses and civil partners.</p> <p>Also consider whether there are any additional costs if the provisions were extended to include partners / cohabitants (where they do not currently include them).</p>
Member literature	<p>Check that member literature is consistent and clear, including standard communications when illustrating or settling benefits, booklets and newsletters.</p> <p>Consider whether to write to all members to clarify the rules on pensions for survivors and what benefits are paid at the discretion of the trustees.</p> <p>Consider how to respond to member questions about pensions for their partners / cohabitants, either general or specific.</p>

Area to be considered	Comments
Lump sum death benefits	<p>Usually lump sums on death are provided under the discretionary trust provisions. The pension scheme's trust deed and rules will contain details of the categories of potential beneficiaries that the trustees will consider before paying the benefit.</p> <p>However, in some instances the provisions may provide for a lump sum to be paid to the member's legal personal representatives.</p>

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