

The Local Government Pension Scheme (Miscellaneous Amendment) Regulations 2019

Draft regulation proposed	LGA comment
<p>1.—(1) These Regulations may be cited as the Local Government Pension Scheme (Miscellaneous Amendment) Regulations 2019.</p> <p>(2) These Regulations come into force on [date], save for regulations 4(b) and 5 which have effect as follows—</p> <ul style="list-style-type: none"> (i) 5th December 2005 in respect of a surviving civil partner of a member; and (ii) 17th July 2013 in respect of a surviving spouse of a same sex marriage with a member. <p>(3) These Regulations extend to England and Wales.</p>	<p>The Marriage (Same Sex Couples) Act 2013 [SI2013/30] received royal assent on 17 July 2013. Section 1, which makes same sex marriage legal, did not come into force until 13 March 2014 by virtue of the Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014 [SI 2014/93]).</p> <p>The Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 [SI 2014/560] was made in accordance with section 18(2) of the Marriage (Same Sex Couples) Act 2013. Paragraph 17 of part 2 of schedule 3 of those regulations inserted regulation 42B (marriage of a same sex couple) into the LGPS 1997 regulations effective from 13 March 2014.</p> <p>Therefore, we believe the date in draft regulation 1(2) (ii) should be changed to 13 March 2014.</p> <p>Section 9 of the Marriage (Same Sex Couples) Act 2013 provides that the parties to a civil partnership are able to convert their civil partnership into a marriage. The Marriage (Same Sex Couples) Act 2013 (Commencement No. 4) Order 2014 [SI 2014/3169] made section 9(6) of the 2013 effective from 10 December 2014. The Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 [SI 2014/3181] sets out the process for conversion from civil partnership to same sex marriage, effective from 10 December 2014. Once converted, the date from which the marriage is to be treated as having subsisted is the date the civil partnership was formed, in accordance with section 9(6) of the 2013 Act. Do the draft regulations need to specify that where a civil partnership is converted to a marriage the date that regulations 4(b) and 5 have effect for same sex spouses will be the date the marriage is treated as having subsisted in accordance with section 9(6) of the 2013 Act?</p>

	<p>In addition, the policy consultation confirms that the amendment to regulation 3 of the Transitional 2014 Regulations which gives effect to the change in regulation D11 of the LGPS 1995 Regulations will be backdated to 14 May 2018 to allow anyone who has been prevented from getting early access to their pension because of the oversight in the 2018 Amendment Regulations [SI 2018/493] to be able to backdate their application to 14 May 2018. However, this is not delivered by these draft regulations.</p>
<p>4. In regulation 3 (membership before 1st April 2014)—</p> <p>(a) for paragraph (5A)(a) substitute—</p> <p>“(a) regulation 11 of Part D of the 1995 Regulations (entitlement to deferred retirement benefits) has effect as follows—</p> <p>(i) in paragraphs (2)(d) and (4) with the substitution of the references to age 60 with references to age 55;</p> <p>(ii) with the substitution of the reference to employing authority with references to administering authority in each place where it occurs; and</p> <p>(iii) in paragraph (3) with the omission of the words “within the period of three months beginning with the relevant date”.”;</p>	<p>There are two references to ‘employing authority’ within regulation D11 of the LGPS Regulations 1995. The first is a decision making event (D11 (2) (c)), the second, the party to whom the member makes an election for voluntary early payment (D11 (3)). Whilst we agree that an election for voluntary early payment should be made by the member to the administering authority (D11 (3)), we do not agree that this change should also apply to the decision making powers in D (11) (2) (c). The effect of draft regulation 4(a)(ii) is to provide that the administering authority will make the decision with regards to the early payment of deferred benefits on compassionate grounds (from age 50 and prior to NRD – NRD calculated in accordance with regulation C3 of the LGPS Regulations 1995) under regulation D11(2)(c). In most cases, there will be a strain cost to the employer of a retirement on compassionate grounds (any early payment reduction that would otherwise apply is waived where the retirement is on compassionate grounds) and the decision should, therefore, remain with the employer. Changing the decision maker to the administering authority would lead to a perverse outcome and be inconsistent with successor regulations (where the decision only rests with the administering authority if the former employer has ceased to be a Scheme employer).</p> <p>We suggest that:</p> <ul style="list-style-type: none"> ○ draft regulation 4(a)(ii) is amended to apply to regulation D11(3) only.

- in order to be consistent with paragraph 1(5) of Schedule 2 of the Transitional 2014 Regulations, which applies to benefits paid on compassionate grounds under the 1997 and 2008 schemes, we suggest that regulation D11(2)(c) is amended to include that where a member's former employer has ceased to be a Scheme employer, the appropriate administering authority should make the decision for payment on compassionate grounds.

We understand that the policy intent is for a member who left active membership prior to 1 April 1998, to be able to elect for voluntary early payment of their pension benefits from age 55 and prior to NRD (NRD is defined within regulation C3 of the LGPS Regulations 1995). As currently worded draft regulation 4(a)(iii) removes the requirement that the member must elect for voluntary early payment within 3 months of the relevant date, but does not achieve the policy intent as it still defines the 'relevant date' (defined in regulation D11(4)) as age 55 or the date of his ceasing to be employed in local government employment, if later. We suggest that a further amendment is included so that regulation D11(4)(a) of the 1997 regulations reads:

- (a) a date on **or after** which he attains the age of 55, or*
- (b) if later, the date of his ceasing to be employed in local government employment.*

We would also suggest that regulation D11(4)(b) be deleted. The requirement to have ceased all local government employment for voluntary early payment of benefits was removed from the scheme with effect from 1 April 1998. In our view, it is inconsistent for payment of deferred benefits before this date to have different qualifying conditions, to those paid under later regulations. It is also not in-line with the Government's policy on pension freedoms.

Draft regulation 4(a)(iii)

We also suggest that draft regulation 4(a)(iii) is amended to exclude the

	word “given” before within (this maybe just a typo within the draft regulations?).
<p>4. (b)after paragraph (5A)(b) insert—</p> <p>“(ba) regulation 42 of the 1997 Regulations (reduction of some surviving spouses’ pensions) has effect with the substitution of the references to—</p> <ul style="list-style-type: none"> i. widower with references to widow or widower; and ii. she with references to the member;”. 	<p>We suggest that draft regulation 4(b) is amended to change regulation 42(3) and (4) only rather than the whole of regulation 42, this is because by changing all references in regulation 42 from widower to ‘widow and widower’, regulation 42(2) will read as below:</p> <p><i>42.-(1) Where a male pensioner member or deferred member marries and dies, the pension to which his widow is entitled under regulation 40 or 41 is calculated as if his retirement pension were only so much of his actual pension as is attributable to the period of his membership in contracted-out employment after 5th April 1978.</i></p> <p><i>(2) Except in the case of a short term pension payable to the widow or widower of an active member, the pension to which a widow or widower is entitled under regulation 40 or 41 is calculated as if the member's retirement pension were only so much of her actual pension as is attributable to her membership after 5th April 1988.</i></p> <p>This has the effect of restricting membership used in the calculation of a widow’s pension to membership after 5 April 1988 which is contradictory to that in 42(1) and is not in line with the stated policy intent (this maybe just an oversight within the draft regulations?).</p> <p>Regulations 42(4)(a) of the 1997 Regulations</p> <p>Regulations 42(4)(a) of the 1997 Regulations also needs to be amended to incorporate widow’s ill health enhancement and we suggest that it should read:</p> <p><i>42(4)(a) forming the enhanced element of a member’s total period of membership by virtue of a retirement to which regulation applied after 5th April 1988 in respect of widowers and 5th April 1978 in respect of widows</i></p>

5.—(1) In regulation 17 (survivor benefits)—

(a) after paragraph (9)(b) insert—

“(c) Any calculation of the survivor pension payable under the Earlier Regulations to a person who is the surviving civil partner of a member or who is the surviving spouse of a same sex marriage with a member is to be on the basis that the survivor is a widow, irrespective of the sex of the member.”;

(b) omit paragraphs (11)(a) and (c);

(c) in paragraph (11)(b), for “survivor” substitute “male survivor”; and

(d) in paragraph (13), after “counted as membership for the purpose of” insert “regulation F6 of the 1995 Regulations or”.

How the changes are being made

We understand the Transitional 2014 Regulations [SI 2014/525] can be used to effect change in the earlier regulations in respect of events that occur from the date the Transitional 2014 Regulations became effective i.e. 1 April 2014 onwards. However, we are unclear how the Transitional 2014 Regulations can be used to effect change in the earlier regulations in relation to events that have occurred before 1 April 2014 (e.g. the benefits that were paid as a result of a death that occurred in 2010 have never been subject to the Transitional 2014 Regulations). We would be grateful for clarification of how the changes apply in these circumstances?

Our analysis of the regulations from this point onwards assumes that the draft regulations can effect change in relation to events that occurred before 1 April 2014.

Potential worsening for civil partners and same sex spouses

The regulations as drafted will lead to the potential worsening for some civil partners/same sex spouses and could potentially put some civil partners/same sex-spouses in a better position than widows (for deaths that occurred before 1 April 2014).

Because of the complexities of survivor pensions we have demonstrated all the scenarios when we think these incidents will occur in appendix 1 but have provided some background information and examples in the text below:

The incidents relate to civil partners and same sex spouses who currently receive survivor pensions based on membership after 5/4/1988 plus relevant additional membership (RAM) as defined in regulation 42(4) of the 1997 regulations or regulation F8(3) of the 1995 Regulations. Under the proposals they would be treated as widows so this additional membership would only count where they were married or in a civil partnership with the deceased at some time whilst they were an active member after 31/3/1972 (whereas currently this additional membership

	<p>is included automatically in the calculation of pre and post leaving survivor benefits under the 1995 and 1997 Regulations for civil partners and same sex spouses).</p> <p>A policy decision was made in 2005 to make relevant additional membership (RAM) under the 1997 regulations and additional membership under F8(3) of the 1995 Regulations, unconditional for civil partners (i.e. it is counted in the calculation of all pre and post leaving survivor pensions under these regulations) because civil partners had not had the opportunity to enter into a civil partnership before leaving. This also applies to the survivor of a same sex marriage by virtue of 42B of the 1997 Regulations. This applies to the 1995 and 1997 regulations and would for post leaving civil partnerships/same sex marriages, be taken away if the draft regulations are enacted, as is. Whilst the survivor pension would be based on a longer period of membership i.e. from 5/4/1978 as opposed to the current 5/4/1988 this is of no consequence if the value of the relevant additional membership or membership under F8(3) of the 1995 Regulations was higher, or no membership was built up before 6/4/1988 but additional membership under regulation 42 of the 1997 Regulations or F8(3) of the 1995 Regulations, would have counted.</p> <p>An example of how these members could now be disadvantaged is:</p> <ul style="list-style-type: none"> ○ Member joined LGPS 1/5/1988 ○ Retired on ill health on 31/3/1998 ○ Entered into a civil partnership on 1/1/2006 ○ Member dies after 31/3/2014 <p>Under the current rules the survivor's pension would be based on the member's membership from 1/5/1988 plus relevant additional membership which includes the ill health enhancement awarded.</p> <p>Under the proposals the survivor pension would be based on the member's membership from 1/5/1988 only and the ill health enhancement would not be included.</p>
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	<p>The draft regulations make this change retrospectively so as drafted this would require administering authorities to reduce such survivor pensions in payment? In our view this would be in contravention of section 12 of the Superannuation Act 1972, which states:</p> <p><i>“No provision shall be made by any regulations by virtue of subsection (2) above unless any person who is placed in a worse position than he would have been in if the provision had not applied in relation to any pension which is being paid or may become payable to him is by the regulations given an opportunity to elect that the provision shall not so apply in relation to that pension except as provided by subsection (4A) below”</i></p> <p>Other incidents where a civil partner or same sex partner would be made worse off is where the member left under the 2008 regulations and died before 1/4/2014. The survivor benefits for pre and post leaving civil partnerships were based on all membership (due to an error in the 2008 regulations) which made them more generous than survivor pensions paid to post leaving widows (widows were based on contracted-out employment after 5 April 1978).</p> <p>This inequality was corrected from 1/4/2014 but the draft regulations provide that, for deaths before 1/4/2014, such survivor pensions will be retrospectively adjusted to be based on post 5/4/1978 contracted out membership only.</p> <p>Policy intent where the calculation of survivor benefits is changed retrospectively?</p> <p>We appreciate that the policy intent is to put civil partners and same sex spouses in the same position as widows and in many cases this will lead to an improvement in the benefits paid. The policy consultation makes it clear that administering authorities will be required to pay any additional amounts due. However, what is the policy intent where a member has transferred out and the survivor benefit used to calculate the CETV would now be different as a result of the retrospective implementation date of</p>
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	<p>these changes? Similarly what is the policy intent where pension sharing orders have been implemented, where the survivor benefits have been trivially commuted to a single lump sum payment or where the member has trivially commuted their own benefits?</p> <p>As already mentioned, there are quite a few incidents where, as currently worded, the regulations would make people worse off. We have already expressed our view that this would be in contravention of section 12(4) of the Superannuation Act 1972; but as drafted, because the regulations make the changes retrospective would there be a requirement for administering authorities to reduce survivor pensions in payment? There is also the issue of prospective survivor benefits already notified on deferred annual benefit statements being reduced. How would any retrospective changes impact on CETVs, trivial commutation lump sums and pension credits/debits?</p> <p>Putting civil partners and same sex spouses in a better position than widows</p> <p>The civil partners/same sex spouses who could potentially be in a better position than widows as a result of these changes are in relation to members who left under the 1997 Regulations.</p> <p><u>Widow</u></p> <ul style="list-style-type: none"> ○ Post leaving marriage where the widow was also married to the member at some time while he was in local government employment after 31/3/1972 ○ Member died before 1/4/2014 ○ Widow's pension was based on post contracted out 5/4/1978 membership <p><u>Survivor of same sex marriage or civil partnership</u></p> <ul style="list-style-type: none"> ○ Post leaving marriage/partnership where the survivor was also married/ in a partnership with the member at some time while he/she was in local government employment after
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	<p>31/3/1972</p> <ul style="list-style-type: none"> ○ Member died before 1/4/2014 ○ Survivor’s pension will now be based on post contracted out 5/4/1978 plus RAM (because of draft regulation 4(b) amending regulation 42(3)) ○ This is providing a higher benefit that would have been provided to a widow ○ However, the benefit that would have been provided to the civil partner/same sex spouse prior to these draft regulations would have been post 5/4/1988 membership plus RAM and this could potentially be higher than contracted out post 5/4/1978 membership plus RAM if the member had contracted in membership from a transfer in. <p>Amendment to the 1995 regulations for widows</p> <p>We understand the policy intent of draft regulation 5(1)(d) is to correct an error in the Transitional 2014 Regulations in relation post leaving widows where the widow was married to the member at some time whilst they were an active member after 31 March 1972. For deaths before 1/4/2014 these widows would have received a survivor pension based on all their husband’s membership. From 1/4/2014, in respect of deaths from that date, the calculation is based on post 5/4/1978 plus relevant additional membership (RAM) by virtue of regulations 17(13) of the Transitional 2014 Regulations – this is a worsening.</p> <p>However, draft regulation 5(1)(d), in our view , does not achieve the policy intent because regulation F6 of the 1995 regulations does not provide for any additional membership. Regulation F6 restricts the membership counted for post-retirement widows but also provides that where a widow was married to the member at some time whilst they were an active member after 31 March 1972 the survivor pension should be based on all membership, as set out in F3, F4 and F5. We suggest that regulation 17(13) be adjusted to something like:</p>
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	<p><i>(13) Membership for the purposes of paragraphs (10) and (12) includes any relevant additional membership that would have counted as membership for the purpose of regulation F6 of the 1995 Regulations or regulations 42 and 42A of the 1997 Regulations (reduction of some surviving spouses' and civil partners' pensions), membership that would have counted under regulations F3, F4 or F5 by virtue of F6 of the 1995 Regulations and any membership purchased under <u>regulation 14A of the Benefits Regulations</u> (elections to pay additional contributions: survivor benefits).</i></p>
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Appendix 1

For deaths after 31/3/2014

Note: the tables do not include pre leaving survivor benefits where the benefits are already equalised.

Civil partners - Member dies after 31/3/2014					
Regulations applicable	Post leaving relationship		Current position	If draft regulation implemented – effective from 5/12/2005	Effect
1995 Regulations	Civil partner	Entered into partnership after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 membership	Possible worsening as RAM no longer included and member may not have membership before 6/4/1988
1997 Regulations	Civil partner	Entered into partnership after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 membership	Possible worsening as RAM no longer included and member may not have membership before 6/4/1988
Same sex spouses - Member dies after 31/3/2014					
Regulations applicable	Post leaving relationship		Current position	If draft regulation implemented – effective from 13/3/2014	Effect
1995 Regulations	Same sex spouse	Married after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 membership	Possible worsening as RAM no longer included and member may not have membership before 6/4/1988
1997 Regulations	Same sex spouse	Married after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 membership	Possible worsening as RAM no longer included and member may not have membership before 6/4/1988

For deaths before 1 April 2014

Note: the tables do not include pre leaving survivor benefits where the benefits are already equalised.

Widows - Member dies before 1/4/2014					
Regulations applicable	Post leaving relationship		Current position	If draft regulation implemented	Effect
1997 Regulations	Widow opposite sex marriage	married after leaving but also married to member at some point after 31/3/1972 whilst member was active	Post 5/4/1978 contracted out membership	Post 5/4/1978 contracted out membership plus relevant additional membership (RAM) ¹	No change for widows as change is not retrospective for widows but potential knock on effect for civil partners and same sex spouses – puts them in a better position than widows

Civil partners - Member dies before 1/4/2014					
Regulations applicable	Post leaving relationship		Current position	If draft regulation implemented – effective from 5/12/2005	Effect
1995 Regulations	Civil partner	Entered into partnership after leaving	Post 5/4/1988 membership plus additional membership defined in F8(3) of the 1995 Regulations	Post 5/4/1978 contracted out membership	Possible worsening as RAM no longer included and member may have contracted in membership that would have counted previously e.g. from a transfer in
1997 Regulations	Civil partner	Entered into partnership after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 contracted out membership	Possible worsening as RAM no longer included and member may have contracted in membership

¹ Awards will not be revisited as draft regulation 4(b) is not retrospective for widows

					that would have counted previously e.g. from a transfer in 6/4/1988
		Entered into partnership after leaving but also in partnership with member at some point after 31/3/1972 whilst member was active	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 contracted out membership plus relevant additional membership (RAM)	Possible worsening if the member had contracted in membership that would have counted previously e.g. from a transfer in
2008 Regulations	Civil partner	Entered into partnership after leaving	All membership	Post 5/4/1978 contracted out membership	Possible worsening if member had membership before 6/4/1978, contracted in membership or other membership that previously counted towards survivor benefits e.g. ill health enhancement, added years etc.
		Entered into partnership after leaving but also in partnership with member at some point after 31/3/1972 whilst member was active	All membership	Post 5/4/1978 contracted out membership plus relevant additional membership (RAM)	Possible worsening if member had membership before 6/4/1978, contracted in membership e.g. from a transfer in.

Same sex spouses - Member dies before 1/4/2014					
Regulations applicable	Post leaving relationship		Current position	If draft regulation implemented – effective from 13/3/2014	
1995 Regulations	Same sex spouse	Married after leaving	Post 5/4/1988 membership plus additional membership defined in F8(3) of the 1995 Regulations	Post 5/4/1978 contracted out membership	Possible worsening as RAM no longer included and member may have contracted in membership that would have counted previously e.g. from a transfer in
1997 Regulations	Same sex spouse	Married after leaving	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 contracted out membership	Possible worsening as RAM no longer included and member may have contracted in membership that would have counted previously e.g. from a transfer in 6/4/1988
		Married after leaving but also married to member at some point after 31/3/1972 whilst member was active	Post 5/4/1988 membership plus relevant additional membership (RAM)	Post 5/4/1978 contracted out membership plus relevant additional membership (RAM)	Possible worsening if the member had contracted in membership that would have counted previously e.g. from a transfer in
2008 Regulations	Same sex spouse	Married after leaving	All membership	Post 5/4/1978 contracted out membership	Possible worsening if member had membership before 6/4/1978, contracted in membership or other membership that previously counted towards survivor benefits e.g. ill health

					enhancement, added years etc.
		Married after leaving but also married to member at some point after 31/3/1972 whilst member was active	All membership	Post 5/4/1978 contracted out membership plus relevant additional membership (RAM)	Possible worsening if member had membership before 6/4/1978, contracted in membership e.g. from a transfer in.