TUC

# Survivor Benefits Review

TUC Submission

## Summary

Trade unions have pressed for equalisation of survivor benefits for decades. Successive governments have recognised that discrimination based on gender or sexual orientation is wrong and have legislated to stop it occurring. But by failing to fully backdate the entitlement to equal survivor pensions such discrimination will continue for some individuals for decades to come. This small group of individuals should not continue to suffer and bear the costs of discrimination which society now judges to be wrong.

The costs of backdating are presented as the main barrier to equalisation. However, the costs are small when put into context – i.e. as a proportion of the overall liabilities of occupational pension schemes and when spread over the decades they will be paid out. They will also diminish quite rapidly as the group affected by this discrimination shrinks.

Many pension schemes, especially those in the private sector, already provide full equality in survivor pensions, counting all periods of accrual for widows, widowers and same-sex partners. Schemes have made savings over the years as marriage rates have declined and fewer members leave a surviving spouse. In most cases these savings have easily offset the costs of extending and backdating accrual of survivor pensions to other dependants.

The Equality and Human Rights Commission, our national human rights institution and the body responsible for making recommendations to government on the equality enactments, has supported the most recent call for full equalisation. In its position paper on the Marriage (Same-Sex Couples) Act it stated: "In the Commission's view, the government should take this opportunity to equalise pension provision for same-sex married couples, civil partners and widowers with the benefits enjoyed by widows."[1]

## The current review

The TUC welcomed the opportunities to meet with HM Treasury and DWP officials as part of this review and we appreciated getting early sight of GAD's estimated costs of full equalisation in both the public service and private sector defined benefit schemes.

In the meetings, we made clear our longstanding demands for full equalisation. This means:

- Fully equalising widowers' pensions with widows' pensions i.e.:
    - Backdating from 1988 to 1972 in public service schemes
    - Backdating from 1988 to 1978 for contracted out rights
    - Amending s.67 of Equality Act 2010 so that survivor benefits are not covered by the 1990 limit on backdating sex equality rights in occupational pension schemes.

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[1] Equal Civil Marriage: Equality and Human Rights Commission position paper (June 2012)

- Removing the exemption in Paragraph 18, Schedule 9 of the Equality Act 2010 which states that only service from 2005 onwards has to count towards survivor pensions for civil partners and same-sex married couples.

While we have welcomed the opportunity to input into this review, the TUC believes that there should have been a full public consultation so that all interested parties, including pension scheme members, had the opportunity to make their views known.

## Full equalisation

### Same-sex partners

In 2003, several trade unions co-ordinated by the TUC challenged the exemption for benefits based on marital status in the Employment Equality (Sexual Orientation) Regulations. The unions argued that denying same-sex partners access to the marital benefits was direct discrimination because same-sex couples had never been allowed to marry. Trade unions decided not to pursue the litigation further because the Civil Partnership Bill appeared to offer same-sex partners who entered into a civil partnership equal access to marital benefits, including survivor pensions. However, civil partners did not achieve full equality as the law prescribed that only service from 5 December 2005, the date the Civil Partnership Act came into force, had to count towards accrual of a survivor pension.

The dramatic inequality that this resulted in can be seen from the facts in the recent *Walker v Innospec* case. Mr. Walker's civil partner would only be entitled to a survivor pension of £500 a year in the event of his death, whereas if he had been married to a woman all of his 23 years' service in his employer's DB scheme would have counted and his widow would have been entitled to £41,000 a year.

A trade union member in the private sector, who is in her 60s, has recently shared with us the valuations she has received which show that her civil partner would only be entitled to half the survivor pension that a widow would be entitled to because her scheme only provides for accrual from 2005 onwards.

Trade union pressure during the passage of the Civil Partnership Act did succeed in getting survivor benefits for civil partners in public service schemes and for contracted out rights backdated to 1988. This 17-year backdating occurred without any noticeable impact at the schemes' valuations. This reinforces how small the total cost of providing equal survivor pensions to same-sex civil partners or same-sex married partners is and it also shows that the 'no retrospection' principle, which the government has sometimes insisted must hold in relation to pensions equality, has already been broken.

Most recently, the TUC raised the issue of unequal survivor pensions through its lobbying on the Equality Act 2010 and again in its briefings on the Marriage (Same-Sex Couples) Act. We note that the coalition government identified survivor pensions as one of the ongoing inequalities between civil partners and married partners in making the case for Equal Marriage in its original consultation paper. It is therefore disappointing that Ministers argued against equal survivor pensions on cost grounds during the parliamentary debate.

## Widows and widowers

While TUC campaigning activities have recently focused on same-sex couples, equalising for same-sex couples cannot and should not happen without equalising widows' and widowers' pensions. The inequality that still exists between widows' and widowers' pensions is the result of historic sex discrimination.

Widows' pensions were introduced at a time when it was quite common for women to leave (or be forced out of) their jobs when they married or had children and, therefore, to be wholly dependent on their partner's income. However, with the introduction of a ban on sex discrimination in employment, equal pay legislation and maternity rights in the 1970s, women's pay and employment patterns began to change significantly. Women's earnings began to make up a higher proportion of household income and by the 1980s many more couples were in relationships characterised by financial co-dependence. However, the provision of survivor benefits in pension schemes failed to keep pace with these developments.

Widowers' pensions were not introduced until 1988 in the public service schemes and for contracted out rights. For private sector schemes that were contracted in or that provided survivor benefits in excess of the contracted out rights, the law required that accrual must be on an equal basis for men and women from 1990 onwards – the date of the ECJ's judgement in the *Barber* case which ruled that occupational pensions were covered by the EU equal pay provisions.

This means there are women who started work in the 1970s and 1980s, women who are now likely to be in their 50s or 60s, who have sizeable parts of their employment history and pension scheme membership that will not count towards a survivor pension for their partner. These women were the first generation to enter the workplace following the passage of sex equality legislation and yet they were not able to accrue survivor benefits on an equal basis until mid-way through their careers.

The long tail and high cost of this discrimination can be seen from the facts of the *Cockburn* case: Mr. Cockburn's GP wife had started her service in the NHS in 1982. She retired due to ill-health in 2006 and died shortly after in 2007. Because her pre-1988 service did not count, Mr. Cockburn was entitled to a survivor pension that was worth £3,200 a year less than if he had been a widow. As his legal challenge did not succeed (the Government argued against equalisation on cost grounds) and in the absence of any policy change, this inequality will persist for the rest of his life.

Also, looking again at the *Barber* judgement, the limit on retrospection was imposed by the ECJ because of the substantial costs of equalising men's and women's pension ages in private sector schemes when it had been common practice for schemes to mirror the gender difference in the state pension age. The costs of fully equalising survivor benefits are of nowhere near the same magnitude. This is because:

- most private sector schemes already provide equal survivor pensions for widows and widowers;
- the number of survivors is considerably smaller than the number of scheme members;
- and on average, the benefits paid to survivors are paid out for a shorter period than the pensions paid to members.

## Cost estimates

The Government has argued against equalisation on grounds of cost, in its defence of the *Cockburn* case, its intervention in the *Walker* case and in parliamentary debates during the M(SSC) Act.

The initial cost estimates from GAD for this review show that the cost of equalisation is higher for public service schemes than for private sector schemes and the bulk of the equalisation costs relate to equalising widows' and widowers' pensions.

### Public service schemes

The cost of full equalisation for all same-sex survivors and widowers across all the public service schemes is estimated to be £3.2bn. It is important to note, as GAD does, that this is not a precise estimate and actual costs could vary somewhat from this figure, although GAD believes any variation would still result in costs of the same order of magnitude.

It is also important to break this figure down into its component parts to understand what proportion of the costs would have to be immediately payable and what proportion would be payable over a number of years. According to GAD:

- £0.8bn would be payable immediately to dependants in the form of backdated payments.
- The remaining costs of providing equal benefits to current dependants and new dependants who would be brought into survivor benefits would be £1bn and this would be spread over approximately 10 years on average.
- This leaves around £1.4bn for equalisation for active members, deferred pensioners and current pensioners and these costs would not start immediately and would be spread over a significant period of time (over 50 years).

GAD calculates that if an increase in total liability of around £3bn was spread over a 15-year period (the standard period for deficit recovery) it would increase contributions by 0.2% of pensionable pay. This is a small increase, especially when contrasted with the savings that public service schemes are likely to have made as a result of the declining number of members who are married at death and therefore leave a qualifying survivor. For example, we understand from affiliates that in the latest valuation of the NHS pension scheme, there has been a reduction of 0.8%of pensionable pay which is due to revised assumptions about marriage rates.

Under the provisions on cost sharing now being implemented for the public service schemes, past service costs for deferred and pensioner members would fall on the employer side (£1.153bn).

By contrast, the cost of equalisation for active members across all the public service schemes is just £0.225bn, indicating that the group affected by this discrimination who are still in employment are towards the end of their working lives.

The LGPS has taken steps towards equalisation. For members in service after 2008, all periods of service count for accrual of widowers' and surviving civil partners' and same-sex married partners' pensions. Similarly, for women who were the main income earner all periods of service count. According to trade unions in local government this equalisation was absorbed with no noticeable impact on subsequent LGPS valuations. Also, it seems that this move towards equalisation may not have been taken into account by GAD so the cost for the LGPS may be less than presented in its estimates.

### Private sector schemes

In the private sector, GAD estimates that the cost of full equalisation would be £400m, or 0.03% of the £1,260bn of DB schemes' liabilities.

This small percentage is due to a combination of factors including:

- Survivor benefits making up a small proportion of all the benefit payments from pension schemes.
- The low proportion of members entering into same-sex marriages or civil partnerships.
- The fact that the majority of schemes already provide fully equalised benefits.

Trade unions are able to provide numerous examples of pension schemes that have fully equalised survivor pensions without there being any significant impact on costs. These include: BAE, Babcock, BP, BT, CABI, Co-operative, Highlands & Islands Airports, National Trust, National Library of Wales, National Museum of Wales, O2, Prudential, RBS, Royal Mail, Telefonica, and USS. And, as our rail unions have informed us: "The Railway Pension Scheme is a scheme that has the majority of its contributions coming from profit making companies. Yet despite this, the cost of full equalisation was considered so insignificant that trustees passed the rule change with very little need for consideration and without a challenge from employers." A rail union official forwarded a recent notification from one of the train companies informing them that they would be fully equalising pension provision for same-sex married couples following the M(SSC)A and it ended with the statement that: "The company is fully supportive of this change."

Based on survey data, GAD assumes that 95% of private sector DB schemes already provide equal widows' and widowers' pensions, counting all periods of accrual, and 77% of schemes provide fully equalised same-sex survivor pensions. This means that all the estimated £300m cost for equalising widows' and widowers' pensions in the private sector would fall on just 5% of pension schemes and these schemes would probably bear around another £20m of the estimated £100m cost of equalising benefits for same-sex partners. If we assume that these schemes represent 5% of the total £1,260bn of DB pension schemes' liabilities in the private sector, then their liabilities would be £63bn. So, the £320m costs of equalisation for these schemes would represent roughly 0.5% of their liabilities. This is notably higher than the 0.03% estimated for all private sector DB schemes but it is still low and well within the margins of prudence in valuations.

### Conclusion

The GAD estimates for this review show that the costs of fully equalising survivor benefits are likely to represent a very small percentage of pension schemes' liabilities.

Yet, for the individuals affected by the ongoing gender and/or sexual orientation discrimination in survivor benefits, the financial impact is huge, especially for those who are affected by the 2005 cut off.

It is time the Government changed the law to oblige pension schemes to fully equalise survivor pensions and the costs of correcting this historic wrong should be borne by the schemes and not individual survivors.