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Pensions: civil partnerships and same sex marriages

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Inside:

1. Background
2. Civil Partnerships
3. Same sex marriages
4. Review of survivor benefits in occupational pension schemes
5. Gender re-assignment



Contents

Summary	3
1. Background	4
2. Civil Partnerships	6
2.1 The State Pension	6
Pension Credit	9
2.2 Occupational and personal pensions	11
Survivors' benefits – contracted-out schemes	11
Survivors' benefits – contracted-in schemes	16
3. Same sex marriages	18
3.1 State Pensions	20
3.2 Occupational pensions	22
Equality Act exception	22
Debate in Parliament	24
4. Review of survivor benefits in occupational pension schemes	30
4.1 Legal challenge – Walker v Innospec	32
4.2 Government response	35
5. Gender re-assignment	39
5.1 Debate on the Bill	39
5.2 Legislation	40

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Summary

The *Civil Partnership Act 2004* gave same sex couples the right to register as civil partners from 21 December 2005. The [Marriage \(Same Sex Couples\) Act 2013](#) enabled same sex couples to marry. For the purposes of State Pension and occupational pension rights, the Act provided for same-sex married couples to be treated in the same way as civil partners.

When the legislation was before Parliament, an area of debate was what this for survivors' benefits, particularly those in 'contracted-in' occupational pension schemes. This is because an exception in the [Equality Act 2010](#) provided that it was not discrimination because of sexual orientation to restrict access to a benefit that would be available to a person who was married or in a civil partnership in relation to rights accrued before 5 December 2005. The effect was that, where an occupational pension scheme provides survivors' benefits to married couples, it also had to provide them to surviving civil partners, but only in respect of service from 5 December 2005.

In response to debates on the 2013 Act, the Government amended the legislation to require a review of survivor benefits in occupational pension schemes and the costs and other effects of eliminating differences. The [review](#) was published in June 2014. In January 2019, the Government said it would respond once it had assessed the implications of the Walker judgement ([PQ 208267](#)).

On 12 July 2017, the Supreme Court allowed the appeal of Mr Walker, who had argued that his pension scheme should provide equal pension benefits for his partner, based on service before December 2005. It made a declaration that:

- i) paragraph 18 of Schedule 9 of the Equality Act 2010 is incompatible with EU law and must be disapplied, and
- ii) Mr Walker's husband is entitled on his death to a spouse's pension, provided that they remain married. ([Press summary, Walker v Innospec, 12 July 2017](#)).

Having reviewed the judgment, the Government decided that, for public service pension schemes, benefits for survivors of civil partnerships or same-sex marriages would generally be aligned with those for widows of opposite-sex marriages. It decided not to make further retrospective changes (i.e. not to fully equalise survivors benefits for widowers of opposite-sex marriages with those of widows):

The Walker judgment has clearly changed the legal position relating to survivor benefits in respect of same-sex unions, and the Government have acted; public service pension schemes will now implement changes to provide that survivors of registered same-sex civil partnerships or same-sex marriage will be provided with benefits that replicate those provided to widows of opposite-sex marriages, with the exception of specific schemes where survivor benefits depend on making the correct contributions. As was made clear earlier in this statement, private pension schemes must take advice and act accordingly in complying with the judgment.

Following careful consideration of the review's findings, the Government have concluded that, aside from those changes brought about by the Supreme Court judgment, they will not make any further retrospective changes to the existing provisions in respect of occupational pension schemes to equalise survivor benefits. While this means that the differences in survivor benefits for accruals in past periods will remain for some, these will work their way out of the system in time. ([HC 73-76WS, 4 July 2019](#)).

Occupational pension provision for unmarried opposite sex partners is covered in CBP-06348 [Occupational pensions – survivors' benefits for cohabitants](#) (January 2019).

1. Background

Survivors' benefits are those benefits paid by occupational pension schemes to survivors of the scheme member, for example, a surviving partner of the opposite or same sex. The detailed arrangements vary by scheme and by category of survivor. The Government's 2014 review of survivor benefits in occupational pension schemes explains how survivors' benefits for opposite sex spouses have developed over time:

2.11 Eligibility for survivor pensions has changed over time. Provision of survivor pensions for females who survive their male spouse developed much earlier than provision for males who survive their female spouse. In the post war period many schemes began to provide survivor benefits for women who survived their male spouse. However, survivor pensions for men who survived their female spouse were not routinely provided until much later. In some circumstances, women (and unmarried men) often received a larger pension than married men to reflect these differences. In some schemes married men paid a contribution towards a survivor's pension that most female members of that scheme did not. Member benefits therefore also potentially differed between men and women in addition to the differences in benefits for their survivors.

2.12 There are a number of historical reasons for the later provision of survivor benefits for surviving male spouses. These reflect the societal expectations of previous decades and the difference in life expectancies between men and women at that time. When survivor pensions were first introduced, men were generally expected to be the breadwinner and most women who outlived their husbands were expected to have no income or pension of their own. On average women also lived longer than men, and so it was more likely that they would require this form of income protection.

2.13 The *Social Security Pensions Act 1975* created the first overarching legal framework for the provision of survivor pensions for women who survive their male spouse. This Act imposed on all schemes which are "contracted out" of the additional state pension a requirement to provide a surviving woman with a survivor's GMP based on any of her deceased husband's service since 6 April 1978.

2.14 Over time, changes in society meant that the reasons for these differences in provision began to be eroded. Women's greater participation in the labour market, and their greater participation in occupational pension schemes, meant these differences in survivor benefits began to be perceived as increasingly unfair.

2.15 Accordingly, action was taken to correct this inequality. The *Social Security Act 1986* provided that a GMP accrued after 6 April 1988 should provide for a survivor pension to be paid to a surviving male whose female spouse was a member of the scheme⁵. At the same time, in most public service schemes survivor benefits taking into account all of the female member's service since 6 April 1988 onwards (not just that part necessary to meet the minimum requirements for "contracted out" schemes) were introduced for men who survive their female spouse. The difference in treatment between male and female scheme members for the purpose of survivor benefits in public service

5 Pensions: civil partnerships and same sex marriages

pension schemes for service prior to 1988 was held in 2011 to be lawful⁶.

2.16 After the European Court of Justice judgment in *Barber* occupational pension schemes were required to provide equal pensions to men and women (including equal pension ages), and to provide equal survivor benefits for males who survive their female spouse, in relation to accruals from 17 May 1990 (the date of the judgment).¹

Alongside this, DWP published research looking at the proportion of schemes that provide survivor benefits, that have differences in the way those survivor benefits are calculated and the period of accruals that are taken into account. It found that:

The proportion of schemes with differences in entitlement is as follows:

- one per cent of schemes that provided survivors' benefits and had benefits accrued prior to 1990 had a difference in the way survivors' benefits were typically calculated for widows and widowers of an opposite sex marriage before 1990 (equating to 28 schemes on a grossed up weighted basis);
- 27 per cent of schemes that provided survivors' benefits to civil partners and had benefits accrued prior to 2005 had a difference in the way benefits were typically calculated between those in a civil partnership and those in an opposite sex marriage (equating to 1,334 schemes on a grossed up weighted basis);
- of those 27 per cent of schemes, two-thirds (65 per cent) said this difference was when calculation of survivors' benefits for those in a civil partnership accruals before 2005 were not taken into account.²

¹ HM Government, [Review of survivor benefits in Occupational Pension Schemes](#), June 2014

² DWP Research and analysis, [Provision of survivor benefits in occupational pension schemes](#), June 2014

2. Civil Partnerships

The *Civil Partnership Act 2004* created a union which is very similar, but not fully identical, to marriage. Civil partners have the same rights and responsibilities as married couples in many areas including tax, social security, inheritance and workplace benefits. However, civil partnership was a completely new legal relationship, distinct from marriage, exclusively for same-sex couples. There is a [comparison of Civil Partnership and marriage for same sex couples](#) on Gov.UK and in section 1.3 of Library Research Paper [RP 14/29](#) (May 2014). In advance of the legislation, the Labour Government issued a consultation document - [A framework for the legal recognition of same-sex couples](#) – asking for views on the changes that should be made to the legislation on state and private pensions, among other things.

The current Government announced in 2018 that it would be extending civil partnerships to opposite-sex couples. It supported a Private Members' Bill – the [Civil Partnerships, Marriage and Deaths \(Registration etc.\) Act 2019](#) in its passage through Parliament. It hopes to allow the first opposite-sex civil partnerships to take place by the end of this year. A paper published in July 2019 set out the implications in a number of areas, including pensions.³

2.1 The State Pension

The State Pension for people reaching State Pension age (SPA) before 6 April 2016 had two tiers:

- The basic State Pension - a flat-rate pension to which individuals accrue entitlement on the basis of their National Insurance (NI) record. An individual needs 30 "qualifying years" of NI contributions or credits for a full basic State Pension.
- The additional State Pension - which is earnings-related and to which people qualify on the basis of earnings between prescribed limits during working life.

An individual with insufficient contributions in their own right may be able to draw on the contribution record of a (former) spouse or civil partner in order to qualify.⁴ NB. As explained in Box 1 below, this changed for people reaching State Pension age from 6 April 2016 when the new State Pension was introduced.

A consultation document published by the Women and Equality Unit in June 2003 proposed allowing civil partners to draw on the contribution record of a (former) partner from 2010, when they were to be extended to married men and widowers:

³ Government Equalities Office, [Implementing opposite-sex civil partnerships: next steps](#), July 2019

⁴ For more detail see Pension Service leaflet, [State Pensions – Your guide](#), October 2014, p25-6; [A detailed guide to State Pensions for advisers and others](#), NP46 September 2008

State Pensions

7.23 Today's state pension system was founded over fifty years ago. Since then many changes have been made to the pension system to adapt to society's changing needs and to extend the ways in which people can prepare for retirement. Because of the need to give sufficient warning to enable people to plan ahead, it can take many years for changes in pension systems to reach maturity.

7.24 The Government's decisions on the way in which state pensions might take account of registered civil partnerships will be affected by a forthcoming change. From 2010, the state pension age for men and women will begin to be equalised over a 10-year period. In 2010 also, derived pension rights for spouses and some other pension benefits will begin to be available on equal terms to men and women. It is thus not until 2020 that the state pension scheme will provide fully equal rights, at the same age, to people who are married.

7.25 Against this background, it would not be possible before 2010 to introduce state pension rights for registered partners which are both similar to those of married couples and treat all-male and all-female couples equally. Introducing changes before this time would create new inequalities within the state pension system. These considerations do not affect private pension schemes, which must already provide rights equally to men and women.

7.26 The main state pension rights that married couples get today are:

(i) category BL pension – a married woman who does not have enough National Insurance contributions to earn a basic state pension of her own can use her husband's contribution record to get a Category BL pension, as long as he has reached state pension age and claimed his pension. This could give the wife a pension of up to 60% of the full basic state pension. At the moment, a husband cannot receive a category BL pension based on his wife's contributions;

(ii) category B pensions - when a husband dies his wife can inherit a state pension at the rate the husband was entitled to (to top up her own pension) plus a proportion of his additional pension (SERPS). In limited circumstances a husband can inherit his late wife's pension; and

(iii) pensions on divorce - on divorce either spouse can "substitute" the other's contribution record for his or her own if the spouse's record is better than his or hers. These rights are derived from a spouse's national insurance contributions.⁵

Schedule 24 of the *Civil Partnerships Act 2004* amended the *Social Security Contributions and Benefits Act 1992*, to allow civil partners to draw on the contribution record of a civil partner:

799. Paragraphs 23 to 33 and 51 extend state pension rights to civil partners. Currently, a married woman (but not a married man) can use her husband's National Insurance contribution record to qualify for a basic state pension when they have both reached state pension age. Civil partners (like married men) will be able to qualify for these pensions when their civil partners who

⁵ DTI Women and Equality Unit, [A framework for the legal recognition of same-sex couples](#), June 2003

were born on or after 6 April 1950 reach state pension age. Because of the difference in state pension ages, this means that female civil partners will qualify from 2010 onwards and male civil partners from 2015 onwards.

800. Where a woman is widowed after reaching state pension age she can qualify for a state pension calculated as if her husband was entitled to it when he died, regardless of her husband's age on death. It consists of a basic pension plus additional pension (a percentage of SERPS depending on when the spouse reached pensionable age and 50 per cent of any State Second Pension). Until 2010 civil partners, like widowers, will only be able to receive these pensions if both spouses or civil partners are over state pension age when the first one dies. However, widowers and civil partners who reach pension age on or after 6 April 2010 will be able to qualify regardless of the age at which their wife or civil partner dies (i.e. on the same basis as widows).

801. Where a spouse is widowed before reaching pension age a state pension can be awarded if a widow or widower at any time in the past was entitled to a bereavement allowance or widowed parent's allowance when over age 45 but only as additional pension and, if aged 45 to 54 when widowed, it is reduced on a sliding scale. These provisions will apply to civil partners from the implementation date.

802. Where a marriage or civil partnership has ended, the contributions of the former spouse or civil partner may be substituted for the period of the marriage or civil partnership to allow a person to qualify for a basic state pension.⁶

The [*Civil Partnership \(Pensions and Benefit Payments\) \(Consequential, etc. Provisions\) Order 2005 \(SI 2005/2053\)*](#) made further changes relating to situations where a civil partner had deferred their State Pension:

7.4 The broad intention is to put civil partners and bereaved civil partners on an equal footing with spouses and bereaved spouses in relation to state retirement pension. To comply with EC Directive 79/7/EEC when extending derived State pension rights to civil partners we must avoid direct discrimination. The policy proposal is to give male and female civil partners those rights currently available equally to spouses from the civil partnerships implementation date and the remaining rights in 2010 when they become available to married men and widowers.⁷

In July 2019, the Government said that it intended to "align the State Pension rules relating to increasing of inheriting State Pension entitlement for opposite-sex civil partners with those in place for same-sex civil partners." This would "ensure consistency of rules in terms of all individuals who enter a civil partnership."⁸

⁶ [Civil Partnership Act 2004, schedule 24 – Explanatory Notes](#)

⁷ [Explanatory Memorandum to SI 2005/2053](#)

⁸ GEO, [Implementing Opposite-Sex Civil Partnerships: Next Steps](#), July 2019

The new State Pension

From 6 April 2016, a new single-tier State Pension was introduced for people reaching State Pension age from that date. Thirty-five qualifying years are needed for the full amount. People qualify for the new State Pension on the basis of their own contribution record, so the rules allowing individuals to derive or inherit an entitlement based on the basis of a (former) spouse or civil partner's entitlement ended with some transitional protection.⁹

In July 2019, the Government said:

Although the new State Pension is generally based only on the individual's own National Insurance contribution record, there are some transitional arrangements that mean an individual can in some circumstances inherit State Pension from their husband, wife or civil partner. However, generally these transitional rules require that the marriage or civil partnership took place before 6 April 2016. (GEO, [Implementing Opposite-Sex Civil Partnerships: Next Steps](#), July 2019)

For more on the background, see Library Note CBP-7414 [The new State Pension – transitional issues](#) (Feb 2019), p19ff

Pension Credit

Pension Credit is a means-tested benefit, so the circumstances of an individual and their partner (if relevant) are looked at together in assessing entitlement.¹⁰ Prior to the *Civil Partnerships Act*, this only applied to a man and a woman who were either a married couple or "living together as husband and wife otherwise than in prescribed circumstances."¹¹ The June 2003 consultation document sought views on whether unregistered same sex couples should be treated as a unit for the purposes of income-related benefits once the civil registration scheme came into effect:

Income-related Benefits

7.19 Income-related benefits are safety-net benefits, which take into account the needs of the individual and, if they have one, their family. The two members of an opposite-sex couple are presumed to be financially interdependent and mutually supporting. They are therefore treated as a single household or family unit whose resources and needs are combined for income-related purposes. Same-sex partners are currently treated as individuals. The Government believes that registered partners should be treated as a family unit, since they would be assumed to be financially interdependent.

The Government proposes that registered partners should be treated as a single family unit for income-related benefits purposes.

7.20 Unmarried opposite-sex couples are treated in the same way as married couples because otherwise they would benefit financially from choosing not to formalise their relationship. It could be argued that unregistered same-sex couples should be treated in the same way as unmarried opposite-sex couples for

⁹ [Pensions Act 2014](#), Part 1

¹⁰ See Pension Service, [Pension Credit: Do I qualify and how much do I get? \(April 2014\)](#)

¹¹ [State Pension Credit Act 2002](#), section 17

income-related benefit purposes. (As with all social security benefits, income-related benefits extend across Great Britain. Any changes to the treatment of unregistered same-sex couples would therefore affect couples in Scotland as well as England and Wales.)

The Government would be grateful for comments on this way of proceeding.¹²

The majority of respondents supported the view that civil partners should be treated as a single family unit for income-related benefits purposes:

Do you wish to comment on the possible arrangements for unregistered same-sex couples in relation to income-related benefits in paragraph 7.20?

4.7 69% of those that responded to this question agreed that unregistered same sex couples should be treated in the same way as unmarried couples for the purposes of income-related benefits. This would ensure uniformity of treatment and would not deter same-sex couples from entering a civil partnership.

4.8 It was also recognised that this might lead to unregistered same-sex couples receiving a lower level of benefit or no benefit at all but some felt that this was acceptable to ensure equality. If this were not done, then the probable loss of benefits for some same-sex couples at the point of registration might prove a deterrent to registering a civil partnership and could therefore undermine the scheme. However, if all couples (married, unmarried, registered in a civil partnership or not) were treated the same then this risk would be alleviated.

Points raised:

- those making decisions about the income-related benefits of unregistered same sex couples would inevitably have to make assumptions about a person's sexual orientation. This would require sensitivity and training. This might also lead to the 'outing' of some same-sex couples;
- respondents expressed concern about the position of home-sharers or cohabitants who were not in a sexual relationship but lived together. If they were assumed to be an unregistered same-sex couple this would entitle them to lower benefit levels or no benefit at all based on an incorrect assumption about their relationship;
- it was wrong to impose financial responsibilities on unmarried or unregistered couples without extending the rights incumbent upon marriage or registration of a civil partnership;
- by failing to open marriage to same-sex couples then the 'equality' argument, that might be used to justify introducing parity between unmarried couples and unregistered couples, could not be used.

The Government proposes that civil partners should be treated as a single family unit for income-related benefits purposes. In addition, where appropriate unregistered cohabiting same-sex couples should also be assessed as a

¹² Women and Equality Unit in June 2003 - [A framework for the legal recognition of same-sex couples](#)

single family unit as is the case for unmarried cohabiting opposite-sex couples. The Government will ensure that this matter is handled sensitively.

Treating same-sex couples (whether registered or unregistered), in the same way as opposite-sex couples (whether married or unmarried) in relation to income-related benefits is the best way to ensure fairness in this area and ensure that a same-sex couple who wish to register a civil partnership would not be financially worse off than they would be if they chose not to register their partnership.¹³

Accordingly, the [State Pension Credit Act 2002](#) was amended to replace the words “married or unmarried couple” with the word “couple”, defined as:

- a. a man and woman who are married to each other and are members of the same household;
- b. a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances;
- c. two people of the same sex who are civil partners of each other and are members of the same household; or
- d. two people of the same sex who are not civil partners of each other but are living together as if they were civil partners otherwise than in prescribed circumstances¹⁴

2.2 Occupational and personal pensions

Survivors’ benefits – contracted-out schemes

The Women and Equality Unit consultation paper proposed that public service schemes and contracted-out private sector schemes should provide survivors’ benefits for civil partners:

Survivor Pensions - Private Pension Schemes

9.11 Most private pension provision is provided through occupational pension schemes which can be:

- Defined Benefit - where the pension payable depends on the length of service and the salary (usually the final salary) earned by the employee; or
- Defined Contribution - where the contributions are invested to provide a pot of money on retirement, which is used to buy an annuity.

Personal pensions and stakeholder pensions, which are other types of private pension provision, are defined contribution arrangements between providers and individuals.

9.12 Employers providing defined benefit pension schemes that are used to contract their employees out of the State Second Pension (formerly SERPS) are required to pay a survivor pension to the surviving spouse of a scheme member. In practice, many

¹³ DTI Women and Equality Unit, [Responses to Civil Partnership: A framework for the legal recognition of same-sex couples](#), November 2003

¹⁴ [State Pension Credit Act 2002 s 17](#), as amended by the *Civil Partnership Act 2004*, sch. 24, para.142.

private sector schemes make payments to others, including opposite-sex and same-sex partners if scheme rules allow trustees to do this, but there is no legal requirement for them to do so. Members of defined contribution occupational schemes and personal pension schemes that are contracted out of the State Second Pension, are required to provide for a survivor pension for their spouse but only on that part of the pension derived from the National Insurance contribution rebate and its investment return (the protected rights).

The Government proposes that the conditions for contracting out should be amended to include a requirement for survivor benefits to be paid to registered partners.

Survivor Pensions - Public Service Pension Schemes

9.13 Public service pension schemes provide occupational pension benefits to members and their eligible survivors. Eligible survivors include any children and the married spouse of the member. Most public service schemes do not provide survivor pensions to unmarried partners, although death lump sum benefits may be provided to unmarried partners in some schemes where members are able to nominate them.

The Government proposes that members of public service pension schemes will earn entitlement to survivor benefits, including a survivor pension, for registered partners in the same way as for married partners.¹⁵

Changes to the general legislation on occupational pensions (or to the rules of an individual scheme) are rarely made retrospective, largely because of the costs involved. Successive governments have applied this principle to improvements in the main public service schemes.¹⁶ Accordingly, when the *Civil Partnerships Bill 2003-04* was first presented to Parliament, it included provision for survivors' benefits in contracted-out schemes to be provided in respect of future service only.¹⁷ When the legislation was the House of Lords, Baroness Scotland of Asthal explained:

I should also make clear that in accordance with the usual system in contracted-out schemes, members will accrue rights to survivor benefits for a civil partner from the date of implementation of the civil partnership proposals. Improvements to public service schemes and contracting-out regimes are made for future service only. As noble Lords will remember, when new benefits were introduced for members of pension schemes, they were normally introduced prospectively—for example the guaranteed minimum pensions were extended to widowers from 1988, whereas widows were entitled from 1978—so retrospection would add significant liabilities to those schemes which do not already pay survivor benefits to unmarried couples. Public sector schemes would have to shoulder most of that burden. But I absolutely understand from the comments made by a number of your Lordships in this debate that that will be an issue that we will wish to address with some care.¹⁸

¹⁵ DTI Women and Equality Unit, [Responses to Civil Partnership: A framework for the legal recognition of same-sex couples](#), November 2003

¹⁶ For more detail, see, for example, SN1424, [Armed Forces Pension Scheme](#), section 4

¹⁷ Civil Partnerships Bill 2004 – Explanatory Notes, para 472

¹⁸ [HL Deb 22 April 2004, cc431-32](#)

13 Pensions: civil partnerships and same sex marriages

However, when the Bill reached the House of Commons, the then Parliamentary Under Secretary of State, Anne McGuire, explained the Government had decided that survivors' benefits for civil partners should be provided in respect of contracted-out service from 1988 (the date from which contracted-out schemes have been required to provide survivors' benefits for widowers):

Pensions have been of great interest and were raised by various hon. Members on both sides of the House. My right hon. Friend the Minister mentioned survivor pensions in public service schemes. There has been a significant discussion on that throughout the lead-up to the Bill. I am pleased to report that the Government will follow the approach that we have taken in the tax system. As for tax purposes, for survivor pensions in public service schemes, registered same-sex couples will be treated in the same way as married couples. The change will be achieved by means of regulations, which will be introduced following Royal Assent. There is no need to amend the Bill.

The regulations will provide equality, as they will allow registered same-sex partners to accrue survivor pensions in public service schemes from 1988. That replicates the position for child and working tax credits, child benefit and guardian's allowance, which will be amended so that the rights and responsibilities of opposite-sex couples are replicated for same-sex couples. We have made it clear that we will use the first available Finance Bill to ensure that registered same-sex couples will be treated the same as married couples for tax purposes.¹⁹

Provision was made for this in the [*Civil Partnership \(Contracted-out Occupational and Appropriate Personal Pension Schemes\) \(Surviving Civil Partners\) Order 2005, SI 2005/2050*](#). The [Explanatory Memorandum](#) said the policy intention was to ensure that civil partners had treatment "as close as possible to that for spouses in the area of contracted-out occupational and personal pensions":

7.1 The *Civil Partnership Act 2004* received Royal Assent on 18 November 2004. The purpose of the *Civil Partnership Act 2004* is to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership. The *Civil Partnership Act 2004* also contains provisions enabling certain overseas same-sex relationships to be treated as civil partnerships. Civil partners will be subject to many of the same legal rights and responsibilities as spouses.

7.2 Two people may register as civil partners of each other provided:

- they are of the same sex;
- neither of them is already a civil partner or married;
- they are not within the prohibited degrees of relationship i.e. members of the same family who are forbidden by law to marry;
- they are both over the age of sixteen (and the consent of the appropriate persons has been obtained if either of the parties are under eighteen).

¹⁹ [HC Deb, 12 October 2004, c249-50](#)

7.3 The policy intention behind this Order is to ensure that civil partners have treatment as close as possible to that for spouses in the area of contracted-out occupational and personal pensions. The Order seeks to fulfil those policy objectives by amending primary and secondary legislation relating to the rules under which people can contract out of the State Second Pension.

7.4 The policy intention will be achieved by making technical amendments to insert a reference to surviving civil partners where, currently, there are references to widows and widowers. However, there is a substantive transitional provision, concerning the survivors of scheme members who died before the civil partnership provisions came into force.

7.5 Under existing rules, schemes are not required to pay survivor benefits in certain circumstances, e.g. where the widow or widower remarries or is living together as husband and wife with another person (because they are deemed to receive financial support from their new relationship). This does not prevent the scheme from choosing to continue to pay the benefit on a voluntary basis.

7.6 In developing these provisions to include civil partners it became clear that there could be an impact on the expectations of existing widows and widowers who, at present, could only lose their survivor benefit if they remarried or started to live together as husband and wife with another person. On implementation of Civil Partnerships, survivors could also lose their benefit if they form a civil partnership or if they live together as if they were civil partners.

7.7 To ensure that legitimate expectations are met, and avoid potential loss of survivor benefits in circumstances that could not have been foreseen when those survivor benefits were paid, we decided that a transitional provision is appropriate. This transitional provision allows for widows and widowers of scheme members who died before 5 December 2005 to be excluded from the new rules i.e. existing rules apply only where survivor benefits arise when a scheme member dies before the introduction of civil partnerships.²⁰

The then Pensions Minister, Stephen Timms, explained:

The first order amends the legislation relating to the requirements that occupational and personal pension schemes must comply with in order to contract-out of the state second pension scheme. The amendments ensure that schemes make provision for benefits for surviving civil partners. The subject of when scheme members will accrue rights to survivor benefits for a civil partner was debated at length. The original intention was for rights to accrue from the implementation date of civil partnership.

However, responding to widespread representations from my hon. Friend and others, the Government announced last October that the public service schemes would provide survivor benefits for civil partners based on members' rights accrued from service since 6 April 1988, and that schemes that contract out would be required to provide survivor benefits based on the member's contracted-out rights also accrued since 6 April 1988. That approach for civil partners is in line with existing provision for

²⁰ [The Civil Partnership \(Contracted-out Occupational and Appropriate Personal Pension Schemes\) \(Surviving Civil Partners\) Order 2005 \(SI 2005/2050\) –Explanatory Memorandum](#)

15 Pensions: civil partnerships and same sex marriages

widowers. The order also provides an element of transitional protection for a widow or widower of a scheme member who died before the implementation date and who subsequently forms a civil partnership.²¹

A Parliamentary written answer of 17 January 2006, explained that:

The Treasury is responsible for the general policy on the statutory public service pension schemes. All of these schemes provide survivor pensions for partners of scheme members where there is a legal partnership through marriage or civil registration in the case of same gender couples. Our policy is not to discriminate on the basis of sexual orientation in provision for partners who are not married or civilly-registered to the scheme member.²²

Differential treatment of widows

As this explains, schemes are now required to make provision for survivors' benefits for widowers and civil partners based on the scheme member's contracted-out rights accrued from 6 April 1988.²³ However, for widows, rights to survivors' benefits apply in respect of service from 1978.²⁴ Although widows may be eligible in respect of service from an earlier date (1978), the implication of a High Court judgment is that there is an "objective and reasonable justification" for this.²⁵ This judgment of the High Court in [R v Iain Cockburn and Secretary of State for Health \[2011\] EWHC 2095 \(admin\)](#) related to the unequal treatment of widowers compared to widows in the NHS Pension Scheme. A press release issued by the BMA on the day of judgement explained that:

The BMA has lost its legal battle for equal pensions for the widowers of doctors.

Mr Justice Supperstone today (29/07/11) ruled that the government had 'an objective and reasonable justification' to maintain the NHS pension scheme rules.

In a ruling at the High Court in London, Mr Justice Supperstone rejected the claim that pension benefits paid to widowers of doctors should be based retrospectively on contributions that women had paid into the NHS pension scheme before April 6, 1988.

Lawyers acting for the BMA had argued that the pension rules treat men differently from women and therefore amounted to sex discrimination.

BMA council chairman Hamish Meldrum said: 'It is unfair that female members of the NHS pension scheme do not have the same rights as men. We're disappointed that this sexual discrimination couldn't be stopped in the High Court, but we will continue to highlight it, and to fight for fair pensions for all doctors.'

Acting for GP's widower

The association had acted on behalf of Iain Cockburn, the widower of Warwickshire GP Clare Boothroyd, who died of

²¹ Debate in 20th Standing Committee on Delegated Legislation, 14 July 2005, cc 3-4

²² [HC Deb, 17 Jan 2006, c1208W](#) [Des Browne]

²³ [The Civil Partnership \(Contracted-out Occupational and Appropriate Personal Pension Schemes\) \(Surviving Civil Partners\) Order 2005 \(SI 2005/2050\)](#)

²⁴ HL Deb, 25 May 2005, c505

²⁵ [Cockburn v Secretary of State for Health \[2011\] EWHC 2095 \(admin\)](#)

cancer in February 2007. Mr Cockburn would receive an extra £3,200 a year in survivor pension payments if he was a widow.

NHS pension scheme rules say service accrued by women before April 6, 1988, does not count towards widowers' pension entitlements, even though women doctors paid the same contributions as male doctors.

Mr Justice Supperstone's ruling states: 'There was an objective and reasonable justification when introducing a change to the NHS pension scheme by the 1989 regulations, entitling non-dependant widowers to survivors' pensions, to make that change prospective in the sense that it applied in relation to periods of service after 5 April 1988, and an objective and reasonable justification to maintain that position, rather than introducing a retrospective change, has remained since that date.'

Discrimination acknowledged

Lawyers on behalf of the health secretary had acknowledged there was discrimination but said it was justifiable because there had been a 'progressive realisation of gender equality' and the initial rules had been set up to recognise the weaker economic position of widows.

The ruling says correcting the discrimination would have cost the NHS pension scheme in England and Wales up to £905m, as an estimated 600,000 people are affected, and up to £120m in Scotland.

The test case could have had a knock-on cost of £4bn as a finding in favour of Mr Cockburn would have set a precedent for other public sector pension schemes such as those for teachers, civil servants, police, local government workers and the armed forces.²⁶

Survivors' benefits – contracted-in schemes

Private sector pension schemes that are not used to contract-out of the State Second Pension have to provide benefits for civil partners as they do for married couples in respect of service from 5 December 2005. To do otherwise would now constitute unlawful direct discrimination under the [Employment Equality \(Sexual Orientation\) Regulations 2003 \(SI 2003/1661\)](#). IDS Pension Service explains:

The regulations cover pay, which includes benefits payable to a partner on the death of a pension scheme member. As a result, a scheme rule that restricts payment of survivor's benefits to opposite-sex partners constitutes unlawful direct discrimination.

Pension schemes are still allowed to restrict payment of survivors' benefits to legal spouses and registered civil partners. The effect of the *Civil Partnership Act 2004* is that where a survivor's pension is payable to a surviving spouse under the rules of the scheme, such a pension must also be paid to a surviving civil partner – although the degree of retrospection may differ [...].²⁷

This exemption was the subject of much debate when the *Marriage (Same Sex) Couples Act 2013* was before Parliament.

²⁶ [BMA news, Judge rules against BMA in equality case, 29 July 2011](#); [Cockburn, R \(on the application of\) v Secretary of State for Health \[2011\] EWHC 2095 \(Admin\) \(29 July 2011\)](#)

²⁷ IDS Pension Service, *Pension Scheme Design*, May 2010, para 6.23

17 Pensions: civil partnerships and same sex marriages

On 12 July 2017, the Supreme Court held para 18 of Schedule 9 to the Equality Act to be incompatible with EU law ([see below](#)).

3. Same sex marriages

The [Marriage \(Same Sex Couples\) Act 2013](#) provided for same sex couples to be able to marry, either in a civil ceremony or, provided the religious organisation concerned was in agreement, on religious premises.²⁸ The legislation was preceded by a period of consultation, during which the Government considered the approach that should be taken to pension rights.

In March 2012, the Government launched a consultation on whether to “remove the ban on same-sex couples having a civil marriage.”²⁹ This explained that, although civil partnerships were designed to provide equivalent rights and responsibilities to marriage, there were some differences. One of these was that “there were some differences around eligibility for some pension rights”. The Government identified these as areas that would require further consultation.³⁰

A position paper published by the Equality and Human Rights Commission in June 2012 said the Government should take the “opportunity to equalise pension provision for same sex married couples, civil partners and widowers with the benefits enjoyed by widows.”

At present, widowers and civil partners enjoy less favourable pension rights in respect of survivor pensions than widows. Currently civil partners are treated the same as married men for the purposes of the state pension. The consultation document states that the Department for Work and Pensions is considering whether to also treat same sex married couples the same as married men for the purposes of the state pension.

Like widowers, civil partners are entitled to claim a survivor pension based on their deceased partner’s contributions from April 1988 to a pension scheme which has contracted out of the State Second Pension. However, widows are treated more favourably in that their deceased partner’s contributions from 1978 are taken into account when calculating their survivor benefits.

For schemes which are contracted in to the State Second Pension Scheme the position of civil partners is even worse, as account is only taken of a deceased civil partner’s contributions made after the introduction of the *Civil Partnership Act* in December 2005 (unless the scheme makes more generous provision).³¹

Schedule 9 paragraph 18(1) *Equality Act 2010* allows employers and pension funds to exclude civil partners from spousal benefits attributable to service prior to 5 December 2005. Therefore a

²⁸ [Marriage \(Same Sex Couples\) Act 2013](#) – explanatory notes, paragraph 7

²⁹ Government Equalities Office, [Equal civil marriage: a consultation](#), March 2012

³⁰ *Ibid*, para 1.10 and 2.23-4

³¹ The Commission understands that it is government policy that public sector pension schemes provide survivor pensions for civil partners on the same basis as provided for spouses. However according to Gray and Brazil in ‘Blackstone’s guide to The Civil Partnership Act 2004’, published in 2005, some public sector schemes require amendment in order to avoid discrimination against civil partners. The Commission does not have information on the current position. See also Industrial Law Journal page 179 – 185 April 3 2006, ‘Employment Law Consequences of the Civil Partnership Act 2004’ by Professor Mark Bell.

19 Pensions: civil partnerships and same sex marriages

scheme may pay benefits to a surviving married partner in respect of service by their deceased married partner before 5 December 2005. However, under this exemption that same scheme may refuse to pay benefits to a surviving civil partner in respect of the service by their deceased partner before 5 December 2005 (the date the Civil Partnership Act came into effect).

Liberty has recently taken a case challenging the provision on the basis that it is a breach of the Human Rights Act and EU law, relying on the case of *Maruko v Vd dB*.

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.³²

However, in its response to the consultation, published in December 2012, the Government said its intention was, as regards both state and occupational pension rights, to "treat same-sex married couples in the same way as civil partners".³³

In her evidence to the Public Bill Committee, Minister for Women and Equalities, Maria Miller, explained why the Government had decided not to take the opportunity to equalise pension provision for same-sex married couples, civil partners and widowers with that of widows:

Q22 Jonathan Reynolds (Stalybridge and Hyde) (Lab/Co-op): Some of the evidence to the consultation urged the Government to take this opportunity to equalise pension provision for same-sex marriage couples, civil partners and widowers with benefits currently enjoyed by widows. Why have the Government not taken this opportunity to do that?

Maria Miller: As the Committee will know, we have done a great deal to try to equalise pension provision in this country. In the vast majority of cases, men, women, civil partners and same-sex married partners are treated equally. There are issues regarding the state pension, particularly for individuals who are over 63. Equalising the anomaly that particularly affects that group of people would cost around £80 million. Particularly given the difficult economic times we are in, we did not feel that that would provide enough benefit for the amount of money that was being paid out. We would be paying disproportionately, and potentially not always hitting the right target.

Q23 Jonathan Reynolds: Thank you for that figure. I have a supplementary question. What work have the Government done to look at the impact on occupational pensions and the benefits enjoyed by people from those?

Maria Miller: Again, we have looked at the matter in some detail. As the hon. Gentleman will know, the issue is reasonably complex. For occupational pensions, same-sex married couples will be treated the same as civil partners. The right to pension benefits for their survivors will be based on rights accrued since 2005, when the Civil Partnership Act came into force. That was something which, as hon. Members present who were on that Bill Committee will remember, was a particular point of debate at that time. The important thing to say here—I think this is really

³² [Equal Civil Marriage: Equality and Human Rights Commission position paper, June 2012](#)

³³ [Equal marriage: The Government's response, December 2012](#), para 9.16-22

interesting—is that the majority of occupational schemes actually exceed the minimum requirement at the moment, and I think that is something to be applauded. I hope the Committee will urge more occupational pension schemes to take this approach, so that civil partnership pension rights are actually more than they are required to be by law. I think that shows good will by those organisations, and we should urge them to do even more.³⁴

Ben Summerskill of Stonewall told the Committee he did not think there was a “huge mischief that would have been put right by this Bill”:

[...] people will remember that we had quite a big fight with the then Chancellor of the Exchequer at the time of the introduction of civil partnerships. He did not want us to have public sector partner pensions at all. It cuts two ways; in terms of the public sector, our clear understanding, having dealt with this for a number of years over civil partnership, is that the discrimination on the backdating of partner pensions to between 1978 and 1988 is in fact a gender discrimination and not a sexual orientation discrimination. Therefore, it was never going to be put right by a Bill of this sort. In the private sector, we acknowledge—Ministers will be able to offer observations on this too—that the Government have never legislated retrospectively for private sector pension schemes. However, I can say that in every case that we have been involved in at Stonewall which we have taken on for someone who had a private sector entitlement prior to 2005, we have been successful in persuading their company or their trustees to change the terms of their pension scheme.³⁵

However, others argued that the Government should have gone further. Rachel Robinson of Liberty said:

Although we are incredibly supportive of the Bill as a whole, that is one area where we feel there is still a substantive inequality in it.[...] We hear from the Government that two thirds of occupational pension schemes already provide equality parity in provision for same-sex and mixed-sex couples. We imagine that on that basis the liability to occupational pension schemes will be very limited. However, for the individuals who are affected, the personal impact will be great.³⁶

John Wadham of the Equality and Human Rights Commission said:

[The Bill] is a very important step forward to equalise relationships. Obviously, it would be sensible that the rest of the difficulties and discriminations were tidied up. So we take the same view that it would be sensible for the consequential equality issues to be dealt with within the pension schemes more generally.³⁷

3.1 State Pensions

The March 2012 consultation document explained that:

2.33 State pensions:

Current position – state pension rules apply differently to married men and women. When civil partnerships were introduced, it was

³⁴ [PBC Deb, 12 February 2013](#)

³⁵ [PBC Deb, 14 February 2013, Q168](#)

³⁶ *Ibid*, c333

³⁷ *Ibid*, c335

21 Pensions: civil partnerships and same sex marriages

decided to consider civil partners the same as 'married men' for state pension purposes.

Consideration – the Department for Work and Pensions is currently considering on what basis these provisions should be extended to equal civil marriages.³⁸

In its December 2012 response to the consultation, the Government said its intention, as regards State pensions, was to treat same-sex married couples in the same way as civil partners:

9.17 The Government is working towards full equality across State pension schemes for men and women, whatever their sexual orientation. However, married men, widowers and male and female civil partners have slightly more restricted access to state pension based on their spouse's or partner's National Insurance record than married women and widows.* These differences reflect historical differences in the working patterns and contributions of men and women. When civil partnerships were introduced, the differences were not replicated, because to do so would have created a new difference in treatment based on gender between male and female civil partners.

9.18 The Government's intention, as regards State pensions, is to treat same-sex married couples in the same way as civil partners. The reasons for this approach are:

- differences in the treatment of men and women are a legacy from the past and will eventually cease to exist.
- we believe it is inappropriate to create new differences in treatment between men and women when the Government is otherwise seeking to equalise treatment.
- pensioners on low incomes will, of course, continue to be entitled to pension credit (which in future will incorporate housing benefit) and support with council tax.

* A married woman with less than £64.40 basic pension in her own right can qualify for a basic pension of up to that amount based on her husband's NI contributions regardless of when he was born. But a married man or civil partner can qualify only if their wife or partner was born after 5 April 1950. A woman widowed over pension age whose husband dies under pension age may inherit part of his additional state pension, but a widower or surviving civil partner in the same circumstances may inherit additional state pension only if they reach pension age after 5 April 2010.³⁹

A more detailed explanation was provided in evidence to the Joint Committee on Human Rights:

Q11: Does the Government plan to equalise state pension entitlement for same sex married couples, civil partners and widowers with the benefits enjoyed by widows?

In relation to state pensions, the remaining differences in treatment will relate to access to the lower-rate basic pension for a person whose (still living) same sex married spouse or civil partner, or a married man whose wife was born before April 1950; and to additional state pension inheritance for survivors who reached pension age before April 2010 but whose deceased

³⁸ Government Equalities Office, [Equal civil marriage: a consultation](#), March 2012

³⁹ [Equal marriage: The Government's response, December 2012](#), para 9.16-18

same sex married spouse, civil partner or wife (of a man) died while still under pension age. In all other circumstances, widows, widowers (of same sex and opposite sex marriages) and surviving civil partners are treated the same.

These residual differences are the effect of the legislation passed in 1995 to bring about equal treatment between men and women from 2010. By definition they are self-limiting because they can only apply to the cohorts described above, and (subject to the Government's proposals for state pension reform becoming law) will not affect anyone reaching state pension age after 5 April 2016. We therefore have no plans to change the existing rules.

The difference in treatment in respect of survivor's rights from 1978 for widows as compared to 1988 for widowers and surviving civil partners relates to the guaranteed minimum pension (GMP) that pension schemes contracted-out of the state earnings-related pension scheme before 1997 are required to pay.

The difference in treatment of widows and widowers in relation to GMPs is in part related to historical social attitudes and in part to past decisions about restructuring to maintain affordability, and it was considered fairest to treat civil partners the same as widowers.

It should be noted that this does not result in an overall difference in survivor benefits, because the GMP is offset against the amount of inheritable additional state pension (AP) that would have been payable, had the deceased not been contracted-out. As the gross inheritable amount (i.e. before any deduction for contracting-out) is based on accruals from 1978 onwards for widowers and surviving civil partners as well as widows, the difference in the amount of inheritable GMP is effectively made up through the state scheme.⁴⁰

A detailed description of the relevant provisions is in paragraphs 125-131 [Marriage \(Same Sex Couples\) Act 2013 – Explanatory Notes](#).

3.2 Occupational pensions

Equality Act exception

The [Equality Act 2010](#) contains an exception, providing that it is not discrimination because of sexual orientation to restrict access to a benefit, facility or service that would be available to a person who was married or in a civil partnership in relation to rights accrued before 5 December 2005 (the date the *Civil Partnerships Act* came into force).⁴¹ The effect of this is that where an occupational pension scheme provides survivors' benefits to married couples, it must also provide them to surviving civil partners, although only in respect of service from 5 December 2005. For schemes that are contracted-out of the State Second Pension, there are additional requirements (see section 2.2 above). They are required to make provision for survivor benefits to be paid to surviving civil partners based on a scheme member's contracted-

⁴⁰ [Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p 12; HC Deb. 21 May 2013 col. 1144](#)

⁴¹ [Equality Act 2010, schedule 9, para 18; Marriage \(Same Sex Couples\) Bill 2012-13, Schedule 4, para 15; Explanatory Notes, para 123; See also Explanatory Notes – Equality Act 2010, paragraphs 846-7](#)

out rights accrued from 6 April 1988, in line with the rules for widowers.⁴²

In its March 2012 consultation document, the Government explained that it was considering whether the provision in the Equality Act should be retained:

2.34 Survivor benefits in occupation pension schemes:

Current position – because civil partnerships only became available in 2005, where an occupational pension scheme provides discretionary survivor benefits, the *Equality Act 2010* allows schemes to only take into account rights accrued from the date the *Civil Partnership Act 2004* came into force.

Consideration – retrospective rights may remain an issue when equal civil marriage is introduced, but the Department for Work and Pensions is currently considering whether this provision in the *Equality Act 2010* should be retained, and the impacts of its removal or modification.⁴³

In its December 2012 response to the consultation, the Government said its intention was to treat same-sex married couples in the same way as civil partners:

9.19 There is also a difference in treatment in occupational pensions as between men and women, reflecting a legacy from the past. The Government's intention, as with State pensions and for similar reasons to those set out above, is to treat same-sex married couples in the same way as civil partners. Since the introduction of civil partnerships, companies which offer survivor benefits for spouses as part of a defined-benefit occupational scheme have been required to extend survivor benefits to civil partners. The Government intends to align the rules for same-sex married couples with those for civil partnerships, for these purposes. The reasons for this approach are:

The alternative approach, to equalise treatment of all same-sex couples, in a civil partnership or marriage, with that of opposite-sex couples would entail an unforeseen retrospective cost to schemes in a challenging economic climate when schemes are already under significant pressure.

In practice, many schemes (we estimate two-thirds) choose to pay exactly the same survivor benefits to spouses, civil partners, unmarried partners and unmarried same-sex couples on a voluntary basis.

9.20 Both state pensions and occupational pensions requirements are matters which are reserved to the UK Government, except in Northern Ireland. Therefore, the plans outlined below will cover Great Britain, rather than just England and Wales.

9.21 Policy on public service pension scheme in the UK is reserved to the UK Government. Those schemes where policy is reserved will treat same-sex married couples as civil partners. This means, that for the majority of schemes, survivor benefits for same-sex married couples will apply from 6 April 1988.*

⁴² [The Civil Partnership \(Contracted-out Occupational and Appropriate Personal Pension Schemes\) \(Surviving Civil Partners\) Order 2005 \(SI 2005/2050\)](#)

⁴³ Government Equalities Office, [Equal civil marriage: a consultation](#), March 2012

* This was the date when survivors' rights were equalised for widows and widowers.⁴⁴

It therefore amended the exception to the *Equality Act 2010* (schedule 9, paragraph 18) so that it applies to same sex married couples in the same way as to civil partners.⁴⁵ The effect is that it is not discrimination because of sexual orientation to based entitlement to survivor's benefits, to the survivor of a civil partnership or same sex married couple, to service from December 2005. A detailed description of the relevant provisions is in paragraphs 132-140, [Marriage \(Same Sex Couples\) Act 2013 – Explanatory Notes](#).

Debate in Parliament

At Public Bill Committee stage in the House of Commons, the then Shadow Equalities Minister, Kate Green proposed an amendment that would:

[...] remove the exemption from the *Equality Act 2010* which allows employers to treat married couples differently from civil partners as regards pension rights attributable to employment service prior to December 2005.⁴⁶

She referred to a case that Liberty had won on the issue at employment tribunal:

In January of this year, Liberty acted on behalf of a client, John Walker, who won a legal battle to secure equal pension benefits for his civil partner. In that case, the employment tribunal found that an occupational pension scheme that provided that John's civil partner could only benefit from pension rights accrued since 2005 when civil partnerships became available in the UK was directly discriminatory.[...] If the legislation is not amended to take account of the Walker judgment and the reliance on the European Court findings, it is likely that further legal action will be taken by same-sex married partners.⁴⁷

(NB. This decision was later reversed by an Employment Appeal Tribunal, which held that the difference in treatment was not unlawful.)⁴⁸

For the Government, Hugh Robertson responded that the exemption had been introduced to "prevent schemes from having retrospective financial obligations towards surviving civil partners that they would not have taken into account in their scheme funding assumptions." The Government did not agree with the finding in the Walker case and was considering its response.⁴⁹

⁴⁴ [Equal marriage: The Government's response, December 2012](#), para 9.19-22

⁴⁵ The amendment was made by schedule 4, part 6 of the [Marriage \(Same Sex Couples\) Act 2013](#)

⁴⁶ [PBC Deb, 7 March 2013, c441](#)

⁴⁷ [Ibid, c443](#); [Liberty press release, LIBERTY CLIENT WINS LEGAL FIGHT FOR EQUAL PENSION BENEFITS, 23 November 2012](#); [Brick Court Chambers press release, Employment Tribunal reads down Equality Act to give civil partners equal pension rights, 27 November 2012](#)

⁴⁸ [Brick Court Chambers, EAT upholds legislation allowing less favourable pension provision to civil partners than to married couples, 18 February 2014](#); See also, [Employment cases update - Innospec Ltd & Ors v Walker \(Interested Party: Sec of State for Work & Pensions\) UKEAT/0232/13/LA](#)

⁴⁹ [PBC Deb, 7 March 2013, c443](#)

In a letter to Ms Green of 11 April, the Minister explained that the impact of removing the exception in relation to contracted-in schemes could be an increase in scheme liabilities of around £18 million. Furthermore, the Government thought that there was a risk that the amendment could lead to survivor's pension rights having to be fully equalised.⁵⁰ The Minister said:

Based on financial modelling conducted in response to the Liberty case, we estimated the impact of removing the exception in relation to contracted-in schemes could be an increase in Defined Benefit scheme liabilities of around £18 million (present value terms). However, there is a risk – if this leads to fully equalising survivor's rights – of further substantial subsequent cost across all Defined Benefit schemes, including private sector schemes that are contracted-out of the State Second Pension, and public service schemes. While for larger schemes which apply the exception, the impact of removing it could be fairly small, it could be much more onerous for some schemes, particularly very small ones. For example, for a scheme with between two and four members, the increase in liabilities associated with payment of survivor benefits to an individual in a same sex marriage could be between 2% and 5%. We estimate that in total the impact on both contracted-in and contracted-out private sector schemes could amount to as much as £90 million. There would be very substantial costs for public service schemes.⁵¹

The Government estimated that the cost of fully equalising survivors' rights to the public sector could be "of the order of £3 billion to £4 billion."⁵²

The issue was debated again at Report Stage on 21 May 2013.⁵³ Caroline Lucas MP said:

Dealing with uncertainties around length of life, the possibility of illness, the decision to marry and many other issues is second nature to pension providers. Gay married people pose no more uncertainty than their straight counterparts. What is more, according to the Government's figures, two thirds of pension providers already do the right thing, so any additional liability to pension schemes will surely be minimal. The financial implications of perpetuating discrimination could be very grave indeed, though, for those individuals who have paid into their pension schemes in the same way as other employees, yet will be denied the survivor benefits available to married mixed-sex couples. [...] My amendment 49 would ensure full compliance with that directive and, crucially, ensure that the equality rulings made by the courts are applicable to all marriage relationships.⁵⁴

Kate Green, said she accepted the estimate of £18 million potential additional cost to private contracted-in occupational pension schemes.

⁵⁰ At present, contracted-out schemes are required to make provision for survivors' benefits for widowers and civil partners based on the scheme member's contracted-out rights accrued from 6 April 1988. However, for widows, survivors' benefits apply in respect of service from 1978. HL Deb, 25 May 2005, c505

⁵¹ [House of Commons Deposited Paper – DEP 2013/0643](#)

⁵² [Steve Webb MP, Evidence to the Joint Committee on Human Rights](#), 14 May 2013, Q44; This estimate is explained in more detail in paragraph 23 of the High Court judgment, [Cockburn, R \(on the application of\) v Secretary of State for Health \[2011\] EWHC 2095 \(Admin\) \(29 July 2011\)](#).

⁵³ [HC Deb, 21 May 2013, c1132-44](#)

⁵⁴ [Ibid, c1132](#)

However, she asked the Government to provide a full report to explain the “costs and implications for all forms of occupational pension” i.e. private sector contracted-in and contracted-out schemes and public service schemes. This would enable Parliament to take an informed decision.⁵⁵

Responding, the then Equalities Minister Helen Grant, said:

Amendment 49 would remove the exception in the *Equality Act 2010* that allows occupational pension schemes to take into consideration only accruals from 2005 for the purpose of survivor benefits for those in a civil partnership. It would also remove the provision in the Bill that extends the exception to same-sex married couples. When civil partnerships were introduced, an exception was added to equality legislation that allowed schemes to restrict access to survivor benefits for those in civil partnerships, so that schemes are required, when calculating survivor benefits, to take into account only accruals from 2005, when civil partnerships were implemented.

We have a responsibility to balance the interests of all parties involved in a pension, so while we are of course absolutely committed to equality for same-sex couples, we do not believe that it would be right to put on schemes the significant additional and retrospective financial burdens that would arise from removing the Equality Act exception. We are very conscious that defined-benefit schemes already face difficult economic conditions. [...]

The hon. Member for Brighton, Pavilion (Caroline Lucas) referred to the recent case of Walker, which was supported by Liberty, in which an employment tribunal found that a pension scheme had discriminated against a member by using that exception. The Government do not agree with that finding. The decision of the tribunal is not binding and there is nothing in it that leads us to question our policy. We intend to challenge the decision robustly. The Government have recently been added as an interested party in the appeal. On that basis, I ask the hon. Member for Brighton, Pavilion not to press the amendment.⁵⁶

In a report published on 11 June 2013, the JCHR recommended that:

[...] the Government should carry out a full review of pension provisions in relation to survivor pension benefit entitlements of same sex married couples and civil partners to ensure that there is no unjustifiable discrimination in pension scheme provisions. In doing so, we call on the Government to provide precise information about the potential costs of equalising pension rights. (Paragraph 101)⁵⁷

At Committee stage in the House of Lords, Labour Peer, Lord Alli, moved a similar amendment. He argued that same sex married couples should be treated in the same way as opposite sex couples:

I am pretty confident that no pension provider can accurately predict how many individuals within a pension scheme will be gay, how many will marry under this Bill when it becomes law or

⁵⁵ [Ibid, c1140](#)

⁵⁶ [HC Deb, 21 May 2013, c1144](#); Amendment number 49 was not called - see [Report Stage proceedings 21 May 2013](#), page 26

⁵⁷ [Human Rights Joint Committee - Second Report of 2013-14, Legislative Scrutiny: Marriage \(Same Sex Couples\) Bill](#)

become civil partners and how many will outlive their partners, husbands or wives by a significant period. I am also pretty confident that for the one-third of schemes that do not pay out, the actuaries who run the numbers probably have already built in the additional costs associated with this amendment. Pensions actuaries—and I have met many of them—deal constantly in uncertainties around the length of life, the possibility of illness, the number of scheme members who are likely to marry and many more issues. Given that two-thirds of schemes already do, I do not understand why we cannot insist that the rest treat same-sex couples who marry in exactly the same way as heterosexual couples who marry. They have all paid in the same pension contributions.⁵⁸

In response, Baroness Stowell said the Government did not think it would be right to impose additional unforeseen obligations on private sector pension schemes:

It has been suggested that the Government should undertake a survey to obtain more exact information on the potential costs. Although we might be able to reconfirm which schemes go back before 2005 in terms of their accruals, obtaining the detailed data for those that do not to enable us to calculate the costs of removing the exception would be complex. Although I referred to the 2009 ONS survey, the kind of survey necessary to be able to identify the different schemes that might be affected in different ways has not previously been carried out. A survey has not been done that could be repeated; it would have to be done from scratch.

To be fair, however, regardless of the scale of the cost, the Government believe that we should not impose the additional unforeseen obligations on schemes on the principle that we are not introducing retrospective changes. As we have said, these private schemes are funded by businesses, and we do not believe that it is for the Government to say what discretionary benefits they should offer.⁵⁹

Lord Alli withdrew the amendment but asked the Minister to reflect further on the issue.⁶⁰

At Report Stage on 10 July 2013, Lord Alli proposed a two-tier process, involving firstly, a review of the issues involved and a report back and secondly, order making powers to implement their decisions.⁶¹ Baroness Stowell explained why the Government was concerned about imposing a “retrospective burden without any evidence of what that impact might be.”⁶² However, she would take the issue away, with “the firm intention of bringing back a government amendment at Third Reading.”⁶³

Amendments were made to the Bill at Third Reading to require a review of the differences in survivor benefits in occupational pension schemes between opposite sex couples and same-sex couples in legal relationships. The review would look at the effect of eliminating

⁵⁸ [HL Deb, 24 June 2013, c508](#)

⁵⁹ [HL Deb, 24 June 2013, c513-4](#)

⁶⁰ *Ibid*, c515

⁶¹ [HL Deb 10 July 2013 c280](#)

⁶² *Ibid*, c285-9

⁶³ [Ibid c289](#)

differences in treatment because of sexual orientation. The amendments also introduced an order-making power to enable a change in the law if, on consideration of the outcome of the review, the Secretary of State thinks a change is needed in order to reduce or eliminate differences between survivor benefits. The amendments were in the names of Baroness Stowell, Lord Alli, Lord Lester and Baroness Royall. Baroness Stowell explained:

The Government have listened carefully and understand the concern that has been expressed that same-sex married couples will be in a different position from opposite-sex married couples as regards occupational pension benefits. The effect of the difference in treatment, which is permitted under the exception in Schedule 9 to the *Equality Act 2010*, is that currently civil partners and, by virtue of the provision made in Schedule 4 to this Bill, people married to someone of the same sex may not benefit from their civil partner or spouse's pensionable service prior to 2005 in respect of any survivor benefit payable on the death of their civil partner or spouse.

We discussed this issue at some length in Committee and on Report, when we had a full debate on Amendments 84 and 84A, tabled by the noble Lord, Lord Alli. I am grateful to him and other noble Lords for highlighting this important issue and for engaging in constructive discussions during the passage of the Bill, which have led us to bring forward this group of amendments.

I will begin by making clear that we are talking here about which period during which contributions were actually made to a pension scheme will be taken into account when calculating survivor benefits on the death of the pension scheme member. Therefore, this issue does not affect people whose pensionable service began in 2005 or later. For those whose pensionable service began prior to 2005, the concern is that contributions that they have made will not benefit their partner on their death. I should also make clear that if the Government were confident that equalising these benefits was straightforward and sustainable, we would be happy to support a move towards equalisation. But as a matter of principle, and as I have explained previously, successive Governments have avoided imposing retrospective costs on pension schemes, particularly private sector pension schemes, which have not been taken into consideration in their funding assumptions.

It would be irresponsible of any Government to commit themselves to imposing potentially significant costs on businesses and the taxpayer without first undertaking an assessment of all the implications and knock-on effects, and assessing the scale of the costs involved. This group of amendments therefore requires the Government to arrange a review of the differences in survivor benefits in occupational pension schemes between opposite-sex couples and same-sex couples in legal relationships, both marriage and civil partnership. It will look at the issue in the round and will include looking specifically at the effect of eliminating differences in treatment because of sexual orientation in terms of survivor benefits between people married to someone of the opposite sex and people married to someone of the same sex. I can therefore assure the House that the review will include an exploration of the issue which is the focus of the concern of the noble Lord, Lord Alli.

As I have said, we must also look at the full costs and implications of any change. This means looking at the effect of equalisation across the board, because any changes made for one group could have significant wider implications. The review will therefore also consider the differences in treatment between widows and widowers of marriages of opposite-sex couples and the impact of removing the current exception permitting these gender-based differences of treatment provided by Section 67 of the Equality Act. It is important to emphasise, however, that these existing gender-based differences in treatment for widows and widowers in relation to survivor benefits arise from changes that have been made over time as a result of societal change. These longstanding differences reflect the historical fact that in the past many women were not economically active and relied on their husbands for their pension. These differences are therefore not consequences of the measures in the Bill, but it is important that the review considers all the interdependencies between the arrangements for different groups in occupational pension schemes in the round.

It is also important that interested parties are consulted and that all relevant voices are heard. The review will also therefore include consultation with those interested parties that the Secretary of State considers appropriate. This point was raised by my noble friend Lord Higgins. I can assure him and the House that consultation will include, for example, pension scheme trustees and industry bodies, as well as organisations representing the interests of lesbian and gay employees.

Following this comprehensive review, the amendments require the Secretary of State to publish a report of the outcome before 1 July 2014. The amendment also includes an order-making power. This ensures that if on consideration of the outcome of the review the Secretary of State thinks that the law needs to be changed in order to reduce or eliminate differences between survivor benefits, this can be achieved through secondary legislation, subject to the affirmative procedure.⁶⁴

The [*Marriage \(Same Sex Couples\) Act 2013*](#) received Royal Assent on 17 July 2013. The pension provisions are in Schedule 4 - part 5 (state pensions) and part 6 (occupational pensions and survivor benefits). The requirement for a review of survivor benefits in occupational schemes is in section 16.

⁶⁴ [HL Deb 15 July 2013 c532-4](#)

4. Review of survivor benefits in occupational pension schemes

As explained above, section 16 of the [Marriage \(Same Sex Couples\) Act 2013](#) placed a duty on the Secretary of State to conduct a review of survivor benefits in occupational pension schemes.

The [report of the review](#) was published on 26 June 2014.⁶⁵ Its key findings were:

The capitalised cost* of removing differences in survivor benefits between opposite sex surviving spouses, same sex surviving spouses and surviving civil partners in the public service pension schemes is estimated at around £2.9 billion.

Of this around £1 billion would be payable immediately in respect of benefits due before 1 April 2015. It is estimated there would then be ongoing costs across public service schemes of around £0.1 billion per annum into the 2020s, reducing thereafter.

The estimated cost to the private sector schemes of removing these differences is around £0.4 billion. [...]

If private sector schemes were to provide benefits to same sex couples on the same basis as opposite sex widowers, as most public service schemes do, this is estimated to cost £0.1 billion.

Public service schemes exceed the statutory minimum requirement which permits occupational pensions schemes to provide survivor benefits for same sex couples only taking account of service since 2005. However, the majority of public service schemes only take into account service from 1988 when calculating same sex survivor benefits, and so rely on paragraph 18 of Schedule 9 of the *Equality Act*.

Of the 27 per cent of private pension schemes that were found to have a difference in the way survivor benefits between surviving opposite sex spouses and surviving civil partners were calculated, around two-thirds only took into account accruals after 2005 in those calculations.⁶⁶

*Capitalised costs mean that the amount of money needed now to pay a series of cashflows in the future. A more detailed explanation is provided in the letter from the Government Actuary's Department to HM Treasury. That letter is attached as [Annex B](#) to this document.

As this explains, removing all differences in treatment was estimated to have a capitalised cost of around £2.9 billion for schemes in the public sector schemes and £0.4 billion for those in the private sector.⁶⁷ Much of this cost is accounted for by eliminating differences in opposite sex survivor benefits provided to widows and widowers – which is estimated to have a capitalised cost of around £2.8 billion to the public service schemes and around 0.3 billion to private sector schemes.⁶⁸

⁶⁵ HM Government, [Review of Survivor Benefits in Occupational Pension Schemes](#), June 2014. The report and Annexes can be found on [Gov.UK](#)

⁶⁶ Ibid p5

⁶⁷ HM Government, [Review of Survivor Benefits in Occupational Pension Schemes](#), June 2014, p22

⁶⁸ Ibid para 4.16

Requiring schemes to eliminate all differences in treatment because of sexual orientation (i.e. to provide benefits to female survivors of same sex legal relationships on the same basis as to opposite sex widows, and to male survivors of same sex legal relationships on the same basis as to opposite sex widowers), would have an estimated capitalised cost of around £0.02 billion to the public service schemes and around £0.1 billion to private sector schemes. Although this would remove all differences because of sexual orientation in the provision of survivor benefits, it would leave differences because of sex.⁶⁹

The estimated capitalised cost of eliminating differences between same sex survivor benefits and opposite sex survivor benefits provided to widowers of opposite sex marriages is £0.1 billion to schemes in the private sector.⁷⁰ However, this would also leave some inequalities in place: the widow of a marriage of an opposite sex couple would be treated more favourably (as now) than the widower of an opposite sex couple and all survivors of same sex relationships.⁷¹

In conclusion, the Government said it would consider the cost and potential impact on pension schemes, along with the wider consequences of making retrospective changes to scheme rules:

6.1 The Government has made it clear that it believes that it is right that married same sex couples and civil partners should be treated equally to married opposite sex couples. That is why it has brought forward legislation to ensure that survivor benefits are now built up equally for all legal relationships.

6.2 However, pensions are unique in that the consequences of actions that were taken in the past are crystallised today, and therefore reflect the inequalities of the past in today's pension outcomes. We know now that many schemes in the private sector have already equalised survivor benefits despite the cost. The review finds that reducing or eliminating the remaining differences in survivor benefits in the private sector would cost £0.4 billion, but that this cost would be concentrated in a relatively small group of schemes. Furthermore, the cost to the public service schemes would be £2.9 billion.

6.3 In considering its response to this review, the Government will need to consider these costs and the potential impact on pension schemes, along with the wider consequences of making retrospective changes to scheme rules. As this review demonstrates, these are complex issues and the Government will have to consider these very carefully before making a decision on whether the law should be changed.⁷²

The TUC responded that the Government should “now do the right thing and end this discrimination against widowers and same-sex couples.”⁷³ It argues that, that the costs to schemes are small when put in context:

⁶⁹ Ibid para 4.14-5

⁷⁰ Ibid para 4.9 and 4.10

⁷¹ Ibid para 4.12

⁷² Ibid p31

⁷³ Josephine Cumbo, TUC calls for equality in pension survivor benefits, *Financial Times*, 26 June 2014

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.⁷⁴

The Government has not yet responded to the review. In November 2016, it said it a decision would be made “in due course.”⁷⁵ In fact, it did not do so until after the judgement of the Supreme Court in *Walker v Innospec*.

4.1 Legal challenge – Walker v Innospec

A legal challenge by John Walker to the use of the Equality Act exception was heard in the Court of Appeal in late June 2015. The civil liberties organisation Liberty, which supported Mr Walker said:

Liberty client John Walker’s legal battle to secure equal pension benefits for his husband continues this week in the Court of Appeal.

Mr Walker retired from chemicals group Innospec in 2003, having worked for the company for more than 20 years. He began his relationship with his now husband in 1983. The couple entered into a civil partnership in January 2006, which they have recently converted into a marriage. Mr Walker wants to ensure that, should he die first, his husband will be adequately provided for.

Unlike the vast majority of private occupational pension schemes, Innospec does not treat surviving same-sex spouses and civil partners the same as surviving spouses of other-sex marriages (widows or widowers).

Relying on an exemption in the *Equality Act 2010*, the trustees of its pension scheme have made clear that they will not pay Mr Walker’s husband a pension based on contributions made to the scheme before 2005, as they would to his widow if he had married a woman. All Mr Walker’s husband will receive, should he outlive him, is a pension of a few hundred pounds a year.

⁷⁴ TUC, [Survivor benefits review: TUC submission](#), 1 July 2014

⁷⁵ [PO 50428, 3 November 2016](#); See also [PO 16179, 23 November 2015](#); [POHL1778 4 August 2015; PO HL5724, 13 March 2015](#). Teachers Pension Scheme – [Q and A, Survivors’ benefits in the Teachers’ Pension Scheme](#), March 2018; [PO 208267 17 January 2019](#)

Mr Walker's claim – arguing that such discrimination contravenes both European Union law and the European Convention on Human Rights – was upheld in the Employment Tribunal in 2012. However, this decision was overturned in the Employment Appeal Tribunal last year, with the Department for Work and Pensions (DWP) intervening in support of Innospec.⁷⁶

In a judgement issued on 6 October 2015, the Court of Appeal held that the Equality Act exception was lawful and that survivors' pensions did not have to take account of service before 5 December 2005. This reinforced the existing law. Lord Justice Underhill said:

I can understand that Mr Walker and his husband will find this conclusion hard to accept. But changes in social attitudes and the legislation which embodies those changes, cannot fully undo the effects of the past.⁷⁷

Mr Walker described the outcome as discriminatory:

I paid exactly the same contributions as my heterosexual colleagues. Yet my husband – with whom I have lived for over 20 years – will be entitled to nothing from the company on my death. If I were married to a woman, or if I divorced my husband and married a woman, she would be entitled to a full spousal pension. How can this constitute anything other than the most flagrant discrimination?⁷⁸

The TUC expressed disappointment.⁷⁹

The Supreme Court heard the case on 8 and 9 March 2017.⁸⁰ In July 2017, it announced that it had found in Mr Walker's favour:

JUDGMENT

The Supreme Court unanimously allows Mr Walker's appeal and makes a declaration that (i) paragraph 18 of Schedule 9 to the Equality Act 2010 is incompatible with EU law and must be disapplied and (ii) Mr Walker's husband is entitled on his death to a spouse's pension, provided they remain married. Lord Kerr (with whom Lady Hale and Lord Reed agree) gives the lead judgment. Lord Carnwath and Lord Hughes give a judgment concurring in part.

REASONS FOR THE JUDGMENT

EU Directive 2000/78/EC (the Framework Directive) requires member states to prohibit discrimination in the field of employment and occupation on various grounds including sexual orientation. The deadline for transposing the Directive into domestic law was 2 December 2003 and the UK did this within the deadline through legislation now incorporated into Part 5 of the *Equality Act 2010*. Parliament also, however, provided for the exception now contained in paragraph 18 of Schedule 9 to the 2010 Act restricting benefits payable in respect of periods of service before 5 December 2005. The essential question in this

⁷⁶ [Liberty continues fight for same-sex pension equality, 29 June 2015](#)

⁷⁷ [Between Dermod O'Brien and Ministry of Justice and between Mr John Walker and Innospec & Ors \[2015\] EWCA Civ 1000, \[2015\] WLR\(D\) 406, 6 October 2015](#)

⁷⁸ [Court rules same-sex couple are NOT entitled to £3.3 bn pension boost, *Daily Telegraph*, 5 October 2015](#)

⁷⁹ TUC press release, [Appeal Court ruling on pensions for same-sex couples a disappointment, says TUC](#), 6 October 2015

⁸⁰ Supreme Court, [Walker v Innospec Ltd and others](#)

appeal is whether paragraph 18 of Schedule 9 is incompatible with the Framework Directive [20-21].

Although EU law does not impose any requirement on member states to recognise same-sex partnerships, the European Court of Justice (CJEU) has held that if a status equivalent to marriage is available under national law, it is directly discriminatory contrary to the Framework Directive for an employer to treat a same-sex partner who is in such a partnership less favourably than an opposite-sex spouse. In the UK, Parliament has chosen to recognise same-sex partnerships, first through the introduction of civil partnerships and subsequently through the recognition of same-sex marriage itself.

The general rule under EU law, as in most modern legal systems, is that legislative changes apply prospectively. The CJEU has developed two principles to establish the temporal application of EU legislation - the "no retroactivity" principle and the "future effects" principle [22-23]. These principles draw a distinction between the retroactive application of legislation to past situations (which is prohibited unless expressly provided for) and its immediate application to continuing situations (which is generally permitted). The relevant question is whether the legal situation has become "permanently fixed" [25]. The application of these principles presents a challenge when one is dealing with entitlement to an occupational retirement pension, the right to which may accumulate over decades and it may not be easy to identify the point at which it becomes "permanently fixed".

The Court of Appeal, in dismissing Mr Walker's appeal, wrongly concluded that entitlement to a survivor's pension is "permanently fixed" at the date of retirement [43]. It was influenced in this view by a line of the CJEU's case law exceptionally limiting the temporal application of one of its judgments relating to equal pay for men and women (the Barber line of case law). In the opinion of the majority of the Court, these cases are not relevant to the application of the Framework Directive in a case such as this. How the CJEU exceptionally applies a temporal limitation to one of its rulings has no inevitable bearing on the temporal application of legislation as a matter of principle.

In any event, two recent decisions of the Grand Chamber of the CJEU concerning the equal treatment rights of same-sex partners to survivor's pensions put success for Mr Walker's claim beyond doubt (Case C-267/06 *Maruko v Versorgungsanstalt der Deutschen Bühnen* and Case C-147/08 *Römer v Freie und Hansestadt Hamburg*). From these cases, it is clear that, unless evidence establishes that there would be unacceptable economic or social consequences of giving effect to Mr Walker's entitlement to a survivor's pension for his husband, at the time that this pension would fall due, there is no reason that he should be subjected to unequal treatment as to the payment of that pension. Mr Walker's husband, provided he does not predecease him, and that they remain married at the time of Mr Walker's death, is therefore entitled under the Framework Directive to a spouse's pension calculated on the basis of all the years of Mr Walker's service with Innospec. On that account, paragraph 18 of Schedule 9, in so far as it authorises a restriction of payment of benefits based on periods of service before 5 December 2005, is incompatible with the Framework Directive and must be disapplied.

Lord Carnwath and Lord Hughes agree with the majority that Mr Walker’s appeal should be allowed, but on the more limited basis that the question of who qualified as his spouse fell to be determined after the Directive had come into force. They prefer to leave the broader question of whether the Barber line of case law is of any relevance to the application of the Framework Directive to be determined by the CJEU in *O’Brien v Ministry of Justice* [2017] UKSC 46, in which the Court has decided to refer to the CJEU a question relating to the pension entitlement of part-time workers.⁸¹

The full judgement is [here](#).

Liberty called on the Government to commit to fully protecting LGBT rights post-Brexit:

But this ruling was made under EU law and is a direct consequence of the rights protection the EU gives us. We now risk losing that protection. The Government must promise that there will be no rollback on LGBT rights after Brexit – and commit to fully protecting them in UK law. How else can John be sure he and others like him have achieved lasting justice today?⁸²

4.2 Government response

The Government explains the implications of the Walker judgment for occupational pension schemes, as follows:

72. For male same-sex couples, following the Supreme Court Judgment in the Walker case, the requirement is that the survivor should get the same as the widow of a male member in an opposite-sex marriage; and for female same-sex couples, the survivor should get the same as the widower of a female member.⁸³

Private sector schemes would be “individually responsible for ensuring that they are compliant with the judgment”:

It is therefore not for the Government to direct private sector schemes in this instance, and any action taken by the Government in respect of public service pension schemes should not be interpreted as the minimum requirement for private pension schemes in considering how they respond to this judgment. These schemes will need to take their own advice to ensure that they are legally compliant with the judgment going forward.⁸⁴

Public service pension schemes

On 21 March 2019, HM Treasury said departments would make the regulatory changes needed in light of the *Walker* judgement.⁸⁵ In public

⁸¹ [Press summary, Walker v Innospec and others \(Respondents\) \[2017\] UKSC 47 On appeal from \[2-15\] ECWA Civ 1000](#)

⁸² [Liberty press release, 12 July 2017](#)

⁸³ Government Equalities Office, [Implementing Opposite-Sex Civil Partnerships](#), July 2019

⁸⁴ [HCWS 4 July 2019 c73WS](#)

⁸⁵ [PQ 135229, 19 April 2019; LGPS: technical amendments to benefits Government response to the consultation; Teachers' Pension website – Survivors' benefits in the Teachers' Pension Scheme; NHS Pension Scheme – proposed changes to regulations 2019; The Police and Firefighters' \(Pensions etc.\) \(Amendment\) \(England and Wales\) Regulations 2019 \(SI 2018/378\); The Armed Forces Pension Schemes and Early Departure Payments Schemes \(Amendments Relating to Flexible Working and Miscellaneous Amendments\) Regulations 2018 \(SI 2018/1111\)](#)

service pension schemes, surviving same-sex spouses and civil partners would, in the majority of cases, receive benefits equal to widows of opposite-sex marriages:

[...] survivors of registered civil partnerships or same-sex marriages should be provided with benefits equal to those that the scheme member would have left to an opposite sex surviving spouse. The Government has therefore decided that survivors of registered civil partnerships or same-sex marriages will be provided with benefits that replicate the benefits provided to widows. These changes will be implemented in LGPS as though they had applied from the respective dates that the civil partnerships and same-sex marriages were implemented.⁸⁶

This was confirmed in a Written Statement of 4 July 2019:

The Government respect the decision of the Supreme Court. It is now clear that same-sex civil partners or spouses are entitled to survivor benefits in the same way as opposite-sex spouses.

Impact of the judgment on public service pension schemes

Following the Court ruling, the Government have decided that in public service schemes, surviving male same-sex and female same-sex spouses and civil partners of public service pension scheme members will, in the majority of cases, receive benefits equivalent to those received by widows of opposite-sex marriages. The exception to this may be in specific schemes where, in the past, improvements in female members' survivor benefits have led to increased contributions. Departments will consult on and take forward changes as soon as possible. Schemes will notify their members of changes and any actions they need to take.

All same-sex survivors of a public service pension scheme member will benefit from this change. How much they benefit by will be determined by a combination of factors, including when the deceased was employed, their pensionable earnings, the length of any pensionable service and the specific benefits of the scheme to which the deceased belonged.⁸⁷

The Government decided "not to equalise treatment between female and male survivors of opposite-sex marriages in public service pension schemes." This was because:

[...] The European Court of Justice judgment in Barber found that occupational pension schemes were required to provide equal pensions to men and women, including survivors' benefits, in relation to relevant employment from 17 May 1990. The public service pensions schemes already exceed the requirement of the Court's judgment.⁸⁸

Sir Steve Webb expressed disappointment that "a generation of widowers will lose out as a result"⁸⁹

⁸⁶ Department of Communities and Local Government, [Local Government Pension Scheme: technical amendments to benefits Government response to the consultation](#)

⁸⁷ [HCWS 4 July 2019 c73WS](#)

⁸⁸ Government Equalities Office, [Implementing Opposite-Sex Civil Partnerships](#), July 2019

⁸⁹ ["New statement shows government 'dragging its heels' on pension equality", Royal London, 5 July 2019.](#)

The Written Statement of 4 July 2019 included the Government's response to its review of survivor's benefits:

During passage of the *Marriage (Same Sex Couples) Act 2013* the Government committed to undertake a review of differences in survivor benefits in occupational pension schemes. A duty to conduct this review was duly enacted in section 16 of the Act.

The review was conducted jointly by the Department for Work and Pensions (DWP) and HM Treasury (HMT), which are the Departments with policy responsibility for private and public service pension schemes respectively, and was published on 26 June 2014.

The review considered the differences in survivor benefits in occupational pension schemes between different categories of member and the costs and other effects of eliminating those differences by the equalisation of survivor benefits. The review investigated the differences between:

- same-sex survivor benefits and opposite-sex survivor benefits provided to widows;
- same sex-survivor benefits and opposite-sex survivor benefits provided to widowers; and
- opposite-sex survivor benefits provided to widows and opposite-sex survivor benefits provided to widowers.

The review considered the extent to which same sex survivor benefits are provided in reliance on paragraph 18 of schedule 9 to the *Equality Act 2010* and the extent to which same sex survivor benefits and opposite sex survivor benefits are calculated by reference to different periods of pensionable service.

The review further considered survivor benefits provided to same-sex civil partners and those provided to same-sex married couples. The law treats same-sex civil partners equally to same-sex married couples for the purposes of survivor benefits in pension schemes because these relationships provide comparable rights and responsibilities. There is no significant difference between them. As such, any differences in the benefits provided to survivors of same-sex civil partners when compared to same-sex spouses would be difficult to justify. The review therefore gave no further consideration to differences between these two groups.

The review demonstrated that there are a variety of differences in treatment in survivor benefits in occupational schemes in respect of rights built up in the past. These differences reflect the change in social attitudes over the last 60 years and the subsequent introduction of new forms of legal relationships. As new groups have been brought into survivor benefit provision, changes have generally been applied prospectively to benefits built up from the point of that change.

The Government support equal treatment of survivors of all legal relationships, and Parliament provided that survivor benefits must be built up equally for all these groups on accruals from 5 December 2005 (when the *Civil Partnership Act 2005* came into force).

The Walker judgment has clearly changed the legal position relating to survivor benefits in respect of same-sex unions, and the Government have acted; public service pension schemes will now implement changes to provide that survivors of registered same-sex civil partnerships or same-sex marriage will be provided with

benefits that replicate those provided to widows of opposite-sex marriages, with the exception of specific schemes where survivor benefits depend on making the correct contributions. As was made clear earlier in this statement, private pension schemes must take advice and act accordingly in complying with the judgment.

Following careful consideration of the review's findings, the Government have concluded that, aside from those changes brought about by the Supreme Court judgment, they will not make any further retrospective changes to the existing provisions in respect of occupational pension schemes to equalise survivor benefits. While this means that the differences in survivor benefits for accruals in past periods will remain for some, these will work their way out of the system in time.⁹⁰

⁹⁰ [HCWS 4 July 2019 c73WS](#)

5. Gender re-assignment

5.1 Debate on the Bill

The then Secretary of State for Culture, Media and Sport, Maria Miller, explained to the Committee considering the [Marriage \(Same Sex Couples\) Bill 2012-13](#), the approach being taken in relation to couples where one member changed their gender:

As with all pensions issues, we look to be as fair as possible, but this is a particularly difficult area. If we make an exception for private and occupational pension schemes when a person changes their legal gender, we place additional regulatory and administrative burdens on pension schemes. We would require schemes to ask survivors intrusive questions to establish the gender history of the deceased and therefore be able to evaluate what the appropriate survivor benefits were. It is a very difficult and complex area that we have looked at in some detail. We have decided that it is best to avoid over-regulation and allow schemes to be flexible in the way that they provide these benefits. Some schemes can and do provide more than the minimum, as I have said before.⁹¹

Paula Dooley of the Gender Identity Research and Education Society told the Committee that this would leave some people with a very difficult choice to make:

We do have some difficulties with the Bill. The first is on pensions, as there is a difficulty for those in an occupational pension scheme when the survivor's pension is considered. Under the Bill as currently configured, if a person within a marriage should get a GRC, then their spouse's survivor pension will be reduced, dramatically in some cases. We believe this to be fundamentally unfair, because what we seem to be seeing is that we are being shoehorned into the arrangements for gay and lesbian folk. Do not forget that this particular couple—this mythical couple—are already married. They have already paid the entitlement for proper benefits on the GRC person's death. So it does not remove the difficult choice that the person will have, again, choosing between their spouse and gender recognition for themselves.⁹²

Kate Green argued that the Bill should be amended to ensure that widows of marriages that became same-sex marriages as a result of their spouse's change of legal gender during the marriage would be treated the same as widows of opposite-sex marriages for the purpose of survivors' benefits in occupational pension schemes. She explained that:

That issue arises because the Bill makes provision for same-sex married couples to be treated in the same way as civil partners for the purpose of survivors' benefits. We have already discussed the situation in relation to contracted-in pensions, where rights date back to 2005. For contracted-out schemes, the position is a little different. Those schemes are required to make provisions for survivor benefits for civil partners based on the contracted-out rights accrued since 6 April 1988, in line with rules for widowers; however, for widows, the rights to survivors' benefits in

⁹¹ [PBC Deb 12 February 2013](#), Q14

⁹² [PBC Deb 14 February 2013](#), Q158

contracted-out schemes apply in respect of service back to 1978. There will therefore be a very, very small group of women who stand to lose that extra 10 years of access to survivor benefits if their partner undergoes gender reassignment and the Bill is not changed.⁹³

Hugh Robertson said that the Government would consider the issue further and return to it at Report stage:

In the light of those submissions, we have looked again at the issue. We understand that for a very small number of people loss of those benefits would indeed be a serious problem; however, I think we all agree that the issue is complex and needs to be looked at very carefully. We need to include consideration of the practical issues both for individuals and for the schemes that would be affected. We would not want to make a change that would result in significant cost to pension schemes and to the public purse. [...] As with the previous amendment, I make it clear to her that that is not an indication that we will accept an amendment, or the reverse; it is simply an undertaking to look at the matter carefully, and bring it back on Report.⁹⁴

The Government made an amendment to the Bill at Report Stage. The then Equalities Minister, Helen Grant, explained:

Government amendments 40 to 47 deal with pension entitlements. They amend part 6 of schedule 4, which provides for same-sex married couples to be treated in the same manner and to be entitled to the same survivor benefits as civil partners. As drafted, that includes couples in same-sex marriages who have preserved their marriage following the change of legal gender of one of the spouses, and it is designed to ensure that all same-sex couples are treated alike for this purpose. We recognise that our policy of treating same-sex marriages in the same way as civil partnerships for occupational pension survivor benefits may create a problem in relation to survivor benefits for a very small group of individuals whose spouses change gender during their marriage. We understand that this could deter a transsexual person from seeking to change their legal gender because of the financial impact on their husband or wife. If the amendments are made, widows of marriages that become same-sex as a result of the husband's change of legal gender during the marriage will still be treated as widows for the purpose of calculating survivor benefits in a contracted-out occupational pension scheme; and for schemes that are not contracted out, in calculating any entitlement to survivor benefits, the marriage will continue to be treated as opposite-sex marriage.⁹⁵

5.2 Legislation

The [Marriage \(Same Sex Couples\) Act 2013](#) introduced an exception where the deceased spouse legally changed gender during the marriage:

Para 134. Widows and widowers of marriages of same sex couples will be entitled to any guaranteed minimum pension accrued after April 1988. However, an exception is made for a woman in a marriage of a same sex couple whose spouse was her

⁹³ [PBC Deb 7 March 2013, c446](#)

⁹⁴ *Ibid*, c447

⁹⁵ [HC Deb, 21 May 2013, c1143](#)

husband immediately before obtaining a gender recognition certificate - a "relevant gender change case". In such cases widows will be treated like widows of men for the purpose of inheritance of the guaranteed minimum pension.⁹⁶

This change was introduced into the rules of public service pension schemes by regulations in 2014. The Explanatory Notes say:

7.11 It is Government policy that married same sex couples should generally be treated in the same way as civil partners in relation to pensions. Most pension schemes provide for survivor benefits for the surviving spouse or surviving civil partner of a scheme member following the scheme member's death. Survivor benefits depend on the service of the scheme member.

7.12 For historical reasons some women who were married to men receive more advantageous survivor benefits than men who survive their wives. For the latter, their entitlement to survivor benefits is usually calculated on the basis of their late wife's service from 1988 onwards, whereas women who survive their husbands can claim entitlements taking account of earlier periods of their late husbands' service. Civil partners and married same sex couples are treated in the same way as widowers of women and therefore their survivor benefits will also be calculated only in respect of service of their deceased spouse or civil partner post-dating 1988. Therefore, if a couple move from being an opposite sex married couple to being a same sex married couple due to one of the couple changing legal gender, then there may be a loss of survivor pension expectation. For example: A male scheme member is married to a woman and has pensionable service prior to 1988. His wife therefore has an expectation of survivor benefits taking account of this service. The scheme member changes legal gender and both spouses agree that the marriage should continue. In the event of the scheme member's death, the scheme member's wife would lose her expectation of survivor benefits taking account of service prior to 1988. Therefore if a couple move from being an opposite sex married couple to being a same sex married couple due to one of the couple changing legal gender, then there may be a loss of survivor pension expectation.

For example: A male scheme member is married to a woman and has pensionable service prior to 1988. His wife therefore has an expectation of survivor benefits taking account of this service. The scheme member changes legal gender and both spouses agree that the marriage should continue. In the event of the scheme member's death, the scheme member's wife would lose her expectation of survivor benefits taking account of service prior to 1988.

7.13 It is Government policy that a person whose spouse changes legal gender should not suffer any financial detriment as a result of their spouse's decision to change legal gender. The amendments to the various public service pension schemes therefore ensure that where a spouse of a scheme member would lose more advantageous survivor benefits because of the member's change in legal gender (which will in most cases affect a woman who was married to a male scheme member who then changed legal gender to female), the spouse will in fact be treated as if that change in legal gender had not occurred, so there is no loss of expectation. If a scheme provides for more generous survivor benefits for men married to female scheme members,

⁹⁶ [Marriage \(Same Sex Couples\) Act 2013 - Explanatory Notes](#)

those men will also be protected from losing these if their wives change legal gender to male.

7.14 Part 2 of Schedule 1 provides for this exception to take effect in relation to public service pension schemes in England and Wales and Schedule 2 does this in relation to certain public service pension schemes in Scotland (relating to the Armed Forces and the Royal Mail and schemes relating to particular bodies carrying out functions in the area of transport). Several of the amendments in Schedule 2 are made as a consequence of the fact that the 2014 Act enables same sex couples in Scotland to marry.⁹⁷

DWP explains that for occupational pensions purposes, a “surviving spouse whose deceased spouse legally changed gender during the marriage will still be able to qualify for a survivor benefit on the same basis as they would have done before the legal change of gender”:

Some pension schemes provide as part of your pension package, survivor benefits for spouses in the event of the death of the scheme member. The type of survivor benefits provided will vary depending on the type of scheme, the rules of that scheme and how long you have been a member of the scheme. Gender and sexual orientation can also affect survivor benefit provision. If you are unsure about survivor benefits in your scheme you should contact your employer or pension provider.

However, under the *Marriage (Same Sex Couples) Act 2013* which applies to marriages under the law of England and Wales, or of a country or territory outside of the UK, there is provision that a surviving spouse whose deceased spouse legally changed gender during the marriage will still be able to qualify for a survivor benefit on the same basis as they would have done before the legal change of gender. The same provisions also exist for applicants in a Scottish marriage. It is important your pension scheme is kept informed of any change in your circumstances in order that your surviving spouse can receive the correct benefit.⁹⁸

⁹⁷ Explanatory Memorandum to [SI 2016/3061](#)

⁹⁸ DWP, [How getting a full Gender Recognition Certificate may affect National Insurance, pensions and other social security benefits for applicants and their spouses or civil partners](#) 2014, updated Feb 2018; See also, LGPS, [Technical consultation on changes to LGPS scheme rules](#), December 2014; See also Civil Service Pensions EPN 365 [Marriage of same sex couples](#)

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