

EXPLANATORY MEMORANDUM TO

THE PENSIONS ACT 2014 (CONSEQUENTIAL AMENDMENTS) ORDER 2016

2016 No. 931

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
- 1.2 This instrument contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes consequential amendments of primary legislation in connection with the new State Pension which was introduced on 6 April 2016. The new State Pension applies to people who reach (or reached) State Pension age on or after that date.
- 2.2 The main group of amendments are to provisions which support the annual exercise to up-rate (increase) social security benefits in payment. They enable the award of certain income-related benefits to be adjusted automatically where another benefit which is taken into account in the calculation of the income-related benefit is up-rated. The amendments ensure this process will continue to apply where the other benefit income is new State Pension.
- 2.3 The other amendment made by this instrument provides the right of appeal against decisions about National Insurance credits which count for new State Pension purposes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This is an affirmative instrument which is being brought into force the day after it is made. The amendment made by Article 3 (provision of appeal rights) should have been in place from 6 April 2016 but was unfortunately overlooked, and is therefore being commenced as soon as possible to minimise the period during which there is no right of appeal. The amendments made by Article 2 should be in force from the start of the 2017 up-rating exercise, which is expected late November or early December 2016 (see paragraphs 7.1 to 7.4 below). These amendments also take effect from the day after the Order is made to ensure they are in place in time, taking account of potential variations in when the exercise may begin and when the instrument can be made.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

- 4.1 The new State Pension was introduced on 6 April 2016 by the Pensions Act 2014¹ (“the 2014 Act”). The main structure and detailed provisions of the new State Pension are set out in, respectively, Part 1 of that Act and the State Pension Regulations 2015² (“the 2015 Regulations”).
- 4.2 Provisions dealing with mainly administrative matters that are common to many benefits, such as claims, decision-making and appeals, are contained in separate legislation. Most of the amendments needed to fit the new State Pension into the existing administrative framework have already been made³ and generally extend the existing arrangements to new State Pension in the same way as they apply to “old” State Pension.⁴ This affirmative instrument is needed to make a small number of further such amendments.
- 4.3 Article 2 of this instrument amends sections 159 to 159D of the Social Security Administration Act 1992 (“the Administration Act”) which relate to the process of recalculating certain benefits as a consequence of annual up-rating. Provision for benefits to be up-rated is contained in sections 150, 150A and 151A of that Act. Section 151A was inserted by the 2014 Act and provides for the “protected payment” and certain other transitional components that may be payable with the new State Pension to be up-rated in line with price increases.⁵ The benefits specified in section 150A, including the old basic State Pension, are up-rated in line with at least the growth in average earnings. Section 150A was amended by the 2014 Act to include the full rate of new State Pension. Section 150 also provides for price-protection, and applies to most other social security benefits and all other components of old State Pension, including additional State Pension and increments (the increase payable when a person defers claiming their State Pension): this was amended by the 2014 Act to include increments from deferring new State Pension. The first up-rating of new State Pension will be in April 2017.
- 4.4 Article 3 amends Schedule 3 to the Social Security Act 1998⁶ (“the 1998 Act”), which lists decisions that can be appealed, to insert a reference at paragraph 17 to new subsection (5ZA) of section 22 of the Social Security Contributions and Benefits Act 1992⁷ (“the Benefits Act”). Section 22(5) of the Benefits Act provides for regulations setting out the circumstances in which a person may be credited with earnings or National Insurance contributions to enable them to qualify for contributory benefits. New subsection (5ZA) was inserted by the 2014 Act to provide the power to make regulations about credits for the purposes of new State Pension. The relevant regulations are in Part 8 of the 2015 Regulations. As noted in paragraph 3.1, the

¹ <http://www.legislation.gov.uk/ukpga/2014/19/contents/enacted>

² <http://www.legislation.gov.uk/uksi/2015/173/contents/made>

³ See Schedule 12 to the 2014 Act and the Pensions Act 2014 (Consequential, Supplementary and Incidental Amendments) Order 2015 <http://www.legislation.gov.uk/uksi/2015/1985/contents/made>

⁴ Old State Pension refers to State Pension for people who reached State Pension age before 6 April 2016.

⁵ A protected payment applies if the rate of old State Pension based on an individual’s pre-April 2016 contributions exceeds the full rate of new State Pension at April 2016 (£155.65). The protected payment is the excess. The other transitional components uprated under section 151A are inherited State Pension, shared State Pension and inherited increments. Amounts of inherited or shared state pension are added to the rest of the person’s new State Pension, excluding any increments from deferring. The total amount up to the full rate will be uprated under section 150A. The balance if any will be uprated under section 151A.

⁶ <http://www.legislation.gov.uk/ukpga/1998/14>

⁷ <http://www.legislation.gov.uk/ukpga/1992/4>

amendment made by Article 3 was overlooked in the earlier exercises to identify consequential amendments and would otherwise have come into force on 6 April 2016. The potential impact of the delayed implementation is explained at paragraph 7.14 below.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is to Great Britain.
- 5.2 The territorial application is to Great Britain.
- 5.3 Subject to the agreement of the Northern Ireland Assembly, corresponding amendments will be introduced in respect of Northern Ireland by the Department for Communities in Northern Ireland.

6. European Convention on Human Rights

- 6.1 The Minister of State for Pensions, the Baroness Altmann, has made the following statement regarding Human Rights:

“In my view the provisions of the Pensions Act 2014 (Consequential Amendments) Order 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

Amendments to do with uprating (Article 2)

- 7.1 Each year, the Secretary of State is required by sections 150, 150A and 151A of the Administration Act to review the level of the social security benefits specified in those provisions to determine whether they have maintained their value against the rise in prices or, for benefits specified in section 150A, the growth in average earnings, since the last review. If they have not done so, he must lay an Up-rating Order before Parliament providing for the relevant benefits to be increased from the following April. The review is carried out in the Autumn and a Ministerial statement is then made to Parliament (the “Up-rating Statement”), announcing the new rates. The new rates do not become law until Parliament has debated and approved the Up-rating Order. As the Order is usually laid before Parliament in January, in practice this means the debates will usually take place in February.
- 7.2 Where a person is in receipt of Income Support, income-based Jobseeker’s Allowance, income-related Employment Support Allowance, Pension Credit or Universal Credit, sections 159 to 159D of the Administration Act enable that income-related benefit to be adjusted automatically, without the need for a further decision by the Secretary of State, where the adjustment is because they, or their partner, are also in receipt of another benefit which is up-rated. The normal decision-making process does not apply in these circumstances and there is no right of appeal where the change is simply the result of an alteration in the rate of benefit set by law.
- 7.3 These provisions also enable awards which begin before the date on which the new rates take effect to take account of the new rates from the date they are due to come into force.
- 7.4 Article 2 amends sections 159 to 159D so that this process can continue to apply in respect of income-related benefit awards which take account of new State Pension. As

the first up-rating of new State Pension will be April 2017, the amendments should be in place by, or very shortly after, the time the Up-rating Statement is made.

- 7.5 These amendments will apply mainly in respect of Pension Credit awards. State pension may also form part of the benefit income of a person claiming a working-age income-related benefit if they are a member of a couple and their partner has reached State Pension age.
- 7.6 Currently, “mixed age” couples - where one member of a couple has reached the qualifying age for Pension Credit⁸ but the other has not - can choose to claim either Pension Credit or the relevant working-age benefit, in effect by deciding who will be the claimant for the couple. The working age benefits are, however, subject to conditions which do not apply in Pension Credit and the numbers receiving the working-age benefit instead of Pension Credit are very low (as at November 2015, the combined total of such awards of Income Support and income-based Jobseeker’s Allowance is estimated at under 3,000⁹); .
- 7.7 Income Support, income-based Jobseeker’s Allowance and income-related Employment and Support Allowance are due to be replaced by Universal Credit. Under current plans, no new claims to these “legacy” benefits will be possible after June 2018 and all those already in receipt will be moved onto Universal Credit by 2021. From June 2018, it is also planned to remove the option to claim Pension Credit instead of Universal Credit from mixed-age couples making new claims. Based on this timetable, therefore, after 2021 these amendments will have effect only in respect of awards of Universal Credit and Pension Credit.

Amendment to do with National Insurance credits (Article 3)

- 7.8 National Insurance contributions can be credited in a wide variety of circumstances where people are unable to work or, in some cases, do not earn enough to pay or be treated as paying contributions. Credits can fill gaps in a person’s National Insurance record so that their future entitlement to certain contributory benefits is protected. Many credits are posted on a person’s National Insurance record automatically when they receive certain benefits, for example Child Benefit for a child under 12, whilst other credits must be applied for and can have specified time limits for applications. Credits are awarded only to the extent necessary to make a tax year a qualifying year for benefit purposes, so if, for example, a person in receipt of Child Benefit has already paid sufficient Class 1 contributions to make that year a qualifying year, the Child Benefit credits would not be needed.
- 7.9 As noted in paragraph 4.4 above, credits that count towards new State Pension are provided for in regulations. Those regulations are in Part 8 of the 2015 Regulations, which makes provision for crediting earnings or contributions for specific cases and circumstances such as parenting and caring, service spouses on accompanied postings, receipt of working tax credit or universal credit and, in relation to men born before 6 December 1953, those under State Pension age who have reached the State Pension age for a woman born on the same day.¹⁰

⁸ Pension Credit qualifying age is aligned to women’s State Pension age for both men and women. Income Support and Universal Credit stop when the claimant reaches Pension Credit qualifying age. Jobseeker’s Allowance and Employment and Support Allowance are both payable up to State Pension age.

⁹ Source: DWP Information Exploitation and Security Directorate, 5% sample, November 2015.

¹⁰ Men born before 6 December 1953 have a State Pension age of 65. State Pension age for women born between 6 April 1950 and 5 December 1953 rises progressively from 60 to 65.

- 7.10 Part 8 of the 2015 Regulations also makes provision to allow certain credits awarded for tax years starting before 6 April 2016 under the Social Security (Credits) Regulations 1975¹¹ (“the 1975 Regulations”) to count towards new State Pension entitlement.
- 7.11 Decisions on whether a person is eligible for credits are for the Secretary of State for Work and Pensions to make as part of the determination of a claim for benefit, or following an application for a credit. Under provisions in section 17 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999¹², this decision-making function, including arrangements for reviewing and revising such decisions, has been delegated to Her Majesty’s Revenue and Customs (HMRC), with the sole exception of decisions on applications for caring for at least 20 hours a week. However, the decision about whether, and if so, the extent to which, the credits are needed to make a tax year a qualifying one for benefit entitlement purposes is made by DWP decision-makers: this decision will be made once the person claims the relevant benefit.
- 7.12 The right of appeal already exists in respect of decisions about eligibility for credits covered by the 1975 Regulations. The amendment made by Article 3 extends appeal rights to decisions as to whether a person is to be credited with earnings or contributions under Part 8 of the 2015 Regulations.
- 7.13 However, people who receive a decision in relation to an application for credits awarded under Part 8 of the 2015 Regulations before the date on which Article 3 comes into force will not have a right of appeal in respect of that decision. As it will not be possible in the time available to amend the standardised decision notices to reflect this fact, it is possible that a person may lodge an appeal against that decision even though there is no jurisdiction for a First-tier Tribunal to hear this appeal. Where this happens, the person will be informed that the law is being changed and that they will be able to acquire a right of appeal from the date the amendment takes effect. HMRC can revise the credits decision under provisions in section 9 of the 1998 Act and regulations made under it.¹³ A decision revised after Article 3 takes effect will carry the right of appeal. In the event that a person is awarded new State Pension before that date, and that award is affected by the decision relating to credits, that entitlement decision will be revised by DWP following a revision of the credits decision by HMRC or a successful appeal. These measures are designed to ensure that individuals will not be adversely affected by the delay in their ability to acquire the right to appeal a credits decision made under Part 8 of the 2015 Regulations.
- 7.14 We anticipate that the number of individuals who may be seeking the right of appeal during the period before Article 3 takes effect is likely to be very low. First, because the practical effect is limited to decisions in respect of one class of credits; namely new Class 3 credits which people have been able to apply for since 6 April 2016 to cover gaps in their National Insurance record for periods back to 1975 that arose while they were accompanying their HM Forces spouse or civil partner on a posting outside the UK. Secondly, while HMRC deals with between 15,000 and 16,000 applications for credits a year, they receive only around 200 requests for the decision to be reconsidered. A person may only appeal once their request for reconsideration has been dealt with and most queries are resolved at the reconsideration stage. During the tax year 2015/16, only six cases progressed to an actual appeal hearing. We expect

¹¹ <http://www.legislation.gov.uk/uksi/1975/556>

¹² <http://www.legislation.gov.uk/ukpga/1999/2/contents>

¹³ <http://www.legislation.gov.uk/uksi/1999/991>

the number of appeals against decisions on the new Class 3 credits to be similarly low, as where applications are refused, the refusal is typically because the person already had sufficient contributions or credited contributions in the relevant tax year for it to count as a qualifying year without the addition of the new Class 3 credits.

- 7.15 In all other cases, once in force, Article 3 will provide the right of appeal for credits decisions made in respect of the 2016/17 tax year.

Consolidation

- 7.16 Informal consolidated text of instruments which are the responsibility of the Department for Work and Pensions is available to the public free of charge via “The Law Relating to Social Security” (Blue Volumes) on the Department’s website at <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/> or the National Archive website [legislation.gov.uk](http://www.legislation.gov.uk). An explanation as to which instruments are maintained on each site is available from <http://www.dwp.gov.uk/docs/lawvolnews.pdf>.

8. Consultation outcome

- 8.1 The Department has not consulted on these changes as they are technical amendments which are required to ensure the continued operation of existing business processes.

9. Guidance

- 9.1 Operational staff are provided with guidance at the start of each annual up-rating exercise and this will cover the changes made by Article 2. In relation to the amendment made by Article 3, guidance to Decision Makers will be updated to reflect the procedures outlined at paragraph 7.13.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no new impact on the public sector for the reason set out in paragraph 8.1 above, except in relation to the measures described at paragraph 7.14 which will necessitate HMRC operating modified procedures for a limited period in respect of a small number of cases. The impact is considered to be negligible.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 We will not monitor these changes specifically, but will do so through established customer feedback processes.

13. Contact

- 13.1 Lyndon Walters at the Department for Work and Pensions, Telephone: 020 7449 7347 or email: Lyndon.walters@dwp.gsi.gov.uk can answer any queries regarding the instrument.