These notes relate to the Scottish Parliamentary Pensions Act 2009 (asp 1) which received Royal Assent on 25 February 2009

SCOTTISH PARLIAMENTARY PENSIONS ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part P Pension Sharing

369. Part P of the Schedule sets out the rules which will apply where the trustees have to deal with a pension sharing order in respect of the divorce, or the dissolution of the civil partnership, of a member.

370. Pension sharing on divorce or nullity of marriage was introduced by the 1999 Act. Pension sharing was introduced to facilitate a clean-break divorce by enabling the capital value of a pension to be split at the time of divorce. It was extended to be available on the dissolution or annulment of a civil partnership by the Civil Partnership Act 2004 (c.33).

371. Before pension sharing under the 1999 Act, pension assets could still be taken into account for financial provision on divorce. The courts could offset pension assets against other marital assets divided or, following the commencement of section 166 of the 1995 Act, issue an earmarking order. Earmarking orders require a pension scheme to pay an amount direct to the ex-spouse who is not a member but only when the actual pension scheme member's entitlement arises.

372. The principle of pension sharing is that it gives an ex-spouse or civil partner individual stand-alone pension rights. This takes the form of a pension credit, representing a proportion of the capital value of the scheme member's shareable pension on divorce or dissolution. The pension scheme then has to discharge its liability in respect of a pension credit granted by a pension sharing order, the manner of discharge depending on the type of scheme and its rules.

Overriding legislation

373. The overriding pension sharing legislation introduced by or made under the 1999 Act broadly provides for pension schemes to give information to allow a pension sharing order to be considered and thereafter to implement any consequent pension sharing order. The split in the pension sharing order may be determined by the courts or by the parties in a joint minute of agreement which takes effect on divorce or dissolution.

374. There are no existing pension sharing provisions in the rules in the 1999 Pensions Order. However, the SPCB managers would still be required to comply with the terms of any pension sharing order in accordance with the overriding legislation.

Summary of Part P

375. Part P makes rules complementary to the overriding legislation. The provisions in Part P are designed to facilitate the transfer of the notional capital value specified in the order into separate scheme rights for the scheme member's ex-spouse or civil partner (rules 91

and 93). There are also some modifications following the consequent reduction (under section 31 of the 1999 Act) of the pension rights of the MSP or office-holder scheme member (rule 92).

Provision of information, charging and apportionment of capital value

376. Prior to a pension sharing order, the managers or trustees give information on the notional capital value of a member's pension to enable the parties to a divorce or dissolution to consider a pension sharing order. As the requirements on trustees to supply information to members and their spouses or civil partners are set out in the Pensions on Divorce etc. (Provision of Information) Regulations 2000 Regulations,[1] they are not repeated in Part P. Similarly, the rules on the calculation of the capital value of the pension rights are prescribed in the Divorce etc. (Pensions) (Scotland) Regulations 2000[2] and not repeated in Part P. These Regulations already provide for the calculation of either the value of the pension in payment or the value of the benefits accrued to date where the pension is not yet in payment.

377. Also relevant to but not requiring specific coverage in Part P are the Regulations allowing the trustees to charge for the provision of information and for the implementation of pension sharing. The Pension Sharing on Divorce etc. (Charging) Regulations[3] are made under section 41 of the 1999 Act. They specify that the charges are those reasonably incurred by the trustees directly related to an individual case and in accordance with a schedule of charges provided in advance. Charges are payable by the scheme member who is most closely involved with the request and can be recovered by reducing benefits.

378. Once the parties are in receipt of information on the capital values, they or the court will decide if a pension sharing order is appropriate. Any order will specify the proportion of the value that is to be used to create a pension benefit for the former spouse or partner.

Implementation of pension sharing order – internal and external transfers

379. The Fund trustees must discharge liability for a pension credit under a pension sharing order within the four month period specified in section 34 of the 1999 Act. As they are trustees of a funded occupational pension scheme, paragraph 1 of Schedule 5 to the 1999 Act provides how the trustees can discharge their liability. They may implement an external transfer of the value of a person's pension credit to another scheme which meets the "qualifying arrangement" test. Alternatively, they may allow an internal transfer, that is allow the ex-spouse or civil partner to become a "pension credit member" in the scheme.

380. The Fund trustees' procedure for implementing these rights needs to follow the procedure under paragraph 1 of Schedule 5 to the 1999 Act and the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000.[4] Again, given the detailed provisions elsewhere, specific rules on implementation procedure are not provided in Part P.

381. Following the procedure for an external transfer will discharge the Fund trustees' obligations as regards the ex-spouse or civil partner. However, if the pension sharing order is to be implemented by an internal transfer, that is the creation of a separate pension credit for the ex-spouse or civil partner in the scheme, there are ongoing rights within the scheme for the Fund trustees to govern. Rule 91 therefore provides for these rights for the scheme within the context of the general law.

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1 S.1. 2000/1048
2 S.S.I. 2000/112
3 S.I. 2000/1049
4 S.I. 2000/1053

Rule 91: Rights of pension credit member

382. Rule 91(1) defines a "pension credit member" as being a person on whom pension rights have been conferred within the scheme by the Fund trustees - that is, an internal transfer in accordance with paragraph 1(2) of Schedule 5 to the 1999 Act.

383. The 1999 Act inserted a new Part IVA, Chapter 1 (sections 101A to 101E) into the 1993 Act to set out the minimum benefits that require to be given to pension credit members. There are also detailed provisions on pension credits benefits for trustees to follow in the Pension Sharing (Pension Credit Benefit) Regulations 2000[5] and the Pension Sharing (Safeguarded Rights) Regulations 2000.[6]

384. These rules will be met by the Fund trustees and are supplemented to the extent necessary for this scheme by rule 91(2) which sets out the benefits to which a pension credit member is entitled under the scheme. It is for the Fund trustees to determine these benefits and rule 91(2) lists the range of benefits which may be conferred. The range is wider than the minimum requirements in Chapter 1 of Part IVA of the 1993 Act.

385. Rule 91(2)(a) sets the normal retirement age at 65 in line with that for other scheme members and rule 91(2)(b) allows for commutation of a portion, subject to the revenue maximum of 25%, of the pension into a lump sum payment. Rule 91(c) allows early retirement from age 60 onwards. Age 60 is the earliest age permitted for pension credit members under the pension sharing legislation.[7]

386. Commutation of pension acquired under a pension sharing arrangement is not permitted prior to normal benefit age (65) except in the circumstances covered by rule 91(2)(d) and (e).[8] These are serious ill-health, when life expectancy is anticipated at less than one year, or where the pension is a trivial amount.[9]

387. Payment of a pension once commenced continues for the life of the recipient. Rule 91(2)(f) guarantees payments of pension for a minimum period of five years. In the event of the death of the pension sharing credit member within five years of pension commencing, payments to the surviving partner, dependent children or personal representatives would continue until the end of that period.

388. If the pension credit member dies before pension commences, rule 91(2)(g) entitles their surviving partner, dependent children or personal representatives to receive a lump-sum payment. The amount payable is based on a 25% proportion of the value of the pension that the pension credit member would have been entitled to. '

389. Rule 91(3) requires that benefits as a pension credit member are separate to any other benefits under the scheme. Rule 91(3) prevents benefits being combined and would only apply in the event that a pension credit member is also entitled to benefits as a scheme member due to their own service as an MSP or office-holder.

390. Rule 91(4) also applies when a person entitled to benefit as a pension credit member also has a separate entitlement to scheme benefits due to their own service. In the event that those separate scheme benefits are discharged by either payment of a trivial lump sum or a refund of contributions, the pension sharing benefits remain unaffected.

Rule 92: Specific rules applying to a pension debit member

391. In addition to making the internal or external transfer for the pension credit of the ex-spouse or civil partner, the Fund trustees need to make a corresponding reduction of the

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5 S.I. 2000/1054
6 S.I. 2000/1055 for "safeguarded rights" as provided for by section 68 of the 1993 Act
7 Section 101C of the 1993 Act as inserted by section 37 of the 1999 Act
8 Section 101C of the 1993 Act and Regulations 3 and 4, S.I. 2000/1054
9 Trivial amount for these purposes currently specified in Part 1 of Schedule 29 to the Finance Act 2004 (c.12) as 1% of the standard lifetime allowance (currently £1.6 million)

rights of the other party. This reduction is made under section 31 of the 1999 Act. Rule 92 makes provision for the circumstances of the scheme within this general law.

392. Rule 92(1) provides a definition of a “pension debit member” as being an individual whose scheme benefits have been reduced in accordance with section 31 of the 1999 Act, as a consequence of a pension sharing order.

393. A pension debit member’s benefits are reduced so that the amount of benefit will be less when the pension comes into payment or when the death benefit is paid. The reduction reflects the appropriate reduction in benefits, except in the circumstances set out in rule 92(2).

394. Rule 92(2) provides that any reduction does not affect the pension debit member’s “scheme pension entitlement” for the purposes of calculating any pensions due under Chapter 3 of Part J of these rules (Surviving partners and children’). Scheme pension entitlement is not reduced for the purpose of calculating surviving partners’ and childrens’ pensions where there has been a pension debit following a pension sharing order’.

395. Rule 92(4) makes provision for a reduction in the amount payable on Death-in-Service but only in relation to the alternative calculation for refund of scheme member contributions paid (see rules 65(2) and 67(2)) when this is higher than the salary multiple. Rule 92(4) makes it clear that the reduction is applied in accordance with the provisions of the 1999 Act.

396. Rule 92(3) prevents a member whose benefits have been reduced by a pension sharing order from buying back those benefits through the purchase of added years beyond any purchases that they could have made had the order not been made. The general added year restrictions are the “annual MSP pension cap” or “annual office-holder pension cap” (see rules 38(2) and 39(4)) which limit maximum pension entitlement to two-thirds of final salary and the annual purchase limit to 20% of salary or the Annual Allowance (see rule 89(3)(c)). For a pension debit member, these limits will be applied ignoring the pension debit reduction.

Rule 93: Death before implementation of pension credit

397. Rule 93 applies when a pension credit member dies in the period before the Fund trustees have discharged the pension credit order either by making an external transfer to a separate scheme or an internal transfer by conferring pension credit member rights on the individual. In these circumstances the default position of the general law is stated in the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000[10] to be the retention of the entire value of the pension credit by the scheme trustees. However, this can be varied and the rules provide that the Fund trustees may pay a lump sum to the individual’s personal representatives up to a maximum of 25% of the value of the pension credit. ’

10 S.I. 2000/1053