These notes refer to the Welfare Reform and Pensions Act 1999 (c.30) which received Royal Assent on 11 November 1999

WELFARE REFORM AND PENSIONS ACT 1999

EXPLANATORY NOTES

INTRODUCTION

These explanatory notes relate to the Welfare Reform and Pensions Act 1999. They have been prepared by the Department of Social Security (DSS) in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

OVERVIEW

Background to the Act

In March 1998, the Government published its Green Paper on welfare reform, *New ambitions for our country: A NEW CONTRACT FOR WELFARE* (Cm 3805). This set out the framework to the Government's programme of welfare reform, based on the Government's central principle of work for those who can, and security for those who cannot.

Following publication of the Green Paper, the Government published consultation documents on fraud and a new approach to Child Support in July 1998. Further proposals were announced in Autumn 1998 for the reform of disability and bereavement benefits and the introduction of a Single Work-Focused Gateway (re-named "ONE") to the benefits system.

The Pensions Green Paper, published in December 1998, proposed a new structure for pensions, including a new State Second Pension to reduce the extent to which low earners have to rely on means-tested benefits, and encouragement for higher earners to save and provide for themselves. Consultation on the proposals in the Pensions Green Paper ended on 31 March 1999.

The measures in the Act

Following consultation on the welfare reform Green Paper and the proposed reform of disability and bereavement benefits, the Government took forward those measures which required primary legislation in the Welfare Reform and Pensions Bill. The Bill also contained a number of changes to National Insurance contributions (NICs), which were announced in the March 1999 Budget.

The main elements of the Act are:

Part I: The framework for the new "stakeholder pension schemes"

Part II: Changes to the regulatory framework for occupational and personal pensions

Parts III and IV: Provisions for pension rights to be split as part of a divorce settlement, in the same way as other financial assets

Part V (section 53): Reforms to Maternity Allowance, to offer it to lower paid women

Part V (sections 54-56): A new scheme of bereavement benefits, available to both men and women, to replace the current widows' benefits

Part V (sections 57-60): Provisions to implement the ONE service, joint claims for Jobseeker's Allowance and Employment Zones

Part V (sections 61-65): Reforms to Incapacity Benefit and Severe Disablement Allowance

Part V (sections 66-67): Reforms to Attendance Allowance and Disability Living Allowance

Part V (sections 73-78) and Part VI (section 81): Changes to National Insurance contributions and their administration

Part V (sections 52, 68-72 and 79-80) and Part VI (sections 82-91): Miscellaneous and supplementary provisions

Stakeholder Pension Schemes

Background

The UK pension system is a partnership between the State (providing the basic state pension, the State Earnings Related Pension Scheme – SERPS – and income-related benefits for pensioners); employers (providing occupational pension schemes) and private pension providers (providing personal pensions).

Today's pension system is composed of three tiers:

the first tier is the basic state pension;

the second tier is a mix of state and mainly private provision which are additional to the basic state pension (this tier includes SERPS, occupational and personal pensions); and

the third tier comprises other voluntary private provision.

People are already compelled to save towards a pension. All employees and self-employed people, except the very lowest paid, must pay National Insurance contributions. These give entitlement to basic state pension. In addition, employees have to pay towards a second-tier pension – SERPS – unless they opt out and make their own provision (contracting out). If people are contracted out of SERPS into a private scheme their National Insurance contributions are reduced or rebated to reflect the value of SERPS foregone.

The minimum that must be paid to a second pension is an average of about 4.6% of earnings – 1.6% from employees and employers pay 3% on top. While employees are required to contribute to a second pension, self-employed people are not. The only second pension choice for them is a personal pension, but many self-employed people make some provision for their retirement through other savings vehicles and investments.

Of 35 million people of working age in Great Britain, some 10.5 million are in occupational schemes, around 10 million personal pensions are held and over 7 million belong to SERPS.

Second pension schemes are not available to everyone. Occupational pension schemes are not an option for the 35% of employees whose employers do not offer a scheme, nor for the self-employed. Personal pensions can be less accessible for some people, particularly the lower paid and those who change jobs frequently.

The Government's detailed proposals for pensions reform were set out in the consultation paper *A new contract for welfare: PARTNERSHIP IN PENSIONS* (Cm 4179), published in December 1998.

The consultation paper proposed a new insurance contract for pensions with three main elements:

> a guaranteed minimum income in retirement for all, increased year by year as resources allow (this does not require primary legislation). Over the longer term the aim is that this should rise in line with earnings;
>
> reforming SERPS through the introduction of the State Second Pension. This will boost the pensions of low earners, carers and certain disabled people (it is proposed that this will be introduced by legislation in the 1999/2000 session of Parliament);
>
> new, accessible, stakeholder pension schemes. The consultation paper proposed that:
>
> > stakeholder pension schemes should be open to everyone but will be targeted at those earning £9,000 – £20,000 and not in an occupational scheme;
> >
> > there would be a simpler tax regime, allowing up to £3,600 to be paid into schemes each year;
> >
> > employers who do not already offer an occupational scheme should identify a stakeholder pension scheme and facilitate access to it for their employees; and
> >
> > stakeholder pension schemes should be set up with an approved governance structure, meet minimum standards and be required to register.

The Government has now legislated to provide the necessary legislative framework for stakeholder pension schemes.

The measures in the Act

The measures in this Act that relate to stakeholder pension schemes are contained in Part I, sections 1 to 8.

The provisions in the Act create a statutory framework for stakeholder pension schemes. There has been further consultation on the detailed aspects of the framework. It is likely that the framework will require adaptation as the schemes evolve. In order to provide this flexibility, many matters of detail will be set out later in secondary legislation.

Pension Sharing on Divorce

Background

Since the 1970s, courts have had to take account of the value of pension rights in divorce and nullity of marriage settlements so that these can be offset against other assets in financial settlements. In addition, attachment and earmarking provisions in the Pensions Act 1995 allow courts:

> in England and Wales and Northern Ireland, to require occupational and personal pension schemes to pay maintenance from a member's pension directly to their former spouse;
>
> throughout the United Kingdom to order part or all of a lump sum payable on the death or retirement of a member to be directed to their former spouse.

Both attachment and earmarking have limitations and as yet have been little used. They do not allow a clean break in most cases, title to the pension rights remains with the spouse in whose name the rights have accrued, and they leave the person receiving the payment at risk of losing the intended retirement income if their ex-spouse dies.

The Government consulted on proposals on pension sharing in *Pension sharing on divorce: REFORMING PENSIONS FOR A FAIRER FUTURE* in June 1998. The consultation paper included draft primary legislation.

The consultation proposed that:

courts and couples should be able to deal with pension rights in the way that provides for the fairest overall financial settlement;

all couples should have the opportunity to settle their pension rights by means of a pension share – pension sharing should be available within financial settlements on divorce and nullity of marriage settled both by court order or (in the case of divorce) agreement;

pension sharing should be open to couples where rights exist under an occupational or personal pension scheme or under the State Earnings Related Pension Scheme (SERPS);

pension sharing should not be compulsory. It should still be possible to offset pension rights against other assets or to use the current attachment and earmarking arrangements;

arrangements for pension sharing should respect and comply with the fundamental principles which underpin each family law system (in England and Wales, in Scotland and in Northern Ireland);

pension sharing should apply only to proceedings which begin after the implementation of the policy. It should not apply retrospectively.

Following consultation, the Government has now legislated to make the proposed changes.

The measures in the Act

The main measures in the Act that relate to pension sharing on divorce and nullity are contained in Parts III and IV, sections 19 - 51.

The provisions in the Act largely put in place the proposals on pension sharing set out in the consultation paper. They introduce the option of pension sharing on divorce or nullity of marriage and will:

allow pension rights to be treated like other assets and the whole, or a proportion, of their value to be transferred from one spouse to the other as part of the financial settlement; but

will not be compulsory – it will still be possible to offset pension rights against other assets or to use the current earmarking and attachment arrangements.

In addition, in the light of comments made during the consultation exercise, the provisions in the Act put beyond doubt the fact that pension sharing will be available only to those who begin proceedings for divorce or nullity after the legislation has been brought into force. The Act also includes changes designed to improve the current legislation on attachment and earmarking.

Bereavement Benefits

Background

The present widows' benefits scheme was introduced in 1946. Three main benefits are available to women who are widowed. These are based upon the National Insurance contributions record of the late husband, rather than the widow herself. The three benefits are:

Widow's Payment – a tax-free lump sum payment of £1,000

Widowed Mother's Allowance – This is paid to widows with children, and ends when the youngest child ceases to be a dependant. It consists of a basic allowance for the widow herself, plus an allowance for each child and any SERPS (State Earnings Related Pension) her late husband was entitled to. It is taxable.

Widow's Pension – This is paid to widows over 45 who do not have dependent children. It is taxable and consists of a basic pension plus any SERPS. The amount payable depends on the woman's age when she was widowed or stopped receiving Widowed Mother's Allowance.

Under the present arrangements, married men are not entitled to bereavement benefits. This affects some 15,000 newly bereaved widowers and around 35,000 children of widowed fathers each year. (The UK has been under challenge in the European Court of Human Rights over the present scheme.)

The Government's reforms

The Government set out its proposals for reforming bereavement benefits in the consultation document *A new contract for welfare: SUPPORT IN BEREAVEMENT* (Cm 4104). This was published in November 1998.

The consultation paper proposed that:

All those currently receiving widows' benefits would continue to receive them;

Both widows and widowers would be entitled to a tax-free lump sum "Bereavement Payment" of £2,000;

Widowed parents with dependent children would receive a weekly, taxable, but non means-tested benefit – the "Widowed Parent's Allowance" – equivalent to and subject to the same entitlement conditions as the current Widowed Mother's Allowance;

Widows and widowers aged 45 and over with no dependent children would receive a weekly, taxable, non means-tested benefit for six months only – the "Bereavement Allowance" – age-related as for the current Widow's Pension, but with no SERPS component. While the Bill was before Parliament, this six month period was extended to one year;

Widows and widowers with children would be guaranteed up to an extra £10 a week through a new disregard of their Widowed Parent's Allowance when calculating entitlement to income-related benefits;

Men and women over 55 at the start of the new arrangements and widowed within the subsequent 5 years would have access to income-related benefits without any job seeking requirements. They would also receive a special premium (worth £14.35 a week at April 1998 rates) to help them maintain their income when their transitional bereavement benefit ended after 6 months.

Following consultation, the Government legislated to make the proposed changes.

The measures in the Act

The measures in the Act that relate to Bereavement Benefits are contained in Part V, sections 54-56, and Part I of Schedule 8. They provide for the new Bereavement Payment, Widowed Parent's Allowance and Bereavement Allowance.

The remaining changes – the disregard of Widowed Parent's Allowance (£10 for Income Support and £15 for other income-related benefits) and the additional support for widows and widowers over 55 – do not require primary legislation.

Welfare to Work

Background

Unemployment has been on a downward trend since the early 1990s. However, some groups – such as those with no or low qualifications, some ethnic minorities and people with a long-term illness or disability – remain vulnerable to longer term unemployment. Unemployment also remains consistently high in some geographical areas.

Within the present system, there is limited flexibility to develop customised solutions in areas of particular need. Only people claiming Jobseeker's Allowance (JSA) are automatically offered advice on finding work or improving their employability. The New Deals for Young People, the Long-Term Unemployed, Lone Parents and Disabled People provide tailored help through access to a personal adviser. However, they are aimed at specific client groups.

Currently, people have to deal with a number of different institutions when claiming benefits – including the Employment Service, Benefits Agency, local authorities and the Child Support Agency.

The Government is introducing three new Welfare to Work initiatives. These are:

> **ONE**, the Government set out its plans for the ONE service in *A new contract for welfare: THE GATEWAY TO WORK* (Cm 4102, October 1998). ONE will bring together the Employment Service, Benefits Agency and other welfare providers at a single point of contact. New claimants of working age will have access to a personal adviser, who will work with them to assess their potential for employment and help them plan a route to independence.
>
> The **New Deal for Partners of Unemployed People,** launched in April 1999 following pathfinders in Cardiff, Leeds and Tayside. £60 million from the windfall tax has been set aside to provide partners of unemployed people with expert, personalised help to find work. In addition, partners aged 18 – 24 who do not have children will be able to go onto the New Deal for Young People;
>
> **Employment Zones**, which will target intensive and innovative help on areas of particular need. In Employment Zones, personal job accounts will bring together money currently attributable to benefit, training and other programmes and enable these to be used more flexibly, to help clients back to work. The Employment Zones Consultation Paper, published on 2 February 1999, set out detailed plans for implementing Employment Zones. The consultation period ended on 30 April 1999.

The ONE service is being piloted in twelve different areas. The first four pilots began in June 1999. Interviews will initially operate on a voluntary basis for non-JSA claimants, until the provisions of the Act come into force.

The measures in the Act

The Welfare to Work measures in the Act are contained in Part V, sections 57 – 60, and Schedule 7:

Sections 57 and 58 contain the provisions for the ONE service. This will require individuals claiming certain benefits to take part in work-focused interviews as a condition of receipt. It will not place any requirement on them beyond taking part in interviews. (For example, they will not be required to attend training courses or seek work other than where the claimant is on JSA, where such requirements are already in operation.)

The powers in the Act will enable the Government to require people to take part in a work-focused interview with a personal adviser at the point of claim, and further interviews while they are on benefit at specified times. These further interviews would be triggered by a change in their circumstances that might have a bearing on their employability (for example, their children reaching a certain age or the claimant taking up or leaving part time work). Section 58 ensures that local authorities can carry out such interviews with claimants who take part on a voluntary basis. This is over and above the requirements in section 57.

Section 59 and Schedule 7 contain provisions that will require childless couples to make joint claims for Jobseeker's Allowance (JSA). It is intended that regulations will prescribe that joint claims will apply to those born after a certain date, with the effect that joint claims will initially apply to young childless couples but gradually extend to cover older childless couples.

The intention of joint claims is to ensure that both partners in childless couples are directly involved in the labour market, to prevent them from becoming dependent on benefit from an early age. Under the new scheme both members of the couple will be claimants with equal rights and responsibilities, rather than the partner being a dependant on the claimant. Those between the ages of 18 and 24 who remain unemployed for six months will go onto the New Deal for Young People. Couples with children will continue to be offered help on a voluntary basis, through the New Deal for Partners of Unemployed People.

Section 60 contains the provisions for implementing Employment Zones. Prototype Employment Zones have been operating under earlier legislation. The new powers in the Act enable schemes to be set up in designated areas where special benefit rules can apply. In order to help participants back to work, the schemes allow them to anticipate funding for up to 6 months' worth of spending on training and jobsearch, combined with money equivalent to the payments they would normally receive from JSA. The powers in the Act also enable the Secretary of State to provide a wider range of support for activities within the Zones which help people to get and keep work, including support for unemployed people who are seeking to become self-employed.

Long Term Illness and Disability

Background

People with a long term illness or disability can currently claim a number of different benefits to help meet their needs. Depending on their circumstances, people can qualify for more than one of these benefits at same time. The main ones are: Incapacity Benefit (contributory); and Severe Disablement Allowance, Disability Working Allowance, Disability Living Allowance and Attendance Allowance (all non-contributory). Several other benefits provide special premiums for disabled adults and children.

The New Deal for Disabled People is developing and testing new ways to help people with a long-term illness or disability to enter and retain work. The national minimum wage and the new Disabled Person's Tax Credit are also intended to help make work pay.

The Government published its plans for reforming benefits for people with a long term illness or disability in *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103, October 1998). In the consultation paper, the Government set out its view that, although the benefits which are currently available are intended to provide security for all those with a long term illness or disability, in some respects the level of support does not fully match up to their needs. The Government also indicated its view that changes were needed to Incapacity Benefit – both to restore the original purpose of the benefit in providing a replacement income for people recently in work; and to take account of changing social conditions.

The consultation paper proposed the following main changes:

reform of Severe Disablement Allowance, to enable young people who are disabled and cannot work and who claim benefit before 20 to receive Incapacity Benefit. After a year on benefit, their entitlement would be £80.80 a week compared with £54.40 at present – thereby reducing the need to rely on Income Support to top up their income;

a new Disability Income Guarantee, which will give single, severely disabled recipients under 60 nearly £6 a week extra, and couples over £8 a week extra;

extending the higher rate mobility component of Disability Living Allowance – currently worth £37.00 a week – to 3 and 4 year old severely disabled children;

reform of the All Work Test so that, as well as determining entitlement to benefit, it also provides information about people's capabilities which can be used to help them plan a return to work; and changing the name of the test to reflect this new approach;

requiring those claiming incapacity benefits to take part in a ONE personal adviser interview, to ensure that they receive help to plan a route back to work, and get the benefits to which they are entitled;

expanding specialist disability services to help disabled people enter work, and examining new ways to improve their retention in work through New Deal for Disabled People;

strengthening the link between work and entitlement in Incapacity Benefit, so that it is only paid to those who have recently been in work and paid National Insurance contributions;

taking account of income from occupational and personal pensions in Incapacity Benefit.

The measures in the Act

Following consultation, the Government legislated to make the proposed changes. The measures in the Act that relate to incapacity and disability benefits are contained in Part V, sections 61-68, and Parts II and III of Schedule 8. The provisions implement all of the proposed changes in the consultation paper, apart from the Disability Income Guarantee and the expansion of specialist disability services, which do not require new primary legislation.

While the Bill was going through Parliament, the Government introduced an amendment to allow young disabled people to claim Incapacity Benefit up to the age of 25 in prescribed circumstances, without having to satisfy the contribution conditions. (The normal age limit proposed by the Government is age 20.) This extension is intended to benefit young disabled people in education or vocational training. The Government also announced that people receiving the higher-rate care component of Disability Living Allowance would not have their pension income taken into account in Incapacity Benefit.

The way in which Incapacity Benefit will be reduced to take account of pension income is now set out on the face of the Act. The Act ensures that the benefit will be reduced by 50p for every additional £1 of pension income that people receive above the first £85.

Section 68 was added in order to provide that certain overpayments of incapacity and disability benefits which arise before 1 June 1999 cannot be recovered from the recipient. This is intended to protect disabled people who could not reasonably be expected to know that their benefit entitlement was incorrect, for example due to a gradual improvement in their condition, or that they should have reported this change to the Benefits Agency.

The measures in the Act do not require any disabled people to look for work, if they do not want to. No existing claimants lose any benefit entitlement at the point of change.

National Insurance contributions (NICs)

Background

In his 1998 Budget, the Chancellor of the Exchequer announced a package of reforms to the structure of NICs. Most of these changes were introduced in the Social Security Act 1998, and came into effect in April 1999. As a result:

> The point at which *employers* start to pay NICs (the employer earnings threshold) is set at the same level as the single person's tax allowance (currently £83 a week) rather than the Lower Earnings Limit (currently £66 a week);
>
> *Employees* no longer have to pay any contributions on earnings up to and including the Lower Earnings Limit, and *employers* do not pay any contributions on earnings below the employer earnings threshold;
>
> The four employer rates of contributions have been replaced by a single rate of 12.2%, and Class 1B contributions have been introduced. Class 1B contributions are paid by employers who enter into a PAYE Settlement Agreement with Inland Revenue for tax.

The Chancellor also announced in 1998 that he would raise the point at which employees start to pay NICs to the level of the single person's tax allowance as soon as measures were in place to protect people against the benefit losses that would otherwise result. These changes were confirmed in the 1999 Budget. In his 1999 Budget statement, the Chancellor also announced that the Upper Earnings Limit (UEL) for employee contributions would be raised to £535 a week in 2000, and £575 in 2001; and that changes would be made to counter National Insurance avoidance where services are provided through an intermediary.

The measures in the Act

These Budget changes, including protection for benefit rights on earnings between the Lower Earnings Limit and the new threshold, were introduced as amendments to the Bill at Commons Committee and Report. The Act also contains various other minor NICs measures.

The NICs measures in the Act are contained in sections 73-78 and 81; and Schedules 9-11). Section 73 introduces Schedule 9, which:

> Introduces a new primary earnings threshold from which employees will start to pay NICs. In two stages, the threshold will be raised to the single person's tax allowance. It is being set at £76 a week in April 2000, with full alignment in April 2001;
>
> Protects benefit rights for earnings between the Lower Earnings Limit and the new threshold. This will ensure that people with earnings below the new threshold are not prevented from building up their entitlement to contributory benefits; and
>
> Provides for the Upper Earnings Limit (UEL) for employee contributions to be set as a multiple of the new threshold. This will enable it to be raised to £535 a week in 2000 and £575 in 2001, in line with the Chancellor's Budget statement.

Section 74 introduces Schedule 10, which makes corresponding provision for Northern Ireland.

Sections 75 and 76 contain new measures to counter National Insurance avoidance, where services are provided through an intermediary. Most employers engage staff direct under a contract of service, paying Class 1 NICs, and income tax through Pay As You Earn (PAYE). They may also hire staff under a contract for services where the person being hired is self-employed. Sections 75 and 76 concern the situation where an individual is hired through a third party (such as a service company) in order to escape any direct contractual relationship between the client and the worker. This provides scope for avoiding tax and National Insurance, and can also lead to a loss of the worker's legal employment rights. Section 75 gives the power to ensure that, if the normal tests of employment and self-employment show that the worker would otherwise be an employee of the client, any payments made by the client in respect of that worker may be treated as earnings for National Insurance purposes. Section 76 makes corresponding provision for Northern Ireland. Matching tax proposals will be made in the Finance Bill introduced in 2000.

The Act also contains three further minor NICs measures. These:

alter the way in which the Class 1B rate of NICs payable on items employers include in PAYE settlement agreements (PSAs) is set (sections 77 & 78). The previous legislation allowed the Government to vary the rate in regulations independently of the main employer's rate. Now the rate of Class 1B is tied directly to the rate of employer (Class 1) contributions;

remove references in existing legislation to the payment of NICs by means of adhesive stamps (Schedule 13, Parts VI & VII); and

make a number of minor amendments and corrections arising from the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (section 81, which introduces Schedule 11). The amendments do not in any way affect the intention of this Act, which transferred NICs policy and the Contributions Agency to the Inland Revenue.

Miscellaneous Measures

The Act also contains various miscellaneous measures. These are:

A number of pensions measures (Sections 9 – 18, and Schedule 2). The Green Paper *A new contract for welfare: PARTNERSHIP IN PENSIONS (* Cm 4179, December 1998) explained that the Government will continue to support occupational pension schemes and simplify regulation where possible. The Pensions Act 1995 sets out the framework for regulating occupational pension schemes and clarifies the responsibilities of scheme trustees, advisers and sponsoring employers. Monitoring of this Act in the light of the Government's commitment has identified a case for simplification in some areas and removal of a few anomalies. Four groups of measures are therefore contained in the Act:

provisions relating to the late payment of employers' contributions to pension schemes (including personal pension schemes);

provisions increasing the compensation payable by the Pension Compensation Scheme;

further protection for pensions on bankruptcy – but with provision for recovering excessive contributions made by people who become bankrupt;

minor measures, e.g. bringing the reporting periods of the Pension Compensation Board into line.

Preservation of "inherited" SERPS rights (section 52). Widows and widowers can currently "inherit" the full amount of their spouse's state earnings-related pension (SERPS). But under changes made in 1986, the amount will be halved for all new cases from 6 April 2000. This change was not fully publicised, and some people were incorrectly told that they or their widower could expect to inherit the full amount of SERPS. Section 52, which was added to the Bill at Lords Report stage, gives the power to make regulations to:

postpone the 50% reduction from 2000 to a later year; or

set up a scheme to determine who has been misled by incorrect or incomplete information about the 50% reduction, so as to ensure that the reduction is not applied to them or their spouses.

Until regulations implementing at least one of the options provided by section 52 are in force, widows and widowers will continue to "inherit" the full amount of their spouse's SERPS.

Extension of entitlement to state Maternity Allowance (section 53). In his 1999 Budget, the Chancellor of the Exchequer announced a reform of Maternity Allowance so that women earning below the lower earnings limit for National Insurance contributions, but earning at least £30 a week, would be entitled to the benefit for the first time. Section 53, which was added to the Bill at Commons Report stage, makes the necessary changes to the legislation.

Requirement for a National Insurance Number to claim Child Benefit (section 69). The Social Security Administration (Fraud) Act 1997 introduced a requirement for a National Insurance Number for all claims to all benefits. However, because of the definition of "benefit" used, this requirement does not apply to Child Benefit. Section 69 extends the requirement to Child Benefit.

Sharing of Functions relating to claims and information (section 71). This section gives local authorities and central Government further powers to collect and share information relating to benefit claims. At present, local authorities may only deal with claims for Housing Benefit and Council Tax Benefit. However, since they will be involved in delivering the ONE pilots, they will need to be able to handle claims and information relating to a wider range of social security benefits. Section 71 aims to achieve this. It also ensures that there is no doubt about the ability of other partners in joint working arrangements with local authorities – for example, the Benefits Agency and the Employment Service – to deal with claims for Housing Benefit and Council Tax Benefit.

Disclosure and use of information (section 72). This section will facilitate cross-Government working in a number of social security and employment-related areas. It provides the powers to use and supply information which are needed to deliver the ONE pilots and Employment Zones. It will also ensure that information can be used to best effect in the New Deal for Lone Parents, New Deal for Disabled People, New Deal for Partners of Unemployed People and the new Personal Capability Assessment.

A housing under-occupation scheme (section 79) which will allow tenants living in the social rented sector (typically, property owned or managed by a local authority or a housing association), who are in receipt of Housing Benefit, to keep part of any benefit saving generated by moving to cheaper and smaller accommodation. It is intended to bring this into force initially on a pilot basis in selected areas.

Information sharing between the Inland Revenue and Child Support Agency (section 80). This measure will enable the Child Support Agency to undertake a full maintenance assessment of self-employed earnings in cases where a non-resident parent has refused to provide the necessary information. The proposed power will allow the Inland Revenue to disclose tax information in those cases where the Child Support Agency has been unable to obtain the information through any other route.

A power to incur preparatory expenditure in advance of future legislation (section 82). This enables the Secretary of State to seek specific Parliamentary approval to incur expenditure to prepare for future changes in the functions for which he is responsible (i.e. social security benefits, child support, war pensions), before Royal Assent is given for the Act that would give effect to the change. For example, a new benefit, or major changes to existing provisions, require a significant amount of preparatory work – such as developing and testing new computer systems, and preparing manuals for use by staff. Often such work has a significant lead-in time. This power will enable the Secretary of State to seek the approval of the House of Commons to commence such work, and so avoid the risk of a delay in implementation.

Extending benefit splitting to hardship payments in Jobseeker's Allowance (Schedule 8, paragraph 29(3) to (5)). These are technical changes to correct anomalies in the Jobseekers Act 1995. All or part of a person’s standard income-based JSA can already be paid to a third party where it is in the family’s interest to do so. This change extends that power to JSA hardship payments.

PARLIAMENTARY STAGES

The table below shows all the Parliamentary stages the Bill went through before it received Royal Assent and became an Act.

Stage	***Date (all dates are 1999) and Hansard reference***
HOUSE OF COMMONS (introduced on 10 February)	
Second Reading	23 February (vol. 326, col. 214)
Committee	2 March to 27 April: 25 sittings (Standing Committee D)
Report	17 May (vol. 331, col. 643) and 20 May (vol. 331, col. 1241)
Third Reading	20 May (vol. 331. col.1342)
HOUSE OF LORDS (brought from the Commons on 21 May)	
Second Reading	10 June (vol. 601, col. 1561)
Committee	24 June (vol. 602, col. 1075); 6 July (vol. 603, col. 725); 13 July (vol. 604, col. 177); 20 July (vol. 604, col. 818)
Report	11 October (vol. 605, col. 26) 13 October (vol. 605, col. 366)
Third Reading	27 October (vol. 606, col. 302)
House of Commons	
Consideration of Lords amendments	3 November (vol. 337, col. 297)
House of Lords	
Consideration of Commons amendments	8 November (vol. 606, col. 1154)
House of Commons	
Consideration of Lords amendments	9 November (vol. 337, col. 924)
House of Lords	
Consideration of Commons amendments	9 November (vol. 606, col. 1323)
ROYAL ASSENT (11 November)	

COMMENTARY ON SECTIONS

Part I: Stakeholder Pension Schemes

This Part of the Act (sections 1-8, and Schedule 1) creates a statutory framework which sets out the general principles for a new type of pension scheme, the "stakeholder pension scheme". It is likely that the framework will require adaptation as schemes evolve. In order to provide this flexibility, the Act allows matters of detail to be set out in secondary legislation.

Part I does not form part of the law of Northern Ireland (but see the note about corresponding Northern Ireland at the end of the commentary below on Schedule 1).

Background

An initial consultation paper on stakeholder pension schemes was published in November 1997. The Government's detailed proposals were set out in the consultation paper *A new contract for welfare: PARTNERSHIP IN PENSIONS* (Cm 4179), published in December 1998.

A series of further consultation papers were published over the summer of 1999, covering the more detailed aspects of stakeholder pension schemes:

minimum standards (published 2 June);

employer access (29 June);

clearing arrangements (12 July);

governance arrangements (2 August);

regulation, advice and information (2 August); and

the tax regime (16 September).

Commentary

Section 1: meaning of "stakeholder pension scheme"

This section defines what a stakeholder pension scheme is. The definition:

enables stakeholder schemes to be accommodated within the existing legislative framework applying to occupational and personal pensions; and

sets out a number of additional requirements which schemes will have to meet in order to acquire stakeholder pension scheme "status".

The Pension Schemes Act 1993 currently defines two types of pension scheme – occupational pension schemes and personal pension schemes.

Subsection (1) provides for a pension scheme of either of these types to be a stakeholder scheme providing that it is registered as such (section 2 refers) and meets a number of specific conditions some of which can be prescribed in regulations.

Subsection (1)(b) provides a general power to prescribe other conditions which will give flexibility for the future to set out additional conditions, in the light of experience of operating schemes.

Subsection (2) requires stakeholder pension schemes to be set up under a trust (or an alternative arrangement specified in regulations).

Trusts are a legal concept used frequently as the basis for pension schemes, under which one or more persons (the trustees) hold property for the benefit of others, under terms which are usually specified in the trust deed. The regulation-making power will provide the flexibility to enable schemes to be run with alternative governance structures if these offer a comparable degree of protection for scheme members. The consultation document on the governance of stakeholder pension schemes proposed a possible model for "secure stakeholder management".

Subsection (3) provides a power to set out requirements as to the content of the instruments that set up a scheme. Taken together with subsection (2), this provides the basis for defining the structure of stakeholder pension schemes.

Regulations will be used to set requirements in relation to, for example:

> the scope of the trust deed: in particular to ensure that the trust deed gives the trustees control of the scheme so that they are able to appoint and dismiss the organisations or individuals that provide services to the scheme (e.g. actuaries, auditors, administrators, investment managers);
>
> the composition of the trustee board: to ensure, for example, that trustees associated with a commercial organisation (which may originally establish the scheme) cannot form a majority of the trustee board, or to require a specified proportion of the trustees to be nominated by members of the scheme;
>
> whether the scheme should provide additional benefits for scheme members: such as an option to take out life assurance cover, or insurance which provides for contributions to continue to be paid if a member becomes ill or disabled.

If details of alternative forms of governance are prescribed under section 1(2) then it is intended that regulations will also be used to set out requirements as to the contents of instruments that set up such schemes.

Subsection (4) provides that schemes must offer "money purchase" benefits to members.

Money purchase benefits are defined in section 181 of the Pension Schemes Act 1993. The main impact will be to exclude schemes which provide benefits related to the member's final salary; unlike occupational pension schemes, there will generally be no organisation to provide the funding commitment required to run stakeholder pension schemes on a salary-related basis. Schemes operating on a money purchase basis must provide benefits which are related to the contributions paid by the members together with the investment returns on those contributions. This will mean that each scheme member would have an identifiable fund of money within the scheme, which is the sum of their contributions and investment returns on those contributions (less charges and expenses). The fund is normally used to purchase an annuity at retirement.

There is also a regulation-making power to prescribe exceptions. This power provides flexibility for the future by allowing the framework to be amended to accommodate schemes which may wish to offer benefits on a suitable alternative basis.

Subsection (5) provides a regulation-making power, which will be used to prescribe requirements in relation to the amount which may be deducted from scheme members' pension funds in respect of charges and expenses.

The regulations will set out how any charge is to be calculated, specify limits on the level of the charge, and specify when a charge can be imposed. For example, it is proposed in the consultation document on minimum standards that there will be no charge for transfer of funds into or out of stakeholder schemes or for changing contribution levels. Requirements for charges will be reviewed in the light of experience of operating schemes. Providing for these matters by regulation gives some flexibility for the future to amend the charging structure or limits if it becomes appropriate to do so.

Subsection (6) makes it a condition of being a stakeholder pension scheme that a scheme complies with the obligations under section 113 of the Pension Schemes Act 1993.

Regulations will set out minimum standards concerning, for example, annual information about:

the value of a pension,

the contributions that have been paid in; and

charges deducted by the schemes.

Subsection (7) provides that schemes must allow members to make contributions either on a regular basis or as and when they can; many existing personal pensions do not provide this flexibility for their members.

The subsection also provides a regulation-making power to prescribe minimum contribution levels, or other restrictions which schemes would be allowed to impose. Setting minimum contribution levels would be used to strike a balance between flexibility for members and the costs to schemes of handling very small contributions. The regulation-making power gives a degree of flexibility to vary these amounts in future if it becomes appropriate to do so.

Subsection (8) provides that stakeholder pension schemes should accept transfers of pension rights from other pension schemes.

Because stakeholder pension schemes will fall under the "pension scheme" definitions in Part I of the Pension Schemes Act 1993, members will have an automatic right to transfer their rights in a stakeholder scheme to another pension scheme (subject to certain limitations specified in the 1993 Act). This subsection provides an additional requirement on stakeholder schemes to *accept* transfer payments in respect of members' rights under other pension schemes and arrangements. It will allow members, for example, to consolidate their pension rights into a single fund if they so choose. There is currently no such requirement for occupational and personal pension schemes. But a stakeholder pension scheme would not be required to accept a transfer if this would prejudice its tax-approved or tax-exempt status. A tax-approved or tax-exempt scheme cannot accept transfers from an "unapproved" scheme, as this would be contrary to Inland Revenue rules.

Subsection (9) requires that a stakeholder pension scheme should be approved or exempted by the Commissioners of the Inland Revenue.

Approval or *exemption* confers a number of tax benefits: in particular, contributions by members qualify for income tax relief, and investment returns and capital gains on the scheme's funds are exempt from tax. Any particular provisions about the conditions for tax approval or the detail of the tax privileges will be dealt with in a future Finance Bill.

Section 2: Registration of stakeholder pension schemes

In addition to meeting the requirements set out in section 1 (and as stated in section 1(1)) pension schemes must be registered as stakeholder schemes with the Occupational Pensions Regulatory Authority (OPRA) in order to acquire stakeholder status. This section defines the procedure for the registration of stakeholder pension schemes and the role of OPRA in relation to this.

Subsection (1) requires OPRA to maintain a register of stakeholder schemes. The register of stakeholder pension schemes will enable members of the public to identify stakeholder schemes, and also provide a basis on which employers can ensure that they comply with the access requirements set out in section 3.

Subsection (2) requires scheme trustees (or specified individuals from schemes run with alternative governance arrangements) to support applications for registration with a declaration that the scheme meets all the conditions contained in section 1. OPRA are required to register schemes on the basis of this application, subject to subsection (3). There is a discretionary power to impose a fee for registering schemes.

Subsection (3) gives OPRA a power to refuse to register schemes or to remove schemes from the register if it has evidence that the scheme does not comply, or no longer complies, with the conditions in section 1.

Subsection (4) gives OPRA the power to impose sanctions on trustees who do not ensure that a scheme which applies to register as a stakeholder scheme complies with the requirements in section 1, and continues to do so once it has been registered.

It allows two sanctions from the Pensions Act 1995 to be applied to breaches of this obligation:

> Section 3 of the 1995 Act allows OPRA to prohibit named individuals from acting as trustees;
>
> Section 10 of the 1995 Act provides for civil penalties for trustees who breach certain obligations imposed by the Act.

This subsection also makes prescribed individuals from schemes with alternative governance arrangements subject to section 10 penalties in the same circumstances.

Subsection (5) provides a criminal sanction for knowingly or recklessly providing misleading information when applying to register a scheme as a stakeholder pension scheme.

This is consistent with a number of requirements in the Pensions Act 1995 which are underpinned by criminal sanctions for more serious breaches in relation to occupational pension schemes.

Subsection (6). Section 115 of the Pensions Act 1995 provides that offences under the Pensions Act 1995 committed by corporate bodies or Scottish partnerships apply to individuals, such as a manager, director or partner, in certain circumstances, for example, where the offence has been committed with the consent of that individual. This subsection applies this provision to offences under *subsection (5)*.

Subsection (7) contains a power which provides for the register of stakeholder pension schemes (or copies or extracts from it) to be made available for inspection or supplied to prescribed persons, subject to certain conditions.

This power mirrors the existing power in section 6(4) of the Pension Schemes Act 1993, which provides for the register of occupational and personal pensions to be made available for inspection. The intention is for the register to be available for inspection by the general public and by those employers required to offer access to schemes for their employees.

Section 3: Duty of employers to facilitate access to stakeholder pension schemes

This section defines the obligation of employers to provide access to stakeholder pension schemes. *Subsection (1)* provides that, unless regulations state otherwise, any employer who employs relevant employees (*subsection (8)* refers) must comply with the requirements set out in this section.

Subsections (2),(3),(4), (5) and (6) define the scope of this requirement.

Subsection (2) provides that employers must choose one or more registered stakeholder schemes, at least one of which offers membership to all employees.

It is anticipated that trade unions or other membership organisations may set up schemes which are open only to members; if an employer chose such a scheme, and had any employees who were not members of such an organisation, he would have to choose an additional or alternative scheme which was available to all.

This subsection requires the employer to make sure, on an ongoing basis, that the designated scheme/s is/are registered. The intention is that an employer should ensure that "at all times" he has a designated scheme which is registered as a stakeholder scheme. Employers will, therefore, need to check, from time to time that the designated scheme/s remain on the OPRA register.

The subsection also provides that employers must consult with employees and any organisation representing them, such as a trade union, about the choice of scheme.

Subsection (3) provides that the employer must inform his employees of the name and address of each designated scheme.

There is also a power to prescribe other information about a designated scheme which the employer must provide – which gives some flexibility to modify the requirement in the light of experience of operating schemes.

Subsection (4) provides that the employer must allow the scheme "reasonable access" to the relevant employees in order to provide information about the scheme. What is "reasonable" is likely to vary according to the nature and size of the employer's business but this could involve the holding of workplace meetings or the distribution of information through pay packets.

Subsection (5) provides that where an employee who is a member of a qualifying scheme so requests, the employer must deduct the employee's contributions from his wages and pay them to the chosen scheme.

The intention is to strike a balance between costs to the employer and flexibility for the member, so there is also a regulation-making power to prescribe restrictions on this requirement.

For example, the consultation document on employer access proposed a limit on the frequency with which an individual could change their contributions through the payroll to 3 monthly intervals. A further power to make regulations provides for deductions to be paid to a person other than the chosen scheme. There has been consultation, on the establishment of a clearing house to receive contributions. Although it was proposed that a clearing house should not be set up at this stage it is still a possibility for the future. If this was the case this power could be used to enable employers to pass contributions to it rather than direct to schemes.

Subsection (6) provides that an employer should withdraw his designation of a scheme if it ceases at any time to be registered as a stakeholder pension scheme. In some circumstances a scheme which has lost its status as a stakeholder scheme may be able to continue to operate; if the employer's designation continues, that could mislead his employees. The intention is to allow employers a reasonable period of time to respond to a loss of registration by a designated scheme.

Subsection (7) applies the civil penalties contained in section 10 of the Pensions Act 1995 to breaches of the employer access requirement.

Subsection (8) provides that an employer is not under any duty to make enquiries or judgements, or act on information about a designated scheme, other than such as are necessary to fulfil the obligations set out in section 3.

Subsection (9) defines the terms "employer", "qualifying schemes" and "relevant employees" for the purposes of this section.

> "*Employer*" means any employer, whether or not resident or incorporated in any part of the United Kingdom.
>
> A "*qualifying scheme*" is the employer's designated scheme (or schemes), or if regulations provide, any other stakeholder pension scheme. Initially, it is intended that employers would only be required to make deductions on behalf of employees who are members of their designated scheme(s). If, in the future, arrangements such as the clearing house are developed, which minimise the additional costs to employers of making payments to a

number of different schemes, the regulation-making power will enable the requirement to be extended to other schemes.

"*relevant employees*" are all employees of an "employer" employed in Great Britain and, where an employer is resident or incorporated in any part of Great Britain, all employees employed outside the United Kingdom. Exceptions are those who are eligible to join that employer's occupational pension scheme and those who earn less than the lower earnings limit (defined in section 181 of the Pension Schemes Act 1993). The power to prescribe other classes of employees provides some flexibility to modify the requirement in the light of experience of operating schemes.

The definitions of "employer" and "relevant employees" ensure that the employer access requirement will cover all employers in respect of their employees in Great Britain, and employers based in Great Britain in respect of certain employees outside the United Kingdom. The latter provision is intended to ensure that those working abroad for limited periods are not excluded from access to a stakeholder pension scheme.

Section 4: Obtaining information with respect to compliance with section 3

Subsections (1) and *(2)* give OPRA the power to require any person who has, or who is likely to have, information relevant to investigating compliance with the employer access requirement to produce any relevant documents.

Subsections (3) and *(4)* apply sections 100 to 103 of the Pensions Act 1995 in relation to OPRA's functions under sections 4 and 5 of this Act.

Section 100 confers power on a justice of the peace (or, in Scotland, a justice) to issue warrants to enable OPRA to search premises in certain circumstances. The extension of section 100 means that OPRA will be able to seek a warrant where they have problems in obtaining documents relating to compliance with the employer access requirements.

Section 101creates offences for obstructing OPRA's investigations.

Section 102provides that OPRA's powers do not enable them to require anyone to give information which would incriminate him or her or his or her spouse, or to require production of documents which would in court be subject to legal professional privilege. Section 102 also provides that liens on documents are unaffected by OPRA's powers to require production of documents.

Section 103enables OPRA to publish reports of its investigations.

Subsection (5) defines "document" for the purposes of this section. The definition mirrors the definition in the corresponding provision of the 1995 Act.

Section 5: Inspection of premises

Section 99 of the Pensions Act 1995 gives OPRA powers to inspect premises and documents and examine people for the purposes of investigating whether certain regulatory provisions of the 1995 Act are being complied with. This section gives OPRA similar powers to investigate compliance with the employer access requirements.

Section 6: Application of certain enactments

Subsections (1) and *(2)*: sections 46, 58 and 102 of the Employment Rights Act 1996 protect the employment rights of employees who are trustees of their employer's occupational scheme.

Trustees are protected from suffering any detriment in relation to their employment as a result of carrying out their duties as a trustee of that scheme; they have the right to take time off work to perform their functions; and dismissal arising from performing their trustee functions constitutes unfair dismissal. *These subsections* extend this protection to employees who are trustees of their employer's designated stakeholder scheme.

Subsection (3) brings into force Schedule 1 (see below). This extends certain provisions of the Pension Schemes Act 1993 and the Pensions Act 1995 to stakeholder pension schemes.

Section 7: Reduced rates of contributions etc: power to specify different percentages

Subsection (1): section 42B(2) of the Pension Schemes Act 1993 enables the Secretary of State to make an order determining the reduced rate of National Insurance contributions payable by members of contracted-out money purchase occupational pension schemes.

The reduced rates reflect the cost of providing members with benefits of an equivalent value to the SERPS benefits they are giving up. This subsection allows different rates to be specified according to whether the money-purchase contracted-out scheme is registered as a stakeholder scheme or not. It could be used, for example, to allow the reduced rate of contributions to reflect any difference in costs between schemes that are stakeholder pension schemes and those that are not.

Subsection (2) provides a corresponding power to set different rates for members of appropriate personal pension schemes, depending on whether or not the scheme is registered as a stakeholder pension scheme.

Subsection (2)(b) allows different rates to be specified depending on when the member first joined the scheme. This would, for example, enable a different rate of rebate to be set for those who have already entered into an arrangement with a pension scheme before a specified date than for those who enter into a new contracted-out arrangement after that date.

Section 8: Interpretation of Part I

Subsection (2) provides a power to treat prescribed occupational pension schemes as personal pension schemes for certain purposes.

The intention is to ensure that occupational pension scheme regulation will apply to stakeholder pension schemes only where appropriate. It is possible that some stakeholder pension schemes could fall under the definition of occupational pension scheme under the Pension Schemes Act 1993 even though they were not employers' schemes. In these cases it would not be appropriate for the whole range of occupational pension scheme regulation to apply.

Subsections (3) to *(6)* apply the requirements of Part I to pension schemes managed by, or on behalf of, the Crown.

Subsection (5) provides the Crown with immunity from prosecution in respect of any offence committed under this Part, but provides that such immunity does not extend to public servants. This provision matches the immunity provision in section 121 of the Pensions Act 1995 (and the one in the new section 111A(14) of the Pension Schemes Act 1993 inserted by section 9 below).

Schedule 1: Application of the 1993 and 1995 Acts to stakeholder pension schemes

Paragraph 1

Sub-paragraph (1) enables certain provisions of the Pension Schemes Act 1993 and the Pensions Act 1995 to be applied to trust-based schemes which are registered as stakeholder pension schemes and which are not occupational pension schemes as defined by the 1993 Act.

This puts broadly similar requirements on the trustees of stakeholder pension schemes as apply to trustees of occupational pension schemes, and allows OPRA to supervise the conduct of stakeholder scheme trustees in much the same way as they supervise occupational pension scheme trustees.

Sub-paragraph (2)(a). Subsections (4) to (9) of section 175 of the Pension Schemes Act 1993 make provision for the Pensions Compensation Board to impose a levy on occupational pension schemes in order to meet the Board's expenditure. Sub-paragraph (2)(a) extends this power to all stakeholder pension schemes.

Sub-paragraph (2)(b) lists the provisions of the Pensions Act 1995 that will apply.

Some parts of the provisions are not relevant to stakeholder schemes which are not occupational schemes, because they will not operate on a salary-related basis and will not normally have a sponsoring employer.

The following provisions from the 1995 Act need to be applied:

Section 3allows OPRA to prohibit named individuals from acting as trustees of an occupational pension scheme.

Section 4 gives OPRA the power to suspend trustees in certain specified circumstances.

Section 5 requires OPRA to give notice of prohibition and suspension orders both to the person concerned and to the other trustees of a trust scheme.

Section 6 makes it an offence to act as trustee while suspended or removed, and sets out provisions for a person who continues to act as a trustee whilst suspended or prohibited.

Section 7 gives OPRA the power to appoint new trustees if an existing one has been prohibited or disqualified and in certain other specified circumstance.

Section 8 defines the scope of the powers of trustees appointed under section 7. Subsections (1) and (2) provide for payments made to trustees appointed by OPRA from scheme resources to be treated as a debt due from the employer; they are not relevant to stakeholder pension schemes as there will generally be no sponsoring employer.

Section 9 gives OPRA the same power as the High Court (Court of Session in Scotland) to vest property in or transfer property to trustees as a consequence of the appointment or removal of a trustee.

Section 10 gives OPRA the power to impose a civil penalty on any person who has committed a specified breach of duty.

Section 11 gives OPRA the power to direct or authorise the winding up of schemes in certain specified circumstances and on the application of certain specified persons. Subsection (3)(c) is not needed because it refers to applications to wind up schemes by employers and there will normally be no sponsoring employer in relation to a stakeholder pension schemes.

Section 13 enables OPRA to obtain injunctions (interdicts in Scotland) if the court is satisfied that it is reasonably likely that a person will misuse/misappropriate scheme assets.

Section 15gives OPRA the power to make certain directions. Subsection (1) is not relevant because it covers failure to comply with section 49(5) of the Pensions Act 1995, which does not apply to stakeholder pension schemes.

Section 27provides that a trustee may not act as scheme actuary or auditor.

Section 28 provides that a trustee of a trust scheme who also acts as a scheme actuary/ auditor in breach of section 27 is guilty of an offence.

Section 29gives OPRA the power to disqualify a person from being the trustee of any trust scheme in certain specified circumstances.

Section 30 contains a number of provisions covering persons who act as trustees while disqualified.

Section 31provides that trustees who are fined for an offence or who receive a civil penalty cannot be reimbursed from the assets of a trust scheme.

Section 32 provides that decisions taken by the trustees of a trust scheme may be taken by a majority of the trustees unless the scheme provides otherwise. The references to sections 16 and 25 of the Pensions Act 1995 do not apply to stakeholder schemes because those sections themselves are not relevant.

Section 33 provides that trustees cannot restrict their liability for a breach of an obligation under any rule of law to take care or exercise skill in carrying out investment function whether or not that function has been delegated to another person.

Section 34 gives trustees the power to make any investment of any kind as if they were absolutely entitled to the assets of the scheme, and to delegate investment decisions to a fund manager. It also provides that trustees are not responsible for any act or default of the fund manager in the exercise of the discretion delegated to him if they have taken reasonable steps to ensure that the fund manager has the appropriate knowledge and experience to manage the investments, and that he is carrying out the work competently and in accordance with section 36 of the Pensions Act 1995.

Section 35 requires trustees to maintain a written statement of the principles governing their decisions. As section 56 of the 1995 Act will not apply to stakeholder schemes, the reference to that section in subsection (2) is not relevant. The obligation to consult the employer in subsection (5) is also not relevant because of the different role of employers in relation to stakeholder schemes.

Section 36 governs the exercise of discretion by the trustees and the fund manager.

Section 39. The general rule that trustees may not benefit where there is a conflict of interest between their personal interest in the scheme and trustee duties is relaxed in relation to member trustees to allow them to benefit in the same way as other members.

Section 41 places a duty on trustees to provide certain documents for scheme members and other specified persons.

Section 47 relates to the appointment of professional advisers. It imposes a duty on scheme trustees to appoint professional advisers and a duty on scheme professionals and employers to make information available to professional advisers and on scheme trustees to disclose information to professional advisers.

Section 48 provides for “whistle-blowing”. Scheme professionals requirement to inform OPRA if they have reasonable cause to believe that trustees/manager, employer or professional adviser is not complying with duties in relation to the scheme.

Section 49 relates to the keeping of accounts etc. Section 49(5) is not relevant to stakeholder schemes. Section 49(8) imposes a duty on employers to remit deductions from earning to scheme trustees within a prescribed period. This section, as amended by section 10, will apply to occupational pension schemes that are registered as stakeholder schemes. Section 9 amends the Pension Schemes Act and introduces similar provisions for personal pension schemes. These will apply to stakeholder schemes that are not occupational schemes.

Section 50 imposes a duty upon scheme trustees to set up and operate procedures for resolving internal disputes.

Section 68 confers power on trustees to modify a scheme for certain purposes. Subsection (3) is not relevant because of the different role of employers in relation to stakeholder pension schemes. *Sub-paragraph (4)* modifies this power in relation to stakeholder schemes.

Sections 81 to 86 relate to the Pensions Compensation Board and set out circumstances where compensation is payable. These will apply to stakeholder pensions schemes in the same way as they apply to money-purchase occupational schemes. However, the condition for the application of the compensation provisions in section 81(1)(b), that the employer must be insolvent, is not relevant because of the limited scope of employer involvement in stakeholder schemes.

Sections 91 to 94 relate to assignment, forfeiture, bankruptcy etc for occupational pension schemes. Section 91(4)(d) is not relevant because of the different role of employers in relation to stakeholder pension schemes.

Section 96(2)(c)deals with OPRA's powers to review any determination to disqualify a trustee.

Section 108 deals with the scope of OPRA's powers to disclose certain information in relation to the discharge of its functions

Sections 110 deals with provision of information in relation to the Compensation Board.

Section 117provides for particular requirements of the Pensions Act 1995 to override provisions of an occupational pension scheme. This will apply to stakeholder pension schemes to the extent that any provision of Part 1 which applies to stakeholder pension schemes conflicts with any scheme rule.

Section 124 and 125 provide interpretation of terms used in Part 1 of the Pensions Act 1995.

Sections 78 to 80, 97, 101 to 107, 109, 111 to 116, 120 and 123 of the 1995 Act are also relevant to stakeholder pension schemes but do not need to be expressly applied as they contain no specific reference to pension schemes.

Sub-paragraph (3) modifies the definition of employer in section 47(9) of the Pensions Act 1995 to reflect the different role of an employer in relation to stakeholder pension schemes.

This section contains provisions that require sponsoring employers to carry out certain functions in relation to their occupational scheme: for example, they must disclose information to the scheme's trustees and professional advisers. For stakeholder pension schemes, the requirement will apply to any person who is or has been subject to the employer access requirement, as defined in section 3 of this Act.

Sub-paragraph (4). Section 68 of the Pensions Act 1995 gives scheme trustees the power to modify scheme rules for certain purposes. This sub-paragraph extends this power in relation to stakeholder pension schemes to enable their trustees to ensure that schemes meet the conditions set out in section 1 of this Act.

Sub-paragraph (5). Sub-paragraph (2) applies section 124 (definitions) of the Pensions Act 1995 to stakeholder pension schemes which are not occupational pension schemes. This sub-paragraph omits the definition of a "member" of an occupational pension scheme from the list of defined terms as it not appropriate to stakeholder schemes which are not occupational schemes.

Paragraph 2

Sub-paragraph (1): applies sections 98 to 100 of the 1995 Act to stakeholder pension schemes which are not occupational pension schemes, including those which may be set up otherwise than on a trust basis:

Section 98 gives OPRA the power to demand the production of certain documents relating to their functions from trustees, professional advisers and employers. Section 98(3) defines what is meant by a "document" for the purposes of sections 98 and 99 to 101.

Sections 99 and 100: see sub-paragraphs (2) and (3) below.

Sub-paragraph (2): section 99 of the Pensions Act 1995 gives OPRA powers to inspect certain premises, require the production of documents and examine people for the purposes of investigating whether certain "regulatory provisions" of the 1995 Act are being complied with. This paragraph modifies the definition of regulatory provisions in relation to stakeholder schemes, so that the powers can be exercised by OPRA to investigate:

> whether the trustees or managers of a stakeholder pension scheme are complying with the applicable provisions of the 1995 Act;
>
> whether their scheme complies with the conditions set out in section 1; and
>
> whether they have taken steps to ensure that those conditions are complied with.

OPRA is also given the power to investigate breaches of any corresponding legislation in Northern Ireland.

Sub-paragraph (3): section 100 of the 1995 Act enables a justice of the peace (or, in Scotland, a justice) to issue a warrant for OPRA to search premises in certain circumstances. This sub-paragraph extends this provision so that it applies also where OPRA have reasonable grounds for believing that an offence has been committed under section 2(5).

Sub-paragraph (4) ensures that OPRA can investigate in Great Britain possible breaches of rules relating to Northern Ireland stakeholder schemes under Northern Ireland legislation. OPRA is a UK-wide organisation and already has powers to investigate breaches of the Northern Ireland legislation corresponding to the 1993 and 1995 Acts.

Paragraph 3

Sub-paragraph (1) enables OPRA to use their powers under section 99 of the 1995 Act to investigate:

> whether a stakeholder pension scheme which is an occupational pension scheme complies or has complied with the conditions set out in section 1; and
>
> whether the scheme trustees have taken steps to ensure that the scheme complies or has complied with those conditions.

Sub-paragraph (2) enables OPRA to seek a warrant under section 100 of that Act where it believes that an offence under section 2(5) of this Act, or a corresponding offence under Northern Ireland legislation (see paragraph 2(4) of the Schedule), has been committed. (Paragraph 2 of the Schedule gives OPRA the same powers in respect of stakeholder schemes which are not occupational schemes – see note above.)

Northern Ireland stakeholder pension scheme legislation

Northern Ireland generally takes responsibility for its own pensions legislation. That will continue under the Northern Ireland Assembly. Section 90(3) extends the stakeholder pension provisions of the Act to England, Scotland and Wales only. Corresponding provisions for Northern Ireland will then be made under Northern Ireland legislation.

The two sets of legislation are likely to be similar. It should therefore be simple for schemes to register (with OPRA) under both sets of legislation if they should wish to do so.

Part II: Pensions: General

This part of the Act comprises a number of measures intended to make the pensions regulatory framework work better; to provide additional protection for scheme members; and to simplify and clarify the rules which pension schemes must follow.

Section 9: Monitoring of employers' payments to personal pension schemes

This section provides a new set of rules for ensuring that employers' payments to personal pension schemes are made on time.

It is important that contributions to occupational and personal pensions should be paid on time. The Pensions Act 1995 introduced new safeguards for *occupational* pension schemes. That Act, and associated regulations, provided for payments to be made within set time limits and established penalties for non-compliance. The rules apply both to contributions by employers and to contributions which derive from deductions from employees' earnings.

Employers can also make payments to their employees' *personal* pensions. Currently, however, there are no equivalent rules requiring timely payment.

This section inserts two new sections into the Pension Schemes Act 1993, *sections 111A and 111B*. These provide a set of rules on the timely payment of contributions by employers into personal pension schemes. References below are to subsections of the *newly inserted section 111A.*

Subsections (1) to *(5)* set out the new rules, which are consistent with rules introduced by the Pensions Act 1995 for occupational pension schemes.

The regime will cover employee contributions deducted from employees' earnings and employers' contributions to pensions. The rules cover the time limits within which payments have to be made and the sanctions that apply where payments are late or not made at all.

Subsection (6) requires trustees and managers of personal pension schemes to monitor the timeliness of payments by employers.

Where a payment is late, or not made at all, the trustees and managers will be required to report to the Occupational Pensions Regulatory Authority (OPRA). The time limits within which reports must be submitted and the circumstances in which such reports will not be required will be set out in regulations.

Subsection (7) requires trustees and managers of schemes to provide information to employees on the amounts and dates of payments made to the scheme by employers.

Subsections (8) and *(11)* to *(13)* relate to provision for civil or criminal sanctions against employers for late payment or non-payment of amounts payable to personal pension schemes.

OPRA will have power to impose a civil penalty where there has been a breach of the requirement to make timely payment of contributions; however, if a person fraudulently evades an obligation to pay a contribution deducted from an employer's earnings, a criminal offence will be committed.

Subsections (9) and *(10)* give OPRA power to impose civil penalties on trustees and managers if they fail to carry out their monitoring role.

In relation to stakeholder pension schemes (see commentary on Part I), *subsection (11)(a)* ensures that an employer who has already been penalised under section 3(7) (for failing to comply with a request to deduct contributions to a stakeholder pension scheme from earnings) is not penalised again under these provisions.

Subsection (14) provides the Crown with immunity from prosecution in respect of an offence committed under subsection (12), but provides that such immunity does not extend to public servants who commit an offence under that subsection.

This provision (inserted into the Pensions Schemes Act 1993, and relating to *personal* pension schemes) matches the immunity provision in section 121(3) of the Pensions Act 1995 for *occupational* schemes.

As part of the provisions for stakeholder pension schemes in Part I, section 3(5) allows regulations to provide for cases where an employer would pay contributions to a person other than the trustees or managers of a scheme (for example, to a clearing house, if this was set up). *Subsection (16)* gives a power to modify the requirements of the new section 111A for such cases.

Subsection (17) ensures that if an employee would have a right of action against his employer where contributions deriving from deductions from his earnings are not paid by the contractually agreed date, then that right will be unaffected (notwithstanding that such date may be earlier or later than the last day of the period prescribed in regulations within which such payment is required to be made).

The following references are to subsections in the *new section 111B.* They closely mirror the provisions already in place for occupational pension schemes under sections 98-103 of the Pensions Act 1995.

Subsections (1) and (2) provide OPRA with the power to require documents from any person who holds information about:

whether section 111A has been complied with;

whether an employer has failed to meet the obligation under that section to pay contributions on time; or

whether a person has fraudulently evaded the obligation to pay over a contribution deducted from employees' earnings.

Subsection (3) gives OPRA's inspectors powers to investigate any of the matters mentioned in subsection (1). It allows them to enter premises, to question anyone there and to demand documents for inspection.

Subsection (4) provides that an inspector wishing to enter premises must, if asked to do so, produce a certificate of appointment.

Subsection (5) specifies the premises that are liable to inspection. These are premises where:

the relevant employees work;

documents relevant to the administration of the employer's business, the payment of the contributions or the relevant scheme are kept; or

the administration, or work connected with the administration, of the business, the contributions or the scheme is carried out.

A private dwelling house is included in this provision only if it is used by, or by permission of, the occupier for trade or business.

Subsections (6) and *(7)* apply sections 100 to 103 of the Pensions Act 1995 in respect of OPRA's powers to require documents or to inspect premises in connection with compliance with section 111A.

Section 100 confers power on a justice of the peace (or, in Scotland, a justice) to issue warrants to enable OPRA to search premises in certain circumstances. The extension of section 100 means that OPRA will be able to seek a warrant where they have problems in obtaining documents relating to compliance with section 111A.

Section 101creates offences for obstructing OPRA's investigations.

Section 102provides that OPRA's powers do not enable them to require anyone to give information which would incriminate him or her or his or her spouse, or to require production of documents which would in court be subject to legal professional privilege. Section 102 also provides that liens on documents are unaffected by OPRA's powers to require production of documents.

Section 103enables OPRA to publish reports of its investigations.

Subsection (9) ensures that section 111B can be used to enforce in Great Britain rules contained in Northern Ireland legislation that correspond to section 111A.

Section 10: Late payments by employers to occupational pension schemes

Section 49(8) of the Pensions Act 1995 at present makes it a criminal offence for employers to deduct money from their employees' salaries as contributions towards an occupational pension scheme and not pay it to the scheme trustees within a prescribed period, if there is no reasonable excuse. Regulation 16 of the Scheme Administration Regulations 1996 sets the prescribed period as 19 days from the end of the month in which the amount is deducted.

This section gives the Occupational Pensions Regulatory Authority (OPRA) the power to impose a civil sanction for breaches of the requirement.

Subsection (1) replaces 49(8) of the Pensions Act 1995 with *new subsections (8)* to *(13)*.

The time limit for payment of employee contributions will continue to be set out in regulations, under the *new section 49(8)*.

The *new section 49(9)* gives the power to impose civil penalties for any breach of the requirement.

It also imposes a new obligation on trustees and managers to report to OPRA and to the employee where employee contributions have not been paid within the time limit prescribed under the new section 49(8).

The *new subsection (10)* provides that OPRA may impose civil penalties on trustees or mangers if they fail to report promptly to OPRA when employee contributions have not been paid within the time limit.

The *new subsections (11)* to *(13)* impose a criminal sanction in circumstances where there has been fraudulent evasion of the obligation to make payment of employee contributions within the prescribed time limit.

In relation to stakeholder pension schemes, *subsection (13)(a)* ensures that an employer who has been required to pay a penalty under section 3 of this Act for failing to comply with the employer access requirements in section 3, is not penalised again under section 10 of the 1995 Act.

Subsection (2) makes it clear that section 88(3) of the Pensions Act 1995, which provides for a civil sanction on employers who do not pay contributions to money purchase schemes on time, only applies to employer contributions (so that section 49(8) deals with employee contributions and section 88(3) deals with employer contributions).

Section 11: Effect of bankruptcy on pension rights: approved arrangements

This section provides statutory protection on bankruptcy for pension rights in approved schemes.

Where a person becomes bankrupt, his assets usually vest in the trustee in bankruptcy. However, the position of pensions on bankruptcy was considered by the Pensions Law

Review Committee (PLRC), set up under the chairmanship of Professor Goode. The Committee's report, published in 1993, recommended that pension rights (as opposed to the pension payments themselves) should not be counted as an asset in bankruptcy. (The report was published as *Pension Law Reform: The Report of the Pensions Law Review Committee* – Cmd 2342-1.)

The recommendations on pensions and bankruptcy in the Report were accepted by the Government (*Security, Equality, Choice: The Future for Pensions* – Cmd 2594). The Committee's recommendations formed the basis for sections 91 to 95 of the Pensions Act 1995.

However, the provisions on bankruptcy in the Pensions Act only apply to occupational pension schemes. No equivalent protection for other types of pension, for example personal pensions, was included in that Act. The measures here provide statutory protection on bankruptcy for pension rights in approved schemes, as defined.

Subsection (1) provides that where a bankruptcy order is made against a person, any rights that he has in an approved pension arrangement are to be excluded from his estate for the purposes of the bankruptcy proceedings.

Subsections (2) and *(3)* define the expression "approved pension arrangement".

> Broadly, an *approved arrangement* is a pension arrangement recognised for tax purposes under Part XIV of the Income and Corporation Taxes Act 1988. Because of the variety of pension arrangements that exist, a regulation-making power is included as a safeguard to protect arrangements that might fall outside a strict interpretation of the definitions contained in paragraphs (a) to (g) of subsection (2).

Subsections (4) and *(5)* provide for circumstances where a person has pension rights in a pension scheme that has applied to the Inland Revenue for approval but not yet received a decision.

If approval is still being sought on the date that a bankruptcy order is made against a person, and subsequently the Inland Revenue decide not to grant approval, then the bankrupt's pension rights in that scheme are to vest in the trustee in bankruptcy (subject to regulations under section 12).

Subsections (6) to *(8)* provide for the circumstances where a bankrupt has pension rights in a pension scheme and the Inland Revenue withdraws approval from that scheme.

If the Inland Revenue issue a notice withdrawing approval after a bankruptcy order is made and the effective date for the withdrawal of approval is before the date of the bankruptcy order itself, then any rights that the bankrupt has in the pension scheme are to vest in the trustee in bankruptcy (again subject to regulations under section 12).

Schedule 13 makes a number of repeals as a consequence of this section and section 12. (The Schedule is introduced by section 88.)

Section 12: Effect of bankruptcy on pension rights: unapproved arrangements

This section enables parallel protection on bankruptcy for pension rights in *unapproved* schemes.

Regulations made under this section will enable rights of a person under an unapproved pension arrangement to be protected in the same way as a person's rights under an approved pension arrangement in prescribed circumstances. The intention is to cover circumstances where the other pension benefits that the bankrupt will receive are likely to be inadequate to meet his reasonable needs and those of his dependants

Section 14: No forfeiture on bankruptcy of rights under pension schemes

Currently, where a person becomes bankrupt, occupational pension schemes (approved and unapproved) commonly protect the person's benefits by means of forfeiture arrangements. The member's benefits are forfeit to the scheme, which can then pay them on a discretionary basis to the member or his family.

If these arrangements were left untouched it would defeat the policy of sections 11 and 12 to protect pension benefits from creditors only in accordance with those sections. That would tilt the balance against the interests of creditors. Consequently, this section provides that pension schemes of all kinds will no longer be able to forfeit pension rights on a member's bankruptcy.

Sections 15-16: Excessive pension contributions made by persons who have become bankrupt

Section 11 ensures that if someone becomes bankrupt, their tax-approved pensions are protected. Under section 12, rights under non-approved pensions may also be protected. However, it is possible that people could put large amounts of their assets into pensions in order to keep them out of the reach of creditors. So sections 15 and 16 (and paragraphs 67-72 of Schedule 12) provide a power to recover excessive contributions from a pension so that they can be used for the benefit of creditors. These measures were added to the Bill as amendments at Commons Report stage (Hansard vol. 331 col. 701), and at Lords Committee stage (Hansard vol. 604 col. 951).

Section 15 amends the Insolvency Act 1986 by replacing sections 342A to 342C;

Section 16 makes parallel provision for Scotland, by replacing sections 36A to 36C of the Bankruptcy (Scotland) Act 1985.

References below are to the new sections 342A to 342C.

Application for a court order (new section 342A)

Where an individual has been made bankrupt and the trustee in bankruptcy has reason to believe that excessive contributions have been made to a protected pension, he can apply to the court for an order to recover the excessive contributions (*subsection (1)*).

The test the court has to consider is whether the making of contributions has unfairly prejudiced creditors (*subsection (2)*). Contributions that have unfairly prejudiced creditors are termed "excessive contributions". *Subsection (6)* provides that the court must consider two matters in particular when considering whether contributions are excessive:

whether the making of any of the contributions was for the purpose of putting assets beyond the reach of creditors;

whether the total amount of contributions was excessive in the light of the bankrupt's circumstances when the contributions were made.

If the court is satisfied that excessive contributions have been made, *subsection (2)* provides that the court may make an order to restore the position to what it would have been if the excessive contributions had not been made.

Court orders (new sections 342B and 342C)

Section 342B gives more details about the nature of an order made under subsection (2) of section 342A. *Subsection (1)* says that the order may include provision:

requiring the pension scheme to pay an amount to the trustee in bankruptcy;

reducing any pension benefits that the individual and his family are entitled to; and for recovery of costs incurred by the scheme in supplying information for the purposes of the application and in complying with the order.

Subsection (3) clarifies that an order to restore the rights of someone other than the bankrupt to what they would have been had the excessive contributions not been made, does not apply to rights that person has as a result of a pension sharing order or agreement (but see sections 342D to 342F inserted by paragraph 71 of Schedule 12).

Subsection (4) limits the amount which the pension scheme can be required to pay to the trustee in bankruptcy to the lesser of:

the amount of the excessive contributions; or

the current value of the bankrupt's pension rights under the scheme.

Subsections (5) and *(6)* provide that, where an order is made for the pension scheme to pay an amount to the trustee in bankruptcy, the order must provide for a corresponding reduction in the bankrupt's rights under the scheme.

An order under section 342A is binding on the trustees or managers of the pension scheme concerned, and overrides the scheme's rules so far as is necessary *(section 342B(7)*).

Section 342C provides supplementary details and clarification. In particular:

Subsection (1) of section 342C requires the trustees or managers of the pension scheme to give the trustee in bankruptcy information about the bankrupt's pension arrangements for the purposes of making an application to the court.

Subsection (2) provides that any other provisions or enactments which prevent assignment of pension rights, do not apply to a court making an order under section 342A.

Subsections (4) and *(5)* provide for regulations and guidance concerning the calculation of the value of an individual's rights under the pension scheme and the calculation of the reduction in the scheme's liabilities in respect of that person.

Pension sharing and bankruptcy

Paragraph 69 of *Schedule 12* inserts new sections 36D to 36F into the Bankruptcy (Scotland) Act 1985. Paragraph 69 provides for situations where both pension sharing and bankruptcy are involved: where in the run-up to a person's bankruptcy, his pension rights were the subject of a pension sharing order or agreement.

These circumstances may arise where a couple divorce and share the pension, and subsequently the scheme member becomes bankrupt. If a court rules that his pension rights are based on excessive contributions, the pension share awarded to his former spouse, or a portion of it, may in limited circumstances be available to his permanent trustee in bankruptcy.

The term *"excessive contributions"* is properly used only in relation to the bankrupt. Once pension rights are transferred to the former spouse it is no longer correct to use the term "excessive contributions". Instead the legislation refers to rights which are the fruits of "the unfair contributions", that is, contributions that have unfairly prejudiced the bankrupt's creditors.

Scottish insolvency law provides that, subject to certain time limits, financial settlements made by the bankrupt, including divorce settlements, can be reopened. The permanent trustee can apply to the court to seek recovery of property or funds if these are a gratuitous alienation or an unfair preference (sections 34 and 36 respectively of the Bankruptcy (Scotland) Act 1985).

Gratuitous alienations mean transfers of assets at undervalue that unfairly attempt to deprive creditors.

Unfair preferences are transactions that give preference to one creditor over another.

In addition, the permanent trustee can apply to a court to recover for the bankrupt's estate any capital sum or property transferred to the bankrupt's former spouse by an order made under section 8(2) of the Family Law (Scotland) Act 1985. This provision is contained in section 35 of the Bankruptcy (Scotland) Act 1985. (*Paragraph 68 of Schedule 12* extends the provisions in section 35(1) of the Bankruptcy (Scotland) Act 1985 to include pension sharing orders.)

The policy linkages between pension sharing and bankruptcy build on the existing legislation. The pension sharing order or agreement will only be able to be unpicked if:

it can be shown to a court that the pension sharing order or agreement had the effect of defeating creditors (e.g. it was a gratuitous alienation or an unfair preference); and

the pension rights transferred to the former spouse could not have been made without including the fruits of unfair contributions; and

even when the unfair contributions are treated as being used in the first instance to produce the bankrupt's share of the pension, some of the former spouse's share of the pension is derived from the unfair contributions.

If all of these conditions are satisfied, there will be a balance of unfair contributions contained in the former spouse's pension share and an application can be made to the court to unpick the pension sharing order or agreement.

In practice, on an application by the permanent trustee under section 36A(1), the court will examine the contribution history of the bankrupt and will come to a view about the value of the excessive contributions. Because of pension sharing, the value of the bankrupt's remaining pension rights may not be sufficient to enable the full amount of the excessive contributions to be recovered from his remaining pension rights. In such a case, the permanent trustee might look to the former spouse's pension share, and make an application to the court under sections 36D(1)-(3) for an order for recovery. The court would be able to exercise the powers available to it in respect of gratuitous alienations, unfair preferences, and orders for the payment of a capital sum on divorce, to the extent that any amount transferred by those means represents unfair contributions.

If the court finds in favour of the permanent trustee, it will be able to order that that part of the former spouse's pension share should be passed to the permanent trustee.

The new section 36D sets out the conditions the court has to consider in determining whether the pension share awarded to the former spouse is recoverable as unfair contributions under these provisions.

Subsections (1), (2) and *(3)* of the new section 36D define pension sharing transactions for the purposes of sections 34, 35 and 36 of the Bankruptcy (Scotland) Act and require that these sections shall only have effect to the extent of that part of the pension share that is recoverable.

By virtue of *subsections (4)* to *(9)*, the court must consider how much of the pension share is derived from unfair contributions. ("Unfair contributions" are defined as contributions made to the bankrupt's pension that unfairly prejudiced his creditors.) These subsections then prescribe how the court is to decide what is actually recoverable.

Firstly, if the part of the bankrupt's pension not derived from unfair contributions was sufficient to fund the share that passed to the former spouse, then no recovery can be made from the former spouse's share. But if any of the share assigned to the former spouse could not have been made other than from the fruits of unfair contributions, that amount is recoverable by the bankrupt's permanent trustee.

Section 36E sets out conditions to be met for these purposes by orders under sections 34, 35 or 36.

Subsection (1) defines the term “recovery order” as meaning a decree granted under section 34(4) of the Bankruptcy (Scotland) Act 1985, an order made under section 35(2) of that Act or a decree granted under section 36(5) of that Act.

Subsection (2) details the matters which a court may include in a recovery order. For example the order may require the pension scheme to pay an amount to the permanent trustee. The matters listed are additional to those which can generally be included in an order remedying an unfair preference etc.

Subsection (4) limits the amount which a pension scheme can be required to pay to the permanent trustee to the smallest of:

the amount of the former spouse’s pension share which represents unfair contributions and is recoverable;

so much (if any) of the unfair contributions as is not recoverable out of the bankrupt’s share by way of an order under section 36A of the Bankruptcy (Scotland) Act 1985 requiring the person responsible for the pension arrangement to pay an amount to the permanent trustee; and

the value of the former spouse’s pension share.

Subsections (5) and *(6)* provide that where an order is made for the pension scheme to pay an amount to the permanent trustee, the order must provide for a corresponding reduction in the former spouse’s rights under the scheme.

Subsection (7) provides that an order or decree under section 34, 35 or 36 is binding on the trustees or managers of the pension scheme concerned, and override the scheme rules so far as is necessary.

Section 36F contains additional requirements in respect of the making of recovery orders.

Subsection (1) requires the trustees or managers of the scheme to provide the permanent trustee with information about the former spouse’s pension arrangement, and if appropriate, the bankrupt’s pension arrangement, for the purposes of making an application for a recovery order.

Subsection (2) provides that provisions or enactments which prevent assignation of pension rights, do not apply to a court making a recovery order.

Subsections (3) and *(4)* provide for regulations and guidance concerning the calculation of the value of the former spouse’s pension share and the calculation of any subsequent reduction in scheme liabilities in respect of the former spouse’s pension share.

Paragraph 71 of *Schedule 12* inserts sections 342D-F into the Insolvency Act 1986. These sections apply to England and Wales, and make parallel provision to the requirements that apply to Scotland (contained in paragraph 69).

Section 17: Compensating occupational pension schemes

This section modifies the compensation provisions in the Pensions Act 1995, with the aim of ensuring that more members of occupational pension schemes receive a greater proportion of their benefits than under the current compensation provisions, should funds be lost because of theft or fraud.

The compensation provisions were introduced in the Pensions Act 1995 and are administered by the Pensions Compensation Board (PCB). The PCB pays compensation to an occupational pension scheme if it has suffered a reduction in its assets through dishonest action, the remaining assets are below a set level and the sponsoring employer is insolvent. The level to which a scheme’s assets must fall before a claim can be made and the amount of compensation that the PCB can pay are set out in the Pensions

Act 1995 and the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997.

Currently, the value of a scheme's assets must fall below 90% of the amount of its total liabilities before a claim may be made. The maximum amount of compensation payable is that needed to restore the scheme to the 90% threshold, or 90% of the loss —whichever is less. (In salary-related schemes the funding level is measured using the valuation method for the Minimum Funding Requirement (MFR), which sets a benchmark funding level that schemes are required by law to attain.)

Subsections (1) and *(2)* reduce this limitation on occupational pension schemes applying for compensation, by amending the rule in the 1995 Act.

Instead of having to fall below 90% of its total liabilities, a scheme will be eligible for compensation if its assets fall below a new "protection level". This is the combined value of 100% of its most urgent liabilities and 90% of its other liabilities. The most urgent liabilities include those to its members already receiving a pension, and those to its members within 10 years of retirement (who will be defined in regulations). This latter group already has to be identified separately for the statutory MFR valuation. Taking a power to prescribe it allows flexibility for compensation calculations to be adjusted in line with any future changes to the MFR basis.

Subsections (3) to *(6)* correspondingly increase the maximum amount of compensation that may be paid, in line with the new threshold.

Section 18: Miscellaneous amendments

This section brings into force Schedule 2 (see below), which makes various minor amendments to the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986, the Pension Schemes Act 1993, the Pensions Act 1995 and the Employment Rights Act 1996.

Schedule 2: Miscellaneous amendments

Paragraphs 1 and 2: Income payments orders against pension payments

These paragraphs provide that income payments orders can still be made despite anything in sections 11 and 12, by amending section 32(2) of the Bankruptcy (Scotland) Act 1985 and section 310(7) of the Insolvency Act 1986.

> *Income payments orders* are orders made by a Court against a bankrupt and stipulate that a percentage of his income must be surrendered and paid to his creditors. Pension income actually in payment is included in the calculation of the bankrupt's income.

The revised wording makes it clear that pension "rights" in approved schemes, and in those unapproved schemes that would be protected on bankruptcy, do not extend to pension "income". This ensures that income payments orders can still be made in respect of pension income.

Paragraph 3: Extended meaning of "personal pension scheme"

The current definition of a personal pension in section 1 of the Pension Schemes Act 1993 is couched in terms of a scheme capable of providing benefits on death or retirement in respect of employed earners. This definition could exclude a scheme (including a stakeholder pension scheme – see commentary on Part I) set up exclusively for a group of self-employed earners. That would leave some self-employed earners with less statutory protection than that enjoyed by employed earners. This amendment addresses that.

As a result of the amendment, parts of sections 73, 96 and 181 of the Pensions Schemes Act 1993, and part of section 126 of the Scotland Act 1998, are repealed by Part I of Schedule 13 (introduced by section 88).

***Paragraph 4* : Revaluation of earnings factors: meaning of "relevant year"**

In order to protect the pension position of individuals who leave their pension schemes before state pension age, the Pension Schemes Act 1993 requires schemes to revalue Guaranteed Minimum Pension (GMP) rights in line with certain prescribed percentages to keep pace with inflation. The provisions governing one particular method of revaluation, known as fixed rate revaluation, do not allow a GMP to be revalued after April 1997.

This paragraph removes that restriction. It provides for a Guaranteed Minimum Pension to be revalued by the prescribed percentage for each year in the period between the earner's leaving the scheme and reaching state pension age (currently 65 for men and 60 for women).

***Paragraph 5* : Interim arrangements**

Section 28 of the Pension Schemes Act 1993 gives holders of personal pensions the right to an interim arrangement in respect of protected rights when their pensions mature.

Interim arrangements for non-protected rights are permitted by section 58 of and Schedule 11 to the Finance Act 1995. Under an interim arrangement, instead of immediately using the accumulated fund to buy an annuity, the pension holder may withdraw an income from the fund, within specified maximum and minimum limits, and defer the purchase of an annuity. When the member reaches the age of 75, the remainder of the fund must be used to buy an annuity. However, unless the fund is sufficiently large (at least £100,000-£200,000) an interim arrangement could deplete the fund to a point where there was insufficient remaining to buy an annuity that would provide a reasonable level of income from age 75 onwards.

There is a power (section 145 of the Pensions Act 1995) to extend the availability of interim arrangements to cover protected rights in occupational schemes, but at present such an extension would create a requirement on schemes to offer such arrangements. For this reason the power to extend the availability of interim arrangements in this way has not been used.

This paragraph amends section 28 of the Pension Schemes Act 1993 to allow the providers to decide whether or not to supply interim arrangements. It is intended that the power to extend the availability of interim arrangements to protected rights in occupational schemes will then be used.

***Paragraph 6*: Effect of certain orders on guaranteed minimum pensions**

This paragraph amends section 47 of the Pension Schemes Act 1993. Section 47 contains provisions in relation to pensions that are contracted out of SERPS. Broadly, the position is that where a person is entitled to a Guaranteed Minimum Pension (GMP) from an occupational pension scheme, his/her SERPS entitlement is reduced by the amount of GMP. That prevents double provision.

The paragraph provides that where an order has been made to recover excessive pension contributions (see commentary on sections 15 and 16), the full value of the GMP will be assumed to be retained for the purposes of the SERPS calculation. Hence SERPS would still be reduced by the full amount, and the state will be prevented from making up any shortfall in the occupational pension which has occurred as a result of the recovery of excessive contributions.

Paragraph 7 : Mandatory payment of contribution equivalent premium

Paragraph 7(1)

When a person leaves an occupational salary-related scheme with less than two years' service (or dies having less than two years' service) the scheme may refund his or her contributions rather than providing him or her (or his or her widow or widower) with a pension. Where this happens the scheme trustees pay a "contributions equivalent premium" (CEP) which restores the leaver's (or widow's or widower's) rights in the state earnings-related scheme (SERPS) for that short period of service. The policy is that payment of a CEP should be mandatory where there are state scheme rights to be restored.

The Pensions Act 1995 introduced new rules for contracted-out schemes, and also amended the legislation dealing with CEPs to take account of those new rules. Section 55 of the Pension Schemes Act 1993, as amended by the 1995 Act, now deals with the payment of CEPs. However, that section does not provide for the mandatory payment of CEPs in certain circumstances.

Paragraph 7(1) amends section 55 of the 1993 Act to make such provision. This paragraph also provides that the Inland Revenue must be notified by the prescribed person where a CEP is required to be paid, and introduces a power to set out how and when such notification must be made.

Paragraph 7(2)

The Northern Ireland Act 1998 excepts certain matters from the legislative and executive powers of the Northern Ireland Assembly, including matters relating to the payment of CEPs. Accordingly, paragraph 7(2) makes amendments to the Pension Schemes (Northern Ireland) Act 1993 equivalent to those made by paragraph 7(1) to the Pension Schemes Act 1993.

Paragraph 8: Payment by Secretary of State of unpaid pension contributions

The Secretary of State can make payments from the National Insurance Fund in respect of contributions to occupational pension schemes that an employer, who has become insolvent, was responsible for but failed to pay. There are provisions to recover these payments from the assets of the insolvent employer. However, these were not amended to reflect the new provisions for contracting out that came into effect from April 1997.

This paragraph amends Schedule 4 to the Pensions Schemes Act 1993 to ensure that certain payments will continue to be recoverable from the insolvent employer's assets as a priority debt where the employer has become insolvent.

Paragraphs 9 to 11: Supervision by the Occupational Pensions Regulatory Authority

Paragraph 9

This paragraph amends section 3 of the Pensions Act 1995. It widens the scope of section 3(2)(b) of the Pensions Act 1995 so that it can apply to, for example, the stakeholder pension schemes provided for in this Act. At present section 3 refers only to Part I of the 1995 Act. The paragraph extends the reference to cover all of that Act and any other Act (including this one).

Paragraph 10

Section 8(4) of the Pensions Act 1995 currently allows OPRA to appoint someone with full powers to act as a trustee, and at the same time order that the other trustees on the board cannot exercise any of their powers. It also allows OPRA to appoint trustees who have restricted powers.

However, the legislation does not make it clear that OPRA can appoint a trustee who has restricted powers and at the same time prevent the other trustees from exercising their powers only in the areas of those restricted powers. For example OPRA may wish to appoint a trustee who, because of the inexperience of the other trustees, would be solely responsible for decisions relating to the scheme's investment strategy. Other day to day administration of the scheme could be left to the remaining trustees.

Paragraph 10 clarifies the situation. It allows OPRA to appoint a trustee with restricted powers and to order that those powers may be exercised to the exclusion of the other trustees on the board.

Paragraph 11

OPRA has the power, under section 10 of the Pensions Act 1995, to impose fines for certain breaches of the legislation. It also has the power to recover the penalty. However, if someone refused to pay, and OPRA had to enforce the penalty through the courts, it would currently have to take out a debt action in the courts.

To avoid having to take out a debt action, in England and Wales the County Court rules provide a fast-track system, which the amendment will allow OPRA to use. This means that to enforce an unpaid penalty OPRA will only have to certify the amount of the unpaid penalty to the County Court and file a copy of the penalty. The Court could then issue a court order to allow the penalty to be enforced. In Scotland, OPRA's order will have the same effect as a sheriff's decree.

Paragraph 12: Occupational pension schemes: institutions who may hold money deposited by trustees etc.

To ensure that pension schemes do not keep money in an employer's bank account, which might put members' funds at risk, section 49(1) of the Pensions Act 1995 requires trustees to keep pension fund money in a separate account at an institution authorised under the Banking Act 1987.

Similarly, where an employer acts as paying agent for the trustees, section 49(5) requires the employer to keep such money in a separate account at an authorised institution.

Reference to the Banking Act 1987 has the effect of preventing money from being kept in building societies because they are exempt from the requirement to apply for authorisation under the Banking Act 1987.

This paragraph amends section 49(1) and (5) of the Pensions Act 1995 to include building societies and European authorised institutions as institutions in which pension fund money may be held.

Paragraph 13: Annual increase in rate of pension

Once occupational pensions become payable, schemes are required to increase them annually. This applies to all pension rights which have accrued on or after 6 April 1997, and to certain rights accruing on or after 5 April 1988. The existing legislation requires an occupational scheme to apply the annual increase by reference to a Revaluation Order which is published each year, based on the published Retail Price Index percentage for the month of September. The Order is not published until the following January. A procedure to advise any scheme which needs to make an increase before the order is published has been in operation.

This paragraph amends section 54 of the Pensions Act 1995 to make it clear that the reference period to be used by schemes to determine the percentage rate of annual increases to occupational pensions in payment is the period covered by the most recently published Revaluation Order.

Paragraph 14: Occupational pension schemes: certificates etc. relating to minimum funding requirement

Paragraph 14(1)

The Minimum Funding Requirement (MFR) sets a benchmark funding level that salary related schemes are required by law to attain. These schemes are required to have regular MFR valuations. Following each valuation, the rates of contributions payable over the next five years are set out in a Schedule of contributions. The rates must be certified by the scheme's actuary as adequate to ensure that funding will meet the MFR provisions. At present this has to be done by reference to the funding level on the date the actuary certifies the Schedule. This requires some complicated calculations because the rates have to be agreed before the actuary can certify them. This change will simplify the procedures by enabling the actuary to certify the contributions by reference to the funding level at an earlier date. The power to prescribe the appropriate date allows flexibility to adjust it if there are further operational difficulties.

Paragraph 14(2)

Where there has been a deterioration in the funding level of a salary related scheme and it is below the MFR, the trustees must prepare a report setting out the reasons for the deterioration. This amendment introduces powers for regulations to set out the time limit within which the trustees must prepare that report. This is consistent with many other provisions in the Pensions Act 1995 relating to time limits for compliance, enabling the period to be adjusted in the light of practical experience. The Government intends to consult with the pensions industry on what the period should be, but it is expected to be three months.

Paragraph 15: Excess assets of wound up schemes

Section 77 of the Pensions Act 1995 sets out the rules as to how excess assets are to be distributed where a scheme is winding up and where there is a scheme rule prohibiting the distribution of assets to the employer. Trustees are required to use any excess assets to enhance members' benefits up to certain limits. Any assets left over after this may then be distributed to the employer, even though the scheme rules would normally prevent this.

Where trustees fail to comply with these requirements, OPRA can prohibit the trustees from being trustees of the scheme but cannot impose a civil penalty. The amendment inserts a reference to section 10 of the Pensions Act 1995 (the power allowing OPRA to impose civil penalties) into section 77(5). This means that where a trustee of an occupational pension scheme fails to follow the rules for distribution of excess assets, and where he makes a payment to the employer in contravention of the section, OPRA will be able to impose a penalty on him.

Paragraph 16: Pensions Compensation Board

The Pensions Compensation Board (PCB) is the body that administers the occupational pensions compensation provisions. It is required to produce an annual report and annual accounts. Currently these two documents do not cover the same annual period. The annual report covers a 12 month cycle which started from 1 August, the date the PCB was formed. The accounts cover the financial year cycle, ending on 31 March.

This paragraph amends section 79(1) of the Pensions Act 1995 to bring the annual report into the same cycle as the accounts, and allows for the first annual report after the change to cover a shorter period to enable the two cycles to coincide.

Paragraph 17: Diligence against pensions: Scotland

For the purposes of debt recovery, it is intended that occupational pensions should be treated as earnings. Hence there is special provision in the Pensions Act 1995 to allow attachment of earnings orders against occupational pensions. This paragraph now allows occupational pensions to be subject to arrestments of earnings (the Scottish equivalent of attachment of earnings orders).

Paragraph 18: Pensionable service

This paragraph amends section 124(3) of the Pensions Act 1995 to allow occupational pension schemes to round the length of pensionable service (for example, to round two weeks of pension up to a month when calculating the final pension). The pension based on these rights would then be increased annually by the published Retail Price Index. This will prevent occupational pension schemes having to identify any rounded rights separately and exclude them from the annual increase.

Paragraph 19: Occupational pension schemes: rights of an employee who is director of a corporate trustee

This paragraph amends sections 46, 58 and 102 of the Employment Rights Act 1996, which provides for paid time off for performance of trustee duties and for training, and for the rights not to suffer detriment in employment or be unfairly dismissed. It ensures that the rights in those sections apply to employees who are directors of a trust company in the same way as they do to employees who are individual trustees.

Parts III-IV: Pensions on Divorce and Nullity

Background

Since the 1970s, the courts have been required to have regard to the value of pension rights so that these can be offset against other assets. The Pensions Act 1995 allowed courts:

- in England and Wales, to require pension arrangements to pay maintenance from a member's pension directly to a former spouse;
- throughout Great Britain, to order part or all of a lump sum payable on the death or retirement of a member to be directed to the former spouse.

These provisions, which are generally known as the earmarking or attachment provisions, have been little used. They do not allow a clean financial break in a divorce settlement or on nullity of marriage and they leave former spouses vulnerable in that they lose their intended or actual retirement income if their former spouse dies before them. Pension sharing will provide an additional option for couples ending their marriage, to ensure that assets can be divided fairly on divorce. It will make it easier for divorcing couples to achieve complete financial independence through a clean break settlement. It should provide many former spouses, most of whom are likely to be women, with greater security of income throughout retirement.

The Government published a public consultation paper in June 1998 that included a draft Pension Sharing Bill and complementary draft legislation containing the necessary changes to tax law. The draft legislation was also scrutinised by the Social Security Select Committee as part of the pre-legislative scrutiny of Bills recommended by the Select Committee on Modernisation.

The Social Security Select Committee published its report on 28 October 1998. Many of the issues raised by the Committee echoed those raised by the 82 respondents to the consultation exercise. The Government responded to the report on 12 January 1999. Copies of the response and the non-confidential replies to the public consultation are available in the Library of the House of Commons and the Record Office of the House of Lords. Although the Committee and the great majority of respondents were firmly in support of the principle of pension sharing, some points of concern were expressed and the provisions of the Bill as introduced contained changes made in response to

Committee's recommendations and the concerns expressed by other commentators about some aspects of the draft legislation.

In particular, the provisions in the Bill were amended to put beyond doubt that pension sharing would be available only to those who began proceedings for divorce or annulment after the legislation had been brought into force. The Government also agreed that pension earmarking should be retained as an alternative to pension sharing. The Act includes changes designed to improve the working of the earmarking legislation. The Act also includes provisions extending sections 25B to 25D of the Matrimonial Causes Act 1973 to overseas divorces etc under the Matrimonial and Family Proceedings Act 1984.

The Government also made a number of technical amendments in the light of recommendations by the Committee and/or responses to the consultation exercise. To enable schemes to simplify the administration of a pension in payment to a former spouse, schemes were to have the discretion to impose a single "indexation" requirement on the whole of the pension to protect its value against inflation during retirement. Similarly, to simplify administration and reduce the costs to pension schemes, the Government dispensed with the requirement for pension schemes contracted-out of the state scheme to obtain separate certificates to hold "safeguarded rights" (that is contracted-out rights which form part of a pension share).

The Government noted the views of the Committee that former spouses of members of unfunded public service schemes should be allowed to choose to transfer out of such a scheme, a point that was also mentioned in some consultation responses. However, former spouses will enjoy the same levels of security and inflation-proofing as other scheme members of a public service scheme and, without this restriction, public expenditure would be brought forward. So, the provisions in the Act continue to prevent former spouses from transferring out of such schemes.

The pension sharing sections

The main purpose of the pension sharing sections is to introduce the option of pension sharing on divorce or nullity of marriage. This will allow pension rights to be treated like other assets and a proportion, or the whole, of their value to be transferred from one spouse to the other as part of the financial settlement. Pension sharing will not be compulsory — it will still be possible to offset pension rights against other assets or to use the current earmarking arrangements.

Pension sharing will be open to couples where the pension rights exist under an occupational pension scheme, a personal pension scheme, the State Earnings Related Pension Scheme (SERPS), or other pension arrangements. Pension sharing will not apply to the basic state pension, where one partner may already substitute their former partner's contribution record for their own in the event of divorce.

The rights created from the value transferred will belong to the person for whom they are created. The eventual payment of the pension will be direct to them and will no longer depend on the circumstances of their ex-spouse.

Pension sharing will apply only in relation to proceedings for divorce or annulment that begin after the new arrangements come into force. The costs of pension sharing will be recoverable from the couple.

Structure of the provisions about pensions on divorce and nullity

Part III

This Part amends existing matrimonial and family law to enable the court to make pension sharing orders in relation to divorce and annulment. It also makes provision amending the earmarking and attachment provisions, and extends the England and Wales provisions to overseas divorce and nullity.

Part IV

Chapter I sets out how, in relation to a pension arrangement, a pension share is effected and the result. Chapter II makes similar provisions in relation to SERPS.

Part VI

The general provisions for the Act in Part VI contain some measures relating specifically to pension sharing. In particular, see

Section 83 part (regulations and orders)

Section 84 (consequential amendments relating to Parts III and IV)

Section 85 part (transitional provisions)

Summary of pension sharing provisions

Part III

*Section 19 (*and*Schedule 3)* amends Parts II and IV of the Matrimonial Causes Act 1973. The effect of the amendments is to enable the court in England and Wales to make pension sharing orders in relation to divorce and nullity of marriage.

Section 20 makes corresponding provision for Scotland.

*Section 21 (*and*Schedule 4)* amends the sections about pensions inserted in the Matrimonial Causes Act 1973 by section 166 of the Pensions Act 1995.

Section 22 extends the earmarking provisions, included in the Pensions Act 1995, to applications for financial relief after an overseas divorce, separation or annulment by amending the Matrimonial and Family Proceedings Act 1984. In Scotland, it is already possible to apply for an attachment order following an overseas divorce.

Section 23 brings together the various England, Wales and Scotland powers in relation to the supply of information, calculation and verification of pension rights and charges for the provision of information into a single Great Britain power. The new power also extends the scope of the regulations to Northern Ireland in the sense that British pension arrangements will have to supply information in relation to financial relief under Northern Ireland legislation.

Section 24 provides for the making of regulations by the Secretary of State to enable pension arrangements to recover their charges for complying with earmarking orders under England, Wales, Scotland or Northern Ireland legislation.

Section 25 gives the Lord Chancellor power by order to make consequential amendments to Part III of the Act, including Schedule 3 (amendments to the Matrimonial Causes Act 1973 to enable the court in England and Wales to make pension sharing orders) if the new divorce procedure in Part II of the Family Law Act 1996 comes into force before Part III of the Act. Exercise of the power is subject to affirmative resolution of both houses of Parliament.

Section 26 provides a number of definitions which are relevant to Part III of the Act.

Part IV

Chapter I

Section 27 sets out the scope of the pension sharing mechanism relating to rights under pension arrangements.

Section 28 activates the pension sharing mechanism following a pension sharing order by the court or an agreement between the divorcing couple.

Section 29 provides, as a result of the pension sharing order or agreement, for the pension rights of a person with rights under a pension arrangement to be subject to a debit and the former spouse to become entitled to a corresponding pension credit in the form of a right against the person responsible for the arrangement.

Section 30 provides a power to specify the calculation of the cash value of the member's pension rights (the "cash equivalent").

Section 31 specifies how the member's pension rights should be reduced as a result of the pension share.

Section 32 deals with the effect of pension sharing on contracted-out rights (that is, the rights built up by members of contracted-out schemes that replace the state earnings related pension scheme (SERPS)). Section 32 reduces contracted-out benefits to take account of a pension share. It also ensures that the state does not have to meet the cost, in the form of payment of extra additional pension, because of the reduction in the member's benefit.

Sections 33 and *34* specify the time limit within which the person responsible for a pension arrangement must discharge his liability in respect of a pension credit. Section 33 also provides that the Occupational Pensions Regulatory Authority (OPRA) must be notified if an occupational pension scheme fails to carry out the pension share on time and enables OPRA to either impose fines in such cases or extend the time allowed for carrying out the order.

*Section 35 (*and*Schedule 5)* sets out the ways in which persons responsible for pension arrangements can discharge their liability for a pension credit. In the case of pension schemes, this is by creating rights for the former spouse within the scheme itself or by making a transfer payment to another suitable pension scheme or arrangement. The section also provides for cases where the person entitled to the pension credit dies before the pension share has been implemented.

Section 36 sets out the special requirements in relation to any part of a former spouse's pension rights derived from the member's contracted-out employment. These rights are called "safeguarded rights". The section also sets out the requirements that schemes wishing to hold safeguarded rights must meet.

Section 37 sets out the general rules relating to the pension rights obtained by the former spouse following a pension share where the rights are provided under an occupational pension scheme. It also provides former spouses with transfer rights except in the case of unfunded schemes.

Section 38 makes provision for pension credit rights when a pension scheme winds up.

Section 39 provides for pensions payable by public service schemes to former spouses following a pension share to be fully protected against inflation ("indexed"). This mirrors the protection enjoyed by other members of public service schemes.

Section 40 provides that the Secretary of State may regulate to make indexation provisions for pensions payable to former spouses by private sector occupational schemes and pensions or annuities derived from safeguarded rights held in personal pension schemes.

Section 41 confers power enabling the Secretary of State to make regulations enabling the person responsible for a pension arrangement to recover pension sharing costs from the parties to the pension share.

Sections 42 and *43* contain technical provisions necessary to enable public service and judicial pension schemes to comply with pension sharing orders or agreements.

Section 44 disapplies a common provision in pensions legislation, which prevents the pension rights of an individual from being passed on to another person (except on death), to enable a pension sharing order or agreement to be carried out. The disapplication also extends to any corresponding provisions of pension arrangements.

*Section 45 c*ontains a regulation-making power to require pension schemes to disclose information relevant to a pension share.

Section 46 defines some of the terms used in Chapter I.

Chapter II

Section 47 sets out which state scheme rights may be subject to pension sharing.

Sections 48, *49* and *50 (*and*Schedule 6)* provide for pension sharing to apply to the additional pension built up in SERPS. The additional pension rights obtained by a former spouse following a pension share are called the "shared additional pension".

Section 51 defines some of the terms used in Chapter II.

Part VI

General

Section 84 gives effect to Schedule 12, Part I of which makes consequential amendments etc. relating to Parts III and IV.

Section 85 contains transitional provisions: subsections (3)-(5) relate to pension sharing.

Section 88 gives effect to Part III of Schedule 13 which repeals some existing legislation in consequence of the pension sharing provisions.

These sections are described in the commentary on Part VI, towards the end of this document.

COMMENTARY

Part III – Pensions on Divorce Etc.

Section 19: Pension sharing orders in England and Wales

This section gives effect to Schedule 3, which amends the Matrimonial Causes Act 1973 to enable the court to make pension sharing orders in connection with proceedings for divorce or nullity of marriage in England and Wales.

Section 20: Pension sharing orders in Scotland

This section amends the Family Law (Scotland) Act 1985 to enable the court in Scotland to make pension sharing orders in relation to divorce and nullity of marriage in Scotland.

Subsection (2) inserts into section 8(1) (which sets out the types of order for financial provision a court may make in an action for divorce) a new type of order named "a pension sharing order".

Subsections (3) and *(4)* insert various definitions into section 27 (interpretation). These definitions largely correspond to the equivalent definitions for England and Wales at Schedule 3, paragraph 2.

The sole point of difference occurs at subsection (3)(b) in the definition of "pension sharing order". This provides for the percentage value or the amount of the shareable rights to be transferred. Allowing the transfer of an amount reflects substantive law and current practice in Scotland in relation to orders for financial provision on divorce.

Section 21: Sections 25B to 25D of the Matrimonial Causes Act 1973

This section gives effect to Schedule 4 which amends the provisions about pensions inserted in the Matrimonial Causes Act 1973 by section 166 of the Pensions Act 1995. These provisions reinforced the courts' existing duty to take account of pensions in divorce settlements and gave courts in England and Wales new powers to require that, when a pension comes into payment or a lump sum death benefit becomes payable, part or all of it of it shall be paid by the pension scheme direct to the former spouse.

Section 22: Extension to overseas divorces etc.

This section amends Part III of the Matrimonial and Family Proceedings Act 1984 to extend the earmarking introduced into the Matrimonial Causes Act 1973 by the Pensions Act 1995, in relation to applications for financial relief in respect of divorces, judicial separations and annulments in England and Wales after an overseas divorce, separation or annulment.

Subsection (2) amends section 18 to require the court, when deciding whether and how to exercise its powers to grant relief under the 1984 Act, to have the same regard to pension benefits as it does in relation to a domestic case. *Subsection (3)* defines pension arrangement and benefits under a pension arrangement.

Subsection (4) amends section 21 of the 1984 Act by inserting two new paragraphs into what was section 21, but which, as a result of the Act, will be section 21(1). Section 21 of the 1984 Act applies provisions of the 1973 Act to financial relief orders under section 17 (financial provision and property adjustment orders) of the 1984 Act.

The additions made by subsection (4) apply to section 17 orders the same provisions about earmarking and attachment as apply under the 1973 Act where, having regard to any benefits under a pension arrangement, the court makes a financial provision order on divorce or nullity.

Subsection (5) inserts new subsections (2) to (5) into section 21 of the Matrimonial and Family Proceedings Act 1984. Of these new subsections:

((2) excludes the power to earmark a pension arrangement under new section 21(1)(bd) and (be) in cases where the only link with England and Wales is the matrimonial home;

((3) applies section 25D(1) of the Matrimonial Causes Act 1973 (transfers of rights between pension arrangements) to pension earmarking orders under the new section 21(1)(bd) and (be); and

((4) allows the Lord Chancellor to make regulations equivalent to those which may be made under section 25D(2) to (2B) of the Matrimonial Causes Act 1973. Section 25D(2) (as amended by the Act) provides that regulations may make provisions as to:

(a) payment of sums due under earmarking orders

(b) rights and liabilities of the parties affected in cases where a payment has been made under a mistaken belief that an earmarking order was valid;

(c) notification of change of circumstances;

(d) discharge of liability under an earmarking order of the person responsible for a pension arrangement;

(e) calculation and verification in relation to the valuation of benefits under a pension arrangement or shareable state scheme rights for the purpose of enabling the court to exercise its powers.

Section 23: Supply of pension information in connection with divorce etc. *Subsection (1)* provides for the Secretary of state to make regulations in relation to the supply of information, calculation and verification of pension rights and charges for the provision of information by pension arrangements in Great Britain in relation to financial relief on divorce, nullity and judicial separation within the United Kingdom.

Subsection (2) provides that regulations under subsection (1) may include for calculation and verification in accordance with guidance from time to time prepared by a person prescribed by the regulations.

Subsection (3) ensures that regulations in subsection (1) may provide for the application in prescribed circumstances (with or without modification) of any provision made under section 41(2) so that, if pension sharing takes place, a pension arrangement may recover charges to which these provisions relate together with charges covered by section 41.

Section 24: Charges by pension arrangements in relation to earmarking orders. The section provides for the making of regulations by the Secretary of State to enable pension arrangements in Great Britain to recover their charges for complying with earmarking orders under England, Wales, Scotland or Northern Ireland legislation.

Section 25: Power to make consequential amendments of Part III.

The section gives the Lord Chancellor power by order to make certain consequential amendments to Part III of the Act, including Schedule 3 (amendments to the Matrimonial Causes Act 1973 to enable the court in England and Wales to make pension sharing orders). By subsection (2) of this section, the order will only be exercisable if any amendment made to the Matrimonial Causes Act 1973 by the Family Law Act 1996 is brought into force before any provision in Part III of the Act.

Part IV – Pension Sharing

Chapter I – Sharing of Rights under Pension Arrangements

Section 27: Scope of pension sharing mechanism

This section sets out the scope of the pension sharing mechanism.

Subsections (1) and *(3)*: pension sharing may extend to a “person’s shareable rights” (defined in subsection (2)) in any pension arrangement other than an excepted public service scheme.

We intend to use the power in subsection (3) to except the Great Offices of State.

Subsection (2): most pension rights will be shareable.

We intend to use the regulation-making power to exclude survivors’ benefits payable to a member in his capacity as a survivor (such as, a widow’s or widower’s pension payable in respect of a former marriage), an injury benefit, compensation payment, and incidental benefits such as travel concessions.

Section 28: Activation of pension sharing

Subsection (1) lists the circumstances in which the pension sharing mechanism is triggered, namely, the taking effect of:

(a) a pension sharing order under the Matrimonial Causes Act 1973;

Note: In England and Wales a pension sharing order will be stayed (and so not take effect) for a period in accordance with the level of the court in which the jurisdiction is exercised. The stay provides time for the parties to appeal. If an appeal is begun during the stay period, the order will be further stayed until the appeal is disposed of.

(b) a provision which corresponds to the provision made by a pension sharing order, is contained in a qualifying agreement between the parties and takes effect on the dissolution of marriage under the Family Law Act 1996;

(c) a provision which corresponds to the provision made by a pension sharing order, is contained in a qualifying agreement between the parties and takes effect after the dissolution of marriage under the Family Law Act 1996;

Note: until Part II of the Family Law Act 1996 comes into force it will not be possible under this Act to pension share by agreement in England and Wales.

(d) an order corresponding to such a pension sharing order made on an application for financial relief in England and Wales under Part III of the Matrimonial and Family Proceedings Act 1984 following an overseas divorce or annulment of marriage;

(e) a pension sharing order made under the Family Law (Scotland) Act 1985;

Note: In Scotland, a pension sharing order will take effect on the day that the order is made. However, the appeal process must be completed before the extract decree or declarator is issued. If an appeal is marked the parties will not therefore be able to send the relevant documentation to the person responsible for the pension arrangement until the appeal process is complete. The implementation period under section 34(1) does not begin until the person responsible for the pension arrangement receives that documentation.

(f) a provision to share a pension that is included in a qualifying agreement negotiated between the parties that takes effect on divorce or nullity in Scotland. The Secretary of State is given a regulation-making power to prescribe the form in which the pension sharing provision must be made;

Note: there is no provision for pension sharing under Northern Ireland legislation at present.

(g) an order corresponding to a pension sharing order in paragraph (e) made on an application for financial relief in Scotland under Part IV of the Matrimonial and Family Proceedings Act 1984 following an overseas divorce or annulment of marriage;

Note: Pension sharing is not at present an option on such an application for financial relief.

(h) a pension sharing order under Northern Ireland legislation;

(i) an order corresponding to such an order made on an application for financial relief in Northern Ireland under Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 following an overseas divorce or annulment of marriage.

Subsection (2) defines the type of agreement in England and Wales that qualifies under subsections (1)(b) and (c). Such an agreement is one that:

(a) has been entered into in such circumstances as the Lord Chancellor may prescribe by regulations;

We propose to use the regulations to ensure that the parties have given prior notice of their intention to pension share and not received any notice of objection from the person responsible for the pension arrangement of their intention to pension share and that their agreement has been reached following mediation or some other form of negotiation involving a third party;

(b) satisfies requirements prescribed by the Lord Chancellor;

We intend to provide that agreements must meet requirements as to form, contain prescribed information and must have been produced to the court before being passed to the pension arrangement concerned.

Subsection (3) defines the type of agreement in Scotland that qualifies under subsection (1)(f). It requires an agreement to be entered into in such circumstances as the Secretary of State may prescribe and also registered in the Books of Council and Session before it can trigger the pension sharing mechanism.

Note: In Scotland, parties who divorce commonly make *Minutes of Agreement* to settle as many issues as possible before going to court. This allows parties to reach their own decisions (with legal advice) about the division of assets. A *Minute of Agreement* is conventionally registered in the Books of Council and Session (a public register kept in Edinburgh by the Keeper of the Registers of Scotland in which a variety of deeds may be registered). Deeds are usually registered for preservation and execution. This allows either party to compel the defaulting party to fulfil his or her obligations under the deed without returning to court.

Subsection (4) prevents an agreement that falls within subsection (1)(b) triggering the pension sharing mechanism in circumstances where:

(a) the sharing of rights under the pension arrangement concerned is dealt with under a pension sharing order, or

(b) the transferor's rights under the pension arrangement concerned are subject to an earmarking/attachment provision under section 25B or 25C of the Matrimonial Causes Act 1973.

Subsection (5) prevents an agreement that falls within subsection (1)(c) triggering the pension sharing mechanism in circumstances where–

(a) the couple were divorced under section 3 of the Family Law Act 1996 and, prior to divorce, had demonstrated that they had settled their future financial arrangements in one of the ways mentioned in section 9(2) of the Act;

i.e. pension sharing by agreement after a divorce will only be available (other than on conversion from a separation to a divorce order under section 4 of the Family Law Act 1996) if the parties did not have to demonstrate that they had settled their financial arrangements – see section 9(7) of the Family Law Act 1996.

(b) there is a pension sharing order, made in relation to the marriage, which relates to the same pension arrangement or the pension arrangement to which the agreement relates has already been the subject of pension sharing by the couple;

(c) the transferor's rights under the pension arrangement concerned are subject to an earmarking/attachment provision under section 25B or 25C of the Matrimonial Causes Act 1973.

Subsection (6) provides that subsection (1)(f) does not apply if there is in force an order under section 12A(2) or (3) of the Family Law Scotland Act 1985 relating to the rights of the transferor under the pension arrangement to which the provision relates.

Subsection (7) to (9): the effect of these provisions is that a pension sharing order or agreement in Scotland will be treated as ineffective if the person responsible for a pension arrangement to which the order or agreement relates does not receive copies of:

the pension sharing order or agreement, and

the relevant decree of divorce or declarator (as well as the information referred to in section 34(1)(b)(i) & (ii)) within two months of the date of the extract of the decree or declarator.

In the case of overseas divorces, the relevant documents should be provided within two months of the date of disposal under section 28 of the Matrimonial and Family Proceedings Act 1984. The procedure will be that the burden of sending the relevant documents to the person responsible for the pension arrangement will rest with the parties to the divorce (or annulment). This would normally be the person who would benefit from the pension sharing.

Subsection (10) makes provision for the court in Scotland to extend the two month period in exceptional cases.

Subsection (11) provides that, in subsections (4)(b), 5(c) and (6), the reference to the party who is the transferor is to the party whose rights the pension sharing provision relates.

Section 29: Creation of pension debits and credits

This important section provides for the member's pension rights to be subject to a debit and for his former spouse to become entitled to a pension credit equal to the amount of the debit.

In England and Wales, the amount of the debit will be a percentage of the current cash equivalent of the member's pension rights in the scheme or arrangement. The percentage will be that stated in the pension sharing order or agreement.

In Scotland, the pension sharing order or agreement may specify that the pension sharing legislation is to apply in relation to a specified amount, rather than a percentage, of the member's pension rights (see section 20) and in that case the amount of the debit will be that specified amount or, if less, the current cash equivalent of the member's rights.

The method for calculating the cash equivalent for these purposes (see section 27) will be similar to the well-established method used for calculating cash equivalents of the pension rights of members who wish to transfer those rights.

In determining the cash equivalent of pension rights available for pension sharing, only those rights accrued up to the day immediately before the day on which the pension sharing order or agreement takes effect are included in the calculation.

Subsection (1) provides for the shareable rights of a scheme member (the transferor) to become subject to a debit of an appropriate amount, and the former spouse (the transferee) to become entitled as against the person responsible for the pension arrangement to a credit of the same amount.

Subsection (2) provides that where the pension sharing order or agreement expresses the value to be transferred as a percentage, the appropriate amount will be that percentage of the cash equivalent of the transferor's rights.

Subsection (3) provides that where the pension sharing order or agreement expresses the value to be transferred as a specific amount (as may be the case in Scotland) rather than as percentage, that amount is the appropriate amount. But, if that amount is greater than the cash equivalent of the transferor's rights, the amount of the cash equivalent is the appropriate amount.

Subsection (4) provides a special rule for determining the benefits by reference to which the cash equivalent is to be calculated where the transferor is currently accruing rights in an occupational scheme (that is, he is an "active" member). In that case, the calculation is to be based on the hypothetical benefits to which he would have been entitled by virtue of his shareable rights under the pension arrangement had he ceased to be an active member immediately before the day on which the pension sharing order or agreement takes effect.

Subsection (5) provides that in all other cases the benefits by reference to which the cash equivalent is to be calculated are those to which the transferor is entitled by virtue of his shareable rights under the pension arrangement at that time.

Subsection (6) provides a regulation-making power to enable any description of benefit to be disregarded for the purposes of subsections (4) and (5) above.

Subsection (7) defines the valuation date for the purpose of calculating the cash equivalent of the relevant benefits. It provides scope for the person responsible for the pension arrangement to choose the day that the valuation will be made, provided that the day chosen falls within the period allowed for implementing the order or agreement. This flexibility broadly follows the existing provisions for the calculation of cash equivalent values for early leavers.

Section 30: Calculation of cash equivalents

There is already a well-established method for valuing the pension rights of early leavers from occupational pension schemes or members of personal pension schemes who wish to transfer their accrued rights to another pension scheme or arrangement. The regulations for the calculation of the cash equivalent in pension sharing cases will broadly reflect the principles set out for calculating cash equivalents for early leavers.

These provisions are in regulation 7 of the Occupational Pension Schemes (Transfer Values) Regulations 1996, and regulation 3 of the Personal Pension Schemes (Transfer Values) Regulations 1987.

In particular, in the case of salary related schemes we intend that cash equivalents for pension sharing, including cash equivalents of pensions in payment, will have to be calculated in a manner approved by a qualified actuary (for example, a Fellow of the Institute of Actuaries or a Fellow of the Faculty of Actuaries). In cases where members have accrued rights in public service schemes, the manner of calculation will be approved by the Government Actuary. The actuary will be bound by professional guidance (see subsection (2)).

Where a salary related occupational scheme is subject to the “minimum funding requirement (MFR)” introduced by the Pensions Act 1995, there will also be a requirement that the cash equivalent must be of at least a minimum amount, consistent with the methods and assumptions used for calculating the MFR, adjusted, where appropriate, to take account of the fact that a cash equivalent calculation for pension sharing is made on an individual, and not a collective basis. The requirements in relation to discretionary benefits will be the same as for ordinary transfer values (see regulation 8(2) and (3) of The Occupational Pension Schemes (Transfer Values) Regulations 1996).

Subsection (2). We intend to use this subsection to prescribe that where the cash equivalent relates to salary-related benefits, then it should normally be calculated and verified in a manner approved by the scheme actuary; and in accordance with guidance published by the Institute of Actuaries and the Faculty of Actuaries.

The Department of Social Security will be in discussion with the Institute of Actuaries and the Faculty of Actuaries about whether the material needed to accommodate the introduction of pension sharing should be in a new stand alone note or an amendment to the actuarial profession’s guidance note on Transfer Values (GN11).

Pension debits

Section 31: Reduction of benefit

This section provides for effect to be given to a pension debit by reducing a member’s pension rights by the percentage specified in the court order or agreement, or, if the order or agreement is in terms of a specified amount rather than a percentage, by the percentage which that amount represents of the current cash equivalent of the member's pension rights. If that amount is greater than the current cash equivalent, the member's rights will be reduced by 100%.

For a member of a money purchase scheme, the debit will normally take the form of a once and for all reduction of a percentage of the money in the pension "pot".

Example: If the effect of the order or agreement is that the member's pension rights are subject to a debit of 40% of the cash equivalent, and the cash equivalent is £100,000, then £40,000 will be taken from the pot.

In the case of a salary related scheme, the way in which the member's benefit will be reduced is more complicated. The following example shows how the process is intended to work in practice. It is based on active member of a salary related occupational pension scheme with 20 years' membership at the date of divorce who earns £30,000 a year at that date. The scheme provides 1/60th of final salary for each year of service. For simplicity, the example assumes that the whole of the pension debit will be subject to statutory revaluation although if the debit includes some GMP rights then that part of the debit will be subject to GMP revaluation in the normal way.

Deferred pension at the date of divorce: **20/60 x £30,000 = £10,000**

Cash equivalent for pension sharing calculated by scheme actuary: **£100,000**

Pension debit ordered by the court (40% of the cash equivalent): **£40,000**

(The former spouse's pension credit of £40,000 is invested separately for her).

This process is similar to that for a money purchase scheme, but, at retirement, the adjustment to the member's salary related benefit will be as follows:

The member retires at age 60 after 30 years' service with a salary of: **£48,000**

Full pension entitlement (ignoring the debit): **30/60 x £48,000 = £24,000**

Using the statutory Revaluation Order in force at the date of retirement, the scheme actuary calculates that the deferred pension of £4,000 (40% of the deferred pension of £10,000) given up at the date of divorce is equivalent to a pension of £6,000 a year at retirement. This is known as the "negative deferred pension."

The member's actual pension will be: **£24,000 - £6,000 = £18,000**

This provision prevents a scheme actuary calculating the pension as if the member had given up 40% (8 years' worth) of the rights to 20 years' pensionable service at the time of the divorce. This is because on retirement, the member's full pension would be reduced by 8 years of his pensionable service.

So, the member's pension would be reduced by: **8/60 x £48,000 = £6,400**

and the final pension would be: **£24,000 - £6,400 = £17,600**

This would give the scheme a windfall gain at the member's expense equivalent to payment of a pension of £400 a year for each year until the member dies. This kind of windfall would be particularly marked in schemes which have faster accrual rates in the final years of service.

In the case of a deferred member of a salary-related scheme, the method of revaluation will depend on the date of leaving and the type of benefit accrued. For example, in the case of an early leaver whose pensionable service terminated before 1 January 1986, whose deferred pension is "frozen" (ie not protected against inflation), then similarly there would be no requirement to revalue the pension debit either.

If the former spouse is given a pension before normal benefit age then the intention is that an actuarial adjustment broadly similar to that when a normal member takes early retirement should apply.

Subsection (1) provides for the reduction in benefit in respect of members of the scheme. The provision requires each qualifying benefit (defined in subsection (3)) to be reduced in the same proportion.

For example, if a deferred member of a contracted-out salary related (COSR) scheme had both GMP rights and excess of GMP rights, and 40% of the member's cash equivalent was debited on the implementation of the order, then both the GMP rights and the excess of GMP rights would be reduced by 40%;

Subsection (2) deals with the case of an active member of an occupational pension scheme who is in pensionable service on the day the order or agreement takes effect. In this case, his benefit is not reduced by the appropriate percentage. Rather, it is reduced by an amount representing the appropriate percentage of the benefit that was taken for the purposes of calculating the cash equivalent. In this case, that calculation is done by reference to the hypothetical deferred pension to which he would have been entitled had he retired (section 26(4)). The benefits which are reduced are those which correspond to the benefits to which the member would have been entitled under the hypothetical pension. So, for example, death in service benefit is not reduced because such benefit does not form part of the hypothetical pension.

Subsection (3) defines a qualifying benefit for the purposes of subsections (1) and (2). In practice, most cash equivalents will be made up of several different benefits, particularly if the member's scheme is contracted-out.

Section 32: Effect on contracted-out rights

This section amends the Pension Schemes Act 1993 to take account of the effect of a pension debit on a scheme member's guaranteed minimum pension (GMP) or protected rights. The section provides for reduction of GMPs or protected rights as a result of a pension debit. Entitlement to state benefits will be calculated as if the pension share had not taken place.

Before 6 April 1997, contracted-out occupational salary related (COSR) schemes had to provide a GMP roughly equivalent to the state earnings related pension scheme (SERPS). Following changes introduced in the Pensions Act 1995, such schemes are no longer required to pay a GMP for pensionable service from 6 April 1997. Instead, they must meet an overall quality test and a minimum funding requirement, and pensions in payment derived from post 6 April 1997 service must also rise by at least 5% a year, or in line with prices, whichever is the less.

Protected rights are the rights in a contracted-out occupational money purchase (COMP) scheme and appropriate personal pension (APP) scheme that derive from the rebate of National Insurance contributions, and in APP schemes only, tax relief on the employee's share of the rebate.

Subsection (2) amends section 10 of the Act. It provides for the reduction of any protected rights in a COMP or an APP, which are subject to a pension debit, by the percentage specified in the pension sharing order or agreement or, where the order is expressed in monetary terms (that is in Scotland) by the amount specified (up to the limit of the cash equivalent of the member's rights) expressed as a percentage of the cash equivalent of the member's rights.

Subsection (3) inserts section 15A into the Pension Schemes Act, which provides for the reduction of a GMP payable by a contracted-out salary related scheme where it is subject to a pension debit. For example, if the cash equivalent has been reduced by 40%, the GMP accrued at the date the order or agreement takes effect (which forms part of the cash equivalent) shall be reduced by 40%. Again where the order or agreement is expressed in monetary terms, the appropriate percentage is the amount specified (up to the limit of the cash equivalent of the member's rights) expressed as a percentage of the cash equivalent mentioned above.

However, where the member is in pensionable service on the day the order or arrangement takes effect, the reduction is by reference to the appropriate percentage of the hypothetical GMP to which he would have been entitled had he ceased to be in pensionable service immediately before that day (see section 31(2)).

Subsection (4) amends section 47 of the Pension Schemes Act to ensure that a member of a contracted-out occupational scheme (whether salary related or money purchase) or APP scheme, will be treated as entitled to a full GMP for the purposes of calculating entitlement to relevant social security benefits (for example, the state additional pension). This is needed to ensure that the state does not become liable to make up the resultant shortfall in the GMP or protected rights paid by the scheme directly caused by pension sharing.

For example, the member might have been entitled to an additional pension of £12 per week but this is reduced to just £2 per week to offset the £10 GMP paid by the scheme to which he would have been entitled had the pension sharing order not been implemented. Under these provisions he will continue to be treated as entitled to a GMP of £10 per week and hence continue to receive an additional pension of just £2 per week, even though as a result of the pension debit his GMP has been reduced by 40% (that is by £4) to £6 per week.

Section 33: Time for discharge of liability

Section 34: "Implementation period"

Section 35: Mode of discharge of liability

These sections (and Schedule 5) focus on the discharge of liability in respect of a pension credit.

Section 33: Time for discharge of liability

Subsection (1) requires the person responsible for a pension arrangement to discharge his liability for a pension credit before the end of the period allowed for implementation, defined in section 34;

Subsection (2) makes provisions similar to those in section 99(7) of the Pension Schemes Act 1993 (inserted by paragraph 6(e) of Schedule 6 to the Pensions Act 1995) concerning the late payment of an early leaver's cash equivalent by an occupational scheme. An individual trustee or manager who fails to discharge their liability for the pension credit within the implementation period will be required, except in prescribed cases, to notify the Occupational Pensions Regulatory Authority (OPRA) of that fact. We intend that where all such steps as are reasonable have not been taken to discharge the liability for the pension credit timeously, then the trustee or manager concerned may be subject to a fine of up to £1,000 by OPRA, and that a fine of up to £10,000 for a corporate offence may be imposed. These fines will be consistent with the penalties for failing to pay an early leaver transfer value on time.

Subsection (3): the purpose of this subsection is to enable OPRA to fine the trustees or managers of an occupational pension scheme if they fail to notify OPRA of their failure to discharge their liability for the pension credit within the implementation period (as required under subsection (2)). We intend that the fines should be consistent with those outlined in subsection (2).

Subsection (4) makes provisions similar to those in section 99(4) of the Pension Schemes Act (as amended by paragraph 6(c) of Schedule 6 to the Pensions Act 1995).

We intend that the circumstances in which OPRA may extend the implementation period for an occupational scheme to discharge its liability for a pension credit should be similar to those set out in regulation 13 of the Occupational Pension Schemes (Transfer Values) Regulations, for example, if the scheme is being wound up, or about to be wound up, or where the interests of the other members would be prejudiced if the liability is discharged, or the trustees have insufficient information to discharge the liability properly.

Section 34: "Implementation period"

Subsection (1) provides that the implementation period will be 4 months beginning on the date on which the order takes effect or, if later, the date on which the pension arrangement receives the relevant matrimonial documents (defined in subsection (2)) and any other information prescribed by regulations made under subsection (1)(b).

We intend to use the regulation-making power to secure that the implementation period will not start until the pension arrangement has the information needed to carry out the pension share. This may include items such as the couple's full names, addresses, ages and National Insurance numbers, as well as for Scotland such documentary evidence as may be prescribed under section 25(3) that the negotiated agreement has been entered in such a way as to be regarded as a 'qualifying agreement'.

Subsection (3) provides that subsection (1) is subject to regulations made under section 41(2)(a). We intend to use the regulation-making power under the latter provision to allow the person responsible for a pension arrangement to postpone the start of the implementation period, where he has made payment of a pension sharing charge a pre-condition to implementing the pension share, until payment of the charge.

Subsection (4)(a) provides a regulation-making power to provide that a scheme must inform both the scheme member and former spouse of the day on which the implementation period begins;

Subsection (4)(b) provides a regulation-making power which we intend to use to allow the implementation period to be suspended where a scheme is being wound up, and is unable to meet its liability to the former spouse in full, and the former spouse has consented to the suspension;

Subsection (4)(c) provides a regulation-making power to provide that implementation of the pension share may be suspended if the pension sharing order is subject to an application for leave to appeal out of time.

Section 35: Mode of discharge of liability

Subsection (1) gives effect to Schedule 5 which is concerned with the way in which liability in respect of a pension credit can be discharged.

Subsection (2) provides a regulation-making power where a former spouse dies after a pension sharing order has taken effect but before it is implemented. We intend to use this power to provide that where a former spouse dies before an order is implemented, the deceased former spouse should be treated as if they had become a member of the arrangement in question. For example, where the pension credit had been derived from the member's personal pension scheme, the personal pension provider would be required to pay the amount of the pension credit to the deceased former spouse's estate.

Section 36: Safeguarded rights

The section inserts a new Part IIIA (sections 68A to 68D) into the Pension Schemes Act 1993. The new sections make special provision for the pension credit rights of a former spouse deriving from membership of a contracted-out occupational pension scheme or an appropriate personal pension (APP) scheme. These rights will be called "safeguarded rights" to distinguish them from the contracted-out rights built up by members of contracted-out occupational pension schemes and APP schemes.

The intention is that the requirements for safeguarded rights should broadly reflect those for contracted-out rights. In particular, we wish to ensure that safeguarded rights (which are wholly or in part financed by rebates of National Insurance contributions, and in the case of APP schemes, tax relief on the employee's share of the rebate) are securely protected and used for the purpose for which they are intended – to provide an income in retirement.

Section 68A

Subsection (1) defines safeguarded rights as rights from a pension share, derived either in total or in part from contracted-out rights or safeguarded rights, subject to subsection (2).

Subsection (2) mirrors the existing protected rights provisions so as to permit the scheme rules to identify safeguarded rights more narrowly. In the case of rights that are directly attributable to a pension share, the safeguarded rights element will reflect the proportion of the member's rights that were contracted-out rights or safeguarded rights. In the case of rights arising from an ordinary transfer, the safeguarded rights element will reflect the proportion of the rights under the transferring scheme which were contracted-out rights or safeguarded rights.

Subsections (3) and *(4)* define the "safeguarded percentage" of rights as the percentage of the rights from which they derive which are contracted-out or safeguarded.

Subsection (5) defines certain terms used in earlier subsections.

Section 68B provides a general regulation-making power to prescribe requirements in respect of safeguarded rights.

We intend to use this power to prescribe requirements in respect of safeguarded rights that broadly mirror those for contracted-out rights built up since April 1997 in an occupational pension scheme or an appropriate personal pension scheme. For example, where the safeguarded rights are used to provide money purchase benefits for the former spouse, the requirements will be similar to those for post-April 97 protected rights as set out in the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996 (SI 1996 No. 1537).

Section 68C: this subsection anticipates the transfer of the Contributions Agency from the DSS to the Inland Revenue. Subject to Parliamentary approval, the intention is to complete the transfer by April 1999. It will give the Agency that will be responsible for the supervision of safeguarded rights, the power to intervene if a scheme fails to comply with a requirement prescribed under section 68B.

Section 68D provides for regulations to prohibit or restrict the transfer or discharge of liability for safeguarded rights under a contracted-out occupational or personal pension scheme.

The provision is similar to the existing power at section 12C of the Pension Schemes Act 1993. We intend to use the regulation-making powers in this section to lay regulations in respect of the discharge of liability that will be comparable to Part III of the Occupational Pensions Schemes (Discharge of Liability) Regulations 1996. Regulations about the transfer of safeguarded rights will be comparable to Part III of the Contracting-out (Transfer and Transfer Payment) Regulations 1996, the Protected Rights (Transfer Payment) Regulations 1996 and the Personal and Occupational Schemes (Protected Rights) Regulations 1996.

Section 37: Requirements relating to pension credit benefit

This section inserts a new Part IVA into the Pension Schemes Act 1993.

Chapter I requires rights in an occupational pension scheme derived (directly or indirectly) from a pension credit to be treated in a way broadly similar to the way in which the rights of a deferred members are required to be treated under Chapter I of Part IV of the Act.

Chapter II gives members of funded occupational and personal pension schemes with rights derived from a pension credit the right to transfer those rights to another pension scheme or arrangement.

Chapter I

Section 101A which defines the scope of the Chapter, reflects section 69(3) of the Pension Schemes Act 1993 and effectively embraces all types of occupational pension scheme.

Section 101B contains the definition of some terms used in this Chapter. Note: – the definition “normal benefit age” parallels “normal pension age” used elsewhere in the Act, the distinction being that “normal pension age” relies on an individual having been in an employment to which the scheme applies, which is not relevant in relation to pension credit rights.

Section 101C

Subsection (1) is self-explanatory. Early payment of pension may be permissible as an alternative to pension credit benefit in prescribed circumstances under section 101D(2)(b).

Subsection (2) provides that a payment of pension credit in lump sum form (that is a separate lump sum benefit payable in addition to any pension) cannot be made before normal benefit age, except in prescribed circumstances.

We intend to use the regulation-making power to permit lump sum payments in circumstances similar to those set out in Regulation 5 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991: for example, where the former spouse’s earning capacity is destroyed or seriously impaired by physical or mental infirmity or when the former spouse has reached the age of 50.

Section 101D provides for pension credit rights to be treated in broadly the same way as rights for deferred members.

Subsection (1): we intend to use the regulation-making power to permit pension credit benefit to be assured by the purchase of an insurance policy or annuity contract entered into with an appropriate insurance company or friendly society.

Subsection (2) permits pension credit benefit to be transferred from one pension scheme or arrangement to another.

We intend to use the regulation-making power at (2)(b) in much the same way that section 73(2) of the Pension Schemes Act 1993 is used to prescribe alternatives to short service benefit and allow for early and deferred retirements. Regulations would allow benefits to be bought-out by insurance policies or annuity contracts. These would largely mirror regulations 7 and 11 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991.

Subsection (4) mirrors the provisions to protect early leavers in section 73(4) of the Pension Schemes Act 1993. We intend to use the regulation-making power to prescribe conditions similar to those set out in regulation 12(3) of the Preservation of Benefit Regulations, which rely on actuarial certification to ensure that pension credit benefits are adequately protected and secure if transferred without the consent of the former spouse.

Section 101E broadly corresponds to the provisions in section 81 of the Pension Schemes Act 1993. It sets out conditions which, if complied with by the trustees or managers of a scheme, will result in their being statutorily discharged from their liability to provide pension credit benefit. A discharge of liability can be secured by the purchase of an insurance policy or annuity contract that meets prescribed requirements.

We intend to use the regulation-making power in subsection (1)(c) to parallel those in Part II of The Occupational Pension Schemes (Discharge of Liability) Regulations. For example, the regulations will set out the conditions on which insurance policies and annuities may be assigned, surrendered, and commuted and set out special provisions in relation to safeguarded rights.

Chapter II

Section 101F gives a former spouse with pension credit rights a right to transfer the cash equivalent of those rights similar to the right which an early leaver has to transfer his accrued rights to another pension scheme or arrangement. However, the right to transfer pension credit benefit does not extend to former spouse members of unfunded schemes.

Subsection (1) requires a transfer notice to be given in writing. This mirrors the requirement in section 95(1) of the Pension Schemes Act 1993;

Subsections (2) and *(3)* mirror the provisions in section 95(2) and (3) of the Pension Schemes Act 1993. The regulation-making powers in subsections (2)(b) and (c) and 3(c) permit the Secretary of State to prescribe requirements as to the type of annuity which can be purchased, and as to the type of arrangement other than an occupational or personal pension scheme in which rights can be bought, with the cash equivalent of pension credit rights.

We intend to use these powers to prescribe that the cash equivalent of such rights may be used on transfer in similar ways to the ways in which an early leaver’s cash equivalent may be used.

Subsection (4) distinguishes between salary related occupational pension schemes and other schemes when determining the amount of the cash equivalent. This is consistent with section 93A of the Pension Schemes Act 1993 (inserted by section 153 of the Pensions Act 1995) which introduced separate procedures for applications for early leaver cash equivalents by members of salary related schemes. Further details of these changes are provided under 101H below.

Subsection (6)(b) we intend to use the regulation-making power to impose additional requirements as to the eligibility of receiving schemes (for example, where the cash equivalent includes a transfer of safeguarded rights).

Section 101G imposes restrictions on the rights of former spouse members to transfer pension credit benefits which broadly correspond to the procedures to be followed by early leavers from salary related occupational pension schemes who wish to exercise their right to a cash equivalent.

Subsection (1) reflects the principle underlying the process that once a statement of entitlement of the amount of the cash equivalent has been provided, the former spouse must make a written transfer request within 3 months.

Subsection (2)(a) limits the right to a cash equivalent to a former spouse who has at least one year to go before reaching the scheme’s normal benefit age; this limitation broadly corresponds to the provision in section 93 of the Pension Schemes Act 1993 for deferred members which limits the right to a transfer value to those at least one year before normal pension age.

Subsection (2)(b) provides that the right to transfer a pension credit benefit is also lost if any pension or benefit derived from pension credit rights has become payable.

Subsection (3) is designed to simplify administration for schemes by requiring former spouses who wish to exercise their right to transfer pension credit rights to submit an application to transfer other rights accrued in the scheme, if the scheme so provides.

Section 101H corresponds to the existing provisions in section 93A of the Pension Schemes Act 1993 which is concerned with statements of entitlement of the amount of early leaver cash equivalents for members of salary related schemes – see also section 101F.

Subsection (1) corresponds to section 93A(1) of the Pension Schemes Act 1993.

Subsection (2) contains regulation-making powers similar to those in section 93A(2) of the Pension Schemes Act 1993. We intend to use these powers to prescribe requirements broadly analogous to regulation 6(1) and 6(2) respectively of the Occupational Pension Schemes (Transfer Values) Regulations 1996. So, schemes will normally be required to calculate the cash equivalent within 3 months of the date of the former spouse's application and having calculated it, provide it to the former spouse within 10 days of the calculation date.

Subsection (3) corresponds to section 93A(3) of the Pension Schemes Act 1993. We intend to use the regulation-making power to mirror the provisions in regulation 6(3) of The Occupational Pension Schemes (Transfer Values) Regulations 1996. The regulations will limit the former spouse to one transfer request in a 12 month period unless the rules of the scheme, or the trustees or managers permit a further application to be made earlier.

Subsection (4) corresponds to section 93A(4) of the Act. We intend that the Occupational Pensions Regulatory Authority (OPRA) should have the power to impose a penalty, in the case of an individual of up to £1,000 and in other cases up to £10,000, for a breach of the requirements mentioned in this subsection.

Section 101I corresponds to section 97(1) of the Pension Schemes Act. We intend to use the regulation-making power to prescribe requirements similar to those in regulation 7 of the Occupational Pension Schemes (Transfer Values) Regulations 1996.

Section 101J: the time limits for trustees to comply with a transfer notice for pension credit benefit correspond to those for the exercise of the right to a cash equivalent under Part IV, Chapter IV of the Pension Schemes Act 1993.

Subsection (1): the 6 month time limit is consistent with section 99(2) of the Pension Schemes Act 1993 (as amended by paragraph 6(a) of Schedule 6 to the Pensions Act 1995).

Subsections (2), (3) and *(6)(a)*: the regulation-making powers are similar to those in section 99(4) and 99(4A) Pension Schemes Act 1993 (as amended by Schedule 6 paragraph 6(c) to the Pensions Act 1995). We intend to use the regulation-making power to allow OPRA to grant an extension of the time allowed for making a transfer in the same way as provided for in regulation 13 of the Occupational Pension Schemes (Transfer Values) Regulations 1996.

Subsections (4) and *(6)(b)* make provisions similar to those in section 99(7) of the Pension Schemes Act 1993 (inserted by paragraph 6(e) of Schedule 6 to the Pensions Act 1995) concerning the late payment of an early leaver's cash equivalent by an occupational scheme. An individual trustee or manager who fails to discharge their liability for the pension credit within the implementation period will be required, except in prescribed cases, to notify OPRA of that fact. We intend that where all such steps as are reasonable have not been taken to discharge the liability for the pension credit timeously, then the trustee or manager concerned may be subject to a fine by OPRA of up to £1,000, and up to £10,000 for a corporate offence. These fines will be consistent with the penalties for failing to pay an early leaver transfer value on time.

Subsection (5): the purpose of this subsection is to enable OPRA to fine the trustees or managers of an occupational pension scheme if the latter fail to notify OPRA of their failure to discharge their liability for the pension credit within the implementation period (as required under subsection (4)). We intend that the fines should be consistent with those outlined in subsection (4).

Subsection (7): the meaning of the valuation date defined here takes account of the different procedures in the case of a transfer of pension credit benefit from a salary related occupational pension scheme or a money purchase scheme.

Subsection (7)(a): the valuation date for a member of a salary related scheme will be determined in a similar way to the "guarantee date" under section 93A(2) of the Pension Schemes Act 1993 and regulation 6(1) and (2) of the Occupational Pension Schemes (Transfer Values) Regulations 1996.

Subsection (7)(b): the valuation date for a former spouse member of a money purchase occupational pension scheme or a personal pension scheme is consistent with the "relevant date" as defined in section 94 of the Pension Schemes Act 1993.

Section 101K

Subsections (1) and (2) are similar to the provision for withdrawing a transfer request under sections 100(1) and (2) of the Pension Schemes Act 1993.

Subsection (3) complements the new section 101G(3) (see above). If the scheme requires former spouse members to exercise their rights to a transfer of pension credit benefit and other accrued rights at the same time, then a transfer notice under Part IVA may only be withdrawn if a transfer notice under section 95 of the Pensions Act 1995 is also withdrawn.

Section 101L: this section provides a power to increase or reduce cash equivalents in respect of pension credit benefits.

Subsections (1) and *(2)* are consistent with the power to increase or reduce cash equivalents under section 97(2)(b) and (3)(b) and (c) of Part IV of Chapter IV of the Pension Schemes Act 1993.

We intend to lay regulations broadly similar to regulations 8 and 9 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 and regulation 4(1) of the Personal Pension Schemes (Transfer Values) Regulations 1987. We intend to use the regulation-making power at (2)(a) to provide for a cash equivalent to be increased on late payment. The proposed regulations will mirror the provisions set out in regulation 10 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 and regulation 4(2) of the Personal Pension Schemes (Transfer Values) Regulations 1987. For example, an occupational pension scheme will be required to pay either the cash equivalent recalculated at the current date, or the original transfer value increased by 1% above the bank base rate over the period from the date of the original calculation until the current date.

Where a scheme is underfunded at the time the transfer payment of pension credit benefit is to be made, we intend to use the regulation-making power at (2)(b) to enable the trustees to reduce the cash equivalent if the circumstances set out in regulation 8(4) or (6) of the Occupational Pension Schemes (Transfer Values) Regulations 1996 are met, for example where the last valuation showed the scheme was underfunded on the basis of a minimum funding requirement. Where a cash equivalent is reduced in these circumstances, the former spouse will be notified of that fact. One of the options open to the former spouse will be to withdraw the notice (see section 101K above) and to leave her rights in the scheme until the funding position improves.

Section 101M provides trustees or managers who comply with their obligations in respect of a transfer of pension credit benefit with a statutory discharge of liability in the same way that section 99 (1)(a) provides a discharge of liability for trustees who comply with their obligations under Part IV, Chapter IV of the Pension Schemes Act 1993.

Section 101N mirrors section 101 of the Pension Schemes Act 1993 and provides that any charge or lien on or set-off against the pension will be disregarded in calculating the cash equivalent.

Section 101O mirrors section 100(4) of the Pension Schemes Act 1993.

Section 101P defines some terms used in the Chapter.

Subsection (1): the definition of "qualifying scheme" excludes unfunded schemes;

Subsection (2) mirrors section 93(1A) of the Pension Schemes Act 1993 (inserted by section 152(3) of the Pensions Act 1995). The definition reflects the special procedures introduced by that Act in respect of cash equivalents in salary related schemes. These have been carried forward in this Act for cash equivalents in respect of salary related pension credit benefits for consistency and ease of administration.

Section 101Q provides a power similar to that in section 93(1B) (b) of the Pension Schemes Act 1993 (inserted by section 153(3) of the Pensions Act 1995). We intend to use this power to deal with those cases where the pension credit benefit includes a mixture of salary-related and money purchase benefits.

Section 38: Treatment in winding up

This section deals with the priority to be awarded to pension credit rights on the winding up of an occupational pension scheme.

Subsection (1) provides for pension credit benefit to be included in the preferential liabilities on the winding up of a scheme to which section 56 of the Pensions Act 1995 applies (that is a salary related scheme subject to the minimum funding requirement (MFR)).

Subsection (2) concerns schemes to which section 56 of the 1995 Act does not apply (that is schemes not subject to the MFR). It gives pensions in payment derived from pension credits the same priority as other pensions in payment. Rights that have not come into payment are accorded the same priority as the rights of deferred members (early leavers). The order of priority is consistent with that for salary related schemes.

Subsection (3) provides that the provisions of subsection (2) override scheme rules.

Indexation

Section 39: Public service schemes

This section amends the Pensions (Increase) Act 1971 to provide for pensions derived from pension sharing in public service schemes. The Act provides for the index-linking of "official pensions", including those of civil servants, teachers, NHS and local authority staff. Other public service pension schemes apply the Act by analogy.

Subsection (2) inserts a new subsection (2A) in section 3 of the Act. This requires the recipient of pension credit benefit payments to have reached age 55 before indexation increases are paid.

Subsection (3) amends section 8(1) of the Act to remove a parenthetical reference to services, since the concept of services is not relevant to pension credit rights.

Subsection (4) amends section 8(2) of the Act. The beginning date for the application of the Act is the date from which the pension is indexed and is normally the day following the last day of service. Pension credit benefit is specifically excluded because a recipient of such benefit will have no last day of service. A new subsection (8)(2A) provides that a pension derived from a pension credit will begin on the day which the pension sharing order takes effect.

Subsection (5) contains changes and additions to some terms used in the Act.

Section 40: Other pension schemes

This section is concerned with pensions in payment derived from a pension share not covered by section 31 above. It enables the Secretary of State to protect an occupational pension in payment, derived from a pension share, against inflation. It also enables the Secretary of State to protect a personal pension derived from safeguarded rights against inflation.

Subsections (1) and (2): we intend to use the regulation-making power to require an occupational pension scheme to index the part of a pension derived from safeguarded rights and/or post-April 1997 occupational pension rights (excluding AVCs) by the retail price index, subject to a cap of 5% per cap per annum. However, for administrative simplicity, schemes will be able to index the whole of the pension if they so choose. Similarly, price indexation up to a 5% cap will apply to personal pensions derived from safeguarded rights. There will be no requirement to index personal pensions derived from non-safeguarded rights but former spouses will be able to purchase an annuity offering protection against inflation if they so choose.

Section 41: Charges by pension arrangements

The purpose of this section is to enable provision to be made allowing pension arrangements to recover from the couple any reasonable administrative costs incurred as a result of implementing the pension share (for example, final valuation, costs of discharging the liability for the pension credit, reduction of the member's benefit etc). There is already provision for pension arrangements to recover the costs of providing valuations earlier in the proceedings that they are not statutorily required to provide.

Pension arrangements will not be obliged to impose charges and the Government does not intend to impose charges in connection with SERPS rights. Charges can be apportioned between the divorcing couple but unless the pension arrangement is notified how the charges are to be split, they will be attributed to the member. The intention is that pension arrangements should have the option of requiring charges to be paid as a pre-condition to implementation of the pension share. Alternatively they should be able to deduct charges from either the member's pension rights or the pension credit obtained by the former spouse as a result of the pension share.

Subsection (1) enables provision to be made for the recovery of charges from either the member or the former spouse.

We intend to use the regulation-making power to require that charges must be reasonable and limited to the costs incurred in implementing the pension sharing order/agreement; and that pension arrangements offer the parties a chance to pay charges at the outset before they can deduct them from the pension credit or the member's pension rights or pension payments.

Subsection (2) provides that regulations made under *subsection (1)* may include the following provisions;

> *subsection (2)(a)*: postponement of the start of the implementation period. We intend to use the regulation-making power to allow the scheme to postpone the start of the implementation until the administration charges have been met (see also section 34(3) above;
>
> subsection (2)(b): we intend to use this provision to allow charges to be recovered from one party where that party has defaulted on meeting the administrative charges, and the charges have been met by the other party;

subsection (2)(c): we intend to use this provision to provide that, where a pension arrangement deducts charges from a pension credit, the provisions in Schedule 5 about discharge of liability in respect of the credit have effect by reference to the net amount of the credit.

subsection (2)(d): to permit the scheme to make additional deductions from any transfer or other payment in respect of the member's rights. We intend to use this regulation-making power to permit a salary related scheme to increase the original charge, by an appropriate rate of interest, when the charges are met not at the time the scheme implements the pension sharing order/agreement, but at a later date.

Subsection (3) controls how the regulations about charges will deal with the question of apportionment between the parties. The principle is that apportionment may be settled, if there is a pension sharing order, by provision in the order, and, if there is a pension sharing agreement, by provision in the agreement. If, in either case, there is no such provision, the default setting is that the charges are attributable to the member spouse whose pension is being shared.

Adaptation of statutory schemes

Section 42: Extension of scheme-making powers

The section extends statutory powers to establish pension schemes to include the power to provide benefits in respect of pension credit rights to former spouses.

Subsection (1) extends the powers to make statutory schemes so that those schemes may be amended to allow for the use of pension credits to provide benefits to former spouses. The pension credits may arise directly out of rights under the scheme in question, or under a public service pension scheme for which it is specified as an alternative in accordance with Schedule 5 paragraph 2.

Subsection (4) enables statutory schemes to make provision for former spouses regardless of any obligation to consult; this enables schemes which would otherwise be required to consult on changes, detrimental or otherwise, to implement pension sharing without doing so.

Section 43: Power to extend judicial pension schemes

This section enables the appropriate minister to make regulations in respect of judicial pension schemes for the purposes of enabling them to accommodate pension credits.

Subsection (1) empowers the appropriate minister to make regulations:

(a) to enable a judicial pension scheme to use pension credits to provide benefits to former spouses. The pension credits may arise directly out of rights under the scheme in question, or from another statutory scheme for which it is specified as a replacement in accordance with Schedule 5 paragraph 2; or

(b) requiring him to refuse transfers in of pension credit rights from another pension scheme.

Subsection (2): the regulation-making power under *subsection (1)* includes provision for pension credit benefits to be a charge on, and payable out of the Consolidated Fund; and a power to make further subordinate legislation, on technical matters, under the judicial pensions Acts.

Subsection (3) explains who the appropriate minister is.

Supplementary

Section 44: Disapplication of restrictions on alienation

This section disapplies, in relation to pension sharing orders and provisions of the kind mentioned in section 28(1), the rules on the inalienability of pension rights (which prohibit the assignment, commutation or surrender of pension rights from the member to another person, except on the death of the member) that apply to armed forces pensions and occupational pensions.

Section 45: Information

This section contains provision for pension arrangements to be required to provide the parties to a pension share with information about its implementation.

Chapter II – Sharing of State Scheme Rights

Section 47: Shareable state scheme rights

This section provides that pension sharing is available in relation to shareable state scheme rights, which are defined in subsection (2). The definition essentially encompasses SERPS rights either earned by the member in his or her own right or derived from a pension share in respect of a previous divorce or nullity of marriage.

Section 48: Activation of benefit sharing

This section lists the circumstances under which the process of sharing state scheme rights, set out in section 49, can be triggered in England and Wales, and Scotland. The provisions are analogous to those in section 28 of this Act, except that there is no equivalent in section 48 to section 28(4)(b), (5)(c) or (6), since earmarking orders cannot be made in relation to state scheme pension rights.

Section 49: Creation of state scheme pension debits and credits

This section sets out how a pension sharing order/agreement relating to the state scheme will work. The basic state retirement pension will not be subject to pension sharing, but the rights to the additional pension (AP) element of a Category A retirement pension will be. An AP may be payable to an employee who has contributed to the State Earnings Related Pension Scheme (SERPS), that is, in any tax year, paid standard rate Class 1 National Insurance contributions. The pension deriving from a state scheme pension credit will be called the "shared additional pension".

Subsection (1) provides that on the taking effect of the pension order/agreement, the "member" of SERPS is subject to a state scheme debit, and the former spouse becomes entitled to a state scheme credit of the same amount.

Subsection (2) provides that where the order/agreement is expressed in terms of a percentage, the amount of the debit and credit is that percentage of the cash equivalent of the member's state scheme rights immediately before the day on which the order/agreement takes effect.

Subsection (3) provides that where the order/agreement is expressed in monetary terms (that is in Scotland) the credit and debit will be the amount stated or, if less, the cash equivalent mentioned above.

Subsection (4): we intend that regulations made under this section will contain a table to be applied when calculating a cash equivalent. This will be set by the Government Actuary and based on such actuarial factors as the age of the person whose rights are being valued.

Subsection (5): for the purposes of sharing the state pension, only those tax years before that in which the order/agreement takes effect will be taken into account.

Section 50: Effect of state scheme pension debits and credits

Subsection (1) gives effect to Schedule 6.

Subsection (2) provides that for incremental periods from 6 April 2010, section 55C of the Social Security Contributions and Benefits Act 1992 (inserted by Schedule 6 to this Act) will be modified to reflect the changes made to section 55 and Schedule 5 of that Act by the Pensions Act 1995. In effect, from April 2010 a person may defer taking the state pension indefinitely and the rate of increment earned will be higher.

Schedule 3: Pension sharing orders: England and Wales

Paragraph 2 inserts a definition of the pension sharing order (new section 21A of the Matrimonial Causes Act 1973).

Section 21A(1) explains that there are two elements to a pension sharing order. The first is a direction that the rights which one of the parties to a marriage has under a particular pension arrangement, or under SERPS, be subject to pension sharing for the benefit of the other party. The second is the specification of the percentage of the value of the rights which is to be transferred (in accordance with the pension sharing mechanisms) from one party to the other.

> *Section 21A(2)* explains what a pension sharing order can relate to. The scope of a pension sharing order is defined by reference to the scope of the pension sharing mechanisms under the law of England and Wales and Scotland (for which provision is made in Part IV of the Act) or under the law of Northern Ireland (for which provision may be made by separate Northern Ireland legislation). The pension sharing mechanisms extend to rights under pension arrangements and rights under SERPS.

Paragraph 3amends section 24 of the Matrimonial Causes Act 1973. The purpose is to prevent pension sharing by variation of a marriage settlement after pension sharing orders are made available under the Matrimonial Causes Act 1973 (see *Brooks v Brooks* [1996] AC 375).

Paragraph 4 inserts new sections 24B, 24C and 24D in the Matrimonial Causes Act 1973.

Section 24B gives the court in England and Wales power to make pension sharing orders on or after the granting of a decree of divorce or nullity. It also imposes restrictions on the making of pension sharing orders. An order cannot take effect unless the decree of divorce or nullity has been made absolute and cannot be made:

> *subsections (3) and (4)*: where the pension arrangement, or shareable state scheme rights, are the subject of a pension sharing order in relation to the marriage (ie where the order has been made, but has not yet taken effect) or have been the subject of pension sharing between the parties to the marriage (ie where a pension sharing order or agreement has already taken effect);

Note: until Part II of the Family Law Act 1996 comes into force it will not be possible under this Act to pension share by agreement in England and Wales

> *subsection (5):* in relation to a person's pension rights which are subject to a financial provision order which includes provision under the earmarking/attachment provisions (sections 25B and 25C), whether the order was made in relation to the same marriage or a previous one.

Section 24C requires a pension sharing order to be stayed for a prescribed period in accordance with regulations made by the Lord Chancellor. The intention is that this prescribed stay period will prevent the order taking effect until the end of the period allowed for an appeal 'in time'. This device will mean that the person responsible for the pension arrangement or the Benefits Agency (as the case may be) will not start to implement an order unless the time for appeal has expired. If notice of appeal is given within that period, the order will be further stayed pending the outcome of the appeal. The purpose is to avoid pension arrangements having to unscramble the implementation of orders because of appeals.

Section 24D enables a court to include provision in a pension sharing order about how the pension sharing charges which may be levied under section 38, or corresponding Northern Ireland legislation, are to be borne by the parties.

Paragraph 5extends the application of section 25 of the Matrimonial Causes Act 1973 (which lists the factors which the court has to take into account when considering whether and how to exercise its powers to make a financial provision order or property adjustment order) to cover pension sharing orders.

Paragraph 6: Section 25A(1) of the Matrimonial Causes Act 1973 imposes a duty on the court when it is deciding to exercise its powers to make financial provision orders and property adjustment orders to consider whether it would be appropriate to exercise its powers to achieve a clean break (that is to terminate all financial obligations between the parties). This paragraph extends the provision to include pension sharing orders.

Paragraph 7extends the court's power under section 31 of the Matrimonial Causes Act 1973 so that, where the provision applies, the court can make, vary or discharge pension sharing orders as well as financial provision and property adjustment orders.

Sub-paragraph (2) inserts a new section 31(2)(g). The powers of the court under section 31(1) are to apply pension sharing orders made under section 24B of the Matrimonial Causes Act 1973 before the decree of divorce or nullity has been made absolute.

Sub-paragraph (3) inserts three new subsections – (4A), (4B) and (4C) -into section 31.

Subsection (4A) provides that the court may only exercise its powers under section 31(1) in relation to a pension sharing order if the application for the variation, discharge etc. was made before the order has taken effect and if, at the time of the application, the decree of divorce or nullity has not been made absolute. For these purposes, a pending application for a section 31(1) order will prevent the pension sharing order taking effect (new section 31(4A)(b)).

Subsection (4B) prevents the variation of a pension sharing order taking effect before a decree of divorce or nullity is made absolute.

Subsection (4C) Variations of pension sharing orders under section 31(1) will be subject to a stay period to be prescribed by regulations in the same manner as pension sharing orders made under section 24B.

Sub-paragraph (4) amends section 31(5) of the Matrimonial Causes Act 1973. This provides that, apart from under the capitalisation of maintenance provisions, pension sharing orders are not to be made on an application to vary any periodical payments order.

Sub-paragraph (5) extends the powers of the court under the 'capitalisation of maintenance' provisions to include the making of a pension sharing order.

Sub-paragraph (6) inserts a new subsection (7G) into section 31. It imposes on the making of a pension sharing order under section 31(7B) the same restrictions as apply under section 24B(3)-(5).

Paragraph 8 amends section 33A of the Matrimonial Causes Act 1973 by adding pension sharing orders to the list of consent orders which can be made by the court on the basis of prescribed information without further enquiry.

Paragraph 9 amends section 37 of the Matrimonial Causes Act 1973. It extends the powers of the court to set aside transactions intended to prevent or reduce financial relief to applications for pension sharing orders on divorce or nullity.

Paragraph 10 inserts a new section 40A of the Matrimonial Causes Act 1973 about the powers of the court to which an appeal is made, where that appeal is begun on or after the day on which the pension sharing order takes effect.

> *Subsection (2)* prevents the court from setting aside or varying the order if the person responsible for the pension arrangement has acted to his detriment following the taking effect of the order (for example, by making a transfer payment to another scheme or arrangement);
>
> *Subsection (3)* prevents the court from setting aside or varying the order if the Secretary of State has acted to his detriment following the taking effect of the order.
>
> *Subsection (4)* provides that for the purpose of determining whether a person has suffered detriment the court may disregard insignificant detriment.
>
> *Subsection (5)* provides that where subsection (2) or (3) applies, the appeal court may make such further orders as it considers appropriate to put the parties in a position it considers appropriate.
>
> *Subsection (6)* has the effect that a pension sharing order under section 40A is only subject to a stay order if the decision of the appeal court can itself be the subject of an appeal.

Paragraph 11inserts a new paragraph into section 52(2) of the Matrimonial Causes Act 1973. The amendment states that references to pension sharing orders are to be construed in accordance with the new section 21A. Section 52 is an interpretation section. This amendment creates consistency in the textual treatment of pension sharing orders and other types of financial relief in the 1973 Act.

Schedule 4: Amendments of sections 25B to 25D of the Matrimonial Causes Act 1973.

Schedule 4 amends the current earmarking provisions of the Matrimonial Causes Act 1973 to ensure that they fit with the system proposed for pension sharing and makes certain provision relating to pension sharing. **Paragraphs 1 to 3** include amendments to sections 25B to 25D of the 1973 Act which are consequential on the pension sharing provisions, and, in particular, on the introduction of the expression "pension arrangement" which encompasses pension rights held in policies of insurance, retirement annuity contracts, as well as occupational pension and personal pension schemes. Accordingly, throughout those sections "pension arrangement" is substituted for "pension scheme" and "person responsible for the arrangement" for "trustees or managers". In addition:

> **Paragraph 1(3)**provides that section 25B(2) shall cease to have effect. Provisions to similar effect are already in section 25. The removal of the duplication will make the provisions easier to understand.
>
> **Paragraph 1(6)** substitutes a new section 25B(5) which provides that orders for payment under subsection (4) may only be expressed in percentage terms. Hitherto, it has been possible for the order to specify an amount or a percentage.
>
> **Paragraphs 1(8)**clarifies the wording of section 25B(7) concerning commuted benefits.
>
> **Paragraph 1(9)**introduces three new subsections into section 25B. The first two subsections restrict the court's powers under section 25B. In particular they prevent pension earmarking if the pension arrangement is subject to a pension sharing order in relation to the marriage which has not yet taken effect or has already been the subject of a pension share by the parties.

Paragraph 2(5)inserts a new section 25C(4) prohibiting compulsory nominations for death benefits in cases where the pension arrangement is subject to a pension sharing order in relation to the marriage which has not taken effect or has already been the subject of a pension share by the parties.

Paragraph 3(2) substitutes a new section 25D(1) for the existing provisions. The difference between the new and the old provisions are consequential in nature. The new section 25D(1)(b) provides that the new pension arrangement must have been appropriately notified in accordance with the Lord Chancellor's regulations.

Paragraph 3(3)amends section 25D(2). As amended this subsection enables regulations to be made by the Lord Chancellor in relation to the following:-

(a) payment of sums due under pension earmarking orders

(b) rights and liabilities of the parties affected in cases where a payment has been made under a mistaken belief that an earmarking order was valid;

(c) notification of changes of circumstances;

(d) discharge of liability under an earmarking order of the person responsible for a pension arrangement;

(e) calculation and verification in relation to the valuation of benefits under a pension arrangement or shareable state scheme rights for the purpose of enabling the court to exercise its powers to make financial orders, under this part of this Act.

Paragraph 3(5)inserts additional definitions for the purposes of the amendments mentioned**.**

Schedule 5: Pension credits: mode of discharge

This Schedule sets out the way in which the person responsible for a pension arrangement may discharge his liability in respect of a pension credit.

Funded pension schemes

Paragraph 1 sets out how a funded pension scheme is to discharge its liability in respect of a pension credit. The intention is that where a pension credit is derived from a funded scheme, the person responsible for that scheme should first offer to discharge its liability for the pension credit by making a transfer payment to a suitable scheme or arrangement of the former spouse's choice.

Sub-paragraph (1) limits the application of this paragraph to funded occupational schemes or personal pension schemes.

Sub-paragraph (2) provides that liability for a pension credit can be discharged by conferring rights on the former spouse within the member's scheme (an internal transfer). The scheme can make the former spouse a member with her consent or in accordance with regulations. We intend to use this regulation-making power where the former spouse does not provide details of an alternative scheme or arrangement to which the scheme can discharge its liability for the pension credit.

Sub-paragraph (3) provides for the external discharge of liability for a pension credit to enable rights to be set up for the former spouse in another scheme or arrangement.

Sub-paragraph (3)(a) is self-explanatory but see paragraph 7 below for the pension arrangements which are disqualified as a destination for a pension credit.

Sub-paragraph (3)(b), as with a transfer of pension rights, there is no statutory obligation on an importing scheme or arrangement to accept a transfer payment.

Sub-paragraph (3)(c): the transfer payment can be made with the former spouse's consent or in accordance with regulations. We intend to use this regulation-making power where the former spouse does not provide details of an alternative scheme or arrangement to which the scheme can discharge its liability for the pension credit and the scheme does not wish to give the former spouse rights within its own scheme.

Sub-paragraph (4): the effect of this sub-paragraph is that no account will be taken of the consent of a former spouse to the setting up of rights for her within the scheme or arrangement (an internal transfer), unless the consent is given after receiving a written offer by the scheme or arrangement to discharge its liability by making a transfer payment to another scheme or arrangement of her choice. However, consent given before receiving such an offer will count if it is not withdrawn within a week of receiving such an offer.

Unfunded public service pension schemes

Paragraph 2 sets out how an unfunded public service pension scheme is to discharge its liability in respect of a pension credit.

Sub-paragraph (1) limits the application of this paragraph to unfunded public service pension schemes.

Sub-paragraph (2): the effect of this provision is that an unfunded public service pension scheme will only be able to discharge its liability in respect of a pension credit by providing benefits under the scheme (an internal transfer), except where sub-paragraph (3) below applies.

Sub-paragraph (3) provides that where an unfunded public service pension scheme from which a pension credit derives is closed to new members, an alternative public service scheme may be specified by the appropriate authority to provide the former spouse with pension rights.

Sub-paragraph (4) sets out how the managers of the scheme may discharge their liability in respect of a pension credit when they specify an alternative scheme under sub-paragraph (3) above. They must ensure that the trustees or managers of the alternative scheme confer on the former spouse appropriate rights under that scheme.

Sub-paragraph (5) provides for the Treasury to designate "the appropriate authority" for the purposes of sub-paragraph (3).

Other unfunded occupational pension schemes

Paragraph 3 set out how an unfunded occupational pension scheme that is not a public service scheme is to discharge its liability in respect of a pension credit.

The intention is that unfunded occupational pension schemes which are not public service schemes may discharge their liability in respect of the pension credit by conferring rights on the former spouse within the member's scheme. Schemes may also discharge their liability by making a transfer payment to another suitable scheme/ arrangement willing to accept it but only with the consent of the former spouse, or where consent is not obtained, in accordance with regulations made by the Secretary of State.

Sub-paragraph (1): the schemes falling within the scope of this sub-paragraph will be unapproved unfunded retirement benefit schemes;

Sub-paragraph (2) provides that schemes within the scope of sub-paragraph (1) may discharge their liability by granting the former spouse rights within the scheme;

Sub-paragraph (3) provides that a transfer payment can be made to a "qualifying arrangement", which is a suitable destination for the pension credit and able and willing to accept it, only with the consent of the former spouse, or in accordance with regulations made by the Secretary of State. The regulation-making power will permit transfer without consent if circumstances are identified in which such a transfer is desirable.

Other pension arrangements

Paragraph 4 sets out how liability in respect of a pension credit derived from a policy of insurance or annuity contract is to be discharged.

Sub-paragraph (1) sets out the pension arrangements to which this paragraph applies.

Sub-paragraph (2) mirrors the provisions in paragraph 1(3). As in paragraph 1(3), we intend to use the regulation-making power in paragraph (c) where the former spouse does not provide details of an alternative scheme or arrangement to which the arrangement can make a payment for the purpose of discharging its liability for the pension credit. A qualifying arrangement is defined in paragraph 6 and disqualified destinations are dealt with in paragraph 7.

Sub-paragraph (3) provides that the pension arrangement may discharge its liability for a pension credit with the consent of the former spouse, by entering into a policy of insurance or an annuity contract with the former spouse, provided that it is not disqualified as a destination under paragraph 7.

Sub-paragraph (4) enables a pension arrangement to discharge its liability for a pension credit by providing an annuity for the former spouse in prescribed circumstances. We intend to use this regulation-making power to deal with the situation where the pension credit is derived from an annuity in payment to the member.

Paragraph 5: a pension scheme or arrangement will not be taken to have conferred appropriate rights within the scheme (an internal transfer) unless the conditions set out in (a) and (b) are satisfied. We intend to use the regulation-making power in (b) to ensure that in calculating benefits in respect of a pension credit, the actuary should use methods and assumptions which are consistent with the methods and assumptions used for calculating outgoing cash equivalents from that scheme. Appropriate adjustment would be permitted, in respect of incoming transfers, to take account of expected salary increases in cases where "added years" are to be credited for a former spouse who is an active member of the scheme.

Paragraph 6: we intend to use the regulation-making power in sub-paragraph (2)(b) to prescribe requirements with which insurance companies must comply that are broadly consistent with those in Part II of the Occupational Pension Schemes (Discharge of Liability) Regulations 1997.

Paragraph 7 sets out the circumstances in which a pension arrangement will be disqualified as a destination for a pension credit.

Sub-paragraph (1): the effect of this sub-paragraph is that where a pension credit is derived from a tax-approved scheme or arrangement, then the scheme receiving the pension credit must also be tax-approved to qualify as a destination for it.

Sub-paragraph (2): we intend to use the regulation-making power to provide that only contracted-out occupational schemes, appropriate personal pension schemes and appropriate policies of insurance or annuity contracts will be permitted as destinations for pension credit rights derived from contracted-out employment.

Sub-paragraph (3): we intend to use the regulation-making power to ensure that in calculating benefits in respect of a pension credit, the scheme actuary should use methods and assumptions which are consistent with the methods and assumptions used for calculating outgoing cash equivalents from that scheme.

Sub-paragraph (4): we intend to use the regulation-making power to determine the terms of the annuity contract or insurance policy which will establish it as a suitable destination for a pension credit.

Paragraph 8 provides for the amount of pension credit to be reduced in relation to the discharge of liability for a pension credit by means of an external transfer where a scheme subject to the minimum funding requirement is underfunded on the valuation day.

Sub-paragraphs (1) and *(2)*: we intend to use the regulation-making power in sub-paragraph (1)(d) to enable the scheme to offer the former spouse a reduced pension credit in circumstances where the former spouse has elected to take a transfer to another scheme or arrangement, having refused the offer of pension credit benefit (without reduction) in the member's scheme. We intend to use the power in sub-paragraph (2) to prescribe that a scheme will be treated as underfunded on the valuation day if the latest actuarial valuation obtained in accordance with section 57 of the Pensions Act 1995 (which relates to the valuation of assets and liabilities for the purposes of the minimum funding requirement) shows the scheme as having insufficient assets to fully meet its liabilities.

The intention is that the provisions will broadly reflect those set out in regulation 8(4) of the Occupational Pension Schemes (Transfer Values) Regulations 1996. For example, if the latest actuarial valuation shows that the scheme was 20% underfunded, then the amount of the pension credit as calculated on the valuation day may be reduced by the same percentage.

Sub-paragraph (3) defines the valuation day.

Paragraph 9 is designed to protect the pension arrangement where there is a time lag between the date on which the member's shareable rights under the arrangement become subject to a pension debit and the date on which the arrangement learns about it. We intend to use the regulation-making power to enable an arrangement to reduce the pension debit by the amount necessary to ensure that it does not suffer a financial loss in respect of a bona fide payment made in ignorance of the pension credit.

Paragraph 10 provides a regulation-making power for increasing the amount of a pension credit where there has been a delay in discharging liability in respect of a pension credit in a case where liability falls to be discharged by means of a transfer payment.

occupational schemes: if a scheme fails without reasonable excuse to make the transfer payment on time then we intend that it should be required to recalculate the cash equivalent as at the date it actually makes the payment and pay that amount or, if higher, the original cash equivalent increased by interest at an annual rate of 1% above base rate between the valuation date and the implementation date.

personal pension schemes: if the scheme fails without reasonable excuse to make the transfer payment on time, we intend that the member's cash equivalent should be increased by the interest payable on it, at the same rate as that payable for the time being on judgement debts by virtue of section 17 of the Judgement Act 1838, between the date the order or agreement took effect and the date the scheme actually makes the payment, or if it is greater, the cash equivalent recalculated as at the date it actually makes the payment.

Paragraph 13: we intend to use this regulation-making power to refer to guidance published by the Institute of Actuaries and Faculty of Actuaries.

Schedule 6: Effect of state scheme pension debits and credits

The Schedule inserts sections 45B, 55A, 55B, and 55C into the Social Security Contributions and Benefits Act 1992.

Paragraph 2 inserts section 45B. This provision covers how and when deductions will be made from an additional pension;

Subsection (1) provides for the reduction of the weekly rate of additional pension where a person becomes subject to a state scheme pension debit.

Subsections (2) to *(7)* explain how the reduction in the additional pension will be calculated. If a person becomes subject to the debit **in or after** the tax year immediately before he reaches pensionable age, the additional pension will be reduced by a weekly amount which is of an actuarially equivalent value to the state scheme debit. If, however, a person becomes subject to the debit **before** the tax year immediately before a person reaches pensionable age, the additional pension will be reduced by that weekly amount, expressed in terms of the valuation day, multiplied by the earnings factor percentage for the relevant tax year specified in the latest annual Revaluation of Earnings Factors Order (the current order is SI 1998/1137).

Paragraph 3 inserts sections 55A - 55C

Section 55A covers how and when a person will become entitled to a shared additional pension.

Subsections (3) to *(6)* are similar to the provisions in section 45B (3), (4), (6) and (7), other than that they refer to the calculation of the shared additional pension. If a former spouse becomes entitled to a state scheme credit **in or after** the tax year immediately preceding that in which she reaches pensionable age, the shared additional pension will be a weekly amount which is of an actuarially equivalent value to the credit. If, however, she becomes entitled to the credit **before** the beginning of the tax year immediately preceding that in which she reaches pensionable age, the additional pension will be that weekly amount, expressed in terms of the valuation day, multiplied by the earnings factor percentage for the relevant tax year specified in the latest annual Revaluation of Earnings Factor Order (the current order is SI 1998/1137).

Section 55B provides for the shared additional pension to be reduced in the same way as the additional pension where it is subject to pension sharing. The section mirrors section 45B.

Section 55C provides for the shared additional pension to be increased where entitlement is deferred. The section is a counterpart to section 55.

Schedule 8: Part VII: Retirement Pensions.

Paragraph 33 inserts a new subsection (4A) into section 48A of the Contributions and Benefits Act. The new subsection provides that a pensioner who is not the widow or widower cannot gain an increase to a category B retirement pension of half of the weekly rate of additional pension payable to the deceased member.

Schedule 12: Consequential amendments – Part I

Paragraph 1: adds a new paragraph (fa) to paragraph 3 of Schedule 1 to the Supreme Court Act 1981. Paragraph 3 lists the proceedings in the High Court that are assigned to the Family Division. By paragraph (fa) all proceedings relating to debits and credits arising under section 29(1) or 49(1) of the Act are assigned to the Family Division.

Paragraphs 2 to 4 amend the Matrimonial and Family Proceedings Act 1984.

Paragraph 3amends section 17 of the Act. This enables the court to make a pension sharing order on an application for financial relief in relation to a marriage dissolved or annulled overseas. A pension sharing order may not be made where the court has jurisdiction solely by virtue of a matrimonial home within the jurisdiction.

Paragraph 4 amends section 21 of the Act by adding provisions about pension sharing to the list of provisions that shall apply to orders made under that Act.

Paragraphs 5 to 12 concern amendments to sections 8, 10, 12A, 13, 16, and 27 of the Family Law (Scotland) Act 1985 in consequence of the pension sharing provisions in the Act, consistent with the changes to sections 25B, 25C and 25D of the Matrimonial Causes Act 1973 above. Two provisions are worth particular mention. Paragraph 10 inserts into section 13 (periodical allowance) of the 1985 Act a reference to a pension sharing order. This is in keeping with the principles of the 1985 Act that a periodical allowance should only be made if it is not appropriate or sufficient to make one or more of the property adjustment orders provided for in section 8, namely an order for payment of capital, transfer of property and now a pension sharing order.

Paragraph 11 amends section 16 of the 1985 Act which enables the court to make an order to vary or to set aside an agreement on financial provision. It may make an order where the agreement (or any term in it) was not fair and reasonable at the time it was entered into. The court may do so on granting decree of divorce or within such time as the court may specify on granting decree of divorce. The amendment to section 16 limits the court's power to vary or set aside a pension sharing provision in an agreement so that the court may only do so at the time it grants decree of divorce. This is to avoid re-opening a pension sharing provision after it has been made. Any non-pension sharing terms of the agreement would not be affected by this limitation.

Paragraph 13: amends the Income and Corporation Taxes Act 1988 to update the cross-reference to pension sharing provisions in the Act.

Paragraphs 14 to 22: amend the Social Security Contributions and Benefits Act 1992.

Paragraphs 15 and 16: the amendments to section 20 and section 21 are consequential upon the provisions for the sharing of SERPS rights set out in Schedule 6 to the Act, which inserts a new section 55A "shared additional pension" into the Act.

Paragraph 17 amends section 39 to ensure that the reduction in the member's additional pension as a consequence of pension sharing is also reflected in any widowed mother's allowance or widow's pension payable on the member's death.

Paragraph 18 amends section 43, which is concerned with which category of retirement pension a person receives when he is entitled to more than one. The new subsection (6) to section 43 provides that shared additional pension is not covered by the term "retirement pension". Thus, a person may receive it in addition to any category of retirement pension.

Paragraphs 19 to 21 amend sections 48A to 48C to ensure that the reduction in the member's additional pension in consequence of pension sharing is also reflected in any Category B pension payable on the member's death.

Paragraph 22 amends section 54(1) to provide for an election by a person to be treated as not having become entitled to a Category A or B retirement pension to apply also to any shared additional pension to which he may be entitled.

Paragraphs 23 to 27amend the Social Security Administration Act 1992 to take account of the shared additional pension that will become payable to the former spouse in pension sharing cases.

Paragraphs 28 to 42amend the Pension Schemes Act 1993.

Paragraphs 29 and 30 are consequential upon the creation of safeguarded rights in section 36 of this Act.

Paragraph 31 amends section 83 which contains provisions for revaluing the benefits of early leavers from occupational schemes from the date on which pensionable service ends until the scheme's normal pension age (NPA). The new subsection (1A) excludes benefits payable by virtue of pension credit rights, except, in the case of salary-related occupational pension schemes, to the extent that the benefits are payable by virtue of rights which involve the member being credited with added years of pensionable service.

Paragraph 32 amends section 85 to make it clear that the revaluation provisions in Chapter II of Part IV of the Act do not apply to such alternatives to pension credit as may be prescribed under the regulation-making power at section 101D(2)(b) inserted by section 37 of this Act.

Paragraphs 33 to 35 amend sections 93, 93A and 94 of the Act to exclude rights which are attributable to a pension credit from the provision relating to "Transfer Values" for members of occupational and personal pension schemes in Part IV of Chapter IV of the Act. (Separate provisions for Transfer Values in respect of pension credit rights are contained in Chapter II of Part IVA of the Act as inserted by section 37 of this Act.)

Paragraph 36 inserts a new subsection (4) to section 96 of the Act to enable an occupational or personal pension scheme to prevent a member from making an application to exercise his right to a cash equivalent without also giving the trustees or managers of the scheme a transfer notice in respect of his pension credit rights under section 101F (as inserted by section 37 of this Act).

Paragraph 37 amends section 98 so that its operation is not affected by anything that happens in relation to rights under a personal pension scheme attributable to a pension credit. There are separate transfer provisions for pension credit rights and other rights.

Paragraph 38: the effect of this amendment is that where an application under Chapter IV of Part IV of the Act depended on the giving of a transfer notice under section 101F, the application under Chapter IV of Part IV can only be withdrawn if the notice is also withdrawn.

Paragraph 39inserts a reference to Chapters I and II of Part IVA into section 129(1) of the Act and a reference to Chapter II of Part IVA into section 129(2) of the Act. Section 129 is concerned with the relationship between statutory requirements and scheme rules.

Paragraph 40 inserts a reference to section 25D of the Matrimonial Causes Act 1973 section 12A of the Family Law (Scotland) Act 1985 or Part III or Part IV of this Act into section 178(a) of the Act. Section 178(a) gives the Secretary of State a regulation-making power to provide who is treated as a manager of an occupational pension scheme. The paragraph also inserts a reference to Chapter 1 of Part IVA into section 178(b) of the Act. Section 178(b) gives the Secretary of State a regulation-making power to provide who is to be treated as a trustee of a pension scheme for the purposes of various parts of the Act.

Paragraph 41 inserts a definition of "pension credit" and "safeguarded rights" into the general interpretation section of the Act.

Paragraph 42extends the scope of section 183(3) to the new section 101I inserted by section 37 of this Act.

Paragraphs 43 to 63amend the Pensions Act 1995.

Paragraph 44: the amendment to section 3(2)(a) of the Act extends the circumstances in which the Occupational Pensions Regulatory Authority (OPRA) may prohibit a person from being a trustee of a scheme to include serious or persistent breaches of duty under Chapter II of Part IVA of the Pension Schemes Act 1993 (pension credit benefit transfer values).

Paragraphs 45 to 49: the effect of the amendments to sections 16, 17, 18, 20 and 21 of the Act is to exclude members whose only rights are attributable to a pension credit from the statutory consultation procedures relating to member-nominated trustees.

Paragraph 50: section 38 provides a power to enable the trustees of a scheme to defer the winding up of the scheme. The effect of the amendment is to give the trustees the option of either deferring winding up the scheme and permitting no new members to be admitted to it or admitting no new members except pension credit members.

Paragraph 51: the effect of the amendment to section 51(6) is to exclude pensions derived from pension credit rights from the requirements to index pensions in payment in section 51 of the Act.

Paragraph 52: the amendment to section 53 is consequential upon the amendment to section 51(6) above.

Paragraph 53: section 67 imposes restrictions on the power to alter occupational pension schemes to enhance the security of entitlements and rights accrued by members. The effect of this amendment is to bring former spouse members within the scope of section 67 and give them the same protection as that enjoyed by other members.

Paragraph 54: the amendment to section 68(2) extends the powers to alter occupational pension schemes or modify them by resolution to enable them to accommodate pension credit rights.

Paragraph 55: the amendment to section 73 in section 38 of this Act provides for pension credit benefit to be included in the preferential liabilities on the winding up of a scheme to which section 56 of the Act applies. The new subsection (3A) will ease administration. It will mean that a scheme will not be required to separately identify the part, if any, of pension credit rights which is derived from voluntary contributions.

Paragraph 56: this amendment will enable a scheme to which section 73 applies to discharge its liability for pension credit benefit on winding up under section 74(3)(b).

Paragraphs 57 to 59: the effects of the amendments to sections 91, 92 and 93 of the Act are to include pension credit rights within the provisions concerning assignment, forfeiture, bankruptcy etc that relate to occupational pension schemes.

Paragraph 60: amends section 99(2) of the Act to enable an inspector to enter the premises of an occupational pension scheme in connection with the provisions relating to pension credit transfer values inserted into Chapter II of Part IVA of the Act by section 37 of this Act.

Paragraph 61: extends the definition of member in section 124(1) of the Act to include a pension credit member and makes other consequential amendments to the interpretation of Part I of the Act consequential upon this Act.

Paragraph 62 and 63 amend section 166 and section 167(4) of the Act to reflect the changes from “pension scheme” to “pension arrangement” in, respectively, sections 25B to 25D of the Matrimonial Causes Act 1973 and the corresponding provisions of the Family Law (Scotland) Act 1985.

Paragraphs 64 to 66 amend the Family Law Act 1996. They amend the prospective amendments of the Matrimonial Causes Act 1973 which are contained in Schedules 2 and 8 to the 1996 Act. They are consequential on the provisions in Schedule 3 to this Act coming into force before the new divorce and separation proceedings contained in the Family Law Act 1996.

Paragraph 65amends Schedule 2 to the Family Law Act 1996.

Sub-paragraphs (3) and (5) to (8) incorporate the definition of a pension sharing order into section 21 of the Matrimonial Causes Act 1973 as amended by the 1996 Act and make consequential amendments to the numbering of the subsections.

Sub-paragraph (4) makes an amendment corresponding to the amendment of section 24 of the Matrimonial Causes Act 1973 made by paragraph 3 of Schedule 3 to this Act (section 24 of the 1973 Act being substituted by paragraph 6 of Schedule 2 to the 1996 Act).

Sub-paragraph (9) replaces section 24B of the Matrimonial Causes Act 1973 with 4 new sections, numbered 24B, 24BA, 24BB and 24BC. These will empower the court to make pension sharing orders in relation to divorces under the Family Law Act 1996 and nullity under the 1973 Act.

Section 24B(1) gives the court power on application at the appropriate time to make a pension sharing order on application;

Subsection (2) specifies the times at which the court can make the order. The definition of "appropriate time" mirrors, so far as relevant, the times when the court can make financial provision and property adjustment orders under the Act.

Subsection (3) ensures that, wherever practicable, the court will make all the relevant pension sharing orders for a given divorce at once, rather than piecemeal.

Subsection (4) makes section 24B subject to restrictions contained in the Matrimonial Causes Act 1973 and in section 19 of the Family Law Act 1996. Section 19 makes provision for when the court has jurisdiction in relation to divorce. For example, the court has no jurisdiction to make a pension sharing order where neither of the parties was domiciled in England or Wales on the date of the statement of marital breakdown, or habitually resident in England or Wales throughout the preceding year.

Section 24BA imposes further restrictions on the court's power to make a pension sharing order. An order cannot be made:

subsection (1): to take effect before the making of a divorce order in relation to the marriage;

subsection (2): while the period of reflection and consideration (described in section 7 of the Family Law Act 1996) is interrupted under section 7(8) of that Act;

subsection (3): where the divorce process has lapsed under section 5(3) or 7(9) of the Family Law Act 1996;

subsection (4): after the divorce order has been made, except in response to an application made before the divorce order was made, or with leave of the court;

subsections (5) to (7): impose restrictions on the making of a pension sharing order in relation to divorce which are equivalent to those imposed by section 24B(3) to (5) of the Matrimonial Causes Act 1973 inserted by paragraph 4 of Schedule 3 to this Act.

subsections (5) and (6): where a pension arrangement, or shareable state scheme rights, are the subject of a pension sharing order in relation to the marriage (ie where the order has been made, but has not yet taken effect) or have been the subject of pension sharing between the parties to the marriage (ie where a pension sharing order or agreement has already taken effect);

subsection (7): in relation to a person's pension rights which are subject to a financial provision order which includes provision under the earmarking/attachment provisions (sections 25B and 25C), whether the order was made in relation to the same marriage or a previous one;

subsection (8) provides the period of reflection and consideration is to have the same meaning as in section 7 of the Family Law Act.

Section 24BB makes provision for pension sharing in cases where a marriage is annulled. As with pension sharing on divorce, the court is required, wherever practicable, to make all the relevant pension sharing orders at once, rather than piecemeal. Orders on nullity can be made on or after the granting of the decree of nullity. They cannot take effect unless the decree has been made absolute.

Section 24BC imposes restrictions on the making of pension sharing orders in relation to nullity which are equivalent to those imposed by section 24BA(5) to (7) on the making of such orders in relation to divorce.

Paragraph 66 amends Schedule 8 to the Family Law Act 1996.

Sub-paragraph (2) alters the amendments of section 25(1) of the Matrimonial Causes Act 1973 to take account of the sections introduced by paragraph 66(9) above. In essence it extends the application of section 25 of the Matrimonial Causes Act 1973 (which lists the factors which the court has to take into account when considering whether and how to exercise its powers to make a financial provision order or property adjustment order) to cover pension sharing orders.

Sub-paragraph (3) Section 25A(1) of the Matrimonial Causes Act 1973 imposes a duty on the court when it is deciding to exercise its powers to make financial provision orders and property adjustment orders to consider whether it would be appropriate to exercise its powers to achieve a clean break (that is to terminate all financial obligations between the parties). This paragraph alters the amendments of section 25A(1) of the 1973 Act so that that provision extends to pension sharing orders.

Sub-paragraph (4) substitutes new paragraphs 11 and 11A for paragraph 11 of Schedule 8 to the 1996 Act. These paragraphs amend sections 25B, 25C and 25D of the 1973 Act. The amendments in the new paragraph 11 and 11A(a) replicate those to sections 25B and 25C in the present paragraph 11. Paragraph 11A(b) effects a consequential change in numbering.

Sub-paragraph (5) inserts two additional paragraphs into paragraph 16(2) of Schedule 8 to the 1996 Act. The first paragraph inserts a new sub-paragraph (fa) into section 31(2) of the 1973 Act and allows the court to vary, discharge, suspend a provision in or revive operation of a suspended provision of a pension sharing order where no divorce order has been made and no separation order is in force. The change in numbering reflects the fact that on the introduction of pension sharing a new sub-paragraph (g) is inserted. That sub-paragraph is amended by the second of the additional paragraphs so that it just applies to nullity.

Sub-paragraph (6) inserts a new sub-paragraph, making a consequential amendment.

Sub-paragraph (7) inserts a new subsection (4AB) into section 31 of the Matrimonial Causes Act 1973. It prevents the variation of a pension sharing order taking effect before the marriage is dissolved.

Sub-paragraph (8) is a consequential amendment. It ensures that the new section 31(4B) will, after the introduction of the new divorce and separation procedures, only be applicable to nullity.

Sub-paragraph (9) inserts two additional sub-paragraphs in paragraph 16 of Schedule 8 to the 1996 Act. They impose on the making of a pension sharing order under section 31(7B) the same duty to make orders on the same occasion and the same restrictions as apply under sections 24B and 24BA.

Sub-paragraph (10) inserts section 31B into the Matrimonial Causes Act 1973. It provides for a pension sharing order to be automatically discharged where a separation order is made following the pension sharing order. Pension sharing orders can only take effect when a divorce order is made. They cannot take effect if a separation order is made. The pension sharing order therefore becomes redundant, and will be discharged.

Sub-paragraphs (11), (12) and (13) make minor consequential amendments to paragraphs 19 and 21 of Schedule 8 to the Family Law Act 1996 following the insertion of pension sharing provisions into the Matrimonial Causes Act 1973.

Sub-paragraphs (14), (15) and (16) have the effect of making minor amendments to the Matrimonial and Family Proceedings Act 1984. They reflect the various technical changes made to the Matrimonial Causes Act 1973 by the amendments to permit pension sharing under the new divorce process which to be established by the Family Law Act 1996.

Part V: Welfare

Chapter I: Social Security Benefits

Section 52: Preservation of rights in respect of additional pension

This section enables the Secretary of State to postpone, or to modify or disapply in certain cases, a reduction of 50% in the amount of additional pension under the State Earnings-Related Pension Scheme ("SERPS") which a widow or widower can "inherit" from a spouse who dies after 5th April 2000.

Currently, widows and, in certain circumstances, widowers may receive the full amount of their deceased spouse's SERPS. However, as a result of changes originally enacted in the Social Security Act 1986 (but now consolidated in the Social Security Contributions and Benefits Act 1992), where a married person dies after 5th April 2000 the surviving spouse will be able to receive only 50% of the deceased's SERPS.

This change was not fully publicised, and some people were incorrectly told that they or their widower could expect to "inherit" the full amount of SERPS.

This section enables the Secretary of State to make regulations, subject to the affirmative resolution procedure, to do one or more of the following:

> to provide for specified categories of widows and widowers to receive more than 50% of their spouse's SERPS;
>
> to postpone the 50% reduction from 6th April 2000 to a later year;
>
> to set up a scheme to determine who has been misled by incorrect or incomplete information about the 50% reduction, so as to ensure that the reduction is not applied in their, or their widow(er)'s, case.

Until provision for one of these options is in force, widow(er)s will continue to "inherit" the full amount of their spouse's SERPS.

An earlier version of this provision was first added to the Bill at Lords Report stage (11th October 1999; Hansard Vol 605, col 26) and this section was substituted at Commons consideration of Lords Amendments (3rd November 1999; Handard Vol 337, col 363).

Commentary

The three options for provision in regulations are set out in subsection (2), subsection (3) and subsections (4) to (6) respectively.

Subsection (2) enables regulations to increase above 50% the proportion of SERPS "inherited" by specified categories of widow(er)s.

Subsection (3) enables regulations to provide for the postponement of the reduction to some year later than the year 2000.

Subsections (4) and (5) enable regulations to provide for a scheme, to be in operation for a specified period, under which claims would be made by people who, in reliance on incorrect or incomplete information provided by a government department about the SERPS reduction, have not safeguarded their own or their spouse's financial position in the event of widowhood after 5th April 2000. Those, or the spouses of those, who claimed successfully under the scheme would not, in the event of their being widowed after 5th April 2000, be affected by the reduction in SERPS payable as part of Widow's Benefit, Bereavement Benefits or Category B Retirement Pension.

Subsection (6) enables those regulations to provide also for procedural and other matters regarding the scheme, such as the time and manner in which claims must be made, the information to be provided, the conditions for success, the decision-making process, and appeals.

Subsection (7) prevents the reduction in SERPS from taking effect until regulations are in force to provide for at least one of the three options described above.

Subsection (8) requires a draft of any regulations under this section to be approved by each House of Parliament before the regulations can be made.

Section 53: Extension of entitlement to state Maternity Allowance

In the 1999 Budget, the Chancellor announced a reform of Maternity Allowance so that women earning below the lower earnings limit for NI contributions, and at least £30 a week, would be entitled to the benefit for the first time. Section 53, which was added to the Bill at Commons Report (Hansard vol. 331, col. 643), makes the necessary changes to the legislation.

Background

There are two maternity benefits for pregnant working women. Statutory Maternity Pay (SMP) is administered and paid by employers; Maternity Allowance (MA) is paid by the DSS.

> Statutory Maternity Pay is paid to employees who satisfy two basic tests. A woman must have been employed continuously by her employer for at least 26 weeks by the 15th week before her baby is expected; and she must earn on average at or above the Lower Earnings Limit (LEL: the starting point for paying National Insurance contributions, currently £66 a week).
>
> Maternity Allowance is paid to women who do not qualify for Statutory Maternity Pay, to the self-employed, and to recently employed women. To qualify, they must have worked and paid National Insurance contributions for at least 26 of the 66 weeks ending with the week before the expected week of childbirth.

Both SMP and MA provide a basic weekly benefit for employees of £59.55 (the same as Statutory Sick Pay) for up to 18 weeks. SMP beneficiaries, however, receive 90% of their average earnings for the first 6 weeks, if this is higher. The self-employed and recently employed receive a lower rate of Maternity Allowance of £51.70.

Summary of changes

Section 53 extends Maternity Allowance to women who earn below the LEL. The changes:

> allow women who earn at least £30 a week, but below the LEL, to get Maternity Allowance worth 90% of their average weekly earnings;
>
> allow women with several low paid jobs to add together their earnings, and get MA for the first time;
>
> allow self-employed women who hold a Small Earnings Exception from paying National Insurance contributions to get Maternity Allowance of £27 a week (90% of £30);
>
> remove the lower rate of MA, so that the self-employed and recently employed receive the same basic rate of benefit as employed women.

The section gives the power to set out the details (e.g. how average weekly earnings should be calculated) in regulations.

Commentary

The section amends section 35 of the Contributions and Benefits Act which contains the rules for Maternity Allowance, and adds a new section 35A.

Subsection (1) replaces section 35(1) of the Act, which sets out the qualifying conditions for Maternity Allowance.

The only substantial change here is in the *inserted subsection (1)(c)*. Currently subsection (1)(c) says that a woman must meet National Insurance contribution conditions to qualify for MA. The new subsection says instead that she must earn above the "Maternity Allowance threshold" (defined in new section 35A(6) – described below – as £30).

There is a minor change in the *inserted subsection (1)(b)*. This makes clear that if a woman works for part of a week, this counts as a whole week for the test of recent employment.

Subsection (2) makes some consequential amendments.

Subsection (3) adds a new section 35A to the Contributions and Benefits Act. This sets out the rates at which Maternity Allowance will be paid, and gives the power to make the detailed arrangements of the earning test through regulations.

Any woman who earns on average at or above the Lower Earnings Limit will get the standard rate of MA (i.e. £59.55 a week) – *inserted subsection (2)*. There is no distinction between employed and self-employed women: self-employed and recently employed women will no longer get a lower rate of benefit.

Any woman whose average earnings are at least equal to the qualifying Maternity Allowance threshold (to be set at £30), but less than the LEL, will get a rate of MA equal to 90% of her average earnings – *inserted subsection (3)*.

The *inserted subsections (4)* and *(5)* of new section 35A contain powers to make regulations. It is intended to use the regulations to:

define "earnings".

For employed earners, the same definition will be used as for Statutory Maternity Pay (i.e. gross earnings of a type that would qualify for National Insurance contributions).

For the self-employed, it is intended to base the calculation on notional earnings. For every week that a woman pays a Class 2 contribution, she will be treated as having earnings equal to the LEL in force for that week. To help the low paid self-employed, a self-employed woman who holds a certificate of Small Earnings Exception will be treated as having earnings equal to the Maternity Allowance Threshold applicable in that week (*subsections 4(b)* and*5(c)*).

define the period and the method to be used for calculating earnings.

The exact period has yet to be decided, but it is intended to take an average of at least 13 and at most 26 weeks' earnings from the 66 week period used in the employment test. Women will be able to take account of their best weeks' earnings when choosing which weeks to use (*subsection (5)(a)* and *(b)*).

provide that the total earnings in any one week may come from a number of different jobs and/or self-employed earnings.

The aim is to ensure, for example, that a woman with three jobs earning £20 a week can add those earnings together to make total weekly earnings of £60. Or, a self-employed woman with a small earnings exception, who is also employed at £20 a week, could add together her notional earnings from self-employment (£30) to the £20 she earns as an employee. This would give her total earnings for that week of £50 (*subsection (5)(d)*).

Subsection (6) of new section 35A provides that the "Maternity Allowance threshold" is to be £30. *Subsections (7)* and *(8)* provide that the Secretary of State may increase this amount for any tax year after 1999/2000 by order.

The amendment made by paragraph 32 of Schedule 8 to the Act makes such orders would be subject to affirmative resolution: i.e. approval in draft by both Houses of Parliament. This is in line with the current procedure for uprating benefits.

Subsection (4) of section 53 provides that the new arrangements for Maternity Allowance will apply to woman whose expected date of confinement begins on or after 20 August 2000, with the first payments possible under the new rules being payable from April 2000.

Maternity Allowance, like Statutory Maternity Pay, may be paid from the 11th week before the week in which the baby is due. It is also payable where the baby is born prematurely. This can be as early as 19 weeks before the expected week of birth. So, women expecting a baby during the week commencing 20 August 2000 could receive Maternity Allowance as early as April 2000 if their baby arrives prematurely.

Schedule 8 Part VI contains some minor consequential amendments, and Schedule 13 some consequential repeals.

Sections 54-56: Benefits for Widows and Widowers

These sections replace the benefits currently paid to widows with a new set of bereavement benefits, which may be paid to both men and women. A consultation document, *A new contract for welfare: SUPPORT IN BEREAVEMENT* (Cm 4104), was published in November 1998 setting out the Government's proposals. Those proposals have subsequently been carried forward into the new legislation, although some elements of these reforms are due to be introduced through secondary legislation.

Background

Since 11 April 1988, there have been three principal benefits available to women who have been widowed. They are each based upon the National Insurance contributions record of the late husband rather than that of the widow herself. Even if the late husband failed to satisfy the contribution conditions, there may be an entitlement to benefit if his death was caused by an industrial accident or disease. The three benefits are:

Widow's Payment – a single, tax-free payment of £1,000;

Widowed Mother's Allowance (WMA) – a taxable benefit for widows with dependent children or who are expecting their late husband's baby. It comprises a basic allowance for the widow herself, an allowance in respect of each additional child, and any Additional Pension (i.e. State Earnings Related Pension (SERPS)) her husband was entitled to. It ends when the youngest child ceases to be a dependant;

Widow's Pension – a taxable benefit for widows who are not entitled to WMA or whose WMA has ceased. It is made up of a basic pension and an Additional Pension (SERPS); the calculated amount of benefit varies, depending on the woman's age when she was widowed or stopped receiving WMA.

Entitlement to both WMA and Widow's Pension ends if the widow re-marries. In addition, neither of these benefits is payable for any periods during which she and a man live together as husband and wife. Similarly, a Widow's Payment is not payable if, at the time of her husband's death, she and another man are living together as husband and wife.

Summary of changes

The changes introduced by this part of the Act consist of :

a "**Bereavement Payment**" of £2,000 paid to both widows and widowers on bereavement. This doubles the value of the current lump sum paid to widows;

a "**Widowed Parent's Allowance**" equivalent to Widowed Mother's Allowance, and including any Additional Pension (SERPS) – for parents who are bereaved of their husband or wife. Entitlement continues until the youngest or only dependent child in the family is aged 16 or up to age 19 if still in full-time further education. This benefit will be available to fathers already widowed when the scheme comes into force;

widows and widowers aged 45 and over with no dependent children will receive a weekly, age-related benefit (with no SERPS component) for one year. This is to be known as a "**Bereavement Allowance**";

only men and women widowed *before* the new provisions take effect will have entitlement to Incapacity Benefit on the basis of their late spouses' contributions.

The package of proposals includes two further measures which can be introduced by regulations using existing powers:

£10 of a person's Widowed Parent's Allowance will be disregarded in assessing entitlement to income-related benefits (such as Income Support);

men and women aged 55 and over at the start of the new arrangements who are widowed during the subsequent five years and whose entitlement to the Bereavement Allowance has expired, will have special access to Income Support. In other words, they will not be required to claim Jobseeker's Allowance and meet its conditions of being available for and actively seeking work. In addition, a new premium will be available in the income-related benefits to ensure that these recipients retain an income that is at least equivalent to the amount of the Bereavement Allowance.

Commentary

Section 54: Bereavement Payment

Subsection (1) replaces the Widow's Payment with a new benefit, which will be payable to both men and women – to be known as the "Bereavement Payment".

Section 36 of the Contributions and Benefits Act which provided for the Widow's Payment is therefore substituted by a *new section,* which refers to "person" and "spouse" rather than "woman" and "husband". It enables the Bereavement Payment to be paid to men or women whose spouse dies on or after the date on which the provision comes into force ("the appointed day").

The inserted section 36(1)-(2) set out the entitlement conditions for the Bereavement Payment. These duplicate the existing conditions for a Widow's Payment.

The inserted section 36(2) preserves the principle that prevented a widow from receiving a Widow's Payment if, at the time of her husband's death, she was living together with another man as husband and wife.

That same principle will apply with Bereavement Payment where the surviving spouse is, at the time of the late spouse's death, living together as husband and wife with a person of the opposite sex. There is no definition of "living together as husband and wife" in legislation, but the concept has been well developed in social security case law.

Subsection (2) replaces Part II of Schedule 4 to the Contributions and Benefits Act, so that the amount of the Bereavement payment will be £2,000. Widow's Payment is worth £1,000.

Section 55: New allowances for bereaved spouses

This section introduces two new benefits for bereaved spouses – Widowed Parent's Allowance and Bereavement Allowance. It does so by inserting four new sections into the Contributions and Benefits Act: sections 36A, 39A, 39B and 39C (the current benefits are defined at sections 37-40). All references below are to sections of the Contributions and Benefits Act.

The *inserted section 36A* sets out when the new benefits, and when the existing scheme, should apply. It provides that:

as a transitional provision, the existing arrangements will continue to apply for all people whose spouses die *before* "the appointed day" (when the new benefits come into force):

If they are women, they will still be able to claim Widowed Mother's Allowance, Widow's Pension and Incapacity Benefit (on the basis of their husbands' contributions), under the current rules. Then, if a widow is aged 45 or over when her Widowed Mother's Allowance ends, she will still be entitled to receive Widow's Pension and/or Incapacity Benefit. If she is under 45, she will still be entitled to receive Incapacity Benefit;

If they are men, they will still be entitled to Incapacity Benefit on the basis of their wives' contributions (as provided by the existing section 41), if they meet the qualifying conditions;

The one difference is that existing widowed fathers will be entitled to the new Widowed Parent's Allowance, if they satisfy the qualifying conditions on the appointed day.

the two new benefits (defined in the new sections 39A, 39B and 39C) will apply for all people whose spouses die *on or after* the appointed day. These people will not be entitled to Incapacity Benefit on the basis of their spouses' contributions.

Widowed Parent's Allowance

The *inserted section 39A* provides for the Widowed Parent's Allowance. It reproduces the rules that currently apply to Widowed Mother's Allowance (set out in section 37), but extends the new benefit to widowers.

Bereavement Allowance

The *inserted section 39B* provides for the Bereavement Allowance. Most of the entitlement conditions of Widow's Pension (in section 38) are retained, but with the following exceptions:

the benefit is available for widowers who meet the conditions of entitlement;

the benefit is only payable for a maximum period of 52 weeks, beginning with the date of death;

no additional pension (State Earnings Related Pension – SERPS) will be paid with the benefit (though note the provisions for SERPS in Retirement Pension for widows and widowers in section 56).

The *inserted section 39C* provides for the rates at which the two new benefits are payable.

Under *subsection (1)*, the weekly rate of Widowed Parent's Allowance will be calculated in the same way as for Widowed Mother's Allowance now.

This means that the inclusion of an additional pension (SERPS) will continue to be made on the basis of existing legislation. The 50% reduction in the value of SERPS from April 2000–which was provided for in the Social Security Act 1986–will remain unchanged (*subsection (4)*). However, see commentary on section 52.

Subsection (2) makes provision for the weekly rate of a Bereavement Allowance. It is to be paid at a basic rate only with no additional pension.

Subsection (5) preserves for Bereavement Allowance the rules which vary the amount of benefit according to the age of the widow when her husband dies or when her entitlement to Widowed Mother's Allowance ends.

There is a 7% deduction from the full rate of benefit for each year she is aged under 55 at that date—and, once determined, the amount stays fixed. The same rule applies to all surviving spouses for Bereavement Allowance.

Section 56: Additional Pension

Section 56 inserts a new section – section 48BB – into the Contributions and Benefits Act. This provides for the amount of Additional Pension (State Earnings Related Pension – SERPS) that widows and widowers should receive when they reach pensionable age, based on their spouses' contributions.

Legislation is already in place to ensure that those who are widowed, whether men or women, are able to use "substitution" provisions to help them achieve a basic Retirement Pension if their own contribution record during the period of marriage is inferior to that of their spouse. Section 48 of the Contributions and Benefits Act provides for circumstances in which a former spouse's contributions can be treated as if they were those of the pensioner, and section 52 contains additional provision for surviving spouses.

Under the existing scheme, widows who receive Widowed Mother's Allowance or Widow's Pension are paid an amount of Additional Pension with their weekly benefit, based on their husbands' contribution records. This benefit continues until they reach pensionable age. They are then entitled to a "Category B" Retirement Pension (i.e. a pension based on their husband's National Insurance contributions) paid at the same level.

The new scheme is different, in that Bereavement Allowance is to be paid for 52 weeks only, and without any Additional Pension (see commentary on section 55 of this Act). So, unless they are still receiving Bereavement Allowance or Widowed Parent's Allowance when they reach pensionable age, future widows and widowers will have a period before retirement when they are not receiving any bereavement benefit or Additional Pension.

But the intention is that, once they do reach pensionable age, and provided they have not remarried, they should have the same amount of Category B Retirement Pension *as if they had* been receiving a benefit with Additional Pension continuously since their date of bereavement. That is to say, their Retirement Pension should be exactly the same as if they had been claiming under the current system. Therefore, this section provides for the same entitlement rules, but by reference to the new bereavement benefits.

Commentary: the inserted section 48BB

The *inserted subsections (1)* and *(2)* relate to widows and widowers who are still receiving Widowed Parent's Allowance when they reach pensionable age. The subsections entitle them to a Category B Retirement Pension, on the basis of their spouses' contributions, at the same weekly level as their Widowed Parent's Allowance.

The *inserted subsections (3)* and *(4)* relate to widows and widowers who were previously entitled to Bereavement Allowance or were aged over 45 when they stopped being entitled to Widowed Parent's Allowance. When they reach pensionable age, they will also be entitled to a Category B Retirement Pension on the basis of their spouses' contributions—calculated by the same rules as if they had been receiving Widow's Pension. The *inserted subsections (5)* to *(8)* provide these rules.

The *inserted subsection (7)* corresponds to the new section 39C(4) inserted by section 55 (above), and provides the 50% reduction in Additional Pension for cases where the spouse dies after 5th April 2000 (see also commentary on section 52 of this Act).

The *inserted subsections (8)* and *(9)* contain the same age-related calculation as new section 39C(5). They reduce the amount of Additional Pension by 7% for every year the bereaved spouse was aged below 55 either

when their spouse died and they became entitled to Bereavement Allowance; or

when they stopped being entitled to Widowed Parent's Allowance.

In both cases they must have been at least 45 years old to qualify (so the maximum reduction is by 10 years, or 70%).

The *inserted subsection (10)* raises the amount of Additional Pension to the same level as if it had been increased by the annual uprating order every year since the date of the spouse's death.

Schedule 8: Consequential amendments

Part I of Schedule 8 makes the necessary amendments to the Contributions and Benefits Act, the Administration Act, the Pensions Schemes Act 1993, and the Income and Corporation Taxes Act 1988, so that they refer correctly to the new bereavement benefits.

Sections 57-58: Work-Focused Interviews

Section 57: Work-focused interviews

This section supports the creation of a single entry-point into the benefit system, focused on work and the help needed to enable people to return to the labour market. It does this by giving powers to require claimants of certain social security benefits to take part in work-focused interviews. It provides for the circumstances in which work-focused interviews may be required and sets out what will happen if people do not take part in the interviews.

Background

The measure will support plans to introduce a single gateway into the benefit system for people of working age who are not in full-time employment. It is intended to bring together the Employment Service, the Benefits Agency and local authorities to provide a more streamlined service, giving claimants one point of contact for all of their benefit requirements. This is why the name for this initiative is the "ONE service".

These proposals were put forward in *A new contract for welfare: THE GATEWAY TO WORK* (Cm 4102), published in October 1998.

> After claimants make initial contact to supply basic information, such as the benefits to be claimed and other details relevant to the claim, they will be given a personal adviser. The adviser will carry out work-focused interviews with each individual: discussing job potential, and providing access to a range of help and information on work, benefits and services such as childcare. The ONE service will be piloted in twelve areas, starting in June 1999. Before the powers in this section come into force, taking part in interviews will be voluntary for claimants of benefits other than Jobseeker's Allowance (JSA).

Most of the arrangements for operating the ONE service will be introduced using existing powers. There are already comprehensive powers to require those claiming JSA (who will make up the majority of claimants entering the service) to attend work-related interviews. However there are no general provisions to require people claiming any other benefit to have an interview about work. The powers in this section will require individuals claiming certain other benefits to take part in work-focused interviews with a personal adviser as a condition of entitlement. ONE is intended to encourage claimants to take further steps towards labour market participation, but any action they take beyond taking part in interviews will be entirely voluntary. For example, they will not be required to attend training courses or seek work.

Commentary

Section 57 inserts new sections 2A and 2B after section 2 of the Administration Act. All references in the commentary below are to these new sections.

New section 2A enables regulations to provide that a claim to benefit will only be considered made once the claimant takes part in a work-focused interview. Where benefit is already being paid, the payment can either be stopped, or the amount payable restricted, for failure to take part in an interview.

While the section allows for the detail of these requirements to be provided for in secondary legislation, the main ways in which it is expected to use these powers are laid out in *subsections (3)* to *(7)*. The reason for this approach is that there needs to be flexibility to adjust the various detailed aspects of the scheme in the light of experience gained during the operation of the pilot exercises.

Paragraph 83 of Schedule 12 makes the first set of regulations made under new section 2A subject to affirmative resolution (requiring positive approval in draft by both Houses of Parliament).

The power itself

New claims to benefit will be made through the ONE service. As part of the claim process, claimants will be required to take part in an interview with their personal adviser to discuss the barriers they face in moving closer to the labour market, and the help and support that is available to overcome those barriers.

Where it is considered inappropriate for someone to discuss work-related issues at that time, given the particular circumstances that they face (for example, the point of claim would not be an appropriate time to discuss work-related issues with a grieving widow), the interview could be deferred until a later date, using the power in subsection (6)(c).

Subsection (1)(a) provides regulation-making powers to require claimants of the benefits listed in *subsection (2)* to take part in a work-focused interview as part of the process of claiming those benefits. The requirement cannot apply to claimants aged 60 and over.

Subsection (1)(b) provides for regulations to be made that will enable interviews to take place where one or more of the benefits listed in *subsection (2)* is already in payment.

In some cases, claimants will be required to take part in interviews *after* benefit has been put into payment. This would happen on the occurrence of a specified event (a "*trigger point*") which could potentially affect someone's employability. These trigger points will be set out in regulations. They are likely to include: when the youngest child of a lone parent or widow reaches school age, or when the results from a Personal Capacity Assessment (see commentary on section 61) become available. Also, interviews may be triggered where claimants have not had a work-focused interview for a specified period of time.

The subsection allows for the trigger points to be specified. Claimants who do not take part in these interviews when required to do so will have the amount of benefit in payment reduced (see *subsections (4)* and *(5)*).

Subsection (2) lists the benefits to which the requirements in subsection (1) will apply.

In particular, *subsection (2)(d)* ensures that this provision will apply to the new benefits for widows and widowers introduced by section 55 of this Act. However, the Bereavement Payment (the new lump sum payment that replaces the Widow's Payment) is excluded from the provisions of this section. Although JSA claimants will enter the ONE service, the benefit is not included in this subsection: powers already exist in the Jobseekers Act 1995 enabling regulations to require claimants to attend at specified offices. Such claimants are therefore already required to fulfil the requirements of a work-focused regime.

How the power would be used

Subsections (3) to *(7)* identify the main ways in which the regulation-making powers provided under subsection (1) might be used, in order to deliver the intention that claimants should take part in work-focused interviews in connection with their benefit claims.

Where a person is claiming or receiving a number of benefits at the same time (for example Income Support, Housing Benefit and Council Tax Benefit), it is not intended to ask them to take part in separate work-focused interviews for each benefit. *Subsection (3)(a)* allows regulations to achieve this.

Subsection (3)(b) enables the Secretary of State to prescribe who will conduct the interviews.

Those prescribed are likely to be representatives of the Secretary of State, local authority employees or persons providing services to either.

The ONE service aims to give claimants a more streamlined, integrated service, by offering a single point of contact for all of their benefit requirements. It will not matter who administers the benefits they claim: the Benefits Agency, the Employment Service or local authorities. This means that a work-focused interview may be conducted by a person acting on behalf of the Secretary of State (most commonly an employee of the Benefits Agency or the Employment Service), by a local authority employee, or by a private/voluntary sector organisation contracted to provide services. Younger claimants will be required to have a meeting with the Careers Service.

Regulations under *subsection (3)(c)* will give those who conduct the interviews the power to determine where and when an interview will take place. This mirrors the provisions in section 8 of the Jobseekers Act.

It is intended that the interview will usually be conducted at a range of easily accessible Benefits Agency, Employment Service or local authority premises. However, where claimants cannot reasonably be expected to visit an office, a home visit may be arranged.

Subsection (3)(d) explains that regulations can set out the circumstances in which a person is to be treated as taking part in or not taking part in the interview.

Since the regulations under this section will impose a general requirement on claimants to take part in a work-focused interview, both the claimants and the personal advisers who conduct the interviews need to be clear about the criteria to be used in judging whether a person has actually taken part.

It is intended that the test of whether claimants have taken part will be:

> whether they attend at the time and place specified; and
>
> whether they provide information in areas relevant to their employment prospects, such as their level of educational qualifications, their previous work history, and any barriers to work they may face.

Where someone does not take part in an interview, this will affect their claim or the amount of benefit they receive (depending on when the failure to take part occurred), unless they can show ‘good cause’ for that failure.

> *Good cause* is a familiar concept in social security and is used, for example, in deciding whether people’s entitlement to JSA should stop where they have not kept an appointment with a representative of the Secretary of State (section 8(1)(d) of the Jobseekers Act).

Subsection (3)(e) enables regulations to provide that if a person is requested to take part in an interview but does not do so then, unless he can show good cause within the prescribed period, *subsection (4)* (which deals with the consequences of failure) will apply.

Subsection (3)(f) enables regulations to specify what constitutes good cause for not taking part in an interview.

Examples might be when someone had an accident on the day set for the interview or where their child fell ill or where they misunderstood the requirements placed upon them because of any language or literacy difficulties.

Subsection (4) deals with the consequences if a claimant does not take part in a work-focused interview when asked to do so.

> *Subsection (4)(a)* deals with the *initial* work-focused interview that takes place at the point of claim or (where the interview is deferred) after benefit has been put into payment.
>
> If a person does not take part in an interview at the point of claim, they will be regarded as not having completed the claims process. Any claim for benefit will therefore not proceed. Where there is a failure to take part in a deferred initial interview, that is, after benefit has been put into payment, the award will be terminated and benefit withdrawn.
>
> *Subsection (4)(b)* deals with the circumstances where entitlement already exists and a further work-focused interview is triggered under subsection (1)(b).
>
> If a person does not take part in such an interview, regulations may provide for the amount of their benefit to be reduced. The reduction will apply until such time as the claimant fulfils the requirement to take part in the interview.

Subsection (5) links to *subsection (4)(b)*, in that it deals with how any reduction in the amount of benefit payable should be calculated and applied.

> *Subsection (5)(a)* gives the power to specify how the amount of the reduction will normally be calculated.
>
> *Subsection (5)(b)* enables the regulations to allow the normal deduction to be set at a lesser amount in prescribed circumstances.
>
> This power will be used where the amount of the reduction would otherwise be greater than the amount of benefit. In addition, it is the intention to ensure that the claimant retains entitlement to a nominal amount of each benefit, to prevent the claim from lapsing and, where appropriate, to ensure that entitlement to any “passported” benefits (such as free NHS Prescriptions, free school meals) is retained.
>
> *Subsection (5)(c)* allows regulations to specify that if the individual is claiming more than one benefit, the reduction may be applied to more than one of the benefits; but the total reduction must not exceed the amount calculated under *subsection (5)(a) or (b)*.
>
> The regulations will also prioritise the benefits against which the reduction is to be applied. It is expected that Housing Benefit will be among the last benefits to which sanctions should be applied, given its specific role in covering essential housing costs. Since regulations will place an obligation only on those claiming benefits included in *subsection (2)*, no sanctions will be applied against any benefit not included within this subsection.

There will be certain people for whom a work-focused interview will not be appropriate. *Subsection (6)* enables regulations to prescribe the circumstances in which the requirement to take part in a work-focused interview is not to be applied.

It also ensures that the "designated authority" (i.e. a representative of the Secretary of State, a local authority employee or a person providing services to either) has the power to waive or defer the interview. There is no intention to set out in regulations the categories of people for whom this would be appropriate. Such decisions will be made on a case-by-case basis, depending on the circumstances of the individual claimant. Regulations will also set out that, where a person has their interview waived or deferred, they will be treated, for the purposes of their claim to benefit, as having met the requirement – until such time as it is appropriate for them to attend an interview.

> *Subsection (6)(a)* enables regulations to specify circumstances in which the requirement to take part in a work-focused interview will be disapplied: either permanently or until a specified time.
>
> It is intended that this power will be used to exempt groups of people who are claiming the benefits listed in subsection (2) but to whom the requirement should not apply. For example, Housing Benefit and Council Tax Benefit claimants who are already in full-time employment, or those claiming one of the specified benefits as well as JSA.
>
> *Subsection (6)(b)* enables the "designated authority" to decide that the requirement to take part in a work-focused interview (either as part of a claim to benefit or where entitlement already exists) should be removed where it would not be of assistance to that person, or appropriate in their particular circumstances.
>
> Regulations will not specify which groups should have the requirement waived although one example might be where a terminally ill person claimed benefit. Where an interview at the point of claim is either waived or deferred (see *subsection (6)(c)*), the claim will be treated as made, despite the fact that there has been no interview; where entitlement already exists, no change will be made to the amount of benefit in payment.
>
> *Subsection (6)(c)* enables the "designated authority" to decide that the requirement to take part in a work-focused interview should be deferred if it is determined that an interview would not be of assistance, or appropriate, at that particular time.
>
> Examples might include a person in the early stages of recovery from a major operation, or a lone parent who had just given birth.

Subsection (7) makes clear that, where the initial interview is deferred from the point of claim until a later date, regulations may provide that the interview is to take place after benefit has been put into payment.

Subsection (8) defines terms used throughout the section.

> A "*work-focused interview*" is the interview that almost all claimants will be asked to take part in, either as part of the process of making a claim, or after the benefit has been put into payment. The purpose of such an interview is to assist or encourage claimants to improve their employment prospects over time, and to identify and take steps to overcome the barriers to work they face through training or specialist support; so that, where appropriate, they can move towards education or taking up employment (whether paid or unpaid). To this end, an interview may cover such areas as previous employment record, capacity to undertake work, the in-work financial support which is available and help in areas such as childcare, housing and training.

Supplementary provisions

Section 2B makes further provision as to how the power in section 2A will be used. It provides that any decision by a personal adviser that a claimant has, without good cause, failed to take part in an interview, may be revised or appealed against – whether the adviser is from the Benefits Agency, the Employment Service or a local authority. It also provides that any personal adviser may actually revise another's decision.

Subsection (1) enables the decisions and appeals procedures in Chapter II of Part I of the Social Security Act 1998 to apply in relation to any "relevant decisions" taken by personal advisers.

Subsection (2) sets out what these "relevant decisions" are – namely, decisions that someone has failed, without good cause, to take part in an interview required under section 2A.

Subsections (3) and (4) provide that all "relevant decisions" by personal advisers should be treated as having been made by the Secretary of State – even if the personal adviser is not a civil servant. The powers in the Social Security Act to revise or supsersede a decision will apply. *Subsection (5)* will enable all personal advisers to revise or supersede a previously-taken "relevant decision".

Subsection (6) requires regulations to give a right of appeal, under section 12 of the Social Security Act, against any relevant decision.

This is intended to ensure that, in practice, all such decisions, whether made by a representative of the Secretary of State or otherwise, will be treated in the same way, with all appeals going to an independent appeals tribunal.

The subsection ensures that the right of appeal is against the personal adviser's decision that the claimant had failed to take part in an interview, rather than the decision to stop or reduce benefit. It focuses on the one decision that causes a penalty to be imposed (which may potentially affect a number of benefits).

Subsection (8) extends the definition of "information relating to social security" to include information supplied as part of a work-focused interview (which might, for example, include such subjects as a person's previous employment record and capacity to work). The intention is to ensure that information gathered about a client's employability can be passed on to their personal adviser. The extended definition applies to:

> section 3 of the Social Security Act 1998 (which allows information relating to social security, child support or war pensions to be exchanged and used for any of those purposes); and

> section 72 of this Act, which provides a framework for the use or supply of the information that underpins a number of social security and employment-related activities, including the ONE service. See the commentary on section 72 for further details.

Section 58: Optional work-focused interviews

Background

This section gives regulation-making powers that will enable new functions to be conferred on local authorities enabling them to undertake a range of work-related activities with claimants. This will allow local authorities to support the introduction of the ONE service into the benefits system (see section 57 above).

Local authorities currently have statutory responsibility for administering Housing Benefit and Council Tax Benefit. Under existing legislation, local authority staff can undertake activities and collect information only where it is relevant to the administration of those particular benefits. Various sections in this Act extend the functions of local authorities to allow them to play a full and active part in the ONE service process: for example, regulations under section 71 will enable local authorities to accept claims and collect information for other benefits. Regulations under section 72 will enable local authorities to use and disclose information about people's employability collected as part of the ONE process.

In addition, regulations under section 57 (which will come into effect in April 2000) will make it a condition of entitlement that claimants of certain benefits (including Housing Benefit and Council Tax Benefit) take part in work-focused interviews – both at the point of claim and at various points afterwards. Section 57 will also allow local authority staff to conduct these *compulsory* work-focused interviews.

However, all ONE service staff, including those working for local authorities, will also need to undertake *voluntary* work-related activities with claimants throughout the duration of the pilots.

The ONE service will be piloted in twelve areas, starting for those making new claims to benefit from the end of June 1999. For those making claims before the powers in section 57 come into force, taking part in this initiative, and having work-focused interviews with a personal adviser, will be voluntary on their part.

Once section 57 does come into effect, claimants will be required to take part in compulsory work-focused interviews in specified circumstances. However, the purpose of these compulsory interviews is to encourage claimants to take further action, including participation in additional, voluntary interviews to improve their job prospects.

Section 58 extends the statutory functions of local authorities to allow them to perform these functions. This will enable local authorities to play a full and active role in the operation of the ONE service, allowing them to provide appropriate support to those making claims to benefit both before and after the start of the compulsory phase in April 2000.

The Act also enables local authorities to be paid for this extra work (Schedule 12, paragraph 80). See the commentary after section 71 for details.

Commentary

Section 58 inserts a new section 2C after section 2B of the Administration Act (itself inserted by section 57). Section 2C enables regulations to be made to confer additional functions on local authorities in prescribed areas to allow them to undertake job-related activities, including work-focused interviews where claimants of certain benefits request or consent to such support.

Subsection (1) provides a power to make regulations to confer functions on local authorities in connection with conducting optional work-focused interviews. The main functions, in addition to the work-focused interview itself, are set out in subsection (3).

Subsection (2) will enable local authorities to provide such assistance to people making claims, or entitled to, prescribed benefits. The ONE service pilots are intended to apply primarily to those making claims to the benefits referred to in section 2A(2). The subsection will also enable local authority staff to provide extra, voluntary help to JSA claimants, and makes clear that the provisions can apply even where compulsory interviews under section 57 have taken place.

Subsection (3) specifies the main functions in connection with conducting work-focused interviews that will be conferred on local authorities under subsection (1). These will enable local authorities to ask for and receive information and evidence in connection with the interviews, including information about current and future employment or training needs. It will also enable local authorities to undertake jobsearch activity on the claimant's behalf.

Subsection (4) enables regulations under this section to make different provisions in different areas across the country. It is the intention that, initially, the regulations will confer these additional functions only on those local authorities supporting the twelve pilot areas.

Sections 59-60: Jobseeker's Allowance

Section 59 and Schedule 7: Joint claims for Jobseeker's Allowance

This section introduces Schedule 7, which provides for certain couples to claim income-based Jobseeker's Allowance (JSA) jointly (rather than one person claiming it on behalf of the couple, as happens under the existing legislation).

Background

Currently, unemployed partners of JSA claimants are not required to be available for or actively seek work. There is no targeted help and support available to assist them to return to work if they wish to do so. Ninety per cent of partners of JSA claimants are women.

Under the new scheme, an unemployed couple who do not have responsibility for children, and who belong to the group to be defined in regulations, will be required to make a joint claim for JSA and each will have to satisfy the conditions of entitlement to the benefit. Regulations will prescribe which couples will be covered by the requirement by reference to their date of birth. It is intended that the requirement will apply to couples where one or both members of the couple is aged under 25 when these measures are introduced. At least one member of the couple must have reached the age of 18.

Both partners will therefore have the same opportunity to receive help and guidance to return to work and to go onto employment programmes including the New Deal for Young People.

The basic conditions of entitlement to JSA are set out in section 1 of the Jobseekers Act. They include the requirement for the claimant to be available for and actively seeking employment and to have a "Jobseeker's Agreement" (i.e. an agreement which is entered into by the claimant and an employment officer which specifies the steps that the claimant will take in order to seek employment – as defined at section 9(1) of the Jobseekers Act).

There are currently two routes to JSA:

> Contribution-based JSA is payable only to a person who, in addition to satisfying the conditions contained in section 1 of the Jobseekers Act, satisfies the National Insurance contribution conditions (section 2 of the Jobseekers Act). It is payable at a personal rate and includes no additional payments for any dependants of the claimant. Both members of a couple may separately qualify for contribution-based Jobseekers Allowance if they each satisfy the contribution conditions on the basis of their own contributions record.
>
> Income-based JSA is an income-related benefit for which the claimant must satisfy the conditions specified in section 3 of the Jobseekers Act in addition to the entitlement conditions at section 1. One member of a couple claims for himself and for any dependants.

The Act introduces a third route to JSA: "joint-claim Jobseeker's Allowance", which will apply in certain cases where JSA is claimed for a couple. This is a sub-category of income-based JSA.

Commentary

The joint claims provision for Jobseeker's Allowance (JSA) is introduced by section 59 which brings Schedule 7 into effect.

Schedule 7 amends the Jobseekers Act to provide for joint claims.

Paragraphs 1 to 16 of the Schedule amend existing provisions of the Jobseekers Act and insert new provisions.

Paragraph 17 makes a necessary change to the rules for social security appeal tribunals set out in the Social Security Act 1998.

Paragraph 2: Entitlement to a Jobseeker's Allowance

This paragraph amends section 1 of the Jobseekers Act which provides for entitlement to JSA. Provisions for entitlement to contribution-based JSA are unchanged.

Sub-paragraph (3) inserts a *new section 1(2A)* into the Jobseekers Act, which states when income-based JSA can be claimed by a claimant who is not a member of a joint-claim couple. New subsection (2B) provides for the conditions of entitlement for a joint-claim couple.

The conditions of entitlement to JSA that joint-claim couples will have to meet are that the couple must claim jointly for the allowance and that they must each satisfy the conditions set out in paragraphs (a) to (c) and (e) to (i) of section 1(2) of the Jobseekers Act (for example, to be available for and to actively seek employment). They must also meet the conditions set out in the new section 3A, inserted by paragraph 3 of the Schedule (see below).

The couple will be covered by these requirements for so long as they claim JSA and their relevant circumstances remain unchanged. Examples of a relevant change for this purpose would be that the couple have a child or separate.

Paragraph 2(3) also inserts into section 1 two *new subsections, (2C)* and *(2D)*. *Subsection (2C)* provides a power to prescribe circumstances in which a claimant who is a member of a joint-claim couple can claim JSA as a single person, under subsection (2A).

It is intended that this should apply where one of the joint claimants fails to satisfy the conditions of entitlement for the joint-claim set out in new section 1(2B) of the Jobseekers Act. The other joint claimant, who is prepared to meet the conditions of entitlement, would then be able to claim contribution-based JSA under section 2 of the Jobseekers Act if he could satisfy the contribution-based conditions. If he could not satisfy the contribution-based conditions, he would be able to claim income-based JSA on his own behalf, by virtue of subsection (2A). However, the couple's income and capital will be taken into account in determining the amount of income-based JSA which is paid. The award of JSA would thus be at the applicable single person's rate with no additional allowance for the partner who had failed to satisfy the conditions of entitlement for joint-claim JSA.

New subsection (2D) provides a power to prescribe in regulations how the provision for joint claims will be applied to the members of a polygamous marriage.

The intention is that where one or more members of a polygamous marriage are born on or after the date set in regulations and there are no dependent children, two members of the marriage will be required to make a joint claim. One of the claimants will always be the male partner, but the members of the marriage will be able to choose which of the wives will be the other joint claimant.

Currently, polygamous marriages are recognised under the benefit system provided they took place in a country where such marriages are legal. The husband may make a claim for himself and for his dependants and receives an addition in respect of each of his wives.

Sub-paragraph (4)(b) (in effect) defines a joint-claim couple as a married or unmarried couple who do not have dependent children.

Regulations will further specify which couples will be covered by the requirement to make a joint claim. It is intended that this will be done by reference to the date of birth of members of the couple. The intention is that couples where at least one partner is born on or after the specified date will be covered by the requirement to make a joint claim. The date will be set so that, at introduction, a couple where at least one partner is aged under 25 and has reached the age of 18 will be covered. The provision would therefore extend, over time, to a couple of any age, so long as they do not have children and one of them was born after the prescribed date.

Paragraph 4: The conditions for claims by joint-claim couples

Paragraph 4 inserts *sections 3A* and *3B* into the Jobseekers Act. These new sections set out the conditions which a joint-claim couple must meet to receive income-based JSA.

Section 3A adapts the provisions of the current section 3 to deal with the circumstances of a joint-claim couple. The section also provides that at least one member of the couple must have reached the age of 18.

If the other member of the couple is 16 or 17 years old, he must have a direction from the Secretary of State under section 16 of the Jobseekers Act that (to prevent severe hardship) JSA may be paid to him or he must be in prescribed circumstances so that JSA can be paid, to satisfy the conditions in new section 1(2B)(c) for a joint-claim couple to receive JSA. (These are the same situations in which, currently, a 16 or 17 year old may be named as a dependant on the JSA claim made by a person aged 18 or over.)

Section 3B deals with the new circumstance of payment of JSA to a joint claim couple. The joint claim couple have to decide which one of them will receive payment of JSA.

If the couple express no preference or cannot agree to whom the payment should be made, the Secretary of State (i.e. a departmental official) will decide who receives the payment. Whether the decision is made by the couple or by the Secretary of State, the payee will be known as the "nominated member". Provision is also made for the circumstances where the nominated member attracts a sanction under new section 20A introduced by paragraph 13. In these cases the other member of the couple, who has not attracted a sanction, will become the nominated member.

The legislation does not prevent direct payments to persons besides the nominated member (see section 3B(5)). Like other JSA claimants, joint-claim couples may have a proportion of their JSA deducted and paid direct to a third party. This is usually applied where JSA claimants have part of their benefit paid direct to a fuel company or mortgage provider. In exceptional circumstances, for example where a claimant has budgeting problems due to alcoholism or gambling, the Secretary of State may use his discretion to pay all or part of a JSA award to the claimant's partner. This is extended to joint-claim couples so that the Secretary of State may make direct payment to the member of the couple who is not the nominated member.

Paragraph 5: Amount payable by way of a Jobseeker's Allowance

This amends section 4 of the Jobseekers Act, which sets out how the amount of JSA payable to an individual claimant is calculated.

It provides a method for calculating JSA where a joint claim has been made. Subsections (6) to (11) of section 4 will not apply to joint claimants but corresponding provisions are included in new section 4A (see note on paragraph 6, below).

Paragraph 6: Amount payable by way of a joint-claim Jobseeker's Allowance

Paragraph 6 inserts *new section 4A* into the Jobseekers Act. It sets out how the amount of JSA payable to a joint-claim couple is calculated and paid where a joint claim has been made and where one or both members of the couple are also entitled to contribution-based JSA.

In effect, this corresponds to subsections (6) to (11) of section 4, which make similar provision for individual claimants. The effect is that where claimants are entitled to both contribution-based JSA and income-based JSA they will receive whichever gives them the greatest amount of benefit. This ensures that members of a couple may receive individual awards of contribution-based JSA where this is in their best interests, even though they have initially made a joint claim. Where contribution-based JSA is paid to an individual, instead of joint-claim JSA, the joint claim rules will not apply.

Paragraph 7: Attendance, information and evidence

This paragraph amends section 8 of the Jobseekers Act in order to adapt the provisions on attendance, information and evidence for joint claims.

The intention is that joint claimants will be able to choose to attend the New Jobseeker Interview either with their partner or separately. They will both have a responsibility to provide information in connection with the furtherance of the joint claim.

Paragraph 8: The Jobseeker's Agreement

This amends section 9(12) of the Jobseekers Act, which provides that a Jobseeker's Agreement ceases to have effect when the claimant's award of JSA comes to an end, to adapt it for joint-claim couples.

Regulations will provide for circumstances in which the Agreement will continue; for example, where the joint-claim couple start a family, the JSA claim will change to a single claim for the whole family. The Agreement may continue and be reviewed.

Paragraph 9: Income and capital

Paragraph 9 inserts *new subsections (2A)* and *(2B)* into section 13 of the Jobseekers Act to adapt it for the purposes of joint-claim couples. Section 13 deals with the treatment of income and capital on a claim for income-based JSA.

Paragraph 10: Trade disputes and joint-claim couples

This paragraph inserts a *new section 15A* into the Jobseekers Act. Sections 14 and 15 of the Jobseekers Act will have effect in relation to joint-claim couples in accordance with the new section 15A.

Currently a person involved in a trade dispute is not entitled to either contribution-based or income-based JSA. However, the partner of the person involved in the trade dispute may make a claim for income-based JSA for herself and any dependants, but no part of the allowance is payable for the person involved in the trade dispute.

The intention of new section 15A is to preserve the current situation with respect to joint-claim couples. Where both members of the couple are involved in a trade dispute and therefore prevented by section 14 from being entitled to JSA, the couple will not be entitled to joint-claim JSA. But where only one member is prevented from being entitled to JSA as a result of section 14, this alone will not prevent the couple from being entitled to a joint-claim JSA.

Currently where the partner of someone who is prevented from claiming JSA by virtue of section 14 makes a claim, the couple receives 50% of the appropriate applicable amount and premiums for the couple. A joint-claim couple who made a claim relying on section 15A would also receive an equivalent amount of JSA.

Paragraph 11: Reduced payments

This paragraph inserts *new section 17(1A)* into the Jobseekers Act. This provision mirrors *section 17(1)* of the Act. It provides a power for the amount of JSA payable to a joint-claim couple to be reduced where a member of the couple is a young person aged 16/17 years old and incurs a sanction.

Regulation 63 of the Jobseeker's Allowance Regulations (S.I. 1996/207) sets out the provisions for reducing payments in respect of a 16/17 year old who incurs a sanction and it is intended that similar provisions will apply to a 16/17 year old member of a joint claim couple.

Paragraphs 12-13: Circumstances in which Jobseeker's Allowance is not payable

Paragraph 13 inserts two *new sections, 20A* and *20B*, into the Jobseekers Act. These parallel the existing sections 19 and 20, but apply to joint claims. *Paragraph 12* inserts a reference to the new sections.

Section 19 of the Jobseekers Act provides circumstances in which JSA is not payable (sanctions). It provides for JSA not to be payable where, for example, the claimant has failed to apply for employment notified to him or has voluntarily left employment without good cause. Section 20 provides for exemptions to section 19.

Payment where one member of the joint-claim couple has breached new section 20A

Where one of the joint claimants breaches subsection (2)(a)-(g) of new section 20A, the claimant who has not contravened JSA rules will receive the same amount of JSA payment as if he had claimed JSA on his own behalf.

It is intended that regulations under the power provided in *subsection (6)* of new section 20A will provide that where the claimant who has not breached the rules meets JSA contribution conditions, he will be paid an amount of income-based JSA equivalent to the rate of contribution-based JSA for the duration of the period of the sanction, provided he continues to meet JSA entitlement conditions.

If he does not meet the JSA contribution conditions, he will be paid an amount equivalent to the amount of income-based JSA that he would receive were he to make a claim for income-based JSA on behalf of himself only (taking into account the couple's income and capital in determining the amount), provided he continues to meet JSA entitlement conditions.

New section 20A(7) provides that, if the claimant who normally receives the payment of JSA is the person who has breached new section 20A, payment of the single rate of JSA for the duration of the sanction will be made directly to the other claimant member of the couple.

Where both claimants breach JSA rules, new section 20A(5)(a) provides that no JSA will be paid for the period during which both are subject to sanctions.

It is intended that regulations will also provide that, where certain breaches of JSA rules attract a stoppage of JSA for two weeks for the first breach and a stoppage of JSA for four weeks for the second breach, the four week stoppage of JSA will apply only where the same partner on a joint claim contravenes the JSA rules more than once.

Paragraph 14: Termination of awards where another entitlement exists

This paragraph amends section 31 of the Jobseekers Act 1995 to extend it to joint-claim couples. It is a general rule that Income Support and JSA are mutually exclusive. In order to be entitled to JSA a person's award of Income Support must come to an end and in order to be entitled to Income Support a person's award of JSA must come to an end. Section 31 permits termination of awards for this purpose.

Paragraph 15: Interpretation

This paragraph amends the definition of "claimant" as contained in section 35 of the Jobseekers Act to include a joint-claim couple claiming a joint-claim JSA or each member of such a couple as the context requires. It also inserts definitions for "joint-claim couple", "joint-claim Jobseeker's Allowance" and "the nominated member".

Paragraph 16: Entitlement without satisfying conditions

This paragraph amends Schedule 1 to the Jobseekers Act (Jobseeker's Allowance: supplementary provisions).

Sub-paragraph (2) inserts a *new paragraph 8A* which allows the Secretary of State to prescribe circumstances in which a joint-claim couple will be entitled to joint-claim JSA even though only one member of the couple satisfies the JSA conditions referred to in new section 1(2B)(b).

Exemptions are necessary to cater for those who are unable to meet the JSA conditions, for example, those who do not meet the capability condition (in section 1(2)(f)) because of illness or disability. Others who have extensive caring responsibilities or are studying full-time will not be able to meet the availability condition (in section 1(2)(a)).

The intention is not to disentitle such joint-claim couples where one member of the couple cannot meet the conditions either at the outset of the joint claim or during the claim. (Currently, the partner is treated as a dependant on the JSA claim and is not required to meet the JSA conditions.)

Regulations will specify the persons to whom the provision applies, but it is intended that the categories will include persons caring for another person, persons incapable of work and those studying full-time in certain circumstances.

Transition to a joint claim

New paragraph 8A(2) of Schedule 1 to the Jobseekers Act provides for regulations to prescribe circumstances in which a couple is entitled to income-based JSA, without having made a joint claim for it. Such a couple will be called a transitional couple (defined as one where a member is entitled to income-based JSA on the coming into force of Schedule 7 to the Act).

The intention is that the couple will be treated as meeting JSA conditions of entitlement until the new claimant member of the couple is required to attend and provide information in connection with the joint claim.

Continuity of claims and awards

This paragraph inserts new paragraphs 9A, 9B, 9C and 9D into Schedule 1 to the Jobseekers Act 1995. These paragraphs contain powers to prescribe circumstances in which an award of joint-claim JSA should be treated as continuing in the form of an award of income-based JSA or contribution-based JSA; an award of joint-claim JSA should lapse; and in which an award of joint-claim JSA may be revived without the need for the claimants to make a new claim. Provision is also made to cater for cases where a claim has not yet been determined.

The various powers cater for JSA claimants who have a change of circumstance, which means they either cease to be a joint-claim couple or become a joint-claim couple. The underlying aim is to avoid unnecessary bureaucracy and ensure that joint-claim couples are treated in the same way as other JSA claimants, whilst at the same time being able to require a fresh claim where this is necessary.

It intended, for example, to use the power to continue an award where a couple in receipt of joint-claim JSA have a baby and so cease to be a joint-claim couple but still need to claim JSA.

Claims yet to be determined and suspended payments

Sub-paragraphs (5), (6) and *(7)* of paragraph 15 amend paragraph 10 of Schedule 1 to the Jobseekers Act (claims yet to be determined and suspended payments) to allow regulations to prescribe when a joint-claim couple or a member of such a couple may be treated as entitled to income-based JSA before the claim has been decided. It is intended that regulations will specify the same circumstances as are currently provided for JSA claimants in regulations.

They also allow for income-based JSA to be paid to the joint-claim couple or a member of such a couple where payment has been suspended. It is intended that regulations will specify the same circumstances as are currently provided for JSA claimants in regulations.

Paragraph 17: Interpretation of Chapter II of Part I of the Social Security Act 1998

Paragraph 17 amends section 39(1) of the Social Security Act 1998 so that members of joint claim couples have a right of appeal jointly or separately.

Schedule 8: Paragraph 28

This paragraph amends section 124(1)(f) of the Contributions and Benefits Act which provides that a person is only entitled to Income Support if he is not entitled to Jobseeker's Allowance. Income Support and JSA are mutually exclusive benefits. As with the provision at paragraph 14 of Schedule 7, it ensures that this general rule is extended to joint claim couples.

Schedule 8: Paragraph 29

Sub-paragraphs (2) and (3) amend sections 4 and 17 respectively of the Jobseekers Act, to ensure consistency of wording with provisions in Schedule 7 to this Act, which introduces joint claims for Jobseeker's Allowance.

Section 60: Special schemes for claimants of Jobseeker's Allowance

Background

This section enables the establishment of Employment Zones. Employment Zones are defined geographical areas where the Secretary of State for Education and Employment contracts with external organisations, either public or private, to try to help long-term unemployed claimants of Jobseeker's Allowance (JSA) to find sustainable employment.

Plans for Employment Zones were announced by David Blunkett, the Secretary of State for Education and Employment, on 2 February 1999, and consultation over the detailed elements of the proposals finished on 30 April 1999. Five prototype Employment Zones and three further, smaller-scale development projects were set up during 1998, under existing legislation. But in order fully to implement Employment Zones, primary legislation was needed in the following areas:

> First, Employment Zones are concentrated on specific areas of high long-term unemployment; yet existing legislation limited the Secretary of State's powers to alter the conditions of entitlement to JSA for different areas of the country;
>
> Second, a key feature of Employment Zones not available in the prototypes is the "Personal Job Account". This will be an account set up for individual participants in the Zone– with the aim of getting them back to work more quickly. It will enable them to anticipate up to 6 months of the funding for training and jobsearch, combined with funds equal to the payments that they would normally receive from JSA.
>
> Third, legislation was required so that, for example, when people do not conform to the requirements of the Employment Zone (e.g. fail to complete and agree an Action Plan with their personal adviser), without good cause, their JSA payments could be withheld.

Commentary

Subsection (1) enables regulations to provide for special arrangements to be made for JSA claimants in geographically defined areas to assist them to find sustainable employment. This subsection enables Employment Zone delivery agents to undertake schemes which may not be available elsewhere in the country. Schemes may also cover the whole of Great Britain.

Subsection (2) provides examples of provisions which can be included in regulations made under this section.

One such provision (set out in subsection (2)(a)) would involve imposing further conditions upon recipients of JSA within an Employment Zone for receiving the benefit. Thus, they could be required to complete and agree an Action Plan with their personal adviser as a precondition for receiving JSA. Regulations made under this section could also suspend the normal labour market conditions, namely, actively seeking and being available for work, for those participating in a prescribed scheme. This is necessary because activities on an EZ may not be consistent with the usual JSA conditions.

Subsection (3) gives a power to apply the provisions of the Jobseekers Act with modifications.

Subsection (4) ensures that the provisions from the Act that may be applied in this way include the rules for when claimants do not meet the conditions of JSA, and the benefit is not paid.

Section 19 of the Jobseekers Act sets out the circumstances when sanctions may be applied to JSA claimants, and the benefit not paid. Examples are when someone has refused to accept a place on an employment programme, or lost that place through misconduct. Section 20A contains the parallel provision for joint-claim JSA introduced by Schedule 7 to this Act (see commentary on section 59 for details). *Subsection (4)(a)* provides that this sanctions regime may be modified for participants in an Employment Zone. The modified details (for example, the length of the sanction) would be set out in regulations (in the same way that the current details are set out in the JSA Regulations).

Section 20 of the Jobseekers Act (and the new section 20B for joint-claim JSA) provides for exemptions to the circumstances when JSA is not payable under section 19 (or 20A). Examples might be where a person is ill, or on jury service. It also gives the power to define when hardship payments may be made to claimants, even though JSA is not in payment. *Subsection (4)(b)* ensures that these provisions may also be modified for participants in Employment Zones.

Subsection (5) enables the Secretary of State to associate himself, financially or otherwise, with arrangements to assist people into sustainable employment.

In Employment Zones this may include contracting out and providing funding to Employment Zone delivery agents for the provision of the necessary services to assist people to find work.

Subsection (6) ensures that the National Assembly for Wales can make payments to those running Employment Zones in Wales without changing the devolution arrangements for training for work, jobsearch and social security, and without restricting the use of such payments to the provision of training.

It is not intended that this change should broaden the Assembly’s role in relation to jobsearch or other non-transferred matters.

Subsection (7) enables the Secretary of State to use the existing powers in section 26 of the Employment Act 1988 with respect to schemes operating under this section.

Section 26 gives the power to make an order covering details of the employment status of those participating in training schemes within an Employment Zone; and details on how income gained while on the scheme should be treated for the purposes of other relevant legislation (e.g. legislation relating to tax or National Insurance contributions).

Section 61: Incapacity for Work

Background

Entitlement to incapacity benefits is dependent on satisfying one of two tests of incapacity for work set out in legislation.

The 'Own Occupation Test' normally applies for the first 28 weeks of incapacity, for those with a recent work record. The test assesses the claimant's ability to do their usual job, based on medical evidence from their GP.

The 'All Work Test' applies after 28 weeks of incapacity for those with a recent work record and from the start of the claim in all other cases. It is a functional test which assesses the claimant's ability to perform a wide range of activities.

The benefits which depend on satisfying the test of incapacity for work are Incapacity Benefit (IB); Severe Disablement Allowance (which is abolished for new claimants by section 65); Income Support; the disability premiums in Income Support, Housing Benefit and Council Tax Benefit; and, in addition to these benefits, National Insurance credits awarded on grounds of incapacity.

The consultation paper *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103) gave a commitment to reform the All Work Test, by changing it so that, as well as establishing the level of people's incapacity for work for benefit purposes, it provides information which will be potentially helpful to claimants and their personal advisers, in combination with a wider assessment of employability, to decide what might be done to assist a return to work.

Summary of changes

Section 61 and Part II of Schedule 8 work together to achieve this reform. Section 61:

renames the All Work Test the "Personal Capability Assessment". This reflects the additional elements added by the section and Part II of Schedule 8, which provide that, as well as producing information for benefit purposes, about people's incapacity,

the assessment process should produce information about people's capabilities; and that

both kinds of information may be used for the purposes of helping people enhance their employment prospects.

retains the existing powers for determining whether a person is "incapable of work" for the purposes of receiving incapacity benefits. The threshold of incapacity at which it would be unreasonable to require a person to work, or seek work, will be unchanged;

enables the Personal Capability Assessment process to be started earlier, with the intention of identifying people's needs as quickly as possible;

makes clear that the Personal Capability Assessment may be repeated at any time throughout the duration of entitlement to benefit.

Section 61: Incapacity for work: Personal Capability Assessments

The section replaces section 171C of the Contributions and Benefits Act, which provides for the All Work Test. *New section 171C* for the most part mirrors the existing provision for the All Work Test, but renames it the Personal Capability Assessment. It also enables the Personal Capability Assessment to be carried out before a person technically becomes subject to the assessment. The intention is to speed up the process and secure a proper assessment of people's needs at an early opportunity. The section also ensures that the Personal Capability Assessment may be repeated, to determine whether a person continues to be incapable of work.

New subsections (1) to *(3)* mirror the existing provision for the All Work Test.

Subsection (1) provides for the “Personal Capability Assessment” to apply in the same way as the All Work Test.

Subsection (2): allows the details of the Personal Capability Assessment to be set out in regulations.

This follows the existing provision for the All Work Test, but deals with capacity as well as incapacity. The existing regulations for the All Work Test set out measures of the extent of a person’s incapacity in specified activities which relate to the ability to work. They cover physical, sensory and mental functions (e.g. walking; sitting; bending and kneeling; hearing; vision; concentration and mood). Assessment is based on a scoring system: claimants who reach a set points threshold are entitled to incapacity benefits, subject to meeting entitlement conditions.

Subsection (3) gives the power to provide for treating people as incapable of work until they have had a Personal Capability Assessment, or have been classed as capable of work for other reasons (for instance, if they fail to respond to a request for information or evidence). It ensures that incapacity benefits can remain in payment pending a decision on whether a person satisfies the test of incapacity.

New subsections (4) and *(5)* make new provisions for the Personal Capability Assessment.

> *Subsection (4)* enables a Personal Capability Assessment to be carried out during the first 28 weeks of incapacity (i.e. while the Own Occupation Test still applies for benefit entitlement purposes).
>
> Currently the process of assessment cannot begin until the date when the All Work Test applies (usually after 28 weeks of incapacity), and can typically take many weeks to complete. This can mean that decisions on benefit entitlement are delayed, and that, following the introduction of the new capability element, information which would be helpful in preparing for a return to work would not be available when it would be of most value – before people have become detached from the labour market. Enabling the process to begin *before* week 29 is intended to address these problems.
>
> *Subsection (5)* ensures that “the Secretary of State” (normally a Benefits Agency official, acting on the Secretary of State’s behalf) may require people who have been found incapable of work in accordance with a Personal Capability Assessment (and who are therefore entitled to incapacity benefits) to undergo a reassessment for the purposes of determining whether they are still incapable of work.

Schedule 8: Part II – Incapacity

Paragraph 23

This paragraph makes amendments to section 171A of the Contributions and Benefits Act, relating to the Personal Capability Assessment provided for in section 61. The intention of the new assessment process is to produce information about people’s capabilities, as well as a decision on their incapacity for work for benefit purposes, and for this information to be used to help them enhance their employment prospects.

Sub-paragraph (2) inserts a *new subsection (2A)* into section 171A of the Contributions and Benefits Act, to widen the scope of the information or evidence that may be requested from claimants.

Subsection (2) of section 171A of the Act currently provides the power to obtain information and evidence in order to determine whether a person satisfies the test of incapacity for work for purposes of entitlement to benefit. The new Personal Capability Assessment will have a dual function: to determine whether a person satisfies the test for benefit entitlement, *and* to use information about a person’s capabilities gathered during the assessment process to draw up a "capability report" on what they might nevertheless be able to do with appropriate help and support. New subsection (2A) provides for the collection of "information or evidence capable of being used for assisting the person in question to obtain work or improve his prospects of obtaining it" – i.e. information about people's work-related capabilities.

In practice, much of the information generated during the Personal Capability Assessment process will be equally relevant to the advice whether a person should be treated as incapable of work for benefit purposes, and to the "capability report". However there may be additional areas that may usefully be explored – such as what work-related activities the person might be able to do, and what sort of help they might need to do them.

Sub-paragraph (3) deals with the power to require claimants to attend a medical examination.

It amends subsection (3) of section 171A of the Contributions and Benefits Act. Subsection (3) at present provides that a person may be called to attend a medical examination where "a question arises as to" whether a person is capable of work. This is now replaced with "where it falls to be determined" whether a person is capable of work, to make it clear that it is not necessary for a medical examination to be preceded by a particular event which has raised a question in the mind of the decision-maker. This amendment supports the provision in section 61 of this Act to clarify the Secretary of State's power to require a reassessment.

Sub-paragraph (4) inserts a new subsection (5) into section 171A which ensures that all information supplied under section 171A is treated as social security information, so that powers relating to the exchange and disclosure of social security information apply to it.

This ensures that information collected during the Personal Capability Assessment which relates to a person's work-related capabilities, as well as information that relates strictly to the question of whether they are technically incapable of work for benefit purposes, can be passed on to personal advisers. It may also be used more generally, for the purpose of enhancing a person's employment prospects and rehabilitation. The relevant powers dealing with information are section 3 of the Social Security Act 1998 and section 72 of this Act (see later commentary).

Paragraph 24 makes a minor change of wording, consequential on the renaming of the All Work Test.

Sections 62-65: Incapacity Benefits

Incapacity Benefit (IB) is a contributory benefit which provides an income for people who are unable to work because of illness or disability, and have paid a specified amount of National Insurance contributions.

These sections make a number of changes to the IB legislation. They:

amend the National Insurance contribution conditions for new claims;

allow income from occupational and personal pensions to be taken into account when assessing what amount of IB people receive;

extend entitlement to IB to long-term incapacitated people who claim while aged 16-19 (or, in prescribed cases, before age 25) and who would currently receive Severe Disablement Allowance.

They also:

abolish Severe Disablement Allowance for new claimants (section 85 provides powers to protect the benefit for existing recipients.)

The Government's proposals were published in the consultation document *A New Contract for Welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103) in October 1998.

Section 62: Incapacity Benefit: restriction to recent contributors

Previously, in order to qualify for Incapacity Benefit (IB), people had to satisfy the two National Insurance contribution conditions set out in paragraph 2 of Schedule 3 to the Contributions and Benefits Act:

> First, they must have *paid* either Class 1 (employed) or Class 2 (self-employed) National Insurance contributions, or a combination of both, on earnings equal to at least 25 times the Lower Earnings Limit (currently £66.00 a week) in *any* one tax year prior to the benefit claim; and
>
> Second, they must have paid, or been credited with, either Class 1 or Class 2 National Insurance contributions, or a combination of both, equal to at least 50 times the Lower Earnings Limit in each of the two tax years prior to the benefit year in which they claim IB. A benefit year begins on the first Sunday in January; the tax year starts on 6 April.

Under the Social Security (Credits) Regulations 1975, people can be given credits in a number of circumstances, to help maintain their contribution record. The main effect of credits is to help people qualify for retirement pensions, but they can also count for other benefits. Credits which can count for the purpose of the second contribution condition in IB include credits for weeks of unemployment, incapacity or training, and credits for weeks receiving Invalid Care Allowance or Disabled Person's Tax Credit.

Commentary

Subsection (2) amends the entitlement rules for IB, so that benefit is payable only to those who have worked and paid National Insurance contributions in one of the *last three* tax years.

It replaces the first National Insurance contribution condition, by replacing paragraph 2(2)(a) of Schedule 3 to the Contributions and Benefits Act.

To qualify for benefit in future, claimants, in addition to satisfying the second contribution condition, must actually have *paid* either Class 1 or Class 2 National Insurance contributions, or a combination of both, on earnings equal to at least 25 times the Lower Earnings Limit in one of the last three tax years before the benefit year to which the claim is made, rather than in any one tax year. This brings IB more into line with contribution-based Jobseeker's Allowance (JSA). The second contribution condition will remain unchanged.

The current provision, in paragraph 2(7) of Schedule 3 to the Contributions and Benefits Act, allows people who do not satisfy the second condition at the time they first claim to make a repeat claim at a later date when they will satisfy it (usually the following January, when the start of a new benefit year triggers a different pair of tax years). *Subsection (3)* extends this to cover the new first contribution condition. This will ensure that people who have paid sufficient contributions to satisfy the contribution conditions from a future date at the point they fall ill or become disabled, are not permanently prevented from qualifying for IB.

For example: a student who works only for a few months after leaving university and then has a serious accident, would have paid contributions in too recent a tax year to qualify for IB—and would not be able to claim the benefit without this provision.

Subsection (4) provides a regulation-making power to modify the new first contribution condition for people in a specified class.

It is intended to use this power to protect people who have paid contributions at some stage but who have not had the opportunity to do so recently because, for example, they have been carrying out caring responsibilities for which they receive Invalid Care Allowance. People on DPTC who have earnings below the LEL for more than two years will also be protected by this sub-paragraph. Without it they would be unable to re-qualify for IB as they would not have paid any contributions and would also be beyond the 2 year linking rule. It will also be used to protect people who were in receipt of IB in the tax year before a new claim; without this protection, they may be unable to re-qualify for benefit after short breaks in entitlement.

Section 63: Incapacity Benefit: reduction for pension payments

This section provides for Incapacity Benefit (IB) to be reduced by 50 pence for every pound of income above £85 that a claimant has from an occupational or personal pension.

IB is usually paid only to people of working age. However, where a person under state pension age (60 for women and 65 for men) has an occupational or personal pension, this previously did not affect entitlement to IB.

Commentary

The section makes these provisions by inserting a new section 30DD into the part of the Contributions and Benefits Act that contains the rules for IB.

The *new section 30DD(1)* provides that where someone who is entitled to IB has income from a pension payment, which is defined by section 30DD(5) to include occupational pensions, personal pensions, and public service pensions, and that pension payment is in excess of a threshold amount of £85, provided by subsection (2), 50 per cent of the excess will be deducted when assessing IB. The *new section 30DD(2)* defines the amount of the threshold as £85 a week, or if the period in question is not a week the appropriate proportion as prescribed in regulations.

The *new section 30DD(3)* gives power to prescribe in regulations people who may not have their benefit reduced. It is intended to use this power to prescribe that people on IB who are entitled to the highest rate care component of Disability Living Allowance will not have their IB reduced.

The *new section 30DD(4)(a)* allows exemptions to be made. For example, the intention is to use this power to disregard payments where the pension payments are in connection with the death of a member of a scheme, or where an occupational pension scheme is in deficit or has insufficient resources to pay the full pension.

The *new section 30DD(4)(b)* gives the power to make regulations to assume a notional income in cases where claimants deliberately choose not to take a pension payment in order to increase or maximise their benefit.

The intention is to make similar regulations to those already in place for other benefits, including Income Support and Jobseeker's Allowance. In the case of personal pensions, the regulations prevent any notional income being taken into account before the person is aged 60. They also provide for notional income to be assessed on the basis of information supplied by the pension provider, using tables supplied by the Government Actuary's Department. It will allow the DSS to take into account the amount of pension income which the claimant deferred. But the amount would have to be greater than £85 a week before it would affect IB.

The *new section 30DD(4)(c)* enables regulations to provide that it is the aggregate amount of pension payments that will be deducted from IB if they exceed the threshold.

The *new section 30DD(4)(d)* provides the power to apportion pension payments into weekly payments.

For example, this will enable monthly pension payments to be converted into weekly amounts so that they can be deducted from IB on a weekly basis.

The *new section 30DD(5)* defines what is meant by “pension payment”. This includes payment from personal pension, occupational pension and public service schemes.

The *new section 30DD(5)(b)* provides the power to prescribe other types of pension, or similar, income for which a deduction may be made (as is the case for JSA).

It is intended to use the power to prescribe that permanent health insurance payments should be deducted from future IB claims. This would apply to those permanent health insurance schemes that are arranged by employers to provide for employees, where the contract of employment has ended. It would not apply to schemes used to fund normal occupational sick pay. In the same way as for occupational and personal pensions, the first £85 a week would be totally disregarded and 50% of the remainder deducted from future IB.

The power in *new section 30DD(5)(c)* to specify other payments would enable income to be taken into account if new products are developed which provide similar income to occupational and personal pensions or permanent health insurance.

The *new section 30DD(6)* provides the definition of the occupational pensions, personal pensions and public service pensions to be taken into account when assessing IB. These pensions are defined in the Pension Schemes Act 1993 and are already used for JSA purposes.

The Act provides (at *Part II of Schedule 8*) for any regulations concerning the definition of pension payments to be subject to affirmative resolution by both Houses of Parliament. That is to say, the regulations must be approved in draft by Parliament before being made. This is in line with the procedures for JSA.

Part II of Schedule 8 makes some minor amendments to existing legislation as a result of the Act’s provisions for IB.

Section 64: Incapacity benefit: persons incapacitated in youth

This section allows a new category of people to claim Incapacity Benefit (IB). They are those people aged between 16 and 19 (or, in prescribed cases, age 25 – see below) who would currently claim and receive Severe Disablement Allowance (SDA). Section 65 of this Act abolishes SDA for new claimants.

Subsection (1) amends the entitlement conditions for IB set out in section 30A of the Contributions and Benefits Act, and provides that this group may receive IB without meeting the contribution conditions.

Subsections (2) and *(4)* make consequential amendments.

Subsection (3) inserts a *new subsection (2A)* into section 30A of the Contributions and Benefits Act.

To be entitled to IB without having satisfied the contribution conditions, a person must have become incapable of work before the age of 20 (or 25 in certain circumstances), must satisfy the conditions of residence or presence in Great Britain, and must not be in full-time education. *Subsection (2A)(c)* provides that these people must also have been continuously incapable of work for at least 196 days (28 weeks) before benefit can be paid. This is intended to ensure that the benefit is correctly targeted at long-term incapacity for work.

Subsection (2A)(b) gives a regulation-making power to extend the cut-off age from 20 to 25 in certain circumstances.

It is intended to use this power to extend the age cut-off from 20 to 25 for people in education, or vocational or occupational training. The intended qualifying conditions for extending the age cut-off will be that:

they must have started the course before their 20^{th} birthday; and

they must have finished their course no earlier than in one of the last two complete tax years before the year in which they claim benefit (the tax year starts on 6 April and the benefit year begins in the next January). So, for example, if their course finishes in June 2005, they will be able to claim IB until December 2008 (so long as they are still under 25).

The inserted subsection (2A)(d) gives regulation-making powers to define the residence and presence conditions. It is intended to use this power to require claimants to have been ordinarily resident or present in Great Britain for a total of at least 26 weeks in the year up to the date of entitlement.

Once a person has qualified for IB under these new rules they may re-claim benefit after the age of 20, following a break in claiming, if the new claim “links” with the previous period of entitlement to IB. For claims to link, the break between benefit claims must not exceed 8 weeks. For those who leave benefit because of starting work the linking period is extended to 52 weeks under the Welfare to Work Regulations 1998. And, for those who leave benefit and claim Disabled Persons` Tax Credit or start a Training for Work course, the linking period is extended to two years.

Subsection (5) inserts *new subsections (6) and (7)*into section 30A of the Contributions and Benefits Act. It is intended to use the power in subsection (6) to allow people to re-qualify for short-term benefit even though they may be over the age limit, if they were awarded IB under the new conditions in subsection (2A) and left benefit to work but earned below the lower earnings limit, or went abroad, and did not re-qualify for benefit through the linking rules.

The intention is to use the power in subsection (7) to define “full-time education” to apply only to people aged 16-18, and to provide that, in order to qualify for benefit, they must spend less than 21 hours a week in education (excluding any time spent on a course not normally taken by a non-disabled student).

Section 65: Abolition of Severe Disablement Allowance;

This section, and*Part IV of Schedule 13*, abolishes Severe Disablement Allowance (SDA), by repealing sections 68 and 69 of the Contributions and Benefits Act.

SDA is a non-contributory, non means-tested benefit, paid to people who cannot work because of illness or disability, and who have not paid sufficient National Insurance contributions to qualify for Incapacity Benefit (IB). For people who become incapable of work before the age of 20, the qualifying test of “incapacity” is the same for SDA as for IB—but those aged 20 and over must additionally be assessed by a doctor as “80% disabled”.

Approximately 70% of SDA recipients also claim Income Support to top up their income, and therefore see no financial gain from claiming the benefit. This is because SDA is paid at a lower rate, and is always deducted pound for pound when calculating the amount of Income Support payable.

Part IV of Schedule 13 makes the necessary consequential repeals for the abolition of SDA.

Section 85 provides a regulation-making power to make transitional and saving provisions which will allow the Government to protect existing recipients. In *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103), the Government said that those recipients aged 20 or above at the point of change would continue to get the benefit.

The Government intends to make regulations that will automatically transfer, a year after the changes are introduced, those under 20s who were entitled to SDA at the point of change, onto long-term Incapacity Benefit. This will give this group of people access to long-term IB at the same time as those who bocame entitled to short-term IB under the new entitlement conditions introduced by section 64 of this Act.

Sections 66-67: Disability Benefits

Sections 66 and 67 make three changes to disability benefits. They:

introduce regulation-making powers as to entitlement to Attendance Allowance;

amend the terminology relating to awards made for an indefinite period; and

extend entitlement to the higher rate mobility component of Disability Living Allowance to 3-and 4-year-old severely disabled children with serious mobility problems.

Background

These proposals were put forward in the consultation paper *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103), published in October 1998.

The consultation paper also proposed the introduction of a “Disability Income Guarantee” to provide additional help for disabled people aged under 60 with the greatest needs and lowest incomes. This measure does not require primary legislation.

Disability Living Allowance (DLA) is a benefit to help with the extra costs of disability. It has two components:

the care component, which has three rates of payment and is available for those who become disabled, need care and attention, and claim the benefit below the age of 65; and

the mobility component, which has two rates of payment and is available for those who become disabled, have serious problems with their mobility and orientation, and claim the benefit between the ages of 5 and 65. The higher rate mobility component is paid to those whose mobility is very seriously restricted; the lower rate is for those who can walk, but need guidance or supervision.

Although the main conditions of entitlement to DLA are set out in primary legislation, there are regulation-making powers which enable the circumstances to be prescribed in which a person is taken to satisfy or not satisfy the conditions of entitlement.

Attendance Allowance (AA) is a benefit paid towards the extra costs of people who are so disabled that they need care and attention from another person, and who become disabled, or claim the benefit, after the age of 65. The conditions of entitlement and the circumstances in which a person qualifies for AA are currently set out in primary legislation. There are two rates of payment: a lower rate for those who need care either by day or night, and a higher rate for those needing both.

Both DLA and AA are non-contributory, non-means-tested benefits, which are paid tax-free. Awards may be for a fixed or indefinite period.

Commentary

Section 66: Attendance Allowance

Regulation-making powers

Currently, the rules that specify the conditions of entitlement and the circumstances in which a person qualifies for Attendance Allowance (AA), are set out in primary legislation, in the Contributions and Benefits Act (sections 64(2) and 64(3)). The present lack of regulation-making powers in AA means, for example, that when proposed changes apply to both AA and Disability Living Allowance (DLA), which are very closely related benefits, it is not possible to introduce the changes simultaneously through regulations.

Subsection (1) introduces a regulation-making power for AA similar to the power to make regulations for DLA.

It inserts a *new section 64(4)* into the Contributions and Benefits Act, to create a power to prescribe circumstances in which the AA night attendance or day attendance conditions are, or are not, to be taken as met.

It is intended that the regulations would be used when the conditions of entitlement to AA needed to be amended or clarified: for example, if a judicial decision departed significantly from the policy intention.

Attendance Allowance for the terminally ill

AA can be awarded, and special rules applied, in respect of people who are terminally ill. Section 66 (1) of the Contributions and Benefits Act refers to entitlement “for the remainder of his life”. This can give the mistaken impression that entitlement under the special rules for people who are terminally ill can never be changed, even if their prognosis improves. The definition of “terminally ill” is in section 66(2)(a), and this Act does not seek to change it.

Subsection (2) amends sections 66(1)(a) and (b) of the Act to make it clear that entitlement to AA under the special rules for terminally ill people only applies during the period in which a person is classed as “terminally ill”. Section 67 of this Act makes a similar amendment to awards of DLA “for life”.

Section 67: Disability Living Allowance

Awards made “for life”

Section 71(3) of the Contributions and Benefits Act permits awards of Disability Living Allowance (DLA) to be made “for life”. Life awards are made where it seem likely that a person’s entitlement to benefit will continue indefinitely.

This has led to misconceptions: many people with a life award believe that the benefit will continue even if they are no longer entitled to it. However, these life awards, like all other awards, can be reviewed and altered when there are grounds for doing so, under the powers in sections 30 and 35 of the Administration Act.

Subsections (1) and *(2)* remove the reference to awards for life in section 71(3) of the Act, and make it clear that DLA may be awarded either for fixed periods or for indefinite periods, subject to review—but that entitlement only applies while the person satisfies the conditions of entitlement. Section 66 of this Act makes similar provision for awards of Attendance Allowance for the terminally ill.

Entitlement to the higher-rate mobility component of DLA

The rules for entitlement to the higher rate mobility component of DLA are in section 73 of the Contributions and Benefits Act. Currently, under section 73(1), children must reach the age of 5 before they can become eligible.

Subsection (3) extends eligibility to the higher rate mobility component to severely disabled 3 and 4 year-olds, in recognition that they can encounter serious mobility problems.

The rules governing eligibility to the lower rate mobility component will not be affected, and this will continue to be available to children on reaching the age of 5.

The subsection inserts a *new section 73(1A)* in the Contributions and Benefits Act, to provide for children aged 3 and over to qualify for the higher rate mobility component if they satisfy the eligibility requirements, and to draw a distinction on grounds of age between eligibility to the higher and lower rates of the mobility component.

Subsection (4) ensures that the extended eligibility does not affect awards made before the date when subsection (3) comes into force.

Sections 68-72: Miscellaneous Provisions

Section 68: Certain overpayments of benefit not to be recoverable

This section provides that certain overpayments of benefits made before 1 June 1999 cannot be recovered from the recipient.

As a condition of receiving benefits, claimants are expected to tell the Benefits Agency about any relevant facts, or later changes in their circumstances, that might affect their benefit entitlement. If they do not, and it is later judged that they have received more benefit than they should have as a result, they are liable to repay the full amount of overpaid benefit. In most cases, it is clear what changes of circumstances need to be reported (for example, getting a higher level of income while receiving an income-related benefit).

However, with disability and incapacity related benefits, there are certain cases where disabled people cannot reasonably be expected to know how their benefit entitlement relates to their physical or mental condition or its effects — or that there is something they have to tell the Agency about. But when their benefit is reviewed, it may be discovered that they have, in fact, been overpaid. Examples of where this might happen are where the purchase of equipment has reduced the level of help needed from another person, or where rehabilitation following a disabling accident has gradually lowered the level of need and increased the capacity for work.

The section ensures that no overpayments of this kind arising from benefit reviews carried out up to 1 June 1999 can be recovered. The proposal to make these overpayments non-recoverable was announced in the answer to a Parliamentary Question on 26 February 1999, and was also discussed with organisations representing disabled people.

The provision will not apply to any overpayment in connection with which a person has been convicted of an offence, or in respect of which a person has agreed to pay a penalty as an alternative to prosecution.

Regulations have already been made, under existing powers, to deal with this kind of case from 1 June 1999. Where it is judged that claimants could not reasonably have known that their benefit entitlement could be affected, the regulations will provide that the relevant date for the change in entitlement to benefit was the date of the review -. Therefore no overpayment will arise.

Commentary

Currently, the rules for recovering overpayments of benefit are set out in Part III of the Social Security Administration Act 1992. They specify that money can be recovered when the overpayment arises because people:

- have failed to declare a relevant change in their circumstances, or
- have misrepresented a material fact. (Misrepresentation for this purpose can be wholly innocent.)

Section 68 provides that, despite the current provisions in that Act, certain overpayments relating to the effects of disability, or to a decision on incapacity for work, will not be recoverable.

Subsection (1) contains the general rule that overpayments covered by this section will not be recoverable.

Subsection (2) indicates that the section applies to reviews of qualifying benefits relating to a change in a person's condition at some point in the past; that the review decision was given before 1 June 1999; and that the overpayment is not one excluded by subsection (6) (see below).

Subsections (3) and *(4)* indicate that the section applies only to disability and incapacity related benefits – and only where benefit entitlement has changed because of a change in the disabled person's care or mobility needs (for Disability Living Allowance or Attendance Allowance) or capacity for work.

So, for example, the power will not apply to overpayments that arise in situations unconnected with the application of the care and mobility tests or the All Work Test, such as entering hospital or leaving the country.

Subsection (5) gives the meaning of "review", "the relevant person" and "the original decision" for the purposes of the section.

Subsection (6) excludes from the scope of the section any overpayment where a person has been convicted of an offence in connection with the overpayment or, in accordance with section 115A of the Administration Act, has agreed to pay a penalty as an alternative to prosecution.

Subsection (7) states that the section does not apply to any overpaid amount recovered from a person before 26 February 1999, the date of the announcement that certain overpayments would not be recovered.

Section 69: Child Benefit: claimant to state national insurance number

This section requires all people claiming Child Benefit either to state their national insurance number, giving proof that it is theirs, or to provide information that would enable their national insurance number to be found or a number to be allocated for them.

This applies to the adult claimant (usually a parent), rather than the child on whose behalf Child Benefit is claimed (children under 16 would not normally have national insurance numbers).

Section 19 of the Social Security Administration (Fraud) Act 1997 makes entitlement to most benefits conditional on the production of a national insurance number. However, because of the definition of "benefit" used (in section 1(4) of the Administration Act), the requirement does not apply to Child Benefit.

Section 69 ensures that the requirement will apply to Child Benefit, by adding *new subsections (1A)* to *(1C)* to the rules for claiming Child Benefit set out in section 13 of the Administration Act.

The Fraud Act allowed regulations to be made exempting certain categories of people from the requirement to supply a national insurance number. The *inserted subsection (1C)* allows exceptions to be made by regulations for claims to Child Benefit: for example, for certain members of voluntary and charitable bodies.

The requirement in the Fraud Act did apply to Guardian's Allowance. However, since entitlement to Guardian's Allowance is conditional upon the receipt of Child Benefit, regulations were made to exempt it. As a consequence of this section, it is intended that further regulations will be made to remove this exemption.

Background

Although a national insurance number is currently not legally required for a claim to Child Benefit, it is requested. In practice, approximately 95%-97% of new claimants do provide national insurance numbers.

The requirement to supply a national insurance number and supporting evidence was introduced to help secure the benefits system against abuse. In addition, national insurance numbers are essential for the efficient processing of benefit claims on the computer systems used by the DSS. For example, the use of a national insurance number enables the Child Benefit system to relay details of a claim to the National Insurance Recording System, which stores people's contributions records. This ensures the accurate assessment of Home Responsibility Protection (HRP) which safeguards the pension entitlement of those who are unable to work due to caring responsibilities.

Section 70: Welfare benefits: miscellaneous amendments

This section introduces Schedule 8, which contains the minor and consequential amendments that need to be made as a result of Part V of the Act. These amendments include:

Part V: "splitting" of Jobseeker's Allowance hardship payments

Paragraph 29 (*sub-paragraphs (5) and (7)*) of Schedule 8 amends the Jobseekers Act, to enable all or part of any hardship payment of JSA to be paid to a person other than the claimant. An officer acting on behalf of the Secretary of State will identify the circumstances in which a hardship payment should be paid to another person, whether all or part of the benefit is involved, and the person to whom the payment is to be made.

Regulation 34 of the Social Security (Claims and Payments) Regulations 1987 allows certain benefit payments to be paid, wholly or in part, to a third party where this is considered necessary in order to protect the interests of the claimant, child or dependent. An example of where this might happen is where the claimant is totally unable to manage his financial affairs and would therefore not use his benefit payment to meet his family's immediate needs. Whereas standard income-based Jobseeker's Allowance (JSA) can already be "split" in this way, the current wording of the Jobseekers Act means that hardship payments of JSA made under section 20(4) or paragraph 10(2) of Schedule 1 can only be made to the claimant.

Background

Hardship payments of JSA, and the circumstances in which they may be made, are described in Part IX of the Jobseeker's Allowance Regulations 1996. Hardship payments are only made where the claimant, their partner, or a member of their family would suffer hardship because JSA is not paid. Two of the situations in which the Jobseekers Act provides for hardship payment to be made are:

> Section 20(4) provides that hardship payments may be made to claimants even when sanctions have been applied, under section 19, and their JSA has been withheld. For example, this might be because the claimant failed to attend a prescribed training programme, or lost a job through misconduct.
>
> Paragraph 10(2) of Schedule 1 to the Jobseekers Act provides that hardship payments may be made where a claimant's JSA payments have been suspended, where a question arises as to whether the claimant satisfies any of the labour market conditions of entitlement.

Section 71: Sharing of functions as regards certain claims and information

Background

This section provides powers which are intended to enable closer working between central and local government in order to make the delivery of social security benefits more customer-focused and better co-ordinated. In particular, the section provides new functions for local authorities, enabling them to collect and record information, and give advice, in respect of benefits which are administered by central government.

The Department's aim is an integrated service which allows clients, as far as possible, to claim social security benefits, child support and war pensions, give information and make enquiries through a single point of contact.

Local authorities are responsible for the administration of Housing Benefit (HB) and Council Tax Benefit (CTB) and, under current legislation, they may only collect information relevant to those particular benefits. It is intended that regulations will be made under this section to enable local authorities to play a full part in integrated working initiatives, in particular, the ONE service (see sections 57, 58 and 72), by allowing them to handle a wider range of social security functions. The section will also enable other partners in integrated working arrangements, such as the Benefits Agency and Employment Service, to provide a similar service in relation to claims for HB and CTB.

It is also intended that clients will be able to claim a range of social security benefits using a single, integrated, claim form. For example, the Department's longer-term plans for improving and streamlining service to pensioners envisage that people wanting to claim Retirement Pension, Income Support, HB and CTB will be able to do so on the same form, rather than having to complete separate claims and provide the same information to both the Benefits Agency and the local authority.

This section does not make any changes to current responsibilities for determining claims. Local authorities will remain responsible for HB and CTB, and claims or information they collect relating to war pensions, child support, or benefits administered by the Benefits Agency will be passed to the relevant Agency for processing.

Schedule 12 provides for local authorities to be paid for the extra work arising from this section (and the provisions for work-focused interviews in sections 57 and 58). See the commentary after this section for more details.

Commentary

The section inserts a new section 7A into the Administration Act.

Subsection (1)(a) confers power to make regulations enabling claims for HB and CTB to be made to a body other than a local authority, which will be specified in the regulations.

In the case of pilots of the ONE service, for example, the specified bodies will be the local Benefits Agency or Employment Service, or offices run by private or voluntary sector providers on their behalf.

Regulations under *subsection (1)(b)* will provide for the mirror image of arrangements under subsection (1)(a) by enabling claims for prescribed social security benefits and war pensions, and applications for child support, to be made to local authorities.

Subsection (2)(a) enables regulations to be made that allow claims made under the provisions of subsection (1), and information provided in connection with those claims whether supplied by the claimant or by a third party (such as the claimant's partner), to be forwarded to the appropriate administering authority.

Subsection (2)(b) provides for the making of regulations enabling the receipt, collection and forwarding of information about social security matters from people who are making claims, or have made claims, for HB, CTB or any prescribed benefits, or from a third party in connection with such claims.

These regulations will enable a claimant, or partner, to carry out routine social security transactions, such as reporting a change of personal circumstances, at a single point of contact. For example, a person would be able to report changes affecting his HB claim to the Benefits Agency, which would then forward the details and any supporting evidence to the local authority.

Regulations under *subsection (2)(c)* will provide for the recording and holding of information and evidence relating to social security matters.

The regulations will enable an office to hold information which relates to benefits for which it has no administrative responsibilities. This situation would arise, for example, where a single claim form is used for a mixture of centrally and locally administered benefits, such as an integrated claim for Income Support and Housing Benefit. The form may be stored by the Benefits Agency, even though the Agency has no administrative responsibility for the Housing Benefit claim.

Subsection (2)(d) provides for the making of regulations enabling advice and information to be given to claimants on a range of social security matters.

It is proposed that regulations made under this provision will allow local authorities greater access to information held on Benefits Agency systems than is currently the case, in order to deal with claimants' enquiries concerning social security benefits administered by the Agency.

Subsection (3) clarifies that subsections (2)(b) (obtaining, receipt and forwarding of information) and (2)(d) (the giving of advice and information about social security matters) apply whether or not the original claim was made under the provisions of subsection (1).

It also clarifies that those paragraphs apply both to people making initial claims to Housing Benefit, Council Tax Benefit or any prescribed benefits, and to those to whom an award has already been made.

Schedule 12Part II

Currently, local authorities only have functions in respect of Housing Benefit (HB) and Council Tax Benefit (CTB). They are paid subsidy for administering these benefits under section 140B(4A) of the Administration Act.

Paragraph 80 of Schedule 12 amends the Administration Act to enable local authorities to be paid for the extra work arising from sections 57, 58 and 71, through an extension of the normal subsidy mechanisms.

Sections 57 and 58 provide for local authorities to undertake work-focused interviews; section 71 enables them to perform functions relating to claims and information for a wider range of social security benefits.

Section 72: Disclosure and use of information

Background

This section is intended to facilitate cross-Government working in a number of social security and employment-related areas in order to deliver the ONE service and Employment Zones; and to ensure that information can be used to best effect in operating the New Deal for Lone Parents, the New Deal for Disabled People, the New Deal for Partners of Unemployed People and the new Personal Capability Assessment.

The ONE service

An important focus of this section is to facilitate the introduction of the ONE service (see also section 57). ONE will be administered by staff from the Employment Service, the Benefits Agency and local authorities, as well as private or voluntary organisations. In this last case, staff will be contracted to carry out parts of the ONE process.

This section does two main things to facilitate the process:

> First, it will allow staff from any organisation administering ONE to use and disclose information relating to a person's claim for any benefit involved.
>
> Second, it will allow staff who are administering ONE to use and disclose information about a claimant's employability.
>
> For example, it will enable information which is collected at the "registration and orientation" stage of the service – such as information about the client's previous work experience, skills and educational attainment – to be passed on to the client's personal adviser, who will conduct the interview and may be from a different organisation.

The use and disclosure of information under this section will be limited to persons who are prescribed in regulations.

It is intended that information which is needed to assess the benefit claim will be passed on to the appropriate agency for processing, and that information about the client's employability will be passed on to their personal adviser.

In the course of the work-focused interview, the personal adviser may identify a source of help or support that is available to the client, and which would improve his capacity to become more independent.

For example, the client might benefit from help with literacy skills. However, since any action other than participation in the interview will be voluntary, any passing of information beyond this stage will be voluntary too. So if the personal adviser makes a suggestion which the client wishes to take up, he would ask the client to sign a disclaimer, allowing the personal adviser to pass a specific piece of information to that specific specialist provider. There is no provision in this Act for this to take place, since it will happen on a purely voluntary basis.

Employment Zones

The Act also provides for the introduction of Employment Zones (see section 60). This section enables information obtained for Jobseeker's Allowance purposes to be passed on to the Employment Zone provider, which may be an organisation in the public, private or voluntary sector.

The Employment Zone provider will need to know the amount of JSA to which the claimant is entitled, so that they can pay him or her an equivalent amount (minus the nominal amount of JSA which would still be in payment by the DSS). Information will also need to flow from the Employment Zone provider to the Employment Service and Benefits Agency (BA), for example to inform BA when a participant has obtained work so that their nominal JSA payments can be terminated; or when the circumstances of the participant have changed in a way which may require their level of benefit to be increased (such as the birth of a child).

New Deal for Partners of Unemployed People, New Deal for Lone Parents and New Deal for Disabled People

In addition, this section is designed to ensure that information can be used to best effect in operating the New Deal for Lone Parents, the New Deal for Disabled People and the New Deal for Partners of Unemployed People.

In the case of the New Deal for Partners of Unemployed People, partners of long-term JSA claimants are invited by the Employment Service to receive specialist advice and support, to help them into work if they wish. The Employment Service may contact the partner direct.

For the New Deal for Lone Parents and the New Deal for Disabled People, information provided in connection with a person's benefit claim may, where appropriate, be passed on by the Benefits Agency to the Employment Service, so that lone parents and disabled people who claim benefits can be contacted and offered advice on jobsearch, training and childcare.

Schemes under the New Deal for Lone Parents and the New Deal for Disabled People need information to be disclosed to and used by private or voluntary sector organisations where they administer these schemes. Both the New Deal for Lone Parents and the New Deal for Disabled People operate on a voluntary basis.

Personal Capability Assessment

This section also ensures that information collected during the new Personal Capability Assessment which relates to a person's work-related capabilities (including information that also relates to the question of whether they are technically incapable of work for benefit purposes) can be made available to personal advisers. The information may also be used more generally, for the purpose of enhancing a person's employment prospects and rehabilitation. The provisions for the Personal Capability Assessment are contained in section 61 and Part II of Schedule 8 (see earlier commentary).

Data Protection

The processing of information in this area will be governed by data protection law, including the Data Protection Act 1998 when commenced. Such processing must be fair and lawful, and comply with the other data protection principles such as the right of individuals to see their own records.

Commentary

Subsection (1) provides a power to make regulations specifying how, to whom, when and for what purposes social security information can be provided by those people mentioned in *subsection (2)* (Ministers of the Crown and persons providing services to them, local authorities, and persons providing services to, or exercising functions of, local authorities). It limits the use which can be made of such information to "relevant purposes", as defined in *subsection (6)*.

The section as a whole enables regulations to provide for information-sharing relating to a number of social security and employment-related initiatives. Those powers give flexibility in an area where configurations of services and help are likely to change and evolve – for example, in the light of experience from current pilot and prototype operations. *Subsection (1)* restricts the use of these regulations to the provisions listed in *subsection (3)*, or to any scheme or arrangements defined under *subsection (4)*.

Subsection (4) enables regulations under *subsection (1)* to designate schemes or arrangements which are concerned with the employment or training prospects of a claimant or his partner.

It is currently intended to designate the following schemes:

the New Deal for Partners of Unemployed People;

the New Deal for Lone Parents; and

the New Deal for Disabled People.

However, this subsection enables new schemes to be designated as they are developed.

Subsection (5) ensures that regulations made under *subsection (1)* may enable disclosed information to be used to supplement or amend information already held by another person.

It also enables the recipient in turn to disclose this information to others, or use it for another purpose, insofar as they were permitted to disclose or use the information which they already held. This provision echoes section 122B(4) of the Administration Act 1992.

Subsection (6) defines the purposes for which information supplied under this section can be used.

These are purposes connected with social security, child support or war pensions; or purposes connected with employment or training. It also defines "*social security information*" for the purposes of this section, as information relating to social security, child support or war pensions. This is consistent with the definition in section 3 of the Social Security Act 1998.

Subsection (7) further defines "purposes connected with employment or training" to make it clear that such purposes can include assisting and encouraging people to enhance their employment prospects.

Chapter II: National Insurance Contributions

Sections 73 & 74 (and Schedules 9 and 10): New threshold for primary Class 1 contributions

These sections provide for a number of changes to National Insurance contributions (NICs) that were announced in the Budgets of 1998 and 1999. They were added to the Bill during Commons Committee stage (Hansard: Standing Committee D col. 981).

Background

In the 1998 Budget, the Chancellor announced a package of reforms to the structure of NICs. Most of these changes were introduced in the Social Security Act 1998, and came into effect in April 1999. As a result:

> the point above which *employers* start to pay NICs, the employer earnings threshold, is set at the same level as the single person's tax allowance (£83 a week in 1999/2000) rather than the Lower Earnings Limit (LEL: £66 a week in 1999/2000);
>
> *employees* no longer have to pay any contributions on the portion of earnings up to and including the LEL (i.e. abolition of the 2% employee "entry fee");
>
> employers do not pay any contributions on the portion of earnings below the employer earnings threshold;
>
> the complex structure of four employer rates of contributions has been replaced by a single rate of 12.2% (or the alternative contracted-out rate); and

Class 1B contributions were introduced – paid by employers who enter into a PAYE Settlement Agreement with the Inland Revenue for tax.

The Chancellor also announced in 1998 that, as part of future reforms, he would raise the point at which employees start to pay NICs to the new threshold for employers and the single person's tax allowance, and would do so as soon as measures were in place to protect people against the benefit losses that would otherwise result. These additional measures were confirmed in the 1999 Budget, and are contained in this Act. The changes are:

Raising in two stages the starting point at which employees begin to pay National Insurance contributions to the level of the single person's tax allowance. Stage 1, to be introduced in April 2000, is for employees to become liable to pay contributions on earnings above a threshold of £76 a week. The second stage, from April 2001, is that the threshold will be fully aligned with the single person's tax allowance (projected to be around £87 a week). Combined with the increased starting point for employers' NICs (mentioned above), this will mean no tax or NICs on earnings of less than £87 a week;

National Insurance contributions build entitlement to contributory benefits. Simply raising the point at which employees begin to pay NICs would stop people with earnings below the new threshold from building up entitlement to contributory benefits. So the Chancellor announced that benefit rights for earnings between the LEL and the new threshold would be protected;

To provide for the Upper Earnings Limit (UEL) for employee contributions to be set as a multiple of the new threshold in order to allow it to be raised to £535 a week in 2000 and £575 in 2001, in line with the Chancellor's Budget statement.

These changes are all provided for in Schedule 9 (with some consequential amendments in Part II of Schedule 12).

Schedule 9

The new provisions involve a re-working of the National Insurance contributions legislation, which is already heavily amended by the Social Security Act 1998 and the Social Security Contributions (Transfer of Functions, etc.) Act 1999. So for clarity, Schedule 9 restates sections 5, 6, 8 and 9 of the Contributions and Benefits Act completely. It also deals with the consequences for contracted-out pension schemes and for the NICs revenue allocated to the NHS.

Section 74 and Schedule 10 make corresponding provision for Northern Ireland. Because they are parallel provisions, they are not referred to in the commentary below.

Commentary

Part I

The first Part of Schedule 9 restates sections 5, 6, 8 and 9 of the Contributions and Benefits Act, and inserts a new section 6A. References below are to sections of the Act.

Section 5 sets the limits and thresholds for National Insurance contributions and is largely restated. The main change is in subsection (1).

Subsection (1)(a) adds to the existing lower and upper earnings limits a new "primary threshold". This is to be the point at which employees begin to pay NICs and will be increased over two years to the level of the single person's tax allowance.

The employer earnings threshold introduced in 1998 as the starting point for employers' NICs – and currently at the weekly equivalent of the single person's tax allowance – is renamed the "secondary threshold" in *subsection (1)(b)*.

The section provides that these limits and thresholds are to be set each year by regulations, subject to specified conditions:

First, through *subsection (2)* the LEL will continue to be tied to the level of the basic state pension;

Second, the UEL is currently set as a multiple of the LEL. It is not possible to raise the UEL to the level the Chancellor has announced whilst keeping to this formula. So *subsection (3)(a)* is modified to require the UEL to be calculated as a multiple of the new primary threshold.

Subsections (4) and *(5)* rationalise the existing provisions for defining non-weekly equivalents of the limits and thresholds for those paid otherwise than weekly.

Section 6 establishes when liability arises for Class 1 NICs. The only subsantial change is to *subsection (1)(a)*. This makes the starting point for primary (employee) contributions the new primary threshold, rather than the LEL. *Subsection (1)(b)* is updated to reflect the renamed secondary threshold.

Section 6A is completely new. It provides that contributions are to be treated as having been paid on earnings which are not less than the LEL and not more than the primary threshold. This enables such earnings to be protected for the purposes of building entitlement to contributory benefits.

Subsection (2) ensures that people earning at or over the LEL do not lose access to contributory benefits and pensions because of the increase in the level of earnings at which employees start to pay NICs.

It has the result that earnings from the LEL up to and including the primary threshold will be treated for benefit purposes (defined in *subsection (3)*) in exactly the same way as earnings on which contributions have actually been paid – i.e. by treating them as notionally paid. The section also ensures that the change to the structure of employee contributions does not reduce the earnings used for calculating entitlement to SERPS (the "earnings factor").

Subsection (4) provides a regulation-making power to enable provisions of the Act to be applied with modifications in relation to people who fall within the scope of the section.

This will make it possible to ensure that benefit rights of such people are not enhanced as a result of the "notional payment".

For instance, liability for Class 1 NICs at present depends on satisfying conditions relating to residence and presence in Great Britain. The regulations would be used to make sure that the same conditions apply before someone could take advantage of the new deeming provision in section 6A.

Sections 8 and 9 contain the rules for calculating the amount of NICs payable. Section 8 deals with primary (employee) Class 1 contributions; section 9 relates to secondary (employer) NICs. Both sections are modified in line with the changes above.

As now, *section 8(1)(a)* provides for the amount of primary Class 1 contribution to be the "primary percentage" (currently 10%) of the earnings between the starting point for NICs liability and the UEL. The change is that the starting point is now the primary threshold rather than the LEL.

Section 9(1) makes the starting point for secondary NICs the renamed secondary threshold.

Part II

The second Part of Schedule 9 amends the Pension Schemes Act 1993, to deal with the effect of the NICs changes on contracted-out pensions. Paragraph 6 amends the rules for salary related schemes; paragraph 7 applies to money purchase schemes.

In the same way that benefit entitlement is protected from the rise in the starting point for NICs, so is entitlement to NI rebates. Current provisions set the employee and employer rebates by reference to percentages of earnings in excess of the LEL. The new provisions will enable the rebate to continue to be calculated by reference to earnings between the LEL and the UEL. But with the introduction of a higher starting point for payment of primary NICs, namely the primary threshold, there will be a narrower range of earnings over which the NICs liability will arise.

This raises the possibility that the amount employers can recover in rebates may be higher than their total NICs liability. However, paragraphs 6 and 7 make arrangements for the Revenue to pay any outstanding balance to the employer and recover any overpayments from him (*new sections 41(1D) and (1E)* and *42A(2C) and (2D)*).

Part III

Paragraph 9 of Schedule 9 amends section 162 of the Social Security Administration Act 1992. This ensures that the proportion of contribution revenue allocated to the National Health Service remains broadly unchanged when the starting point for employee contributions is increased to the primary threshold.

Sections 75 and 76: Earnings of workers supplied by service companies etc.

Background

Section 75 provides for a new power to counter the risk of avoidance of National Insurance contributions where an individual (the worker) provides personal services through an intermediary. It is intended that the provisions in this Act will be matched by tax legislation that will, in specified circumstances, require the intermediary to operate Pay As You Earn (PAYE) on the payments made to, or in respect of, the worker. The Chancellor of the Exchequer announced in his Budget that these measures would take effect from 6 April 2000. Consequently, the regulations to be made under Section 75 will come into force from that date. Equivalent provisions for Northern Ireland are contained in Section 76.

Section 75 concerns the situation where the worker is engaged by a business (the client) through a third party (such as a service company). In the absence of such a third party, the relationship between a client and a worker would determine the employment status for the purposes of both tax and National Insurance. Liability would then be assessed according to whether the person was employed or self-employed. However, where a worker is engaged through one or more third parties, it is possible to escape any direct contractual relationship between client and worker. This provides scope for the avoidance of tax and National Insurance contributions (NICs).

The powers in section 75 are intended to deal with the situation where the relationship between a client and a worker would be one of employer and employee, but for the intermediary. They provide for a specified amount of the payments made in respect of the worker to be treated as earnings paid to an employee – and therefore liable for NICs. Regulations under the section will ensure that specified amounts will be regarded as paid to the worker for the purposes of primary Class 1 NICs and the intermediary will be liable for the corresponding secondary Class 1 NICs. The regulations will identify how the amount to be treated as earnings paid to the worker will be calculated.

In order to minimise the administrative burden, the Chancellor announced that certain details of the new rules would only be finalised after discussion with representative bodies. An outline of the proposed new rules was circulated to those who had expressed an interest in this measure and there have been a number of discussions with business representatives on the original proposals.

In the light of this consultation, the Paymaster General announced various changes to the proposal on 23 September 1999. The main changes were:

- to make the intermediary rather than the client responsible for operating the new rules and deducting and accounting for NICs where required;
- to ensure that the conventional test used to distinguish between employment and self-employment for individuals not using intermediaries would also apply in cases covered by the new legislation; and
- to allow a deduction for certain expenses in determining the amount of money which is to be treated as earnings subject to Class 1 contributions in cases where the new rules apply.

These new proposals are reflected in the section.

Section 75 will enable NICs regulations to take effect at the same time as the proposed new tax rules without the need for retrospection. It sets out the general powers on the face of the Act and allows for the technical detail to be contained in regulations. This approach is consistent with current social security legislation.

For example, section 4(6) of the Social Security Contributions and Benefits Act 1992 enables regulations to be made for the purpose of treating as earnings certain forms of employee shares (conditional and convertible shares) and the Social Security (Contributions) Regulations 1979 (S.I. 1979/591) ("the Contributions Regulations") provide all the consequential technical detail. Regulation 18 of the Contributions Regulations provides the basis on which the amount of earnings comprised in a payment of conditional or convertible shares is to be ascertained and regulation 19 provides when such shares are to be disregarded from earnings. This section takes the same approach, which also has the advantage that it provides the flexibility to enable changes to be made more easily should the parallel tax provisions or business practice change in the future.

Commentary

Subsection (1) sets out the circumstances in which the regulation-making power is to operate. Regulations will set out which arrangements involving a worker hired through an intermediary will be caught by the provision.

The normal range of tests to decide a worker's status, which have developed through the courts and the principles of common law, will be used to determine whether the relationship between the client and the worker should be subject to the new rules.

Subsection (1) also enables regulations to specify (i) what payments and benefits are to be treated as earnings paid to the worker in respect of employed earner's employment for the purposes of the Contributions and Benefits Act, and (ii) the extent to which they are to be so treated.

It is intended that regulations will provide that, in addition to payments that are earnings by virtue of section 3 of the Contributions and Benefits Act, payments treated as earnings by virtue of section 4 of that Act (for instance, conditional and convertible shares) will be treated as earnings under this provision.

It is intended that the regulations will prescribe how to calculate the amount to be treated as earnings. This follows the existing practice whereby regulations made under section 3(2) of the Contributions and Benefits Act provide for the calculation of the amount of earnings comprised in specified payments (see regulation 18 of the Contributions Regulations); and regulations made under section 3(3) of that Act specify what payments that are to be exempt from that calculation (see regulation 19 of the Contributions Regulations).

Subsection (2) defines the meaning of an "intermediary" for the purposes of the provision. It is intended that regulations should provide for the intermediary to be either the company that employs the worker or a partnership in which he is a partner.

Subsection (3) then provides specific, but non-exhaustive, illustrations of what the regulations made under the section may provide.

> *Subsection (3)(a)* enables regulations to specify that a worker is to be treated as employed in employed earner's employment for the purposes of the Contributions and Benefits Act in respect of his "attributable earnings".
>
> > "*Attributable earnings*" are a specified amount of the "relevant payments and benefits" made or provided in connection with the services the worker performs for the client. They will be a minimum amount, which must be treated as salary paid to the worker by the intermediary within the tax year and subject to Class 1 NICs.

Subsection (3)(b) enables the intermediary (whether or not he fulfils the prescribed conditions about residence and presence in Great Britain) to be treated as *the* secondary contributor in respect of the worker's attributable earnings.

Subsection (3)(c)(i) enables regulations to specify what deductions are to be made in calculating the amounts on the payments that are treated as earnings paid to the worker in respect of the *services* provided to the client. Regulations would allow for the deduction of certain allowable expenses currently exempt for the purposes of other parts of the Act.

An example of this is found in regulation 18(4)(b) of the Contributions Regulations, where identifiable payments towards expenses incurred by an employee in carrying out his employment are exempted from NICs.

Subsection (3)(c)(ii) enables regulations to specify how the amount of earnings that the worker is to be treated as having been paid is to be calculated or estimated. It will be for the intermediary to *calculate* the earnings caught by the provision and what deductions can be made.

Subsection (3) (d) enables *regulations* to set out how the worker's "attributable earnings" may be aggregated with any other earnings he has, in order to calculate the full year's NICs liability correctly.

Subsection (3)(e) provides for regulations to determine the date by which contributions payable under *the* provision have to be paid and accounted for.

Subsection (3)(f) enables regulations to specify how relevant payments and benefits are to be apportioned. It is intended to specify in regulations how an aggregate payment in respect of two or more workers is to be apportioned (including apportionment in cases where one or more of that number would be regarded as in employed earner's employment with the client other than by virtue of the regulations). In circumstances where, at the time of payment, it is not possible for the intermediary to identify the amount attributable to each worker/individual, it is proposed that the regulations will provide for apportionment on a just and reasonable basis, and for contributions to be calculated on the "apportioned" earnings.

This is consistent with the approach found in regulation 18 of the Contributions Regulations. Regulation 18 already includes an apportionment calculation following section 48 of the Social Security Act 1998 (which amended section 3 of the Contributions and Benefits Act by inserting a new subsection (2A)). Paragraph (21) and (24) of regulation 18 of the Contributions Regulations, which were made under the power in the new subsection (2A), specify the basis of apportionment in respect of payments to two or more employed earners in the form of a contribution to an unapproved retirement benefit scheme and a non-cash voucher (paragraphs (21) and (24) respectively).

Subsection (3)(g) will enable the worker's employment with an intermediary or otherwise to be disregarded *for*NIC purposes.

Subsection (3)(h) enables regulations to be made to ensure that a relevant payment or benefit is not subject to a double National Insurance liability. This may be necessary in cases where an amount to be treated as earnings by virtue of the new rules would otherwise be liable to NICs under other provisions.

Subsection (3)(i) enables regulations to specify the extent to which two or more connected persons should be treated as a single person for the purposes of the regulations.

This is necessary, for example, to deal with cases where a worker is engaged to work for the client via a connected party (such as an associate company), within the meaning of section 839 of the Income and Corporation Taxes Act 1988, and no contract exists between the intermediary and the associate for the worker's services. It is intended that regulations will determine whether the client and the associate are to be treated as single persons and consequently, whether the new rules should apply to them. Regulations may specify persons of any other specified description as being single persons for the purposes of the provision.

Subsection (3)(j) will *ensure* that the new rules are still applicable where the contract is not made by the client but someone "connected" to him.

Subsection (3)(k) allows for *regulations* to modify or exclude the application of the new rules.

Subsection (4) enables the regulations to set out what expenses may be deducted by the intermediary when calculating a worker's attributable earnings. The Government has proposed that 5 per cent of the intermediary's receipts from relevant engagements should be deducted, to cover general expenses. In addition, any employer's pension contributions to an approved scheme in respect of the worker and any secondary Class 1 contributions paid by the employer will be deductible.

Subsection (5) enables regulations to specify that terms and conditions of a contract or arrangement may be disregarded for the purposes of applying the new rules. It is intended to use regulations to ensure that the substance of the relationship will determine whether the worker should be treated as being in employed earner's employment for the purposes of the Contributions and Benefits Act.

Subsection (7) ensures that the reference in subsection (1)(a) above to a worker being under an obligation to perform services is carried through.

Subsection (8) provides that any regulations made under the provision by the Treasury will require the concurrence of the Secretary of State for Social Security. This reflects the interaction between contributions and contributory benefits. The latter are the responsibility of the Secretary of State.

The regulations implementing this measure will come into force on 6 April 2000 and will parallel the tax clauses due to be introduced in the Finance Bill 2000. However, in order to ensure the simplest possible systems for business to operate, it is necessary to keep the tax and NIC rules in line with each other.

Subsection (9) therefore gives a power to enable this section to be adapted by order if the parallel tax provisions change.

There are a number of precedents for a use of this type of power. One example of the modification of primary legislation by order is found in section 10 of the Contributions and Benefits Act. Section 10 provides for a Class 1A contribution to be paid annually by an employer in respect of the provision of a car or fuel to an employee. The Class 1A charge applies where, for any tax year, an income tax benefit is chargeable under Schedule E by virtue of sections 157 and 158 Income and Corporation Taxes Act 1988 (ICTA) in respect of the provision of the car and/or fuel. Section 10 includes a modification power at subsection (7) to enable the Secretary of State to make regulations modifying section 10 where it is necessary or expedient to do so in consequence of any alteration to section 157 and 158 ICTA.

The annual Finance Bill means that changes to the tax legislation could occur annually, subject to Parliamentary approval. There is no equivalent annual legislation available to make changes to primary legislation covering National Insurance contributions. So, without this subsection, it would be difficult to amend the Contributions and Benefits Act to mirror the changes to the Finance Act.

Sections 77 and 78: National Insurance Class 1B contributions

Section 77 ties the National Insurance Class 1B rate to the rate of 'secondary' (employer) Class 1 contributions, thus preventing the Class 1B rate from being raised independently by regulations. Both rates are currently set at 12.2%.

It amends section 10A of the Contributions and Benefits Act which deals with Class 1B contributions, replacing subsection (6) (which provides that the percentage rate is to be 12.2%, but enables it to be altered under section 143A of the Administration Act) with a provision to tie it to the rate of the secondary contribution, as specified in section 9(2) of the Contributions and Benefits Act.

Background

Measures introduced in the Social Security Act 1998 provide that, from 6 April 1999, employers can settle the National Insurance liability on a Pay As You Earn Settlement Agreement (PSA) for tax purposes. This introduced a new class of National Insurance contributions known as Class 1B.

The percentage rate of Class 1B NICs was initially set at the same level as the rate of secondary (employer) contributions, but was capable of being varied independently of the secondary Class 1 rate.

This section ties the rate of Class 1B directly to the rate of secondary (employer) contributions, thus taking away the ability for it to be varied independently of that rate.

Section 78 makes corresponding provision for Northern Ireland.

Schedule 13Parts VI and VII: Repeals : National Insurance contributions

Parts VI and VII contain repeals which are consequential on sections 73, 74, 77 and 78. The repeal of paragraphs 8(2) and (3) of Schedule 1 to the Contributions and Benefits Act updates the legislation by removing reference to the payment of National Insurance contributions by adhesive stamps, to reflect the current methods of payment available.

Background

Before April 1993, flat rate National Insurance contributions payable by the self-employed (Class 2) or paid on a voluntary basis (Class 3) could be made by affixing a stamp of appropriate value to a contribution card in respect of each contribution week. Since then, it has been possible to:

make a payment of the amount of contributions specified in a written notice issued within 14 days of the end of the quarter in question; or

pay by direct debit.

Adhesive stamps ceased to be sold by the Post Office soon afterwards, and could not therefore be used as a method of paying National Insurance contributions. The references in paragraph 8(2) and (3) of Schedule 1 are therefore redundant.

Parts VI and VII of Schedule 13 also include repeals consequential on section 81 and Schedule 11.

Chapter III: Other Welfare Provisions

Section 79: measures to reduce under-occupation by housing benefit claimants

This section will allow tenants living in the social rented sector (typically, property owned or managed by a local authority or a housing association), who are in receipt of Housing Benefit (HB), to keep part of any benefit saving generated by moving to cheaper and smaller accommodation.

The scheme to be made under this section will encourage tenants who are "under-occupying" accommodation in the public or social rented sector (that is, living in accommodation that is considered large in relation to their number and needs) to move to smaller and cheaper accommodation. On completion of the move, HB claimants will be rewarded with a lump-sum payment equivalent to half the difference between their old and new weekly rent, multiplied by 156. Since HB usually meets 100% of rental costs in the social rented sector, this is roughly half of the benefit savings expected over three years. It is intended that the lump sum will be disregarded as capital in the calculation of entitlement to income-related benefits, such as Income Support or the Working Families Tax Credit.

Regulations under *subsections (1)* and *(3)* would define exactly how the sum paid to claimants should be calculated, and in what circumstances a dwelling would be regarded as "under-occupied" (for example, a 3-bedroom house could be regarded as exceeding the requirements of a couple).

Subsection (4) gives power to make deductions from the lump-sum payment for any arrears of rent owed by the tenant, or for any overpayment of HB which is recoverable from the claimant.

Other debts to the local authority or to the DSS (e.g. the Social Fund) are not to be deducted; deductions are to be strictly limited to the two items mentioned.

Subsection (5) provides a right of appeal against decisions made under the scheme.

The details of the appeal – for example, the appeal body, the determinations that may be appealed against and the appeals procedure – will be set out in regulations.

The section would allow the under-occupation scheme to be applied nationwide, though *subsection (7)* makes clear that no local authority would be obliged to take part in the scheme. However, the intention is to pilot the scheme in three local authorities; therefore *subsection (6)* allows the power to be used for a limited time and in certain areas only, and for any necessary transitional arrangements to be made. Section 83(8) would allow different provision in different areas.

Subsection (9) provides that the under-occupation scheme payments should be administered under the rules and powers for Housing Benefit (which are set out in the Administration Act)—but allows for exceptions to be specified.

Among the HB rules is the procedure for the DSS to reimburse local authorities for the money they pay in benefits. Normally this happens through a subsidy system; the subsidy rules mean that an authority may not always receive the full amount it pays out. However, *subsection (8)* provides the power to prescribe a different claims and payments mechanism. The intention is that, under the scheme, authorities should be reimbursed *in full* for the lump-sum payments they make.

Section 80: Supply of information for child support purposes

This provision allows the Inland Revenue, on a discretionary basis, to supply tax information it holds in respect of self-employed non-resident parents to the Child Support Agency (CSA). This is intended to enable the CSA to build up a financial picture of non-resident parents whose earnings either are not known or need to be verified.

The CSA is required by law to assess maintenance liability when a valid application is received. To make this assessment, it needs details of the non-resident parent's earnings. This information is sometimes difficult to obtain directly from the non-resident parent, who may deliberately withhold information with a view to delaying a demand for maintenance or may simply be unable to locate the relevant documentation. Whilst this is less significant for employed earners, where the CSA can approach the employer direct, non-resident parents who are self-employed, and who refuse to supply details of their profits, are extremely difficult to assess.

The Agency therefore needs to be in a position to build up a financial picture of a non-resident parent who does not provide details of his income, using as wide as possible a range of alternative sources of information. Tax information held by the Inland Revenue may offer the only alternative source of such information for the self-employed. However, the intention is that this will be a last resort measure, where the

CSA has asked the non-resident parent for information, and issued a reminder, but there is still inadequate detail to make an assessment.

Access to tax information relating to self-employed non-resident parents is necessary to ensure that more non-resident parents pay the maintenance they owe. Given the Revenue's confidentiality provisions, the CSA can only gain access to this information if there is a specific statutory gateway. This provision provides this gateway and allows direct access, at the Revenue's discretion, to any tax information about self-employed non-resident parents held by the Inland Revenue.

Schedule 2 to the Child Support Act 1991 already allows the Secretary of State to request the Inland Revenue to provide information for the purposes of tracing non-resident parents. This information is restricted to the current address of the non-resident parent and his current employer. The CSA has access, via the Contributions Agency, to earnings information recorded on end-of-year tax returns that employers currently submit to the Inland Revenue. There is currently no provision, however, for other tax information to be used in assessing child support liability.

Commentary

The section inserts a *new paragraph 1A* into Schedule 2 to the Child Support Act 1991.

Sub-paragraph (1) limits the power to obtaining tax information about *self-employed* non-resident parents, not all non-resident parents. It allows access to information for any tax year in which the non-resident parent was or is self-employed.

Sub-paragraph (2) exempts the Revenue from its confidentiality rules when providing this particular information.

Sub-paragraph (3) ensures that the paragraph only applies to disclosures made to the CSA by, or under the authority of, the Commissioners of the Inland Revenue.

Sub-paragraph (4) prevents, as a general rule, any tax information disclosed to the CSA under this power from being disclosed further.

For example, this overrides the power in section 3 of the Social Security Act 1998, which allows child support information to be used for the purposes of administering social security benefits. The exception in *sub-paragraph (4)(b)* allows the information to be used in civil and criminal court cases brought under the Child Support Act. For example, if a non-resident parent is served with a liability order, it may be possible to use information covered by this provision to satisfy the court that there is income to meet the liability.

Part VI: General

This part of the Act contains a number of general provisions, which will determine, for example, how powers to make regulations are used, and how the different measures will be brought into force.

It also introduces a power to incur expenditure on proposed new services (section 82).

Section 81: Contributions and pensions administration

Section 81 introduces Schedule 11, which principally makes a number of amendments in the light of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and related legislation.

That Act transferred responsibility for National Insurance contributions and other (mainly related) matters from the DSS to the Inland Revenue and the Treasury, from 1 April 1999. The clause and Schedule were added to this Bill during Commons Committee stage (Hansard: Standing Committee D col. 1031), after the Social Security

Contributions (Transfer of Functions, etc.) Bill had received Royal Assent. Further measures were added to the Schedule at Lords Committee (Hansard: vol. 604, col. 941).

The provisions in Schedule 11 consist mainly of:

> consequential amendments not made by the Social Security Contributions (Transfer of Functions, etc.) Act and its Northern Ireland equivalent; and
>
> minor adjustments in the allocation of functions between the Departments.

Where appropriate, the Schedule includes broadly parallel changes to the Northern Ireland legislation.

Most of the Schedule is purely technical, but there are three points that call for specific mention:

> *Paragraphs 7* and*8*make clear that the Inland Revenue can pass information held mainly in relation to contracting out of SERPS to the Benefits Agency for social security and other purposes; and, conversely, that the Agency can pass information about social security and other matters (in particular, SERPS information), to the Revenue for, principally, contracting-out purposes. This is not a new practice. In the past, specific powers were not needed for that transfer because the DSS could share information within the Department. Provision is now needed because the contracting-out functions have been transferred to the Revenue. The amendments also mean that the information can be required to be supplied.
>
> *Paragraph 22* further amends section 170 of the Pension Schemes Act 1993, which confers power to make regulations concerning, among other things, contracting-out matters. This amendment slightly extends that power so that it covers first instance decisions. *Paragraph 21* makes a similar change for the equivalent Northern Ireland legislation.
>
> *Paragraph 30* repeals section 3(3)(c) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999. That subsection was not commenced so that section 27 of the Inland Revenue Regulation Act 1890 (officers may conduct proceedings before justices) would apply to contributions as to tax, and is now superfluous. *Paragraph 5* makes a related amendment to remove an overlap with section 116(5A).

Section 82: Authorisation of certain expenditure

This section enables the Secretary of State to incur expenditure on preparing for legislative changes within his responsibilities, provided that he has the consent of the Treasury and the approval of the House of Commons.

Under a 1932 Public Accounts Committee concordat, any functions of a Government Department that continue beyond a given year – particularly where there are financial liabilities – should normally be defined by specific statute, rather than rely solely on the authority of the annual Appropriation Act.

The section enables the Secretary of State to seek specific Parliamentary approval to incur expenditure to prepare for future changes in the functions within his responsibilities (i.e. social security benefits, child support, war pensions), without the need for further primary legislation.

For example, a new benefit, or major changes to existing provisions, requires a significant amount of preparatory work: such as developing and testing new computer systems, and preparing manuals for use by staff. Often such work has significant lead-in time. This power will enable the Secretary of State to obtain the approval of the House of Commons to commence such work, and so avoid the risk of a delay in implementation.

Commentary

Subsection (1) gives the power to incur expenditure. *Subsections (2)* to *(7)* clarify and limit the way the power would work.

Subsection (2) requires the Secretary of State to obtain the approval of both the Treasury and the House of Commons before the power is exercised in any specific instance.

A report detailing the purpose and amount of expenditure must be laid before the House of Commons. (This procedure is modelled on the provisions of section 88B of the Local Government Finance Act 1988 – inserted by the Local Government Finance Act 1992, Schedule 10, paragraph 18).

Subsection (3) limits the Secretary of State's right to incur expenditure to two years, starting from the date the report is approved by the Commons.

Subsection (4) ensures that other powers to incur expenditure, either for development work or under other specific legislative authority, are not affected by this new power.

Subsections (5) and *(6)* provide for adjustments between the Consolidated Fund and the National Insurance Fund (which pays for National Insurance benefits and their administration).

Section 83: Regulations and orders

Section 83 sets out how the regulation-making powers arising from this Act may be used.

Subsections (2) and (3) provides for regulations to be subject to the negative resolution procedure. This means that the regulations will be laid before Parliament after being made, but only debated if a Member or Peer seeks such a debate.

Subsections (4) to (6) follow other social security legislation, in making clear that regulations may make different provision within the classes to which the specific regulation-making power relates, and may make incidental or transitional provisions.

Subsection (8) ensures that regulations made under section 60 (employment zones) and section 79 (housing under-occupation scheme) may make different provision in different parts of the country.

Subsection (9) provides for regulations under section 60 and section 72 (information sharing) to apply in specified areas only.

Subsections (10) and *(11)* give the Treasury a joint role in making regulations under the pension sharing provisions in Part IV of the Act.

Section 84 Consequential amendments etc.

Subsection (1) gives effect to Schedule 12, Part I of which makes consequential amendments in connection with the pension sharing provisions in Parts III and IV of the Act.

Subsection (2) provides regulation-making powers to enable the Secretary of State to amend or revoke any instrument made under an Act as he thinks necessary or expedient as a consequence of the coming into force of any provisions specified in subsection (4).

Subsection (3) provides a power to enable the Secretary of State to make by regulations the kind of provision that can be included in a commencement order.

For fuller details on the pension sharing measures, see the commentary on Parts III and IV.

Section 85: Transitional provisions

This section gives the power to make any necessary transitional arrangements for the provisions in the Act.

Subsections (1) and *(2)* relate to the pensions measures in Parts I and II; *subsection (6)* relates to Part V (welfare). These are standard formulations, used elsewhere in social security legislation;

Subsections (3) to *(5)* provide specific transitional provisions for the pension sharing measures in Parts III and IV. They are intended to ensure that pension sharing orders cannot be introduced with retrospective effect, but can only be made in proceedings begun on or after the day on which pension sharing provisions in this Act are brought into force.

In England and Wales they prevent a pension sharing order being made where proceedings for divorce or nullity started before the day (commencement day) on which section 19 is brought into force.

In Scotland no pension sharing order or agreement under the Family Law (Scotland Act) 1985 may be made in any divorce (or action for declarator of nullity) brought before the day on which section 20 of the Act comes into force or under section 31(7B) of that Act if the marriage was dissolved by a decree granted in proceedings so begun.

Section 87: Corresponding provision for Northern Ireland

This section enables Northern Ireland provisions corresponding to measures in the Act to be made by Order in Council. It was added to the Bill at Lords Report (13 October 1999; Hansard vol. 605, col. 474).

Section 88: Repeals

This section gives effect to Schedule 13, which repeals some existing legislation as a consequence of the measures in the Act. For further details:

Part I of Schedule 13 (pensions: miscellaneous): see commentary on Parts I and II of the Act;

Parts II and III of Schedule 13 (pension sharing on divorce): see commentary on Parts III and IV of the Act;

Part IV (abolition of Severe Disablement Allowance): see section 65;

Part V (joint claims for Jobseeker's Allowance): see section 59 and Schedule 7;

Parts VI and VII (National Insurance contributions): see commentary after sections 77 and 78.

Section 89: Commencement

The Act introduces a large number of measures, which will not all come into force on the same day. This section provides a power to bring various provisions into force by order, on different days for different purposes, and specifies which provisions came into effect on Royal Assent.

Section 90: Extent

This section sets out the territorial application of the provisions in the Act. Most apply throughout Great Britain. Some, on pensions and National Insurance contributions, are UK-wide. In some parts of the Act that deal with interactions with family and civil law (for example, the provisions for pension sharing on divorce), sections may apply to England and Wales only, or Scotland only.

Section 91: Short title, general interpretation and Scottish devolution

The only provision calling for specific mention here is subsection (4), which relates to Scottish devolution.

Social security is a matter wholly reserved to the Westminster Parliament. Some of the provisions in this Act, however, impinge on matters devolved to the Scottish Parliament. In particular, the provisions in relation to valuing pension arrangement benefits for calculating matrimonial property, fall within the responsibility of Scottish Ministers.

This technical amendment designates these provisions in the Act as "pre-commencement enactments" for the purpose of the Scotland Act 1998. This enables functions within the competence of Scottish Ministers to be exercised by them and allows them to commence the provisions which fall outside the social security reservation.

This provision was added to the Bill at Lords Report (13 October 1999; Hansard vol. 605, col. 504).

SCHEDULES

Where necessary, the Schedules are described at relevant points of the main commentary. The table below shows where each Schedule (or Part of a Schedule) is explained.

Schedule	*Subject*	*Refer to commentary on:*
1	Application of 1993 and 1995 Acts to registered schemes	**Section 6**
2	Pensions: miscellaneous amendments	**Section 18**
3	Pension sharing orders: England and Wales	**Parts III and IV**
4	Amendments of sections 25B to 25D of the Matrimonial Causes Act 1973	**Parts III and IV**
5	Pension credits: mode of discharge	**Parts III and IV**
6	Effect of state scheme pension debits and credits	**Parts III and IV**
7	Joint claims for Jobseeker's Allowance	**Section 59**
8	Welfare benefits: minor and consequential amendments:	
8 Part I	Bereavement benefits	**Section 59**
8 Part II	Incapacity	**Section 63**
8 Part III	Abolition of Severe Disablement Allowance	**Section 65**
8 Part IV	Income Support	**Section 59**
8 Part V	Jobseeker's Allowance	**Sections 59 & 70**
8 Part VI	Maternity Allowance	**Section 53**
8 Part VII	Retirement Pension	**Parts III and IV**
8 Part VIII	Administration of benefits	**Section 71**
9 & 10	New threshold for primary Class 1 contributions	**Sections 73 & 74**
11	Contributions and pensions administration	**Section 81**
12	Consequential amendments:	
12 Part I	Consequential on Parts III and IV	**Parts III and IV**
12 Part II	Other consequential amendments	Sections 15-16; 57-58, 71; 73-74

Schedule	*Subject*	*Refer to commentary on:*
13	Repeals:	
13 Part I	Pensions: miscellaneous	**Parts I and II**
13 Part II	Pensions on divorce etc.	**Parts III and IV**
13 Part III	Pension sharing	**Parts III and IV**
13 Part IV	Abolition of Severe Disablement Allowance	**Section 65**
13 Part V	Benefits: miscellaneous	**Part V**
13 Part VI	National Insurance contributions	**Sections 77 & 78**
13 Part VII	National Insurance contributions: Northern Ireland	**Sections 77 & 78**

COMMENCEMENT

Section 89(4) and (5) set out which provisions of the Act came into force on Royal Assent, or came into force then for the purposes of making regulations. All the other provisions are to be brought into force by commencement orders.

GLOSSARY

Administration Act

The Social Security Administration Act 1992: the Act that contains most of the rules and regulation-making powers to specify how social security benefits should be claimed, paid and administered. It consolidated the existing legislation in 1992, and has been amended subsequently. See also **the Contributions and Benefits Act**.

All Work Test

The test of incapacity used for the purposes of assessing entitlement to **Incapacity Benefit** and **Severe Disablement Allowance** (and the premiums for disability with **Income Support** and Council Tax Benefit). It is a functional test which assesses the claimant's ability to carry out a wide range of activities.

Section 61 replaces the All Work Test with the "Personal Capability Assessment".

Annuity

An arrangement by which a life insurance company pays someone a regular income, usually for life, in return for a lump-sum premium.

Attendance Allowance (AA)

A non-contributory, tax-free, non-means-tested benefit paid to meet the extra costs arising from the care needs of elderly and disabled people. Paid at two rates: higher rate (needing care day and night) and lower rate (needing care day or night).

Sections 66 and 67 make changes to the rules for AA and **Disability Living Allowance**.

Contributions and Benefits Act

The Social Security Contributions and Benefits Act 1992: contains most of the provisions for setting out the rules for **National Insurance contributions** and entitlement to social security benefits (with the main exception of **Jobseeker's Allowance**). It consolidated the existing legislation when it was introduced in 1992, and has been amended since then. Several sections of this Act have their effect by amending it. See also **the Administration Act**.

Contracting out

An arrangement under which members of a pension scheme which meets certain requirements, obtain rights in that scheme in place of their **SERPS** entitlement. **National Insurance contributions** for these employees are reduced or, in the case of an Appropriate Personal Pension (see **Personal Pension)**, partly repaid to the scheme.

Disability Living Allowance (DLA)

A non-contributory, tax-free, non-means-tested benefit paid to meet the extra costs of care and mobility needs for people who become disabled before the age of 65. There are two components: a care component (paid at a higher, middle or lower rate) and a mobility component (paid at a higher or lower rate).

Sections 66 and 67 make changes to the rules for DLA and **Attendance Allowance**.

Housing Benefit (HB)

An income-related (means-tested) benefit to provide help with the housing costs of private and public sector tenants.

Section 79 introduces measures for a scheme to reduce the under-occupation of social housing by HB claimants.

Incapacity Benefit (IB)

A weekly benefit paid to people who are unable to work because of illness or disability, and have paid a specified amount of **National Insurance contributions**. Paid at 3 rates:

> a short-term lower rate: payable to those who do not qualify for Statutory Sick Pay, for the first 28 weeks of incapacity;
>
> a short-term higher rate: payable from 28 weeks to 52 weeks of incapacity;
>
> a long-term rate: payable after 52 of incapacity.

"Incapacity for work" is measured:

> during the first 28 weeks (in the case of people with a recent work record) by the "Own Occupation Test", which assesses people's ability to do their usual job;
>
> after 28 weeks (or from the start of the claim for people without a recent work record), through the "All Work Test": a functional test which assesses the claimant's ability to perform a wide range of activities.

Sections 62 and 63 amend the rules for IB; section 61 introduces a modified qualifying test.

Income Support (IS)

An income-related (means-tested) benefit for people who are not in work (or working less than 16 hours a week) and whose income is less than a specified level. It is calculated on the basis of age, family membership and other prescribed circumstances.

Jobseekers Act

The Jobseekers Act 1995: established **Jobseeker's Allowance**. Amended by section 60, and Schedules 7 and 8.

Jobseeker's Allowance (JSA)

Jobseeker's Allowance is the social security benefit for people who are unemployed or who are working for less than 16 hours per week. To qualify for JSA a jobseeker must be capable of work, available for work, actively seeking work, and must enter into a "Jobseeker's Agreement" which sets out the steps he will take in order to find work. Jobseekers who have paid sufficient **National Insurance contributions** can receive contribution-based JSA at a personal rate for up to six months. Those who do not qualify for contribution-based JSA, or whose needs are not met by the contribution-based allowance, can claim income-based JSA for themselves and their dependants subject to a means test. Income-based JSA is paid for as long as needed, provided that the qualifying conditions continue to be met.

Schedules 7 and 8 Part V make particular changes to the rules for JSA.

Lower Earnings Limit (LEL)

The weekly level of earnings below which there is not a liability to pay **National Insurance contributions**. It is also the level at which people secure entitlement to basic contributory benefits. Weekly earnings above this point (and up to the Upper Earnings Limit) accrue entitlement to SERPS or to contracted-out rebates.

Sections 73 and 74 (and Schedules 9 and 10) increase the starting point for paying contributions from the LEL to a new "primary threshold". Benefit entitlement will continue to build up on earnings at or above the LEL.

Maternity Allowance

Weekly benefit paid by the Benefits Agency to mothers-to-be who do not qualify for Statutory Maternity Pay, or who are self-employed. Section 53 extends entitlement to women earning below the **Lower Earnings Limit** but at least £30 a week.

National Insurance contributions

Contributions payable by those in work and their employer into the National Insurance fund, which are used to pay contributory social security benefits to qualifying individuals. Self-employed people pay a lower rate but have more limited rights to benefits. Contributions are divided into four main classes which bring access to different benefit entitlements:

Class 1: Payable by employed earners on all earnings between the **Lower Earnings Limit** and **Upper Earnings Limit**, and by employers on all earnings above the **Lower Earnings Limit**. Class 1 contributions give access to all National Insurance benefits, both at a flat rate and with earnings-related increases where relevant (provided that the individual meets the specific conditions of entitlement for each benefit). Sections 73-76 make changes to the rules for Class 1 contributions.

Class 1A : contributions paid by employers in respect of employees' car and fuel benefits. The charge is based on the cash equivalent of the car benefit and the car fuel benefit provided for private use of the employee.

Class 1B: contributions paid on settlements (PAYE Settlement Agreements) made with the Inland Revenue by an employer. This class of contributions is being introduced in April 1999.

Class 2: Flat-rate contribution paid by self-employed earners. Benefits are payable at the basic rate only, and there is no entitlement to certain benefits.

Class 3: Flat-rate voluntary contributions payable for any period when people were not liable to pay Class 1 or 2 contributions because they were not employed or were outside the country.

Class 4: Profit-related additional contributions payable by self-employed earners with profits above an annual threshold, up to an upper threshold equivalent to the **Upper Earnings Limit** for Class 1 contributors. These contributions do not give entitlement to any additional benefits (they are intended to ensure that those who can, contribute an amount which more accurately reflects the levels paid by employed earners and their employers).

National Insurance number

A unique number given to every individual of working age to keep track of their **National Insurance contributions**. Benefit claimants are expected to produce a national insurance number (or sufficient evidence for one to be allocated) as a condition of a claim. Section 69 extends this requirement to Child Benefit.

Occupational pension scheme

A scheme organised by an employer or on behalf of a group of employers to provide pensions and/or other benefits for, or in respect of, one or more employees on leaving service or on death or retirement.

Usually there are two types of occupational pension schemes:

final salary schemes (also referred to as a salary-related scheme or defined benefit scheme). The benefits are calculated by reference to the employee's salary at or near the time of retirement or on leaving service, and the length of pensionable service.

money purchase schemes (also known as defined contribution schemes). Contributions are invested to produce a capital sum on retirement. The capital sum (less any tax-free lump sum) is used to purchase an **annuity** to provide a pension.

Occasionally there are hybrid schemes. Both types of occupational pension scheme commonly provide, in addition to other benefits, a lump sum life assurance benefit based on a multiple of the member's salary.

Occupational Pensions Regulatory Authority (OPRA)

A statutory body, created by the Pensions Act 1995, responsible for ensuring that occupational pension schemes comply with the requirements of the relevant legislation. It has powers of investigation and can impose penalties ranging from prohibition from acting as a trustee, imposition of fines to criminal prosecution.

Pension Schemes Act 1993 ("the 1993 Act")

Consolidates most of the rules for **occupational** and **personal** pensions. Includes provisions for protecting scheme members and for contracting out of **SERPS**.

Pensions Act 1995 ("the 1995 Act")

This Act provides a framework of statutory obligations on employers, trustees, scheme professionals and others connected with pension schemes in order to provide greater security for scheme members.

Personal pension

An arrangement between an individual who is self-employed, in non-pensionable employment or who is not a member of an employer's scheme, and a pension provider (such as an insurance company) which enables the individual to make provision for a pension on a money purchase basis. See also **occupational pension scheme**.

An Appropriate Personal Pension (APP) is a personal pension scheme that has been certified as suitable for **contracting out** of **SERPS**.

Severe Disablement Allowance (SDA)

A non-contributory, non means-tested benefit, paid to people who cannot work because of illness or disability, and who have been unable to pay sufficient **National Insurance contributions** to qualify for Incapacity Benefit (IB). For people who become incapable of work before the age of 20, the qualifying test of "incapacity" is the same for SDA as for IB—but those aged 20 and over must additionally be assessed by a doctor as "80% disabled".

Section 65 abolishes SDA for new claimants, while providing the power to protect the benefit for existing claimants. Section 64 allows 16-19 year olds (and other specified people below the age of 25) who would currently receive SDA to receive Incapacity Benefit instead.

State Earnings Related Pension Scheme (SERPS)

A scheme introduced in 1978 which provides an additional state pension component, calculated by reference to the employee's earnings, on top of the basic state pension (the flat-rate pension paid to people who have met the minimum **National Insurance contribution** requirements).

Upper Earnings Limit (UEL)

The level of weekly earnings above which there is no liability for employee **National Insurance contributions**. It sets the upper limit for the weekly earnings on which **SERPS** accrue and which qualify for contracted-out rebates. See also **Lower Earnings Limit**.