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

COMMENTARY ON SECTIONS

Commentary

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.