

WELFARE REFORM AND PENSIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY

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.

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

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 3 amends 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 5 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.

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 7 extends 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.

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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 11 inserts 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.

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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.

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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 3 amends 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 27 amend 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 42 amend 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 39 inserts 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 42 extends the scope of section 183(3) to the new section 101I inserted by section 37 of this Act.

Paragraphs 43 to 63 amend 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 65 amends Schedule 2 to the Family Law Act 1996.

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

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.

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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; Hansard 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.

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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.