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

SCOTTISH PARLIAMENTARY PENSIONS ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part J Surviving Partners and Children

232. Part J of Schedule 1 covers the pension entitlement of surviving partners and children of current or former MSPs or office-holders who were at the time of their death a scheme member, scheme pensioner or deferred pensioner. The rules covering these pensions comply with the rules in section 167 and Part 2 of Schedule 28 of the Finance Act 2004 (which set out the rules relating to payment of pension death benefits by a registered pension scheme). The rules in Part J replace the rules contained at Part K of the 1999 pensions order.

Rule 56: Meaning of scheme pension entitlement

233. In order to calculate a surviving partner or child's entitlement to pension, it is first necessary to determine what pension would have been due to the deceased had they survived. The amount of pension that would have been payable depends upon what type of scheme member the deceased was at the time of their death. Rule 56 refers to this as "scheme pension entitlement" and sets out how this is calculated for each type of scheme member.

234. Rule 56(2) sets out how scheme pension entitlement is calculated for persons who die while a participating member. Rule 56(2)(a) determines that, for a participating member who died aged 65, or over this is based on the prospective annual scheme pension that would have been payable had the deceased retired on the day of their death (i.e. was no longer an MSP or office-holder on that day). For an MSP this would be the pension payable under rule 38 and for an office-holder the pension payable under rule 39. Rule 56(2)(b) determines that for a participating member who died under age 65, the prospective annual scheme pension is the annual pension that would have been payable had the deceased become entitled to a serious ill-health pension on the day of their death. For an MSP this would be the pension calculated under rule 50(1) and for an office-holder the pension calculated under rule 50(2).

235. Rule 56(3) determines the scheme pension entitlement for an individual who died while being a deferred pensioner. Under (a) the scheme pension entitlement for a deferred pensioner over 65 is the annual pension that had already been accrued up to the date of death including any reckonable service between ages 65 and 75. For those under 65, (b) determines the scheme pension entitlement is the annual pension that has already been accrued up to the date of death and would have been payable if the person was 65 on that date. For an MSP this would be the pension calculated under rule 38 and for an office-holder the pension calculated under rule 39.

236. Rule 56(4) sets out scheme pension entitlement for those in receipt of a scheme pension and makes clear that any reduction in the pension payable as a result of payment of a

retirement lump sum is to be ignored for the purposes of survivor benefits. Under (a) for a scheme pensioner who died and took a retirement lump sum under rule 43(2), scheme pension entitlement is the annual pension that would have been payable at the date of death had it not been reduced under commutation rule 43(2). For a scheme pensioner who died and did not take a retirement lump sum, scheme pension entitlement is the annual pension in payment on the date of their death.

237. Rule 56(7) covers former participating members whose pension rights had been extinguished by taking an ill-health lump sum under rule 55(3) before they died (see paragraph 233). Scheme pension entitlement is the pension that would have been payable if the deceased had received a serious ill-health pension. For an MSP this would be the pension calculated under rule 50(1) and for an office-holder the pension calculated under rule 50(2).

237(a) Rule 56(5) deals with the treatment of scheme pensioners whose pension has been suspended under rule 41 on their becoming an MSP or the holder of a pensionable office. Under rule 56(5A) these scheme members are to be treated as if they were scheme pensioners immediately before their death for the purposes of calculating scheme pension entitlement. The suspension of pension under rule 41 is treated as having been lifted immediately before death. Any additional scheme pension entitlement as a participating member is calculated separately.

238. In the case of an individual aged 75 or over who died whilst their pension was reduced to nil (under rule 44(2)), rule 56(7) determines that the prospective pension is calculated as if the deceased was a deferred pensioner on their date of death (see paragraph 237). Therefore, the scheme pension entitlement used to calculate the survivor benefits ignores the lump sum commutation taken by such an individual.

Chapter 2 Partners' pensions

239. Chapter 2 of Part J sets out the rules covering partner pensions and trivial lump sum payments.

Rule 57: Partner

240. Rule 57 provides the definition of a qualifying partner. Under rule 57(1) the deceased's partner may be a spouse, civil partner or a person who qualifies under rule 57(2) as an "unmarried partner".

241. For an unmarried partner to qualify for a partner's pension rule 57(2) determines that the deceased must have notified the Fund trustees in writing of their unmarried partner at least six months immediately before their death. The trustees must also be satisfied based on the evidence they have received that:

(i) The deceased had lived together with their unmarried partner as if husband and wife or civil partners for a period of at least 2 years before the death. The reference to living together as husband and wife or as civil partners mirrors the relationship test in section 25 of the Family Law (Scotland) Act 2006;

(ii) the parties were in an exclusive relationship and neither the deceased or their unmarried partner had lived with any other person in such a relationship or with a spouse or civil partner during the 2 year period;

(iii) during the 2 year period the unmarried partner was financially dependant on the deceased or they were mutually financially dependant – to meet a requirement of the Finance Act 2004 at Schedule 28 (paragraph 15(3)); and

(iv) Immediately before the deceased's death the deceased and their unmarried partner must not have been prevented by law from marrying or becoming civil partners. As such both parties must not have been the spouse or civil partner of any person and neither party should have been prevented by law from marrying or becoming civil partners because of their age, mental capacity, relationship or other legal restriction.

Rule 58: Partner's pension

242. Rule 58 sets out the qualification conditions for payment of a partner's pension. Rule 58(1) allows for a partner's pension to be payable following the death of a participating member, deferred pensioner or scheme pensioner. Rule 58(2) determines that a partner's pension is $5/8^{\text{ths}}$ of the deceased's prospective pension entitlement as described in paragraphs 235-240.

243. Under rule 69, the partner's pension is suspended for any 5 year guarantee period as a partner will receive a larger entitlement of the deceased's pension if they qualify for a payment under the 5 year guarantee provisions (see Part L).

Rule 59: Enhancement of initial partner's pension

244. Rule 59 provides for an enhancement of a partner's pension for three months following the death of a participating member or pensioner to the level of income the member was receiving at that time, in order to give the partner time to adjust financially to the loss of the partner's income.

245. Rule 59(1) and (4) provide that the amount payable for any part of the three month period is increased where the amount A determined by rule 59(2) is less than the amount B determined by rule 59(3).

246. The amount A in rule 59(2) is the amount of pension that is due to be paid to the surviving partner during the three month period. To that amount is added any children's pension to be paid to that partner for the benefit of an eligible child during that period.

247. Amount B in rule 59(3) depends upon whether the deceased was a participating member (i.e. a serving MSP or office-holder) or a scheme pensioner at the time of their death. If a scheme member then B is the salary they would have received during the three month period. If a scheme pensioner, B is the amount of scheme pension they would have received during that period.

248. Under rule 59(4) the partner's pension is increased during the three month period by the difference between amount A and amount B.

249. Rule 59(5) sets out how a participating member who is also a scheme pensioner (whose pension payments are suspended under rule 41 on becoming an MSP or the holder of a pensionable office) is to be treated for the purposes of rule 59. Such a member is to be treated as a participating member for the purposes of this rule.

Rule 60: Duration of partner's pension

250. Rule 60 determines when a partner's pension commences and the application and payment details required. Rule 60(1) determines that a partner's pension is payable from the day after the deceased partner died. Rule 60(2) states that payments to a partner need not begin unless the trustees receive notice of entitlement or any relevant information required to arrange payment, for example, details of any other pensions in payment in order to calculate any tax liability if the Lifetime Allowance limit is breached. The Fund trustees also require banking or other payment details.

251. Rule 60(3) makes clear that a partner's pension is paid for life. This applies regardless of whether the deceased's partner subsequently marries, becomes a civil partner or co-habits with another person. Rule 60(4) provides for periodic payments of the pension which is usually monthly in arrears.

Rule 61: Partner's trivial lump sum

252. Rule 61 provides an option, instead of periodic instalments, for certain partner's pensions to be commuted and paid as a partner's trivial lump sum known as a "trivial commutation lump sum death benefit".[1] It is a one off tax-free lump sum paid instead of a monthly pension. Under the Finance Act 2004 a trivial lump sum cannot be paid in respect of a deceased person who was aged 75 or over,[2] and the amount paid must not exceed 1% of the Lifetime Allowance. For the year 2008/09, this equates to a pension of £825 per annum.

253. Rule 61(1) makes provision for a partner's trivial lump sum requiring that:

- the partner applies in writing to the trustees for a trivial lump sum instead of an annual pension;
- no payment has been made to the partner in respect of a partner's pension or a death in service lump sum;
- the partner is not entitled to a 5 year guarantee pension under rule 69; and
- the trustees be satisfied that the trivial lump sum payment would be a trivial commutation lump sum death benefit under Schedule 29 to the Finance Act 2004.

254. Under subparagraph (2), the Fund trustees determine the amount of the partner's trivial lump sum. Rule 61(3) determines that the amount must be certified by the scheme actuary or calculated in accordance with guidance and tables provided by the scheme actuary.

255. Rule 61(4) makes clear that payment of a one off trivial lump sum extinguishes the partner's rights to all other benefits under the scheme in respect of the deceased.

Chapter 3 Children's pensions

256. Chapter 3 sets out the rules covering eligibility for and payment of children's pensions.

Rule 62: Children's pensions

257. Rule 62(1) determines that a children's pension may be payable in the event of the death of a participating member, scheme pensioner or deferred pensioner.

258. Rule 62(2), (3) and (4) determine that, where a partner's pension is payable, the total children's pension payable will be a quarter of the deceased's scheme pension entitlement (as calculated under rule 56, see paragraphs 235-240) if there is one child and $3/8^{ths}$ if there are two or more children (Amount A). Where no partner's pension is payable the total amount is higher, being $5/16^{ths}$ of the deceased's scheme pension entitlement for one child or $5/8^{ths}$ for two or more children (Amount B).

Rule 63: Eligible children

259. Rule 63 sets out the definition of a child. Under rule 63(1), a child includes an adopted child and a stepchild (providing that when the deceased died the stepchild was financially dependant on the deceased or dependant on the deceased due to physical or mental impairment).

260. Rule 63(2) sets out conditions, one of which must be met for a child to be an "eligible child" at any given time. One of the conditions must always apply although it need not always be the same one.

Condition 1 requires the child to be born and under aged 17.

---

1 Defined in paragraph 20 of Schedule 29 to the Finance Act 2004
2 Schedule 29 to the Finance Act 2004

Condition 2 is directed at older children aged over 17 but under 23 and includes a financial dependency test. It is primarily directed at those in continuing education but could apply in other circumstances. The child must have been financially dependent on the deceased on death or under age 17. To continue to qualify, the Fund trustees must be satisfied that any child would have been financially dependent on the deceased had they survived.

Condition 3 applies to any child who, because of physical or mental impairment, was dependant on the deceased when they died. To qualify for ongoing payments, the Fund trustees must remain satisfied that the dependency would have continued had the deceased survived.

Rule 64: Payment of children's pension

261. Under rule 64(1), a children's pension is payable during any period a child qualifies under rules 62 and 63. A children's pension would normally be paid to the surviving parent, but rule 64(2) gives the Fund trustees discretion to decide who should receive the children's pension (or any part of it).

262. Rule 64(3) requires that, where a children's pension is paid to someone other than a qualifying child, the whole pension must be used for the benefit of the child(ren), unless the Fund trustees direct that the proportions are to be different. This may occur where there are a number of eligible children, given that the total amount does not increase although there are more than two eligible children.

263. Rule 64(4) gives the Fund trustees power to recover payment of a children's pension from the recipient in the event that the recipient is not using it for the benefit of the child. The trustees could take other action to ensure that the money is applied for the benefit of the intended beneficiary. They can seek to recover amounts not used for the child, including reducing future pension payable to the recipient. In addition, rule 64(5) gives the Fund trustees discretion to withhold a children's pension if it is not being used for their benefit. Any withheld amounts can be paid when the Fund trustees are satisfied that the pension will be used for its intended purpose.

264. Under rule 64(6)(a), the Fund trustees need not commence payment of a children's pension until they have received notification of the child's entitlement. This could be the child's birth or adoption certificate or evidence of financial dependency. Under rule 64(6)(b), the Fund trustees also require details of any other pensions in payment, in order to calculate any tax liability if the Lifetime Allowance is exceeded. The Fund trustees would also require details to allow payments to be made, such as home address and bank details.

265. Under rule 64(7), the pension will be paid monthly in arrears or by any other payment frequency of no longer than one year, as determined by the Fund trustees.

Transitional provisions – partner's and children's pensions

266. Paragraphs 11 and 13 of Schedule 3 contain transitional provisions for entitlement to partner's and children's pensions.

267. Pensions for individuals will be calculated under the new rules, save where covered by the transitional and saving provisions in Schedule 3. Under paragraph 10, the old rules will apply in respect of a pensioner member i.e. a scheme pensioner. Without paragraph 11, the new provision for an unmarried partner's pension made under rule 57 (2) would not apply to pensioners or survivors of deceased pensioners. Paragraph 11 applies this new provision to such individuals. Thus eligible unmarried partners of existing scheme pensioners and deceased pensioners qualify under rule 57.

268. The provisions of paragraph 13 apply to those who have 15 years of qualifying service at the date the new rules come into force. If they subsequently take early retirement, for the

purposes of calculating a partner's and/or children's pension, the paragraph provides for the disregard of any reduction made to the pension as a result of taking early retirement.