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

Part III – Pensions on Divorce Etc.

Section 19: Pension sharing orders in England and Wales

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

Section 20: Pension sharing orders in Scotland

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

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

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

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

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

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

Section 22: Extension to overseas divorces etc.

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

Subsection (2) amends section 18 to require the court, when deciding whether and how to exercise its powers to grant relief under the 1984 Act, to have the same regard to

pension benefits as it does in relation to a domestic case. *Subsection (3)* defines pension arrangement and benefits under a pension arrangement.

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

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

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

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

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

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

(a) payment of sums due under earmarking orders

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

(c) notification of change of circumstances;

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

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

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

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

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

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

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

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

Part IV – Pension Sharing

Chapter I – Sharing of Rights under Pension Arrangements

Section 27: Scope of pension sharing mechanism

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

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

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

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

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

Section 28: Activation of pension sharing

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

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

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

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

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

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

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

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

Note: In Scotland, a pension sharing order will take effect on the day that the order is made. However, the appeal process must be completed before the extract decree or declarator is issued. If an appeal is marked the parties will not therefore be able to send the relevant documentation to the person responsible for the pension arrangement until the appeal

process is complete. The implementation period under section 34(1) does not begin until the person responsible for the pension arrangement receives that documentation.

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

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

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

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

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

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

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

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

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

(b) satisfies requirements prescribed by the Lord Chancellor;

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

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

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

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

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

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

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

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

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

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

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

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

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

the pension sharing order or agreement, and

the relevant decree of divorce or declarator (as well as the information referred to in section 34(1)(b)(i) & (ii))

within two months of the date of the extract of the decree or declarator.

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

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

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

Section 29: Creation of pension debits and credits

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

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

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

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

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

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

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

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

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

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

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

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

Section 30: Calculation of cash equivalents

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

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

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

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

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

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

Pension debits

Section 31: Reduction of benefit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 32: Effect on contracted-out rights

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

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

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

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

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

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

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

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

Section 33: Time for discharge of liability

Section 34: "Implementation period"

Section 35: Mode of discharge of liability

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

Section 33: Time for discharge of liability

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

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

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

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

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

Section 34: "Implementation period"

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

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

Subsection (3) provides that subsection (1) is subject to regulations made under section 41(2)(a). We intend to use the regulation-making power under the latter provision to allow the person responsible for a pension arrangement to postpone the

start of the implementation period, where he has made payment of a pension sharing charge a pre-condition to implementing the pension share, until payment of the charge.

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

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

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

Section 35: Mode of discharge of liability

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

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

Section 36: Safeguarded rights

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

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

Section 68A

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

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

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

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

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

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

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

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

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

Section 37: Requirements relating to pension credit benefit

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

> Chapter I requires rights in an occupational pension scheme derived (directly or indirectly) from a pension credit to be treated in a way broadly similar to the way in which the rights of a deferred members are required to be treated under Chapter I of Part IV of the Act.
>
> Chapter II gives members of funded occupational and personal pension schemes with rights derived from a pension credit the right to transfer those rights to another pension scheme or arrangement.

Chapter I

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

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

Section 101C

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

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

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

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

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

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

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

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

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

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

Chapter II

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

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

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

or personal pension scheme in which rights can be bought, with the cash equivalent of pension credit rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 101K

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

Subsection (3) complements the new section 101G(3) (see above). If the scheme requires former spouse members to exercise their rights to a transfer of pension credit

benefit and other accrued rights at the same time, then a transfer notice under Part IVA may only be withdrawn if a transfer notice under section 95 of the Pensions Act 1995 is also withdrawn.

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

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

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

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

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

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

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

Section 101P defines some terms used in the Chapter.

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

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

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

Section 38: Treatment in winding up

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

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

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

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

Indexation

Section 39: Public service schemes

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

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

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

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

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

Section 40: Other pension schemes

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

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

Section 41: Charges by pension arrangements

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

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

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

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

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

> *subsection (2)(a)*: postponement of the start of the implementation period. We intend to use the regulation-making power to allow the scheme to postpone the start of the implementation until the administration charges have been met (see also section 34(3) above;
>
> subsection (2)(b): we intend to use this provision to allow charges to be recovered from one party where that party has defaulted on meeting the administrative charges, and the charges have been met by the other party;
>
> subsection (2)(c): we intend to use this provision to provide that, where a pension arrangement deducts charges from a pension credit, the provisions in Schedule 5 about discharge of liability in respect of the credit have effect by reference to the net amount of the credit.
>
> subsection (2)(d): to permit the scheme to make additional deductions from any transfer or other payment in respect of the member's rights. We intend to use this regulation-making power to permit a salary related scheme to increase the original charge, by an appropriate rate of interest, when the charges are met not at the time the scheme implements the pension sharing order/agreement, but at a later date.

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

Adaptation of statutory schemes

Section 42: Extension of scheme-making powers

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

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

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

Section 43: Power to extend judicial pension schemes

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

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

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

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

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

Subsection (3) explains who the appropriate minister is.

Supplementary

Section 44: Disapplication of restrictions on alienation

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

Section 45: Information

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

Chapter II – Sharing of State Scheme Rights

Section 47: Shareable state scheme rights

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

Section 48: Activation of benefit sharing

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

Section 49: Creation of state scheme pension debits and credits

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

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

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

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

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

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

Section 50: Effect of state scheme pension debits and credits

Subsection (1) gives effect to Schedule 6.

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

Schedule 3: Pension sharing orders: England and Wales

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subsection (2) prevents the court from setting aside or varying the order if the person responsible for the pension arrangement has acted to his detriment following the taking effect of the order (for example, by making a transfer payment to another scheme or arrangement);

Subsection (3) prevents the court from setting aside or varying the order if the Secretary of State has acted to his detriment following the taking effect of the order.

Subsection (4) provides that for the purpose of determining whether a person has suffered detriment the court may disregard insignificant detriment.

Subsection (5) provides that where subsection (2) or (3) applies, the appeal court may make such further orders as it considers appropriate to put the parties in a position it considers appropriate.

Subsection (6) has the effect that a pension sharing order under section 40A is only subject to a stay order if the decision of the appeal court can itself be the subject of an appeal.

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

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

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

Paragraph 1(3)provides that section 25B(2) shall cease to have effect. Provisions to similar effect are already in section 25. The removal of the duplication will make the provisions easier to understand.

Paragraph 1(6) substitutes a new section 25B(5) which provides that orders for payment under subsection (4) may only be expressed in percentage terms. Hitherto, it has been possible for the order to specify an amount or a percentage.

Paragraphs 1(8)clarifies the wording of section 25B(7) concerning commuted benefits.

Paragraph 1(9)introduces three new subsections into section 25B. The first two subsections restrict the court's powers under section 25B. In particular they prevent pension earmarking if the pension arrangement is subject to a pension sharing order in relation to the marriage which has not yet taken effect or has already been the subject of a pension share by the parties.

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

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

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

(a) payment of sums due under pension earmarking orders

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

(c) notification of changes of circumstances;

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

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

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

Schedule 5: Pension credits: mode of discharge

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

Funded pension schemes

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

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

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

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

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

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

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

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

Unfunded public service pension schemes

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

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

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

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

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

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

Other unfunded occupational pension schemes

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

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

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

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

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

Other pension arrangements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sub-paragraph (3) defines the valuation day.

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

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

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

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

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

Schedule 6: Effect of state scheme pension debits and credits

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

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

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

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

Paragraph 3 inserts sections 55A - 55C

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

Subsections (3) to *(6)* are similar to the provisions in section 45B (3), (4), (6) and (7), other than that they refer to the calculation of the shared additional pension. If a former spouse becomes entitled to a state scheme credit **in or after** the tax year immediately preceding that in which she reaches pensionable age, the shared additional pension will be a weekly amount which is of an actuarially equivalent value to the credit. If, however, she becomes entitled to the credit **before** the beginning of the tax year immediately preceding that in

which she reaches pensionable age, the additional pension will be that weekly amount, expressed in terms of the valuation day, multiplied by the earnings factor percentage for the relevant tax year specified in the latest annual Revaluation of Earnings Factor Order (the current order is SI 1998/1137).

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

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

Schedule 8: Part VII: Retirement Pensions.

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

Schedule 12: Consequential amendments – Part I

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

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

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

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

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

Paragraph 11 amends section 16 of the 1985 Act which enables the court to make an order to vary or to set aside an agreement on financial provision. It may make an order where the agreement (or any term in it) was not fair and reasonable at the time it was entered into. The court may do so on granting decree of divorce or within such time as the court may specify on granting decree of divorce. The amendment to section 16 limits the court's power to vary or set aside a pension sharing provision in an agreement so that the court may only do so at the time it grants decree of divorce. This is to avoid re-opening a pension sharing provision after it has been made. Any non-pension sharing terms of the agreement would not be affected by this limitation.

Paragraph 13: amends the Income and Corporation Taxes Act 1988 to update the cross-reference to pension sharing provisions in the Act.

Paragraphs 14 to 22: amend the Social Security Contributions and Benefits Act 1992.

Paragraphs 15 and 16: the amendments to section 20 and section 21 are consequential upon the provisions for the sharing of SERPS rights set out in Schedule 6 to the Act, which inserts a new section 55A "shared additional pension" into the Act.

Paragraph 17 amends section 39 to ensure that the reduction in the member's additional pension as a consequence of pension sharing is also reflected in any widowed mother's allowance or widow's pension payable on the member's death.

Paragraph 18 amends section 43, which is concerned with which category of retirement pension a person receives when he is entitled to more than one. The new subsection (6) to section 43 provides that shared additional pension is not covered by the term "retirement pension". Thus, a person may receive it in addition to any category of retirement pension.

Paragraphs 19 to 21 amend sections 48A to 48C to ensure that the reduction in the member's additional pension in consequence of pension sharing is also reflected in any Category B pension payable on the member's death.

Paragraph 22 amends section 54(1) to provide for an election by a person to be treated as not having become entitled to a Category A or B retirement pension to apply also to any shared additional pension to which he may be entitled.

Paragraphs 23 to 27amend the Social Security Administration Act 1992 to take account of the shared additional pension that will become payable to the former spouse in pension sharing cases.

Paragraphs 28 to 42amend the Pension Schemes Act 1993.

Paragraphs 29 and 30 are consequential upon the creation of safeguarded rights in section 36 of this Act.

Paragraph 31 amends section 83 which contains provisions for revaluing the benefits of early leavers from occupational schemes from the date on which pensionable service ends until the scheme's normal pension age (NPA). The new subsection (1A) excludes benefits payable by virtue of pension credit rights, except, in the case of salary-related occupational pension schemes, to the extent that the benefits are payable by virtue of rights which involve the member being credited with added years of pensionable service.

Paragraph 32 amends section 85 to make it clear that the revaluation provisions in Chapter II of Part IV of the Act do not apply to such alternatives to pension credit as may be prescribed under the regulation-making power at section 101D(2)(b) inserted by section 37 of this Act.

Paragraphs 33 to 35 amend sections 93, 93A and 94 of the Act to exclude rights which are attributable to a pension credit from the provision relating to "Transfer Values" for members of occupational and personal pension schemes in Part IV of Chapter IV of the Act. (Separate provisions for Transfer Values in respect of pension credit rights are contained in Chapter II of Part IVA of the Act as inserted by section 37 of this Act.)

Paragraph 36 inserts a new subsection (4) to section 96 of the Act to enable an occupational or personal pension scheme to prevent a member from making an application to exercise his right to a cash equivalent without also giving the trustees or managers of the scheme a transfer notice in respect of his pension credit rights under section 101F (as inserted by section 37 of this Act).

Paragraph 37 amends section 98 so that its operation is not affected by anything that happens in relation to rights under a personal pension scheme attributable to a pension credit. There are separate transfer provisions for pension credit rights and other rights.

Paragraph 38: the effect of this amendment is that where an application under Chapter IV of Part IV of the Act depended on the giving of a transfer notice under section 101F,

the application under Chapter IV of Part IV can only be withdrawn if the notice is also withdrawn.

Paragraph 39inserts a reference to Chapters I and II of Part IVA into section 129(1) of the Act and a reference to Chapter II of Part IVA into section 129(2) of the Act. Section 129 is concerned with the relationship between statutory requirements and scheme rules.

Paragraph 40 inserts a reference to section 25D of the Matrimonial Causes Act 1973 section 12A of the Family Law (Scotland) Act 1985 or Part III or Part IV of this Act into section 178(a) of the Act. Section 178(a) gives the Secretary of State a regulation-making power to provide who is treated as a manager of an occupational pension scheme. The paragraph also inserts a reference to Chapter 1 of Part IVA into section 178(b) of the Act. Section 178(b) gives the Secretary of State a regulation-making power to provide who is to be treated as a trustee of a pension scheme for the purposes of various parts of the Act.

Paragraph 41 inserts a definition of "pension credit" and "safeguarded rights" into the general interpretation section of the Act.

Paragraph 42extends the scope of section 183(3) to the new section 101I inserted by section 37 of this Act.

Paragraphs 43 to 63amend the Pensions Act 1995.

Paragraph 44: the amendment to section 3(2)(a) of the Act extends the circumstances in which the Occupational Pensions Regulatory Authority (OPRA) may prohibit a person from being a trustee of a scheme to include serious or persistent breaches of duty under Chapter II of Part IVA of the Pension Schemes Act 1993 (pension credit benefit transfer values).

Paragraphs 45 to 49: the effect of the amendments to sections 16, 17, 18, 20 and 21 of the Act is to exclude members whose only rights are attributable to a pension credit from the statutory consultation procedures relating to member-nominated trustees.

Paragraph 50: section 38 provides a power to enable the trustees of a scheme to defer the winding up of the scheme. The effect of the amendment is to give the trustees the option of either deferring winding up the scheme and permitting no new members to be admitted to it or admitting no new members except pension credit members.

Paragraph 51: the effect of the amendment to section 51(6) is to exclude pensions derived from pension credit rights from the requirements to index pensions in payment in section 51 of the Act.

Paragraph 52: the amendment to section 53 is consequential upon the amendment to section 51(6) above.

Paragraph 53: section 67 imposes restrictions on the power to alter occupational pension schemes to enhance the security of entitlements and rights accrued by members. The effect of this amendment is to bring former spouse members within the scope of section 67 and give them the same protection as that enjoyed by other members.

Paragraph 54: the amendment to section 68(2) extends the powers to alter occupational pension schemes or modify them by resolution to enable them to accommodate pension credit rights.

Paragraph 55: the amendment to section 73 in section 38 of this Act provides for pension credit benefit to be included in the preferential liabilities on the winding up of a scheme to which section 56 of the Act applies. The new subsection (3A) will ease administration. It will mean that a scheme will not be required to separately identify the part, if any, of pension credit rights which is derived from voluntary contributions.

Paragraph 56: this amendment will enable a scheme to which section 73 applies to discharge its liability for pension credit benefit on winding up under section 74(3)(b).

Paragraphs 57 to 59: the effects of the amendments to sections 91, 92 and 93 of the Act are to include pension credit rights within the provisions concerning assignment, forfeiture, bankruptcy etc that relate to occupational pension schemes.

Paragraph 60: amends section 99(2) of the Act to enable an inspector to enter the premises of an occupational pension scheme in connection with the provisions relating to pension credit transfer values inserted into Chapter II of Part IVA of the Act by section 37 of this Act.

Paragraph 61: extends the definition of member in section 124(1) of the Act to include a pension credit member and makes other consequential amendments to the interpretation of Part I of the Act consequential upon this Act.

Paragraph 62 and 63 amend section 166 and section 167(4) of the Act to reflect the changes from "pension scheme" to "pension arrangement" in, respectively, sections 25B to 25D of the Matrimonial Causes Act 1973 and the corresponding provisions of the Family Law (Scotland) Act 1985.

Paragraphs 64 to 66 amend the Family Law Act 1996. They amend the prospective amendments of the Matrimonial Causes Act 1973 which are contained in Schedules 2 and 8 to the 1996 Act. They are consequential on the provisions in Schedule 3 to this Act coming into force before the new divorce and separation proceedings contained in the Family Law Act 1996.

Paragraph 65amends Schedule 2 to the Family Law Act 1996.

Sub-paragraphs (3) and (5) to (8) incorporate the definition of a pension sharing order into section 21 of the Matrimonial Causes Act 1973 as amended by the 1996 Act and make consequential amendments to the numbering of the subsections.

Sub-paragraph (4) makes an amendment corresponding to the amendment of section 24 of the Matrimonial Causes Act 1973 made by paragraph 3 of Schedule 3 to this Act (section 24 of the 1973 Act being substituted by paragraph 6 of Schedule 2 to the 1996 Act).

Sub-paragraph (9) replaces section 24B of the Matrimonial Causes Act 1973 with 4 new sections, numbered 24B, 24BA, 24BB and 24BC. These will empower the court to make pension sharing orders in relation to divorces under the Family Law Act 1996 and nullity under the 1973 Act.

Section 24B(1) gives the court power on application at the appropriate time to make a pension sharing order on application;

> *Subsection (2)* specifies the times at which the court can make the order. The definition of "appropriate time" mirrors, so far as relevant, the times when the court can make financial provision and property adjustment orders under the Act.
>
> *Subsection (3)* ensures that, wherever practicable, the court will make all the relevant pension sharing orders for a given divorce at once, rather than piecemeal.
>
> *Subsection (4)* makes section 24B subject to restrictions contained in the Matrimonial Causes Act 1973 and in section 19 of the Family Law Act 1996. Section 19 makes provision for when the court has jurisdiction in relation to divorce. For example, the court has no jurisdiction to make a pension sharing order where neither of the parties was domiciled in England or Wales on the date of the statement of marital breakdown, or habitually resident in England or Wales throughout the preceding year.

Section 24BA imposes further restrictions on the court's power to make a pension sharing order. An order cannot be made:

subsection (1): to take effect before the making of a divorce order in relation to the marriage;

subsection (2): while the period of reflection and consideration (described in section 7 of the Family Law Act 1996) is interrupted under section 7(8) of that Act;

subsection (3): where the divorce process has lapsed under section 5(3) or 7(9) of the Family Law Act 1996;

subsection (4): after the divorce order has been made, except in response to an application made before the divorce order was made, or with leave of the court;

subsections (5) to (7): impose restrictions on the making of a pension sharing order in relation to divorce which are equivalent to those imposed by section 24B(3) to (5) of the Matrimonial Causes Act 1973 inserted by paragraph 4 of Schedule 3 to this Act.

subsections (5) and (6): where a pension arrangement, or shareable state scheme rights, are the subject of a pension sharing order in relation to the marriage (ie where the order has been made, but has not yet taken effect) or have been the subject of pension sharing between the parties to the marriage (ie where a pension sharing order or agreement has already taken effect);

subsection (7): in relation to a person's pension rights which are subject to a financial provision order which includes provision under the earmarking/attachment provisions (sections 25B and 25C), whether the order was made in relation to the same marriage or a previous one;

subsection (8) provides the period of reflection and consideration is to have the same meaning as in section 7 of the Family Law Act.

Section 24BB makes provision for pension sharing in cases where a marriage is annulled. As with pension sharing on divorce, the court is required, wherever practicable, to make all the relevant pension sharing orders at once, rather than piecemeal. Orders on nullity can be made on or after the granting of the decree of nullity. They cannot take effect unless the decree has been made absolute.

Section 24BC imposes restrictions on the making of pension sharing orders in relation to nullity which are equivalent to those imposed by section 24BA(5) to (7) on the making of such orders in relation to divorce.

Paragraph 66 amends Schedule 8 to the Family Law Act 1996.

Sub-paragraph (2) alters the amendments of section 25(1) of the Matrimonial Causes Act 1973 to take account of the sections introduced by paragraph 66(9) above. In essence it extends the application of section 25 of the Matrimonial Causes Act 1973 (which lists the factors which the court has to take into account when considering whether and how to exercise its powers to make a financial provision order or property adjustment order) to cover pension sharing orders.

Sub-paragraph (3) Section 25A(1) of the Matrimonial Causes Act 1973 imposes a duty on the court when it is deciding to exercise its powers to make financial provision orders and property adjustment orders to consider whether it would be appropriate to exercise its powers to achieve a clean break (that is to terminate all financial obligations between the parties). This paragraph alters the amendments of section 25A(1) of the 1973 Act so that that provision extends to pension sharing orders.

Sub-paragraph (4) substitutes new paragraphs 11 and 11A for paragraph 11 of Schedule 8 to the 1996 Act. These paragraphs amend sections 25B, 25C and 25D of the 1973 Act. The amendments in the new paragraph 11 and 11A(a) replicate those to sections 25B and 25C in the present paragraph 11. Paragraph 11A(b) effects a consequential change in numbering.

Sub-paragraph (5) inserts two additional paragraphs into paragraph 16(2) of Schedule 8 to the 1996 Act. The first paragraph inserts a new sub-paragraph (fa) into section 31(2) of the 1973 Act and allows the court to vary, discharge, suspend a provision in or revive operation of a suspended provision of a pension sharing order where no divorce order has been made and no separation order is in force. The change in numbering reflects the fact that on the introduction of pension sharing a new sub-paragraph (g) is inserted. That sub-paragraph is amended by the second of the additional paragraphs so that it just applies to nullity.

Sub-paragraph (6) inserts a new sub-paragraph, making a consequential amendment.

Sub-paragraph (7) inserts a new subsection (4AB) into section 31 of the Matrimonial Causes Act 1973. It prevents the variation of a pension sharing order taking effect before the marriage is dissolved.

Sub-paragraph (8) is a consequential amendment. It ensures that the new section 31(4B) will, after the introduction of the new divorce and separation procedures, only be applicable to nullity.

Sub-paragraph (9) inserts two additional sub-paragraphs in paragraph 16 of Schedule 8 to the 1996 Act. They impose on the making of a pension sharing order under section 31(7B) the same duty to make orders on the same occasion and the same restrictions as apply under sections 24B and 24BA.

Sub-paragraph (10) inserts section 31B into the Matrimonial Causes Act 1973. It provides for a pension sharing order to be automatically discharged where a separation order is made following the pension sharing order. Pension sharing orders can only take effect when a divorce order is made. They cannot take effect if a separation order is made. The pension sharing order therefore becomes redundant, and will be discharged.

Sub-paragraphs (11), (12) and (13) make minor consequential amendments to paragraphs 19 and 21 of Schedule 8 to the Family Law Act 1996 following the insertion of pension sharing provisions into the Matrimonial Causes Act 1973.

Sub-paragraphs (14), (15) and (16) have the effect of making minor amendments to the Matrimonial and Family Proceedings Act 1984. They reflect the various technical changes made to the Matrimonial Causes Act 1973 by the amendments to permit pension sharing under the new divorce process which to be established by the Family Law Act 1996.

Part V: Welfare

Chapter I: Social Security Benefits

Section 52: Preservation of rights in respect of additional pension

This section enables the Secretary of State to postpone, or to modify or disapply in certain cases, a reduction of 50% in the amount of additional pension under the State Earnings-Related Pension Scheme (“SERPS”) which a widow or widower can “inherit” from a spouse who dies after 5th April 2000.

Currently, widows and, in certain circumstances, widowers may receive the full amount of their deceased spouse’s SERPS. However, as a result of changes originally enacted in the Social Security Act 1986 (but now consolidated in the Social Security Contributions and Benefits Act 1992), where a married person dies after 5th April 2000 the surviving spouse will be able to receive only 50% of the deceased’s SERPS.

This change was not fully publicised, and some people were incorrectly told that they or their widower could expect to “inherit” the full amount of SERPS.

This section enables the Secretary of State to make regulations, subject to the affirmative resolution procedure, to do one or more of the following:

> to provide for specified categories of widows and widowers to receive more than 50% of their spouse's SERPS;
>
> to postpone the 50% reduction from 6th April 2000 to a later year;
>
> to set up a scheme to determine who has been misled by incorrect or incomplete information about the 50% reduction, so as to ensure that the reduction is not applied in their, or their widow(er)'s, case.

Until provision for one of these options is in force, widow(er)s will continue to "inherit" the full amount of their spouse's SERPS.

An earlier version of this provision was first added to the Bill at Lords Report stage (11th October 1999; Hansard Vol 605, col 26) and this section was substituted at Commons consideration of Lords Amendments (3rd November 1999; Handard Vol 337, col 363).

Commentary

The three options for provision in regulations are set out in subsection (2), subsection (3) and subsections (4) to (6) respectively.

Subsection (2) enables regulations to increase above 50% the proportion of SERPS "inherited" by specified categories of widow(er)s.

Subsection (3) enables regulations to provide for the postponement of the reduction to some year later than the year 2000.

Subsections (4) and (5) enable regulations to provide for a scheme, to be in operation for a specified period, under which claims would be made by people who, in reliance on incorrect or incomplete information provided by a government department about the SERPS reduction, have not safeguarded their own or their spouse's financial position in the event of widowhood after 5th April 2000. Those, or the spouses of those, who claimed successfully under the scheme would not, in the event of their being widowed after 5th April 2000, be affected by the reduction in SERPS payable as part of Widow's Benefit, Bereavement Benefits or Category B Retirement Pension.

Subsection (6) enables those regulations to provide also for procedural and other matters regarding the scheme, such as the time and manner in which claims must be made, the information to be provided, the conditions for success, the decision-making process, and appeals.

Subsection (7) prevents the reduction in SERPS from taking effect until regulations are in force to provide for at least one of the three options described above.

Subsection (8) requires a draft of any regulations under this section to be approved by each House of Parliament before the regulations can be made.

Section 53: Extension of entitlement to state Maternity Allowance

In the 1999 Budget, the Chancellor announced a reform of Maternity Allowance so that women earning below the lower earnings limit for NI contributions, and at least £30 a week, would be entitled to the benefit for the first time. Section 53, which was added to the Bill at Commons Report (Hansard vol. 331, col. 643), makes the necessary changes to the legislation.

Background

There are two maternity benefits for pregnant working women. Statutory Maternity Pay (SMP) is administered and paid by employers; Maternity Allowance (MA) is paid by the DSS.

Statutory Maternity Pay is paid to employees who satisfy two basic tests. A woman must have been employed continuously by her employer for at least 26 weeks by the 15th week before her baby is expected; and she must earn on average at or above the Lower Earnings Limit (LEL: the starting point for paying National Insurance contributions, currently £66 a week).

Maternity Allowance is paid to women who do not qualify for Statutory Maternity Pay, to the self-employed, and to recently employed women. To qualify, they must have worked and paid National Insurance contributions for at least 26 of the 66 weeks ending with the week before the expected week of childbirth.

Both SMP and MA provide a basic weekly benefit for employees of £59.55 (the same as Statutory Sick Pay) for up to 18 weeks. SMP beneficiaries, however, receive 90% of their average earnings for the first 6 weeks, if this is higher. The self-employed and recently employed receive a lower rate of Maternity Allowance of £51.70.

Summary of changes

Section 53 extends Maternity Allowance to women who earn below the LEL. The changes:

allow women who earn at least £30 a week, but below the LEL, to get Maternity Allowance worth 90% of their average weekly earnings;

allow women with several low paid jobs to add together their earnings, and get MA for the first time;

allow self-employed women who hold a Small Earnings Exception from paying National Insurance contributions to get Maternity Allowance of £27 a week (90% of £30);

remove the lower rate of MA, so that the self-employed and recently employed receive the same basic rate of benefit as employed women.

The section gives the power to set out the details (e.g. how average weekly earnings should be calculated) in regulations.

Commentary

The section amends section 35 of the Contributions and Benefits Act which contains the rules for Maternity Allowance, and adds a new section 35A.

Subsection (1) replaces section 35(1) of the Act, which sets out the qualifying conditions for Maternity Allowance.

The only substantial change here is in the *inserted subsection (1)(c)*. Currently subsection (1)(c) says that a woman must meet National Insurance contribution conditions to qualify for MA. The new subsection says instead that she must earn above the "Maternity Allowance threshold" (defined in new section 35A(6) – described below – as £30).

There is a minor change in the *inserted subsection (1)(b)*. This makes clear that if a woman works for part of a week, this counts as a whole week for the test of recent employment.

Subsection (2) makes some consequential amendments.

Subsection (3) adds a new section 35A to the Contributions and Benefits Act. This sets out the rates at which Maternity Allowance will be paid, and gives the power to make the detailed arrangements of the earning test through regulations.

Any woman who earns on average at or above the Lower Earnings Limit will get the standard rate of MA (i.e. £59.55 a week) – *inserted subsection (2)*. There is no distinction between employed and self-employed women: self-employed and recently employed women will no longer get a lower rate of benefit.

Any woman whose average earnings are at least equal to the qualifying Maternity Allowance threshold (to be set at £30), but less than the LEL, will get a rate of MA equal to 90% of her average earnings – *inserted subsection (3)*.

The *inserted subsections (4)* and *(5)* of new section 35A contain powers to make regulations. It is intended to use the regulations to:

define "earnings".

For employed earners, the same definition will be used as for Statutory Maternity Pay (i.e. gross earnings of a type that would qualify for National Insurance contributions).

For the self-employed, it is intended to base the calculation on notional earnings. For every week that a woman pays a Class 2 contribution, she will be treated as having earnings equal to the LEL in force for that week. To help the low paid self-employed, a self-employed woman who holds a certificate of Small Earnings Exception will be treated as having earnings equal to the Maternity Allowance Threshold applicable in that week (*subsections 4(b)* and*5(c))*.

define the period and the method to be used for calculating earnings.

The exact period has yet to be decided, but it is intended to take an average of at least 13 and at most 26 weeks' earnings from the 66 week period used in the employment test. Women will be able to take account of their best weeks' earnings when choosing which weeks to use (*subsection (5)(a)* and *(b)*).

provide that the total earnings in any one week may come from a number of different jobs and/or self-employed earnings.

The aim is to ensure, for example, that a woman with three jobs earning £20 a week can add those earnings together to make total weekly earnings of £60. Or, a self-employed woman with a small earnings exception, who is also employed at £20 a week, could add together her notional earnings from self-employment (£30) to the £20 she earns as an employee. This would give her total earnings for that week of £50 (*subsection (5)(d)*).

Subsection (6) of new section 35A provides that the "Maternity Allowance threshold" is to be £30. *Subsections (7)* and *(8)* provide that the Secretary of State may increase this amount for any tax year after 1999/2000 by order.

The amendment made by paragraph 32 of Schedule 8 to the Act makes such orders would be subject to affirmative resolution: i.e. approval in draft by both Houses of Parliament. This is in line with the current procedure for uprating benefits.

Subsection (4) of section 53 provides that the new arrangements for Maternity Allowance will apply to woman whose expected date of confinement begins on or after 20 August 2000, with the first payments possible under the new rules being payable from April 2000.

Maternity Allowance, like Statutory Maternity Pay, may be paid from the 11th week before the week in which the baby is due. It is also payable where the baby is born prematurely. This can be as early as 19 weeks before the expected week of birth. So, women expecting a baby during the week commencing 20 August 2000 could receive Maternity Allowance as early as April 2000 if their baby arrives prematurely.

Schedule 8 Part VI contains some minor consequential amendments, and Schedule 13 some consequential repeals.

Sections 54-56: Benefits for Widows and Widowers

These sections replace the benefits currently paid to widows with a new set of bereavement benefits, which may be paid to both men and women. A consultation document, *A new contract for welfare: SUPPORT IN BEREAVEMENT* (Cm 4104), was published in November 1998 setting out the Government's proposals. Those proposals have subsequently been carried forward into the new legislation, although some elements of these reforms are due to be introduced through secondary legislation.

Background

Since 11 April 1988, there have been three principal benefits available to women who have been widowed. They are each based upon the National Insurance contributions record of the late husband rather than that of the widow herself. Even if the late husband failed to satisfy the contribution conditions, there may be an entitlement to benefit if his death was caused by an industrial accident or disease. The three benefits are:

Widow's Payment – a single, tax-free payment of £1,000;

Widowed Mother's Allowance (WMA) – a taxable benefit for widows with dependent children or who are expecting their late husband's baby. It comprises a basic allowance for the widow herself, an allowance in respect of each additional child, and any Additional Pension (i.e. State Earnings Related Pension (SERPS)) her husband was entitled to. It ends when the youngest child ceases to be a dependant;

Widow's Pension – a taxable benefit for widows who are not entitled to WMA or whose WMA has ceased. It is made up of a basic pension and an Additional Pension (SERPS); the calculated amount of benefit varies, depending on the woman's age when she was widowed or stopped receiving WMA.

Entitlement to both WMA and Widow's Pension ends if the widow re-marries. In addition, neither of these benefits is payable for any periods during which she and a man live together as husband and wife. Similarly, a Widow's Payment is not payable if, at the time of her husband's death, she and another man are living together as husband and wife.

Summary of changes

The changes introduced by this part of the Act consist of :

a "**Bereavement Payment**" of £2,000 paid to both widows and widowers on bereavement. This doubles the value of the current lump sum paid to widows;

a "**Widowed Parent's Allowance**" equivalent to Widowed Mother's Allowance, and including any Additional Pension (SERPS) – for parents who are bereaved of their husband or wife. Entitlement continues until the youngest or only dependent child in the family is aged 16 or up to age 19 if still in full-time further education. This benefit will be available to fathers already widowed when the scheme comes into force;

widows and widowers aged 45 and over with no dependent children will receive a weekly, age-related benefit (with no SERPS component) for one year. This is to be known as a "**Bereavement Allowance**";

only men and women widowed *before* the new provisions take effect will have entitlement to Incapacity Benefit on the basis of their late spouses' contributions.

The package of proposals includes two further measures which can be introduced by regulations using existing powers:

£10 of a person's Widowed Parent's Allowance will be disregarded in assessing entitlement to income-related benefits (such as Income Support);

men and women aged 55 and over at the start of the new arrangements who are widowed during the subsequent five years and whose entitlement to the Bereavement Allowance has expired, will have special access to Income Support. In other words, they will not be required to claim Jobseeker's Allowance and meet its conditions of being available for and actively seeking work. In addition, a new premium will be available in the income-related benefits to ensure that these recipients retain an income that is at least equivalent to the amount of the Bereavement Allowance.

Commentary

Section 54: Bereavement Payment

Subsection (1) replaces the Widow's Payment with a new benefit, which will be payable to both men and women – to be known as the "Bereavement Payment".

Section 36 of the Contributions and Benefits Act which provided for the Widow's Payment is therefore substituted by a *new section*, which refers to "person" and "spouse" rather than "woman" and "husband". It enables the Bereavement Payment to be paid to men or women whose spouse dies on or after the date on which the provision comes into force ("the appointed day").

The inserted section 36(1)-(2) set out the entitlement conditions for the Bereavement Payment. These duplicate the existing conditions for a Widow's Payment.

The inserted section 36(2) preserves the principle that prevented a widow from receiving a Widow's Payment if, at the time of her husband's death, she was living together with another man as husband and wife.

That same principle will apply with Bereavement Payment where the surviving spouse is, at the time of the late spouse's death, living together as husband and wife with a person of the opposite sex. There is no definition of "living together as husband and wife" in legislation, but the concept has been well developed in social security case law.

Subsection (2) replaces Part II of Schedule 4 to the Contributions and Benefits Act, so that the amount of the Bereavement payment will be £2,000. Widow's Payment is worth £1,000.

Section 55: New allowances for bereaved spouses

This section introduces two new benefits for bereaved spouses – Widowed Parent's Allowance and Bereavement Allowance. It does so by inserting four new sections into the Contributions and Benefits Act: sections 36A, 39A, 39B and 39C (the current benefits are defined at sections 37-40). All references below are to sections of the Contributions and Benefits Act.

The *inserted section 36A* sets out when the new benefits, and when the existing scheme, should apply. It provides that:

as a transitional provision, the existing arrangements will continue to apply for all people whose spouses die *before* "the appointed day" (when the new benefits come into force):

If they are women, they will still be able to claim Widowed Mother's Allowance, Widow's Pension and Incapacity Benefit (on the basis of their husbands' contributions), under the current rules. Then, if a widow is aged 45 or over when her Widowed Mother's Allowance ends, she will still be entitled to receive Widow's Pension and/or Incapacity Benefit. If she is under 45, she will still be entitled to receive Incapacity Benefit;

If they are men, they will still be entitled to Incapacity Benefit on the basis of their wives' contributions (as provided by the existing section 41), if they meet the qualifying conditions;

The one difference is that existing widowed fathers will be entitled to the new Widowed Parent's Allowance, if they satisfy the qualifying conditions on the appointed day.

the two new benefits (defined in the new sections 39A, 39B and 39C) will apply for all people whose spouses die *on or after* the appointed day. These people will not be entitled to Incapacity Benefit on the basis of their spouses' contributions.

Widowed Parent's Allowance

The *inserted section 39A* provides for the Widowed Parent's Allowance. It reproduces the rules that currently apply to Widowed Mother's Allowance (set out in section 37), but extends the new benefit to widowers.

Bereavement Allowance

The *inserted section 39B* provides for the Bereavement Allowance. Most of the entitlement conditions of Widow's Pension (in section 38) are retained, but with the following exceptions:

the benefit is available for widowers who meet the conditions of entitlement;

the benefit is only payable for a maximum period of 52 weeks, beginning with the date of death;

no additional pension (State Earnings Related Pension – SERPS) will be paid with the benefit (though note the provisions for SERPS in Retirement Pension for widows and widowers in section 56).

The *inserted section 39C* provides for the rates at which the two new benefits are payable.

Under *subsection (1)*, the weekly rate of Widowed Parent's Allowance will be calculated in the same way as for Widowed Mother's Allowance now.

This means that the inclusion of an additional pension (SERPS) will continue to be made on the basis of existing legislation. The 50% reduction in the value of SERPS from April 2000–which was provided for in the Social Security Act 1986–will remain unchanged (*subsection (4)*). However, see commentary on section 52.

Subsection (2) makes provision for the weekly rate of a Bereavement Allowance. It is to be paid at a basic rate only with no additional pension.

Subsection (5) preserves for Bereavement Allowance the rules which vary the amount of benefit according to the age of the widow when her husband dies or when her entitlement to Widowed Mother's Allowance ends.

There is a 7% deduction from the full rate of benefit for each year she is aged under 55 at that date—and, once determined, the amount stays fixed. The same rule applies to all surviving spouses for Bereavement Allowance.

Section 56: Additional Pension

Section 56 inserts a new section – section 48BB – into the Contributions and Benefits Act. This provides for the amount of Additional Pension (State Earnings Related Pension – SERPS) that widows and widowers should receive when they reach pensionable age, based on their spouses' contributions.

Legislation is already in place to ensure that those who are widowed, whether men or women, are able to use "substitution" provisions to help them achieve a basic Retirement Pension if their own contribution record during the period of marriage is inferior to that of their spouse. Section 48 of the Contributions and Benefits Act provides for circumstances in which a former spouse's contributions can be treated as if they were those of the pensioner, and section 52 contains additional provision for surviving spouses.

Under the existing scheme, widows who receive Widowed Mother's Allowance or Widow's Pension are paid an amount of Additional Pension with their weekly benefit, based on their husbands' contribution records. This benefit continues until they reach pensionable age. They are then entitled to a "Category B" Retirement Pension (i.e. a pension based on their husband's National Insurance contributions) paid at the same level.

The new scheme is different, in that Bereavement Allowance is to be paid for 52 weeks only, and without any Additional Pension (see commentary on section 55 of this Act). So, unless they are still receiving Bereavement Allowance or Widowed Parent's Allowance when they reach pensionable age, future widows and widowers will have a period before retirement when they are not receiving any bereavement benefit or Additional Pension.

But the intention is that, once they do reach pensionable age, and provided they have not remarried, they should have the same amount of Category B Retirement Pension *as if they had* been receiving a benefit with Additional Pension continuously since their date of bereavement. That is to say, their Retirement Pension should be exactly the same as if they had been claiming under the current system. Therefore, this section provides for the same entitlement rules, but by reference to the new bereavement benefits.

Commentary: the inserted section 48BB

The *inserted subsections (1)* and *(2)* relate to widows and widowers who are still receiving Widowed Parent's Allowance when they reach pensionable age. The subsections entitle them to a Category B Retirement Pension, on the basis of their spouses' contributions, at the same weekly level as their Widowed Parent's Allowance.

The *inserted subsections (3)* and *(4)* relate to widows and widowers who were previously entitled to Bereavement Allowance or were aged over 45 when they stopped being entitled to Widowed Parent's Allowance. When they reach pensionable age, they will also be entitled to a Category B Retirement Pension on the basis of their spouses' contributions—calculated by the same rules as if they had been receiving Widow's Pension. The *inserted subsections (5)* to *(8)* provide these rules.

The *inserted subsection (7)* corresponds to the new section 39C(4) inserted by section 55 (above), and provides the 50% reduction in Additional Pension for cases where the spouse dies after 5th April 2000 (see also commentary on section 52 of this Act).

The *inserted subsections (8)* and *(9)* contain the same age-related calculation as new section 39C(5). They reduce the amount of Additional Pension by 7% for every year the bereaved spouse was aged below 55 either

when their spouse died and they became entitled to Bereavement Allowance; or

when they stopped being entitled to Widowed Parent's Allowance.

In both cases they must have been at least 45 years old to qualify (so the maximum reduction is by 10 years, or 70%).

The *inserted subsection (10)* raises the amount of Additional Pension to the same level as if it had been increased by the annual uprating order every year since the date of the spouse's death.

Schedule 8: Consequential amendments

Part I of Schedule 8 makes the necessary amendments to the Contributions and Benefits Act, the Administration Act, the Pensions Schemes Act 1993, and the Income and Corporation Taxes Act 1988, so that they refer correctly to the new bereavement benefits.

Sections 57-58: Work-Focused Interviews

Section 57: Work-focused interviews

This section supports the creation of a single entry-point into the benefit system, focused on work and the help needed to enable people to return to the labour market. It does this by giving powers to require claimants of certain social security benefits to take part in work-focused interviews. It provides for the circumstances in which work-focused interviews may be required and sets out what will happen if people do not take part in the interviews.

Background

The measure will support plans to introduce a single gateway into the benefit system for people of working age who are not in full-time employment. It is intended to bring together the Employment Service, the Benefits Agency and local authorities to provide a more streamlined service, giving claimants one point of contact for all of their benefit requirements. This is why the name for this initiative is the "ONE service".

These proposals were put forward in *A new contract for welfare: THE GATEWAY TO WORK* (Cm 4102), published in October 1998.

> After claimants make initial contact to supply basic information, such as the benefits to be claimed and other details relevant to the claim, they will be given a personal adviser. The adviser will carry out work-focused interviews with each individual: discussing job potential, and providing access to a range of help and information on work, benefits and services such as childcare. The ONE service will be piloted in twelve areas, starting in June 1999. Before the powers in this section come into force, taking part in interviews will be voluntary for claimants of benefits other than Jobseeker's Allowance (JSA).

Most of the arrangements for operating the ONE service will be introduced using existing powers. There are already comprehensive powers to require those claiming JSA (who will make up the majority of claimants entering the service) to attend work-related interviews. However there are no general provisions to require people claiming any other benefit to have an interview about work. The powers in this section will require individuals claiming certain other benefits to take part in work-focused interviews with a personal adviser as a condition of entitlement. ONE is intended to encourage claimants to take further steps towards labour market participation, but any action they take beyond taking part in interviews will be entirely voluntary. For example, they will not be required to attend training courses or seek work.

Commentary

Section 57 inserts new sections 2A and 2B after section 2 of the Administration Act. All references in the commentary below are to these new sections.

New section 2A enables regulations to provide that a claim to benefit will only be considered made once the claimant takes part in a work-focused interview. Where benefit is already being paid, the payment can either be stopped, or the amount payable restricted, for failure to take part in an interview.

While the section allows for the detail of these requirements to be provided for in secondary legislation, the main ways in which it is expected to use these powers are laid out in *subsections (3)* to *(7)*. The reason for this approach is that there needs to be

flexibility to adjust the various detailed aspects of the scheme in the light of experience gained during the operation of the pilot exercises.

Paragraph 83 of Schedule 12 makes the first set of regulations made under new section 2A subject to affirmative resolution (requiring positive approval in draft by both Houses of Parliament).

The power itself

New claims to benefit will be made through the ONE service. As part of the claim process, claimants will be required to take part in an interview with their personal adviser to discuss the barriers they face in moving closer to the labour market, and the help and support that is available to overcome those barriers.

Where it is considered inappropriate for someone to discuss work-related issues at that time, given the particular circumstances that they face (for example, the point of claim would not be an appropriate time to discuss work-related issues with a grieving widow), the interview could be deferred until a later date, using the power in subsection (6)(c).

Subsection (1)(a) provides regulation-making powers to require claimants of the benefits listed in *subsection (2)* to take part in a work-focused interview as part of the process of claiming those benefits. The requirement cannot apply to claimants aged 60 and over.

Subsection (1)(b) provides for regulations to be made that will enable interviews to take place where one or more of the benefits listed in *subsection (2)* is already in payment.

In some cases, claimants will be required to take part in interviews *after* benefit has been put into payment. This would happen on the occurrence of a specified event (a "*trigger point*") which could potentially affect someone's employability. These trigger points will be set out in regulations. They are likely to include: when the youngest child of a lone parent or widow reaches school age, or when the results from a Personal Capacity Assessment (see commentary on section 61) become available. Also, interviews may be triggered where claimants have not had a work-focused interview for a specified period of time.

The subsection allows for the trigger points to be specified. Claimants who do not take part in these interviews when required to do so will have the amount of benefit in payment reduced (see *subsections (4)* and *(5)*).

Subsection (2) lists the benefits to which the requirements in subsection (1) will apply.

In particular, *subsection (2)(d)* ensures that this provision will apply to the new benefits for widows and widowers introduced by section 55 of this Act. However, the Bereavement Payment (the new lump sum payment that replaces the Widow's Payment) is excluded from the provisions of this section. Although JSA claimants will enter the ONE service, the benefit is not included in this subsection: powers already exist in the Jobseekers Act 1995 enabling regulations to require claimants to attend at specified offices. Such claimants are therefore already required to fulfil the requirements of a work-focused regime.

How the power would be used

Subsections (3) to *(7)* identify the main ways in which the regulation-making powers provided under subsection (1) might be used, in order to deliver the intention that claimants should take part in work-focused interviews in connection with their benefit claims.

Where a person is claiming or receiving a number of benefits at the same time (for example Income Support, Housing Benefit and Council Tax Benefit), it is not intended

to ask them to take part in separate work-focused interviews for each benefit. *Subsection (3)(a)* allows regulations to achieve this.

Subsection (3)(b) enables the Secretary of State to prescribe who will conduct the interviews.

Those prescribed are likely to be representatives of the Secretary of State, local authority employees or persons providing services to either.

The ONE service aims to give claimants a more streamlined, integrated service, by offering a single point of contact for all of their benefit requirements. It will not matter who administers the benefits they claim: the Benefits Agency, the Employment Service or local authorities. This means that a work-focused interview may be conducted by a person acting on behalf of the Secretary of State (most commonly an employee of the Benefits Agency or the Employment Service), by a local authority employee, or by a private/voluntary sector organisation contracted to provide services. Younger claimants will be required to have a meeting with the Careers Service.

Regulations under *subsection (3)(c)* will give those who conduct the interviews the power to determine where and when an interview will take place. This mirrors the provisions in section 8 of the Jobseekers Act.

It is intended that the interview will usually be conducted at a range of easily accessible Benefits Agency, Employment Service or local authority premises. However, where claimants cannot reasonably be expected to visit an office, a home visit may be arranged.

Subsection (3)(d) explains that regulations can set out the circumstances in which a person is to be treated as taking part in or not taking part in the interview.

Since the regulations under this section will impose a general requirement on claimants to take part in a work-focused interview, both the claimants and the personal advisers who conduct the interviews need to be clear about the criteria to be used in judging whether a person has actually taken part.

It is intended that the test of whether claimants have taken part will be:

> whether they attend at the time and place specified; and
>
> whether they provide information in areas relevant to their employment prospects, such as their level of educational qualifications, their previous work history, and any barriers to work they may face.

Where someone does not take part in an interview, this will affect their claim or the amount of benefit they receive (depending on when the failure to take part occurred), unless they can show ‘good cause’ for that failure.

> *Good cause* is a familiar concept in social security and is used, for example, in deciding whether people’s entitlement to JSA should stop where they have not kept an appointment with a representative of the Secretary of State (section 8(1)(d) of the Jobseekers Act).

Subsection (3)(e) enables regulations to provide that if a person is requested to take part in an interview but does not do so then, unless he can show good cause within the prescribed period, *subsection (4)* (which deals with the consequences of failure) will apply.

Subsection (3)(f) enables regulations to specify what constitutes good cause for not taking part in an interview.

Examples might be when someone had an accident on the day set for the interview or where their child fell ill or where they misunderstood the requirements placed upon them because of any language or literacy difficulties.

Subsection (4) deals with the consequences if a claimant does not take part in a work-focused interview when asked to do so.

Subsection (4)(a) deals with the *initial* work-focused interview that takes place at the point of claim or (where the interview is deferred) after benefit has been put into payment.

If a person does not take part in an interview at the point of claim, they will be regarded as not having completed the claims process. Any claim for benefit will therefore not proceed. Where there is a failure to take part in a deferred initial interview, that is, after benefit has been put into payment, the award will be terminated and benefit withdrawn.

Subsection (4)(b) deals with the circumstances where entitlement already exists and a further work-focused interview is triggered under subsection (1)(b).

If a person does not take part in such an interview, regulations may provide for the amount of their benefit to be reduced. The reduction will apply until such time as the claimant fulfils the requirement to take part in the interview.

Subsection (5) links to *subsection (4)(b)*, in that it deals with how any reduction in the amount of benefit payable should be calculated and applied.

Subsection (5)(a) gives the power to specify how the amount of the reduction will normally be calculated.

Subsection (5)(b) enables the regulations to allow the normal deduction to be set at a lesser amount in prescribed circumstances.

This power will be used where the amount of the reduction would otherwise be greater than the amount of benefit. In addition, it is the intention to ensure that the claimant retains entitlement to a nominal amount of each benefit, to prevent the claim from lapsing and, where appropriate, to ensure that entitlement to any "passported" benefits (such as free NHS Prescriptions, free school meals) is retained.

Subsection (5)(c) allows regulations to specify that if the individual is claiming more than one benefit, the reduction may be applied to more than one of the benefits; but the total reduction must not exceed the amount calculated under *subsection (5)(a) or (b).*

The regulations will also prioritise the benefits against which the reduction is to be applied. It is expected that Housing Benefit will be among the last benefits to which sanctions should be applied, given its specific role in covering essential housing costs. Since regulations will place an obligation only on those claiming benefits included in *subsection (2)*, no sanctions will be applied against any benefit not included within this subsection.

There will be certain people for whom a work-focused interview will not be appropriate. *Subsection (6)* enables regulations to prescribe the circumstances in which the requirement to take part in a work-focused interview is not to be applied.

It also ensures that the "designated authority" (i.e. a representative of the Secretary of State, a local authority employee or a person providing services to either) has the power to waive or defer the interview. There is no intention to set out in regulations the categories of people for whom this would be appropriate. Such decisions will be made on a case-by-case basis, depending on the circumstances of the individual claimant. Regulations will also set out that, where a person has their interview waived or deferred, they will be treated, for the purposes of their claim to benefit, as having met the requirement – until such time as it is appropriate for them to attend an interview.

Subsection (6)(a) enables regulations to specify circumstances in which the requirement to take part in a work-focused interview will be disapplied: either permanently or until a specified time.

It is intended that this power will be used to exempt groups of people who are claiming the benefits listed in subsection (2) but to whom the requirement should not apply. For

example, Housing Benefit and Council Tax Benefit claimants who are already in full-time employment, or those claiming one of the specified benefits as well as JSA.

Subsection (6)(b) enables the "designated authority" to decide that the requirement to take part in a work-focused interview (either as part of a claim to benefit or where entitlement already exists) should be removed where it would not be of assistance to that person, or appropriate in their particular circumstances.

Regulations will not specify which groups should have the requirement waived although one example might be where a terminally ill person claimed benefit. Where an interview at the point of claim is either waived or deferred (see *subsection (6)(c)*), the claim will be treated as made, despite the fact that there has been no interview; where entitlement already exists, no change will be made to the amount of benefit in payment.

Subsection (6)(c) enables the "designated authority" to decide that the requirement to take part in a work-focused interview should be deferred if it is determined that an interview would not be of assistance, or appropriate, at that particular time.

Examples might include a person in the early stages of recovery from a major operation, or a lone parent who had just given birth.

Subsection (7) makes clear that, where the initial interview is deferred from the point of claim until a later date, regulations may provide that the interview is to take place after benefit has been put into payment.

Subsection (8) defines terms used throughout the section.

A "*work-focused interview*" is the interview that almost all claimants will be asked to take part in, either as part of the process of making a claim, or after the benefit has been put into payment. The purpose of such an interview is to assist or encourage claimants to improve their employment prospects over time, and to identify and take steps to overcome the barriers to work they face through training or specialist support; so that, where appropriate, they can move towards education or taking up employment (whether paid or unpaid). To this end, an interview may cover such areas as previous employment record, capacity to undertake work, the in-work financial support which is available and help in areas such as childcare, housing and training.

Supplementary provisions

Section 2B makes further provision as to how the power in section 2A will be used. It provides that any decision by a personal adviser that a claimant has, without good cause, failed to take part in an interview, may be revised or appealed against – whether the adviser is from the Benefits Agency, the Employment Service or a local authority. It also provides that any personal adviser may actually revise another's decision.

Subsection (1) enables the decisions and appeals procedures in Chapter II of Part I of the Social Security Act 1998 to apply in relation to any "relevant decisions" taken by personal advisers.

Subsection (2) sets out what these "relevant decisions" are – namely, decisions that someone has failed, without good cause, to take part in an interview required under section 2A.

Subsections (3) and (4) provide that all "relevant decisions" by personal advisers should be treated as having been made by the Secretary of State – even if the personal adviser is not a civil servant. The powers in the Social Security Act to revise or supsersede a decision will apply. *Subsection (5)* will enable all personal advisers to revise or supersede a previously-taken "relevant decision".

Subsection (6) requires regulations to give a right of appeal, under section 12 of the Social Security Act, against any relevant decision.

This is intended to ensure that, in practice, all such decisions, whether made by a representative of the Secretary of State or otherwise, will be treated in the same way, with all appeals going to an independent appeals tribunal.

The subsection ensures that the right of appeal is against the personal adviser's decision that the claimant had failed to take part in an interview, rather than the decision to stop or reduce benefit. It focuses on the one decision that causes a penalty to be imposed (which may potentially affect a number of benefits).

Subsection (8) extends the definition of "information relating to social security" to include information supplied as part of a work-focused interview (which might, for example, include such subjects as a person's previous employment record and capacity to work). The intention is to ensure that information gathered about a client's employability can be passed on to their personal adviser. The extended definition applies to:

> section 3 of the Social Security Act 1998 (which allows information relating to social security, child support or war pensions to be exchanged and used for any of those purposes); and
>
> section 72 of this Act, which provides a framework for the use or supply of the information that underpins a number of social security and employment-related activities, including the ONE service. See the commentary on section 72 for further details.

Section 58: Optional work-focused interviews

Background

This section gives regulation-making powers that will enable new functions to be conferred on local authorities enabling them to undertake a range of work-related activities with claimants. This will allow local authorities to support the introduction of the ONE service into the benefits system (see section 57 above).

Local authorities currently have statutory responsibility for administering Housing Benefit and Council Tax Benefit. Under existing legislation, local authority staff can undertake activities and collect information only where it is relevant to the administration of those particular benefits. Various sections in this Act extend the functions of local authorities to allow them to play a full and active part in the ONE service process: for example, regulations under section 71 will enable local authorities to accept claims and collect information for other benefits. Regulations under section 72 will enable local authorities to use and disclose information about people's employability collected as part of the ONE process.

In addition, regulations under section 57 (which will come into effect in April 2000) will make it a condition of entitlement that claimants of certain benefits (including Housing Benefit and Council Tax Benefit) take part in work-focused interviews – both at the point of claim and at various points afterwards. Section 57 will also allow local authority staff to conduct these *compulsory* work-focused interviews.

However, all ONE service staff, including those working for local authorities, will also need to undertake *voluntary* work-related activities with claimants throughout the duration of the pilots.

The ONE service will be piloted in twelve areas, starting for those making new claims to benefit from the end of June 1999. For those making claims before the powers in section 57 come into force, taking part in this initiative, and having work-focused interviews with a personal adviser, will be voluntary on their part.

Once section 57 does come into effect, claimants will be required to take part in compulsory work-focused interviews in specified circumstances. However, the purpose of these compulsory interviews is to encourage claimants to take further

action, including participation in additional, voluntary interviews to improve their job prospects.

Section 58 extends the statutory functions of local authorities to allow them to perform these functions. This will enable local authorities to play a full and active role in the operation of the ONE service, allowing them to provide appropriate support to those making claims to benefit both before and after the start of the compulsory phase in April 2000.

The Act also enables local authorities to be paid for this extra work (Schedule 12, paragraph 80). See the commentary after section 71 for details.

Commentary

Section 58 inserts a new section 2C after section 2B of the Administration Act (itself inserted by section 57). Section 2C enables regulations to be made to confer additional functions on local authorities in prescribed areas to allow them to undertake job-related activities, including work-focused interviews where claimants of certain benefits request or consent to such support.

Subsection (1) provides a power to make regulations to confer functions on local authorities in connection with conducting optional work-focused interviews. The main functions, in addition to the work-focused interview itself, are set out in subsection (3).

Subsection (2) will enable local authorities to provide such assistance to people making claims, or entitled to, prescribed benefits. The ONE service pilots are intended to apply primarily to those making claims to the benefits referred to in section 2A(2). The subsection will also enable local authority staff to provide extra, voluntary help to JSA claimants, and makes clear that the provisions can apply even where compulsory interviews under section 57 have taken place.

Subsection (3) specifies the main functions in connection with conducting work-focused interviews that will be conferred on local authorities under subsection (1). These will enable local authorities to ask for and receive information and evidence in connection with the interviews, including information about current and future employment or training needs. It will also enable local authorities to undertake jobsearch activity on the claimant’s behalf.

Subsection (4) enables regulations under this section to make different provisions in different areas across the country. It is the intention that, initially, the regulations will confer these additional functions only on those local authorities supporting the twelve pilot areas.

Sections 59-60: Jobseeker’s Allowance

Section 59 and Schedule 7: Joint claims for Jobseeker’s Allowance

This section introduces Schedule 7, which provides for certain couples to claim income-based Jobseeker’s Allowance (JSA) jointly (rather than one person claiming it on behalf of the couple, as happens under the existing legislation).

Background

Currently, unemployed partners of JSA claimants are not required to be available for or actively seek work. There is no targeted help and support available to assist them to return to work if they wish to do so. Ninety per cent of partners of JSA claimants are women.

Under the new scheme, an unemployed couple who do not have responsibility for children, and who belong to the group to be defined in regulations, will be required to make a joint claim for JSA and each will have to satisfy the conditions of entitlement to

the benefit. Regulations will prescribe which couples will be covered by the requirement by reference to their date of birth. It is intended that the requirement will apply to couples where one or both members of the couple is aged under 25 when these measures are introduced. At least one member of the couple must have reached the age of 18.

Both partners will therefore have the same opportunity to receive help and guidance to return to work and to go onto employment programmes including the New Deal for Young People.

The basic conditions of entitlement to JSA are set out in section 1 of the Jobseekers Act. They include the requirement for the claimant to be available for and actively seeking employment and to have a "Jobseeker's Agreement" (i.e. an agreement which is entered into by the claimant and an employment officer which specifies the steps that the claimant will take in order to seek employment – as defined at section 9(1) of the Jobseekers Act).

There are currently two routes to JSA:

> Contribution-based JSA is payable only to a person who, in addition to satisfying the conditions contained in section 1 of the Jobseekers Act, satisfies the National Insurance contribution conditions (section 2 of the Jobseekers Act). It is payable at a personal rate and includes no additional payments for any dependants of the claimant. Both members of a couple may separately qualify for contribution-based Jobseekers Allowance if they each satisfy the contribution conditions on the basis of their own contributions record.
>
> Income-based JSA is an income-related benefit for which the claimant must satisfy the conditions specified in section 3 of the Jobseekers Act in addition to the entitlement conditions at section 1. One member of a couple claims for himself and for any dependants.

The Act introduces a third route to JSA: "joint-claim Jobseeker's Allowance", which will apply in certain cases where JSA is claimed for a couple. This is a sub-category of income-based JSA.

Commentary

The joint claims provision for Jobseeker's Allowance (JSA) is introduced by section 59 which brings Schedule 7 into effect.

Schedule 7 amends the Jobseekers Act to provide for joint claims.

> Paragraphs 1 to 16 of the Schedule amend existing provisions of the Jobseekers Act and insert new provisions.
>
> Paragraph 17 makes a necessary change to the rules for social security appeal tribunals set out in the Social Security Act 1998.

Paragraph 2: Entitlement to a Jobseeker's Allowance

This paragraph amends section 1 of the Jobseekers Act which provides for entitlement to JSA. Provisions for entitlement to contribution-based JSA are unchanged.

Sub-paragraph (3) inserts a *new section 1(2A)* into the Jobseekers Act, which states when income-based JSA can be claimed by a claimant who is not a member of a joint-claim couple. New subsection (2B) provides for the conditions of entitlement for a joint-claim couple.

The conditions of entitlement to JSA that joint-claim couples will have to meet are that the couple must claim jointly for the allowance and that they must each satisfy the conditions set out in paragraphs (a) to (c) and (e) to (i) of section 1(2) of the Jobseekers Act (for example, to be available for and to actively seek employment). They must also meet the conditions set out in the new section 3A, inserted by paragraph 3 of the Schedule (see below).

The couple will be covered by these requirements for so long as they claim JSA and their relevant circumstances remain unchanged. Examples of a relevant change for this purpose would be that the couple have a child or separate.

Paragraph 2(3) also inserts into section 1 two *new subsections, (2C)* and *(2D). Subsection (2C)* provides a power to prescribe circumstances in which a claimant who is a member of a joint-claim couple can claim JSA as a single person, under subsection (2A).

It is intended that this should apply where one of the joint claimants fails to satisfy the conditions of entitlement for the joint-claim set out in new section 1(2B) of the Jobseekers Act. The other joint claimant, who is prepared to meet the conditions of entitlement, would then be able to claim contribution-based JSA under section 2 of the Jobseekers Act if he could satisfy the contribution-based conditions. If he could not satisfy the contribution-based conditions, he would be able to claim income-based JSA on his own behalf, by virtue of subsection (2A). However, the couple's income and capital will be taken into account in determining the amount of income-based JSA which is paid. The award of JSA would thus be at the applicable single person's rate with no additional allowance for the partner who had failed to satisfy the conditions of entitlement for joint-claim JSA.

New subsection (2D) provides a power to prescribe in regulations how the provision for joint claims will be applied to the members of a polygamous marriage.

The intention is that where one or more members of a polygamous marriage are born on or after the date set in regulations and there are no dependent children, two members of the marriage will be required to make a joint claim. One of the claimants will always be the male partner, but the members of the marriage will be able to choose which of the wives will be the other joint claimant.

Currently, polygamous marriages are recognised under the benefit system provided they took place in a country where such marriages are legal. The husband may make a claim for himself and for his dependants and receives an addition in respect of each of his wives.

Sub-paragraph (4)(b) (in effect) defines a joint-claim couple as a married or unmarried couple who do not have dependent children.

Regulations will further specify which couples will be covered by the requirement to make a joint claim. It is intended that this will be done by reference to the date of birth of members of the couple. The intention is that couples where at least one partner is born on or after the specified date will be covered by the requirement to make a joint claim. The date will be set so that, at introduction, a couple where at least one partner is aged under 25 and has reached the age of 18 will be covered. The provision would therefore extend, over time, to a couple of any age, so long as they do not have children and one of them was born after the prescribed date.

Paragraph 4: The conditions for claims by joint-claim couples

Paragraph 4 inserts *sections 3A* and *3B* into the Jobseekers Act. These new sections set out the conditions which a joint-claim couple must meet to receive income-based JSA.

Section 3A adapts the provisions of the current section 3 to deal with the circumstances of a joint-claim couple. The section also provides that at least one member of the couple must have reached the age of 18.

If the other member of the couple is 16 or 17 years old, he must have a direction from the Secretary of State under section 16 of the Jobseekers Act that (to prevent severe hardship) JSA may be paid to him or he must be in prescribed circumstances so that JSA can be paid, to satisfy the conditions in new section 1(2B)(c) for a joint-claim couple

to receive JSA. (These are the same situations in which, currently, a 16 or 17 year old may be named as a dependant on the JSA claim made by a person aged 18 or over.)

Section 3B deals with the new circumstance of payment of JSA to a joint claim couple. The joint claim couple have to decide which one of them will receive payment of JSA.

If the couple express no preference or cannot agree to whom the payment should be made, the Secretary of State (i.e. a departmental official) will decide who receives the payment. Whether the decision is made by the couple or by the Secretary of State, the payee will be known as the "nominated member". Provision is also made for the circumstances where the nominated member attracts a sanction under new section 20A introduced by paragraph 13. In these cases the other member of the couple, who has not attracted a sanction, will become the nominated member.

The legislation does not prevent direct payments to persons besides the nominated member (see section 3B(5)). Like other JSA claimants, joint-claim couples may have a proportion of their JSA deducted and paid direct to a third party. This is usually applied where JSA claimants have part of their benefit paid direct to a fuel company or mortgage provider. In exceptional circumstances, for example where a claimant has budgeting problems due to alcoholism or gambling, the Secretary of State may use his discretion to pay all or part of a JSA award to the claimant's partner. This is extended to joint-claim couples so that the Secretary of State may make direct payment to the member of the couple who is not the nominated member.

Paragraph 5: Amount payable by way of a Jobseeker's Allowance

This amends section 4 of the Jobseekers Act, which sets out how the amount of JSA payable to an individual claimant is calculated.

It provides a method for calculating JSA where a joint claim has been made. Subsections (6) to (11) of section 4 will not apply to joint claimants but corresponding provisions are included in new section 4A (see note on paragraph 6, below).

Paragraph 6: Amount payable by way of a joint-claim Jobseeker's Allowance

Paragraph 6 inserts *new section 4A* into the Jobseekers Act. It sets out how the amount of JSA payable to a joint-claim couple is calculated and paid where a joint claim has been made and where one or both members of the couple are also entitled to contribution-based JSA.

In effect, this corresponds to subsections (6) to (11) of section 4, which make similar provision for individual claimants. The effect is that where claimants are entitled to both contribution-based JSA and income-based JSA they will receive whichever gives them the greatest amount of benefit. This ensures that members of a couple may receive individual awards of contribution-based JSA where this is in their best interests, even though they have initially made a joint claim. Where contribution-based JSA is paid to an individual, instead of joint-claim JSA, the joint claim rules will not apply.

Paragraph 7: Attendance, information and evidence

This paragraph amends section 8 of the Jobseekers Act in order to adapt the provisions on attendance, information and evidence for joint claims.

The intention is that joint claimants will be able to choose to attend the New Jobseeker Interview either with their partner or separately. They will both have a responsibility to provide information in connection with the furtherance of the joint claim.

Paragraph 8: The Jobseeker's Agreement

This amends section 9(12) of the Jobseekers Act, which provides that a Jobseeker's Agreement ceases to have effect when the claimant's award of JSA comes to an end, to adapt it for joint-claim couples.

Regulations will provide for circumstances in which the Agreement will continue; for example, where the joint-claim couple start a family, the JSA claim will change to a single claim for the whole family. The Agreement may continue and be reviewed.

Paragraph 9: Income and capital

Paragraph 9 inserts *new subsections (2A)* and *(2B)* into section 13 of the Jobseekers Act to adapt it for the purposes of joint-claim couples. Section 13 deals with the treatment of income and capital on a claim for income-based JSA.

Paragraph 10: Trade disputes and joint-claim couples

This paragraph inserts a *new section 15A* into the Jobseekers Act. Sections 14 and 15 of the Jobseekers Act will have effect in relation to joint-claim couples in accordance with the new section 15A.

Currently a person involved in a trade dispute is not entitled to either contribution-based or income-based JSA. However, the partner of the person involved in the trade dispute may make a claim for income-based JSA for herself and any dependants, but no part of the allowance is payable for the person involved in the trade dispute.

The intention of new section 15A is to preserve the current situation with respect to joint-claim couples. Where both members of the couple are involved in a trade dispute and therefore prevented by section 14 from being entitled to JSA, the couple will not be entitled to joint-claim JSA. But where only one member is prevented from being entitled to JSA as a result of section 14, this alone will not prevent the couple from being entitled to a joint-claim JSA.

Currently where the partner of someone who is prevented from claiming JSA by virtue of section 14 makes a claim, the couple receives 50% of the appropriate applicable amount and premiums for the couple. A joint-claim couple who made a claim relying on section 15A would also receive an equivalent amount of JSA.

Paragraph 11: Reduced payments

This paragraph inserts *new section 17(1A)* into the Jobseekers Act. This provision mirrors *section 17(1)* of the Act. It provides a power for the amount of JSA payable to a joint-claim couple to be reduced where a member of the couple is a young person aged 16/17 years old and incurs a sanction.

Regulation 63 of the Jobseeker's Allowance Regulations (S.I. 1996/207) sets out the provisions for reducing payments in respect of a 16/17 year old who incurs a sanction and it is intended that similar provisions will apply to a 16/17 year old member of a joint claim couple.

Paragraphs 12-13: Circumstances in which Jobseeker's Allowance is not payable

Paragraph 13 inserts two *new sections, 20A* and *20B*, into the Jobseekers Act. These parallel the existing sections 19 and 20, but apply to joint claims. *Paragraph 12* inserts a reference to the new sections.

Section 19 of the Jobseekers Act provides circumstances in which JSA is not payable (sanctions). It provides for JSA not to be payable where, for example, the claimant has failed to apply for employment notified to him or has voluntarily left employment without good cause. Section 20 provides for exemptions to section 19.

Payment where one member of the joint-claim couple has breached new section 20A

Where one of the joint claimants breaches subsection (2)(a)-(g) of new section 20A, the claimant who has not contravened JSA rules will receive the same amount of JSA payment as if he had claimed JSA on his own behalf.

It is intended that regulations under the power provided in *subsection (6)* of new section 20A will provide that where the claimant who has not breached the rules meets JSA contribution conditions, he will be paid an amount of income-based JSA equivalent to the rate of contribution-based JSA for the duration of the period of the sanction, provided he continues to meet JSA entitlement conditions.

If he does not meet the JSA contribution conditions, he will be paid an amount equivalent to the amount of income-based JSA that he would receive were he to make a claim for income-based JSA on behalf of himself only (taking into account the couple's income and capital in determining the amount), provided he continues to meet JSA entitlement conditions.

New section 20A(7) provides that, if the claimant who normally receives the payment of JSA is the person who has breached new section 20A, payment of the single rate of JSA for the duration of the sanction will be made directly to the other claimant member of the couple.

Where both claimants breach JSA rules, new section 20A(5)(a) provides that no JSA will be paid for the period during which both are subject to sanctions.

It is intended that regulations will also provide that, where certain breaches of JSA rules attract a stoppage of JSA for two weeks for the first breach and a stoppage of JSA for four weeks for the second breach, the four week stoppage of JSA will apply only where the same partner on a joint claim contravenes the JSA rules more than once.

Paragraph 14: Termination of awards where another entitlement exists

This paragraph amends section 31 of the Jobseekers Act 1995 to extend it to joint-claim couples. It is a general rule that Income Support and JSA are mutually exclusive. In order to be entitled to JSA a person's award of Income Support must come to an end and in order to be entitled to Income Support a person's award of JSA must come to an end. Section 31 permits termination of awards for this purpose.

Paragraph 15: Interpretation

This paragraph amends the definition of "claimant" as contained in section 35 of the Jobseekers Act to include a joint-claim couple claiming a joint-claim JSA or each member of such a couple as the context requires. It also inserts definitions for "joint-claim couple", "joint-claim Jobseeker's Allowance" and "the nominated member".

Paragraph 16: Entitlement without satisfying conditions

This paragraph amends Schedule 1 to the Jobseekers Act (Jobseeker's Allowance: supplementary provisions).

Sub-paragraph (2) inserts a *new paragraph 8A* which allows the Secretary of State to prescribe circumstances in which a joint-claim couple will be entitled to joint-claim JSA even though only one member of the couple satisfies the JSA conditions referred to in new section 1(2B)(b).

Exemptions are necessary to cater for those who are unable to meet the JSA conditions, for example, those who do not meet the capability condition (in section 1(2)(f)) because of illness or disability. Others who have extensive caring responsibilities or are studying full-time will not be able to meet the availability condition (in section 1(2)(a)).

The intention is not to disentitle such joint-claim couples where one member of the couple cannot meet the conditions either at the outset of the joint claim or during the claim. (Currently, the partner is treated as a dependant on the JSA claim and is not required to meet the JSA conditions.)

Regulations will specify the persons to whom the provision applies, but it is intended that the categories will include persons caring for another person, persons incapable of work and those studying full-time in certain circumstances.

Transition to a joint claim

New paragraph 8A(2) of Schedule 1 to the Jobseekers Act provides for regulations to prescribe circumstances in which a couple is entitled to income-based JSA, without having made a joint claim for it. Such a couple will be called a transitional couple (defined as one where a member is entitled to income-based JSA on the coming into force of Schedule 7 to the Act).

The intention is that the couple will be treated as meeting JSA conditions of entitlement until the new claimant member of the couple is required to attend and provide information in connection with the joint claim.

Continuity of claims and awards

This paragraph inserts new paragraphs 9A, 9B, 9C and 9D into Schedule 1 to the Jobseekers Act 1995. These paragraphs contain powers to prescribe circumstances in which an award of joint-claim JSA should be treated as continuing in the form of an award of income-based JSA or contribution-based JSA; an award of joint-claim JSA should lapse; and in which an award of joint-claim JSA may be revived without the need for the claimants to make a new claim. Provision is also made to cater for cases where a claim has not yet been determined.

The various powers cater for JSA claimants who have a change of circumstance, which means they either cease to be a joint-claim couple or become a joint-claim couple. The underlying aim is to avoid unnecessary bureaucracy and ensure that joint-claim couples are treated in the same way as other JSA claimants, whilst at the same time being able to require a fresh claim where this is necessary.

It intended, for example, to use the power to continue an award where a couple in receipt of joint-claim JSA have a baby and so cease to be a joint-claim couple but still need to claim JSA.

Claims yet to be determined and suspended payments

Sub-paragraphs (5), *(6)* and *(7)* of paragraph 15 amend paragraph 10 of Schedule 1 to the Jobseekers Act (claims yet to be determined and suspended payments) to allow regulations to prescribe when a joint-claim couple or a member of such a couple may be treated as entitled to income-based JSA before the claim has been decided. It is intended that regulations will specify the same circumstances as are currently provided for JSA claimants in regulations.

They also allow for income-based JSA to be paid to the joint-claim couple or a member of such a couple where payment has been suspended. It is intended that regulations will specify the same circumstances as are currently provided for JSA claimants in regulations.

Paragraph 17: Interpretation of Chapter II of Part I of the Social Security Act 1998

Paragraph 17 amends section 39(1) of the Social Security Act 1998 so that members of joint claim couples have a right of appeal jointly or separately.

Schedule 8: Paragraph 28

This paragraph amends section 124(1)(f) of the Contributions and Benefits Act which provides that a person is only entitled to Income Support if he is not entitled to Jobseeker's Allowance. Income Support and JSA are mutually exclusive benefits. As

with the provision at paragraph 14 of Schedule 7, it ensures that this general rule is extended to joint claim couples.

Schedule 8: Paragraph 29

Sub-paragraphs (2) and (3) amend sections 4 and 17 respectively of the Jobseekers Act, to ensure consistency of wording with provisions in Schedule 7 to this Act, which introduces joint claims for Jobseeker's Allowance.

Section 60: Special schemes for claimants of Jobseeker's Allowance

Background

This section enables the establishment of Employment Zones. Employment Zones are defined geographical areas where the Secretary of State for Education and Employment contracts with external organisations, either public or private, to try to help long-term unemployed claimants of Jobseeker's Allowance (JSA) to find sustainable employment.

Plans for Employment Zones were announced by David Blunkett, the Secretary of State for Education and Employment, on 2 February 1999, and consultation over the detailed elements of the proposals finished on 30 April 1999. Five prototype Employment Zones and three further, smaller-scale development projects were set up during 1998, under existing legislation. But in order fully to implement Employment Zones, primary legislation was needed in the following areas:

> First, Employment Zones are concentrated on specific areas of high long-term unemployment; yet existing legislation limited the Secretary of State's powers to alter the conditions of entitlement to JSA for different areas of the country;
>
> Second, a key feature of Employment Zones not available in the prototypes is the "Personal Job Account". This will be an account set up for individual participants in the Zone– with the aim of getting them back to work more quickly. It will enable them to anticipate up to 6 months of the funding for training and jobsearch, combined with funds equal to the payments that they would normally receive from JSA.
>
> Third, legislation was required so that, for example, when people do not conform to the requirements of the Employment Zone (e.g. fail to complete and agree an Action Plan with their personal adviser), without good cause, their JSA payments could be withheld.

Commentary

Subsection (1) enables regulations to provide for special arrangements to be made for JSA claimants in geographically defined areas to assist them to find sustainable employment. This subsection enables Employment Zone delivery agents to undertake schemes which may not be available elsewhere in the country. Schemes may also cover the whole of Great Britain.

Subsection (2) provides examples of provisions which can be included in regulations made under this section.

One such provision (set out in subsection (2)(a)) would involve imposing further conditions upon recipients of JSA within an Employment Zone for receiving the benefit. Thus, they could be required to complete and agree an Action Plan with their personal adviser as a precondition for receiving JSA. Regulations made under this section could also suspend the normal labour market conditions, namely, actively seeking and being available for work, for those participating in a prescribed scheme. This is necessary because activities on an EZ may not be consistent with the usual JSA conditions.

Subsection (3) gives a power to apply the provisions of the Jobseekers Act with modifications.

Subsection (4) ensures that the provisions from the Act that may be applied in this way include the rules for when claimants do not meet the conditions of JSA, and the benefit is not paid.

Section 19 of the Jobseekers Act sets out the circumstances when sanctions may be applied to JSA claimants, and the benefit not paid. Examples are when someone has refused to accept a place on an employment programme, or lost that place through misconduct. Section 20A contains the parallel provision for joint-claim JSA introduced by Schedule 7 to this Act (see commentary on section 59 for details). *Subsection (4)(a)* provides that this sanctions regime may be modified for participants in an Employment Zone. The modified details (for example, the length of the sanction) would be set out in regulations (in the same way that the current details are set out in the JSA Regulations).

Section 20 of the Jobseekers Act (and the new section 20B for joint-claim JSA) provides for exemptions to the circumstances when JSA is not payable under section 19 (or 20A). Examples might be where a person is ill, or on jury service. It also gives the power to define when hardship payments may be made to claimants, even though JSA is not in payment. *Subsection (4)(b)* ensures that these provisions may also be modified for participants in Employment Zones.

Subsection (5) enables the Secretary of State to associate himself, financially or otherwise, with arrangements to assist people into sustainable employment.

In Employment Zones this may include contracting out and providing funding to Employment Zone delivery agents for the provision of the necessary services to assist people to find work.

Subsection (6) ensures that the National Assembly for Wales can make payments to those running Employment Zones in Wales without changing the devolution arrangements for training for work, jobsearch and social security, and without restricting the use of such payments to the provision of training.

It is not intended that this change should broaden the Assembly's role in relation to jobsearch or other non-transferred matters.

Subsection (7) enables the Secretary of State to use the existing powers in section 26 of the Employment Act 1988 with respect to schemes operating under this section.

Section 26 gives the power to make an order covering details of the employment status of those participating in training schemes within an Employment Zone; and details on how income gained while on the scheme should be treated for the purposes of other relevant legislation (e.g. legislation relating to tax or National Insurance contributions).

Section 61: Incapacity for Work

Background

Entitlement to incapacity benefits is dependent on satisfying one of two tests of incapacity for work set out in legislation.

> The 'Own Occupation Test' normally applies for the first 28 weeks of incapacity, for those with a recent work record. The test assesses the claimant's ability to do their usual job, based on medical evidence from their GP.
>
> The 'All Work Test' applies after 28 weeks of incapacity for those with a recent work record and from the start of the claim in all other cases. It is a functional test which assesses the claimant's ability to perform a wide range of activities.

The benefits which depend on satisfying the test of incapacity for work are Incapacity Benefit (IB); Severe Disablement Allowance (which is abolished for new claimants by section 65); Income Support; the disability premiums in Income Support, Housing

Benefit and Council Tax Benefit; and, in addition to these benefits, National Insurance credits awarded on grounds of incapacity.

The consultation paper *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103) gave a commitment to reform the All Work Test, by changing it so that, as well as establishing the level of people's incapacity for work for benefit purposes, it provides information which will be potentially helpful to claimants and their personal advisers, in combination with a wider assessment of employability, to decide what might be done to assist a return to work.

Summary of changes

Section 61 and Part II of Schedule 8 work together to achieve this reform. Section 61:

renames the All Work Test the "Personal Capability Assessment". This reflects the additional elements added by the section and Part II of Schedule 8, which provide that, as well as producing information for benefit purposes, about people's incapacity,

the assessment process should produce information about people's capabilities; and that

both kinds of information may be used for the purposes of helping people enhance their employment prospects.

retains the existing powers for determining whether a person is "incapable of work" for the purposes of receiving incapacity benefits. The threshold of incapacity at which it would be unreasonable to require a person to work, or seek work, will be unchanged;

enables the Personal Capability Assessment process to be started earlier, with the intention of identifying people's needs as quickly as possible;

makes clear that the Personal Capability Assessment may be repeated at any time throughout the duration of entitlement to benefit.

Section 61: Incapacity for work: Personal Capability Assessments

The section replaces section 171C of the Contributions and Benefits Act, which provides for the All Work Test. *New section 171C* for the most part mirrors the existing provision for the All Work Test, but renames it the Personal Capability Assessment. It also enables the Personal Capability Assessment to be carried out before a person technically becomes subject to the assessment. The intention is to speed up the process and secure a proper assessment of people's needs at an early opportunity. The section also ensures that the Personal Capability Assessment may be repeated, to determine whether a person continues to be incapable of work.

New subsections (1) to *(3)* mirror the existing provision for the All Work Test.

Subsection (1) provides for the "Personal Capability Assessment" to apply in the same way as the All Work Test.

Subsection (2): allows the details of the Personal Capability Assessment to be set out in regulations.

This follows the existing provision for the All Work Test, but deals with capacity as well as incapacity. The existing regulations for the All Work Test set out measures of the extent of a person's incapacity in specified activities which relate to the ability to work. They cover physical, sensory and mental functions (e.g. walking; sitting; bending and kneeling; hearing; vision; concentration and mood). Assessment is based on a scoring system: claimants who reach a set points threshold are entitled to incapacity benefits, subject to meeting entitlement conditions.

Subsection (3) gives the power to provide for treating people as incapable of work until they have had a Personal Capability Assessment, or have been classed as capable of

work for other reasons (for instance, if they fail to respond to a request for information or evidence). It ensures that incapacity benefits can remain in payment pending a decision on whether a person satisfies the test of incapacity.

New subsections (4) and *(5)* make new provisions for the Personal Capability Assessment.

> *Subsection (4)* enables a Personal Capability Assessment to be carried out during the first 28 weeks of incapacity (i.e. while the Own Occupation Test still applies for benefit entitlement purposes).
>
> Currently the process of assessment cannot begin until the date when the All Work Test applies (usually after 28 weeks of incapacity), and can typically take many weeks to complete. This can mean that decisions on benefit entitlement are delayed, and that, following the introduction of the new capability element, information which would be helpful in preparing for a return to work would not be available when it would be of most value – before people have become detached from the labour market. Enabling the process to begin *before* week 29 is intended to address these problems.
>
> *Subsection (5)* ensures that "the Secretary of State" (normally a Benefits Agency official, acting on the Secretary of State's behalf) may require people who have been found incapable of work in accordance with a Personal Capability Assessment (and who are therefore entitled to incapacity benefits) to undergo a reassessment for the purposes of determining whether they are still incapable of work.

Schedule 8: Part II – Incapacity

Paragraph 23

This paragraph makes amendments to section 171A of the Contributions and Benefits Act, relating to the Personal Capability Assessment provided for in section 61. The intention of the new assessment process is to produce information about people's capabilities, as well as a decision on their incapacity for work for benefit purposes, and for this information to be used to help them enhance their employment prospects.

Sub-paragraph (2) inserts a *new subsection (2A)* into section 171A of the Contributions and Benefits Act, to widen the scope of the information or evidence that may be requested from claimants.

Subsection (2) of section 171A of the Act currently provides the power to obtain information and evidence in order to determine whether a person satisfies the test of incapacity for work for purposes of entitlement to benefit. The new Personal Capability Assessment will have a dual function: to determine whether a person satisfies the test for benefit entitlement, *and* to use information about a person's capabilities gathered during the assessment process to draw up a "capability report" on what they might nevertheless be able to do with appropriate help and support. New subsection (2A) provides for the collection of "information or evidence capable of being used for assisting the person in question to obtain work or improve his prospects of obtaining it" – i.e. information about people's work-related capabilities.

In practice, much of the information generated during the Personal Capability Assessment process will be equally relevant to the advice whether a person should be treated as incapable of work for benefit purposes, and to the "capability report". However there may be additional areas that may usefully be explored – such as what work-related activities the person might be able to do, and what sort of help they might need to do them.

Sub-paragraph (3) deals with the power to require claimants to attend a medical examination.

It amends subsection (3) of section 171A of the Contributions and Benefits Act. Subsection (3) at present provides that a person may be called to attend a medical examination where "a question arises as to" whether a person is capable of work. This is now replaced with "where it falls to be determined" whether a person is capable of work, to make it clear that it is not necessary for a medical examination to be preceded by a particular event which has raised a question in the mind of the decision-maker. This amendment supports the provision in section 61 of this Act to clarify the Secretary of State's power to require a reassessment.

Sub-paragraph (4) inserts a new subsection (5) into section 171A which ensures that all information supplied under section 171A is treated as social security information, so that powers relating to the exchange and disclosure of social security information apply to it.

This ensures that information collected during the Personal Capability Assessment which relates to a person's work-related capabilities, as well as information that relates strictly to the question of whether they are technically incapable of work for benefit purposes, can be passed on to personal advisers. It may also be used more generally, for the purpose of enhancing a person's employment prospects and rehabilitation. The relevant powers dealing with information are section 3 of the Social Security Act 1998 and section 72 of this Act (see later commentary).

Paragraph 24 makes a minor change of wording, consequential on the renaming of the All Work Test.

Sections 62-65: Incapacity Benefits

Incapacity Benefit (IB) is a contributory benefit which provides an income for people who are unable to work because of illness or disability, and have paid a specified amount of National Insurance contributions.

These sections make a number of changes to the IB legislation. They:

> amend the National Insurance contribution conditions for new claims;
>
> allow income from occupational and personal pensions to be taken into account when assessing what amount of IB people receive;
>
> extend entitlement to IB to long-term incapacitated people who claim while aged 16-19 (or, in prescribed cases, before age 25) and who would currently receive Severe Disablement Allowance.

They also:

> abolish Severe Disablement Allowance for new claimants (section 85 provides powers to protect the benefit for existing recipients.)

The Government's proposals were published in the consultation document *A New Contract for Welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103) in October 1998.

Section 62: Incapacity Benefit: restriction to recent contributors

Previously, in order to qualify for Incapacity Benefit (IB), people had to satisfy the two National Insurance contribution conditions set out in paragraph 2 of Schedule 3 to the Contributions and Benefits Act:

> First, they must have *paid* either Class 1 (employed) or Class 2 (self-employed) National Insurance contributions, or a combination of both, on earnings equal to at least 25 times the Lower Earnings Limit (currently £66.00 a week) in *any* one tax year prior to the benefit claim; and

> Second, they must have paid, or been credited with, either Class 1 or Class 2 National Insurance contributions, or a combination of both, equal to at least 50 times the Lower Earnings Limit in each of the two tax years prior to the benefit year in which they claim IB. A benefit year begins on the first Sunday in January; the tax year starts on 6 April.

Under the Social Security (Credits) Regulations 1975, people can be given credits in a number of circumstances, to help maintain their contribution record. The main effect of credits is to help people qualify for retirement pensions, but they can also count for other benefits. Credits which can count for the purpose of the second contribution condition in IB include credits for weeks of unemployment, incapacity or training, and credits for weeks receiving Invalid Care Allowance or Disabled Person's Tax Credit.

Commentary

Subsection (2) amends the entitlement rules for IB, so that benefit is payable only to those who have worked and paid National Insurance contributions in one of the *last three* tax years.

It replaces the first National Insurance contribution condition, by replacing paragraph 2(2)(a) of Schedule 3 to the Contributions and Benefits Act.

To qualify for benefit in future, claimants, in addition to satisfying the second contribution condition, must actually have *paid* either Class 1 or Class 2 National Insurance contributions, or a combination of both, on earnings equal to at least 25 times the Lower Earnings Limit in one of the last three tax years before the benefit year to which the claim is made, rather than in any one tax year. This brings IB more into line with contribution-based Jobseeker's Allowance (JSA). The second contribution condition will remain unchanged.

The current provision, in paragraph 2(7) of Schedule 3 to the Contributions and Benefits Act, allows people who do not satisfy the second condition at the time they first claim to make a repeat claim at a later date when they will satisfy it (usually the following January, when the start of a new benefit year triggers a different pair of tax years). *Subsection (3)* extends this to cover the new first contribution condition. This will ensure that people who have paid sufficient contributions to satisfy the contribution conditions from a future date at the point they fall ill or become disabled, are not permanently prevented from qualifying for IB.

For example: a student who works only for a few months after leaving university and then has a serious accident, would have paid contributions in too recent a tax year to qualify for IB—and would not be able to claim the benefit without this provision.

Subsection (4) provides a regulation-making power to modify the new first contribution condition for people in a specified class.

It is intended to use this power to protect people who have paid contributions at some stage but who have not had the opportunity to do so recently because, for example, they have been carrying out caring responsibilities for which they receive Invalid Care Allowance. People on DPTC who have earnings below the LEL for more than two years will also be protected by this sub-paragraph. Without it they would be unable to re-qualify for IB as they would not have paid any contributions and would also be beyond the 2 year linking rule. It will also be used to protect people who were in receipt of IB in the tax year before a new claim; without this protection, they may be unable to re-qualify for benefit after short breaks in entitlement.

Section 63: Incapacity Benefit: reduction for pension payments

This section provides for Incapacity Benefit (IB) to be reduced by 50 pence for every pound of income above £85 that a claimant has from an occupational or personal pension.

IB is usually paid only to people of working age. However, where a person under state pension age (60 for women and 65 for men) has an occupational or personal pension, this previously did not affect entitlement to IB.

Commentary

The section makes these provisions by inserting a new section 30DD into the part of the Contributions and Benefits Act that contains the rules for IB.

The *new section 30DD(1)* provides that where someone who is entitled to IB has income from a pension payment, which is defined by section 30DD(5) to include occupational pensions, personal pensions, and public service pensions, and that pension payment is in excess of a threshold amount of £85, provided by subsection (2), 50 per cent of the excess will be deducted when assessing IB. The *new section 30DD(2)* defines the amount of the threshold as £85 a week, or if the period in question is not a week the appropriate proportion as prescribed in regulations.

The *new section 30DD(3)* gives power to prescribe in regulations people who may not have their benefit reduced. It is intended to use this power to prescribe that people on IB who are entitled to the highest rate care component of Disability Living Allowance will not have their IB reduced.

The *new section 30DD(4)(a)* allows exemptions to be made. For example, the intention is to use this power to disregard payments where the pension payments are in connection with the death of a member of a scheme, or where an occupational pension scheme is in deficit or has insufficient resources to pay the full pension.

The *new section 30DD(4)(b)* gives the power to make regulations to assume a notional income in cases where claimants deliberately choose not to take a pension payment in order to increase or maximise their benefit.

The intention is to make similar regulations to those already in place for other benefits, including Income Support and Jobseeker's Allowance. In the case of personal pensions, the regulations prevent any notional income being taken into account before the person is aged 60. They also provide for notional income to be assessed on the basis of information supplied by the pension provider, using tables supplied by the Government Actuary's Department. It will allow the DSS to take into account the amount of pension income which the claimant deferred. But the amount would have to be greater than £85 a week before it would affect IB.

The *new section 30DD(4)(c)* enables regulations to provide that it is the aggregate amount of pension payments that will be deducted from IB if they exceed the threshold.

The *new section 30DD(4)(d)* provides the power to apportion pension payments into weekly payments.

For example, this will enable monthly pension payments to be converted into weekly amounts so that they can be deducted from IB on a weekly basis.

The *new section 30DD(5)* defines what is meant by "pension payment". This includes payment from personal pension, occupational pension and public service schemes.

The *new section 30DD(5)(b)* provides the power to prescribe other types of pension, or similar, income for which a deduction may be made (as is the case for JSA).

It is intended to use the power to prescribe that permanent health insurance payments should be deducted from future IB claims. This would apply to those permanent health insurance schemes that are arranged by employers to provide for employees, where the contract of employment has ended. It would not apply to schemes used to fund normal occupational sick pay. In the same way as for occupational and personal pensions, the first £85 a week would be totally disregarded and 50% of the remainder deducted from future IB.

The power in *new section 30DD(5)(c)* to specify other payments would enable income to be taken into account if new products are developed which provide similar income to occupational and personal pensions or permanent health insurance.

The *new section 30DD(6)* provides the definition of the occupational pensions, personal pensions and public service pensions to be taken into account when assessing IB. These pensions are defined in the Pension Schemes Act 1993 and are already used for JSA purposes.

The Act provides (at *Part II of Schedule 8*) for any regulations concerning the definition of pension payments to be subject to affirmative resolution by both Houses of Parliament. That is to say, the regulations must be approved in draft by Parliament before being made. This is in line with the procedures for JSA.

Part II of Schedule 8 makes some minor amendments to existing legislation as a result of the Act's provisions for IB.

Section 64: Incapacity benefit: persons incapacitated in youth

This section allows a new category of people to claim Incapacity Benefit (IB). They are those people aged between 16 and 19 (or, in prescribed cases, age 25 – see below) who would currently claim and receive Severe Disablement Allowance (SDA). Section 65 of this Act abolishes SDA for new claimants.

Subsection (1) amends the entitlement conditions for IB set out in section 30A of the Contributions and Benefits Act, and provides that this group may receive IB without meeting the contribution conditions.

Subsections (2) and *(4)* make consequential amendments.

Subsection (3) inserts a *new subsection (2A)* into section 30A of the Contributions and Benefits Act.

To be entitled to IB without having satisfied the contribution conditions, a person must have become incapable of work before the age of 20 (or 25 in certain circumstances), must satisfy the conditions of residence or presence in Great Britain, and must not be in full-time education. *Subsection (2A)(c)* provides that these people must also have been continuously incapable of work for at least 196 days (28 weeks) before benefit can be paid. This is intended to ensure that the benefit is correctly targeted at long-term incapacity for work.

Subsection (2A)(b) gives a regulation-making power to extend the cut-off age from 20 to 25 in certain circumstances.

It is intended to use this power to extend the age cut-off from 20 to 25 for people in education, or vocational or occupational training. The intended qualifying conditions for extending the age cut-off will be that:

> they must have started the course before their 20th birthday; and

> they must have finished their course no earlier than in one of the last two complete tax years before the year in which they claim benefit (the tax year starts on 6 April and the benefit year begins in the next January). So, for example, if their course finishes in June 2005, they will be able to claim IB until December 2008 (so long as they are still under 25).

The inserted subsection (2A)(d) gives regulation-making powers to define the residence and presence conditions. It is intended to use this power to require claimants to have been ordinarily resident or present in Great Britain for a total of at least 26 weeks in the year up to the date of entitlement.

Once a person has qualified for IB under these new rules they may re-claim benefit after the age of 20, following a break in claiming, if the new claim "links" with the previous

period of entitlement to IB. For claims to link, the break between benefit claims must not exceed 8 weeks. For those who leave benefit because of starting work the linking period is extended to 52 weeks under the Welfare to Work Regulations 1998. And, for those who leave benefit and claim Disabled Persons` Tax Credit or start a Training for Work course, the linking period is extended to two years.

Subsection (5) inserts *new subsections (6) and (7)*into section 30A of the Contributions and Benefits Act. It is intended to use the power in subsection (6) to allow people to re-qualify for short-term benefit even though they may be over the age limit, if they were awarded IB under the new conditions in subsection (2A) and left benefit to work but earned below the lower earnings limit, or went abroad, and did not re-qualify for benefit through the linking rules.

The intention is to use the power in subsection (7) to define "full-time education" to apply only to people aged 16-18, and to provide that, in order to qualify for benefit, they must spend less than 21 hours a week in education (excluding any time spent on a course not normally taken by a non-disabled student).

Section 65: Abolition of Severe Disablement Allowance;

This section, and*Part IV of Schedule 13*, abolishes Severe Disablement Allowance (SDA), by repealing sections 68 and 69 of the Contributions and Benefits Act.

SDA is a non-contributory, non means-tested benefit, paid to people who cannot work because of illness or disability, and who have not paid sufficient National Insurance contributions to qualify for Incapacity Benefit (IB). For people who become incapable of work before the age of 20, the qualifying test of "incapacity" is the same for SDA as for IB—but those aged 20 and over must additionally be assessed by a doctor as "80% disabled".

Approximately 70% of SDA recipients also claim Income Support to top up their income, and therefore see no financial gain from claiming the benefit. This is because SDA is paid at a lower rate, and is always deducted pound for pound when calculating the amount of Income Support payable.

Part IV of Schedule 13 makes the necessary consequential repeals for the abolition of SDA.

Section 85 provides a regulation-making power to make transitional and saving provisions which will allow the Government to protect existing recipients. In *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103), the Government said that those recipients aged 20 or above at the point of change would continue to get the benefit.

The Government intends to make regulations that will automatically transfer, a year after the changes are introduced, those under 20s who were entitled to SDA at the point of change, onto long-term Incapacity Benefit. This will give this group of people access to long-term IB at the same time as those who bocame entitled to short-term IB under the new entitlement conditions introduced by section 64 of this Act.

Sections 66-67: Disability Benefits

Sections 66 and 67 make three changes to disability benefits. They:

introduce regulation-making powers as to entitlement to Attendance Allowance;

amend the terminology relating to awards made for an indefinite period; and

extend entitlement to the higher rate mobility component of Disability Living Allowance to 3-and 4-year-old severely disabled children with serious mobility problems.

Background

These proposals were put forward in the consultation paper *A new contract for welfare: SUPPORT FOR DISABLED PEOPLE* (Cm 4103), published in October 1998.

The consultation paper also proposed the introduction of a "Disability Income Guarantee" to provide additional help for disabled people aged under 60 with the greatest needs and lowest incomes. This measure does not require primary legislation.

Disability Living Allowance (DLA) is a benefit to help with the extra costs of disability. It has two components:

> the care component, which has three rates of payment and is available for those who become disabled, need care and attention, and claim the benefit below the age of 65; and
>
> the mobility component, which has two rates of payment and is available for those who become disabled, have serious problems with their mobility and orientation, and claim the benefit between the ages of 5 and 65. The higher rate mobility component is paid to those whose mobility is very seriously restricted; the lower rate is for those who can walk, but need guidance or supervision.

Although the main conditions of entitlement to DLA are set out in primary legislation, there are regulation-making powers which enable the circumstances to be prescribed in which a person is taken to satisfy or not satisfy the conditions of entitlement.

Attendance Allowance (AA) is a benefit paid towards the extra costs of people who are so disabled that they need care and attention from another person, and who become disabled, or claim the benefit, after the age of 65. The conditions of entitlement and the circumstances in which a person qualifies for AA are currently set out in primary legislation. There are two rates of payment: a lower rate for those who need care either by day or night, and a higher rate for those needing both.

Both DLA and AA are non-contributory, non-means-tested benefits, which are paid tax-free. Awards may be for a fixed or indefinite period.

Commentary

Section 66: Attendance Allowance

Regulation-making powers

Currently, the rules that specify the conditions of entitlement and the circumstances in which a person qualifies for Attendance Allowance (AA), are set out in primary legislation, in the Contributions and Benefits Act (sections 64(2) and 64(3)). The present lack of regulation-making powers in AA means, for example, that when proposed changes apply to both AA and Disability Living Allowance (DLA), which are very closely related benefits, it is not possible to introduce the changes simultaneously through regulations.

Subsection (1) introduces a regulation-making power for AA similar to the power to make regulations for DLA.

It inserts a *new section 64(4)* into the Contributions and Benefits Act, to create a power to prescribe circumstances in which the AA night attendance or day attendance conditions are, or are not, to be taken as met.

It is intended that the regulations would be used when the conditions of entitlement to AA needed to be amended or clarified: for example, if a judicial decision departed significantly from the policy intention.

Attendance Allowance for the terminally ill

AA can be awarded, and special rules applied, in respect of people who are terminally ill. Section 66 (1) of the Contributions and Benefits Act refers to entitlement "for the remainder of his life". This can give the mistaken impression that entitlement under the special rules for people who are terminally ill can never be changed, even if their prognosis improves. The definition of "terminally ill" is in section 66(2)(a), and this Act does not seek to change it.

Subsection (2) amends sections 66(1)(a) and (b) of the Act to make it clear that entitlement to AA under the special rules for terminally ill people only applies during the period in which a person is classed as "terminally ill". Section 67 of this Act makes a similar amendment to awards of DLA "for life".

Section 67: Disability Living Allowance

Awards made "for life"

Section 71(3) of the Contributions and Benefits Act permits awards of Disability Living Allowance (DLA) to be made "for life". Life awards are made where it seem likely that a person's entitlement to benefit will continue indefinitely.

This has led to misconceptions: many people with a life award believe that the benefit will continue even if they are no longer entitled to it. However, these life awards, like all other awards, can be reviewed and altered when there are grounds for doing so, under the powers in sections 30 and 35 of the Administration Act.

Subsections (1) and *(2)* remove the reference to awards for life in section 71(3) of the Act, and make it clear that DLA may be awarded either for fixed periods or for indefinite periods, subject to review—but that entitlement only applies while the person satisfies the conditions of entitlement. Section 66 of this Act makes similar provision for awards of Attendance Allowance for the terminally ill.

Entitlement to the higher-rate mobility component of DLA

The rules for entitlement to the higher rate mobility component of DLA are in section 73 of the Contributions and Benefits Act. Currently, under section 73(1), children must reach the age of 5 before they can become eligible.

Subsection (3) extends eligibility to the higher rate mobility component to severely disabled 3 and 4 year-olds, in recognition that they can encounter serious mobility problems.

The rules governing eligibility to the lower rate mobility component will not be affected, and this will continue to be available to children on reaching the age of 5.

The subsection inserts a *new section 73(1A)* in the Contributions and Benefits Act, to provide for children aged 3 and over to qualify for the higher rate mobility component if they satisfy the eligibility requirements, and to draw a distinction on grounds of age between eligibility to the higher and lower rates of the mobility component.

Subsection (4) ensures that the extended eligibility does not affect awards made before the date when subsection (3) comes into force.

Sections 68-72: Miscellaneous Provisions

Section 68: Certain overpayments of benefit not to be recoverable

This section provides that certain overpayments of benefits made before 1 June 1999 cannot be recovered from the recipient.

As a condition of receiving benefits, claimants are expected to tell the Benefits Agency about any relevant facts, or later changes in their circumstances, that might affect their benefit entitlement. If they do not, and it is later judged that they have received more benefit than they should have as a result, they are liable to repay the full amount of overpaid benefit. In most cases, it is clear what changes of circumstances need to be reported (for example, getting a higher level of income while receiving an income-related benefit).

However, with disability and incapacity related benefits, there are certain cases where disabled people cannot reasonably be expected to know how their benefit entitlement relates to their physical or mental condition or its effects — or that there is something they have to tell the Agency about. But when their benefit is reviewed, it may be discovered that they have, in fact, been overpaid. Examples of where this might happen are where the purchase of equipment has reduced the level of help needed from another person, or where rehabilitation following a disabling accident has gradually lowered the level of need and increased the capacity for work.

The section ensures that no overpayments of this kind arising from benefit reviews carried out up to 1 June 1999 can be recovered. The proposal to make these overpayments non-recoverable was announced in the answer to a Parliamentary Question on 26 February 1999, and was also discussed with organisations representing disabled people.

The provision will not apply to any overpayment in connection with which a person has been convicted of an offence, or in respect of which a person has agreed to pay a penalty as an alternative to prosecution.

Regulations have already been made, under existing powers, to deal with this kind of case from 1 June 1999. Where it is judged that claimants could not reasonably have known that their benefit entitlement could be affected, the regulations will provide that the relevant date for the change in entitlement to benefit was the date of the review -. Therefore no overpayment will arise.

Commentary

Currently, the rules for recovering overpayments of benefit are set out in Part III of the Social Security Administration Act 1992. They specify that money can be recovered when the overpayment arises because people:

> have failed to declare a relevant change in their circumstances, or
>
> have misrepresented a material fact. (Misrepresentation for this purpose can be wholly innocent.)

Section 68 provides that, despite the current provisions in that Act, certain overpayments relating to the effects of disability, or to a decision on incapacity for work, will not be recoverable.

Subsection (1) contains the general rule that overpayments covered by this section will not be recoverable.

Subsection (2) indicates that the section applies to reviews of qualifying benefits relating to a change in a person's condition at some point in the past; that the review decision was given before 1 June 1999; and that the overpayment is not one excluded by subsection (6) (see below).

Subsections (3) and *(4)* indicate that the section applies only to disability and incapacity related benefits – and only where benefit entitlement has changed because of a change in the disabled person's care or mobility needs (for Disability Living Allowance or Attendance Allowance) or capacity for work.

So, for example, the power will not apply to overpayments that arise in situations unconnected with the application of the care and mobility tests or the All Work Test, such as entering hospital or leaving the country.

Subsection (5) gives the meaning of "review", "the relevant person" and "the original decision" for the purposes of the section.

Subsection (6) excludes from the scope of the section any overpayment where a person has been convicted of an offence in connection with the overpayment or, in accordance with section 115A of the Administration Act, has agreed to pay a penalty as an alternative to prosecution.

Subsection (7) states that the section does not apply to any overpaid amount recovered from a person before 26 February 1999, the date of the announcement that certain overpayments would not be recovered.

Section 69: Child Benefit: claimant to state national insurance number

This section requires all people claiming Child Benefit either to state their national insurance number, giving proof that it is theirs, or to provide information that would enable their national insurance number to be found or a number to be allocated for them.

This applies to the adult claimant (usually a parent), rather than the child on whose behalf Child Benefit is claimed (children under 16 would not normally have national insurance numbers).

Section 19 of the Social Security Administration (Fraud) Act 1997 makes entitlement to most benefits conditional on the production of a national insurance number. However, because of the definition of "benefit" used (in section 1(4) of the Administration Act), the requirement does not apply to Child Benefit.

Section 69 ensures that the requirement will apply to Child Benefit, by adding *new subsections (1A)* to *(1C)* to the rules for claiming Child Benefit set out in section 13 of the Administration Act.

The Fraud Act allowed regulations to be made exempting certain categories of people from the requirement to supply a national insurance number. The *inserted subsection (1C)* allows exceptions to be made by regulations for claims to Child Benefit: for example, for certain members of voluntary and charitable bodies.

The requirement in the Fraud Act did apply to Guardian's Allowance. However, since entitlement to Guardian's Allowance is conditional upon the receipt of Child Benefit, regulations were made to exempt it. As a consequence of this section, it is intended that further regulations will be made to remove this exemption.

Background

Although a national insurance number is currently not legally required for a claim to Child Benefit, it is requested. In practice, approximately 95%-97% of new claimants do provide national insurance numbers.

The requirement to supply a national insurance number and supporting evidence was introduced to help secure the benefits system against abuse. In addition, national insurance numbers are essential for the efficient processing of benefit claims on the computer systems used by the DSS. For example, the use of a national insurance number enables the Child Benefit system to relay details of a claim to the National Insurance Recording System, which stores people's contributions records. This ensures the accurate assessment of Home Responsibility Protection (HRP) which safeguards the pension entitlement of those who are unable to work due to caring responsibilities.

Section 70: Welfare benefits: miscellaneous amendments

This section introduces Schedule 8, which contains the minor and consequential amendments that need to be made as a result of Part V of the Act. These amendments include:

Part V: "splitting" of Jobseeker's Allowance hardship payments

Paragraph 29 (*sub-paragraphs (5) and (7)*) of Schedule 8 amends the Jobseekers Act, to enable all or part of any hardship payment of JSA to be paid to a person other than the claimant. An officer acting on behalf of the Secretary of State will identify the circumstances in which a hardship payment should be paid to another person, whether all or part of the benefit is involved, and the person to whom the payment is to be made.

Regulation 34 of the Social Security (Claims and Payments) Regulations 1987 allows certain benefit payments to be paid, wholly or in part, to a third party where this is considered necessary in order to protect the interests of the claimant, child or dependent. An example of where this might happen is where the claimant is totally unable to manage his financial affairs and would therefore not use his benefit payment to meet his family's immediate needs. Whereas standard income-based Jobseeker's Allowance (JSA) can already be "split" in this way, the current wording of the Jobseekers Act means that hardship payments of JSA made under section 20(4) or paragraph 10(2) of Schedule 1 can only be made to the claimant.

Background

Hardship payments of JSA, and the circumstances in which they may be made, are described in Part IX of the Jobseeker's Allowance Regulations 1996. Hardship payments are only made where the claimant, their partner, or a member of their family would suffer hardship because JSA is not paid. Two of the situations in which the Jobseekers Act provides for hardship payment to be made are:

> Section 20(4) provides that hardship payments may be made to claimants even when sanctions have been applied, under section 19, and their JSA has been withheld. For example, this might be because the claimant failed to attend a prescribed training programme, or lost a job through misconduct.
>
> Paragraph 10(2) of Schedule 1 to the Jobseekers Act provides that hardship payments may be made where a claimant's JSA payments have been suspended, where a question arises as to whether the claimant satisfies any of the labour market conditions of entitlement.

Section 71: Sharing of functions as regards certain claims and information

Background

This section provides powers which are intended to enable closer working between central and local government in order to make the delivery of social security benefits more customer-focused and better co-ordinated. In particular, the section provides new functions for local authorities, enabling them to collect and record information, and give advice, in respect of benefits which are administered by central government.

The Department's aim is an integrated service which allows clients, as far as possible, to claim social security benefits, child support and war pensions, give information and make enquiries through a single point of contact.

Local authorities are responsible for the administration of Housing Benefit (HB) and Council Tax Benefit (CTB) and, under current legislation, they may only collect information relevant to those particular benefits. It is intended that regulations will be made under this section to enable local authorities to play a full part in integrated working initiatives, in particular, the ONE service (see sections 57, 58 and 72), by allowing them to handle a wider range of social security functions. The section will also

enable other partners in integrated working arrangements, such as the Benefits Agency and Employment Service, to provide a similar service in relation to claims for HB and CTB.

It is also intended that clients will be able to claim a range of social security benefits using a single, integrated, claim form. For example, the Department's longer-term plans for improving and streamlining service to pensioners envisage that people wanting to claim Retirement Pension, Income Support, HB and CTB will be able to do so on the same form, rather than having to complete separate claims and provide the same information to both the Benefits Agency and the local authority.

This section does not make any changes to current responsibilities for determining claims. Local authorities will remain responsible for HB and CTB, and claims or information they collect relating to war pensions, child support, or benefits administered by the Benefits Agency will be passed to the relevant Agency for processing.

Schedule 12 provides for local authorities to be paid for the extra work arising from this section (and the provisions for work-focused interviews in sections 57 and 58). See the commentary after this section for more details.

Commentary

The section inserts a new section 7A into the Administration Act.

Subsection (1)(a) confers power to make regulations enabling claims for HB and CTB to be made to a body other than a local authority, which will be specified in the regulations.

In the case of pilots of the ONE service, for example, the specified bodies will be the local Benefits Agency or Employment Service, or offices run by private or voluntary sector providers on their behalf.

Regulations under *subsection (1)(b)* will provide for the mirror image of arrangements under subsection (1)(a) by enabling claims for prescribed social security benefits and war pensions, and applications for child support, to be made to local authorities.

Subsection (2)(a) enables regulations to be made that allow claims made under the provisions of subsection (1), and information provided in connection with those claims whether supplied by the claimant or by a third party (such as the claimant's partner), to be forwarded to the appropriate administering authority.

Subsection (2)(b) provides for the making of regulations enabling the receipt, collection and forwarding of information about social security matters from people who are making claims, or have made claims, for HB, CTB or any prescribed benefits, or from a third party in connection with such claims.

These regulations will enable a claimant, or partner, to carry out routine social security transactions, such as reporting a change of personal circumstances, at a single point of contact. For example, a person would be able to report changes affecting his HB claim to the Benefits Agency, which would then forward the details and any supporting evidence to the local authority.

Regulations under *subsection (2)(c)* will provide for the recording and holding of information and evidence relating to social security matters.

The regulations will enable an office to hold information which relates to benefits for which it has no administrative responsibilities. This situation would arise, for example, where a single claim form is used for a mixture of centrally and locally administered benefits, such as an integrated claim for Income Support and Housing Benefit. The form may be stored by the Benefits Agency, even though the Agency has no administrative responsibility for the Housing Benefit claim.

Subsection (2)(d) provides for the making of regulations enabling advice and information to be given to claimants on a range of social security matters.

It is proposed that regulations made under this provision will allow local authorities greater access to information held on Benefits Agency systems than is currently the case, in order to deal with claimants' enquiries concerning social security benefits administered by the Agency.

Subsection (3) clarifies that subsections (2)(b) (obtaining, receipt and forwarding of information) and (2)(d) (the giving of advice and information about social security matters) apply whether or not the original claim was made under the provisions of subsection (1).

It also clarifies that those paragraphs apply both to people making initial claims to Housing Benefit, Council Tax Benefit or any prescribed benefits, and to those to whom an award has already been made.

Schedule 12Part II

Currently, local authorities only have functions in respect of Housing Benefit (HB) and Council Tax Benefit (CTB). They are paid subsidy for administering these benefits under section 140B(4A) of the Administration Act.

Paragraph 80 of Schedule 12 amends the Administration Act to enable local authorities to be paid for the extra work arising from sections 57, 58 and 71, through an extension of the normal subsidy mechanisms.

Sections 57 and 58 provide for local authorities to undertake work-focused interviews; section 71 enables them to perform functions relating to claims and information for a wider range of social security benefits.

Section 72: Disclosure and use of information

Background

This section is intended to facilitate cross-Government working in a number of social security and employment-related areas in order to deliver the ONE service and Employment Zones; and to ensure that information can be used to best effect in operating the New Deal for Lone Parents, the New Deal for Disabled People, the New Deal for Partners of Unemployed People and the new Personal Capability Assessment.

The ONE service

An important focus of this section is to facilitate the introduction of the ONE service (see also section 57). ONE will be administered by staff from the Employment Service, the Benefits Agency and local authorities, as well as private or voluntary organisations. In this last case, staff will be contracted to carry out parts of the ONE process.

This section does two main things to facilitate the process:

> First, it will allow staff from any organisation administering ONE to use and disclose information relating to a person's claim for any benefit involved.
>
> Second, it will allow staff who are administering ONE to use and disclose information about a claimant's employability.
>
> For example, it will enable information which is collected at the "registration and orientation" stage of the service – such as information about the client's previous work experience, skills and educational attainment – to be passed on to the client's personal adviser, who will conduct the interview and may be from a different organisation.

The use and disclosure of information under this section will be limited to persons who are prescribed in regulations.

It is intended that information which is needed to assess the benefit claim will be passed on to the appropriate agency for processing, and that information about the client's employability will be passed on to their personal adviser.

In the course of the work-focused interview, the personal adviser may identify a source of help or support that is available to the client, and which would improve his capacity to become more independent.

For example, the client might benefit from help with literacy skills. However, since any action other than participation in the interview will be voluntary, any passing of information beyond this stage will be voluntary too. So if the personal adviser makes a suggestion which the client wishes to take up, he would ask the client to sign a disclaimer, allowing the personal adviser to pass a specific piece of information to that specific specialist provider. There is no provision in this Act for this to take place, since it will happen on a purely voluntary basis.

Employment Zones

The Act also provides for the introduction of Employment Zones (see section 60). This section enables information obtained for Jobseeker's Allowance purposes to be passed on to the Employment Zone provider, which may be an organisation in the public, private or voluntary sector.

The Employment Zone provider will need to know the amount of JSA to which the claimant is entitled, so that they can pay him or her an equivalent amount (minus the nominal amount of JSA which would still be in payment by the DSS). Information will also need to flow from the Employment Zone provider to the Employment Service and Benefits Agency (BA), for example to inform BA when a participant has obtained work so that their nominal JSA payments can be terminated; or when the circumstances of the participant have changed in a way which may require their level of benefit to be increased (such as the birth of a child).

New Deal for Partners of Unemployed People, New Deal for Lone Parents and New Deal for Disabled People

In addition, this section is designed to ensure that information can be used to best effect in operating the New Deal for Lone Parents, the New Deal for Disabled People and the New Deal for Partners of Unemployed People.

> In the case of the New Deal for Partners of Unemployed People, partners of long-term JSA claimants are invited by the Employment Service to receive specialist advice and support, to help them into work if they wish. The Employment Service may contact the partner direct.
>
> For the New Deal for Lone Parents and the New Deal for Disabled People, information provided in connection with a person's benefit claim may, where appropriate, be passed on by the Benefits Agency to the Employment Service, so that lone parents and disabled people who claim benefits can be contacted and offered advice on jobsearch, training and childcare.
>
> Schemes under the New Deal for Lone Parents and the New Deal for Disabled People need information to be disclosed to and used by private or voluntary sector organisations where they administer these schemes. Both the New Deal for Lone Parents and the New Deal for Disabled People operate on a voluntary basis.

Personal Capability Assessment

This section also ensures that information collected during the new Personal Capability Assessment which relates to a person's work-related capabilities (including information that also relates to the question of whether they are technically incapable of work for

benefit purposes) can be made available to personal advisers. The information may also be used more generally, for the purpose of enhancing a person's employment prospects and rehabilitation. The provisions for the Personal Capability Assessment are contained in section 61 and Part II of Schedule 8 (see earlier commentary).

Data Protection

The processing of information in this area will be governed by data protection law, including the Data Protection Act 1998 when commenced. Such processing must be fair and lawful, and comply with the other data protection principles such as the right of individuals to see their own records.

Commentary

Subsection (1) provides a power to make regulations specifying how, to whom, when and for what purposes social security information can be provided by those people mentioned in *subsection (2)* (Ministers of the Crown and persons providing services to them, local authorities, and persons providing services to, or exercising functions of, local authorities). It limits the use which can be made of such information to "relevant purposes", as defined in *subsection (6).*

The section as a whole enables regulations to provide for information-sharing relating to a number of social security and employment-related initiatives. Those powers give flexibility in an area where configurations of services and help are likely to change and evolve – for example, in the light of experience from current pilot and prototype operations. *Subsection (1)* restricts the use of these regulations to the provisions listed in *subsection (3)*, or to any scheme or arrangements defined under *subsection (4).*

Subsection (4) enables regulations under *subsection (1)* to designate schemes or arrangements which are concerned with the employment or training prospects of a claimant or his partner.

It is currently intended to designate the following schemes:

the New Deal for Partners of Unemployed People;

the New Deal for Lone Parents; and

the New Deal for Disabled People.

However, this subsection enables new schemes to be designated as they are developed.

Subsection (5) ensures that regulations made under *subsection (1)* may enable disclosed information to be used to supplement or amend information already held by another person.

It also enables the recipient in turn to disclose this information to others, or use it for another purpose, insofar as they were permitted to disclose or use the information which they already held. This provision echoes section 122B(4) of the Administration Act 1992.

Subsection (6) defines the purposes for which information supplied under this section can be used.

These are purposes connected with social security, child support or war pensions; or purposes connected with employment or training. It also defines "*social security information*" for the purposes of this section, as information relating to social security, child support or war pensions. This is consistent with the definition in section 3 of the Social Security Act 1998.

Subsection (7) further defines "purposes connected with employment or training" to make it clear that such purposes can include assisting and encouraging people to enhance their employment prospects.

Chapter II: National Insurance Contributions

Sections 73 & 74 (and Schedules 9 and 10): New threshold for primary Class 1 contributions

These sections provide for a number of changes to National Insurance contributions (NICs) that were announced in the Budgets of 1998 and 1999. They were added to the Bill during Commons Committee stage (Hansard: Standing Committee D col. 981).

Background

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

> the point above which *employers* start to pay NICs, the employer earnings threshold, is set at the same level as the single person's tax allowance (£83 a week in 1999/2000) rather than the Lower Earnings Limit (LEL: £66 a week in 1999/2000);
>
> *employees* no longer have to pay any contributions on the portion of earnings up to and including the LEL (i.e. abolition of the 2% employee "entry fee");
>
> employers do not pay any contributions on the portion of earnings below the employer earnings threshold;
>
> the complex structure of four employer rates of contributions has been replaced by a single rate of 12.2% (or the alternative contracted-out rate); and

Class 1B contributions were introduced – paid by employers who enter into a PAYE Settlement Agreement with the Inland Revenue for tax.

The Chancellor also announced in 1998 that, as part of future reforms, he would raise the point at which employees start to pay NICs to the new threshold for employers and the single person's tax allowance, and would do so as soon as measures were in place to protect people against the benefit losses that would otherwise result. These additional measures were confirmed in the 1999 Budget, and are contained in this Act. The changes are:

Raising in two stages the starting point at which employees begin to pay National Insurance contributions to the level of the single person's tax allowance. Stage 1, to be introduced in April 2000, is for employees to become liable to pay contributions on earnings above a threshold of £76 a week. The second stage, from April 2001, is that the threshold will be fully aligned with the single person's tax allowance (projected to be around £87 a week). Combined with the increased starting point for employers' NICs (mentioned above), this will mean no tax or NICs on earnings of less than £87 a week;

National Insurance contributions build entitlement to contributory benefits. Simply raising the point at which employees begin to pay NICs would stop people with earnings below the new threshold from building up entitlement to contributory benefits. So the Chancellor announced that benefit rights for earnings between the LEL and the new threshold would be protected;

To provide for the Upper Earnings Limit (UEL) for employee contributions to be set as a multiple of the new threshold in order to allow it to be raised to £535 a week in 2000 and £575 in 2001, in line with the Chancellor's Budget statement.

These changes are all provided for in Schedule 9 (with some consequential amendments in Part II of Schedule 12).

Schedule 9

The new provisions involve a re-working of the National Insurance contributions legislation, which is already heavily amended by the Social Security Act 1998 and the Social Security Contributions (Transfer of Functions, etc.) Act 1999. So for clarity, Schedule 9 restates sections 5, 6, 8 and 9 of the Contributions and Benefits Act completely. It also deals with the consequences for contracted-out pension schemes and for the NICs revenue allocated to the NHS.

Section 74 and Schedule 10 make corresponding provision for Northern Ireland. Because they are parallel provisions, they are not referred to in the commentary below.

Commentary

Part I

The first Part of Schedule 9 restates sections 5, 6, 8 and 9 of the Contributions and Benefits Act, and inserts a new section 6A. References below are to sections of the Act.

Section 5 sets the limits and thresholds for National Insurance contributions and is largely restated. The main change is in subsection (1).

Subsection (1)(a) adds to the existing lower and upper earnings limits a new "primary threshold". This is to be the point at which employees begin to pay NICs and will be increased over two years to the level of the single person's tax allowance.

The employer earnings threshold introduced in 1998 as the starting point for employers' NICs – and currently at the weekly equivalent of the single person's tax allowance – is renamed the "secondary threshold" in *subsection (1)(b).*

The section provides that these limits and thresholds are to be set each year by regulations, subject to specified conditions:

First, through *subsection (2)* the LEL will continue to be tied to the level of the basic state pension;

Second, the UEL is currently set as a multiple of the LEL. It is not possible to raise the UEL to the level the Chancellor has announced whilst keeping to this formula. So *subsection (3)(a)* is modified to require the UEL to be calculated as a multiple of the new primary threshold.

Subsections (4) and *(5)* rationalise the existing provisions for defining non-weekly equivalents of the limits and thresholds for those paid otherwise than weekly.

Section 6 establishes when liability arises for Class 1 NICs. The only subsantial change is to *subsection (1)(a)*. This makes the starting point for primary (employee) contributions the new primary threshold, rather than the LEL. *Subsection (1)(b)* is updated to reflect the renamed secondary threshold.

Section 6A is completely new. It provides that contributions are to be treated as having been paid on earnings which are not less than the LEL and not more than the primary threshold. This enables such earnings to be protected for the purposes of building entitlement to contributory benefits.

Subsection (2) ensures that people earning at or over the LEL do not lose access to contributory benefits and pensions because of the increase in the level of earnings at which employees start to pay NICs.

It has the result that earnings from the LEL up to and including the primary threshold will be treated for benefit purposes (defined in *subsection (3)*) in exactly the same way as earnings on which contributions have actually been paid – i.e. by treating them as notionally paid. The section also ensures that the change to the structure of employee

contributions does not reduce the earnings used for calculating entitlement to SERPS (the "earnings factor").

Subsection (4) provides a regulation-making power to enable provisions of the Act to be applied with modifications in relation to people who fall within the scope of the section.

This will make it possible to ensure that benefit rights of such people are not enhanced as a result of the "notional payment".

For instance, liability for Class 1 NICs at present depends on satisfying conditions relating to residence and presence in Great Britain. The regulations would be used to make sure that the same conditions apply before someone could take advantage of the new deeming provision in section 6A.

Sections 8 and 9 contain the rules for calculating the amount of NICs payable. Section 8 deals with primary (employee) Class 1 contributions; section 9 relates to secondary (employer) NICs. Both sections are modified in line with the changes above.

As now, *section 8(1)(a)* provides for the amount of primary Class 1 contribution to be the "primary percentage" (currently 10%) of the earnings between the starting point for NICs liability and the UEL. The change is that the starting point is now the primary threshold rather than the LEL.

Section 9(1) makes the starting point for secondary NICs the renamed secondary threshold.

Part II

The second Part of Schedule 9 amends the Pension Schemes Act 1993, to deal with the effect of the NICs changes on contracted-out pensions. Paragraph 6 amends the rules for salary related schemes; paragraph 7 applies to money purchase schemes.

In the same way that benefit entitlement is protected from the rise in the starting point for NICs, so is entitlement to NI rebates. Current provisions set the employee and employer rebates by reference to percentages of earnings in excess of the LEL. The new provisions will enable the rebate to continue to be calculated by reference to earnings between the LEL and the UEL. But with the introduction of a higher starting point for payment of primary NICs, namely the primary threshold, there will be a narrower range of earnings over which the NICs liability will arise.

This raises the possibility that the amount employers can recover in rebates may be higher than their total NICs liability. However, paragraphs 6 and 7 make arrangements for the Revenue to pay any outstanding balance to the employer and recover any overpayments from him (*new sections 41(1D) and (1E)* and *42A(2C) and (2D)*).

Part III

Paragraph 9 of Schedule 9 amends section 162 of the Social Security Administration Act 1992. This ensures that the proportion of contribution revenue allocated to the National Health Service remains broadly unchanged when the starting point for employee contributions is increased to the primary threshold.

Sections 75 and 76: Earnings of workers supplied by service companies etc.

Background

Section 75 provides for a new power to counter the risk of avoidance of National Insurance contributions where an individual (the worker) provides personal services through an intermediary. It is intended that the provisions in this Act will be matched by tax legislation that will, in specified circumstances, require the intermediary to operate Pay As You Earn (PAYE) on the payments made to, or in respect of, the worker. The

Chancellor of the Exchequer announced in his Budget that these measures would take effect from 6 April 2000. Consequently, the regulations to be made under Section 75 will come into force from that date. Equivalent provisions for Northern Ireland are contained in Section 76.

Section 75 concerns the situation where the worker is engaged by a business (the client) through a third party (such as a service company). In the absence of such a third party, the relationship between a client and a worker would determine the employment status for the purposes of both tax and National Insurance. Liability would then be assessed according to whether the person was employed or self-employed. However, where a worker is engaged through one or more third parties, it is possible to escape any direct contractual relationship between client and worker. This provides scope for the avoidance of tax and National Insurance contributions (NICs).

The powers in section 75 are intended to deal with the situation where the relationship between a client and a worker would be one of employer and employee, but for the intermediary. They provide for a specified amount of the payments made in respect of the worker to be treated as earnings paid to an employee – and therefore liable for NICs. Regulations under the section will ensure that specified amounts will be regarded as paid to the worker for the purposes of primary Class 1 NICs and the intermediary will be liable for the corresponding secondary Class 1 NICs. The regulations will identify how the amount to be treated as earnings paid to the worker will be calculated.

In order to minimise the administrative burden, the Chancellor announced that certain details of the new rules would only be finalised after discussion with representative bodies. An outline of the proposed new rules was circulated to those who had expressed an interest in this measure and there have been a number of discussions with business representatives on the original proposals.

In the light of this consultation, the Paymaster General announced various changes to the proposal on 23 September 1999. The main changes were:

to make the intermediary rather than the client responsible for operating the new rules and deducting and accounting for NICs where required;

to ensure that the conventional test used to distinguish between employment and self-employment for individuals not using intermediaries would also apply in cases covered by the new legislation; and

to allow a deduction for certain expenses in determining the amount of money which is to be treated as earnings subject to Class 1 contributions in cases where the new rules apply.

These new proposals are reflected in the section.

Section 75 will enable NICs regulations to take effect at the same time as the proposed new tax rules without the need for retrospection. It sets out the general powers on the face of the Act and allows for the technical detail to be contained in regulations. This approach is consistent with current social security legislation.

For example, section 4(6) of the Social Security Contributions and Benefits Act 1992 enables regulations to be made for the purpose of treating as earnings certain forms of employee shares (conditional and convertible shares) and the Social Security (Contributions) Regulations 1979 (S.I. 1979/591) ("the Contributions Regulations") provide all the consequential technical detail. Regulation 18 of the Contributions Regulations provides the basis on which the amount of earnings comprised in a payment of conditional or convertible shares is to be ascertained and regulation 19 provides when such shares are to be disregarded from earnings. This section takes the same approach, which also has the advantage that it provides the flexibility to enable changes to be made more easily should the parallel tax provisions or business practice change in the future.

Commentary

Subsection (1) sets out the circumstances in which the regulation-making power is to operate. Regulations will set out which arrangements involving a worker hired through an intermediary will be caught by the provision.

The normal range of tests to decide a worker's status, which have developed through the courts and the principles of common law, will be used to determine whether the relationship between the client and the worker should be subject to the new rules.

Subsection (1) also enables regulations to specify (i) what payments and benefits are to be treated as earnings paid to the worker in respect of employed earner's employment for the purposes of the Contributions and Benefits Act, and (ii) the extent to which they are to be so treated.

It is intended that regulations will provide that, in addition to payments that are earnings by virtue of section 3 of the Contributions and Benefits Act, payments treated as earnings by virtue of section 4 of that Act (for instance, conditional and convertible shares) will be treated as earnings under this provision.

It is intended that the regulations will prescribe how to calculate the amount to be treated as earnings. This follows the existing practice whereby regulations made under section 3(2) of the Contributions and Benefits Act provide for the calculation of the amount of earnings comprised in specified payments (see regulation 18 of the Contributions Regulations); and regulations made under section 3(3) of that Act specify what payments that are to be exempt from that calculation (see regulation 19 of the Contributions Regulations).

Subsection (2) defines the meaning of an "intermediary" for the purposes of the provision. It is intended that regulations should provide for the intermediary to be either the company that employs the worker or a partnership in which he is a partner.

Subsection (3) then provides specific, but non-exhaustive, illustrations of what the regulations made under the section may provide.

Subsection (3)(a) enables regulations to specify that a worker is to be treated as employed in employed earner's employment for the purposes of the Contributions and Benefits Act in respect of his "attributable earnings".

"*Attributable earnings*" are a specified amount of the "relevant payments and benefits" made or provided in connection with the services the worker performs for the client. They will be a minimum amount, which must be treated as salary paid to the worker by the intermediary within the tax year and subject to Class 1 NICs.

Subsection (3)(b) enables the intermediary (whether or not he fulfils the prescribed conditions about residence and presence in Great Britain) to be treated as *the* secondary contributor in respect of the worker's attributable earnings.

Subsection (3)(c)(i) enables regulations to specify what deductions are to be made in calculating the amounts on the payments that are treated as earnings paid to the worker in respect of the *services* provided to the client. Regulations would allow for the deduction of certain allowable expenses currently exempt for the purposes of other parts of the Act.

An example of this is found in regulation 18(4)(b) of the Contributions Regulations, where identifiable payments towards expenses incurred by an employee in carrying out his employment are exempted from NICs.

Subsection (3)(c)(ii) enables regulations to specify how the amount of earnings that the worker is to be treated as having been paid is to be calculated or estimated. It will be for the intermediary to *calculate* the earnings caught by the provision and what deductions can be made.

Subsection (3) (d) enables *regulations* to set out how the worker's "attributable earnings" may be aggregated with any other earnings he has, in order to calculate the full year's NICs liability correctly.

Subsection (3)(e) provides for regulations to determine the date by which contributions payable under *the* provision have to be paid and accounted for.

Subsection (3)(f) enables regulations to specify how relevant payments and benefits are to be apportioned. It is intended to specify in regulations how an aggregate payment in respect of two or more workers is to be apportioned (including apportionment in cases where one or more of that number would be regarded as in employed earner's employment with the client other than by virtue of the regulations). In circumstances where, at the time of payment, it is not possible for the intermediary to identify the amount attributable to each worker/ individual, it is proposed that the regulations will provide for apportionment on a just and reasonable basis, and for contributions to be calculated on the "apportioned" earnings.

This is consistent with the approach found in regulation 18 of the Contributions Regulations. Regulation 18 already includes an apportionment calculation following section 48 of the Social Security Act 1998 (which amended section 3 of the Contributions and Benefits Act by inserting a new subsection (2A)). Paragraph (21) and (24) of regulation 18 of the Contributions Regulations, which were made under the power in the new subsection (2A), specify the basis of apportionment in respect of payments to two or more employed earners in the form of a contribution to an unapproved retirement benefit scheme and a non-cash voucher (paragraphs (21) and (24) respectively).

Subsection (3)(g) will enable the worker's employment with an intermediary or otherwise to be disregarded *for* NIC purposes.

Subsection (3)(h) enables regulations to be made to ensure that a relevant payment or benefit is not subject to a double National Insurance liability. This may be necessary in cases where an amount to be treated as earnings by virtue of the new rules would otherwise be liable to NICs under other provisions.

Subsection (3)(i) enables regulations to specify the extent to which two or more connected persons should be treated as a single person for the purposes of the regulations.

This is necessary, for example, to deal with cases where a worker is engaged to work for the client via a connected party (such as an associate company), within the meaning of section 839 of the Income and Corporation Taxes Act 1988, and no contract exists between the intermediary and the associate for the worker's services. It is intended that regulations will determine whether the client and the associate are to be treated as single persons and consequently, whether the new rules should apply to them. Regulations may specify persons of any other specified description as being single persons for the purposes of the provision.

Subsection (3)(j) will *ensure* that the new rules are still applicable where the contract is not made by the client but someone "connected" to him.

Subsection (3)(k) allows for *regulations* to modify or exclude the application of the new rules.

Subsection (4) enables the regulations to set out what expenses may be deducted by the intermediary when calculating a worker's attributable earnings. The Government has proposed that 5 per cent of the intermediary's receipts from relevant engagements should be deducted, to cover general expenses. In addition, any employer's pension contributions to an approved scheme in respect of the worker and any secondary Class 1 contributions paid by the employer will be deductible.

Subsection (5) enables regulations to specify that terms and conditions of a contract or arrangement may be disregarded for the purposes of applying the new rules. It is intended to use regulations to ensure that the substance of the relationship will determine

whether the worker should be treated as being in employed earner's employment for the purposes of the Contributions and Benefits Act.

Subsection (7) ensures that the reference in subsection (1)(a) above to a worker being under an obligation to perform services is carried through.

Subsection (8) provides that any regulations made under the provision by the Treasury will require the concurrence of the Secretary of State for Social Security. This reflects the interaction between contributions and contributory benefits. The latter are the responsibility of the Secretary of State.

The regulations implementing this measure will come into force on 6 April 2000 and will parallel the tax clauses due to be introduced in the Finance Bill 2000. However, in order to ensure the simplest possible systems for business to operate, it is necessary to keep the tax and NIC rules in line with each other.

Subsection (9) therefore gives a power to enable this section to be adapted by order if the parallel tax provisions change.

There are a number of precedents for a use of this type of power. One example of the modification of primary legislation by order is found in section 10 of the Contributions and Benefits Act. Section 10 provides for a Class 1A contribution to be paid annually by an employer in respect of the provision of a car or fuel to an employee. The Class 1A charge applies where, for any tax year, an income tax benefit is chargeable under Schedule E by virtue of sections 157 and 158 Income and Corporation Taxes Act 1988 (ICTA) in respect of the provision of the car and/or fuel. Section 10 includes a modification power at subsection (7) to enable the Secretary of State to make regulations modifying section 10 where it is necessary or expedient to do so in consequence of any alteration to section 157 and 158 ICTA.

The annual Finance Bill means that changes to the tax legislation could occur annually, subject to Parliamentary approval. There is no equivalent annual legislation available to make changes to primary legislation covering National Insurance contributions. So, without this subsection, it would be difficult to amend the Contributions and Benefits Act to mirror the changes to the Finance Act.

Sections 77 and 78: National Insurance Class 1B contributions

Section 77 ties the National Insurance Class 1B rate to the rate of 'secondary' (employer) Class 1 contributions, thus preventing the Class 1B rate from being raised independently by regulations. Both rates are currently set at 12.2%.

It amends section 10A of the Contributions and Benefits Act which deals with Class 1B contributions, replacing subsection (6) (which provides that the percentage rate is to be 12.2%, but enables it to be altered under section 143A of the Administration Act) with a provision to tie it to the rate of the secondary contribution, as specified in section 9(2) of the Contributions and Benefits Act.

Background

Measures introduced in the Social Security Act 1998 provide that, from 6 April 1999, employers can settle the National Insurance liability on a Pay As You Earn Settlement Agreement (PSA) for tax purposes. This introduced a new class of National Insurance contributions known as Class 1B.

The percentage rate of Class 1B NICs was initially set at the same level as the rate of secondary (employer) contributions, but was capable of being varied independently of the secondary Class 1 rate.

This section ties the rate of Class 1B directly to the rate of secondary (employer) contributions, thus taking away the ability for it to be varied independently of that rate.

Section 78 makes corresponding provision for Northern Ireland.

Schedule 13 Parts VI and VII: Repeals : National Insurance contributions

Parts VI and VII contain repeals which are consequential on sections 73, 74, 77 and 78. The repeal of paragraphs 8(2) and (3) of Schedule 1 to the Contributions and Benefits Act updates the legislation by removing reference to the payment of National Insurance contributions by adhesive stamps, to reflect the current methods of payment available.

Background

Before April 1993, flat rate National Insurance contributions payable by the self-employed (Class 2) or paid on a voluntary basis (Class 3) could be made by affixing a stamp of appropriate value to a contribution card in respect of each contribution week. Since then, it has been possible to:

make a payment of the amount of contributions specified in a written notice issued within 14 days of the end of the quarter in question; or

pay by direct debit.

Adhesive stamps ceased to be sold by the Post Office soon afterwards, and could not therefore be used as a method of paying National Insurance contributions. The references in paragraph 8(2) and (3) of Schedule 1 are therefore redundant.

Parts VI and VII of Schedule 13 also include repeals consequential on section 81 and Schedule 11.

Chapter III: Other Welfare Provisions

Section 79: measures to reduce under-occupation by housing benefit claimants

This section will allow tenants living in the social rented sector (typically, property owned or managed by a local authority or a housing association), who are in receipt of Housing Benefit (HB), to keep part of any benefit saving generated by moving to cheaper and smaller accommodation.

The scheme to be made under this section will encourage tenants who are "under-occupying" accommodation in the public or social rented sector (that is, living in accommodation that is considered large in relation to their number and needs) to move to smaller and cheaper accommodation. On completion of the move, HB claimants will be rewarded with a lump-sum payment equivalent to half the difference between their old and new weekly rent, multiplied by 156. Since HB usually meets 100% of rental costs in the social rented sector, this is roughly half of the benefit savings expected over three years. It is intended that the lump sum will be disregarded as capital in the calculation of entitlement to income-related benefits, such as Income Support or the Working Families Tax Credit.

Regulations under *subsections (1)* and *(3)* would define exactly how the sum paid to claimants should be calculated, and in what circumstances a dwelling would be regarded as "under-occupied" (for example, a 3-bedroom house could be regarded as exceeding the requirements of a couple).

Subsection (4) gives power to make deductions from the lump-sum payment for any arrears of rent owed by the tenant, or for any overpayment of HB which is recoverable from the claimant.

Other debts to the local authority or to the DSS (e.g. the Social Fund) are not to be deducted; deductions are to be strictly limited to the two items mentioned.

Subsection (5) provides a right of appeal against decisions made under the scheme.

The details of the appeal – for example, the appeal body, the determinations that may be appealed against and the appeals procedure – will be set out in regulations.

The section would allow the under-occupation scheme to be applied nationwide, though *subsection (7)* makes clear that no local authority would be obliged to take part in the scheme. However, the intention is to pilot the scheme in three local authorities; therefore *subsection (6)* allows the power to be used for a limited time and in certain areas only, and for any necessary transitional arrangements to be made. Section 83(8) would allow different provision in different areas.

Subsection (9) provides that the under-occupation scheme payments should be administered under the rules and powers for Housing Benefit (which are set out in the Administration Act)—but allows for exceptions to be specified.

Among the HB rules is the procedure for the DSS to reimburse local authorities for the money they pay in benefits. Normally this happens through a subsidy system; the subsidy rules mean that an authority may not always receive the full amount it pays out. However, *subsection (8)* provides the power to prescribe a different claims and payments mechanism. The intention is that, under the scheme, authorities should be reimbursed *in full* for the lump-sum payments they make.

Section 80: Supply of information for child support purposes

This provision allows the Inland Revenue, on a discretionary basis, to supply tax information it holds in respect of self-employed non-resident parents to the Child Support Agency (CSA). This is intended to enable the CSA to build up a financial picture of non-resident parents whose earnings either are not known or need to be verified.

The CSA is required by law to assess maintenance liability when a valid application is received. To make this assessment, it needs details of the non-resident parent’s earnings. This information is sometimes difficult to obtain directly from the non-resident parent, who may deliberately withhold information with a view to delaying a demand for maintenance or may simply be unable to locate the relevant documentation. Whilst this is less significant for employed earners, where the CSA can approach the employer direct, non-resident parents who are self-employed, and who refuse to supply details of their profits, are extremely difficult to assess.

The Agency therefore needs to be in a position to build up a financial picture of a non-resident parent who does not provide details of his income, using as wide as possible a range of alternative sources of information. Tax information held by the Inland Revenue may offer the only alternative source of such information for the self-employed. However, the intention is that this will be a last resort measure, where the CSA has asked the non-resident parent for information, and issued a reminder, but there is still inadequate detail to make an assessment.

Access to tax information relating to self-employed non-resident parents is necessary to ensure that more non-resident parents pay the maintenance they owe. Given the Revenue’s confidentiality provisions, the CSA can only gain access to this information if there is a specific statutory gateway. This provision provides this gateway and allows direct access, at the Revenue’s discretion, to any tax information about self-employed non-resident parents held by the Inland Revenue.

Schedule 2 to the Child Support Act 1991 already allows the Secretary of State to request the Inland Revenue to provide information for the purposes of tracing non-resident parents. This information is restricted to the current address of the non-resident parent and his current employer. The CSA has access, via the Contributions Agency, to earnings information recorded on end-of-year tax returns that employers currently submit to the Inland Revenue. There is currently no provision, however, for other tax information to be used in assessing child support liability.

Commentary

The section inserts a *new paragraph 1A* into Schedule 2 to the Child Support Act 1991.

Sub-paragraph (1) limits the power to obtaining tax information about *self-employed* non-resident parents, not all non-resident parents. It allows access to information for any tax year in which the non-resident parent was or is self-employed.

Sub-paragraph (2) exempts the Revenue from its confidentiality rules when providing this particular information.

Sub-paragraph (3) ensures that the paragraph only applies to disclosures made to the CSA by, or under the authority of, the Commissioners of the Inland Revenue.

Sub-paragraph (4) prevents, as a general rule, any tax information disclosed to the CSA under this power from being disclosed further.

For example, this overrides the power in section 3 of the Social Security Act 1998, which allows child support information to be used for the purposes of administering social security benefits. The exception in *sub-paragraph (4)(b)* allows the information to be used in civil and criminal court cases brought under the Child Support Act. For example, if a non-resident parent is served with a liability order, it may be possible to use information covered by this provision to satisfy the court that there is income to meet the liability.

Part VI: General

This part of the Act contains a number of general provisions, which will determine, for example, how powers to make regulations are used, and how the different measures will be brought into force.

It also introduces a power to incur expenditure on proposed new services (section 82).

Section 81: Contributions and pensions administration

Section 81 introduces Schedule 11, which principally makes a number of amendments in the light of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and related legislation.

That Act transferred responsibility for National Insurance contributions and other (mainly related) matters from the DSS to the Inland Revenue and the Treasury, from 1 April 1999. The clause and Schedule were added to this Bill during Commons Committee stage (Hansard: Standing Committee D col. 1031), after the Social Security Contributions (Transfer of Functions, etc.) Bill had received Royal Assent. Further measures were added to the Schedule at Lords Committee (Hansard: vol. 604, col. 941).

The provisions in Schedule 11 consist mainly of:

> consequential amendments not made by the Social Security Contributions (Transfer of Functions, etc.) Act and its Northern Ireland equivalent; and

> minor adjustments in the allocation of functions between the Departments.

Where appropriate, the Schedule includes broadly parallel changes to the Northern Ireland legislation.

Most of the Schedule is purely technical, but there are three points that call for specific mention:

> *Paragraphs 7* and*8*make clear that the Inland Revenue can pass information held mainly in relation to contracting out of SERPS to the Benefits Agency for social security and other purposes; and, conversely, that the Agency can pass information about social security and other matters (in particular, SERPS information), to the Revenue for, principally,

contracting-out purposes. This is not a new practice. In the past, specific powers were not needed for that transfer because the DSS could share information within the Department. Provision is now needed because the contracting-out functions have been transferred to the Revenue. The amendments also mean that the information can be required to be supplied.

Paragraph 22 further amends section 170 of the Pension Schemes Act 1993, which confers power to make regulations concerning, among other things, contracting-out matters. This amendment slightly extends that power so that it covers first instance decisions. *Paragraph 21* makes a similar change for the equivalent Northern Ireland legislation.

Paragraph 30 repeals section 3(3)(c) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999. That subsection was not commenced so that section 27 of the Inland Revenue Regulation Act 1890 (officers may conduct proceedings before justices) would apply to contributions as to tax, and is now superfluous. *Paragraph 5* makes a related amendment to remove an overlap with section 116(5A).

Section 82: Authorisation of certain expenditure

This section enables the Secretary of State to incur expenditure on preparing for legislative changes within his responsibilities, provided that he has the consent of the Treasury and the approval of the House of Commons.

Under a 1932 Public Accounts Committee concordat, any functions of a Government Department that continue beyond a given year – particularly where there are financial liabilities – should normally be defined by specific statute, rather than rely solely on the authority of the annual Appropriation Act.

The section enables the Secretary of State to seek specific Parliamentary approval to incur expenditure to prepare for future changes in the functions within his responsibilities (i.e. social security benefits, child support, war pensions), without the need for further primary legislation.

For example, a new benefit, or major changes to existing provisions, requires a significant amount of preparatory work: such as developing and testing new computer systems, and preparing manuals for use by staff. Often such work has significant lead-in time. This power will enable the Secretary of State to obtain the approval of the House of Commons to commence such work, and so avoid the risk of a delay in implementation.

Commentary

Subsection (1) gives the power to incur expenditure. *Subsections (2)* to *(7)* clarify and limit the way the power would work.

Subsection (2) requires the Secretary of State to obtain the approval of both the Treasury and the House of Commons before the power is exercised in any specific instance.

A report detailing the purpose and amount of expenditure must be laid before the House of Commons. (This procedure is modelled on the provisions of section 88B of the Local Government Finance Act 1988 – inserted by the Local Government Finance Act 1992, Schedule 10, paragraph 18).

Subsection (3) limits the Secretary of State's right to incur expenditure to two years, starting from the date the report is approved by the Commons.

Subsection (4) ensures that other powers to incur expenditure, either for development work or under other specific legislative authority, are not affected by this new power.

Subsections (5) and *(6)* provide for adjustments between the Consolidated Fund and the National Insurance Fund (which pays for National Insurance benefits and their administration).

Section 83: Regulations and orders

Section 83 sets out how the regulation-making powers arising from this Act may be used.

Subsections (2) and (3) provides for regulations to be subject to the negative resolution procedure. This means that the regulations will be laid before Parliament after being made, but only debated if a Member or Peer seeks such a debate.

Subsections (4) to (6) follow other social security legislation, in making clear that regulations may make different provision within the classes to which the specific regulation-making power relates, and may make incidental or transitional provisions.

Subsection (8) ensures that regulations made under section 60 (employment zones) and section 79 (housing under-occupation scheme) may make different provision in different parts of the country.

Subsection (9) provides for regulations under section 60 and section 72 (information sharing) to apply in specified areas only.

Subsections (10) and *(11)* give the Treasury a joint role in making regulations under the pension sharing provisions in Part IV of the Act.

Section 84 Consequential amendments etc.

Subsection (1) gives effect to Schedule 12, Part I of which makes consequential amendments in connection with the pension sharing provisions in Parts III and IV of the Act.

Subsection (2) provides regulation-making powers to enable the Secretary of State to amend or revoke any instrument made under an Act as he thinks necessary or expedient as a consequence of the coming into force of any provisions specified in subsection (4).

Subsection (3) provides a power to enable the Secretary of State to make by regulations the kind of provision that can be included in a commencement order.

For fuller details on the pension sharing measures, see the commentary on Parts III and IV.

Section 85: Transitional provisions

This section gives the power to make any necessary transitional arrangements for the provisions in the Act.

Subsections (1) and *(2)* relate to the pensions measures in Parts I and II; *subsection (6)* relates to Part V (welfare). These are standard formulations, used elsewhere in social security legislation;

Subsections (3) to *(5)* provide specific transitional provisions for the pension sharing measures in Parts III and IV. They are intended to ensure that pension sharing orders cannot be introduced with retrospective effect, but can only be made in proceedings begun on or after the day on which pension sharing provisions in this Act are brought into force.

In England and Wales they prevent a pension sharing order being made where proceedings for divorce or nullity started before the day (commencement day) on which section 19 is brought into force.

In Scotland no pension sharing order or agreement under the Family Law (Scotland Act) 1985 may be made in any divorce (or action for declarator of nullity) brought before the day on which section 20 of the Act comes into force or under section 31(7B) of that Act if the marriage was dissolved by a decree granted in proceedings so begun.

Section 87: Corresponding provision for Northern Ireland

This section enables Northern Ireland provisions corresponding to measures in the Act to be made by Order in Council. It was added to the Bill at Lords Report (13 October 1999; Hansard vol. 605, col. 474).

Section 88: Repeals

This section gives effect to Schedule 13, which repeals some existing legislation as a consequence of the measures in the Act. For further details:

Part I of Schedule 13 (pensions: miscellaneous): see commentary on Parts I and II of the Act;

Parts II and III of Schedule 13 (pension sharing on divorce): see commentary on Parts III and IV of the Act;

Part IV (abolition of Severe Disablement Allowance): see section 65;

Part V (joint claims for Jobseeker's Allowance): see section 59 and Schedule 7;

Parts VI and VII (National Insurance contributions): see commentary after sections 77 and 78.

Section 89: Commencement

The Act introduces a large number of measures, which will not all come into force on the same day. This section provides a power to bring various provisions into force by order, on different days for different purposes, and specifies which provisions came into effect on Royal Assent.

Section 90: Extent

This section sets out the territorial application of the provisions in the Act. Most apply throughout Great Britain. Some, on pensions and National Insurance contributions, are UK-wide. In some parts of the Act that deal with interactions with family and civil law (for example, the provisions for pension sharing on divorce), sections may apply to England and Wales only, or Scotland only.

Section 91: Short title, general interpretation and Scottish devolution

The only provision calling for specific mention here is subsection (4), which relates to Scottish devolution.

Social security is a matter wholly reserved to the Westminster Parliament. Some of the provisions in this Act, however, impinge on matters devolved to the Scottish Parliament. In particular, the provisions in relation to valuing pension arrangement benefits for calculating matrimonial property, fall within the responsibility of Scottish Ministers.

This technical amendment designates these provisions in the Act as "pre-commencement enactments" for the purpose of the Scotland Act 1998. This enables functions within the competence of Scottish Ministers to be exercised by them and allows them to commence the provisions which fall outside the social security reservation.

This provision was added to the Bill at Lords Report (13 October 1999; Hansard vol. 605, col. 504).