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

WELFARE REFORM AND PENSIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Commentary

Section 1: meaning of "stakeholder pension scheme"

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

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

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

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

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

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

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

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

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

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

the scope of the trust deed: in particular to ensure that the trust deed gives the trustees control of the scheme so that they are able to appoint and dismiss the organisations or individuals that provide services to the scheme (e.g. actuaries, auditors, administrators, investment managers);

the composition of the trustee board: to ensure, for example, that trustees associated with a commercial organisation (which may originally establish the scheme) cannot form a majority of the trustee board, or to require a specified proportion of the trustees to be nominated by members of the scheme;

whether the scheme should provide additional benefits for scheme members: such as an option to take out life assurance cover, or insurance which provides for contributions to continue to be paid if a member becomes ill or disabled.

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

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

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

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

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

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

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

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

the value of a pension,

the contributions that have been paid in; and

charges deducted by the schemes.

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

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

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

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

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

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

Section 2: Registration of stakeholder pension schemes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "*Employer*" means any employer, whether or not resident or incorporated in any part of the United Kingdom.
>
> A "*qualifying scheme*" is the employer's designated scheme (or schemes), or if regulations provide, any other stakeholder pension scheme. Initially, it is intended that employers would only be required to make deductions on behalf of employees who are members of their designated scheme(s). If, in the future, arrangements such as the clearing house are developed, which minimise the additional costs to employers of making payments to a number of different schemes, the regulation-making power will enable the requirement to be extended to other schemes.
>
> "*relevant employees*" are all employees of an "employer" employed in Great Britain and, where an employer is resident or incorporated in any part of Great Britain, all employees employed outside the United Kingdom. Exceptions are those who are eligible to join that employer's occupational pension scheme and those who earn less than the lower earnings limit (defined in section 181 of the Pension Schemes Act 1993). The power to prescribe other classes of employees provides some flexibility to modify the requirement in the light of experience of operating schemes.

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

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

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

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

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

Section 101creates offences for obstructing OPRA's investigations.

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

Section 103enables OPRA to publish reports of its investigations.

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

Section 5: Inspection of premises

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

Section 6: Application of certain enactments

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

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

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

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

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

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

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

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

Section 8: Interpretation of Part I

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

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

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

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

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

Paragraph 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 2

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

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

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

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

> whether the trustees or managers of a stakeholder pension scheme are complying with the applicable provisions of the 1995 Act;
>
> whether their scheme complies with the conditions set out in section 1; and

whether they have taken steps to ensure that those conditions are complied with.

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

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

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

Paragraph 3

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

whether a stakeholder pension scheme which is an occupational pension scheme complies or has complied with the conditions set out in section 1; and

whether the scheme trustees have taken steps to ensure that the scheme complies or has complied with those conditions.

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

Northern Ireland stakeholder pension scheme legislation

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

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

Part II: Pensions: General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

whether section 111A has been complied with;

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

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

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

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

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

the relevant employees work;

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

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

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

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

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

Section 101creates offences for obstructing OPRA's investigations.

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

Section 103enables OPRA to publish reports of its investigations.

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

Section 10: Late payments by employers to occupational pension schemes

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

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

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

> The time limit for payment of employee contributions will continue to be set out in regulations, under the *new section 49(8)*.
>
> The *new section 49(9)* gives the power to impose civil penalties for any breach of the requirement.
>
> It also imposes a new obligation on trustees and managers to report to OPRA and to the employee where employee contributions have not been paid within the time limit prescribed under the new section 49(8).
>
> The *new subsection (10)* provides that OPRA may impose civil penalties on trustees or mangers if they fail to report promptly to OPRA when employee contributions have not been paid within the time limit.
>
> The *new subsections (11)* to *(13)* impose a criminal sanction in circumstances where there has been fraudulent evasion of the obligation to make payment of employee contributions within the prescribed time limit.
>
> In relation to stakeholder pension schemes, *subsection (13)(a)* ensures that an employer who has been required to pay a penalty under section 3 of this Act for failing to comply with the employer access requirements in section 3, is not penalised again under section 10 of the 1995 Act.

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

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

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

Where a person becomes bankrupt, his assets usually vest in the trustee in bankruptcy. However, the position of pensions on bankruptcy was considered by the Pensions Law Review Committee (PLRC), set up under the chairmanship of Professor Goode. The Committee's report, published in 1993, recommended that pension rights (as opposed to the pension payments themselves) should not be counted as an asset in bankruptcy. (The report was published as *Pension Law Reform: The Report of the Pensions Law Review Committee* – Cmd 2342-1.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application for a court order (new section 342A)

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

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

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

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

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

Court orders (new sections 342B and 342C)

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

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

reducing any pension benefits that the individual and his family are entitled to; and

for recovery of costs incurred by the scheme in supplying information for the purposes of the application and in complying with the order.

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

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

the amount of the excessive contributions; or

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

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

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

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

> *Subsection (1)* of section 342C requires the trustees or managers of the pension scheme to give the trustee in bankruptcy information about the bankrupt's pension arrangements for the purposes of making an application to the court.
>
> *Subsection (2)* provides that any other provisions or enactments which prevent assignment of pension rights, do not apply to a court making an order under section 342A.
>
> *Subsections (4)* and *(5)* provide for regulations and guidance concerning the calculation of the value of an individual's rights under the pension scheme and the calculation of the reduction in the scheme's liabilities in respect of that person.

Pension sharing and bankruptcy

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

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

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

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

> *Gratuitous alienations* mean transfers of assets at undervalue that unfairly attempt to deprive creditors.
>
> *Unfair preferences* are transactions that give preference to one creditor over another.

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

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

> it can be shown to a court that the pension sharing order or agreement had the effect of defeating creditors (e.g. it was a gratuitous alienation or an unfair preference); and
>
> the pension rights transferred to the former spouse could not have been made without including the fruits of unfair contributions; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the value of the former spouse's pension share.

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

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

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

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

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

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

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

Section 17: Compensating occupational pension schemes

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

The compensation provisions were introduced in the Pensions Act 1995 and are administered by the Pensions Compensation Board (PCB). The PCB pays compensation to an occupational pension scheme if it has suffered a reduction in its assets through dishonest action, the remaining assets are below a set level and the sponsoring employer is insolvent. The level to which a scheme's assets must fall before a claim can be made and the amount of compensation that the PCB can pay are set out in the Pensions Act 1995 and the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997.

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

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

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

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

Section 18: Miscellaneous amendments

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

Schedule 2: Miscellaneous amendments

Paragraphs 1 and 2: Income payments orders against pension payments

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

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

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

Paragraph 3: Extended meaning of "personal pension scheme"

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

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

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

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

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

Paragraph 5 : Interim arrangements

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

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

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

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

Paragraph 6: Effect of certain orders on guaranteed minimum pensions

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

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

Paragraph 7 : Mandatory payment of contribution equivalent premium

Paragraph 7(1)

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

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

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

Paragraph 7(2)

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

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

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

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

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

Paragraph 9

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

Paragraph 10

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

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

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

Paragraph 11

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

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

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

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

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

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

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

Paragraph 13: Annual increase in rate of pension

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

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

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

Paragraph 14(1)

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

Paragraph 14(2)

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

Paragraph 15: Excess assets of wound up schemes

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

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

Paragraph 16: Pensions Compensation Board

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

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

Paragraph 17: Diligence against pensions: Scotland

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

Paragraph 18: Pensionable service

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

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

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

Parts III-IV: Pensions on Divorce and Nullity

Background

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

in England and Wales, to require pension arrangements to pay maintenance from a member's pension directly to a former spouse;

throughout Great Britain, to order part or all of a lump sum payable on the death or retirement of a member to be directed to the former spouse.

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

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

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

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

The Government also made a number of technical amendments in the light of recommendations by the Committee and/or responses to the consultation exercise. To enable schemes to simplify the administration of a pension in payment to a former spouse, schemes were to have the discretion to impose a single "indexation" requirement on the whole of the pension to protect its value against inflation during retirement. Similarly, to simplify administration and reduce the costs to pension schemes, the

Government dispensed with the requirement for pension schemes contracted-out of the state scheme to obtain separate certificates to hold "safeguarded rights" (that is contracted-out rights which form part of a pension share).

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