

# PENSIONS ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 5 – Occupational and Personal Pension Schemes: Miscellaneous Provisions**

##### **Summary**

866. This Part outlines a number of measures which will apply to occupational and personal pension schemes. These largely fall into three groups of provisions. The first group of measures provides simplification or easements for the administration of pension schemes. Requirements for member-nominated trustees, payments by employers, amendments to the Pensions Compensation Board (before its functions are subsumed into the Pension Protection Fund), internal dispute resolution, contracting out and the new subsisting rights provisions fall into this category. Additionally, changes to the mandatory annual increase in the rate of certain pensions will provide scope for financial easements to companies running such schemes.
867. Other provisions in this Part will extend the obligations of employers and schemes. For example, *sections 247 – 249* impose an obligation on trustees to have a certain level of knowledge and understanding in order to carry out their functions as trustees. Trustees will also be required to draw up a Statement of Investment Principles and review this at least every three years. *Sections 257 and 258* provide pension protection for employees who are subject to a transfer of employment.

##### **Categories of pension scheme**

##### *Section 239: Categories of pension scheme*

868. *Subsection (3)* of this section substitutes the definitions of “occupational pension scheme” and “personal pension scheme” in section 1 of the Pension Schemes Act 1993.
869. The new definition of an “occupational pension scheme” defines such a scheme as one that provides benefits for people with service in employment (or self-employment) described in the scheme rules and which may also provide benefits to members who are not in that kind of employment (or self-employment). An occupational pension scheme for this purpose is one that has its main administration in the UK or outside the European Union. (A scheme whose main administration is in another EU Member State will be regulated primarily by the authorities in that state, but see Part 7 of the Act.) For a scheme to be an occupational pension scheme, at least one of the persons establishing the scheme must be within new section 1(2) of the Pension Schemes Act 1993. The new definition of an “occupational pension scheme” also includes a pension scheme that is prescribed in regulations or that is of a kind prescribed in regulations.
870. A “personal pension scheme” is defined as a pension scheme (see new section 1(5)) which is not an occupational pension scheme and which is established by a person within section 154 of the Finance Act 2004 (the persons by whom registered pension schemes may be established). That section says that a pension scheme may be registered for tax purposes only if it is an occupational pension scheme for tax purposes or has been

established by a person listed in subsection (1) of that section. The persons listed include insurance companies, managers of unit trust schemes, banks and building societies.

871. *Subsection (4)* inserts new subsections (2) to (6) into section 1 of the Pension Schemes Act 1993. The effect of new subsection (2) is that for a scheme to be an occupational pension scheme, at least one of the persons establishing it must be an employer, employee or self-employed person or a representative of employers, employees or self-employed people. One effect of new subsection (3) is that a pension scheme established for paid office-holders by the person who pays them can be an occupational pension scheme. New subsection (4) provides that an occupational pension scheme may cater for more than one kind of employment (or self-employment). New subsection (5) defines a pension scheme for the purposes of section 1 of the Pensions Schemes Act 1993 (Categories of pension schemes) as one which provides benefits on retirement, on having reached a particular age or on termination of service. New subsection (6) allows the definition of personal pension scheme to be amended if the list in section 154 of the Finance Act 2004 (the persons by whom registered pension schemes may be established) of persons who may provide such schemes is itself amended by order under that section.

### ***Section 240: Meaning of employer in Part 1 of the Pensions Act 1995***

872. This section amends section 125 of the Pensions Act 1995 (supplementary provision relating to interpretation) to enable regulations to be made to prescribe, by the affirmative procedure, that in particular circumstances, certain persons shall be treated as "employers" for the purposes of any provisions of the Act.

### **Requirements for member-nominated trustees and directors**

#### ***Section 241: Requirement for member-nominated trustees***

873. *Sections 241, 242, and 243* replace the existing provisions in sections 16 to 21 of the Pensions Act 1995. Sections 43 to 46 of the Child Support, Pensions and Social Security Act 2000, which were not commenced, are also repealed.
874. *Subsection (1)(a)* requires trustees of an occupational trust scheme to make arrangements for at least one-third of the total number of trustees to be member-nominated trustees. The arrangements must be put in place within a reasonable time of the section applying to the scheme. The Regulator is required to issue a code of practice on the meaning of "reasonable time" under *section 90* of this Act (codes of practice). *Subsection (1)(b)* requires trustees to ensure the arrangements are implemented.
875. *Subsection (2)* defines "member-nominated trustees" as trustees of an occupational trust scheme who are nominated by a process in which at least the following are eligible to participate:
- all the active members or, an organisation which adequately represents the active members, and
  - all the pensioner members or, an organisation which adequately represents the pensioner members
876. The meaning of "adequate" will be covered in the code of practice issued by the Regulator under *section 90*. As the section says "at least" the trustees have the option to involve both members and representative organisations.
877. The selection process must involve some or all of the members of the scheme.
878. If the number of nominations is equal to or less than the number of vacancies, the nominees can be deemed to be selected under *subsection (5)(d)*. *Subsection (4)* provides that, where an employer approves, the arrangements may provide for more than the minimum number necessary to meet the one-third requirement under *subsection (1)(a)*.

879. *Subsection (5)* provides more details of the required arrangements. The purpose of *subsection (5)(a)* is to ensure that the arrangements will not leave vacancies unfilled for an unreasonable length of time, and *subsection (5)(b)* ensures that unfilled vacancies must be re-advertised at reasonable intervals. Under *subsection (5)(c)* the arrangements must provide that where the employer so requires someone who is not a member of the scheme must have the employer's approval to qualify for selection as a member-nominated trustee.
880. *Subsection (6)* ensures that a member-nominated trustee cannot be removed without the agreement of all the other trustees. *Subsection (7)* prevents the arrangements excluding member-nominated trustees from exercising functions which other trustees can exercise simply on account of their being member-nominated trustees.
881. *Subsection (8)* provides for exceptions. The section does not apply in the case of an occupational trust scheme if:
- every member of the scheme is a trustee of the scheme and no other person is such a trustee;
  - every trustee of the scheme is a company (in which case [section 242](#) applies), or;
  - the scheme is of a prescribed description.
882. *Subsection (9)* provides for civil penalties under section 10 of the Pensions Act 1995 (civil penalties) to apply to any trustee who has failed to take all reasonable steps to secure compliance if the arrangements securing at least one-third member-nominated trustees are not in place or are not being implemented.

#### ***Section 242: Requirement for member-nominated directors of corporate trustees***

883. This section sets out broadly the same requirements as [section 241](#), except that it applies where every trustee of an occupational trust scheme is a company. In this case, the requirement is for at least one-third of the directors of each company to be member-nominated directors.
884. The effect of *subsections (8)* and *(9)* is to allow a company that is trustee in relation to more than one scheme to treat the schemes as if they were a single scheme for the purposes of meeting the member-nominated directors' requirement. The company can however elect not to aggregate the schemes.
885. *Subsection (10)* provides that this section does not apply to an occupational trust scheme if the scheme is of a prescribed description.
886. *Subsection (11)* provides for civil penalties under section 10 of the Pensions Act 1995 (civil penalties) to apply to a company if the arrangements securing at least one-third member-nominated directors are not in place as required under *subsection (1)(a)* or are not being implemented.

#### ***Section 243: Member-nominated trustees and directors: supplementary***

887. *Subsection (1)* is an order making power that permits the Secretary of State to change the minimum proportion of member-nominated trustees or directors from one-third to one-half.
888. *Subsection (2)* is a modification power that will be used to modify application of the provision in prescribed circumstances, for example to disregard independent trustees for the purpose of calculating the minimum number of member-nominated trustees or directors.
889. *Subsection (3)* defines the terms "company" and "occupational trust scheme" for the purposes of [sections 242 and 243](#).

## **Obligations of trustees of occupational schemes**

### ***Section 244: Investment Principles***

890. This section substitutes a new section 35 of the Pensions Act 1995 for the existing section 35 which governs the requirement on trustees to prepare a statement of investment principles.
891. New section 35(1) and (2) requires the trustees of a scheme to prepare a written statement of the investment principles governing decisions about the investments of their scheme. The trustees are required to maintain and review this statement.
892. New section 35(3) enables regulations to set out requirements that the trustees of a scheme must comply with before preparing or revising a statement of investment principles.
893. New section 35(4) enables regulations to specify the form and content of a statement of investment principles. Some of the matters that will have to be included in a statement of investment principles are the kind of investments to be held and the balance between the different types of investments.
894. By virtue of new section 35(6) a trustee is subject to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) if he has failed to take all reasonable steps to comply with the requirements relating to a statement of investment principles.

### ***Section 245: Power to make regulations governing investment by trustees***

895. *Subsection (2)* inserts a new section 36(1) and (1A) into the Pensions Act 1995 requiring trustees, to exercise their powers of investment in accordance with regulations and section 36(3) and (4) of that Act. Where the trustees have delegated responsibility for investment to a fund manager then that fund manager has to exercise his responsibility in accordance with regulations.
896. *Subsection (4)* amends the existing section 36(3) so that before making investments trustees have to obtain and consider proper advice on whether the investment is satisfactory. In considering whether the investment is satisfactory the trustees must have regard to the requirements of regulations under section 36(1) to the extent that these relate to the suitability of investments and to the principles contained in any statement of investment principles required by section 35.
897. *Subsection (5)* amends the existing section 36(8) so that the Regulator cannot issue a prohibition order under section 3 of the Pensions Act 1995 to a trustee who doesn't take all reasonable steps to comply with the requirements in section 36 to obtain and consider advice. The Regulator may still issue a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) to such a trustee.
898. *Subsection (6)* inserts a new section 36(9) to allow the provisions of section 36 to be disapplied to certain schemes.

### ***Section 246: Borrowing by trustees***

899. This section inserts a new section 36A into the Pensions Act 1995. The new section 36A provides a power to enable regulations to be made which would prevent trustees, and fund managers to whom they had delegated responsibility for investment from borrowing money or acting as a guarantor.

### ***Section 247: Requirement for knowledge and understanding: individual trustees***

900. This section provides that an individual who is a trustee of an occupational pension scheme must be conversant with specified scheme documents and have knowledge and

understanding of matters relating to the performance of his functions as a trustee of that scheme.

901. *Subsection (3)* requires a trustee to be conversant with:
- the trust deed and scheme rules;
  - the statement of investment principles under section 35 Pensions Act 1995, if any;
  - where appropriate, the most recent statement of funding principles;
  - any other policy document relating to the administration of the scheme generally.
902. *Subsection (4)* requires a trustee to have knowledge and understanding of:
- the law in relation to pensions and trusts;
  - the principles relating to investment of assets;
  - the principles relating to scheme funding;
  - such other matters as are prescribed in regulations.
903. *Subsection (5)* provides that a trustee of a scheme must have an appropriate level of knowledge and understanding to enable him properly to exercise his functions as a trustee of that scheme.
904. Under *section 90* the Regulator must issue a code of practice regarding the obligations imposed on trustees by this section.

#### ***Section 248: Requirement for knowledge and understanding: corporate trustees***

905. This section essentially reproduces the provisions of *section 247* in respect of corporate trustees. It requires a corporate trustee to ensure that any individual who exercises any trustee functions that the company has is conversant with the scheme documents and to have the knowledge and understanding outlined at *section 247*, in so far it is relevant to the functions performed by that individual.

#### ***Section 249: Requirement for knowledge and understanding: supplementary***

906. This section sets out supplementary provisions in respect of *section 247 and 248*. The section defines the functions of a trustee and specifies that these provisions do not affect any other rule of law affecting trustees' knowledge or expertise. The section also enables regulations to provide that *sections 247 and 248* do not apply to a trustee or apply with modifications.

### **Payment of surplus to employer**

#### ***Section 250: Payment of surplus to employer, and Section 251: Payments of surplus to employer: transitional power to amend scheme***

907. *Sections 250 and 251* provide new rules governing payments to an employer from an actuarial surplus in an ongoing occupational pension scheme.
908. To retain tax-exempt status, tax law currently requires an occupational pension scheme to take appropriate steps to reduce an excessive actuarial surplus. The valuation of the scheme's assets and liabilities must be carried out in accordance with Schedule 22 of the Income and Corporation Taxes Act 1988 (ICTA). This includes Inland Revenue rules which stipulate methods of calculation on an ongoing basis, and the requirement for a plan for the elimination of an excessive surplus to be approved by the Inland Revenue. One of the ways by which a scheme may reduce the surplus is by a payment to the employer, taxable at 35%.

*These notes refer to the Pensions Act 2004 (c.35)  
which received Royal Assent on 18 November 2004*

909. Section 37 of the Pensions Act 1995 allows payments to be made to an employer from a tax-approved occupational pension scheme only when it has an excessive surplus according to Revenue rules, and sets out further conditions that must be met before such a payment can be made.
910. The tax simplification measures in the Finance Act 2004 remove the requirement to dispose of an excessive surplus. It remains the case that a payment of surplus to an employer would be taxed at 35%.
911. *Section 250* substitutes a new section 37 of the Pensions Act 1995 to govern the circumstances under which trustees may make a payment to an employer from an actuarial surplus, and how such a surplus should be determined.
912. Subsections (1) and (2) of new section 37 repeat relevant provisions at the original section 37(1) and (2), ensuring that such payments can be made from an ongoing scheme only if scheme rules permit the payment of surplus to an employer and providing that any scheme power for the payment of a surplus to the employer must be exercised by the trustees.
913. Subsection (3) of new section 37 prevents trustees from making a payment to the employer unless:
- they have a certificate from a prescribed person that the assets and liabilities of the scheme have been calculated and verified in accordance with prescribed requirements, and stating the maximum amount of the payment that may be made;
  - the payment does not exceed the maximum amount given on the certificate;
  - the trustees are satisfied that it is in the interests of the members for the payment to be made;
  - where appropriate, the employer has requested, or consented to, the payment;
  - the Regulator has not issued a freezing order against the scheme under *section 23* of this Act; and
  - scheme members have been notified in accordance with prescribed requirements.
914. Subsection (4) allows the Secretary of State to make provisions in regulations for:
- the valuation of the scheme's assets and liabilities;
  - the assets and liabilities to be taken into account for the valuation;
  - the valuation to be carried out in the prescribed manner by a prescribed person;
  - the certificate referred to in subsection (3);
  - the duration of the validity of the certificate; and
  - the maximum amount of the payment.
915. Regulations made under subsection (5) will require trustees to inform both the Inland Revenue and the Regulator when making a payment.
916. Subsections (6) and (7) allow the Regulator to impose sanctions under section 10 of the Pensions Act 1995 (civil penalties) where these rules are not complied with. *Sections 13, 15 and 16* of this Act would also permit the Regulator respectively to issue an improvement notice (e.g. requiring that the procedures be properly followed), to seek an injunction from the Court preventing such a payment, or to require restitution of a payment made improperly.
917. In exchange for the imposition of a higher threshold before a payment to the employer may be made, the new provision does not reproduce the requirement that, before a

payment may be made to the employer, 5% limited price indexation (LPI) protection must be extended to all scheme pensions (over and above the protection in respect of rights accrued after 1997 provided by the main statutory LPI provisions). Guaranteed pension increases, as required by the LPI legislation or by scheme rules, would be included in the assessment of liabilities for the purpose of the full buy out calculation, and this will be set out in the regulations.

918. *Section 251* introduces transitional powers for trustees to amend scheme rules to take account of the repeal of the Income and Corporation Taxes Act 1988 provisions and the substitution of a new section 37 of the 1995 Pensions Act.
919. In schemes where current rules allow payments to the employer other than in order to comply with Revenue requirements, but which may have been constrained by section 37 of the Pensions Act 1995, trustees may choose to revive their original powers, limit them or leave them un-revived. In schemes where rules are framed so as only to allow payments in circumstances specified under the Income and Corporation Taxes Act 1988, trustees may choose whether and how they wish to take a power to make payments of surplus to the employer. Revenue requirements for tax approval have generally required scheme rules to prohibit payments of surplus except with Revenue approval and in accordance with the Income and Corporation Taxes Act 1988 rules.
920. In both cases, trustees:
- must be satisfied that such a rule change is in the interests of scheme members;
  - can only make one such decision,
  - must make it within five years of the commencement of these provisions, and
  - must give written notice to the employer and scheme members that they plan to change the scheme rules on payments to the employer.
921. In each case, any new rules will be subject to the overriding provisions in *section 250*.

### **Restrictions on payment into occupational pension schemes**

#### ***Section 252: UK-based scheme to be trust with effective rules***

922. This section requires that an occupational pension scheme which has its main administration in the UK must be established under irrevocable trusts.
923. *Subsections (1) and (2)* provide that where an occupational pension scheme has its main administration in the UK, it can only accept “funding payments” (see *subsection (6)*) if it is established under irrevocable trusts.
924. *Subsection (3)* provides that a scheme must also have proper written rules about benefits under the scheme before it can accept funding payments.
925. Regulations made under *subsection (4)* may exempt certain schemes from the requirement to be established under irrevocable trust. Specifically, statutory schemes could be exempted under this power.
926. *Subsection (5)* gives the Regulator the power to sanction trustees or managers who accept payments into a scheme which is not trust based or which does not have proper written rules.

#### ***Section 253: Non-European scheme to be trust with UK-resident trustee***

927. This section sets out requirements for an occupational pension scheme that has its main administration outside the EU but receives contributions from: employers in the UK (wherever their employees work); or from employers anywhere in the world in respect of their employees who work in the UK. It provides that the employers must not make

contributions unless the scheme is established under trust and there is a trustee in the UK.

***Section 254: Representative of non-European scheme to be treated as trustee***

928. This section specifies that where a non-EC occupational pension scheme appoints someone to act on their behalf in the UK, that person is to be treated as the trustee for the purpose of UK pensions legislation as defined in *subsection (3)*.
929. *Subsection (2)* provides a power to make regulations excluding such persons from being treated as trustees.

**Activities of occupational pension schemes**

***Section 255: Activities of occupational pension schemes***

930. This section implements article 7 of the EU Directive on the activities and supervision institutions for occupational retirement provision (Directive 2003/41/EC).
931. *Subsection (1)* places a requirement on the trustees of an occupational pension scheme based in the UK requiring them to limit its activities to those relating to providing retirement benefits. Such an occupational pension scheme must not, for example, also provide mortgages.
932. *Subsection (2)* provides a power to make regulations exempting certain schemes from this limitation. This is in line with the option given in article 5 of the Directive to enable Member States to exempt schemes with less than 100 members, or certain statutory schemes, from provisions such as *subsection (1)*.
933. *Subsection (3)* enables the Regulator to impose a civil penalty, under section 10 of the Pensions Act 1995 (civil penalties), on trustees or managers who have failed to take all reasonable steps to ensure that the scheme's activities are exclusively related to retirement-benefit provision.
934. *Subsections (4)* and *(5)* respectively define retirement-benefit activities and retirement benefits in line with the Directive. Schemes may provide benefits related to reaching retirement and may also provide benefits which supplement such benefits such as those relating to death, disability, termination of employment, sickness or poverty.

**No indemnification for fines or civil penalties**

***Section 256: No indemnification for fines or civil penalties***

935. This section provides that a trustee or manager of an occupational or personal pension scheme cannot be reimbursed out of scheme assets in respect of a fine imposed for an offence of which he is convicted, or a civil penalty imposed under either section 10 of the Pensions Act 1995 (civil penalties) or section 168(4) of the Pension Schemes Act 1993 regarding a failure for which he is personally liable. *Subsection (2)* provides that this includes a prohibition on providing for the payment of premiums in respect of an insurance policy, where the risks include the imposition of such a fine or the requirement to pay such a penalty.
936. *Subsection (3)* provides that where any amount is paid out of the assets of an occupational or personal pension scheme contrary to this section, section 10 of the Pensions Act 1995 (civil penalties) applies to any trustee or manager who fails to take all reasonable steps to ensure compliance.
937. *Subsection (4)* provides that where a trustee or manager of a scheme is reimbursed out of occupational or personal pension scheme assets for matters set out in *subsection (1) (a)* or *(b)* and he knows, or has reasonable grounds to believe, that he has been so reimbursed, he will be guilty of an offence unless he has taken all reasonable steps to



ensure that he is not so reimbursed. *Subsection (5)* provides that a person guilty of an offence under *subsection (4)* is liable on summary conviction to a fine not exceeding the statutory maximum and on conviction on indictment to imprisonment for a term not exceeding two years, or a fine or both.

## **Pension protection on transfer of employment**

### ***Section 257: Conditions for pension protection***

938. *Sections 257 and 258* protect the pension position of employees who are involved in a business transfer to which the TUPE regulations apply. If, prior to the transfer, the transferred employee had access to an occupational pension scheme to which the employer contributed, or would have had access to such a scheme if he had been employed by the transferor for a longer period, then the new employer must secure at least a prescribed level of pension provision for the employee following the transfer. *Section 257* sets out the conditions in which those employees are eligible for the pension protection provided by *section 258*.
939. *Subsection (5)* ensures that employees are still protected even if the transferor has withdrawn their occupational pension scheme by reason of the transfer.
940. References to transferor include any associate of the transferor and for the purposes of determining who is to be an associate of the transferor for the purposes of this section the criteria in section 435 of the Insolvency Act 1986 (meaning of “associate”) are to apply.

### ***Section 258: Form of protection***

941. This section specifies the pension provision that transferee employers must make for employees where the conditions in *section 257* apply;
942. *Subsection (1)* makes it a condition of the employee’s employment contract with the transferee that the transferee complies with either the requirement in *subsection (2)* or the requirement in *subsection (3)*.
943. The requirements in *subsection (2)* are:
- that the transferee secures that the employee is, or is eligible to be, a member of an occupational pension scheme in relation to which the transferee is the employer;
  - where the scheme is a money-purchase occupational pension scheme, that the transferee is, or would be, required to make relevant contributions to the scheme in respect of the employee; and
  - where the scheme is not a money-purchase scheme, that it must satisfy either the statutory standard in section 12A of the Pension Schemes Act 1993 (the Reference Scheme Test) or an alternative requirement to be prescribed in regulations.
944. The requirement in *subsection (3)* is that the transferee makes relevant contributions to a stakeholder pension scheme of which the employee is a member.
945. *Subsections (4) and (5)* allow the requirement in *subsection (3)* to be treated as complied with so long as the transferee employer has offered membership of a stakeholder pension scheme to the employee with the promise that the transferee will make relevant contributions from the time the employee becomes a member of that scheme.
946. *Subsection (6)* allows for variation by agreement between the transferee employer and the employee of the contractual term which imposes the requirement.
947. *Subsection (7)* leaves “Relevant contributions” to be defined in regulations.

## **Consultation by employers**

### ***Section 259: Consultation by employers: occupational pension schemes***

948. This section provides a power for regulations to be made prescribing the circumstances in which an employer in relation to an occupational pension may be required to consult certain persons before prescribed decisions are made by the employer, or the trustees or managers about changes to the scheme. It provides a power for regulations to prescribe the types of decisions leading to major or significant changes to occupational pension schemes that will trigger the requirement to consult. It also provides a power for regulations to be made requiring that trustees or managers of an occupational pension scheme may not make a prescribed decision in relation to that scheme unless they have first notified the employer of the proposed decision and they are satisfied that the employer has undertaken any consultation required by the regulations.
949. *Subsection (1)* enables regulations to be made to prescribe which employers will be obliged to consult prescribed persons, and will enable certain employers to be exempt from the requirement to consult. There is power to prescribe which decisions will trigger the consultation requirement and power to prescribe how the consultation should take place.
950. *Subsection (2)* enables regulations to be made that may require trustees or managers of an occupational pension scheme not to make a prescribed decision, unless they have first notified the employer of the proposal to make a prescribed decision and they are satisfied that the employer has undertaken the consultation process as required under *subsection (1)*.
951. *Subsection (3)* provides that the validity or otherwise of a prescribed decision in relation to an occupational pension scheme is not affected by any failure to comply with regulations made under this section. *Subsection (4)* refers to [section 261](#) which contains further provisions about regulations made under this section.

### ***Section 260: Consultation by employers: personal pension schemes***

952. *Subsection (1)* of this section provides a power to make regulations requiring prescribed employers who have direct payment arrangements in place for their employees in respect of a personal pension schemes to consult certain prescribed persons in a prescribed manner before making a prescribed decision in respect of the personal pension scheme.
953. *Subsection (2)* provides that the validity or otherwise of any decision prescribed for the purposes of *subsection (1)(b)* is not affected by any failure to comply with regulations made under this section. *Subsection (3)* refers to [section 261](#) which contains further provisions about regulations made under this section.

### ***Section 261: Further provision about regulations relating to consultation***

954. *Subsection (1)* of this section provides that for the purposes of this section “consultation regulations” means regulations under [section 259](#) or [260](#).
955. *Subsection (2)* provides that consultation regulations may be made specifying how consultation must be carried out including making provision for the time periods for consultation, the information that must be provided to those consulted, and who is to be consulted, including any discretion the employer may have as to the persons to be consulted. The prescribed requirements may also contain provision about representatives that employees may have and the method of selecting those employees. *Subsection (2)* also makes provision for regulations to be made to protect employee representatives (such as Trade Union and Information and Consultation (I&C) representatives) involved in the pensions consultation process from suffering any detriment or unfair dismissal by reason of carrying out their consultation duties, and to

ensure they are given adequate time and remuneration to carry out their consultation duties. This mirrors existing protection provided to employee representatives by reason of the Employment Rights Act 1996 and the protection that is proposed for I&C representatives.

956. *Subsection (2)* also provides for regulations to be made enabling any requirement to consult on future pension changes to be waived or relaxed by order of the Regulator in appropriate circumstances. The section also makes provision for regulations to require the employer to communicate to the trustees or managers of the scheme any representations received by the employer as part of the consultation process.
957. *Subsection (3)* provides that where employers, trustees or managers have obligations imposed on them by the consultation regulations, they must, if required by the Regulator, provide information to the Regulator to show that they have complied with those obligations. *Subsection (4)* provides for regulations to be made identifying the type of information to be provided to the Regulator under *subsection (3)* as proof of compliance, and the form, manner and time period within which it must be provided.
958. *Subsection (5)* makes it clear that where employers have other duties to consult on changes to future pension arrangements those duties are unaffected by the new consultation regulations.

## **Modification of pension rights**

### ***Section 262: Modification of subsisting rights***

959. This section replaces section 67 of the Pensions Act 1995 (restriction on powers to alter schemes).
960. The new sections are designed to enable schemes to make rule changes that could affect member's subsisting rights, provided certain provisions and restrictions are met, for example trustees must agree to a modification being made and members must be informed about proposed changes. The rights which are protected are referred to as 'subsisting rights' – this covers accrued rights and pensions or benefits which are in payment.
961. Two categories of modification are created, 'protected modifications' and 'detrimental modifications'. A protected modification (for example a change that would convert accrued defined benefit rights into defined contribution rights) can only be made with the informed consent of the member concerned (the consent requirement – see section 67B). A detrimental modification can be made with the informed consent of an affected member (see section 67B). Where this is done without such consent, the actuarial value of that member's accrued rights at the time the modification takes effect must be maintained (the member must not suffer a reduction in the actuarial value of those rights as at the date the modification is put into effect) (see sections 67C and 67D). The actuarial equivalence requirements will enable schemes to restructure the 'package' of a member's accrued rights without his consent (subject to the rules governing 'protected modifications') whilst ensuring that the actuarial value of those rights are maintained.
962. Where a detrimental modification or protected modification is made the trustees must give their approval and they cannot do so unless the relevant requirements concerning consent or actuarial equivalence have been satisfied (see section 67E).
963. Once a detrimental or protected modification has been made the trustees must notify members who were required to consent. Where actuarial equivalence applied they must take reasonable steps to notify affected members (see section 67F).
964. The Regulator shall have power to declare a detrimental or protected modification void and may make incidental orders such as requiring the trustees to take certain steps or declaring rights granted with the modification void (see sections 67G and 67H). The

Regulator may also impose civil penalties on trustees and any persons who incorrectly make scheme modifications (see section 67I).

965. *Section 67 – The subsisting rights provisions*
966. This section sets out the scope of the ‘subsisting rights’ provisions and refers to the requirements that must be satisfied when making a change to a scheme that would or might have a detrimental effect on any member’s subsisting rights, or where the change is one that falls within the definition of a ‘protected modification’ at section 67A(3). A detrimental modification is one which would or might adversely affect subsisting rights. A protected modification is where defined benefit rights are converted to defined contribution rights or where a pension in payment is reduced.
967. Subsection (1) provides that the subsisting rights provisions apply to any power that any person has under the scheme to modify an occupational pension scheme. It does not apply to a power conferred on a public service pension scheme or a prescribed scheme or scheme of a prescribed description. This power will for example be used to exclude scheme which have less than two members.
968. Subsection (2) provides that a modification may be declared void by the Regulator (under the powers contained in section 67G) unless the following requirements are satisfied:
- where the modification is a protected modification, the consent requirements at section 67B have been satisfied in respect of each affected member;
  - where the modification is a detrimental modification, either the consent requirements at section 67B or the actuarial equivalence requirements at section 67C are satisfied for each affected member;
  - the trustees of the scheme have met the trustee approval requirement at section 67E and the reporting requirement at section 67F.
969. Subsection (3) provides that the subsisting rights provisions do not apply when a modification is made for a purpose connected with debits under section 29(1) of the Welfare Reform and Pensions Act 1999 (which covers the treatment of pension rights on divorce) or in a prescribed manner.
970. Subsections (5) and (6) cover situations where a member dies after the trustees have begun the process leading up to making a detrimental or protected modification (as defined in section 67(A)(2)) so that the trustees need not repeat steps which had already been satisfied in relation to the member when he died.

### **Section 67A – The subsisting rights provisions: interpretation**

971. This section defines a number of terms used in these provisions. Subsection (2) defines “regulated modification” as a ‘protected modification’ or a ‘detrimental modification’ or both.
972. Subsection (3) defines the term ‘protected modification’ as meaning a modification that:
- on taking effect, would or might result in any subsisting rights of a member, or a survivor of a member, which are defined benefit rights becoming, or being replaced by, defined contribution rights;
  - would or might result in the reduction in the amount of any pension currently in payment;
  - is a modification of a prescribed description.
973. Modifications that fall within the definition of a ‘protected modification’ cannot be made without the consent of the affected member (see section 67C).

974. Subsection (4) defines the term “detrimental modification” as meaning a modification which, at the time the modification comes into effect, would or might adversely affect any subsisting rights of a member or survivor (see subsection (10)(b) which explains when a modification might have an adverse affect). Subsection (5) defines the term “affected member” as either being a member or a survivor.
975. Subsection (6) defines the term “subsisting rights” as any right which, at the time of the modification, has accrued to or in respect of the member to future benefits under the scheme rules, or any entitlement to the present payment of a pension or other benefit which a person has at the time of the modification under the scheme rules. Subsection (6)(b) provides that, in relation to the survivor of a member of the scheme, the definition covers any entitlement to a survivor’s benefit in payment, or right to any future benefits. Subsection (6) also provides that a pension credit right is included in the definition of ‘subsisting rights’.
976. Subsection (7) provides that the subsisting rights of an active member are to be determined as if the member had opted, immediately before the modification takes effect, to terminate his service in the pension scheme. Therefore any benefits to which the member would not be entitled on leaving service will not be included as subsisting rights. This will mean that benefits like death in service benefits will not be subsisting rights.
977. Subsection (8) defines the term “scheme rules” as meaning the rules of the scheme and relevant legislative provisions, and subsection (9) defines the term “relevant legislative provision” and the circumstances when these legislative provisions are to override any of the provisions of the scheme.
978. Subsection (10)(a) defines the term “survivor” for the purposes of this section as meaning the widow or widower of a member of a scheme, or a person who has survived the member and who has any entitlement to a benefit or to benefits payable in the future, under the scheme rules in respect of the member. Subsection (10)(b) also provides that a detrimental modification would or might have an adverse effect on that person’s subsisting rights if it would alter the nature or extent of those entitlements or rights, in a way that would or might result in less generous benefits or future benefits being less generous.

### **Section 67B – The consent requirements**

979. Subsections (1) to (3) set out the requirements that must be met when a modification is being made which requires the consent of the affected member. The requirements are the informed consent requirement and the timing requirement.
980. Subsections (4) and (5) set out the conditions which must be met in order to satisfy the informed consent requirement. The trustees must, before the modification is made, inform the member that the consent requirements apply; give the member information in writing explaining the modification and the effect it would have on him; advise the member that he may make representations to the trustees about the modification if he wishes and that he will have a reasonable opportunity to make such representations. Once these provisions have been complied with the modification may proceed only if the affected member gives his written consent.
981. Subsection (5) allows trustees to use the actuarial equivalence requirements (see section 67C) where consent has not been given to a detrimental modification. If this provision is used, the trustees will not have to undertake a second information exercise should they fail to obtain member consent.
982. If the trustees do not make this clear to the member at the outset when asking for member consent to a detrimental modification they will have to comply with the information requirements contained in the actuarial equivalence provisions (section 67C(4)) and provide the information a second time.

983. Subsection (6) sets out the timing requirement. Its effect is that a member's consent to a modification lapses unless the modification is made within a reasonable time after the consent is given.

### **Section 67C – The actuarial equivalence requirements**

984. Subsection (2) provides that these requirements apply to detrimental modifications and where the trustees of a scheme have determined that they propose to make a modification under these provisions in respect of any affected members.
985. Subsection (3) notes the three elements that make up the actuarial equivalence requirements – the information requirement, the actuarial value requirement, and the actuarial equivalence statement requirement. Subsection (4) provides that in order to satisfy the 'information requirement' the trustees must, before the modification is made, inform the member that the actuarial equivalence requirements apply; give the member information in writing explaining the modification and the effect it would have on him; advise the member that he may make representations to the trustees about the modification if he wishes and afford him a reasonable opportunity to make such representations.
986. Subsection (5) places a duty on trustees to take appropriate action before making the modification to secure that the actuarial value of each affected member's subsisting rights will be maintained.
987. Subsection (6) provides that the actuarial equivalence statement requirement is satisfied in respect of an affected member if the trustees have, within a reasonable period following the date when the modification has taken effect, obtained an actuarial equivalence statement relating to that member in respect of the modification.
988. Subsection (7) provides that an "actuarial equivalence statement" under subsection (6) is a written statement provided by the scheme actuary (appointed to the scheme under section 47(1)(a) of the Pensions Act 1995). Provision may be made in regulations prescribing that a person other than the scheme actuary may give this statement. Subsection (8) defines how, for the purposes of subsections (5) and (7), actuarial value is maintained. It provides that this is achieved if the actuarial value of the member's subsisting rights immediately after the time when a modification takes effect (i.e. under the scheme rules as amended by the modification), is equal to or greater than the actuarial value of his subsisting rights immediately before that time (i.e. under the scheme rules prior to the modification).

### **Section 67D – The actuarial equivalence requirements: further provisions**

989. Subsection (2) provides that the information requirement already undertaken can still satisfy the requirements in section 67C(4) if it is proposed to revise the modification so long as the revised modification does not differ from the original modification in any material respect.
990. Subsection (3), which is a corollary of section 67B(5), will allow trustees to inform members that they are proposing to make a detrimental modification and to seek the member's consent but, if that consent is not given, they will proceed with the modification using the actuarial equivalence provisions. If this provision is used, the trustees will not have to undertake a second information exercise.
991. Subsection (4) provides a power to prescribe that specific requirements must be met when calculating the actuarial value of an affected member's subsisting rights. Subsection (5) enables the prescribed requirements in subsection (4) to provide that the actuarial equivalence calculations may be in accordance with guidance prepared by a prescribed body and that that guidance may be approved by the Secretary of State.
992. Subsection (6) clarifies that an actuarial equivalence statement can be given in respect of two or more affected members, or in respect of members of any particular description.

The actuary may, for example, provide a single statement relating to all of the active scheme members.

### **Section 67E – The trustee approval requirement**

993. The trustees must approve a detrimental or protected modification. Subsection (1) provides that where the trustees do not have power to make the modification they must give their consent. Where a modification is made (whether or not by the trustees) the trustees cannot approve it unless they are satisfied that the consent requirements (section 67B) or actuarial equivalence requirements (section 67C), as relevant, have been satisfied. Therefore approval cannot be given until after the consent requirements or actuarial equivalence requirements have been complied with.
994. Subsection (3) provides that the trustees must approve a modification within a reasonable period after the date the first member gave his consent. Trustees must therefore not proceed with, or agree to a modification, where there has been an unreasonable delay following receipt of consent.

### **Section 67F – The reporting requirement**

995. The effect of subsection (1) is that when the trustees determine to make, or give consent to, a modification, they must, within a reasonable period notify each member who consented to a modification that they have done so; taken all reasonable steps to notify each affected member to whom the actuarial equivalence requirements apply that they have done so.

### **Section 67G – Powers of the Authority: voidable modification**

996. Where the exercise of a power to modify is voidable by virtue of section 67A-67H, the Regulator may make an order under subsection (2) that subsection (6) applies to a detrimental or protected modification. The order can declare that a modification or grant of rights under the scheme is void to the extent specified. It will be void in respect of specified people. The modification will be void from the date it was to take effect.
997. The modification may have made additional modifications or granted extra rights so as to balance any detrimental affects. These modifications will also have to be declared void so that members will not benefit from the Regulator’s order. Subsection (3) allows the Regulator to make an order to secure this does not happen.
998. Subsection (4) gives the Regulator flexibility to apply the order to one or more affected members - “the specified persons”. The order may therefore name the individual or individuals concerned, or may refer to them by describing the members covered by the order, for example by specifying that the order applies to all the active members of the scheme.
999. Subsection (5) provides that the Regulator may when declaring a modification void require the trustees to take the steps specified in the order, and to do so within the specified time. The Regulator may also ratify things done by the trustees which would otherwise have been in breach of the scheme rules (i.e. subsection (7) applies).
1000. Subsection (7) allows the Regulator to order that anything done by the trustees (as described in subsection (5)(b)) does not contravene the scheme rules.
1001. Subsection (8) provides that an order made under this section may be made either prior to or after the time when the modification or grant would, but for the order, have taken effect. This enables the Regulator to take action before and after the date when a modification is to take effect.

## **Section 67H – Power of the Authority to intervene**

1002. The Regulator may under subsection (2)(a) direct a person not to make a detrimental or protected modification. This may be done only where the Regulator has reasonable grounds to believe a modification will be made which will be voidable.
1003. The Regulator may under subsection (2)(b) require the trustees to take any steps required to comply with the requirements in section 67(2). This order can be made before or after a detrimental or protected modification is made.
1004. *Subsection (3)(a)* provides that if a person makes a detrimental or protected modification in contravention of an order not to do so, the Regulator can declare that modification void using section 67G. *Subsection (3)(b)* provides that if the trustees fail to comply with an order to take steps under subsection (2)(b), the Regulator can declare the modification void using section 67G.

## **Section 67I – Subsisting rights requirement: civil penalties**

1005. This section covers the circumstances when the Regulator may impose a civil penalty for a failure to comply with the subsisting rights provisions.
1006. Subsection (1) provides that subsections (2) and (3) apply where a detrimental or protected modification is voidable by virtue of section 67(2). Subsection (2) provides that where a modification is made either by the trustees of a scheme exercising a power vested in them, or by any other person in circumstances that are not provided for in subsection (3), section 10 of the Pensions Act 1995 (civil penalties) applies to any trustee who has failed to take all reasonable steps to secure that the modification is not so voidable.
1007. Subsection (3) provides that section 10 of the Pensions Act 1995 (civil penalties) applies to people who are not trustees who, without reasonable excuse, exercise a power to make a modification if either:
- the trustees have not given their consent to the modification as required under section 67E(1) or,
  - the timing requirement in section 67B(6) has not been complied with.
1008. Subsection (4) provides that section 10 of the Pensions Act 1995 applies to any trustee who has failed to take all reasonable steps to secure compliance with any requirements imposed under subsection (5)(a) of section 67G requiring trustees to take specified steps within the time specified.
1009. Subsection (5) provides that where a detrimental or protected modification is made by the exercise of a power in contravention of an order made by the Regulator not to make the modification (section 67H(2)(a)) section 10 of the Pensions Act 1995 applies to:
- any trustee who fails to take all reasonable steps to secure compliance with the order (where the power in question is exercised by the trustees), and
  - any other person who, without reasonable excuse, exercises the power in contravention of the order.
1010. Subsection (6) provides that where the trustees fail to comply with any requirement specified in an order made by the Regulator to take certain steps in the time specified, either before or after the regulated modification is made (section 67H(2)(b)), section 10 of the Pensions Act 1995 applies to any trustee who fails to take all reasonable steps to secure such compliance.



## **Short service benefit**

### ***Section 263: Increase in age at which short service benefit must be payable***

1011. This section amends Chapter 1 of Part 4 of the Pension Schemes Act 1993, which provides for the basic preservation of benefits for people who leave pensionable service before normal pension age and who have at least two years' qualifying service, or have had a transfer payment into the scheme in respect of rights under a personal pension scheme. Section 71(3) of the Pension Schemes Act 1993 previously provided that deferred short service benefits payable under scheme rules must be payable from normal pension age, or if that is earlier than 60, no later than age 60.
1012. *Subsection (1)* amends section 71(3) of the Pension Schemes Act so that short service benefit must be payable from no later than age 65 except where normal pension age is over 65, in which case short service benefit must be paid from normal pension age.
1013. *Subsection (2)* adds to section 72 of the Pensions Act 1993 a new subsection (4) which provides that payment of short service benefit from an age other than normal pension age under section 71(3) does not conflict with the basic principle that short service beneficiaries are not treated less favourably than long service beneficiaries.

## **Early leavers**

### ***Section 264: Early leavers: cash transfer sums and contribution refunds***

1014. This section introduces a fifth chapter into Part 4 of the Pension Schemes Act 1993 consisting of new sections 101AA to 101AI. They make provision for members who leave after three months pensionable service in a scheme, but before their rights have vested in the scheme, to be entitled to a cash transfer or a refund of employee contributions. The new sections 101AA to 101AI do not preserve those rights in the scheme so that the person has a preserved pension entitlement. But they provide instead for the member to have the choice of a cash transfer sum or a refund of their contributions.

## **Section 101AA – Scope of Chapter 5**

1015. Subsection (1) provides that Chapter 5 is to apply to any member of an occupational pension scheme whose pensionable service ends before normal pension age, who has at least three months qualifying service but does not have relevant accrued rights in the scheme. In other words his full rights have not vested. Subsection (2) sets out the three month qualifying service condition and what service periods count towards it. It includes service in another scheme where there has been a cash transfer from that scheme into this scheme. Subsection (3) provides that a period under subsection (2) only counts as far as it counts towards the qualification of long service benefits within the meaning of Chapter 1.
1016. Subsection (4) defines for the purpose of subsection (1) “the relevant accrued rights to benefit under the scheme”. These are rights in the scheme which are not pension credit rights and would entitle the member to a short service benefit as in section 71(1) of the Pension Schemes Act 1993. Subsection (5) provides that all references in Chapter 5 to “a member in relation to an occupational pension scheme” are to a person to whom the provisions in Chapter 5 apply.
1017. *Paragraph 30* of *Schedule 12* (which makes minor and consequential amendments in connection with the Act) includes an amendment to section 179 of the Pension Schemes Act 1993 (which sets out what counts as linked qualifying service) so that it will include a transfer of a cash transfer sum as provided by the new Chapter 5 of Part 4 inserted by this section.

### **Section 101AB – Right to cash transfer sum and contribution return**

1018. Section 101AB sets out the circumstances in which a right to a cash transfer sum, or refund of contributions arises. Subsection (1) provides that a member has the right to either a cash transfer sum, or a refund of contributions when his pensionable service ends. Subsection (2) provides that the right to the options in subsection (1) is subject to the provisions of Chapter 5. Subsection (3) defines the term cash transfer sum as being the cash equivalent value of the benefits which would have accrued in respect of the member had the scheme not had a rule requiring a minimum period of service before those rights could vest.
1019. Subsection (4) defines the term contribution refund as being a sum representing contributions paid by or on behalf of the member on the member's own account and, where rights have been transferred into the scheme, any employee contributions into the first scheme which are included in the transfer payment. Subsection (5) defines what is meant by the term "employee contributions" in subsection (4). It means contributions made to the scheme by or on behalf of the member on his own account but does not include any transfer payment or amount paid to the scheme which is attributable to a pension credit.

### **Section 101AC – Notification of right to cash transfer sum or contribution refund**

1020. This section sets out what the trustees or managers of the scheme must do when the pensionable service of a member ceases and he acquires a right under the provisions in section 101AB. Subsection (1) provides that this section only applies when the member's pensionable service under the scheme has ended. Subsections (2) and (3) provide that the trustees or managers must, within a reasonable period, give the member written information setting out the amount of the cash transfer sum, how it may be used, the amount of the contribution refund and such other information as may be required by regulations. The notification must also include the date by which the member must notify the trustees or managers of his choice.
1021. Subsection (4) provides that the information required by regulations may include information about any tax liability on the options open to the member and about the effect on any other options the member may have under scheme rules or otherwise. Subsection (5) provides that the trustees or managers may notify the members that if he fails to exercise his choice by the due date given in the notification the trustees or managers may be entitled to pay a contribution refund to him. Subsection (6) provides that any trustee or manager who has failed to take reasonable steps to comply with the requirements in subsection (2) may be liable to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties).

### **Section 101AD – Exercise of right under 101AB**

1022. Subsection (1) explains that this section applies where a member has acquired a right under section 101AB to a contribution refund or cash transfer sum. Subsection (2) provides for the member to exercise his right by notifying the trustees or managers in writing of his choice of a cash transfer sum or a contribution refund. If he opts for the cash transfer sum he must also state which one of the permitted ways outlined in the letter he wishes to use. Subsection (3) requires that the reply must be within the date specified by the trustees or managers, or any other later date that they may allow.

### **Section 101AE – Permitted ways of using cash transfer sum**

1023. This sets out the permitted ways of using a cash transfer sum under section 101AB. Subsection (2) provides that a cash transfer sum may be used to: acquire rights under another occupational pension scheme, or a personal pension scheme, providing the receiving scheme is willing and able to accept the transfer and the receiving scheme meets prescribed requirements, or to purchase one or more appropriate annuities. It

also provides for regulations to set out other ways in which the cash transfer sum may be used. Subsection (3) defines “appropriate annuity” as an annuity which satisfies prescribed requirements and, is to be purchased from an insurer who is chosen by the member, satisfies the requirements in section 19(4) of the Pension Schemes Act 1993 and is willing to accept payment from the trustees or managers.

### **Section 101AF – Calculation of cash transfer sum and contribution refund**

1024. This provides for regulations to prescribe how cash transfer sums and refunds of contributions are calculated. Subsection (2) provides that the contribution refund must be calculated in accordance with any requirements in regulations. Subsection (3) provides that regulations may enable administrative costs to be deducted from cash transfer sums and for cash transfer sums and contribution refunds to be increased or reduced in prescribed circumstances.
1025. Subsection (4) provides that those circumstances that may be prescribed under subsection (3)(b), may include failure of the trustees or managers to take the necessary action required under section 101AG(2) or (4) of the Pension Schemes Act 1993 once a member has exercised his right to a cash transfer or contribution refund, and the state of scheme funding, (for example, to allow a cash transfer sum to be reduced if the scheme is underfunded or where the transfer has already been made to the member under scheme rules). Subsection (5) allows regulations to provide for the cash transfer sum or contribution refund to be reduced to the extent that a member may not receive anything.
1026. *Paragraph 30 of Schedule 12* (which makes minor and consequential amendments in connection with the Act) includes an amendment to section 179 of the Pension Schemes Act 1993 which sets out what counts as linked qualifying service so that it will include a transfer of a cash transfer sum as provided by the new Chapter 5 of Part 4 inserted by this section.
1027. *Paragraph 18 of Schedule 12* (which makes minor and consequential amendments in connection with the Act) introduces a new section 113A to the Pension Schemes Act 1993. This will enable regulations to specify the information which must be provided to trustees or managers of the receiving occupational pension scheme when rights are transferred from one scheme to another. The powers will enable trustees of the receiving scheme to obtain information about employee contributions paid in the transferring scheme.

### **Section 101AG – Duties of trustees or managers following exercise of right**

1028. This sets out the duties on the managers or trustees of the scheme when they receive the reply from the member exercising his choice within the time limit. Subsection (2) requires the trustees or managers to take whatever steps are needed to comply with the member’s request for a cash transfer sum within a reasonable period of receiving it. Subsection (3) discharges the trustees or managers of any obligation in respect of any rights (other than pension credit rights) the member may have in the scheme or to provide a contribution refund in respect of any rights in the scheme when they have taken the steps required.
1029. Subsection (4) requires the trustees or managers to take whatever steps are needed to comply with the member’s request for a contribution refund within a reasonable period of receiving it. Subsection (5) provides that where trustees or managers have taken the steps required to pay the contribution refund they are discharged from any obligation in respect of any rights (other than pension credit rights) the member may have in the scheme, or if the member also has a right under scheme rules for a contribution refund, the amount of the contribution refund paid under Chapter 5 may be offset against it. Subsection (6) provides that where the trustees or managers fail to carry out the action required in subsections (2) and (4) they may be liable to a civil penalty under section 10 of the Pensions Act 1995.

### **Section 101AH – Powers of trustees or managers where right not exercised**

1030. This applies where the member has failed to respond to the notification issued by the trustees or managers as required in section 101AC. Subsection (1) applies the provisions in this section when the member fails to exercise his right by the reply date, or any other later date set by the trustees or managers who have notified him in accordance with section 101AC(3).
1031. Subsection (2) makes provision for the trustees or manager to pay a contribution refund within a reasonable period beginning with the reply date or later date agreed by the trustees or managers, if the member has not exercised his right by the dates in subsection (1). Subsection (3) provides that where trustees or managers have paid the contribution refund they are discharged from any obligation in respect of any rights the member may have in the scheme or if the member also has a right under scheme rules for a contribution refund, the amount of the contribution refund paid under Chapter 5 may be offset against it.

### **Section 101AI – Rights under section 101AB: further provisions**

1032. This sets out the further provisions that may apply to the right of a cash transfer sum or contribution refund under section 101AB. Subsection (1) provides that a member will lose any right acquired under 101AB in the case of the scheme having been wound up, or subject to the provisions in subsection (2), if he fails to exercise his right by the due date.
1033. Subsection (2) allows for the trustees or managers, on application from the member, to set a later reply date within which the member can exercise his right. Subsection (3) provides that the trustees or managers must notify the member in writing of any later date determined by them and that the later date is treated as the reply date for the purposes of subsection (1). Subsection (4) provides that a notification under subsection (3) of this section, section 101AC(2) and section 101AD(2) may be given to the member by delivering it to him, leaving it at his proper address, or by posting it to him at that address.
1034. Subsection (5) provides that the proper address is, in the case of a corporate body, the registered or principal office and in all other cases the last known address. Subsection (6) provides that Chapter 5 is subject to any provision made under section 61 of the Pension Schemes Act 1993 that permits a deduction from any payment of a contribution refund, or requiring the payment of a contribution refund to be delayed. Subsection (7) defines the expressions of “applicable rules”, “member”, “permitted way”, “relevant benefits” and “reply date” for the purpose of Chapter 5. Subsection (8) lists what provisions are relevant legislative provisions for the purposes of subsection (7).

### **Safeguarding pension rights**

#### ***Section 265: Paternity leave and adoption leave***

1035. This section adds two new paragraphs into Schedule 5 of the Social Security Act 1989. The new paragraphs apply provisions in respect of paid paternity leave and paid adoption leave that mirror those found at paragraph 5 of that Schedule (which are headed “unfair maternity provisions” and provide that employer pension contributions during periods of paid maternity leave should be made as if the woman was working normally).

#### ***Section 266: Inalienability of occupational pension***

1036. Section 91(1) of the Pensions Act 1995 sets out the general rule that entitlement or a right to an occupational pension cannot be assigned, surrendered or charged, or a lien or set-off be exercised in respect of it. Section 91(5) sets out a number of exceptions to that rule. This section amends section 91(5), at subsection (5)(f), to provide for a further

exception to section 91(1), where a payment of a pension is made in error, giving rise to a monetary obligation in favour of the scheme. This amendment brings section 91 into line with what had always been the policy intent.

## **Voluntary contributions**

### ***Section 267: Voluntary contributions***

1037. *Subsection (1)* removes section 111 of the Pension Schemes Act 1993 (the voluntary contribution requirement), which required occupational and personal pension schemes to allow additional voluntary contributions to be paid by members. In addition it provided that they are prohibited from imposing restrictions on the contributions made by members, they must secure that any such contributions must be used to provide additional benefits and that the value of such benefits must be reasonable.
1038. *Subsection (2)* removes the reference to the voluntary contribution requirements from section 132 (duty to bring schemes into conformity with indirectly-applying requirements) of that Act. This section required the trustees or managers or person responsible for administration of a public service scheme to ensure the rules of the scheme comply with the voluntary contribution requirement.
1039. *Subsection (3)* removes the definition of “voluntary contribution requirements” from section 181 (general interpretation) of that Act.

## **Payments by employers**

### ***Section 268: Payments made by employers to personal pension schemes***

1040. This section amends section 111A of the Pension Schemes Act 1993 (monitoring of employers’ payments to personal pension schemes) by inserting new subsections (3) to (7A). These require the trustees or managers of a scheme to monitor the payment of contributions by the employer under the direct payment arrangements. These are defined by section 111A(2) of that Act as arrangements under which contributions are paid by employers on behalf of the employee or by the employer on his own account. In order to carry out this obligation, the trustees and managers can request the employer provide them with information on payments. The employer must then comply with this request within a reasonable period. If an employer does not comply with the request for payment information the trustees or managers must within a reasonable period give notice of this to the Regulator.
1041. New subsection (7A) of section 111A of that Act requires trustees or managers to give the Regulator a notice. This will be required where a contribution under the direct payment arrangements has not been paid by its due date, and the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions. The notice must be given to the Regulator and the employee within a reasonable period after the due date. Under [section 90](#), the Regulator must issue a code of practice on the meaning of ‘material significance’ in relation to the exercise of its functions, and on the meaning of ‘reasonable period’.
1042. *Subsection (3)* amends section 111A(8) of that Act so that a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) may apply where the employer does not take all reasonable steps to comply with the trustees or managers request for payment information and as a result they were not able to comply with their duty to monitor payment of contributions.
1043. A civil penalty under section 10 of the Pensions Act 1995 (civil penalties) may also be imposed on an employer where a contribution payable is not paid by its due date.

1044. *Subsection (4)* amends section 111A(9) of that Act so that it refers to new subsections (7) and (7A) rather than old subsection (6) and (7). Under subsection 111A(9) a civil penalty may be imposed on trustees or managers who fail to take all reasonable steps to comply with the requirement to give the Regulator notice as required.

***Section 269: Payments made by employers and members to occupational pension schemes***

1045. This section amends two sections of the Pensions Act 1995.
1046. *Subsection (1)* amends section 49(9) of that Act (duty of trustee etc to report a failure by employer to pay contributions deducted from earnings on time). This amendment applies where an amount which has been deducted from earnings (corresponding to a contribution payable on behalf of an active member of an occupational pension scheme) has not been paid to the managers or trustees of the scheme within the prescribed period. The trustees or managers (except in prescribed circumstances) must give notice of this failure to the Regulator, within a reasonable period after the date when the payment became due where they have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions.
1047. This section also replaces section 88(1) of that Act (schedules of payments to money purchase schemes). It will continue to apply to occupational pension schemes where there has been a failure to pay any amount on or before the due date under a contribution schedule required under *section 87* (other permitted disclosures). The trustees or managers must give notice of this failure to the Regulator where they have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions. Regulations may prescribe circumstances when they must not give notice. Under *section 90* the Regulator must issue a code of practice on the meaning of ‘material significance’ in relation to the exercise of its functions, and on the meaning of ‘reasonable period’, in respect of these amended sections.

**Winding up**

***Section 270: Winding up***

1048. This section amends the provisions in the Pensions Act 1995, which give the order in which all occupational pension schemes’ liabilities are discharged when they are wound up. Broadly speaking, the amendments are intended to ensure that the benefits provided for members on the winding up of a scheme should not be less than the compensation that would have been provided by the Board of the Pension Protection Fund had the Board assumed responsibility for the scheme under Part 2 of the Pensions Act 2004.
1049. *Subsection (1)* substitutes new sections 73, 73A and 73B for the existing section 73 of the Pensions Act 1995 (preferential liabilities on winding up).
1050. New section 73(1) and (2) provides that section 73 applies to an occupational pension scheme which is being wound up, other than a scheme which is a money purchase scheme, a prescribed scheme or a scheme of a prescribed description. It is intended that the schemes to which section 73 applies will be broadly similar to the schemes which are “eligible schemes” within the meaning given by *section 126* of the Act.
1051. New section 73(3) provides that a scheme’s assets must be applied first to satisfy the liabilities in respect of pensions and other benefits set out in new subsection (4). If the scheme’s assets are insufficient to meet all these liabilities then the assets must be applied to satisfy the liabilities in the earlier paragraphs of subsection (4) first. If there are insufficient assets to satisfy the liabilities in a particular paragraph in full then those liabilities have to be satisfied proportionately.

*These notes refer to the Pensions Act 2004 (c.35)  
which received Royal Assent on 18 November 2004*

1052. New section 73(4) provides for the following priority order for scheme liabilities in respect of pensions and other benefits:
- (a) liabilities for pensions or benefits under relevant pre-1997 contracts of insurance that cannot be surrendered or in respect of which the surrender value does not exceed the liability secured by the contract;
  - (b) liabilities for pensions and benefits not exceeding the corresponding Pension Protection Fund liability, excluding liabilities falling within paragraph (a) ;
  - (c) liabilities for pensions and benefits derived from voluntary contributions, excluding liabilities falling within paragraph (a) or (b);
  - (d) other liabilities for pensions and benefits that do not fall within paragraph (a), (b) or (c).
1053. New section 73(5) defines what is meant by: “corresponding Pension Protection Fund liability” and “relevant pre-1997 contract of insurance”. The “corresponding Pension Protection Fund liability” in relation to any liability for a pension or other benefit is the cost of securing benefits corresponding to the compensation under Part 2 of the Pensions Act 2004 that a person would have received in respect of the pension or other benefit had the Board of the Pension Protection Fund assumed responsibility for the scheme. Subsection 73(6) provides that in determining corresponding Pension Protection Fund liabilities regulations may be made that modify the provisions of Part 2 of the Pensions Act 2004 which govern the payment compensation under that Part.
1054. New section 73(7) provides that regulations may modify the priority order in subsection (4). New section 73(8) provides that regulations may prescribe how it is to be determined which paragraph of subsection (4) a liability derived from voluntary contributions falls within. Section 73(9) provides a power to make regulations modifying Chapter 5 of Part 4 of the Pension Schemes Act 1993 where that Chapter applied to a person on the commencement of the winding up period.
1055. New section 73(10) defines the meaning of “assets”, “liabilities”, “the pension compensation provisions”, “scheme rules” and “winding up period”.
1056. New section 73A(1) states that section 73A applies where a scheme to which section 73 applies is being wound up. Section 73A(2) provides that the trustees or managers must secure that, during a winding up period, any pensions or benefits paid to or in respect of a scheme member are reduced, so far as necessary, to reflect the liabilities that will be satisfied under the priority order in section 73(4). It also provides that trustees or managers may take such steps as necessary to recover any overpayment or pay any shortfall arising from the requirement to reduce pensions and benefits.
1057. Section 73A(3) provides that during a winding up period no benefits accrue under the scheme rules and no new members are to be admitted to the scheme.
1058. Sections 73A(4) to 73A(6) qualify the prohibition in section 73(3) and ensure that it does not prevent the accrual of increases in pensions and other benefits; any accrual derived from the investment of payments made in respect of money purchase benefits; or the discharge of a person’s pension credit rights derived from the scheme by the grant of rights under the scheme.
1059. Section 73A(7) and (8) provide powers to make regulations requiring the trustees or managers of a scheme to adjust the entitlements of a person to a discretionary award (such as an enhanced ill-health pension) or to a survivors benefit in certain circumstances. This will allow provisions to be made which prevent a discretionary award during the winding up period increasing the cost to the scheme of discharging the liabilities in respect of a member. The regulations may provide how the required adjustments are to be determined and the manner in which they are to be made and make provision about the consequences of breaching those regulations.

1060. Section 73A(9) states that if any person other than the trustees or managers of a scheme, (such as the employer in relation to the scheme) has powers under a scheme to distribute the assets of a scheme during a winding up, then those powers cannot be exercised by that person but, subject to sections 73, 73A and 73B Pensions Act 1995, may instead be exercised by the trustees or managers. Subsection 73A(10) defines the meaning of “appropriate rights”, “discretionary award”, and “shareable rights” and provides that subsection 73(10) also applies to section 73A.
1061. Section 73B(1) provides that actions taken in contravention of section 73A(3) are void. Subsection (2) provides that the Regulator may issue trustees or managers with a civil penalty if they do not take all reasonable steps to comply with the winding up provisions. Subsections (4) and (5) provide powers to make regulations about the determination, calculation and verification of scheme assets and liabilities and to modify the winding up provisions in certain cases (for example, in relation to multi employer schemes). Subsection (6) sets out that the winding up provisions do not apply to certain liabilities.
1062. Subsection (7) provides that the winding up provisions apply to liabilities under Chapter 4 of Part 4 of the Pension Schemes Act 1993 that arise before the commencement of the winding up period and were not discharged before that time. Subsection (8) confers powers to make regulations which provide that in prescribed circumstances entitlement to benefits arising from the death of a scheme member can be treated as having arisen immediately before the commencement of the winding up period. This is to provide for situations where a person does not satisfy the conditions for entitlement to a death benefit immediately on the member’s death.
1063. Subsection (9) provides that, if immediately before a winding up period a person is entitled to an amount of pension or benefit but has postponed payment, the person is not to be regarded as having become entitled to that amount before the beginning of the winding up period and so the winding up provisions will apply to that liability. Section 73B(10) states that, for the purpose of section 73B, “winding up provisions” means sections 73, 73A and 74.
1064. *Subsection (2) of section 270* amends section 74 of the Pensions Act 1995 (discharge of liabilities by insurance etc) The amendments to section 74 introduced under this subsection bring it in line with the new section 73. *Subsection (2)(a)* amends section 74(1), so that it applies to a scheme which is winding up and to which section 73 applies. *Subsection (2)(b)* removes the words "(including increases in pensions)" from 74(2). Increases are referred to separately in the current section 73. However, the new section 73 no longer refers to increases separately and therefore the words in 74(2) are no longer necessary. *Subsection (2)(c)* adds a new sub-paragraph to section 74(3) of the Pensions Act 1995 and provides that the discharge of a liability for a pension or other benefit by payment of a cash sum in circumstances where prescribed requirements are met will be a discharge meeting the requirements of section 74(2). *Subsection (2)(d)* changes the reference in section 74(4) from "rules of the scheme" to "scheme rules". It also removes the words "(including increases in pensions)" from 74(4) as they are no longer necessary. *Subsection (2)(e)* removes subsection (5)(b) from section 74(2). Subsection (5)(b) is no longer necessary because new section 73B(2) (b) contains a power which will allow the modification of section 74 in relation to prescribed descriptions of schemes. *Subsection (2)(f)* inserts new subsection (6) which provides that money purchase assets and liabilities are excluded from the application of section 74. It also defines "scheme rules" by reference to the definition in the [section 318](#).

## **Deficiency in assets of certain occupational pension schemes**

### ***Section 271: Debt due from the employer when assets insufficient***

1065. This section amends section 75 of the Pensions Act 1995 (deficiencies in the assets). In summary new section 75 ensures that in certain circumstances a debt can be placed



on the sponsoring employer of an occupational pension scheme, if the value of the scheme's assets is less than its liabilities. Broadly speaking, a debt for an amount equal to the difference is triggered if the scheme winds up or the employer becomes insolvent or there is an application to the Board of the Pension Protection Fund to assume responsibility for the scheme on the basis that the employer is unlikely to continue as a going concern or a resolution is passed for the voluntary winding up of the solvent employer. Detailed conditions apply to the three circumstances in which a debt can be imposed and these are set out in new subsections (2), (4), (4B) and (4C) of section 75.

1066. *Subsection (2)* replaces the existing subsection (1) to (4) of section 75 with new subsections (1) to (4C).
1067. New section 75(1) as amended applies the section to occupational pension schemes that are not money purchase schemes, prescribed schemes or schemes of a prescribed description. The current prescribing powers in section 75(9) are removed by *subsection (6)*.
1068. New section 75(2) and (3) set out when a debt falls due from an employer if there is a deficit in the scheme's assets at a time when the scheme is winding up but before any relevant event occurs. The trustees or managers can trigger a debt equal to the amount of the deficit by designating that time under *subsection (2)(b)*. "Relevant event" is defined in new subsection (6A). However, a debt is not triggered under this section if a relevant event within subsection (6A)(a) or (b) (an insolvency event etc) occurs before the scheme begins to wind up and that event has not been "cancelled" by a binding "cessation notice" issued before the start of wind up.
1069. Similarly the amount of any deficit becomes a debt due by the employer under *subsection (4)* if the employer becomes insolvent, there is an application or notification regarding the scheme or enters into members' voluntary liquidation. *Subsection (4)* sets out detailed rules about this. In the case of an insolvent employer, and an application or notification, the debt is contingent upon either confirmation that a scheme rescue is not possible or the scheme starting to wind up.
1070. New section 75(6A) defines relevant events as:
- where an insolvency event (as defined as in [section 121](#)) occurs in relation to the employer in relation to an occupational pension scheme;
  - where the trustees or managers apply to the Board under [section 129](#) asking it to assume responsibility for a scheme on the basis that the employer is unlikely to continue as a going concern or the Regulator notifies the Board of the Pension Protection Fund of such a scheme under that section;
  - where in relation to the employer a resolution is passed for a voluntary winding up, in circumstances where the employer is solvent.
1071. New section 75(6B) defines cessation notices and cessation events for the purpose of this section. Broadly a cessation notice is where a withdrawal notice is issued or the insolvency practitioner issues a notice that he is unable to confirm the status of a scheme under [section 148](#) does not apply. A cessation event occurs when a cessation notice becomes binding. A cessation event is a possibility until the notices specified in subsection (d) and (e) are no longer reviewable and any review has been concluded.
1072. New section 75(6D) provides that a debt does not arise on a voluntary winding up of a solvent employer if the resolution for the voluntary winding up has been stayed or the winding up has been converted to a creditor's voluntary winding up. The subsequent creditor's voluntary winding up will itself be a relevant event for the purposes of subsection (4)

**Section 272: Debt due from the employer in the case of multi-employer schemes**

1073. This section introduces a new provision which enables section 75 of the Pensions Act 1995 (deficiencies of assets) to be modified in order to provide flexibility in calculating the section 75 debt when a participating employer withdraws from a multi-employer scheme. The detail of this provision will be set out in regulations.
1074. In tandem with *sections 43 to 47* of this Act, this section is designed to avoid situations where, whether by chance or design, withdrawal from multi-employer arrangements leaves pension liabilities situated in a company which is substantially weaker than other companies with which it is associated. Such a situation increases the risk that the scheme could wind up without having the funds to pay members their benefits. This could mean significant liabilities were passed on to the Pension Protection Fund or that certain members had their benefits cut back.
1075. *Subsection (2)* provides that regulations may in particular provide for the circumstances in which a debt is to be treated as due under section 75 from an employer in relation to a multi-employer scheme.
1076. *Subsection (3)* provides that a section 75 debt may be treated as due in relation to a multi-employer scheme in circumstances other than those in which the scheme is being wound up or a relevant event occurs (as defined in section 75). For example, in multi-employer schemes, debts can be triggered on the withdrawal of an individual employer from the scheme at a time when other employers remain.
1077. *Subsection (4)* provides that for the purpose of multi-employer schemes regulations may prescribe alternative manners for determining, calculating and verifying the liabilities and assets of a scheme and their amount or value.
1078. *Subsection (5)(a)* provides that regulations may allow an alternative manner of valuation to be used if certain requirements are met. *Subsection (5)(b)* provides that regulations may give the Regulator power to direct that a section 75 debt which has been calculated using an alternative manner, is unenforceable for a specified period and that the debt should be recalculated applying a different manner if certain requirements are met within that period. Employers will be permitted to seek approval of arrangements after the date on which the event triggering the debt has occurred. Where the Regulator approves a particular arrangement, a new basis for calculating the debt can be substituted. This alternative basis will, in most cases, be the scheme's ongoing funding basis in accordance with Part 3 of this Act.
1079. *Subsection (6)* provides that the requirements mentioned in *subsection (5)* may include a requirement that a prescribed arrangement is in place which is approved by the Regulator.
1080. The amount of a debt on a withdrawal of an employer from a multi-employer scheme will usually be calculated on a full buy-out basis. Regulations made under this power will allow an alternative (usually lower) basis for calculation to the full buy-out basis to be adopted where approved arrangements are entered into with a view to ensuring that the scheme is supported in the future. The regulations will provide that in the case of all approved arrangements (other than transfers of benefits out of the scheme) the debt will be recalculated on the scheme's ongoing funding basis adopted in accordance with Part 3 of this Act. The regulations will provide that any liabilities actually transferred out of the scheme should be excluded from the debt calculation. The approved arrangements will be very similar to those set out in *section 45(2)* (meaning of financial support).
1081. *Subsection (7)* sets out that regulations may provide that the Regulator may not approve the details of such an arrangement unless certain conditions are met. These conditions may include a requirement that the arrangements identify persons against whom the Regulator may issue a contribution notice. The Regulator may also have to be satisfied of prescribed matters in relation to such persons. This will include that the consent of a person must be obtained before the person can be identified in this way.

1082. *Subsection (9)* provides that a “contribution notice” imposes a liability upon the person to whom it is issued to pay the sum specified in the notice to the trustees of the multi-employer scheme or, where the Board of the Pension Protection Fund has assumed responsibility for the scheme, to the Board. *Subsection (10)* provides that a contribution notice may be issued if an arrangement ceases to be in place or the Regulator considers that it is no longer appropriate. The Regulator must also be of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice. *Subsection (11)* provides that any sum specified in a contribution notice is to be treated as a debt due from the person to whom it is issued. The debt will be owed to the person named in the notice.
1083. *Subsection (12)(a)* provides that regulations must provide for how the sum specified in the contribution notice is to be determined, provide for circumstances in which joint and several liability for the debt can be applied, provide for the matters which the notice must contain, and provide for who may exercise the powers to recover the debt due. *Subsection (12)(b)* provides that the regulations may apply with or without modifications any of the provisions of *sections 47 to 51* (financial support directions) of this Act in relation to contribution notices issued under the regulations.
1084. *Subsection (13)* defines “multi-employer scheme” as a trust scheme which applies to earners in employments under different employers. *Subsection (14)* provides that this section operates without prejudice to the powers conferred by sections 75(5), 75(10), 118(1)(a) and 125(3) of the Pensions Act 1995.

## **Pension disputes**

### ***Section 273: Resolution of disputes***

1085. This section replaces section 50 of the Pensions Act 1995 with a new section 50 and sections 50A and 50B, and sets out revised requirements relating to the dispute resolution arrangements for occupational pension schemes.

### **New section 50 of Pensions Act 1995 – Requirement for dispute resolution arrangements**

1086. *Subsection (1)* provides that trustees or managers of an occupational pension scheme must ensure that dispute resolution arrangements are made and implemented. *Subsection (2)* provides that dispute resolution arrangements are such arrangements as are required under this section for resolving pension disputes.
1087. *Subsection (3)* defines a pension dispute as being a dispute about matters relating to the scheme between the trustees or managers of the scheme on the one hand and one or more persons “with an interest in the scheme” on the other. Certain disputes are exempted under *subsection (9)*.
1088. *Subsection (4)* requires the dispute resolution arrangements to provide a procedure for any party to a dispute who is a person “with an interest in the scheme” to be able to apply to the trustees or managers of the scheme to make a decision on the matters of the dispute.
1089. *Subsection (5)* provides that where a dispute is referred to the trustees or managers for a decision, they must make a decision within a reasonable period of receiving the application and notify the applicant of the decision within a reasonable period. Under *section 90* the Regulator is required to issue a code of practice on what constitutes a “reasonable period”.
1090. *Subsection (6)* requires that the dispute resolution arrangements must comply with the requirements set out in new section 50B.

1091. Subsection (7) provides that the dispute resolution arrangements must have effect on existing schemes on or after the commencement date of this section in relation to applications made on or after that date.
1092. Subsection (8) exempts from the application of this section schemes where every member of the scheme is a trustee and schemes with no more than one member, and provides a power for further exemptions to be set out in regulations. Subsection (9) sets out the types of dispute to which the dispute resolution arrangements do not apply and provides a power for further exemptions to be set out in regulations.
1093. Subsection (10) provides for section 10 of the Pensions Act 1995 (civil penalties) to apply to trustees or managers who do not take reasonable steps to make or implement dispute resolution arrangements under section 50.

#### **New section 50A – Meaning of “person with an interest in the scheme”**

1094. Subsection (1) sets out the meaning of “a person with an interest” in the scheme for the purposes of section 50. It reflects the definitions currently set out in the [Occupational Pension Schemes \(Internal Dispute Resolution Procedures\) Regulations 1996 \(SI 1996/1270\)](#).
1095. Subsection (2) sets out the meaning of “non-dependant beneficiary” for the purposes of subsection (1)(c).
1096. Subsection (3) sets out the meaning of “prospective member” for the purposes of subsection (1)(d).

#### **New section 50B – The dispute resolution procedure**

1097. This new section sets out the matters which must be included in the dispute resolution procedure.
1098. Under subsection (2) the procedure must provide for the representation of a person in order for an application for the resolution of a dispute to be made or continued where (i) that person dies, (ii) that person is a minor or a person otherwise incapable of acting, or (iii) in any other case, that person nominates a representative.
1099. Subsection (3) provides that the dispute resolution procedure may include provision about the time limits for making an application for the resolution of a dispute but further provides that the procedure must (in the case of a person with an interest in a scheme as mentioned in section 50A(1)(e) or 50A(1)(f)) require a six-month time limit for making the application.
1100. Subsection (4) requires the dispute resolution arrangements to set out details about how the application is to be made; what information should be included in the application; and the way in which decisions are to be reached and given.
1101. Subsection (5) provides for the dispute resolution procedure to cease if, after the application is made, the dispute becomes one in respect of which proceedings have been commenced in any court or tribunal or the Pensions Ombudsman has commenced an investigation as a result of a complaint made or a dispute referred to him.

#### **The Pensions Ombudsman**

##### ***Section 274: The Pensions Ombudsman and Deputy Pensions Ombudsmen***

1102. *Subsections (1) and (2)* of this section amend section 145 of the Pension Schemes Act 1993, which established the office of the Pensions Ombudsman. The amendments provide that the Pensions Ombudsman may resign or be removed from his office only on the grounds set out in his terms and conditions of appointment.

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1103. At present, section 145(4C) of the Pension Schemes Act 1993 enables the Pensions Ombudsman to delegate his functions to any of his employees, but he cannot delegate the determination of complaints made and disputes referred to him. This means that if the Pensions Ombudsman was incapacitated, or if he died or resigned from his office, no determinations could be made until a new Pensions Ombudsman was appointed. Alternatively, if the Pensions Ombudsman had a particularly heavy workload, complaints and disputes awaiting determination might be delayed while he determined outstanding complaints and disputes.
1104. *Subsection (3)* of this section inserts a new section 145A into the Pension Schemes Act 1993.
1105. New section 145A(1), (2) and (3) provides for the appointment of one or more persons to act as a deputy to the Pensions Ombudsman. A Deputy Pensions Ombudsman will have all the functions and powers of the Pensions Ombudsman and will be appointed upon such terms and conditions as the Secretary of State may think fit.
1106. New section 145A(4) sets out the circumstances in which a Deputy Pensions Ombudsman may carry out the functions of the Pensions Ombudsman. The circumstances are:
- where there is a vacancy in that office;
  - at any time when the Pensions Ombudsman is for any reason unable to discharge his functions; and
  - at any other time, with the consent of the Secretary of State (such as when the Pensions Ombudsman's workload means the assistance of a Deputy is appropriate).
1107. New section 145A(5) provides that all the provisions in legislation relating to the performance of the Pensions Ombudsman's functions are to be interpreted as including a Deputy Pensions Ombudsman who is performing those functions.
1108. New section 145A(6) provides for the Secretary of State to pay to, or in respect of, a Deputy Pensions Ombudsman, remuneration, compensation for loss of office, pension, allowances and gratuities, or other benefits as determined by the Secretary of State. This provides similar provisions to those relating to the Pensions Ombudsman.
1109. *Subsection (4)* provides that any Deputy Pensions Ombudsman is to be added to the persons disqualified from being elected as a Member of Parliament (and consequently, disqualifies him or her from being elected as a Member of the European Parliament). This brings the position regarding a Deputy Pensions Ombudsman in line with the existing position regarding the Pensions Ombudsman.
1110. *Subsection (5)* provides for both the Pensions Ombudsman and any Deputy to the Pensions Ombudsman to be disqualified from being elected to the Northern Ireland Assembly. This mirrors the position of disqualifying the Pensions Ombudsman and any Deputy Pensions Ombudsman from being elected as a Member of Parliament.
1111. *Subsections (6)* provides for a Deputy Pensions Ombudsman to join a pension scheme established under section 1 of the Superannuation Act 1972 by the Minister for the Civil Service. *Subsection (7)* enables the Pensions Ombudsman to pay to the Minister for the Civil Service any amount that the Minister may direct in respect of a person who is a Deputy Pensions Ombudsman joining such a scheme. *Subsection (8)* requires the Pensions Ombudsman to make payments to the Minister for the Civil Service, where such payments are directed, in respect of the Pensions Ombudsman's and his employees' membership of a pension scheme established under section 1 of the Superannuation Act 1972.

### **Section 275: Jurisdiction**

1112. In the case of *Brittanic Asset Management v. the Pensions Ombudsman*, the Court of Appeal drew a distinction between a person who undertakes “an act of administration concerned with the scheme” and a person “concerned with the administration of the scheme”. It noted that the former fell outside the Pensions Ombudsman’s jurisdiction. This section provides that the Pensions Ombudsman will be able to investigate complaints involving “one-off” acts of administration.
1113. *Subsection (1)* inserts a new subsection (4A) into section 146 of the Pension Schemes Act 1993. Under section 146(4), regulations may treat a person who is not a trustee, manager or employer, but who is concerned with the financing or administration of, or the provision of benefits under, a pension scheme as though he were a person responsible for the management of the scheme. Section 146(4A) provides that a person or body of persons is concerned with the administration of a scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme.
1114. *Subsection (2)* provides that new section 146(4A) will not have retrospective effect and will only apply in relation to disputes and complaints in relation to matters taking place on or after the date the new section 146(4A) comes into force.
1115. *Subsection (3)* provides that for the purpose of *subsection (2)*, questions in relation to the carrying out of a sole trustee’s functions are to be treated as a “dispute”. This allows them to come within the ambit of *subsection (2)*.

### **Section 276: Investigations**

1116. This section repeals section 54 of the Child Support, Pensions and Social Security Act 2000 and removes the amendments made to sections 148, 149 and 151 of the Pension Schemes Act 1993 by that section. Section 54 was brought into effect for the purposes of making rules and regulations only, and no rules or regulations have ever been made. Section 54 is repealed by *subsection (1)*. *Subsection (2)* repeals the amendments made to sections 148, 149 and 151 of the Pension Schemes Act 1993.

## **Pension compensation**

### **Section 277: Amendments relating to the Pensions Compensation Board**

1117. *Subsection (2)(a)* amends section 80 of the Pensions Act by inserting a new subsection (2A). This ensures that the Pensions Compensation Board may review any determination even though an application has not been made.
1118. *Subsection (2)(b)* replaces section 80(4) and (5) with a new subsection (4). This provides that regulations may make provision with respect to reviews applications and procedures for an application.
1119. *Subsection (3)* amends section 81 of that Act which sets out the conditions which must apply in order to apply for compensation. It will no longer be necessary for a scheme to be underfunded. The other conditions in section 81 will continue to apply, namely the value of the assets must have been reduced due to an act or omission and the employer must be insolvent.
1120. *Subsection (4)* replaces section 83(3) and (4) of that Act with a new subsection (3). This removes the requirement that the compensation paid must not exceed the amount required to eliminate the scheme’s underfunding. The amount payable is the shortfall minus any amounts recovered by the trustees plus interest on that amount (if any).
1121. These provisions will only operate until the new Board of the Pension Protection Fund takes over the functions of the Pensions Compensation Board and the latter is abolished under Part 9 of this Act.

## **Annual increases in rate of pensions**

### ***Section 278: Annual increase in rate of certain occupational pensions***

1122. Section 51 of the Pensions Act 1995 requires that certain private sector occupational pensions on or after 6th April 1997 must be increased annually by at least the appropriate percentage. This is the lesser of the revaluation percentage and 5%. This requirement is modified by *section 278* so that pensions derived from salary related benefits built up on or after the “commencement day” are to be increased by at least the annual percentage increase in the Retail Prices Index (the general level of prices in Great Britain) or 2.5%, whichever is the lesser. In addition, the requirement for an annual increase will not apply to pensions deriving from money purchase benefits which come into payment on or after the “commencement day”. The “commencement day” is the day appointed for the coming into force of *section 278*.
1123. *Subsection (2)* amends section 51(1) in order to clarify the basis on which the section applies.
1124. *Subsection (3)* ensures that pensions derived from money purchase benefits that are already in payment before the commencement day, continue to be required to be indexed.
1125. *Subsection (4)* amends section 51(4)(b) by specifying that the maximum “relevant percentage” for Category X and Category Y pensions is 5% and 2.5% respectively. The relevant percentage is the minimum amount by which a pension must be indexed – that is the Retail Price Index or 5%/ 2.5%, whichever is the lesser,
1126. *Subsection (5)* inserts new subsections (4A), (4B) and (4C). New section 51(4A) defines a Category X pension as being one which is in payment before the commencement day or is a pension which will derive wholly from pensionable service before the commencement day. New section 51(4B) defines a Category Y pension as being one which will derive wholly from pensionable service on or after the commencement day. New section 51(4C) provides for different indexation requirements to apply where the pension becomes a pension in payment on or after the commencement day and will derive from pensionable service before and after the commencement day.
1127. *Subsection (6)* amends section 51(5) so that any regulations made under this subsection may provide that any of the provisions of section 51 apply to a pension as if so much of it as would not otherwise be attributable to pensionable service or to payments in respect of employment were attributable to such service or payments before or on or after the commencement day.
1128. *Subsection (7)* inserts new section 51ZA into the Pensions Act 1995 and provides a new definition for the “appropriate percentage” (the minimum amount by which a scheme must increase its pensions in payment). This replaces the definition in section 54(3) of that Act.

### ***Section 279: Annual increase in rate of certain personal pensions***

1129. Section 162 of the Pensions Act 1995 requires that personal pensions deriving from protected rights (rights that derive mainly from a National Insurance contribution rebate and its investment return) built up on or after 6<sup>th</sup> April 1997 must be increased by at least the appropriate percentage. This is the lesser of the percentage which appears to the Secretary of State to be the percentage increase in the Retail Price Index and 5%. This requirement is modified by *section 279* so that the annual increase does not apply to pensions deriving from protected rights which come into payment on or after the “commencement day”.
1130. *Subsection (2)* amends section 162(1) in order to clarify the basis on which the section applies. It has the effect of removing the requirement to increase pensions that come into payment on or after the “commencement day”.

1131. *Subsection (3)* amends section 163(3) of the Pensions Act 1995 by:
- amending the definition of “appropriate percentage” to bring it into line (in part) with the definition as used in section 51 of that Act; and
  - defining “commencement day” as being the day appointed for the coming into force of *section 279*.

***Section 280: Power to increase pensions giving effect to pension credits etc***

1132. Section 40 of the Welfare Reform and Pensions Act 1999 is concerned with pensions in payment derived from a pension credit where there has been a pension sharing order. It contains a power that enables the Secretary of State to make provision for pensions provided to give effect to eligible pension credit rights or safeguarded rights to be increased by the Retail Price Index not exceeding 5%. These requirements are modified in line with the changes being made under *sections 278 and 279*.
1133. *Subsection (2)* amends section 40(1) of the Welfare Reform and Pensions Act 1999 by replacing the reference to “5%” with “the maximum percentage”.
1134. *Subsection (4)* inserts new subsection (2A) into section 40 of the Welfare Reform and Pensions Act 1999 to ensure that subsection (2) of section 40 does not apply to pensions derived from money purchase benefits coming into payment on or after the “commencement day”.
1135. *Subsection (4)* also inserts new subsection (2B) into section 40 of the Welfare Reform and Pensions Act 1999 and this defines “the maximum percentage” as being:
- 5% for pensions in payment before the commencement day or where entitlement arose before that day;
  - 2.5% where entitlement arose on or after the commencement day.
1136. *Subsection (5)* amends section 40(3) of the Welfare Reform and Pensions Act 1999 by defining the “commencement day” as being the day appointed for the coming into force of *section 280*. The terms “money purchase benefit” and “relevant pension credit” are also defined.

**Revaluation**

***Section 281: Exemption from statutory revaluation requirement***

1137. This section amends section 84 of the Pension Schemes Act 1993 (basis of revaluation) to enable schemes to satisfy the statutory revaluation requirements by revaluing the total pension or other benefit fully in line with the Retail Prices Index. This effectively restores the situation to that which existed before the provision was repealed by the Pensions Act 1995. New subsection (6) defines the meaning of “Retail Prices Index”.

**Contracting out**

***Section 282: Meaning of “working life” in Pension Schemes Act 1993***

1138. This section amends the meaning of “working life” in section 181 of the Pension Schemes Act 1993. This definition is used for calculating an earner’s Guaranteed Minimum Pension (GMP). The existing definition of “working life” has the same meaning as in paragraph 5(8) of Schedule 3 to the Social Security Contributions and Benefits Act 1992 (i.e. “working life” is the period between (inclusive) the tax year in which the person attained the age of 16; and (exclusive) the tax year in which he attained pensionable age or died under that age). Under section 126 of and Schedule 4 to the Pensions Act 1995, pensionable age for women to which paragraph 5(8) refers will be raised from 60 to 65 in stages commencing in 2010, to bring women’s pensionable



age into line with that for men. By virtue of the amendments made by this section “working life” for the purposes of calculating an earner’s GMP will now end with the tax year before the person reaches the age of 65 (in the case of a man) or 60 (in the case of a woman), or if earlier, the tax year before the person dies. The amendment made by this section brings the definition of “working life” into line with the definition of “pensionable age” for GMPs, which will remain unchanged from 2010.

***Section 283: Power to prescribe conditions by reference to Inland Revenue approval***

1139. This section adds a new section 9(5A) to the Pension Schemes Act 1993 to enable regulations to be made in relation to contracted-out occupational pension schemes and appropriate schemes containing requirements based on whether the scheme complies with certain provisions of tax legislation.

***Section 284: Restrictions on commutation and age at which benefits may be received***

1140. *Subsection (1)* amends section 21(1) of the Pension Schemes Act 1993 (which refers to commutation, surrender and forfeiture) to provide that where a scheme is required to comply with section 13 (minimum pensions for earners) or section 17 (minimum pensions for widows or widowers) of the Pension Schemes Act 1993 in providing a guaranteed minimum pension, then the scheme may provide for payment of a lump sum instead of that pension to the extent that this is permitted by regulations.

1141. *Subsection (2)* amends section 17 of the Pension Schemes Act 1993 (minimum pensions for widows and widowers) to provide that where a person has received a lump sum instead of a guaranteed minimum pension in circumstances prescribed by regulations, that person will be treated as if they had not received the lump sum for the purposes of calculating the minimum pension payable to their widow or widower.

1142. *Subsections (3) to (7)* amend sections 28 and 29 of the Pension Schemes Act 1993 to remove certain restrictions on protected rights which build up in contracted-out money-purchase occupational pension schemes and appropriate schemes (a personal pension scheme that meets the requirements of section 7(4) of the Pension Schemes Act 1993.). *Subsections (3) to (5)* enable regulations to provide for protected rights to be paid as lump sums in certain circumstances and subject to certain restrictions. *Subsections (6) and (7)* remove the restrictions as to the age at which members’ protected rights can be given effect, except in occupational pension schemes where, unless the member agrees a later date, they must be given effect to no later than the member’s 65<sup>th</sup> birthday.

**Stakeholder pensions**

***Section 285: Meaning of “stakeholder pension scheme”***

1143. This section makes two clarifying amendments to section 1 of the Welfare Reform and Pensions Act 1999 (the WRAP Act) which outlines the meaning of ‘stakeholder pension scheme’. The section amends section 1(5) of the WRAP Act to clarify that the limitation on the application of stakeholder pension funds of scheme members to defray administrative expenses (the “charge cap”) applies not only to contributions paid by or on behalf of members, but also to contributions paid by an employer on his own account to the designated scheme of one of his employees, and contributions made by another third party such as a relative. The section therefore amends reference to member contributions to cover contributions made ‘by, or on behalf or in respect of’. This section also inserts section 1(10) into the WRAP Act, to clarify that stakeholder pension schemes must be contracted-out schemes to satisfy a qualifying condition for registration by the Regulator to the effect that they must accept transfer payments (including contracted-out rights) in respect of members’ rights in other private pension schemes.