

THE LAW COMMISSION
The SCOTTISH LAW COMMISSION
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Pensions Schemes Bill

Report on the Consolidation of the Legislation Relating to Pension Schemes

Presented to Parliament by the Lord High Chancellor and the Lord Advocate
by Command of Her Majesty

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THE LAW COMMISSION AND
THE SCOTTISH LAW COMMISSION

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Pension Schemes**

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain,
and the Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate*

The Pension Schemes bill which is the subject of this Report consolidates the legislation relating to pension schemes. In order to produce a satisfactory consolidation it is necessary to make the following recommendations.

The Treasury, the Department of Social Security, the Department of Employment, the Occupational Pensions Board, the Pension Law Review Committee, the National Association of Pension Funds, the Association of Pension Lawyers and the Friendly Societies Liaison Committee have been consulted in connection with the consolidation and do not object to any of the recommendations.

(Signed) HENRY BROOKE, *Chairman, Law Commission*
C K DAVIDSON, *Chairman, Scottish Law Commission*

26 April 1993

Recommendations

1. *Widowers*

Section 52C(5) of the Social Security Pensions Act 1975 sets out the requirements to be met by arrangements by which the trustees of contracted-out pension schemes secure guaranteed minimum pensions under the schemes. If the arrangements meet the requirements the trustees can discharge their liability for those pensions.

The 1975 Act was originally drafted with references to requisite benefits rather than guaranteed minimum pensions. Requisite benefits were benefits for the earner or his widow. But amendments made by the Social Security Act 1986 substituted for the requirement for "requisite benefits" requirements that the earner himself and the earner's widow *or widower* should have a guaranteed minimum pension. Accordingly, section 9(4) of the Social Security Act 1986 provides that many provisions in the legislation should be construed as if references to "widows" included "widowers" and with "consequential modifications".

Section 9(4) failed to list section 52C(5) amongst the provisions containing references to "widow" which should be so construed. It did, however, mention section 52D. Thus section 52D(1)(a) must be read as referring to the securing of guaranteed minimum pensions for a member or the member's widow *or widower as mentioned in section 52C* and section 52D(4) as referring to a scheme having ceased *by virtue of section 52C* to be liable to provide guaranteed minimum pensions for a member and a member's widow *or widower*. It seems plain therefore that the omission of a reference in section 9(4) to section 52C was a mistake and we recommend that the reference in section 52C(5) to a widow should be read as including a widower.

The same reasoning applies to the failure of section 9(4) of the Social Security Act 1986 to refer to section 41B(1A)(d) despite the fact that that section refers back to section 41B(1) which is referred to in section 9(4). We recommend that the reference in section 41B(1A)(d) to a widow should be read as including a widower.

This recommendation is given effect to in *Clauses 19(5)(a) and 87(4)* of the Bill.

2. *Enforcement of liability for state scheme premiums*

Section 152(3) of the Social Security Act 1975 provided that where, in criminal proceedings for failure to pay contributions or for certain other offences relating to liability for contributions, a court in Scotland granted an absolute discharge or made a probation order under Part I of the Criminal Justice (Scotland) Act 1949, the discharge or probation order was, for the purposes of sections 150 and 151 (which contained provisions regarding enforcement of liability), to be treated as a conviction on indictment or a summary conviction, according to whether the proceedings were solemn or summary.

Section 152 of the 1975 Act was repealed by the Social Security (Consequential Provisions) Act 1992. Paragraph 36 of Schedule 2 to that Act inserted a new section 60ZF in the Social Security Pensions Act 1975, reproducing the effect of section 152 so far as it related to state

pensions. Subsection (3)(b) of section 60ZF, relying on section 17(2)(a) of the Interpretation Act 1978, contains a reference to Part I of the Criminal Procedure (Scotland) Act 1975 in place of the reference to Part I of the Criminal Procedure (Scotland) Act 1949, which the Scottish 1975 Act had repealed. Part I of the Scottish 1975 Act, however, relates only to proceedings on indictment whereas Part I of the 1949 Act related both to such proceedings and to summary proceedings. Section 60ZF(3) refers to both solemn and summary proceedings and it is clear that the reference to Part I of the Scottish 1975 Act rather than to the whole Act is a mistake. We therefore recommend that the reference to the Criminal Procedure (Scotland) Act 1975 in section 60ZF(3)(b) should be to the whole Act and not just to Part I.

This recommendation is given effect to in *Clause 68(3)(b)* of the Bill.

3. *Adaptation for Scotland of references to bankruptcy*

Paragraph 16(3)(b) of Schedule 16 to the Social Security Act 1973 provides that an occupational pension scheme may contain provision for the forfeiture of short service benefit by reference to the bankruptcy of the member of the scheme or, in certain cases, the beneficiary.

Bankruptcy is not a term of art in Scots law and other references to bankruptcy in the pensions legislation have accordingly been specifically adapted for Scotland: see, for example, paragraph 5(2) of Schedule 17 to the 1973 Act. There is no apparent reason why paragraph 16(3)(b) of Schedule 16 should not extend to Scotland and the absence of a Scottish adaptation is, in our view, an oversight. The appropriate equivalent Scottish concept is sequestration of the estate of the member or beneficiary and we recommend that paragraph 16(3)(b) should be amended accordingly.

This recommendation is given effect to in *Clause 78(3)(b)* of the Bill.

4. *Friendly societies*

Section 71 of the Social Security Act 1973 enables regulations to be made, after consultation with the Chief Registrar of Friendly Societies, for enabling friendly societies registered under the Friendly Societies Act 1974 to conduct certain insurance business with a view to the establishment of occupational pension schemes. Paragraph 7 of Schedule 10 to the Social Security Act 1986 applies section 71 to personal pension schemes too.

The Friendly Societies Act 1992 provided for the cessation of registration under the 1974 Act and introduced a new system for the establishment of friendly societies. A society established under the 1992 Act is incorporated from the date of its registration under that Act. A society which is a registered friendly society within the meaning of the 1974 Act may apply to be registered and incorporated under the 1992 Act and when it does so its registration under the 1974 Act will be cancelled. Therefore all new societies will be incorporated and registered under the 1992 Act and as time goes by an increasing number of societies originally registered under the 1974 Act are likely to become so.

The 1992 Act also established the Friendly Societies Commission to administer the system of regulation of friendly societies, conferring a number of functions under the 1992 Act on it and transferring some functions under the 1974 Act to it. Although the Chief Registrar of

Friendly Societies continues to have some functions, it is envisaged that they will decrease in volume and he will be superseded by the Commission as times goes by.

The 1992 Act was passed with great speed immediately before the dissolution of Parliament in 1992. It failed to amend section 71 of the Social Security Act 1973 so as to refer to societies incorporated under the 1992 Act. We recommend that section 71 should be amended so as to extend to such societies and that regulations under section 71 should be made after consultation with either the Chief Registrar of Friendly Societies or the Friendly Societies Commission.

This recommendation is given effect to in *Clauses 162 and 185(7)* of the Bill.

5. *Modification of provisions in Social Security Act 1986 as respects foreign cases - evidence*

Section 80 of the Social Security Act 1986 enables certain provisions in that Act to be modified in their application to persons outside Great Britain etc. Section 80(2)(d) permits the regulations to provide for the taking of evidence by a British consular official "or such other person as may be determined". There is no provision, however, as to how the matter is to be determined, but we believe that "determined" must mean "determined in accordance with regulations", and that the provision should be expanded accordingly. (A similar recommendation was made as respects this provision as it applied to certain provisions in the 1986 Act relating to statutory maternity pay in the Report of the Law Commission and the Scottish Law Commission on the Consolidation of the Legislation relating to Social Security (Cm 1726). It was agreed to by the Joint Committee and was given effect to in what is now section 170(2)(d) of the Social Security Contributions and Benefits Act 1992.)

This recommendation is given effect to in *Clause 165(3)(d)* of the Bill.

6. *Definition of "normal pension age"*

The definitions of normal pension age in section 66(1) of the Social Security Pensions Act 1975 and paragraph 4 of Schedule 16 to the Social Security Act 1973 are similar but not quite identical. We recommend that for simplicity the definition from the 1973 Act be adopted throughout. We do not believe that this makes any material difference.

This recommendation is given effect to in *Clause 180* of the Bill.

7. *Reference of proposed regulations to the Occupational Pensions Board*

Under section 61(2) of the Social Security Pensions Act 1975 where the Secretary of State proposes to make regulations for the purposes of Parts III and IV of that Act or Part I of the Social Security Act 1986, he is required to refer the proposals to the Occupational Pensions Board. Schedule 3 to the Social Security Act 1990 inserted a new Part IVA in the 1975 Act (which established the Pensions Ombudsman). Section 13(1) of the 1990 Act inserted section 59K in Part V of the 1975 Act (conferring power to make regulations about the registration of occupational and personal pension schemes). Paragraph 12 of Schedule 4 to the 1990 Act inserted section 60ZA in that Part (conferring power to make regulations for imposing levy in respect of occupational or personal pension schemes).

The 1990 Act omitted to make provision about the reference of regulations proposed to be made under the inserted provisions. It did not amend section 61(2) to refer to these extra

provisions so as to require regulations relating to pensions to be referred to the Occupational Pensions Board and it did not except these provisions from section 9(7) of the Social Security Act 1980 (with the result that they fell by default to be referred to the Social Security Advisory Committee, which is the appropriate body to consider regulations about state pension benefits rather than private benefits). The Report of the Law Commission and the Scottish Law Commission on the Consolidation of the Legislation relating to Social Security (Cm 1726) included a recommendation that such regulations should not be referred to the Social Security Advisory Committee. It was agreed by the Joint Committee and was given effect in what is now section 170(5) of the Social Security Administration Act 1992.

We now recommend that the omission to amend section 61(2) be rectified so that these regulations must be referred to the Occupational Pensions Board.

This recommendation is given effect to in *Clause 185(1)* of the Bill.