

These notes refer to the Pensions (No. 2) Act (Northern Ireland) 2008 (c.13) which received Royal Assent on 15 December 2008

Pensions (No. 2) Act (Northern Ireland) 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

PART 1 – Pension Scheme Membership for Jobholders

CHAPTER 1 – Employers’ Duties

Section 1: Jobholders

This section defines “jobholder” for the purpose of the employer duty as a worker who ordinarily works in Northern Ireland, is aged between 16 and 75 and who earns qualifying earnings (as defined in [section 13](#)). This section also provides that where a jobholder has more than one employer, the employer duty provisions apply separately in relation to each employment.

Section 2: Continuity of scheme membership

This section prevents an employer in any way facilitating the end of a jobholder’s active membership of a qualifying scheme or causing a scheme to cease to be a qualifying scheme (by action or omission) without putting the member into another qualifying scheme (within a time period to be prescribed by the Department). This means that employers have an ongoing duty to ensure that jobholders always have access to a qualifying scheme. This duty does not apply if the jobholder ends membership of their own accord and the duty only applies so long as the jobholder is employed by the employer.

Section 3: Automatic enrolment

[Section 3](#) introduces the employer obligation to automatically enrol jobholders aged between 22 and state pension age into a scheme that fulfils the criteria for an “automatic enrolment scheme” (see [section 17](#)). Automatic enrolment must take place when the individual first meets the relevant criteria (i.e. is a jobholder, is over 22 and is paid qualifying earnings) in that employment. This is known as the “automatic enrolment date” ([subsection \(7\)](#)).

The section contains a power which allows the Department to set out in regulations the steps the employer must take to arrange for the jobholder to be automatically enrolled ([subsection \(2\)](#)).

This obligation does not apply if, within a prescribed period, the jobholder has been an active member of a qualifying scheme in that employment, but chose to end membership (*subsection (4)*). This is to prevent jobholders being automatically enrolled into a scheme soon after they decided to leave.

The employer may be required, as part of the regulated automatic enrolment process, to provide prescribed information to any person, in particular the trustees or managers of an occupational pension scheme or the provider of a personal pension scheme (*subsection (5)*). This will enable the provision of information about a jobholder to the scheme to enable their enrolment.

There is a power which enables the Department to make regulations to deem an agreement to exist between the jobholder and the provider for the purposes of *subsection (2)* where the employer fulfils their employer duty obligation by automatically enrolling the jobholder into a personal pension scheme that meets prescribed conditions (*subsection (6)*).

Section 4: Postponement of automatic enrolment

Section 3 establishes that the effective date of automatic enrolment must be the first day on which the jobholder becomes eligible. *Section 4*, however, provides for the possibility of delaying initial automatic enrolment in circumstances prescribed in regulations. The period of permitted deferral will be established in regulations.

Employers that are permitted to delay automatic enrolment may be required to ensure that members remain in such a scheme for a prescribed period of time, unless the jobholder leaves that employment or chooses to leave the scheme. This will enable the member to make up pension savings foregone during the initial delay period.

Section 4 will operate as part of the ongoing duty and not just during the implementation period.

Section 5: Automatic re-enrolment

This section sets out the duty on employers to periodically automatically “re-enrol” into an automatic enrolment scheme jobholders who are aged at least 22 and under pensionable age who are not already members of a qualifying scheme.

As with automatic enrolment, this obligation does not apply if the jobholder chose to end membership, in that employment, within a prescribed period before the re-enrolment date (*subsection (4)*). This is to prevent re-enrolment soon after the jobholder has chosen to leave the scheme.

There is a power which enables the Department to make regulations to deem an agreement to exist between the jobholder and the provider for the purposes of *subsection (2)* where the employer fulfils their employer duty obligation by automatically enrolling the jobholder into a personal pension scheme that meets prescribed conditions (*subsection (7)*).

Section 6: Timing of automatic re-enrolment

Section 6 provides that regulations will determine that re-enrolment will not occur more frequently than once every three years for either the jobholder or the employer. It then sets out exceptions whereby regulations may be made to enable re-enrolment to take place more frequently than once in a three year period.

Section 7: Jobholder's right to opt in

There may be jobholders who are not participating in workplace saving because they opted out or cancelled their active membership, or do not qualify for automatic enrolment because they are aged between 16 and 22 or between pensionable age and age 75.

Section 7 allows such jobholders to require their employer to make arrangements to enrol them into an automatic enrolment scheme by giving them notice. The jobholder can give notice to opt in under this section more than once in a 12 month period, although the employer is not obliged to accept more than one notice in 12 months. Therefore, employers are not required to keep enrolling a jobholder who has opted out a number of times in the same year.

This process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (4)*).

Section 8: Jobholder's right to opt out

This section establishes the right of a jobholder who has been automatically enrolled (or re-enrolled) into an automatic enrolment workplace pension scheme to opt out of that membership by providing a signed notice to their employer within a prescribed period indicating that they choose not to participate. The form and content of this notice will be set out in regulations, as will the period during which they can choose to opt out, to whom the jobholder must give notice of opt-out and arrangements which must be made to give effect to an opt out decision. The opt-out notice must include information relating to the effect of opting out on the jobholder. Opting out in this context refers to the specific decision not to participate in a pension scheme from the point of enrolment. Once in a scheme, an active member is subsequently free to cancel membership at any time and this section does not interfere with that established right.

Once a jobholder has opted out they will be treated as if they had never been a member of that qualifying scheme. In effect this means that they will not have any rights in the scheme and any contributions collected from the jobholder and the employer will be refunded (*subsection (2)(b)*).

Regulations will also establish how and by when refunds must be made and how they are calculated.

Section 9: Workers without qualifying earnings

There may be people who do not qualify for automatic enrolment and who are not participating in workplace saving. Although they ordinarily work in

Northern Ireland and are aged at least 16 and under 75 (two of the three qualifying conditions for a jobholder in *section 1*) they do not have qualifying earnings, as defined in *section 13*.

Section 9 allows workers without qualifying earnings to require their employer to make arrangements to enrol them into a pension scheme by giving notice. The worker may give notice to opt in under this section more than once in a 12 month period, although the employer is only obliged to act on one request in a 12 month period. This doesn't prohibit the employer allowing workers to join the scheme at other times by agreement. An employer is not obliged to make any matching contribution but may choose to do so.

The enrolment process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (3)*).

For the purposes of this section a pension scheme may be either an occupational pension scheme, or a personal pension scheme registered under the Finance Act 2004. Also, a personal pension scheme must have direct payment arrangements, within the meaning of section 107A of the Pension Schemes (Northern Ireland) Act 1993, between the worker and the employer. "Direct payment arrangements" are either where the employer makes a contribution and sends it to the worker's scheme or where the employer deducts contributions from the worker's earnings and forwards these to the worker's scheme on behalf of the worker.

Section 10: Information to be given to workers

This section provides that regulations must require information to be given to the jobholder about the effect on them of automatic enrolment, re-enrolment, postponement of automatic enrolment, giving notice to opt in and the right to opt out. This might include, for example, information about the scheme into which they have been enrolled, what will happen next and their right to opt out of pension saving. The regulations will also prescribe who must provide the information and when it must be provided.

Section 11: Information to be given to the Pensions Regulator

Section 11 gives the Department power to make regulations requiring employers to provide information to the Pensions Regulator about how they are complying, or intend to comply, with the employer duties, including information relating to the pension schemes that are to be used. An example of information that may be required is information about the scheme into which an employer will be automatically enrolling jobholders.

This section works with the provisions in Chapters 2 and 4 of this Part, by enabling the Regulator to obtain the information needed to support the compliance regime.

Section 12: Introduction of employers' duties

This section provides the Department with a power to make regulations permitting employers of any description to start discharging their duties (including those on continuity of scheme membership, automatic enrolment and re-enrolment, and allowing opt-in and opt-out) after other employers. This will allow the introduction of the employer duties to be staged over a period of time.

Section 13: Qualifying earnings

This section defines qualifying earnings, by reference to an earnings band, with lower and upper limits of £5,035 and £33,540 per annum (in 2006/07 earnings terms), on which pensions contributions will be calculated for money purchase schemes. Having qualifying earnings (i.e. above £5,035) is a criterion of being a "jobholder" and so is a factor in determining whether a worker is to be automatically enrolled.

The section defines "earnings" as monetary sums comprising: wages/salary, commissions, bonuses, overtime and certain statutory benefits. It also enables the Department to set out in regulations other sums that can be considered as part of "earnings".

Section 14: Review of qualifying earnings band

Section 14 of the Pensions Act 2008 requires the Secretary of State to review annually the value of the qualifying earnings lower and upper limits and amend them to maintain their value. *Section 14* enables the Department to make corresponding provision for Northern Ireland.

Section 15: Pay reference period

The pay reference period is the period of earnings over which the calculation is made to (a) determine whether the jobholder should be automatically enrolled (i.e. with earnings more than £5,035 per annum) and (b) calculate the level of contributions that the jobholder and employer need to pay for money purchase schemes. While the qualifying earnings band established in *section 13* is expressed in annual terms (and 12 months is the default pay reference period), this section allows the Department to prescribe alternative periods because of the different types of workers and different pay periods used by employers. There is a need to enable the pay reference period to be tailored to specific worker and payment type. For example, agency workers might require a much shorter calculation period than salaried employees.

Section 16: Qualifying schemes

This section defines a qualifying scheme. Qualifying schemes are those that meet minimum standards and quality requirements, which can be used by employers in discharging their obligations under *section 2*.

A qualifying scheme can be either an occupational pension scheme or a personal pension scheme. Qualifying schemes must meet the quality requirement for the scheme type (see [sections 20 to 27](#)). They must also be registered under Chapter 2 of Part 4 of the Finance Act 2004, which means that they are registered for tax relief.

Subsection (2) enables regulations to dis-apply the requirement to be tax registered for schemes based outside of the United Kingdom if they meet further requirements to be prescribed in regulations. The further requirements are likely to refer to schemes operating outside the United Kingdom with members who will receive United Kingdom tax relief on their contributions.

The Department may by regulations set out the circumstances in which a scheme, that would otherwise qualify, is not a qualifying scheme. This can be where the payments and contributions – for example annual management charges - that must be made to the scheme exceed a prescribed amount (*subsection 3(a) and (b)*); or the scheme provides average salary benefits and contains prescribed features (*subsection 3(c)*).

Section 17: Automatic enrolment schemes

There will be additional requirements on schemes that are used for the purposes of automatic enrolment, automatic re-enrolment and allowing opt-in. These schemes must be qualifying occupational pension schemes or qualifying personal pension schemes and must also enable automatic enrolment to take place. An automatic enrolment scheme must not require jobholders who are enrolled to express a choice, or provide information, in order to remain active members. For example, a jobholder will not be required to make a choice about the fund into which their contributions may be invested. Nor can the scheme refuse membership on the grounds that the jobholder does not provide information. An automatic enrolment scheme must also satisfy any further conditions that may be prescribed in secondary legislation.

Section 18: Occupational pension schemes

For the purposes of this Part, occupational pension schemes are those which fall within the definitions set out in *paragraphs (a) and (b)* or are of a prescribed description if they are based outside the European Economic Area.

Section 19: Personal pension schemes

Personal pension schemes are defined as those that fall outside the definition of an occupational pension scheme (see [section 18](#)).

Section 20: Quality requirement: UK money purchase schemes

In order to be deemed a qualifying scheme, a United Kingdom occupational money purchase scheme must have rules that assure an employer contribution of at least 3% of qualifying earnings and total contributions paid by the employer and jobholder of at least 8% (including tax relief).

The Pensions Act (Northern Ireland) 2008 legislates for the repeal of contracting out arrangements for money purchase schemes currently provided for under the Pension Schemes (Northern Ireland) Act 1993. However, in the event that this has not occurred when the employer duties commence, *subsection (2)* enables regulations to be made to modify the contributions required for money purchase schemes with members whose employment is contracted-out of the State Second Pension Scheme.

Section 20 also contains a regulation-making power that allows the Department to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with such minor amounts of contributions which are uneconomic to administer.

Section 21: Quality requirement: UK defined benefits schemes

Section 22: Test scheme standard

Section 23: Test scheme

Section 21 provides that the quality requirement for defined benefits schemes depends on whether or not the jobholder is in contracted-out employment, as defined under the Pension Schemes (Northern Ireland) Act 1993.

If a jobholder is in contracted-out employment, evidenced by a certificate issued under section 3(1) of the Pension Schemes (Northern Ireland) Act 1993, the scheme satisfies the quality requirement in relation to that jobholder. *Subsection (3)* enables the Department to change, by order, the quality requirement so that a scheme does not qualify on the evidence of contracting out alone, but is required to meet a modified version of the test scheme standard (see *sections 22* and *23*) with an accrual rate of no more than 1/80th rather than 1/120th as set out in *section 23(4)(a)*.

For jobholders who are members of a defined benefits scheme and are not in contracted-out employment, the scheme must meet the test scheme standard (see *section 22*).

Section 22 provides that a scheme satisfies the test scheme standard if it provides benefits for the relevant members of the scheme that are broadly equivalent to, or better than, the benefits provided by a model test scheme – set out in *section 23*. Relevant members are (*subsection (2)*):

- for a jobholder who is not in contracted-out employment, the jobholder and all active members who are not in contracted-out employment and are jobholders of the same employer;
- for a jobholder who is in contracted-out employment, the jobholder and all active members who are in contracted-out employment and are jobholders of the same employer.

In making a comparison when applying this section, the pensions of relevant members must be considered as a whole (*subsection (3)*). A regulation-making power enables the Department to set out detail on how comparison with the model test scheme will be done (*subsection (4)*). Regulations under *subsection (4)* may provide for the determination to be made in accordance with guidance issued by the Department (*subsection (5)*).

Under *subsection (6)*, the Department may provide, by regulations, that an actuary will be required to confirm that a scheme meets the test.

The model test scheme on which the comparison is made is set out at [section 23](#). It provides a pension for life based on a maximum of 40 years of accruals at an annual rate of 1/120th.

Section 24: Quality requirement: UK hybrid schemes

Hybrid schemes have a mix of defined benefits and money purchase elements. In order to qualify they will be required to satisfy the quality requirement for either money purchase schemes ([section 20](#)) or defined benefits schemes ([sections 21 to 23](#)). The quality requirements set out in *subsections (1)(a)* and *(1)(b)*, which are those for money purchase schemes and defined benefits schemes, respectively, can be modified by regulations in their application to certain hybrid schemes.

Employers will be directed to the quality requirement they should use for a hybrid scheme in rules made by the Department (*subsection (2)*).

Section 25: Quality requirement: non-UK occupational pension schemes

[Section 25](#) enables the Department to regulate for the quality criteria of non-United Kingdom based occupational pension schemes.

Section 26: Quality requirement: UK personal pension schemes

[Section 26](#) provides the conditions which a United Kingdom personal pension scheme must meet in order to satisfy the quality requirement. In order to qualify, personal pension schemes must only provide money purchase benefits (*subsection (3)*). The employer must be required to contribute at least 3% of qualifying earnings (*subsection (4)*) and the jobholder must be required to make up any shortfall in contributions up to a contributions total of 8% (to include 1% tax relief) of qualifying earnings in the pay reference period (*subsections (5) and (6)*). There will need to be agreements between the scheme, the employer and the jobholder confirming the contributions required. The employer must be required to pass over contributions to the scheme on the basis of direct payment arrangements within the meaning of section 107A of the Pension Schemes (Northern Ireland) Act 1993 (*subsection (7)*).

As with money purchase schemes ([section 20](#)) there is also a provision to alter contribution levels should the repeal of contracting-out for money purchase schemes not have occurred by the time these duties commence.

Subsection (9) contains a regulation-making power that allows the Department to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with minor amounts of contributions which are uneconomic to administer.

Section 27: Quality requirement: other personal pension schemes

This section allows the Department to prescribe quality requirements for non-United Kingdom personal pension schemes.

Section 28: Sections 20, 24 and 26: certification that quality requirement is satisfied.

This section confers a power on the Department to make regulations which will enable employers to certify that a scheme satisfies the relevant quality requirement under *sections 20, 24 or 26*. This is subject to any provision made by the regulations as to cases where the requirements of a scheme, and any agreement under section 26, for payment of contributions did not satisfy prescribed conditions.

Section 29: Transitional periods for money purchase and personal pension schemes

This section sets out how employers operating qualifying occupational money purchase schemes and personal pension schemes will be able to phase in their contributions over two transitional periods.

This is achieved by setting lower contributions in the quality requirements over two transitional periods. Both transitional periods shall last at least 1 year and the exact duration of both will be prescribed in regulations.

In the first period, scheme rules must require employer contributions of at least 1% and a total contribution of at least 2% of the jobholder's qualifying earnings in the pay reference period. For the second period, the minimum contributions will increase to 2% from the employer and 5% overall.

Section 30: Transitional period for defined benefits and hybrid schemes

This section sets out the phasing arrangements for employers operating defined benefits or hybrid schemes. It enables those employers to delay automatic enrolment, for a specific group of jobholders for a transitional period to be prescribed in regulations.

Subsection (2) defines the conditions which must be satisfied for inclusion in this group of jobholders. They must be existing jobholders of the employer who have previously been, and remain, able to join a qualifying defined benefits or hybrid scheme.

The employer must automatically enrol such jobholders into a qualifying defined benefits or hybrid scheme by the end of the transitional period. If, before

the transitional period ends, a jobholder ceases to be able to join a defined benefits or hybrid scheme or if the scheme they are eligible for ceases to qualify (*subsection (4)*), then the employer must automatically enrol the jobholder into alternative qualifying provision.

If the alternative scheme is another defined benefits or hybrid scheme, the employer must ensure membership is effective from the date on which the original scheme ceased to qualify or be available for the jobholder (i.e. the scheme closure date) (*subsection (5)*). *Subsection (6)* provides that if the alternative scheme is a money purchase scheme, then the employer must make membership effective from the original automatic enrolment date by paying backdated employer contributions.

Section 31: Effect of freezing order or assessment period

This section provides that active membership of a qualifying scheme does not cease for a jobholder or worker (this includes where a worker has opted in to the scheme under *section 9*) for the purposes of the employer duties when the accrual of benefits in that scheme has been frozen either by an order imposed by the Pensions Regulator or because of an assessment by the Pension Protection Fund. Nor will the scheme cease to be a qualifying scheme in such circumstances.

Section 32: Power of trustees to modify by resolution

Subsection (1)(a) enables trustees to make changes to a scheme necessary to comply with the conditions in *section 17(2)* (automatic enrolment schemes), for example, making a scheme suitable for automatic enrolment by removing any condition of membership which requires a choice of investment to be made.

Subsection (1)(b) allows changes to enable contributions payable to a scheme to be increased to comply with *section 20* or *section 24(1)(a)*. The permitted changes are to increase the contribution rate, the basis on which it is calculated or the frequency of its payment (*subsection (2)*). However, changes cannot be made without consent of the employer (*subsection (3)*).

Subsection (4) makes separate provision for those schemes where there is more than one employer.

Regulations may provide that this section does not apply to prescribed occupational pension schemes (*subsection (5)*).

Section 33: Deduction of contributions

An employer who automatically enrolls, re-enrolls or arranges opt in for a jobholder into a scheme is permitted to deduct the jobholder's contributions from the jobholder's remuneration and pay them to the scheme.

Regulations may require the employer to make such a deduction at any time on or after the date from which the jobholder becomes a scheme member (*subsection (2)*).

CHAPTER 2 – Compliance

Section 34: Effect of failure to comply

Section 34 provides that no private right of action for breach of statutory duty arises against an employer who has failed to comply with requirements set out in the employer duty provisions (*sections 2 to 11* or regulations under those sections). Under the Act the Pensions Regulator is the sole body responsible for taking action against such breaches.

Subsection (2) provides that nothing in Chapter 2, or in the employer duty provisions, is intended to affect any right of action which might arise otherwise than under these provisions.

Section 35: Compliance notices

Section 36: Third party compliance notices

This Act introduces powers for the Pensions Regulator to issue compliance notices. Where the Regulator is of the opinion that a contravention of the employer duties has occurred, a compliance notice will be the formal method of communicating the actions that should be taken to comply, and the consequences of not doing so. Compliance notices will generally be the first step in the graduated compliance regime.

Section 35 gives the Pensions Regulator the power to issue a compliance notice to a person who has breached an employer duty. Employer duties will generally apply to employers, but may also apply to other persons specified in regulations. A compliance notice will direct the recipient to put right their breach of the employer duty.

A compliance notice may require the recipient to take specific steps to place the jobholder in the same position, as nearly as possible, as if the breach had not occurred (*subsections (4) and (5)*).

Section 36 provides that a “third party compliance notice” can be issued to a person (the third party) if the Pensions Regulator is of the opinion that a person has contributed to a breach of the employer duties by someone else who is subject to the duties. A third party compliance notice will direct the recipient to put right the action or inaction that contributed to the breach of the duty.

An example of where a third party compliance notice might be issued is where a scheme or pension provider has failed to process the enrolment information it has received from the employer and this prevents the employer from meeting the enrolment duty.

Section 37: Unpaid contributions notices

In addition to compliance notices, *section 37* provides the Pensions Regulator with the power to issue an unpaid contributions notice to an employer if it is of the opinion that an employer has failed to pay the required contributions on time.

Section 37 makes provision for what an unpaid contributions notice is, to which contributions it is applicable and what information may be included in the notice.

Section 38: Calculation and payment of contributions

Section 38 makes provision for the calculation of unpaid contributions in respect of (*subsection (1)*):

- a compliance notice issued for contravention of section 2(1), or a failure to comply with, an enrolment duty; or
- an unpaid contribution notice.

Subsection (2) provides that a notice may require the employer to calculate the amount of contributions that have not been paid into the scheme. The notice may also require that, where contributions are made within a prescribed period after a certain date, the employer must pay their own contributions with the worker having the option to pay their own, but not being obliged to do so. However, where contributions are not made during that prescribed period of time, the employer must pay all outstanding contributions.

Section 38 also enables the Pensions Regulator to estimate the amount of unpaid contributions using information other than that provided by the employer (for example, information held by Her Majesty's Revenue and Customs or the employee's scheme) and to require employers to pay interest on unpaid contributions (*subsections (3) and (4)*).

Section 39: Meaning of "relevant contributions"

Section 39 provides that "relevant contributions", for the purposes of *sections 37 and 38*, includes both contributions payable directly by an employer into a scheme and contributions payable by an employer on behalf of a worker out of deductions from the worker's earnings. The section also provides that the definition applies for both jobholders and for workers without qualifying earnings under *section 9*.

Section 40: Fixed penalty notices

Section 41: Escalating penalty notices

Section 42: Penalty notices: recovery

Sections 40 to 42 provide the Pensions Regulator with powers to issue penalty notices where the Regulator is of the opinion that there has been a failure to comply with a compliance notice, a third party compliance notice, an unpaid contributions notice, a notice requiring certain information (Article 67 of the Pensions (Northern Ireland) Order 2005) or any of the provisions listed in *section 40(2)*.

A fixed penalty notice (*section 40*) will require the person to whom it is issued to pay a penalty of up to £50,000 within a specified timeframe. Regulations will set out the actual penalty rate.

An escalating penalty notice (*section 41*) can be issued in cases where there is continuing failure to comply – such as where a fixed penalty notice has been ignored. The penalty will escalate at a rate prescribed in regulations but will not exceed £10,000 per day.

An escalating penalty notice cannot be issued if the Regulator is in the process of undertaking a review of a compliance notice, a third party compliance notice or an unpaid contributions notice, following an application for review by the person to whom such a notice was issued. The Regulator may not issue an escalating penalty notice if the person has exercised his right to make a referral (appeal) to the Pensions Regulator Tribunal against a fixed penalty notice and the referral has not yet been determined (*subsection (2)*).

The Regulator can recover any penalty payable under *sections 40* or *41*. Any such penalties recovered by the Regulator must be paid into the Consolidated Fund (*section 42*).

Section 43: Review of notices

Section 43 provides that the Pensions Regulator may review a notice issued under Chapter 2 if it is asked to do so by the person to whom the notice was issued, or if the Regulator considers it to be appropriate (*subsection (1)*).

Regulations may prescribe the time period in which the person to whom the notice was issued can apply for review of the notice and the period in which the Regulator may otherwise review the notice (*subsection (3)*).

Subsections (4) and *(5)* provide that the effect of a notice is suspended until a review is completed, and must take into consideration any representations made by the person to whom the notice was issued.

Subsection (6) sets out the Regulator's powers in reviewing a compliance notice. The Regulator may confirm, vary or revoke the notice, or it can choose to replace the notice with a different one.

Section 44: References to the Pensions Regulator Tribunal

Section 44 provides that a person who has received a fixed or escalating penalty notice may submit an appeal to the Pensions Regulator Tribunal against the issue of the notice and/or the amount of the penalty (*subsection (1)*).

Subsection (2) provides that a person making a reference (appeal) must first request a formal review by the Pensions Regulator, unless the Regulator itself initiates a review. The Regulator may, however, decide not to undertake a review.

Subsection (3) provides that the effect of a notice is suspended on a reference to the Pensions Regulator Tribunal and sets out the period of suspension.

Subsection (5) amends Article 97 of the Pensions (Northern Ireland) Order 2005 to provide for the period within which a reference to the Tribunal must be made.

Section 45: Offences of failing to comply

Section 46: Offences by bodies corporate

Section 47: Offences by partnerships and unincorporated associations

Sections 45 to 47 make it a criminal offence for employers to wilfully fail to comply with specified duties.

These duties are automatic enrolment (*section 3(2)*), re-enrolment of eligible jobholders into an automatic enrolment scheme (*section 5(2)*) and the requirement to enrol jobholders into an automatic enrolment scheme at the jobholders' request (*section 7(3)*).

Section 45(2) provides that a person who commits such an offence could face imprisonment for up to two years and/or a fine on conviction on indictment. On summary conviction, they are liable for a fine not exceeding the statutory maximum.

Sections 46 and 47 and section 20 of the Interpretation Act (Northern Ireland) 1954 enable the following to be prosecuted for the *section 45* offence:

- specified individuals within a body corporate, as well as the body corporate itself (*section 46*);
- partnerships and individual partners; unincorporated associations and officers within these (*section 47*).

Section 48: Offences of providing false or misleading information

Section 48 extends Article 75(1)(a) of the Pensions (Northern Ireland) Order 2005, which deals with offences of providing false or misleading information, to include the offence of providing the Pensions Regulator with false or misleading information about the actions taken by the employer for the purpose of complying with the employer duties (under regulations under *section 11*).

Section 49: Monitoring of employers' payments to personal pension schemes

Section 107A of the Pension Schemes (Northern Ireland) Act 1993 makes provision about monitoring arrangements under which an employer pays contributions to personal pension schemes in respect of an employee. It also provides that fraudulent evasion of such arrangements is an offence. *Section 49* extends that section to apply to arrangements in respect of jobholders, defined in this Act, who would not otherwise fall within the definition of "employee", but who fall under the definition of "workers".

CHAPTER 3 - Safeguards: Employment and pre-employment

Sections 50 to *58* represent a package of pre-employment and employment safeguards to ensure that individuals' entitlements under the Act can be protected. The package contains three key elements. *Sections 50* to *53* introduce a prohibition on employers attempting to screen out job applicants on the basis that they want to be a member of a pension scheme. *Section 54* introduces a prohibition on employers acting (or attempting) to induce employees to opt out from, or cease, membership of a qualifying workplace pension scheme. Both these prohibitions will be enforced by the Pensions Regulator. *Sections 55* to *58* provide employees with a range of employment rights to enable them to present a complaint to an industrial tribunal if they feel they have been put at a disadvantage or dismissed as a result of their pension choices. The Regulator will not have a role in the enforcement of these rights.

Section 50: Prohibited recruitment conduct

Section 51: Compliance notices

Section 52: Penalty notices

Section 53: Review of notices and references to the Pensions Regulator Tribunal

Sections 50 to *53* introduce a prohibition on certain recruitment conduct and provide the Pensions Regulator with powers to notify employers of breaches of this prohibition and, subsequently, to issue penalties. *Section 50* provides that the prohibition is contravened if, in an application for employment, an employer makes a statement or asks a question that indicates that the application might be conditional on whether or not an applicant might opt out of auto-enrolment. A typical example would be if a job advertisement indicated that the applicant might stand more chance of success if he was prepared to opt out of auto-enrolment.

Section 51 enables the Pensions Regulator to issue a compliance notice to an employer where it is of the opinion that the employer has contravened *section 50* and outlines what the notice may contain. Notices may inform the employer what it must do in order to remedy their non-compliance with *section 50* or prevent it re-occurring. For example, an employer might be required by a notice to change the wording of an application form or other recruitment material for the future.

The notice may also set out the time periods within which employers have to take certain actions such as provide information about the contravention of the prohibition and how they have now complied with the notice. Compliance notices may also state that if an employer fails to comply with the requirements of the notice, the Regulator may issue a penalty notice.

Section 52 provides that the Pensions Regulator may issue penalty notices in respect of *section 50* and failure to comply with compliance notices issued under

section 51. The penalty must not exceed £50,000 and the person to whom the notice is issued (the employer) must pay the penalty within a specified period. *Subsection (4)* sets out what information must be in the penalty notice.

The Regulator will have the power to recover any penalties payable and any penalty recovered must be paid into the Consolidated Fund (*subsection (5)*).

Section 53 provides that the Pensions Regulator will have the ability to review both compliance and penalty notices, issued under *sections 51* and *52*, in respect of the recruitment conduct prohibition in *section 50*.

As with penalty notices issued under *section 40* or *41*, an employer will have the right of appeal to the Pensions Regulator Tribunal in respect of the issue of a penalty notice in relation to the recruitment conduct prohibition, or the amount of the penalty payable under that notice.

Section 54: Inducements

Section 54 introduces a prohibition on employers attempting to induce their workers to opt out from, or cease membership of, a qualifying workplace pension scheme and gives the Pensions Regulator the power to take compliance action against a contravention. An employer contravenes this prohibition if they take any action for the sole or main purpose of inducing a worker or jobholder to give up membership of a relevant scheme, without becoming an active member of another relevant scheme within the prescribed period under *section 2(3)*.

The Regulator may issue a compliance notice under *section 35* if it believes that the employer has contravened *section 54*.

A compliance notice cannot be issued unless the contravention occurred within a prescribed period before (i) a complaint to the Regulator was made about the contravention of the provision or (ii) the time when the Regulator informed the employer of an investigation of a contravention.

Section 55: The right not to suffer detriment

Section 56: Enforcement of the right

Section 55 provides a statutory right for workers not to be subjected to any detriment on specified grounds. For example, this right would protect a worker who might be denied promotion or training opportunities because of their decision not to opt out of pension scheme membership.

Subsection (4) provides that if the detriment in question amounts to dismissal, this section does not apply (but see *section 57*).

Section 56 provides that workers have a right to bring claims that they have been subjected to a detriment to an industrial tribunal. If the tribunal upholds a claim, it can make an award of compensation to be paid by the employer to the worker.

Section 57: Right of employee not to be unfairly dismissed

Section 57 inserts a new Article 135D into the Employment Rights (Northern Ireland) Order 1996, which protects an employee from being dismissed on grounds mirroring those specified in the right not to suffer detriment (*section 55*), for example, where an employee is dismissed for refusing to opt out of pension scheme membership.

As with the right not to suffer detriment, an employee who is dismissed on these specified grounds shall be regarded as having been unfairly dismissed, regardless of whether the employee concerned actually meets the eligibility criteria for the employer duty.

Section 58: Restrictions on agreements to limit operation of this Part

Subsection (1) renders void any agreement between a worker and their employer to either (a) exclude or limit the operation of any provision in Part 1 of this Act or (b) preclude a person from bringing proceedings under *section 56* (i.e. enforcement of the right not to suffer detriment) before an industrial tribunal.

Under the terms of this provision, an agreement between the worker and employer will be void and unenforceable by the employer, who will be further restricted (under *subsection (2)*) from recovering the financial or other benefit given in exchange for it.

Subsections (3) and (4) provide that *subsection (1)* will not apply where an employer and a worker have entered into any agreements under conciliation arrangements dealt with by a conciliation officer or under a compromise agreement (the conditions for which are listed in *subsection (5)*). These subsections ensure that *subsection (1)* does not undermine any conciliation process by inadvertently voiding any agreement made as part of the conciliation process.

CHAPTER 4 – Supplementary provision about compliance and information-sharing

Section 59: Requirement to keep records

Section 59 permits the Department to make provision requiring any person to keep records in a prescribed form for a prescribed period, not exceeding 6 years. Regulations may require the provision of such records, on request, to the Pensions Regulator.

The regulations may provide for the Regulator to apply penalties under Article 10 of the Pensions (Northern Ireland) Order 1995 where a person fails to comply with this requirement.

Section 60: Powers to require information and to enter premises

This section gives the Pensions Regulator powers to require information and to enter premises to ensure compliance. It amends Article 67 of the Pensions

(Northern Ireland) Order 2005 to permit the Regulator to require any person who holds or is likely to hold information relevant to the exercise of the Regulator's functions to provide an explanation of a document requested, at a specified time and place.

The Regulator will not be able to require anyone to answer any question or provide any information that might incriminate themselves or their partner or spouse (*subsection (2)*).

This section also amends Article 69 of the Pensions (Northern Ireland) Order 2005 to allow an inspector, appointed by the Regulator, to enter premises liable to inspection to investigate whether an employer is complying with requirements under Chapter 1 of Part 1, *section 50* or *54* or any corresponding provision in force in Great Britain (*subsection (3)*).

Section 61: Disclosure of tax information etc.

This section substitutes a new Article 83 of the Pensions (Northern Ireland) Order 2005. It allows Her Majesty's Revenue and Customs to disclose information on specified matters to the Pensions Regulator to enable the Regulator to discharge its functions (*subsection (2)*). The section allows Her Majesty's Revenue and Customs to share any information it holds in relation to tax or duty (including income tax), national insurance contributions or the national minimum wage (*subsection (1)*).

Section 61 also places controls on the Regulator's ability to disclose this information. Any information the Regulator receives from Her Majesty's Revenue and Customs under this section must be treated as restricted information (*subsection (3)*), and can only be disclosed if one of the following exceptions applies:

- Her Majesty's Revenue and Customs has authorised the disclosure (or the disclosure is back to Her Majesty's Revenue and Customs);
- it is needed for criminal proceedings;
- it is needed for civil proceedings started by the Regulator;
- it is needed for the Regulator to carry out its functions; or
- the data has been anonymised.

Information received by the Regulator from Her Majesty's Revenue and Customs under this section is specifically excluded from some of the grounds on which the Regulator can normally disclose information it holds. These are set out in Articles 77, 78 and 80-82 of the Pensions (Northern Ireland) Order 2005. This includes, for example, disclosure with the consent of the person to whom the information relates, or where necessary to help other specified regulatory bodies exercise their functions.

Section 62: Penalty for disclosure

Section 62 increases the maximum sentence on summary conviction for officials, contractors or any other people who directly or indirectly receive restricted information from the Pensions Regulator and who disclose such information without authorisation. Such unauthorised disclosure is already a criminal offence under Article 77 of the Pensions (Northern Ireland) Order 2005. This section makes anyone who is convicted of this offence liable, on summary conviction, to a prison term of up to six months and/or a fine not exceeding the statutory maximum.

Section 63: Objectives of the Regulator

Section 63 provides a new statutory objective for the Pensions Regulator. In addition to those listed at Article 4(1) of the Pensions (Northern Ireland) Order 2005, the Regulator's objectives will now include maximising compliance with the new duties being placed on employers under Chapter 1 of Part 1, and the safeguards in *sections 50* (prohibited recruitment conduct) and *54* (inducements).

Section 64: Functions of the Pensions Ombudsman

Section 64 gives the Pensions Ombudsman a new function, alongside his functions under section 142 of the Pensions Schemes (Northern Ireland) Act 1993, to investigate complaints relating to a jobholder opting out of a pension scheme. This clarifies that people who have opted out will be able to bring a complaint to the Ombudsman.

CHAPTER 5 – Personal Accounts Delivery Authority

Section 65: Functions and winding up

This section makes provision for broadening the Personal Accounts Delivery Authority's functions. It provides that section 16 of the Pensions Act (Northern Ireland) 2008, which sets out the initial functions of the Authority in Northern Ireland, shall cease to have effect (*subsection (1)*). It allows for the Authority not only to advise and prepare but also to take forward the implementation work to establish the Personal Accounts scheme and to work with the Pensions Regulator to create the infrastructure to enable employers to register and comply with their new duties.

Specifically, this section provides for the Authority to give any assistance or advice on the establishment and operation of the scheme that the Department might require, and any advice that the Authority considers it appropriate to provide. Similarly, it also provides for the Authority to provide such assistance or advice on arrangements to enable employers to comply with their new duties (in Chapter 1).

This section provides the Authority with an ancillary power which will allow it to do anything calculated to facilitate, or incidental or conducive to, the carrying

out of any of its functions. For example, this will allow the Authority to enter into formal negotiations and to finalise contracts.

Where the Secretary of State makes an order under section 23(7) of the Pensions Act 2007 repealing provisions relating to the Personal Accounts Delivery Authority subsection (6) enables the Department to make corresponding provision for Northern Ireland.

Section 66: Principles

This section requires the Personal Accounts Delivery Authority to consider a number of guiding principles when carrying out its functions. The Authority must have regard to those principles and consider how they apply in relation to the advice or assistance it provides. The main effect of these principles is that the Authority will consider in carrying out its functions how to encourage those people with moderate to low incomes, who are not currently saving for a pension, to make provision for their retirement (*subsection (2)*).

All the principles are of equal importance and relate to the manner in which the Authority will discharge its functions. The principles are not the only matters which the Authority will have to consider, neither will the principles necessarily be determinative of the choices the Authority makes, but they are matters to which the Authority will have express regard.

This section also requires the Authority to do anything it considers appropriate to engage in discussion with relevant stakeholders about its functions and how it discharges its functions (*subsection (3)*).

Section 67: Directions and guidance

This section allows the Department to give directions and guidance to the Personal Accounts Delivery Authority on anything to do with the discharge of its functions. In turn, the Authority is required to consider any guidance and comply with any direction. If the Department gives a direction it must be made in writing. The Department must publish any direction issued under this section.

Section 68: Disclosure of information by the Pensions Regulator

Section 68 amends Article 79 of the Pensions (Northern Ireland) Order 2005 to enable the Pensions Regulator to disclose restricted information to the Personal Accounts Delivery Authority in order to enable the Authority to provide assistance or advice to the Regulator.

CHAPTER 6 – Stakeholder Pension Schemes

Section 69: Stakeholder pension schemes

Section 69 amends the Welfare Reform and Pensions (Northern Ireland) Order 1999 to remove the statutory duty on employers to have a designated

stakeholder pension scheme, and all but one of the detailed related requirements (consultation, provision of information etc).

From the date these changes come into effect, the payroll deduction requirement (Article 5(5) of the Welfare Reform and Pensions (Northern Ireland) Order 1999) will continue as a transitional provision. Under this provision, those employees who are making regular contributions into their stakeholder pension through their employer's payroll, will continue to be able to do so until they stop making these contributions or leave the employer's employment.

This recognises that in making their decision to contribute into a stakeholder pension, employees did so in the knowledge that they could make their contributions via their employer's payroll. This transitional provision only applies if the request to deduct these contributions from the employee's pay was made prior to the date when these changes take effect, and the employee is making regular contributions into their stakeholder pension.

CHAPTER 7 – Application and interpretation

Section 70: “Employer”, “worker” and related expressions

This section defines the terms “employer”, “worker” and other related expressions for Part 1 of the Act.

Section 71: Agency workers

This section provides that agency workers, who would not otherwise fall within the definition of “worker”, are considered as workers for the purposes of the employer duty (automatic enrolment, automatic re-enrolment and opting in). The agency will be the relevant “employer” for agency workers for the purposes of the employer duty, or as a fall-back, either the agent or principal responsible for paying the worker, or if that cannot be determined, whichever one actually pays the worker.

Section 72: Directors

This section specifies the circumstances in which a company director is a worker for the purposes of this Part.

Section 73: Crown employment

Section 74: Armed Forces

Section 75: Police

These sections clarify how the provisions in Part 1 of the Act impact on some specific types of worker or employer.

Sections 73 and *75* set out specific classes of people who fall to be treated as workers for the purposes of these provisions. As such, the employer duty will apply to these specific groups in the same way as it applies in relation to

other employment and other workers. The only exception is for employment by or under the Crown, where there is no criminal liability placed on the Crown. However, the Pensions Regulator is enabled to apply to the High Court for a declaration that there has been a failure by the Crown to comply with duties in *section 45(1)* which, although not giving rise to criminal liability, is unlawful.

Section 74 sets out the specific exclusion of the armed forces from these provisions.

Section 76: Persons working on vessels

Section 76 initially excludes all persons employed in any capacity on board a ship from the provisions of the Act. This is subject to the power of the Secretary of State to make affirmative regulations under section 96 of the Pensions Act 2008 setting out those persons employed on a ship who will be included under this Part or the Pensions Act 2008.

Section 77: Extension of definition of worker

This section provides that the definition of “worker” may be extended to include individuals who are not currently caught. Such individuals would be deemed to be subject to a worker’s contract of a prescribed kind and working for a person of a prescribed description, who would be deemed to be the employer for the purposes of automatic enrolment.

Section 78: Interpretation of Part

This section sets out the meaning of particular words and phrases used throughout this Part.