

*These notes refer to the Pension Schemes Act (Northern Ireland)
2016 (c.1) which received Royal Assent on 15 January 2016*

Pension Schemes Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – General Changes to Legislation about Pension Schemes

Section 36: Pensions promise obtained from third party

This section relates to the possibility of a pensions promise, for the purposes of a defined benefits or shared risk scheme being obtained from a third party, as set out in section 5. It contains a regulation-making power to require that trustees or managers of a scheme must not obtain any such promise from a third party unless conditions set out in the regulations are met. Regulations under this section may also provide for civil penalties to apply to a person who fails to comply with them. This section also makes changes to Article 34(7) of the 1995 Order to add this section to the list of provisions that Article 34, which makes its own provisions in relation to trustees' power of investment, cannot override.

Section 37: Duty to act in the best interest of members

Regulations under this section may require managers in non-trust based schemes to act in members' best interests when taking certain specified decisions. This duty may apply in shared risk schemes and defined contribution schemes offering collective benefits.

Regulations may provide for the duty to override obligations that are inconsistent with that duty, but do not otherwise affect any other duty that might arise. Where a manager has breached or threatened to breach the duty under such regulations to act in members' best interests, regulations may provide that the manager will be subject to the same consequences as would follow from breach of a fiduciary duty.

Section 38: Disclosure of information about schemes

Section 109 of the Pension Schemes Act sets out a power for the Department to make regulations in relation to occupational and personal pension schemes, setting out requirements to keep certain persons informed of various matters including the scheme's constitution, its administration and finances, and the rights and obligations that may arise under the scheme.

This section amends section 109, removing the list at subsection (2) of the persons who can be kept informed under provisions of the regulations, and instead specifying that it applies in respect of ‘persons of prescribed descriptions’ – that is, the persons who should be kept informed will be set out in secondary legislation.

The section also introduces a requirement for schemes to have regard to any guidance prepared by the Department when complying with disclosure requirements.

Section 39: Extension of preservation of benefit under occupational pension schemes

This section amends Part 4 of the Pension Schemes Act, which concerns the preservation of benefit for early leavers of occupational pension schemes. Pension scheme members whose pensionable service is terminated before reaching normal pension age are entitled to payment of the benefit accrued up to that point, providing they have two years’ qualifying service or have previously transferred their rights into the scheme from a personal pension. (Members who leave without a preserved benefit are entitled to transfer the value of the benefits they have accrued or receive a refund of their own contributions.)

The preserved benefit to which former members are entitled – termed “short service benefit” – is the same as that which would have been payable for that period if they had remained members in pensionable service in the scheme until retirement.

The 2015 Act introduces a requirement that, where all benefits for a member are money purchase benefits, a preserved pension must be provided after 30 days’ qualifying service.

The section amends section 67 of the Pension Schemes Act so that schemes must provide a short service benefit where leavers have at least 30 days’ qualifying service and all the pension benefit is a non-salary related one (that is, not calculated either by rate or amount with reference to the member’s salary) or where it is a collective benefit. If any of the pension benefit is salary related, the two year rule still applies.

Where a benefit may be calculated on a salary related basis in some circumstances and on a non-salary related basis in others (e.g. an underpin benefit which pays the higher of the two calculations), it will be treated as salary-related for these purposes.

If a member’s pensionable service began before the amendments came into operation, the previous requirements for preservation of benefits will continue to apply.

The section also ensures the uniform accrual rules do not apply in respect of collective benefits.

Section 40: Revaluation of accrued benefits

Schedule 1: Early leavers: revaluation of accrued benefits

When a member stops being an active member of a scheme more than a year prior to retirement, the accrued benefits are required to be “re-valued” at the scheme’s normal pension age to provide a measure of inflation protection over the period of deferral. Sections 79 to 82 of, and Schedule 2 to, the Pension Schemes Act set out the procedure for revaluation based on benefit type.

The existing section 80 of the Pensions Schemes Act takes the final salary method as its default method of revaluation for accrued benefits. This method requires benefits to be increased by inflation capped at 5 or 2.5 per cent each year (depending on when pensionable service occurred), but there is an alternative for average salary, flat rate or money purchase benefits. In these cases, the legislation allows for revaluation using the average salary and flat rate methods, where trustees or managers consider these methods, respectively, to be more appropriate than the final salary method, and the money purchase method where benefits are money purchase or benefits from a personal pension scheme.

The basic principle behind the non-final salary provisions is that both active scheme members and those who have left the scheme before normal pension age should be treated in the same way. Their rights in relation to accrued benefits should not be affected because they have, for example, changed their place of employment and consequently left that pension scheme. The methods are set out in Schedule 2 to the Pension Schemes Act. For the final salary method, the annual Occupational Pensions (Revaluation) Order (Northern Ireland) sets out the percentages to be used for people retiring during the following year. The average salary and flat rate methods state that benefits are to be re-valued in the same way as they would have been had the member remained in pensionable service. In the money purchase method the requirement is to apply the same investment return on the accrued benefits to both active and deferred members.

The [Pensions \(2012 Act\) \(Consequential and Supplementary Provisions\) Regulations \(Northern Ireland\) 2014 \(S.R. 2014 No. 213\)](#) introduced an additional cash balance method for cash balance benefits not calculated by reference to final salary which accrue after section 27 of the 2012 Act is commenced. This also required active and deferred members to be treated in the same way.

Schedule 1 to the Act amends the Pension Schemes Act. There will be no changes to the method applicable for benefits which accrued before the changes come into operation or for relevant pension credits rights where entitlement arose before the changes come into operation. A new “default method” will apply for all benefits except those which are money purchase, salary related or flat rate. (“Salary related” will include final salary cash balance schemes). The default is simply to revalue benefits as they would have been had the member remained in pensionable service. The exceptions for the default method remain money purchase benefits, flat rate benefits and what are now termed “salary

related” benefits. A salary related benefit must be re-valued using the final salary method except where those benefits are average salary and trustees or managers consider the average salary method more appropriate. Money purchase benefits should be re-valued using the money purchase method. These methods continue to apply the definitions set out in Schedule 2 to the Pension Schemes Act where referenced.

Collective benefits will be re-valued using the default method.

Schedule 1 (see new section 80D) also sets out the revaluation procedure for hybrid benefits – those benefits which are made up of different components, the highest of which is paid. In this case, each component will be re-valued separately before deciding which is the highest. This replicates the effect of provision currently contained in regulations. In new section 80E there is provision for schemes which have used certain alternative methods of revaluation (primarily public service pension schemes) to continue to do so.

There is also a power (in new section 81A) to add revaluation methods for personal pension schemes. This is to allow for the possibility that in the future the design of personal pensions introduces a wider range of benefits than are provided for by the new provisions.

Section 41: Collective benefits exempt from indexation

Section 42: Regulatory own fund schemes exempt from indexation

Section 43: Power to create other exemptions from indexation

The 1995 Order makes provision for indexation of pensions under occupational pension schemes (other than public service pension schemes). Section 41 excludes collective benefits from the requirement to annually increase pensions in payment set out in Article 51 of the 1995 Order.

Section 42 amends the provision in Article 51 of the 1995 Order to ensure schemes set up as “Regulatory Own Funds” will be exempt from requirements to index benefits. This is because it may not always be appropriate for such schemes to index the benefits offered. Section 42(3) introduces a definition of a “Regulatory Own Fund scheme” which refers directly to Article 17 of European Council Directive (2003/41/EC).

Section 43 amends Article 51 of the 1995 Order to insert a regulation-making power that may disapply the requirement to annually increase pensions in payment in respect of a pension, or part of a pension, of a specified description. The power cannot be used to remove the requirement to index pensions that came into payment or parts of pension attributable to pensionable service that has occurred before the day on which regulations come into operation, or to a pension or any part of a pension under a defined benefits scheme. The regulations will therefore not be able to affect rights already accrued or benefits under a defined benefits scheme.

Section 44: Removal of requirement to maintain a register of independent trustees

This section removes the statutory requirement for regulations to provide that the Pensions Regulator compile and maintain a register of trustees (the relevant regulations are the [Occupational Pension Schemes \(Independent Trustee\) Regulations \(Northern Ireland\) 2005 \(S.R. 2005 No. 169\)](#)).

Article 23 of the 1995 Order allows the Pensions Regulator to appoint an independent trustee to a scheme whose employer has suffered an insolvency event. The Regulator can only appoint a trustee from the trustee register, which it must establish and maintain. But the Regulator has another, general power (under Article 7 of the 1995 Order) to appoint trustees to replace a person found not to be “fit and proper” to be a trustee. In relation to this there is no requirement to appoint from a register of trustees. This section removes the requirement to maintain a register of trustees under Article 23, in order that the Regulator can instead follow the same procedure as when appointing trustees under Article 7.

Section 45: Rules about modification of schemes

Article 67 of the 1995 Order contains provisions to protect members against detrimental modifications to their “subsisting rights” – that is, “any right which at that time 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 the member has at that time, under the scheme rules”.

The section replaces the existing regulation-making power to disapply Article 67 for the exercise of a power in a prescribed manner and replaces it with a power to disapply in prescribed cases.

Modifications can only be made if the value of the benefits is the same before and after the change or if the member agrees. Some changes can only be made if the member agrees: these are called “protected modifications”. Article 67A sets out the circumstances in which a modification to members’ rights is a ‘protected modification’.

Currently, Article 67A states that a change is a “protected modification” where money purchase benefits would replace non-money purchase benefits, or where the change would result in a reduction to a pension in payment.

This section amends Article 67A to include a modification where a right to benefits that include a pensions promise is to be replaced by a right to benefits where there is no pensions promise, where a right to a retirement income in respect of which there is a pension promise becomes a right to benefits other than retirement income and where a right or entitlement to a benefit which is not a collective benefit is replaced with a right or entitlement to collective benefits.

This section also amends Article 67A to provide that a reduction to a collective benefit in payment is not a “protected modification”.

It also updates the list of relevant override provisions in Article 67A to include regulations made under Part 2 of this Act and regulations made under Schedules 17 and 18 to the 2015 Act. This means where these regulations override conflicting provision in the scheme rules, that the regulations are treated as part of the scheme rules for the purposes of the subsisting rights provisions.

Section 46: Pension sharing and normal benefit age

When a pension is shared on divorce etc, the former spouse's or civil partner's share may (or, in the case of unfunded public service schemes must) be retained in the pension scheme as a pension credit benefit. Schemes must have a normal benefit age when they start to pay the pension credit benefit. At the moment this must be between 60 and 65.

As longevity increases, some pension schemes will start to increase their normal pension age above 65. This section amends section 97C of the Pension Schemes Act to allow a pension scheme to increase its normal benefit age for a pension share to a permitted maximum. The permitted maximum is 65, or if higher, the highest normal pension age for any benefit payable to, or in respect of, ordinary members of the scheme.

The section also amends section 97B of the Pension Schemes Act to provide a new definition of "normal benefit age" and "normal pension age."

Section 47: Other amendments to do with Parts 1 and 2

Schedule 2: Other amendments to do with Parts 1 and 2

Schedule 2 makes consequential amendments to existing pensions legislation to take account of the categories of scheme defined in Part 1 and collective benefits defined in Part 2. The Schedule also makes some resulting changes to replace references to money purchase schemes to limit the number of ways of categorising schemes in legislation.

Where there are references in existing legislation to a "money purchase scheme", these are generally replaced by references to "a scheme under which all the benefits that may be provided are money purchase benefits". This does not change the effect of the legislation – rather, they are technical changes to limit the number of categories that can be attached to pension schemes.

In other cases, the new categories are themselves substituted for existing definitions.

Pension Schemes (Northern Ireland) Act 1993

Section 120 of the Pension Schemes Act places a duty on the Department for Employment and Learning to pay unpaid contributions to schemes in the event of employer insolvency and consequent default on employer contributions. The amount that the Department is required to pay is the least of three amounts set out in paragraphs (a) to (c) of subsection (3). Subsection (3A) states that

where the scheme is a money purchase scheme, the amount is the lesser of the amounts specified in paragraphs (a) and (c) (paragraph (b) is not relevant to money purchase schemes). The Schedule amends the wording to replace “money purchase scheme” with “defined contributions scheme, or a shared risk scheme under which all of the benefits that may be provided are money purchase benefits”. The Schedule also amends subsection (3A) so that it also applies to a shared risk scheme under which all the benefits that may be provided are money purchase benefits or collective benefits. This updates the provision to ensure it applies in the right way to schemes which offer collective benefits and that they are covered by the appropriate provision, as well as ensuring all schemes which are shared risk and have only money purchase and collective benefits, and schemes which are defined contributions and provide a guaranteed income after the point of retirement, are captured.

Section 176 of the Act is amended so that the terms, “defined contributions scheme”, “defined benefits scheme”, and “shared risk scheme”, as set out in Part 1 of this Act and “collective benefit”, as set out in Part 2 of this Act, apply in that Act.

Pensions (Northern Ireland) Order 1995

Article 37 of the 1995 Order makes provision in relation to payments to employers when a trust-based occupational scheme is in surplus. Paragraph 7 of the Schedule amends paragraph (1A) of Article 37 to disapply that Article in relation to funds held for the purposes of collective benefits. Funds held for the purposes of providing collective benefits should only be used to provide those benefits except in very limited circumstances. Employer liability in respect of collective benefits is limited to the employer contributions and they cannot be required to make any additional payments where the funds are insufficient to meet the targets. Correspondingly, they should not, as a general rule, have a right to any surplus in the fund. Regulations made under section 24 will set out any exceptions to the rule that the funds must only be used for provision of collective benefits.

Articles 51 and 51A of the 1995 Order relate to indexation requirements for pension schemes (that is, the method by which pensions in payment are increased annually to take account of inflation). The Schedule amends paragraph (1)(a)(iii) of Article 51, which exempts pensions in money purchase schemes from indexation requirements in certain circumstances, by substituting “defined contributions scheme” for “money purchase scheme”. It consequently amends Article 51A to replace ‘money purchase scheme’ with “defined contributions scheme”. This means that the indexation requirements exclude all defined contributions schemes, including money purchase schemes, schemes offering collective benefits, and those that are defined as self-annuitising under Article 51A.

Article 73 of the 1995 Order deals with distribution of liabilities when an occupational pension scheme winds up. Paragraph 11 of the Schedule amends

paragraph (2) of Article 73 to reflect the new scheme categories found in Part 1 of the Act.

Paragraph 11 of the Schedule applies the existing provisions on wind up to the new categories of defined benefits, shared risk and defined contributions schemes. The provisions on winding up do not apply to schemes under which all the benefits that may be provided are money purchase benefits or prescribed schemes or schemes of a prescribed description. This maintains the current position.

An “employer debt” is a reference to a statutory debt arising under Article 75 of the 1995 Order. Article 75 of the 1995 Order applies to an occupational pension scheme (other than a scheme which is a money purchase scheme, or a prescribed scheme or a scheme of a prescribed description) where there is a funding deficit in circumstances where either the scheme is winding up or a prescribed event has occurred in relation to the employer.

Paragraph 12 of the Schedule provides that Article 75 will not apply to an occupational pension scheme which offers only collective benefits, money purchase benefits, or a combination of the two. This paragraph also provides that where a scheme offers a combination of collective and non-collective benefits, the scheme is to be treated for the purposes of Part 1 of the 1995 Order as two separate schemes, with one scheme relating to the collective benefits and the other relating to the other benefits. Not all benefits in a defined contributions scheme will necessarily be money-purchase – some or all may be collective benefits.

Articles 85 and 86 of the 1995 Order make provision requiring trustees or managers of occupational money purchase schemes to prepare schedules of payments for scheme members. The Schedule amends this requirement so that it applies to all defined contribution schemes and any shared risk schemes under which either all of the benefits that may be provided are money purchase benefits, or a combination of money purchase and collective benefits. The wording of paragraph (2)(a) of Article 85 is altered to place focus on the type of benefits that are being offered, in order that ‘relevant benefits’ are considered regardless of whether a scheme is a defined contributions or a shared risk scheme. Article 121 of the 1995 Order is amended so that the terms “defined contributions scheme”, “defined benefits scheme” and “shared risk scheme”, as set out in Part 1 of this Act and “collective benefit” as set out in Part 2 of the Act, apply in that Order and to include a definition of “occupational” in relation to a defined benefits scheme, shared risk scheme or defined contributions scheme.

Welfare Reform and Pensions (Northern Ireland) Order 1999

Article 35 of the Welfare Reform and Pensions (Northern Ireland) Order 1999 makes provision about the treatment of pension credits in winding up. Currently it does not apply to a money purchase scheme. The amendment replaces the reference to a money purchase scheme with a reference to a scheme under which

all the benefits that may be provided are money purchase benefits. This does not change the effect.

Pensions (Northern Ireland) Order 2005

The majority of the amendments made to the 2005 Order take out a number of references to money purchase schemes and update provisions in that Order to take account of the new pension scheme categories and the introduction of collective benefits. In most cases, the effect of the provisions is to extend exemption of the provision from schemes offering only money purchase benefits to schemes in which all benefits are collective or a combination of collective and money purchase. However, in paragraph 24 is a further qualification – with the effect that the provision does apply to schemes with only money purchase benefits which include a third party promise.

Article 2 of the 2005 Order defines terms used throughout that Order. Paragraph 21 of Schedule 2 of this Act inserts the new scheme category and collective benefit definitions and omits the definition of ‘money purchase scheme’. It also updates the list of overriding provisions contained in the definition of “scheme rules” in the 2005 Order, to include regulations made under Part 2 of this Act, and under Schedule 17 and 18 to the 2015 Act. This means that where these regulations override conflicting provision in the scheme rules the regulations are treated as part of the scheme rules for the purposes of the 2005 Order.

Paragraphs 22, 28, 31 and 33 also amend the definition of pensions legislation in Articles 9, 85, 231 and 267 of the 2005 Order to include provisions in and made under the Act, ensuring that the Regulator can take action where there are breaches of the Act and Regulations made under it and to allow for modification of the provisions where schemes receive contributions from a European employer.

Article 110 of the 2005 Order defines those occupational pension schemes which are eligible to be taken over by the Board of the Pension Protection Fund. Paragraph 29 of the Schedule amends the 2005 Order to include reference to the new categories of occupational pension scheme in Part 1 of the Act, (defined benefits, shared risk and defined contributions schemes) as eligible for the Pension Protection Fund. This paragraph also has the effect that occupational pension schemes that offer only money purchase and collective benefits, and occupational pension schemes that offer only collective benefits are not eligible for the Pension Protection Fund.

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

Sections 20 to 28 of the Pensions (No. 2) Act set out the requirements that a pension scheme must meet if it is to be a qualifying scheme for the purposes of meeting an employer’s enrolment duties under pension legislation. (This is sometimes referred to as “automatic enrolment”.)

The amendments in Schedule 2 to the Act replace the existing definitions of “defined benefits scheme”, “money purchase scheme” and “hybrid scheme” in

these sections with the new definitions set out in Part 1 of this Act, and change the section headings accordingly. The quality requirements are on the whole unchanged (except where stated).

Section 26 is amended to refer to a personal pension scheme “that is a defined contributions scheme”. The requirements are the same except it will no longer be a requirement that all benefits under the scheme must be money purchase benefits.

Section 78 is amended to insert the definitions of “defined benefits scheme”, “defined contributions scheme” and “shared risk scheme” as set out in Part 1 of this Act and “collective benefit” as set out in Part 2 of the Act, as well as defining “occupational” as it applies to these pension schemes. The original references to “defined benefits”, “money purchase scheme” and “hybrid scheme” are omitted.