



Department  
for Work &  
Pensions

# Pension Schemes Bill Delegated Powers

Memorandum from DWP to the Delegated Powers  
and Regulatory Reform Committee

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November 2014

# Introduction

The Pension Schemes Bill was introduced in the House of Commons on 26<sup>th</sup> June 2014.

This memorandum identifies the provisions for delegated legislation in the Bill as amended in the Commons. It explains the purpose of the powers, the reasons why they are left to delegated legislation, the Parliamentary procedure selected for the exercise of these powers and why that procedure has been chosen.

The Department has followed the precedent in pensions legislation by setting out the overall legislative framework on the face of the Bill but giving the Secretary of State the power to make detailed provision in secondary legislation. This is due partly to the fact that it is considered inappropriate for Parliamentary time to be spent on every detailed provision during the passage of the Bill, but is also a reflection of the fact that the content of such provisions may change from time to time. It is desired to avoid amending the primary legislation on each such occasion. However, both the initial provisions and any subsequent changes will be subject to what are considered to be appropriate Parliamentary safeguards.

# Background and Summary

In November 2013, the Government published a consultation paper, *Reshaping workplace pensions for future generations*, which outlined broad proposals for encouraging greater innovation and risk-sharing in private pension arrangements in the UK. The paper set out the possibility of recasting the legislative framework, to move away from the polarity created by existing definitions and carve out a clear risk sharing space, and enabling collective schemes. Once the consultation period had closed and replies were received, the Government published a response paper in June 2014, setting out specific proposals to take forward. These proposals form the basis of the Pension Schemes Bill 2014.

The Bill is in six parts:

- Part 1 – Categories of pension scheme
- Part 2 – Collective benefits
- Part 3 – General changes to legislation about pension schemes
- Part 4 – Pension flexibilities
  - Chapter 1: Pensions guidance
  - Chapter 2: Independent advice
  - Chapter 3: Drawdown, conversion of benefits and lump sums
  - Chapter 4: Transfers
  - Chapter 5: Interpretation of Part
- Part 5 – Miscellaneous
- Part 6 – General

## **Part 1 – Categories of Pension Scheme**

This Part of the Bill contains provisions to introduce new definitions into the legislative framework for private pensions, establishing three mutually exclusive categories of scheme type based on type of promise during the accumulation phase about the retirement benefits that schemes offer to members. In the case of a scheme not fitting into one of these definitions, regulations must provide for a scheme to be treated as two or more separate schemes, each falling within a category. Regulations may also be made to provide for any other circumstances in which a scheme is to be treated as two or more separate schemes. Regulations may also set out further details about requirements and exceptions in relation to defined benefits schemes.

## **Part 2 – Collective benefits**

This Part defines collective benefits that may be provided by pension schemes. It also contains a series of regulation-making powers relating to the governance of schemes providing collective benefits. Requirements may be set out in secondary legislation in relation to scheme reporting, the payment of benefits, benefit targets and valuation.

## **Part 3 – General changes to legislation about pension schemes**

This Part contains a number of changes to existing pensions legislation as a consequence of the definitions set out in Parts 1 and 2. It contains new powers to make regulations: setting out conditions to be met for a pensions promise to be obtained from a third party; imposing a duty on managers to act in the best interests of members when making specified decisions in relation to collective benefits or shared risk schemes; exempting from indexation pensions of a specified description; preventing members of public service defined benefits schemes transferring into certain schemes; and creating exemptions from subsisting rights provisions in prescribed cases. It also enables the Secretary of State to issue statutory guidance on the disclosure of information about schemes.

## **Part 4 – Pension flexibilities**

This part contains changes to give savers greater flexibility in how they access their defined contributions pension pots. It contains provisions to establish a pensions guidance service. It provides that the Treasury must make

arrangements for the provision of pensions guidance and establishes a framework for the Financial Conduct Authority (FCA) to supervise designated guidance providers delivering pensions guidance by arrangement with the Treasury. It places a duty on the FCA to make rules to require specified pension providers to 'signpost' towards the guidance service. In addition it contains a requirement whereby members with defined benefit savings must take appropriate independent advice to ensure they have properly considered the implication of a transfer of those savings.

Consequential to the Taxation of Pensions Bill, it contains changes to reflect the consequences of allowing a cash balance occupational pension scheme to opt to allow its members the options of designating funds as available for drawdown and/or to take an uncrystallised pension fund lump sum. It also restricts transfers out of certain public service defined benefits pension schemes and also introduces a power for Ministers to require the cash equivalent transfer value for transfers from funded public service schemes to schemes from which flexible benefits can be obtained be reduced, in certain circumstances. This part also extends the current transfer rights for scheme members with 'flexible benefits' giving them a right to transfer up to and beyond their scheme's normal retirement age and amends existing statutory transfer rights so that they apply at benefit category, rather than at scheme, level.

### **Part 5 – Miscellaneous**

This Part allows the Secretary of State to make payments into the Remploy Limited Pension and Assurance Scheme directly.

This Part also includes two clauses concerning judicial pensions, a clause extending provisions of the Pensions Schemes Act 1993 (relating to survivors' benefits in the case of Same Sex Marriage and gender change cases) to Scotland and a clause dealing with pension sharing and normal benefit age.

### **Part 6 – General**

Part 6 contains matters relating to the application of the Bill and regulations made under it, including powers to make consequential amendments to any legislation, whenever made, and to commence provisions by regulations. It also makes general provision in respect of regulations under the Bill.

## **Schedules 1 – 5**

- Schedule 1 makes consequential amendments to the Pension Schemes Act 1993 concerning the revaluation of accrued benefits to apply the categories introduced in Part 1 and to take account of collective benefits as defined in Part 2
- Schedule 2 deals with other amendments to do with Parts 1 and 2
- Schedule 3 covers pensions guidance
- Schedule 4 deals with rights to transfer benefits
- Schedule 5 covers consequential amendments resulting from the provisions about pension schemes for fee-paid judges.

## **Extent**

Clause 83 deals with extent. The Bill extends to England and Wales and to Scotland only, subject to certain exceptions. Clause 78 (extension to Scotland of certain provisions about marriage of same sex couples) only extends to Scotland. The provisions listed in subsection (4) of clause 83 also extend to Northern Ireland as well as the rest of Great Britain. The provisions listed in subsection (5) of clause 83 extend to Northern Ireland only. Also, in accordance with subsection (2) of clause 83, where the Bill amends legislation, those amendments have the same extent as the legislation being amended.

## **Parliamentary Scrutiny**

The Department for Work and Pensions (DWP) has considered in each case the appropriate parliamentary procedure to be followed in exercising the delegated powers under the Bill. The commentary below on each power sets out which parliamentary procedure has been proposed and why that procedure is considered appropriate.

# General

All the delegated powers in the Bill are exercisable by statutory instrument. An annex to this memorandum lists all the clauses containing powers to make delegated legislation.

# Analysis of delegated powers by clause

## Part 1 – Categories of scheme

### Clause 2 – Defined benefits scheme

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Clause 2 (d) provides for regulations to specify additional requirements which must be met in order for a scheme to fall within the defined benefits scheme definition.

The key elements of the defined benefits scheme definition are set out in clause 2. Clauses 5 and 7 provide for meanings and interpretations of the terms used in clause 2. Taken together these clauses provide the overarching features that a scheme must contain for it to be categorised as a defined benefits scheme, and also deal with known and existing scheme structures and designs, to ensure they fall under the correct scheme definitions.

This regulation-making power at 2(d) is included to ensure that only schemes which provide members with certainty throughout the accumulation phase about the level of retirement income to be provided will fall within the defined benefits definition. While all existing scheme shapes which we know about are covered by the definition used in the Bill without the need for further specification, concerns have been raised that it may be possible to design a scheme in such a way that it satisfies these requirements but nonetheless passes key risks, e.g. investment risk, onto members. The power is therefore intended as a belt and braces measure to ensure that this cannot be done and that the policy intent behind the categorisation is not undermined. The regulation-making power is to address theoretical risks in relation to the evolution of new designs, and the need to be responsive to those designs, to deliver the intent conveyed in the primary legislation. Therefore, it is appropriate to set these matters out in regulations, and thereby also enable consultation with the industry.



The power is to be subject to negative resolution procedure. This is considered appropriate because any regulations made under the power will be technical in nature to ensure that the policy intention conveyed in the primary legislation is not undermined.

### **Clause 5 – Meaning of ‘pensions promise’ etc**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause provides three regulation-making powers.

### **Clause 5(6)**

The first two regulation-making powers in clause 5 are at subsection (6) and allow regulations to specify what kind of discretions can be applied by a pension scheme to a benefit without preventing it from meeting the requirements of providing a ‘full pensions promise’. DWP is aware that some scheme rules might provide for certain types of discretion which may mean the benefit does not meet the requirement under subsection (1)(b) of clause 5 – i.e. that although a promise is provided, at all times before the benefit comes into payment, about the level of benefit, the level of the benefit cannot be said to be determined wholly by reference to that promise in all circumstances.

Where a discretion is capable of being used only in relation to individual circumstances, subsection (6)(a) provides for it to be disregarded – but only if it also meets other requirements which may be specified in regulations. Without the regulation-making power there is the possibility of unintended consequences, whereby factors related to individual circumstances are applied which introduce a type of uncertainty for members which the defined benefits category was not envisaged to include. For example, that the employer has discretion unilaterally to vary the benefit for any reason related to individual circumstances.

The specific types of discretions related to individual circumstance which the wording in clause 5(6)(a) is aimed at are those such as providing for benefits on grounds of ill health before the normal pension age. This clause would mean such a discretion did not affect the categorisation as a defined benefits

scheme because there is still a full pensions promise. The regulation-making power enables the Secretary of State to specify additional specific requirements that must be met to limit the discretions which may be disregarded to avoid unintended consequences.

There are also some wider discretions in some schemes which could potentially affect whether a benefit is the subject of a full pensions promise under clause 5(1)(b) and which are not related to members' individual circumstances. We wish to examine and consult further on which such discretions should be disregarded when determining whether or not there is a full pensions promise. For example, discretions such as general augmentation powers are common features of current salary related scheme rules and it is possible that all or some of these powers should not be taken into account. The regulation-making power allows for further consultation on the point including, for example, the appropriateness of a time bound exception – for example rules already in place at a particular point in time. This regulation-making power will help ensure the least unintended and inappropriate impacts on existing defined benefits schemes.

The regulation-making powers in this clause will be subject to the negative resolution procedure, as any regulations made under the power will be technical in nature.

### **Clause 5(7)**

The third regulation-making power in clause 5 is at subsection (7). Clause 5(7) makes an exception to the provisions at subsections (1) and (2) in relation to the time at which a promise must be made for it to meet the meaning of pensions promise, and enables the Secretary of State to make regulations on this matter. Subsections (1) and (2) state that a pensions promise is a promise made 'at a time before the benefit comes into payment'.

The exception at subsection (7) is to cater for defined contributions schemes which also provide an income stream in retirement. Such schemes will need to discuss and make a commitment to the member about that retirement income before the first payment is made. The schemes will usually only make the promise in relation to the final pot and only in the immediate run up to the retirement date. This means in effect it provides no more certainty to the member than other defined contributions schemes, and should be defined as a defined contributions scheme. But the phrase "a time before the benefit

comes into payment” may mean it would be defined as a shared risk scheme. This subsection and regulation-making power therefore make an exception in relation to this type of promise – and enable this type of scheme to remain in the defined contributions scheme definition.

The exception is formulated as a four part test. The primary legislation provides that the exception applies only where the promise is about the level of income; and where that promise is conditional on the income coming into payment by a certain date; that the promise is first given during a period specified in regulations ending with the day on which it would come into payment; and that it is not a promise of a description specified in regulations.

The regulation-making powers relate to specifying the period within which the promise is first given, and also to specifying which promises are not part of this exception. These are both matters of technical detail, and which may need to be responsive to development and evolution in scheme design and therefore are appropriate matters for regulation rather than being set out on the face of the primary.

For example - the regulations could specify the ‘period’ to be one which reflects current practice about when defined contributions schemes contact members if they want to offer them an income in retirement. Over time, it may become apparent that schemes shift this date or period. It is possible that normal practice in respect of this period could change due to the changes announced in the Budget 2014 in relation to decumulation. Also, regulations will enable us to consult with industry about current practice and explore any issues arising which schemes consider should or should not be part of an exception.

The regulations specifying what promises are not part of the exception are intended to describe features of scheme designs that should be shared risk, and where the promise should be classified as a pensions promise under clause 5, but may otherwise be accidentally caught by the specified time period. Some schemes might provide certainty in the run up to retirement (which differs to that provided by defined contributions schemes which provide a retirement income) – for example the Pension Income Builder or the Retirement Income Insurance product as described in the consultation document ‘*Reshaping workplace pensions for future generations*’ (November 2013). These schemes are materially different in terms of the certainty offered to the member during the savings period. The regulation-making

power enables the Secretary of State to specify the type of promise that would not be caught by the exception. Setting this out in regulations enables consultation with the industry and to be able to respond to new designs as they arise.

The powers are subject to negative resolution. This is considered appropriate as the regulations will be technical in nature.

## **Clause 6 – Treatment of a scheme as two or more separate schemes**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulation (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause provides two regulation-making powers. One requires regulations to be made to provide for a pension scheme which does not fit into the categories in Part 1 to be treated as if it were two or more separate schemes, each of which fits within one of the categories. The second allows for regulations to provide for other circumstances in which a scheme is to be treated as two or more schemes. Both powers apply for the purposes of Part 1 and any other specified legislation.

The regulations required under clause 6(1) will ensure that all schemes fit into the categories set out in Part 1. An example of the intended use of regulations under this power includes where a scheme offers defined benefit type arrangements to some members, and defined contribution type benefits to others. This type of scheme would not be defined as a shared risk pension scheme, since, though there are promises in relation to some retirement benefits, these are not available to all members. Instead, the regulations which are required could provide that the scheme will be treated for the purposes of the categories as two schemes: a defined benefits scheme, in relation to those benefits where there is a full pensions promise, and a defined contributions scheme, in relation to those benefits where there is no promise.

Whilst we have extensively tested the definitions against existing and planned models, we intend the market to evolve and develop new pension designs in the shared risk space. These regulation-making powers enable the

Government to ensure that, moving forwards, schemes are treated appropriately in terms of categorisation in line with the stated policy intent.

Regulations under this clause will be subject to the negative resolution procedure. As any ensuing regulations are designed to provide additional detail to the clear intent set out in the primary legislation, and will not impact but merely reflect benefit designs within schemes, this was considered to be the most suitable form of Parliamentary scrutiny.

## ***Part 2 – Collective Benefits***

### *Overview of the Approach in this Part*

This part of the Bill provides for a number of regulation-making powers which are needed to set out the detailed and technical requirements applying to pension schemes offering collective benefits. Collective benefits are provided on the basis of pooling risks across the scheme membership. This means that when a member retires, they do not select an individual retirement income product; rather, an income is paid from the scheme's asset pool. Evidence suggests that schemes providing collective benefits may provide a greater degree of stability in pension incomes than traditional defined contributions schemes, because the pooling of risks means demographic and financial risks are smoothed across the membership.

In considering the appropriate design of the regulatory regime needed to oversee schemes offering collective benefits, the Department has listened to the views of industry, as well as taking into account the experience of European pension systems where collective arrangements are already enabled. The market can be expected to innovate and new collective models evolve. This changing landscape will be determined by economic circumstance and the specific conditions provided by the UK pensions market. Therefore, it is important that the Government does not lose the flexibility to modify the more detailed operational requirements on schemes offering collective benefits in light of further industry experience after commencement.

The Bill defines collective benefits and puts in place regulation-making powers. There will then be a comprehensive set of regulations which govern the day-to-day running and decision-making in schemes that provide collective benefits, covering matters such as benefit targeting, investment

performance, and communications to members. The alternative – to provide the full level of technical detail on the face of the Bill – would add a level of technical prescription to the primary clauses that is without precedent in UK pensions legislation. It could also prematurely curb market innovation, due to the inflexibility of the provision, and the difficulty in responding to operational experience.

Finally, this Part of the Bill seeks to ground a number of the regulation making provisions for schemes providing collective benefits upon the provisions that already exist for money purchase or occupational trust-based schemes (and, where appropriate, makes specific reference to the relevant legislation). Therefore, another important justification of the general approach to secondary legislation in this Part is its consistency with the Parliamentary procedure that generally applies in relation to regulation-making powers for money purchase and occupational trust-based schemes.

### **Clause 8 – Introduction and definition**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Clause 8 defines a ‘collective benefit’. Where, in all circumstances the rate or amount of the benefit payable to or in respect of a member depends entirely on (a) the assets available to pay that member’s and other members’ benefits and (b) factors used to determine what proportion of that amount is available for the provision of the particular benefit, these benefits are defined as ‘collective’ in the Bill. Clause 8(3)(a) also provides that a benefit which is a money purchase benefit is not a collective benefit.

Clause 8(3)(b) provides a regulation-making power to allow other benefits of a specified description to be excluded from the definition. Its purpose is to exclude certain benefits which would otherwise fall within the definition of “collective benefits” from the regulatory requirements that attach to “collective benefits”. The power would be used in situations where it would be more appropriate for provision of those benefits to be subject to a different regulatory regime. We might, for example, wish to exclude certain “with

profits” pension arrangements (which currently exist in the personal pensions space and are already subject to appropriate regulation by the Financial Conduct Authority), from the definition of “collective benefits” to ensure that they are not subject to two separate regulatory regimes (and the additional regulatory burdens that this would entail for those pension arrangements).

The power to exclude benefits of a certain description from the definition of “collective benefits” is delegated to secondary legislation to allow the Department to react flexibly and responsively to the potential models of collective benefits which are created.

The negative resolution procedure is considered appropriate as the Department does not anticipate that there will be many situations in which benefits will need to be excluded from the definition of “collective benefits”. The Department believes that the exclusion of “with profits” arrangements, for example, from the definition of “collective benefits” should not be controversial since its aim would be to provide clarity to providers in terms of the appropriate regulatory regime for these types of arrangements.

### **Clause 9 – Duty to set targets for collective benefits**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 9 provides that regulations may require the trustees or managers of a scheme to set targets in relation to any collective benefits that are offered by the scheme. The Department intends to require trustees or managers of pension schemes offering collective benefits to set a target about the rate or amount of those benefits.

The setting of targets in relation to collective benefits is key to ensuring that schemes providing collective benefits operate in as transparent a manner as possible. Whilst the target is unenforceable, it will provide a clear indication of the level of benefits that the scheme is seeking to provide for its members.

When a scheme first starts to offer collective benefits, the Department intends to require the trustees or managers to obtain a certificate from an actuary confirming the initial targets set by the scheme have been set within an appropriate specified probability range. This range of probability will be specified by the Secretary of State in regulations. Our intention in relation to the “initial target” is that at the point that the scheme begins to offer collective benefits, there should be a tenable link between the contributions paid into the scheme, the investments held by it and the target level of benefit to be provided by those investments. The aim is that this link should be retained in subsequent years, but in practice the probability of a scheme being able to meet its target benefits may deviate from the required range from time to time. Where this happens, regulation-making powers in subsequent clauses in Part 2 should enable this deviation to be addressed.

This range of probability will need to be set at a level which takes into account a number of different matters. Concerns about scheme transparency and the importance of ensuring that members understand the rate or amount of benefit that the scheme is aiming to provide will need to be balanced with the need to ensure that there is sufficient flexibility around the link between assets and target levels to allow schemes to take advantage of risk sharing options that are inherent to schemes that offer collective benefits – for example, the ability to smooth investment returns across the membership. The Department intends to canvass industry opinion as to the appropriate range of probability before deciding the range.

As well as including a power to require the trustees or managers to obtain an actuarial certificate which confirms that the probability of meeting initial targets falls within the range specified in regulations, this clause also contains powers for the Secretary of State to make provision about the content of the certificate, stipulate that such a certificate can only be provided by an actuary with certain qualifications, and may also set out matters to which the actuary must have regard.

Examples of “matters to which the actuary must have regard” could include the level of contributions payable to the scheme, the investment strategy followed, economic variables, the membership profile of the scheme and longevity assumptions.



The negative procedure is considered the appropriate level of Parliamentary scrutiny for all the regulation-making powers in this clause. A number of the provisions – such as powers to impose requirements about the way that targets are expressed, and when they should be sent to a specified person (such as the Pensions Regulator) – are largely procedural in nature.

Other provisions are more technical in nature – such as the power to set out matters to which the actuary must have regard and the power to make provision about the content of the certificate.

In relation to the power to specify a range of probability in regulations that the trustees or managers must have regard to when targeting a rate or amount of a benefit, it is important that this is subject to the negative resolution procedure to ensure that there is sufficient flexibility for the Secretary of State to be able to respond to situations at short notice. For example, as schemes start operating under the new framework, experience may dictate that certain levels of probability work better in practice.

## **Clause 10 – Policy about factors used to determine each benefit**

*Powers conferred on: Secretary of State*

*Powers exercised by Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

To ensure transparency and openness as to how collective benefits are calculated, the Department's intention is to require trustees or managers to have a policy in place about factors used to calculate members' benefits. There will also be a requirement to follow that policy. Factors might include contributions paid by or in respect of the member, the value and type of assets held by the scheme in respect of collective benefits, and actuarial factors such as estimated investment returns and longevity.

The clause also contains regulation-making powers which could be used to require the trustees or managers to consult about the policy, to make provision about content and how often the policy should be reviewed (and revised), and to set out principles that must be followed by the trustees or managers when they are drawing up the policy. Examples of principles that

regulations might require the trustees or managers to follow could be ensuring that the level of contributions that have been paid into the scheme in respect of each member is taken into account when calculating members' benefits, including where a member has transferred in or paid additional contributions, or ensuring that due regard is given to the impact of the policy on all age cohorts.

As well as involving some technical detail, which may be unsuitable for inclusion in primary legislation, a number of the requirements in relation to the policy will be largely procedural in nature. It is considered that the negative resolution procedure is the most appropriate form of parliamentary scrutiny for a technical, procedural area such as this.

#### **Clause 11 – Power to impose requirements about factors used to determine each benefit**

*Powers conferred on: Secretary of State*

*Powers exercised by Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

There may be instances in which it would be appropriate for regulations to set out the factors that trustees or managers should use when calculating members' benefits. Although we envisage that in the majority of cases this would not be necessary, and the trustees or managers would decide how benefits should be calculated (and this would be reflected in the policy about factors described above), it is important that regulations can set out requirements about factors in the event that policies prove ineffective or inadequate. In particular, it may be necessary to set factors to limit the ability of some schemes acting in ways that discriminated inappropriately in relation to some groups of members, for example, by prescribing certain age related factors to limit intergenerational unfairness.

Delegating these provisions to secondary legislation will help ensure that the provisions are appropriate and ensure that where necessary any safeguards can be introduced quickly as schemes providing collective benefits evolve.

Regulations made under the powers provided for in this clause will be subject to the negative resolution procedure, as the regulations are likely to be technical in nature and may need to be made quickly if circumstances require it.

### **Clause 12 – Payment schedule**

### **Clause 13 – Overdue contributions and other payments**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 12 provides that regulations may require the trustees or managers of collective schemes prepare, maintain, and if necessary, revise a payment schedule which shows the rates of contributions payable towards the scheme on behalf of the employer and the active members of the scheme, and the dates when such contributions are to be paid. Regulations may require the payment schedule to include other amounts payable to the scheme and the dates on which they are due, and make further provision about the content of the payment schedule and its revision. “Other amount” could include, for example, scheme expenses payable by the employer should this be offered.

Clause 13(1) includes a regulation-making power to require the notification of a specified person where contributions set out in a payment schedule are overdue, and to make further provision for the recovery of those payments.

The intention is that the form of the payment schedule will be similar to the “schedules of payments” provisions that exist for money purchase schemes (under sections 87 and 88 of the Pensions Act 1995 and regulations made under those provisions), including enforcement provisions which relate to overdue contributions. Clause 12(4) and 13(3) provide that provisions corresponding or similar to any provision set out in sections 87 and 88 of the Pensions Act 1995 may be applied in the context of collective benefits.

Regulations made under the powers in Clauses 12 and 13 will be subject to the negative resolution procedure. This mirrors the Parliamentary procedure

for regulations made under sections 87 and 88 of the Pensions Act 1995 and so helps to ensure consistency of approach across pensions legislation.

### **Clause 14 – Statement of investment strategy**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clauses 14 to 18 set out a number of powers which allow requirements to be placed on trustees and managers of schemes in relation to the principles governing decisions about investments, and the choice of and review of investments held for the purpose of providing collective benefits.

Sections 35 and 36 of the Pensions Act 1995 (and the Occupational Pension Schemes (Investment) Regulations 2005) outline the requirements and principles governing investments for trust-based schemes, including the kinds of investment to be held, the balance between different kinds of investment risk, and the expected return on investments.

Clause 14 includes a regulation-making power requiring trustees or managers to produce a statement about their strategy for all investments held in connection with the provision of collective benefits. In practice, it is likely that regulations made under clause 14 will resemble regulations made under section 35 of the Pensions Act 1995. It is envisaged that the regulations will set out the form that the statement of investment strategy must take, together with requirements as to content. For example, regulations might require the trustees or managers to ensure that the statement of investment strategy includes their policies in relation to the kinds of investments to be held, the balance between different kinds of investments and the expected returns on those investments. Clause 14(3) therefore includes a power to make corresponding or similar provision to any provision made by section 35 of the Pensions Act 1995.

However, notwithstanding the potential similarities with existing legislation that currently applies to trust-based schemes, it is important that regulation-making powers are included in the Bill in relation to the investment strategy for

collective benefits. This is not only so that there is consistency in terms of investment requirements and obligations between trust-based and contract-based schemes that offer collective benefits, but also because, given the different nature of collective benefits to other forms of pension benefits as a result of the opportunities associated with risk-sharing between members, it is appropriate to have separate provisions relating to investment strategy and decisions. For example, it may be appropriate for the investment strategy for collective benefits to be revisited on a more regular basis than an investment strategy which relates to the provision of other types of benefits – a requirement to review the strategy on an annual, rather than a triennial, basis might be appropriate. The Department believes that the level of detail involved in these provisions is most appropriately dealt with in delegated legislation to ensure that the requirements can be readily adapted and remain fit for purpose as schemes providing collective benefits evolve.

Regulations made under the powers in clause 14 will be subject to the negative resolution procedure. Regulation-making powers relating to the preparation and content of a statement of investment principles under section 35 of the Pensions Act 1995 are dealt with by way of negative resolution procedure, so it is appropriate for the same process to apply here to ensure consistency of approach across pensions legislation.

### **Clause 15 – Investment performance reports**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 15 contains a regulation-making power to require the trustees or managers of a pension scheme that provide collective benefits to obtain reports about the performance of investments that relate to collective benefits.

In particular, these regulations may make provision about what must be included in the investment performance report, the frequency with which the reports must be obtained, and the person from whom the reports must be obtained. The power to specify the person from whom the reports must be obtained has been included because it may not always be appropriate for the

trustees or managers to draw up an investment performance report – it might be more appropriate, for example, for such a report to be drawn up by a fund manager, since they will be the person best placed to report on investment performance. This power is necessary to ensure that trustees or managers are actively reviewing the performance of investments so that appropriate steps can be taken as quickly as possible to address any issues with investment choices or strategy. This is important in ensuring that there is transparency in the way that the scheme is run and also for member protection.

It is considered that secondary legislation is appropriate given the detailed and technical nature of the report itself and the need to ensure on-going appropriate management of scheme investments. In addition, having these powers in secondary legislation will enable the investment performance report requirements to be changed quickly if it becomes apparent that provisions about the content of the report are not quite fit for purpose or the frequency with which reports need to be obtained is unduly burdensome for the trustees or managers. Regulations made under the powers provided for in clause 15 will be subject to the negative resolution procedure, as the regulations will be technical in nature and may need to be made quickly if circumstances require it.

### **Clause 16 – Investment Powers**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Schemes providing collective benefits could be occupational or personal pension schemes, and could be set up under trust or under a contract-based arrangement.

Clause 16 provides for a number of powers, in the context of investment powers in connection with collective benefit investments. Clause 16(1) includes a power to make provision about the powers of investment of trustees or managers in connection with collective benefit investments. Regulations may also make provision about the delegation of investment

decisions in connection with collective benefit investments and the powers of any person who has had investment decisions delegated to them.

Existing legislation for trust-based occupational pension schemes in the Pensions Act 1995 (and regulations made under the relevant provisions) makes provision about investment powers (including delegation of investment powers and excluding liability for breach of an obligation to take care or exercise skill in the performance of investment functions). We are likely to want to make similar provision for schemes containing collective benefits.

Clause 16(2) therefore includes powers which allow us to provide that regulations may make corresponding or similar provision to section 34 or 36 of the Pensions Act 1995, and to disapply those sections in relation to collective benefit investments. Examples of how the power to make provision corresponding or similar to a provision made by section 36 might be used in practice could be to specify criteria to be applied in choosing investments and requiring diversification of investments. In practice, clause 16 therefore allows the current restrictions that apply to trustees of trust based occupational schemes in relation to choosing investments to be applied to trustees and managers of schemes in relation to the performance of investment functions involving collective benefit investments and for provision to be adapted more specifically as necessary for non-trust based personal pension schemes and schemes which offer collective benefits.

However, regulations made under this clause may need to be adjusted as new types of schemes providing collective benefits are designed. Setting out these requirements in regulations will help ensure that the provisions are appropriate and ensure that they can be readily adapted and remain fit for purpose as schemes providing collective benefits evolve.

The negative procedure is considered appropriate. Regulation-making powers relating to, for example, the choice of investments under section 36 of the Pensions Act 1995 are dealt with by way of negative resolution procedure, so it would be appropriate for the same process to apply here to ensure consistency of approach across pensions legislation.

## **Clause 17 – Restriction on borrowing by trustees or managers**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 17 creates a new power so that borrowing in respect of schemes with collective benefits can be restricted or prevented in a similar way as borrowing is currently restricted in trust based occupational schemes. We want to ensure that funds held for the purposes of collective benefits are utilised to provide those benefits. We therefore want to ensure that there are only limited circumstances when there may be other calls on the fund.

Clause 17 will allow us to make similar provision to regulations that are made under section 36A of the Pensions Act 1995. These provisions limit trustees of trust based occupational schemes and those that have had investment decisions delegated to them, from borrowing money against the scheme's funds, or acting as guarantor except where there is a need to resolve a temporary liquidity problem so that benefits can be paid.

We intend to make corresponding provision in a way that will also apply to managers of schemes providing collective benefits. We therefore intend to put schemes providing collective benefits under the same restrictions as trust based occupational schemes in the context of borrowing money or acting as a guarantor.

Section 36A is drafted with trustees in mind. Delegating these provisions to secondary legislation will allow the government to respond flexibly if there are changes that need to be made in respect of decisions by managers. This will help to allow us to protect the fund, and protect the benefits of members.

Regulations made under the powers provided for in clause 17 will be subject to the negative resolution procedure, as the regulations will be technical in nature.

**Clause 18: Investment powers: duty of care**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*



*Parliamentary Procedure: Negative*

Clause 18 includes a regulation-making power that means regulations may prevent any instrument or agreement excluding, or limiting, any liability of the trustees or managers of a pension scheme, or any person to whom they have delegated decisions, in respect of the performance of investment functions involving collective benefit investments.

Existing legislation (section 33 Pensions Act 1995) ensures that trustees of trust based occupational schemes, and those who have had investment functions delegated to them, are unable, through an instrument or agreement, to exclude themselves from liability under their duty to exercise skill in the exercise of those investment functions. This includes putting barriers in place such as making enforcement of rights subject to restrictive or onerous conditions, restricting any right or remedy, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy. Making it unlawful for trustees, managers and those managing investments on their behalf to act in this way helps ensure that those responsible for those schemes are unable to evade their duty of care in respect of those funds and how they are managed.

As with the provisions in clause 17, delegating these provisions to secondary legislation will allow the government to respond flexibly if there are changes that need to be made in respect of decisions by managers. This will help to ensure that trustees or managers, or other persons under a duty of care in relation to the performance of any investment functions, remain accountable for their actions. Regulations made under the powers provided for in clause 18 will be subject to the negative resolution procedure, as the regulations will be technical in nature.

**Clause 19 – Valuation reports**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 19 contains a regulation-making power which may require those schemes offering collective benefits to obtain a document, prepared by an actuary, and defined in the Bill as a “valuation report”. The intention is that this

report will contain assessments of the value of the pool of assets, which the scheme holds and has designated as the source of paying out collective benefits, and of the sufficiency of those assets to meet the targets in respect of the rate or amount of collective benefits, that have previously been set by the trustees or managers.

This clause includes regulation-making powers to require trustees or managers in a scheme offering collective benefits to obtain the report from an actuary who has specified qualifications or meets other specified requirements, to make further provision about what should be included in the report, and to make provision about the frequency with which the valuation report should be obtained. The clause also provides that regulations may require the actuary to certify whether, in the actuary's opinion, the probability of the scheme being able to provide the target level of benefits is equal to, higher or lower than or outside of a specified range of probability. This will be key to the steps that the trustees or managers take to respond to the outcome of the valuation (and links with the policy for dealing with a deficit or surplus which is referred to in clause 21).

Given the actuarial factors that underlie the calculation of collective benefits, the Department's view is that it is likely to be necessary to ensure that the trustees or managers obtain the report from an actuary who has specified qualifications or meets other specified requirements. Again, this comes down to member protection – the actuary will be required to make some judgment calls when valuing assets held by the scheme and assessing the likelihood of the scheme meeting any targets in relation to those benefits which potentially impact on the level of benefits the members ultimately receive from the scheme. Although actuaries are also required to exercise their judgement when drawing up actuarial valuations and reports in other pensions contexts (such as when providing an actuarial valuation under section 224 of the Pensions Act 2004), it is particularly important in the context of collective benefits that the actuary has a sufficient and appropriate level of technical expertise, since the risk in relation to collective benefits lies entirely with the members; the consequence of poor actuarial advice could be lower benefits for members. Unlike under a traditional salary-related pension arrangement where the employer stands behind any promise offered by the scheme and is therefore responsible for meeting any funding shortfall, trustees or managers may not have recourse to additional funds from an employer (or from the member) in the context of providing collective benefits. The accuracy of the

valuation report and actuarial certification is likely to be of paramount importance.

It is anticipated that valuation reports will need to be obtained on an annual basis in order for the trustees or managers to be able to monitor to what extent the assets held by the scheme are likely to be sufficient to provide the target level of benefits – and then to take appropriate steps to address any issues that arise (as set out in their policy for dealing with a deficit or surplus – see clause 21). As well as ensuring greater transparency in relation to the link between target levels of benefits and the investments held by the scheme, regulations are likely to require that the content of the valuation report and the associated actuarial certification must then be taken into account by the trustees when applying their policy for dealing with a deficit or surplus (see clause 34).

Regulations made under these provisions will be subject to the negative resolution procedure. This is considered appropriate given the technical nature of the regulations, and given that similar powers elsewhere in pensions legislation are subject to the negative procedure. Regulations will allow the Department to ensure that the content of the valuation report remains relevant and appropriate as new designs of schemes providing collective benefits develop. In addition, and again depending on the types of scheme design that emerge, it is important that safeguards can be quickly put in place in relation to particular qualifications that an actuary preparing a valuation report in this context must hold. It is not anticipated that these safeguarding measures would be contentious.

## **Clause 20 – Valuation process**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 20 provides for regulations to make provision about the methods or assumptions to be used by an actuary valuing assets, or assessing the likelihood of a scheme meeting a target in relation to a collective benefit for the purposes of preparing a valuation report under clause 19. It is important to

ensure that all of the relevant assets are taken into account for the purposes of a valuation report, and also to allow schemes to make certain specified deductions from these assets, for example in respect of administrative expenses or other specified matters. The clause therefore includes powers to allow such provision to be made.

In addition, regulations may include requirements in relation to the methods and assumptions to be used by the actuary in the preparation of the report, or the general principles to be used in determining the methods and assumptions in preparing the valuation report. An example of such general principles might be that the mortality tables used and the demographic assumptions made must be based on prudent principles, having regard to certain factors.

The Government has taken the power to make this provision by regulations rather than in primary legislation for a number of reasons. The provisions in this clause will involve a detailed and technical process that is most suitably set out in secondary legislation. Its implementation will require further consideration and consultation with interested parties, such as the actuarial profession. It is also felt to be important to retain a significant degree of flexibility in establishing the details of the process, so that the Department can make a quick and effective response to any concerns raised. As schemes that provide collective benefits do not currently exist within the occupational pension sphere in the UK, the Department will need sufficient flexibility to ensure that the valuation process and the methods or assumptions to be used by an actuary valuing target benefits, are fit for purpose.

The negative resolution procedure is considered the most appropriate form of parliamentary scrutiny for the provisions in this clause. The potential provision for the methods or assumptions to be used by an actuary (as set out in clause 20(1)), will need to take into account the views of the actuarial profession, and may need to be adjusted, at short notice – as an example, this might be to take account of the latest longevity projections or a changed economic climate.

The remaining powers in subsections (3) and (4) of clause 20 – which may require an actuary to certify that methods or assumptions determined in accordance with regulations have been followed, and may impose other requirements on an actuary when preparing a valuation report, including a need to have regard to guidance issued at intervals by a specified person –

are largely procedural requirements for which the negative resolution is most appropriate.

### **Clause 21 – Policy for dealing with a deficit or surplus**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

This clause provides that regulations may require trustees or managers of a pension scheme to set out in advance a policy about how to deal with deficits or surpluses relating to the provision of collective benefits. Where a valuation report shows a deficit or a surplus, clause 21(1)(b) provides that regulations may require the trustees or managers to follow their policy. There is a deficit or surplus in relation to a collective benefit if the probability of the scheme meeting a target is outside a certain probability range.

The main objective behind this clause is to ensure that schemes offering collective benefits operate in a transparent and accountable manner, with the policy setting out precisely how benefit levels might change for members under different economic scenarios that a scheme could face. Imposing an obligation for the trustees or managers to then follow this policy where a valuation report shows a “deficit” or a “surplus” would provide members with a measure of reassurance about the way their benefits might change in different situations.

Regulations under this clause may require the trustees or managers of the scheme to consult about the policy, provide for the content of the policy and provide for review and revision of the policy. It is important to ensure that schemes offering collective benefits operate in a transparent and accountable way. Whilst the intention is to use the powers to make provision about what information the policy should contain (including the types of scenarios that the policy should address), there should also be a degree of flexibility available to trustees and managers as to the way that any deficit or surplus should be dealt with (except in very limited circumstances). The appropriate action might, for example, differ depending on scheme design or depending on historic decisions made within the scheme. This is why subsection (4)(b)

contains a power to require the policy to contain provision for a deficit or surplus to be dealt with in one or more of a “range of ways”. However, it is important that some parameters are put in place in relation to acceptable ways or time periods for dealing with a deficit or surplus; this is why a power has been included at subsection (4)(a) to require the policy to be formulated with a view to achieving results described in the regulations within a period or periods described in the regulations.

Subsection (4) also includes a power to require the policy to set out matters that the trustees or managers must take into account, or principles they must follow, in formulating the policy. Again, this power has been included so that appropriate parameters can be put in place in relation to acceptable ways of dealing with a deficit or surplus. For example, we might want to put some parameters around the extent to which intergenerational risk transfers can take place.

In terms of how the policy might work in practice, a scheme’s policy for dealing with a surplus might specify that where a surplus arises, the target should be increased to reflect this. An alternative option might be for the scheme to leave the target at its current level for another year and then, if appropriate, to increase the target in response to the next valuation report. If there were a deficit, depending on the benefit design, the policy could be to reduce increases to pensions in payment for a period, or to reduce the target.

Subsection (3)(c) contains a power to make provision about the review and revision of the policy. It is likely that this power would be used to require the trustees or managers to review this policy on a regular basis – possibly on an annual basis to tie in with annual valuation reports. It may be appropriate in some circumstances for the policy to be revised, following that review. However, given that a change to the surplus/deficit policy in a collective scheme could potentially involve a redistribution of assets amongst the membership, clause 21(3)(a) includes a power to require the trustees or managers to consult about the policy; we envisage that this might be used to require trustees or managers to consult with members before changing their policy. This power is essential to transparency.

As well as involving a large amount of technical detail, which is unsuitable for inclusion in primary legislation, some of the requirements in relation to the policy will be largely procedural in nature. Setting out the requirements for the

management of deficits and surpluses in secondary legislation will also enable a greater period of engagement with industry during which the Department intends to consider how the policy might operate under a range of possible scheme designs to ensure that the regulations governing the policy for dealing with a deficit or surplus are fit for purpose. It is considered that the negative resolution procedure is the most appropriate form of parliamentary scrutiny for a technical, procedural area such as this.

## **Clause 22 – Power to impose requirements about dealing with a deficit or surplus**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Although in the majority of cases, we envisage that the trustees' or managers' policy for dealing with a deficit or surplus, once applied, will be sufficient to ensure that the probability of meeting targets in relation to any collective benefits returns to within the specified range within the appropriate time period, there may be certain circumstances in which it would be appropriate for regulations to specify that the deficit or surplus must be dealt with in a specific way. Clause 22 therefore includes a power to impose such a requirement.

Subsection (2) provides that the regulations may specify steps that must be taken by the trustees or managers of the scheme and the time within which any steps must be taken.

We envisage that it might be necessary to exercise these powers where (a) the policy has not resulted in the probability of the scheme meeting a target in relation to the benefit returning to the required probability range within a set period of time – perhaps within three to five years, or (b) where there is a very large deficit (or potentially a very large surplus) such that the level of assets held by the scheme for the provision of collective benefits bears very little relationship to the target benefits.

The most likely course of action that regulations would require trustees or managers to take in such situations would be to cut or raise the target level of benefits (and potentially take corresponding action in relation to pensions in payment) so that the likelihood of the scheme being able to meet target benefits returns to the required probability range.

Specifying the circumstances in which a deficit or surplus in respect of any collective benefits must be dealt with in a particular way in secondary legislation will provide the necessary flexibility to be able to respond to issues that may arise as collective models develop and to ensure that the provisions remain fit for purpose.

It is considered that the negative resolution procedure is the most appropriate form of parliamentary scrutiny for a technical area such as this.

### **Clause 23: Deficits attributable to an offence or the imposition of a levy**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Although money purchase schemes are not usually subject to the “employer debt” provisions under section 75 of the Pensions Act 1995 because a funding shortfall which has to be met by the employer cannot arise, there are some very limited circumstances where it is still appropriate for an amount to be treated as a debt due from an employer to the trustees or managers of the scheme. The intention is that where money purchase schemes would be subject to the “employer debt” provisions, the same should apply to the extent that schemes provide collective benefits.

Clause 23 includes a power for an amount to be treated as a debt due from an employer to the trustees or managers of a scheme providing collective benefits in cases where there is a deficit attributable to a specified offence or the imposition of a specified levy.



Although subsection (2) provides that regulations may correspond to or resemble any provision made by Section 75 of the Pensions Act 1995 (which resembles a similar provision included in section 89(2) of the Pensions Act 1995 in relation to money purchase schemes), there is no intention for this power to be exercised in any circumstances other than those set out in subsection (1).

The powers in this clause are intended to apply to situations in which money purchase schemes would be subject to the employer debt provisions in practice, so that to the extent that a scheme provides collective benefits, it is treated in the same way as a money purchase scheme would be treated.

Section 89(2) of the Pensions Act 1995 is subject to the negative resolution procedure; it would therefore be appropriate for this clause also to be subject to the negative resolution procedure, given the technical nature of these provisions and the need for a consistent approach to regulation-making powers across pensions legislation.

#### **Clause 24: Payment of amounts out of collective benefit funds**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 24(1) provides that regulations must prohibit the making of payments out of funds held for the purposes of providing collective benefits except in prescribed circumstances.

Section 37 of the Pensions Act 1995 makes provision in relation to payments to employers when an on-going trust based occupational scheme is in surplus. Clause 24(2) provides that the regulations may make provision corresponding or similar to section 37 of the Pensions Act 1995 in relation to funds held for the purposes of collective benefits.

The general rule is that funds held for the purposes of providing collective benefits should only be used for those purposes and clause 24 therefore

imposes a duty on the Secretary of State to make regulations to this effect. However, there may be some very limited circumstances when it may be appropriate for an employer, or some other party to be entitled to a payment out of the funds should there be a "surplus". For example, it is possible that an employer may wish to assist a scheme with collective benefits that falls into difficulty. We would wish to encourage such action and it may be more likely to happen if the employer could arrange for the possibility of full or partial repayment if the scheme has a future surplus. We might therefore wish to make regulations expressly allowing for this possibility.

Delegating these provisions to secondary legislation will allow the government to consider the implications of making any such regulations carefully and to consult with stakeholders before setting the detail of these exceptions.

The negative resolution procedure is considered the most appropriate form of Parliamentary scrutiny. Powers in Section 37 of the 1995 Act are subject to the negative procedure, and for consistency it is thought that these powers should also be subject to that procedure.

#### **Clause 25 – Transfer Value: policy for calculating cash equivalent of benefits**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

This clause contains a power to require in regulations that trustees or managers of a scheme offering collective benefits have, and follow, a policy for the calculation and verification of cash equivalents of collective benefits. The purpose of this policy is to set out the methodology of assigning 'rights' to members in a collective fund.

It is intended that collective benefits will be subject to the existing transfer value provisions in the Pension Schemes Act 1993. Sections 97 and 101 of the Pension Schemes Act 1993 provide that "cash equivalents" are to be calculated and verified in a prescribed manner. Section 30 of the Welfare Reform and Pensions Act 1999 contains a similar power in the context of pension sharing on divorce. Although the Secretary of State therefore already

has powers to provide how cash equivalents should be calculated and verified, clause 25(3)(b) contains a power to ensure that the trustees' or managers' policy for calculating and verifying any cash equivalent for collective benefits is consistent with any requirements imposed by regulations under section 97 or 1011 of the Pension Schemes Act 1993, section 30 of the Welfare Reform and Pensions Act 1999, or other specified requirements. Again, the purpose of this power is to ensure transparency in the way the schemes that provide collective benefits operate and to ensure that the policy reflects any requirements imposed by regulations made under the provisions listed above.

This clause also contains powers to make other provision about the content of the policy, the review and revision of the policy, and may require trustees or managers to consult about the policy. In addition, regulations may set out matters that the trustees or managers must take into account, or principles they must follow, when drawing up the policy. This policy will be a key scheme document and it is important that, as schemes providing collective benefits develop, there is an opportunity to adjust the detail as to content of the policy to take account of the way that a variety of schemes operate in practice. Where trustees or managers wish to make substantial changes to their policy for calculating the cash equivalent of benefits, it may be appropriate for consultation with members to occur before these changes can be made.

The regulations will need to include a fair amount of technical detail, unsuitable for inclusion in primary legislation. Some of the requirements in relation to the policy will be largely procedural in nature. Delegating to secondary legislation will allow the Department to consult the views of the pensions industry, including, for example, actuaries and investment professionals and ensure that the provisions set out in regulations will capture potential future varieties of collective benefits. The negative resolution procedure is considered the most appropriate form of Parliamentary scrutiny. Similar powers in pensions legislation are subject to the negative procedure, and for consistency it is thought that these powers should also be subject to that procedure.

## **Clause 26 – Winding up**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

The provisions governing the winding up of a pension scheme are important in providing protection and transparency for members in the event of the scheme being wound-up. Clause 26 therefore contains a power to make provision about the winding up of a pension scheme (or part of a scheme) where at least some of the benefits which may be provided by the scheme are collective benefits.

The clause makes it clear that regulations may make provision about the distribution of assets (including any priority order), the operation of the scheme during winding up, the discharge of liabilities and excess assets on winding up. Making appropriate provision about these areas in regulations is key to ensuring that a scheme containing collective benefits can be wound up in an efficient and orderly manner, and that the winding up is effected within an appropriate period of time (to reduce the risk of assets depreciating during winding up).

Statutory provisions governing the winding up of existing occupational pension schemes (other than money purchase schemes and other exempted schemes) are set out in the Pensions Act 1995. Collective benefits are different in nature from money purchase benefits and promised benefits; the current statutory winding up provisions were not drafted with collective benefits in mind, and it is likely that collective benefits will not be compatible with some of these provisions as currently drafted. We envisage that collective benefits may therefore need to be taken out of the existing wind-up provisions and a more appropriate set of provisions put in place in relation to their wind-up. For example, it may not be appropriate to have a statutory priority order along the lines of section 73 which applies in respect of collective benefits.

We have therefore taken a power in clause 26 to provide that regulations may disapply, amend or otherwise modify the application of sections 38, 73, 73A, 73B, 74 and 76 of the Pensions Act 1995 and make corresponding or similar provision to any provision made by those sections.

We need to ensure that the existing statutory winding up provisions continue to apply in the right way - and that a combination of the primary legislation and any regulations made under Part 2 of the Bill make appropriate provision for the winding up of a number of different models of pension schemes, including schemes which contain a mixture of collective and other benefits (whether money purchase benefits, promised benefits or a mixture of the two).

It is likely that the regulations will need to include a greater degree of technical detail than would be suitable for inclusion in primary legislation. In addition, regulations may need to be adjusted to take account of new types of schemes providing collective benefits as they develop. Setting out the winding up requirements in regulations will help to ensure that the provisions remain appropriate and can respond to and take account of innovation in scheme design.

The negative resolution procedure is considered the appropriate level of Parliamentary scrutiny for the regulation-making powers in this clause as the provisions are technical and procedural in nature. In addition, regulations made under the existing winding up provisions are subject to the negative resolution procedure, so adopting the negative resolution procedure here would help to ensure consistency of approach across pensions legislation.

### **Clause 27 – Requirement to wind up scheme in specified circumstances**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulation (Statutory Instrument)*

*Parliamentary procedure: Negative*

The clause contains a power to require trustees or managers of a scheme providing collective benefits to wind up the whole or part of the scheme in specified circumstances.

Although trustees and managers will be required to have a policy on winding up a scheme paying collective benefits, there may be specific circumstances where it is appropriate for legislation to require such a scheme to wind up.

This will only be used where it is clear a scheme is not sustainable, and it is not in the interests of scheme members to allow it to continue on a collective basis. An example of this might be where the scheme contained fewer than a

prescribed number of members and the scheme cannot effectively operate risk pooling or smoothing of assets, which may be to the detriment of member generally.

Subsection (2) contains powers which clarify how any requirements made under this clause will fit with any existing powers, rule of law or legislation. Firstly, subsection (2)(a) provides that regulations may provide for the winding up of the scheme (or part of the scheme) to be as effective in law as if it had been made under powers conferred by or under the scheme.

Subsection (2)(b) provides that regulations made under this clause may potentially require the scheme, or part of it, to be wound up in spite of any legislation or rule of law, or any scheme rule, which would otherwise operate to prevent the winding up. This makes it clear that requirements under this clause can override other legislative or other legal requirements in certain circumstances.

Subsection (2)(c) provides that regulations may require the scheme, or part of it, to be wound up without regard to any legislation, rule of law or scheme rule that would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent with a view to the winding up. This power makes it clear that where a requirement to wind up the scheme under this clause does not directly conflict with another legal requirement, but nevertheless the practical effect of that other legal requirement would be to prevent the winding up of the scheme, that other legal requirement is to be disregarded. This would cover situations, for example, where the scheme could be wound up as required by any regulations made under this clause, but where the employer would have to consent to that winding up (and the consent was not forthcoming).

Similar wording to that included in subsection (2) appears elsewhere in pensions legislation in the context of winding up – for example, in section 154 of the Pensions Act 2004 and section 11 of the Pensions Act 1995.

Delegating these powers to secondary legislation would allow the Department to consult fully with interested parties before making regulations under this clause with a view to ensuring there is broad agreement about where they would be appropriate.

The negative procedure is considered the appropriate level of Parliamentary scrutiny for the regulation-making powers in this clause as the provisions are technical and procedural in nature.

## **Clause 28 – Policies about winding up**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulation (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause contains a power to require trustees or managers of a scheme offering collective benefits to have and to follow a policy about the winding up of the scheme or part of it.

The purpose of this policy is to set out clearly for the benefit of members the circumstances under which the scheme or part of the scheme will be wound up and how the assets of the scheme will be distributed between members.

Winding up a pension scheme can be a complex task that is subject to both legislation and the rules of the scheme concerned, and it is important that there is a single policy that sets out the circumstances where trustees or managers are permitted or required to wind up the scheme, and how they intend to use any discretionary powers they have. We have therefore taken powers at subsection (3) to allow the Department to achieve this objective.

Subsection (3)(a) provides that regulations may require the policy to contain an explanation of the circumstances in which the trustees or managers are permitted or required to wind up the scheme (or part of the scheme) and any requirements about the distribution of assets. Subsection (3)(b) would allow regulations to require the policy to contain an explanation of how trustees or managers intended to use any power to wind up the scheme, or part of it, and how they intend to use any powers in relation to the distribution of assets. Subsection 3(c) allows regulations to require that the treatment of costs on winding up is set out in the policy.

Again, the intention behind these powers is to ensure that schemes providing collective benefits operate in a transparent manner and that members are aware of the processes and decisions that will apply at key moments, such as when the scheme is being wound up.

Subsection (2) contains powers to make other provision about the content of the policy, the review and revision of the policy, and may require trustees or managers to consult about the policy. It also provides that regulations may set out matters that the trustees or managers must take into account, or principles they must follow, when drawing up this policy. This power should

allow appropriate parameters to be put in place in relation to acceptable ways for determining, for example, how assets should be distributed. For example, we might want to put some parameters around the extent to which one cohort of members could be favoured above another cohort.

This policy will be a key scheme document and it is important that, as schemes providing collective benefits develop, there is an opportunity to adjust the detail as to content of the policy to take account of the way that a variety of schemes operate in practice. It might be appropriate to require the trustees or managers to consult with members before making any material changes to the policy, which could in turn potentially impact on how assets are distributed between members on winding up – and hence on what each member ultimately receives from the scheme.

Delegating to secondary legislation will allow the Department to consult the views of the pensions industry. It will also provide the flexibility needed to ensure that the policies about winding up remain relevant to members and, if necessary, any principles that the trustees or managers are required to follow can be revised in line with developments in scheme design.

The negative resolution procedure is considered the most appropriate form of Parliamentary scrutiny as the regulations will be largely technical in nature.

### **Clause 29 – Working out which assets are available for the provision of collective benefits**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulation (Statutory Instrument)*

*Parliamentary procedure: Negative*

The clause provides for regulations about how to work out which assets in a pension scheme are held for the purpose of providing collective benefits. In a scheme with more than one part or section providing collective benefits regulations may also set out how to determine which assets relate to which section or part. The clause also provides for regulations about how to work out which assets held by the scheme are held for the purposes of providing any benefits other than collective benefits.

These powers are needed to ensure it is clear which assets are held for the provision of collective benefits, in particular in respect of schemes that provide a mix of collective benefits and non-collective benefits. Although it may be straightforward where there is a mix of collective and money-purchase



benefits, it could potentially be more difficult to identify which assets are held for the purpose of providing particular benefits if there is a mix of collective benefits and non money-purchase benefits.

This clarity is important to ensure assets are properly assigned in relation to the benefits they are intended to provide, for example when a scheme is winding up or in the context of providing a transfer value.

Delegating to secondary legislation will allow the Department to consult the views of the pensions industry on how this process would work best in practice. The negative resolution procedure is considered the most appropriate form of Parliamentary scrutiny as regulations made under this clause are likely to be very detailed and technical in nature.

### **Clause 30 – Requirement to obtain actuarial advice**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 30 provides for regulations to require trustees or managers to consult an actuary before making specified decisions or taking specified steps, and to require that actuary to have particular qualifications or meet other requirements. This is an important power to ensure that scheme decision-making incorporates expert advice.

In addition, the regulations may provide that the actuary must have regard to guidance issued periodically by a specified person and may impose other requirements on the actuary when advising on those matters. There is precedent within pensions legislation for including provisions which require the actuary to have regard to prescribed guidance, for example under section 230(3) (matters on which advice of actuary must be obtained) of the Pensions Act 2004. The provision in clause 30(2) is a technical requirement to ensure that scheme actuaries can be required to have recourse to the most recent and appropriate professional guidance when advising those with responsibilities in schemes offering collective benefits. Given the detailed nature (and potential variability) of this guidance and additional requirements on actuaries, it is considered most appropriate to delegate these prescriptions to secondary legislation.

Regulations made under this clause will be subject to the negative resolution procedure as they are likely to be technical and procedural in nature.

### **Clause 31 – Sub-delegation**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 31 provides that regulations under part 2 may confer discretion on a person in relation to the provisions in that part of the Bill, for example, regulations may make provision for the methods or assumptions to be used by an actuary but leave some discretion about these matters to the actuary.

The provision is not a stand-alone regulation-making power, and the procedure will be determined according to the procedure which applies to the substantive regulation-making power being used. All part 2 regulation-making powers are negative.

### **Clause 32 – Publication etc of documents**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 32 provides a power to impose requirements in regulations about the publication of the scheme documents described in part 2. The regulations may also specify the persons to whom copies of each document must be sent. The negative resolution procedure is considered the most suitable and proportionate form of Parliamentary scrutiny. The provisions in this clause are procedural in nature and the Department does not envisage that the exercise of these powers would be controversial.

### **Clause 33 – Enforcement**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 33 allows regulations to provide for section 10 of the Pensions Act 1995 to apply where there is non-compliance with any regulations made under Part 2 of the Bill.

The Pensions Regulator has an existing enforcement power under section 10 of the Pensions Act 1995. This prescribes that, where the Regulator is satisfied that by reason of any act or omission this section applies to any person, they may by notice in writing require that person to pay, within a prescribed period, a civil penalty in respect of that act or omission not exceeding the maximum amount. The maximum amount of any penalty under section 10 of the Pensions Act 1995 is £5,000 in the case of an individual or £50,000 in the case of a company, or such lower amount as might otherwise be prescribed.

Setting out in secondary legislation where civil penalties apply will allow the Department to provide for appropriate enforcement of regulations made under Part 2 of the Bill.

The provision is not a stand-alone regulation-making power, and the procedure will be determined according to the procedure which applies to the substantive regulation-making power being used. All part 2 regulation-making powers are negative.

### **Clause 34 – Overriding requirements**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Clause 34 provides that any regulations made under part 2 of the Bill can override a provision in scheme rules to the extent they conflict with them. This means, for example, the Department can be sure that regulations providing important member protections will always take precedence over scheme rules that say something different. This is a fairly common provision in existing

pensions legislation, and ensures trustees and managers of pension schemes are clear about their responsibilities where legislation and scheme rules appear to conflict.

It will not be appropriate for all regulations made under Part 2 to override scheme rules. Allowing the regulations to specify if a provision does override scheme rules in the case of a conflict allows for a proportionate and balanced approach. It also allows for amendments to be made as these types of scheme develop.

The provision is not a stand-alone regulation-making power, and the procedure will be determined according to the procedure which applies to the substantive regulation-making power being used. All part 2 regulation-making powers are negative.

### ***Part 3 – General changes to legislation about pensions schemes***

#### **Clause 36 – Pensions promise obtained from third party**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause provides that regulations may be made to require that trustees and managers must not obtain a pensions promise from a third party unless conditions specified in the regulations are met. The regulations can provide for section 10 of the Pensions Act 1995 to apply for non-compliance, which allows the Pensions Regulator to impose a financial penalty. The maximum amount of any penalty is £5,000 in the case of an individual or £50,000 in the case of a company, or such lower amount as might otherwise be prescribed.

We intend regulations under this provision to enable additional member protections where the scheme itself is not liable for the guarantee, and where there may not be a direct contractual relationship between the member and

the provider of the third party guarantee in new styles of shared risk and defined benefits schemes, and where the Pension Protection Fund and the Financial Services Compensation Fund may not apply. The conditions would be intended to ensure that the risk being taken with such an arrangement was proportionate.

This level of detail is considered unsuitable for primary legislation. Setting out requirements in secondary legislation will also enable a greater period of consultation during which we hope to take account of all variations of scheme type and also establish whether regulation is in fact needed. Industry may well address this issue via best practice, but legislation will need to be responsive if issues arise in the market.

These regulations will be subject to the negative resolution procedure. As they are technical and will need to be responsive, this was considered the most suitable form of Parliamentary scrutiny.

### **Clause 37 – Duty to act in the best interests of members**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary Procedure: Negative*

Because of the new types of risks that may arise in these new types of shared risk schemes and schemes offering collective benefits, clause 37 sets out a regulation-making power which allows regulations to require managers of non-trust based schemes to act in members' best interests when taking certain specified decisions.

This duty cannot be applied to managers in schemes set up under a trust. There will be a trustee in such schemes who is taking the types of decisions that are likely to be specified under this power. Trustees are already under a general fiduciary duty to members. The duty can apply in relation to shared risk schemes and schemes offering collective benefits. This duty cannot be applied generally to scheme managers in non trust-based schemes, but only in relation to certain specified decisions made by managers.

Clause 37(3)(a) allows for regulations to provide that the duty to act in members' best interests when taking specified decisions overrides inconsistent obligations with that duty.

Under clause 37(4) the regulations may also provide that the consequences of a manager breaching (or threatening to breach) the duty to act in the best interests of members be the same as the consequences of breaching (or threatening to breach) a fiduciary duty owed by the manager to the members, and, accordingly, for the duty to be enforceable in the same way as a fiduciary duty.

The types of decisions we are intending to specify for the purposes of this power will generally be those taken in circumstances where the individual member has no ability to influence or control the decision that is made, but where the decision could have a significant impact on their benefits. Being able to make this provision in secondary legislation will allow the government to respond flexibly as new types of schemes and benefit designs are developed, and by extension, new types of managerial decisions which may impact members' benefits arise.

We envisage that the decisions to be specified in regulations may include:

- The distribution and redistribution of assets between members in schemes that provide collective benefits;
- In shared risk schemes, in relation to third party promises – in particular decisions about whether to offer or purchase a guarantee, the accurate attribution of the promise to relevant members; and retrieving and allocating any returns on those promises.

It is considered that the negative resolution procedure is the most appropriate form of Parliamentary scrutiny as the decisions to be specified are likely to be detailed and technical in nature.

## **Clause 38 – Disclosure of information about schemes**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause amends an existing regulation-making power in section 113 of the Pension Schemes Act 1993. Section 113 provides for the Secretary of State to make regulations placing information requirements on pension schemes.

This clause removes the non-exhaustive list of those people to be kept informed, allowing such persons to be prescribed in regulations. This is not a new power to prescribe those persons to be kept informed; rather, it is a reframing of the current provision. It also stipulates that trustees or managers should make reference to guidance which may be prepared by the Secretary of State when complying with the requirements.

Setting out those persons to be kept informed in secondary legislation will allow the Department to take account of the new categories of scheme and members in terms that are meaningful. The existing power in section 113 can then be used to specify new types of information to be disclosed that will be appropriate for schemes, particularly in relation to shared risk schemes.

Regulations under section 113 are subject to the negative resolution procedure.

#### **Clause 40 – Revaluation of accrued benefits**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Clause 40 and Schedule 1 amend Chapter 2 of Part 4 of the Pension Schemes Act 1993 (Revaluation of Accrued Benefits (Excluding Guaranteed Minimum Pensions)). The amendments introduce a new regulation-making power.

Following the changes made by this Bill, personal pension schemes may be encouraged to provide benefits other than money purchase benefits. The power will enable regulations to amend Chapter 2 in order to modify the current revaluation provisions to ensure that the revaluation methods that are currently not available to personal pension schemes are made suitable for those schemes. This will enable those schemes to appropriately revalue deferred benefits for early leavers if new personal pension schemes evolve so that the average salary or final salary method is considered more appropriate. The power is restricted so that the revaluation method used for a benefit to which a right has already accrued may not be changed (see new section 85A(2)(b)). This power will be subject to the negative resolution procedure. Although it is a power to amend primary legislation, any regulations will be limited to technical changes which build on existing requirements, and will be responsive to new benefit structures. The negative procedure was therefore considered appropriate.

#### **Clause 42 – Regulatory own fund schemes exempt from indexation**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Sections 51 to 54 of the Pensions Act 1995 make provision for indexation of pensions under occupational pension schemes (except public service pension schemes which are covered by the Pensions (Increase) Act 1971). 'Indexation' is the method by which pensions in payment are increased annually to retain their value against inflation. Indexation requirements originally applied to all benefits accrued from April 1997, but from 6 April 2004, the requirement does not apply to money purchase benefits, except where they related to a pension already in payment before 6 April 2004.

This clause amends the 1995 Act to exclude regulatory own fund schemes from the requirement to index pensions in payment. Regulatory own funds are a type of occupational pension scheme that is required to hold additional reserves because the scheme itself (rather than a sponsoring employer) underwrites risks related to life, death or disability benefits or guarantees a given investment performance or a given level of benefits.



The clause inserts a definition of a regulatory own fund which refers directly to the relevant European Council Directive. Also inserted is a regulation-making power to amend the reference to any provision of an EU instrument that may replace it. This is a simple power to allow us to amend this piece of UK legislation if any further EU legislation overrides the current definition.

This clause is subject to the negative resolution procedure. As any changes will be purely technical changes to reflect any changes to EU law, this was felt to be appropriate.

### **Clause 43 – Power to create other exemptions from indexation**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Affirmative*

This clause inserts a regulation-making power into the Pensions Act 1995 to create further exemptions from indexation for pensions of a prescribed description. The Government does not intend to interfere either with rights already accrued or with benefits under a defined benefits scheme. The clause, therefore, places restrictions on how the power can be used. A new exemption cannot be made in respect of any pension under a defined benefits scheme, any pension that comes into payment before the regulations come into force or any pension attributable to service before the regulations come into force. This provides assurance that the power cannot be used in a way that affects rights already accrued.

This power will allow the Department to consider in detail the indexation requirements appropriate to the different types of pension arrangement made possible in the Bill. For example, where shared risk pension schemes, or collective benefits are concerned, statutory indexation may not be appropriate, as some schemes may offer indexation on a discretionary basis. Setting this out in secondary legislation will enable the Department to make appropriate provision for different pension types as necessary. We anticipate the new legislation will result in a number of different scheme designs where members have a mix of benefits, each of which will have to be considered separately to determine whether they should be subject to indexation.

This clause will be subject to the affirmative resolution procedure. Changes in indexation are considered to be fundamental, with important implications for those affected. As such, Parliament should be given the opportunity to actively debate them. The affirmative procedure will also provide a high degree of transparency.

#### **Clause 45 – Rules about modification of schemes**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause inserts a regulation-making power into section 67 of the Pensions Act 1995 to create exemptions from the application of the subsisting rights provisions in prescribed cases. It replaces the existing regulation-making power in section 67 which provides that the subsisting rights provisions do not apply in relation to the exercise of a power in a prescribed manner.

Application of the subsisting rights provisions will not be appropriate in all cases where the proposed modification is in respect of collective benefits. For example, where the scheme needs to change target benefits. In this case the necessary protections for members are provided through specific legislation around setting and changing targets. The existing power is not sufficient to disapply the subsisting rights provisions in this type of case.

The negative resolution procedure is considered the appropriate level of Parliamentary scrutiny for the regulation-making powers in this clause. Regulations made under the existing power in section 67 are subject to the negative resolution procedure, so adopting the negative resolution procedure here would help to ensure consistency of approach across pensions legislation.

#### **Part 4 – Pensions guidance**

Chapter 1: Pensions guidance  
Chapter 2: Independent advice  
Chapter 3: Drawdown, conversion of benefits and lump sums  
Chapter 4: Transfers  
Chapter 5: Interpretation of Part

## **Chapter 2: Independent advice**

### **Clause 48 - Independent advice in respect of conversions and transfers: Great Britain**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Trustees or managers of a pension scheme in Great Britain will be required to check that a member or survivor has received appropriate independent advice before converting safeguarded benefits into flexible benefits, or making a transfer payment in respect of safeguarded benefits to a scheme in which the member will acquire flexible benefits.

This clause confers a regulation-making power to enable the Secretary of State to make exceptions to this requirement. The regulations may also specify what trustees and managers must do to check that a member or survivor has received appropriate independent advice, and when the check must be carried out.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of Parliamentary scrutiny. Any exceptions made will be limited and are expected to be technical. The regulations will also set out technical and detailed matters within the parameters of the general policy.

### **Clause 49 - Power to require employer to arrange advice for purposes of section (Independent advice in respect of conversions and transfers: Great Britain)**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause confers a regulation-making power to enable the Secretary of State to specify circumstances in which an employer must arrange or pay for a member or survivor to receive the appropriate independent advice required by clause 48. The regulations may in particular impose a limit on the amount that an employer must pay and prohibit an employer from seeking to recover from the member or survivor the costs incurred by the employer. The clause imposes civil penalties on an employer who fails to comply with the regulations.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of Parliamentary scrutiny. The regulations will be detailed and technical in nature.

**Clause 51 - Independent advice in respect of conversions and transfers:  
Northern Ireland**

*Powers conferred on: Department for Social Development in Northern Ireland*

*Powers exercised by: Regulations (Statutory Rule)*

*Parliamentary procedure: Negative*

Trustees or managers of a pension scheme in Northern Ireland will be required to check that a member or survivor has received appropriate independent advice before converting safeguarded benefits into flexible benefits, or making a transfer payment in respect of safeguarded benefits to a scheme in which the member will acquire flexible benefits.

This clause confers a regulation-making power to enable the Department for Social Development in Northern Ireland to make exceptions to this requirement. The regulations may also specify what trustees and managers must do to check that a member or survivor has received appropriate independent advice, and when the check must be carried out.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of scrutiny. Any exceptions made will be limited and are expected to be technical. The regulations will also set out technical and detailed matters within the parameters of the general policy.

**Clause 52 - Power to require employer to arrange advice for purposes of section (Independent advice in respect of conversions and transfers: Northern Ireland)**

*Powers conferred on: Department for Social Development in Northern Ireland*

*Powers exercised by: Regulations (Statutory Rule)*

*Parliamentary procedure: Negative*

This clause confers a regulation-making power to enable the Department for Social Development in Northern Ireland to specify circumstances in which an employer must arrange or pay for a member or survivor to receive the appropriate independent advice required by clause 51. The regulations may in particular impose a limit on the amount that an employer must pay and prohibit an employer from seeking to recover from the member or survivor the costs incurred by the employer. The clause imposes civil penalties on an employer who fails to comply with the regulations.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of scrutiny. The regulations will be detailed and technical in nature.

**Clause 54 - Independent advice: income tax exemption**

*Powers conferred on: HM Treasury*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative - laid before the House of Commons only*

This clause inserts a new section 308B into Part 4, Chapter 9 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). New clauses 48 and 51

provide for the provision of independent advice in respect of conversions and transfers in Great Britain and Northern Ireland respectively. The new section 308B of ITEPA will exempt the cost of independent financial advice being paid for or reimbursed by the employer from being treated as a taxable benefit in kind for income tax purposes, provided specific conditions are met.

One of those conditions is that such other requirements as may be specified in regulations made by the Treasury in relation to the provision, payment or reimbursement are satisfied. The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of parliamentary scrutiny as the regulations will be technical and procedural in nature. The regulations will be laid before the House of Commons only (see section 717 of ITEPA) in accordance with the normal convention for tax related secondary legislation.

The income tax exemption will automatically remove any liability to Class 1A National Insurance Contributions (NICs), since such liability only arises where there is a corresponding tax liability. Existing regulatory powers will be used to introduce a comparable disregard for Class 1 NICs.

### **Chapter 3: Drawdown, conversion of benefits and lump sums**

#### *Overview of the Approach in this Chapter*

The Taxation of Pensions Bill will introduce changes with effect from April 2015 which will significantly extend the forms of “authorised payments” that may be paid by pension schemes under tax legislation. Those changes will include a relaxation of conditions on the payment of drawdown pensions, and a new category of lump sum payable out of funds to which a person is entitled under the scheme which have not yet been used to provide benefits to him or her (“uncrystallised funds pension lump sums”). Schemes will be able to offer these types of payments in relation to “money purchase arrangements”, the definition of which in tax legislation includes both money purchase and cash balance arrangements. However, in pensions legislation, cash balance benefits are not included in the definition of money purchase benefits, and are treated differently from such benefits in several significant respects. As a consequence of this, clause 56 requires that occupational pension schemes may only pay drawdown pensions in respect of money purchase benefits (pensions legislation definition). Existing regulation-making powers will be used to enable trustees or managers of relevant occupational pension

schemes to amend their rules in order to offer drawdown pensions and/or uncrystallised funds pension lump sums, if they so wish. Trustees or managers with cash balance arrangements will also be able to amend their rules to allow the conversion of these cash balance benefits into money purchase benefits.

Schemes which choose to offer drawdown pensions will need to make provision about how that process will operate in the context of the scheme's particular benefit structure (including the conversion of cash balance benefits into money purchase benefits for that purpose). This may include, if members (or their survivors) are to be permitted to access their pension savings in the form of drawdown earlier than the age at which they would normally be entitled to take payment of benefits under the scheme, a reduction to the person's benefit entitlement to reflect that early access. Where a scheme allows drawdown pensions to be taken in respect of part of an individual's entitlement under the scheme, the scheme may need to specify a method for calculating the remaining cash balance benefits to which the individual is entitled. Similarly, schemes which choose to offer lump sum payments out of uncrystallised funds in respect of cash balance benefits may need to make provision about the calculation of a person's remaining cash balance benefits where only part of their entitlement is paid as a lump sum, and about any reduction to be applied to a lump sum which is paid in advance of a person's normal pension age under the scheme.

#### **Clause 56 – Provision about conversion of certain benefits as available for drawdown: Great Britain**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause allows regulations to be made in relation to the conversion of cash balance benefits into money purchase benefits, where a member or a survivor of a member wishes to exercise an option to do so in order to designate assets as available for the payment of a drawdown pension in respect of part or all of their benefits under the scheme (where this option is offered under the scheme rules).

Prior to the enabling legislation coming into force, it is not known to what extent schemes will choose to offer the option to designate assets under the scheme as available for payment of drawdown pension, nor what scheme rules will provide in relation to the process to be followed where a person chooses to exercise such an option. It is the intention to monitor how occupational pension schemes undertake the conversion process once the enabling legislation is in place.

If, in practice, schemes adopt processes which do not operate fairly, or experience specific difficulties in relation to the conversion process, it is our intention to place conditions on the process through regulations.

Subsections (2) and (3) of clause 56 outline some of the circumstances in relation to which it is envisaged that regulations may be required. For example, given that the flexibility to access pension savings in the form of drawdown payments may significantly increase the incentive for some individuals to access their benefits before their normal pension age (where their scheme permits them to do so), it may be necessary to regulate how schemes calculate any reduction which is applied in relation to such early access, particularly in the context of more complex cash balance benefit structures.

Subsection (4) permits the regulations to override scheme rules, where that is necessary.

Regulations made under this power will be subject to the negative resolution procedure. This is considered appropriate because any regulations made under this power will be technical in nature. In addition, if particular difficulties arise, schemes may delay payments pending the making of the regulations. Such delays may cause significant problems for relevant members.

**Clause 61** provides for an equivalent power to that described above to be exercisable in relation to Northern Ireland by the Department for Social Development in Northern Ireland.

#### **Clause 57 – Provision about calculation of lump sums: Great Britain**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*



*Parliamentary procedure: Negative*

This clause allows regulations to be made in relation to the calculation of lump sums paid in respect of cash balance benefits, where a person chooses to exercise an option under scheme rules to take part or all of their entitlement to such benefits as a lump sum payment.

The reasons for taking this power are similar to those outlined above in connection with the power to make regulations in relation to the conversion of cash balance benefits into money purchase benefits for the purpose of designating assets as available for the payment of a drawdown pension. The flexibility to be paid benefits in the form of one or more cash lump sums may represent an incentive for some individuals to seek early access to their pension savings. Therefore, it may, be necessary to regulate how schemes calculate any reduction which is applied, where a person takes a lump sum in respect of their cash balance benefits in advance of their normal pension age (where scheme rules permit this).

Subsections (2) and (3) outline the particular circumstances in relation to which it is envisaged that regulations may be required.

It is the intention to monitor how occupational pension schemes undertake these matters once the enabling legislation is in place. If schemes do not operate fairly, or experience specific difficulties in practice (for example, in determining how to calculate a person's remaining cash balance benefits under the scheme following payment of part of the person's entitlement as a lump sum), regulations will be made to address any issues that arise.

Subsection (4) permits the regulations to override scheme rules, where that is necessary.

This power will be subject to the negative resolution procedure. As described in reference to clause 56, any regulations made under this power will be technical in nature. In addition, if particular difficulties arise, schemes may delay payments pending the making of the regulations. Such delays may cause significant problems for relevant members. Therefore this procedure was considered appropriate.

**Clause 62** provides for an equivalent power to that described above to be exercisable in relation to Northern Ireland by the Department for Social Development in Northern Ireland

**Clause 59 – Restriction on payment of lump sums during PPF assessment period: Great Britain**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause amends section 138 of the Pensions Act 2004, to clarify the restriction under that section on the payment of non-money purchase benefits by an occupational pension scheme which is being assessed for entry into the Pension Protection Fund (PPF) (in other words, where the scheme is in a PPF assessment period). The amendment reflects the introduction of a new type of pension lump sum to be permitted under tax legislation with effect from April 2015.

At present section 138 requires that the benefits paid during a PPF assessment period must be reduced to ensure they do not exceed the compensation which would be payable if the scheme transferred into the PPF. This clause inserts a new subsection to provide that non-money purchase benefits may only be paid as lump sums during a PPF assessment period where compensation would be payable in the form of a lump sum if the scheme transferred into the PPF. Where a scheme offers members the option to take cash balance benefits as uncrystallised funds pension lump sums, payment of such lump sums will not be permitted during an assessment period.

In connection with that restriction, subsection (10) of this clause inserts a regulation-making power into section 138, to allow regulations to provide circumstances in which a lump sum payable under the scheme is to be treated as if it would be payable as PPF compensation. This power reflects the fact that it is not the intention to prevent payment of a lump sum during an assessment period where there are only minor differences between the lump sum payable under scheme rules and a lump sum payable as PPF compensation.

Regulations made under this power will be subject to the negative resolution procedure. As any regulations will be technical in nature and will build on existing requirements this is considered appropriate.

## **Clause 65 – Rights to transfer benefits**

### **Schedule 4 – Rights to transfer benefits**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Clause 65 and Schedule 4 amend Chapter 4 of Part 4 and Part 4A of the Pension Schemes Act 1993 to reflect the new pension flexibilities introduced by the Taxation of Pensions Bill and changes to pensions legislation in Part 1 of this Bill.

They provide for the transfer requirements to be disapplied in respect of persons of a prescribed description or modified in respect of members with particular types of benefit. These are the regulation-making powers currently in section 93(1B) of the Pension Schemes Act 1993 and are amended only to the extent necessary to take account of the changes, and will be used in the same way as now.

Other existing regulation-making powers in Chapter 4 of Part 4 and Part 4A of the Pension Schemes Act 1993 are unchanged.

## **Clause 66 - Restriction on transfers out of public service defined benefits schemes: Great Britain**

*Powers conferred on: the Secretary of State and the Treasury*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

This clause restricts the right (under Part 4 Chapter 4 of the Pension Schemes Act 1993) to transfer from one pension scheme to another, so as to prevent a member of an unfunded public service defined benefits scheme using that right to transfer to another pension scheme in which they can obtain flexible

benefits. A member of an unfunded public service defined benefits scheme will only be able to exercise the right to transfer to another scheme if the benefits that may be provided in the other scheme are not flexible benefits, and the other scheme satisfies prescribed requirements. Similarly, members of an unfunded public service defined benefits scheme will only be able to exercise the right to transfer to a personal pension scheme which satisfies prescribed requirement, or to purchase an annuity which satisfies prescribed requirements, or to subscribe to other pension arrangements which satisfy prescribed requirements.

This clause confers a regulation-making power to enable the Secretary of State or the Treasury to prescribe those various requirements. The clause also confers a regulation-making power enabling the Treasury to make regulations providing that the restrictions on transfer will not apply in certain circumstances or in relation to certain schemes or to schemes of a certain type.

Before making regulations under this clause the Secretary of State or the Treasury must consult such persons as they may consider appropriate, unless whichever one of them is making the regulations considers consultation inexpedient because of urgency.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of Parliamentary scrutiny. Any exceptions made will be limited and are expected to be technical, for example to ensure that the Fair Deal policy continues to operate as intended. The power to prescribe requirements is modelled on the existing power in section 95 of the Pension Schemes Act 1993, which is subject to the negative resolution procedure.

**Clause 67 – Reduction of cash equivalents: funded public service defined benefits schemes: Great Britain**

*Powers of designation conferred on: Ministers of the Crown, Scottish Ministers, the Independent Parliamentary Standards Authority, trustees of the Parliamentary Contributory Pension Fund, trustees of the Scottish Parliamentary Contributory Pension Fund and the Treasury*

*Powers exercised by: Designation*

*Parliamentary procedure: None*

*Powers to make regulations conferred on: the Treasury and the Scottish Ministers*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative except for the power to modify the definitions of “local authority” and “the relevant person” in which case Affirmative*

Permitting transfers out of unfunded public service defined benefits schemes to schemes in which flexible benefits are available would expose the Exchequer to significant risks. There are not the same risks in relation to transfers out of funded public service schemes, and they are therefore not subject to the restriction on transfers in clause 66 above. However it is important that powers are available to protect public finances in the event that the level of transfers out of a funded public service scheme increases the risk of support from public funds. This clause therefore provides the power to protect public funds in the event that such a risk does crystallise.

This clause confers a power on the relevant person to designate that scheme. For schemes other than certain Scottish schemes, the relevant person is any Minister of the Crown by whom or with whose approval a funded public service defined benefits pension scheme was established or the Treasury. This is except for the MPs’ pension scheme (where the relevant person is the Independent Parliamentary Standards Authority and the trustees of the Parliamentary Contributory Pension Fund) and the Ministerial pension scheme (where the relevant person is the trustees of the Parliamentary Contributory Pension Fund). For certain Scottish schemes the relevant person is the Scottish Ministers; or, in the case of a scheme established by virtue of section 81(4)(b) of, or paragraph 3(4)(b) of Schedule 2 to, the Scotland Act 1998, the trustees of the Scottish Parliamentary Contributory Pension Fund. Separate provision is made for the UK Parliamentary Schemes and Scottish Parliamentary Scheme to reflect who has responsibility for those schemes and because Ministers (or Scottish Ministers) may be members of the scheme. No separate provision was needed for Wales because the current scheme for Welsh Ministers is a trust-based scheme.

The power may be used only if the relevant person considers that the level or expected level of transfers out of the scheme increases the likelihood of payments out of public funds being needed to ensure that the scheme can meet its liabilities. A designation may have effect for no more than two years and may be renewed or revoked depending on whether there is still a need for it.

The clause defines local authority in relation to England so as to apply to payments provided by the main local authorities. The clause confers a power on the Treasury to modify this definition of “local authority”. This is to enable the provision to be flexible enough to use in the event that a pension scheme does need to receive public funds from a “minor” local authority without also needing to receive those funds from one of the main local authorities. The clause also confers a power on the Treasury and, in relation to certain Scottish schemes, on the Scottish Ministers to modify the definition of “the relevant person”. This is to enable the definition to take account of changes to scheme structures. Any such regulations would be technical provisions, to ensure that the policy intent was not undermined by changes in the list of bodies which are scheme employers in, for example, the Local Government Pension Scheme, so that the definition of “local authority” in the Bill no longer reflected the local authorities which are scheme employers in public service pension schemes.

The clause also confers a power on the Treasury to make regulations which provide that where a designation has been made the scheme trustees or managers must reduce the amount of the cash equivalent for acquiring flexible benefits in another scheme by an amount determined in accordance with the regulations. Before making regulations under this clause the Treasury or, in relation to their power, the Scottish Ministers, must consult such persons as they may consider appropriate, unless they consider consultation inexpedient because of urgency.

Save for the power to modify the definition of “local authority” and “the relevant person”, the regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of Parliamentary scrutiny. These regulations would be detailed and technical and similar in nature to the Occupational Pension Schemes (Transfer Values) Regulations 1996, made under section 97 of the Pension Schemes Act 1993, to which the negative resolution procedure applies.

The power to modify the definition of “local authority” and “the relevant person” will be subject to the affirmative resolution procedure. It is a power to modify primary legislation so this was felt to be the appropriate level of Parliamentary scrutiny.

**Clause 69 - Restriction on transfers out of public service defined benefits schemes: Northern Ireland**

*Powers conferred on: the Department for Social Development in Northern Ireland or the Department of Finance and Personnel*

*Powers exercised by: Regulations (Statutory Rule)*

*Parliamentary procedure: Negative*

This clause restricts the right (under the Pension Schemes (Northern Ireland) Act 1993) to transfer from one pension scheme to another, so as to prevent a member of an unfunded public service defined benefits scheme using that right to transfer to another pension scheme in which they can obtain flexible benefits. A member of an unfunded public service defined benefits scheme will only be able to exercise that right to transfer to another scheme if the benefits that may be provided in the other scheme are not flexible benefits, and the other scheme satisfies prescribed requirements. Similarly, members of an unfunded public service defined benefits scheme will only be able to exercise that right to transfer to a personal pension scheme which satisfies prescribed requirements, to purchase an annuity which satisfies prescribed requirements or for subscribing to other pension arrangements which satisfy prescribed requirements.

This clause confers a regulation-making power to enable the Department for Social Development in Northern Ireland or the Department of Finance and Personnel to prescribe those various requirements

The clause also confers a regulation-making power enabling the Department of Finance and Personnel to make regulations providing that the restrictions on transfer will not apply in certain circumstances or in relation to certain schemes or to schemes of a certain type.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of parliamentary scrutiny. Any exceptions made will be limited and are expected to be technical, for example, to ensure that the Fair Deal policy continues to operate as intended. The power to prescribe requirements is modelled on the existing power in section 91 of the Pension Schemes (Northern Ireland) Act 1993, which is subject to the negative resolution procedure.

**Clause 70 - Reduction of cash equivalents: funded public service defined benefits schemes: Northern Ireland**

*Powers of designation conferred on: the Department of Finance and Personnel, any Northern Ireland Minister or Northern Ireland department*

*Powers exercised by: Designation*

*Parliamentary procedure: None*

*Powers to make regulations conferred on: the Department of Finance and Personnel*

*Powers exercised by: Regulations (Statutory Rule)*

*Parliamentary procedure: Negative except for the power to modify the definition of “the relevant Department” in which case the confirmatory procedure*

This clause makes equivalent provision for Northern Ireland to the provision made in clause 67 above. It provides the power to protect public funds in the event that the level of transfers out of a funded public service scheme increase the risk of support from public funds.

This clause confers a power on the relevant Department to designate that scheme. The relevant Department is the Department of Finance and Personnel or any Northern Ireland department by whom or with whose approval a funded public service defined benefits pension scheme was established. The power may be used only if the relevant Department considers that the level or expected level of transfers out of the scheme increases the likelihood of payments out of public funds being needed to ensure that the scheme can meet its liabilities. A designation may have effect



for no more than two years and may be renewed or revoked depending on whether there is still a need for it.

The clause confers a power on the Department of Finance and Personnel to make regulations which provide that where a designation has been made the scheme trustees or managers must reduce the amount of the cash equivalent for acquiring flexible benefits in another scheme by an amount determined in accordance with the regulations.

The regulations will be subject to the negative resolution procedure, which was felt to be the appropriate level of Parliamentary scrutiny. The regulations would be detailed and technical and similar in nature to The Occupational Pension Schemes (Transfer Values) Regulations (Northern Ireland) 1996, made under section 93 of the Pension Schemes (Northern Ireland) Act 1993, which are subject to the negative resolution procedure.

The clause also confers a power on the Department of Finance and Personnel to modify the definition of “the relevant Department”. This is to enable the definition to take account of changes to scheme structures. The power to modify the definition of “the relevant person” will be subject to the confirmatory procedure. It is a power to modify primary legislation so this was felt to be the appropriate level of Parliamentary scrutiny.

## ***Part 5 – Miscellaneous***

### **Clause 76 – Pension scheme for fee-paid judges**

#### **Schedule 5 – Pension scheme for fee-paid judges: consequential amendments**

*Power conferred on: Lord Chancellor*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Clause 76 inserts a power into the Judicial Pensions and Retirement Act 1993 to enable the Lord Chancellor to establish a pension scheme for eligible fee-paid judges in Great Britain and Northern Ireland, as required by case law.

This is for historic cases only. As things currently stand, this will reach back to 7 April 2000, but the point is subject to appeal. It also ensures that fee-paid judges who are subsequently appointed to the salaried judiciary are extended the same protection rights as members of existing public service pension schemes as provided for in regulations under the Public Service Pensions Act 2013.

Schedule 5 provides for the fee-paid judicial pension scheme created as a result of clause 76 to be linked to the Pensions (Increase) Act 1971 (the 1971 Act). The fee-paid pension scheme will be added to Schedule 2 of the 1971 Act. The 1971 Act operates so that if a pension has been in payment for a year, at the start of the following year it receives an indexation uplift. If the pension has not been in payment for a full year, there is a pro-rata indexation.

In principle, litigation brought by fee-paid judges has established their entitlement to a pension no less favourable than the pension scheme for salaried judges under Part 1 of the Judicial Pensions and Retirement Act 1993. The precise details of the scheme have been consulted on and any derivation from the principle will be subject to scrutiny in the Employment Tribunal. Additionally, the scheme for fee-paid judges will be used to provide pensions in respect of service from April 2000 and April 2015. From April 2015, all fee-paid judges, save for those with transitional protections, will move into the new judicial pension scheme made under section 1 of the Public Service Pensions Act 2013. Where the scheme will only apply for a limited, historic period and in such prescribed circumstances, the negative resolution procedure is appropriate.

### **Clause 78 – Extension to Scotland of certain provisions about marriage of same sex couples**

*Power conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Negative*

Section 38A was inserted by the Marriage (Same Sex Couples) Act 2013 and enables regulations to be made to specify further conditions that need to be met in order for those sections to have effect in relation to a relevant gender change case, including information that should be provided by either member of a couple in such a case. A 'relevant gender change case' is a case where

the earner was a woman by virtue of a gender recognition certificate having been issued and the earner and her widow were married before the certificate was issued. Widows in these cases will be entitled to inherit half the Guaranteed Minimum Pension (GMP) based on accruals back to 1978. In order to benefit from this exception, widows in these cases will need to produce evidence of their spouse having changed gender to support their claim for pension benefits. Paragraph 20A of the Marriage (Same Sex Couples) Act 2013 inserted section 38A into the Pension Schemes Act 1993 to enable regulations to be made to specify the detail of what information may be needed to be provided by a member of the couple, or other conditions that may be met, before scheme trustees are obliged to treat these widows as if they were widows of opposite sex marriages.

Section 38A currently only applies to England and Wales. This small legislative change is to ensure the powers to make regulations apply to Scotland so that, as is usual, legislation can be made to extend to England Wales and Scotland as regulation of occupational pensions is a reserved matter.

## ***Part 6 – General***

### **Clause 80 – Power to make consequential amendments etc**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Affirmative or Negative*

Many consequential changes to existing legislation are being made by other provisions of this Bill. This clause inserts a regulation-making power to make further consequential changes, i.e. to bring existing legislation into line with the new definitions and types of benefit that are established in this Act. The provision includes a Henry VIII power to allow amendments consequential on this Bill to be made to primary or secondary legislation, whenever passed or made. We have prioritised for inclusion in the Bill certain key consequential amendments that relate to fundamental elements of the current legislative structure. The main provisions in the Bill are to establish a new framework - which of itself does not directly place any new requirements on schemes. The

key consequential amendments in the Bill relate to the nature of benefit rights and entitlements of members at key points in the pension saving lifecycle in order to enable proper scrutiny and give sufficient clarity.

However, this power has been taken in order to deal with other amendments which will be needed subsequently for the proper operation of the provisions in the Bill and their interaction with other requirements in private pensions and wider legislation, including legislation of other Government Departments. The changes made by this Bill constitute significant change to the pensions legislative structure, and are therefore likely to take some time to bed in. There will be detailed implications which will need to be worked through during the implementation stages, including consideration of virtually all of the current stock of pensions secondary legislation and the powers under which it is made. Even if an attempt is made in future legislation to take account of the effect of the Bill there is a clear risk that unintended consequences will slip through unnoticed, which could cause implementation problems. The power to amend future legislation therefore acts as a useful safety net.

Further, given the wide range of consequential amendments that are needed, it is considered best for all of those amendments to primary or secondary legislation to be made in a single instrument or set of instruments shortly before the relevant provisions of the Bill are implemented.

The breadth of the Henry VIII power in this clause is considered necessary in light of the Department's recent experience with other pensions legislation that made fundamental changes, for example the ending of contracting-out for Defined Contribution schemes, which was provided for in the Pensions Act 2008. That Act contained a similar Henry VIII power which was used when certain operational needs came to light late in the delivery process but which could not have been foreseen at the time the 2008 Act was drafted. Parliament has also agreed that a similar power was appropriate in other legislation which made similarly wide changes, for example in the Welfare Reform Act 2012 (see section 32(4) of that Act). For these reasons, this power is considered necessary and appropriate in this Bill.

Because of the complex nature of the private pension market – including the multitude of arrangements running under current legislation, and the volume of regulations made under primary legislation the Department will consult with industry to check the practical impact and need for further and detailed consequential changes. As mentioned, it is likely that some of the necessary

amendments will be to primary legislation. The principle of amending primary legislation is considered to be sufficiently serious to warrant scrutiny under the affirmative resolution procedure when this power is exercised so as to amend, repeal or modify provision of an Act. However, when the power is exercised so as to make consequential amendments to secondary legislation, the negative procedure is considered appropriate.

### **Clause 81 – Regulations**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: Affirmative or negative*

Clause 81 makes general provision in respect of the regulations that will be made under powers under the Bill. It allows the inclusion of incidental, supplementary, consequential, transitional, transitory or saving provisions. It also allows regulation-making powers to be used to make different provision for different purposes and in relation to all or only some of the purposes for which it may be used.

### **Clause 84 – Commencement**

*Powers conferred on: Secretary of State*

*Powers exercised by: Order (Statutory Instrument)*

*Parliamentary procedure: None*

Clause 84 sets out when the provisions in the Bill will come into force. Clause 84(4) provides for various, to come into force on such day as the Secretary of State may by regulations appoint.

The provisions listed in clause 84(1) of the Bill will come into force on Royal Assent.

Clause 79 (Pensions sharing and normal benefit age) will come into force on 1 April 2015.

Clause 84(6) contains a standard power for the Secretary of State to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Act.

As is usual, regulations made under the commencement powers in clause 84(4) and (6) are not subject to parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them and the power enables those provisions to be brought into force at a convenient time and in an orderly manner.

## **Schedule 3 – Pensions guidance**

### **Section 333C of the Financial Service and Markets Act 2000 – Giving of Pensions Guidance**

*Powers conferred on: the Treasury*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: draft affirmative resolution procedure*

New section 333C, inserted into the Financial Service and Markets Act 2000 (FSMA), provides that the bodies specified in subsection (2)(a) to (d) (the Pensions Advisory Service and the national associations of Citizens Advice Bureaux) are to have the function of giving pensions guidance in accordance with arrangements made with the Treasury. Subsection (5) confers a regulation-making power on the Treasury in order that it may repeal the references to any of the bodies specified in subsection (2) should they no longer be involved in giving pensions guidance in accordance with arrangements with the Treasury. Subsection (6) provides a power to make consequential amendments which is required given the references to the bodies specified in subsection (2) at new section 333E.

Paragraph 9 of Schedule 3 to this Bill provides for subsection (2) of section 429 of FSMA (Parliamentary control of statutory instruments) to be amended to add reference to section 333C. This provides that the exercise of the powers is subject to the affirmative resolution procedure. This is considered appropriate as these subsections confer powers to amend primary legislation.

### **Section 333E – Designation of providers of pensions guidance**

*Powers conferred on: the Treasury*

*Powers exercised by: notice*

*Parliamentary procedure: none*

Subsection (1)(e) of new section 333E confers a power on the Treasury to designate a person as someone who must, in giving pensions guidance, comply with standards set by the Financial Conduct Authority (FCA) under

new section 333H. Subsection (3) provides for the revocation of a designation. The designation under subsection (1)(e) is entirely non-statutory as it is not thought to be necessary or appropriate that Parliament oversees the Treasury's delegation of the duty to take such steps as they consider appropriate to ensure that people have access to pensions guidance under new section 333B.

Certain procedural safeguards are provided for at subsections (2) to (6) of new section 333E. Subsection (2) requires the Treasury to consult the FCA, notify the person to be designated and to consider any representations that are made. Subsection (4) provides that designation and revocation of designation is by written notice, which subsection (5) provides must be given to all other designated guidance providers and to the FCA to ensure that they are able to comply with their respective duties as provided for elsewhere in new Part 20A. Subsection (6) provides for the Treasury to publish a list of persons designated under this power.

### **Section 333H of FSMA – Standards for giving of pensions guidance by designated guidance providers**

*Powers conferred on: the FCA*

*Powers exercised by: standards (a new form of instrument)*

*Parliamentary procedure: none (see below)*

New section 333H provides for the FCA to set standards for the giving of pensions guidance by designated guidance providers. The FCA is then responsible for monitoring the compliance of designated guidance providers with these standards (new section 333I) and the FCA and the Treasury jointly share responsibility for enforcing compliance with the standards (new sections 333J to 333M).

Section 19 of FSMA provides that no person can carry on a regulated activity in the UK unless they are an authorised person or an exempt person. Section 22(1)(a) of FSMA provides that an activity is a regulated activity for the purposes of FSMA if it is an activity of a specified kind which is carried on by way of business and relates to an investment of a specified kind. While the Government's intention is that the provision of guidance is an activity which in



general is outside the regulatory perimeter because it involves the provision of information (albeit tailored) rather than advice or sales, there will be instances where the guidance may stray into regulated activity.

The Treasury intends to introduce secondary legislation to provide that designated guidance providers are to be exempt from the relevant activities specified in Part 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544. Accordingly designated guidance providers will not be regulated by the FCA. The standards that the FCA sets under this new power are, therefore, the equivalent for designated guidance providers of rules which the FCA makes in the course of regulating authorised persons.

Chapter 2 of Part 9A of FSMA establishes the procedural requirements which apply to the FCA's making of rules applicable to authorised persons (as defined in section 31 of FSMA). The procedural requirements for the setting of standards are set out in subsection (5) of new section 333H: this subsection applies, with modifications, the relevant procedural requirements from Chapter 2 of Part 9A of FSMA.

### **Section 333Q of FSMA – Funding of FCA's pensions guidance costs**

*Powers conferred on: the FCA*

*Powers exercised by: rules*

*Parliamentary procedure: none (see below)*

New section 333Q provides for the FCA to collect amounts from designated guidance providers to cover the FCA's pensions guidance costs as specified in subsection (4). Subsection (1) provides that the FCA is to make rules for the collection of these sums.

Rules made by the FCA pursuant to provisions in FSMA are made subject to the procedural provisions set out in Chapter 2 of Part 9A. Rules made under the new section 333Q are subject to these same procedural requirements save for (i) the addition of the requirement in subsection (2) for consultation with the Treasury before publication of draft rules; (ii) the amendment to section 138F of FSMA (notification of rules), provided for by paragraph 7 of Schedule 3 to this Bill, to exclude the requirement to notify the Bank of

England of the making, alteration or revocation of any rules; and (iii) the amendment to section 138I of FSMA (exemption from requirement to carry out a cost benefit analysis) in paragraph 8 of Schedule 3 to this Bill to include reference to rules made under this section.

### **Section 333R of FSMA – Funding of Treasury’s pensions guidance costs**

*Powers conferred on: the FCA*

*Powers exercised by: Rules*

*Parliamentary procedure: none (see below)*

New section 333R provides for the FCA to collect amounts from authorised persons, with a view to recovering the Treasury’s pensions guidance costs, defined in subsection (10), in the sum specified by the Treasury under subsection (1). Subsection (2) provides that the FCA must make rules for the collection of these sums.

As with new section 333Q, rules made by the FCA under section 333R are subject to the procedural requirements set out in Chapter 2 of Part 9A save for certain modifications. Those modifications that are provided for with regard to rules made under section 333R are as follows: (i) the addition of the requirement in subsection (4) for consultation with the Treasury before publication of draft rules; (ii) the addition of a requirement that the rules may only be made with the consent of the Treasury (subsection (5)) – the Treasury having been able to specify matters which it will take into account when deciding whether to give consent and the FCA being obliged to have regard to such matters (subsections (6) and (7)); (iii) the amendment to section 138F of FSMA (notification of rules), provided for by paragraph 7 of Schedule 3 to this Bill, to exclude the requirement to notify the Bank of England of the making, alteration or revocation of any rules; and (iv) the amendment to section 138I of FSMA (exemption from requirement to carry out a cost benefit analysis) in paragraph 8 of Schedule 3 to this Bill to include reference to rules made under this section.

The monies collected by the FCA under these rules are then paid to the Treasury, which then must pay these into the Consolidated Fund as provided by subsections (8) and (9) of new section 333R. The Treasury is then allocated funds to fulfil its statutory functions pursuant to new section 333B as voted by Parliament in the ordinary manner.

*Powers conferred on: the Treasury*

*Powers exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: affirmative resolution procedure.*

Subsection (12) confers a power on the Treasury to make regulations to amend the definition of the “Treasury’s pensions guidance costs” as defined in subsection (10).

This power is appropriate because it is possible for the nature of the guidance service to change – within the framework set out elsewhere in the new Part 20A – such that the definition provided by subsection (1) no longer covers all of the Treasury’s pensions guidance costs and in such circumstances the Treasury should have powers (without recourse to primary legislation) to amend subsection (10) with a view to full recovery of its costs.

Paragraph 9 of Schedule 3 to this Bill provides for subsection (2) of section 429 of FSMA (Parliamentary control of statutory instruments) to be amended to add reference to section 333R. This provides that the exercise of the powers is subject to the affirmative resolution procedure. This is appropriate as these subsections confer powers to amend primary legislation.

### **Section 137FB of FSMA – FCA general rules: disclosure of information about the availability of pensions guidance**

*Powers conferred on: the FCA*

*Powers exercised by: Rules*

*Parliamentary procedure: none (see below)*

New section 137FB provides – at subsection (2) – for a duty on the FCA to make rules requiring managers and trustees of FCA regulated pension schemes to signpost the availability of pensions guidance to their members who have flexible benefits.

As with new sections 333Q and 333R above, rules made by the FCA under section 137FB are subject to the procedural requirements set out in Chapter 2 of Part 9A save for certain modifications, namely (i) the addition of the requirement in subsection (2) for consultation with the Treasury and the Secretary of State before publication of draft rules; (ii) the amendment to section 138F (notification of rules), provided for by paragraph 7 of Schedule 3 to this Bill, to exclude the requirement to notify the Bank of England of the making, alteration or revocation of any rules; and (iii) the amendment to section 138I (exemption from requirement to carry out a cost benefit analysis) in paragraph 8 of Schedule 3 to this Bill to include reference to rules made under this section.