The Law Commission and The Scottish Law Commission

(LAW COM. No. 203)
(SCOT. LAW COM. No. 132)

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS BILL

SOCIAL SECURITY ADMINISTRATION BILL

SOCIAL SECURITY (CONSEQUENTIAL PROVISIONS) BILL

REPORT ON THE CONSOLIDATION OF THE LEGISLATION RELATING TO SOCIAL SECURITY

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

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The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

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THE LAW COMMISSION

AND

THE SCOTTISH LAW COMMISSION

Social Security Contributions and Benefits Bill
Social Security Administration Bill
Social Security (Consequential Provisions) Bill

Report on the consolidation of certain enactments relating to Social Security

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain, and the Right Honourable the Lord Fraser of Carmyllie, Q.C., Her Majesty's Advocate.

The Bills which are the subject of this Report consolidate the legislation relating to social security. In order to produce a satisfactory consolidation it is necessary to make the recommendations which are set out in the Appendix to this Report. With one exception they are made by both Commissions. The exception is recommendation 11. This does not affect the law of Scotland. It is therefore made only by the Law Commission.

The relevant government departments have been consulted in connection with the recommendations and agree with them.

PETER GIBSON, *Chairman, Law Commission*

C. K. DAVIDSON, *Chairman, Scottish Law Commission*

22 October 1991

ARRANGEMENT OF RECOMMENDATIONS

APPENDIX

Introductory Note

In this Appendix—

"the Contributions and Benefits Bill" means the Social Security Contributions and Benefits Bill;

"the Administration Bill" means the Social Security Administration Bill;

"the Consequential Provisions Bill" means the Social Security (Consequential Provisions) Bill;

"the Tribunals and Inquiries Act" means the Tribunals and Inquiries Act 1971 (c.62)

"the 1975 Act" means the Social Security Act 1975 (c.14);

"the Pensions Act" means the Social Security Pensions Act 1975 (c.60);

"the 1980 Act" means the Social Security Act 1980 (c.30);

"the 1982 Act" means the Social Security and Housing Benefits Act 1982 (c.24);

"the 1983 Act" means the Health and Social Services and Social Security Adjudications Act 1983 (c.41);

"the 1985 Act" means the Social Security Act 1985 (c.53);

"the 1986 Act" means the Social Security Act 1986 (c.50);

"the 1988 Act" means the Social Security Act 1988 (c.7);

"the 1989 Act" means the Social Security Act 1989 (c.24);

"the 1990 Act" means the Social Security Act 1990 (c.27).

1. *Earnings factors*

Section 13(5) of the 1975 Act provides for the manner in which tables and rules for ascertaining earnings factors are to be drawn up. Paragraph (a) as originally enacted contained a rule about the relationship between Class 1 contributions and earnings factors. Paragraph 6(b) of Schedule 5 to the 1985 Act inserted section 13(5A). This gives the Secretary of State power by regulations to make such modifications of section 13(5)(a) as appear to him to be appropriate in consequence of section 4(6B) of the 1975 Act. Section 4(6B) was inserted by section 7(2) of the 1985 Act. It provided for the primary earnings brackets for Class 1 contributions and their appropriate percentage rates. The rates were subject to alteration by orders under section 4, 122 or 123A of the 1975 Act.

Paragraph 2(4) of Schedule 8 to the 1986 Act made amendments to section 13(5) of the 1975 Act and, in particular, paragraph (b) repealed section 13(5)(a). In consequence, an entry for section 13(5A) (the power to modify section 13(5)(a)) was made in Schedule 11 to the 1986 Act (repeals). The repeal was never brought into force.

Section 4(2) of the 1989 Act inserted the present paragraph (a) in section 13(5) of the 1975 Act. This paragraph is similar to the original version but takes account of the other changes to earnings factors made in 1986. The new paragraph (a) is expressed to be subject to subsection (5A). Section 1(1) of the 1989 Act replaced subsections (6) to (6B) of section 4 of the 1975 Act with new subsections. The new subsection (6A) provides for the primary percentages for primary Class 1 contributions which are subject to alteration under sections 122 and 123A. It is thus broadly equivalent to the old subsection (6B). But the new subsection (6B) is about something quite different from the old one. It provides for the interpretation of section 4(6) where earners are paid otherwise than weekly. The 1989 Act failed to carry out the necessary consequential amendment to section 13(5A) so as to make it refer to section 4(6A), rather than section 4(6B), the reference to section 4(6B) being now meaningless owing to the new subject-matter of that subsection.

Clause 23(4) of the Contributions and Benefits Bill therefore needs to refer to clause 8(2), (corresponding to section 4(6A)), rather than clause 8(3) (which corresponds to section 4(6B)).

As indicated above, the repeal of section 13(5A) of the 1975 Act by the 1986 Act has never been commenced. The fact that the new subsection (5)(a) refers to subsection (5A) means that it never will be commenced, as the reference would be made meaningless. We therefore propose that the power to commence this repeal should not be reproduced.

Effect is therefore given to the first part of this recommendation in clause 23(4) of the Contributions and Benefits Bill. The second part needs no express provision in the text of the consolidations.

2. *Maternity allowance*

Section 17(2)(a) of the 1975 Act contains power by regulations to make provision as to the days which are or are not to be treated for the purposes of unemployment benefit, sickness benefit, invalidity benefit *and a maternity allowance* as days of unemployment or of incapacity for work. Schedule 3 to the 1975 Act as originally enacted specified, in paragraph 3, the contribution conditions for a maternity allowance. Sub-paragraph (3) provided as follows—

"(3) The second condition is that—

(a) the claimant must in respect of the relevant past year have either paid or been credited with contributions of a relevant class; and

(b) the earnings factor derived from those contributions must be not less than that year's lower earnings limit multiplied by 50".

Sub-paragraph (4) defined "the relevant past year" as the last complete year before the beginning of the relevant benefit year and "the relevant benefit year" as the benefit year in which there fell the beginning of the period of interruption of employment including the relevant time. There used therefore to be a reference to the period of interruption of employment in the contribution conditions. By virtue of section 17(1)(d) of the 1975 Act a period of interruption of employment consists of days of unemployment or incapacity for work. But a new paragraph with fresh contribution conditions for maternity allowance was substituted by paragraph 14 of Schedule 4 to the 1986 Act. There is no longer any reference to a period of interruption of employment. The reference in section 17(2)(a) to maternity allowance is superfluous. We recommend that it should not be reproduced.

Effect has been given to this recommendation by not including a reference to a maternity allowance in clause 57(3)(a) of the Contributions and Benefits Bill.

3. *Special hardship allowance*

Section 91(2) of the 1975 Act provides that the increases of benefit referred to in subsection (1) include for the purposes of subsection (1)(a), in the case of a beneficiary under the age of 18, any increase in the rate of a disablement pension under section 60 (special hardship). Section 60 was repealed by paragraph 5(2) of Schedule 3 to the 1986 Act which was brought into force on 1 October 1986. The words in section 91(2) referring to increases under section 60 were included in Schedule 11 (repeals) but the repeal has never been brought into force. The words are spent because since 1 October 1986 nobody of any age has been entitled to any increase under section 60.

We recommend that the repeal of the words in section 91(2) of the 1975 Act should be treated as if it had commenced, with the result that the words should not be reproduced in clause 107(2) of the Contributions and Benefits Bill (the provision which corresponds to section 91(2)).

4. *Statutory sick pay and statutory maternity pay—evidence*

In relation to statutory sick pay, section 22(2)(d) of the 1982 Act permits regulations to provide for the taking of evidence by a British consular official "or such other person as may be prescribed". By section 26(1) of that Act "prescribed" means prescribed by regulations. The equivalent proposition for statutory maternity pay comes from section 80(2)(d) of the 1986 Act which refers to a British consular official "or such other person as may be determined". There is no provision as to how the matter is to be determined, but we believe "determined" must mean "determined in accordance with the regulations", and that the provision should be expanded accordingly. For consistency the provision about statutory sick pay should be in the same terms.

Effect is given to this recommendation in clauses 162(2)(d) and 170(2)(d) of the Contributions and Benefits Bill.

5. *Statutory maternity pay—contributions payments*

Paragraph 1 of Schedule 4 to the 1986 Act provides for the recovery of amounts paid by way of statutory maternity pay. Under paragraph 1(a) and (d) regulations are to make provision entitling a person who has made such a payment to recover the amount paid in

prescribed circumstances by making deductions from his contributions payments and providing for the recovery in prescribed circumstances of the whole or any part of such an amount from contributions payments. The expression "contributions payments" is not defined.

Subsection (1) of section 9 of the 1982 Act contains powers in relation to statutory sick pay which are equivalent to those in the 1986 Act for statutory maternity pay. Subsection (2) of that section defines "contributions payments" as meaning in relation to an employer "any payments (other than payments arising under the National Insurance Surcharge Act 1976) which the employer is required, by or under any enactment, to make in discharge of any liability in respect of primary or secondary Class 1 contributions". We see no reason to suppose that the position should be different for statutory maternity pay. We recommend that there should be a definition of "contributions payments" for statutory maternity pay corresponding to that for statutory sick pay. (The reference in section 9(2) of the 1982 Act to payments arising under the National Insurance Surcharge Act 1976 is not reproduced for either type of payment because the Act was repealed by the Finance Act 1984 (c.43).)

Effect is given to this recommendation in clause 167(2) of the Contributions and Benefits Bill.

6. *Subordinate legislation—consequential or transitional provision*

Section 22(7) of the Child Benefit Act 1975 (c.61) provides that any power conferred by that Act to make an Order in Council or regulations includes power to make such incidental or supplementary provision as appears to Her Majesty, the Secretary of State or the Secretary of State and the Treasury, as the case may be, to be expedient for the purposes of the Order or regulations. Section 166(3) of the 1975 Act and section 4(2) of the Industrial Injuries and Diseases (Old Cases) Act 1975 (c.16) originally contained similar wording. But they were amended by paragraph 10(1) of Schedule 8 to the 1989 Act. That substituted for the words "or supplementary" the words ", supplementary, consequential or transitional". Section 166(3) has been applied to the powers to make regulations or orders under the other Acts constituting the Social Security Acts 1975 to 1991, a collective title which does not cover the Child Benefit Act.

Accordingly, it is only in relation to powers in that Act that there is no power to make consequential or transitional provision. We believe that this anomaly should be removed.

Effect is given to this recommendation in clause 175(4) of the Contributions and Benefits Bill and clause 189(5) of the Administration Bill.

7. *Subordinate legislation—Treasury consent*

Section 166(5) of the 1975 Act is as follows—

> "(5) A power conferred on the Secretary of State by any provision of this Act, other than section 86(1) to (4), or by section 123(2) or (3) of the Social Security (Northern Ireland) Act 1975 (Her Majesty's Forces), to make any regulations or order, where the power is not expressed to be exercisable with the consent of the Treasury, shall if the Treasury so direct be exercisable only in conjunction with them.".

This subsection does not extend to Northern Ireland. But it appears to us that the words referring to the Northern Ireland Act should be part of the Northern Ireland social security legislation.

We accordingly recommend that section 166(5) should be reproduced in the Contributions and Benefits Bill without the reference to the Northern Ireland Act and that the material about the Northern Ireland Act should be transferred to the appropriate Northern Ireland legislation.

Effect is given to this recommendation in clause 175(7) of the Contributions and Benefits Bill and by the amendment of section 155 of the Northern Ireland Act in Schedule 2 to the Consequential Provisions Bill.

8. *Questions for the Secretary of State*

Section 93(1) of the 1975 Act lists certain questions arising under that Act which are to be determined by the Secretary of State. Subsection (2A) (inserted by paragraph 1(1) of Schedule 3 to the 1989 Act) provides that regulations may restrict the persons who may

apply for the determination of *"any such question as is mentioned in* subsection (1)". Subsection (3) and sections 94(1) and 96(1) contain provisions referring to any "question *within* section 93(1)". Section 148(1) deals with cases where during other proceedings *"any such question* arises *as is mentioned in* section 93(1)".

Section 60(1) of the Pensions Act lists certain questions and provides that the questions to which section 93(1) applies include them. In addition, section 66(2) of that Act provided that generally the 1975 Act and the Pensions Act were to have effect as if the provisions of the latter were contained in the former.

Section 52(2) of the 1986 Act provides that the questions to which section 93(1) of the 1975 Act applies shall include any question specified in Part II of Schedule 5 to the 1986 Act.

The first problem is that sections 93(2A) and 148(1) of the 1975 Act refer to a question "mentioned in section 93(1)" but section 60(1) of the Pensions Act and section 52(2) of the 1986 Act do not proceed by way of textual amendment. Strictly therefore no account should be taken of the questions listed in section 60(1) of the Pensions Act or Part II of Schedule 5 to the 1986 Act in operating sections 93(2A) and 148(1) of the 1975 Act.

The second problem is whether section 60(1) of the Pensions Act and section 52(2) of the 1986 Act make these questions "within section 93(1)" for the purposes of sections 93(3), 94(1) and 96(1) of the 1975 Act.

In spite of the differences of language we do not think that there is intended to be a distinction between these different groups of questions. We recommend therefore that the anomalies of drafting should be removed.

Effect is given to this recommendation by listing all the questions arising out of the social security system in clause 17(1) of the Administration Bill. Clauses 17(3) and (4), 18(1), 19(1) and 117(1) then treat those questions from the Pensions Act and the 1986 Act which arise out of the social security system as if they had been mentioned in section 93(1) of the 1975 Act and refer to them accordingly. The questions about occupational and personal pensions are left where they are but section 60(1) of the Pensions Act and section 52(2) of the 1986 Act are amended to refer to clause 17(1) of the Administration Bill instead of section 93(1) of the 1975 Act.

9. *Review of decisions relating to family credit*

Section 104(1)(b) of the 1975 Act permits the review of a decision if there has been a relevant change of circumstances since the decision was given. Section 52(8) of the 1986 Act provides that in its application to family credit section 104(1)(b) of the 1975 Act shall have effect subject to section 20(6) of the 1986 Act. Section 20(6) provides that family credit is payable for a period of 26 weeks and, subject to regulations, an award shall not be affected by any change of circumstances during that period.

Paragraph 11(1) of Schedule 3 to the 1989 Act inserted a new paragraph (bb) in section 104(1) of the 1975 Act, so that a review is permitted if it is anticipated that a relevant change of circumstances will occur. No amendments were made to section 52(8) of the 1986 Act. We think it should have been amended to refer to section 104(1)(bb), in order to treat that paragraph in the same way as section 104(1)(b) and avoid any suggestion that section 104(1)(bb) overrides the important principle in section 20(6). We recommend that the anomaly should now be removed.

Effect is given to this recommendation in clause 25(4) of the Administration Bill, which refers to clause 25(1)(c) (derived from section 104(1)(bb)) as well as to clause 25(1)(b) (derived from section 104(1)(b)).

10. *Criminal intent*

Section 58(8) of the 1986 Act refers to a person "wilfully" delaying or obstructing an inspector. There is some doubt as to the precise meaning of the word "wilfully" and, for that reason, common practice in recent legislation has been to avoid the term, but use "intentionally" instead. We do not think that in practice this will make any significant change in the mental element required for the offence and any change that is made is, we believe, fully justified by the desirability of replacing a word which has given rise to difficulties with one which has not occasioned the like problems. We recommend that the subsection reproducing section 58(8) should take account of this.

Effect is given to the recommendation in clause 111(1)(a) of the Administration Bill, which replaces "wilfully" with "intentionally".

11. *Local authority funds*

Section 30(7) of the 1986 Act provides that rent allowance subsidy is payable in the case of a local authority in England and Wales for the credit of their general rate fund. The Local Government Finance Act 1988 established a new system of funds for local authorities. On 1 April 1990 district councils, London borough councils and the Council of the Isles of Scilly were required by section 91(2) of that Act to establish a general fund which was to replace the general rate fund. Therefore in so far as it applies to years beginning on or after 1 April 1990 section 30(7) of the 1986 Act refers to an obsolete fund. For those years it conflicts with section 91(4) of the Local Government Finance Act, which requires any sum received by a relevant authority after 31 March 1990 to be paid into its general fund, except where it is required to be paid into its collection fund or a trust fund. Rent allowance subsidy is not required to be so paid. So it goes into the general fund.

We recommend that the provision reproducing section 30(7)(a) should be limited to years beginning before 1 April 1990.

Effect is given to this recommendation in clause 135(10) of the Administration Bill.

12. *Social Security Advisory Committee*

Section 9 of the 1980 Act establishes the Social Security Advisory Committee. Under section 9(1)(a) and (c) its functions include giving advice and assistance to the Secretary of State in connection with the discharge of his functions under "the relevant enactments" and performing such other duties as may be assigned to the Committee by or under, among other provisions, "any of the relevant enactments". Under section 10(1) where the Secretary of State proposes to make regulations under "any of the relevant enactments", he is required to refer his proposals to the Committee, but this does not apply to regulations specified in Part II of Schedule 3.

Section 9(7) (as amended) defines "the relevant enactments" as meaning the Social Security Acts 1975 to 1991 and various other enactments, but this is to be construed as excluding Parts III and IV of the Pensions Act, Part I of the 1986 Act and Schedule 5 to the 1989 Act. Those provisions are about occupational and personal pensions and contracting-out. Under section 61(2) of the Pensions Act, where the Secretary of State proposes to make regulations for the purposes of those provisions, he is required to refer the proposals to the Occupational Pensions Board, which is the body concerned with both occupational and personal pensions as opposed to social security pensions.

Schedule 3 to the 1990 Act inserted Part IVA of the Pensions Act (which established a Pensions Ombudsman). Section 13(1) inserted section 59K in Part V of the Pensions Act (conferring power to make regulations about the registration of occupational and personal pension schemes). Paragraph 12 of Schedule 4 inserted section 60ZA in that Part (conferring power to make regulations for imposing a levy in respect of occupational or personal pension schemes).

The first problem is that no amendments were made to the definition of "the relevant enactments" in section 9(7) of the 1980 Act, with the result that, although the subject-matter is not appropriate (because it concerns occupational and personal pensions), proposals to make regulations under Part IVA or sections 59K or 60ZA of the Pensions Act have to be referred to the Social Security Advisory Committee. It is proposed to correct this by not including these provisions in the definition of "the relevant enactments".

The second problem arises from the fact that, although specific powers to make regulations are contained in Part I of the 1986 Act and Schedule 5 to the 1989 Act, there are general provisions about regulation-making powers in section 83 of the 1986 Act and section 29 of the 1989 Act. These apply section 166(1) to (3A) of the 1975 Act for the purpose of the specific 1986 and 1989 powers. When regulations are made, these general provisions are relied on and recited in the statutory instrument as well as the specific provisions.

Paragraph 13(2) of Part II of Schedule 3 to the 1980 Act deals with this point in relation to Parts III and IV of the Pensions Act. The Part specifies regulations not required to be submitted. Paragraph 13(2) specifies regulations made only *for the purposes* of Part III (other than regulations made under section 51A(10)) or IV of the Pensions Act. There is a

distinction between regulations *made* under an enactment and regulations made *for the purposes of* an enactment. The fact that regulations made only *for the purposes of* Part III are also made *under* the general provisions does not produce the result that the regulations have to be referred to the Social Security Advisory Committee. (There is an exception for those under section 51A(10). This is reflected in section 51A(13) of the Pensions Act.)

Paragraph 12(2)(c) of Schedule 8 to the 1989 Act amended the definition of "the relevant enactments" in section 9(7) of the 1980 Act by excluding Part I of the 1986 Act and Schedule 5 to the 1989 Act. But it did not insert in Part II of Schedule 3 to the 1980 Act a paragraph equivalent to paragraph 13(2) of that Schedule. The effect is that regulations made *for the purposes of* these provisions but also *under* the relevant general powers have to be referred to the Social Security Advisory Committee as well as to the Occupational Pensions Board. We do not think that this can have been intended since such regulations are not about social security matters. We therefore recommend that there should be no reference to section 83 of the 1986 Act or section 29 of the 1989 Act in the definition of "the relevant enactments".

Effect is given to this recommendation by making the definition of "the relevant enactments" in clause 170(5) of the Administration Bill refer only to that Bill and the Contributions and Benefits Bill and not to the legislation about occupational and personal pensions.

13. *Regulations about applications for leave to appeal from Social Security Commissioners—Parliamentary procedure*

Section 14 of the 1980 Act provides for appeals on questions of law from decisions of Social Security Commissioners. Subsection (2) is as follows—

"(2) No appeal under this section shall lie from a decision except—

(a) with the leave of the Commissioner who gave the decision or, in a case prescribed by regulations, with the leave of a Commissioner selected in accordance with regulations; or

(b) if he refuses leave, with the leave of the appropriate court."

Subsection (3) provides (among other things) that "regulations may make provision with respect to the manner in which and the time within which applications must be made to a Commissioner for leave under this section and with respect to the procedure for dealing with such applications." Subsection (7) provides for regulations modifying subsections (3) and (5) in relation to decisions or references under section 112 of the 1975 Act (as distinct from ordinary appeals).

Section 14 extends to Northern Ireland. Regulations under it may therefore relate to a Commissioner within the meaning of the 1975 Act or to a Commissioner within the meaning of the Social Security (Northern Ireland) Act 1975 (c.15). This necessitates separate procedural provisions as to the making of regulations for Great Britain on the one hand and for Northern Ireland on the other. For Great Britain paragraph (a) of subsection (8) provides that the powers to make regulations shall be exercisable by statutory instrument. The subsection also provides that "any statutory instrument made by virtue of this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament".

The 1975 Act deals in section 167 with the Parliamentary control of orders and regulations. Most of the subsequent Acts dealing with social security also have a general provision about Parliamentary control. The 1990 Act took the opportunity of standardising these provisions. It amends them in paragraphs 8 and 12 of Schedule 6. It does not however amend section 14(8) of the 1980 Act.

There are two forms of Parliamentary control relevant to the subordinate legislation with which section 167 of the 1975 Act and the other provisions amended by the 1990 Act are concerned. In most cases an instrument will be subject to negative procedure. In other words it will take effect unless it is annulled by a resolution of either House of Parliament. But the procedure for some instruments is affirmative. This means that they may not be made unless a draft has been approved by a resolution of each House. Section 14(8) of the 1980 Act provides for negative procedure.

The amendments made by the 1990 Act had a further purpose, in addition to that of standardising the provisions about Parliamentary control. A statutory instrument can be (and often is) made in the exercise of two powers. It is therefore possible for an instrument to be made in the exercise of a power subject to negative procedure and also in the exercise of a power subject to affirmative procedure. A draft of the instrument will have to be positively approved by Parliament because of the provisions in it which are subject to affirmative procedure. It can then be argued that such approval is all that is needed, because to apply negative procedure to an instrument already approved by Parliament would be superfluous. But an alternative argument is that the instrument is subject both to affirmative and also to negative procedure.

It appears to us that the 1990 amendments remove this difficulty so far as it existed in connection with the subordinate legislation with which they were concerned. They do this by requiring negative procedure only in cases where there is no requirement of affirmative procedure. But since the 1990 Act did not amend section 14(8) of the 1980 Act, the problem is still there for that subsection.

Subsection (2)(a) of clause 24 of the Administration Bill corresponds to section 14(2)(a) of the 1980 Act. Subsection (3) of the clause corresponds to subsection (3) of that section. Clause 34(5) attracts clause 24 to the special cases of attendance allowance, disability living allowance and disability working allowance. Section 14(7) of the 1980 Act is represented by the modifications of Clause 24 in Schedule 4 to the Consequential Provisions Bill.

The Administration Bill give powers to make subordinate legislation to the Secretary of State and to the Lord Chancellor. Clause 190(3) is concerned with the Secretary of State's powers and clause 190(4) is about the Lord Chancellor's powers. Each contains what is now, following the 1990 Act, the standard provision for parliamentary control. We recommend that clause 190(4) should cover regulations under clause 24, as well as the Lord Chancellor's other powers to make regulations under the Bill. There appears to us to be no reason for treating regulations under clause 24 differently.

We accordingly recommend that the words relating to negative procedure in section 14(8) of the 1980 Act should not be separately reproduced. The regulations will therefore automatically fall within clause 190(4) of the Administration Bill.

14. *Industrial Injuries Advisory Council*

Part II of Schedule 16 to the 1975 Act lists the regulations which do not require prior submission to the Industrial Injuries Advisory Council. Paragraph 3 specifies regulations made by virtue of section 66(5) for the purpose only of prescribing a day. Section 66 concerns increases in disablement pension for adult dependants. Subsection (5) does contain a regulation-making power but it is one to authorise an increase of benefit in certain circumstances. Subsection (5) was substituted for the original subsection (5) by section 13(5) of the 1985 Act. The original subsection (5) contained power to prescribe a day from which modifications of the original subsection (4) were to take effect. There is now no such power. An entry for paragraph 3 of Schedule 16 to the 1975 Act was inserted in Schedule 11 to the 1986 Act (repeals), but the repeal has not been commenced.

We recommend that the repeal of the paragraph should be treated as if it had commenced, with the result that the paragraph should not be reproduced in Part II of Schedule 7 to the Administration Bill.

15. *Power to alter ages specified in certain provisions*

Section 30(1) of the 1975 Act provided for reductions in the rate of Category A or B retirement pensions where the earnings of a pensioner who was less than 5 years over pensionable age exceeded a specified amount. Section 27(5) of that Act provided that a person who had not retired from regular employment was deemed to retire on the expiration of 5 years from his attaining pensionable age. Section 4(1) of the Social Security Act 1979 (c.18) added subsection (6) to section 30 of the 1975 Act. Paragraph (a) of that subsection permitted the Secretary of State by order to substitute a shorter period for the period of 5 years mentioned in sections 30(1) and 27(5).

Paragraph (b) of the subsection contains a power to substitute for the ages of 65 and 70 in specified provisions of the 1975 Act such lower ages as are appropriate in consequence of any provision made by virtue of paragraph (a). The specified provisions were sections 26(1) and (3) (widow's pension), 36(5) and 37(6) (reference to retiring age in relation to non-contributory invalidity pension and invalid care allowance), 79(2)(a) (no claim needed for

Category A or Category B retirement pension in certain circumstances) and 30(3) (regulations under which a person may elect to be treated as if he had not retired for certain purposes).

Section 7(1) of the 1989 Act abolished the rule formerly contained in section 30(1) of the 1975 Act. It did this by providing that section 30(1) should cease to have effect. In addition, paragraphs 1 and 2(3) of Schedule 1 to the 1989 Act repealed sections 27(5) and 30(6)(a) of the 1975 Act. Paragraph (b) of section 30(6) was not repealed. In fact it was amended by paragraph 9 of Schedule 7 to the 1989 Act (pre-consolidation amendments) which substituted a reference to section 36(8) for the reference to section 36(5). This amendment was made because the whole of section 36 had been replaced when severe disablement allowance replaced non-contributory invalidity pension in 1984. The new section had the reference to retiring age in subsection (8), not subsection (5), but an amendment to substitute the correct subsection reference in section 30(6)(b) was not made in 1984.

The present position is that section 30(6)(b) of the 1975 Act purports to contain a power to substitute lower ages in consequence of any provision made by virtue of paragraph (a). But paragraph (a) no longer exists and no order was ever made by virtue of it. It will therefore never be possible to say that an order is in consequence of provision made by virtue of paragraph (a) and thus it will also never be possible to exercise the power in paragraph (b).

We therefore recommend that section 30(6)(b) should be repealed and not reproduced.

16. *Industrial death benefit*

Schedule 9 to the 1975 Act deals with limits of entitlement to industrial death benefit. Paragraph 8 of Schedule 3 to the 1986 Act repealed sections 67, 68 and 70 to 75 of the 1975 Act and Schedule 9 to that Act. However, before the repeals were brought into force, paragraph 2 of Schedule 1 to the 1988 Act was enacted. This provided that these repeals, other than the repeals of sections 67(2)(b) and 71 to 74, were only to take effect in relation to deaths occurring on or after 11 April 1988. Paragraph 8 of Schedule 3 to the 1986 Act and Schedule 1 to the 1988 Act were both brought into force on 11 April 1988. The effect of all this is that sections 71, 72 and 73 of the 1975 Act and Schedule 9 to that Act were all repealed with effect from 11 April 1988, but Schedule 9 was only repealed in relation to deaths occurring on or after 11 April 1988.

Nevertheless most of the paragraphs in Schedule 9 depend on provisions that were repealed totally. Paragraphs 2 to 5 impose limits on entitlement to a pension under section 72 or an allowance under section 73. Paragraph 6(1) of Schedule 9 limits the amount of death benefit payable by way of parents' gratuities under section 71(4). Paragraph 6(2) limits the amount payable by way of relatives' gratuities under section 72(5) and paragraphs 6(3) and 7(3) are supplementary. Paragraph 7(1) and (2) contain provisions about pensions under section 72. Finally paragraph 8(1) provides that a person is to be disregarded for the purposes of the Schedule, except in so far as it relates to an allowance under section 70 (paragraph 1), if he dies within the prescribed time after the deceased without being awarded that benefit. The effect of paragraph 8(1) is therefore that such a person is to be disregarded for the purposes of paragraphs 2 to 7. The rest of paragraph 8 is supplementary.

All these paragraphs therefore depend on sections 71 to 73, which have been repealed in relation to all deaths. The paragraphs can thus have no effect.

We recommend that paragraphs 2 to 8 of Schedule 9 to the 1975 Act should be repealed and not reproduced.

17. *Increases and reductions in benefit by reference to occupational and personal pensions*

Section 10 of the 1988 Act provides that increases and reductions of benefit under the 1975 Act which under sections 41, 44 to 47, 64 and 66 of that Act fall to be calculated by reference to a person's earnings are to be calculated by reference to any earnings from payments by way of occupational pension as well as earnings from employment.

Section 47B(1) of the 1975 Act provides that, except as may be prescribed, in sections 41 and 44 to 47 any reference to earnings includes a reference to payments by way of occupational pension. Section 66A makes similar provision in relation to sections 64 and 66 (disablement pension). Sections 47B and 66A were inserted by section 14(a) and (b) of the Health and Social Security Act 1984 (c.48).

Section 10 of the 1988 Act applies to the same provisions of the 1975 Act as do sections 47B and 66A of the 1975 Act. Like them its effect is that earnings include payments by way of occupational pension. Unlike sections 47B and 66A, it does not contain power to provide for exceptions by regulations. Nor does it contain provision like that in section 47B(2) and section 66A(2) dealing with payments by way of occupational or personal pension made otherwise than weekly.

The 1988 Act repealed section 47B(1)(b): see Schedule 5.

Section 9(3) of the 1989 Act amended sections 47B and 66A of the 1975 Act so that personal pensions are treated in the same way as occupational pensions, but no amendments were made to section 10 of the 1988 Act. It therefore still only refers to occupational pensions.

In our view section 10 of the 1988 Act is superfluous. We therefore recommend that it should be repealed and not reproduced.

18. *Chairmen of tribunals*

Paragraph 2(1) of Schedule 10 to the 1975 Act (the only part of paragraph 2 still on the statute book) provides that a person appointed to act as chairman of a social security appeal tribunal shall hold and vacate office in accordance with the terms of his letter of appointment. It also applies to disability appeal tribunals by virtue of paragraph 11 of Schedule 10A to the 1975 Act, (a Schedule which was added to that Act by paragraph 16 of Schedule 1 to the Disability Living Allowance and Disability Working Allowance Act 1991 (c.21)). In our view paragraph 2(1) is superfluous.

Section 97(2C) of the 1975 Act provides that "the President shall nominate the chairman" of a social security appeal tribunal. This has been applied to disability appeal tribunals by paragraph 2 of Schedule 10A to the 1975 Act.

Section 97(2D) is as follows—

"(2D) The President may nominate as chairman either himself or a person drawn

(a) from the panel appointed by the Lord Chancellor or, as the case may be, the Lord President of the Court of Session under section 7 of the Tribunals and Inquiries Act 1971; or

(b) from the persons appointed to act as chairmen under paragraph 1A of Schedule 10 to this Act."

This also applies to disability appeal tribunals by virtue of paragraph 2 of Schedule 10A to the 1975 Act.

Section 7(2) of the Tribunals and Inquiries Act provides that "members of panels constituted under this section shall hold and vacate office under the terms of the instruments under which they are appointed". Paragraph 1A(4) of Schedule 10 to the 1975 Act provides that "a person appointed to an office under this paragraph shall hold and vacate that office in accordance with the terms of his appointment". This covers the President, who is appointed under paragraph 1A(1), as well as the chairmen appointed under that paragraph. Section 7(2) of the Tribunals and Inquiries Act and paragraph 1A(4) of Schedule 10 to the 1975 Act between them cover all the persons who can be appointed to act as chairmen of social security appeal tribunals or disability appeal tribunals. We believe therefore that there is no place for paragraph 2(1) of Schedule 10 to the 1975 Act.

We recommend that it should be repealed and not reproduced.

19. *Tribunals constituted under regulations*

Section 114(1) of the 1975 Act authorises the making of provision by regulations for the determination of questions by a "tribunal appointed or constituted in accordance with the regulations". Any such tribunal would be additional to those which the Act itself sets up.

Paragraph 30A(a) of Schedule 1 to the Tribunals and Inquiries Act originally referred to "Local tribunals constituted under section 97 of the Social Security Act 1975 or constituted under regulations made under section 114 of that Act". But the system of tribunals was revised by the 1983 Act. Sub-paragraph (2) of paragraph 1 of Schedule 8 to that Act

transferred the functions of local tribunals to social security appeal tribunals and sub-paragraph (3)(a)(ii) has the effect that a reference to a social security appeal tribunal constituted under section 97 of the 1975 Act is substituted for the reference in paragraph 30A(a) to a local tribunal constituted under that section.

It appears to us that, so long as there are tribunals constituted under primary legislation and known as social security appeal tribunals, it is inept for Schedule 1 to the Tribunals and Inquiries Act to suggest that social security appeal tribunals may be constituted under regulations. Any tribunal that was established by regulations under section 114 of the 1975 Act would no doubt have some different name. There is nothing in section 114 to indicate how the scope of the functions of a tribunal constituted under the regulations ought to be defined. We believe that the implication in paragraph 30A of Schedule 1 to the Tribunals and Inquiries Act, as originally inserted, that a tribunal constituted under regulations would be a local tribunal was mistaken. A tribunal might be set up by regulations, for example, to deal with cases about a particular type of benefit wherever they arose.

It is necessary to amend paragraph 30A of Schedule 1 to the Tribunals and Inquiries Act to take account of the consolidations. We recommend that the amendment should make it refer simply to tribunals constituted under the regulations without describing them further.

Effect is given to this recommendation by the amendment of paragraph 30A in Schedule 2 to the Consequential Provisions Bill.

20. *Earners paid otherwise than weekly—the "prescribed equivalent"*

The 1975 Act provides for the payment of contributions by employed earners. Under section 4 these are in principle calculated by reference to weekly earnings of amounts falling between a lower and an upper limit. But this produces a difficulty where earners are not paid weekly. The problem of defining the limits for these earners was solved by providing, in subsections (2) and (6), for a "prescribed equivalent". The definition of "Prescribe" in Schedule 20 had the effect that these equivalents would be in regulations.

Section 1(1) of the 1989 Act substituted new subsections for certain subsections of section 4 of the 1975 Act including subsection (6). The new subsection (6) inserted by the 1989 Act does not refer to prescribed equivalents. The problem of earners paid otherwise than weekly is now met, for subsection (6), by a new subsection (6B)—

> "(6B) In the case of earners paid otherwise than weekly, any reference in subsection (6) above to the current upper, or (as the case may be) lower, earnings limit shall be taken as a reference to the prescribed equivalent of that limit."

The upper earnings limit and the lower earnings limit appear in the 1986 Act, as well as the 1975 Act. Section 3(1) provides for the amount of the Secretary of State's minimum contributions to a personal pension scheme. It refers to the upper and lower earnings limit. Section 7 is concerned with occupational pension schemes which become contracted-out between 1986 and 1993. Subsection (1) requires the Secretary of State to make a payment in respect of an earner in employment which is contracted-out by reference to the scheme. The amount is calculated, under subsection (4), by reference to the upper and lower earnings limits. Section 84(2) provides that expressions used in Part I of the Act (within which sections 4 and 7 both fall) and in the Pensions Act have the same meanings in that Part as they have in that Act. Section 66(2) of that Act provides that in general the Act is to be treated as if its provisions were contained in the 1975 Act. This has the result that "upper earnings limit" and "lower earnings limit" have the same meaning in sections 3 and 7 of the 1986 Act as in the 1975 Act. The 1986 Act then has to deal with the problem of the limits for earners paid otherwise than weekly. Sections 3(4) and 7(5) accordingly provided that references to these limits should be "references, in the case of an earner who is paid otherwise than weekly, to their prescribed equivalents under section 4(2) and (6) of the Social Security Act 1975".

The reference to section 4(6) of the 1975 Act in each of these two subsections of the 1986 Act was originally perfectly correct. But it has become incorrect owing to the amendments of the 1975 Act made by section 1(1) of the 1989 Act. The reference should now be to subsection (6B), the subsection which currently gives power to prescribe equivalents.

It is necessary to amend sections 3(4) and 7(5) of the 1986 Act to take account of the consolidations. We recommend that the amendments should make each of the subsections refer to clause 8(3) of the Contributions and Benefits Bill, the provision of that Bill corresponding to section 4(6B) of the 1975 Act (as amended by the 1989 Act).

Effect is given to this recommendation by the amendments of sections 3(4) and 7(5) of the 1986 Act in Schedule 2 to the Consequential Provisions Bill.

21. *Mistaken entries in 1986 repeal Schedule*

Entries for section 50(5) of the 1975 Act (industrial injuries benefit) and paragraphs 41 and 42 of Schedule 4 to the Pensions Act (amendments of sections 25(1) and 26(1) of the 1975 Act) were inserted in Schedule 11 to the 1986 Act (repeals), but the repeals have not been commenced. We understand that the insertions were inadvertent. This is supported by the fact that there is nothing to found these repeals elsewhere in the Act.

Clause 94(5) of the Contributions and Benefits Bill reproduces section 50(5). Clauses 37(1) and 38(1) of that Bill reproduce the subsections amended by the paragraphs in the Schedule to the Pensions Act with the amendments made by those paragraphs.

We recommend that the entries in the 1986 Schedule should be disregarded.

This recommendation needs no express provision in the text of the consolidations.

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