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UNITED KINGDOM PENSIONS LAW REFORM*

George Walker†

INTRODUCTION

The provision of an adequate level of retirement income for all members of society has become an accepted absolute minimum principle in all Western and developed economies as well as in many other parts of the world. Despite the large amount of important work which has been carried out in this area and the significant recent progress achieved, a number of difficulties continue to arise with regard to the provision of proper support in all cases.¹

The increasingly detailed and complex nature, as well as dated structure of most national pension systems, as well as the often archaic larger Social Security frameworks within which they operate,² can be criticised for failing both to create proper saving mechanisms for those in employment and to provide a sufficient level of support for those who are not.

Significant problems also arise with regard to funding structures as many national state systems continue to operate on a pay-as-you-go, as opposed to funded, basis.³ With a signif-

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¹ See, for example, David W. Kalisch & Tetsuya Aman, *Retirement Income Systems: The Reform Process Across OECD Countries*, in AGEING WORKING PAPERS: MAINTAINING PROSPERITY IN AN AGEING SOCIETY: THE OECD STUDY ON THE POLICY IMPLICATIONS OF AGEING, Working Paper 3.4 (1998), prepared as part of the OECD's study on the policy implications of ageing.

² In connection with the relationship between pension and Social Security reform see, for example, Jean-Victor Gruat, *Adequacy and Social Security Principles in Pension Reform*, in AGEING WORKING PAPERS: MAINTAINING PROSPERITY IN AN AGEING SOCIETY: THE OECD STUDY ON THE POLICY IMPLICATIONS OF AGEING, Working Paper 3.1 (1998).

³ This means that pensions claims, at any one time, are paid through the immediate transfer of funds from those currently in employment. Pensions pay-

icant increase in the dependency ratio expected as a result of future demographic changes,⁴ a funding crisis will necessarily arise in many countries which will require either that taxes be substantially increased or pension benefits correspondingly reduced. Further difficulties may also continue to arise with regard to administrative waste and inequitable coverage and treatment.⁵

As a result of growing pressures for reform, the structure and operation of pension systems in most industrialised and emerging countries are currently subject to extensive examination and review.⁶ A number of difficult issues, however, arise in attempting to ensure that any particular pension arrangement, or set of connected arrangements, operates in as effective a manner as possible and, in particular, in a way that protects all of the different, and often conflicting, interests of all members of society.

To deal with the large number of issues and complex range of interests involved, many modern pension systems operate through a number of separate but connected payment or benefit mechanisms. These may include, for example, a minimum first tier state pension facility as well as a more generous second tier earnings-related scheme.⁷ Alternative second tier pro-

ments then operate as a charge on the current workforce. The opposite of a pay-as-you-go system is funded provision under which each generation provides for its own future entitlement through a process of continued saving and capital accumulation. See, e.g., G. A. MACKENZIE ET AL., PENSION REGIMES AND SAVING 6 (IMF Occasional Paper No. 153, 1997). For further discussion, see *infra* note 13.

⁴ This is the ratio between the number of people entitled to pension benefits to the number of individuals of working age who contribute to the state system at any one time. The difficulty which arises is that as a larger proportion of society retires, the costs of funding imposed on current employees must be increased, failing which the amount of benefit provided must be reduced. See, e.g., David Blake & J.M. Orszag, *Towards a Universal Funded Second Pension: A Submission for the 1997 Pensions Review Focusing on the Financial Aspects of the Provision of a Second Tier Funded Pension* (Oct. 1997). On the issue generally, see SHEETAL K. CHAND & ALBERT JAEGER, AGEING POPULATIONS AND PUBLIC PENSION SCHEMES (IMF Occasional Paper No. 147, 1996).

⁵ See, e.g., MACKENZIE ET AL., *supra* note 3, at 1.

⁶ See, e.g., MACKENZIE ET AL., *supra* note 3; Kalisch & Aman, *supra* note 1.

⁷ Many public pensions operate on a flat-rate basis with residence and/or means testing criteria used for determining benefit eligibility. This may or may not require prior contribution with the state covering the additional costs involved. Earnings-related schemes require that contributions be made over a minimum period. See Kalisch & Aman, *supra* note 1, at paras. 2, 16-32.

Most public pension plans operate on a defined benefit, as opposed to defined

vision may be in place with further third tier or supplementary savings mechanisms made available for higher earners. The interests of those not in employment may then have to be protected through separate state operated benefit structures. The most appropriate mix of mechanisms in any particular country will necessarily depend upon both the historical development of its local economic and fiscal structures as well as the political and social culture.

Whatever system is in place, proper entitlement rules and funding arrangements must be established. Whether funds are managed within the public or private spheres, all schemes must be subject to proper supervision and control either in accordance with general principles of law or more specific statutory direction. Moreover, beneficiaries must have ready and affordable rights of proper redress in the event of malpractice in the administration of a scheme as well as possible compensation or other support facilities in the event of loss. It is in these particular areas that the law has an important continuing role to play in the development of effective pension systems and their future reform.

In the United Kingdom, first tier payments are made under the basic state pension scheme⁸ with second tier benefits

contribution, basis. This means that the pension provision received will be calculated giving consideration to certain fixed criteria such as salary and work history. Under a defined contribution scheme, the pension holder will receive the value of any specific contributions made plus accumulated returns which will generally be paid out in a single, or number of, lump sum(s) or through an annuity. See MACKENZIE ET AL., *supra* note 3, at 6.

⁸ The state pension is paid for out of the National Insurance Fund to which contributions are made through national insurance payments. National insurance contributions are levied according to earnings with a lower earning limit ("LEL") below which no contribution is made. Above the LEL, contributions are paid by employees on all earnings up to the upper earnings limit ("UEL"). The LEL is currently £56 per week or 18% of gross average earnings for adult workers with the UEL being set at between 7 and 7 1/2 times of the LEL. The basic pension is paid depending upon contribution record with a maximum requirement of 44 years out of 49 for a man and 39 years out of 44 for a woman which represents 90% of their working lives. This will be equalised beginning in 2020. Proportionately less payments are made with respect to shorter record periods subject to a minimum entitlement of 1/4 of the full rate. The basic pension is paid at a flat rate of £66.75 per week with a higher dependant's pension being paid of £106.70 per week for a married couple. Currently, 86% of men and 49% of women qualify for the full basic pension with 10.6 million pensioners making claims which cost the government about £32 billion each year. See A NEW CONTRACT FOR WELFARE: PARTNERSHIP IN PENSIONS, 1998, Cmnd. 4179, at ch. 2, paras. 13-14 [hereinafter

made available through either the compulsory contributive state Earnings-Related Pension Scheme ("SERPS")⁹ or by contracting out into either an occupational or private pension scheme. People with few savings and no pension entitlements are eligible for benefits in the form of income support, housing or other benefits under the larger Social Security arrangements administered by the Department of Social Security ("DSS").¹⁰

The development of occupational schemes has been particularly successful in the United Kingdom, with over 10 million employees currently members.¹¹ The total market value of the assets of all occupational schemes is now in excess of £640 billion.¹² These schemes may be either earnings related or money purchase schemes although some hybrid forms are also available.¹³ Contributions to occupational pension schemes

GREEN PAPER]; PENSION LAW REFORM—THE REPORT OF THE PENSION REVIEW COMMITTEE, 1993, Cmnd. 2342, at vol. I, ch. 2.5 [hereinafter GOODE REPORT]; *see also* ROBIN ELLISON, PENSIONS LAW AND PRACTICE ch. 3 (Release 21, Feb. 1998).

⁹ SERPS was set up in 1978 but revised under the Social Security Act of 1986. Payments are related to earnings between the LEL and UEL for each year of pensionable employment. For retirement before the year 2000, SERPS will be 1.25% of total salary (adjusted for inflation) between the LEL and UEL in each of the best 20 years of employment. This will result in a maximum pension of 25% of an individual's average pay over the 20 year period. After the year 2000, progressive reductions will take place over the subsequent 10 years to 20% of average pay. *See* GOODE REPORT, *supra* note 8, at paras. 2.5.13-2.5.20; ELLISON, *supra* note 8, at chs. 5, 6, 7; RICHARD NOBLES, PENSIONS, EMPLOYMENT AND THE LAW ch. 1 (1993).

¹⁰ For a list of current entitlements, *see* DSS web site.

¹¹ In 1981, 10.7 million employees were participants which included 6.8 million men and 3.9 million women. Of this, 6.5 million were involved with private sector schemes with 4.2 million in public sector schemes. Although over 70% of public sector employees were scheme members, only 40% participated in private schemes. The total figures involved then represented just under half of the employed working population. *See* GOODE REPORT, *supra* note 8, at para. 2.2.4. Of the 35 million people of working age in the United Kingdom, only about 10.5 million are currently members of occupational schemes. This represents less than one-third of the employed working population. *See* GREEN PAPER, *supra* note 8, at ch. 2, para. 15.

¹² *See* GREEN PAPER, *supra* note 8, at ch. 2, para. 21.

¹³ The majority of occupational schemes are now salary-related or defined benefit rather than defined contribution. *See supra* note 7. The number of defined contribution or money purchase schemes has, however, grown from 100,000 in the 1970s to over 1 million by 1998. *See* GREEN PAPER, *supra* note 8, at ch. 2, para. 15. An earnings-related scheme (or final salary or defined benefit schemes) provides that benefits be directly related to member's former earnings. Such schemes generally provide for 1/60th or 1/80th of the final salary of pensionable employment. *See, e.g.,* GOODE REPORT, *supra* note 8, para. 2.2.12. Such schemes may also

may also be increased by individual employees either by making additional voluntary contributions ("AVCs") or by making free-standing additional voluntary contributions ("FSAVCs").¹⁴ Apart from occupational schemes, employees or self-employed persons are also free to participate in one of a large range of personal pension schemes.¹⁵

Despite the relative success of the U.K. pensions system to date, there have been increasing calls for reform of both the structure of entitlements currently in place and the methods of funding adopted.¹⁶ Such calls have arisen partly as a result of specific instances of malpractice or abuse such as the Maxwell pensions fund scandal¹⁷ or the more recent pensions mis-selling, the implications and effects of which have still not been fully resolved.¹⁸ The system is also very complex, which raises

ment. See, e.g., GOODE REPORT, *supra* note 8, para. 2.2.12. Such schemes may also be referred to as funded or capitalisation schemes insofar as a sum of money is set aside every year to be invested for provision of future retirement income.

¹⁴ Schemes are required to permit members to make AVCs under the Social Security Act of 1986, section 12, subject to special exclusion such as those listed under the Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations of 1987 (SI 1987/1108), Reg. 2. Under a FSAVC arrangement, the additional pension provision is dealt with apart from the occupational pension scheme through a separately approved provider such as an insurance company, bank, building society or unit trust company. See GOODE REPORT, *supra* note 8, at para. 2.5.5.

¹⁵ Individual pension provision for those not in pensionable employment or for the self-employed was formally available through retirement annuity contracts under Section 226 of the Income and Corporation Taxes Act of 1970 ("ICTA") (now section 618 of the ICTA). Since 1 July 1988, such "Section 226" annuity contracts have no longer been available. Currently, over 5 million personal pensions are held within the United Kingdom. These were encouraged as a result of the prohibition by the Social Security Act of 1986 on making membership in an occupational scheme a condition for employment, the possibility of transferring benefits from an occupational to a personal pension scheme and the ability to contract out of SERPS with the contracted-out rebate being used to fund the personal pension. It is generally not possible to be a member of an occupational and a personal pension scheme at the same time except where the occupational scheme is not contracted out of SERPS or the scheme is non-contributory. Personal pension schemes are also attractive due to the more generous limits permitted with regards to contributions which vary from 171/2% of earnings for persons under the age of 35 to 40% for persons aged 61 or over. See GOODE REPORT, *supra* note 8, at paras. 2.5.8-2.5.12; ELLISON, *supra* note 8, at ch. 4.

¹⁶ See, e.g., GREEN PAPER, *supra* note 8, at ch. 2. For a review of recent developments in this area, see *infra* Section VI.

¹⁷ See *infra* Section II.

¹⁸ See, e.g., Richard Nobles & Julia Black, *Pensions Mis-Selling—The Lessons for Regulating Privatised Social Security*, 64 BROOK. L. REV. 933 (1998).

exceptionally large number of options available confuses interested parties and, to a large extent, acts as a disincentive to scheme participation.¹⁹ The economic effectiveness of current structures has also been criticised at the same time as there has been a more general growing political concern with the adequacy and fairness of the present system, especially for the poorest sections of society.

The purpose of this Article is to outline the historical development of the basic pensions system in the United Kingdom. Part I will examine its early historical development. In Part II the limitations in the current structures of control which were highlighted by the recent Maxwell pensions fund scandal will be considered, and Part III will note the initial proposals issued by the House of Commons Select Committee. Part IV will examine in greater detail the specific recommendations of the separate special review body, the Goode Committee, which was set up in response to the Maxwell scandal. The relevance of the new provisions introduced under the Pensions Act of 1995 will be considered in Part V and their importance and value assessed. In Parts VI and VII, subsequent pressures for reform will also be noted including the government's most recent proposals for a more substantial revision of the present arrangements which were set out in its December 1998 Green Paper.²⁰ This Article will conclude with some final observations and comments with regard to the present state of pension reform in the United Kingdom.

I. EARLY HISTORICAL DEVELOPMENT

Early forms of occupational arrangements considerably pre-dated the state's assumption of responsibility for pension provision. The development of retirement provision and retirement age requirements were, however, both comparatively recent. Basic retirement schemes were originally developed by the state similar to the Customs and Excise Superannuation Scheme in the 17th Century. There was, however, neither a compulsory retirement age for civil servants until the early 1800s nor a limit placed on private sector retirement until the

¹⁹ See Blake & Orszag, *supra* note 4, at ch. 1.

²⁰ See GREEN PAPER, *supra* note 8.

1890s. Apart from family support, former employees depended upon *ex gratia* payments, failing which the workhouse.²¹ In addition, although the state was responsible for the early development of many occupational schemes, proper state provision did not begin until the beginning of the 20th Century. Similarly, the significant development of personal pension schemes in addition to, or in place of, other primary and secondary tier arrangements began only recently in the 1980s.

A. Occupation Pension Schemes

While various forms of pension provision have ancient origins,²² early forms of occupational pension schemes date from the guild systems in the 15th Century, with modern forms of scheme arrangement dating from the 17th Century.²³ The first organised provision of occupational pensions was established by Her Majesty's Customs and Excise in 1686 when the Lord High Treasurer required officers to pay 3p in the pound of their salary by way of contribution to a pension fund. Graded payments were then made on retirement after at least 7 years of service (or earlier if retirement was caused by occupational injury).²⁴ The first private sector pension scheme was set up in 1770 by Lord Clive, the governor of Bengal, by way of a trust fund for relief of military personnel invalidated from the East India Company's service and their widows. Insurance and life assurance schemes were also introduced during the 18th Century and were accompanied by early studies in actuarial methods with the Institute of Actuaries subsequently being formed in 1848.²⁵

A comprehensive scheme for civil servants was set up in 1810 with the age for retirement set at 60 and a final salary-related scheme of payment.²⁶ Due to the high costs involved,

²¹ See LESLIE HANNAH, *INVENTING RETIREMENT* (1986); GOODE REPORT, *supra* note 8, at para. 2.1.1. See generally GOODE REPORT, *supra* note 8, at ch. 2.1; DAVID BLAKE, *PENSION SCHEMES AND PENSION FUNDS IN THE UNITED KINGDOM* ch. 1 (1995); ANTHONY M. REARDON, *PENSIONS HANDBOOK* ch. 2 (6th ed. 1997).

²² See, for example, discussion by Ellison with regard to the payments made by Darius, the King of the Persians, by way of military reward. ELLISON, *supra* note 8, at para. 1.010.

²³ See ELLISON, *supra* note 8, at para. 1.012.

²⁴ See GOODE REPORT, *supra* note 8, at para. 2.1.4.

²⁵ See GOODE REPORT, *supra* note 8, at paras. 2.1.5, 2.1.6.

²⁶ The objective was to replace the corrupt system of sinecures and other per-

related scheme of payment.²⁶ Due to the high costs involved, civil servants were required to make contributions beginning in 1822 although this practice was abolished by statute in 1824.²⁷ Thereafter, a contributory scheme for male civil servants was introduced under the Superannuation Act of 1834 which provided for a pension of two-thirds of an employee's final salary following 45 years of service. A definitive scheme was subsequently established following the 1856 Report of the Select Committee on Civil Service Superannuation. The civil service arrangements in place under this scheme were subsequently replaced, however, in 1859 by a modern form of benefits which provided for 1/60th of an employee's final salary for each year of service up to a maximum of 40/60ths. Private schemes modelled on such civil service arrangements were subsequently set up in other areas including teaching,²⁸ the railway companies,²⁹ the Bank of England and the East India Company.³⁰ By 1900, one million people, or 5 percent of the workforce, were members of occupational pension schemes. Such members were generally comprised of managerial staff,

²⁶ The objective was to replace the corrupt system of sinecures and other perquisites of office with an open and orderly organised scheme, to reward loyal service and to promote efficiency by pensioning off older staff. See GERALD RHODES, *PUBLIC SECTOR PENSIONS* (1952).

²⁷ The Treasury nevertheless issued a minute in 1829 requiring deductions from new appointees' salary by way of pension contribution although a bill to implement this was later withdrawn and the practice discontinued. See GOODE REPORT, *supra* note 8, at para. 2.1.8.

²⁸ An initial money purchase scheme was set up under the Elementary School Teachers (Superannuation) Act of 1898. This was replaced by a final salary scheme under the School Teachers (Superannuation) Act of 1918. See GOODE REPORT, *supra* note 8, at para. 2.1.10.

²⁹ Railway schemes developed to provide pensions for managerial and clerical workers with other workers being supported through saving clubs, friendly societies and other self-help organisations. For example, the Provident Society was established by the Great Western Railway in 1838 to provide pension provisions for those unable to work due to sickness, accident or old age. The London & Birmingham Railway Company introduced a form of wage contribution-based scheme in 1853 following an earlier allowances system. The London & North Western Railway Superannuation Fund was also set up in the 1850s along with the Railway Clearing System Superannuation Fund Association in 1873. This provided for the first multiple employer final salary superannuation scheme. See GOODE REPORT, *supra* note 8, at paras. 2.1.11-2.1.14.

³⁰ The Gas Light & Coke Company, for example, set up staff and manual workers schemes in 1842 and 1870. Similar schemes were set up by the Prudential Assurance Company in 1866, Siemens Brothers in 1872 and the Royal Exchange in 1880. See GOODE REPORT, *supra* note 8, at para. 2.1.15.

and friendly societies.³¹ Although many of these private schemes were modelled on the civil service arrangements, similar benefits were not provided, and the governing philosophy was still one of funds being provided by way of gratuitous provision rather than entitlement.³²

By the beginning of the 20th Century, the approach adopted had changed to one of enlightened self-interest and common business sense. This metamorphosis had occurred as a result of the introduction of the first state pension provision scheme under the Old Age Pensions Act of 1908.³³ In 1909 the civil service scheme was amended to assume its modern form following the Courtney Commission Report in 1903.³⁴ The development of occupational schemes was further strengthened with the introduction of additional tax relieves, especially those introduced under the Finance Act of 1921.³⁵ Although some concerns arose in the 1920s with regard to trusts breaching the rule against perpetuities, legislation was introduced in 1927 to exempt qualifying occupational pension schemes which had not already made any necessary adjustments.³⁶ During the 1930s and 1940s, the provision of occupational pensions through insured schemes grew substantially as life offices offered employers, first, individual pension policies and, subsequently, group policies—which benefited from economies of scale, lower premiums, ease of administration and increased spread of risk.³⁷ In May 1938 the Ministry of Labour conducted the first

³¹ See GOODE REPORT, *supra* note 8, at para. 2.1.17.

³² See ELLISON, *supra* note 8, at para. 1.014.

³³ See GOODE REPORT, *supra* note 8, at para. 2.1.18.

³⁴ The basis of entitlement was set at 1/80th of final salary for every year of service with a cash payment of 3/80th of final salary subject to a maximum of 40 years of pensionable service. See GOODE REPORT, *supra* note 8, at para. 2.1.19.

³⁵ This introduced a statutory right to tax relief on contributions made to pension funds by employers and employees and on the investment income of approved pension funds. This followed the recommendations of the earlier REPORT OF THE ROYAL COMMISSION ON THE INCOME TAX, 1903, Cd. 615. See GOODE REPORT, *supra* note 8, at 2.1.20.

³⁶ See Superannuation and Other Funds (Validation) Act of 1927. General exemption was subsequently provided under Section 69 of the Social Security Act of 1973. Concerns with regard to the rule against perpetuities continued, for example, until 1970. See, e.g., GOODE REPORT, *supra* note 8, at para. 2.1.24 (citing *Re Thomas Meadows & Co. Ltd. and Subsidiary Companies* (1960); STAFF PENSION SCHEME RULES ch. 278 (1971)).

³⁷ These occupational pension schemes developed from 20% to over 50% of the market. See GOODE REPORT, *supra* note 8, at para. 2.1.24.

comprehensive survey of occupational pension schemes.³⁸ The popularity of occupational pension schemes was stimulated again during the 1940s as a result of high levels of taxation and a wider tax base. Some action was taken by the Inland Revenue, however, to limit tax avoidance through the introduction of restrictions on employee contributions to 15 percent of an employee's total salary, limits on the amount of lump sum benefits payable by insurance company schemes and limits on private schemes, restricting them strictly to the provision of benefits similar to public sector schemes.³⁹

During the post-War period, the structure and nature of pension provision was examined by a number of bodies, and various recommendations for reform were made. One particularly difficult area which was identified was the increasingly complex tax treatment of pension schemes. Despite calls for the introduction of a simple and coherent tax treatment of funds, little substantial progress was achieved under the Income Tax Act of 1952 which only codified existing provision. Similarly, little progress was achieved under the Finance Act of 1956 which extended tax relief to the self-employed and exempted annuity contract investments under section 32 of the Finance Act of 1921.⁴⁰ In 1954 the Phillips Committee noted

³⁸ Specifically, 6,544 employers provided pension schemes of which 4,944 were confined to the administrative and professional classes and to clerical, sales and similar staff. The total number of employees covered was 1.6 million of the 3 million who worked for the firms concerned. Almost two-thirds of the pension schemes were group based although the membership was very small. See GOODE REPORT, *supra* note 8, at paras. 2.1.25-2.1.26; ELLISON, *supra* note 8, at para. 1.017.

³⁹ These requirements were introduced under the Finance Act of 1947. See GOODE REPORT, *supra* note 8, at paras. 2.1.27-2.1.30.

⁴⁰ The main organisations concerned with pensions recommended the re-statement of relevant tax law in a simple and coherent form although this was not followed. See *Tax Treatment of Retirement Benefits: A Report Submitted to the Chairman of the Board of Inland Revenue by the Federation of British Industries, the Association of British Chambers of Commerce, the Life Offices' Association and the Association of Superannuation Funds*. The matter was again considered by the Millard Tucker Report in 1954 although there was still no attempt to construct an appropriate new conceptual framework covering the taxation issues of all of the different schemes involved. See REPORT OF THE COMMITTEE ON THE TAXATION TREATMENT OF PROVISIONS FOR RETIREMENT, 1954, Cmd. 9063. Following passage of the Finance Act of 1956, pension benefits were provided under the Finance Act of 1921 with lump sum benefits provided under the approved scheme provisions of the Finance Act of 1947. See GOODE REPORT, *supra* note 8, at paras. 2.1.31-2.1.32.

the potential difficulties of financing the accelerating rate of elderly dependency in society.⁴¹ Thus, while there already existed a tendency for employees to defer retirement during this period, any subsequent attempts by the government to encourage this practice were rejected.⁴²

During the 1950s and 1960s, a number of significant changes occurred in the pensions industry especially with the development of more actively-managed and equity-based investment portfolios⁴³ and an increase in competition between self-administered schemes and insurance company pension services. As the costs of pension provision increased and investment practices became more active, a number of larger organisations set up self-administered schemes either managed internally or through merchant bankers. This development led to both a significant drop in the cost of premiums as well as a large number of new management services being offered by insurance companies in response to the increased competition which had developed.⁴⁴ Further, in 1958 the first full report on pension provision was published by the Government Actuary's Department, referencing schemes in place as of the end of 1956.⁴⁵ By this time, the idea of pensions as represent-

⁴¹ See REPORT OF THE COMMITTEE ON THE ECONOMIC AND FINANCIAL PROBLEMS OF THE PROVISION FOR OLD AGE, 1954, Cmd. 93333.

⁴² See REPORT OF AN ENQUIRY BY THE MINISTRY OF PENSIONS AND NATIONAL INSURANCE, 1954.

⁴³ The introduction of alternative investment strategies was led by George Ross Goobey at Imperial Tobacco Pension Fund. The Trustee Investment Act of 1961 also significantly relaxed the investment powers of trustees by allowing them to transfer up to 50% of their portfolios to U.K. securities, building society shares and units in authorised unit trusts. The first tax-exempt unit trust for pension funds was set up in 1957. In addition to the growth of active management of investments in these areas, pension funds also began to invest in property markets. See GOODE REPORT, *supra* note 8, at paras. 2.1.34-2.1.36.

⁴⁴ See GOODE REPORT, *supra* note 8, at para. 2.1.37.

⁴⁵ See GOVERNMENT ACTUARY, OCCUPATIONAL PENSION SCHEMES: A SURVEY (HMSO, 1958). This report was published in accordance with one of the recommendations of the Phillips Report. It showed that pension scheme membership had increased from 13% in 1936 to 33% in 1956 with 4.3 million individuals in 37,500 private occupational schemes and 3.8 million in nationalised industries involved in public sector schemes. Since 1958, similar surveys have been produced every four years by the Government Actuary. See GOODE REPORT, *supra* note 8, at para. 2.1.39. By 1963, private scheme membership had spread to 7.2 million in 60,000 schemes. Considering the 3.9 million members of public schemes, 48% of the employed population was covered. By 1967, private scheme membership had increased to 8.1 million with 4.1 million in public sector schemes. This represented the peak

ing deferred pay rather than gratuity had also emerged.⁴⁶

During the 1970s, a new simplified code for approval of employee pension and life assurance benefits was introduced under the Finance Act of 1970. This Act provided for the payment of a tax free lump sum from a fund which had grown tax free, with benefits commensurate with civil service provision.⁴⁷ Further improvements in the provision of state and occupational pensions were then introduced from 1973 onwards as part of larger developments in the Social Security system within the United Kingdom. Specifically, preservation requirements to protect the accrued rights of early leavers were introduced under the Social Security Act of 1973. This Act also established the Occupational Pension Board ("OPB") to approve occupational schemes and advise on compliance with the new preservation rules.⁴⁸ These provisions were largely re-enacted under the Social Security Pensions Act of 1975 with further information disclosure regulations being introduced in 1986.⁴⁹

Under the Social Security Acts of 1985 and 1986, early leavers were given the option of transferring to new schemes or having the value of their accrued benefits used to either purchase a deferred annuity or invest in an appropriate personal pension scheme. Since 1986, preserved benefits were required to be revalued in line with inflation subject to a statu-

of scheme participation with 53% of the employed population. A small decline in scheme participation was noted in 1971. By 1987, the total number of scheme participants had fallen to 10.6 million or 49% of the employed population. Although this number increased slightly to 10.7 million in 1991, this figure represented the same proportion of total employed as of 1987. See GOODE REPORT, *supra* note 8, at paras. 2.1.41, 2.1.42.

⁴⁶ For discussion, see GOODE REPORT, *supra* note 8, at para. 2.1.38.

⁴⁷ The Act provided for employees to take a tax free lump sum of up to 11/2 times their final salary after a minimum of 20 years of service. Between 1950 and the 1970s, a large number of schemes had elected to operate on a final salary basis which both protected payments from inflation and encouraged early retirement. Such schemes rose from 8 to 10 million between 1971 and 1975. See GOODE REPORT, *supra* note 8, at paras. 2.1.44, 2.1.40.

⁴⁸ The Act also exempted approved schemes from the rule against perpetuities.

⁴⁹ See OCCUPATIONAL PENSION SCHEMES (DISCLOSURE OF INFORMATION) REGULATIONS 1986, SI 1986/1046. These followed a report by the OPB in 1981 and of the DSS in 1983. See OPB, IMPROVED PROTECTION FOR THE OCCUPATIONAL PENSION RIGHTS AND EXPECTATIONS OF EARLY LEAVERS, 1981, Cmnd. 8271; DSS, REPORT OF THE WORKING GROUP ON THE LAW AND CONVENTIONS GOVERNING PENSION FUNDS, 1983.

tory limit. Moreover, limited price indexation of the entire preserved pension has been required since 1 January 1991 under the Social Security Act of 1990. The 1990 Act also set up the Pensions Ombudsman and the Pensions Registry to allow deferred members to trace former schemes. Finally, increased support provided to advisory bodies during this period led to an expansion in the role of the Occupation Pensions Advisory Service ("OPAS").⁵⁰

A further pension schemes bill was presented before Parliament during the 1992-3 session to complete the process of consolidation of Social Security statutes which had begun with the Social Security Contributions and Benefits Act of 1992 and the Social Security Administration Act of 1992. This was followed by the Pensions Act of 1995 which was passed to give effect to various recommendations contained in the Goode Report. As discussed earlier, the Goode Report was issued in response to the circumstances surrounding the Maxwell pension scandal. Such scandal is considered in further detail *infra* in Part II.⁵¹

B. *State Provision*

Despite the publication of a large number of reports with recommendations for the introduction of some form of state provision during the end of the 19th and the beginning of the 20th Century, it was not until 1908 that the first government sponsored scheme was introduced. Until then, the individual was assumed to be responsible for making proper provision for his own illness and old age. The assumption of responsibility by the state for pension provision was rejected by a number of official reports during the 1890s despite a number of notable figures such as Joseph Chamberlain, Canon William Blackley and Charles Booth calling for pension reform.⁵²

⁵⁰ See GOODE REPORT, *supra* note 8, at paras. 2.1.45-2.1.49.

⁵¹ See *infra* Section II.

⁵² See, e.g., REPORT OF THE SELECT COMMITTEE ON THE AGED DESERVING POOR, 1899, C. 296; REPORT OF THE COMMITTEE ON OLD AGE PENSIONS, 1898, C. 8911; REPORT OF THE ROTHSCHILD COMMISSION, 1898; REPORT OF THE ROYAL COMMISSION ON THE AGED LAWS, 1895, C. 7684; REPORT OF THE ABERDARE ROYAL COMMISSION, 1895; see also GOODE REPORT, *supra* note 8, at para. 2.1.54.

The first pension scheme introduced only provided for five shillings per week for individuals 70 years old and over. Moreover, these individuals were subject to a means and moral character test. Compulsory health insurance was subsequently introduced in 1911 under the National Insurance Act which was administered by friendly societies. Means testing of the basic provision was removed under the Pensions Act of 1925 with contributions being made compulsory for manual workers and others earning less than £250 per year. Early provision was, however, included to permit contracting out where members were adequately provided for by occupational pension schemes. Finally, in 1928, benefits payable were adjusted to ten shillings per week for persons aged 65 and over.

In 1942, a new unified plan for Social Security was introduced under the Beveridge Report.⁵³ Under the Report, Sir William Beveridge recommended that a flat-rate social insurance benefit be paid in all cases where an individual's earnings had been interrupted by unemployment, disability or retirement. Such benefit provision was required to be sufficient to provide the minimum amount of funds needed for an individual's subsistence in all normal circumstances. Further, the scheme was to be based on a single flat-rate contribution. These provisions were given effect under the National Insurance Act of 1946 which provided for universal collection of national insurance contributions and the introduction of benefit schemes for all U.K. employers and employees. While contracting out of the basic state provision was prohibited under the 1946 Act, the National Insurance Act of 1959 allowed occupational schemes to assume responsibility for the new graduated retirement benefits introduced in 1961. This provided for limited earnings-related payments. These payments, however, were replaced by the Social Security Pensions Act of 1975 which introduced SERPS beginning in April 1978. Under SERPS, national insurance contributions were payable with reference to earnings bands. Specifically, pension benefits were payable on 25 percent of average lifetime figures of earnings within the best 20 years of an individual's contribution record. This percentage was subsequently reduced to a 20 percent figure under the Social Security Act of 1986 following a

⁵³ See SOCIAL INSURANCE AND ALLIED SERVICES, 1942, Cmd. 6404.

review of Social Security provision by the incoming Conservative government in 1979. Contracting out of SERPS was also permitted provided that a guaranteed minimum pension ("GMP") was provided under alternative occupational schemes. For the first time, money purchase schemes and personal pensions were also allowed to be used for contracting out purposes.⁵⁴

By the early 1990s, the basic two-tiered structure of pension provision in the United Kingdom had been established. Subsequent crises and an increasing awareness of the continuing importance, but new complexity, surrounding pension structures would, however, begin to generate new calls for reform.

II. THE MAXWELL PENSIONS FUND SCANDAL

Pension provision in the United Kingdom was subject to substantial review following The Mirror Group pension scandal in 1992 which involved the withdrawal of substantial assets from existing pension funds.⁵⁵ Robert Maxwell purchased The Mirror Group in 1984 and quickly imposed a pensions holiday. A pensions holiday meant that the company did not make any payments into the general pension fund of 14 1/2 percent of each member's salary while employees continued to pay 6 percent from their wages.⁵⁶ While not illegal in light of the fund's surplus, this saved Maxwell from making over £800,000,000 worth of contributions to the pension fund each year. Maxwell also imposed a statutory minimum increase in pensions of 3 percent and undertook to remove all hostile trustees from the pension fund's board which included union officials, workers' representatives and other unsupportive individuals.⁵⁷

⁵⁴ See GOODE REPORT, *supra* note 8, at paras. 2.1.58-2.1.63.

⁵⁵ See, e.g., SOC. SEC. COMM., THE OPERATION OF PENSION FUNDS 61-II (Mar. 1992) [hereinafter OPERATION OF FUNDS]; see also ROY GREENSLADE, MAXWELL: THE RISE AND FALL OF ROBERT MAXWELL AND HIS EMPIRE ch. 14 (1992).

⁵⁶ See GREENSLADE, *supra* note 55, at 253.

⁵⁷ While there had originally been six trustees from management and six from unions when Maxwell acquired The Mirror Group, the union representatives were subsequently replaced with more docile management figures. At the same time, Maxwell reduced the quorum to allow meetings to be held with a minimum of two people from 1986 onwards. From an early stage, other trustees were simply not

While Maxwell originally appeared to lack any specific intent to withdraw money from employees' pension funds, he subsequently adopted a deliberate strategy of undermining the independence of the trustees over a prolonged period of time. This practice facilitated his later abuses. Surprisingly, although many of Maxwell's actions were described as unusual, none were illegal at the time. In fact, despite concerns over the operation of U.K. occupational schemes in general, precedent involving employer tampering with employee pension funds failed to exist.

As Chairman of The Mirror Group Pensions Trust, Maxwell subsequently appointed one of his private trusts, Bishopgate Investment Management, to act as manager of over half the pension fund's assets. Following this, substantial investments were made by the pension fund in Maxwell connected companies. In June 1990, Maxwell instructed Larry Trachtenberg, the Managing Director of London & Bishopgate International Investment Management, to place £100 million worth of pension fund share certificates at his personal disposal.⁵⁸ By December 1990 the pension fund surplus had risen from £85 million in April 1988 to £149.3 million although difficulties had arisen in confirming the value of the assets since complete accounts were not available.⁵⁹

Beginning April of 1990, Maxwell began to withdraw funds from the various pension schemes under his control through Bishopgate Investment Management of which he was chairman. At that time Bishopgate Investment Management was responsible for £700 million worth of assets. Such figure included 72 percent of the £200 million assets of the Maxwell Communications Works pension scheme and 56 percent of The Mirror Group pension fund. This compilation was achieved by lending shares to two of Maxwell's other private companies, The Robert Maxwell Group and Headington Investments, un-

invited to meetings. See GREENSLADE, *supra* note 55, at 254.

⁵⁸ Trachtenberg promptly delivered the certificates to Maxwell's office where he deposited them in his personal safe. See GREENSLADE, *supra* note 55, at 254. While Trachtenberg had not acted illegally in transferring the share certificates, he had already been suspended from the board of London & Bishopgate following a stop-lending conflict which had arisen with the First Toyko Index Trust which Maxwell had acquired in January 1989. See *id.* at 257.

⁵⁹ See GREENSLADE, *supra* note 55, at 256.

der supposedly legitimate stock lending operations (commonly undertaken by pension funds). Rather than return the equivalent shares within a day, or a couple of days, however, Maxwell used the securities as collateral for loans received from a number of different banks. Moreover, instead of accounting for the proceeds of any share's sale to the pension fund, Maxwell diverted monies received to other loss-making activities.⁶⁰

After the scandal, it was confirmed that approximately £420 million of assets had been withdrawn from various pension funds. Of this amount, approximately £235 million was simply money owed by private Maxwell companies from securities sold by the pension fund.⁶¹

Although a number of people had become concerned about the possible removal of assets from the pension funds, no action had been taken by the authorities. An Association of Mirror Pensioners had been established by Tony Boram, former editorial director at The Mirror Group. By the beginning of 1990, this Association had uncovered a considerable amount of evidence. It became further concerned with the amount of money invested in Maxwell companies following the release of the pension scheme's report and accounts for the year through April 1990. Although attempts were made to draw this matter to the attention of the press, no action was taken, partly as a result of the fact that engaging the support of Maxwell-connected journalists (including those on The Mirror) proved difficult.⁶² Finally, despite referral of the matter to the Occupational Advisory Pension Service ("OPAS"), again no further action was taken.⁶³

⁶⁰ In one subsequent deal involving the purported acquisition of First Tokyo Index Trust by a specially established Maxwell called "Adviser (188)," Maxwell borrowed £60 million from the Swiss Bank Corporation. He then disposed of part of the shares acquired contrary to an agreement with SBC and used part of the balance as collateral for loans acquired from Credit Suisse and Lehman Brothers. See GREENSLADE, *supra* note 55, at 259-61.

⁶¹ This involved one transaction worth £100,000,000 concerning an unlisted Israeli company and various other disposals sold through Maxwell companies without the monies due being duly paid to the pension funds. See OPERATION OF FUNDS, *supra* note 55, at para. 83.

⁶² For comments, see, for example, OPERATION OF FUNDS, *supra* note 55, at paras. 100-06.

⁶³ For criticism of the action of the OPAS, see OPERATION OF FUNDS, *supra* note 55, at paras. 107-09.

III. THE SOCIAL SECURITY COMMITTEE

The House of Common's Social Security Committee⁶⁴ began investigating pension-related issues and, in particular, the equalisation of pension ages prior to the Maxwell scandal.⁶⁵ This inquiry was then extended to include the ownership and control of pension assets in light of the circumstances surrounding the Maxwell affair.

In its Report, the Committee noted the improvements which had been achieved in the provision of pensions this century. It further recognised the complex nature of pensions law and the difficulty of arriving at any simple, meaningful list of reform proposals.⁶⁶ The continued reliance on medieval trust law as the core legal basis for pension law was severely criticised, and the Committee stated that it thought that pension funds should be governed by laws analogous to those governing companies. In light of the complexity of the issues involved, the Committee recommended that a formal inquiry be undertaken by the government during the following year to collect relevant data supporting the detailed structure of a new pensions act.⁶⁷

⁶⁴ The Social Security Committee was appointed under SO No. 130 to examine the expenditure, administration and policy of the DSS, associated public bodies and other similar matters within the responsibilities of the Secretary of State for Northern Ireland. The Committee was comprised of a maximum of 11 members of which 3 was a quorum. The Committee had the power to send for persons, papers and records, appoint technical experts to supply information or explain matters of complexity, communicate with other committees regarding its evidence and meet with any other such committees in deliberating, taking evidence or considering draft reports.

⁶⁵ This began with the decision of the European Court of Justice in the *Barber* case. See *supra* note 126 and accompanying text.

⁶⁶ The Committee stated:

The issues involved in the ownership and control of pension funds are very complex, and while the Committee does not pretend to have come to a single mind on all aspects of pension reform, we do believe that there is a need to change the legal basis on which pension funds operate . . . However, we believe that, given past errors, politicians should approach reform with a certain degree of humility rather than pretend that they are the possessors of a quick political panacea.

OPERATION OF FUNDS, *supra* note 55, at paras. 7, 8.

⁶⁷ See OPERATION OF FUNDS, *supra* note 55, at para. 10. The operation and recommendations of the Goode Report which was subsequently published are considered in *infra* Section IV.

In addition to its core recommendation establishing a review body, the Committee considered the legal under-pinning of pension funds,⁶⁸ conducted an interim examination of the circumstances surrounding the Maxwell scandal,⁶⁹ examined the regulatory system governing pensions law in the United Kingdom and commented on the governance of a number of other pension funds in operation with various recommendations for reform being made.

The Committee expressed an urgent need for pensions law reform and criticised the unquestionable inadequacy of trust law as the legal basis supporting occupational pension schemes.⁷⁰ Moreover, it noted that a number of reforms had already received widespread consensus and should be implemented. These reforms related to the greater safeguard of investments, improved disclosure and information, monitoring functions, the powers of trustees and certain other ancillary matters.⁷¹

⁶⁸ The Committee noted the substantial growth of occupational pension schemes. Almost 25 million people were members or beneficiaries of non-state pension schemes; 19 million belonged to occupational schemes organised by their employers with the remaining 4.6 million having personal pension plans. See SOCIAL SECURITY: THE GOVERNMENT'S EXPENDITURE PLANS 1992-1993 TO 1994-1995, 1992, Cmnd. 1914. The Committee noted the trust law basis of pension law and four recent sources of official criticism. These critical sources were comprised of documents obtained from the Committee established to review the functioning of financial institutions which was chaired by Right Honorable Sir Harold Wilson, Professor Gower's Green Paper on investor protection, Professor Gower's report to the Secretary of State for Trade & Industry on the review of investor protection and the Occupational Pension Board's 1982 Report. See REVIEW OF INVESTOR PROTECTION, 1984, Cmnd. 9125; OPB, 1982, Cmnd. 8649; REPORT OF THE COMMITTEE TO REVIEW THE FUNCTIONING OF FINANCIAL INSTITUTIONS, 1980, Cmnd. 7937; REVIEW OF INVESTOR PROTECTION: A DISCUSSION DOCUMENT (HMSO 1982).

⁶⁹ The Committee noted that the first public warning of the impending crisis was the report in *The Daily Mail* on 24 October 1990 by Max Hotopf concerning the investment of pension fund assets in Maxwell companies. A second report was published on 18 May 1991 following the publication of the fund's accounts for the year ending April 1990. This showed that £160,000,000, which represented the top 20 investments, were no longer in the top 100 public companies. Of these, the only remaining investments were in Maxwell Communications. The Committee noted the failure to register early warnings especially through the media and by the OPAS. The Committee also examined the role of all of the different sets of professional advisers involved and made various recommendations in this regard. See OPERATION OF FUNDS, *supra* note 55, § 5.

⁷⁰ See OPERATION OF FUNDS, *supra* note 55, at para. 282.

⁷¹ See OPERATION OF FUNDS, *supra* note 55, at paras. 286-90.

The more general conclusions in the Committee's Report were well received at the time. However, some of its more specific recommendations, such as the replacement of existing trust law with a new regulatory statute or the overburdensome training of trustee's, were strongly criticised.⁷² Thus, in light of the importance of the issues raised, the government agreed to set up a further review body.

IV. THE PENSION LAW REVIEW COMMITTEE

Following receipt of the recommendations set forth in the Social Security Committee Report, the Secretary of State for Social Security announced the establishment of a new review committee. The Pension Law Review Committee was established under the chairmanship of Professor Roy Goode in June 1992 and began working in July 1992.

The purpose of such Committee was to consider all aspects of public and private sector occupational schemes, whether funded or unfunded and whether contracted out or not, of state earnings-related arrangements. The Committee was neither directly concerned with state pensions nor personal pensions. The Committee was also not concerned with the fiscal implications of pensions policy although some comments were made on the possible adverse effects on scheme structure, security and management.

While the Committee was aware of the large and complex nature of occupational pensions, it noted that it was only during its work that it fully realised how difficult the area truly was and the large number of differing views which existed between employees and employees on the subject of pension policy. The Committee further recognised the contribution made by the OPB between 1975 and 1989 and, in particular, the value of its major reports on the balance of employer and employee interests, the involvement of pension schemes with mergers and take-overs, trustee decision-making, the need for restrictions on self-investment and other measures to safeguard the rights of scheme members.⁷³

⁷² See, e.g., ELLISON, *supra* note 8, at para. 1.056.

⁷³ See OPB, PROTECTING PENSIONS, SAFEGUARDING BENEFITS IN A CHANGING ENVIRONMENT, 1989, Cmnd. 573; OPB, IMPROVED PROTECTION FOR THE OCCUPA-

In its final report of September 1993, the Committee provided a critique of the basic pensions law and made a number of recommendations for reform. The new regulatory structure scheme proposed was, in particular, designed to satisfy four essential criteria: fairness to all parties, security for scheme members, practicality and the simplification of the law regulating occupational pension schemes and their administration.⁷⁴

The recommendations of the Committee included six key proposals:

(1) Trust law should continue to provide the foundation for creating interests, rights and duties arising in connection with occupational pension schemes although these should be reinforced by a new pensions act administered by a pensions regulator.

(2) Freedom of trust should be limited to ensure the reality of the pension promise, to protect rights accrued in respect of past service and to allow members to make appointments to the trustee board.

(3) The provision of information for scheme members should be improved both in content and in clarity and presentation.

(4) The security of members' entitlements should be strengthened by a minimum solvency requirement; monitoring by the new pensions authority, scheme auditors and actuaries; restrictions on withdrawals from surpluses; and a compensation scheme to cover scheme deficits arising from fraud, theft or other misappropriations.

(5) When establishing a scheme, employers should be free to reserve the right to close, freeze or wind-up schemes, to approve or refuse increases in benefits and to reduce or stop contributions subject to the pre-set minimum solvency requirement.

(6) The administrative burdens imposed on employers and scheme administrators should, wherever possible, be reduced

TIONAL PENSION RIGHTS AND EXPECTATIONS OF EARLY LEAVER, 1982, Cmnd. 8271; OPB, OCCUPATIONAL PENSION SCHEMES COVER FOR DISABLED PEOPLE, 1977, Cmnd. 6849; OPB, EQUAL STATUS FOR MEN AND WOMEN IN OCCUPATIONAL PENSIONS, 1976, Cmnd. 6599; OPB, SOLVENCY, DISCLOSURE OF INFORMATION AND MEMBER PARTICIPATION IN OCCUPATIONAL PENSION SCHEMES, 1975, Cmnd. 5904.

⁷⁴ See GOODE REPORT, *supra* note 8, at para. 1.1.15.

and flexibility increased through simplification of the law and its administration.⁷⁵

The Committee's basic critical analysis of the existing law and the principal recommendations made for reform are set forth below.

A. *Inadequacies of the Present Law*

The current law which was based on trust was believed to suffer from a number of deficiencies especially with regard to its considerable complexity and lack of structure and organisation. Unnecessarily wide powers and discretions were also conferred on employers and trustees with no final compensation being available in the event of asset misappropriation. The reliance on general trust law also meant that there failed to exist clear regulatory authority to monitor and enforce proper standards in the administration of occupational pension schemes.⁷⁶ The Committee, therefore, suggested that an Occupational Pension Schemes Act should be enacted to set out a structured framework of rights and duties and a pensions regulator appointed with overall responsibility for the regulation of occupational pension schemes.⁷⁷

⁷⁵ Detailed statutory investment rules should, in particular, be replaced with a general prudent person standard and statutory investment criteria. Further, there should be a rapid transition towards a single tax system, and there should be a move from excessively detailed and obscurely-drafted rules towards more general, clearly-expressed statements of principles. See GOODE REPORT, *supra* note 8, at para. 1.1.15.

⁷⁶ See GOODE REPORT, *supra* note 8, at para. 4.1.

⁷⁷ The following particular recommendations were made: (1) An Occupational Pension Schemes Act should be enacted to set out a structured framework of rights and duties and a Pensions Regulator appointed with overall responsibility for the regulation of occupational pension schemes. GOODE REPORT, *supra* note 8, at para. 4.1.3. (2) Trust law was deemed generally satisfactory and should continue to provide the foundation for interests, rights and duties arising in relation to pension schemes although some principles require modification in their application. GOODE REPORT, *supra* note 8, at para. 4.1.14. (3) A shift in the permitted distribution of powers was deemed necessary, in particular, to protect scheme members against adverse amendment of scheme rules affecting their rights to accrued service through the creation of non-excludable rights to participate in scheme management and decision-making and the provision of all necessary information in both a readily understandable and full form upon request. GOODE REPORT, *supra* note 8, at para. 4.1.18. (4) General statements of principle should be adopted in primary legislation and the amount of detailed prescription reduced. GOODE REPORT, *supra* note 8, at para. 4.1.25. (5) Statutory and other rules affecting pension

B. *Recommendations*

The Committee further made the following specific recommendations with regard to various aspects of the operation, administration and control of occupational pension schemes:

1. Defining and Protecting the Pension Promise

The Committee considered that employees belonging to occupational pension schemes should have certain reasonable expectations which should be protected under the law. The Committee referred to these expectations as the "Pension Promise." The Pension Promise was principally comprised of accrued rights which meant that the benefits payable to scheme members accrued with service and that their subsequent payment was protected.⁷⁸ The Committee made four specific recommendations in this regard.⁷⁹

2. Interest in the Pension Fund and Surpluses

Particular difficulties had arisen in recent years concerning fund surpluses. These difficulties largely resulted from the economic circumstances of the 1980s and changes in actuarial

schemes should be simplified and reduced in number. GOODE REPORT, *supra* note 8, at para. 4.1.26. (6) There should be a relatively small number of rules which are vigorously enforced as against a larger proliferation of regulations which were frequently breached through lack of adequate monitoring and enforcement. GOODE REPORT, *supra* note 8, at para. 4.1.35.

⁷⁸ The Committee noted that these rights were not, at that time, strictly legal especially as trust deeds gave employers and trustees wide powers of amendment. It did, however, assert that it thought that these rights should nevertheless be protected in law. See GOODE REPORT, *supra* note 8, at para. 4.2.2.

⁷⁹ These recommendations were: (7) Certain limits should be set to freedom of trust to preserve the reality of the pension promise especially in relation to accrued rights. GOODE REPORT, *supra* note 8, at para. 4.2.8. (8) The proposed Pensions Act should clarify the scope of the employer's obligations under the contract of employment and the fiduciary as opposed to personal powers conferred under scheme documents. GOODE REPORT, *supra* note 8, at para. 4.2.15. (9) The employer should be regarded as having a number of unexcludable obligations to the scheme including proper funding in accordance with scheme documentation and the general law. GOODE REPORT, *supra* note 8, at para. 4.2.17. (10) The primary duties of the trustees in relation to the pension promise should be given statutory expression. GOODE REPORT, *supra* note 8, at para. 4.2.18.

assumptions.⁸⁰ The Committee noted that particular difficulties arose with regard to both defining surpluses and the Inland Revenue requirement that excess surpluses (of over 105 percent) had to be disposed of by employers within five years in order to protect their tax exempt status. This was achieved in practice through contribution holidays, withdrawal of funds by employers, and benefit improvements. The Committee made separate recommendations with regard to surpluses in on-going schemes⁸¹ and on winding-up.⁸²

3. Funding

The proper funding of a scheme's accrued liabilities was considered fundamental to the pension promise. Proper funding was a means of protecting accrued rights even in the event of the insolvency of the sponsoring employer. To do so, howev-

⁸⁰ See GOODE REPORT, *supra* note 8, at paras. 1.1.3, 4.3.3.

⁸¹ These recommendations were: (11) Substantial changes to the law governing surpluses were not required, but some additional restrictions should be imposed on employer payments. GOODE REPORT, *supra* note 8, at paras. 4.3.27, 4.3.28. (12) The Inland Revenue Surplus Regulations should be amended to include insured schemes. GOODE REPORT, *supra* note 8, at para. 4.3.27. (13) Payments to the employer should generally not be permitted unless authorised by the trust deed or an amendment pursuant to a modification order by the Pensions Regulator with consent to payments or amendments only being approved by the Regulator in limited cases. GOODE REPORT, *supra* note 8, at para. 4.3.30. (14) Where the trust deed did not allow for employer payments, the employer should be required to notify scheme members to enable them to make representations to the Regulator against payment being permitted. GOODE REPORT, *supra* note 8, at para. 4.3.30. (15) The employer should continue to be able to make contribution holidays within the limits permitted by the scheme rules in balance of cost earnings-related schemes except where the funding level would fall below the new minimum solvency requirement recommended. GOODE REPORT, *supra* note 8, at para. 4.3.33. (16) The Inland Revenue 5 year rule for elimination of excess surplus by contribution holiday should be extended to the average length of future service of active members up to 15 years. GOODE REPORT, *supra* note 8, at para. 4.3.35. (17) The tax charge on non-eliminated excess surplus only applying to surpluses in excess of the 105% limit should be confirmed in statute. GOODE REPORT, *supra* note 8, at para. 4.3.37).

⁸² These recommendations were: (18) Surpluses on winding-up should generally be dealt with in accordance with scheme rules, failing which trustees should be given statutory discretion as to the application of funds rather than allow this to revert to the employer by way of resulting trust or to the Crown as *bona vacantia*. GOODE REPORT, *supra* note 8, at para. 4.3.48. (19) If the scheme rules prohibit employer payments, member benefits should be augmented and trustees given discretion to allocate any further balances as they see fit subject to regulatory approval. GOODE REPORT, *supra* note 8, at para. 4.3.48.

er, funding had to be set at a level which ensured that the scheme was in a position to meet all of its liabilities as they fell due. In connection with this, the Committee considered whether a statutory minimum solvency requirement should be imposed and how it should operate in practice. The Committee concluded that such requirement was appropriate, subject to certain exceptions, and made a number of recommendations with regard to the cover required and its administration and operation in practice.⁸³

⁸³ These recommendations were: (20) A minimum solvency requirement was necessary to secure the pension rights of members. GOODE REPORT, *supra* note 8, at para. 4.4.16. (21) Schemes which were unapproved solely because they provided for benefits in excess of Inland Revenue earnings-related limits or earnings caps should be exempt from any funding requirement. GOODE REPORT, *supra* note 8, at para. 4.4.19. (22) A solvency band should be set between the minimum solvency standard of 100% and a base level of 90% with funds falling below the minimum requiring an injection of funds within three months of receipt of notification from the actuary of the deficiency, failing which the trustees should be required to recover the necessary funds from the employer. GOODE REPORT, *supra* note 8, at paras. 4.4.20, 4.4.21. (23) Trustees should notify the members in the event of the employer not injecting funds within 14 days. GOODE REPORT, *supra* note 8, at para. 4.4.22. (24) The regulator should be empowered to take whatever remedial measures appear necessary in the event of the trustees being unable or unwilling to recover the necessary funds. GOODE REPORT, *supra* note 8, at para. 4.4.23. (25) All schemes subject to the minimum solvency requirement would have to establish and maintain a funding plan in compliance with their 100% level, with the trustees submitting a business plan in the event of contravention providing for restoration within the three years subject to the further intervention of the Regulator. GOODE REPORT, *supra* note 8, at para. 4.4.24. (26) The trustees and scheme actuary should be under a duty to report any shortfall to the Regulator as soon as they become aware of it. GOODE REPORT, *supra* note 8, at para. 4.4.26. (27) Liabilities should be calculated as the sum of cash equivalence calculated on the same basis as for individual transfer values for active and deferred members and the cost of immediate annuities for pensioners. GOODE REPORT, *supra* note 8, at paras. 4.4.45, 4.4.46. (28) The government should consider introducing a new security to back schemes' indexed liabilities. GOODE REPORT, *supra* note 8, at para. 4.4.47. (29) A five year transition period should be introduced for compliance with the new solvency standard. GOODE REPORT, *supra* note 8, at para. 4.4.48. (30) Merged schemes should comply with the solvency requirement as soon as possible with any previously under-funded scheme benefits being postponed in the event of a winding-up. GOODE REPORT, *supra* note 8, at para. 4.4.50. (31) Methodology should be continually revised to produce greater consistency in the assessment of scheme solvency than at present. GOODE REPORT, *supra* note 8, at para. 4.4.53. (32) Trustees should provide an annual certificate of solvency from the scheme actuary in addition to the full valuation which is carried out every three and a half years. GOODE REPORT, *supra* note 8, at para. 4.4.54. (33) Tax relief on any special contributions in relation to solvency shortfalls should be provided immediately. GOODE REPORT, *supra* note 8, at paras. 4.4.57, 4.4.58.

4. Pension Fund Trustees

The Committee noted the importance of trustee functions being properly carried out in connection with the administration of all types of schemes. The Committee, however, recognised the wide variety and expertise of trustee boards. They, therefore, attempted to balance the introduction of new legislative measures with the promotion of higher standards through statements of good practice and the provision of proper training programmes. Recommendations made to deal with various trustee concerns included the qualification and disqualification of trustees, the degree of employer control over trustee appointment and removal as well as the composition of the trustee board, the distribution of powers between the employer and trustees, trustees' conflicts of interest, outdated restrictions on the powers of trustees, the inability of trustees to meet claims against them for loss caused by breach of duty and the level of knowledge of trustees concerning their role and responsibility.⁸⁴

⁸⁴ Other recommendations included: (34) The new authority should have the power to disqualify persons from acting as trustees where they have been convicted of fraud, theft or other dishonesty subject to a right of appeal. Trustees should be subject to automatic disqualification on the same grounds as applied to company directors under the Company Directors Disqualification Act of 1986 (Bankruptcy, etc.). GOODE REPORT, *supra* note 8, at paras. 4.5.13, 4.5.12. (35) The scheme auditor and actuary should not be allowed to act as trustees and good practice should also exclude the scheme administrator. GOODE REPORT, *supra* note 8, at para. 4.5.14. (36) Employers should not have the sole power to appoint trustees and should not be able to veto member selections. GOODE REPORT, *supra* note 8, at para. 4.5.21. (37) Schemes should not be required to appoint pensioner trustees but should be encouraged to consider including them on the board of trustees. GOODE REPORT, *supra* note 8, at para. 4.5.28. (38) Members should be entitled to appoint, at least, one-third of the trustees subject to a minimum of two in relation to earnings-related schemes with the employers appointing the balance. GOODE REPORT, *supra* note 8, at para. 4.5.40. (39) Members should be entitled to appoint, at least, two-thirds of the trustees subject to a minimum of two in relation to money purchase schemes. GOODE REPORT, *supra* note 8, at para. 4.5.40. (40) The regulators should have power to determine whether hybrid schemes should be subject to the one-third or two-thirds rule. GOODE REPORT, *supra* note 8, at para. 4.5.41. (41) With the agreement of the employer, scheme members should be allowed to appoint non-member trustees including trade union representatives with any disagreements being referred to the authority. GOODE REPORT, *supra* note 8, at para. 4.5.42. (42) Guidance should be provided by the authority with the assistance of the Advisory, Conciliation and Arbitration Service ("ACAS") as to the means of trustee selection. GOODE REPORT, *supra* note 8, at para. 4.5.43. (43) Existing appointment rules should continue in place until either the employers or members

5. Amendment and Winding-Up

Particular difficulties may arise with regard to the amendment or winding-up of schemes by employers, balancing the interests of different categories of members and protecting accrued rights.⁸⁵ The Committee considered that the existing rules governing amendment and winding-up were unsatisfactory. It thought that members' interests should best be protected through trustees who should be required to balance all differing interests in as fair a manner as possible. The favourable or detrimental impact of amendment or winding-up on future or accrued rights should be taken into account. Notice should also be given where accrued rights may be affected, and winding-up should be subject to the oversight of the Occupational Pensions Regulatory Authority ("OPRA"). Other problems in this area dealt with the calculation and security of benefits, delays in awarding pensions and transfer values and discriminatory trustee decisions. A number of recommendations were made to attempt to resolve these difficulties.⁸⁶

exercise their rights under the new rules. GOODE REPORT, *supra* note 8, at para. 4.5.44. (44) No minimum or maximum terms of office for trustees should be set out in law. GOODE REPORT, *supra* note 8, at para. 4.5.46. (45) Employers should not be able to remove member-appointed trustees except on a unanimous decision of all trustees and subject to authority notification. GOODE REPORT, *supra* note 8, at para. 4.5.49. (46) Certain matters should always be reserved to the trustees including the appointment of scheme auditor, actuary, fund manager or other professional adviser, investment strategy, distribution of unallocated surpluses and treatment of discretionary benefits. GOODE REPORT, *supra* note 8, at para. 4.5.52. (47) Other matters should be dealt with under the scheme rules including the closing, freezing or winding-up of the scheme, increasing benefits or reducing or stopping contributions. GOODE REPORT, *supra* note 8, at para. 4.5.53. (48) Trustee meetings should be held on a regular basis subject to proper notice, distribution of agenda and papers and minutes being kept. GOODE REPORT, *supra* note 8, at para. 4.5.57. (49) Trustee boards should meet, at least, once a year to approve the annual report and actuarial certificate and on such other occasions as may be reasonable. GOODE REPORT, *supra* note 8, at para. 4.5.57. (50) Trustee boards should decide matters by a majority subject to unanimity being required under the scheme rules. GOODE REPORT, *supra* note 8, at para. 4.5.58. (51) Pension funds should not be required to be bonded or insured against liability. GOODE REPORT, *supra* note 8, at para. 4.5.64. (52) Member trustees should be allowed reasonable time off for training by employers without loss of pay. GOODE REPORT, *supra* note 8, at para. 4.5.65.

⁸⁵ See GOODE REPORT, *supra* note 8, ch. 4.6.

⁸⁶ Such recommendations included: (53) The authority should be empowered to consent to scheme amendments and winding-up on behalf of members and beneficiaries who cannot be traced. GOODE REPORT, *supra* note 8, at para. 4.6.7. (54) It

6. Early Leaving

Several issues arose in the event of a member's early leaving of a pension scheme. The immediate concern was the preservation of value of the member's accrued pension and whether deferred members should be placed in the same position as current members or be made subject to some separate treatment which, at least, maintained the real value of the original pension. Difficult issues also arose as to whether discretionary benefits should be included in calculating the amount to be transferred to other schemes. Moreover, in the event of a scheme's merger, unresolved questions existed regarding de-

was not necessary to place limits on powers of amendment to schemes which affected members' past or future rights favourably provided that the minimum solvency requirements were complied with. GOODE REPORT, *supra* note 8, at para. 4.6.12. (55) Amendments should not be permitted where they detrimentally affect accrued rights subject to approval by the authority in exceptional cases. GOODE REPORT, *supra* note 8, at paras. 4.6.13-4.6.15. (56) Employers' right to procure changes should be subject to scheme rules, employment law and members' contracts of employment. GOODE REPORT, *supra* note 8, at para. 4.6.16. (57) Active members should be notified of detrimental amendments in advance insofar as practical. GOODE REPORT, *supra* note 8, at para. 4.6.17. (58) Employers should be able to wind-up schemes with or without consent of scheme members subject to compliance with the minimum solvency requirements and new compensation arrangements. GOODE REPORT, *supra* note 8, at para. 4.6.21. (59) Trustees should give members reasonable notice where a scheme is to be wound-up not involving the insolvency of the employer. GOODE REPORT, *supra* note 8, at para. 4.6.23. (60) A minimum amount of information in a standard format should be provided to members concerning the process of winding-up. GOODE REPORT, *supra* note 8, at para. 4.6.24. (61) Updated information should also be provided, at least, annually in relation to the winding-up. GOODE REPORT, *supra* note 8, at para. 4.6.24. (62) The authority should be notified of the winding-up of all schemes within 14 days of commencement and should itself have the power to wind-up schemes in the event of the employer's insolvency, under-funding or inadequate provision or following proper investigation. GOODE REPORT, *supra* note 8, at paras. 4.6.25, 4.6.26. (63) The Ombudsman should have the power to pass cases to the authority where winding-up may be appropriate. GOODE REPORT, *supra* note 8, at para. 4.6.28. (64) The authority should have the power to appoint a suitable trustee or trustees irrespective of the type of scheme involved in the event of the employer's insolvency. GOODE REPORT, *supra* note 8, at para. 4.6.30. (65) Benefits should be calculated on the basis of cash equivalence in the event of a winding-up with distribution being effected in accordance with the scheme rules in the event of additional assets being available. GOODE REPORT, *supra* note 8, at para. 4.6.31. (66) The scheme rules should govern how benefits are applied on a winding-up. GOODE REPORT, *supra* note 8, at para. 4.6.35. (67) Interim awards should be made by trustees. GOODE REPORT, *supra* note 8, at para. 4.6.67. (68) The Employer Debt Regulations should be amended as then currently proposed. GOODE REPORT, *supra* note 8, at para. 4.6.42.

lays by trustees in responding to transfer payment requests, the quality of advice given to members in relation to transfers and whether the Transfer of Undertakings (Protection of Employment) Regulations of 1981 should apply to pension rights in addition to other rights and obligations in the event of a business being taken over. Early leaving problems may arise as a result of individual choice, scheme transfer in the event of a company sale or merger or re-organisation of existing pension arrangements. A number of recommendations were again made in this regard.⁸⁷

7. Scheme Administration

The Committee noted the importance of the role of administrators and professional advisers such as actuaries, auditors and lawyers in connection with the operation of pension

⁸⁷ These recommendations were: (69) The Committee decided that deferred pensions should continue to be revalued by prices capped at 5%. GOODE REPORT, *supra* note 8, at paras. 4.7.14, 4.7.17. (70) No change was required to the present preservation and revaluation requirements for money purchase schemes. GOODE REPORT, *supra* note 8, at para. 4.7.19. (71) The actuarial certificate should provide adequate protection for scheme members affected by bulk transfers with individual member consent not being required. GOODE REPORT, *supra* note 8, at para. 4.7.25. (72) Bulk transfers between schemes or by single employers on the winding-up of one scheme should be permitted without the consent of members. GOODE REPORT, *supra* note 8, at para. 4.7.26. (73) Transfer values of a fully-funded scheme should be calculated on a no less favourable basis and reduced proportionately where the solvency of the scheme was less than 100%. GOODE REPORT, *supra* note 8, at para. 4.7.29. (74) The range of existing transfer values should be narrowed by the actuarial profession. GOODE REPORT, *supra* note 8, at para. 4.7.31. (75) Employers should not be allowed to grant non-reduced early retirement to particular groups of members without this being reflected in the calculation of transfer values by the actuary. GOODE REPORT, *supra* note 8, at para. 4.7.38. (76) Trustees should retain the right to decide whether discretionary benefits should be included or excluded by the actuary on calculation of a transfer value. GOODE REPORT, *supra* note 8, at para. 4.7.40. (77) The authority should be able to impose a penalty on the scheme administrator if, without good cause, the transfer value was not paid within the 12 month period prescribed by statute. GOODE REPORT, *supra* note 8, at para. 4.7.48. (78) A clear and simple leaflet explaining transfer processes should be produced by the authority and made available to all scheme members. GOODE REPORT, *supra* note 8, at para. 4.7.49. (79) A statement of guidance concerning the provision of general advice should be produced by the Securities and Investments Board ("SIB") in light of the potential implications of the Financial Services Act. GOODE REPORT, *supra* note 8, at para. 4.7.52. (80) The existing Transfer of Undertakings provisions should not be extended to pension rights although a test case should be raised by the government with the European Court of Justice to confirm the matter. GOODE REPORT, *supra* note 8, at para. 4.7.55.

schemes. Their specific obligations and responsibilities, however, were not considered to be sufficiently clear. Further confusion arose with regard to the relationship between trustees and their sponsoring employer. Increased clarity was accordingly recommended. The Committee also noted the importance of the employer's function in controlling and administering cash movements in and out of schemes. Difficulties, however, may arise in this area with regard to the netting off of payments and the security of the funds involved. Thus, the Committee considered the value of using separate trustee bank accounts for all types of schemes.⁸⁸

⁸⁸ Specifically, (81) Trustees should ensure that services are clearly defined in service documents where the administration is conducted by the sponsoring employer. GOODE REPORT, *supra* note 8, at para. 4.8.7. (82) A scheme actuary should be appointed by the trustees in every scheme. GOODE REPORT, *supra* note 8, at para. 4.8.16. (83) The scheme actuary should be required to certify scheme solvency annually on a minimum solvency basis with the solvency certificate being sent to the authority. GOODE REPORT, *supra* note 8, at para. 4.8.20. (84) Trustees and employers should be under statutory duties to provide all information necessary for the actuary. GOODE REPORT, *supra* note 8, at para. 4.8.22. (85) Actuaries should be required to report serious or persistent irregularities to the authority and be exempt from any legal liabilities for doing so. GOODE REPORT, *supra* note 8, at para. 4.8.23. (86) Scheme auditors should be appointed by the trustees which may include the employer's auditor, provided that their roles and responsibilities are clearly set out in the appointment document. GOODE REPORT, *supra* note 8, at paras. 4.8.28, 4.8.30. (87) Auditors should be required to report serious or persistent irregularities to the authority again subject to exemption from legal liability. GOODE REPORT, *supra* note 8, at para. 4.8.36. (88) Fund managers should generally be appointed and instructed by trustee boards with their terms of appointment being set out in a formal letter of engagement. GOODE REPORT, *supra* note 8, at para. 4.8.39. (89) Trustees should always ensure that managers are provided with a clear statement of their duties and the fund's investment strategy. GOODE REPORT, *supra* note 8, at para. 4.8.40. (90) The role and terms of reference of the legal adviser should be set out in a formal letter of appointment with any conflicts of interest being properly notified. GOODE REPORT, *supra* note 8, at para. 4.8.46. (91) Administrators should be required to file with the authority an audited statement that contributions have been received at due dates and at appropriate rates and that they have been invested on a timely basis. GOODE REPORT, *supra* note 8, at para. 4.8.53. (92) Money purchase scheme payments should be made within a fixed time limit (less than two months) subject to penalty. GOODE REPORT, *supra* note 8, at para. 4.8.57. (93) Earnings-related scheme employee contributions should be paid within one month of the payroll date as a matter of good practice. GOODE REPORT, *supra* note 8, at para. 4.8.58. (94) Additional voluntary contributions should be subject to the same rules as money purchase schemes. GOODE REPORT, *supra* note 8, at para. 4.8.59. (95) A schedule of due payment dates should be prepared by the employer and trustees. GOODE REPORT, *supra* note 8, at para. 4.8.62. (96) All special contributions should be noted on the schedule of payments. GOODE REPORT, *supra* note 8, at para. 4.8.63. (97) Scheme members should be notified by

8. Fund Management

The Committee recognized both the central role of trustees in the fund management process and the need to clearly define the rights and obligations of trustees and fund managers concerning the proper investment strategy and practices to be adopted. The current provisions applicable to the criteria for prudent investment and powers of delegation were examined. As it was essential that the assets of a scheme were at all times able to match liabilities, the investment of the pension fund was of crucial importance to the security of the pension rights along with the employee and employer contributions.⁸⁹ The Committee also considered the continuing legitimacy of

the trustees of contributions more than three months overdue. GOODE REPORT, *supra* note 8, at paras. 4.8.64, 4.8.65. (98) GMP priority should be extended to all payments due in the event of the employer's insolvency. GOODE REPORT, *supra* note 8, at para. 4.8.68. (99) While payment netting may continue, payments not to be made within a short period should be credited to a separate bank trust account. GOODE REPORT, *supra* note 8, at paras. 4.8.71, 4.8.73. (100) All pension schemes should be required to maintain separate bank trust accounts apart from wholly-insured schemes where the employer does not handle cash directly. GOODE REPORT, *supra* note 8, at para. 4.8.76. (101) All those involved in the administration of pension schemes should be required to keep proper books and records. GOODE REPORT, *supra* note 8, at para. 4.8.77. (102) Trustees should be required to make an annual return to the authority consisting of a copy of audited scheme accounts, the administrator's statement of payment of contributions, the actuarial certificate of scheme solvency and, where appropriate, an actuarial certificate of the scheme's ability to meet its GMP obligations. GOODE REPORT, *supra* note 8, at para. 4.8.78.

⁸⁹ Specifically, (103) A new statutory prudent investment standard should be adopted imposing on trustees a general duty of reasonable care and diligence. GOODE REPORT, *supra* note 8, at para. 4.9.7. (104) The Trustee Investments Act of 1961 and the Money Purchase Contracted-Out Schemes Regulations 1987 rules should be replaced by flexible investment guidelines in a new Pensions Act. GOODE REPORT, *supra* note 8, at para. 4.9.8. (105) Annual reports should contain a statement by the trustees that they have carefully considered the investments and are satisfied that they comply with the statutory criteria. GOODE REPORT, *supra* note 8, at para. 4.9.9. (106) Normal stock lending practices should not be prohibited. GOODE REPORT, *supra* note 8, at para. 4.9.16. (107) The present law on ethical and socially responsible investment was satisfactory. GOODE REPORT, *supra* note 8, at para. 4.9.18. (108) The practice revisions adopted by IMRO and the SIB should be continued. GOODE REPORT, *supra* note 8, at para. 4.9.24. (109) Section 23 of the Trustee Act of 1925 and of the Trusts (Scotland) Act of 1921 should be extended to allow decision making powers to be delegated to an authorised fund manager without vicarious liability. GOODE REPORT, *supra* note 8, at para. 4.9.29.

stock lending and whether pension schemes should invest in ethical or socially responsible projects as well as whether external fund managers should be used in all cases.

9. Safeguarding Assets

The issue of asset security was considered by the Committee as it was concerned about the possibility of fraud, theft and misappropriation. In addition to imprudent investment, asset values could be affected through desegregation with the return of assets to the employer, improper dealings with assets or their proceeds and inadequate record keeping and documentation. While it was not possible to prevent all losses, various mechanisms could be developed to limit malpractice or make it easier to avoid. These included asset segregation, independent custody, asset designation and regulatory control of fund manager activity.⁹⁰

10. Protection against Employer Insolvency

The Committee was concerned about safeguarding members' interests through the protection of accrued rights, proper funding and deficit requirements⁹¹—although benefits might be reduced, or not paid at all, in the event of an employer's insolvency. The issue of employer insolvency could be approached either by making fund claims preferred debts in a winding-up or by introducing separate compensation ar-

⁹⁰ The Committee recommended: (110) The present 5% limit on self-investment should continue although any other inter-fund and employer dealing should be prohibited. GOODE REPORT, *supra* note 8, at para. 4.10.21. (111) Disinvestment of excessive employer-related holdings should be carried out over a five year period. GOODE REPORT, *supra* note 8, at para. 4.10.22. (112) Any excessive self-investment should not be taken into account in determining minimum solvency compliance. GOODE REPORT, *supra* note 8, at para. 4.10.23. (113) Small self-administered schemes should continue to be exempt from self-investment. GOODE REPORT, *supra* note 8, at para. 4.10.24. (114) Trustees should not be required to place pension fund assets with independent custodians in all cases. GOODE REPORT, *supra* note 8, at para. 4.10.37. (115) Trustees should periodically review the custody arrangements as a matter of good practice. GOODE REPORT, *supra* note 8, at para. 4.10.37. (116) A code of practice should be laid down by the authority for pension fund trustees in relation to fund investment. GOODE REPORT, *supra* note 8, at para. 4.10.59.

⁹¹ See *supra* notes 78-90 and accompanying text.

rangements. If a new compensation scheme was set up, however, difficulties would arise with regard to defining qualifying risks, compensation levels and entitlements. Whether the funds should be paid to schemes or to members, schemes to be covered and payment mechanisms to be adopted had also to be considered. As a result of the difficulties issues which arose, a number of recommendations were made in this regard.⁹²

⁹² These recommendations were: (117) If a scheme is in deficit, the employer should make whatever contribution was necessary to secure the scheme's liabilities. GOODE REPORT, *supra* note 8, at para. 4.11.1. (118) A debt due from an insolvent employer created by a shortfall should not be given priority over debts due to other creditors. GOODE REPORT, *supra* note 8, at para. 4.11.8. (119) Trustees should be empowered to apply to the court for variation or repayment orders where a particular member or group has obtained an unreasonable advantage within three years of the employer's bankruptcy or liquidation. GOODE REPORT, *supra* note 8, at paras. 4.11.10, 4.11.11. (120) A compensation scheme should be established to protect members against the defaults of those dealing in pension fund assets. GOODE REPORT, *supra* note 8, at para. 4.11.26. (121) Compensation should be limited to loss resulting from fraud, theft or other misappropriation. GOODE REPORT, *supra* note 8, at para. 4.11.37. (122) Pension fund assets for the purposes of compensation should include any separately identifiable employee contributions which have been misappropriated by the employer. GOODE REPORT, *supra* note 8, at para. 4.11.38. (123) All funded schemes should be included along with insured schemes subject to setting up a separate streamlined regulatory and compensation procedure. GOODE REPORT, *supra* note 8, at paras. 4.11.39, 4.11.41. (124) Compensation should be paid as a lump sum based on the lower of lost assets or scheme deficit taking into account any right of recourse from the employer. GOODE REPORT, *supra* note 8, at paras. 4.11.46, 4.11.47. (125) An independent Pension Compensation Board should be established. GOODE REPORT, *supra* note 8, at para. 4.11.50. (126) The Board should have the power to make interim payments or reduce or withhold amounts where the trustees have not taken reasonable steps to recover losses. GOODE REPORT, *supra* note 8, at para. 4.11.51. (127) If a scheme is in deficit, the authority should be able to apply to the court for an information order. GOODE REPORT, *supra* note 8, at para. 4.11.52. (128) All compensation payments should be made by way of loan to account for possible recovery. GOODE REPORT, *supra* note 8, at para. 4.11.54. (129) Compensation should only be limited to the lesser of 90% of the value misappropriated or 90% of the deficit. GOODE REPORT, *supra* note 8, at para. 4.11.59. (130) The Board should have power to determine how payments are distributed. GOODE REPORT, *supra* note 8, at para. 4.11.61. (131) The cost of the compensation scheme should be imposed on occupational schemes generally. GOODE REPORT, *supra* note 8, at para. 4.11.69. (132) The scheme should be funded by means of a post-event levy on all schemes in proportion to the value of liabilities which have to be funded for the purpose of the minimum solvency requirements. GOODE REPORT, *supra* note 8, at paras. 4.11.74, 4.11.75. (133) Employers should be required to pay any additional contribution equal to any payment from the pension scheme to the compensation scheme in relation to money purchase schemes. GOODE REPORT, *supra* note 8, at para. 4.11.75. (134) The Board should have borrowing powers in anticipation of levy. GOODE REPORT, *supra* note 8, at para. 4.11.75. (135) Levy provisions should

11. Information for Scheme Members

Scheme members must be provided with all necessary information to allow them to understand benefits and developments as well as to confirm the security of any entitlements and the proper and competent administration of a scheme. A large amount of information had been provided under the OPB's 1986 Disclosure Regulations although difficulties continued to arise with regard to the ability of members to understand the material provided. The Committee accordingly considered the most important matters concerning the administration of the scheme which members would require, the interests of different categories of members and whether information should be provided on request or automatically. Various recommendations were made.⁹³

come into immediate effect subject to transitional provisions in relation to the minimum solvency standard. GOODE REPORT, *supra* note 8, at para. 4.11.78.

⁹³ These recommendations were: (136) Schemes should be encouraged to consolidate their trust deeds and rules, at least, every five years (para 4.12.20). (137) The current restriction on the availability of scheme documents to one inspection every 12 months should be removed. GOODE REPORT, *supra* note 8, at para. 4.12.21. (138) If a charge was levied for the provision of copies, this should be limited to the cost of photocopying. GOODE REPORT, *supra* note 8, at para. 4.12.22. (139) Information in an easy to understand format and in plain English should be provided with regard to whether the scheme is registered and its registration number, the nature of the pension promise with contributions payable, scheme benefits and benefit security, past policy with regard to pension increases, trustee arrangements, the powers of scheme amendment and rights to further information. GOODE REPORT, *supra* note 8, at para. 4.12.26. (140) All active members and pensioners should receive an annual statement in plain English showing their individual benefits and key information concerning the scheme including solvency levels, basic asset distribution and fund movements. GOODE REPORT, *supra* note 8, at para. 4.12.28. (141) Members should be able to obtain additional information on request including a full annual report and accounts. GOODE REPORT, *supra* note 8, at para. 4.12.28. (142) The authority should consider how information should be made available concerning money purchase schemes (para 4.12.30). (143) A review of the current provisions governing pension scheme accounts should be undertaken by the relevant authorities. GOODE REPORT, *supra* note 8, at para. 4.12.33. (144) The security of schemes would be improved by amending the Disclosure Regulations to include, for example, having the trustee board approve the accounts and authorise their signature by, at least, two trustees, having the reports and accounts written in English and having them available to members and lodged with the Pensions Registry with seven months of the end of the scheme year. GOODE REPORT, *supra* note 8, at para. 4.12.33. (145) Trustees should make their actuarial valuation available to members within a maximum of 21 months of the valuation date as at present or 3 months of receipt whichever is less. GOODE REPORT, *supra*

12. Dispute Resolution

The Committee determined that the present OPAS procedures for settling disputes with regard to pension schemes were unsatisfactory. Court action was also thought to be difficult and expensive while the Ombudsman's powers were considered to be too restricted. A number of recommendations were made to attempt to make the system as fair, accessible and speedy as possible for both individual and collective disputes.⁹⁴

note 8, at para. 4.12.34. (146) Deferred members should have the right to receive an individual statement of rights and benefits and a copy of the annual report and accounts on request. GOODE REPORT, *supra* note 8, at para. 4.12.40. (147) Time limits and penalties should be imposed on the supply of information. GOODE REPORT, *supra* note 8, at para. 4.12.45.

⁹⁴ Such recommendations were: (148) All medium and larger schemes should be required to establish a formal internal disputes procedure in an approved form of which members must be notified. GOODE REPORT, *supra* note 8, at para. 4.13.38. (149) There should be sufficient financial support given to OPAS to enable it to employ paid conciliation staff and to arrange meetings with complainants, administrators and trustees as necessary. GOODE REPORT, *supra* note 8, at para. 4.13.39. (150) The jurisdiction of the Ombudsman should be extended to include disputes between employers and trustees or among trustees rather than be replaced by a tribunal. GOODE REPORT, *supra* note 8, at paras. 4.13.42, 4.13.43. (151) The Ombudsman should be given power to enforce decisions directly. GOODE REPORT, *supra* note 8, at para. 4.13.43. (152) The Ombudsman should be able to direct that compensation payments include a reasonable sum to reflect distress, delay and inconvenience as well as actual financial loss. GOODE REPORT, *supra* note 8, at para. 4.13.43. (153) The Ombudsman should be encouraged to experiment with informal hearings in an inquisitorial rather than adversarial manner. GOODE REPORT, *supra* note 8, at para. 4.13.43. (154) The formal determinations of the Ombudsman should be published with the names of the parties involved, at least, where there may be implications for other scheme members or schemes in general. GOODE REPORT, *supra* note 8, at para. 4.13.43. (155) The office of the Ombudsman should be given sufficient resources to allow it to discharge its extended responsibilities. GOODE REPORT, *supra* note 8, at para. 4.13.44. (156) The Ombudsman should be given powers to require papers to be given to OPAS, and trustees and claimants should be able to ask the Ombudsman to incorporate settlement agreements in a formal determination. GOODE REPORT, *supra* note 8, at para. 4.13.45. (157) The regulatory authority should be empowered to rely on a determination by the Ombudsman as evidence of facts found by the determination without the need for further proof. GOODE REPORT, *supra* note 8, at para. 4.13.47. (158) The manner in which pension fund litigation should be expedited should be immediately considered with a view toward reducing the costs involved for individual litigants and the use of pre-trial review procedures should, in particular, be considered with simple and faster procedures being adopted for smaller schemes. GOODE REPORT, *supra* note 8, at paras. 4.13.51, 4.13.53.

13. Assignment and Loss of Pension Rights

Although beneficial interests under trusts may be freely disposed of, many pension fund-related trust deeds contained prohibitions on dealings in pension entitlements or made them liable to forfeiture. Accordingly, the Goode Committee made a number of recommendations with regard to both changes in the ability of members to deal in their entitlements as well as with regard to legitimate forfeiture events.⁹⁵

⁹⁵ Such recommendations were: (159) Inalienability of pension rights should be made a rule of general application. GOODE REPORT, *supra* note 8, at para. 4.14.4. (160) There is no need for a general change in the law on payment of benefits on death. GOODE REPORT, *supra* note 8, at para. 4.14.16. (161) Scheme members should not be entitled to give binding instructions to trustees about the payment of death benefits unless the scheme rules so provide. GOODE REPORT, *supra* note 8, at para. 4.14.16. (162) Unnecessary restrictions on trustees' discretion as to payment of death benefits should be revised, failing which the authority should be given the power to amend them by way of a modification order. GOODE REPORT, *supra* note 8, at para. 4.14.16. (163) Schemes should continue to be allowed to permit trustees to terminate future payment rights upon bankruptcy and to make payments to a member's spouse or dependant when the pension was due to come into payment. GOODE REPORT, *supra* note 8, at para. 4.14.21. (164) Public service schemes requiring forfeiture where an offence has been committed certified injurious to the state or liable to lead to a serious loss of confidence in the public service should be considered reasonable although they should be subject to a right of appeal to the courts. GOODE REPORT, *supra* note 8, at para. 4.14.25. (165) Provisions should be made void where pension rights of an ex-employee are forfeited for any form of misconduct although employers should be allowed to recover any losses suffered through the misconduct. GOODE REPORT, *supra* note 8, at para. 4.14.28. (166) Conditions as to the exercise of a charge, lien or right of set-off in respect of short service benefits should be extended to long service benefits with employers being prohibited from exercising any rights against the benefit due. GOODE REPORT, *supra* note 8, at para. 4.14.32. (167) Immunity from creditors under the Social Security Pension Act of 1975 to GNPs, and entitlements to protected rights payments should be extended to cover all pension entitlements. GOODE REPORT, *supra* note 8, at para. 4.14.35. (168) Forfeiture should not be allowed by reason of remarriage or cohabitation with payment of a widows or widowers pension being protected in law. GOODE REPORT, *supra* note 8, at para. 4.14.38. (169) Trustees should not be prohibited from refusing a pension to the spouse of a member where the marriage took place after the related employment although the general criteria to be applied should be set out in the trust deed and scheme rules as clearly as possible and made known to members upon joining the scheme and upon retirement. GOODE REPORT, *supra* note 8, at para. 4.14.40.

14. Early Pension on Grounds of Ill Health

The Committee considered the circumstances under which trustees may be allowed to make payments from pension schemes in respect of ill health or incapacity. A number of recommendations were made in this regard.⁹⁶

15. Pension Rights on Divorce

The issue of divorcee's rights to pension benefits had been considered by a number of bodies. An independent Working Group on Pensions and Divorce had been appointed by the Pensions Management Institute and had carried out a detailed study of the rights of divorced spouses to pension benefits.⁹⁷ The Committee recommended that further work be carried out on the basis of the Working Group's general approach.⁹⁸

16. Public Sector Schemes

The Committee made a number of recommendations concerning the extent to which a public scheme should be treated differently from a private one.⁹⁹

⁹⁶ Specifically, (170) The rules for entitlement to an ill-health pension should be left to the determination of individual schemes. GOODE REPORT, *supra* note 8, at para. 4.15.12. (171) There was room for improvement in the drafting of scheme rules and in the procedures for awarding ill-health benefits which could be best achieved through the adoption of a code of practice. GOODE REPORT, *supra* note 8, at para. 4.15.13.

⁹⁷ See WORKING GROUP ON PENSIONS AND DIVORCE, PENSIONS AND DIVORCE.

⁹⁸ These recommendations were: (172) The calculation of transfer values should also take into account the Committee's recommendation with regard to cash equivalents. GOODE REPORT, *supra* note 8, at para. 4.16.16.

⁹⁹ These recommendations were: (173) Public sector schemes should be required to comply with the Committee's general recommendations although certain differences in the structure of private and public sector schemes may require a distinct approach. GOODE REPORT, *supra* note 8, at para. 4.17.1. (174) Public sector trust-based schemes should be required to comply with the Committee's recommendations on the composition of trustee boards. GOODE REPORT, *supra* note 8, at para. 4.17.13. (175) Local government legislation should be amended to permit scheme member involvement in the management of such schemes similar to the Committee's recommendations concerning private sector earnings-related schemes. GOODE REPORT, *supra* note 8, at para. 4.17.13. (176) Public sector schemes should be required to comply with similar rules concerning the disclosure of information to members subject to some adjustments, for example, with regard to distinguish-

17. Inland Revenue and Social Security Requirements

The Committee considered a number of issues with regard to the impact of complex taxation and Social Security schemes on the operation of pension schemes and pension payments. The Committee considered that a number of amendments should be made.¹⁰⁰

ing between unfunded and funded schemes. GOODE REPORT, *supra* note 8, at para. 4.17.14. (177) Legislation governing public service schemes should be consolidated every five years. GOODE REPORT, *supra* note 8, at para. 4.17.15. (178) All funded public sector schemes, including local authority schemes, should be required to comply with the minimum solvency standards proposed. GOODE REPORT, *supra* note 8, at para. 4.17.19. (179) The compensation scheme should apply to all funded public sector schemes. GOODE REPORT, *supra* note 8, at para. 4.17.20. (180) Management committees administering local government schemes should be required to observe the same prudent person standard for investments as private schemes. GOODE REPORT, *supra* note 8, at para. 4.17.21. (181) Forfeiture provisions should be narrowly defined and wider provisions in scheme rules made void. GOODE REPORT, *supra* note 8, at para. 4.17.22. (182) The Pensions Ombudsman should have jurisdiction over complaints of maladministration and disputes on issues of law and fact in public service schemes, including Her Majesty's Forces' schemes subject to members having exhausted relevant internal complaints procedures. GOODE REPORT, *supra* note 8, at para. 4.17.25. (183) The treatment of future privatisations should consider the security of pension entitlements and the application of surplus funds of members. GOODE REPORT, *supra* note 8, at para. 4.17.27.

¹⁰⁰ These amendments were: (184) Regulations to allow the surplus of AVCs to be introduced to ameliorate the difficulties in determining whether payments would be appropriate. GOODE REPORT, *supra* note 8, at para. 4.18.13. (185) The Pension Schemes Office should have additional resources to ensure that the existing backlog in the approval of schemes is removed more quickly than proposed and that targets for the approval of definitive trustees should be achieved in the future. GOODE REPORT, *supra* note 8, at para. 4.18.22. (186) Whether an earnings cap should be introduced should be left for political determination. GOODE REPORT, *supra* note 8, at para. 4.18.25. (187) The tax regime applicable to occupational pension schemes should, for practical purposes, continue to be based predominantly on benefit limits. GOODE REPORT, *supra* note 8, at para. 4.18.40. (188) All scheme members not affected by the earnings cap should be immediately brought into the 1989 tax regime. GOODE REPORT, *supra* note 8, at para. 4.18.57. (189) The Contracted Out Employment Group of the Department of Social Security should attempt to reduce delay and simplify reporting arrangements with major pension providers and administrators. GOODE REPORT, *supra* note 8, at para. 4.18.66. (190) The link between the surplus for the indexation of past accruals should be broken except where the employer is seeking payment from surplus. GOODE REPORT, *supra* note 8, at para. 4.18.69. (191) No specific recommendations could be made with regard to the indexation of pension payments in light of the divergent views which the Committee members held. GOODE REPORT, *supra* note 8, at para. 4.18.72. (192) Disparities in Social Security and Inland Revenue requirements should be resolved as soon as possible. GOODE REPORT, *supra* note 8, at para.

18. The Structure of Regulation

In addition to making recommendations with regard to the operation of occupational pension schemes, the Committee considered it necessary to establish a new regulatory authority. The new structure was considered necessary to ensure the protection of the security of members' assets and rights. The new authority would also consider complaints about the management or suspected misappropriation of assets either by scheme members or professionals involved in the administration of scheme assets. A number of recommendations were made with regard to the establishment, operation and funding of the new authority.¹⁰¹

4.18.77.

¹⁰¹ These recommendations were: (193) The Pensions Act should lay down a new statutory framework for occupational pension schemes. GOODE REPORT, *supra* note 8, at para. 4.19.2. (194) The Act should have the primary purpose of laying down principles and rules governing such schemes. GOODE REPORT, *supra* note 8, at para. 4.19.3. (195) The new authority or Secretary of State should be empowered to establish streamlined regulatory and compensation procedures for small schemes administered by insurance companies or other regulated service providers. GOODE REPORT, *supra* note 8, at para. 4.19.8. (196) Schemes not required to meet the minimum solvency requirement should be exempt from other funding rules although all other provisions should apply in the normal way. GOODE REPORT, *supra* note 8, at para. 4.19.9. (197) Members should be clearly advised of the absence of the pension promise in unfunded schemes and reduced security in funded schemes not required to comply with the minimum solvency requirement. GOODE REPORT, *supra* note 8, at para. 4.19.9. (198) Statutory provisions should clearly indicate the extent to which they amend or overrule the common law or otherwise provide a defence for breach of a common law duty. GOODE REPORT, *supra* note 8, at para. 4.19.12. (199) Mandatory rules should apply automatically without the need for incorporation in scheme documents (para 4.19.14). (200) Every breach of duty should have a sanction. GOODE REPORT, *supra* note 8, at para. 4.19.16. (201) Certain breaches of statutory duty should be treated as criminal offences and made punishable accordingly. GOODE REPORT, *supra* note 8, at para. 4.19.17. (202) Certain other types of infringement should be treated as civil wrongs subject to civil proceedings with others being only sanction by the authority. GOODE REPORT, *supra* note 8, at para. 4.19.18. (203) The Pensions Act should be supplemented by other statutory and non-statutory measures including appropriate codes of practise. GOODE REPORT, *supra* note 8, at para. 4.19.19. (204) The codes of practise should, in particular, provide a useful supplement to regulation in such matters as disclosure, prior notification, transfer procedures, board composition and frequency and conduct of trustee meetings. GOODE REPORT, *supra* note 8, at paras. 4.19.20, 4.19.21. (205) The regulatory authority should have wide-ranging functions and powers. GOODE REPORT, *supra* note 8, at para. 4.19.22. (206) The authority should be given the power and resources to carry out spot checks as well as detailed investigations independently of any complaint. GOODE REPORT, *supra* note 8, at para. 4.19.24. (207) The authority should be required to ensure

19. European Policy on Cross-Border Pension Provision

The Committee noted the work which had been carried out by the European Commission to facilitate cross-border occupational pension schemes. Although difficulties remained to be resolved, the Committee considered that its proposals were fully consistent with the European policy adopted.¹⁰²

The U.K. government strongly welcomed the recommendations contained in the Goode Report.¹⁰³ It was, in particular, supportive of the aims of modernising and improving the framework of law effecting occupational pension funds in order to bring about a fair balance between the interests of scheme members, pensioners and employers. Moreover, the government agreed that trust, rather than corporate, law remained the best available framework for such schemes.

Before implementing the 218 recommendations contained in the Report, the government sought industry and professional opinion on the detailed issues raised. It was particularly

that security was not put at risk and that management systems were sound although it should not be prescribed how they should be achieved through detailed regulations. GOODE REPORT, *supra* note 8, at para. 4.19.25. (208) The authority should be directed by a person who has a detailed understanding of the pension industry and authority to enforce statutory requirements and develop voluntary standards. GOODE REPORT, *supra* note 8, at para. 4.19.28. (209) The new authority should replace the OPB. GOODE REPORT, *supra* note 8, at para. 4.19.30. (210) An advisory committee should be set up to support the authority which should, in particular, consult with the pensions industry and report to the Secretary of State. GOODE REPORT, *supra* note 8, at para. 4.19.31. (211) The advisory committee should represent a wide range of interests including scheme members and pension providers. GOODE REPORT, *supra* note 8, at para. 4.19.31. (212) The costs of the authority should be met by the state rather than the industry. GOODE REPORT, *supra* note 8, at para. 4.19.33. (213) The authority should be required to make an annual report to the Secretary of State a copy of which should be laid before Parliament and published. GOODE REPORT, *supra* note 8, at para. 4.19.34. (214) The authority should have a wide range of penalties including reprimand, severe reprimand and fine, removal or disqualification of trustees and the winding-up of schemes. GOODE REPORT, *supra* note 8, at para. 4.19.35. (215) The authority should be immune from liability for all *bona fide* regulatory acts. GOODE REPORT, *supra* note 8, at para. 4.19.37. (216) Information should be exchanged between the regulatory authority and other regulators insofar as relevant to the exercise of its powers and functions. GOODE REPORT, *supra* note 8, at para. 4.19.39. (217) Responsibility for the conduct of investment business should remain with the financial services authorities. GOODE REPORT, *supra* note 8, at para. 4.19.52.

¹⁰² See GOODE REPORT, *supra* note 8, at para. 4.20.16.

¹⁰³ See 258 HC OFFICIAL REPORT col. 527 (6 Series, 24 Apr. 1995).

anxious to receive comments with regard to the operation of the Committee's recommendations concerning the minimum solvency requirement, surpluses, management of schemes, compensation and regulation prior to drafting any new legislation.

V. THE PENSIONS ACT OF 1995

The currently-effective Pensions Act of 1995 implemented many of the recommendations contained in the Goode Report with regard to occupational pension schemes.¹⁰⁴ The objective of the Act was to increase confidence in the security of occupational pensions and to enhance choice by making money-purchase provision attractive to a wider age range of people. A state pension age of 65 was also introduced, and the Act made it easier for occupational schemes to provide equal treatment for men and women.¹⁰⁵ OPRA was established with new powers of investigation and enforcement and a separate compensation scheme created to protect members against asset withdrawal. Pensions were also protected against inflation by the requirement that schemes increase pension rights each year by, at least, the retail price index up to 5 percent.¹⁰⁶

While much of the new law in this area was set forth in the Act, a large number of specific requirements were subsequently developed through secondary legislation. In addition to these regulations, the law in this area continues to develop through statements of practice issued by the OPRA, court decisions in such areas as trustees, equal treatment, personal injury and death as well as statutory changes in such other areas as securities law, insolvency, income and corporation tax and VAT.¹⁰⁷

¹⁰⁴ The Pensions Act of 1995 received its Royal Assent on 19 July 1995. While certain provisions came into effect on that date, others came into force on October 2 and 4 December 1995 and 1 January 1996. See SI 1995/2548, 3140. The remaining provisions have come into effect on various appointed days.

¹⁰⁵ See DSS Press Release 94/209, 16 December 1994. A volume of memoranda relating to the pensions bill was also produced by the House of Commons Social Security Committee. See HC 336, Session 94-95 (24 April 1994). For comment, see ELLISON, *supra* note 8, at para. 1.056B.

¹⁰⁶ See ELLISON, *supra* note 8.

¹⁰⁷ For a view of recent developments see, for example, ELLISON, *supra* note 8, at Bulletin; CAMERON MCKENNA, PENSION LAW BULLETIN; *FT Pensions Law and*

The main improvements in the law of pensions introduced under the Act include the following:

1. The Occupational Pensions Regulatory Authority

The establishment and constitution of a new pensions regulatory authority coinciding with OPRA is provided for under section 1 and schedule I of the Act.¹⁰⁸ The new authority replaces the work of the earlier OPB.¹⁰⁹ The authority is required to report to the Secretary of State annually.¹¹⁰

2. Supervision by the OPRA

OPRA is given a broad range of powers to allow it to effect its supervision of relevant schemes.¹¹¹ These generally follow the recommendations contained in the Goode Report. Under the Act, the decisions of OPRA are final subject to an application for review and appeal to the courts on a question of law.¹¹²

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¹⁰⁸ The Authority consists of not less than seven members appointed by the Secretary of State including persons capable of representing a wide range of interests in the pensions area. See SI 1995/2548, 3140, at § 1(2)(3). Members and employees are exempt from liability in the discharge of the functions under the Act. See *id.* § 1(4); see also *supra* note 101.

¹⁰⁹ See GOODE REPORT, *supra* note 8, at ch. 4.19, recommendation (209); see also *supra* note 101.

¹¹⁰ See SI 1995/2548, 3140, § 2.

¹¹¹ The Act contains specific provision with regard to prohibition orders (Section 3), suspension orders (Section 4), removal of trustees and notices (Section 5), removal or suspension of trustees (Section 6), appointment of trustees (Sections 7 and 8), removal and appointment of trustees (Section 9), civil penalties (Section 10), powers to wind up schemes (Section 11), injunctions and interdicts (Section 13), restitution (Section 14), and directions (Section 15). See SI 1995/2548, 3140, §§ 3-11, 13-15. The Act also contains supplementary provisions concerning disqualification of persons from being trustees (Section 29(3) and (4)), payment of surplus to employer (Section 37(5)), new 'blowing the whistle' rules (Section 48), grounds for applying for a modification (Sections 69 and 70), excess assets on winding-up (Section 76) and dissolution of the OPB (Section 150). See *id.* §§ 29(3)-(4), 37(5), 48, 69, 70, 76, 150; see also GOODE REPORT, *supra* note 8, at ch. 4.19, recommendation (193)-(217); *supra* note 101.

¹¹² See SI 1995/2548, 3140, §§ 96-97.

3. Trustees, Directors and Managers

The Act requires trustees to make arrangements for selecting member-nominated trustees and directors up to, at least, one-third of the total number of trustees and directors.¹¹³ Independent trustees must also be appointed in certain circumstances including the insolvency of a company or individual employer in relation to a scheme.¹¹⁴

General provisions are also included with regard to trustees.¹¹⁵ Specifically, the functions, powers and duties of trustees are set out in some detail.¹¹⁶ Further provisions are included with regard to employee trustees¹¹⁷ and the obligations of trustees and managers in relation to money purchase schemes.¹¹⁸

These provisions provided important new guidance with regard to the activities of trustees, directors and managers in relation to relevant pension schemes.

¹¹³ This provision is subject to certain exceptions with specific provisions being included dealing with the selection and eligibility of member-nominated appointments. See SI 1995/2548, 3140, §§ 16-21; see also GOODE REPORT, *supra* note 8, at ch. 4.5, recommendations (39)-(40); see also *supra* note 84.

¹¹⁴ See SI 1995/2548, 3140, §§ 22-26.

¹¹⁵ These include prohibitions on a person acting as a trustee, actuary or auditor of the same scheme, the identification of classes of persons disqualified from being trustees and ensuring that the assets of a scheme are not used to reimburse a trustee for any fine or penalty which they may be required to pay. See SI 1995/2548, 3140, §§ 27-31; see also *supra* note 84, 88.

¹¹⁶ The Act includes specific provisions concerning trustee decisions by a majority (Section 32), investment powers (Section 33), power of investment and delegation (Section 34), investment principles (Section 35), choosing investments (Section 36), payment of surplus to employer (Section 37), power to defer winding-up (Section 38) and exercise of powers by member trustees (Section 39). See SI 1995/2548, 3140, §§ 32-39. Additional provisions are also included relating to restrictions on employer-related investments (Section 40) and provisions of documents from members (Section 41). See *id.* §§ 40-41.

¹¹⁷ Employers must allow employees who are trustees to take reasonable time off, provide payment in respect of such time with the employee being protected from unfair dismissal or other detriment by reason of the performance of their functions as trustees. See SI 1995/2548, 3140, §§ 42-46; see also GOODE REPORT, *supra* note 8, at ch. 4.5, recommendation (52); *supra* note 84.

¹¹⁸ See SI 1995/2548, 3140, §§ 87-89.

4. Advisors

Trustees must appoint an auditor and actuary; appointees must receive instructions from these individuals and report to the trustees rather than the employer. The Act also requires them to report any breaches of statutory obligation to OPRA.¹¹⁹

5. Receipts, Payments and Records

Particular duties are imposed on trustees with regard to receipts, payments and records. Trustees must keep all monies received by them in separate bank accounts except in certain circumstances. Regulations have also been issued concerning the recordkeeping of both trustee meetings and all prescribed transactions.¹²⁰

6. Resolution of Disputes

Trustees or managers must implement arrangements for the resolution of disputes between prescribed persons relative to all matters concerning a given pension scheme. These must, in particular, provide for an individual to give a decision on a disagreement upon application of a complainant. They must also require the trustees and managers to reconsider the matter following such determination. The particular rules to be applied are developed in regulations.¹²¹

7. Indexation

Pensions under approved occupational pension schemes, excluding public service, must be increased annually by a minimum specified percentage. The rules do not apply to public

¹¹⁹ See *id.* §§ 47-48; see also GOODE REPORT, *supra* note 8, at ch. 4.8, recommendation (85), (87); *supra* note 88.

¹²⁰ See *id.* § 49; see, e.g., THE OCCUPATIONAL PENSIONS SCHEMES (SCHEME ADMINISTRATION) REGULATIONS, SI 1996/1715.

¹²¹ See SI 1995/2548, 3140, § 50; THE OCCUPATIONAL PENSIONS SCHEMES (INTERNAL DISPUTE RESOLUTION PROCEDURES) REGULATIONS, SI 1996/1270; GOODE REPORT, *supra* note 8, at ch. 4.13, recommendations (148)-(158); *supra* note 94.

service schemes and restrictions are included on increases where the member is under 55 years of age.¹²²

8. Minimum Funding Requirement

A minimum funding requirement is established under which the value of a scheme's assets must not exceed its liabilities.¹²³ Trustees are required to obtain actuarial valuations and certificates as to the adequacy of contributions in relation to the overall level of funding and to keep an appropriate schedule of contributions confirming compliance. OPRA must be notified where the contributions have not been made in accordance with the schedule and a report prepared if the scheme fails to meet the minimum funding requirement. If the valuation discloses that the assets are less than 90 percent of the liabilities, the employer must ensure that they are increased to a minimum of 90 percent within a prescribed period. These provisions introduce important new protections for member's interests against fraud and misuse.

9. Equal Treatment

Any occupational pensions scheme which does not contain an equal treatment rule shall be treated as including one for the purposes of the Act.¹²⁴ An equal treatment rule is one which relates to the terms on which persons become members and members of the scheme are treated. Under the Act, women must not be treated any less favourably than men, failing which the relevant term will be automatically adjusted.¹²⁵ Such provisions were introduced following the decisions of the

¹²² See SI 1995/2548, 3140, §§ 51-55. The relevant percentage is the percentage increase in the retail price index for the reference period, being a period determined, in relation to each periodic increase under the rules to be issued or the percentage for that period which corresponds to 5% per annum, whichever is the lesser. See *id.* § 51(4); THE OCCUPATIONAL PENSION SCHEMES (INDEXATION) REGULATIONS 1996, SI 1996/1679.

¹²³ See SI 1995/2548, 3140, §§ 56-61; THE OCCUPATIONAL PENSION SCHEME (MINIMUM FUNDING REQUIREMENT AND ACTUARIAL VALUATIONS) REGULATIONS 1996, SI 1996/1536; GOODE REPORT, *supra* note 8, at ch. 4.4, recommendations (20)-(33); *supra* note 83.

¹²⁴ See SI 1995/2548, 3140, § 62(1).

¹²⁵ See *id.* § 62(2)(3).

European Court of Justice *Barber v. Guardian Royal Exchange*.¹²⁶ An exception is included where the terms are attributable to differences between men and women in state pensions under the Social Security Contributions and Benefits Act of 1992 or where they result from the application of actuarial factors which differ between men and women.¹²⁷

10. Modification of Schemes

The Act introduces new provisions with regard to the modification of schemes.¹²⁸ Rights to modify schemes must not be exercised where they would effect any already accrued right or entitlement unless specific conditions are complied with.¹²⁹ Trustees may by resolution modify schemes with a view toward extending the class of relevant beneficiaries, to comply with the terms and directions imposed by the Compensation Board or to otherwise give effect to the terms of Act. OPRA may also authorise the modification or itself alter a scheme in certain circumstances.¹³⁰

11. Winding-Up

New provisions are introduced concerning the priority of claims under a winding-up.¹³¹ The assets of a scheme must be first applied towards satisfying pension liabilities. If the assets are insufficient, payments must be made on a proportional

¹²⁶ Case 262/88, *Barber v. Guardian Royal Exch.*, [1981] QB 344; [1990] 2 All ER 660; see GOODE REPORT, *supra* note 8, at paras. 3.2.40-3.2.45; *supra* Section IV(19). The court held that pensions payable under contracted-out occupational pension schemes were paid for the purposes of Article 119 of the European Community ("EC") Treaty and that benefits under the scheme, including date of commencement, must be equal as between men and women. In light of the significance of the decision, it was held that no claims could be made before the date of judgement of 19 May 1990 except where claims had already been instituted. This was confirmed in the second Protocol to the Treaty of the European Union.

¹²⁷ See SI 1995/2548, 3140, § 64.

¹²⁸ See *id.* §§ 67-72; see also GOODE REPORT, *supra* note 8, at ch. 4.6, recommendations (53)-(57); *supra* note 86.

¹²⁹ See SI 1995/2548, 3140, § 67(2), (3).

¹³⁰ See *id.* § 69(1), (2).

¹³¹ See *id.* §§ 73-77; GOODE REPORT, *supra* note 8, at ch. 4.6, recommendations (58)-(67); *supra* note 86.

basis, and the difference will be treated as a debt due from the employer to the trustees or managers of the scheme.¹³²

12. Pensions Compensation Board

The Pensions Compensation Board is set up under the Act. The Board consists of a Chairman and two members appointed by the Secretary of State.¹³³ The Act contains a number of detailed provisions concerning the functions and powers of the Board.¹³⁴ These functions include specific provision with regard to applications for payment, determination of amounts, time limits, payments and payment in anticipation. Further, surplus funds may be distributed amongst schemes upon direction of the Secretary of State.

13. Assignment, Forfeiture and Bankruptcy

Accrued rights or entitlements under occupational pension schemes are inalienable except as permitted under the Act.¹³⁵ Exceptions include assignments in favour of widows, widowers or dependants.¹³⁶ Forfeiture of rights is also prohibited except as provided for under the Act.¹³⁷

¹³² See SI 1995/2548, 3140, §§ 73(2), 75(1). If an exempt approved scheme under the Income and Corporation Taxes Act of 1988, *id.* § 592(1), is wound up, the power to distribute surplus assets to the employer can only be exercised with the consent of the trustees in certain circumstances. If assets remain undistributed, they may either be applied by the trustees to provide additional benefits or be distributed to the employer. See *id.* §§ 76, 77.

¹³³ See *id.* § 78(1), (2), sched. 2; GOODE REPORT, *supra* note 8, at ch. 4.11, recommendations (120)-(135); *supra* note 92.

¹³⁴ See, for example, reports to the Secretary of State (Section 79), review of decisions (Section 80), cases where compensation provisions apply (Section 81), applications for payments (Section 82), amount of compensation (Section 83), payments in anticipation (Section 84) and surplus funds (Section 85). See SI 1995/2548, 3140, §§ 79-85. The Act also contains provisions concerning the publication of reports (Section 113) and disclosure of information (Section 114). *Id.* §§ 113, 114.

¹³⁵ See *id.* § 91; GOODE REPORT, *supra* note 8, at ch. 4.14, recommendations (159)-(169); *supra* note 95.

¹³⁶ See *id.* § 91(5).

¹³⁷ See *id.* §§ 92(1), 92-95.

14. Information

The Act contains new rules concerning the gathering and disclosure of information by OPRA and the Compensation Board. OPRA is empowered to require trustees, managers, professional advisors, employers or any person holding relevant information to disclose such information when it is essential to the carrying on of OPRA's functions. Inspectors may also be appointed and warrants for entry obtained.¹³⁸ OPRA is prohibited, however, from disclosing information except as provided for under the Act.¹³⁹ Disclosure is generally permitted to corresponding overseas authorities, if necessary to discharge the functions of OPRA, or other supervisory agencies or the Inland Revenue. The Compensation Board may also obtain necessary information subject to penalty.¹⁴⁰

15. State Schemes

The Act provides for the equalisation of the pensionable age of women and men at 65, progressively, over a ten year period beginning on 6 April 2010.¹⁴¹ Amendments are also introduced to ensure equalisation in terms of entitlement to state pensions and benefits.

16. Certification

New requirements are introduced under the Act for contracting out of SERPS. These include reductions in contributions to the state scheme, reductions in state scheme benefits and payments of rebates.¹⁴²

¹³⁸ See *id.* §§ 98-103; GOODE REPORT, *supra* note 8, at ch. 4.12, recommendations (136)-(147); *supra* note 93.

¹³⁹ See SI 1995/2548, 3140, §§ 104(1), 105-09.

¹⁴⁰ See *id.* §§ 110-14.

¹⁴¹ See *id.* at pt. II, § 216. See generally GOODE REPORT, *supra* note 8, at ch. 4.17, recommendations (173)-(183); *supra* note 99.

¹⁴² See *id.* at pt. III, §§ 135-51.

17. Ancillary Measures

A number of more general provisions are included in Part V of the Act.¹⁴³ The most important of these relate to the extension of the jurisdiction and resources of the Pensions Ombudsman, provision for an annual increase in the rate of personal pensions and the strengthening of the duty of the courts to regard the value of pensions in considering divorce settlements.¹⁴⁴ A levy on pension schemes is also included to provide for the costs of OPRA and the Compensation Board.

Based on the above provisions and the relevant secondary legislation subsequently enacted, a significant new regulatory framework has been created for both occupational and personal pension schemes within which the rights and interests of members are now subject to much more complete and effective protection. Many of the core provisions given effect under the Act are based on the earlier recommendations contained in the Goode Report. Thus, the effect has been to create a solid body of statutory and secondary provision for the control of both scheme structures and operation in addition to the protections already provided for under the common law.

Unfortunately, one continuing difficulty which arises is that the law in this area has become correspondingly more complex as supplementary levels of protection have been provided. This makes pensions law increasingly less accessible to the general public as well as to all but the most expert of professional advisers and, consequently, expensive to confirm and enforce. Substantial new burdens have also been placed on scheme trustees and managers and, to a lesser extent, employers while the new regulatory authorities including OPRA, the Compensation Board and the Pensions Ombudsman have had to adjust to new requirements imposed.

¹⁴³ These provisions include transfer values (Sections 152-154), penalties (Section 155), the Pensions Ombudsman (Sections 157-159), modification and winding-up of schemes (Section 161), personal pensions (Sections 162-164), levy (Section 165), pensions and divorce (Section 166), war pensions (Section 168), official and public service pensions (Sections 170-172) and consequential amendments (Sections 173-175 and 176-181). See SI 1995/2548, 3140, §§ 152-55, 157-59, 161-66, 168, 170-81.

¹⁴⁴ See *supra* Section IV(15); *supra* note 98.

Finally, these above provisions only relate to scheme supervision and control rather than benefit or payment rules. Much of the more recent attention in this area has accordingly focused on larger systems of reform with a view toward creating more effective and fairer savings, funding and payment structures.

VI. UNITED KINGDOM PENSION REFORM

The operation of pension schemes and pension provision has received an increasing amount of political and economic attention in the United Kingdom especially since the late 1970s. Particular concerns have, for example, arisen with regard to the economic impact of current pension arrangements and the size of the funds involved. Specific criticisms have, in particular, been directed at the distorting effect of large pension funds on the normal savings processes within the economy¹⁴⁵ as well as with regard to the concentration of power in pension fund managers and associated dissolution of member rights.¹⁴⁶

Although some consensus appears to have developed with regard to the need for a revised system of pension provision in the United Kingdom, the various specific differences of opinion which have arisen have made it increasingly difficult to arrive at any clear and generally acceptable solution.¹⁴⁷

The response adopted to date by the various political parties and other interested welfare and research bodies or institutions has been varied.¹⁴⁸ Despite its earlier radical propos-

¹⁴⁵ See, e.g., VICTOR MORGAN, CHOICE IN PENSIONS; THE POLITICAL ECONOMY OF SAVING FOR RETIREMENT (1984); DAVID FANNING, PENSION FUNDS IN THE UNITED KINGDOM FINANCIAL MARKETS (Societe Universitaire de Recherches Financieres, SUERF Series N 037 A, 1985); CENTER FOR POLICY STUDIES, PERSONAL AND PORTABLE PENSIONS FOR ALL (1983); B. Dumbleton & J. Shutt, *Pensions: The Capitalist Trap*, NEW STATESMAN, 7 Sept. 1979, at 334-37; Tony Jackson, *Breaking Up The Pension Funds*, INVESTORS CHRONICLE, 29 Apr. 1983; see also ROBERT L. CLARKE, THE ECONOMICS OF INDIVIDUAL AND POPULATION AGEING (1980); RETIREMENT POLICY: THE NEXT FIFTY YEARS (Fogarty ed., 1982).

¹⁴⁶ See, e.g., BRYN DAVIES, LOCKING THE STABLE DOOR: THE OWNERSHIP AND CONTROL OF OCCUPATIONAL PENSION FUNDS (1992).

¹⁴⁷ See, e.g., *supra* Sections II, III, IV. For comment, see ELLISON, *supra* note 8, at paras. 1.051-1.056B.

¹⁴⁸ The Labour party announced in its 1992 manifesto that it would restore the link between increases in the basic pension and prices or earnings as well as

als, the new Labour government has most recently produced a more modest and arguably realistic set of proposals in relation to U.K. pension reform. Although much of the detail remains to be confirmed, a number of important new initiatives have been announced.

VII. THE FUTURE OF PENSIONS PROVISIONS IN THE UNITED KINGDOM

The government published its Green Paper on a Partnership in Pensions in December 1998.¹⁴⁹ As part of an overall review of pensions provision following its election in May 1996, the new government set up an independent Pensions Provision Group. The object of the Group was to consider the current

extend the national insurance system to low-paid and part-time workers. Rather than have a fixed retirement age, a flexible period of retirement between the ages of 60 and 70. A new National Pensions Plan was also recommended to supplement existing SERPS and to provide people with a pension based on their 20 best years of earnings. This would also be available to the self-employed. Before opting out, occupational and personal pensions schemes would have to guarantee a minimum pension as well as equal treatment for men and women. The law would provide that pension funds belong to their members and not employers with higher employee representatives and an independent trustee chairman. It was subsequently announced in 1995 that the Labour party was considering the integration of tax and benefits to pensioners to guarantee a minimum income for all. These ideas have been developed subsequently. *See, e.g.*, BRYN DAVIES, *BETTER PENSIONS FOR ALL* (1995).

Frank Field, the Chairman of the Select Committee on Social Security, has published separate proposals to create a new mixed state and private pension framework based on compulsory employee and employer contributions. All employers would be required to pay a contribution equal to 6% of gross salary into a private pension, employees would pay a contribution of 4% of gross salary with the state making up contributions for those not in employment. A guaranteed minimum pension of a value, at least, 20% above the current state provision would be introduced with a levy being imposed on those who receive more than £9,000 per annum from their private pension scheme. Pension fund members would also have the right to transfer the funds to other recognised financial institutions including trade unions and friendly societies. *See, e.g.*, FRANK FIELD & MATHEW OWEN, *PRIVATE PENSIONS FOR ALL: SQUARING THE CIRCLE*.

Other reform proposals include the formulation of a national retirement policy, a reduction in the power of pension funds, equalising the tax treatment of pension schemes and the creation of a Unified Funded Pension Scheme for Britain. For general discussion see, for example, DAVID BLAKE, *ISSUES IN PENSION FUNDING* ch. 8 (1992); BLAKE, *supra* note 21, at ch. 16; ELLISON, *supra* note 8, at para. 1.056; RICHARD NOBLES, *PENSIONS, EMPLOYMENT AND THE LAW* ch. 10 (1993); Blake & Orzsag, *supra* note 4, at ch. 6.

¹⁴⁹ *See* GREEN PAPER, *supra* note 8.

state of pension provision in the United Kingdom and to outline possible likely future trends.¹⁵⁰ The Pension Provision Group Report, therefore, contained a detailed analysis of the issues which had to be addressed in considering pension reform. This formed the basis of the later Green Paper.¹⁵¹

The currently effective Green Paper outlines the effects of current pension policies in the United Kingdom. It describes the current system and explains why it cannot meet the demands of the next century without reform.¹⁵² It further describes why, in particular, it cannot provide adequate security for people who cannot afford to save and have lost the trust of those who can. A "New Insurance Contract" must accordingly be established which has the aim of restoring trust, encouraging saving and directing assistance where it is most needed.¹⁵³

¹⁵⁰ See PENSION PROVISION GROUP, *We All Need Pensions: The Prospects for Pension Provision* (June 1998).

¹⁵¹ See GREEN REPORT, *supra* note 8, at ch. 2, para. 2.

¹⁵² See GREEN PAPER, *supra* note 8, at chs. 1-3.

¹⁵³ The objectives of the government are to provide security for those who cannot provide for themselves as well as to make it easier for people to save who can do so. The current system failed those who could not save in that they were not entitled to basic state pension or SERPS where they did not pay National Insurance contributions earning less than £3,300. Privately-funded schemes were inappropriate for those earning between £3,300 and £9,000 a year due to the small amount of benefit received as against the high costs and charges involved. Carers and disabled people, in particular, were also dependent upon the state due to their inability to make proper pension provision.

The system was also considered to have failed those who could save. Although occupational pension schemes remained an important source of pension provision, growth in the use of such schemes had peaked. There had been a decline in the number of people employed in large companies and in the public sector which had a strong tradition of occupational pension provision. There had been changes in the regulation of occupation schemes including the removal of employers entitlement to make membership a condition of employment since 1988. There had also been a restructuring of occupational pension schemes involving a switch from salary-related to money purchase schemes which had been accompanied by a reduction in the contribution made by employers to such schemes.

A number of significant changes in the labour market and society had also taken place which meant that such schemes covered a smaller percentage of the working population. Fewer people worked for a single employer throughout their employment lifetime; more were self-employed or only worked on a part-time or short-term basis. There was continuing growth in employment in small and medium sized companies which were traditionally less likely to provide occupational pension schemes. More women were also involved in the workplace which created a greater independence for both men and women although certain deficiencies persisted, for example, with regard to the rights of women upon divorce.

In considering the possible options for change available, the government rejected, at one extreme, the full privatisation of pension provision and, at the other, the construction of a state-based provider of pensions built on the continental model.¹⁵⁴ The government accordingly decided to retain the basic structure of the current public and private sector tiered approach but to make a number of changes to this framework with a view toward securing its more effective operation.

The principal features of the new approach are as follows:¹⁵⁵

(1) A new public-private partnership building on the best features of state and private provisions.

(2) The basic state pension will remain a key building block of the pension system and will continue to be increased, at least, in line with prices.

(3) All pensioners will be guaranteed a decent income on retirement through a minimum income guarantee.

(4) SERPS will be replaced by a new state Second Pension which will ensure that everyone with either a lifetime of work or credits from caring will build up rights to a pension which lifts them above the minimum income guaranteed in retirement.

(5) The minimum income guarantee and the state Second Pension will provide security for those who cannot save enough themselves to produce a decent income in retirement.

(6) A new framework for flexible, secure and value-for-money stakeholder pensions will be created to meet the demands of changes in the labour market and society.

(7) Increased National Insurance rebates will be made available for people who contract out of SERPS into a stakeholder pension. This will create an additional incentive for moderate earners to join.

Those who could save were also discouraged from doing so due to shortcomings in the personal pension market including, for example, the high charges involved and recent incidences of mis-selling. Poor information and lack of trust in the pension system also substantially contributed to creating important disincentives for people not to save. See GREEN PAPER, *supra* note 8, at ch. 3.

¹⁵⁴ See GREEN PAPER, *supra* note 8, at ch. 6.

¹⁵⁵ See GREEN PAPER, *supra* note 8, at ch. 6, para. 12.

(8) Improved pensions education and awareness will be provided, including the provision of an annual pension statement for every adult.

While the existing basic framework of pension provision will be retained, efforts will focus on increasing the basic entitlement for the poorest members of society, supplementing this with a revised state Second Pension in place of SERPS and introducing the new stakeholder pension scheme to encourage those with minimum and higher incomes to make increased provision either as an alternative to, or in addition to, privately-funded arrangements.

A. *Basic Pension Provision*

The U.K. government is particularly concerned with ensuring that as much assistance as possible is made available to the poorest pensioners in society. It is recognised that the present system suffers from a number of important defects and that pensioner poverty remains a significant problem. Many pensioners have been unable to build up any form of second pension to support the minimum state provision while others have found that it has become increasingly difficult to rely on state provision alone. For many of these pensioners, it is necessary to rely on income-related benefits and, in particular, income support. Many entitled to claim income support, however, are not claiming it while the operating rules penalise those who have built up some savings during their working lives.¹⁵⁶

In response to these difficulties, the government proposes to immediately introduce a minimum income guarantee,¹⁵⁷ provide extra help with fuel bills during the winter months¹⁵⁸

¹⁵⁶ Since 1988, the income support rules ignore savings below £3,000 while benefits are reduced on a sliding scale in respect of savings between £3,000 and £8,000 with no claim being possible for those with savings over £8,000. The effect of these rules is considered to penalise those who have made some attempt at saving or who have some savings left. They are accordingly widely resented.

¹⁵⁷ Beginning in April 1999, the government will introduce a minimum income guarantee through Income Support of, at least, £75 for single pensions and £116.60 a week for couples which represents almost three times the increase they would otherwise have received under the usual income support uprating rules. See GREEN PAPER, *supra* note 8, at chs. 5, 6.

¹⁵⁸ All eligible pensioner households will be guaranteed a £20 winter fuel payment from 1999/2000 which will benefit almost 10 million pensioners. See GREEN

and adopt measures to increase take-up of the minimum income guarantee provided.¹⁵⁹ In the longer-term, the government will attempt to continue to modernise and improve the ways in which support is delivered to the poorest pensioners and to attempt to provide greater rewards for those who have made some provision for their own retirement. The government is also concerned with removing the perceived unfair operation of the income support qualification rules although no specific proposals are included in this regard in the Green Paper. The government only invites comment at this stage.

B. *State Second Pensions*

While the government recognises that SERPS has been successful to a certain extent, it has decided to replace it with a new state Second Pension which will increase the entitlements of those on low incomes and carers which have otherwise been penalised under the earlier system.¹⁶⁰ It is also hoped that the number of people who have had to rely on income-related benefits can be cut while moderate earners will be encouraged to make a better second pension for themselves.

To assist the lower paid under the new proposals, the government proposes to double the value of payments on earnings up to £9,000 a year and to treat contributing employees earning up to £9,000 a year as if they had earned £9,000 a year when their new state Second Pension is calculated. Carers will be credited into the new state Second Pension as if they had earnings of £9,000 a year.¹⁶¹ Moderate earners will be assisted by the doubling of the new minimum level on their

PAPER, *supra* note 8, at ch. 5, para. 9.

¹⁵⁹ The government has commissioned researchers to examine why entitlement claims were not being made and has undertaken pilot schemes to attempt to identify entitled claimants and to encourage them to claim. Reasons for not claiming included stigma, lack of information and perceived difficulty and complexity of claims procedure. The government has decided to refine its techniques to attempt to identify those who may be entitled to claim more accurately, to encourage claims to be made especially where some stigma or uncertainty may otherwise arise and to attempt to make claims to Income Support in particular, triggered on as automatic a basis as possible. See GREEN PAPER, *supra* note 8, at ch. 5, paras. 12-17.

¹⁶⁰ While SERPS is efficient, it is earnings-related which fails to assist those on low incomes. See GOODE REPORT, *supra* note 8, at ch. 6, para. 3.

¹⁶¹ See GREEN PAPER, *supra* note 8, at ch. 6, paras. 9, 12.

first £9,000 of earnings which will be gradually increased until their earnings reach £18,500. Between the levels of £9,000 and £18,500, rebates will be increased to encourage the taking out of funded pensions through either occupational, private or stakeholder schemes. Thus, it is expected that funded pensions will eventually replace the state Second Pension for all moderate and higher earners at which point the state Second Pension will operate on a flat-rate basis only for those on lower earnings.¹⁶² It is expected that the immediate increase in the amount provided for lower earners up to £9,000 a year will be worth almost £50 a week.

The new state Second Pension proposal is important although some confusion may arise with regard to the distinction between a first and second tier pension. The first tier will remain non-earnings related; the second tier will be paid in return for work undertaken although the flat-rate nature of the final scheme proposed may be somewhat misleading. Both will operate on an actual or accredited flat-rate basis with former employees supplementing their basic state pension with the new state Second Pension. Others will have to continue to rely on income support and similar benefits if they do not otherwise qualify for a pension.

Of even greater importance are the incentives which will be incorporated to encourage people to move from the state Second Pension to a funded scheme. Specifically, the levels of rebates to be provided are of particular relevance. While a rebate-related incentive system has been in place for some time, the new element is the inclusion of the option to enter into a stakeholder pension where an occupational pension scheme is not available. This option acts as an alternative to a more expensive privately-funded scheme. Much more clarification will, however, be required in this area, especially with regard to such matters as funding and administration costs. To the extent that the costs of employers are substantially increased, this may, of course, have a significant impact on the initial employment opportunities created and will have to be carefully monitored.

¹⁶² See GREEN PAPER, *supra* note 8, at ch. 6, paras. 10, 11.

C. *Stakeholder Pension*

The objective of the stakeholder pension scheme proposals are to extend the availability of funded pensions to moderate and higher earners. The U.K. government asserts that many existing pension arrangements are often unsuitable or expensive. It, therefore, has introduced a new, flexible, value-for-money scheme to allow more middle earners to save for retirement. Although the market value of occupational pension funds is in excess of £640 billion with a further £190 billion invested in personal pension schemes, the former are not available to many employed and/or self-employed¹⁶³ while significant disincentives, especially with regard to administrative costs, discourage greater use of the latter. Accordingly, the U.K. government modernised its pension system by creating a new, flexible, cost-effective alternative scheme.

The government also wants to ensure that people have confidence in the security and running of the new schemes, that more efficient access to pensions is provided and that the habit of saving either through long-term pension schemes or through the new separate Individual Savings Accounts ("ISA"), which has also been proposed, is promoted.¹⁶⁴ The target group for the new stakeholder pensions are principally those earning between £9,000 and £20,000 a year.¹⁶⁵ However, while many people earning over £20,000 generally already make additional pension provision, it is thought that they too will be able to benefit from the lower charges, greater flexibility and simpler tax regime which will apply to the new stakeholder pension scheme.¹⁶⁶

The government's proposals with regard to stakeholder schemes are designed to remove the complexity relating to personal pensions schemes,¹⁶⁷ to ensure that buyers received

¹⁶³ Thirty five percent (35%) of employees were not covered by any occupational scheme. See GREEN PAPER, *supra* note 8, at ch. 7, para. 5.

¹⁶⁴ See GREEN PAPER, *supra* note 8, at ch. 7, para. 8.

¹⁶⁵ This group includes around 10.7 million people, half of which are already participating in occupational schemes. Of the 5.3 million not in occupational schemes, it is estimated that around 2.5 million contribute to personal pensions with 1 million in personal pensions but only contributing the rebate from their National Insurance contributions. See GREEN PAPER, *supra* note 8, at ch. 7, para. 11.

¹⁶⁶ See GREEN PAPER, *supra* note 8, at ch. 7, para. 10.

¹⁶⁷ Many personal schemes have complex charging structures depending upon

a good deal,¹⁶⁸ and to reduce the costs of regulation¹⁶⁹ and the costs of distributing and marketing schemes.¹⁷⁰ Specifically, the marketing costs generally associated with personal pensions will be reduced by making stakeholder schemes as simple and cost-effective as possible. This will be achieved by requiring employers who do not already offer occupational scheme facilities to make stakeholder schemes available to their employees and to make necessary payments by deduction from their employees' wages. The requirement to be imposed on the 35 percent of non-occupational scheme contributing employers to make separate stakeholder facilities available to employees is possibly the most significant new development in this area.

With regard to the scope of coverage of stakeholder schemes, employees who are eligible for occupational schemes and employees whose earnings fall below the National Insurance LEL will be excluded. Whether all other employers will be required to participate on a compulsory or voluntary basis is, however, still unclear. Although the government is interested in introducing the scheme on as wide a basis as possible, it has stated that it is concerned about the potential burdens which will fall on employers with a limited number of employees who are mostly low-paid and likely to be better off in the new state Second Pension.¹⁷¹ Opinion was accordingly invited as to whether access should be on a voluntary basis for some groups of employers.

the amount paid and the duration of the investment. Stakeholder schemes will be standardised insofar as possible in accordance with certain minimum standards to provide both a minimum level of protection and clarity in their operations. See GREEN PAPER, *supra* note 8, at ch. 7, paras. 17, 18.

¹⁶⁸ Control of the operation of many personal pensions schemes is constrained by the limited powers of members and restrictions on their ability to move to other service providers. It is accordingly proposed that stakeholder schemes be run in a manner which will fully protect the interests of members. See GREEN PAPER, *supra* note 8, at ch. 7, paras. 19, 20.

¹⁶⁹ As many of the costs involved with private pensions arose through marketing and providing investment advice, it is hoped that the costs associated with stakeholder pensions can be reduced by focusing on administration rather than sales with a higher degree of protection being made available through the minimum standards to be introduced and the requirement that the schemes are run in their members' interests. See GREEN PAPER, *supra* note 8, at ch. 7, paras. 21, 22.

¹⁷⁰ See GREEN PAPER, *supra* note 8, at ch. 7, paras. 23, 24.

¹⁷¹ See GREEN PAPER, *supra* note 8, at ch. 7, para. 56.

Stakeholder pension schemes will use a collective structure, as with occupational schemes, to ensure the best value-for-the-money for scheme members. As at present, OPRA will be responsible for the regulation of all trust-based stakeholder pension schemes.¹⁷² FSA will continue to be responsible for the marketing of schemes and any related investment advice while firms responsible for the managing of funds will be authorised and supervised by FSA.¹⁷³ Members of stakeholder pensions schemes will have access to the Pensions Ombudsman in the event of maladministration by trustees and to the Financial Services Ombudsman with regard to complaints about inappropriate advice or promotional material.

The legislation required to create the stakeholder pension scheme will be included in the Welfare Reform Bill which will be presented to Parliament in the current session. Detailed aspects concerning the operation of the scheme will then be developed through secondary legislation after the bill has received Royal Assent. It is intended that the first stakeholder pension schemes will be set up as of April 2001.

CONCLUSION

A number of complex issues clearly arise in designing the proper structure and detailed method of operation for any new system of modern pension provision. In light of the very distinct needs and available resources of all of the people involved, many systems will have to continue to proceed on a structured or tiered basis whereby different sub-schemes with separate conditions of entitlement, funding and payment rules will have to remain in place. Each of these sub-systems must, however, be continually reviewed and revised over time to ensure that all savings and support needs are satisfied in light of the current economic, social and fiscal regimes in place in any particular country.

¹⁷² The main provisions in the Pensions Act of 1995 will be applied to stakeholder schemes including the production of annual reports and accounts, the appointment of professional advisers, the drawing up a statement of investment principles and the maintenance of procedures for dealing with internal disputes. See GREEN PAPER, *supra* note 8, at ch. 7, para. 42.

¹⁷³ See GREEN PAPER, *supra* note 8, at ch. 7, paras. 40, 41.

Despite all of the well-intended political initiatives launched and other proposals for reform developed in the United Kingdom, however, a number of difficult issues remain to be resolved in the revision of the current system. The basic framework adopted to date provides a sound basis for the development of adequate pension provision for many pensioners although a number of gaps and difficulties remain which must be corrected. All instances of pensioner poverty must, in particular, be immediately eradicated. Full provision must be made available to all pensioners in need either through the basic state pension or Social Security-related payments with the value of these payments being protected over time. Pensioners who do attempt to make some provision for themselves should not be penalised by obscure benefit or support rules. The system should encourage rather than punish personal provision and be revised accordingly.

With regard to larger systems reform, the government's most recent proposals which were set out in its December 1998 Green Paper are important new developments and have to be strongly welcomed. The improved basic state pension and new state Second Pension will provide considerable additional assistance for low earners and carers in retirement. Although some concerns have been expressed with regard to the amount of actual coverage which will be provided, it can only be hoped that the government will listen to the views expressed during the consultation period and act accordingly.

The new stakeholder schemes will also create an important new alternative to existing occupational and private pension arrangements. The incentives introduced to encourage middle earners to move from the state Second Pension into funded pensions are particularly welcome although it remains to be seen how effective they will be in practice. Particular difficulties may arise with regard to the lack of compulsion involved as well as with the complexity of the new arrangements proposed. It has to be hoped that the new stakeholder schemes will be as flexible, secure and popular as intended. Much of the detail surrounding their structure and operation, however, has still to be confirmed.

In so far as some of the more successful aspects of the current system are to be retained, especially through the continued availability of occupational and private schemes, it is

essential to ensure that these operate in an effective manner and are not prejudiced by the new measures proposed. Concerns have already been expressed that the longer term availability of occupational and private schemes may be substantially threatened following the introduction of the new stakeholder arrangements. The availability of independent pensions advice may also be reduced at a time when the system is becoming considerably more, rather than less, complicated. Having decided to keep much of the present system in place, the government must take care to ensure that the existing advantages or benefits produced are not unnecessarily undermined by the new measures proposed.

In addition, the new initiatives will have to be supported by the pensions industry although much may depend upon the perceived income which they may be able to generate. Employers in medium and smaller-sized companies will also have to assume more responsibility with regard to the development of the new schemes. This will clearly increase employer costs, at least initially, although incidental benefits will be available both by attracting more employees and by employers using the same schemes themselves. The difficulty that arises, however, is that the largest burden of change may have to be borne by employers least able to assume the costs involved. It can only be hoped that these proposals will not act to discourage the employment of staff—lower paid staff in particular—in smaller businesses or otherwise interfere with these businesses possibly already-limited profitability. The government will have to take a proper lead in this regard and be sensitive to the new difficulties created.

The government must also ensure that all public and private schemes are subject to effective supervision and control. Significant progress has been made in this area with many of the detailed recommendations contained in the Goode Report being implemented under the Pensions Act of 1995. This work must be continued. A proper control framework which fully recognises and protects the interests of all parties must be in place and operate effectively at all times.

Proper pension provision remains an issue of fundamental social importance. Politicians, economists, lawyers and other social commentators must continue to examine and revise existing arrangements to ensure that effective savings and

funding mechanisms are in place and that proper pension provision is secured for all over time. While some valuable recent initiatives have been undertaken in this regard in the United Kingdom, this work must now be taken forward further for the benefit of all of those effected and for society as a whole.