

SOUTH AFRICAN LAW COMMISSION

PROJECT 112

SHARING OF PENSION BENEFITS

REPORT

JUNE 1999

(ii)

To Dr AM Omar, MP, Minister of Justice

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973, (Act 19 of 1973), for your consideration the Commission's report on the investigation into the sharing of pension benefits.

I Mahomed
Chairperson
June 1999

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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SUMMARY OF RECOMMENDATIONS

The sharing of retirement fund benefits between spouses on divorce must be governed by substantive legislation separate from the Divorce Act, 1979.

Provision should be made for the division of retirement benefits as such and not merely for the exchange of compensatory assets in place of such benefits.

The exchange of compensatory assets in place of a share of retirement fund benefits should nevertheless remain as an option available to the spouses.

Spouses may exclude pension sharing in terms of their antenuptial contract.

A spouse may waive any right to retirement fund benefits.

Spouses may agree in writing to share retirement fund benefits in different proportions than those prescribed.

Subject to the principles contained in the proposed legislation, a retirement fund may make use of approximate calculations where exact data is not obtainable.

The costs that are recoverable from spouses in respect of the division of benefits may be prescribed by regulation.

The non-member spouse has a right to a share of the retirement fund benefits which accumulated in respect of the member during the marriage. The extent of the right is prescribed in the formulae set out in the proposed legislation in respect of the various types of retirement schemes.

Any share of retirement fund benefits to which a non-member spouse is entitled is made available on a locked-in basis - in other words, by way of deferred pension and not as a cash benefit.

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Benefits to which a non-member spouse is entitled must be paid to him or her direct from the retirement fund by which the benefits are held on behalf of the non-member spouse.

If the non-member spouse dies before the date on which the benefits become payable to the member, the withdrawal value of the benefits on the date of the death of the non-member spouse is payable to his or her estate.

The sharing of retirement fund benefits is at this stage limited to spouses whose marriages are recognized as such in terms of existing law.

The proposed legislation should make it clear that retirement fund benefits are not divided as part of the matrimonial property of spouses.

The proposed legislation should be applicable in respect of marriages dissolved after the commencement of the new provisions.

The new provisions should not apply in respect of spouses who have in terms of their antenuptial contract chosen complete separation of their property, but such spouses should be allowed to make the said provisions applicable to them by way of written contract.

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CHAPTER 1

1. Background

1.1 The question of the division of pension benefits upon the divorce of spouses was investigated by the South African Law Commission some twelve years ago.¹ At the time no provision existed in our law in terms of which a divorced spouse had any claim to any portion of the retirement fund benefits of the spouse from whom he or she is divorced the Commission recognized that the retirement fund benefits of a member of a retirement fund form an important part of the member's assets, even though those benefits may not be immediately realizable. The member's right to such benefits was referred to as the member's "pension interest". It was further recognized that the spouse of a member of a retirement fund has a direct interest in the member's pension interest and that this interest ought not to be terminated summarily by the divorce of the spouses. It was therefore recommended that for purposes of the division of the assets of spouses upon their divorce the pension interest of a spouse who is a member of a retirement fund must be deemed to be part of his or her assets, thus affording the non-member spouse an opportunity to share in the retirement fund benefits of the member spouse to the extent that the applicable matrimonial property dispensation allows the sharing of the assets of the spouses².

1.2 In order to effect a division of the assets of the spouses upon their divorce it is necessary that the value of the pension interest of a member of a retirement fund should be readily ascertainable on the date of the member's divorce. If the divorce occurs before benefits become payable in terms of the rules of the fund concerned, the true value of the member's pension interest as at the date of the divorce would in many instances have to be determined actuarially with regard to the contingencies which determine the payment of those benefits. The Commission was of the view that this would be too costly and time-consuming to be a practical solution. It

¹ See Commission's report on the Investigation Into The Possibility Of Making Provision For A Divorced Woman To Share In The Pension Benefits Of Her Former Husband, October 1986, herein referred to as the 1986 report.

² Par. 6.4 of 1986 report.

was therefore decided that the value of the pension interest should be fixed at the amount that would have been available to the member if he or she had resigned on the date of the divorce, or in the case of a retirement annuity, the total of the member's contributions to the fund as at the date of the divorce, plus interest thereon at the prescribed rate.³

1.3 The Commission considered the question whether the courts should be empowered to make an equitable division of the pension interest as such in every case. The Commission, however, saw no justification for treating the pension interest differently from any other asset of the parties. The Commission was of the view that such a differentiation would run counter to the essential features of the various matrimonial property dispensations.⁴

1.4 Because the pension interest is a deemed asset which would not be available for division between the parties on their divorce, the Commission was of the opinion that in most instances the non-member spouse's share of the pension interest would be paid in the form of other available assets. Such compensatory asset could consist in the form of the cession of a policy equal to the value of the non-member spouse's share of the pension interest, or the transfer of a sum of money or some other asset to the non-member spouse.⁵ The Commission recognized that in some instances it might not be practical to make a compensatory asset available to the non-member spouse. Provision was therefore made that a court may make an order that a retirement fund must pay the non-member spouse's share of the retirement fund benefits direct to the non-member spouse when the benefits become payable under the rules of the fund.⁶

1.5 The Commission's recommendations were embodied in the Divorce Act, 1979, via the Divorce Amendment Act, no 7 of 1989.

1.6 The provisions for the sharing of retirement fund benefits on divorce as provided for by the abovementioned legislation proved to be unsatisfactory in several respects. Representations

³ Par. 6.9 of 1986 report

⁴ Par. 6.4 of the 1986 report

⁵ Par. 6.18 of 1986 report

⁶ Par. 6.20 of 1986 report

in this regard led to a further investigation by the South African Law Commission. The Commission's second report, under the title : The Division Of Pension Benefits On Divorce, was brought out in March 1995. In paragraph 4.1.1 of this report the Commission makes it clear that its second investigation was not aimed at reviewing the law relating to pension sharing, but merely at solving particular problems that have been identified.

1.7 The Commission's recommendations involving legislative changes emanating from its second investigation are summarized in paragraph 4.3 of the 1995 report and are set out in the Bill which forms Schedule A of that report. These recommendations relate mainly to the extension of the definition of "pension interest" so as to clarify certain obscurities and to provide for matters not covered by the existing definition. It is further made clear that an order deferring a non-member spouse's share until the member's benefits become payable, should be resorted to only if the court is satisfied that the non-member spouse cannot be compensated satisfactorily in any other manner in respect of his or her share of the member's pension interest. It is also made clear that an amount payable to a non-member spouse by way of deferred payment in terms of an order of court may not exceed the amount payable in a lump sum in terms of the rules of the fund concerned.

1.8 One of the main objections to the existing provisions is that no provision has been made for the avoidance of the effects of inflation on the non-member spouse's share where that share is payable when the member's benefits become payable. The Commission again gave consideration to the desirability of making provision for the addition of interest to the non-member spouse's share but decided against it. The reasons given by the Commission are, firstly, that it would be unfair to the member spouse who would have to pay the interest, and secondly, because an order for the deferred payment of the non-member spouse's share ought to be made only as a last resort if that spouse cannot be compensated satisfactorily in any other manner.⁷

1.9 The Commission was urged to investigate the splitting of retirement annuities so that part of the reserve value could be transferred to a new annuity in the name of the non-member spouse.⁸

⁷ Par. 4.2 of 1995 report

⁸ Ar. 3.1,10.3 (d) of 1995 report

The Commission was, however, of the view that the splitting of retirement annuities is a matter which is connected with the reform of the law relating to pensions as such and that it ought to be addressed by the pensions industry if necessary.⁹

1.10 It was also suggested to the Commission that because of the nature and purpose of a pension, the pension interest of a member ought to be divided between spouses separately from their other assets. The Commission, however, preferred the more practical approach which promotes a clean break between the spouses and probably requires much less administration and would also be less costly than the proposed division of the pension interest.¹⁰

1.11 The Life Offices Association and the Institute of Retirement Funds expressed the view that the changes proposed by the Commission at the time could be accepted by way of interim measures, but the unsatisfactory and inequitable way in which the non-member spouse's share of the member's pension interest is determined remains a source of great dissatisfaction. It was suggested that in the long term a more equitable solution should be developed, even though it may require fundamental changes to the current pension practice.¹¹ In view hereof the Minister of Justice did not proceed with the promotion of the legislation proposed by the Commission, but referred the matter back to the Commission so that the necessary review could be undertaken.

⁹ Par. 2,20 of 1995 report

¹⁰ Par. 2.3.19 of 1995 report

¹¹ Par. 3.1.10 of 1995 report

CHAPTER 2

2. Comparative survey

2.1 During its first investigation the South African Law Commission made a comparative study of the treatment of pensions on marriage breakdown. The study covered the Netherlands, West Germany, Switzerland, Austria, England, the United States of America, New Zealand, Australia, Canada and Scotland. The Commission's findings are summarized in Chapter 4 of the 1986 report. In the time that has elapsed since the said comparative study was done the position has changed dramatically in some of the states referred to. In its working paper of April 1998 on the **Sharing of Pension Benefits** The Commission deals more fully with the position in Canada. The Commission's reform proposals contained in the said working paper are in fact based on Canadian models.

2.2 In the December 1998 issue of the **International Pension Lawyer**¹² the subject of **The Treatment Of Pensions On Marriage Breakdown** is extensively covered in respect of the following countries : Australia, Canada, Denmark, Ireland, The Netherlands, New Zealand, South Africa, the United Kingdom, and the United States of America. The position in each country is set out by a pension lawyer of that country. What follows is a summary of the main features of the position in the said countries.

2.3 Australia

2.3.1 Superannuation is regulated by government as a retirement income policy. Benefits are in most instances not available to members until their permanent retirement at a prescribed age. As superannuation benefits are held within discretionary trusts, they do not constitute property of a marriage which may be subject to an order of a family court upon the breakdown of a marriage. The courts have held that an interest in a superannuation fund is normally a contingent interest only. Until the member receives it into his or her hands he or she has no

¹² Journal of the International Pension and Employee Benefits Lawyers Association (IPEBLA)

control over it and is unable to dispose of it. The interest does not form part of the member's estate.

2.3.2 The **Superannuation Industry(Supervision)Act** furthermore does not allow the transfer of a superannuation interest between spouses. Generally such an interest is treated as a future financial resource or future asset of the member. As such it may merely be taken into consideration when the court makes an order regarding property or maintenance. The difficulty with this option is that either party may die before the benefit is received or other changes may occur which may affect the financial position of either party. This method of dealing with superannuation on marriage breakdown has therefore been described as vague and unsatisfactory. The courts' powers to deal with superannuation are very restricted. A member's benefit cannot be split at the time of separation or when a dispute is heard by the court. The most that a court can do is -

- (a) to adjourn the proceedings until the benefit becomes payable (this is highly unsatisfactory, particularly when the time of the vesting of the benefit is years in the future),
- (b) to restrain a party from dealing with future assets arising from superannuation benefits (this option suffers from the same problem and also requires some form of secondary court order),
- (c) to adjust the settlement of other matrimonial property to account for the fact that either or both parties may become entitled to a superannuation benefit at some time in the future (the difficulty with this option is to know precisely what the benefit will be when it becomes due, and it is also not always possible to offset the value of the benefit because there may not be sufficient other assets), or
- (d) to order that the superannuation benefit be split at such future time as it becomes due.

2.3.3 All the abovementioned options are generally regarded as unsatisfactory. In May 1998 the Federal Attorney General released a paper outlining proposals for legislative reform to make it possible for superannuation benefits to be divided between spouses on marriage breakdown. The main features of the proposed legislation are the following:

- Superannuation (during its accumulation phase) will not be assessed as part of property but will be subject to its own scheme, having regard to its unique characteristics.
- The court will be empowered to apply a presumption that superannuation interests referable to a period of cohabitation are to be divided equally. The presumption will be varied by particular circumstances.
- Defined contribution schemes may be divided relatively easily. The non-contributing spouse will be required to hold the interest in the divided fund until release would normally be available.
- In defined benefit schemes the final benefits are dependent upon future events. Typically the benefit has two components - the vested benefit and the non-vested value. The member has a notional entitlement to the non-vested value. If only the vested benefit is taken into account on marriage breakdown, it is likely to be unfair to the non-contributing spouse since it may not fully reflect the value of the interest accumulated during the marriage. However, taking into account the full accrued retirement benefit is likely to be unfair to the contributing member since that full value may never be received if the member leaves the scheme earlier than normal retirement age. The government actuary has developed a set of factors to determine the contingency value of a member's accrued retirement benefit representing the present value of the various superannuation outcomes weighted according to the probability of each of those outcomes occurring.

2.3.4 The principles on which superannuation splitting will be based are the following:

- While the difference between superannuation and other assets is noted, the full value of superannuation should be taken into account on marriage breakdown.
- Future proceedings between spouses should be avoided, if possible.
- If the parties reach agreement without a court order, that agreement should not be easily set aside.
- The proposed amendments will enable courts to make orders binding trustees, notwithstanding any trust deed or governing rule to the contrary.
- The court will encourage parties to reach agreement on a split of superannuation, except where the interest to be divided is too small or where it would otherwise not be in the interest of the parties.

2.4 Canada

2.4.1 Pensions are considered to be property, and part of the marital assets which are to be shared on marriage breakdown. This has been the position for approximately the past 10 years. Previously pensions were considered to be a stream of income once payment thereof began.

2.4.2 The basic premise behind the division of assets on marriage breakdown is that all assets acquired during the marriage should be divided equally between the spouses. Subject to a few exceptions, family law requires that the assets of each spouse must be valued at the time of marriage breakdown and reduced by the value of the assets at the time of the marriage to arrive at a net value of assets for each spouse. The total net values are added together and divided by two. The spouse with the excess value is required to compensate the other spouse.

2.4.3 Pensions are of the most difficult assets to value, particularly defined benefit pensions that have not yet commenced payment. The case law gives little guidance. Some judges

prefer valuing the benefit as though the member had terminated employment. Some prefer projecting the benefit to the member's normal retirement date. Some prefer a valuation method somewhere between the two extremes. The various methods can produce values that differ considerably. To avoid litigation, many couples hire actuaries and agree to abide by their valuations.

2.4.4 Most jurisdictions in Canada limit the payment of pensions to a non-member spouse to one-half of the pension earned during the marriage. If marriage breakdown occurs after the member has retired and is receiving a pension, the non-member spouse may only receive a pension equal to a portion of the member's pension. Some jurisdictions will, however, permit the payment of a lump sum to the non-member spouse even after the pension has commenced.

2.4.5 In the case of defined benefit pensions that have not yet commenced payment, three methods are used for payment of the non-member spouse's share. Some jurisdictions allow several methods and permit the non-member spouse to elect one from among them. The three methods are:

- (a) deferral,
- (b) separate pension, and
- (c) immediate payment.

(a) Deferral

Division of the pension is not done until some future date, which could be many years after the marriage breakdown. Usually the division of the pension will be calculated at the member's earliest retirement date or normal retirement date or date of termination of service or death, as provided in the pension plan if the member continues to work. The intention is to permit the non-member spouse to receive the advantage of benefit increases granted to the member. Under this method payment will usually be made to the non-member spouse at the time of the division. If the non-member spouse is permitted to transfer the pension entitlement out of the pension plan, the transfer will be made on a

locked-in basis. The funds must eventually be used to purchase some form of pension for the non-member spouse.

(b) Separate pension

This method permits an actual split of the benefit within the pension plan before the member's termination of employment. The non-member spouse receives a share of the commuted value of the member's pension, calculated at the time of the marriage breakdown. This separate benefit is then transferred to a separate account in the name of the non-member spouse and is administered as if the non-member spouse was a deferred vested member of the plan. Payment is made at the member's early retirement date, or earlier if employment is terminated before that date. The non-member spouse's rights are protected under the plan at the member's termination of employment or death, or a pension is paid from the plan to the non-member spouse, based on his or her life instead of the member's life.

(c) Immediate payment

Since issues surrounding the equalization of marital assets takes place at the time of divorce, it seems logical that the division of a pension (which is a marital asset) should also be settled at the same time. However, only a few Canadian jurisdictions permit the payment of a pension benefit at the time of marriage breakdown. Using this method, the pension is valued and an amount is transferred to the non-member spouse at the time of marriage breakdown, usually on a locked-in basis. The member's benefits under the plan are adjusted accordingly. This method is used in the province of Quebec, which has the most detailed legislation regarding pension credit splitting.

2.4.6 Despite the progress made in Canada over the past 10 years in the area of pension credit splitting on marriage breakdown, a great deal of confusion remains. To simplify administration for plan sponsors, immediate division of the pension asset is preferable, avoiding the necessity of retaining records for many years, since the division will not be made until the

member actually terminates employment. Finally, greater understanding of the pension as property is required for plan members, so they will understand the true value of this unique asset.

2.5 Denmark

2.5.1 Different trade unions have their own pension schemes. Typical of these schemes is the fact that benefits are paid as long as the beneficiary lives. The member is paid a retirement or disability pension as long as he or she lives, and when the member dies the surviving spouse is paid a spouse pension for the rest of his or her life. Characteristic of this kind of pension scheme is that if the member dies on the day of his or her retirement and leaves no surviving spouse, he or she receives no value for money with regard to contributions made. With other types of pension schemes a one-time lump sum is paid when the member dies or becomes disabled or reaches retirement age. These two types of pension schemes are treated differently on divorce.

2.5.2 In the case of the first kind of pension scheme mentioned, the spouse will only be paid a pension on divorce if he or she is eligible for maintenance payments, and then only for the period that maintenance is due. Since most married couples have employment and earn income, they are not eligible for maintenance, which usually means that pension will not be divided on divorce.

2.5.3 In the case of the second type of pension scheme the pension is shared equally on divorce. The pension capital saved is either divided into two equal pensions or the owner of the pension scheme pays the other spouse half of the pension.

2.5.4 The first-mentioned type of pension scheme is the traditional, original type of scheme. It was created during the period when men dominated the labor market. Women have now become more prevalent in several working areas where this pension scheme is used. Men often have jobs where the second type of scheme is used. This is irrelevant as long as the marriage exists or if the husband has the first type of pension scheme. This is, however, no longer always the case, and hence the sudden focus on the injustice of the system.

2.5.5 Through the years the fairness of this asymmetrical sharing system has only been tested in the lower courts. It was only recently that the sense of the system was questioned in the Supreme Court and this court expressed the view that a solution to the problem must be brought about by legislative change. As a result hereof a committee has been set up which will make recommendations in this regard.

2.6 Ireland

2.6.1 Irish pension plans are employer sponsored. In the private sector plans are funded. The fund is held by trustees. Both defined contribution plans and defined benefit plans are common. The latter usually provide benefits related to length of service and to retiring salary. Most plans provide benefits on retirement as well as on death while still employed. The pension adjustment regime treats retirement benefits and death benefits differently.

Retirement benefits - earmarking

2.6.2 When a couple divorce, a court has a broad discretion to divide their assets between them. The division can, at the request of either spouse, extend to the accumulated rights of the member spouse to retirement benefits from the pension plan. The court can make a pension adjustment order under which a percentage of the member spouse's accumulated rights to retirement benefits will be "earmarked" for eventual payment to the non-member spouse. The court may only take into account pension rights which the member has earned up to the date of the divorce.

Retirement benefits - pension splitting

2.6.3 At any time a minimum value can be put on a member's pension rights. It is the value of the pension rights the member would receive if he or she left employment immediately. However the member's career may develop, benefits of at least that value will always be paid.

Consequently, the non-member spouse's earmarked percentage of the leaving service entitlement represents the least that the non-member spouse will receive.

2.6.4 At any time after a pension adjustment order has been made, the non-member spouse may exchange the earmarked percentage of the member spouse's benefits for independent benefits which are equivalent to the earmarked percentage of the member spouse's leaving service entitlement at the time of the exchange. This exchange does not affect the member spouse, who has already lost the earmarked percentage of the retirement benefits. It does also not adversely affect the plan or the employer or other members of the plan because the independent benefits cannot cost more than the earmarked percentage of the retirement benefits would have cost, and may well cost less. This exchange is referred to as "pension splitting". To effect it, the trustees of the member spouse's pension plan pay a transfer value actuarially equivalent to the earmarked percentage of the member spouse's leaving service entitlement to another pension plan on behalf of the non-member spouse. The form and timing of these benefits can be designed to suit the non-member spouse's circumstances.

2.6.5 From the non-member spouse's point of view, pension splitting is not necessarily ideal. By accepting a transfer calculated on a leaving service basis, the non-member spouse forgoes the value of any enhancement to the member spouse's accrued benefits arising from future salary increases. Moreover, when the transfer amount is paid to another pension plan (especially a personal plan set up by the non-member spouse with a pension provider), it may be reduced by administrative costs, commission, etc. The non-member spouse must therefore choose between, on the one hand an earmarked share of benefits which depends on the member spouse's career, and on the other hand, independent benefits which may be of a lower value and which may have to bear costs and commissions. The problem is less in a defined contribution plan, where salary growth is not relevant, or in the case where the member spouse is close to retirement age at the time of the splitting of the pension. The problem is also smaller if the non-member spouse is a member of another pension plan which is willing to receive the transfer without deducting costs of administration.

Death-in-service benefits

2.6.6 Death-in-service benefits are similar to life insurance and for purposes of the pension adjustment regime they are treated accordingly. The appropriate pension adjustment order is an earmarking order, designating of the death-in-service benefits for payment to the non-member spouse if the member spouse dies while in service. These benefits are unfunded, and as long as the member spouse is alive, have a very small value, so the question of pension splitting does not arise.

Experience

2.6.7 The pension adjustment regime came into force in early 1997. As yet, there is relatively little experience of its operation in practice. Anecdotal evidence suggests that many spouses who are separating or divorcing do not seek a pension adjustment order. Those who do, often give no attention to the question until very late in the court proceedings, and there is reason to suspect that in many cases they do not fully understand how the order will operate. The regime is a complex one. It may be too complex to meet the needs of divorcing couples, whose financial resources are often already strained and who cannot, therefore, afford the personal advice needed to take full advantage of the regime. Family law practitioners are not well-educated in the complexities of pension law and practice. There is a need for an education and information exercise, to ensure that pensions receive the attention they deserve, and that divorcing couples use the pension adjustment regime to their own best advantage.

2.7 The Netherlands

Special partner pension after a divorce

2.7.1 Until February 1973, in the Netherlands the ending of a marriage by divorce had no direct consequences at all for the pension rights of either of the spouses. In February 1973, that changed by the introduction of a so called “special partner pension” for the female spouse. All of the partner pension accrued until the date of divorce (and not already reserved for a previous former spouse), was to be reserved for the ex-wife.

2.7.2 For each new wife the building of the partner pension starts at the moment of the previous divorce. After the death of the pension member, not only the widow but also the former spouse(s) receive their part of the partner pension. If a former spouse dies before the pension member does, the special partner pension will be forfeited and does not flow back for the benefit of possible other spouses. In August 1987 an equal right was introduced for male spouses.

2.7.3 The law regarding special partner pension can, and from the year 2000 must, also be applied to partners who are not married but just living together(keeping a joint household), and accepted by the pension plan as surviving relatives. If they break up their joint household, they also have the right to receive special partner pension rights. At the present time there are still many pension plans which do not attribute the special partner pension to those separating partners who were not legally married.

2.7.4 Since January 1, 1998, there has been a third form of partnership in the Netherlands. In addition to marriage and joining of a household(sealed by a notarized act), two people can get officially registered as partners. Because the rights and duties that are distributed by law upon the registered partners resemble those that come with marriage, it has been characterized as “the gay wedding”. In fact, almost a year after the introduction of the registration of partners, many heterosexual couples have also been registered. By law these registered partners must be treated equal to married partners in pension plans.

November 27, 1981 - May 1, 1995

2.7.5 Until 1981 old age pension was seen as a strictly personal right. It was not considered to be an asset that must be valued and divided between ex-spouses. However, in 1981 the Supreme Court ruled that old age pension rights were assets in the apportionment of matrimonial property, unless parties by prenuptial agreement had decided that there was no community of property whatsoever. From that moment on, the total value of both the old age pension and the special partner pension had to be divided.

2.7.6 How to exercise that right, was up to the spouses. It was possible to let each spouse keep his or her own old age pension and to settle the pension value with or by other assets. It was also possible to let each spouse keep his or her own partner pension. The pension plan only had to pay the old age pension to the pension member (and not partly to the former spouse), and eventually the special partner pension was paid to the former spouse (unless the former spouse agreed otherwise). In the situation of two people living together while not married, there was no community of property, and therefore, only a division of old age pension in the case of a voluntary agreement the splitting of those rights.

Since May 1, 1995

2.7.7 For over three years now the partition of pensions in case of marriage breakdown has been arranged by law. Since January 1, 1998, this has also been applicable in the situation of a registration of breakdown. The law regarding the attribution of a special partner pension in the case of a divorce is still the same, but there is a new rule regarding the division of old age pension. Separate from the attribution of all the partner pension accrued until the date of divorce (and not already reserved for a previous former spouse), the old age pension accrued during the period of the marriage or registration has to be divided. The standard is 50 percent, but the parties may decide to divide according to different percentages. They may also decide to divide the pension accrued during a different period or not to divide at all. This law is not applicable where the joint household is ended.

2.7.8 If the pension member starts to receive his or her pension, the former partner receives his or her part directly from the pension plan. Because of the growing flexibility regarding the date of retirement, the former partner can therefore not be sure when exactly he or she will receive a share of his or her spouse's old age pension. If the former spouse dies, the divided pension flows back to its original owner.

2.7.9 An alternative is that, if both partners and the pension plan cooperate, the former partner swaps his or her special partner pension and his or her right to a part of an old age pension into an individual right to old age pension. The former partner then starts to receive the pension

at his or her own date of retirement, whether or not the original pension member is dead or alive. The former partner now also has the option to elect a transfer of the value. If after a conversion the partner dies, the pension does not flow back to the original owner.

2.8 New Zealand

Matrimonial Property Act Regime

2.8.1 The Matrimonial Property Act, 1976, governs the division of matrimonial property following a marriage breakdown. The key principle is that, unless the parties have agreed otherwise or one spouse's contribution to the marriage was clearly greater than the other's, each spouse will share equally in the matrimonial property. The spouses' respective shares are determined at the date when they cease to live together as husband and wife.

2.8.2 "Matrimonial property" is defined to include:

"Any pension benefit to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage".

A husband and wife may agree on the division of their property, including superannuation entitlements. Agreements must be in writing and signed by both parties after receiving independent legal advice. The Act allows the court to order a husband and wife to enter into a deed or arrangement assuring that a non-member spouse receives a certain portion of the member's superannuation rights. Such order binds the trustees or administrator of the scheme in question.

2.8.3 Unless the rules of a scheme allow in-service withdrawals (which is rare), a court order is the only mechanism permitting a scheme to pay money to a non-member spouse prior to the member leaving service. A court order will, however, override the rules of a scheme and bind

the trustee. A frequent problem is that court orders go too far and purport to distribute more than the vested leaving service benefits. Where this happens, the trustee must send the parties back to the court.

Valuation

2.8.4 Because matrimonial property includes both vested and contingent superannuation entitlements, actuarial input is often required to value those entitlements. The principles for valuing prospective superannuation benefits can be summarized as follows:

- matrimonial property should reflect not merely vested, but also contingent superannuation entitlements;
- valuation should be at the date of separation, with interest to the date of settlement;
- the “clean break” approach(making an immediate distribution to the non-member spouse) should be preferred to deferring distribution;
- caution is necessary in assessing a member’s future prospects and the significance of post-separation events.

2.8.5 The valuation methodology is as follows:

- identify the benefit ultimately receivable, using separation date assumptions;
- divide from that benefit the matrimonial property proportion attributable to the pre-separation period;
- discount for the present value of early payment, and

- adjust the result for contingencies which might affect the enjoyment of the benefit.

In employer-sponsored defined contribution schemes the usual practice is to calculate a value that lies between:

- the member's resignation benefit, and
- the member's aggregate account balances, including any non-vested employer contributions.

This valuation takes into account the member's age and the likelihood of his or her remaining in the scheme until all employer contributions are vested.

Distribution mechanisms

2.8.6 When the matrimonial property component of a member's superannuation entitlements has been valued, the court determines what share should be paid to or vested in the non-member spouse. The court might decide that the superannuation component of the matrimonial property will remain entirely with the member spouse, but that the non-member spouse will receive a larger share of the other matrimonial property. Alternatively, the court might decide that at least some of the superannuation component of the parties' matrimonial property is to be allocated to the non-member spouse. In that circumstance, court orders can be worded in any number of ways. Depending on the wording, issues can arise as to the practical implementation of these orders.

2.8.7 There are broadly two alternative distribution mechanisms. The first, and still the more common, is to adopt the "clean break" principle and pay the non-member spouse a cash settlement. Particularly when a member has to make a payment with respect to contingent entitlements which are as yet unavailable, this often requires the non-member spouse to accept the value of his or her superannuation entitlement in the form of other property. The second alternative is to provide that benefits will be shared only when they ultimately become payable to

the member spouse. The effect of such an order is to give the non-member spouse a share of the member's interest in the scheme. Examples of this approach are:

- ordering, in the case of a pension-based scheme, that the non-member spouse is entitled to receive one half of the spouse's entitlement, as to both commuted lump sums and periodic pension payments, and
- ordering trustees to give the non-member spouse a separate account in the scheme.

The non-member spouse does not obtain full membership of the scheme, but is entitled only to receive benefits when the member spouse becomes eligible for benefits.

Proposals for reform

2.8.8 Proposed amendments to the Matrimonial Property Act would extend the equal sharing regime to cover the death of a spouse. The exclusion of that situation to date is an anomaly which requires costly court proceedings. The proposed amendments will also make it clear that a deceased spouse's superannuation entitlements are matrimonial property.

2.8.9 There is currently no legislative regime in New Zealand for dividing property when a de facto relationship ends. The **De Facto Relationships (Property) Bill** would provide a statutory regime where a de facto relationship (which must generally be of more than three years' duration) ends by separation or with the death of one partner. There would be a presumption of equal sharing of "core" relationship property such as the family home. Other relationship property would be divided on the basis of the partners' respective contributions to the relationship. The new regime would apply only to relationships in the nature of marriage between a man and a woman. There is ongoing debate as to whether it should also extend to same-sex relationships.

2.9 The United Kingdom

2.9.1 Occupational pensions form an important part of the income of the retired in the UK. Most occupational pension schemes provide benefits not only for their members, but also for a member's spouse upon the death of the member. The entitlement of the spouse arises from the marital link with the member. Before the **Pensions Act 1995** a spouse would usually lose all rights under the pension scheme on divorce, unless he or she was a dependant of the member when the member died. Moreover, pension rights are often unevenly distributed between men and women. This sometimes results in financial hardship, particularly since pension rights are often the most valuable asset. The law has recently been reformed to address this problem. The **Pensions Act 1995** now makes it obligatory for the court to have regard to pension rights.

2.9.2 The **Pensions Act 1995** gives the court the power to direct the trustees to pay part of the member's pension to the former spouse from the time when the member retires. The payment would cease on the member's death. Lump sums on retirement or death can also be awarded. The following criteria apply:

- Trustees may only pay earmarked benefits to a former spouse if ordered to do so by a court.
- Earmarking does not apply to a spouse's pension which would normally be payable on the member's death. This is lost to the former spouse on divorce, unless the former spouse qualifies for a dependant's pension under the rules.
- An earmarking order lapses on the remarriage of the former spouse.
- If the former spouse dies, the earmarked benefits revert to the member.
- Payment of the earmarked pension to the former spouse begins when the member retires and ends when the member dies.

- The member bears the income tax on the whole of the benefit payable from the scheme. This is because under the earmarking provisions the pension is treated as belonging to the member.

2.9.3 The Family Proceedings Rules permit trustees to ask for further information concerning an application for an order, object to it and be represented at any hearing. This is an important opportunity for trustees to resolve any difficulties or uncertainties in relation to a proposed order. Once an order has been made, the party benefitting from it must serve it on the trustees.

2.9.4 The Divorce Regulations provide that where:

- a member transfers all his or her benefits to another scheme,
- the transferring trustees notify the trustees of the receiving scheme of the court order, and
- the transferring trustees notify the former spouse of the transfer,

the court order will transfer to the receiving scheme. The transferring trustees must comply with the formal notification procedures. If they do not, the court order will not transfer and they will be left with the obligation to provide an earmarked pension but no money to pay for it. The transferring trustee must supply to the receiving trustee:

- copies of every court order and any amending order in relation to the member;
- the address and payment details of the former spouse, including any changes to those notified by the former spouse,
- if the member's earmarked benefits were transferred from an earlier scheme, any notice given by trustees of that scheme in relation to the earmarking order.

2.9.5 Notice must be given by the trustees to the former spouse where an event has occurred which is likely to result in a significant reduction in the benefits payable under the scheme. This enables the former spouse to revert to the court and ask it to make further provision for him or her.

Pension splitting on divorce : the “clean break” principle

2.9.6 This would give the court the power to divide the value of pension rights by ordering the trustees to allocate a portion of the member’s rights at the time of divorce to the former spouse, which he or she could transfer or receive as benefits in his or her own right. It is the solution which best achieve the aim of alleviating financial hardship of former spouses who lose rights on divorce. Arguably, it should also pose less of an administrative burden on trustees than earmarking. A Pension Sharing Bill was launched by the government during June 1998 and extensive consultation is taking place. The Bill is expected to become an Act in the year 2000. Under the Bill pension rights will be treated the same as any other asset so that the whole or any portion of their value can be transferred from one spouse to the other as part of the financial negotiations on divorce. Pension sharing will simply be one of many options facing divorcing couples. It will still be possible to off-set pension rights against other matrimonial assets or to use the earmarking orders under the **Pensions Act 1995**.

2.9.7 Pension sharing is far more consistent with the “clean break” principle. The problem with earmarking is that it is a parasitic right. The ex-spouse’s pension rights depend on when the member begins to draw a pension, and worst of all, the pension dies with the member. A member’s pension rights will become subject to a “debit” and the former spouse will become entitled to a “credit” equal to the amount of the debit. The amount of the debit will be a percentage of the actuarial value of the member’s pension rights accrued up to the date of the order. Provided the pension scheme is funded, the ex-spouse will be permitted to transfer his or her newly acquired rights to another scheme.

2.10 The United States

2.10.1 Most Americans are covered by employer-sponsored pension plans. For many their interest in a pension plan is often one of their most valuable assets. Whether this interest should be divided on the divorce or separation of the plan member, and how the division should be effected, are often important considerations in divorce proceedings. The division of matrimonial property is governed by domestic state law, whereas the assignment of pension rights is governed by Federal law. Pension rights may be assigned only if a competent court recognizes a former spouse's interest in a member's pension rights and makes a "qualified domestic relations order", generally referred to as a QDRO. A qualified domestic relations order recognizes the existence of an "alternate payee's" right to receive, or assigns to an alternate payee the right to receive, all or any portion of the benefits payable with respect to a participant under a pension plan.

2.10.2 A QDRO must contain the following information:

- The name and last known address of the participant and each alternate payee;
- the name of each pension plan to which the order applies;
- the dollar amount or percentage, or the method of determining the amount or percentage, of the benefit to be paid to the alternate payee; and
- the number of payments or time period to which the order applies.

2.10.3 There are certain provisions which a QDRO may not contain:

- The order may not require a plan to provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan;
- the order may not require the plan to provide for increased benefits determined on the basis of actuarial value;

- the order may not require the plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined;
- the order may not require the plan to pay benefits to an alternate payee in the form of qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse.

2.10.4 Qualified domestic relation orders are generally used either to provide support payments(temporary or permanent) to the alternate payee(who may be the spouse, former spouse or a child or other dependent of the participant)or to divide marital property in the course of dissolving a marriage. These different goals often result in different choices in drafting a QDRO.

2.10.5 One approach that is used in some orders is to “split” the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment. This approach to dividing retirement benefits is referred to as the “shared payment” approach. Under this approach, the alternate payee will not receive any payments unless the participant receives a payment or is already in pay status. This approach is often used when a support order is being drafted after a participant has already begun to receive a stream of payments from the plan, such as a life annuity. An order for shared payments, like any other QDRO, must specify the amount or percentage of the participant’s benefit payments that is assigned to the alternate payee(or the manner in which such amount or percentage is determined). It must also specify the number of payments or period to which it applies. This is particularly important in the shared payment QDRO, which must specify when the alternate payee’s right to share in the payments begins and ends.

2.10.6 Orders that seek to divide a pension as part of the marital property upon divorce or legal separation often take a different approach to dividing the retirement benefit. These orders usually divide the participant’s retirement benefit (rather than just the payments) into two separate portions with the intent of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the

participant. This approach to dividing retirement benefits is referred to as the “separate interest” approach. An order that provides for a separate interest for the alternate payee must specify the amount or percentage of the participant’s retirement benefit to be assigned to the alternate payee, or the manner in which such amount or percentage is to be determined. The order must also specify the number of payments or period to which it applies, and such orders often satisfy this requirement simply by giving the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment and the time at which the separate interest will be paid.

2.10.7 Federal law does not require the use of either approach for any specific domestic relations purpose, and it is up to the drafters of any order to determine how best to achieve the purpose for which the pension benefits are being divided. The shared payment approach and the separate interest approach can each be used for either defined benefit or defined contribution plans.

CHAPTER 3

3. Consultation

3.1 The Commission published a Discussion Paper on the Sharing Of Pension Benefits during April 1998.¹³ The proposals were in the form of a draft Bill, which is attached as Annexure A to this report. The proposals can be summarized briefly as follows:

- separate legislation should be enacted to regulate the sharing of retirement fund benefits between spouses on their divorce,
- the spouse of a member of a retirement fund should, on the divorce of the member and the said spouse, acquire a right to share in the member's retirement fund benefits when those benefits become payable,
- a partner in a marriage relationship entered in accordance with customary law or a recognized religion should, for purposes of the proposed legislation, be regarded as a spouse,¹⁴
- a non-member spouse's share of the retirement fund benefits should be paid direct from the member's fund by way of deferred retirement benefits (the rules operating in respect of the member's retirement fund benefits must, in so far as they can be applied, also be applicable in respect of the non-member's share of the said benefits),
- the formulae for determining the non-member spouse's share of the member's retirement fund benefits in respect of the various types of retirement schemes, and

¹³ Discussion Paper No 77

¹⁴ At the time of the publication of the Discussion Paper, the Recognition Of Customary Marriages Act, 1998 had not yet been passed by parliament.

the various categories of benefits provided for, should be clearly set out in the proposed legislation,

- the division of retirement fund benefits on divorce should not be dependant upon the matrimonial property system which applies to the marriage of the spouses, and
- the proposed legislation should not have retrospective effect, but spouses falling outside the ambit of the proposed legislation should be able to make the provisions thereof applicable to their marriage by agreement between them.

3.2 The proposed Bill was drafted in close consultation with representatives of the Institute of Retirement Funds, The Life Offices Association and the Actuarial Society of South Africa. The said representatives, together with the research officer of the Commission, formed an informal workgroup which met on several occasions. A representative of the South African Revenue Services was also included in the workgroup from time to time. The workgroup also tried to involve a representative of Cosatu but, although the documentation was send to him he did not find it possible to attend the workgroup's meetings.

3.3 The Discussion Paper was published for general information and comment . The availability thereof was made known by means of a media announcement. Ample time was allowed for the submission of comment. The comments received are summarized below.

3.4 Adv Vuyani Ngalwana

3.4.1 Adv Ngalwana is a member of the Cape Bar. He is also an associate member of the Pension Lawyers Association of South Africa.

3.4.2 Adv Ngalwana argues that the definitions of "marriage" and "spouse" in the Bill are in conflict with the Constitution because they exclude same-sex marriages and thus discriminate unfairly against members of such relationships.

3.4.3 Clause 3(1) of the Bill envisages that the member's equishare in a money-purchase scheme is to be divided equally between the member and the non-member spouse on their divorce before the maturity of the member's benefits. The member's equishare could, however, include employer's contributions that have not vested at the time of the divorce. Such contributions, and investment returns thereon, are usually not available to a member on his or her withdrawal from the fund by reason of resignation or dismissal. Clause 3(1) of the Bill ought therefore to be qualified so as to ensure that the non-member spouse does not become entitled to benefits to which the member would not have been entitled in the event of his or her withdrawal from the fund before the vesting of those benefits.

3.4.4 Adv Ngalwana is further of the opinion that clause 3(3) of the Bill has the effect of giving the non-member spouse "membership-by-ambush" of the member's retirement fund and that this flies in the face of the requirements for approval of a fund for tax purposes, namely an employer-employee relationship. He is also of the view that the transfer of the non-member spouse's share to another fund, as provided for in the Bill, will have tax implications since such transfers are not covered by the Income Tax Act.

3.4.5 The duties placed on an administrator of a fund in terms of clause 3(2) and (4) should rest on the fund itself, which is a *persona iuris*.

3.4.6 Clause 4(1)(b) read with clause 4(2) of the Bill provides that the non-member spouse shall, in the case of a benefit that becomes payable to the member in terms of the rules of the fund in circumstances other than the resignation, dismissal or the winding up of the fund, be entitled to a benefit calculated in accordance with a prescribed formula. The benefits in question would include retirement benefits, disability benefits and death benefits. Not all retirement funds provide for "risk benefits" (death and disability cover). Such benefits are often provided for separately by way of life assurance or a separate disability scheme. However, no one is *entitled* to a death benefit. The trustees of a fund have a discretion to who among the deceased member's dependants and nominees should receive a death benefit and what the amount of such benefit should be. The trustees may in their discretion award all the death benefits to a dependant child of the deceased member and no benefit at all to a surviving spouse. Furthermore, whatever death

benefit may be awarded to a surviving spouse he or she is not entitled to within the first twelve months of the death of the member. This provision ensures that sufficient time is allowed for the tracing of all possible dependants or nominees of the deceased member.

3.4.7 In Adv Ngalwana's view the provisions of the Bill in general are in conflict with the principle underlying retirement funds, namely to provide retirement benefits for members of those funds. In his opinion it is not necessary to introduce entirely separate legislation to govern the division of retirement benefits between spouses on their divorce. All that is needed is to make provision that any amount to which the non-member spouse is entitled in terms of the existing provisions shall bear interest at the prescribed rate if not paid at the time of the divorce.

3.5 The Institute Of Retirement Funds Of South Africa

3.5.1 The current dispensation determining the rights and entitlements of divorcing members and their spouses is not satisfactory. Apart from the practical difficulties and anomalies created by the wording of the Divorce Amendment Act of 1989, the Act is based on an interim solution and not on a satisfactory long term solution to the problem. The new draft is an attempt to formulate a long term solution. Although the main concept embodied in the draft has successfully been implemented elsewhere, one should be mindful of the fact that it is difficult to superimpose such a new concept on a well-developed retirement fund industry such as our own. The implementation of the new dispensation will require a number of administrative adjustments with cost implications. The maintenance of the new dispensation will also require the keeping of additional exact data which will place upward pressure on the administration costs of retirement funds.

3.5.2 Apart from the inevitable complexity which will be created, the new dispensation appears to be workable on the whole. The most difficult aspect, to which the Institute is not at this stage able to recommend any single satisfactory solution, is the exact basis upon which the member and the non-member spouse's benefits should be defined for purposes of the Act. One will have to choose between two alternatives. One alternative is an accurate but costly method which identifies with sufficient detail not only all monthly contributions, but also any lump sum

injection, especially amounts transferred from other funds, together with the investment returns thereon, before and after the date of the marriage. The other alternative, which will be less accurate, is to determine an average according to years of membership, with an appropriate arrangement relating to lump sum payments and transfers.

3.5.3 As regards the application of the proposed provisions also in respect of cohabitation agreements and so called same sex marriages, the Institute is of the opinion that this is a matter which ought to be dealt with properly as part of the matrimonial property law and until such time as such general reform measures are adopted in our law the existing position should remain unchanged.

3.5.4 The Institute has suggested a number of changes to some of the definitions in clause 1 of the Bill. These changes appear to be necessary and have been adopted.

3.5.5 The following comment was made in connection with clause 3(1) of the Bill:

Paragraph 4.1.6.2 (of the Discussion Paper) read with section 3(1) require fund administrators to be able to determine, with a great deal of accuracy, the contributions made in respect of any member during any period, together with investment returns thereon. The following concerns should be dealt with:

- (a) Many administrators will not be able to produce these numbers with regard to past transactions.
- (b) Secondly, section 3(1), if implemented, will require administrators to maintain a very laborious and costly operating system which may not be in the interest of members on a cost-benefit analysis.
- (c) The formulation focuses on total contributions and does not take into account the amounts deducted in respect of risk benefits and administration costs. In the current climate of greater benefit flexibility and cafeteria arrangements the numbers arrived at will be very inaccurate.

The most obvious solution (especially in regard to the third point) appears to be a simple pro rata calculation, i.e. divide the total amount accumulated for retirement benefits into the relevant number of years of membership requiring recurrent contributions- without reference to the amounts paid during any particular period. More than one marriage, transfers to one or more

funds or lump sum injection will, however, frustrate the aim of this simplistic pro rata apportionment of the benefit. If forced to choose between imperfect solutions, many of the objections to such a pro rata apportionment can be overcome by providing for the total period of membership (including “transferred membership”) to be reduced by one half of the period of marriage in respect of which benefits have been paid to a non-member spouse or transferred to another fund for a non-member spouses. As argued above, in the case of defined benefit funds, benefits resulting from lump sum contributions should not be divided with reference to the length of periods. Such benefits should rather be divided into two equal parts in favor of the member and the non-member to whom the member was married at the time of the making of the order.

3.5.6 In clause 4(1)(a) symbol B needs to be reduced by one half of the period of marriage in respect of which benefits have been paid to a non-member spouse or transferred to another fund for the non-member spouse. Again, in clause 4(1)(b) symbol B must be reduced as outlined above. It is possible in principle for a non-member spouse to become entitled to both a retirement as well as a death benefit after the date of the divorce. It is suggested that a proviso be inserted to deal with such a situation. This section will also be problematic in the sense that the non-member spouse may become entitled to a proportion of any benefit payable to a child. Once again, a proviso should be inserted to deal with such an eventuality. In terms of current practice, children’s pension and surviving spouse’s pension compete for the same available cash held by the fund, unless the children’s pensions are fully insured. No complete solution to the problem appears possible.

3.5.7 Section 4(2) belongs under section 5 and should be incorporated there as section 5(2). The intention with this clause is to make sure that, in relation to a member who is retired at the date of the divorce, the non-member spouse will also be entitled to 50% of the benefit payable at his death, such as the survivor portion of a joint and survivor annuity. In the case of members not yet retired, this is dealt with by splitting the actuarial liability. It seems that the actuarial liability in respect of a member should be expressed as “the fund’s actuarial liability in respect of a member (including the fund’s actuarial liability in respect of non-member spouses resulting from members’ membership)”.

3.5.8 A new section 4(2) should be considered, providing as follows:

At any time after a member, if he were to retire, would become entitled to a retirement benefit from a fund, the non-member spouse in respect of whom an order was made in accordance with subsection (1) may request in writing to the fund that his or her share of the retirement fund benefits be transferred to another retirement fund for his or her benefit. In this event the transfer value will be determined in accordance with section 4(1)(b), but factor C will be the actuarial liability of the fund in respect of the member on the date of the non-member's written request, as calculated by the actuary of the fund concerned.

This new subclause is considered necessary to give the non-member spouse some control over his or her retirement planning. Without it, he or she will have to wait until the member actually retires before any retirement benefits can be paid. But the noble objectives of such a measure will create complications which the retirement fund industry may not be able to administer. It will also increase some fund's and employers' liabilities., because the death benefits of those who may already retire may be less in value than the retirement benefit. The introduction or not of such a measure will have to be debated further with the retirement fund industry.

3.5.9 In clause 4(4) one should consider the appropriateness of making provision for the payment of the non-member spouse's share at the date of his or her death, rather than the arrangement in terms of which his or her estate must wait until a benefit accrues to the member. To achieve this, the last line from "when" should be deleted and replaced with the following:

The claim shall be calculated in accordance with subsection 4(1)(b), where factor C will be the actuarial liability of the fund in respect of the member on the date of death of the non-member spouse, calculated by the actuary of the fund concerned.

This measure will, however, also create complications which the retirement fund industry may not be able to administer, and may increase funds' liabilities to an extent deemed unacceptable. Its introduction or not will have to be debated further with the industry. The reasons for the objections to the new section 4(2) apply here as well. One has to remember that a part of the actuarial value as at the date of death of the non-member will often be inferior to the discounted value of what he or she would have been entitled to at the retirement of the member. Symbols A and B requires different meanings, depending on whether the benefits were accumulated under

a defined benefit or defined contribution fund. It seems that a special formula should apply to benefits purchased with lump sums.

3.5.10 With regard to clause 8, it seems that the proposed Act will apply notwithstanding the entire Pension Funds Act, 1956, other laws that establish particular retirement funds and rules of retirement funds. It should, however, be made sure that sections 37(A),(B),(C) and (D) of the Pensions Fund Act, 1956 will apply to a non-member spouse's share as if he or she is the member.

3.5.11 Specific provision need to be made for existing housing loans and securities and divorce orders vis-a vis a non-member spouse's claim on the splitting of retirement fund benefits at divorce, after the new act came into operation. Measures should be introduced to ensure that any existing security or housing loan will take precedence *pari passu* in date order. Non-members will become quasi members of the fund and will have to be taken into account in respect of all member communications as well as member election exercises. A specific provision should be considered whereby the benefits of members and beneficiaries other than non-member spouses are reduced in proportion to the sharing in those benefits by non-member spouses.

3.6 The Law Society of the Cape of Good Hope

3.6.1 At the request of the Law Society of the Cape Of Good Hope a committee of attorneys practising in and around Cape Town compiled the following comments on the Commission's proposals:

3.6.2 Section 7(7) of the Divorce Act provides that pension benefits are to be taken into account in determining the patrimonial benefits to which the parties to a divorce action are entitled. Accordingly, pension benefits should be treated in the same manner as any other asset in the parties' estates when determining the parties' respective rights. In other words, the parties' entitlement in respect of pension benefits should be determined by the parties' matrimonial regime, in the same manner as the parties' other assets.

3.6.3 Subsection 7(7)(c) specially provides that in determining the patrimonial benefits to which the parties are entitled, pension benefits will not be taken into account in respect of a marriage out of community of property entered into after 1 November 1984 where the accrual system is excluded.

3.6.4 It should be made clear that, except in the case of a community marriage or where the basis on which the accrual is to be shared warrants it, there should be no equal sharing of the pension benefits.

3.6.5 The committee is of the view that the discretion of the court, when ordering a redistribution or a division and/or forfeiture, should not be effected by proposed legislation, nor should the parties' right to decide how they wish to deal with their assets be determined by the legislature.

3.6.6 The committee suggest that new legislation should include directions as to how the member of a pension fund may exercise any election he or she may have in respect of pension benefits. For example, in terms of the rules of a pension fund the members may be entitled to elect to receive only a portion of the pension benefit by way of a capital sum and the remainder by way of monthly pension payments, without the non-member being entitled to object.

3.6.7 The committee suggests that new legislation should prescribe whether or not pension benefits accrue to a member on withdrawal from a particular fund or whether the member is entitled to re-invest such in a new fund so that the non-member would only receive his or her share when the member actually receives the benefits.

3.6.8 The committee suggests that new legislation should provide that only the portion of the pension benefit which the member actually receives accrues to the member for tax purposes.

3.6.9 The committee suggests that various definitions contained in the proposed Bill require clarification.

- (a) “divorce” - What is a marriage in accordance with religious law?
- (b) “marriage” - What is a union or relationship in accordance with “any recognized religion”? Who should recognize the religion? Would any obscure belief be regarded as a religion?
- (c) “matured” - This should be extended to include resignation, dismissal or termination of services.

3.6.10 The committee suggests that section 3(1)(a) of the proposed Act be qualified with the words “until the date of the divorce”.

3.6.11 The committee suggests that section 3(1)(b) should make it clear that the net investment returns allocated or to be allocated in respect of those contributions up to the date of divorce should be those allocated from the date of the marriage.

3.6.12 It is suggested that payment of interest accruing to the portion due to the non-member from the date of divorce to the date of payment should be addressed. The committee is of the view that the non-member’s interest is severely prejudiced if his or her benefit is frozen at the date of divorce. It is suggested that the Pension Fund Rules should be amended to provide that the non-member could receive his or her share of the pension benefit at the date of the divorce.

3.6.13 An anomaly will be created if the sharing of pension interest, which is a consequence of marriage, be applied to relationships not formally recognized in civil law. Until such time as *de facto* marriages are recognized in other respects, pension sharing should not be contemplated in respect of such relationships.

3.6.14 The consequences resulting from the shortfall in the event of the parties’ liabilities exceeding their assets, should be dealt with in accordance with the present practice, i.e. the

shortfall should be divided proportionately in accordance with the divorce Act and, in the event of non-payment, a member who has paid more than his or her proportionate share should be entitled to a recourse against the other member. If this is not allowed and pension is divided equally, the committee is of the opinion the non-member's right of recourse is taken away.

3.6.15 The committee is of the opinion that the proposal regarding the determination of the value of pension interest as well as compensating assets in place of the share of pension interest, appears to be a sound one as does the proposal that the pension administrator set up a separate account for the non-member from which he or she will receive payment directly from the fund.

3.7 The Law Society of South Africa

3.7.1 The Law Society supports the proposals of the Commission, but wishes to make the following comments:

3.7.2 The proposed legislation should not contain any restrictions which may limit or inhibit the exercise of a court's discretion in ordering either a redistribution or division or for failure of patrimonial benefits.

3.7.3 Insofar as pension/provident fund benefits are concerned, the Society agrees that the value thereof for purposes of sharing or forfeiture or redistribution should be calculated from the date of the marriage to the date of the divorce.

3.7.4 It is suggested that the proposed legislation should make provision to the effect that, regardless of whether the member elects to receive the maximum percentage payable in a lump sum or whether he or she elects to re-invest for the purposes of receiving a larger annual or monthly pension, the amount the member would have been entitled to receive if he or she had elected to take the maximum cash payment is the amount to be taken into account in the calculation of the non-member's share.

3.7.5 The vast majority of people who have married in community of property, and a significant number of people who have married with antenuptial contract excluding the accrual system, are not aware of the potential benefits that may have been due to a non-member of a pension or provident fund. It is therefore recommended that, regardless of the matrimonial property regime applicable to parties in a divorce action, the provisions relating to pension sharing should be applicable, save where the parties have excluded pension sharing in their antenuptial contract.

3.7.6 Section 11 of the proposed legislation would appear to be draconian- it would seem to exclude a benefit that may be applicable in the distribution or redistribution of assets which would normally be taken into consideration on divorce. If this is not the intention of the legislature, the section should be worded with more clarity.

3.7.7 The Society is in agreement with the principle of the Bill, but questions the wisdom of including “divorces” arising from unregistered marriages. Such marriages and such divorces do not have the sanction of the State.

3.7.8 The intention of the Bill is that the sharing of retirement fund benefits on divorce will not be dependent upon the matrimonial property system. However, marriages contracted between 1984 and the introduction of the new Act are expressly excluded. Whilst legislation should not be retrospective, it is thought that the Bill should apply to all marriages regardless of the regime.

3.8 Tswaranang Legal Advocacy Centre to End Violence Against Women

3.8.1 Tswaranang commends the Commission on the initiative taken to address problems encountered with the current system of sharing of pension benefits on the dissolution of marriages. The Bill is a progressive step forward in its deeming of the legal consequences of the various matrimonial dispensations irrelevant in determining whether or not a person is entitled to share in a partner’s pension benefits when the marriage is dissolved. By making pension sharing

possible, a woman who is not economically active and consequently not in a position to acquire her own pension scheme, is protected from being left destitute by her partner when the marriage is dissolved. However, Tswaranang is concerned that the ambit of relationships which can benefit from this new scheme is limited to traditional families. Relationships other than formal marriages, such as cohabitation relationships and same-sex relationships, have been excluded from this scheme. Tswaranang recommends that the scope and ambit of the Bill should be broadened to include these relationships so as to ensure the constitutionality of the Bill and to protect those who are most needy of protection.

3.8.2 Tswaranang recommends various amendments to the Bill, all aimed at extending the provisions of the Bill to partners in cohabitation and same-sex relationships. It is thus suggested that the definition of “divorce” should be replaced by a definition of “dissolution of the marriage” which is defined to include “the dissolution of a relationship of marriage by an order of court or in accordance with recognized customary or religious law and the dissolution of a relationship of cohabitation by agreement between the parties.”

3.8.3 The definition of “marriage” is to be replaced by a definition of “relationship” which should include “a relationship between people of opposite and same sex living together as husband and wife in a relationship of cohabitation”

3.8.4 It is further suggested that the definition of “non-member spouse” should be replaced by a definition of “member’s partner”.

3.9 National Coalition for Gay And Lesbian Equality

3.9.1 The Coalition is a voluntary association of more than 74 lesbian, gay, bisexual and transgendered organizations in South Africa. The Coalition is mandated to work for legal and social equality for its members.

3.9.2 The Commission is urged to take cognisance of the diverse range of family relationships and structures within South Africa, including heterosexual couples, same-sex partnerships, polygamous marriages, and domestic partnerships between siblings such as two unmarried sisters living together and who owe each other a mutual obligation of support. The Commission's attention is drawn to the decision in *Fraser v Children's court of Pretoria North* 1997 (2)SA 261 where it is stated that family law can no longer be based on simplistic distinctions between married and unmarried people because in modern society stable relationships between unmarried parents are no longer exceptional. Attention is further drawn to the decision in *Harksen v Lane NO and others* 1998(1)SA300(CC) where the majority of the court expressed the view that discrimination on the basis of marital status touches the essential dignity and worth of the individual.

3.9.3 The Coalition endorses the view that the criteria for any relationship, married or unmarried, should take into account the personal and proprietary consequences of any relationship, be they married or unmarried, heterosexual or same-sex. There can be little doubt that the framers of the Constitution aimed to recognize the worth and dignity of all human relationships based on freedom, equality and dignity.

3.9.4 Family law has traditionally failed to keep pace with changing social realities. The failure to recognize and support other than conventional marriages has created substantial uncertainty regarding the rights and obligations of individuals in non-conventional relationships. The exclusion of gays and lesbians from marriage and the absence of legally recognized alternatives has left many couples unable to define their relationships as they choose and has led to unfair treatment. Such exclusions clearly constitute discrimination on the grounds of both sexual orientation and marital status.

3.9.5 Apart from fulfilling constitutional obligations, the inclusion of same-sex couples in the proposed legislation will guide the State and all and all providers of pension schemes in promoting diversity and tolerance in society because it eliminates unfair discrimination which contributes to general social conflict. The State has a legitimate interest in developing pension sharing in a just, fair and equitable manner among diverse family relationships including lesbian

and gay families, because such a policy will ensure that the overburdened social security and assistance programs would reach poorer families in all their diversities.

3.10 Professor J C Sonnekus of the Rand Afrikaans University

3.10.1 Professor Sonnekus approves the approach that pension sharing ought to be regulated by separate legislation and not merely by way of a few obscure provisions in the Divorce Act. He also approves the approach of discarding the idea whereby pension interests were in the past merely regarded as forms of assets in respect of which the ordinary rules relating to matrimonial property apply. The new approach of dividing or splitting pension benefits is in his view the correct one. It is in accordance with the objectives of pension schemes and pension expectations.

3.10.2 A criticism leveled at the Bill by professor Sonnekus is that it does not make provision for compulsory pension preservation. He lays stress on the disadvantages of the present practice in terms whereof accumulated pension benefits (or at least part of such benefits) are available to a member on the termination of employment or membership of the fund. Such benefits are often wasted instead of applying them for retirement purposes. Legislative intervention in this regard is in his opinion urgently required.

3.10.3 Professor Sonnekus is opposed to the idea embodied in clause 2(2) of the Bill that spouses may in their antenuptial contract exclude the sharing of pension benefits between them in the event of their divorce.

3.10.4 If polygamous marriages are recognized for purposes of pension sharing, the formulae provided for on the Bill will have to be adapted. Professor Sonnkus agrees that same-sex relationships should not at this stage be recognized for purposes of pension sharing.

3.10.5 The events upon which a pension becomes payable should not in respect of a non-member spouse be linked to those events in respect of the member. Once a division or splitting

of benefits has been effected, the entitlement of the non-member spouse to any benefit must be determined in terms of the rules of the fund irrespective of any option exercisable by the member.

3.11 Steve Wright, Senior Director, Legal Services, Alexander Forbes

3.11.1 Mr Wright views the Bill as a first draft which needs refinement. In his view the limited membership of the non-member spouse of the member's retirement fund after a splitting of benefits has been effected, will create problems and uncertainties. He also points out that the Bill does not make provision for multiple spouses of a member nor does it recognize same-sex partners.

3.11.2 In Mr Wright's view, the Bill seems to be far more complex than the existing law and it will create a feeding ground for dispute and litigation. It should be seen as starting point for discussion rather than a finished product.

3.12 I R F Seminars

3.12.1 Kobus Hanekom, Senior Manager, E B Legal Consultancy and member of the informal work group, took the initiative to organize two seminars on the splitting of pension benefits on divorce. The seminars were sponsored by the Institute Of Retirement Funds and were held at Johannesburg on 10 November 1998 and at Cape Town on 11 November 1998. Each seminar was attended by some 30 persons, mostly lawyers and other persons practising in the retirement fund industry.

3.12.2 Although divergent views were expressed at the seminars, the majority of attendants at the Johannesburg seminar appeared to find the proposed legislation too complex and called for its simplification. They suggested that improvements should rather be effected to the existing law than to introduce an entirely new law. They suggested that the clean break on divorce principle should be promoted as far as possible. Many were also opposed to the idea of separating retirement fund benefits from other matrimonial property. They were of the view that many of the perceived "unfair" provisions of the existing law could be avoided by adequate

division of matrimonial property. There were, however, also those who supported the proposed legislation.

3.12.3 The attendants at the Cape Town seminar were generally more in favor of the proposed Bill, although most of them also had difficulty with the complexity of the new provisions. It was, however, conceded that an equitable division of pension benefits does not lend itself to simple legislation. As one attendant remarked, *“Good legislation should be based on principle rather than expediency. One should strive for ways and means of overcoming the problems and arguments relating to administration costs, rather than deviate from the principle.”*

3.13 Further deliberations

3.13.1 In view of all the comments received and the views expressed at the seminars, the Bill was redrafted. It was again considered by the informal work group referred to above. The Bill was further refined and eventually approved by all the members of the work group.

CHAPTER 4

4. Conclusions and recommendations

4.1 The Commission remains of the view that it is desirable to make provision for the division of retirement fund benefits in specific legislation, separate from the present property provisions of the Divorce Act, 1959. The Commission strives to achieve an equitable division of retirement fund benefits accumulated during the subsistence of a marriage. In principle each spouse should have a right to share in the retirement fund benefits which have accumulated in respect of the other spouse during the subsistence of the marriage and this principle ought to be embodied in the proposed legislation. Spouses should nevertheless remain free to exclude this right contractually or to limit its application or to waive the right. These broad outlines or objectives are stated in clause 2(1), (2) and (3) of the proposed Bill.

4.2 The existing provisions for the division of pension benefits approach the matter from the premise that pension rights are matrimonial assets which ought to be divided between spouses in accordance with the matrimonial property dispensation applicable to the marriage. Since pension rights are, however, often dependant upon contingencies and are not always realizable at the time of a divorce, the division of these benefits is effected by way of the exchange of other assets in lieu of the pension rights. Only where this is not possible, provision is made for the payment of the non-member spouse's share out of the proceeds of the retirement fund benefits when the benefits become payable, and the obligation is placed on the fund concerned to make the payment. In the Commission's view, this approach does not give proper expression to the underlying purpose of pension schemes, namely to make provision for one's old age, nor does it always result in the equitable division of pension rights on the divorce of spouses. The Commission proposes a scheme whereby the retirement fund benefits as such are divided, either at the time of the divorce, or at a future date or the occurrence of some future event determined by the rules of the fund. Spouses should, however, remain free to exchange other assets in lieu of a right to retirement fund benefits. This is Provided for in clause 2(4) of the proposed Bill.

4.3 Although the formulae proposed by the Commission for the division of the various types of retirement fund benefits between spouses on their divorce are aimed at achieving equitable results, it is perhaps possible that the personal circumstances of spouses might necessitate departure from the said formulae in certain respects. For this reason spouses are permitted to agree in writing to share retirement fund benefits in a proportion different from that which is prescribed by the Act.

4.4 It is appreciated that there may be instances where the information which is necessary for the application of the formulae prescribed by the Act will not be available. It is therefore deemed necessary to provide that in such circumstances use may be made of approximate figures, having regard to the objectives of the Act.

4.5 One of the main objections to the legislation proposed by the Commission is that it is too complicated and that even lawyers and others involved in the pension industry would find it difficult to understand and to apply the proposed provisions. It is notable that similar objections have been raised against similar legislation that have recently been introduced in some of the jurisdictions referred to in the comparative survey summarized in Chapter 3 above. The fact of the matter is that the equitable division of unmatured retirement fund benefits is not always a simple matter that lends itself to uncomplicated legislation. The choice lies between, on the one hand, detailed and relatively complex provisions to achieve the objective of a fair and equitable division of benefits in the event of the divorce of spouses, and on the other hand, more simple and straightforward provisions which would, however, often fall short of the desired aim. The Commission has opted for the first choice. It should be noted that this is also the direction taken by most of the countries covered in the comparative study.

4.6 The basis of the proposed legislation is that retirement fund benefits accumulated in respect of a member of a retirement fund during the member's marriage, ought to be shared equally between the member and his or her spouse in the event of their divorce.

4.7 It is necessary to distinguish between matured and unmatured benefits and between benefits in a defined contribution scheme and benefits in a defined benefit scheme. By matured

benefits is meant that the retirement date or other payment event in respect of the member of a retirement fund has already arrived, and unmatured benefits are benefits in respect of which such event lies in the future. Defined contribution schemes, also referred to as money purchase schemes, are schemes in respect of which the benefits payable are dependant mainly on contributions made to the retirement fund by or on behalf of the member of the fund and on investment returns on such contributions. Defined benefit schemes are schemes where the benefits are dependant not merely on contributions by the member and the employer, but also on length of service and salary levels of the member.

4.8 The division of benefits in a defined contribution scheme is a relatively simple exercise because the value of the benefits are readily ascertainable at any time. It is also a simple exercise to split the benefits at the time of the divorce of the spouses into the shares to which each spouse is entitled. In order to effect a clean break between the spouses, it is proposed that the spouses' shares should be separated and the non-member spouse's share should either be retained by the member's retirement fund in a separate account or should be transferred to another retirement fund for the benefit of the non-member spouse. The transfer of the benefits would, however, be subject to the rules of the fund in respect of the vestment of benefits. What is important to bear in mind, is that the non-member spouse's share of the benefits will not be available to him or her as a cash benefit, but only as a deferred pension, payable on the retirement events prescribed by the rules of the fund. In the event of the death of the non-member spouse before his or her share of the benefits become payable, the fund must pay to the estate of the deceased non-member spouse the amount which would have been available for transfer to another fund at the date of the death of the non-member spouse.

4.9 In the case of retirement fund benefits embodied in a defined benefit scheme, the division of benefits between spouses become somewhat more complicated because there are several contingencies which may play a role.

4.9.1 An unmatured defined benefits scheme has no cash value, other than the withdrawal value in the event of the member leaving the service of his or her employer before reaching the retirement age. In terms of the existing legislation all that the non-member spouse

is entitled to is a share of the withdrawal value of the member's benefits, which in most cases is a very insignificant amount.

4.9.2 In terms of the proposed legislation the non-member spouse has a right to a share of the member's retirement fund benefits on the date when those benefits become payable in terms of the rules of the fund concerned. The non-member spouse's share is based on the duration of the marriage, but salary increases of the member and improvement of benefits are taken into account in favor of the non-member spouse. The formula in clause 4(1) of the proposed Bill is not really as intricate as it appears on the face of it. It is designed to cover all the contingencies that may have to be taken into account but all the factors would not necessarily figure in each and every instance where a non-member spouse's share of the benefits have to be determined.

4.9.3 Clause 4(3) of the proposed Bill deals with the situation where the non-member spouse dies before the member's retirement fund benefits become payable. It was initially proposed that the amount which falls into the estate of the deceased non-member spouse should also be determined at the date when the benefits become payable. This would, however, necessitate a delay in the finalization of the estate of the deceased non-member spouse. It is therefore proposed that a cash value representing the value of the withdrawal benefit at the date of the death of the non-member spouse should be paid to the deceased's estate.

4.9.4 If the divorce takes place when retirement fund benefits are already payable or being paid to the member, the non-member spouse becomes entitled to a share of those benefits based on the duration of the marriage and, in the case of a polygamous marriage, on the number of spouses who have to share those benefits. The non-member spouse's share is payable to him or her direct from the fund.

4.10 The Commission has been urged to extend the proposed legislation so as to cover relationships in the nature of marriage which are at present not recognized as marriages. It was also endeavored to persuade the Commission that a failure to apply the proposed provisions also to same-sex relationships would render the legislation unconstitutional on the ground of unfair discrimination on grounds of sexual orientation.

4.10.1 The Commission is, however, of the view that the sharing of retirement fund benefits between spouses on their divorce should for the present be limited to spouses recognized as such in terms of existing law. The Commission is engaged in projects under which the review of the Marriage Act, 1961, the recognition of religious marriages, the legal consequences of cohabitation and similar relationships are being investigated and considered.

4.10.2 Very recently customary marriages have, at the initiative of the Commission, become recognized as marriages in terms of the Recognition Of Customary Marriages Act, 1998. Such marriages would therefore fall within the ambit of the proposed provisions. Further developments in the field of family law might extend the pension sharing provisions to other types of relationships in the near future.

4.11 As appears from Chapter 3 above, one of the main objections to the Commission's proposals is that the division of retirement fund benefits on the basis proposed by the Commission would involve retirement funds in a great deal of administration which in turn would bring about extra costs.

4.11.1 It is appreciated that the proposed provisions will require retirement funds to keep certain records in the event of the divorce of a member and in some instances to open accounts in respect of non-members. There are also matters such as notices to and correspondence with non-members. It seems inevitable that certain costs will have to be absorbed by retirement funds. There are, however, other costs that could be attributed to the member or the non-member spouse. Provision is made in clause 7 of the proposed Bill for regulations prescribing, inter alia, the costs that may be recovered from the member or the non-member spouse.

4.11.2 It is submitted that with the aid of modern technology the extra administration and costs would not be an excessive burden upon retirement funds. In so far as administration and costs are, however, unavoidable, it is the price that have to be paid for a better and more equitable system for the division of retirement fund benefits between spouses in the event of the breakdown of their marriages.

4.12 In the working paper published by the Commission the view was expressed that the rules of the matrimonial property law are unsuitable for the equitable division of retirement fund benefits between spouses on their divorce and the reasons upon which this view was based were set out in the working paper. Most of the respondents who reacted to the Commission's proposals supported this view. There were, however, also those who were of the opinion that it would be much simpler to treat retirement fund benefits simply as matrimonial property and let the applicable property system take care of the division of the assets of the spouses. The Commission remains convinced that the only manner in which retirement fund benefits can be shared equitably between spouses in the event of their divorce is to separate such benefits from the other assets of the spouses and to make provision for the sharing of those benefits on the basis of the duration of the marriage as provided for in the proposed Bill. For this reason it is recommended that section 7(7) of the Divorce Act, 1979 (which provides that in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets) should be repealed. As consequential amendments the definitions of "pension fund", "pension interest" and "rules" in section 1 of the Act, the rest of section 7(7) and section 7(8) of the Act should also be deleted. This is provided for in clause 9 of the proposed Bill. Furthermore it is necessary that it should be explicitly provided that retirement fund benefits do not form part of the joint estate of spouses married in community of property and are also excluded from the accrual of the estate of a spouses who are married in accordance with the accrual system. This is provided for in clauses 8 and 11 of the proposed Bill.

4.13 The Commission also makes the following recommendations:

4.13.1 It is recommended that the proposed provisions should be applicable to spouses whose marriages are dissolved by divorce or annulment after the commencement of the proposed legislation. Where divorce action or annulment proceedings have been instituted before the commencement of the proposed provisions the law applicable before such commencement should apply.

4.13.2 It is recommended that the provisions of the proposed legislation should not be applicable in respect of spouses who married before the commencement of those provisions if they have effected the complete separation of their property by way of an antenuptial contract which excludes community of property and of profit and loss and the accrual system. Such spouses should nevertheless have the option of making the said provisions applicable to them by written agreement. Spouses who marry after the commencement of the proposed legislation and who wish to effect a complete separation of their property and also to exclude the sharing of retirement fund benefits between them as contemplated in the proposed legislation will have to embody a specific exclusion to this effect in their antenuptial contract.

4.13.3 It should be noted that spouses who married after the Commencement of the Matrimonial Property Act, 1984(1November 1984), and who have excluded community of property and of profit and loss and the accrual system are also excluded from pension sharing under the existing law. In fact, no sharing of any assets take place between them on their divorce. This matrimonial system is deliberately chosen by many elderly people who marry for a second or subsequent time and where both spouses have sufficient means of their own. It is submitted that there is no need to extend the provisions of the proposed legislation to such spouses, unless they do so contractually.

4.13.4 In respect of spouses who married out of community of property and of profit and loss before 1 November 1984 the court granting a divorce has the power to order that assets be transferred from one spouse to the other in narrowly defined circumstances. Such an order may only be made on the application of one of the parties and in the absence of agreement between the parties regarding the division of their assets. The court must furthermore be satisfied that it will be equitable and just to make such order by reason of the fact that the party in whose favor the order is made has contributed directly or indirectly to the maintenance or increase of the estate of the other party during the marriage. The court must take into account the extent of the contribution made by such party, the means and obligations of the parties, any donation made by one party to the other during the marriage or which is still owing in terms of the antenuptial contract, any order granted by the court in respect of the forfeiture of patrimonial benefits, and any other factor which in the opinion of the court should be taken into account. It is submitted

that the entitlement of a party to retirement fund benefits under a retirement scheme would be a factor which must be taken into account. It therefore seems unnecessary to treat the marriages under discussion differently from those referred to in paragraph 4.13.3 above.

4.13.5 The Commission's recommendations for the reform of the law relating to the division of retirement fund benefits on divorce are embodied in the Bill which forms Annexure B of this report.

ANNEXURE A

REPUBLIC OF SOUTH AFRICA

DIVISION OF RETIREMENT FUND BENEFITS ON DIVORCE ACT

(As introduced)

(MINISTER OF)

[B - 98]

REPUBLIEK VAN SUID-AFRIKA

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To provide for the division of retirement fund benefits on the divorce of spouses; and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

- 1.** In this Act, unless the context otherwise indicates—
- (i) "beneficiary" means a person who is entitled or may become entitled to receive benefits from a retirement fund on the death of a member in terms of the rules of the fund;
 - (ii) "defined benefit scheme" in relation to a retirement fund means a scheme which is not a defined contribution scheme;
 - (iii) "defined contribution scheme" in relation to a retirement fund means a scheme under which the retirement benefits payable thereunder are based solely on—
 - (a) contributions made by or for the benefit of a member;

- (b) investment returns on such contributions; and
 - (c) any surplus allocated to a member;
- (iv) "divorce" includes the dissolution of a marriage in accordance with recognised customary or religious law;
- (v) "marriage" includes a union or relationship between a man and a woman that is recognised as a marriage in accordance with customary law or any recognised religion;
- (vi) "matured" in relation to retirement fund benefits means benefits that, at the date of divorce, have become payable to a member on his or her retirement or permanent disability in terms of the rules of the fund;
- (vii) "member" means a member of a retirement fund;
- (viii) "non-member spouse" means the spouse of a member, irrespective of whether that spouse is also a member of the same or any other retirement fund;
- (ix) "pensionable service" in relation to retirement fund benefits in respect of a member means the period during which such benefit was earned by the member;
- (x) "retirement fund" means—
 - (a) any pension fund organisation registered under the Pension Funds Act, 1956 (Act No. 24 of 1956); or
 - (b) any retirement fund or retirement scheme established by law; or
 - (c) any retirement fund or retirement scheme established in terms of an industrial agreement under the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (xi) "retirement fund benefit" means any benefit payable in terms of the rules of a retirement fund on the occurrence of a specified event;
- (xii) "spouse" means a partner in a marriage and includes a divorced spouse;

- (xiii) "unmatured" in relation to retirement fund benefits means that the stage where such benefits become payable to a member or a beneficiary in terms of the rules of a fund has not been reached.

Sharing of retirement fund benefits on divorce

2. (1) If the marriage of a member and his or her spouse is dissolved by divorce, the non-member spouse is, in accordance with the provisions of this Act, entitled to share in the retirement fund benefits which accumulated in respect of the member during the subsistence of the marriage.

(2) Spouses may in their antenuptial contract explicitly exclude the sharing of retirement fund benefits between them in the event of their divorce.

(3) A spouse may in writing waive any right he or she may have to share in the retirement fund benefits of the other spouse in terms of the provisions of this Act.

(4) Spouses may by written agreement between them make provision for the settlement of other assets on a spouse in lieu of that spouse's share or right to a share of the other spouse's retirement fund benefits.

Division of unmaturred retirement fund benefits in defined contribution scheme

3. (1) If a retirement fund benefit which is to be divided between spouses on their divorce is unmaturred and is embodied in a defined contribution scheme, the non-member spouse's share of the said benefit shall be equal to one half of—

- (a) the total of all contributions made to the fund by or for the benefit of the member from the date of his or her marriage to the non-member spouse; plus
- (b) the net investment returns allocated or to be allocated in respect of those contributions up to the date of the divorce; plus
- (c) any surplus allocated by the fund to the member during the said period.

(2) The administrator of the member's retirement fund must upon receiving notice in the prescribed form that a division of the member's retirement fund benefits is to be effected at the date of the divorce of the spouses, effect a splitting of the member's account balance as at the said date and open a separate account for the benefit of the non-member spouse in respect of his or her share of the member's retirement fund benefits as determined in accordance with subsection (1). The balance in the separate account earns investment returns as if the non-member spouse became a member of the retirement fund concerned.

(3) After the splitting of retirement fund benefits as contemplated in this section, the rules of the retirement fund concerned shall apply to the non-member spouse's share as if he or she is the member with regard to such share: Provided that—

- (a) the stage where benefits become payable and the form in which benefits may be paid shall be subject to the rules which would have applied if no splitting of benefits had been effected; and
- (b) the non-member spouse's entitlement to his or her share of the benefits shall, in proportion to their effect on the member's share of the benefits, be subject to any rules of the fund

pertaining to the vesting of benefits in accordance with the member's period of service or membership of the fund.

(4) The said administrator may, with the written consent of the non-member spouse, and must if requested thereto in writing by the non-member spouse, transfer the non-member spouse's share of the retirement fund benefits as determined in accordance with subsection (1), to another fund for the benefit of the non-member spouse: Provided that the transfer of the said benefits shall not take place before the benefits have become fully vested as contemplated in subsection (3).

Division of unmaturred retirement fund benefits in defined benefit scheme

4. (1) If a retirement fund benefit which is to be divided between spouses on their divorce is unmaturred and is embodied in a defined benefit scheme the non-member spouse shall, on the date when the benefit becomes payable under the rules of the fund, be entitled—

(a) in the case of a benefit which accrues to the member as a result of his or her resignation, dismissal or the dissolution of the fund, to the proportion of such benefits determined in accordance with the following formula:

$$\frac{1}{2} \frac{A}{B}$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse; and

B = the total period of pensionable service accumulated by the member;

(b) in the case of a benefit which becomes payable in any other circumstances, to a benefit the value of which shall be determined in accordance with the following formula:

$$\frac{1}{2} \frac{A}{B} \quad X \quad C$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse;

B = the total period of pensionable service accumulated by the member; and

C = the actuarial liability of the fund in respect of the member on the day preceding the day on which the benefit becomes matured as calculated by the actuary of the fund concerned: Provided that where such benefit is payable by way of periodic payments the benefit as determined above shall take the form of an annuity payable during the lifetime of the non-member spouse, as calculated by the actuary of the fund concerned.

(2) In the event where the retirement fund benefit contemplated in subsection (1) is superseded by an alternative benefit on account of the death of the member (other than a benefit payable to a member's dependant child), the non-member spouse shall be entitled to a proportion of the said benefit determined in accordance with the formula contemplated in the said subsection.

(3) The administrator of the member's retirement fund must, if notified in the prescribed form of a non-member spouse's right to a share of the member's retirement fund benefits, pay to the non-member spouse his or her share of those benefits direct from the fund when the said benefits become payable.

(4) If the non-member spouse dies before the date on which his or her share of the member's retirement fund benefits become payable, the non-member spouse's estate shall have a claim against the administrator of the member's retirement fund in respect of such share of those benefits when they become payable.

Division of matured retirement fund benefits

5. (1) If matured retirement fund benefits must be divided between a member and his or her spouse on their divorce, the share of those benefits to which the non-member spouse shall be entitled must be determined in accordance with the following formula:

$$\frac{1}{2} \frac{A}{B} \times C$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse;

B = the total period of pensionable service accumulated by the member; and

C = the amount of the said retirement fund benefits.

(2) The provisions of section 4(2) and (3) shall, with the necessary changes, apply in respect of a non-member spouse's share of a matured retirement fund benefits as determined in accordance with this section.

Proof of date of commencement and dissolution of certain marriages

6. Whenever the date of the commencement of a marriage concluded otherwise than in accordance with the Marriage Act, 1961 (Act No. 25 of 1961), or the date of the dissolution of a marriage dissolved otherwise than by a decree of divorce granted by a competent court is relevant for purposes of this Act and such date is in dispute between the parties concerned, the said date may be proved by a certificate issued by a magistrate after he or she has satisfied himself or herself as to the true date of the marriage or the dissolution of the marriage, as the case may be.

Regulations

7. The Minister may make regulations prescribing—
- (a) the form in which an administrator of a retirement fund must be notified of any division of retirement fund benefits of a member;
 - (b) the apportionment of the costs relating to the division of retirement fund benefits; and
 - (c) any other matter that may or must be regulated in order to give effect to principles underlying the provisions of this Act.

Amendment of section 37A of Act 24 of 1956

8. Section 37A of the Pension Funds Act, 1956 (Act No. 24 of 1956), is hereby amended by substituting the following for subsection (1):

"(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), **[and]** the Maintenance Act, 1963 (Act No. 23 of 1963), and the Division of Retirement Fund Benefits on Divorce Act, 19...., no benefit provided for in

the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary to contained in the rules of such a fund, be capable to being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form execution under judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine."

Amendment of section 1 of Act 70 of 1979

9. Section 1 of the Divorce Act, 1979 (Act No. 70 of 1979), is hereby amended by deleting the definitions of "pension fund", "pension interest" and "rules".

Amendment of section 7 of Act 70 of 1979

10. Section 7 of the Divorce Act 1979, is hereby amended—

(a) by substituting the following for paragraph (a) of subsection (7):

"(a) In the determination of the patrimonial benefits to which the parties to a divorce may be entitled, the **[pension interest of a party shall, subjected to paragraphs (b) and (c), be deemed to be part of his assets]** rights to which a party may be entitled under the provisions of the Division of Retirement Fund Benefits on Divorce Act, 19...., must be taken into account.";

(b) by deleting paragraph (b) and (c) of subsection (7); and

(c) by deleting subsection (8).

Amendment of sections 5 of Act 88 of 1984

11. Section 5 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), is hereby amended by the addition of the following subsection:

"(3) (a) No benefit paid to or which is being received by a member of a retirement fund or any other asset which the member acquires by virtue of his or her possession or former possession of such benefit, and no right which such a member has to the payment of retirement fund benefits in the future, shall for purposes of determining the accrual of that member's estate upon divorce, form part of the said member's estate.

(b) No right which the spouse of a member of a retirement fund may have in terms of the Retirement Fund Benefits Act, 19..., or any other law to a share of the member's retirement fund benefits and no part of such benefits which has been or is being paid to such spouse shall for purpose of determining the accrual of the estate of such spouse on divorce, form part of his or her estate."

Application of Act

12. (1) Any right which a party to a divorce action instituted before the commencement of this Act may have in respect of the retirement fund benefits of the other party to such action must be determined as if this Act had not been adopted.

(2) Spouses married before the commencement of this Act, but after 1 November 1984, and who have in terms of their antenuptial contract excluded community of property, community of profit and loss and the accrual system in respect of their marriage shall for purposes of section 2(2) be deemed to have explicitly excluded the sharing of retirement fund benefits in accordance with the provisions of this Act, unless they have by written agreement between them elected to make the said provisions applicable to them in the event of their divorce.

Short title and commencement

13. This Act shall be called the Division of Retirement Fund Benefits on Divorce Act, 19.., and shall commence on a date fixed in the *Gazette* by the President.

ANNEXURE B

REPUBLIC OF SOUTH AFRICA

DIVISION OF RETIREMENT FUNDS ON DIVORCE ACT

.....
(As introduced)
.....

(MINISTER OF)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To provide for the division of retirement fund benefits on the divorce of spouses; and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

- 1.** In this Act, unless the context otherwise indicates-
- (i) “defined benefit scheme” means a retirement fund which is not a defined contribution scheme;
- (ii) “defined contribution scheme” means a retirement fund under which the retirement fund benefits payable are based mainly on-
- (a) the contributions made to the fund by or for the benefit of a member;
- (b) any amount transferred to the fund from any other fund in respect of a member;
- (c) investment returns in respect of such contributions and transfers; and
- (d) any surplus or deficit allocated to a member;

(iii) “divorce” includes the annulment of a marriage by a competent court;

“marriage” means a marriage solemnized in terms of the Marriage Act, 1961 (Act 25 of 1961) or a customary marriage as defined in section 1 of the Recognition Of Customary Marriages Act, 1998 (Act Of 1998);

(v) “matured” in relation to retirement fund benefits means that such benefits have in terms of the rules of the fund concerned become payable to a member on the member’s retirement or permanent disability, which event occurred before the date of the member’s divorce, or in the case of an annuity, that the first annuity payment thereunder became payable to the member before the date of the member’s divorce and “maturity” has a related meaning;

(vi) “member” means a member of a retirement fund and includes a person who has ceased to be a member of such fund on account of retirement or permanent disability;

(vii) “non-member spouse” means the spouse of a member, whether or not that spouse is also a member of the same or any other retirement fund;

(viii) “pensionable service” in relation to a member means the period on which the retirement fund benefits payable to the member in terms of the rules of the fund is based;

(ix) “retirement fund” means-

6.1 any pension fund organization registered or to be registered under the Pensions Fund Act, 1956 (Act No. 24 of 1956); or

6.2 any retirement fund or retirement scheme established by law; or

any retirement fund or retirement scheme established in terms of any collective agreement in terms of the Labor Relations Act, 1995 (Act No. 66 of 1995);

- (x) “retirement fund benefit” means any benefit payable in terms of the rules of a retirement fund in consequence of the membership or past membership of a member;
- (xi) “spouse” includes a divorced spouse;
- (xii) “unmatured” in relation to retirement fund benefits means that at the date of the divorce of the spouses the benefits are not yet matured benefits.

General guidelines for sharing of retirement fund benefits on divorce

2. (1) If a member’s marriage is dissolved by divorce the divorced non-member spouse is, in accordance with the provisions of this Act, entitled to share in the retirement fund benefits which accumulated in respect of the member during the subsistence of the marriage.

(2) Spouses may in their antenuptial contract explicitly exclude any sharing of retirement fund benefits between them in the event of their divorce.

(3) A spouse may in writing waive any right which he or she may have to share in the retirement fund benefits of the other spouse in terms of the provisions of this Act.

(4) A spouse may in writing agree to accept any other asset or assets in place of any right which he or she has to share in the retirement fund benefits of a member.

(5) A spouse who in terms of this Act has a right to share in the retirement fund benefits of the other spouse may in writing agree to share in such benefits in a proportion different from that which is provided for in this Act.

(6) Whenever effect cannot be given to a provision of this Act because of lack of exact complete information, the fund concerned, or the actuary of the fund if there is one, may, when applying any formula provided for in this Act, make use of approximate calculations, having regard to the objectives of this Act.

Division of unmatured retirement fund benefits in defined contribution scheme

3. (1) If retirement fund benefits in respect of a member are embodied in a defined contribution scheme and the member's marriage is dissolved by divorce before the maturity of those benefits, the non-member spouse shall on the date of the divorce acquire a right to a share of those benefits, determined in accordance with the following formula :

$$\frac{1}{2} (A+B+C+D)$$

where: A = the total of all contributions applied in respect of retirement benefits made to the fund by or on behalf of the member during the subsistence of the marriage between the member and the non-member spouse, excluding any transfer value of benefits paid to the fund in respect of the member during the said period;

B= such part of any transfer value of benefits paid to the fund in respect of the member during the subsistence of the marriage as may be attributable to the period of the marriage;

C=the net investment returns allocated or which are still to be allocated in respect of the contributions contemplated in A and such portion of any transfer value of benefits contemplated in B, up to the date of the divorce; and

D= any surplus or deficit allocated by the fund to the member during the subsistence of the marriage.

(2) The member's retirement fund must upon receiving notice in the prescribed form that a division of the member's retirement fund benefits is to be effected at the date of the member's divorce, effect a splitting of the member's retirement fund benefits in accordance with subsection (1) and must open a separate benefit record in respect of the non-member spouse's share of the benefits.

(3) The non-member spouse's share of the retirement fund benefits earns investment returns as if the non-member spouse became a member of the retirement fund concerned.

(4) After the splitting of retirement fund benefits as contemplated in subsection (2), the rules of the retirement fund concerned in respect of any retirement option available to the member spouse shall also apply to the non-member spouse independently of the member as if the non-member spouse is the member in respect of such share.

(5) The non-member spouse's entitlement to a share of the member's retirement fund benefits shall, in proportion to its effect on the member's share of those benefits, be subject to any rules of the fund pertaining to the vesting of benefits in accordance with the member's period of service or membership of the fund or the age of the member.

(6) Whenever a splitting of retirement fund benefits has been effected as contemplated in subsection (1), the retirement fund concerned -

- (a) must, if requested thereto in writing by the non-member spouse, transfer the non-member spouse's share of the benefits to another retirement fund for the benefit of the non-member spouse : Provided that to the extent that any benefit may not have vested at the date of the request for the transfer of the benefits, the non-member spouse's share of the benefits must be reduced to take into account such non-vested benefits;
- (b) may of its own accord transfer the non-member spouse's share of the benefits to another retirement fund approved by the non-member spouse : Provided that no such transfer shall be effected without the written consent of the non-member spouse, unless the benefits have fully vested.

(7) A non-member spouse's share of any retirement fund benefits retained by a retirement fund in a separate benefit record as contemplated in subsection (2) or transferred to another retirement fund as contemplated in subsection (6), is not available for voluntary withdrawal by the non-member spouse.

(8) If the non-member spouse dies before the date on which his or her share of the of the member's retirement fund benefits become payable, the fund shall be liable to the estate of the deceased non-member spouse to an amount equal to the amount which would have been payable in terms of subsection (6) had the non-member spouse requested the transfer of his or her share of the benefits on the day preceding his or her death.

Division of unmaturred retirement fund benefits in defined benefit scheme

4. (1) If a retirement fund benefit which is to be divided between spouses on their divorce is unmatured and is embodied in a defined benefit scheme, the non-member spouse shall, on the date on which the benefit becomes payable in terms of the rules of the fund, be entitled - (a) in the case of a benefit which is payable in the form of a lump sum and which accrues as a result of the member's resignation or dismissal or the dissolution of the fund, to the proportion of such benefit determined in accordance with the following formula:

$$\frac{1}{2} [A + (B/C) \times D + (E/F) \times G]$$

where A = such part of the benefit acquired by way of transfer from another retirement fund during the subsistence of the marriage, plus that part of the benefit acquired by way of purchase of additional pension rights during the subsistence of the marriage;

B = the period from the date of the marriage, or the date of the commencement of the member's membership if later, up to the date of the divorce;

C = the period from the date of commencement of the member's membership of the fund to the date on which the benefit becomes payable;

D = that part of the benefit which is not attributable to a particular period of the member's membership of the fund or service with the employer;

E = the period of pensionable service accrued in respect of the member during the subsistence of the marriage, excluding any additional period purchased or otherwise acquired;

F = the total period of pensionable service accrued in respect of the member, excluding any additional period purchased or otherwise acquired;

G= the total benefit available to the member.

less -

that part of the benefit acquired by way of transfer from another retirement fund or by way of the purchase of additional pension rights before the date of the marriage or the date of the divorce,

less-

such part of the benefit acquired by way of transfer from another retirement fund during the subsistence of the marriage as may not be attributable to the period of the marriage,

less-

that part of the benefit contemplated in A above,

less-

that part of the benefit contemplated in D above;

- (b) in the case of a benefit which becomes payable in any other circumstances or which is not payable as a lump sum, to a benefit the value of which shall be determined in accordance with the formula contemplated in paragraph (a) above where -

G = the value of the actuarial liability of the fund in respect of the member on the day preceding the day on which the benefit becomes payable, as calculated by the actuary of the fund,

less -

that part of the benefit which was accumulated or acquired in respect of the member before the commencement of the marriage or after the divorce,

less -

that part of the benefit contemplated in A and D of paragraph (a) above but calculated with reference to the actuarial liability of the fund;

less -

such part of the benefit acquired by way of transfer from another retirement fund during the subsistence of the marriage as may not be attributable to the period of the marriage.

(2) The member's retirement fund must, if notified in the prescribed form of the non-member's right to a share of the member's retirement fund benefits, pay to the non-member spouse his or her share of those benefits direct from the fund when the benefits become payable.

(3) If the non-member spouse dies before the date on which his or her share of the member's retirement fund benefits become payable, the member's retirement fund shall be liable to the estate of the deceased non-member spouse for an amount equal to the benefit to which the non-member spouse would have been entitled in terms of subsection (1) (a) had the member resigned on the date of the death of the non-member spouse.

Division of matured retirement fund benefits

5. (1) If matured retirement fund benefits must be divided between a member and his or her spouse on their divorce, the share of those benefits to which the non-member spouse shall be entitled must be determined in accordance with the formula contemplated in section 4(1)(a), where-

B = the period from the date of the marriage or the date of the commencement of the member's membership of the fund, if later, up to the date on which the benefit became payable; and

C= the period from the of commencement of the member's membership of the fund to the date on which the benefit became payable.

(2) The member's retirement fund must, if notified in the prescribed form of the non-member spouse's right to share in the member's retirement fund benefits, pay to the non-member spouse his or her share of those benefits direct from the fund. .

Division of benefit in polygamous marriages

6. If during any period in respect of which a non-member spouse is entitled to a share of the member's retirement fund benefits in terms of sections 3, 4 or 5 the member was married to more than one spouse, the non-member spouse's share of those benefits in respect of any such period shall be determined in accordance with the formulae contemplated in the said sections but the factor of $\frac{1}{2}$ must in respect of any such period be changed to $\frac{1}{x}$ where x denotes the number of spouses, including the member, in existence during the period concerned.

Regulations

7. The Minister may make regulations prescribing-
- (a) the form in which an administrator of a retirement fund must be notified of any division of retirement fund benefits of a member;
 - (b) the costs incurred by a retirement fund in giving effect to the provisions of this Act which are recoverable from a member or a non-member spouse;
 - (c) any other matter that may or must be regulated in order to give effect to principles underlying the provisions of this Act.

Retirement fund benefits excluded from joint estates

8. No retirement fund benefit accumulated in respect of or paid to a member as contemplated in this Act forms part of the joint estate of such member and the non-member spouse in respect of whom the division of the benefit is made, and no share of such benefit to which the said non-member spouse is entitled forms part of the said joint estate.

Amendment of section 37A of Act 24 of 1956

9. Section 37A of the Pension Fund Act, 1956 (Act No. 24 of 1956), is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), **[and]** the Maintenance Act, 1963 (Act No. 23 of 1963) and the Division of Retirement Fund Benefits on Divorce Act, 19...., no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall not withstanding anything to the contrary to contained in the rules of such a fund, be capable to being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor’s financial position in terms of section 65 of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.”.

Amendment of Act 70 of 1979

10. The Divorce Act, 1979(Act No 70 of 1979), is hereby amended -

- (a) by the deletion of the definitions of “pension fund”, “pension interest” and “rules” in section 1; and
- (b) by the deletion of subsections (7) and (8) of section 7.

Amendment of sections 5 of Act 88 of 1984

11. Section 5 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), is hereby amended by the addition of the following subsection:

“(3) (a) No benefit paid to or which is being received by a member of a retirement fund or any other asset which the member acquires by virtue of his or her possession or former possession of such benefit, and no right which such a member has to the payment of retirement fund benefits in the future, shall for purposes of determining the accrual of that member’s estate upon divorce, form part of the said member’s estate.

(b) No right which the spouse of a member of a retirement fund may have in terms of the Division Of Retirement Fund Benefits On Divorce Act, 19....., or any other law to a share of the member’s retirement fund benefits and no part of such benefits which has been or is being paid to such spouse shall for purpose of determining the accrual of the estate of such spouse in divorce, form part of his or her estate.”.

Application of Act

12. (1) Subject to subsections (2) and (3), this Act applies in respect of all marriages dissolved by divorce or annulment after the commencement of this Act.

(2) Any right which a party to a divorce action or annulment proceedings instituted before the commencement of this Act may have in respect of the retirement fund benefits of the other party to such action must be determined as if this Act had not been adopted.

(3) Spouses who have in terms of their antenuptial contract excluded community of property, community of profit and loss and the accrual system in respect of their marriage shall for purposes of section 2(2) be deemed to have explicitly excluded the sharing of retirement fund benefits in accordance with this Act, unless they have by written agreement between them made the said provisions applicable to them in the event of their divorce.

Short Title and commencement

13. This Act shall be called the Division of Retirement Fund Benefits On Divorce Act, 19...., and shall commence on a date fixed in the *Gazette* by the President.