

THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4572 of 30 April, 2019

PRIVATE SECTOR PENSIONS BILL 2019

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THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4572 of 30 April, 2019

B. 18/19

BILL

FOR

AN ACT to make provision with respect to the provision of pension plans to employees employed in the private sector, to establish a Pensions Commissioner, and for connected purposes.

ENACTED by the Legislature of Gibraltar.

PART I

PRELIMINARY

Title and commencement.

1. This Act may be cited as the Private Sector Pensions Act 2019 and shall come into operation on such date as the Minister may, by Notice published in the Gazette, appoint; and the Minister may appoint different days for the coming into operation of different provisions of this Act.

Interpretation.

2. In this Act, unless the context otherwise requires-

“account balance” in respect of a member means the market value of all employer contributions and member contributions, if any, plus earnings thereon;

“actuary” means a person capable of appointment under the Financial Services (Insurance Companies) Act;

“additional voluntary contribution” means a contribution to the pension fund by a member of the pension plan beyond any amount that the member is required to contribute;

“administrator” means the person or persons who administer the pension plan;

“Class VII License” means a licence issued under section 8 of the Financial Services (Investment and Fiduciary Services) Act and classified as a Class VII licence under Schedule 1 to the Financial Services (Licensing) Regulations 1991;

“Class XVI License” means a licence issued under section 8 of the Financial Services (Investment and Fiduciary Services) Act and classified as a Class VII licence under Schedule 1 to the Financial Services (Licensing) Regulations 1991;

“Commissioner” means the Pensions Commissioner established by section 14;

“deferred pension” means a pension benefit, payment of which is deferred until the beneficiary reaches pensionable age under the pension plan;

“defined benefit” means a benefit determined in advance with reference to various factors including level of earnings and length of employment and a “defined benefit pension plan” means a plan providing such a benefit;

“defined contribution pension plan” means a pension plan providing a benefit that is determined solely with reference to, and is provided by, accumulated contributions made by or for the credit of a member together with the investment yield of such accumulated contributions and that is determined on an individual account basis;

“document” includes any information held or kept by electronic means;

“earnings” in relation to a person, means gross sums of any of the following descriptions that are payable to the person in connection with his employment-

- (a) salary and wages;
- (b) statutory sick pay under the Employment (Sick Pay) Order; and
- (c) statutory maternity pay under the Social Security (Insurance) Act;

“employee” means any individual who enters into or works under a contract of employment with an employer which is registered at the Department of Employment, and the term includes a person whose services have been interrupted by a suspension of work during a period of leave or temporary lay-off;

“employer” means a person in Gibraltar who employs employees, and includes a self-employed person;

“financial institution” means;

- (a) a body holding a Class VII licence;
- (b) a body holding a Class XVI licence ; or
- (c) any other company which is approved by the Commissioner for the purposes of this Act;

“financial institution pension plan” means a pension plan established by a financial institution and approved by the Commissioner to offer defined-contribution pension plans or defined-benefit pension plans for individuals, whether employees or self-employed;

“former member” means a person who has terminated employment or membership in a pension plan and-

- (a) is entitled to a deferred pension payable from the pension fund;
- (b) is in receipt of a pension payable from the pension fund; or
- (c) is entitled to receive any other payment from the pension fund;

“member” means a member of a pension plan;

“multi-employer pension plan” means a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund or a financial institution pension plan;

“Minister” means the Minister with responsibility for Finance;

“pension” means a pension benefit that is in payment;

“pensionable age” means the age specified and agreed in a pension plan, but which shall not exceed 70;

“pension benefit” means the periodic payment due to a person in accordance with the rules of a pension plan;

“pension fund” means the fund maintained to provide benefits under or related to the pension plan;

“pension plan” means either-

- (a) an occupational pension organized and administered under the Financial Services (Occupational Pensions Institutions) Act 2006 and any regulations made thereunder to provide pensions for employees;
- (b) a financial institution pension plan; or
- (c) a pension scheme, trust or plan established by the Government and appointed under section 4(6) of this Act;

“person” means an individual or a body corporate or unincorporated;

“prescribed” means prescribed by regulations;

“Register” means the register of pensions to be kept and maintained by the Commissioner under section 15 of this Act;

“registration” means registration under this Act;

“regulations” means regulations made under this Act;

“retirement product” means such pension plan other than a pension plan referred to in this Act as may from time to time be prescribed;

“self-employed person” means a person registered under the Businesses Trades and Professions (Registration) Act whose earnings (otherwise than in the capacity of an employee) derive from his production (in all or part) from a trade, profession, business or vocation in Gibraltar;

“surplus” means the excess of assets over liabilities in a pension fund both calculated in the prescribed manner;

“termination” in relation to employment, includes retirement and death;

“transfer value” for the purpose of determining the lump sum amount that is equivalent to a pension or a benefit, means the value of the pension or benefit calculated in the manner provided in the rules of the pension plan and as of a fixed date; and

“trustee” means a trustee of a pension plan.

Restrictions on application of Act.

3.(1) This Act does not require a pension plan to be provided in respect of employment or service which constitutes a “public service” within the meaning of the Pensions Act.

(2) This Act does not apply to pensions established under the Social Security (Insurance) Act and any regulations made thereunder.

(3) The requirements of this Act and the regulations shall not be construed to prevent the registration or administration of a pension plan and related pension fund that provide pension benefits or ancillary benefits more advantageous to members and former members than those required by this Act and the regulations.

PART II

REGISTRATION, ADMINISTRATION, AND MEMBERSHIP, OF PENSION PLANS

Obligation of employers to establish and maintain pension plans.

4 .(1) Subject to the provisions of this Act, every employer shall, in relation to all employees meeting the requirements of section 10-

- (a) if, immediately before the commencement of this Act, there is in existence a pension plan, continue and maintain the pension plan in accordance with this Act;
- (b) if, immediately before the commencement of this Act, there is no pension plan in existence, participate in a pension plan;
- (c) where he is so required under the provisions of this Act, make contributions to a pension fund of the pension plan.

(2) An employer shall comply with subsection (1) above-

- (a) where the employer is a large employer, on or before 1st July 2021;
- (b) where the employer is a medium employer, on or before 1st July 2022;
- (c) where the employer is a small employer, on or before 1st July 2025; and
- (d) where the employer is a micro employer, on or before 1st July 2027.

(3) For the purposes of subsection (2) whether an employer is a micro, small, medium or large employer on the date that this Act comes into operation, shall be determined in accordance with Schedule 9 of the Companies Act 2014, save that any reference to the words “company” and “entity” shall be substituted with the word “employer” and for the avoidance of doubt, this subsection shall apply regardless of whether the employer is an individual or a body corporate or unincorporate.

(4) Where a pension plan is in the process of being wound up, subsection (1) shall not be construed as prohibiting the administration of a pension plan for the purpose of winding up the plan, as the case may be.

(5) An employee-

- (a) may elect, by submitting the prescribed form to the Commissioner, not to benefit from a pension plan provided under subsection (1);

- (b) shall be free at any time to elect, by notice in writing to the employer, to choose to benefit from a pension plan provided under subsection (1), despite having previously elected not to participate, and shall be included at the next possible opportunity pursuant to the terms and rules of the pension plan.

(6) For the purposes of section 4(1), the Minister may by regulations appoint a pension plan or scheme which shall be made available for employers to participate in, in relation only to those employees who satisfy the eligibility criteria in section 10 of this Act, but whose earnings are below certain thresholds, which are to be prescribed in regulations enacted under this section.

(7) Regulations made under subsection (6) may, without limitation, provide for-

- (a) criteria for eligibility to contribute to the pension scheme appointed under subsection (6);
- (b) restrictions on contributions payable into the pension fund by employers, employees or both;
- (c) the portability of the pension funds;
- (d) requirements to transfer the pension fund in prescribed circumstances.

Applications for registration.

5.(1) Within the period of ninety days after the date applicable to that employer as detailed in section 4(2), all employers shall make an application for registration for each of his employees to the Commissioner in the prescribed form which shall contain-

- (a) details of those employees participating in a pension plan together with
 - (i) the documents evidencing the pension plan and evidencing the participation by employees, and
 - (ii) the name, occupation, qualification and address of each person constituting the board of trustees and/or the name and address of administrators of the pension plan;
- (b) details of those employees who have elected not to participate in a pension plan, together with the prescribed form submitted under section 4(5); and
- (c) details of those employees who do not satisfy the eligibility requirements in section 10 of this Act, together with an explanation as to why they do not satisfy these requirements.

(2) The Commissioner, upon being satisfied that the application complies with this Act, shall enter the employer and employees on the Register and shall confirm in writing within 21 days that the employer complies with the requirements of this Act.

(3) An employer shall submit in the prescribed form details of any changes in the particulars to be submitted under section 5(1), within 30 days of any of the occurrence of any of the following events-

- (a) any new employee being employed by that employer;
- (b) any termination of the employment or redundancy of any employee;
- (c) any material changes in the terms of employment of any employee; and
- (d) any employee making an election under section 4(5)(b) of this Act.

Duty of employer to provide information to administrator.

6. An employer shall provide the administrator of a pension plan with any information required by the administrator for the purpose of complying with the terms of the pension plan or this Act or regulations.

Duty of administrator to provide information to members, etc.

7. Unless otherwise provided in any regulations, upon a person becoming eligible to become a member of a pension plan, the administrator shall provide in writing to each person eligible to become a member of the pension plan-

- (a) an explanation of the provisions of the pension plan that apply to that person;
- (b) an explanation of the person's rights and obligations in respect of the pension plan; and
- (c) any other information prescribed by regulations.

Statement of benefits on termination of employment or on ceasing to be a member.

8. Where a member terminates employment with his employer or otherwise ceases to be a member, the administrator shall give to the member, or to any other person who as a result becomes entitled to a payment under the pension plan, a written statement setting out-

- (a) the prescribed information in respect of the pension plan;
- (b) in the case of a defined benefit plan, the member's expected benefits at his pensionable age;
- (c) in the case of a defined contribution plan, the amount of money standing to the member's account;

- (d) in the case of a defined benefit plan, the transfer value of the expected benefits as determined by an actuary;
- (e) any ancillary benefits;
- (f) detailed information on the portability of the pension plan.

Access to documents in custody of administrator.

9.(1) Subject to any applicable data protection laws, if any of the following persons, namely-

- (a) a member;
- (b) a former member;
- (c) any other person entitled to benefits under the pension plan;
- (d) an agent authorised in writing by a person mentioned in paragraph (a), (b) or (c);
- (e) an employer who participates in the pension plan,

makes a written request to the administrator for the inspection of any documents and information relating to a pension plan and the pension fund, and as may be relevant to him, the administrator shall make those documents and information available to him without charge and shall permit that person to make extracts available or to copy them at his own expense or, if a copy is made available to him by the administrator, upon the payment of such reasonable fee as the administrator may determine.

(2) The administrator may, before making available the requested information, require the person to provide information establishing his entitlement to see the information.

(3) Notwithstanding subsection (1), the administrator shall not make available personal information that relates to a member or former member without the consent of that member or former member, or that member's or former member's legal representative.

(4) A person shall not be permitted to inspect documents or personal information that relates to a member or former member without the consent of that member or former member, or that member's or former member's legal representative.

Eligibility for membership.

10.(1) The obligation on employers in section 4 of this Act shall apply in respect of every employee who meets the requirements of subsection (2) below.

(2) Except as otherwise provided by or under this Act, an eligible employee shall, by virtue of this section alone, be a member in a pension plan if-

- (a) he is fifteen years old or more;
- (b) he has completed 12 months of employment with the employer to whom the pension plan relates prior to membership in the pension plan; and
- (c) in a period of 12 months the earnings payable to him exceeds or is equal to £10,000,

and, subject to the provisions of this Act, his membership in the pension plan shall continue until he attains the pensionable age.

(3) Where a person is employed by more than one employer, he shall be enrolled as a member of each pension plan for which he has met the criteria set out in subsection (2).

(4) A member of a pension plan does not cease to be a member by reason only that he ceases to be employed by his employer.

PART III

CONTRIBUTIONS

Contributions.

11.(1) Subject to subsections (2) to (5)-

- (a) a member of a defined contribution pension plan and his employer shall both contribute equally to the pension fund of the pension plan for the benefit of that member;
- (b) a member of a multi-employer pension plan, under which the obligation of the member's employer to contribute is limited to a fixed sum, and his employer shall both contribute equally to the pension fund of the pension plan for the benefit of that member; and
- (c) a member of a defined benefit plan and his employer shall contribute in accordance with the provisions of the pension plan and the regulations such amounts as are required to fund the benefits accruing under the pension plan,

from the date of membership in the pension plan, a sum equal to 2% per annum of the employee's earnings.

(2) Notwithstanding subsection (1), an employer may, in respect of any or all of his employees, contribute to the pension fund amounts representing both the amount required to be contributed by the employer and a part or the whole of the amount required to be contributed by the employee.

(3) Notwithstanding subsection (1), a member may make additional voluntary contributions to the pension fund in accordance with the rules of the pension plan but no such additional contribution shall be construed as imposing an obligation on the employer to contribute to the pension fund an amount exceeding the amount specified in that subsection in respect of the employer's contribution.

(4) Notwithstanding subsection (1), an employer may make contributions in respect of a member to the pension fund in accordance with the rules of the pension plan, that exceed the contributions required to be made under subsection (1), but no such additional contribution shall be construed as imposing an obligation on the member to contribute to the pension fund an amount exceeding the amount specified in that subsection in respect of the member's contribution.

(5) The employer shall, at least once in every month, withhold from the member's earnings the relevant amount of the member's contribution and pay the same within thirty days following the month in which the amount was withheld, together with the employer's contribution, directly into the pension fund.

(6) The administrator shall immediately give written notice to the employer and to the Commissioner of any contribution that is not paid to the pension fund when due.

(7) No administrator is in breach of any duty to which he is otherwise subject by reason of his communicating in good faith to the Commissioner, whether or not in response to a request made by him, or by reason of any obligation under subsection (6), any information or opinion on any matter of which he becomes aware and which may affect the fair and proper administration of a pension plan or pension fund.

(8) The Minister may, from time to time, by order vary the rate specified in subsection (1).

(9) The Minister may, by regulations, provide for-

- (a) the manner in which failure to comply with the provisions of this section is to be dealt with;
- (b) the procedure for the recovery of any contributions due under this section;
- (c) the rate of interest on contributions;
- (d) the recovery of contributions or other amounts erroneously paid, or paid in excess of or below the prescribed rates.

Civil proceedings.

12.(1) All contributions due to the pension fund of a pension plan by an employer, including members' contributions withheld under section 11(5), are recoverable as a debt due to the pension fund, and without prejudice to any other remedy, may be recovered summarily as a civil debt by-

- (a) the Commissioner, on behalf of the pension fund;
- (b) a person, including an administrator, authorised in writing by the Commissioner;
or
- (c) where the pension plan permits, the member.

(2) Without prejudice to any other remedy for recovery of contributions that are due to be paid to a pension fund by an employer, including members' contributions withheld under section 11(5), the directors and officers of a company or other body corporate that, as an employer, owes contributions are liable jointly and severally for contributions that became due while they were directors or officers, and proceedings may be taken under this section against all or any of them for recovery of those contributions.

(3) For the avoidance of doubt, proceedings may be taken under this section against persons who were directors or officers after they cease to be directors or officers, including persons who ceased to be directors or officers before the coming into force of this section.

(4) A director or officer who has paid contributions pursuant to proceedings under this section has a right of contribution against any other directors and officers of the company or other body corporate who are liable under this section for the contributions paid by that director or officer, and a right to be indemnified by the company or body corporate in respect of those contributions.

(5) For the purposes of subsections (2) to (4), "officer" means-

- (a) in the case of a company as defined in section 2 of the Companies Act 2014, an individual appointed as a director or secretary of the company, and shall include shadow directors and de facto directors; and
- (b) in the case of other companies and bodies corporate, an individual who performs functions for a company or other body corporate similar to those normally performed by an individual appointed as a director or secretary.

PART IV

ORDERS AND ADVICE BY COMMISSIONER

Orders by Commissioner.

13.(1) The Commissioner may, in the circumstances mentioned in subsection (2), order an administrator or any other person to take or refrain from taking any action in respect of a pension plan or a pension fund.

(2) The Commissioner may make an order under this section if he is of the opinion that the administrator of the pension plan, the employer or any other person dealing with a pension plan is contravening a requirement of this Act or regulations.

(3) In an order made under this section the Commissioner may specify the time or times when or the periods of time within which the persons to whom the order is directed must comply with the order.

(4) An order under this section is not effective unless the reasons for the order are set out in the order.

PART V

THE PENSIONS COMMISSIONER

Establishment of Office of Pensions Commissioner.

14.(1) There is hereby established the Office of the Pensions Commissioner.

(2) The Commissioner shall be the Commissioner for Income Tax from time to time in appointment.

Register of Pensions.

15.(1) The Commissioner shall keep a register in such parts and in such form as may be prescribed in which shall be entered the name (including every other name by which such person may have been known), address and date of registration of all-

- (a) employers who have made an application under section 5;
- (b) the employees of employers registered under paragraph (a) who-

- (i) participate in a pension plan provided by that employer;
- (ii) have elected not to participate in a pension plan provided by that employer in accordance with section 4(5);
- (iii) do not qualify under section 10 for membership of a pension plan.

(2) The Commissioner may keep the register electronically and provide for receipt of the information to be contained on the register to be submitted in electronic form.

Functions of the Commissioner.

16. The functions of the Commissioner are-

- (a) to keep and maintain the Register;
- (b) to administer this Act and regulations;
- (c) to consider and determine applications for the registration of pension plans;
- (d) to promote and ensure compliance, by administrators of pension plans, with the provisions of this Act and regulations;
- (e) to enforce the provisions of this Act and the regulations in respect of the administration of pension plans;
- (f) to promote public education on pension plans and their benefits;
- (g) to advise the Minister on any matter relating to pensions, including the development of laws relating to pension plans;
- (h) to provide such information relating to its functions as the Minister may require;
- (i) to investigate complaints relating to pension plans; and
- (j) to perform any other functions provided for in or under this Act.

Officers of the Commissioner.

17. The Commissioner shall appoint such other officers as he may consider appropriate for the discharge of his functions under this Act.

Power to order information and reports.

18.(1) For the purpose of ascertaining compliance with this Act and regulations, the Commissioner may order an employer or an administrator of a pension plan to provide the Commissioner with such information or report within such time limits as he may specify.

(2) An order under this section may include, but is not limited to, ordering the preparation of a new report and specifying the assumptions and methods or both, that shall be used in the preparation of the new report.

PART VI

GENERAL

Power of entry, search, etc.

19.(1) For the purposes of the administration or enforcement of this Act and regulations or any matter relating to the Act or regulations, the Commissioner shall have such powers as are conferred on him under the Income Tax Act 2010, in respect of-

- (a) entering any premises where documents are kept;
- (b) examining, investigating or making inquiries or requiring the production of any document or thing relating to a pension plan or a pension fund; and
- (c) making, taking, removing or requiring the making, taking or removal of copies or extracts relating to an examination, investigation or inquiry.

Extension of time.

20. The Commissioner may extend any time limit under this Act or regulations, before or after the expiration of the time limit, if satisfied that there are reasonable grounds for granting the extension and may give such directions as the Commissioner considers proper consequent upon the extension.

Offences, penalties and orders for payment.

21.(1) A person who contravenes a provision of this Act or the regulations is guilty of an offence.

(2) A person who contravenes an order made under this Act is guilty of an offence.

(3) A person who hinders or obstructs another person lawfully carrying out a duty under this Act or regulations is guilty of an offence.

(4) A person convicted of an offence under this Act is liable on summary conviction, to a fine not exceeding level 4 on the standard scale, or, in case of a second or subsequent offence, twice the amount at level 4 on the standard scale.

(5) Where a person is convicted of an offence relating to the failure to submit or make payment to a pension fund, the court may, in addition to any penalty, assess the amount not submitted or paid and order the person to pay the amount to the pension fund.

Offences by bodies corporate.

22.(1) Where an offence under this Act or the regulations which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

Regulations.

23(1) The Minister may, after consultation with the Commissioner, make regulations-

- (a) for the administration of pension plans, pension funds and benefits;
- (b) prescribing the criteria for the portability of pension funds and the method of calculating the transfer value of a pension or benefit in a pension plan;
- (c) prescribing the methods of calculating the values of assets and liabilities of pension funds; and the carrying out of periodic actuarial valuations of pension plans;
- (d) prescribing criteria to be complied with in connection with the paying of surplus out of pension funds;
- (e) regulating the investment of money from pension funds and prescribing the investments or categories of investment in which such money may be invested;
- (f) prescribing the requirements for life annuity contracts purchased from benefits paid or payable under this Act;
- (g) prescribing rates of interest and the method of calculating interest payable under this Act or the regulations;
- (h) prohibiting the investment of money from pension funds; and

- (i) requiring the audit of pension plans and pension funds and prescribing the persons who may perform, and the manner of performing, such audits;
- (j) governing the winding up or partial winding up of pension plans and prescribing priorities or the method of determining priorities on winding up, including priorities in the allocation of assets and related matters;
- (k) prescribing reports to be submitted to the Commissioner, the contents and method of preparation of such reports, the persons by whom such reports are to be prepared and the qualification, if any, required in respect of such persons;
- (l) prescribing forms and records required to be prescribed under the Act and time limits for retention of such records;
- (m) prescribing any fees payable under any provision of this Act or regulations;
- (n) prescribing retirement products and the requirement of such products;
- (o) prescribing the information that shall be provided by an administrator of a pension plan to members and the period of time for which such information shall be provided; and
- (p) prescribing the criteria for the vesting of pension funds;
- (q) prohibiting and restricting certain transfers of contributions into a pension fund;
- (r) prescribing minimum levels aggregate of aggregate benefits of a member of a pension plan and any ancillary benefits to be taken into consideration;
- (s) enforcing the provisions of this Act and any regulations;
- (t) generally prescribing all other matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Rule against perpetuities

24. The rule of law relating to perpetuities shall not apply, and shall be deemed never to have applied, to the trusts of any pension fund held under a pension plan appointed under this Act.

EXPLANATORY MEMORANDUM

The Act proposes a new Private Sector Pensions Act.

Part 1 of the Act includes provision as to the scope of the Act, which will apply only to employers in the private sector.

Part 2 imposes an obligation on employers to either continue with any existing pension plans available to their employees, or if none are in place, to participate in a pension plan established by regulated pension providers. Low income employees will be able to contribute to a pension plan established by the Government. Employers will be under a duty to register such participation with the Commissioner, who shall be the Commissioner of Income Tax.

Section 10 specifies which employees qualify for benefit under the obligation on employers to participate in a pension plan. Employees must be 15 years of age or over, earn at least £10,000 per annum, and must have been employed by that employer for a year.

Part 3 establishes the minimum contribution rate that employers and employees will make to the pension plans subject to the Act, being 2% of the employees' annual earnings. Employers and employees may choose to make higher contributions at any time.

Part 4 details the types of advice and order than may be given by the Pensions Commissioner.

Part 5 of the Act establishes the Pensions Commissioner. The Commissioner shall keep a register which will list all employers and their employees' status' under this Act.

Section 16 lists the functions of the Commissioner which include to promote education on pension plans and their benefits, to verify payments made under pension plans, and to investigate complaints relating to a pension plan.

The Commissioner is provided with powers of entry and search to facilitate the enforcement and monitoring of compliance with the Act, as per the powers granted under the Income Tax Act 2010.

The Act creates offences for contravention of any provision of the Act or orders or regulations made thereunder. Section 21 sets the fine payable for such offences at level 4 on the standard scale, which doubles in the case of a second or subsequent offence.

