Baroness Thomas of Winchester
c/o Clerk of the Delegated Powers and
Regulatory Reform Committee
Delegated Legislation Office
House of Lords
London
SW1A 0PW

7 December 2013

Dear Celia,

PENSIONS BILL: GOVERNMENT RESPONSE TO THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE 13TH REPORT OF SESSION 2013-14

I am grateful to the Delegated Powers and Regulatory Reform Committee for their report on the Pensions Bill (Thirteenth Report of Session 2013-14) which was published on 22 November 2013.

I am writing to explain how I am taking forward the recommendations made in the report. I note that the Committee considered that most of the powers included in the Bill were an acceptable use of delegated legislation. The Government has today tabled amendments to the Bill to respond to the majority of the Committee's recommendations. I thought it would be helpful to set out, below, the approach we are taking in relation to each of the powers on which the Committee commented.

We have also tabled other Government amendments to Parts 1 and 5 of the Bill for consideration in Grand Committee. These are primarily technical amendments to ensure the legislation works as intended and most of them do not contain any delegated powers. However, there is one amendment which does contain a delegated power and we have therefore prepared a supplementary memorandum to the Committee in relation to this amendment. This is attached at Annex A and I will also place a copy in the House Library and publish it on the GOV.uk website.
Committee recommendations

Clause 3 – single tier start rate:

Clause 3 contains a power to set the full rate of the single-tier pension in regulations. The Government welcomes the Committee’s view that whilst this is a change from the current system (where the rate of basic State Pension is set out in primary legislation), it is not inappropriate in principle. As stated in our memorandum to the Committee, a core principle of the reform is that the full single-tier pension is set above the basic level of the means test (the State Pension Credit Standard Minimum Guarantee). As this is increased annually by at least earnings, setting the start rate in regulations closer to implementation will allow the Government to take this into account. The Government also notes that, whilst the rate of basic State Pension was set in primary legislation in the Social Security Contributions and Benefits Act 1992, this is not the case with all other social security benefits and a similar approach to provide for the rates to be set in regulations has been taken in more recent legislation e.g. Jobseeker’s Allowance, Employment and Support Allowance and Universal Credit.

Clause 17 – single tier deferral arrangements:

Clause 17 provides for arrangements for a person to defer the payment of their single-tier pension in order to accrue an increase to their pension (known as increments). It provides a power to set in regulations the rate at which increments will be calculated. The Committee recommended that regulations under this power should be subject to the affirmative procedure; we accept this recommendation and have tabled an amendment accordingly.

Clauses 18 and 20 – single tier and overseas residents:

Clause 18(3) and 18(4) provide that regulations may modify the amount of state pension to be used to calculate the deferral increase due where a person has been resident overseas during their period of deferral. Clause 20 provides a power to make regulations to exclude people who are not ordinarily resident in Great Britain or a specified territory from entitlement to the annual ‘up-rates’ of the single-tier pension. The intention is that regulations under both Clause 18 and Clause 20 that define an “overseas resident” will make identical provision.

The Committee recommended that regulations under Clause 20 should be subject to the affirmative resolution procedure and similarly recommended that regulations under clause 18(4) be either subject to the affirmative resolution procedure or the clause be amended to provide that “overseas resident” is to mean the same in clause 18 as in clause 20.
We accept the Committee’s recommendations and have tabled amendments to provide for regulations under Clause 18(3) and Clause 20 to be subject to the affirmative resolution procedure. The Committee’s recommendation was specifically in respect of clause 18 subsection (4) but we have tabled an amendment in respect of regulations under clause 18(3) as subsection 18(4) defines “overseas resident” as a person who is not ordinarily resident in Great Britain or any other territory specified in “the regulations” (i.e. regulations under subsection (3)).

**Clauses 19 and 31 – single tier / bereavement support payment and prisoners:**

Clauses 19 (single tier) and 31 (bereavement support payment) provide that regulations may disqualify payment to a person who is imprisoned, detained in legal custody or unlawfully at large as a result of having committed a criminal offence. The Bill, as currently drafted, provides for regulations under these powers to be subject to the negative procedure as is the case with the equivalent regulations in the current system. We have taken this opportunity to simplify the legislative approach so that the regulations simply set out the details of the disqualification for prisoners as opposed to the current approach where the disqualification is set out in primary legislation and the regulations provide for the exceptions to the disqualification. Given this change in legislative approach, the Committee recommended that these regulations should be subject to the affirmative procedure; we accept this recommendation and have tabled an amendment accordingly.

**Clause 33 – prohibiting the offer of incentives to transfer pension rights:**

Clause 33 provides for regulations to prohibit the offering of incentives with the intention of inducing a member of a salary-related occupational pension scheme to agree to a transfer of their rights to another pension scheme or arrangement. The Committee recommended that regulations under this power should be subject to the affirmative procedure; we accept this recommendation and have tabled an amendment accordingly.

**Clause 48 – power to make consequential amendments etc:**

Clause 48 provides a power to make by order consequential, incidental or supplementary provision in relation to any provision in the Bill. This includes a Henry VIII power to allow amendments to be made to primary or secondary legislation whenever passed or made. Whilst the Committee did not raise any issues with the power itself, they did call for an explanation of why the power allows future legislation to be amended.

The Government does believe that there are compelling reasons why it is necessary to allow for an order under clause 48 to amend future legislation to ensure that any legislation passed after the current Bill is consistent with the provisions of the Bill. The complexity of social security and pensions
legislation and, in particular, the interaction with occupational pensions legislation, means that legislative changes as significant as those made by the Bill are likely to take a while to bed in. Some of the detailed implications will need to be worked through during the implementation stages and as regulations are laid. This is particularly relevant for the new state pension which will not start until 2016, around two years after the Bill is expected to be passed. It is therefore possible that during the period these implications are being considered primary legislation will be passed which cannot take into account the details of provision made under the Bill.

Further, it may be best for all consequential amendments that are needed to future primary or secondary legislation to be made in a single instrument or set of instruments shortly before the Bill is implemented. The alternative would be to draft future provisions to reflect the Pensions Bill and then make potentially complex transitory provision pending the coming into force of the Bill.

The Government acknowledges that the power in the Pensions Act 2008, which is referred to in our memorandum to the Committee, does not extend to future legislation beyond the session in which the Act is passed. However, both the Pensions Act 2007 (section 15(6)) and the Welfare Reform Act 2012 (section 32(4)) contain Henry VIII powers which are similarly broad and extend to future legislation.

The power in the Pensions Act 2007 was used to make consequential amendments to primary legislation passed after that Act. Regulation 3 of the Pensions Act 2007 (Abolition of Contracting-out for Defined Contribution Pension Schemes) (Consequential Amendments) (No. 2) Regulations 2011 (S.I. 2011/1724) made two consequential amendments to the Pensions Act 2008 which were necessary as it was not possible for the 2008 Act to take into account how the policy was implemented under the 2011 Regulations which were made three years later.

Any order made under the power in clause 48(2) which amends primary legislation will be subject to the affirmative resolution procedure and so this provides Parliamentary control of any consequential amendment of primary legislation.

I hope that, on the basis of the explanation above, the Committee and the House will be reassured that this provision is needed and that there is sufficient Parliamentary control of any order made under the power.

Schedule 14 – single tier and the power to amend schemes to reflect the end of contracting out:

Schedule 14 provides for regulations to set out the detailed parameters for the statutory override. The policy intention of the statutory override is to allow scheme sponsors to make amendments to their occupational pension schemes following the end of contracting out and the subsequent
increase in National Insurance costs, where they would otherwise be prevented from doing so either by scheme rules or the requirement to gain trustee approval. The intention is that all relevant employers should be able to use this power if required.

Sub-paragraph 2(1) of Schedule 14 provides that the statutory override may be used to amend the scheme to increase the members’ contributions or change their accrual rate but sub-paragraph 2(2) limits these changes so the employer can recover no more than the increase in their National Insurance contributions in respect of the members. The power in sub-paragraph 2(5) was intended to ensure that, should the Government’s work with schemes and industry professionals reveal that for some scheme designs the restrictions applied to the override by sub-paragraph 2(2) were not appropriate, we would be able to modify the application of those restrictions. However, the Government notes the Committee’s concerns about the power in sub-paragraph 2(5) and its potential effect on the protection afforded by sub-paragraph 2(2). In light of the Committee’s recommendation on the power in sub-paragraph 2(5) and the information we have received from scheme professionals as we continue discussing the details with them, we no longer believe we need this power in that form. We have therefore tabled an amendment to remove sub-paragraph 2(5).

However we are aware of scheme designs, such as cost-share schemes, where changes in scheme funding are shared between the sponsoring employer and members. In these cases, the funding arrangements of the scheme could mean that increasing employee contributions and/or changing scheme liabilities in relation to future accruals to the limit set out in paragraph 2(2) would not automatically enable the employer to reduce their own contributions to the scheme to recover the cost of increased National Insurance contributions. We therefore intend to table a further amendment to Schedule 14 to make provision for such scheme designs. This new provision does not contain a delegated power and does not change the protection afforded to scheme members by sub-paragraph 2(2).

The Committee also recommended that regulations under sub-paragraph 2(3) of Schedule 14 be subject to the affirmative procedure given that they define the key expressions used in sub-paragraph 2(2). I can assure the Committee and the House that the technical regulations under this subparagraph are being drafted in consultation with pensions industry representatives and advisors and the draft regulations will be subject to a full public consultation, with input from representatives of the pensions industry, employers and scheme members. Making regulations under paragraph 2(3) subject to the affirmative procedure would, in effect, require the full package of regulations on the statutory override to be subject to the affirmative procedure as they would be taken as a single instrument. The Government has assured pension schemes that they will have a two-year preparation period for changes relating to the ending of contracting-out.
Subjecting the draft regulations to the affirmative procedure would considerably shorten the amount of time which schemes will have to prepare and put in place amendments for April 2016. This would mean a prolonged period of uncertainty which would delay employers and industry from committing resources, such as the employment of actuaries and other professionals and would in turn delay any negotiation between employers, members and trustees. At this stage, I am therefore not minded to table an amendment to provide for these regulations to be subject to the affirmative procedure. I will of course, listen to the views of the House during Committee.

Schedule 17 – power to restrict charges or impose requirements on work-based pension schemes; paragraphs 1 and 2:

Schedule 17 provides a power for the Secretary of State to make regulations to restrict charges or impose requirements relating to administration or governance on workplace pension schemes.

The Committee recommended that, in view of the novelty of the power and the likely level of public and political interest in any statutory regime that is established to regulate administration charges, regulations under paragraph 1 should require the affirmative procedure on the first occasion on which the powers are exercised. We accept this recommendation and have tabled an amendment to the Bill accordingly.

The Committee also raised concerns that the power to set administration and governance requirements is inappropriately wide, noting that the powers could conceivably extend to almost any aspect of a scheme’s management. The Government has indicated the areas it is considering for quality standards in its call for evidence on ‘Quality standards in workplace defined contribution pension schemes’ and the Office of Fair Trading also made recommendations about the governance of workplaces schemes in the recent report of its market study into workplace defined contribution schemes. These publications point to requirements relating to many aspects of the management of a workplace scheme, and in particular scheme governance, investment governance and administration. The Government accepts that the scope of Schedule 17 is broad but believes this is necessary in order to ensure we are able to take appropriate action to address both the recommendations made by the Office of Fair Trading and the areas highlighted by the Government in our call for evidence.

We are therefore satisfied that the scope of the power is appropriate, given the publicly stated intentions to use it to set requirements relating to the governance and administration of workplace schemes. All regulations made under this paragraph will be subject to the affirmative procedure so

---

Parliament will have the ability to fully scrutinise how the power is used, and our proposals for regulations will also be subject to public consultation.

The Committee also raised concerns about the potential for guidance made under the provisions in paragraph 2(2)(b) to be used in an ambulatory way to undermine secondary legislation. I can assure the Committee and the House that we do not intend to use guidance in this way. The ability to set guidance is intended to be used to supplement regulations in certain circumstances where it may be appropriate. For example, if requirements are set regarding the way in which schemes are administered it will be important that these have the ability to be updated in line with changes in industry practice as a result of the modernisation of administration systems. While the quality requirement would be set out in regulations, it may be proportionate to include details about complying with this in guidance to ensure they can be updated in line with changes in industry practice. The Government understand the Committee’s concerns that guidance should not be used as a substitute for regulations and I can assure the Committee and the House that this will not be the case. As the Committee appreciates the regulations will take precedence over any inconsistent guidance and we can assure the Committee that the regulations will be drafted in such a way that guidance can only be supplementary. As regulations made under this paragraph would be subject to the affirmative procedure, Parliament will have the ability to scrutinise their content and satisfy themselves that the balance between those regulations and guidance is appropriate. Similar provision for determination to be made in accordance with guidance was made in sections 22(4) and 22(5) of the Pensions Act 2008 (in relation to applying the test scheme standard).

I will of course listen to the view of the House in Committee and I hope that on the basis of the explanation above and the fact that any regulations are subject to the affirmative resolution the Committee and the House will be reassured that this provision is appropriate.

Schedule 17 - power to restrict charges or impose requirements on work-based pension schemes: paragraph 7:

The Government notes the Committee’s concern about the ability under the power in Schedule 17, paragraph 7 to amend future legislation and particularly the possibility that the power could be used in relation to future primary legislation. The Committee recommended that such extension is inappropriate unless the House can be satisfied that there are compelling reasons why it should be retained in the Bill.

The Government does believe that there are compelling reasons. This provision gives the ability to ensure that any legislation passed after the current Bill is consistent with any regulations made subsequent to that legislation. Given the fact that the powers under the Schedule in relation to charges, administration and governance are necessarily broad and, as the
Committee recognises, novel, it is likely to take some time until the regulations can be made to fully address all the issues which are needed to provide protection for members of pension schemes. It is therefore possible that whilst these measures are being considered primary legislation may be passed and this would not be able to take into account regulations which, at that point, would not have been made. It would therefore be unfortunate if there was no power to amend that legislation by regulations to ensure consistency and instead any inconsistency would need to remain unresolved until new primary legislation could be taken to make those consequential amendments.

As noted above in relation to Clause 48, similarly broad powers were contained in both the Pensions Act 2007 (section 15(6)) and the Welfare Reform Act 2012 (section 32(4)) and whilst the provision in the Welfare Reform Act 2012 has not yet been used, the provision in the Pensions Act 2007 has been used in exactly the circumstances referred to above. The Committee noted that any regulations which amend primary legislation will be subject to the affirmative resolution procedure and so this provides Parliamentary control of any consequential amendment of primary legislation.

As with Clause 48 I hope that, on the basis of the explanation above and the fact that any regulations are subject to the affirmative resolution, the Committee and the House will be reassured that this provision is needed and that there is sufficient Parliamentary control of any regulations made under the power.

I hope that the Committee and the House as a whole find this response useful in their further consideration of the Pensions Bill. I would like to thank the Committee again for their Report.

I am copying this letter to Baroness Sherlock and to all Peers with an interest in the Bill. I shall place a copy of this letter in the House Library, along with a copy of the supplementary memorandum on Government amendments.

Yours sincerely,

[Signature]

Lord Freud

Minister for Welfare Reform