

The Secretary of State for Work and Pensions and Baroness Stedman-Scott's response to the House of Lords' Delegated Powers and Regulatory Reform Committee's Report of 11th February 2020 on the Pensions Schemes Bill

Introduction

The Delegated Powers and Regulatory Reform Committee of the House of Lords ("the Committee") published its report on the Pension Schemes Bill 2020 on 11th February. The Select Committee on the Constitution published its report on the constitutional aspects of the Bill on 13th February.

The two Committees may find it helpful to read the Government's responses to each of their reports together. The Government thanks the Committees for their reports.

This partial response to this Committee's report addresses the issues where further explanation was requested. The Government is continuing to consider the other issues raised by the report and will respond on those issues separately. This response applies to the equivalent provisions in the Bill, as applicable in Northern Ireland.

Clause 6(2): amendment of definition of "money purchase benefits"

The Committee considers that there is insufficient justification for such a wide and significant power and that the power as it stands is inappropriate. The Committee considers that the power should be restricted so that it can be exercised only in the circumstances identified in the Delegated Powers Memorandum, that is, where doing so is considered necessary as a consequence of a change that is being made generally to the definition of money purchase benefits (§10).

The Government notes that whilst collective money purchase benefits are a subset of money purchase benefits, they are still a new type of pension benefits in the UK. Accordingly, it is not inconceivable that a judicial decision could affect the definition of collective money purchase benefits independently of the definition of money purchase benefits more broadly. The prospect of judicial re-characterisation of schemes purporting to provide collective money purchase benefits has been of particular concern to those with whom we consulted before drafting the legislation. To restrict the power to situations where it may be used only when the definition of money purchase benefits, generally, is being amended could frustrate the Government's ability to put right quickly any unforeseen consequences arising from a judicial decision.

As rightly pointed out in the Committee's report, this is a wide power. This is because it is inevitably difficult to foresee the circumstances in which its use might be necessary, for example, the precise reasoning of a court decision which interprets a particular scheme's rules under the new provisions. The power in clause 2(1), to which the Committee refers, has a different purpose to the power in clause 6(2) and may not be appropriate to achieve the necessary end, for example, in circumstances where a scheme authorised and functioning as a collective money purchase scheme is characterised by the courts as a defined benefit scheme following hostile litigation. The scope of the power in clause 2(1) is only to deal with schemes whose benefits might technically fall within the definition of "qualifying benefits" but which the Government considers are outside the spirit of Part 1. It would not address the situation where the very nature of what "qualifying benefits" means is changed through a judicial decision.

The Government appreciates the Committee's concern that the power could be exercised for wider policy reasons, and not simply as a means of responding to unexpected court judgments. The regulation making power at section 32 of the Pensions Act 2011 was introduced in response to the Supreme Court decision of *Houldsworth v Bridge Trustees Ltd*¹. Since the enactment, the power in section 32 has not been exercised and the lack of exercise is in line with the Government's intention not to use the power unless it needs to use it as a reactive tool. That does not, however, render the power unnecessary. Clause 6(2) remains a crucial safeguard for schemes looking to offer collective money purchase benefits against unforeseen consequences arising from judicial decisions. Without such a provision, schemes would have little comfort that there is an expedient way to put right any such consequences. Finally, the Government notes that the exercise of this power is subject to the affirmative resolution procedure, which enables close Parliamentary scrutiny of any proposed regulations under this power.

Clauses 11 – 17: use of the first-time affirmative procedure

The Committee notes that the scope of the powers remain the same on the first and subsequent exercises, and therefore that there is nothing in principle to prevent the changes made by subsequent exercises of the power from being as significant as the provision made by the first exercise (§14). The Select Committee on the Constitution makes similar observations in §19 and §20 of their report.

Clauses 11-17 relate to the authorisation criteria for collective money purchase schemes. As set out in its Delegated Powers Memorandum, the Government considers that there should be an opportunity for Parliament to have a full debate on the first use of these powers relating to the authorisation criteria, as these will set the framework for authorising schemes which has not previously existed and so will be entirely new. Subsequent use of these powers will be to amend the framework put in place by the first exercise of the power. The Government's view is that it is therefore appropriate that subsequent use of the powers follow the negative resolution procedure. This will provide the flexibility needed to respond to changes as new schemes and the wider market develop. The Government notes that this follows the approach that was taken for equivalent powers in the Pension Schemes Act 2017 relating to the authorisation criteria for Master Trusts.

The Government notes, moreover, that the future use of these powers will remain subject to Parliamentary scrutiny, including by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. The Government does not take the view that the application of the negative resolution procedure to future exercises of the power is license to use the powers inappropriately.

Clause 28: power to designate significant events

The Committee recommends that the House seeks further explanation from the Minister as to why it is not feasible to set out on the face of the Bill the events that are to constitute significant events for the purposes of clause 28, even if this were coupled with a power to make changes in the future to the list of events (§23).

Where a significant event has occurred, clause 28 imposes a duty on persons listed to report the event to the Pensions Regulator. Unlike triggering events, which are set out in clause 31, significant

¹ [2011] UKSC 42

events are not key risk events for the scheme. Hence whilst they warrant notification to the Regulator, their occurrence may not give rise to withdrawal of a scheme's authorisation. Collective money purchase benefits schemes are a new type of pension scheme. The Government wishes to consult with industry further prior to setting out what events will constitute significant events. The list of significant events is unlikely to be subject to frequent change, however, the Government does consider that there should be flexibility so that the list can be amended and updated to reflect future developments.

The Government does not therefore consider that there are key significant events which should be listed as significant events in primary legislation and therefore effectively "fixed", even if coupled with a power to make changes in future. In taking this approach the Government is mindful that a similar approach was taken in the Pension Schemes Act 2017 in relation to significant events for the purposes of Master Trusts.

[Paragraph 2 of Schedule 10: amendments to Part 3 of the Pensions Act 2004](#)

The Committee considers that the Government has failed to explain why there is a need for a power to impose conditions on who may be the chair of trustees of a defined benefit scheme, and that in the absence of an explanation the delegation of the power is inappropriate. If the power is to be retained the Committee suggest that the applicable procedure should be affirmative (§34 and §36).

The proposal to require defined benefit schemes to appoint a chair of trustees was included in the March 2018 White Paper *Protecting Defined Benefit Pension Schemes*. It was informed by the experience of the requirement for defined contribution schemes to appoint a chair of trustees, as set out in the Occupational Pension Schemes (Charges and Governance) Regulations 2015. Those regulations make provision regarding who can be chair of trustees of defined contribution schemes, for example where a trustee is a professional trustee body or a company. The Bill inserts a requirement for defined benefit schemes to appoint a chair in new section 221B(7) of the Pensions Act 2004. The power in new section 221B(6)(b) to make provision regarding who can be appointed chair will enable provision to be made in regulations for defined benefit schemes to deal with similar cases to those which have been provided for in regulations for defined contribution schemes. The regulations will be subject to the consultation requirements in section 317 of the Pensions Act 2004. The Government wants to ensure that these provisions are workable and effective, and therefore want to consult with the industry and other interested parties before finalising the detail. The Government also wants to retain the flexibility to refine the requirements in the future in the light of experience and changing economic context. The Government therefore thinks that it is appropriate for the detail of these requirements to be in secondary legislation and that the negative resolution procedure provides appropriate Parliamentary scrutiny.

[Clause 25 \(transfer rights\), clause 47 \(power to extend the definition of qualifying schemes\) and clause 124 \(conditions before pension rights can be transferred\)](#)

The Government will respond separately, as soon as possible, to the Committee's recommendations in relation to these provisions.

The Department for Work and Pensions

4 March 2020.