

# The Secretary of State for Work and Pensions and Baroness Stedman-Scott's response to the House of Lords' Select Committee on the Constitution's Report of 13<sup>th</sup> February 2020 on the Pensions Schemes Bill

## Introduction

The Select Committee on the Constitution (the "Committee") published its report on the Pensions Schemes Bill 2020 on 13<sup>th</sup> February. The Delegated Powers and Regulatory Reform Committee ("DPRRC") published its report on the delegated powers in the Bill on 11<sup>th</sup> 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.

## Clause 107: sanctions for avoidance of employer debt etc.

The Committee has requested that the Government explain why the Director of Public Prosecutions ("DPP") does not have a role in bringing or consenting to all proceedings brought under this provision for the criminal offences of avoidance of employer debt and sanctions, and for conduct risking accrued scheme benefits (§4).

Parliament has previously conferred upon the Pensions Regulator ("TPR") their own powers<sup>1</sup> (not subject to oversight by the DPP) to prosecute offences which may be punished by a custodial sentence. Examples of these offences are:

- section 45(1) of the Pensions Act 2008 (offences for failing to comply with automatic enrolment) which, if found guilty, may be punishable by up to 2 years of imprisonment;
- Section 77(5) of the Pensions Act 2004 (offence for altering, suppressing, concealing or destruction of any document) which, if found guilty, may be punishable by up to 2 years of imprisonment;
- Section 49(11) of the Pensions Act 1995 (offence for fraudulent evasion of obligation to make certain payments) which, if found guilty, may be punishable by up to 7 years of imprisonment.

TPR's statutory objectives<sup>2</sup> include protecting the benefits of pension scheme members, which includes prosecuting individuals who have committed offences of causing harm to pension schemes. In the context of these statutory regulatory powers, Parliament has judged previously in certain instances that TPR are well placed to make appropriate decisions to prosecute. The issues of employer debt and sanctions, and accrued scheme benefits, are especially technically complex. The Government's view is that TPR are well placed to judge the circumstances when it is appropriate to prosecute, as well as conducting the prosecution, in these circumstances.

There are safeguards in place to ensure that TPR abide with the relevant requirements and framework for prosecution:

- TPR's prosecution policy confirms that any interviews will be carried out in line with the Police and Criminal Evidence Act 1984 and the relevant Codes of Practice.

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<sup>1</sup> Section 4 of the Pensions Act 2004

<sup>2</sup> Section 5 of the Pensions Act 2004

- TPR abide by the Regulation of Investigatory Powers Act 2000, where relevant, when gathering information. Investigations will be conducted in accordance with the Criminal Procedure and Investigations Act 1996.
- When deciding whether to bring criminal proceedings in England and Wales, or to refer the matter to another prosecuting authority, TPR have stated that they will consider and apply the principles set out in the Code for Crown Prosecutors.

TPR's prosecution powers extend to England and Wales only. In Scotland and Northern Ireland, they work with the Crown Office and Procurator Fiscal Service and the Public Prosecution Service.

#### Clause 110: interviews

The Committee has asked that the Government clarify that legal counsel or other representatives are entitled to accompany a person summoned to an interview under these powers (§6).

There is no exclusion of a right to legal representation in Clause 110. Moreover, there is a power in new section 72A(2) of the Pensions Act 2004 to prescribe what information must be contained in the interview summons. The Government intends to prescribe information relating to legal representation, as well as other appropriate information, following further consultation. The Government intends that legal representation will not be denied to a person summoned to an interview and where the purpose of the interview is for a criminal investigation, TPR would be expected to adhere to the requirements set out in the Police and Criminal Evidence Act 1984 and the relevant Codes of Practice.

#### Clause 44: pause orders

The Committee has asked the Government to explain the appropriateness of the approach that it has taken with pause orders and how it is compatible with the doctrine of implied repeal and what alternative approaches were considered (§9).

The Pensions Regulator may issue a pause order in relation to a collective money purchase scheme during a triggering event period for the scheme if one of two conditions are met (clause 44(1) and (2)). The first condition is that the Regulator is satisfied that the making of the pause order will help the trustees to carry out the implementation strategy (clause 44(3)). The second condition is that the Regulator is satisfied that there is, or is likely to be if a pause order is not made, an immediate risk to the interests of members or to the assets of the scheme, and that it is necessary to make a pause order to protect the interests of the generality of members of the scheme (clause 44(4)). Clause 44(5) to (9) and Schedule 2 are very specific about the scope of pause orders.

The purpose of clause 44 is to confer a limited discretion on the Regulator to give trustees the opportunity to act protectively in the best interests of the generality of members, in spite of; the rules of the scheme, any enactment or, rule of law to the contrary, (paragraph 5 of Schedule 2, which also applies to an order made under any of paragraphs 2, 3 or 4 of that Schedule). The alternative to conferring this discretion would be to delegate a power on the Secretary of State to make secondary legislation, with or without Parliamentary oversight, that has a similar effect. This is not considered a realistic option in circumstances where the Regulator may need to act quickly to protect members' interests. It should be noted also that a pause order only serves to override, temporarily, and in the particular case concerned, competing statutory or other requirements as they apply at the time the pause order is made. Nothing in paragraph 5 of Schedule 2 purports to prevent the normal operation of the doctrine of implied repeal. In particular, there is no entrenching against future Acts. The Government therefore does not agree that the doctrine is undermined.

The doctrine of implied repeal is set out in Code s.6.10 of *Bennion on Statutory Interpretation*, 7th ed (2017). The statement at s.6.10 is:

“(1) Where the provisions of an Act are inconsistent with the provisions of an earlier Act, the earlier provisions may be impliedly repealed by the later. A similar principle applies to the abrogation of common law rules: see Code s 25.8.

(2) The doctrine of implied repeal is subject to the following qualifications:

- (a) there is a general presumption against implied repeal, the strength of which varies according to the context;
- (b) it is doubtful whether a constitutional statute can ever be impliedly repealed;
- (c) the presumption against implied repeal is also particularly strong where general provision in an Act covers a situation for which specific provision is made in an earlier Act.”

As regards the position of a pause order in relation to Acts passed after this Bill is enacted, the question will be one of interpretation of those later Acts. It will be whether, because of the doctrine of implied repeal, the provisions of this Bill about pause orders are repealed or are otherwise to be read subject to the later-enacted Act – with a corresponding effect on whether pause orders may be issued and what they may do.

#### Clause 47 powers to extend definition of qualifying schemes

The Government notes the Committee’s agreement with the DPRRC’s conclusion that the delegated power included in this provision is inappropriate (§14). The Government will respond substantively on these issues in its response to that Committee’s report.

#### Part IV dashboards

The Committee has expressed its regret at the inclusion of skeletal provision in the Bill (§17). The Government notes the Committee’s views and accepts that these provisions are skeletal. A comprehensive explanation of the policy intent and purpose of the provisions is provided in the Delegated Powers Memorandum that accompanies the Bill at pages 92 – 108.

As the Committee seems to acknowledge (§16), the purpose of enacting skeletal provisions now is to provide momentum for the process of co-operation and collaboration that will be needed to develop and test a dashboard service infrastructure. There will be two elements to this: supporting the Industry Delivery Group, brought together under the guidance of the Money and Pensions Service, to develop its proposals by working with a range of stakeholders; and ensuring that pension scheme providers themselves engage with the process and prepare for the delivery of the new service. This process will inform the content of future secondary legislation. The only alternative to this approach would be to table a Bill once the process is fully complete. The Government’s view is that this would be impractical, because it would not provide the legislative certainty and framework within which to push forward the development process now.

The Government notes furthermore that much of the finer, technical detail of the dashboard process would be more appropriate for secondary legislation. The Government does not believe that it would be desirable or practical to produce “sample Regulations” ahead of taking powers in future, supplemental primary legislation. This would pre-empt both Parliament’s wishes and the outcome of any necessary consultation. In the Government’s view the proper course is to seek Parliament’s authority for the powers now (by tabling this Bill), together with an explanation of the Government’s

intention (which has been provided in its Delegated Powers Memorandum) to enable it to proceed. Finally, the Government notes that Parliament will have the full opportunity to scrutinise the secondary legislation, in accordance with the procedure Parliament enacts.

The Committee referred also to clause 118, and asked the Government to explain who might be prescribed by the Secretary of State as someone who can publish standards, specifications or technical requirements that must be complied with by the pensions dashboard service (§18). As set out in the Delegated Powers Memorandum, pensions dashboards as a digital service will evolve over time, based on user-testing. The ability to set and update standards and technical specifications, supported through secondary legislation, will ensure that it remains beneficial and relevant to consumers.

Pensions dashboards fit with wider Government aims to give consumers access and control of their own data, particularly across financial services. The Government's approach is therefore to ensure dashboards are fit for purpose over the long term, which includes recognising that ownership of the dashboard infrastructure and the responsibilities for the setting of standards may need to change over time (as explained in Paragraph 1.364 of the Delegated Powers Memorandum). It is not possible to set out now who might be asked to take on this responsibility in future, nor to state now the mechanisms of accountability to Parliament. This would need to be determined according to the circumstances. It should be noted that these regulations are subject to the affirmative resolution procedure at all uses, which enables Parliamentary scrutiny and debate on any specific future proposal.

#### [Affirmative procedure on first use](#)

The Committee has commented that the Bill makes widespread use of powers that are subject to the affirmative procedure for their first use and to the negative procedure thereafter and draws the attention of the House to this and to the increasing use of the practice more generally (§§19 -20).

The DPRRC addresses the point in relation to Part 1 (§§ 11 to 14), and the Government will respond in further detail to that report. From a constitutional perspective, the Government notes that, as part of the Parliamentary scrutiny process for secondary legislation, it is the practice of the Joint Committee on Statutory Instruments, and the Secondary Legislation Scrutiny Committee, to draw Parliament's attention to instances where they conclude that the use of a delegated power is unusual or irregular. The Government does not accept that the practice of specifying an affirmative procedure on first use is licence to use those provisions inappropriately at a future stage.

Department for Work and Pensions

4 March 2020.