

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

16th Report of Session 2019–21

Pension Schemes Bill [HL]: Government Response

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Haskel](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Thurlow](#)

[Lord Tope](#)

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Publications

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelgatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Sixteenth Report

PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

1. We considered this Bill in our 4th¹ and 7th² Reports of this Session. The Committee received a partial response to the 4th Report on 4 March 2020. This was published in our 8th Report.³ We have now received a full response from Baroness Stedman-Scott OBE DL, Parliamentary Under Secretary of State (Minister for Work and Pensions). The response is printed at Appendix 1.

1 [4th Report](#), Session 2019-21 (HL Paper 17).

2 Report on Government Amendments to the Bill: [7th Report](#), Session 2019-21 (HL Paper 28).

3 [8th Report](#), Session 2019-21 (HL Paper 40).

APPENDIX 1: PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

Letter from Baroness Stedman-Scott OBE DL, Parliamentary Under Secretary of State (Minister for Work and Pensions), to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

The Delegated Powers and Regulatory Reform Committee of the House of Lords (“the Committee”) published its reports on the Pension Schemes Bill 2020 on the 11 February 2020 (4th report), and in respect of Government amendments to the Bill on 3 March 2020 (7th report).

The Government provided a response to the Committee on 4th March 2020, which addressed the issues where further explanation was sought in the Committee’s 4th report. This is the Government’s full response to the issues not covered previously. In addition, having considered the Committee’s recommendations, the Government has tabled amendments in relation to the following clauses: 11 to 17 and Schedule 3 (relating to clause 25) where the amendments specifically address issues raised by the Committee and 47 where it aims to provide clarity on the circumstances where the power may be used.

As before, this response applies to equivalent provisions in the Bill with Northern Ireland extent. Clause numbers are referred to as they were on introduction and in brackets as they are following Government amendments in the House of Lords.

Clauses 11 to 17: use of first-time affirmative procedure

The Committee noted in its report of 11 February 2020 that the scope of the powers remains 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 made similar observations in §19 and §20 of their report of 13 February 2020.

In its partial response to the Committees of 4 March 2020, the Government set out its rationale for the use of the first-time affirmative procedure in these clauses, as set out in its Delegated Powers Memorandum. In particular, the Government referred to the need to provide flexibility to respond to change, as these new schemes and the wider market develop. It also noted that the approach followed that taken in relation to equivalent powers in the Pension Schemes Act 2017, in respect of master trust schemes.

On further reflection, the Government has decided to table amendments for Report Stage to address the Committee’s concerns in respect of clauses 11 to 17. It is recognised that collective money purchase schemes are entirely new schemes, and that the framework provided for by these clauses, which relate to their authorisation, is therefore critical. The amendments will ensure that all those powers in clauses 11 to 17 that are subject to the first-time affirmative procedure will now be subject to the affirmative procedure on each use.

Clause 25: Transfer rights – affirmative procedure

The Committee is of the view that the Government has given insufficient reasons for applying the negative resolution procedure to what are essentially Henry VIII powers and

recommend in the absence of a more convincing justification the affirmative procedure should apply instead. [§19]

Clause 25 amends Chapter 1 of Part 4ZA of the Pension Schemes Act 1993 (“PSA 1993”) (which allows members of a qualifying occupational pension scheme to transfer their accrued rights out of the scheme). Members of a collective money purchase scheme (referred to by the Committee as a CDC scheme) have an equal right to transfer out of a scheme, in broadly the same way as any member of a money purchase scheme has. Clause 25(4) and 25(5) govern timeframes in which action must be taken by trustees on application for a transfer out of a CDC scheme, and both subsections contain regulation-making powers which permit the relevant specified time periods to be amended.

Clause 25(4)(c) amends section 99 of the PSA 1993 (Trustees’ duties after exercise of an option) to include a power to extend the time in which trustees must facilitate a request to transfer out of a CDC scheme to a period longer than the specified six months. As explained in the Delegated Powers Memorandum, whilst the transfer process for CDC scheme members will largely be the same as for money purchase schemes, out of necessity there are going to be some differences. For example, in relation to the calculation of the Cash Equivalent Transfer Value for CDC schemes, it is anticipated that the calculations will resemble those performed for non-Money Purchase (or Defined) Benefits, which require actuarial advice.

At this stage, and in advance of collective money purchase benefits coming into existence, the six month period for processing these types of money purchase transfer has been assessed as adequate but the Government acknowledges that in due course it may become apparent that a longer period is required, i.e. an extension to accommodate appropriate actuarial input. New section 99(2)(c) of the PSA 1993 provides the Government with the ability to respond to the evidence received from industry. On further consideration, the Government has decided to table an amendment for Report Stage making the exercise of this power subject to the affirmative procedure, to address the Committee’s concerns, and permit appropriate Parliamentary scrutiny of the use of this power.

Clause 25(5) inserts new section 99A into the PSA 1993 to make provision for a “cooling-off” period in relation to requests to transfer collective money purchase benefits, during which trustees may not facilitate the requested transfer unless they receive written instruction from the member to do so. The three week window may be amended by regulations. As CDC schemes are a new type of benefit, it is thought to be appropriate to introduce a mechanism to allow members time to consider whether they should surrender the rights they have built up. This time period does not exist for money purchase schemes, where, once a request has been made, the trustees must process the transfer with no further reference to the member. The difference in approach to other money purchase transfers will be monitored to ensure the Government responds appropriately if the industry evidence is that the three week period needs to be changed. In light of the above, and taking into account the Committee’s concerns, the Government has decided to table amendments for Report Stage making the exercise of this power subject to the affirmative procedure.

Clause 47: Power to extend the definition of qualifying schemes

The Committee considers that it is inappropriate to leave provision for regulating multi employer collective money purchase schemes to subordinate legislation; and, that the delegation of powers by clause 47 is inappropriate.

During the consultation process, the Government received responses from a range of industry bodies, such as the Association of British Insurers, the Society of Pensions Professionals and the TUC, that restricting the provision of collective money purchase benefits to single employer schemes or connected multi-employer schemes is a mistake and urged the Government to consider extending the regime to other models, such as Master Trusts.

This sentiment has been echoed by the Work and Pensions Select Committee. In its report into collective defined contribution pension schemes published in July 2018⁴, the Committee recommended that the regulations governing CDC schemes should accommodate mutual, multiemployer, industry wide and standalone schemes. This would enable more employees, including self-employed or gig economy workers, to benefit from the potential benefits of collective pension pooling.

In light of the interest from various groups, and in response to the Work and Pensions Select Committee recommendations, the Government believes that taking such a regulation-making power would enable the Government to react in a timely manner to emerging interest, without the need for further primary legislation. Nevertheless, the Government takes the concerns expressed by the Committee seriously and acknowledges the limitations on the circumstances in which the power to amend other primary legislation may be used could be made clearer. The Department therefore intends to bring forward amendments to clause 47 at Report to clarify the purposes and situations for which the power may be used.

Clause 124 (present clause 125) (Exercise of right to a cash equivalent)

The Committee considers that the powers in clause 124 should be limited so that they can only be exercised where the Minister considers doing so is necessary to protect the interests of pension scheme members. [§41]

The Committee recommends that the powers in clause 124 is made the subject of the affirmative resolution procedure, particularly if it is retained in its current form. [§42]

The intent behind clause 124 is protective, evidenced by the fact that it is focussed on cases where a member exercises their statutory right to transfer to another pension as opposed to where a member is seeking to purchase annuities (sections 95(2)(c) and (2A)(c) of the PSA 1993). The proper exercise of powers conferred by clause 124 entails acting to protect the interests of scheme members. Introducing such a requirement on the face of the Bill is unnecessary and may have the unintended consequence of casting doubt on the intent behind other pensions legislation that does not contain such provision.

The Government acknowledges and understands the Committee's concerns regarding the use of negative procedures in the context of Clause 124. However, the Government cannot accept the Committee's recommendation and it considers the negative procedure to be appropriate and proportionate for this clause.

Clause 124 is being introduced to safeguard pension savers. A commitment was made by the Government to limit the statutory right to transfer in its response to the Pension Scams consultation, August 2017⁵. Experience has informed the Government that scams methodology is constantly evolving and a proportionate

4 <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/580/58002.htm>.

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638844/Pension_Scams_consultation_response.pdf

and flexible regulatory response is needed to counter this evolving threat to pension savers. The Government's concern is that the lengthier affirmative procedure would reduce the agility of the Government's response to scam activity and increase the opportunity for fraudsters to adapt their response.

As a mitigating factor, regulations made under this power will still be subject to wide scrutiny due to the requirement to consult in accordance with section 185 of the PSA 1993, except in circumstances where the Secretary of State considers consultation inexpedient because of urgency (s.185(2)(d)). Consultation will allow those responsible for implementing the provisions to have an opportunity to influence the development of regulations.

Parliament will have the opportunity to scrutinise the regulations under the negative procedure. As stated already, the negative procedure does not prevent the relevant Committees from drawing concerns to Parliament's attention, whereas it does, due to the timescales involved, limit the opportunities fraudsters will have to redefine their methods in response to any changes. The Government's view, therefore, is that these powers strike an appropriate balance.

After Clause 123 (present clause 124) Climate change risk

The Committee considers that the regulation-making powers conferred by sections 41A and 41C should be subject to the affirmative procedure in respect of all exercises of the powers. [§12]

The Committee also considers that guidance issued under section 41A(5) should be subject to Parliamentary scrutiny by the affirmative procedure. [§16]

Section 41A – scrutiny procedure

In its supplementary delegated powers memorandum, the Government indicated that, subject to consultation, it envisages the first regulations made under section 41A will reflect recommendations made by the Task Force on Climate-related Financial Disclosures. The recommendations rest on long-established concepts of financial management, including good governance, risk management, setting strategies and using metrics and targets to measure progress.

The Government therefore envisages that subsequent regulations made under section 41A would adjust this framework as needed to respond to developments in understanding and industry best practice – for example to reflect any updates to the recommendations made by the Task Force – rather than significantly change the overall regime. Such regulations would be subject to the consultation requirements in section 120 of the Pensions Act 1995.

Subject to consultation, the Government anticipates that the first regulations made under section 41A will also provide for the timeline within which the new requirements will apply to both the largest schemes initially and smaller schemes thereafter.

Since subsequent use of the powers under section 41A is likely to be for the purpose of adjusting the overall regime and it is essential the Government is able to act quickly to keep pace with developments in understanding and industry best practice, the Government remains of the view that the negative procedure is appropriate.

The Government also notes, as before, that subsequent use of the powers in section 41A will remain subject to Parliamentary scrutiny, including by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee.

Section 41C – scrutiny procedure

The Committee's report states it is reasonable to assume that, once established by the first exercise of powers, an enforcement regime is unlikely to be subject to significant changes. The Government agrees.

The Committee nevertheless recommends that the regulation-making powers conferred by section 41C should be subject to the affirmative procedure in respect of all exercises of the powers. It notes that there is nothing to prevent the Government from providing for significant increases in financial penalties on subsequent exercises of the power.

The Government notes that the maximum level of financial penalty which may be imposed is already limited by section 41C(4). Clearly the Government is prevented from making significant increases to the financial penalty that exceed the limits set out there. Having set those limitations, it is appropriate that subsequent uses of the power are subject to the negative procedure.

The Committee has also expressed the view that extension of the regime to smaller schemes should be subject to the same level of Parliamentary scrutiny as when the regime is first applied to larger schemes. However, as set out above, the Government does not envisage that significant changes will be made to the enforcement regime once it has been established. This includes changes to reflect its application to smaller schemes.

The Government therefore remains of the view that the negative procedure provides for appropriate scrutiny of subsequent use of the powers in section 41C. It notes that such use will remain subject to Parliamentary scrutiny, including by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. The consultation requirements in section 120 of the Pensions Act 1995 will also apply.

Section 41A(5) – scrutiny of guidance

The Government notes it is highly unusual to make guidance subject to Parliamentary approval in the way the Committee recommends.

The purpose of issuing guidance is to help ensure consistency of approach between schemes so that the information they produce can more easily be understood and compared. The Government envisages that the guidance will include technical details relating to matters such as different climate change scenarios and metrics that trustees should have regard to in different circumstances. The guidance is intended to assist trustees in complying with the legislation, rather than as a set of rules which trustees must follow.

By contrast, the rules which trustees and managers must follow will be set out in the regulations made under section 41A and Parliament will have the opportunity to scrutinise those regulations.

The Government needs to be able to update and adapt the guidance quickly as industry practice develops, in order to meet changing circumstances, react to

questions and assist trustees with meeting their obligations. The ability to provide guidance quickly and flexibly is essential, in view of the speed at which action to address climate change is required.

In view of the proposed purpose and nature of the guidance, the Government does not, therefore, agree that it is appropriate to make the guidance subject to a requirement for Parliamentary scrutiny and approval.

Section 41A and 41B – amendments

The Government would also like to take this opportunity to inform the Committee of amendments to sections 41A and 41B that it has tabled for consideration at Report, in response to concerns raised by some Peers during Committee stage.

The amendments seek to clarify how the powers in sections 41A and 41B may be used to require that scheme trustees and managers take into account and publish the likely effects of different climate change scenarios on their pension scheme, including a scenario where the Paris Agreement goal of holding the increase in the average global temperature to well below 2°C above preindustrial levels, is achieved. Further detail is provided in the Government's supplementary delegated powers memorandum.

The Government repeats its thanks to the Committee for its analysis of the Bill and the constructive recommendations. It is noted that some of the issues raised by the Committee were also covered in the separate report on the Bill published by the Constitution Committee. Therefore, a copy of this response shall also be sent to the Chair of that Committee.

19 June 2020

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hregister>. The Register may also be inspected in the Parliamentary Archives.