



HOUSE OF LORDS

Select Committee on the Constitution

2nd Report of Session 2019–21

Pension Schemes Bill [HL]

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Matt Korris (Clerk), Matt Byatt (Policy Analyst) and Alasdair Johnston (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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Pension Schemes Bill [HL]

1. The Pension Schemes Bill [HL] (“the Bill”) was introduced into the House of Lords on 7 January 2020 and had its second reading on 28 January. Grand Committee on the Bill is scheduled to begin on 24 February.
2. The Bill provides for a new type of pension scheme (collective money purchase benefits); gives new powers to the Pensions Regulator; sets out a legal framework for the creation of online pensions dashboards;¹ and makes provision for other miscellaneous matters.

Criminal offences

3. Clause 107 introduces an offence of avoidance of employer debt and sanctions, and another for conduct risking accrued scheme benefits. For either offence, a person is liable on summary conviction to a fine or on conviction on indictment to imprisonment for a term not exceeding seven years, a fine, or both.
4. Proceedings for the two offences established by this clause may be instituted by the Pensions Regulator (“the Regulator”) or the Secretary of State, or (separately) by or with the consent of the Director of Public Prosecutions. **The Bill allows for the possibility of proceedings that lead to imprisonment. The Government must explain why the Director of Public Prosecutions does not have a role in bringing, or consenting to, all—and not just some—of such proceedings.**

Information-gathering powers

5. The Bill provides for several new information-gathering powers for the Regulator. Non-compliance with these provisions is added to a list of offences of providing false or misleading information to the Regulator under the Pensions Act 2004.
6. Under section 72 of the Pensions Act 2004 the Regulator can issue notices to require persons to provide information in writing in connection with the Regulator’s functions. Clause 110 empowers the Regulator to require such persons to attend an interview “to answer questions and provide explanations on one or more matters specified in the notice”. There is a significant difference between providing a written response to the Regulator and responding orally to questions in an interview held under these proposed new powers. **The Government should clarify that legal counsel or other representatives are entitled to accompany a person summoned to an interview under these powers.**

Pause orders

7. Clause 44 and schedule 2 provide the Regulator with the power to make pause orders, which can require compliance with directions preventing schemes from accepting new members, making payments towards or transfers out of the scheme, or paying benefits. Schedule 2 states:

¹ Pensions dashboards are online services that allow people to access their pension information electronically. The Bill provides powers to create pensions dashboards that will bring together information on an individual’s savings from multiple pensions, including the State Pension, in a single place online. Pensions Bill [HL], [Explanatory Notes](#), paras 24–25

“5 (1) A pause order, or an order made under any of paragraphs 2, 3 or 4, may be made in relation to a collective money purchase scheme—

- (a) in spite of any enactment or rule of law, or any rule of the scheme, that would operate to prevent the order being made, and
- (b) without regard to any enactment, rule of law or rule of the scheme that would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent, with a view to making the order.”

8. Pause orders potentially have the effect of overriding the requirements of another statute. While this may be an appropriate power in relation to Acts already on the statute book, such orders could be exercised in respect of an enactment that is passed after this Bill becomes law and therefore operate prospectively to suspend future Acts of Parliament. The traditional doctrine of implied repeal holds that a statute enacted later in time prevails over an earlier statute to the extent that they are inconsistent, but pause orders potentially undermine this principle.
9. We do not doubt the importance of the pause order powers to protecting collective money purchase schemes. Identical provisions exist in respect of pause orders for master trust schemes in the Pensions Schemes Act 2017 and in respect of freezing orders for winding up occupational pension schemes under section 32 of the Pensions Act 2004. However, **the Government should explain why the approach it has taken with pause orders is appropriate, how it is compatible with the doctrine of implied repeal, and what alternative approaches it considered that could have achieved the same goals without raising this constitutional question.**

Delegated powers

10. The Delegated Powers and Regulatory Reform Committee (DPRRC) has reported on the Bill.² In drawing on its analysis we focus on provisions that appear to raise constitutional concerns.

Henry VIII powers

11. Part 1 of the Bill provides for single-employer collective money purchase pension schemes. Clause 47 provides delegated powers that permit the amendment of Part 1, or of any other enactment, to revise the regulatory framework to create multi-employer collective money purchase schemes.
12. The Government’s justification for the powers is flexibility: “the ability to respond to changing market demands for non-connected multi-employer ... schemes as they emerge” and to “adapt the authorisation regime in different ways best suited to a particular scheme structure.”³ The consequences of allowing new collective money purchase schemes are significant and the clause provides powers to create and adapt the existing framework instead of setting out the features that the framework may have. Regulations under clause 47 are subject to the affirmative procedure. Nonetheless clause 47 is skeletal and contains a broad Henry VIII power.

2 Delegated Powers and Regulatory Reform Committee, *Fourth Report* (Session 2019–21, HL Paper 17)

3 Pension Schemes Bill [HL], *Delegated Powers Memorandum*, para 1.200

13. The DPRRC observed:

“The fact that the Bill currently prohibits multiple-employer collective money purchase schemes suggests that such schemes may give rise to significantly different regulatory issues from those presented by single employer collective money purchase schemes which are currently allowed under the Bill. This is also supported by the fact that clause 47(3) to (5) gives the Secretary of State such wide powers to make changes to the provisions that govern single employer schemes.”⁴

14. The DPRRC concluded that the power was therefore inappropriate.⁵ **We agree.***Skeletal provisions*

15. Part 4 of the Bill creates four broad regulation-making powers in respect of new online pensions dashboards. These powers are skeletal as the scheme has not yet been developed. The Delegated Powers Memorandum explains:

“The final design of the infrastructure has not yet been agreed. This is a task for the new Industry Delivery Group. The Industry Delivery Group is a team of industry experts, including pension providers, insurers, fintech, the regulators, consumer advocates and government, brought together under the guidance of the Money and Pensions Service (MaPS), to develop recommendations and solutions for the development and delivery of pensions dashboards. In the consultation response a proposed dashboard service infrastructure was put forward, but the final design will be determined by the Industry Delivery Group. Until further detailed design work has been completed it is not possible to specify exactly what components will be needed in the infrastructure, although some design principles were set out in the consultation, and some examples are provided below.”⁶

16. There is a need for some of these powers in order to commence the work on pensions dashboards and facilitate the sharing of data to make them function. However, the rest of the powers could have been omitted until the policy had been prepared and sample regulations produced for consideration as part of a future bill. We have observed previously that “Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them.”⁷17. We note that the powers are subject to the affirmative procedure and recognise the complexity of these pensions issues. However complexity is not an excuse for taking powers in lieu of policy development. **We regret the inclusion of such a skeletal provision in this Bill.**

18. A specific power in respect of pensions dashboards is in clause 118 (new section 238A(5)(a) of the Pensions Act 2004). This confers powers on the Secretary of State to require the pensions dashboard service to comply with

4 Delegated Powers and Regulatory Reform Committee, *Fourth Report* (Session 2019–21, HL Paper 17), para 28

5 *Ibid.*, para 29

6 Pension Schemes Bill [HL], *Delegated Powers Memorandum*, p.92

7 House of Lords Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 58

standards, specifications or technical requirements, but it also allows the Secretary of State to delegate the setting of standards to “a person specified or of a description specified in the regulations”. This could be the Regulator but need not be an existing body with lines of accountability to ministers and to Parliament. **We recommend the Government explain who such nominated persons might be and through what mechanisms they will be accountable to Parliament.**

Affirmative procedure on first use

19. The Bill makes widespread use of delegated powers that are subject to the affirmative procedure for their first use and the negative procedure for any further use. In one instance (regulations made under clause 11(3)(a)) the Delegated Powers Memorandum explains that this is to “allow for full and thorough debate” of the first regulations and that the Government “envisage that further use of this power will be limited to adapting details of the ‘fit and proper criteria’ to reflect changes in the market that may occur.”⁸
20. The practice of specifying delegated powers that are affirmative on first use has become more widespread in recent years.⁹ The appeal of this approach is that Parliament can debate the substantive detail of the Government’s policy then any subsequent minor amendments are subject to negative procedure. However, there is nothing to stop a future government replacing a policy wholesale using these powers, with the only scrutiny of a new policy being the use of the negative procedure. This does not make it inappropriate for use in this Bill, however we draw the attention of the House to this practice for its consideration of other bills in the future.

⁸ Pension Schemes Bill [HL], [Delegated Powers Memorandum](#), para 1.33

⁹ See, for example, the [Pension Schemes Act 2017](#) and [Space Industry Act 2018](#).

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTERESTS

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Baroness Taylor of Bolton (Chair)
 Lord True
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple
 Baroness Corston
No relevant interests
 Baroness Drake
No relevant interests
 Lord Dunlop
No relevant interests
 Lord Faulks
No relevant interests
 Baroness Fookes
No relevant interests
 Lord Hennessy of Nympsfield
No relevant interests
 Lord Howarth of Newport
No relevant interests
 Lord Howell of Guildford
No relevant interests
 Lord Pannick
No relevant interests
 Baroness Taylor of Bolton (Chair)
No relevant interests
 Lord True
No relevant interests
 Lord Wallace of Tankerness
No relevant interests

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Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.