



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

7th Report of Session 2019–21

Pension Schemes Bill [HL]: Government Amendments

Ordered to be printed 26 February 2020 and published 3 March 2020

Published by the Authority of the House of Lords

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](#)

Registered Interests

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Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

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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 hldellegatedpowers@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 Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Seventh Report

PENSION SCHEMES BILL [HL]: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our 4th Report of this Session. Since we reported, the Government have tabled a number of amendments. The amendments to which we draw the attention of the House in this Report have already been considered at Committee stage. The purpose of this report is therefore to inform debate at Report stage.
2. Some of the amendments either include new delegated powers or affect existing ones. The Department for Work and Pensions has provided a supplementary delegated powers memorandum relating to these amendments.¹

Amendment 73–New clause on climate change risk

3. This amendment inserts three new sections into the Pensions Act 1995:
 - Section 41A confers a regulation-making power to impose requirements on the trustees or managers of an occupational pension scheme with a view to ensuring the effective governance of the scheme with respect to the effects of climate change.
 - Section 41B confers a regulation-making power to require trustees or managers of an occupational pension scheme to publish information relating to the effects of climate change on the scheme.
 - Section 41C allows provision to be made with a view to ensuring compliance with regulations made under sections 41A and 41B.
4. The powers conferred by section 41A appear to be wide. They allow regulations to impose requirements on trustees and managers of occupational pension schemes to ensure that there is effective governance of the scheme with respect to the effects of climate change. There is nothing on the face of the legislation expressly to limit the kinds of requirements which might be imposed (other than the fact that they must be intended to ensure effective governance with respect to the effects of climate change). Subsections (3) and (4) give examples of the kinds of requirements which may be imposed but these are not exhaustive.
5. One important point to note is that the powers do not need to be applied to all occupational pension schemes uniformly. The powers allow the requirements only to apply to particular kinds of schemes identified in the regulations. The new provisions will also allow different requirements to be applied in relation to different kinds of scheme. The Department explains in the supplementary memorandum that it expects the requirements will initially be limited to large schemes. It is also stated that the powers will allow the Government to improve risk management practices within occupational pension schemes in a way that is proportionate to the schemes in question. This suggests that

¹ Department for Work and Pensions, *Supplementary Delegated Powers Memorandum* (13 February 2020): <https://publications.parliament.uk/pa/bills/lbill/58-01/004/5801004-DPM-Supplementary.pdf> [accessed 3 March 2020]

the implementation of the requirements is likely to be staged and that the requirements may be different as between different kinds of scheme.

6. The powers conferred by sections 41B and 41C are also very open-ended. Section 41B allows the Secretary of State to determine in regulations what kinds of information relating to the effects of climate change that the trustees or managers are required to publish, without any express limits on what the regulations may require. As with section 41A, the regulations can impose these information requirements only on specified descriptions of scheme and can impose different requirements on different types of scheme.
7. Section 41C confers a wide power to make provision in regulations with a view to ensuring compliance with requirements imposed under sections 41A and 41B. Although specific matters are listed in subsections (2) and (3) (such as provision for imposing financial penalties), these are not exhaustive of the provision which may be included in the regulations.
8. The Parliamentary procedure which applies to the scrutiny of the regulations is different as between sections 41A and 41C on the one hand and section 41B on the other. In the latter case, the regulations are subject to the negative resolution procedure, in the case of sections 41A and 41C the first-time affirmative procedure applies.
9. It is our practice to look closely at powers which are subject to the first-time affirmative procedure. The scope of a power remains the same on the first and subsequent exercises, and therefore we consider that the Government should provide convincing reasons why it is only the first exercise of the power that requires the affirmative resolution procedure to apply. The Department have provided the following explanations in support of the first-time affirmative procedure:²

Section 41A: It is stated that the affirmative procedure is appropriate on first use because these are new requirements. The negative procedure is sufficient thereafter because subsequent regulations are likely to focus on adjusting these requirements in light of developments in understanding about how schemes may best approach managing climate-related risks. It is also argued that the speed at which climate change risk change action is required makes the negative procedure appropriate.

Section 41C: The reasons for applying the first-time affirmative procedure in this case appear to be connected to the use of that procedure for section 41A. The Department states that it is appropriate because the first use of powers under section 41C:

“will coincide with the first use of powers in section 41A, meaning that a higher level of scrutiny is appropriate for the compliance regime”.

It is argued that subsequent regulations are likely to focus on changes to the detail of the compliance regime, and therefore that the negative resolution procedure is appropriate.

10. We are not convinced by the Department’s argument that the negative procedure will be sufficient for subsequent exercises of powers under section 41A. These are wide powers to impose requirements relating to the governance of pensions schemes with respect to the effects of climate

² See paragraphs 10 and 11 and paragraphs 35 and 36 of the supplementary memorandum.

change. The Government make the point themselves that the scientific understanding of climate change and the consensus as to its effects and mitigation is developing continually. In our view, it is reasonable to assume that as these things change and develop there may need to be significant changes in the kinds of provisions which are included in regulations under section 41A. Also, the Government have made clear that the requirements will first be applied to larger schemes, with the regime only being extended to other schemes on subsequent exercises of the power. In our view, how and in what ways the regime is extended to other schemes is a matter of significance that warrants the affirmative procedure also applying to subsequent exercises of the powers.

11. The Government have themselves made a link between the Parliamentary scrutiny which should apply to regulations under section 41A and that which should apply to regulations under section 41C. We consider there are also good arguments for saying that the affirmative procedure should apply to all exercises of the power in this case as well. The power is expressed in very general terms as a power to make provision with a view to ensuring compliance with regulations under sections 41A and 41B. On the face of it, this would allow a very wide range of enforcement provisions to be applied. Although 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, it always remains a possibility. For example, there would be nothing to prevent the Government providing for significant increases in financial penalties on subsequent exercises of the power. Also, if the intention is to apply the regime to smaller schemes on a subsequent exercise of powers, then in our view the application of the regime to those schemes should be subject to the same level of scrutiny as when the regime was first applied to larger schemes.
12. **In the light of these matters, we recommend 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.**

Amendment 73—Guidance

13. Section 41A(5) of the Pensions Act 1995 requires trustees and managers of occupational pension schemes to have regard to guidance prepared by the Secretary of State in complying with regulations under that section. There is no requirement for the guidance to be subject to any Parliamentary scrutiny.
14. The reason given in the memorandum³ for not requiring Parliamentary scrutiny is not, in our view, particularly helpful or informative:

“As the guidance relates to legislative requirements, it is not considered necessary for it to be subject to a Parliamentary procedure.”
15. In our view, there are good reasons for requiring guidance issued under section 41A(5) to be subject to Parliamentary scrutiny. It imposes a statutory duty on trustees and managers of schemes which requires them to have regard to the guidance when complying with the requirements of the section. It seems reasonable to suppose that the guidance will have a significant impact on the governance actions which trustees and managers of the schemes take in order to comply with the requirements, particularly as any failure properly

3 See paragraph 11 of the supplementary memorandum.

to comply is likely to make the trustees or managers of a scheme liable to pay a financial penalty.

16. **Accordingly, we consider that guidance issued under section 41A(5) should be subject to Parliamentary scrutiny. In our view, since the guidance will form part of a package with the regulations to which it relates, the affirmative procedure should also apply to the guidance.**

Northern Ireland

17. The amendments made by Amendment 73 do not extend to Northern Ireland. Corresponding amendments for Northern Ireland are made by Amendments 81 and 98. In our view, the same issues arise with these amendments as arise with Amendment 73.

Amendment 77—Extension of clause 124 to unfunded public service defined benefits schemes

18. Clause 124 amends Parts 4ZA and 4A of the Pension Schemes Act 1993 which confer a right on members of pension schemes to transfer their accrued rights. In particular, it amends sections 95 and 101F by inserting provisions which will prevent trustees or managers of a relevant pension scheme from transferring a member's accrued rights unless conditions prescribed in regulations are met.
19. In our recent report on this Bill, we recommended that:
 - the power to prescribe conditions should be limited so that it can only be exercised where the Minister considers doing so is necessary to protect the interests of pension scheme members; and
 - the power should be subject to the affirmative resolution procedure rather than the negative resolution procedure.
20. Amendment 77 extends the scope of clause 124 so that the power to prescribe conditions which must be met before accrued rights may be transferred also applies to unfunded public service defined benefits schemes. **The recommendations made in our earlier report apply equally to these kinds of schemes as they do to the other schemes to which clause 124 will apply.** The same applies in respect of the equivalent amendment for Northern Ireland (Amendment 99).

APPENDIX 1: MEMBERS' INTERESTS

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

For the business taken at the meeting on 26 February 2020 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Goddard of Stockport, Lord Haskel, Baroness Meacher, Lord Rowlands, Lord Thurlow and Lord Tope.