



Department
for Work &
Pensions

Pensions Bill Delegated Powers

Supplementary memorandum from DWP to the
Delegated Powers and Regulatory Reform
Committee

February 2014

Pensions Bill Delegated Powers: Supplementary memorandum by the Department for Work and Pensions

Introduction

1. This Memorandum is prepared by the Department for Work and Pensions, and is supplementary to the Memorandum dated 31 October 2013. It identifies new or amended delegated powers conferred in the Government amendments to the Pensions Bill tabled on 11 February 2014 for consideration at Lords Report stage. It explains the purpose of the powers, the reasons why they are left to delegated legislation, the Parliamentary procedure selected for the exercise of these powers and why that procedure has been chosen. References to the amendment numbers are as they appear on the list of Government amendments provided to the Committee on 11 February.
2. The Government has tabled further amendments for consideration at Lords Report stage but these have not been covered in this memorandum as they do not confer any powers for delegated legislation. A letter explaining all Government amendments has been sent to Peers with an interest in the Bill and a copy has been placed in the House Library.

Extent

3. The amendments extend to England and Wales and to Scotland. Pensions are a transferred matter in respect of Northern Ireland and, as such, legislation is the responsibility of the Northern Ireland Assembly.

Analysis of delegated powers

Government amendment 1: Clause 38 – Automatic enrolment: powers to create general exceptions

Powers conferred on: Secretary of State

Powers exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Negative

4. This amendment inserts a new subsection into new section 87A to provide a restriction on what the regulation-making power contained in that section may be used for.
5. Automatic enrolment is in its early stages, but the Department has already identified situations where the duty on the employer to automatically enrol a worker would result in situations that are counter to the policy intention. For instance, a worker who has enhanced or fixed tax protection for high

net wealth pension savings who could suffer punitive tax charges should they be automatically enrolled.

6. Clause 38 inserts a new section into the Pensions Act 2008 (new section 87A) which provides a power to enable the Secretary of State, through regulations, to relieve employers of the employer duty provisions in relation to workers of a prescribed description and workers in prescribed circumstances.
7. The clause also enables the Secretary of State to confer the power on employers so that in prescribed circumstances an employer need not automatically enrol a worker but may choose to do so. This could be, for example, in the case of a worker working out their period of notice when the employer would, otherwise, become subject to the employer duty provisions.
8. There has been concern that the power could be exercised in such a way as to exclude employers from automatic enrolment on the basis of their size. This is not the Government's intention and so this amendment has been tabled to restrict the use that may be made of the power. It specifically provides that an exception may not be framed by reference to the size of the employer.
9. Regulations made under this clause will be subject to the negative resolution procedure; the Department does not feel that this amendment limiting the use of the power merits a change in the Parliamentary scrutiny procedure. As set out in the Department's original memorandum, the negative procedure is felt to be appropriate as the Department does not anticipate that there will be very many situations where the employer duty provisions will need to be disapplied. The situations that have been anticipated are not controversial and the Department believes any new situations identified will be similarly uncontroversial. Draft regulations would be subject to consultation with the pensions industry and employers if need be.

Government amendments 2 and 3: Clause 43 – Work-based schemes: power to restrict charges or impose requirements

Government amendments 9 and 10: Schedule 18 – Work-based schemes: power to restrict charges or impose requirements

Powers conferred on: Secretary of State

Powers exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Affirmative (when first exercised for regulations relating to charges – paragraph 1; whenever exercised for regulations relating to governance or administration requirements)

10. Clause 43 gives effect to Schedule 18 which provides a power for the Secretary of State to make regulations to restrict charges or impose requirements relating to administration or governance on work-based pension schemes.

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11. We have previously written to the Committee about the Government's intention to use the power to set charges, governance and administration requirements for schemes used for workplace pension saving. It has been our intention for the power to be broad enough to set requirements for schemes regardless of whether they are open or closed to new members or to new accruals.
12. In our memorandum to the Committee in October 2013 we explained that the ability to take a power that covers schemes that are closed to new members or new accruals is particularly important given the concerns that the Office of Fair Trading have raised about standards in older schemes, which are expected to be more likely to fall into these categories.
13. However, we have become aware that the power, as currently drafted, would not be sufficient to cover a certain group of contract-based schemes, including those that are closed to new members. This is because of part (b) of the definition of "work-based pension scheme" and "worker" used in Schedule 17, which applies for the purposes of Schedule 18 (see paragraph 4(1)). This defines a "work-based pension scheme" as:
 - (a) an occupational pension scheme;
 - (b) a personal pension scheme where direct payment arrangements (within the meaning of section 111A of the Pension Schemes Act 1993) exist in respect of one or more members of the scheme who are workers; or
 - (c) a personal pension scheme which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (stakeholder pension schemes).

"worker" means a person –

 - (a) who is a worker for the purposes of Part 1 of the Pensions Act 2008; or
 - (b) to whom a provision of Part 1 of that Act applies as if the person were a worker because of a provision of Chapter 8 of that Part.
14. We think it important that the scope of the power extends to all schemes which have been used for workplace saving, including those where direct payment arrangements in respect of one or more workers do not exist. The amendments to Clause 43 and Schedule 18 therefore amend the power to remove the definition of work-based pension scheme. This would ensure that the power has the ability to cover all schemes that have been used for workplace pension saving, as initially intended. Any regulations made would need to describe the scheme covered by the regulations by virtue of paragraph 1(5) or paragraph 2(5) of Schedule 18 and so Parliament would have the opportunity to consider the scope of the regulations.
15. By removing the definition of work-based, the scope of the amended power would be broader than initially drafted. Although our immediate intention is only to use the power for schemes used for work-based saving,

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this breadth of scope is necessary to ensure that we can protect members in all relevant schemes.

16. The Department will work closely with the pensions community as we develop regulations to be made under this Schedule.
17. The amendments do not alter the parliamentary procedure for regulations made under this clause. Regulations made under paragraph 1 of this Schedule (relating to charges, when exercised for the first time) or paragraph 2 (relating to governance or administration requirements) will be subject to the affirmative resolution procedure. This is considered appropriate as they are new areas of legislation, and will ensure that Parliament is able to consider the scope of the regulations.

Government amendment 4: Clause 50 - Pension Protection Fund: compensation cap to apply separately to certain benefits

Powers conferred on: Secretary of State

Powers exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Negative

18. The amendment to Clause 50 amends an existing power to make regulations under paragraph 26(9) of Schedule 7 to the Pensions Act 2004 ("the Act") so that provisions in consequence of clause 50 may be made with retrospective effect.
19. The Pension Protection Fund (PPF) pays compensation to members of under-funded defined benefit occupational pension schemes where the employer has become insolvent. The amount of compensation may be subject to a maximum cap.
20. Where a person becomes entitled to compensation in respect of two or more benefits (or a lump sum) under their scheme (or a connected scheme) on the same day these benefits are added together before considering whether the compensation cap in paragraph 26 of Schedule 7 to the Act applies or not. However, where this entitlement is derived from two different scheme entitlements – an individual's own pensionable service and a pension credit arising from a divorce or dissolution settlement - the policy intent is that these entitlements are kept separate and the cap applied separately to each.
21. Whilst current PPF practice is in line with this policy intent, the existing legislation in the Act requires the two amounts to be added together before the cap is applied – which could lead to a significantly lower payment. Clause 50 (as introduced via an amendment to the Bill at Grand Committee) amends paragraph 26 of Schedule 7 to the Act so that the existing legislation is aligned with the policy intent and the current practice. The provisions of clause 50 have retrospective effect to ensure that past payments of compensation which were calculated in line with the policy intent, but not in accordance with the legislation, are covered.

22. The issue described above in relation to the Act also arises where a person becomes entitled to compensation on a particular day and they had, at an earlier date, become entitled to compensation in respect of benefits (or a lump sum) from the same scheme (or a connected scheme). This situation is dealt with in secondary legislation made under paragraph 26(9) of Schedule 7 which modifies paragraph 26. These modifications apply the compensation cap to the second, or subsequent, tranche of compensation.
23. The amendment to clause 50 inserts a new subsection (8) which amends the existing regulation-making power in paragraph 26(9) of Schedule 7 to the Act to allow for regulations made under this power to have retrospective effect, but only where the regulations are being made as a consequence of this clause. This will enable the modifying regulations to be amended so that any past payments of compensation which were calculated in line with the policy intent, but not in accordance with the secondary legislation, are covered.
24. Regulations made under this power will continue to be subject to the negative resolution procedure. The regulations make provision for the specific situation where a person has entitlement arising on two different dates. The amendment in subsection (8) limits the extent to which provisions in the regulations can have retrospective effect to changes made in consequence of the same changes being made to the primary legislation. The retrospective amendments will maintain the current practice adopted by the PPF when compensation is being paid in respect of benefits based on the individual's own pensionable service and a pension credit arising from a divorce or dissolution settlement. The Department therefore considers the existing level of scrutiny to be appropriate.

Government amendment 7: Schedule 12 – State pension: amendments

Powers conferred on: Secretary of State

Powers exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Negative

25. The amendment to paragraph 3 of Schedule 12 inserts a new subsection (5ZB) in to section 22 of the Social Security Contributions and Benefits Act 1992 (“SSCBA 1992”). This imposes an obligation on the Secretary of State to bring forward regulations under the power in new section 22(5ZA) to provide for the crediting of National Insurance contributions in respect of spouses or civil partners of service personnel who accompanied their service personnel spouse on overseas assignments.
26. Currently National Insurance credits can be awarded to such persons, on application, for 2010/11 and subsequent tax years under regulation 9E of the Social Security (Credits) Regulations 1975/556. These regulations are made under section 22(5) of the SSCBA 1992. The intention is for these

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regulations to be extended to persons reaching state pension age on or after 6 April 2016 using the new power in section 22(5ZA), which provides for the crediting of earnings or contributions under the single-tier pension (inserted by paragraph 3 of Schedule 12 to the Bill).

27. The Government is keen to demonstrate their commitment to legislate for this specific group prior to the 2010/11 tax year. Therefore new section 22(5ZB) imposes a duty on the Secretary of State to exercise the power in new section 22(5ZA) to make regulations in relation to spouses of service personnel.
28. The intention is that eligible individuals who reach State Pension age on or after 6 April 2016 would be able to apply to have their National Insurance record credited with contributions for tax years before the 2010/11 tax year, during which they had accompanied the service personnel on a posting outside the UK. The purpose of the National Insurance credit is to allow these individuals to fill gaps in their contribution history prior to 2010/11 and as far back as 1975/76, thereby gaining the opportunity to build up qualifying years counting towards entitlement to a single-tier pension.
29. The regulations will specify the class of contributions to be credited and the details of the eligible group. This will include a definition of a member of Her Majesty's forces, using the existing power in section 116(3) of the SSCBA1992. The provision includes (at paragraph (c)) the power to make exceptions to the categories of eligible persons. This power is included so that the Secretary of State may make exceptions similar to those in regulation 9E(8)(a) and (b) of S.I. 1975/556. As with S.I.1975/556, the general power in section 175(3) of the SSCBA 1992 to make provision subject to specified conditions will be used to set out the specific details of the scheme regarding the manner in which and the time limits within which the National Insurance credits must be applied for. The intention is that procedures broadly similar to those in regulation 9E of S.I. 1975/556 will be adopted.
30. Regulations made under this duty will be subject to the negative resolution procedure in line with the equivalent pre-existing power at section 22(5) and the powers at new section 22(5ZA).

Government amendments 18 and 19: Schedule 20 – Pension Protection Fund: increased compensation cap for long service

Powers conferred on: Secretary of State

Powers exercised by: Order & Regulations (Statutory Instruments)

Parliamentary procedure: Mixed (Negative and none)

31. Clause 55(8) provides for the making, by order, of transitional, transitory or saving provisions in connection with the provisions of this Act. Schedule 20, paragraph 19 clarifies that an order made under clause 55(8) could be

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used to make further transitional provision in relation to the introduction of the increased compensation cap for long service, even though Parts 3 and 4 to the Schedule make specific transitional provision for the introduction of the increased cap.

32. In particular amendment 18 clarifies that an order under clause 55(8) could be used to disapply or modify the specific transitional provisions in Schedule 20 or make similar transitional provision where a person has 'multiple benefits'. A person has 'multiple benefits' where they have entitlement to compensation in relation to more than one benefit arising from their membership of a scheme which are payable at different times. This approach mirrors the existing approach where the primary legislation is modified by regulations made under paragraph 26(9) of schedule 7 to the Pensions Act 2004 in multiple benefits cases.
33. Amendment 19 inserts two further sub-paragraphs to deal with the situation where a person's entitlement to compensation has arisen under the Pensions Act 2008, as a consequence of a pension sharing compensation order, following a divorce or dissolution of a civil partnership.
34. Amendment 19 sub-paragraph (1) relates to the power in clause 55(8) and specifies that this power can be used to make transitional provision for this group, where their compensation is capped. The transitional provisions would be similar to those in Part 3 of Schedule 20 which cover how the increased compensation cap for long service will apply to individuals receiving compensation under Schedule 7 to the Pensions Act 2004.
35. Currently there is a regulation making power in paragraph 18 of Schedule 5 to the Pensions Act 2008 which allows for the amount of compensation paid to this group to be limited (i.e. capped). Amendment 19 sub-paragraph (2) clarifies that this power may also be used to make transitional provision in relation to the introduction of the increased compensation cap for long service.
36. In respect of Parliamentary scrutiny, orders made under clause 55(8) will not be subject to any parliamentary procedure (as is usual for commencement orders) and regulations made under the power in paragraph 18 of Schedule 5 to the Pensions Act 2008 will be subject to the negative resolution procedure. The Department does not consider that any change is required to these resolution procedures as a result of the amendments, as they are intended to clarify the scope of the powers and do not seek to fundamentally change either power.

Department for Work and Pensions
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