

Legal Advice Note

LEGISLATIVE CONSENT MEMORANDUM – PUBLIC SERVICE PENSIONS BILL

Background

1. On the 2nd October 2012, the Minister for Finance and Leader of the House gave notice of a motion in the following terms –
“To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that provisions of the Public Service Pensions Bill as introduced into the House of Commons on 13 September 2012 relating to the restrictions to be applied to new pension schemes for public bodies, in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”
2. The Legislative Consent Memorandum (“LCM”) was considered on the 9th October 2012 by the Business Committee, who agreed, in accordance with Standing Order 29.4, to refer it to the Constitutional and Legislative Affairs Committee for scrutiny. The Business Committee agreed that the Committee should report on the LCM by 15 November 2012 to allow the LCM to be debated in plenary on 20 November 2012.
3. The Constitutional and Legislative Affairs Committee reported in December 2012. It noted the Assembly Commission’s view that the Bill had the potential to undermine Assembly legislation (i.e. the National Assembly for Wales (Remuneration) Measure 2010) and that the pension scheme for Welsh Ministers and Assembly Members should be excluded from the Bill. It recommended that the Welsh Government should seek to consider very carefully the Commission’s views, and undertake discussions with the UK Government and the other devolved administrations.
4. Consideration of the Legislative Consent Motion in the Assembly was postponed, but is now scheduled for plenary on Tuesday 29th January 2013.

Position in Scotland and Northern Ireland

5. The Bill as drafted would impact on pension schemes within the competence of the Scottish Parliament and Northern Ireland Assembly, including the pension schemes for Members of those legislatures. When the Constitutional and Legislative Affairs Committee reported, no legislative consent motions had been tabled in those jurisdictions. The position now is that schemes within the competence of the Scottish Parliament and the Northern Ireland Assembly will be excluded from the Bill by amendments to be tabled in the House of Lords at Report stage, at the request of the Scottish Government and the Northern Ireland Executive. This is confirmed in the revised Explanatory Notes that accompanied the Bill on introduction in the Lords.

The Bill

6. The Public Service Pensions Bill was introduced into the House of Commons on 13 September 2012 by the Chancellor of the Exchequer. The Bill has now completed its Committee Stage in The House of Lords, and Report Stage is scheduled for 12th February 2013. The detailed background to the Bill can be found in paragraphs 3-11 of the Explanatory Notes to the Bill at <http://services.parliament.uk/bills/2012-13/publicservicepensions/documents.html>

7. The purpose of the Bill is generally to set a mandatory framework for new public sector pension schemes for the payment of pensions and other benefits. It will apply to public sector pension schemes in Wales, including schemes within the legislative competence of the Assembly (hence the need for a Legislative Consent Motion). The schemes within competence are the pension scheme for Assembly Members and members of the Welsh Assembly Government, as defined in the Government of Wales Act 2006, (i.e. Welsh Ministers, Deputy Welsh Ministers and the Counsel General), and the scheme for members of Welsh local authorities. Further detail about legislative competence is set out below.

8. It is important to note that the Bill does not alter the present pension schemes for members of the Welsh Assembly Government, Assembly Members or members of Welsh local authorities. However, the mandatory framework it lays down will apply to any new pension schemes created for those persons.

9. In the case of many such schemes (but not the scheme for Assembly Members and members of the Welsh Assembly Government), it provides powers to Ministers (UK, Welsh or other, as applicable) to create new schemes, subject to that mandatory common framework.

10. The Bill also provides powers for the Treasury to set further technical requirements. Some of these Treasury powers would apply to any future new pension scheme for Assembly Members and members of the Welsh Assembly Government. Further detail of this is given below and in the Annexe.

11. Finally, the Bill gives powers to the Pensions Regulator to operate a system of independent oversight over the operation of the schemes within its scope. This would include any new pension scheme for Assembly Members and members of the Welsh Assembly Government.

Legislative Competence

12. The provisions to which the LCM refers come within the National Assembly's legislative competence under headings 4 (Economic Development) and 13 (National Assembly for Wales) of Schedule 7 to the Government of Wales Act 2006.

13. It is noteworthy that there are no subjects relevant to "pensions" under heading 4 (Economic Development). However, certain pension schemes do come within the Assembly's legislative competence, by virtue of a "carve-out" from an exception under heading 4. The history of this is that heading 4 was amended by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2007 (SI 2007/2143) to include a specific exception from the Assembly's competence in relation to occupational and personal pension schemes. This

in turn was amended by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010, which introduced a carve-out from that exception, The relevant exception, and the carve-out, read as follows (emphasis added):

“Occupational and personal pension schemes (including schemes which make provision for compensation for loss of office or employment, compensation for loss or diminution of emoluments, or benefits in respect of death or incapacity resulting from injury or disease), apart from schemes for or in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General or Deputy Welsh Ministers and schemes for or in respect of members of local authorities.”

14. Heading 13 (National Assembly for Wales) contains the following specific reference to pensions: *Salaries, allowances, pensions and gratuities for and in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers.* Thus, when the exception for pensions was inserted by the 2007 Order, it was necessary to include a carve-out so that the exception did not contradict the competence granted under heading 13. This need was not identified at the time but was addressed by the 2010 order.

The Consent Memorandum

15. The Legislative Consent Memorandum identified clause 27 as the one that relates to the Assembly’s legislative competence. As a result of subsequent amendments, this is now clause 29. Clause numbers quoted in this note are those as the Bill emerged from Committee Stage in the Lords. This clause applies certain provisions of the Bill to new “public body pension schemes”, which would include those for Assembly Members, the First Minister, Welsh Ministers, the Counsel General or Deputy Welsh Ministers and for or in respect of members of local authorities.

16. Legal Services consider that other clauses of the Bill are also relevant to the LCM. These are dealt with in the following paragraphs.

Relevant provisions of the Bill

17. As set out above, clause 29 of the Bill applies certain provisions of the Bill to new ‘public body pension schemes’ which are new schemes established by a public authority (defined in clause 35) for the payment of pensions and other benefits to members or staff of a statutory body or the holder of a statutory office. **Any new scheme for Welsh Ministers, the Counsel General, Assembly Members or members of Welsh local authorities, would therefore have to comply with the following provisions of the Bill –**

- (a) section 3(1) and (2) and Schedule 3 (scheme regulations);
- (b) section 4 (scheme manager);
- (c) sections 5 and 6 (pension board), if the scheme has more than one member;
- (d) sections 8 to 10 (scheme design); .
- (e) sections 11 and 12 (cost control);
- (f) sections 14 to 16 (information and records).

Further details of these provisions are annexed to this note.

18. These will apply with the following modifications –

- (a) references to scheme regulations are to be read as references to the rules of the scheme;
- (b) references to the responsible authority are to be read as references to the public authority which established the scheme.

19. **This Bill will make no changes to the legislative competence of the National Assembly. Accordingly, it will remain within the Assembly’s competence to amend or repeal the current Bill, in relation to any new scheme for Welsh Ministers, the Counsel General, Assembly Members or members of Welsh local authorities. However, that would require an Act of the Assembly rather than the simpler process for making a new pension scheme, as set up by the Assembly in the National Assembly for Wales (Remuneration) Measure 2010.**

The significance for the Commission and the Remuneration Board

20. Section 20 of the Government of Wales Act 2006 makes provision for the remuneration of Assembly Members. Subsection (3) permits the making of provision for their pensions; subsection (4) specifies that this may include the establishment and administration of schemes; subsection (6) declares that the provision is to be made by a determination of the Remuneration Board, and subsection (7) provides that the Commission must give effect to that determination. **The Bill as drafted would therefore constrain the exercise by the Remuneration Board and the Commission of their functions under the 2006 Act (as amended by the 2010 Measure establishing the Remuneration Board).**

Legal Services

24 January 2013

Annexe – Provisions of the Public Service Pensions Bill which would affect any new scheme for Welsh Ministers, the Counsel General, Assembly Members or members of Welsh local authorities

Clause 3 requires the consent of the Treasury for any new scheme regulations (rules in the case of the Assembly scheme). There would be no need for that consent for scheme regulations made by Welsh Ministers for the fire and rescue service.

Clause 4 will require each scheme to have its own manager with responsibility for scheme administration. The manager may be the ‘responsible authority’ which is the body that makes the scheme. This would be consistent with the Commission managing the scheme in accordance with section 20(7) of the Government of Wales Act 2006.

Clause 5 will require the scheme to provide for a Pension Board. The remit of pension boards will be to ensure compliance with legislation, codes of practice and regulatory issues. The clause contains various provisions relating to conflict of interest.

Clause 6 will require the scheme manager to publish information regarding the membership and responsibilities of the Board.

Clauses 8–10 relate to the design of a scheme. Schemes may be defined benefits schemes, defined contributions schemes or schemes of any other description, though final salary schemes are specifically excluded. Index-linking must comply with annual orders made by the Treasury.

Clause 9 relates to revaluation and clause 10 provides that the normal pension age must be the same age as a person’s state pension age, or 65 if that is higher. It then contains further provisions regarding the effect of changes to the state pension age on the payment of benefits under schemes.

Clauses 11 and 12 relate to cost control. Clause 11 relates to the actuarial valuation of defined benefits schemes in accordance with Treasury

directions. Clause 12 provides for capping the cost to the employer in accordance with regulations and directions made by the Treasury.

Clauses 14 and 15 require the scheme manager to publish certain information about the scheme and to provide information to the Treasury in accordance with Treasury directions. Section 16 will require the manager to maintain records in accordance with regulations made by the Secretary of State.