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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont

Our Ref CFP275/11-15

1 November 2013

Dear Shane,

PUBLIC SERVICE PENSIONS BILL

RESPONSE TO LETTER FROM THE COMMITTEE DATED 17TH OCTOBER 2013

The DFP Committee scheduled an Evidence Session from DFP Officials on drafting issues and consideration of scheme amendments on the clauses in the Public Service Pensions Bill for 23 October 2013. The Committee had requested that officials are in a position to provide full responses at the Evidence Session on 23 October 2013 on the issues raised to assist the Committee further its deliberations.

On 17 October the Committee requested that the Department would provide a response to several queries and in light of the time constraints and given that DFP Officials would be attending the Committee meeting on 23 October they were content that the issues would be addressed during the oral evidence from the officials rather than in writing.

The majority of the issues raised only required detail and explanation on the technical and factual content of the clauses. However, some issues sought the Departmental approach to several proposed amendments. Therefore, as a result of time constraints and the DFP officials being unable to complete the detail on all issues and provide full responses, the Department consider it appropriate to now complete their response in writing.

The Department's response on each of the issues raised is set out at **Annex 1**, in the order raised in the Committee's letter of 17 October 2013. It should be noted that in instances where issues have been raised in earlier correspondence, this has been indicated and cross referenced.

Yours sincerely

Judith Finlay

JUDITH FINLAY
Departmental Assembly Liaison Officer

**RESPONSE TO COMMITTEE ON ISSUES AND PROPOSED AMENDMENTS
RAISED**

CLAUSE 3 – SCHEME REGULATIONS

Committee Comment

"Departmental officials agreed to follow up on issues arising from the discussion around this clause."

Departmental Response

Scheme regulations require the consent of the Department of Finance and Personnel. This is a standing convention. It is a normal constitutional principle and convention that DFP is tasked with ensuring propriety and regularity on behalf of the Assembly and the mechanism for doing this (in this case) is via the DFP approval role provided in the Pension Bill.

Clause 3 contains additional provisions about how the power to make scheme regulations under the Bill can be used. DFP consent is based on its responsibility for public expenditure on behalf of the NI Assembly and DFP's good practice on protecting that responsibility by inserting consents in some legislation. An example of legislation which requires explicit DFP approval is expenditure falling on the Northern Ireland Consolidated Fund. The fact that pensions are paid out of Annually Managed Expenditure, AME and is cash being drawn down from the Consolidated Fund is probably the most important factor leading to greater scrutiny from DFP than might be the case for some policies.

CLAUSE 4 – SCHEME MANAGER

Committee Comment

Departmental officials agreed to follow up on the following queries:

"In what circumstances would it be necessary for the scheme manager to be different from the responsible authority (i.e. the 5 Departments listed at Schedule 2)?"

"What is the position as regards the existing main schemes?"

Departmental Response

The Responsible Authority for schemes has the power to make the scheme regulations for the relevant scheme. (The Department). Each public service pension scheme must also have a Scheme Manager who is a person responsible for managing or administering the scheme. (Accounting Officer). The Responsible

Authority may also be the Scheme Manager however this can be difficult to manage where there are several parts to a scheme. In these scenarios the scheme may require different persons acting as scheme managers for each part of the scheme.

The existence of an administering authority (scheme manager) which is separate to the responsible authority (DOE) for the local government scheme is probably a reflection of the fact that from the late 1800s superannuation for local government officers was administered and paid for by the relevant councils.

The Local Government (Superannuation) Act 1950 established NILGOSC to administer what was then the Local Government Superannuation Scheme and the fund. Any remaining locally managed schemes, e.g. Belfast Corporation were wound up under powers in the Local Government Act (Northern Ireland) 1972.

Local Government, for example, have several Councils which can require individual scheme managers. The other unfunded schemes would, in the main, have dual role responsibilities with Responsible Authority and Scheme Manager.

CLAUSE 5 – PENSION BOARD

Committee Proposal

"Arising from the concerns raised in the NILGA evidence, Departmental officials to confirm whether an amendment will be tabled to replace 'must' with 'may' at clause 5, subsection (2)".

Departmental Response - accept

This is a non contentious proposal and provides flexibility for NILGOSC to act as the Pension Board if this is required. This approach was agreed with Local Government officials at the Public Service Pensions Bill Working Group. The DFP Minister will table an amendment to have replace 'must' with 'may' at clause 5, subsection (2). Previous discussions with both DFP Officials and NILGOSC have confirmed that they are content with this proposed amendment.

CLAUSE 7 – SCHEME ADVISORY BOARD

Committee Comment

"Why will the scheme advisory boards provide advice to the responsible authorities only on request, under subsection (1)?"

Departmental Response

It is expected that the Pensions Board will consult the Scheme Advisory Board on desirability of scheme changes when action for scheme change is under consideration as a consequence of movement in scheme costs and adjustments to the cost cap or other overarching changes in law where a change is required to maintain scheme compliance.

The provision provides a statutory basis that the information will be provided when requested and at the appropriate time. Advisory boards would have discretion to offer a view on desirability of scheme changes as a matter of course at any time. The provisions in the bill for scheme advisory boards permit them to establish their own ways of working.

The provision ensures information is provided when requested. It does not rule out provision of a view at other times.

Committee Comment

"Would there be circumstances in which it would be preferable for a board to be able to offer its advice without being specifically requested to do so?"

Departmental Response

Advisory Boards are likely to offer advice when scheme changes are required as a result of overarching policy changes, overarching changes in law or European directives, or as a result of identified pressures on the cost cap mechanism on the approaches which could address these changes or cost pressures, such as a readjustment of contributions or other adjustments to the scheme.

Committee Comment

"With reference to subsection (2), can a board offer advice to a scheme manager and pension board in circumstances where no more than one of each exist?"

Departmental Response

Yes. But this is unlikely to be the case in the current NI arrangements. This provision provides for eventuality that there might be more than one manager as is the case in the local government schemes in GB. In the course of consultation on the Collective Consultation Working Group on the scheme provisions scheme representatives including those for the NI Local Government Scheme were content to retain this provision.

CLAUSE 8 – TYPES OF SCHEMES

Committee Comment

"What is the requirement for the provision in subsection (2), paragraph (b) regarding defined benefits schemes other than CARE schemes?"

Departmental Response

It is expected that for the foreseeable future all defined benefits schemes will be of the CARE type. The Bill makes provision to protect the CARE scheme design so that it should last for at least 25 years. The Bill applies enhanced processes for TUS consultation and Assembly scrutiny which will be made to apply in the event of any proposal to change elements of the CARE scheme design, its benefit accrual rates and the members' contribution rates, outside of the normal operation of the cost cap mechanism, within that protected period.

Lord Hutton considered variations of the CARE scheme design including cash balance versions where the accruals are based on career average earnings and then converted to an annuity on either guaranteed or open market terms. Lord Hutton recommended, and the current Government agreed, the CARE calculation design provided for in the Bill. The provisions at clause 8 allow a sufficient level of scope for a future generation to develop or modify the design for example if evidence for a progressively better model becomes available within the legislative lifetime of the Bill but within the context of the enhanced protections for protected elements (25 year guarantee) under clause 22.

The clause makes general provision for various scheme designs including those such as the defined contribution schemes which already exist in the public service, such as the Civil Service Partnership scheme. The aim is to provide staff with choices for pension saving as an alternative to the main defined benefit scheme.

There is no intention to provide defined contribution schemes instead of the CARE defined benefit schemes. It would be inappropriate to limit the options available to current and future generations of public service workers by removing these flexibilities from the Bill.

CLAUSE 9 – REVALUATION

Committee Proposal

"Is DFP required to consult on the orders that it makes under clause 9 and, if not, why not?"

With regard to the provision in clause 9, subsection (5) which would see only those orders that specify percentage decreases being subject to affirmative

resolution, how would DFP respond to the view that, if percentage increases are a cost on the public purse, then the Assembly should have greater control over those also?"

Departmental Response -reject

DFP **are** required to consult on the orders that it makes under Clause 9. Generally, this would be through the 'negative resolution procedure which is a form of Assembly control over a statutory rule. A statutory rule going through this procedure will automatically become law unless the Assembly objects. Conversely, 'affirmative resolution procedure' refers to a procedure where a statutory rule must be affirmed or approved by the Assembly to become law.

If affirmative resolution procedures were applicable to **all** statutory rules the Assembly would likely be inundated with debates on many minor rule amendments which in the main would be non detrimental and therefore the Assembly process could be brought to a stand still.

The negative resolution procedure is considered to provide an appropriate degree of Assembly control for revaluation orders where, as is normally the case, the Order specifies a percentage increase. Similar procedures apply to the regular uprating of benefits (under the *Social Security Administration (Northern Ireland) Act 1992*) and official pensions in payment (under the *Pensions (Increase) Act (Northern Ireland) 1971*).

The Department currently makes orders to revalue pensions in payment in line with the general increases applied to state benefits and additional pensions and factors with reference to prices when DSD makes a revaluation order under the Social Security Administration Act 1992. A similar order would be made in line with the annual Social Security Revaluation of Earnings Orders made under that Act. The important point is these are established methods for annual adjustment in line with HM Treasury and DWP secondary legislation for revaluation in line with earnings or prices. The safeguard however is the requirement in this Clause which provides that affirmative procedure would apply in the historically rare case where there is negative revaluation.

CLAUSE 10 – PENSION AGE

Committee Proposal

"Given that some stakeholders have called for greater flexibility to enable future decisions on NPA to be made on a scheme-by-scheme basis, what would be the DFP view on an amendment to clause 10, subsection 1 to provide that the NPA must be the same as the person's state pension age or 'as otherwise prescribed in scheme regulations'?"

Departmental Response - reject

This clause is one of the core provisions of the PSP Bill and was a central recommendation of the Independent Public Service Pensions Commission to respond to trends in increased longevity, options for deferred retirement and increased working lifetimes, and to make public service pension provision sustainable for the long term. The overall reform policy to link State Pension Age with Normal (i.e. Scheme) Pension Age was agreed by the Executive on 8 March 2012. The Executive also agreed to implement these reforms consistently with the GB equivalent schemes. This is also a core provision now enacted in the Public Service Pensions Act 2013 in Great Britain. The NI Administration faces a substantial reduction in its available funding from HM Treasury if the policy to link State Pension Age with Normal Pension Age is not implemented or delayed. This clause does indeed specify the pension age however, it is important to point out that the secondary legislation process provides scope for departments and their TUS to further refine scheme level arrangements in the course of their overall consultations on new scheme regulations. This process is the correct route for scheme specific arrangements to mitigate the impact of reductions applied if individuals chose to retire early. Scheme officials can provide further evidence at the scheduled Evidence Session in relation to recent developments in equivalent GB schemes including the Firefighter's scheme to provide effective options for early departures before the pension age required in the Bill. The response to the Committee to their letter of 24th also deals with this issue.

CLAUSE 12 – EMPLOYER COST CAP

Committee Proposal

"Departmental officials agreed to follow up with consideration of amending the Bill to include a duty on DFP to consult before making directions".

Departmental Response - accept

DFP have provided an undertaking at the Collective Consultation Working Group to consult for 12 weeks as this is a new procedure for DFP. The DFP Minister will table an amendment to include a further provision under Clause 12 to the effect that DFP Directions may only be made, after the Department of Finance and Personnel have consulted the relevant stakeholders.

Committee Proposal

"Is DFP required to consult on the regulations that it makes under clause 12, subsections (5) and (8) and, if not, why not?"

Departmental Response - accept

DFP have provided an undertaking at the Collective Consultation Working Group to consult for 12 weeks on the Employer Cost Cap regulations as this is a new

procedure for DFP. The DFP Minister will table an amendment to include a further provision under Clause 12 to the effect that DFP Regulations may only be made, after the Department of Finance and Personnel have consulted the relevant stakeholders.

Committee Proposal

"Why does the provision at clause 12, subsection (7) not expressly state that the action provided for will not affect any provision already built up in the scheme, as is suggested on page 14 of the Explanatory & Financial Memorandum?"

Departmental Response - reject

Clause 3 (3) (b) deals with retrospection. Clause 12 does not provide for any power for retrospection; therefore there is no need for such an amendment.

CLAUSE 13 – EMPLOYER CONTRIBUTIONS IN FUNDED SCHEMES

Committee Proposal

"In relation to clause 13, subsections (4) to (7), Departmental officials agreed to follow up with consideration of amending the Bill to enhance the independence of the person appointed to review the actuarial valuation and employer contribution rates (especially given the role of the appointed person and the fact that the responsible authority and the scheme manager could be one and the same)."

"With reference to subsection (6), paragraph (c) of clause 13, Departmental officials agreed to follow up with consideration of amending the Bill to take account of circumstances in which the responsible authority is the scheme manager (see clause 4, subsection (3))."

Departmental Response - reject

The clause 13(4) sets out that a person appointed by the responsible authority should report on certain "aims". These aims are specified in the Bill in relation to Valuation and Cost Control processes. The person appointed to review the actuarial valuation and employer contribution rates on NILGOSC are subject to NIAO requirements. The Department's view is that this a technical exercise where financial or actuarial expertise is the primary requirement rather than independence. The responsible authority for the Local Government scheme is required to include confirmation to the effect that its aims have been achieved as part of its annual reporting in accounts which are published and are subject to the independent scrutiny of the Northern Ireland Audit Office. The responsible authority for the Local Government scheme is the Department of the Environment which maintains control of the policy for the scheme. NILGOSC is the Scheme Manager. Therefore, the

scenario of the responsible authority being the same as the Scheme Manager for funded schemes under Clause 13 will not arise for the Local Government Scheme.

CLAUSE 17 – REGULATORY OVERSIGHT

Committee Proposal

"Why has the (less commonly used) confirmatory procedure been chosen for the orders made under clause 17?"

Departmental Response

Schedule 4 amends the Pensions (NI) order 2005 to make provision in relation to the regulatory oversight of public service pension schemes. In particular, it makes provision in relation to the role of the Pensions Regulator – the UK-wide regulatory body for pensions. Given that the Regulator operates on a UK-wide basis, DSD seek to ensure, as far as possible, that the necessary legislation in GB and NI is made to the same timetable with common operative dates etc. This facilitates the issue of guidance and maintenance of up-to-date information on the Regulator's website for GB and NI without the additional costs of separate guidance/information.

The confirmatory procedure is the standard procedure used in relation to social security and pensions instruments made by DSD, which require the approval of the Assembly. This method facilitates the maintenance of parity of timing with the corresponding instruments in GB whilst safeguarding the Assembly's power of control over the Order.

The reason why the confirmatory procedure is required is that Clause 17 amends the Pensions (NI) Order 2005 which requires that (with certain exceptions not relevant to this query), that regulations or orders under that Order be made subject to the confirmation procedure. Article 288(6) (b) of that Order refers.

DSD propose to table any Order for approval of the Assembly as soon as possible after the Order is made and has secured Committee and the Examiners clearance. Should the Assembly not approve the Order, the Order ceases to have effect.

CLAUSE 21 – CONSULTATION

Committee Proposal

"Why does the consultation requirement in clause 21 not also cover the cross-cutting orders and regulations made by DFP under powers elsewhere in the Bill (e.g. clauses 9, 12 and 31)?"

"Why is the Department reluctant to agree an amendment to consult 'with a view to reaching agreement' under clause 21, subsection (1)? Without such an amendment, is there a risk that the consultation would be less meaningful?"

Departmental Response - reject

There are four principles for effective consultation cited by case law which known as the Gunning Principles. The Department conducts its current ongoing consultations in the spirit of these principles which provide the appropriate balance for employee representation and operational efficiency with the implicit aim of reaching agreement. Sometimes agreement is not always achievable. Also there are scheme changes where many are routine or non contentious and to report on the detail of consultation for the purpose of illustrating how agreement was sought could unnecessarily compromise operational efficiency for Departments and the Assembly. The current procedures for making changes to current public service pension schemes vary from scheme to scheme. Under the Bill all future scheme changes will be made in regulations which will be subject to negative resolution procedure in the Assembly and which affords an appropriate level of Assembly scrutiny to ensure the proper consultation on scheme level changes has been completed.

CLAUSE 22 – PROCEDURE FOR PROTECTED ELEMENTS

Committee Proposal

"Why are the scheme regulations made under clause 22 not subject to affirmative resolution procedure, particularly since they will contain provision changing the 'protected elements' of the scheme (as described at clause 22, subsection (5))?"

Departmental Response

Before the scheme comes into operation, the Department must have laid before the Assembly a report providing information about:

- (a) the consultation that took place for the purposes of Article 3(2), so far as relating to the provision,
- (b) the steps taken in connection with that consultation with a view to reaching agreement in relation to the provision with the persons consulted, and
- (c) whether such agreement has been reached."

During Consideration Stage of the Superannuation Bill, the previous DFP Minister advised the Committee that it would be his Department's intention to lay such a report at the same time as any amending scheme to enable the Assembly to consider all relevant information collectively and before any such scheme comes into operation".

The same process would apply under this provision.

CLAUSE 23 – PROCEDURE FOR RETROSPECTIVE PROVISION

Committee Proposal

"Is it the case that, as drafted, the responsible authority would not have to meet the consent or consultation requirements under clause 23 if it decides that the retrospective changes that it proposes have adverse effects but that these are not 'significant'? In such circumstances, is it also the case that only the negative resolution procedure would apply to the scheme regulations?"

"Given the concerns raised by the Human Rights Commission with clause 23 and the fact that it deals with accrued rights which Hutton recommended should be properly protected, how might the Department improve the legal certainty of clause 23?"

"While the Department argues that 'it is the terms of ... the scheme regulations that would have to be assessed against the requirement for legal accessibility and foreseeability rather than the enabling power' in clause 23, would it be possible to table an amendment to define 'significant adverse effects' on the face of the Bill? Would DFP be willing to table such an amendment in order to provide a further safeguard in the primary legislation?"

"While an individual may have recourse to the courts in circumstances where they have a different view on the significance of an adjustment to their accrued benefits to that of the responsible authority, to what extent does the Department consider that to be an efficient and proportionate protection?"

Departmental Response - reject

Clause 23 requires responsible authorities to consult with the aim of reaching agreement on pension changes which would have retrospective effect. Where agreement may not be achievable the clause provides for an effective trade union veto over the change where it would have a significantly adverse effect. Trade unions will also have representation on the Pension Boards which will be involved in determining the 'significance' of any adverse change. In the Department's view the protections for accrued rights and the safeguards against adverse scheme changes in the Bill are sufficiently robust. A trade union veto on every retrospective change could compromise the capability for responsible authorities to maintain scheme rules in compliance with overarching legal and policy changes.

The definition of 'significant adverse effects' is indeed difficult to pin down as authorities may have differing opinions on what they perceive to be a "significant adverse effect" and indeed can exercise discretion. However, the Pension Authority has an obligation to inform people affected and aim to reach agreement. If an individual has a different viewpoint on the significance of an adjustment to their accrued rights and believe that an authority has gone too far outside the parameters of determining a significant adverse effect, they have the right to a Judicial Review. It would be the Department's view that pension authorities would not want these

extreme measures to be exercised and therefore would attempt to resolve the issue prior to recourse to the courts.

Therefore, in the Department's view the protections for accrued rights and the safeguards against adverse scheme changes in the Bill are sufficiently robust. A trade union veto on every retrospective change could compromise the capability for responsible authorities to maintain scheme rules in compliance with overarching legal and policy changes.

Committee Comment

"With reference to the DFP response to the NIHRC concerns around retrospective provisions, where it points out that the responsible authority must lay a report before the Assembly under clause 23, subsection (4). Is there any safeguard to ensure that the report is laid in sufficient time in advance of committee/Assembly consideration of the scheme regulations?"

Departmental Response

This would be a similar process as that already covered under Clause 22 on the Procedure for Protected Elements.

CLAUSE 32 – EXISTING PUBLIC BODY PENSION SCHEMES

Committee Proposal

"With reference to the wording of subsection (1), Departmental officials undertook to clarify whether an amendment will be brought forward to change the term 'may' to 'must' given the wording at clause 10 (1)."

Departmental Response - reject

This clause requires a commencement order by the Department of Finance and Personnel to take effect. The final date for restriction of public body schemes is not yet determined. The proposed amendment would have the effect of placing a requirement on those schemes to change the current provisions for pension age prematurely.

