

LEGISLATIVE CONSENT MEMORANDUM

PENSION SCHEMES BILL

Draft Legislative Consent Motion

1. The draft motion, which will be tabled by the Minister for Employment and Learning, is:

“That this Assembly endorses the principle of the extension to Northern Ireland of clause 45 of, and Schedule 5 to, the Pension Schemes Bill, as amended in Committee in the House of Commons dealing with a pension scheme for fee-paid judges.”

Background

2. This memorandum has been laid before the Assembly by the Minister for Employment and Learning under Standing Order 42A(2). The Pension Schemes Bill (‘the Bill’) was introduced in the House of Commons on 22 June 2014. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2014-15/pensionschemes.html>

Summary of the Bill and its policy objectives

3. The Bill establishes a new legislative framework for private pensions, defining them on the basis of the promise they offer for members about their retirement benefits during the accumulation phase. The promise will either refer to all the benefits (defined benefits), some of the benefits (shared risk), or there will be no promise (defined contributions). It will also enable the provision of collective benefits (provided on the basis of allowing the scheme's assets to be used in a way that pools risks across membership).
4. The Bill also gives force to measures announced in Budget 2014 to give people aged 55 and over more flexibility about how to access their defined contribution pension savings from April 2015. It enables a prohibition on transfers out of unfunded public service pension schemes, except to other defined benefit schemes.

Provisions which deal with a Devolution Matter

5. Amendments made to the Bill during Committee Stage in the House of Commons have introduced a provision to allow a pension scheme to be

established by the Lord Chancellor, through regulations, for fee-paid judicial office holders, as required by case law. The provision deals with a devolution matter as it extends to cover devolved fee-paid judiciary in Northern Ireland. The provision is aimed at old and transitional cases. Pensions for eligible fee-paid office holders in Northern Ireland will in future be governed by the new schemes under the applicable recent public service pensions legislation.

Reasons for making the Provisions

6. In *O'Brien v Ministry of Justice* [2013] UKSC 6, which dealt with the interpretation and application of the Part-Time Workers Directive, the UK Supreme Court held that fee-paid judicial office holders are entitled to a pension on terms equivalent to those enjoyed by their salaried counterparts. Following its decision, the Supreme Court referred the matter to an employment tribunal to determine the details of the pension entitlement.
7. Similar litigation is ongoing before the industrial tribunals regarding fee-paid judicial office holders in Northern Ireland: both the 'excepted', mainly courts, judiciary who are the responsibility of the Ministry of Justice and the 'devolved', mainly tribunal, judiciary who are the responsibility of the Departments for Employment and Learning; for Social Development and of Justice.
8. Whilst some matters remain the subject of litigation, the Ministry of Justice on 17 June 2014 published a statement indicating that, in 2015/16, it will put in place a pension scheme for eligible fee-paid judicial office holders for whom it is responsible. The scheme will apply to fee-paid service from 7 April 2000 to 31 March 2015 and will mirror the current judicial pension scheme under the Judicial Pensions and Retirement Act 1993 ('the 1993 Act') for salaried judiciary. When the 1993 Act was enacted, it was not envisaged that fee-paid office holders would be entitled to a pension.
9. To ensure that affected individuals are not without pension provision longer than is necessary, the Ministry of Justice has committed to establishing this scheme during the 2015/16 financial year. The Bill amends the 1993 Act so as to empower the Lord Chancellor to establish, by regulations, a pension scheme for fee-paid judicial office holders; and to facilitate a small number of technical, consequential changes.
10. The scheme established by the 1993 Act for salaried judiciary is UK-wide. With its provisions now to be extended to cover fee-paid judiciary, this would include those eligible excepted office holders among the Northern

Ireland court judiciary for whom the Ministry of Justice is responsible. The precise posts affected have yet to be determined in Northern Ireland.

11. As the 1993 Act, presently constituted, applies also to devolved salaried judicial positions for which Northern Ireland Departments have responsibility, extending its application to eligible devolved fee-paid positions would appear to be the best means of ensuring that eligible fee-paid members of the judiciary receive an equivalent pension to their salaried counterparts at the same time.
12. Litigation already before the industrial tribunals includes claims from both devolved and excepted judiciary here. The expectation of timely action is clear and, although there are outstanding questions for the concerned Departments to resolve as to coverage of new arrangements, the Department for Employment and Learning is satisfied that its fee-paid tribunal judiciary require appropriate pension arrangements to be put in place. Moreover, when the industrial tribunal comes to review developments in due course, it will want to ensure that any claimants in this jurisdiction are not prejudiced by failure to put in place appropriate arrangements in 2015/16.
13. Given this situation, the Departments for Employment and Learning, for Social Development and of Justice have agreed that it is appropriate that the provisions in the Bill relating to a pension scheme for fee-paid judges extend to judicial office-holders in the devolved field. The effect of this is to give the Lord Chancellor powers to establish a pension scheme for fee-paid judiciary which will include the devolved fee-paid judicial office holders, ensuring that relevant individuals have access to arrangements in Northern Ireland on the same terms and at the same time as their excepted counterparts.

Reasons for utilising the Bill rather than an Act of the Assembly

14. To ensure that a remedy scheme can be operational in 2015/16, appropriate primary legislative powers should be in place early enough to allow for the preparation of regulations establishing the scheme and the setting in place of necessary supporting IT, administrative and governance arrangements.
15. Three legislative options are open to the Department. The first is to identify a suitable primary legislative vehicle to take forward the relevant amendments. Unfortunately, such a vehicle is unlikely to become available in the immediate future and, if this option were to be pursued, the establishment of a pension for fee-paid devolved judicial office holders would be significantly delayed.

16. A second alternative, the development of an Assembly Bill specifically for the purpose of providing entitlement, would be a lengthy process and would be a disproportionate use of resources and time given that, currently, only a small number of individuals may be affected. Again, pursuing this option would significantly delay the establishment of the pension.
17. Option three, a legislative consent motion, is considered to be the most timely, reasonable and proportionate way forward in the circumstances.

Consultation

18. The Ministry of Justice is currently conducting a public consultation on the proposed design of the fee-paid pension scheme to be established by regulations made by the Lord Chancellor. It will cover fee-paid judicial office holders in England and Wales, Scotland and Northern Ireland determined as eligible for a pension. Although the full list of eligible fee-paid judicial offices in Northern Ireland has still to be determined and is subject to ongoing litigation, the Ministry of Justice would encourage all fee-paid judicial office holders in Northern Ireland to read, and provide any comments on, the proposed scheme design. The consultation, which opened on 19 September 2014, closes on 12 December 2014.

Human Rights and Equality

19. The relevant provisions are compatible with the European Convention on Human Rights as defined in section 1 of the Human Rights Act 1998 and there is no adverse impact on those listed under section 75 of the Northern Ireland Act 1998.

Financial Implications

20. At this stage, with the Northern Ireland litigation still ongoing, the exact financial implications of being required to provide pensions for eligible devolved fee-paid judicial office holders have yet to be fully quantified. Officials have, however, been engaging on the financial analysis with the Government Actuary's Department and other relevant bodies.

Summary of Regulatory Impact

21. These amendments will not impact on businesses, charities, social economy enterprises or the voluntary sector.

Engagement to date with the Committee for Employment and Learning

22. A letter providing the Committee with information on the intention to extend this amendment to cover Northern Ireland and of the need for a

legislative consent motion issued on 25 September 2014. Similar letters also issued to the Committees for Social Development and Justice.

Conclusion

23. The view of the Minister for Employment and Learning is that, in the interests of good government, the Assembly should support the terms of the draft legislative consent motion as set out in paragraph 1 of this memorandum.

Department for Employment and Learning

11th November 2014

Judicial pensions

45 Pension scheme for fee-paid judges

- (1) In the Judicial Pensions and Retirement Act 1993, after Part 1 insert –

“PART 1A

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18A Pension scheme for fee-paid judges

- (1) The appropriate Minister may by regulations establish a scheme for the payment of pensions and other benefits to or in respect of fee-paid judges.
- (2) The scheme may make provision for payments to or in respect of a person in relation to the person’s service before the scheme is established. 15
- (3) No benefits are to be provided under a new public service pension scheme in relation to service in relation to which benefits are to be provided under a scheme under this section. 20
- “New public service pension scheme” means a scheme under –
- (a) section 1 of the Public Service Pensions Act 2013, or
- (b) section 1 of the Public Service Pensions Act (Northern Ireland) 2014 (c. 2).
- (4) Regulations under this section may, in particular, include provision corresponding or similar to – 25
- (a) any provision made by Part 1, section 20 or Schedule 2 or 2A;
- (b) any provision that may be made by regulations under Part 1, section 20 or Schedule 2 or 2A.
- (5) In this section – 30
- “judge” means a person who holds an office specified in the regulations;
- “fee-paid judge” means a judge whose service is remunerated by the payment of fees (as opposed to the payment of a salary).”
- (2) Schedule 5 contains related amendments. 35

SCHEDULE 5

Section 45

PENSION SCHEME FOR FEE-PAID JUDGES: CONSEQUENTIAL AMENDMENTS

Pensions (Increase) Act 1971 (c. 56)

- 1 The Pensions (Increase) Act 1971 is amended as follows.
- 2 In section 19(2)(a) (extent to Northern Ireland) –
 - (a) after “or section” insert “18A or”, and
 - (b) after “section 10 of that Act” insert “or provision made under section 18A of that Act that is corresponding or similar to the provision that may be made by regulations under section 10 of that Act”.
- 3 In Schedule 2 (official pensions), after paragraph 4A insert –

“4AA A pension payable under a scheme made under section 18A of the Judicial Pensions and Retirement Act 1993, other than a pension payable under or by virtue of provision that is corresponding or similar to the provision that may be made by regulations under section 10 of that Act.”

Judicial Pensions and Retirement Act 1993 (c. 8)

- 4 The Judicial Pensions and Retirement Act 1993 is amended as follows.
- 5 In section 22 (application of the Pensions (Increase) Act 1971 to Northern Ireland), in subsection (2) –
 - (a) after “shall include” insert “ –
 - (a) ”;
 - (b) at the end insert “; and
 - (b) pensions payable under a scheme made under section 18A above, other than pensions payable under or by virtue of provision that is corresponding or similar to the provision that may be made by regulations under section 10 above.”
- 6 (1) Section 28 (funding arrangements) is amended as follows.,
 - (2) In subsection (2) (benefits payable out of money provided by Parliament),

- after paragraph (a) (but before the “and” at the end) insert—
- “(aa) any pension or other benefits payable under a scheme made under section 18A above;”.
- (3) In subsection (7), for “section 10 above” substitute “—
- (a) section 10 above, or 5
 - (b) provision made under section 18A above that is corresponding or similar to the provision that may be made by regulations under section 10 above.”
- 7 In section 28A (contributions in respect of Northern Ireland judges), at the end insert “or as a fee-paid judge in Northern Ireland (within the meaning given by section 18A)”. 10