Public Service Pensions Bill (the “Bill”) Representations to the Joint Committee on Human Rights from the British Medical Association (BMA) December 2012

The BMA is an independent trade union and voluntary professional association which represents doctors from all branches of medicine across the UK. It has a total membership of over 150,000.

SUMMARY OF ISSUES

The Bill includes a breathtakingly wide-reaching “Henry VIII” clause (Clause 3(3)) that permits successive governments to amend the Bill substantially without provision for effective parliamentary scrutiny and with little or no publicity for changes that could adversely affect hundreds of thousands of people. Clause 3(3) is cause for significant concern for the BMA, primarily because it could result in:

1. constitutional corruption;
2. human rights infringements;
3. inconsistencies with guarantees given by the Government; and
4. the power afforded by the drafting of Clause 3(3) going beyond its stated purpose.

Perhaps most worryingly was the fact that Clause 3(3) in its unamended form allows for:
- unilateral and retrospective changes, including reductions, to accrued benefits in public sector pension schemes;
- drastic changes to the design of the pension schemes as set out in the Bill; and
- amendments to relevant pension statutes that are not yet enacted.

Further to the BMA’s briefing for the Bill’s Commons Second Reading on 29 October 2012, the BMA’s written and oral evidence to the Public Bill Committee on 6 November 2012, and the BMA’s briefing for Commons Report Stage on 4 December 2012 (outlining concerns shared by other substantial public sector trade unions such as the TUC, GMB, UNISON, and the Royal College of Nursing), for the headline reasons identified above (set out in detail below), the BMA is calling for the removal of Clause 3(3) in its entirety. If this is not an option, then for at least further safeguards to include:

1. inserting a provision along the lines of s.2(3) Superannuation Act 1972, or s.40 of the Constitutional Reform and Governance Act 2010, which prohibits retrospective effects, and deleting Clause 3(3)(c);
2. inserting a new provision that states that Clause 3(3) will not affect the rest of the Bill;
3. limiting the Clause to incidental and consequential amendments; and
4. making any changes under this provision subject to the super-affirmative procedure as described by the House of Lords Committee 2010, and as has been used in the Public Bodies Act 2011.

1. CONSTITUTIONAL CORRUPTION

(i) Criticisms of Henry VIII Clauses (background information)

Henry VIII clauses allow legislation via the back door, denying Parliament the opportunity to subject the measures being passed to the necessary degree of scrutiny. Not only do they unduly fetter parliamentary scrutiny, but they are also counter-democratic and undermine parliamentary sovereignty; because of this, such clauses constitute an affront to Parliament and are, generally, a bad idea.

This is not a new concept. Historically, the use of Henry VIII clauses has been robustly criticised. The Joint Committee on Human Rights will no doubt be aware that select committees in Parliament have already recognised them as a “constitutional oddity” (House of Lords Constitution Committee, Sixth Report on the Public Bodies Bill, dated 4 November 2010 (the “Committee”)) that should be “confined to the dustbin of history” (per Lord Chief Justice Judge at the Lord Mayor’s Annual dinner for Judges in July 2010).

In recent years, select committees have shown increasing concern that Henry VIII clauses are being used to substantially change primary legislation (initially scrutinised and then approved by Parliament) beyond
consequential and incidental amendments. An example is the Henry VIII clauses contained in the recent Public Bodies Act 2011. As a reminder, the Committee, in its report on the Public Bodies Bill, set out cogent criticisms of the proposed Henry VIII clause at clause 11 in that bill, including that it was too extensive and ill-defined. The Committee also highlighted the ineffective safeguards provided by the affirmative procedure. Unlike the wider proposed clause in the current Bill, the Henry VIII clause in the Public Bodies Bill was only to be exercised with regard to certain pre-conditions such as efficiency, and could not remove any “necessary protection”. Nevertheless, the Committee’s report concluded that these were insufficient safeguards.

In its report on the Public Bodies Bill, the Committee stated that:

“where the further use of such powers is proposed in a Bill, we have argued that the powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight. When assessing a proposal in a Bill that fresh Henry VIII powers be conferred, we have argued that the issues are ‘whether Ministers should have the power to change the statute book for the specific purposes provided for in the Bill and, if so, whether there are adequate procedural safeguards’”.

Following this criticism, the Government agreed to amend the relevant Henry VIII clause in that bill and also to make the remaining Henry VIII clauses subject to the enhanced “super affirmative procedure”. Clause 3(3) of the Bill is seeking to go far wider than the original clause 11 of the Public Bodies Bill (in that it is unlimited in its scope and is stated expressly to permit amendments which have retrospective effect), it should bear even greater scrutiny. Clause 3(3) fails both of the tests outlined by the Committee and should therefore be removed in its entirety.

There are a number of examples of Henry VIII clauses in recent legislation, which have all been limited in their scope to reduce constitutional concerns. Non-exhaustive examples include the Legislative and Regulatory Reform Act 2006 (which is subject to the limitations of “necessary protections” and proportionality); and of particular relevance (given that this set out the current public sector pension framework), section 6(1) of the Superannuation Act 1972, which allows only for consequential amendments and (by s2(3)) expressly prevents any retrospective changes to accrued pension rights). Even examples of the use of Henry VIII clauses, together with their limitations such as these, remain the subject of substantial and in our view justified criticisms. Therefore, a Henry VIII clause, such as the one in the Bill, which goes far further, will lead to significant problems and therefore should be removed. Alternatively, if the Government feels it is absolutely necessary, at the very least its scope should be significantly limited before the Bill advances further through the parliamentary process.

(ii) Lack of Effective Checks and Balances

The Bill provides only a limited opportunity to place changes before Parliament before they are imposed. The affirmative resolution procedure, required in order to amend primary legislation or to introduce a retrospective change which has a significantly adverse impact upon scheme members, is insufficiently effective to amount to an adequate safeguard against constitutional corruption. This is because:

- the process is effectively useless – a instrument has not been struck down since 1969;
- there is no real scrutiny; and
- there is only one vote, which is all or nothing, with no opportunity for amendments to be provided.

This process appears to be little more than a “rubber stamping exercise”.

Further, changes that do not amend primary legislation and/or are not of retrospective effect can be done by way of negative resolution. This procedure is even less effective than the affirmative resolution process. As such, key elements such as the main new scheme regulations and design of schemes will be dealt with even fewer safeguards.

2. HUMAN RIGHTS INFRINGEMENTS

While the Chancellor of the Exchequer has signed off on the Bill as being compatible with the Convention, it is our view that the inevitable effect of the original Clause 3(3) will lead to challenges under the Human Rights Act 1998 if subsequent secondary (delegated) legislation is used to give retrospective effect to amendments which have an adverse impact upon scheme members. Accrued pension rights are “possessions” for the purposes of Article 1, Protocol 1 of the European Convention of
Human Rights 1952. Accordingly, any removal of accrued pension rights is likely to be in breach of Article 1 of Protocol 1. This means, of course, that the proposed secondary legislation can be made subject to judicial review and, if the judicial review succeeds, the secondary legislation is liable to be struck down. The House of Lords has an opportunity now to seek to avoid a costly and distracting legal claim by rejecting Clause 3 (3).

It has been raised during the Commons debates on the Bill that Clause 3 could be limited by seeking changes akin to provisions in s.2(3) Superannuation Act 1972. Whilst an amendment along that vein reduces the scope of legal challenge, by requiring any reductions in accrued pension rights to be agreed, the risk is far from being eliminated, not least because it is not clear from whom the agreement must be sought. The agreement of “representatives of the persons…likely to be affected” does not necessarily mean that each individual scheme member agrees. Rather, the “representative” could just be voicing a majority view. As such, individuals may still seek judicial review which, if successful, results in the secondary legislation being struck down.

3. INCONSISTENCIES WITH GUARANTEES GIVEN BY THE GOVERNMENT

In the Foreword to the paper Public Service Pensions: good pensions that last on 2 November 2011, Mr Danny Alexander, the Chief Secretary to the Treasury refers to “guaranteed benefits on retirement”, “it is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive” and

“I believe that the Government’s offer is a generous deal, offering certainty and fairness to both the public service workers and other taxpayers. I consider this approach will stand the test of time, with no more reform for at least 25 years” (our emphasis added)

Since that paper, the Government has also said that “the Government intends to … ensure a high bar is set for future Governments to change the design of the schemes” and that the Bill represents “a settlement for a generation” and “protects the benefits already earned by members of existing public service pension schemes”.

In the Explanatory Notes that accompany the Bill, at paragraph 11, it is stated that:

“11. The Bill protects the benefits already earned by members of existing public service pension schemes and allows continued membership of those schemes for certain categories of person who are closest to retirement.”

Accordingly, the Government has clearly and publicly committed to the position that accrued pension rights will not be affected by the proposed new Act, and has also made clear that no further changes are proposed for a generation.

In these circumstances, it is unclear why the inclusion of Clause 3(3) in the Bill is necessary or appropriate. There is no apparent need for the enabling legislation for scheme regulations to be drafted in such wide terms. We note that s.2(3) of the Superannuation Act 1972, in contrast, specifically stated that the Henry VIII clause in that legislation could not be used to take away accrued rights under the Principal Civil Service Pension Scheme. If the intention, in including Clause 3(3), is to enable the Minister to make technical amendments to scheme regulations, and/or minor consequential amendments to primary legislation, then the Clause (and Clause 21) should be redrawn to expressly say so.

The current ability to make radical and retrospective changes to scheme regulations, including to the current public sector schemes, is going to cause great concern and worry to public sector workers. It will inhibit their ability to make plans for their retirement with the appropriate degree of certainty.

Given the public commitments made by the Government, there can be no possibility that the Government would ever wish to make use of Clause 3(3) to take away accrued pension entitlements for public sector workers. We believe that this should be spelt out in the drafting of the Bill. It should be made clear that (a) none of the changes will have retrospective effect which adversely affects the entitlement relating to past service for scheme members (current members, retired members and their dependants) and (b) in particular, Clause 3(3) may not be used in a way that adversely affects the accrued rights of members of the current public sector pension schemes.
In short, since the stated purpose of the Bill, and the scheme regulations made under it, is to provide a settlement for a generation, Clause 3(3) is inappropriate and unnecessary. Instead, a far more limited power, permitting only technical and minor consequential amendments should be included in its place.

4. DRAFTING CONCERNS

A future Government could make use of Clause 3(3) to:
1. reduce accrued final salary rights with the agreement of “representatives of the persons...likely to be affected”, but not necessarily with the agreement of each individual scheme member (see above) and without the need for primary legislation, with the negligible safeguards of the affirmative procedure;
2. drastically change the design of pension schemes and scheme regulations, for instance for making different provisions for different cases/descriptions of persons, without having to come back to Parliament to debate primary legislation;
3. allow any person to exercise an unfettered discretion, which is not defined in the Bill; and
4. breach the 25 year guarantee.

This must be an error in the drafting as these powers go beyond the stated purpose for Clause 3(3) (as set out in paragraphs 24 – 27 of the Explanatory Notes to the Bill). These paragraphs explain that “this power may be necessary where legislation is inconsistent with or requires modification as a consequence of scheme regulations”. However, Clause 3(3) is a sledgehammer to crack a nut, with the potential to make radical changes rather than simple, consequential modifications. It is unclear why such extensive “sweep up” powers are required. It cannot be because the Government is not aware of the current framework of pensions legislation and so must include Clause 3(3), on a “belt and braces” basis, for fear that the amending provisions of the Bill itself will overlook some piece of primary legislation that needs amending. Schedule 5 to the Bill sets out a comprehensive list of the statutory provisions governing existing public sector pension schemes and Schedule 8 sets out a list of consequential and minor amendments. In the circumstances, as set out under paragraph 3 above, there is simply no need for the wide power to make amendments as is set out in Clause 3(3).

There is also a central illogicality about the inclusion of Clause 3(3). Much of the Bill consists of detailed and specific provisions which stipulate what the scheme regulations must (and must not) contain. This includes protections for scheme members set out in Clauses 18, 19-21, and 29. However, the Minister could disregard and override these specific provisions by making use of Clause 3(3). There is nothing in Clause 3(3) which would prohibit the Minister from making use of his or her Clause 3(3) power to amend one or more of the other provisions in the Bill. We appreciate that, if this were done, there might be scope for a legal challenge to the resulting secondary legislation on the basis that, by implication, the power in Clause 3(3) does not extend to a power to amend the other specific provisions in the Bill but, at the very least, the drafting of Clause 3(3) is inadequate and misleading.

The way forward

It is our opinion that Clause 3(3) is a glaring example of Parliament being by-passed and an unprecedented reservation of powers unilaterally to change public service pensions. Clause 3(3), as currently drafted, is simply unnecessary and, more significantly still, runs counter to the Government’s stated intentions for the Bill and for public sector pensions reform generally.

The easiest way to resolve this problem would be to delete subsections 3(3)(b) and (c) and to make amendments to subsections 3(3)(a) and (d).

Alternatively, at the very least, the Bill should be amended so that any provision is limited along similar lines to the Henry VIII clauses in the Legislative and Regulatory Reform Act 2006, s40 of the Constitutional Reform and Governance Act 2010, Public Bodies Act 2011 and the Superannuation Act 1972: by:

1. inserting a provision along the lines of s.2(3) Superannuation Act 1972, or s.40 of the Constitutional Reform and Governance Act 2010, which prohibits retrospective effects, and deleting Clause 3(3)(c);
2. inserting a new provision that states that Clause 3(3) will not affect the rest of the Bill;
3. limiting the Clause to incidental and consequential amendments; and
4. making any changes under this provision subject to the super-affirmative procedure as described by the House of Lords Committee 2010, and as has been used in the Public Bodies Act 2011.

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