Public Service Pensions Bill
House of Lords Second Reading
19th December 2012

This briefing is UK wide

The British Medical Association (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.

OVERVIEW

The BMA has been deeply concerned about the UK Government’s approach to public sector pension reform from the outset, and particularly the unfair way in which the NHS Pension Scheme is being treated. While we believe the aim of creating a common legislative framework for all public sector pensions is sensible, the Public Service Pensions Bill goes much further.

The BMA accepts that the NHS Pension Scheme must offer a fair deal for taxpayers as well as to staff. At a time when many NHS employees are in the third year of a pay freeze and dealing with the combined effects of major funding pressures and structural reforms, the BMA strongly believes that there is no justification for the scale of the planned changes to public sector pensions or the speed at which they are to be implemented.

It is disappointing that there was little significant improvement to the Bill during its passage in the House of Commons. The Bill requires urgent changes to avoid the legislation entrenching disparities across and within the different public sector schemes. In particular, we would strongly urge members of the House of Lords to consider:

• Amendments to curtail new sweeping powers that would allow successive UK Governments to make unilateral and retrospective changes to accrued benefits in public sector pension schemes, utterly undermining the ‘settlement for a generation.’

• Amendments to allow the Working Longer Review to report before there is a final legislative change to tie the normal pension age to the state pension age.

INAPPROPRIATE DELEGATION OF LEGISLATIVE POWERS

Undermining of the ‘25 year guarantee’
The UK Government has sought to position these changes as guaranteed for a generation. It states that:

‘This means that no changes to scheme design, benefits or contribution rates should be necessary for 25 years outside of the processes agreed for the cost cap. To give substance to this, the Government intends to include provisions on the face of the forthcoming Public Service Pensions Bill to ensure a high bar is set for future Governments to change the design of the schemes. The Chief Secretary to the Treasury will also give a commitment to Parliament of no more reform for 25 years.’

However, far from setting a higher bar, the Bill gives sweeping powers to this and future Governments to amend, through secondary legislation, any other legislation (whenever passed or made) and to make retrospective provisions. This clause grants breathtakingly wide powers to the UK Government 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. This fundamentally undermines the claim that this would be a settlement for a generation.
It has been commonly understood until now that changes to public sector pensions would not have retrospective effect. This is enshrined in the Pensions Act 1995, as amended, in respect of private sector occupational pension schemes and has always been the convention in public sector schemes. This Bill seeks not only to embed in primary legislation the ability of the UK Government to make sweeping changes to the schemes at any time through regulations but, in an unprecedented move, to allow retrospective changes.

The ‘Henry VIII’ clause (Clause 3) should be removed or, at the very least, be subject to significantly tighter safeguards. Henry VIII clauses have been roundly criticised by select committees in Parliament as being a ‘constitutional oddity’ that should be ‘consigned to the dustbin of history’ and that such powers must be ‘clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary scrutiny.’

The only very limited safeguard is that changes to primary legislations or retrospective changes should be by affirmative resolution. In the case of retrospective changes, according to Clause 21 (1)(b), this would only apply where it ‘appears to the responsible authority to have significant adverse effects in relation to members of the scheme.’ Although there is a provision for any regulations to go through the affirmative procedure, this is wholly inadequate. While any regulation would be debated, and could, theoretically, be rejected, they could not be amended. The last time that a piece of secondary legislation was rejected was in 1969. This ‘safeguard’ is well known to be little more than a rubber-stamping exercise.

The BMA has received expert advice from Leading Counsel and law firm Manches LLP on the constitutional impact of the proposed Henry VIII clause in the Bill. The power to retrospectively amend means that accrued pension rights could be affected, which will likely result in a challenge under the Human Rights Act 1998 and may lead to a declaration of incompatibility and other legal challenges.

In summary, Clause 3(3) is cause for significant concern because it could result in:

i. constitutional corruption;
ii. human rights infringements;
iii. inconsistencies with guarantees given by the Government; and
iv. 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:

i. unilateral and retrospective changes, including reductions, to accrued benefits in public sector pension schemes;
ii. drastic changes to the design of the pension schemes as set out in the Bill; and
iii. amendments to relevant pension statutes that are not yet enacted.

It was raised during 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 for 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.

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 UK 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, s.40 of the Constitutional Reform and Governance Act 2010, Public Bodies Act 2011 and the Superannuation Act 1972 by:

- 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);
- inserting a new provision that states that Clause 3(3) will not affect the rest of the Bill;
- limiting the Clause to incidental and consequential amendments; and
- making any changes under this provision subject to the super-affirmative procedure as described by the House of Lords Constitution Committee 2010, and as has been used in the Public Bodies Act 2011.

The BMA believes that:

- The Bill requires amendments to Clause 3. During the Commons Public Bill Committee Stage, the UK Government stated that most changes affecting members’ rights would be minor and technical – this was also confirmed in a letter to the BMA. However, the Bill is not explicit in this regard. If the UK Government intends for changes to be minor and technical, then the Bill should say so to avoid this or any future Government having the power to undermine the 25 year guarantee.

Unclear method of indexation
The Bill specifies in Clause 8 that revaluation of accrued career average revalued (CARE) benefits will be governed by the Bill but that increases to deferred pensions and pensions in payment will still be governed by the Pensions (Increase) Act 1971.

The BMA believes that:

- The method of revaluation should be consulted on and subject to the affirmative procedure to avoid a potential reduction in revalued earnings if earnings or prices were negative. The BMA would support an amendment to the Bill to ensure this.

Treasury control over valuations
Under Clause 10, scheme valuations will be conducted through direction from the Treasury, with the Treasury determining the method, data and assumptions to be used and ultimately the contribution rate. Valuations may cover both the existing schemes and the new schemes established in the Bill.

The BMA believes that:

- Giving the Treasury wide powers to impose what data and assumptions are to be used in valuations and how a valuation is to be undertaken needs to be tempered with a requirement to consult. The BMA would welcome an amendment to make this explicit in the Bill.

Treasury control over the employer cost cap
Clause 11 will allow for the employer cost cap to be set in accordance with direction from the Treasury. The employer cost cap will be a rate used to measure the costs of a scheme.
The Treasury will have powers to specify how the cap will operate in terms of specifying margins either side of the cap and the margin of adjustment required if costs exceed those margins. Regulations will determine the process if a cost adjustment is required and a default mechanism to ensure an adjustment is made.

The BMA believes that:

- Regulations on the employer cost cap must be fully consulted on and subject to the affirmative procedure. The BMA would welcome an amendment to the Bill to make this requirement clear.

PENSION AGE

Linking state and normal pension ages
The Bill links normal pension age for public sector pensions to state pension age, which is set to rise to 68 by 2046. This applies to all public sector workers except for firefighters, police and the armed forces, where the normal pension age will remain 60.

The Working Longer Review of the planned increase in the normal pension age for staff in the NHS Pension Scheme to 68, is currently being undertaken jointly by the UK Government, employers and health unions.

The Review should be allowed to make genuinely evidence-based recommendations as to whether all or some frontline NHS staff have roles that are particularly physically, mentally and/or emotionally demanding and so should have their normal pension age capped at a lower age.

The BMA believes that:

- The Bill should be amended to allow the Review to report before there is a final legislative change to increase the NHS normal pension age beyond 65. The BMA would support an amendment that provides the necessary flexibility.

CAREER AVERAGE REVALUED EARNINGS SCHEME (CARE)

Unfair impact of a CARE scheme on some staff groups
The Bill gives powers to establish different types of schemes (including defined benefit and defined contribution schemes), with the exception of a final salary scheme which is specifically excluded. There will be a switch to a new CARE scheme for all NHS staff in 2015. For hospital doctors, this means the end of the final salary scheme, resulting in around a 30 per cent reduction in value on a like-for-like basis.

As part of reforms to the NHS Pension Scheme in 2008, health unions agreed to the introduction of a multi-tiered employee contribution structure. This was to reflect the fact that higher earners had previously received proportionately more benefit than lower earners from final salary arrangements for every £1 of employee contributions paid. The level of tiering is now set to increase dramatically by 2014-15, with higher earners within the NHS scheme paying significantly greater proportions of their salaries for their pensions than lower earners – even though the final salary link which benefited higher earners more has been broken.

For higher earning NHS staff, this unfairness is even more marked as the NHS scheme in general compares unfavourably to other public sector schemes for many staff. For example, many doctors will have to pay twice as much as a civil servant on a similar salary to receive a similar pension. The new tiering structure means that the cost of accruing pension benefits (even after income tax relief is taken into account) will vary for individual NHS staff members who join the NHS scheme after the CARE scheme is introduced.
The BMA accepts the general principle that the lowest paid staff should be encouraged by scheme design to join the pension scheme. It also accepts that tiering to recognise higher rate tax relief is appropriate within a CARE system. However, the steep tiering is completely unjustified in a CARE scheme.

During the Commons stages of the Bill, the UK Government wrote to the BMA signalling that there is potential for a fairer contribution structure post-2015, when the new CARE scheme comes into place. The UK Government also signalled that it would bring forward talks on the post-2015 contributions structure. Whilst it is a positive step that the UK Government has recognised some of our concerns, we will need to see what progress is made.

The BMA believes that:

- A fairer approach in a new CARE scheme system will be essential, as subsequent regulations must prescribe a much flatter structure for the NHS scheme contribution.
REFERENCES

1 The BMA has always accepted that the NHS Pension Scheme must offer a fair deal to taxpayers as well as to NHS staff but the BMA believes there is no justification for the scale of the planned changes or the speed at which they are to be implemented. In 2008, NHS staff agreed to major changes to the NHS scheme to make it sustainable in the long term. This involved a large increase in employee contributions and the introduction of tiered contributions to protect lower paid workers. It also meant an increase in the pension age for new entrants (to 65). The BMA engaged very constructively with the UK Government and employers to reach agreement on these reforms, which for many senior doctors resulted in a 42% increase to pension contributions. Costs to taxpayers were reduced and controlled, with mechanisms in place to make the NHS Pension Scheme sustainable for the future, including agreement that any unforeseen increase in costs due to improved longevity would be met by members. The terms agreed for the NHS Pension Scheme were envisaged by all parties as a long-term deal, and not one that would be abandoned by the UK Government just four years later.

2 The Bill provides a common legislative framework for all public sector pension schemes following recommendation from Lord Hutton in the final report of the Independent Public Service Pensions Commission. Several public sector schemes are captured within the Bill, including the NHS Pension Scheme. Independent Public Service Pensions Commission: Final Report, 10 March 2011. Available at: http://cdn.hm-treasury.gov.uk/hutton_final_100311.pdf


4 The Working Longer Review is a tripartite partnership review group between national recognised NHS Trade Unions, NHS employers and health department representatives. More information is available at: http://www.nhsemployers.org/payandcontracts/nhspensionschemereview/impactofworkinglongerreview/Pages/NHSWorkingLongerReview.aspx


7 House of Lords Constitutional Committee, Sixth Report on Public Bodies Bill, dated 4th November 2010

8 Per LCJ Judge at the Lord Mayor’s Annual dinner for Judges in July 2010

9 House of Lords Constitutional Committee, Sixth Report on Public Bodies Bill, dated 4th November 2010

10 GPs already have a CARE scheme but they will also see their contributions rise very significantly and will have to work to 68.