



Report on the Supplementary Legislative Consent Memorandum for the Public Service Pensions Bill

Background

1. On the 2 October 2012, the Minister for Finance and Leader of the House (“the Minister”) 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 9 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 (“the Committee”) for scrutiny. The Business Committee agreed that the Committee should report on the LCM by 15 November 2012 to allow the motion to be debated in plenary on 20 November 2012. This deadline was subsequently extended until 3 January 2013, to allow the Committee to take into account the views of the Assembly Commission.

The Bill

3. The Public Service Pensions Bill¹ was introduced into the House of Commons on 13 September 2012 by the Chancellor of the Exchequer. Report Stage in the House of Commons was completed on 4 December 2012 and the Bill will now go to the House of Lords for consideration.

4. The Bill would change the law in all parts of the United Kingdom, and legislative consent will be sought from each of the devolved legislatures.

¹ Public Service Pensions Bill http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0070/cbill_2012-20130070_en_1.htm

This is explained in the Explanatory Notes that accompanied it on introduction in the Commons as follows –

“TERRITORIAL EXTENT

12. This Bill extends to England and Wales, Scotland and Northern Ireland.

13. The Northern Ireland Assembly’s consent will be sought in relation to the provisions of this Bill to make schemes for pensions and other benefits that are within the competence of that Assembly.

14. This Bill contains provisions that trigger the Sewel Convention in Scotland. The provisions relate to the pensions of certain members of the Scottish judiciary and a power to require the closure and reform of pension schemes in public bodies for which the Scottish Parliament has competence. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. We have sought “in principle” agreement from Scottish Ministers to seek a Legislative Consent Motion for these provisions. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will also be sought for them.

15. The consent of the National Assembly for Wales will be sought in relation to provisions in this Bill which apply to new pension schemes for public bodies and” statutory office holders; the National Assembly for Wales has competence in relation to pension schemes for Assembly Members, Welsh Ministers and members of local authorities.”

5. The purpose of the Bill is generally to set out the new arrangements for the creation of schemes for the payment of pensions and other benefits. It provides powers to Ministers to create such schemes according to a common framework of requirements. The Bill also provides powers for the Treasury to set specific technical details of certain requirements and gives powers to the Pensions Regulator to operate a system of independent oversight over the operation of these schemes.

6. The Explanatory Notes explain that:

“It is intended that the powers in the Bill will supersede powers, including those contained in the following legislation, to create schemes for the payment of pensions and other benefits:

- Superannuation Act 1972, for civil servants, people employed in local government service, teachers and persons engaged in health services;*
- Fire and Rescue Services Act 2004;*
- Armed Forces (Pensions and Compensation) Act 2004;*
- Police Pensions Act 1976;*
- Judicial Pensions and Retirement Act 1993; and*

- *Superannuation (Northern Ireland) Order 1972.*

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.”

Legislative Competence

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

8. The wording under heading 4 (Economic Development) 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 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. As a consequence the exception to the Assembly’s legislative competence in relation to pensions contains a carve out for matters referred to in the LCM and reads as follows:

“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.”

9. 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. The further carve out, for members of local authorities, was made by the 2010 order.

The Consent Memorandum

10. The LCM identifies clause 27 as the one that relates to the Assembly’s legislative competence. Clause 27 identifies the requirements in the Bill that will apply 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.

11. There is a further issue in relation to competence. Clause 16 requires that no benefits are to be provided under an existing scheme listed in Schedule 5. These include “A scheme constituted by paragraph 6(3) of Schedule 11 to the Welsh Language (Wales) Measure 2011 (nawm 1)”. Paragraph 6(3) reads as follows:

- “(3) *The Welsh Ministers may pay—*
- (a) pensions to, or in respect of, persons who have been members of the Tribunal, and.*
 - (b) amounts for or towards provision of pensions to, or in respect of, persons who have been members of the Tribunal.”*

12. The Assembly’s legislative competence in relation to the Welsh language under Schedule 7 is generally much broader than it was under Schedule 5 to the Government of Wales Act 2006. The Government’s view is that the pension provisions in the Welsh Language Measure were incidental to the provisions establishing the Tribunal, and therefore remain so. However, the exception for ‘Occupational and personal pension schemes’ did not appear in Schedule 5. There must therefore be some doubt whether this is within the Assembly’s legislative competence. The Welsh Government has now explained in a letter to the Committee Chair on the 31 October why it had not made reference to this in the LCM, and how it proposes to deal with the issues. We refer to this point in our conclusions.

13. There are other specific Welsh references in the Bill. Clause 1 excepts scheme regulations made by Welsh Ministers relating to fire and rescue workers from those for which the consent of the Treasury is required. Welsh Ministers have a power to make schemes in relation to the fire and rescue services, but the National Assembly has no power to make primary legislation on the subject because of the exception of occupational and personal pension schemes from its legislative competence. Clause 20(5) contains a requirement to consult the National Assembly if certain changes are proposed to such schemes. The Government’s letter also explains its views on this.

14. This Bill will make no changes to the legislative competence of the National Assembly. Accordingly, it will remain within the Assembly’s competence to make provision in Acts of the Assembly that are not consistent with the requirements of the current Bill.

Consideration

15. We considered the LCM on 22 October 2012. We subsequently wrote to the Minister on 24 October 2012, in particular seeking clarification about the implications of the proposals for the pension arrangements of members of the Welsh Language Tribunal and of Assembly Members and Ministers.

16. The Minister responded by letter on 31 October 2012 and in so doing, indicated that the Welsh Government would be willing to extend the timescale for consideration of the LCM, to allow the Assembly Commission to consider it in relation to the Assembly Members' pension scheme.

17. We considered the Legislative Consent Memorandum at our meeting on 5 November 2012 together with the Minister's letter of 31 October. As a consequence, we sought and received, from the Business committee, a new reporting deadline of 3 January 2013, to allow us to take into account the views of the Assembly Commission on the proposals.

18. On 28 November 2012, the Presiding Officer responded to a letter from the Minister dated 7 November, setting out the Assembly Commission's views on the proposals. The letter was considered by the Committee on 3 December.

19. The correspondence referred to in paragraphs 15 to 18 is reproduced at annexes 1 to 4 of this report.

Conclusion

20. We are generally content with the Minister's clarification of the issues we raised in our letter of 25 October.

21. In relation to pensions for members of the Welsh Language Tribunal, under the Welsh Language (Wales) Measure 2011, we note the Welsh Government's view that there is no need to restore any competence that has previously existed under Schedule 5 to the Government of Wales Act 2006, but which has now been excepted under Schedule 7 to that Act. This is because the power to make 'incidental' provisions under sections 108(3) to (5) of the Act is still available. The fact that there is now a specific exception relating to 'occupational and personal pension schemes' affecting the Assembly's legislative competence inevitably raises the question of whether the incidental power still applies when there is a specific exception to the contrary.

22. The Committee considered that the Supreme Court's consideration of the Local Government Byelaws (Wales) Bill could have had a bearing on whether pensions for members of the Welsh Language Tribunal could be established as an incidental provision. In the event, the Supreme Court's judgement, whilst it assists in the interpretation of what provisions may be incidental, does not address the relationship between the power to make incidental provision when there is a specific exception relating to that matter.

23. We note the Assembly Commission's view that the Public Service Pensions Bill, as currently drafted, has the potential to undermine

Assembly legislation and that the pension scheme for Welsh Ministers and Assembly Members should be excluded from the Bill.

24. We note from the UK Government's explanatory memorandum that the Bill is likely to require consent from the Scottish Parliament and the Northern Ireland Assembly. However, we understand that no equivalent legislative consent motions have yet been tabled in these jurisdictions.

25. We believe that the Welsh Government should consider very carefully the views of the Assembly Commission and that the Government could benefit from further discussions on this important issue with the UK Government and the other devolved administrations. For that reason, we believe that very careful consideration should be given to postponing the debate on the Legislative Consent Motion until such time as any such discussions have been successfully concluded.

Annex 1

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee

Jane Hutt AM
Minister for Finance and Leader of the
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA

24 October 2012

Dear Jane

Public Service Pensions Bill: Legislative Consent Memorandum - Invitation to give evidence to the Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee considered the Legislative Consent Memorandum for the Public Service Pensions Bill at its meeting on 22 October 2012.

The Committee noted that the Memorandum made no mention of the provisions in the Bill that refer to the powers of Welsh Ministers in relation to the fire and rescue services, nor to those that affect the pension arrangements of members of the Welsh Language Tribunal.

The latter was of particular concern as the Committee's attention was drawn to the contrast between Schedules 5 and 7 to the Government of Wales Act 2006. Schedule 7 contains a specific exception under 'Economic development' for 'Occupational and personal pension schemes', to which the only carve-outs are for Assembly members, the First Minister, Welsh Ministers, the Counsel General or deputy Welsh Ministers and schemes for or in respect of members of local authorities. These are the schemes referred to in your LCM.

Schedule 5, on the other hand, contained no such exception, so that the Assembly was able to legislate for pensions for members of the Welsh Language Tribunal as a matter incidental to its competence to promote and facilitate the use of the Welsh language.

Section 16 of the Bill, and Schedule 5 to it, appear to have the effect of preventing the Welsh Ministers from making the arrangements approved by the Assembly in paragraph 6 of Schedule 11 to the Welsh Language Measure. The exception that appears in Schedule 7 to the Government of Wales Act 2006 will prevent the Assembly legislating to make alternative arrangements, whether consistently with the Pensions Bill or otherwise.

Furthermore, Matter 12.16 in Schedule 5 to the 2006 Act gave the Assembly legislative competence not merely in relation to members of local authorities, but also of National park authorities and fire and rescue authorities. This competence too appears to have been lost in the transition from Part 3 to Part 4 of the 2006 Act.

Members of the Committee are therefore likely to wish to explore with you

- why these matters were not referred to in the LCM;
- what arrangements are now proposed for the pensions of members of the Welsh Language Tribunal;
- whether it was intended that the Assembly should have a more limited competence under Schedule 7 than under Schedule 5, and if so, why;
- if not, what is being done to seek to restore that competence, and whether the present Bill provides an opportunity to do so.

In addition, the Bill also includes provisions that may affect the Remuneration Board's ability to revise or remake the Assembly Members' pension scheme in future, or at least affect the Board's thinking. As you are aware, the Board is currently consulting on issues and options prior to a full review of Assembly Members' pension arrangements. The Committee may, therefore, also wish to take your mind on the potential impact on the work of the Board and whether the Assembly Commission should have the opportunity to take a view formally on the Memorandum before it is considered in Plenary.

It may be that these are all matters that could be cleared up in correspondence. However, given the relative lack of time for these points to be clarified before the Committee is required to report to the Assembly, it would be helpful if you could attend the Committee's meeting on Monday 5 November 2012 at 2:30pm to discuss the matters set out above. I do not envisage the Committee requiring more than 30 minutes of your time on this occasion.

I would be grateful if your officials could liaise with the Deputy Clerk of the Committee Olga Lewis (tel: 02920 898154) with regards to the practical arrangements.

I look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink that reads "David Melding". The signature is written in a cursive style with a long, sweeping tail that extends to the right.

David Melding AM
Chair

Annex 2

Jane Hutt AC / AM
Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/JH/0391/12

David Melding AM
Chair
Constitutional and Legislative Affairs
Committee
Cardiff Bay
Cardiff
CF99 1NA

31 October 2012

Dear David,

Public Service Pensions Bill: Legislative Consent Motion – Invitation to give evidence to the Constitutional and Legislative Affairs Committee

Thank you for your letter of 25 October inviting me to attend the Constitutional and Legislative Affairs Committee meeting on 5 November. Unfortunately, I will be unable to attend on this occasion. I have therefore set out my response to the committee's comments regarding the Public Service Pensions Bill Legislative Consent Memorandum (LCM) below.

Why Welsh Ministers' powers in relation to fire and rescue services and Welsh Language Tribunal pension arrangements were not referred to in the Memorandum.

The legislative consent memorandum did not refer to the powers of Welsh Ministers because these matters did not bear directly on the issue of the motion, that being the legislative competence of the National Assembly for Wales to create new pension schemes for Assembly Members, Welsh Ministers and members of local authorities.

The Bill does address areas where Welsh Ministers have executive functions. Welsh Ministers have powers, and have exercised their powers, under the Fire and Rescue services Act 2004 to make orders relating to the pension schemes for firefighters. The statutory power extends to all employees of fire and rescue authorities but non-firefighter employees are covered within the Local Government Pension Scheme.

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The other pension arrangement you mention is within the Welsh Language (Wales) Measure 2011 which enables the Welsh Ministers to make pension payments to the members of the Welsh Language Tribunal. To date no such arrangements have been put in place.

The Bill's provisions will mean that the firefighters pension schemes and the Welsh Language Tribunal members' scheme (if there were one) would close and be replaced by schemes which comply with the requirements of the Bill.

I will therefore make a written statement to the Assembly on the Bill's effects on the powers of Welsh Ministers, as opposed to those matters within legislative competence in due course.

What arrangements are now proposed for the pensions of members of the Welsh Language Tribunal?

Preparatory work in relation to the establishment of the Welsh Language Tribunal and appointment of Tribunal members is underway. The Welsh Language Measure gives the Welsh Ministers a power to pay pensions to, or in respect of, persons who have been members of the Tribunal. It also gives the Welsh Ministers a power to pay amounts for or towards provision of pensions to, or in respect of, persons who have been members of the Tribunal. This is being considered as part of the preparatory work for the establishment of the Tribunal.

Whether it was intended that the Assembly should have a more limited competence under Schedule 7 than under Schedule 5; and if so, why; if not, what is being done to seek to restore the competence, and whether the present Bill provides an opportunity to do so

The Welsh Government's view is that in Schedule 7 to the Government of Wales Act 2006 the term "local authorities" includes both National Park authorities (NPAs) and fire and rescue authorities (FRAs). I understand that this view is shared by the Wales Office. Accordingly the carve out for pensions for the members of local authorities means that there is also a carve out for pensions for members of NPAs and FRAs.

You suggest that the pension provision made in the Welsh Language Measure was possible under Schedule 5 because the pension provision was inserted as being incidental to the purposes of the Measure but that is not permissible under Schedule 7. The Welsh Government's view is that if the Assembly was to consider making a Welsh Language Act now, the "incidental" power would still be available even though pensions are in general excepted. We believe this is clear from section 108(3) to (5) of the Government of Wales Act 2006.

Accordingly I do not consider that there is a need to restore any competence in this area.

Whether the Assembly Commission should have the opportunity to take a view formally on the memorandum / motion before it is considered in Plenary

I will write to the Assembly Commission seeking their view on this matter. The debate on agreeing the LCM is scheduled for 20 November. I would be content to postpone the debate to provide the Commission sufficient time to consider the issue if requested.

In that event, we would have to balance the need to allow as much time as we would wish with the parliamentary timetable, and I would wish any new date to be agreed with Business Committee.

*Yours sincerely,
Jane*

Jane Hutt AC / AM
Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House

Annex 3

Jane Hutt AC / AM
Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF/JH/0415/12

Rosemary Butler AM
Presiding Officer and Commission
Chair,
Assembly Commission
National Assembly for Wales,
Cardiff Bay

7 November 2012

Dear Rosemary,

PUBLIC SERVICE PENSIONS BILL

The Public Service Pensions Bill was introduced into Parliament by the UK Government on 13 September and received its second reading on 29 October.

The majority of public service pension matters in Wales are not devolved. However, the Bill does impact on the Assembly's competence by imposing constraints on the design of future new pension schemes for Assembly Members, Welsh Ministers and members of Welsh local authorities.

A Legislative Consent Motion (LCM) was laid in the Assembly on 2 October in relation to these issues. It was scheduled to be debated in plenary and the Assembly's consent sought on 20 November. As part of the scrutiny process before that debate, the LCM is being considered by the Constitutional and Legislative Affairs Committee (CLAC).

The CLAC Chair wrote to me on 25 October suggesting the Assembly Commission should have an opportunity to provide views on the LCM memorandum before it is debated in plenary. I am happy to agree this approach but would ask that you confirm the Commission does wish to offer its views. A copy of the LCM and memorandum is attached.

In order to provide sufficient time for the Commission to consider matters sufficiently, formulate its views and provide a response, I have arranged to postpone the scheduled plenary debate until 8 January 2013. I hope that this is helpful. If the Commission wish to offer views on the memorandum, I would therefore ask that they are forwarded to me by 7 December 2012, before the Assembly goes into recess.

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Beathsker,
Jane

Jane Hutt AC / AM
Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House

Annex 4

Cynulliad
Cenedlaethol
Cymru
National
Assembly for
Wales



Jane Hutt AM
Minister for Finance and Leader of the House
Welsh Government
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Your ref: LF/JH/0415/12
Our ref: PO334/RB/CE

29 November 2012

Dear Jane

Public Service Pensions Bill: Legislative Consent Motion

Thank you for your letter dated 7 November asking for the Commission's view on the Public Service Pensions Bill Legislative Consent Motion. The Bill will put in place a legislative framework making changes to future public sector pension arrangements across the UK, including those within the competence of the National Assembly for Wales. This includes the pension scheme for Welsh Ministers, the Counsel General and Assembly Members.

You will be aware that, since the start of the Fourth Assembly, remuneration arrangements for Members of the National Assembly for Wales are made by an independent statutory Board, set up by the National Assembly for Wales (Remuneration) Wales Measure 2010. The Board is responsible for putting in place a system of pay and allowances which enables Assembly Members to fulfil their roles. Although the Bill does not purport to alter the terms of the present pension schemes within the Assembly's competence, it would, as drafted, impact upon the exercise by the Remuneration Board of its functions under the Government of Wales Act 2006, as amended by the 2010 Measure, by requiring any new schemes to comply with principles set out in the Bill.

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Croesewir gohebiaeth yn y Gymraeg a'r Saesneg/We welcome correspondence in both English and Welsh



As the pensions arrangements mentioned above are within the competence of the National Assembly for Wales, the Assembly would need to pass its own Bill to enable the Remuneration Board to deviate from the principles set out in the Bill, if they determined that it was appropriate to do so. The Public Service Pensions Bill, as currently drafted, therefore has the potential to undermine the position enshrined in Assembly legislation that decisions on remuneration for Members should be made in a transparent way by an independent body, not by the Assembly itself.

The Remuneration Board is currently consulting on future pension arrangements for Assembly Members and has not reached a view on the likely outcome. The Board has already indicated in its consultation that it will take into consideration changes to public sector pensions when making its decision on future arrangements for Assembly Members.

I have consulted with Commissioners and the Chair of the Remuneration Board and, for the reasons I have set out, the Assembly Commission has come to the view that the pension scheme for the First Minister, Welsh Ministers, the Counsel General, Deputy Welsh Ministers and Assembly Members should be excluded from the Public Service Pensions Bill.

I hope that you will be able to pursue these points with the UK Government.

Rosemary Butler AM, Presiding Officer