

19 April, 2000

To All Home Members

Dear Member

Section 67 of the Pensions Act 1995

I am writing to tell you about an unusual step which the profession has taken, in obtaining an Opinion from Counsel on a topic on which the legislation places a duty on an actuary. The subject matter of the Opinion is primarily of interest to pensions actuaries; however, similar circumstances might arise at some time in relation to other areas of actuarial work, and we thought that those outside the pensions field might like to be aware of this particular situation. For pensions actuaries, I strongly suggest that you follow up this letter and consider attending one of the seminars referred to below.

The Background

The background is that Section 67 of the Pensions Act 1995 requires trustees to obtain members' consents, or a certificate from an actuary, before making any modification to a scheme which would or might affect members' entitlements or accrued rights in respect of service before the modification. (The actuary is asked to certify that *in his* (or her) *opinion* the modification *would not adversely affect* members' accrued rights or entitlements.)

In 1997 the Association of Pension Lawyers (APL), Department of Social Security (DSS) and the Faculty and Institute of Actuaries held several meetings to discuss issues faced by actuaries and lawyers in relation to Section 67. In September 1997 the three bodies issued a note summarising their discussions; this is included, for the time being, in the Manual of Actuarial Practice.

When forming an opinion, the actuary is expected to consider the application of the legislation in relation to the particular circumstances of the case involved. The actuary may, of course, take legal advice, but the decision whether or not to grant a certificate must be that of the scheme actuary alone.

The generic nature of Section 67 has thus led to some real difficulties in practice. Section 67, by its very nature, was never intended to be prescriptive, as individual scheme circumstances will vary so much. As a consequence, Section 67 relies much on the individual actuary's professional judgement. The non-prescriptive nature of Section 67 has meant, similarly, that it has not been possible to give meaningful professional guidance, and this has exacerbated the uncertainty. Perhaps inevitably, therefore, our experience suggests that employers, trustees and actuaries have had a variety of advice (from lawyers as well as actuaries) on the circumstances in which certificates under Section 67 are, or are not, required and on whether or not in particular circumstances a certificate can be given. On further investigation of the problems, it has become clear that those involved may hold different and often strongly conflicting views on key issues connected with Section 67, and in some cases may not even have been aware that a contrary view could reasonably be taken.

Further Talks

Some two years ago, when the problems initially began to surface, the profession started fresh talks with the DSS and the APL to identify the areas of uncertainty about Section 67, and to try to resolve them.

The profession's representatives from the Pensions Board in these discussions have been (and still are) Wendy Beaver (Chairman of the Guidance Committee of the Pensions Board) and David Linnell (member of the Guidance Committee with specific responsibility for Section 67). As a result of this work, some minor - and welcome - changes to regulations have been made by the DSS. However, as more experience of the practical working of Section 67 became available, it became clear that we needed a clear and authoritative exposition of the problems involved before further discussions could take place. Such an exposition would also greatly assist actuaries when dealing with Section 67 problems.

Counsel's Opinion

Accordingly the Pensions Board decided to obtain a Joint Opinion on the known problem areas from Counsel (Nicholas Warren QC and Paul Newman). It was not expected that Counsel would provide definitive views on the matters raised (although they were at liberty to do so, if appropriate); rather, they were expected to (and did) analyse and set out the arguments on both sides and to comment on what they felt were the preferable (but not definitive) interpretations.

The Opinion is now available in the pensions section of the profession's website - <http://www.actuaries.org.uk/practice/pensions-pubs.html>. Copies are also available from Gloria Tucker at Staple Inn, but as the Opinion runs to some 60 pages we hope you will understand that we would prefer to despatch copies by post only to those who cannot easily down-load it. Copies have been sent to the DSS and the APL.

Seminars

The Opinion cannot be easily summarised, nor would it be safe to do so – however, it does have a Table of Contents which should assist readers to locate the topics relevant to them. We strongly recommend that actuaries with Section 67 certificates to sign should first consult the Opinion and ensure that they have considered the issues it raises.

In order to help those concerned, we have arranged 4 half-day seminars in May (8th Leeds, 18th Cheltenham, 23rd Edinburgh and 26th London) for actuaries, legal advisers and any other interested parties to discuss the Opinion and its practical implications: a booking form is attached to this letter. The sessions will be led by Wendy Beaver and David Linnell; together with Ian Gault, Partner at Herbert Smith, who is the Pensions Board's legal adviser.

In view of my earlier comment that those involved may sometimes hold different and often strongly conflicting views on key issues connected with Section 67, and in some cases may not be aware that a contrary view could reasonably be taken, I urge those actuaries who deal with Section 67 cases to attend one of these sessions and to come to them with an open mind. Attendance at these seminars will be open to all actuaries – not merely those who act as scheme actuary. We will evaluate demand, and would hope to make further dates available should that be necessary.

Public Interest Issues

Finally, there is one further point I would like to make. We have always welcomed, in principle, the opportunity which Section 67 gives to actuaries to apply professional judgement. However, the Opinion

from Counsel, while extremely helpful in addressing the areas which should be taken into account, cannot and does not give definitive conclusions in some very key areas (e.g. security). This confirms the Pension Board's concern that actuaries (and lawyers) may sometimes differ in their views as to whether a certificate may be granted. This raises public interest issues for scheme members, since it may mean in some circumstances a material effect on their benefits, depending on which way their scheme actuary's professional judgement falls.

In the final analysis, we need to be aware, too, that only the courts can give a definitive interpretation of statutes. Thus, given the nature of some of the potential differences in interpretations, it is possible that an actuary's judgement could be successfully challenged in court, possibly many years after the events to which it related. This could have a major potential impact on members' benefits and employers' finances not only in the scheme concerned, but also much more widely across members and schemes in similar circumstances. Such uncertainty does not seem desirable.

Conclusion

In conclusion, we see publication of Counsel's Opinion and the resulting seminars as serving two purposes, therefore:

- to inform the profession comprehensively, with the benefit of Counsel's Opinion, as to the issues which need to be considered for the purposes of Section 67 certification and where there is scope for alternative interpretations; and
- to offer a forum for experiences to be shared and views to be heard on the practical workings of this legislation.

We propose to inform DSS fully of the outcome of these meetings and will continue to explore with them ways of addressing the problems of uncertainty which this Counsel's Opinion underlines.

Yours sincerely

M A Pomery
Chairman, Pensions Board
Faculty and Institute of Actuaries

Encl: booking form

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