

# Leaders in Pensions

## Trustee Knowledge Update – November 2018

Welcome to the November 2018 edition of our Trustee Knowledge Update which summarises recent changes in law and regulation. It is aimed at helping trustees (including trustee directors) comply with the legal requirement to have knowledge and understanding of the law relating to pensions and trusts. This edition focuses on the key legal developments over the last three months.

### Government and legislation

#### New investment and disclosure requirements

Following its consultation on “clarifying and strengthening trustees’ investment duties”, the Government has now made regulations extending the matters which must be included in a statement of investment principles (SIP) and requiring trustees of most schemes offering DC benefits to publish their SIP. By 1 October 2019:

- trustees must ensure that their SIP includes details of how they take into account “financially material considerations over the appropriate time horizon of the investments”, the extent (if at all) to which “non-financial matters” are taken into account and their policies on stewardship and engagement activities; and
- trustees of “relevant schemes” (most schemes holding money purchase benefits but not solely AVCs) must also prepare and update their default fund SIP as for point one above, and where the relevant scheme has 100 or more members, the trustees must also publish their SIP on a website and include a link to the published SIP in money purchase benefit statements.

In addition, from 1 October 2020, trustees of relevant schemes with 100 or more members must produce and publish an implementation statement setting out how the SIP has been followed during the year and explaining any changes.

The regulations are accompanied by updated [statutory guidance](#) on reporting costs, charges and other information.

“Financially material” considerations are defined as including but not being limited to environmental, social and governance considerations (which include but are not limited to climate change) which the trustees consider financially material. The “appropriate time horizon” is the length of time that the trustees consider is needed for the funding of future benefits by the investments of the scheme. This should prompt trustees of schemes approaching buy-out or wind up to consider short term risks and other schemes to look longer term to reflect the “demographics of members and beneficiaries”. In DC schemes the length of time is intended to refer to the scheme as a whole, not the duration of individual investments.

A key change from the draft regulations (see [TKU Issue 44](#)) is that the Government has stepped back from requiring trustees to publish a statement of members’ views. This has been replaced by the requirement to state in the SIP the extent to which “non-financial matters” are taken into account. These are defined as “the views of members and beneficiaries including (but not limited to) their ethical views and their views in relation to social and environmental impact and present and future quality of life of the members and beneficiaries of the trust scheme”. The response makes it clear that there is no intention that trustees must survey or take account of members’ views in these areas.

**Action points:** October 2019 may seem a long way off, but trustees are required to consult with employers on the revision of the SIP and they should also be taking advice from their investment consultants.

#### Master trust authorisation and supervision regime

The legislation establishing the new master trust authorisation and supervision regime came into force on 1 October 2018. A master trust is defined as an occupational pension scheme which provides money purchase benefits, is used, or intended to be used, by two or more employers and is not used only by employers which are connected with each other.

As well as the detailed requirements of the legislation, there is also a TPR Code of Practice and various guidance. A master trust must meet the required standards across the following criteria:

- All the people who have a significant role in running the scheme can demonstrate that they are fit and proper.
- The scheme has IT systems which enable it to run properly and there are robust administration and governance processes.
- There is a continuity plan in place to protect members if something happens that may threaten the existence of the scheme.
- The scheme has the financial resources to cover running costs and also the cost of winding up the scheme if it fails, without impacting on members.

Existing master trusts (established before 1 October 2018) are required to apply to TPR for authorisation before 1 April 2019. Any existing master trust operating from 1 April without having applied for authorisation or having been refused authorisation will be subject to penalties of up to £10,000 per day.

Trustees should be aware that requirements catch not only commercial master trusts, but also “accidental” master trusts. This could arise in a group scheme (DC or hybrid) where there is a participating employer which is not connected with the other employers (perhaps as a result of a corporate transaction or a joint venture).

**Action points:** Trustees of multi-employer schemes which have not applied for master trust authorisation and hold DC benefits should review all scheme employers to ensure that they are “connected”. If an unconnected employer is identified then urgent advice should be taken.

#### Implementation of IORP II

The provisions of the recast EU directive on the activities and supervision of institutions for occupational retirement provision (IORP II) is due to be incorporated into domestic law by 13 January 2019. Two sets of final regulations have

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appeared (with no formal consultation), both due to come into force on 13 January 2019. These cover:

- Governance – these replace the current internal controls provision with a new requirement for trustees to establish and operate an “effective system of governance including internal controls”. There are also detailed prescribed requirements for a new TPR Code of Practice on governance which is yet to be published.
- Cross border schemes - these include tweaks to some definitions and to the authorisation process and new requirements for bulk transfers between schemes in different EEA countries.

IORP II includes a requirement for annual benefit statements for active and deferred members which would apply to DB schemes as well as DC. No legislation on this has yet appeared. We understand that the government may have deferred its decision on this, possibly pending the launch of the pensions dashboard.

**Action points:** No immediate action required but the Code of Practice on governance and internal controls will include new requirements for trustees including undertaking a mandatory risk assessment every three years.

## Regulator ([www.pensionsregulator.gov.uk](http://www.pensionsregulator.gov.uk))

### 21st Century Trusteeship – Meetings and Decision-making and Value For Members

TPR has issued the [ninth](#) and [tenth](#) modules of its 21<sup>st</sup> Century Trusteeship project. These consider respectively effective meetings and decision-making and how trustees should be monitoring and achieving value for members.

**Action points:** Trustees should familiarise themselves with the 21<sup>st</sup> Century Trusteeship materials as part of their ongoing training and development.

### TPR Future – a new approach to supervision

TPR has published a [document](#) setting out its new approach to supervising and monitoring schemes. One-to-one supervision will be introduced for 25 of the biggest DC, DB and public sector schemes from October 2018. This will be rolled out to more than 60 schemes over the next year.

In addition, “higher volume supervisory approaches” are also being introduced from October to address risks and influence behaviours in a broader group of schemes. This will be piloted with approximately 50 DB schemes to assess compliance with messages in TPR’s 2018 annual funding statement, specifically concerning whether schemes are being treated fairly when it comes to dividend payments to shareholders.

**Action points:** For information only. Schemes caught in the new supervision approach will be contacted by TPR.

## HMRC ([www.hmrc.gov.uk/pensionschemes/index.htm](http://www.hmrc.gov.uk/pensionschemes/index.htm))

### Newsletters 102 to 104

Highlights from HMRC’s monthly newsletters in August, September and October include:

- An update on the new Manage and Register Pension Schemes Service;
- A reminder that new master trusts have to notify HMRC at the same time that they apply to TPR for authorisation;
- A reminder that schemes operating relief at source need to enrol on the new SDES system by 30 November; and
- A statement that scheme administrators should only contact HMRC in cases of transfer if they have concerns about the receiving scheme’s registration status. Scheme administrators should carry out their own checks when deciding whether or not to make a transfer and if satisfied that the receiving scheme is a registered pension scheme, the transfer can be made without contacting HMRC for confirmation of the registration status.

**Action points:** For information only.

### Budget 2018

There were no dramatic changes affecting pension schemes in this year’s Budget statement but relevant points include:

- The government is continuing its project to encourage pension funds to invest in long term investments and in growing businesses. This is being taken forward in various ways by the DWP, FCA and industry groups.
- The Government will be looking at using RPI even less in future (and moving to CPIH) - but no mention of any overriding powers in relation to pension schemes.
- The lifetime allowance for 2019/20 has been confirmed at £1,055,000.
- The response to the consultation on banning cold-calling has been published and the legislation will be finalised shortly.
- The DWP will be consulting later this year on the design and launch of the pensions dashboard. There is additional £5m funding for this.

**Action points:** For information only.

## PPF ([www.pensionprotectionfund.org.uk](http://www.pensionprotectionfund.org.uk))

### Draft Levy Determination for 2019/20

The PPF has published its [draft levy determination](#) for 2019/20. The general approach is stability, with the PPF proposing only minor adjustments to its levy methodology, and no significant changes to the scoring model for insolvency risk.

As anticipated, the consultation confirms that schemes with type A or B contingent assets (group company guarantees or charges over assets) containing a fixed maximum sum element must re-execute and certify their agreements on the new standard forms which were published in January 2018. If they do not, no levy credit will be given.

Aside from re-certification, no material changes are likely to be made to the contingent assets regime for 2019/20. The final levy determination is expected in December and the main deadlines for the provision of information to the PPF

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will be 5.00pm on 29 March 2019 for hard copy document and midnight on 31 March 2019 for other information.

In relation to the recent Hampshire CJEU case (see below), the PPF states that it will consider the ruling carefully and, once the chosen implementation approach is clear, will consider whether any changes are necessary to its section 179 valuation guidance. The PPF has already started writing to affected members who may be entitled to additional compensation.

**Action points:** Trustees should check whether they have any Type A or B contingent assets which require re-executing on the new standard forms. If so, they should raise this with the employer as soon as possible and take advice on the new requirements. Trustees with contingent assets which do not require re-execution should be taking steps to start the certification process.

## Changes to PPF compensation

In the *Beaton* case in October 2017, the High Court ruled that “fixed pensions” (generally arising from transfers-in) should not be aggregated with pensions deriving from pensionable service within the scheme for the purposes of applying the PPF compensation cap. Following that case, the Government proposed that amendments would be made to ensure that “fixed pensions” and “normal” pensions would be aggregated for the purposes of the cap (essentially reversing *Beaton*). However, as a result of the *Hampshire* judgment (see below), the Government has (at least temporarily) reversed that decision and benefits will not be aggregated for cap purposes. Amendments have however been made to the PPF compensation provisions with effect from 2 October 2018 in relation to revaluation, indexation and survivors’ compensation to ensure that *Beaton* does not have negative consequences for those whose compensation wholly or partly derives from “fixed pensions”.

**Action points:** This will have a direct impact on trustees of schemes in a PPF assessment period. They should ensure that future benefits are paid on the basis of the amended compensation provisions.

## Cases

### Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank Plc & Ors (High Court)

This landmark decision was handed down on 26 October. The Court has ruled that pension benefits must be equalised for the effect of guaranteed minimum pensions (GMPs) accrued between 17 May 1990 and 5 April 1997, a decision that will have significant implications for most defined benefit pension schemes. This is a very important decision for trustees to consider. While actual changes to benefits will in practice be extremely complicated and so require detailed planning, there will be immediate issues to address, such as communication with affected members; the impact on scheme funding; the calculation of transfer values; and payment of trivial and serious ill-health commutation. Please see this [article](#) for more information.

**Action points:** Trustees of any scheme affected by this ruling will need to take detailed legal and actuarial advice on how to proceed both in the short and long term.

### Hampshire v Board of the Pension Protection Fund (CJEU)

The member (Mr Hampshire), was aged 58 and in receipt of a pension when his employer became insolvent. However, as he was below normal pension age, the PPF compensation cap applied which in his case meant his entitlement to PPF compensation was less than half of his entitlement under the scheme, even before lower future increases were taken into account. The member argued that this was a breach of article 8 of the EU Insolvency Directive which requires Member States to ensure that “necessary measures” are taken to protect the interests of employees and former employees in respect of accrued pension rights.

In 2014 the High Court rejected the member’s argument, based on the ECJ ruling in *Robins* in 2007, that the Directive required the UK to ensure that each individual member received at least 50 per cent of their scheme benefits. However, in 2016 the Court of Appeal decided to refer the point to the Court of Justice of the European Union, as well as whether article 8 was directly effective.

The CJEU held that EU law requires Member States to guarantee 50 per cent pension compensation on insolvency for each individual employee, “without exception”, with protection lasting for the entire pension period (in order to prevent the percentage falling as a result of the passage of time). The Court also held that the Directive could be relied on directly by individuals against the PPF.

**Action points:** No immediate action is required by trustees. The PPF is currently considering whether any changes are required to its valuation guidance.

### Barnardo’s v Buckinghamshire (Supreme Court)

This Supreme Court has ruled unanimously that the rules of the Barnardo’s pension scheme do not empower the trustees to adopt an index other than RPI for the purposes of pension increases. The scheme rule in question allowed the trustees to adopt an index which “replaced” RPI. The Supreme Court agreed with the Court of Appeal in finding that the rule did not enable the trustees to depart from RPI for as long as RPI continues to be published. Having made this finding, the Supreme Court did not then need to go on to consider whether the adoption of a different index would be subject to the subsisting rights requirements in sections 67-67I of the Pensions Act 1995.

**Action points:** As with all the cases involving switching from RPI to CPI this turns on the particular scheme rules. The Supreme Court did though set out a clear statement of how pension scheme rules should be interpreted, which will apply to all schemes.

### HMRC v Parry (Court of Appeal)

This case concerned two alleged lifetime transfers of value made by the member shortly before her death, on which HMRC claimed inheritance tax (IHT). Under the Inheritance Tax Act 1984, a disposition reducing the value of a person’s estate is a transfer of value, although there is an exception if it is not “intended... to confer a gratuitous benefit on any person”.

The first alleged transfer of value was the member’s transfer of funds from her s32 pensions policy to a new personal pension scheme, when she learned that she had terminal cancer. The second was her omission, in her lifetime, to take benefits from the receiving scheme. A

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person's intentional omission to exercise a right is treated as a disposition if it diminishes the value of their estate and increases the value of another person's estate: the receiving scheme had paid the benefit subsequently arising on her death to her sons, in accordance with her signed expression of wish.

The Court of Appeal held that the transfer between pension schemes, and the member's deliberate omission to take income from the receiving scheme, were transfers of value and together formed a scheme intended to confer gratuitous benefits on her sons. Both the transfer and the omission were motivated by the member's desire that her sons should receive the death benefits payable if she did not take a pension. The exercise of the receiving scheme administrator's discretion to pay the monies to the sons did not break the chain of causation: the sons' estates had still been increased "by" her omission to take benefits herself.

**Action points:** For information only.

## Miscellaneous

### Pensions Administration Standards Association (PASA) eAdmin Group

The latest PASA initiative is its eAdmin Group. This working group (to be overseen by the Pensions Regulator) is designed to explore how schemes, trustees, regulators and administration providers can optimise technology to improve their service. Initial findings are anticipated by early 2019.

**Action points:** For information only.

**Dates for diaries:** Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. We will be holding trustee training on 12 February 2019. If you have any enquiries about this course or would like to reserve a place, please contact **Megan Thorogood** – E: [megan.thorogood@cms-cmno.com](mailto:megan.thorogood@cms-cmno.com).

If you are interested in any additional trustee or employer training, please contact **Kieron Mitchinson** - E: [kieron.mitchinson@cms-cmno.com](mailto:kieron.mitchinson@cms-cmno.com) who can provide you with a list of our current training topics or discuss any particular training needs you might have.

**General:** For further information on our pension services, please contact **Mark Grant** – E: [mark.grant@cms-cmno.com](mailto:mark.grant@cms-cmno.com), T: +44 (0)20 7367 2325 or your usual pension partner. Please also visit our website at [www.cms.law](http://www.cms.law).

The Pensions team is part of the CMS Financial Markets and Pensions group and advises employers and trustees of schemes varying in size, from a few million pounds to the largest schemes in the UK. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees. We provide a full range of services in connection with occupational pension schemes, including all aspects of employment and EU law. The team also works closely with our corporate lawyers, providing support on mergers and acquisitions, insolvency lawyers supporting us on employer covenant issues, and the financial services team which specialises in regulatory and fund management matters.

The information in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The Update is intended to simplify and summarises the issues which it covers. It represents the law as at 9 November 2019.

*CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335.*

## Ombudsman ([www.pensions-ombudsman.org.uk](http://www.pensions-ombudsman.org.uk))

### Signposting for pension dispute resolution

Since April, when the dispute resolution function of TPAS transferred to the Pensions Ombudsman, there has been some confusion as to how trustees should signpost this in scheme booklets and IDRPs documentation. The Pensions Minister has now [confirmed](#) that the Government intends, by April 2020, to modify relevant legislation to reflect the fact that:

- complaints or disputes concerning workplace or personal pension arrangements should be referred to TPO;
- general requests for information or guidance should be referred to either TPAS or the single financial guidance body that will supersede it; and
- complaints going to TPO that are intended for TPO's Early Resolution Service (the former TPAS disputes function) will not have to go through the scheme's IDRPs first.

Pending the legislative changes, and so long as schemes update their signposting to reflect the first two bullet points above, TPR says that it will not consider imposing any penalties for technical non-compliance with the existing legislation. TPO has published [sample wording](#) which trustees might wish to use.

*For the latest on The Pensions Ombudsman and his work, please see our most recent quarterly [Pensions Ombudsman Update](#).*