

# TRUSTEE KNOWLEDGE UPDATE

Legal Update – May-July 2021

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## LEGISLATION

### [Real time reporting of non-taxable payments following death](#)

(27 April 2021)

These regulations come into force on 6 April 2022. They provide for the mandatory reporting to HMRC of certain types of non-taxable death benefit payments through the Real Time Information (RTI) system. The payments which will be reportable are pension guarantee payments, pension death benefits and certain lump sum death benefits. The payer of the benefit will be subject to penalties if the RTI return is not made in accordance with the regulations. HMRC has published a related [policy paper](#).

### [Finance Act 2021](#)

(10 June 2021)

The Finance Act 2021 received Royal Assent on 10 June. Its provisions include section 28 which freezes the standard lifetime allowance until 2026 and section 28 and Schedule 5 which contain amendments to the Finance Act 2004 relating to collective defined contribution schemes.

### [TPR Information Gathering Powers](#)

(23 June 2021)

These regulations come into force on 1 October 2021. They set out the minimum information which TPR must include on a notice which requires a person to attend an interview under the extended provisions in the PSA 2021. They also modify TPR's extended inspection powers so they apply to multi-employer schemes and sets the level of fixed and escalating civil penalties.

### [Climate Change Governance and Reporting Regulations](#)

(13 July 2021)

These regulations come into force on 1 October 2021 introducing new governance and reporting requirements for pension schemes in relation to climate change. Trustees of schemes in scope must have effective governance, strategy, risk management, and accompanying metrics and targets for the assessment and management of climate risks and opportunities and must report on these in line with the Taskforce on Climate-related Financial Disclosure's recommendations. The report must be published on a publicly available website. Also coming into force on 1 October 2021 are [regulations](#) introducing new trustee knowledge and understanding and scheme registration requirements in connection with the new governance and reporting obligations.

The regulations will initially apply to schemes with £5bn or more in relevant assets and all authorised master trusts. From 1 October 2022 schemes with £1bn or more in relevant assets will come into scope. There will be mandatory fines for failure to produce a report and TPR may impose fines for other breaches of the requirements.

The regulations are accompanied by [statutory guidance](#) which trustees must have regard to when complying with the governance and reporting requirements of the regulations.

#### **Comment:**

These regulations impose important new duties on trustees, starting with the largest schemes. The requirements in the regulations and guidance are very detailed and trustees in scope will have to work through them carefully, with the assistance of their advisers. The regulations acknowledge that in some circumstances the collection of the relevant information is not possible. Where this is the case, trustees are required to report only "so far as they are able".

## CONSULTATIONS AND DRAFT LEGISLATION

### [Pension scams: empowering trustees and protecting members consultation](#)

(14 May 2021)

The DWP has published [consultation](#) on draft regulations aimed at protecting pension scheme members from scams. The DWP expects to introduce the new regulations in the autumn.

Under the proposals, trustees will not be able to make a statutory cash equivalent transfer payment unless either the transfer is to one of the prescribed low-risk scheme-types (these are likely to include public service schemes and authorised master trusts) or they determine that other prescribed conditions are met. These will include the member having an employment link with the receiving scheme's employer or that the circumstances do not give rise any to "red flags" or "amber flags". If the trustees determine that no flags, as prescribed in the regulations, are present then the transfer can continue. Where there is an amber flag, the transfer cannot proceed unless the member takes scams guidance from MaPS (unless they have already done so for the same scheme in the last 12 months). Where there is a red flag, the trustees cannot make a statutory transfer.

#### **Comment:**

Many trustees have found themselves in a very difficult position where a scam is suspected but the legislation required them to make the transfer. These proposals go some way to removing this problem, however, the requirements in the draft regulations are very detailed and may require trustees to make judgement calls which could cause problems in practice.

### [Response to consultation on value for members](#)

(21 June 2021)

In September the Government [consulted](#) on proposals that unless smaller DC schemes (with less than £100m in assets) can demonstrate they provide value for members, trustees should take immediate steps to wind up the scheme and consolidate members into a larger scheme.

The Government also proposed that all relevant schemes (broadly schemes with DC benefits other than AVCs) would have to report in the Chair's statement on the investment return on default and member-selected funds and to include a total asset value on the scheme return for the first scheme year ending after 1 October 2021.

The Government has now confirmed that its proposals will be brought in broadly as planned. The first (VFM) assessment will apply for schemes for their first scheme year ending after 31 December 2021. DWP has issued [statutory guidance](#) covering completion of the annual value for members assessment (for small schemes); and the requirement to report on investment return (for all relevant schemes).

### [Incorporating performance fees within the charge cap](#)

(21 June 2021)

In March, DWP consulted on draft regulations to enable trustees to smooth investment performance fees over a 5-year period for charge cap purposes, helping to encourage investment in illiquid assets.

In June, DWP finalised its performance fee proposals, citing "*almost unanimous support*" for changing the charge cap regulations to allow schemes to smooth performance fees over 5 years. This change will come into effect in autumn 2021.

DWP is also making minor changes to its statutory guidance on reporting costs and charges. The [revised version](#), including new illustrations, takes effect from 1 October 2021.

### [Strengthening TPR's Powers: Contribution Notices and Information Gathering – consultation response](#)

(29 June 2021)

The Government has published its response to its March 2021 consultation on the employer resources test for contribution notices (CNs) and TPR's information gathering powers. The information gathering regulations have now been laid and there is a revised draft of the [employer resources regulations](#). Despite a number of respondents requesting a more holistic approach to employer resources, taking into account employer covenant, the Government has decided to stick with the "profit before tax" approach it originally proposed.

The Government confirms that TPR will produce policy guidance on how and when they will use their information gathering powers, including how they will use their powers to investigate criminal offences.

A few responses sought clarification on the status of the lookback power and the Government remains of the view that the new employer resources and insolvency tests will only apply to acts (or failures to act) from 1 October 2021. The planned commencement regulations will clarify this position.

### [Stronger Nudge to pensions guidance](#)

(9 July 2021)

The Government has published consultation seeking views on draft regulations aimed at delivering a "*stronger nudge*" to pensions guidance when individuals seek to access, or transfer for the purpose of accessing, flexible pension benefits. The consultation closes on **3 September 2021**.

The proposal is to introduce new requirements requiring trustees to ensure that individuals have either received or opted out of receiving appropriate pensions guidance before proceeding with their

application to transfer or draw benefits. This will apply to members aged 50 or over and those in receipt of survivors' benefits who have a right or entitlement to "flexible benefits" under the scheme (i.e. not those who have only DB benefits). Applications from those who have received Pension Wise guidance in the previous 12 months, have received regulated advice on the proposed transaction or are applying for a serious ill-health lump sum and have informed the trustees of this will be exempt.

#### **Comment:**

The Government is concerned that a significant number of DC pots are being accessed without advice or guidance. These proposals mean that members will have to actively opt-out of receiving guidance before transferring or drawing their benefits. They are slated to come into force in April 2022 and will be in addition to the restrictions on transfer payments due to come into force this autumn.

### [Increasing the normal minimum pension age](#)

(20 July 2021)

HM Treasury has published the response to consultation on increasing normal minimum pension age (NMPA). Also published is a [policy paper](#) and [draft legislation](#) (to be included in the Finance Bill 2021-22). The draft legislation is subject to consultation until **14 September 2021**.

The Government is going to proceed with its proposal (as originally announced in 2014) to increase the NMPA from 55 to 57 from 6 April 2028. Individuals will be able to retain a lower protected pension age (PPA) where:

- on 5 April 2023 the member had an actual or prospective right under the scheme to any benefit from an age of less than 57; and

- the rules of the pension scheme on 11 February 2021, which applied or would have applied to the member, included a provision conferring such a right.

An individual will not lose their PPA if they are subject to a block transfer or an individual recognised transfer to another registered pension scheme. Where a transfer is made, the PPA will apply only to the benefits transferred-in, not to benefits already accrued or to be accrued in the receiving scheme. The Government will provide further advice on transitional arrangements for members who do not have a PPA and have reached age 55 but not age 57 by 6 April 2028.

**Comment:**

Although this change may be unpopular with members and could cause some administrative complexity (particularly in relation to transfers-in), schemes have been given a sensible lead-in period to enable them to make any necessary rule amendments. Advice may need to be taken on whether the wording of existing scheme rules does confer a right to take a benefit from an age less than 57. The changes should be clearly communicated to members in good time.

## HMRC

### [Trust registration guidance](#)

(17 May 2021)

HMRC has substantially updated its guidance to reflect new requirements for the registration of express trusts with the Trust Registration Service (TRS). Registered pension schemes and trusts holding life or retirement policies are exempt from the requirements. (unless they are required to pay certain taxes). Later in 2021 the register will open for the registration of all (non-exempt) express trusts. This will include EFRBS and some trusts established for children or other vulnerable beneficiaries. Trustees will have twelve months from that date to complete the registration.

Trusts liable to the payment of tax should already be registering with TRS within 6 months of the end of the tax year in which the liability arises. HMRC has also published new [guidance](#) for managing information in relation to trusts which are already registered with TRS and a new [internal manual](#) detailing how the TRS will administer the requirements of the Money Laundering Regulations.

## THE PENSIONS REGULATOR

### [Annual Funding Statement 2021](#)

(26 May 2021)

TPR's annual funding statement (AFS) is particularly relevant to DB schemes with valuation dates between 22 September 2020 and 21 September 2021 (known as Tranche 16, or T16 valuations) and to schemes undergoing significant changes that require a review of their funding and risk strategies. T16 valuations will be regulated in accordance with the current legislation and DB funding code. The new funding code is not expected to come into force until late 2022 at the earliest.

Considerations for schemes set out in the AFS include:

- choosing assumptions carefully to take into account plans to align RPI with CPIH from 2030;
- trustees can consider taking account of post valuation experience at the date of signing the recovery plan. Trustees should have a credible justification for the assumptions chosen;
- as schemes move to maturity trustees should actively monitor and mitigate their liquidity risks;
- trustees should consider obtaining independent specialist advice to support covenant assessment;
- TPR would not generally expect DRCs to be reduced or recovery plan end dates to be extended. TPR expects any

request to reduce contributions to be short term, with higher contributions in subsequent years limiting any extension to the recovery plan. Shareholder distributions will be considered as being inconsistent with the scheme having to agree lower contributions;

- some employers could request to defer DRCs over the short term to take advantage of the 130% super-deduction capital allowance for tax purposes from 1 April 2021 until 31 March 2023. In such circumstances, TPR expects trustees to treat any request for lower or deferred DRCs consistently with its [COVID-19 guidance](#) and the expectations set out in the AFS;
- trustees should take a rigorous approach to assessing the impact of any corporate transactions and to negotiate mitigation (where relevant) to protect the interests of members and ensure fair treatment with other creditors.

### [Climate-related governance and reporting consultation](#)

(5 July 2021)

TPR is consulting on [guidance on governance and reporting of climate-related risks and opportunities](#) and on a [new appendix](#) to its Monetary Penalties Policy concerning breaches of the Climate Change Governance and Reporting Regulations. The consultation closes on 31 August 2021.

The draft guidance is in addition to the [statutory guidance](#) published by the DWP in June. It sets out TPR's expectations of trustees in response to the new climate change regulations and is aimed at trustees of schemes in scope of those regulations. TPR states that if trustees follow the guidance, and report on the steps they have taken, they should be able to demonstrate good governance of climate-related risks and opportunities.

TPR is proposing to set the mandatory penalty for failure to publish a TCFD report at £2,500 (the minimum allowed by regulations) with a

subsequent penalty for a repeated breach of £5,000 and an initial penalty of £5,000 where the scheme has a professional trustee in place. The amount of any discretionary penalty will, as with other penalties covered by the Policy, generally depend on the persons concerned, band level and any aggravating or mitigating factors.

## CASES

### [Britvic Plc v Britvic Pensions Ltd](#) - *Court of Appeal supports literal interpretation of pension increase rule*

(10 June 2021)

The scheme was established in 2003 on a demerger. The rules stated that pensions would increase by limited price indexation (capped by reference to RPI) “*or any other rate decided by the principal employer*”.

Last year, the [High Court](#) rejected the principal employer's argument that this allowed it to apply either a higher or lower pension increase rate each year. The judge said that the draftsman had clearly intended annual increases capped in line with the RPI or such [higher](#) rate, not ‘other’ rate, as the employer might decide: something had clearly gone wrong with the language.

The Court of Appeal allowed the employer's appeal. It held that the language used in the rule (“*any other rate*”) was unambiguous and even though the drafting was unsatisfactory there was nothing allowing the court to depart from the clear language, particularly as it was interpreting the rules of a pension scheme.

#### Comment:

The case delivers another strong steer, this time at Court of Appeal level, that pensions documents will usually be construed literally. “*Commercial common sense*” was not to be used as an aid to interpretation in circumstances where the language used by the parties was clear and unambiguous.

**[Punter Southall Governance Services Ltd v Hazlett](#) – *Payment of pension arrears: High Court rules on limitation and forfeiture issues***

(17 June 2021)

This case (concerning the Axminster pension scheme) considered the treatment of pension arrears arising from the correction of underpaid past increases, unequalised GMPs, and incorrect [Barber](#) equalisation.

**Limitation:** The judge, Morgan J, confirmed his approach in the [Lloyds Banking Group](#) equalisation cases that no limitation period applied to the member’s claim against the trustees for underpaid instalments of pension.

**Forfeiture clauses:** The court considered two ‘forfeiture’ clauses. It held that the first did not, correctly construed, allow forfeiture - it dealt only with how unclaimed monies could be applied. The other provided that where a beneficiary failed to claim a benefit within six years of it becoming due, *“it shall be forfeited but the Trustees may at their discretion subsequently apply all or any part of [it]”* in a range of ways. The judge confirmed that this clause meant that the monies were forfeited, but the trustees then had a discretionary decision to make.

**Exercise of discretion:** The judge considered what factors trustees might have to take into account in exercising any discretion not to forfeit. It was “obviously” relevant to consider how the situation arose and the consequences of the power being exercised or not exercised. The absence of fault on beneficiaries’ part and/or the presence of fault on the trustees’ part were capable of being relevant factors, as was whether the members could reasonably have been expected to make claims sooner. Despite a strong steer that trustees might wish to exercise their discretion in favour of paying benefits to members who had not been at fault, he stopped short of holding that it would necessarily be “perverse” for them not to do so: the administrative difficulties involved could potentially be relevant.

**Amendment of forfeiture rule:** The judge found that the introduction of the forfeiture rule described above had not breached a scheme amendment power providing that no alteration *“would diminish the benefits ... already accrued”*.

**Interest on arrears:** The judge rejected arguments that there was any legal bar on trustees awarding interest on pension increase arrears. On the facts, he held that the appropriate rate was 1% over base rate (the members had argued for 2%), considering that his reasoning on this point in [Lloyds](#) remained valid.

The case also considered a number of other points including the court’s approach to compromise of claims, and the extent to which unclaimed monies could be used to meet scheme expenses and unpaid “section 75” debts.

**Comment:**

This comprehensive and detailed judgment reinforces the conclusions reached in the Lloyds GMPs case about limitation periods for arrears of pensions, and the payment of interest on arrears. It also provides a useful steer for trustees exercising scheme rules discretions over forfeiture of unclaimed pension, where more than 6 years have passed since an instalment was due.

**[Secretary of State for Work and Pensions v Hughes](#) – *Court of Appeal agrees that PPF compensation cap is unlawful, but allows PPF appeal on calculation issues***

(19 July 2021)

Last year, the High Court held that the PPF “compensation cap” was unlawful on age discrimination grounds, because members above normal pension age were not subject to the cap. The Court also made findings about how the PPF should calculate benefits in relation to members in order to ensure compliance with rulings of the Court of Justice of the EU that all members should receive at least 50% of the

value of their accrued pension benefits when their employer becomes insolvent.

The Court of Appeal upheld the High Court's finding on the compensation cap. However, it accepted arguments by the PPF that the PPF was entitled to adopt a one-off actuarial comparison to meet its Insolvency Directive obligations, rather than adopt a 'lifetime payments test'; and that the PPF was entitled to continue its existing approach for calculating survivor pensions. The survivor's right was to receive at least 50% of the compensation the member was getting from the PPF: not 50% of the pension that the survivor would have had under the original pension scheme.

**Comment:**

It remains to be seen how the Government will respond to this confirmation of the striking-down of the compensation cap. However, the Court's finding that the PPF's preferred calculation methods are in accordance with EU law will be good news not just for the PPF but also potentially for PPF levy-payers.

## MISCELLANEOUS

### FCA

[Enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers](#)

(22 June 2021)

The FCA is consulting on proposals to introduce climate-related financial disclosure rules and guidance for asset managers, life insurers, and FCA-regulated pension providers. It is intended that the first phase (covering asset managers with assets under management (AuM) of more than £50bn and asset owners with more than £25bn AuM) will come into effect from 1 January 2022 with the first disclosures to be made by 30 June 2023. The consultation closes on 10 September 2021.

### PASA

[Guidance Note on GMP Conversion](#)

(9 July 2021)

The PASA GMP Equalisation Working Group Guidance sets out how schemes might approach GMP conversion as part of a GMP equalisation project. It outlines approaches to the application of GMP conversion which have been adopted or are actively being considered by early adopters, together with associated considerations. It isn't intended to advocate a particular course of action.

The Guidance covers three common situations in which GMP conversion is being used:

- a bulk one-off exercise for existing pensioners and dependants;
- an at retirement process; and
- a bulk one-off exercise for deferred members.

The Guidance suggests that schemes which may be likely to find GMP conversion attractive include those schemes with complex benefits, smaller schemes, particularly those seeking to buy-out and schemes with a significant number of lower earners. Schemes which may be currently less likely to adopt GMP conversion include those with straightforward benefits, larger schemes where administration costs can be spread over a wider membership and schemes with a large number of high earners.

**Comment:**

This helpful and practical guidance describes current practice in the complex area of GMP conversion, in the absence of further guidance or legislation from DWP and HMRC. Any schemes considering GMP conversion as part of their GMP equalisation project should take it into account when planning their approach.

## ICO

### [European Commission adequacy decision on data transfers](#)

(28 June 2021)

This final GDPR adequacy decision confirms the Commission's current assessment that the UK ensures an equivalent level of protection to that offered by the General Data Protection Regulation. It means that trustees and employers should continue to be able to benefit from the free flow of personal data from the EU/EEA to the UK - although note that the decision is subject to a four year 'sunset clause', after which it will only be renewed if the UK continues to ensure adequate protection.

### **Other organisations**

#### **Pensions Dashboards Programme (PDP) [Progress update report](#)**

(13 May 2021)

The PDP's latest update includes an updated indicative programme timeline that confirms plans for voluntary onboarding and testing into 2022, staged (compulsory) onboarding and dashboards becoming available in 2023, and transition to 'business as usual' from 2024.

The PDP has also published a [Call for input on staging](#). It proposes that compulsory staging should comprise of three 'waves': first, the largest schemes (1000+ members); then, medium schemes (100 to

999 members); and finally, small and micro schemes (under 100 members). The first wave - for the largest schemes - would begin in April 2023 and consist of three distinct cohorts:

- master trusts and FCA regulated providers of personal pensions, starting spring 2023;
- DC schemes used for automatic enrolment, during 2023;
- all other occupational schemes with 1,000 members or more, in order of size, with the largest DB onboarding in 2023.

The second wave would not begin until all large schemes had successfully connected (which the PDP suggests is unlikely to be before 2024).

#### **The Pensions Management Institute (PMI) [Accreditation for lay trustees](#)**

(17 June 2021)

The PMI has launched an accreditation regime for lay trustees following last year's roll-out of its APTitude accreditation for professional trustees. Lay trustees will need to complete the TPR trustee toolkit and both parts of the PMI's pension trusteeship certificate, as well as 15 hours of relevant CPD annually and any new or updated toolkit modules.

*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. CMS runs regular trustee training days. If you would like to be updated of upcoming dates or have any other enquiries about this course, please contact Megan Thorogood ([megan.thorogood@cms-cmno.com](mailto:megan.thorogood@cms-cmno.com)).*