

# Essential UK Pensions News

February 2020

## Introduction

Essential Pensions News covers the latest pensions developments each month.

## Pension Schemes Bill 2019-20

### Second reading in the House of Lords

On January 28, 2020, the Pension Schemes Bill received its second reading in the House of Lords.

The Lords' debate focused on the Bill's provisions regarding collective money purchase benefits (CMPBs), pensions dashboards and the Regulator's new powers. On the latter, peers expressed concern about the scope of the new criminal offences created under the Bill (that is, an offence of avoidance of employer debt; and an offence of conduct risking accrued scheme benefits). Lord Hutton considered that the wording "*goes significantly beyond the criminal sanction proposed in the consultation which preceded the Bill.*" He noted that this was originally framed as criminalising "*wilful or reckless behaviour in relation to a pension scheme,*" but this formulation is absent from the Bill.

In relation to CMPBs, peers supported the legislative framework that the Bill will enact, but expressed concerns that many of the detailed provisions stand to be made in secondary legislation.

On pensions dashboards, there was support for the measures implementing a legislative framework, although several peers suggested there should only be a single publicly-funded dashboard, while others supported a mix of public and private dashboards.

There were also concerns that the Bill contains no provisions regarding defined benefit consolidation, although a response from the DWP to its December 2018 consultation is expected "shortly."

The Committee Stage started on February 24, 2020. It is expected that there will then be some in-depth examination of the drafting of the Regulator's new powers, although it is unclear whether this may result in alternative wording from the Government to more accurately reflect the previously stated policy intent.

### Concerns about scope of regulation-making powers raised by House of Lords committee

The Delegated Powers and Regulatory Reform Committee of the House of Lords has published a report highlighting concerns on certain provisions in the current draft of the Pension Schemes Bill 2019-20. The points highlighted by the committee include:

- The power to change the definition of "qualifying benefits" for collective money purchase schemes (CMPS) is too broad.
- The power to extend the cooling-off period and extend the payment period, in respect of transfers from CMPS, should not be limited to the negative resolution procedure.
- It is "inappropriate" to allow for possibility of the CMPS legislation to be extended to allow multiple unconnected employer schemes by means of subordinate legislation.

These provisions will come under scrutiny during the Committee Stage.

### New trustee governance duties regarding climate change risk

Baroness Stedman-Scott, Parliamentary Under-Secretary of State at the DWP, has laid amendments to the Bill that will introduce new provisions into the Pensions Act 1995 regarding trustees' governance duties in relation to climate change risk.

New section 41A will create regulation-making powers for the DWP to:

*"impose requirements on the trustees or managers of an occupational pension scheme of a prescribed description with a view to securing that there is effective governance of the scheme with respect to the effects of climate change."*

No further information is yet available about the types of occupational pension scheme that will be covered by the provisions. The effects of climate change are stated to include risks arising from steps taken because of climate change (whether by governments or otherwise), and opportunities relating to climate change. Regulations made by the DWP under the provisions may impose requirements on trustees or managers about:

- Reviewing the exposure of the scheme to risks of a prescribed description and assessing the assets of the scheme in a prescribed manner
- Determining, reviewing and (if necessary) revising a strategy for managing the scheme's exposure to such risks
- Determining, reviewing and (if necessary) revising targets relating to the scheme's exposure to such risks, and measuring performance against these targets
- Preparing documents containing information of a prescribed description

New section 41B 1995 will create regulation-making powers to require trustees of affected schemes to publish information of a prescribed description relating to the effects of climate change on the scheme.

New section 41C will put in place a compliance framework regarding the new duties. To this end, additional powers will be conferred on the Pensions Regulator to issue compliance, third party and penalty notices in respect of breaches of regulations made under sections 41A and B. A penalty imposed under the regulations may not exceed £5,000 in the case of an individual or £50,000 in any other case.

On February 11, 2020, the DWP issued a supplementary memorandum giving further information about new climate change trustee risk governance duties that are being enacted in the Bill. The memorandum from the DWP to the House of Lords Delegated Powers and Regulatory Reform Committee explains that the provisions reflect recommendations made by the industry-led Taskforce on Climate-related Financial Disclosures created by the Financial Stability Board. The Taskforce was established to develop a set of recommendations for consistent climate-related financial risk disclosures in mainstream reporting.

According to the DWP, the provisions to be enacted as sections 41A to 41C of the Pensions Act 1995 are designed to confer powers capable of ensuring occupational pension schemes act and report in line with the Taskforce's recommendations. The policy intention is to require trustees and managers to govern effectively their scheme's exposure to the effects of climate change. The DWP says the powers "are not intended to direct pension schemes as to how they should invest".

The new powers will apply to all occupational pension schemes, both defined benefit and defined contribution, though they are likely initially to be limited to larger schemes. In formulating its approach, the DWP plans to balance what it describes as the "urgent need" to consider climate change risks in the scheme governance process against business requirements which may take time to implement, such as updating systems and preparing data.

These issues are likely to be aired during the Bill's committee stage, which started on February 24, 2020.

## Comment

There were initial concerns that some of these new amendments appeared to go significantly beyond current scheme disclosure requirements on investment around climate change and could have given unprecedented new powers to Government bodies to interfere and request changes to private sector schemes' investment strategies. However, the DWP's supplemental memorandum goes some way to allaying these concerns that the proposed changes could have affected trustees' fiduciary duty and freedom to invest in members' best interests.

## News from the Pensions Regulator

### Regulator publishes DB scheme return checklist

The Pensions Regulator has published a [checklist](#) for schemes completing the DB scheme return from January 2020. Although there are no changes to the scheme return this year, the checklist provides a useful reminder of some of the information required, including:

- Schemes being asked if the scheme is invested in with-profits and, if so, what features the scheme has. The questions include an option to select "not known" as the answer, but the Regulator expects schemes to take steps to obtain this information in time for their next annual return.
- In the 2019/20 scheme return, where the scheme confirms that members' benefits have been transferred out, it must now provide all the requested details. The "not known" option has been removed.

### Regulator drops mandatory professional trustee plans after consultation and delayed accreditation process starts April 2020

The Regulator has confirmed that it does not currently intend to require schemes to have a professional trustee, which was a question posed in its July 2019 consultation on the future of trusteeship and governance. Most consultation responses were against the proposal.

However, the Regulator hopes that the Association of Professional Pension Trustees (APPT) standards for professional trustees and the accompanying accreditation process will "help to bring greater consistency in the quality of professional trustees and in turn provide greater confidence that accredited professional trustees meet the standards we expect."

Following delays to the launch, the Pensions Management Institute has announced an accreditation programme opening on February 24, 2020. Somewhat oddly, this seems to be in competition with the APPT's professional pension trustee accreditation process, which is open to applications from the start of the 2020/21 financial year. Previously, it seemed that the APPT

would oversee the framework of the standards for trustees in collaboration with the Pensions Management Institute, which was to run the examinations. Accredited trustees will then be required to comply with a “rigorous professional standards code” developed by the APPT in consultation with the Regulator.

On the other consultation proposals, the Regulator has confirmed that:

- It will review and update its trustee knowledge and understanding (TKU) expectations in the relevant code and consult on changes to the code and the trustee toolkit in early 2021.
- An industry working group will be established to develop guidance and practical tools, amongst other things, to support schemes in taking steps to improve diversity and inclusion on boards.
- It will support the APPT in the development of an industry code for sole trusteeship.
- It will continue to monitor DC consolidation activity and work with both industry and the DWP to find solutions to overcome barriers to consolidation.

View the [consultation response](#).

## Comment

The Regulator has emphasised that its single code project will take priority and consultation on this is expected to be launched in the first half of 2020. Once the single code is finalised, the Regulator will address the TKU review. This year promises to be a busy one for the pensions industry.

## Regulator’s blog outlines DB funding consultation timetable in a “year of positive change”

In a blog posted on the Regulator’s website, chief executive Charles Counsell has outlined its priorities for the coming year, including its plans to launch its long-term strategy later in 2020.

The [blog](#) sets out details of how it plans to consult on a revised DB funding code to introduce clearer funding standards, supported by the changes to legislation contained in the Pension Scheme Bill 2019/20.

The new code will:

- Focus on the importance of schemes taking a long-term view and managing risks appropriately.
- Permit employers to follow either a “fast track” or a “bespoke” approach, with the latter subject to greater regulatory scrutiny. Fast track will be a more prescribed route but will involve less scrutiny.

There will be two formal consultation exercises in 2020. The first, in March 2020 will focus on funding principles. The second, scheduled for later in the year, will focus on the detail of the new code.

The blog also acknowledges the Regulator’s support for some form of DC consolidation for smaller and underperforming schemes, and notes the similar benefits between this and DB consolidation achieved through DB master trusts and future “superfunds”

## HMRC publications

### HMRC publishes its long-awaited guidance on GMP equalisation

On February 20, 2020, HMRC published its long-awaited [supplementary guidance](#) for the Pensions Tax Manual in relation to GMPs (for registered pension schemes with periods of contracted-out pensionable service between May 17, 1990 and April 5, 1997). The guidance relates solely to GMP-related benefit adjustments and not other adjustments, if any, which apply to the same period.

The guidance covers such issues as:

- The annual allowance, including deferred member carve-out
- The lifetime allowance, including fixed, primary, individual and enhanced protection

The guidance confirms that GMP equalisation benefit adjustments are not, on their own, new entitlements and would not constitute new accrual of benefit that should be tested for annual allowance purposes or which would prejudice applicable lifetime allowance (LTA) protections.

For current pensioners, where GMP equalisation implementation results in an increase to what should have been the individual’s starting pension at retirement, the original (Benefit Crystallisation Event 2) calculation will require correction with reference to the individual’s remaining LTA at the time of starting to draw benefits. This correction also applies where an individual attains age 75 without having drawn any pension (BCE 5). A LTA charge will be payable where the recalculation results in the member exceeding their remaining LTA.

Members who became entitled to their pension after April 5, 2006 will need to be provided with an updated BCE statement showing the percentage of LTA used up, calculated with reference to the LTA which applied at the date of the original BCE.

Where a scheme administrator becomes jointly liable for any LTA charge arising as a result of recalculations, a written application may be made to HMRC for a discharge.

## Comment

It will be a relief to scheme administrators to see this first tranche of HMRC’s guidance, which was originally promised for December 2019.

### HMRC publishes technical consultation on trust registration aspects of MLD5

On January 24, 2020, HMRC and HM Treasury published a [technical consultation](#) on the changes to be made to HMRC’s Trust Registration Service (TRS) to implement the fifth Money Laundering Directive (MLD5). The consultation ended on February 21, 2020.

It is proposed that the obligation to register with the TRS will be expanded to include all UK express trusts and some non-EU resident express trusts irrespective of whether the trust has incurred a tax liability. However, in expanding this obligation, HMRC and HM Treasury wish to define the scope of the obligation to exclude trusts where the risk of money laundering and terrorist financing is likely to be low. It therefore plans to exclude trusts with a purpose and structure that mean payments to beneficiaries are predetermined and highly controlled or where they are already supervised by HMRC or other regulators, which therefore will include the majority of pension scheme trusts.

## Comment

No action is required for the moment, but trustees may wish to review any anti-money laundering policy they have in respect of their scheme later in 2020, once the draft regulations are finalised.

## HMRC publishes Pension schemes newsletter 116: Reminder about notification of status of residency reports

Issue 116 of the Pension schemes newsletter was published on January 28, 2020 and includes a reminder that schemes should by now have received their annual notification of residency status report. This confirms members' residency status for the purpose of ascertaining the correct tax relief that should be applied according to whether members are resident in England (including Northern Ireland), Scotland or Wales. HMRC reminds schemes that if they have not downloaded their report within six days, they will have to ask for it to be re-presented. A look-up service is also available for those schemes that have not received a residency report.

## HMRC updates Pensions Tax Manual following UK withdrawal from EU and also regarding death benefits

HMRC updated its Pensions Tax Manual to reflect the fact that the UK is no longer an EU member state following its withdrawal from the EU on January 31, 2020.

The changes include minor drafting amendments to the definition of "scheme administrator," the wording of the scheme administrator residency requirements and the guidance on recognised transfers to qualifying recognised overseas pension scheme.

The PTM section on death benefits has also been updated to clarify rather, than substantially altering, the content. For example:

- The section on the payment of a beneficiary's annuity on a member's death has been amended to clarify the pre- and post-2015 positions and when a beneficiary's annuity may be purchased. Before April 6, 2015, only a dependant could receive an annuity as an authorised pension payment following the death of a member. From April 6, 2015, in addition to a dependant, an annuity could also be provided to a nominee and a successor.
- Various sections have been updated to clarify which tax years the guidance relates to, adding links to archive guidance where needed, to clarify tax treatment depending on when payment was made and, where possible, to simplify the language used.

View the [Pensions Tax Manual updates](#).

## High Court decisions on issues regarding to RPI to CPI changes

### *Britvic plc v Britvic Pensions Ltd and Simon Richard Mohun* [2020]: Switch from RPI for indexation not permitted by High Court

On January 17, 2020, the High Court gave judgment on the interpretation of the pension increase rule in the Britvic Pension Plan.

The relevant scheme rule stated that the rate of increase was to be in line with the Retail Prices Index (RPI), subject to a capped increase each year of either 2.5 per cent or 5 per cent (depending on the date of service) "or any other rate decided by the principal employer."

The High Court (Hodge J) disagreed with Britvic's view that the wording of the rule allowed the employer to substitute a rate that was higher or lower than would otherwise apply, deciding that the phrase "any other rate" meant only some other higher rate, and not a lower one.

In reaching its decision, the Court followed the principles of construction set out in the judgments in *Barnardo's v Buckinghamshire* [2018] and *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] from the Supreme Court and the Court of Appeal respectively. It held that the better interpretation was that the phrase "any other rate" created a two-stage mechanism to be used in any year, which had the effect that the trustee was required to apply the RPI default rate unless the employer exercised its discretion to substitute a higher, but not lower, rate. This conclusion was supported by the legislation and admissible documentary background evidence. The High Court also found that the rules relating to revaluation of pensions during deferment were subject to the same percentage and cap on increases.

### *Atos IT Services UK Ltd v Atos Pension Schemes Ltd* [2020]

On January 27, 2020 the High Court handed down judgment having considered the construction of the definition of RPI in the Atos UK 2011 Pension Scheme's pension increase rule. Nugee J held that RPI meant RPI and will continue to mean RPI for so long as RPI is published by the Office for National Statistics (ONS), even though the ONS acknowledged that RPI was not a good measure of inflation and preferred the use of a different measure.

Nugee J held that the meaning of the expression in the definition of RPI under the Scheme's rules that "the general index of retail prices (all items) published by the Office for National Statistics" was RPI. Further, the meaning of the phrase "or where that index is not published" was where that index is not published for any purpose. Since the RPI is still published by the UK Statistics Authority (albeit because it was under a statutory duty to maintain and publish RPI), the trigger condition allowing the employer and trustees to agree a substituted index had not been met.

In reaching this decision, Nugee J confirmed that the case turned "on the construction of the particular terms used in the scheme in question."

## Comment

These decisions are the most recent in the line of CPI/RPI cases to come before the courts and, as with previous decisions, the specific wording of the scheme's trust deed and rules (and admissible documentary background evidence) means that this decision will have a limited impact on schemes with different provisions on switching between RPI and other indices. Because of this, such cases are still likely to be litigated.

For the time being, RPI remains as a measure of inflation. However, in September 2019, the then-Chancellor of the Exchequer (Sajid Javid) announced plans to consult on reforming RPI, following a formal request from the UKSA in March 2019 for RPI to be abolished or else reformed. Until 2030, when the last relevant index-linked gilts mature, the UKSA is required by legislation to obtain the Chancellor's consent to any change to the RPI that is fundamental and materially detrimental to the holders of those index-linked gilts. Mr. Javid rejected the UKSA's first proposal to end the publication of RPI, commenting that it would be highly disruptive. He concluded that he was not minded to promote legislation that would remove the requirement for UKSA to produce and publish RPI. However, he accepted in principle the proposal to align the RPI with the CPIH, on condition that it could not happen before February 2025. It is possible that the planned consultation will still be launched at the 2020 Budget, which is due to be held on March 11, 2020, by the new Chancellor, Rishi Sunak.

The current state of limbo means that pension schemes cannot assess with any confidence future rates of the RPI. The impact on pension schemes of any proposals to reform or discontinue RPI will depend on the drafting of the particular scheme's rules. Cases such as these highlight the constraints that may arise from scheme rules' specific drafting.

## Could ethical veganism impact on future pension fund investments?

In an employment tribunal preliminary hearing on January 3, 2020, Judge Robin Postle ruled that ethical veganism satisfies the tests required for it to be a philosophical belief, with the result that it was protected under the Equality Act 2010. For a belief to be protected under the Act, it must meet a series of tests including being worthy of respect in a democratic society, not being incompatible with human dignity and not conflicting with fundamental rights of others. The ruling means that ethical vegans are entitled to protection from discrimination.

An ethical vegan (also known as a moral vegetarian) is someone who not only follows a vegan diet but extends the philosophy into other areas of their lives, and opposes the use of animals for any purpose. The Judge gave much weight much to the fact that Mr Casamitjana's belief impacts on all areas of his life.

The complainant, Mr Casamitjana, had complained that his employer, the League Against Cruel Sports (LACS), had sacked him after he raised concerns that its pension fund was invested in companies involved in animal testing. LACS claimed Mr Casamitjana was dismissed for gross misconduct.

LACS offered a contract-based pension scheme which, until 2015, auto-enrolled its staff into an "ethical" fund. The employer subsequently changed the default investment fund, and offered an ethical fund only as a "self-select" option for employees. Mr Casamitjana argued this was insufficient but LACS stated on its website, *"There are pension funds available that offer more "ethical" choices – but these are generally not available for organisations to offer automatically, because they often have higher financial risk and higher administration charges that fall outside the regulations."*

## Comment

It is possible that the case may open the door for veganism to form part of pension trustees' environmental, social and governance (ESG) considerations. Currently though, issues which are non-financial in nature (such as members' ethical views) may be taken into account only in limited circumstances.

Nevertheless, the case does illustrate the importance for trustees and providers to understand exactly how their pension scheme assets are invested. Strong governance around investment decisions is essential, so that fund choices can be justified if challenged. For defined contribution default funds, the primary objective is to provide good member outcomes and value for those members' investments. However, it is difficult for trustees to take into account member beliefs where there is no overall consensus among members and where the impact of taking the belief in question into account is financially detrimental.

The tribunal's preliminary ruling did not consider whether the claimant had been unfairly dismissed as a result of discrimination because of his philosophical beliefs. A further hearing on the substantive issues of potentially unfair dismissal and discrimination was scheduled for February 20, 2020.

## National Insurance contribution threshold rises and auto-enrolment earnings trigger remains at £10,000

Draft regulations laid before Parliament on January 30, 2020 increase the NI contribution threshold from £8,632 to £9,500 pa from April 6, 2020 whilst increasing the Lower Earnings Limit from £6,136 pa to £6,240 pa. The Upper Earnings Limit remains frozen at £50,000.

There are intentions to increase the NI contribution threshold to £12,500 in the coming years, eventually to equal the income tax personal tax allowance which is currently set at £12,500 for both 2019/20 and 2020/21, after which it is to increase in line with the CPI.

In a written statement, Minister for Pensions and Financial Inclusion Guy Opperman has confirmed that the earnings trigger for auto-enrolment will remain at £10,000 (as it has since 2014/15) and both the lower and upper earnings limits will continue to be aligned to the NI contribution thresholds.

## Comment

This will disappoint some in the pensions industry who had hoped that the Government may have taken the opportunity to move the LEL down, so that the auto-enrolment regime would include more low earners. However, freezing the earnings trigger will mean more people are auto-enrolled gradually as wages increase.

## Pensions Issues in the Pipeline

New or changed items are in *italics*.

*January 31, 2020 – The UK withdrew from the EU and the transition period will last until December 31, 2020.*

October 1, 2019 – New SIP requirements came into force relating to environmental, social and governance (ESG) factors.

GMP Equalisation – GMPEWG conversion guidance has now been published and the first tranche of guidance has now been issued by HMRC – see above.

*Revised Funding Regime – Consultation on a revised Code of Practice was expected “in the summer” (of 2019) with technical provisions expected to remain broadly as they are, and with the main change being the addition of a secondary long-term funding target. However, now the General Election is over, the Pension Schemes Bill was reintroduced to the House of Lords on January 7, 2020, essentially in the same form as previously. The DWP and TPR are due to produce documentation for consultation on the new DB funding regime shortly.*

*New Pension Schemes Bill – In the latest political drama, the Conservatives were returned to Government with a majority of 80. The new Pension Schemes Bill includes provisions covering the Pensions Dashboard, the Regulator’s powers, and the revised Funding Regime, and its passage through Parliament will now proceed, with the Committee Stage due to start on February 24, 2020.*

October 1, 2020 – New disclosure obligations apply for trustees in relation to scheme’s Statement of Investment Principles under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

October 1, 2021 – New requirements apply for trustees to publish information on a publicly available, free website relating to voting and capital structure of investment companies under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

# Global resources

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We employ 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

## Our global offices



**7000+**

People worldwide

**4000+**

Legal staff worldwide

**50+**

Offices

### Europe

Amsterdam

Athens

Brussels

Frankfurt

Hamburg

Istanbul

London

Luxembourg

Milan

Monaco

Moscow

Munich

Paris

Piraeus

Warsaw

### United States

Austin

Dallas

Denver

Houston

Los Angeles

Minneapolis

New York

St Louis

San Antonio

San Francisco

Washington DC

### Canada

Calgary

Montréal

Ottawa

Québec

Toronto

Vancouver

### Latin America

Mexico City

Rio de Janeiro

São Paulo

### Asia Pacific

Bangkok

Beijing

Brisbane

Canberra

Hong Kong

Jakarta<sup>1</sup>

Melbourne

Port Moresby  
(Papua New Guinea)

Perth

Shanghai

Singapore

Sydney

Tokyo

### Africa

Bujumbura<sup>3</sup>

Cape Town

Casablanca

Durban

Harare<sup>3</sup>

Johannesburg

Kampala<sup>3</sup>

Nairobi<sup>3</sup>

### Middle East

Dubai

Riyadh<sup>2</sup>

---

## Contacts

### **Lesley Browning**

#### **Partner**

Tel +44 20 7444 2448/+44 77 1030 3311  
lesley.browning@nortonrosefulbright.com

### **Peter Ford**

#### **Partner**

Tel +44 20 7444 2711  
peter.ford@nortonrosefulbright.com

### **Shane O'Reilly**

#### **Partner**

Tel +44 20 7444 3895  
shane.o'reilly@nortonrosefulbright.com

 **NORTON ROSE FULBRIGHT**

**Law around the world**

nortonrosefulbright.com

© Norton Rose Fulbright LLP. Extracts may be copied  
provided their source is acknowledged.  
21990\_EMEA - 02/20