BRIEFING

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What's Happening in Pensions

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Travers Smith Pensions Sector Group

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Pension protection levy 2024/25: The Pension Protection Fund is consulting on proposals for the 2024/25 pension protection levy. The proposed total levy estimate of £100 million is half the estimate for 2023/24.

TCFD reporting – first TPR fine: The Pensions Regulator has publicised its first fine (of £5,000) for failure to publish a TCFD report (which failure was because of an error in the URL link provided by the scheme). It says that it will report all future fines.

TPR climate blog post: Mark Hill of the Pensions Regulator has written a blog post: "How trustees can help make climate scenario analysis 'decision-useful'". The Regulator is concerned at industry review reports of unrealistic trustee assessments of the implications for their scheme of significant climate change.

CPI and RPI: The price inflation figures for the year to September 2023 have been announced (8.9% RPI / 6.7% CPI). These are the figures that apply for the purposes of annual statutory indexation and revaluation, and often under scheme rules. They also feed into the state pension 'triple lock' calculation, though current earnings inflation is higher.

General levy on pension schemes: The Government is consulting on options to increase the general levy on pension schemes between 2024/25 and 2026/27. As well as across-the-board increases, its preferred option includes a £10,000 additional charge from 2026 for schemes with fewer than 10,000 members.

Pensions dashboards: The Pensions Dashboards Programme has published answers to common questions. This includes an update on the forthcoming statutory guidance on expected connection dates (referring to expected industry engagement on this over next few months).

Restatements of retained EU law: Various draft regulations under the Retained EU Law (Revocation and Reform) Act 2023 have been laid before Parliament for approval. These include restatement regulations to ensure that the judgments in the *Hampshire, Hughes, Walker* and *Allonby* cases on points of European law will remain part of UK law.

Automatic enrolment extension: The Pensions (Extension of Automatic Enrolment) Bill has received Royal Assent. A consultation on Government proposals in relation to removal of the qualifying earnings lower limit and lowering the automatic enrolment age will follow.

BBC amendment power case: The BBC has received permission to appeal the High Court's decision that a proviso in its scheme amendment power, which protects the "interests" of active members, restricts changes to future service benefits as well as to accrued benefits.

TPR DC guidance: The Pensions Regulator has updated its DC investment guidance and communicating/reporting guidance to assist compliance with the changes to regulations regarding illiquid investments etc.

Regulated apportionment arrangement guidance: The Pensions Regulator has published new guidance on regulated apportionment arrangements.

ESG – social factors: The UK Taskforce on Social Factors is consulting with the pensions industry on a guide "Considering Social Factors in Pension Scheme Investments".

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TPO determination on distribution of surplus: The Pensions Ombudsman has dismissed a complaint by a member of the Bristol Water section of the Water Companies Pension Scheme about the distribution of surplus when the section was wound-up and benefits bought out.

TPR scams reporting campaign: The Pensions Regulator has launched a campaign to enlist the help of trustees, administrators, advisers and advocates to combat pension scams. It seeks to raise awareness of the importance of reporting pension scam suspicions and increasing understanding of the reporting journey.

Pension sharing on divorce – charges: The PLSA has published updated guidance concerning recommended charge ranges when dealing with pension sharing on divorce.

PENSIONS RADAR: You may also be interested in the latest edition of Pensions Radar, our quarterly listing of expected future changes in the UK law affecting work-based pension schemes.

SUSTAINABILITY MATERIALS: Our Sustainable finance and Investment Hub includes a section on ESG and sustainable finance issues for pension schemes and their sponsors.

Pension protection levy 2024/25

The Pension Protection Fund is consulting on proposals for the 2024/25 pension protection levy rules.

Due to a very favourable funding position, the PPF considers that it does not currently need any further funding from levy payers. Current legislation requires the PPF to charge a levy and that each year's levy estimate cannot be more than 25% higher than the previous year. Reducing the total levy to close to zero would, as the law stands, effectively rule out any significant future levy collection. Although the law could be changed by the Secretary of State, without the need for primary legislation.

The PPF therefore proposes a total levy estimate for 2024/25 of £100 million, which is half the £200 million estimate for 2023/24 (which itself was almost half the £390 million estimate for 2022/23), though the actual 2023/24 collection is expected to be around £170 million. Some minor methodology changes are required in order to achieve this. The PPF estimates that 99% of schemes will see a levy reduction, with the other 1% generally being schemes with a significantly worsened insolvency score.

The PPF intends to maintain a £100 million estimated levy collection for future years unless the law is changed (or there is a significant change in the risks it faces). That will require more significant methodology changes because of the expected reduction in the number of levy-paying schemes.

The PPF has not published a draft determination, appendices or guidance this year.

The consultation closes at 5pm on 30 October 2023. The final levy rules will be published in December.

Climate-related reporting – first TPR fine

The Pensions Regulator has publicised its first fine for failure to comply with the climate change reporting requirements. It fined the ExxonMobil Pension Plan trustee £5,000 for failing to publish the scheme's TCFD report on a publicly available website by the deadline applicable to it of 31 July 2022.

It seems that the scheme had prepared the report and given it to the administrator to publish, all on time, but a faulty URL used by the scheme administrator meant that it was not available online when the Regulator looked for it. This was corrected within six days of the Regulator making contact but there is a mandatory fine for failure to publish a report on time. The minimum level of fine is £2,500 but the Regulator imposed a £5,000 fine on the trustee "because it was a corporate body and to reflect the nature of the breach". A regulatory intervention report gives more detail.

The Regulator intends to name in its regular compliance and enforcement bulletins other schemes that are fined for failures to publish.

TPR climate blog post

Mark Hill, Climate and Sustainability Lead at the Pensions Regulator, has written a blog post: "How trustees can help make climate scenario analysis 'decision-useful'". The Regulator is concerned at industry review reports of unrealistic trustee assessments of the implications for their scheme of significant climate change. Trustees are urged to think carefully about TCFD reports they are currently preparing and even to review reports recently published.

Mr Hill says that the industry reviews *"starkly highlight the limitations of current models and scenario analysis. They rightly question the validity of some published outcomes, which appear to seriously underestimate the financial risk from climate change and are at odds with the established earth and climate science."*. In evidence, he says that in some scheme TCFD reports only a relatively minor reduction in the investment returns is expected if global temperatures increased by 4%. He acknowledges that there is a lot of uncertainty but says that in these circumstances *"Scientific consensus suggests there would be catastrophic biodiversity loss, the collapse of the insurance sector, increased migration and potentially resource wars. In such a scenario, it's expected the period between cataclysmic events would reduce and economic and social ecosystems would collapse."*.

He says that trustees do not need to be climate experts but should:

- *"have an appropriate level of knowledge and understanding of climate issues*
- *undertake regular training and ask for additional training if they do not feel comfortable making decisions based on the information provided*
- *regularly review the climate-related capabilities of service providers and consider the need for additional advisers or specialist input*
- *be able to understand the narratives underlying their climate scenarios, the limitations of those scenarios and the assumptions made in their construction*
- *broadly rationalise the outputs from those scenarios for their scheme*
- *consider with advisers the use of stress testing and tail risk analysis to complement their climate scenario input to investment strategy decision making*

> *In the years where trustees are not formally required to undertake scenario analysis, we expect them to review their most recent analysis and consider undertaking more, in the light of the recent developments TPR has highlighted.*
>
> *Triggers for new analysis include the availability of new or improved scenarios or modelling capabilities or a change in practice or trends.*
>
> *Where trustees do not undertake new analysis, they should explain why in their TCFD report.*
>
> *We also expect trustees and their advisers to be mindful of industry developments and good practice."*

He adds:

> *"Around 90 schemes in the current wave of 350 had published by 31 July 2023 and a further 180 are expected to publish by 6 November. Many of those will have completed scenario analysis, using exploratory climate scenarios which have been challenged recently.*
>
> *Where trustees have already completed their scenario analysis but not finalised their TCFD report, it would be useful for members if trustees provided additional commentary in their report on the analysis they carried out and how they expect it to develop.*
>
> *Where they have finalised their report, they can record additional comments in their board minutes and make them available to members.*
>
> *In both instances, trustees should consider if additional analysis or action is needed."*

CPI and RPI

A 6.7% CPI inflation figure was announced for the year to September 2023. The September figure is a key one for pension schemes because it is the one used for statutory pension increases. It also feeds into deferred pension revaluation orders. Statutory indexation and revaluation are subject to caps but some scheme rules go further, with many of these also using the September inflation figures.

For schemes that are required to apply RPI increases, the inflation figure for the year to September 2023 is 8.9%. The figure for CPIH, with which RPI is expected to be aligned from 2030, is 6.3%.

The September CPI figure is also the one used under the state pension 'triple lock'. But the earnings inflation figure, at 8.5% (to be confirmed), is higher. That will be the 2024 state pension increase unless Parliament agrees to change the law (which it did for 2022, when there was high earnings inflation partly caused by the end of the Coronavirus furlough scheme) or the Chancellor of the Exchequer perhaps finds another way around this. An announcement is expected from the Chancellor in the 22 November Autumn Statement.

General levy on pension schemes

The Government is consulting on options to increase the general levy on pension schemes between 2024/25 and 2026/27, in order to mitigate the current funding deficit. As well as across-the-board increases, its preferred option includes a £10,000 additional charge from 2026 for schemes with fewer than 10,000 members.

The general levy applies to registrable occupational and personal pension schemes and recovers Government funding for the activities of the Pensions Regulator (except in respect of automatic enrolment), the activities of the Pensions Ombudsman, and the pensions-related activities of the Money and Pensions Service. Rates are based on scheme membership numbers and different rates apply to DB schemes, DC schemes (other than master trusts), master trusts and personal pension schemes.

The three options are:

- Option 1: Freeze rates at current levels, requiring greater rises at a later date.
- Option 2: Retain the current levy structure and increase rates by 6.5% per year, with the aim of correcting the deficit by 2030/31.
- Option 3 (the Government's preferred option): Increase rates by 4% per year and from 2026 apply an additional charge of £10,000 to small schemes (i.e. DB or DC schemes with fewer than 10,000 members as at April 2026). The Government thinks that this will also pay off the deficit by 2030/31 and bring about more consolidation than otherwise.

The levy was reformed and rates were increased in 2021/22 and 2023/24 (see WHiP Issue 88).

The consultation closes on 13 November 2023.

Pensions dashboards

The Pensions Dashboards Programme has published answers to "Common questions on dashboards". This includes the following on the forthcoming statutory guidance:

> *"Dates for when individual pension providers and schemes will connect will be set out in guidance. Providers and schemes will be grouped together over different stages in connection windows. This will work in a similar way to the previous staging profile in legislation, in order to stagger connections.*
>
> *Pension providers and schemes must be able to demonstrate they have had regard to the guidance when making decisions about when they will connect. They will be advised to connect to dashboards according to the timeline. Doing so will help to manage the volume of connections, ensure all providers and schemes in scope can be connected by the deadline, and allow for dashboards to become publicly available as early as possible."*

It adds: *"The Pensions Dashboards Programme (PDP) and our delivery partners recognise the need for as long a lead-time as possible to enable industry to prepare for connection. We are committed to engaging with industry over the coming months on the staging timeline to be included in guidance. There will be engagement between PDP, DWP, industry, and regulators on draft guidance before it is finalised."*

Restatements of retained EU law

Draft regulations under the Retained EU Law (Revocation and Reform) Act 2023 (see WHiP Issue 103) have been laid before Parliament. They are all required to be approved under the affirmative procedure, i.e. by resolutions of each House. Details are set out below.

Regulations restating *Hampshire* and *Hughes*

The draft Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023 are intended to restate the decisions in the *Hampshire* and *Hughes* cases, regarding EU law minimum requirements for employer insolvency pension protection, so that this 'retained EU law' will continue to apply indefinitely in UK law. This means that:

- the PPF compensation cap is removed (this had not previously been announced); and
- there will continue to be a 50% minimum individual compensation requirement (which will be an issue less often following removal of the cap). New PPF guidance spells out more detail on how the 50% minimum guarantee will work.

This all applies only to schemes with a PPF assessment date falling on or after 1 January 2024. Until then the 'retained EU law' continues to apply, so the intention is that the *status quo* is preserved.

As noted in WHiP Issues 72 and 90 (respectively):

- In *Hampshire*, the European Court ruled that the insolvency protection required under European law is an individual minimum guarantee that the affected employee or former employee will receive at least 50% of their accrued pension entitlement.
- In *Hughes*, the UK Court of Appeal held that: (1) this can be assessed on an actuarial value basis, with ongoing checks not required; and (2) applying the PPF compensation cap (to those who had reached normal pension age) unlawfully discriminates on grounds of age and the legislative provisions are disapplied.

'Bauer' rights are conspicuously not restated by the regulations. In *Bauer*, the European Court ruled that circumstances in which less than 100% protection is inadequate also include where, as a result of the reduction of benefits, the individual is living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the relevant country (see WHiP Issue 80). It appears that this aspect of protection will fall away in respect of insolvency events after the end of 2023.

Regulations restating *Walker* and *Allonby*

The draft Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 are intended to restate the decisions in the *Walker v Innospec Limited* case and (in relation to GMP equalisation) the *Allonby* case. This means that:

- the 5 December 2005 accrual cut-off in the Equality Act 2010 for equal survivor pensions for same sex spouses and civil partners is removed; and
- any requirement under the Equality Act 2010 for anyone claiming GMP equalisation to identify an actual comparator of the opposite sex is removed.

This takes effect immediately before the end of 2023, though until then the 'retained EU law' that the regulations are intended to restate continues to apply.

Background:

- In *Walker v Innospec Limited*, the UK Supreme Court declared that paragraph 18 of schedule 9 of the Equality Act 2010, which purports to allow schemes to restrict equality in spouses' pensions for same sex spouses and civil partners to post-5 December 2005 service, is contrary to EU law and must be disregarded (see WHiP Issue 65).

- In *Allonby v Accrington & Rossendale College*, a case about equal pensions access for non-contracted workers (who were predominantly women) to a public sector statutory scheme, the European Court ruled that *"Where state legislation is at issue, the applicability [of the requirement that men and women are treated equally] vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex…"*. The Government takes this to apply to all GMP equalisation claims too, since inequalities caused by GMPs are the result of statutory provisions, but this has never been decided by the courts. This is a particular issue for single sex schemes.

The restatement of *Walker* is uncontroversial, ensuring that the *status quo* is preserved and same sex spouses and civil partners may not be discriminated against, and therefore requires no further comment.

The *Allonby* restatement is not necessarily effective: it relies on the Government's interpretation of the retained EU law being correct. That may be the case but it is not certain. As noted above, the Government has interpreted the European Court's decision in *Allonby* to say that a GMP equalisation claimant does not need to identify an actual comparator – i.e. under overriding EU law, a notional or statistical one will suffice – and that the Equality Act is overridden by that EU law. That was on the grounds that it is a discrimination claim arising from statutory provisions, which *Allonby* was too. But *Allonby* was about equal access to a statutory scheme (the Teachers' Pension Scheme), so the Government is extrapolating the decision in applying it to GMP equalisation.

We have had a consultation and draft regulations on this before, in 2012 (see WHiP Issue 32). Then, the plan was to use regulations under the European Communities Act 1972 to amend the Equality Act 2010 to remove the need under the domestic legislation for an actual comparator. But those regulations were never made. The new draft regulations resurrect the same drafting but use the restatement powers in the 2023 Act to make them (with the European Communities Act 1972 now having been repealed).

In 2012, respondents to the consultation pointed out that the 1972 Act could only validly be used if the Government's extrapolation of *Allonby* was correct, which had not been decided by the courts and was not clear. Respondents also said that the drafting, which is the same in the new draft regulations, could be enhancing equalisation rights above the level required by EU law (and now retained EU law) because it applies on a term-by-term basis: this also called into question the validity of using regulations under the 1972 Act.

The same comments can be made about the use of the restatement powers in the 2023 Act: a restatement can only be made if it is actually restating retained EU law and not going further. This purported restatement of *Allonby* is therefore of debateable validity. The same uncertainty therefore continues, notwithstanding these regulations, about the need or otherwise for an actual comparator for a GMP equalisation claim.

Automatic enrolment extension

The Pensions (Extension of Automatic Enrolment) Bill has received Royal Assent and is now the Pensions (Extension of Automatic Enrolment) Act 2023.

This was a private member's bill that had Government support. It allows, via regulations, reduction of the automatic enrolment age from 22 to a lower age (likely to be 18) and abolition of the qualifying earnings band lower threshold (with phasing out possible).

The Government press release promises a consultation but does not say when. At the second reading of the bill in the House of Lords, Government minister Viscount Younger said that the Government hopes to consult on regulations in the autumn.

BBC amendment power case

The BBC has received permission to appeal the High Court's decision that a proviso in the BBC Pension Scheme amendment power, which protects the "interests" of active members, restricts changes to future service benefits as well as to accrued benefits. See WHiP Issue 104 for details.

TPR DC guidance

The Pensions Regulator has updated its DC investment guidance and communicating/reporting guidance to assist compliance with the changes to regulations regarding illiquid investments etc. under the Occupational Pension Schemes (Administration, Investment, Charges and Governance) and Pensions Dashboards (Amendment) Regulations 2023 (see WHiP Issue 102).

This concerns requirements for DC schemes to have content, from varying dates:

- in their default statement of investment principles regarding their policy on investment in illiquid assets; and
- in their chair's statement:
  - on the percentages of assets in default arrangements split between eight asset classes; and
  - on the amount of any performance-based fees paid under default arrangements.

Regulated apportionment arrangement guidance

The Pensions Regulator has published, without any announcement, new guidance on regulated apportionment arrangements (RAAs). This replaces shorter 2010 guidance (see WHiP Issue 21). A similarly short 'guide for journalists' remains on the Regulator's website (see WHiP Issue 65).

Under a regulated apportionment arrangement, when an employer ceases to participate in a scheme a section 75 employer debt is not paid (or not paid in full) but rather the unpaid debt liability share is assigned to one or more of the remaining employers. It is used in restructurings and reorganisations and requires the agreement of the Pensions Regulator.

The Pension Protection Fund (which can stop an RAA from taking effect by objecting) also has relevant guidance. Some aspects of this are now also included in the Regulator's guidance, for example the 'anti-embarrassment' measures that give the scheme/PPF a stake in the exiting employer from which they will benefit in the event that it goes on to prosper. The guidance also notes that the same principles will be applied to arrangements that produce a similar outcome to an RAA, including 'PPF+ compromises'. Under these, an employer debt is compromised, with Pensions Regulator clearance, in order to avoid otherwise inevitable insolvency..

ESG – social factors

The UK Taskforce on Social Factors is consulting with the pensions industry on a guide "Considering Social Factors in Pension Scheme Investments". It includes more than 30 recommendations about how social factors can be better incorporated into trustee investment and stewardship decisions and thus help them to manage financially material social risks and opportunities. The consultation closes on 1 December 2023.

TPO determination on distribution of surplus

The Pensions Ombudsman has dismissed a complaint by a member of the Bristol Water section of the Water Companies Pension Scheme about the distribution of surplus when the section was wound-up and benefits bought out.

The trustee had a discretion to augment benefits but paid all the £12 million surplus to the employer, after deducting the tax charge. The Ombudsman decided that the decision had been reasonable and was not perverse. A significant factor for the trustee had been the £16 million additional deficit contributions paid by the employer, who had always borne the funding risk. Pensions also benefited from good inflation protection. Pensions Ombudsman determinations are not precedents and disputes such as this will always have their own specific facts. It will, however, be interesting to see if the decision is appealed.

The Pensions Regulator and Parliament's Work and Pensions Committee have both raised enquiries about the matter with the trustee.

TPR scams reporting campaign

The Pensions Regulator has launched a campaign to enlist the help of trustees, administrators, advisers and advocates to combat pension scams. Via LinkedIn, it seeks to raise awareness of the importance of reporting pension scam suspicions and increasing understanding of the reporting journey.

Reporting here refers to reporting to Action Fraud and (as applicable) the FCA or Pensions Regulator. Further information can be found here. A content toolkit is available here.

Pension sharing on divorce – charges

The PLSA has published updated guidance for pension schemes with recommended charge ranges when dealing with pension sharing on divorce. It applies from 2 January 2024.

It also includes a flowchart on the circumstances in which schemes may levy charges in relation to pension sharing orders.

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FOR FURTHER INFORMATION, PLEASE CONTACT

Daniel Gerring
Partner, Head of Pensions
daniel.gerring@traverssmith.com
+44 (0)20 7295 3341

Susie Daykin
Partner
susie.daykin@traverssmith.com
+44 (0)20 7295 3247

Niamh Hamlyn
Partner
niamh.hamlyn@traverssmith.com
+44 (0)20 7295 3287

David James
Partner
david.james@traverssmith.com
+44 (0)20 7295 3087

Andy Lewis
Partner
andrew.lewis@traverssmith.com
+44 (0)20 7295 3444

Dan Naylor
Partner
dan.naylor@traverssmith.com
+44 (0)20 7295 3454

Nick White
Knowledge Counsel
nick.white@traverssmith.com
+44 (0)20 7295 3472