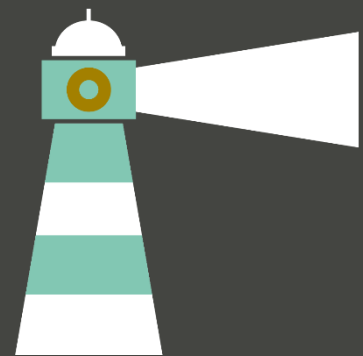


What's Happening in Pensions

Issue 107 – March 2024



[Travers Smith Pensions Sector Group](#)



In this issue:

Funding and investment regulations: The Government has laid for Parliament's approval the long-awaited DB funding and investment regulations. The regulations are due to come into force on 6 April 2024 and will apply in respect of valuations with an effective date on or after 22 September 2024. The Pensions Regulator subsequently launched a consultation on the content of the statement of strategy.

TPR general code of practice: The Pensions Regulator's new 'General code of practice' has been laid before Parliament for approval and is expected to come into force on 27 March 2024. It brings together and updates ten existing codes. The key new content concerns the requirement for schemes to have effective systems of governance, now including (for schemes with 100 or more members) periodic 'own risk assessments'.

DB and hybrid scheme return: The Pensions Regulator has published a web page describing material changes to the information to be provided by DB and hybrid schemes this year in their scheme return. There are 25 new questions about LDI, investment liquidity and leverage. Schemes must also confirm their primary Dashboards contact. Completing this new section in particular will involve some preparatory work and potentially external input.

Options for defined benefit schemes: The Government is consulting on proposals to facilitate access to surplus in DB schemes and for the PPF to run a public consolidator scheme targeting smaller, less well funded schemes. This follows the proposals announced in the 2023 Autumn Statement and before that the summer 2023 Mansion House reforms.

DC investment disclosure: With the aim of increasing pension scheme investment in UK assets, the Government announced that it intends to require DC schemes disclose publicly the breakdown of their asset allocations, including UK equities, by 2027. The FCA will consult on the detail of this proposal as part of the broader value for money framework. The requirement will also be extended to the Local Government Pension Scheme "as early as 2024".

TPR private markets investment guidance: The Pensions Regulator has published new guidance "to help pension scheme trustees consider better outcomes for savers by investing in private market assets". It covers both DC and DB investment and is designed for trustees who have a limited understanding of investment outside of regulated public markets.

Lifetime allowance abolition: HMRC has been issuing newsletters providing various clarification and corrections in relation to how certain provisions of the new tax regime will operate.

Social factors guidance: The Taskforce on Social Factors, set up by Department for Work and Pensions, has published a Guide on Considering Social Factors in Pension Scheme Investments. The Guide and its supporting materials provide a toolkit for schemes that are looking to improve how they identify and manage social factors – the "S" of ESG.

General pension scheme levy: The Government has decided to raise the general levy on pension schemes by 6.5% a year for all schemes, between 2024/25 and 2026/27. It ultimately decided against its originally preferred proposal for 4% increases plus an extra £10,000 charge for schemes with fewer than 10,000 members.

Continued...

Amendment power fetter case: The High Court has considered the implications of 'excessive execution' of a scheme amendment power. The power was purportedly exercised to make amendments that were prohibited, depending upon the outcome for each member, by a restriction on adverse amendments to accrued rights. The amendment was to convert final salary benefits to career average, with inflation-based revaluation to be applied to the accrued pension rather than maintenance of the final salary link. The court ruled that the amendment was validly made as regards those who ultimately benefit from it, even if the amendment was invalidly made as regards those who would be worse off.

Case on DB to DC conversion: The High Court has considered various evidential and legal questions in relation to purported scheme rule amendments made in 1992 under which DB benefits were purportedly converted to DC, partly dependent on the member's age. A key issue was whether an amendment power fetter prohibited the amendment. The court held that it did not but that opening DC balances would in some cases need to be enhanced and current pot values recalculated.

Automatic enrolment - earnings trigger and qualifying earnings: The Government has announced that the automatic enrolment earnings trigger and qualifying earnings band figures will be kept at their current levels for 2024/25.

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](#).

Funding and investment regulations

The Government has laid for Parliament's approval the long-awaited [DB funding and investment regulations](#) and has published a [consultation response](#).

The Regulations set out new principles to govern how DB schemes are to be funded, alongside an integrated investment strategy, based on a long-term objective for providing benefits (for example buy-out, consolidation or run-off). In connection with actuarial valuations, schemes will be required to set a funding and investment strategy and submit a statement of strategy to the Pensions Regulator.

The regulations are due to come into force on 6 April 2024 and will apply in respect of valuations with an effective date on or after 22 September 2024. There is a 15 month deadline (i.e. the same as for producing the valuation) for producing the funding and investment strategy and the statement of strategy.

The Government considers that the final regulations are consistent with other policy initiatives that are under development – in other words the Mansion House reforms and in particular the Government's growth agenda (see [WHiP Issues 104](#) and [106](#)).

The final text of the Pensions Regulator's code of practice (see [WHiP Issue 99](#)) has not yet been published and nor have details of its 'fast-track' consideration regime or the promised new covenant guidance (on which there will be a consultation). They are expected to be in place before the regulations take effect in September.

We have outlined the new regime and summarised key changes to the consultation proposals (see [WHiP Issue 97](#)) in our briefing '[New funding and investment regime: what has changed and what do schemes need to do?](#)'.

Subsequently, the Pensions Regulator [launched](#) a consultation asking trustees and advisers for views on proposals regarding the approach to, and content of, the statement of strategy. It includes an example statement and a reference list of the data and information DB scheme trustees will be required to include. The consultation closes on 16 April 2024.

TPR general code of practice

The Pensions Regulator's new [General code of practice](#) has been laid before Parliament for approval and is expected to come into force on 27 March 2024. It brings together and updates ten existing codes of practice. The key new content concerns the requirement (in force since 13 January 2019) for schemes to have effective systems of governance, now including (for schemes with 100 or more members) periodic 'own risk assessments'.

Although published in pdf format, the code is designed to be viewed online and internal links and links to guidance and other materials will be added to that version when it is issued.

This follows a Spring 2021 consultation (see [WHiP Issue 88](#)) and August 2021 interim response (see [WHiP Issue 91](#)). A [final consultation response](#) has now been published. The Regulator [is challenging](#) trustees to use the code as an opportunity to ensure that their scheme is fit for the 21st century.

The ten codes of practice that have been combined and updated are:

- Reporting breaches of the law
- Early leavers
- Late payment of contributions (occupational pension schemes)
- Late payment of contributions (personal pension schemes)
- Trustee knowledge and understanding
- Member nominated trustees / member-nominated directors - putting arrangements in place
- Internal controls
- Dispute resolution reasonable periods
- DC code
- Public service code

Some points to note regarding changes to the text of the consultation draft include the following:

- The deadline for schemes to produce their first own risk assessment will be as set out (as a minimum) in the regulations. The earliest this date can be for a scheme is the last day of the second scheme year to begin after the code of practice is issued (i.e. after 27 March 2024) but a later date can apply, for example (for a DB scheme) depending upon when the scheme's next valuation is due.
- Own risk assessments will then have to be completed at least every three years, not annually as was originally going to be expected. They can consist of a collation of other relevant documents and not all component parts have to be updated at the same time. But the Regulator stresses that the primary focus should be on having an effective system of governance, with the own risk assessment following on from that. There will be no template or guidance for producing the own risk assessment.
- There is much more clarity about the risk management function and who can perform it.
- The proposed reference to a 20% limit on investments in unregulated markets has been removed.
- The Regulator will not expect investments to be reviewed quarterly (though information should still be prepared quarterly). Instead, it expects a review to be done "regularly".
- Remuneration policies (for schemes with 100 or more members) will only be expected to set out the "basis and means" for remuneration, not figures or rates, and will not be expected to be published online, though this should still be considered.
- The Regulator now expects trustees to review appointments of advisers and service providers every three years, rather than two.
- There is no longer an expectation that trustees consider publishing their minutes. Instead, trustees are encouraged to engage with members about their activities.
- There is more content throughout on equality, diversity and inclusion.

For more information, see our briefing '[TPR's General Code of Practice](#)' and forthcoming articles on particular aspects of the code.

DB and hybrid scheme return

The Pensions Regulator has published a [web page](#) describing material changes to the information to be provided by DB and hybrid schemes this year in their scheme return.

See our briefing '[Get ready: changes to 2024 Scheme Returns for DB/Hybrid Schemes](#)' to understand why more advance preparation than usual will be needed this year.

The notable changes are as follows:

- There is only one part to be completed this year: all the questions will be answered in Exchange and there is no separate form.
- There are 25 new questions about investment liquidity and leverage. This new section of the return in particular will involve some preparatory work and so these questions should be considered as soon as possible. The addition of these questions follows the LDI and gilts market turmoil after the September 2022 'mini-Budget', subsequent Pensions Regulator LDI guidance (see [WHiP Issue 102](#)), and the Parliamentary Select Committee LDI inquiry (see [WHiP Issues 103](#) and [106](#)).
- There are questions about the scheme's fiduciary management arrangements (if any) and its investment consultants. This follows the Regulator taking over from the Competition and Markets Authority in October 2022 the responsibility for monitoring compliance with these requirements (see our August 2019 briefing '[Investment consultancy and fiduciary management: a dose of CMA medicine](#)').
- Help text has been improved for the asset breakdown section, to try to improve the quality of information that schemes provide.
- Details need to be supplied of a primary contact for pensions dashboards compliance purposes.
- New questions about AVC providers have been added.

DB and hybrid scheme returns must be completed and submitted in Exchange by 31 March 2024.

Options for defined benefit schemes

The Government [is consulting](#) on proposals to facilitate access to surplus in DB schemes and for the PPF board to run a public consolidator scheme targeting smaller, less well funded schemes. This follows the proposals announced in the 2023 Autumn Statement (see [WHiP Issue 106](#)) and before that the summer 2023 Mansion House reforms (see [WHiP Issue 104](#)). The proposals are intended, in different ways, to increase investment by DB schemes in UK productive assets.

The consultation closes on 19 April 2024 and includes a short survey that the Government would like DB schemes to complete, in order to gauge the potential level of interest.

Access to surplus

The proposals on easing access to surplus are intended to encourage well-funded DB schemes to run on rather than de-risk and, in doing so, invest more in productive assets that support economic growth.

The Government's intention is to make it easier for both employers and members to benefit from a scheme surplus. Measures proposed include:

- Providing a statutory power to amend scheme rules (where needed) to allow payments of surplus or, alternatively, granting a statutory power to make such payments. There will need to be consideration here as to where the balance of power lies as between employers and trustees.
- Making it clear how trustee duties apply when considering distribution of surplus. New Pensions Regulator content is expected to guide trustees in their decision-making, in a code of practice or guidance.
- Consideration of whether the current high funding level hurdle should be reduced. Currently a scheme needs to be

fully funded on buy-out basis. Various possible options for different criteria are suggested by reference to funding level and/or covenant strength.

- Allowing schemes to make one-off payments to members out of surplus. (Currently, such payments are generally unauthorised payments and so subject to a tax penalty: this means that schemes can only use surplus payments to benefit members by increasing benefits, and the future liability cost is then unpredictable.)
- (Previously announced) the reduction of the rate of the free-standing tax charge on payments of surplus to an employer from 35% to 25%. (A statutory instrument to do this is awaited.)
- Allowing schemes to pay a 'super levy' to secure 100% PPF protection for members. (The rationale here is that giving additional security makes it easier for trustees agree to release surplus. It may also make it easier to decide to run a scheme on where buy-out or transfer to a consolidator is an option.) In order to avail themselves of this, schemes would need to abide by certain criteria. The PPF has estimated that the additional levy would be at least 0.6% of buy-out liabilities each year.

There would be no requirement for employers to use surplus payments for any particular purpose.

Public consolidator scheme

The proposals for a public consolidator scheme are intended to help small DB schemes to consolidate, thereby in many cases improving investment opportunities and enhancing member outcomes. The scheme is expected to invest partly in productive assets.

The intention is that the scheme will be established by 2026. It will be run by the Board of the Pension Protection Fund but separate from the PPF. It will have a statutory objective of offering an option for schemes that are unattractive to commercial providers (consolidators and insurers). Eligibility criteria could reinforce this. Target schemes are therefore smaller, less well funded ones but it will be open to others and entry will be voluntary.

There would be no sectionalisation within the scheme: assets would be pooled. Benefits would be provided under a small number of standardised benefit options, so there would be some actuarially equivalent reshaping of benefits when a scheme joins, involving the creation of winners and losers. It will run on, rather than operating as a 'bridge to buy-out'.

The scheme will likely have a target funding level, similar to that applicable to commercial consolidators, such that schemes joining may (depending upon their funding level) have to pay an entry price. It may be possible to provide that additional funding over time, with benefits pared back in the event of default by an insolvent employer. In the absence of such an ongoing funding requirement, there would be no ongoing employer obligation to the scheme.

A big question is whether the scheme will be underwritten by the Government (i.e. taxpayers) or PPF reserves. The Government favours the former but exposure is not likely to be unlimited.

The PPF later published a [discussion document](#) on the design of the scheme.

DC investment disclosure

With the aim of increasing pension scheme investment in UK assets, the Government [announced](#) (with a follow-up announcement in the [Budget report](#)) that it intends to require DC schemes disclose publicly "the breakdown of their asset allocations", including UK equities, by 2027.

The FCA will consult on the detail of this proposal "in the spring", as part of the broader value for money framework. The requirement will also be extended to the Local Government Pension Scheme "as early as 2024". It is not yet clear, to what extent 'look-through' will be required in respect of investments in funds.

This is intended to help allow the Government to understand levels of UK investment. It will then "review what further action should be taken if this data does not demonstrate that UK equity allocations are increasing".

This is in addition to the existing proposals (see [WHiP Issue 104](#)) for schemes to report publicly on value for money, comparing themselves with at least two schemes that have over £10 billion in assets (and later, even bigger schemes), and on historic net investment returns.

Although the FCA will lead on this, the Government intends to apply the ultimate requirements to schemes regulated by the Pensions Regulator too.

In a new announcement, the Government says that "schemes performing poorly will be prevented from taking on new business from employers. The [Pensions] Regulator and the FCA will have a range of intervention powers". (We note that there are already Pensions Regulator Powers in this regard applicable to underperforming master trust schemes.)

Separately, it was announced that the Government is working with the Association of British Insurers on a framework for monitoring progress under the 'Mansion House Compact'. Under this, various insurers and master trust providers agreed to work towards an objective of having at least 5% of their DC default fund assets invested in unlisted equities by 2030 (though it does not specify any particular level of such investment in the UK) (see [WHiP Issue 104](#)).

TPR private markets investment guidance

The Pensions Regulator [has published](#) new [guidance](#) "to help pension scheme trustees consider better outcomes for savers by investing in private market assets". It covers both DC and DB investment and is designed for trustees who have a limited understanding of investment outside of regulated public markets. As such, it serves as a good introduction to investment in asset classes such as private equity, private debt, real estate, infrastructure and natural resources (including agricultural land and forestry).

The Regulator says:

"The private markets guidance makes clear that with the right advice and effective governance, private market assets can play a valuable part in a diversified portfolio that aims to improve and protect saver benefits.

TPR's guidance follows on from the Government's Mansion House reforms, which are designed to enable the financial services sector to unlock capital for UK industries and increase returns for savers while supporting growth across the wider economy.

TPR expects trustees to act in the best interests of savers and that means properly considering the full range of investment options.

The guidance calls on trustees to ensure they have an appropriate level of knowledge and understanding to be able to work with their advisers to fully consider how accessing private market assets may meet their needs. This includes setting objectives for their investment advisers relating to private market investment advice and improving outcomes for members.

Those who do not have the skills or resource to explore a more diversified portfolio should consider changing their governance model or consolidating."

Lifetime allowance abolition

HMRC has been busy communicating issues with the Finance Bill, now enacted as the [Finance Act 2024](#), which the Government intends to correct (by regulations, under powers in the Act) as well as clarifying various matters in relation to how some of the new tax provisions will operate.

Pension schemes newsletter 155

[HMRC pension schemes newsletter 155](#) included a section on changes needed to the legislation, following industry comments. This included the following issues:

- Linking eligibility for a pension commencement excess lump sum (PCELS) to the lump sum and death benefit allowance creates unintended consequences for members with multiple pension schemes. HMRC intend to remove this link; the key allowance condition will be that a member has exhausted either one of the two new lump sum allowances.
- Scheme-specific lump sum protection – the calculation needs correcting (in the definition of 'D').
- Event 24 reporting of lump sum payments – correction so that a lump sum report to HMRC only needs to be made if the lump sum payment exceeds an individual's available allowances (i.e. not for every lump sum). Also, schemes will not be required to confirm that any tax due on a lump sum death benefit has been paid (i.e. because the legal personal representatives will be responsible for paying).

- Calculating tax due on lump sum death benefits – changes to clarify that schemes are not obliged to report to HMRC any tax due on lump sum death benefits (for the same reason as above).

The newsletter also includes ten FAQs on the changes, including confirmation that schemes will from 6 April 2024 be able to pay an UFPLS to members aged 75 and over (although confusingly this is not a current restriction).

A later correction to one of these FAQs said the following (and the newsletter has been updated accordingly):

"Question 8 within the lifetime allowance (LTA) frequently asked questions has been updated to correct a factual error and reflect that we will not be legislating to amend (and limit) which pension schemes individuals can apply to for a transitional tax-free amount certificate. We expect applications to be made to the scheme from which the first lump sum is paid after 6 April 2024, but it will remain the case that they can apply to any scheme of which they are a member."

December 2023 lifetime allowance guidance newsletter

This newsletter contains additional information on how the new "overseas transfer allowance" will operate, and confirms that the current process for assessing tax due on payment of defined benefit or uncrystallised funds lump sum death benefits will apply.

Under this process, the member's personal representatives must provide certain information to HMRC and HMRC will then use this information to assess any tax due from recipients of the lump sum where the relevant lump sum allowance has been exceeded.

February 2024 lifetime allowance guidance newsletter

This new [newsletter](#) includes answers to frequently asked questions on various topics and a section on transitional tax-free amount certificates. Points of interest include the following:

- Where several relevant benefit crystallisation events occur on the same day, it will be up to the member to decide on the order. HMRC will be providing "early guidance" on this.
- HMRC confirms that the Government will be amending the DWP legislation on pension commutation to allow schemes to pay a pension commencement excess lump sum under the new tax legislation without breaching other restrictions that may otherwise prevent commutation of pension to provide such a lump sum.
- Regulations on trivial commutation will be amended to provide that a trivial lump sum can be paid when a member has some available lump sum allowance. (These are separate from the Finance Act 2004 and at present say that the member needs to have some lifetime allowance available.)
- Annual relevant benefit crystallisation event certificates will need to be issued to members even if they are over age 75. Regulations will be amended accordingly. (This is new: there is currently no requirement to issue a benefit crystallisation event certificate to such members.)
- HMRC has also clarified when the new requirements to issue one-off relevant benefit crystallisation event certificates (before 5 April 2025) need to be provided (which applies where an individual has had a benefit crystallisation event but is not receiving a pension from the scheme). This is only required for individuals who continue to have uncrystallised benefits in the scheme.
- HMRC will be publishing guidance for members on when they should (and should not) apply for a transitional tax-free amount certificate. (These certificates allow the member to use the actual amount of tax-free cash taken before 6 April 2024 as using up the new lump sum cash allowances, rather than the default provisions which provide for this to be calculated by reference to the previously used lifetime allowance).
- Regulations will amend the Finance Act 2024 so that transitional tax-free amount certificates must include the tax-free element of pre-April 2006 lump sums, as well as for lump sums paid under the Finance Act 2004 regime.
- As trailed in Newsletter 155, Regulations will amend the legislation to remove the current "permitted maximum" as included in the Finance Act 2024 provisions and instead provide that a pension commencement excess lump sum can be paid where a member has exhausted either (rather than both) of the new allowances.

Future newsletters will cover:

- the changes to enhanced protection;

- the operation of lump sum and death benefit allowance enhancement factors;
- the impact of stand-alone lump sums and lump sums taken under scheme-specific lump sum protection on an individual's allowances; and
- the impact on allowances where individuals have a protected pension age of below 50 and take pension benefits before normal minimum pension age.

March 2024 lifetime allowance guidance newsletter

A further [newsletter](#), just published, addresses additional frequently asked questions on various topics.

Social factors guidance

The Taskforce on Social Factors (TSF), set up by the Department for Work and Pensions, [has published](#) a Guide on Considering Social Factors in Pension Scheme Investments. The TSF Guide and its supporting materials provide a toolkit for schemes that are looking to improve how they identify and manage social factors – the "S" of ESG.

As well as indicators of baseline, good and leading practice for trustees, there are examples of sources of social data and questions to ask advisers and asset managers, plus case studies and more than 30 recommendations aimed at organisations across the pensions industry for addressing some of the challenges around managing social factors. One welcome change since the draft issued for consultation last October is a new "Quick Start Guide" for trustees.

In describing trustees' legal duties in this area the TSF's Guide follows, and draws upon, the Financial Markets Law Committee's recent [paper on "Pension Fund Trustees and Fiduciary Duties"](#), which seeks to address ongoing uncertainty over trustees' fiduciary duties in the context of sustainability and investment.

Lawyers from Travers Smith's Pensions Sector Group were involved with the TSF's work. Partner Andy Lewis contributed to the final Guide and Senior Counsel Harriet Sayer contributed to the Society of Pension Professionals' response to the TSF's original consultation. Andy Lewis also sat on the Financial Markets Law Committee fiduciary duty group.

General pension schemes levy

The Government [has decided](#) to raise the general levy on pension schemes by 6.5% a year for all schemes, between 2024/25 and 2026/27. It ultimately decided against its originally preferred, but widely opposed, proposal for 4% increases plus an extra £10,000 charge for schemes with fewer than 10,000 members. [Regulations](#) have been laid to implement this.

Amendment power fetter case

In [Avon Cosmetics Limited v Dalriada Trustees Limited and others](#), the High Court has considered the implications of 'excessive execution' of a scheme amendment power. In this case, the power was purportedly being exercised to make amendments that were prohibited, depending upon the outcome for each member, by a restriction on adverse amendments to accrued rights. The amendment was to change future accrual of benefits from a final salary to career average basis, with inflation-based revaluation to be applied to the accrued final salary pension at the date of the change rather than maintenance of the final salary link.

In the context of settlement of a professional negligence claim, the Court ruled that the amendment was validly made as regards those who ultimately benefit from it, notwithstanding that the amendment was invalidly made as regards those who would be worse off (which the Court was not asked to consider).

The amendment power fetter prevented any amendment which affected prejudicially (a) any pension in payment at the date on which the amendment was made or (b) any rights accrued or secured up to that date.

The purported amendments were to move from a final salary basis of accrual to a career average revalued earnings (CARE) basis. As part of that, accrued final salary pensions were frozen as at the effective date of the amendment by taking the final salary at that point and from then on applying increases equivalent to statutory revaluation increases (i.e.

based on price inflation up to a cap). The Court was asked to assume that severing the final salary link was in breach of element (b) of the fetter for members for whom their salary increases result in a higher pension than revaluation increases do.

The question before the Court was only what are the consequences of such 'excessive execution' of the amendment power for those who end up being better off as a result of it (i.e. because the revaluation increases their pre-amendment pension by more than would have been the case had the final salary link been maintained) ("Revaluation winners"). If the Court were to rule that they should be denied the benefit of the amendment, by reason of it being wholly invalid, that would reduce the potential professional negligence damages claim. The Court was not asked to rule on the consequences for those whose accrued rights were prejudiced by the excessive amendment (i.e. because they are better off with a retained salary link than with revaluation increases) ("FS Winners").

Judge Davis-White KC, sitting as a deputy High Court judge, considered relevant case law at length, including judgments that adopted different legal approaches in similar circumstances. He upheld the validity of the amendment as regards the Revaluation Winners, reasoning as follows:

- In these circumstances, the court will incline to uphold the validity of the exercise so far as it can. Where what has been done can be conceptually separated into a valid exercise and an invalid exercise and the two are in substance conceptually different then it is possible to save the valid part of the exercise of the power as a matter of construction by implication of a limitation on the terms of the exercise of the power, so that it is read as only effecting the valid part of the exercise.
- In order to save the valid part of an excessive exercise of a power, the court must be satisfied that the person exercising the power, had they properly appreciated the true limits on the power, would have exercised it in the same way, at least as regards that part of the actual exercise which would be valid.
- The concepts of FS Winners and Revaluation Winners are sufficiently different and identifiable, even if there may be a timing issue as to when categorisation of an individual member into the relevant category is possible.
- The substantial purpose of the amendments was to remove the final salary link by closing the final salary section to future accruals and to change the final salary link to revaluation increases. If, which was not contested, the trustees were not permitted fully to sever the final salary link for FS Winners, objectively what remains (as regards Revaluation Winners) was within the overall objective intention.

In a later [judgment](#) regarding the claims of FS Winners (which were outside the scope of the first judgment), the judge approved a compromise after hearing arguments from counsel for representative beneficiaries. It had been agreed by the parties that (broadly) FS Winners should benefit to the extent of 70% of the value of their claims – i.e. their pre-amendment accrued benefits would be calculated at normal pension age on a revaluation basis plus 70% of the difference between those benefits calculated on that basis and calculated on the final salary link basis. Taking into account the estimated chances of success if the legal issues were to be considered by the Court of Appeal, and other factors including litigation costs and sooner 'catch-up' payments to those who are already in receipt of pension, the judge approved the proposal.

Case on DB to DC conversion

In [Newell Trustees Limited v Newell Rubbermaid UK Services Limited and another](#), the High Court considered various evidential and legal questions in relation to purported scheme rule amendments made in 1992 under which DB benefits were purportedly converted to DC, partly dependent on each member's age. This was a 'Part 8' application to the court concerning issues identified in due diligence ahead of a buy-out.

With effect from 1 January 1992, the defined benefit Parker Pension Plan (which was later merged into a new scheme) was purportedly amended to introduce a new DC section, by an interim deed followed by a definitive deed. From that date:

- Active members aged under 40 joined the DC section for past as well as future service. Consents were (arguably) obtained.
- Active members aged 40 to 44 were given the option to join the DC section (again for past as well as future service) or to stay in the DB section.

- Active members aged 45 and over had no option but to remain in the DB section.

The legal questions included the application of an amendment power fetter, extrinsic contract arguments and age discrimination issues.

The amendment power prohibited amendments "*such as would prejudice or impair the benefits accrued in respect of membership up to that time*" (note, not "would or might"). The judge (Michael Green J) held, among other things, that:

- The amendment power allowed the conversion of DB benefits to DC. Members could be better or worse off as a result, depending on investment returns and individual circumstances, so it was not the case that their benefits would be prejudiced or impaired by the amendments. Declaring the amendments invalid, by reason of being outside the scope of the power, would penalise those who benefit from the change.
- But first instance case law required the judge, he said, to conclude that the final salary link could not be broken. This meant that the amounts used to calculate the DC opening balances (for both the under 40s and those aged 40 to 44) should have been calculated taking into account assumed future salary increases.

Accordingly, the judge ordered that the conversion to DC was valid but that opening balances must be recalculated, with an uplift applied where the original sum was lower than the recalculated amount, and actual investment returns applied to those recalculated figures.

On other questions:

- The validity of an interim amending deed was upheld. The judge found on the available evidence that booklets supposed to have been appended and signed, but not included in a certified copy (the original of which was lost), probably had been included in the original deed. In any event, the wording of the deed was wide enough to have incorporated them by reference. Arguments about the interim deed not operating as an executory trust were rejected because the deed's intent was clear and all parties had undertaken to give effect to it. He also noted that the anticipated definitive deed had been executed.
- Even if the interim deed was not effective because of issues with its interim status, the 1993 definitive deed had validly made the amendments retrospectively.
- In any event, members had consented to the changes by signing copies of the booklet (and no one had raised a complaint in 30 years). There were binding extrinsic contracts agreeing to the change for the 40 to 44 year olds, subject to any personal individual arguments. There was no substantive requirement for consent to be informed consent but in any event the judge could not make findings on informed consent in proceedings such as these, under which there was no evidence adduced on the matter.
- The age discrimination arguments failed. The events pre-dated the introduction of age discrimination legislation in 2006 and there was nothing in the current scheme rules that was discriminatory in contravention of the Equality Act 2010's non-discrimination rule. In any event, the judge considered that the treatment of members by reference to age in 1992 was objectively justified.

The judge was critical of the approach taken by the representative beneficiary in pursuing, 30 years after events, "all possible objections" to the validity of the amendments.

The key case law on amendment power fetters is in only High Court judgments. There are aspects of this judgment that are open to challenge on appeal, and it would be very interesting to hear from the Court of Appeal in this area generally, but representative beneficiaries are not usually able to have their appeal costs covered. An appeal therefore seems unlikely.

Automatic enrolment – earnings trigger and qualifying earnings

A Government [report](#) on the automatic enrolment earnings trigger and qualifying earnings band announced that for 2024/25:

- the earnings trigger will again be frozen at £10,000 pa (it has been at this level since 2014, meaning that over time more people are being brought into ambit of automatic enrolment);
- the qualifying earnings band will remain £6,240 pa to £50,270 pa (meaning, for most workers, higher employer and employee contributions as earnings rise).

The report notes that the delayed consultation on extending the automatic enrolment regime under the Pensions (Extension of Automatic Enrolment) Act 2023 (see [WHiP Issue 105](#)) will happen "at the earliest opportunity". The proposals are expected to be removal of the qualifying earnings lower limit and lowering the minimum automatic enrolment age.

Travers Smith's award-winning Pensions Sector Group seamlessly encompasses all the technical legal specialisms our pensions clients need. Our experienced and talented multi-specialist teams are at the forefront of pensions so we can help you to predict and plan for the future. For more information about our services please visit our [website](#) or speak to your usual Travers Smith contact.



[You can also follow us on LinkedIn](#)

FOR FURTHER INFORMATION, PLEASE CONTACT



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



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



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