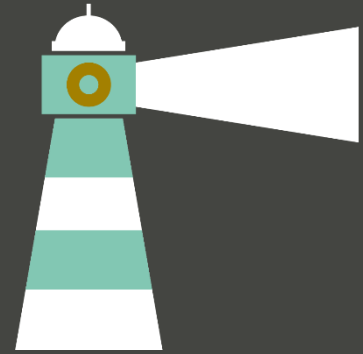


# What's Happening in Pensions

Issue 109 – June 2024



[Travers Smith Pensions Sector Group](#)



## In this issue:

**General Election:** The calling of the General Election means that various Government pensions initiatives are paused. In particular, the Pensions Regulator's funding and investment code of practice cannot now come into force in time for the legislation that it is designed to complement; and individuals affected by unresolved technical issues with the lifetime allowance abolition legislation are now in for a longer period of limbo.

**TPR annual funding statement:** The Pensions Regulator has published its 2024 annual funding statement. This is aimed principally at schemes with valuation dates before the new DB funding regime takes effect (being valuation dates between 22 September 2023 and 21 September 2024) but nevertheless applies principles from that regime.

**Lifetime allowance abolition:** The latest HMRC newsletter includes further lifetime allowance abolition content and an appended consolidation of the 105 FAQs from various recent newsletters.

**Pensions dashboards:** A progress report from the Pensions Dashboards Programme indicates that they are preparing connection guidance and working with more than 20 volunteer schemes to connect early and test the infrastructure. This was followed by the publication of updated data standards.

**Recoupment claim – TPO detailed legal analysis:** The Pensions Ombudsman has published a 72-page determination in a case concerning recoupment of overpaid pension, in which he goes into a detailed legal analysis that indicates how he might be expected to approach such cases in the future.

**Pensions Ombudsman procedures:** The Pensions Ombudsman has published a blog post on a review of their operating model and how they will make changes to procedures in order to address their backlog and reduce waiting times.

**Data protection – wrongly addressed benefit statements:** The High Court has dismissed the bulk of over 400 claims brought by current and former Sussex police officers against their scheme administrator for breaches of data protection legislation and/or misuse of private information. This related to benefit statements sent by mistake to out-of-date addresses.

**TPR on DB consolidation:** The Pensions Regulator has published a blog post on scheme consolidation. It includes a warning about using a new DB consolidator model pending consideration by regulators and Government.

**TPR DC landscape report:** The Pensions Regulator has published its latest annual report on the occupational DC trust-based landscape in the UK, covering membership and assets. It is based on scheme returns for 2023.

**Finance (No.2) Act 2024:** The Finance (No.2) Bill received Royal Assent before Parliament was dissolved and is now the Finance (No.2) Act 2024. It includes legislation relating to the transfer of collective money purchase benefits from a scheme that is winding-up.

**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](#).

## GENERAL ELECTION

The General Election that will take place on 4 July 2024 has caused government to be paused. There can now be no new legislation until after the new Parliament begins. The pre-election period of sensitivity (previously commonly referred to as 'purdah') also means that there should be no policy announcements from Government departments. It is also normal for bodies such as the Pensions Regulator to pause any public activity that could have a political angle.

There is clear impact in two areas in particular:

- **DB funding code:** The Pensions Regulator's funding code of practice has to be laid before Parliament for at least 40 non-recess days before it comes into effect. The dissolution of Parliament and expected summer recess would seem to mean that the code will not be in place by the time the funding and investment regulations take effect on 22 September 2024 (see [WHiP Issue 108](#)). A short delay should not present problems in most cases because the regulations apply in respect of valuations with effective dates after 22 September 2024 and trustees have 15 months from the valuation date to finalise the valuation, their funding and investment strategy and their statement of strategy. But if there is a change of Government then there may be a longer pause while the incoming ministers are brought up to speed and satisfy themselves about the policy direction.
- **Lifetime allowance regulations:** In [WHiP Issue 108](#), we reported on identified issues with the legislation that abolished the lifetime allowance and introduced the lump sum allowance, the lump sum and death benefit allowance and the overseas transfer allowance. The Government has been working on a second set of regulations to correct aspects of the legislation concerning various protections and technical issues. In the meantime, it had advised that individuals in certain scenarios may wish to pause taking or transferring benefits pending the making of the further regulations. Unfortunately, the regulations were not laid before Parliament was dissolved. Affected individuals are therefore now in for a longer period of limbo before the amending regulations can be made. This is further complicated by Labour's promise to reverse the lifetime allowance abolition, though that is much easier said than done.

There are also, of course, a large number of **longer term policy initiatives** that affect DB and DC pension schemes. These are outlined in our latest [Pensions Radar](#) with the previously expected timescale indicated. For many of these, we were expecting consultation responses and policy announcements to be issued over the coming months. That will not now happen. Depending on the political complexion of the next Government, we may expect a longer pause while they review existing initiatives and formulate their pension policies.

The dissolution has also resulted in the early termination of the Work and Pensions Committee's inquiry into the **Norton pension schemes** (relating to unlawful employer-related investment). The inquiry cannot now be completed, so the committee chair [has written](#) to the Secretary of State summarising key points. The letter notes that there will be the following important policy questions for the next Parliament:

- Whether The Pensions Regulator's remit should be extended to cover pension scheme administrators;
- Whether the Regulator should have rule-making powers;
- The funding of the Pensions Ombudsman and whether some of its funding should be demand-led; and
- What changes could be made to the Fraud Compensation Fund and when payments can be made from it.

All of the other items in this issue of WHiP pre-date the calling of the General Election (except where stated otherwise).

## TPR ANNUAL FUNDING STATEMENT

The Pensions Regulator [has published](#) its [2024 annual funding statement](#). This is aimed principally at schemes with valuation dates before the new DB funding regime takes effect (being valuation dates between 22 September 2023 and 21 September 2024) but nevertheless applies principles from that regime.

Shorter than usual and issued while we wait for the Regulator's funding code of practice (see above), the statement notes that many schemes' funding positions have improved considerably in the last couple of years. In light of that and the Government 'Options for DB pension schemes' initiatives (see [WHiP Issue 107](#)), it urges schemes to give fresh consideration to their long-term objective.

Particular points of interest include the following:

- Half of schemes are expected to have exceeded their estimated buy-out funding levels. This gives trustees and employers an opportunity to reassess their long-term targets and consider run-on, consolidator or insurance options.
- A sizeable minority of schemes are expected to be in deficit on a technical provisions basis. Trustees of these schemes will need to continue to focus on achieving a recovery plan that is as short as reasonable, based on affordability to the employer. They will also need to pay careful attention to the employer covenant, given their higher reliance on it.
- Schemes are increasingly facing calls from employers to reduce or suspend contributions and from members for discretionary pension increases. In considering employer requests, trustees should consider the resilience of their investment strategy and the level of covenant support. On pension increases, it says that trustees "should be aware of who would benefit from any decision to award a discretionary increase, and whether their scheme has a history of paying discretionary increases".
- The statement splits schemes into three broad categories and notes the by now familiar expectations as regards endgame options. The categories are:
  - Funding level is at or above buy-out
  - Funding level is above technical provisions but below buy-out
  - Funding level is below technical provisions
- The [2023 annual funding statement](#) (see [WHiP Issue 102](#)) continues to apply as regards the expectation that trustees should be determining which of ten groups their scheme falls most closely into and then meeting the Regulator's expectations for schemes in that group. The categorisation considers employer strength, funding characteristics and maturity.

## LIFETIME ALLOWANCE ABOLITION

[HMRC pension schemes newsletter 159](#) included further lifetime allowance abolition content and an appended consolidation of the 105 FAQs from various recent newsletters (including some "clarifications").

The content includes:

- Analysis of five scenarios where an individual has become entitled to benefits of various kinds before 6 April 2024 but they are paid after that date.
- Guidance on when a pension commencement excess lump sum can be paid.
- Confirmation of how scheme specific lump sum protection will work when the legislation is amended to operate as intended (which is effectively the same as under the lifetime allowance regime).
- Notification that the statutory override that protects scheme benefit limitations that apply by reference to the lifetime allowance will be amended to correct a "slight technical error" that means that it disappplies an existing limit for some schemes.
- Notification that the transitional rules for calculating available lump sum and death benefit allowance for an individual who took benefits before 6 April 2024 will be amended to reflect the fact that only some death benefit lump sum payments were benefit crystallisation events under the lifetime allowance regime (and so only they were tested against the lifetime allowance).

The amended FAQ answers are those now numbered 13, 21, 70, 75, 76, 104 and 105.

HMRC's [Pension Schemes Newsletter 160](#), published on 30 May 2024, announced that there is now an [online tool](#) for scheme members to check if they can apply for a transitional tax-free amount certificate (TTFAC). The newsletter has no other content on the lifetime allowance abolition, save for a reminder to schemes of what a TTFAC must include in order to be valid. It is silent on the forthcoming regulations referred to above.

## PENSIONS DASHBOARDS

### PDP progress update

The Pensions Dashboards Programme (PDP) has published a new [progress update report](#). Points of interest include the following:

- A new advisory group has been formed, including the members of the previous steering group and eight new appointees.
- PDP is currently preparing guidance on connection and will develop an online connection hub.
- For those schemes and providers building their own direct route to connection (rather than using the services of a third party), PDP is preparing to start connection testing later this year. Those that have not yet engaged with PDP should make contact as soon as possible to discuss their connection plans.
- The 20+ volunteer schemes and providers that are connecting early (see [WHiP Issue 108](#)) are building direct routes to connect. Connection testing will start later this year.
- After the first schemes are connected (it is not clear if this refers to the volunteer schemes or the first wave of staged connections), PDP will undertake user testing. How this goes will inform the Government's decision about when to make dashboards available to the public.
- Updated data standards will be published "soon" (see below). Other updated standards and the code of connection will follow, after testing with the volunteer participants.

### Data standards

The PDP later [announced](#) the aforementioned update of its [data standards](#). These standards cover the data requirements for finding and viewing pensions information and their use is mandatory. They are designed to help providers and schemes, and third party organisations connecting on their behalf, to build a common set of message handling tools to receive and reply with data. As with all the dashboards standards, they are subject to final approval by the Secretary of State.

## RECOUPMENT CLAIM – TPO DETAILED LEGAL ANALYSIS

The Pensions Ombudsman has published a 72-page [determination](#) in a case concerning recoupment of overpaid pension, in which he goes into a detailed legal analysis that indicates how he might be expected to approach such cases in the future.

### Background

The complaint was against the trustees of the BIC UK Pension Scheme and follows the *Burgess v BIC UK Limited* litigation (see WHiP Issues [70](#) and [76](#)). In 2019, the Court of Appeal overturned a High Court decision and ruled that increases to pensions from April 1992 had not been validly introduced under the scheme rules. Pensions had therefore been overpaid for decades.

Members had been told that from April 1992 they would be entitled to annual increases of up to 5% on the excess over GMP of their pre-1997 accrual and had been paid those increases. The issue concerning the rules was noticed in late 2011 and members were told in February 2013 that future increases would be suspended pending resolution of the matter. But ongoing pension payments continued to include past increases that may not have been validly granted and this was not mentioned.

In 2019 and 2020, the trustees explained generally and then more specifically what they proposed to do. The trustees proposed to pay pension instalments from July 2020 onwards at the correct level, and recoup past overpaid amounts by deducting them from future instalments of pension over the same period over which the pension had been overpaid. They also said that recovery will not continue beyond the member's death, i.e. there will be no claim against any pensioner's estate for outstanding sums.

### The complaint

"Mr E" had been overpaid for 24 years and 8 months, a total of £90,934. He accepted the reduction of future instalments to the correct level from July 2020, which meant a reduction from £1,552 per month to £1,055. But he challenged the trustees' proposal to recoup past overpayments at the rate of £307 per month (over more than 24 years),

which would have meant him receiving (before tax) less than half the monthly pension he had been receiving before the reduction. In detailed evidence, and with the help of his daughter (he is approximately 82 years old), he described his income and expenditure. This demonstrated that he had raised his standard of living from when the increases began.

There were a large number of other affected pensioners. Many of them had accepted the trustees' proposals. But it seems that a handful of others have disputed not only the recoupment but also the reduction of future instalments to the correct level. Further determinations are therefore expected.

### **The Ombudsman's approach**

Mr E is not a lawyer and had complained in general terms about unfairness. The Ombudsman invited him to expand his complaint to cover various potential defences to recovery of the overpayments but noted that the original complaint of unfairness was, in his view wide, enough to cover all those potential defences. He notes that it is good practice for trustees to take a similar approach to considering defences for and with complainants when working through a scheme's internal dispute resolution procedure.

Following a request by the trustees, the Ombudsman allowed the employer, as well as the trustees, to make representations in response to the complaint.

### **Legal analysis**

The starting point for an unjust enrichment claim (which is one of the legal bases for recovering overpayments) is that generally it is not equitable for someone to retain money paid by mistake, whether or not the payer has been negligent. There are, however, circumstances when it is not equitable to recover the overpayment (or all of it).

The Ombudsman noted that a claim for recoupment (or set off) is different from a claim for repayment. In the latter case, overpaid members can raise defences including 'change of position', estoppel and time limitation. These defences do not apply, he said, in cases of recovery by recoupment from future payments: rather, recoupment is a 'self-help' remedy and calls for consideration of (a) general equitable principles and (b) whether a defence of 'laches' is available. But whilst accepting that specific free-standing defences of change of position and estoppel were not available to Mr E, the Ombudsman decided that he would apply the principles underlying them when assessing whether or not it was equitable to permit recoupment.

The Ombudsman set out and then considered the requirements for establishing **change of position** (i.e. where the recipient has irrevocably and in good faith incurred expenditure as a result, or in anticipation of, the overpayment). He decided that Mr E would satisfy those requirements before the 2013 announcement, when he could have had no inkling about the overpayment, and also after it, because the announcements had been inadequate in explaining to Mr E the implications of what could happen as regards increases already paid. It was in no way clear, the Ombudsman said, that increases applied before February 2013 were "baked into" future instalments and so overpaid money might be reclaimed in respect of them too: in other words, further overpayments would potentially be building up after February 2013 (to the extent of a further £40,000 in Mr E's case). The proposals were properly explained to members in 2020, so continuing the higher expenditure from then was at the member's risk. But the information provided showed that Mr E was spending materially less from around August 2019. From then, therefore, there could be no change of position defence.

The Ombudsman also considered the requirements for establishing **estoppel by representation** (i.e. where a person has made a clear representation or promise, on which another person has reasonably relied, and they should not be allowed to go back on it). Generally, the Ombudsman said, an overpayment on its own will not amount to a representation that the member is entitled to the money paid in error. But a representation is sometimes implicit in light of the surrounding circumstances, for example if the payer is under a legal obligation to ascertain the payee's entitlement correctly. He found that this was the case here. The retirement statement, monthly payslips and annual P60s that the trustees issued included no caveats that might render them ambiguous, for example by saying that the trustees could only pay the benefits set out in the scheme rules. The Ombudsman considered that they amounted to unambiguous representations that Mr E was entitled to the sums specified. In any event, he added, the payments themselves amounted to implied representations because the trustees were under a legal duty to pay the correct benefits and deduct the correct PAYE income tax. When challenged by BIC, the Ombudsman accepted that this means that a defence of estoppel by representation can succeed in many more circumstances than is commonly thought.

The February 2013 announcement communicated uncertainty about pensioners' entitlement to the increases. Although the announcement was unsatisfactory, the Ombudsman was not convinced that from that point the various representations described above were clear enough to give rise to an estoppel by representation defence.

The possibility of a claim for **estoppel by convention** (i.e. where the parties have acted on the common assumption that a given state of facts or law is true and it would be unfair on one party for the other to go back on the agreed assumption) was quickly dismissed. There was no continuing common assumption and all communications came from the trustees. This will normally be the case in pension overpayment cases, so in practice it will be very rare for estoppel by convention to be arguable.

These different **equitable factors** considered by the Ombudsman gave rise to conflicting conclusions. Overall, however, the Ombudsman considered that it was equitable to deny recoupment of overpayments from the periods both before and after the February 2013 announcement, but not after 1 August 2019.

'**Laches**' is a defence to an equitable claim of recovery on the basis that the claimant has delayed asserting their right to reclaim and should not be entitled to recover. The Ombudsman decided that the trustees had moved too slowly and without enough diligence in seeking to resolve the issue. In the meantime, members were being kept in limbo and further overpayments were building up without members understanding that and with an ultimate detrimental effect on them. Accordingly, he concluded that it was unconscionable for the trustees to be able to assert their right to recovery against Mr E of the overpayments that built up between the issuing of the February 2013 announcement and 31 July 2019. Overpayments that built up from 1 August 2019 are, however, recoverable. The Ombudsman's choice of dates here is not explained but they elide conveniently with his earlier conclusions.

As for the **period of recoupment**, the trustees proposed to recover over the same period over which the overpayments had been made. This is set out in Pensions Ombudsman guidance as the usual starting point. That would have meant £307 per month for more than 24 years (on the basis that the full £90,934 could be recouped) but the trustees had not considered affordability. The Ombudsman noted that Mr and Mrs E's net income over expenditure was £170 per month but that this took into account mortgage payments in respect of a property acquired after the possibility of recoupment was known. He considered that recoupment at £200 a month was equitable, despite (due to the much smaller figure that the trustees are permitted to recoup) this being very much faster recoupment than was proposed by the trustees or than he would normally expect.

### **The outcome**

These conclusions had the following effect:

- The BIC scheme trustees could not recoup any of the overpayments that built up before 1 August 2019, amounting to £84,380. (General equitable principles disallowed this for all that period and the defence of laches also disallowed it for the latter part of the period.)
- The trustees were permitted to recoup the overpayments that built up from 1 August 2019, subject to first obtaining the approval of the County Court under section 91 of the Pensions Act 1995 (as required following the Court of Appeal decision in the *CMG* case – see [WHiP Issue 106](#)). This amounts to £6,554 and can be recouped at the rate of £200 per month (which means a recovery period of 2 years 9 months).

(The published determination does not include a separate schedule for the benefit of the relevant county court officer, indicating the amount that can be recouped and at what rate. This is despite the Ombudsman saying in his recent [factsheet](#) (see [WHiP Issue 106](#)) that he would now be doing this in recoupment determinations. The relevant information can, however, be found in the Ombudsman's conclusions.)

The Ombudsman also awarded Mr E £1,000 for significant non-financial injustice (a.k.a. distress and inconvenience), which was the amount offered by the trustees. The amount to be recouped is to be reduced if Mr E agrees that the £1,000 can be applied for that purpose and/or he opts to make payments to reduce the recoverable amount. (This appears to explain why the Ombudsman is allowing the trustees to recover more than Mr E can afford: £1,000 spread over 2 years 9 months is almost exactly the difference between £200 and £170 per month.)

He also added that the trustees should review the £200 monthly recoupment figure if in the future Mr E can demonstrate to their satisfaction that his financial circumstances have deteriorated and that amount is unaffordable.

## **PENSIONS OMBUDSMAN PROCEDURES**

The Pensions Ombudsman has published a [blog post](#) by Chief Operating Officer Robert Loughlin on a review of their operating model and how they will address their backlog and reduce waiting times.

He says:

"During this year there are three areas that we will be prioritising:

- **Resolution Team changes** – The conditions for our Resolution Team being able to investigate a complaint will be tightened and will require complainants to demonstrate that they have exhausted the respondent's formal complaints process (such as an occupational pension scheme's IDRPs).
- **Expedited Determinations** – we will be extending the use of short-form decisions and Determinations for appropriate cases at all stages of our processes. This will bring forward our decision-making in these cases and reduce the number of hand-offs between different teams.
- **Our thresholds for accepting complaints** – we will also be exploring whether there are certain categories of complaints that are more appropriately dealt with by other organisations and whether a de minimis threshold should be applied in some circumstances.

...

We will deliver the full programme of changes over the next three years but have set ourselves the ambitious target of achieving an improved position over the next 12-18 months."

## DATA PROTECTION – WRONGLY ADDRESSED BENEFIT STATEMENTS

In [\*Farley \(formerly CR\) and others v Paymaster \(1836\) Ltd\*](#), the High Court dismissed the bulk of over 400 claims brought by current and former Sussex police officers against their scheme administrator for breaches of data protection legislation and/or misuse of private information. This related to pension benefit statements containing personal information sent by mistake to out-of-date addresses in 2019. As well containing other personal and financial information, the information would have indicated to a reader that the person was, or had been, a police officer.

The judge struck out the claims of the vast majority of claimants, who had not presented any evidence that their benefit statement had been opened and read by any third party. This was on the grounds that they disclosed no reasonable grounds for bringing the claim. The envelopes had been marked 'Private and confidential' and the judge said that he would not infer that any had been opened and read where there was no evidence of that having happened.

14 other claims were allowed to proceed.

Separately, we understand that a claim form and particulars of claim have now been filed with the High Court in a data protection class action on behalf of several thousand individual scheme members in respect of the 2023 cyber security incident at Capita.

## TPR ON DB CONSOLIDATION

The Pensions Regulator has published a [blog post](#) by David Walmsley, Interim Director of Supervision – Market Oversight, on scheme consolidation.

This updates readers on the Regulator's timetable for publishing on

- guidance on superfunds profit release – "shortly"; and
- guidance on DB alternative arrangements including capital backed journey plans – "later this year".

Those timescales may, of course, now be affected by the calling of the General Election.

It also raises a warning flag about schemes using a new consolidator model, pending consideration by regulators and Government. This model involves an occupational pension scheme which will accept individual DC transfers and give members a DB pension and a share of any investment outperformance. Mr Walmsley says: "We, other regulators and government are continuing to consider whether a solution like this one could be supported, and we would not expect the market to develop further until this question has been resolved."

More broadly, he adds: "We also expect trustees considering transferring savers into a new type of scheme to engage with our market oversight team to make sure that they are meeting our expectations to protect savers."

## TPR DC LANDSCAPE REPORT

The Pensions Regulator [has published](#) its latest annual report on the occupational DC trust-based landscape in the UK, covering membership and assets. It is based on scheme returns for 2023.

The Regulator says its key findings are as follows:

- *"The DC landscape has been subject to concentration at a similar rate to previous years. The number of non-micro DC and hybrid schemes decreased by 11% over the last year while the number of members increased by 9%. The reduction in schemes is solely driven by schemes with fewer than 5,000 memberships.*
- *Master trusts continue to provide for the majority of DC members. 84% of DC or hybrid scheme memberships are within a master trust.*
- *There has been little growth (1%) in assets per member in 2023. This is down from an annual growth of 10 to 20% in assets per member in the previous three years. Investment markets were volatile in 2022, impacting scheme returns received in 2023 and resulting in a wide dispersion of returns dependent on the date of scheme submissions. The data in this publication includes valuations from as early as December 2022."*

## FINANCE (NO.2) ACT 2024

The [Finance \(No.2\) Bill](#) received Royal Assent before Parliament was prorogued and then dissolved for the election and is now the [Finance \(No.2\) Act 2024](#). It includes (at section 24) legislation relating to the transfer of collective money purchase benefits from a scheme that is winding-up.

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

---