

# Pensions Bulletin

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Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Bridget Murphy](#)

## New law

### I. CDC: DWP consultation

1. Employers examining their future pension offering may be interested in the DWP's [consultation](#) about the introduction of collective defined contribution ('CDC') schemes. The consultation closes on 16<sup>th</sup> January, 2019.
2. The consultation paper sets out the Government's broad proposals as to how one particular kind of CDC scheme, that proposed for Royal Mail employees, might work in the UK, and the legislative and regulatory regime that would be needed to support it.
3. The Government has decided that fresh primary and secondary legislation is needed. This will make it clear that CDC benefits are a type of money purchase benefit so that employers will have clarity about their liabilities to the scheme.
4. The Government is keen to bring forward legislation to facilitate the setting up of

this kind of CDC scheme as soon as Parliamentary time allows (expected to be in the Pensions Bill 2019).

5. The key advantage of CDC to employers would be the ability to offer a pension scheme providing an income in retirement in the form of pension from the scheme's own assets, but without the risks and balance sheet impact of sponsoring a DB plan.
6. In the Government's view, the advantages of CDC to members could include:
  - 6.1 providing a savings and income in retirement option within one package, thus relieving members of the need to make complex financial decisions on retirement,
  - 6.2 enabling the sharing of longevity risk,
  - 6.3 the possibility of achieving greater scale, resulting in lower investment cost than some non-pooled schemes, and

- 6.4 the possibility of trustees being able to adopt an investment allocation tilted towards higher return assets than in a conventional DC scheme.

## Tax

### II. Budget 2018

Some points of interest contained in the [2018 Budget](#), delivered on Monday, 29<sup>th</sup> October, 2018:

#### A. 2019/20 lifetime allowance CPI rise

The lifetime allowance for 2019/20 will rise to £1,055,000, in line with CPI.

#### B. Indexation - Government intends to adopt CPIH

The Government announced its intention to make CPIH (which includes a measure of housing costs) its headline measure of inflation over time (CPI stood at 2.4% at September 2018 whilst CPIH stood at 2.2%). Work is ongoing to understand its properties compared to RPI and CPI. This

change would require an orderly transition, and is likely to take place over an extended period of time.

### C. *DC schemes investing in less liquid assets: patient capital*

The Government is looking at the barriers to long term investment by defined contribution schemes in less liquid assets. It was announced that:

1. Several large DC pension providers are working with the British Business Bank to explore options for pooled investment in patient capital.
2. The FCA will publish a discussion paper before the end of 2018 looking at the UK's existing fund regime and investment in patient capital.
3. The FCA will consult by the end of 2018 on updating the permitted links framework to allow unit-linked pension funds to invest in patient capital assets.

### D. *Charge cap 2019 consultation*

As part of the patient capital initiative, the DWP will consult in 2019 on the function of the auto-enrolment default fund charge cap (currently set at 0.75%) to ensure that it does not unduly restrict the use of performance fees, whilst maintaining member protections. The issue is that illiquid assets are expensive to manage and to

buy and sell, and may effectively be restricted by the current cap.

For the overview of tax legislation and rates please click [here](#).

## Cases

### III. Supreme Court decides that rules do not permit switch to CPI

A Supreme Court ruling confirms that the position for schemes considering a switch from RPI to CPI has not changed. The options available to those schemes will depend on the wording of their rules.

The Supreme Court unanimously agreed with the Court of Appeal's conclusion that the rules of the Barnardo Staff Pension Scheme did not give the trustees power to change the basis for pension increase and revaluation calculations from RPI to CPI, except where RPI is officially replaced with another index.

#### A. *Facts*

1. The scheme Rules referred to increases being the percentage rise in the Retail Prices Index, or 5% if lower. The 'Retail Prices Index' definition stated:

*"Retail Prices Index means the General Index of Retail Prices published by the Department of Employment or any replacement adopted by the Trustees without prejudicing Approval. ..."*

2. There were 2 possible interpretations of the RPI definition:

2.1 RPI, or any index that replaces RPI, which is *then* adopted by the Trustees; or

2.2 RPI, or any index *adopted by the Trustees* as a replacement for RPI.

#### B. *Decision*

1. The Supreme Court agreed with the Court of Appeal's decision that interpretation 2.1 above applied. To read about the Court of Appeal decision please see [Pensions Bulletin 16/17](#).
2. Although RPI had fallen from favour as an appropriate measure of the cost of living, it was not appropriate to use hindsight of such post-execution events to assess whether a provision makes good commercial sense.
3. The Supreme Court's dismissal of the appeal meant that it did not need to address the cross appeal argument that Section 67 of the Pensions Act 1995 would have prevented a switch to CPI anyway.

**Comment:** The Court of Appeal, similarly, did not need to reach a conclusion about Section 67 but decided to cover the point in any

event. The Court of Appeal confirmed the position reached in the *Qinetiq* and *Arcadia* cases. Those cases decided that Section 67 was not engaged at each step of the revaluation or indexation process. Until the trustees exercised their choice about which index to use the member did not have a right to an increase measured in a particular way.

*Barnardo's v Buckinghamshire* - 7<sup>th</sup> November, 2018

#### IV. CJEU decides Directive applies to service prior to Directive transposition deadline

To the extent that they have not already done so, schemes addressing any part-timer discrimination will need to ensure that the benefit calculation for affected individuals reflects a recent CJEU decision. This may have funding implications for affected schemes.

The CJEU decided that the Part Time Workers Directive (97/81/EC) applies to all past accrual, including accrual before the transposition deadline for that Directive, where the pension came into payment on or after the transposition deadline.

##### A. Facts

1. The Supreme Court asked the CJEU to examine whether periods of service before the deadline for transposing the Part Time Workers

Directive (7<sup>th</sup> April, 2000) should be taken into account when calculating the amount of pension for a part time worker.

2. The case concerned Mr O'Brien, a part-time judge (known as a recorder) from 1978 until 2005, when he retired at the age of 65. Mr O'Brien was told that recorders did not fall within the categories of judicial office-holder to whom a pension was payable.
3. The Supreme Court was inclined to think that, in so far as the service took place prior to the Directive's entry into force, the Directive applied to the future effects of that situation. To read about the Supreme Court judgment please see [Pensions Bulletin 17/12](#).

##### B. Decision

1. The CJEU agreed with the Supreme Court's preliminary view. Service prior to the Directive's transposition deadline, as well as service afterwards, must be taken into account in the calculation of pension where the pension came into payment on or after that deadline.
2. The fact that a right to pension is definitively acquired at the end of a period of service did not mean that the legal situation of the worker was definitive.

3. New laws do not apply to legal situations that became definitive before the new law came into force. However, new laws do apply immediately to the future effects of situations which arose under the old law, as well as to new legal situations, unless the new law specifically contains a temporal limit.

*O'Brien - Case C-432/17* - 7<sup>th</sup> November, 2018

#### V. Proportionate due diligence required for transfer out

An Ombudsman decision serves as a reminder to trustees of the need to take a proportionate approach in their investigation of the receiving scheme when dealing with transfer requests.

##### A. Facts

1. Mr S had a Self-Invested Personal Pension ('SIPP') arrangement. He wanted to transfer his benefits in the SIPP to the Universities Superannuation Scheme ('USS'). Mr S sent the transfer forms in December, 2016 but the transfer only took place in July, 2017.
2. Complaining that the late transfer had caused him to suffer investment losses, Mr S contacted the Pensions Ombudsman. He argued that one cause of the delay related to the level of due diligence which was undertaken by the

SIPP administrator in relation to the USS.

### B. Decision

1. The Deputy Pensions Ombudsman decided that the SIPP administrator made disproportionate due diligence enquiries concerning the USS.
2. The scheme administrator had verified the USS with HMRC and had then gone on to request scheme deeds and certified copies of USS bank statements, which the USS took 4 months to provide.
3. The Ombudsman found that, as the USS was a large, well-known scheme, the due diligence was not proportionate to the risk posed.
4. The member was awarded £500 for distress and inconvenience, plus an amount equal to the loss of investment return he had suffered by reason of the delay.

[PO-19383](#)

## VI. Ombudsman decides redundant employee contractually estopped from claiming unreduced pension

A recent Pensions Ombudsman decision serves as a reminder to employers to check the wording in the pension scheme trust deed and rules when drafting settlement

agreements, to avoid triggering enhanced benefits on redundancy.

### A. Facts

1. Mrs S was employed by AGCO Ltd as an HR manager. She signed a settlement agreement which provided that her employment would end ‘by reason of Compulsory Redundancy’.
2. The relevant rule of the Massey Ferguson Works Pension Scheme provided for unreduced pension where the member ‘retires from Service at the request of the Employer’ after reaching age 50.
3. That rule was the same as a provision considered by the Court of Appeal in *AGCO* in 2003. The court in *AGCO* had held that a member who took voluntary redundancy was within the rule. But the rule did not apply in compulsory redundancies, and for most other cases of dismissal.

### B. Decision

1. The Pensions Ombudsman decided that Mrs S was contractually estopped from claiming that she was entitled to unreduced pension benefits.
2. The wording in the agreement was clear and Mrs S’s position in the company afforded her

particular knowledge of the impact of the *AGCO* ruling.

[PO-15157](#)

## Points in practice

### VII. Social impact investing and patient capital: Regulator updates DC investment governance guide

1. The Pensions Regulator has updated its “[How To](#)” guide to investment governance to reflect developments in relation to social impact investing and patient capital. The guide supports the Regulator’s DC Governance Code of Practice.
2. In relation to **social impact investing**, the guide states that trustees need to have good reason to think scheme members share their view and that there is no risk of significant financial detriment to the fund.

**Comment:** This change reflects the DWP’s response to its recent consultation on ESG investments ([Pensions Bulletin 18/13](#)) where it said that it would not require trustees to have a policy in relation to social impact investing, and that this would remain a “non-financial matter”.

3. On **patient capital**, the Regulator states that such investments<sup>1</sup> should represent only a small proportion of a pension fund’s overall asset allocation. Trustees should complete sufficient due diligence to understand the main drivers of the expected return and how risks are managed and mitigated. They should also consider the suitability of the scale, expected time horizon and liquidity of the investment in the context of the scheme’s objectives and member profile.

**Comment:** The 2018 Budget noted that the Government is looking at current barriers to DC schemes investing for the long term in less liquid assets (please see item II above on the Budget).

## Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Put in place register of persons with significant control (“PSC”) for trustee	6 <sup>th</sup> April, 2016 and ongoing requirement	<a href="#">Pensions Bulletin 16/03</a>

<sup>1</sup> described in the guide as the provision of long term finance to high potential firms to enable them to reach their full potential

No.	Topic	Deadline	Further information/action
	company where trustee is a corporate		
2.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 <sup>th</sup> July, 2016 at the latest and ongoing requirement	Trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes and some or all of the benefits are money purchase. <a href="#">Pensions Bulletin 16/04</a> .
3.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact.
4.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 <sup>th</sup> April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	Retroactive effect from 6 <sup>th</sup> April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
5.	GMP equalisation		
5.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15 <sup>th</sup> May, 2017  Judgment published	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.  26th October, 2018 <a href="#">Pensions Bulletin 18/15</a>
5.2	Government response to consultation on GMP equalisation published	13 <sup>th</sup> March, 2017	<a href="#">Pensions Bulletin 17/7</a>
6.	HMRC’s existing practice on VAT and pension schemes to continue indefinitely		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. <a href="#">Pensions Bulletin 17/18</a>
7.	DC bulk transfers without member consent: introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 17/18</a> <a href="#">Pensions Bulletin 18/05</a> <a href="#">Pensions Bulletin 18/08</a>
8.	Bulk transfers of contracted-out rights without consent: introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/01</a> <a href="#">Pensions Bulletin 18/05</a>

No.	Topic	Deadline	Further information/action
9.	Deferred debt arrangements become available	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/05</a>
10.	Disclosure of costs, charges and investments - new requirements Chair's statement and website must publish costs and charges information	Mostly in force 6 <sup>th</sup> April, 2018  Within 7 months of scheme year end falling on or after 6 <sup>th</sup> April, 2018 - so earliest compliance deadline is 5 <sup>th</sup> November, 2018	<a href="#">Pensions Bulletin 18/05</a>
11.	Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%)	6 <sup>th</sup> April, 2018 to 5 <sup>th</sup> April, 2019	
12.	CJEU decides PPF compensation must equal at least 50% of each recipient's benefit ( <i>Hampshire - Case C-17/17</i> )	6 <sup>th</sup> September, 2018	<a href="#">Pensions Bulletin 18/13</a>

No.	Topic	Deadline	Further information/action
13.	Data protection: New Regulation: EU General Data Protection Regulation in force	25 <sup>th</sup> May, 2018	<a href="#">Pensions Bulletin 16/05</a> <a href="#">Employment Bulletin 16/15</a>  As data controllers, trustees need to ensure that compliance with the EU General Data Protection Regulation is achieved.  A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
14.	Existing EMIR exemption extension for pension scheme arrangements ends  EU Parliament confirms further extension of pensions exemption, with further extensions possible	16 <sup>th</sup> August, 2018  12 <sup>th</sup> June, 2018	<a href="#">Pensions Bulletin 17/01</a> <a href="#">Pensions Bulletin 18/12</a>  <a href="#">Pensions Bulletin 18/10</a>
15.	Master trusts new authorisation and supervision regime starts	1 <sup>st</sup> October, 2018	<a href="#">Pensions Bulletin 18/12</a> <a href="#">Pensions Bulletin 18/13</a> (note: SI later re-issued as <a href="#">SI 2018/1030</a> )

No.	Topic	Deadline	Further information/action
16.	IORP II transposition deadline	12 <sup>th</sup> January, 2019	<a href="#">Pensions Bulletin 16/11</a>
17.	Brexit	By 29 <sup>th</sup> March, 2019, unless extended	UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:  (a) European Council and UK unanimously decide to extend period, or  (b) UK withdraws, if able to do so, its Article 50 notice before 29 <sup>th</sup> March, 2019.
18.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6 <sup>th</sup> April, 2019 onwards	
19.	Trustees must ensure Statement of Investment Principles meets new requirements on ESG and stewardship	Most requirements to be met by 1 <sup>st</sup> October, 2019	<a href="#">Pensions Bulletin 18/13</a>

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](#) or your usual Slaughter and May adviser.

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