

Quarterly briefing

December 2017

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases



Q4

December 2017

On the front cover this quarter:
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Abbreviations

AA: Annual Allowance
CA: Court of Appeal
CJEU: Court of Justice of the European Union
DB: Defined benefit
DC: Defined contribution
DPA: Data Protection Act 1998
DRC: Deficit reduction contribution
DWP: Department for Work and Pensions
ECWG: Employer Covenant Working Group
FCA: Financial Conduct Authority
GDPR: General Data Protection Regulation
HMRC: HM Revenue & Customs
IGC: Independent Governance Committee
ICO: Information Commissioner's Office
LTA: Lifetime Allowance
NI: National Insurance
NPA: Normal Pension Age
PASA: Pensions Administration Standards Association
PLSA: Pensions and Lifetime Savings Association
PPF: Pension Protection Fund
QROPS: Qualifying Recognised Overseas Pension Scheme
ROPS: Recognised Overseas Pension Scheme
SDLT: Stamp duty land tax
SDRT: Stamp duty reserve tax
SIF: Special Investment Fund
SPA: State Pension Age
TPAS: The Pensions Advisory Service
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator
UTR: Unique Taxpayer Reference
WPC: Work and Pensions Committee

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Current legal agenda

Autumn Budget 2017

More changes to pensions tax relief ahead?

Speculation is rife, as ever, as we await the Autumn Budget on 22 November 2017.¹ Commentators suggest that pensions tax relief could suffer further chips from the Chancellor's axe, with the AA and/or tapered AA, or the planned inflationary increase in the LTA potentially in his sights.

A tale of two Bills

The Finance Bill 2017-19² is set to legislate for certain policies which were dropped from the Finance Act 2017 due to lack of Parliamentary time ahead of the snap election in June. These include:

- the reduction of the money purchase AA from £10,000 to £4,000
- a new income tax exemption for pensions advice, allowing employers to pay for individuals to take relevant pensions advice, or to reimburse them for the cost of such advice, without any liability for income tax arising, provided the payment does not exceed £500 in a tax year.

Another Finance Bill³ (currently in draft) includes new powers for HMRC to register and de-register certain pension schemes to tackle scams and fraudulent schemes. In addition, the draft Bill includes powers for HMRC to refuse to register Master Trusts not authorised by TPR, or occupational pension schemes whose sponsor is a dormant company. These measures are expected to be confirmed in the Budget.

Dreaming of a White Paper?

White Paper expected in early 2018

Earlier this year, the DWP consulted on the security and sustainability of private sector DB pensions, looking at some of the key challenges facing such schemes.⁴ According to Charlotte Clark, Director for Private Pensions and Stewardship,⁵ the follow-up White Paper, which is expected to focus on scheme consolidation, benefit simplification and TPR's powers, is due by the end of February 2018.

VAT on services to DB schemes – light at the end of the tunnel?

The saga surrounding the recovery of VAT by DB schemes appears to be nearing its conclusion. With the extended deadline for the transitional period fast approaching, which allows the VAT treatment outlined in Notice 700/17⁶ to continue to be used until 31 December 2017, HMRC updated its internal tax manual on 7 November 2017 to note that this treatment can now be used indefinitely. We await formal confirmation of the position from HMRC and will issue an Alert once this has been announced.

Data protection: is your scheme ready for the new rules?

See our spotlight on data protection on page 4

Time is ticking for schemes to be "GDPR ready" when new rules on data protection are introduced on 25 May 2018.

We are producing a series of Alerts and checklists on different elements of the new rules, all of which are available through our website – www.sackers.com.

1 [Autumn Budget 2017](#)

2 [Finance Bill 2017-19](#)

3 [Finance Bill 2017 to 2018](#)

4 See our Alert: [Security and sustainability in DB schemes](#) (21 February 2017)

5 Speaking at the PLSA conference – [Plenary 7](#) (19 October 2017)

6 See our Alert: [VAT on professional fund management costs – further extension of transitional period](#) (8 September 2016)

Spotlight on data protection

Data Protection Bill 2017

A Data Protection Bill before Parliament aims to incorporate the GDPR's provisions into UK legislation, and to replicate and update the existing DPA. As the legislation is expected to apply both before and after Brexit, the Bill needs to be read "alongside the definitions found in the GDPR" in order to fully understand it.⁷

For occupational pensions, an easement is proposed to allow sensitive personal data to be processed without consent where the processing:

Easement for processing sensitive personal data by occupational pension schemes

- is necessary for the purposes of making a determination in connection with eligibility for, or benefits payable under, an occupational pension scheme
- is not carried out for the purposes of measures or decisions with respect to the data subject, and
- "can reasonably be carried out without the consent of the data subject".

For the latter test to be met, the data controller "cannot reasonably be expected" to obtain the data subject's consent and must not be aware of the data subject withholding consent. While somewhat tortuous, this provision seems to be aimed at dealing with sensitive personal data which may be held incidentally in respect of potential beneficiaries (for example, on death benefit nomination forms) or other historic information, such as decisions relating to past ill-health cases.

ICO guidance

Draft guidance in the pipeline

The GDPR builds on existing requirements under the DPA regarding the need to have a written contract in place between data controllers and processors. The GDPR specifies detailed terms that such a contract must contain with the aim of setting high standards and protecting individuals' interests.

Draft guidance from the ICO on contracts and liabilities between controllers and processors⁸ explains:

Consultation responses awaited

- what data controllers must include in their contracts with data processors
- the responsibilities and liabilities data processors have under the GDPR.

Earlier in 2017, the ICO also consulted on draft guidance on obtaining consent.⁹ It plans to publish its final guidance once the "Article 29 Working Party" (the group of EU Data Protection Authorities of which the ICO is a member), has agreed its Europe-wide consent guidelines. Publication is expected in December 2017, with the guidance "unlikely [...] change significantly in its final form".

How we can help

We can help trustees and employers prepare for the GDPR in a number of ways, including reviewing existing or new contracts, updating data protection policies, reviewing procedures, and drafting member communications.

For assistance with any of these, or any other GDPR query you may have, please speak to your usual Sackers contact.

⁷ See our Alert: [Data Protection Bill 2017](#) (22 September 2017)

⁸ [GDPR contracts and liabilities between controllers and processors](#) (draft guidance) (ICO, 13 September 2017)

⁹ [GDPR consent guidance](#) (draft guidance) (ICO, 2 March 2017)

Regulatory

Department for Work & Pensions

The disclosure of costs, charges and investments in DC workplace schemes

The DWP is consulting on policy and draft regulations for how costs and charges information should be published and made available to members, and for members to request information about the funds in which their money is invested.¹⁰ It proposes:

- requiring more detailed information on costs and charges to be included in the Chair's annual governance statement, including an illustration of the compounding effect they have on members' pension savings
- requiring trustees to publish costs and charges information on the internet for public consumption, and
- imposing a duty on trustees to disclose certain information on a scheme's pooled funds, on request, to members and recognised trade unions.

Consultation closes at 5pm on 6 December 2017

Bulk transfers of DC pensions without consent

The DWP recognises that changes to the pensions landscape, in particular the prevalence of DC schemes, have made the tests for DC to DC bulk transfers without member consent less meaningful. And, recognising that the current legislation's drafting is causing problems in practice, the DWP is consulting on draft regulations¹¹ which are designed to simplify requirements for "pure" occupational DC schemes.¹²

The DWP proposes removing existing safeguards and replacing them with new member protections. The regulations are intended to enable bulk transfers without consent from occupational DC schemes to:

- an authorised master trust, or
- another occupational DC scheme, where the transferring trustees have obtained and considered the written advice of a "suitably qualified professional" who is "independent" of the receiving scheme.

Proposed new conditions

Where transferring members are protected by the default fund charge cap,¹³ the DWP proposes that the receiving scheme will be required to continue to apply the cap for those members. It is also consulting on a policy that any funds into which members who are protected by the cap are switched, without making an active choice, should be subject to the cap.

Charge cap protection

The consultation closes at 5pm on 30 November 2017. The regulations are due in force from 6 April 2018.

10 See our Alert: [DWP consults on the disclosure of costs, charges and investments in DC occupational schemes](#) (30 October 2017)

11 [Consultation on changes to DC bulk transfers without consent](#) (31 October 2017)

12 Schemes which provide money purchase benefits without a guarantee

13 See our Alert: [Better workplace pensions – response to consultation](#) (9 February 2015)

Financial Conduct Authority

Transaction cost disclosures

From 3 January 2018, certain financial firms will need to provide information about transaction costs, administration charges and appropriate contextual information, in response to a request from the trustees or an IGC of a relevant pension scheme.¹⁴ The obligation will fall on firms which manage the investments of DC workplace pensions. Generally, this will mean asset managers, but investment and custody banks may also be required to provide this information. The FCA has also made clear that the rules apply to swaps and similar arrangements.

By setting out a methodology for calculating costs in a consistent way, and by placing obligations on firms to respond to requests for information about costs, the new FCA rules aim to enable a pension scheme's "governance body" to comply with the statutory requirement to review transaction costs and administration charges, and assess whether they represent value for money.

Providing support on financial matters – guide for trustees and employers

The FCA and TPR have published a guide for employers and trustees on providing support with financial matters without needing to be subject to FCA regulation.¹⁵

The guide clarifies the types of information that an employer or pension scheme trustee may give, as well as advice they should not give, with a view to increasing the efficacy of the workplace in supporting consumers on the financial aspects of their lives. It also provides practical examples and signposts resources that may be helpful to employers and trustees as to the type of support they might offer to employees and pension scheme members.

HM Revenue & Customs

Anti-money laundering: HMRC's register of beneficial owners

HMRC is now required to maintain a central register of beneficial ownership information for express trusts with tax consequences. Despite the low risk presented by occupational pension schemes, they are caught by this requirement.¹⁶

Trustee records

Trustees need to maintain accurate and up-to-date records of certain specified information (which includes members' and survivors' names, NI numbers and UTRs) about all the beneficial owners of their pension scheme. Beneficial owners include the participating employers, the trustees, and the members, prospective members and survivors.

The HMRC register

In any tax year in which a pension scheme incurs a liability to pay income tax, capital gains tax, inheritance tax, SDLT, land and buildings transaction tax, or SDRT, it is classified as a "taxable relevant trust". As such, it needs to register with HMRC and provide HMRC with certain information about the scheme's beneficial owners. Schemes which incurred a relevant tax liability in the tax year 2016/17 need to enter the information on HMRC's register as soon as practicable and, at the latest, by 31 January 2018.

If the number of named beneficiaries exceeds ten, a description of the class of persons who are entitled to benefit from the trust, ie employees and former employees of the companies disclosed, and their survivors, can be provided.

New disclosure rules apply to certain financial firms from 3 January 2018

The FCA and TPR clarify what kind of information trustees and employers can provide

Trustees should ask their scheme accountant what taxes have been incurred

¹⁴ See our Alert: [FCA publishes Policy Statement on transaction cost disclosure in workplace pensions](#) (28 September 2017)

¹⁵ [Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation](#) (September 2017)

¹⁶ See our Alert: [Prevention of Financial Crime – action points for trustees](#) (26 October 2017)

Regulatory cont.

Tackling tax evasion

Two new offences aimed at preventing criminal tax evasion and the criminal facilitation of tax evasion (both domestic and foreign) apply to the directors of corporate trustees. Penalties include unlimited fines.

A company will have a defence to the offences if they have reasonable procedures in place to prevent its “associated persons” from criminally facilitating tax evasion, or where it is unreasonable to expect such procedures. Trustee directors therefore need to undertake an assessment of the risks that anyone acting on their behalf (such as the scheme administrator, accountants and investment consultants) may criminally facilitate tax evasion, and put reasonable prevention procedures in place.

VAT on pension fund management services

In the past, HMRC did not consider pension funds of any kind to be “special investment funds” and therefore treated services provided in connection with all types of pension fund as falling outside the VAT exemption for fund management services. However, in the March 2014 case of ATP Pension Services, the CJEU found that a pension fund which pooled investments from a number of DC occupational pension schemes could be a SIF and therefore VAT exempt.

HMRC has announced that its policy of allowing insurers to treat their supplies of non-SIF pension fund management services as VAT exempt insurance is to be discontinued. But it has confirmed that the majority of pension fund management services provided by insurers are supplied for DC pension funds and therefore qualify (and have always qualified) for exemption as SIFs following ATP.¹⁷

Change in policy effective from 1 January 2018

Pension Protection Fund

Consultation on the third levy triennium

Following consultation on the PPF levy rules for 2018/19,¹⁸ alternative approaches for assessing a scheme’s insolvency risk are to be adopted for certain types of employer, to ensure they pay an appropriate levy:

- where an employer (or its ultimate parent) has a public credit rating, this will be used as the basis for assessing insolvency risk
- for unrated regulated financial service entities, the PPF will use a credit scoring model developed by Standard & Poor
- entities close to government, which are judged to be of very low risk, will be allocated to levy band 1, where appropriate.

For the levy year 2018/19, trustees certifying / recertifying a Type A contingent asset (a parent or group company guarantee) which would result in a levy reduction of £100,000 or more will be required to obtain a guarantor strength report from a professional adviser prior to certification.

The calculation method for certifying DRCs will be simplified. The requirement for the DRC amount to incorporate a deduction for investment management expenses met out of scheme assets is to be removed for all schemes, while smaller schemes¹⁹ will be able to certify the contributions paid under a scheme’s recovery plan, plus any “special contributions” which have served to amend the recovery plan or to remove the need for one.

Check data and scores on the PPF/ Experian portal

Final rules and levy determination due December 2017

¹⁷ [Revenue and Customs Brief 3 \(2017\): VAT – treatment of pension fund management services](#) (5 October 2017)

¹⁸ See our Alert: [Consultation on the third PPF levy triennium](#) (9 October 2017)

¹⁹ Schemes with submitted s.179 liabilities of less than £10 million

Regulatory cont.

Consultation on contingent assets in the PPF levy

The PPF is consulting on contingent assets in the PPF levy, alongside draft revised standard form contingent asset agreements.²⁰ The consultation focuses on:

- the type of obligations that should be covered in contingent asset agreements
- the operation of the liability caps in the agreements, in particular the fixed cap.

The PPF is not expecting existing contingent asset agreements to be re-executed before 31 March 2018 in order to continue receiving levy credit, but it does expect to include such a requirement in its rules for the levy year 2019/20. The revised contingent asset forms are due to be available in January 2018.

Bridging pensions

Bridging pensions allow individuals who retire before SPA to be paid a higher rate of pension initially, which then reduces when the individual begins to receive their State Pension or reaches an age specified in their scheme rules.

The DWP has been consulting on draft regulations to amend an anomaly in PPF compensation, whereby pensioner members in receipt of a bridging pension at the higher rate when their scheme enters the PPF receive PPF compensation based on this higher rate for life.²¹ Had the scheme not entered the PPF, the member's scheme pension payments would have later reduced. For some members, this means they may be financially better off in the PPF than under their scheme rules.

The draft regulations would allow the PPF to take account of bridging pensions either by smoothing the amount of PPF compensation over an individual's lifetime (the Government's preferred approach) or by mirroring a scheme's rules. The DWP has also asked whether changes are needed in respect of GMPs, and if PPF compensation should reflect increases in a member's scheme pension which would have taken place at GMP age, to ensure that the GMP requirements are met.

The Pensions Regulator

New TPR policies: professional trustees and monetary penalties

TPR has published a policy²² setting out its description of a professional trustee. Focusing on whether a person's business includes trusteeship, TPR will normally consider a person to be a professional trustee if they have represented themselves to one or more unrelated schemes as having expertise in trustee matters generally.

The new monetary penalties policy sets out how TPR will generally use its powers to impose penalties under pensions legislation. Professional trustees are likely to be given higher penalties under this policy.

TPR targets pension scammers

To help address the issue of new types of pension scam emerging, TPR is using online messaging to warn consumers to keep their eyes and ears open.²³

New animation by TPR on Facebook, Twitter and YouTube reminds viewers to watch out for scam sites that dress themselves up with anti-scam messaging to pose as legitimate businesses. Another focuses on the need to hang up immediately on pension cold callers.

The PPF also warns people that rogue pension websites may carry anti-scam messages in a bid to trick consumers that they are legitimate businesses.

**Consultation closes
21 November 2017**

**The DWP's response
is awaited**

**TPR and the PPF
encourage everyone
to be on the lookout**

²⁰ [Consultation on contingent assets in the PPF levy](#) (October 2017)

²¹ [Pension Protection Fund: draft regulations to take account of bridging pensions](#) (31 August 2017)

²² [Monetary penalties and professional trustee description policies](#) (TPR, 10 August 2017)

²³ [Use your eyes and ears to avoid pension scams](#) (TPR, 16 October 2017)

Retirement savings reforms

DB schemes

DB Taskforce examines opportunities for change

The final report of the PLSA's DB Taskforce makes three main recommendations:²⁴

- the introduction of chairs' annual statements for DB scheme trustees, so they can show they are operating in line with best practice on governance, investment performance and cost transparency
- making it easier to simplify and standardise benefit structures while maintaining actuarially equivalent benefits for members
- facilitating the consolidation of schemes to turn the potentially uncertain promise of future support (the employer covenant) into tangible funding through stronger and more secure backing from a larger sponsor.

Government work would be needed before any options could be implemented

Guidance on transactions in a distressed environment

The ECWG has published guidance to help practitioners evaluate the impact of a range of distressed scenarios on the covenant of sponsoring employers, and the risks to the security of member benefits.²⁵ It aims to bring out key issues which may be relevant in different distressed scenarios and potential solutions.

The guidance is not intended to be exhaustive or prescriptive, as the impact of any distressed scenario on covenant will be specific to its own circumstances, and any response "must take account of the full range of issues "in the round"".

Pension scams

Lords look to clamp down on cold calling

The Financial Guidance and Claims Bill which deals with the move to a single financial guidance body, amalgamating the Money Advice Service, TPAS and Pension Wise, is making its way through Parliament.²⁶

Proposals to ban cold calling were initially rejected by the House of Commons, but the Lords at Committee stage have put back a requirement for the financial guidance body to consider the effect of unsolicited telephone and text messages for financial products and to ban cold calling in certain circumstances.

Cold calling ban resurrected?

Administration

PASA to mediate on administration service transfers

PASA has announced plans to launch a mediation service to help "resolve the issues experienced by schemes during the transfer of administration services from one provider to another".²⁷

The service, which will be voluntary and non-binding, seeks to bring the scheme together with transferring and receiving administration providers for "practical and fair solutions in line with good industry practice". The mediators will be independent of administration firms to avoid conflicts of interest. PASA intends to publish details of the scheme for formal launch in January 2018.

PASA has also confirmed that its administrator members will need to comply with its Code of Conduct on Administration Provider Transfers from 1 January 2018.

²⁴ [Opportunities for change](#) (PLSA, September 2017)

²⁵ [Transactions in a distressed environment](#) (ECWG, September 2017)

²⁶ [Financial Guidance and Claims Bill](#)

²⁷ [PASA to mediate on administration service transfers](#) (4 October 2017)

DC schemes

Charges and governance

Extension of ban on member-borne commission

Since 6 April 2016, service providers have been prevented from levying a charge on members to recover the cost of any commission payments to advisers, for certain advice or services, in respect of any new commission arrangements, or variations or renewals of existing commission arrangements, on or after that date.

Subject to certain exceptions, the ban applies to occupational pension schemes that provide money purchase benefits which are used for automatic enrolment. All members, whether active or deferred, who are, or were, employed by an employer who is using the scheme as a qualifying scheme are protected by the ban

Regulations to implement the second phase of the ban, prohibiting commission payments in respect of arrangements entered into before 6 April 2016, came into force with effect from 1 October 2017.²⁸ Service providers have until 1 April 2018 to make any changes or modifications to their systems and processes to comply with the prohibition.

Second phase of ban now in force

Pension freedoms

Work and Pensions Committee investigation

The WPC has been collating evidence on the pension freedom and choice reforms introduced in 2015, to see whether their objectives are being achieved and whether any policy changes are required.²⁹ Among other things, they are looking at:

- what people are doing with their pension pots, whether the decisions they are making are consistent with their own objectives, and whether there is adequate monitoring of the decisions being made
- whether people are taking proportionate advice and guidance (and if not, why not) and whether people are adjusting their behaviour in response to advice and guidance received
- the extent to which pensions dashboards enable consumers to make more informed decisions about their retirement savings
- how Pension Wise is working and whether reforms are needed, including possible implications for the creation of the proposed new single public financial guidance body
- whether the Government and FCA are taking adequate steps to prevent scamming and mis-selling.

The WPC is examining the retirement market

Master trusts

PASA accreditation to include Master Trusts and buyout providers

PASA has launched a pilot programme for including Master Trusts and buyout providers within its accreditation framework.³⁰ It is developing a set of standards which are designed to be both appropriate and assessable.

PASA expects to launch the accreditation to the wider market “in the coming months”.

28 See our Alert: [Extension of the ban on member-borne commission](#) (11 September 2017)

29 [Work and Pensions Committee inquiry](#) (launched 20 September 2017)

30 [PASA pilots Master Trust accreditation framework](#) (8 August 2017)

Cases

Court of Appeal

Safeway v Newton

The CA has referred a question to the CJEU in proceedings brought by Safeway regarding the retrospective equalisation of NPAs in its DB scheme (“the Scheme”).³¹

Facts

The case concerns the date on which NPA was equalised under the Scheme at 65 for both men and women (having been 65 for men and 60 for women).

Safeway (the principal employer) argued that equalisation occurred on 1 December 1991, the date notified to Scheme members in a written announcement in July 1991. From 1 December 1991, the Scheme was administered on the basis that this change had been made. A deed of amendment dated May 1996 stated that the change had retrospective effect to 1 December 1991.

The Scheme’s power of amendment was widely drafted to allow retrospective effect, including to the date of any prior member announcement.

CA decision

Agreeing with the High Court, the CA found that the scheme rules needed to have been amended by deed and rejected Safeway’s argument that the 1991 announcement alone was effective to equalise NPAs.

The second question for the court was, if the power of amendment could only be exercised by deed, whether the power to do so retrospectively for the purposes of equalising NPAs was prohibited by EU legislation as the High Court had held, relying on the 1994 CJEU case of *Smith v Avdel Systems*. As the power of amendment in that case differed from the Safeway power, which clearly permitted retrospective amendments, the CA considered that a reference to the CJEU was required.

CA asks CJEU whether retrospective amendment breaches equal treatment rules

Pensions Ombudsman

Mrs N (PO-9935)

In a recent overseas transfer case, Mrs N complained there had been insufficient due diligence on the supposed QROPS to which she had requested a transfer.³²

While the Danica scheme had featured on HMRC’s ROPS list, it was removed before Mrs N made her transfer request to Friends Life. However, the transfer proceeded and HMRC subsequently imposed an unauthorised member payment tax charge and surcharge of approximately £49,000.

Although the transfer occurred before TPR issued its guidance on pension scams in 2013, as a result of which higher standards of due diligence are now required, TPO found that Friends Life should still have carried out “reasonable basic checks”, which would have included checking HMRC’s ROPS list. Friends Life was therefore ordered to pay the tax charges, less the notional tax liability Mrs N would have paid had the full pension been taken as an uncrystallised funds pension lump sum. Friends Life was also required to pay £1,000 for the distress and inconvenience caused, which had had a significant impact on Mrs N’s health.

Although Mrs N also sought to reclaim the costs she had incurred in sorting out the matter with her tax advisers, TPO made no award for these as she could have sought help from TPAS free of charge.

Ensure thorough checks are carried out before any transfer

³¹ See our summary: [Safeway v Newton & ors](#)

³² See our summary: [Mrs N \(PO-9935\)](#)

Upcoming seminars



We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on particular topics.

Quarterly legal update	08/02/18	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	17/05/18	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	26/07/18	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	08/11/18	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world

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Recent publications



Our latest **DC Briefing** highlights topical news on DC pensions from a legal viewpoint. We cover:

- update on costs and charges
- TPR finds improvements needed in DC governance
- keep your eye on your member communications
- spotlight: retirement options.