

Pensions Lessons for Trustees 2018

The Best Days of Your Life?

September 2018



Dear Pensions Trustees,

**you are cordially invited
to a school reunion!**

All present and former pupils are welcome,
as we celebrate education from the 1950s
to the present day.

Take a look at our bumper roundup of items
for your pensions agenda and relive what may
(or may not) have been the best days of your life.

School Memories of the 1950s and 1960s

Do you remember school dinners of liver and cabbage, with tapioca (frogspawn) pudding? Let's not forget the daily third of a pint of milk, dished out by the milk monitor, which was warm and sour in the summer but frozen on the top in winter. You may have learned to read with "Peter and Jane" books, but secretly longed to solve mysteries with Enid Blyton's Famous Five! If you felt ill, a spoonful of cod-liver oil and a breath of fresh air cured most things. And you were taught to never start a sentence with the word "and".

Extra Prefect Duties for The Pensions Regulator

In March 2018, the Department for Work and Pensions (DWP) issued a [white paper](#) on protecting defined benefit (DB) pensions. It followed this up in June 2018 with its first consultation on strengthening the powers of The Pensions Regulator (TPR). The consultation included proposals for:

- Extending the types of events covered by the notifiable events regime
- Earlier reporting of certain notifiable events (prior to completion of a transaction)
- A new requirement for employers to issue a declaration of intent to trustees that would be shared with TPR before certain transactions complete
- Introducing new civil fines of up to £1 million for employers, connected and associated persons, and in some cases trustees
- Introducing new criminal sanctions of unlimited fines and custodial sentences for certain breaches
- Changing the contribution notice and financial support direction regime

1. **Action.** Trustees should monitor developments, and if new civil fines are introduced, consider whether they have adequate insurance to cover fines of up to £1 million, noting that the insurance premiums for such cover could not be paid from scheme assets.

An Examination With the Nit Comb – Routine Fines

TPR has used a number of its powers for the first time this year, including fining trustees for failures that have appeared routine in nature, such as the failure to obtain audited accounts and the failure to obtain actuarial valuations on time (although there have been "underlying issues" in some cases).

TPR has warned trustees, "you need to get the basics right, including giving us up-to-date information about the scheme, and we will take action if you fail." This statement accompanied a report that trustees of a scheme had been fined for failing to comply with section 62 of the Pensions Act 2004, which requires them to "take all reasonable steps" to notify TPR of changes to registrable information "as soon as reasonably practicable". Our "[Back to Basics](#)" blog post contains more information.

2. **Action.** Trustees should be aware of their duty to notify TPR of changes to registrable information and may wish to check that they have adequate procedures in place for prompt notification. Professional trustees should be alert to this requirement when appointed to a new pension scheme.



Safety First With the Tufty Club – Legal Privilege

Trustees may be requested to supply pension scheme information for a number of reasons, including subject access requests under the General Data Protection Regulation (GDPR) and investigations by TPR. TPR has used its powers to demand information and documents under section 72 of the Pensions Act 2004 in excess of 500 times. When faced with information requests, trustees need to understand which documents are disclosable and which are legally privileged. Trustees also need to protect against losing privilege inadvertently.

3. Action. Trustees should understand how legal privilege protects documents from becoming disclosable and the circumstances under which privilege is lost. We recommend that trustees consider adopting a privilege protocol and agree this with key advisers.

A Rap on the Knuckles for the Scammers

As part of its commitment to eradicating pension scams, the government plans to lay regulations before Parliament in the autumn, banning direct marketing cold calling in relation to pensions. The ban will be enforced by the Information Commissioner's Office, which will be able to fine offenders up to £500,000. The government has said that it will "proactively communicate" with the public to publicise the ban. We believe that raising public awareness via a public information campaign will be a vital part of the success of this process.

Version 2 of "[Combatting Pension Scams: A Code of Good Practice](#)" has been issued by the Pension Scams Industry Group. The code has been updated to reflect developments over the three years since it was introduced. It is now recommended that trustees or administrators speak to members over the telephone if a transfer is identified as potentially risky; this should help to identify the source and circumstances of the transfer request, which in turn should aid the due diligence process. The personal touch may also help members to think more clearly about the risks. The Pensions Advisory Service can play a useful role in providing members with an impartial view of the transfer and the warning signs. The revised code also highlights evolving tactics that are used by scammers and contains sample letters and case studies.

4. Action. Trustees are advised to keep up to date with good practice and legislation aimed at combatting pension scams.

School Uniform Inspection – CMA Preliminary Review

In September 2017, the Competition and Markets Authority (CMA) launched a market investigation into competition problems within the investment consultancy market and – to a greater degree – the fiduciary management market. The deadline for publication of the final report is 13 March 2019.

The CMA's [provisional findings](#) indicate that around half of pension scheme trustees choose the same provider for fiduciary management that they use for investment consultancy, have a low level of engagement when choosing their first fiduciary manager and often do not have sufficient information on fees or quality of service to be able to make meaningful comparisons.

The recommended changes include a requirement for trustees to carry out a competitive tender when selecting their first fiduciary manager, and a tender within five years where a fiduciary manager is already in place.

5. Action. Trustees who have appointed fiduciary managers may need to plan for action when the final report is published. Trustees should seek legal advice before entering into contracts for investment and fiduciary management services.

Passing the 11+ – New Standards for Professional Trustees

In March 2018, consultation closed on a set of standards for professional trustees. These were produced by the Professional Trustee Standards Working Group and were originally expected to be finalised before the summer, but are now expected around December, along with a new accreditation programme for professional trustees. The draft standards promote best practice for trustees generally, and include some example conflict scenarios that trustees should be mindful of. The original intention was to introduce a "comply or explain" regime, but we understand that this proposal has been dropped. The new standards will sit alongside TPR's [policy](#) for monetary penalties and its [definition](#) of "professional trustee". We understand that TPR may amend this definition before the standards are issued.

6. Action. Professional trustees should adhere to the standards once they come into force. The wider trustee population will also, no doubt, be keen to monitor developments.



School Memories of the 1970s and 1980s

We move on to times where schools had proper PE kits – instead of pupils performing gymnastics in their vests and pants. Teachers wrote on blackboards with chalk, which was often thrown at pupils who were staring out of the window (or reading *Jackie* at the back of the class). Detentions were frequently given – sometimes to the whole class, for being too noisy. Did you ever manage to sit through a whole class with chewing gum in your mouth and not get caught? And were you allowed to watch *Grange Hill*, or was it considered to be a “bad influence”?

Time to “Stand and Deliver” on Social Impact Investment

The government has consulted on measures to strengthen trustees’ investment duties. This follows two key reports by the Law Commission and an industry-led advisory group into social impact investment. The government proposes making changes to the matters to be included in a scheme’s statement of investment principles (SIP). Direct references to “social, environmental or ethical” considerations are replaced by a requirement for trustees to state their policy in relation to “financially material considerations”, which are defined as including (but not limited to) environmental, social and governance considerations, including climate change. Changes are proposed to the requirement for trustees to state their policy in relation to stewardship, and trustees should also make a statement on the extent to which they will take account of the views that, in the reasonable opinion of the trustees, members of the scheme hold. These views may include social impact investment.

Additionally, it is proposed that trustees of schemes with defined contribution (DC) benefits (other than additional voluntary contribution-only arrangements) would produce an annual statement setting out performance against the SIP; this would be published in a publicly available format along with the scheme’s SIP and trustees’ statement on members’ views. Consultation closed on 16 July and we await the outcome.

7. Action. Once legislation is introduced, trustees will have to review and update their SIP before the deadline (possibly October 2019), even if this is outside the three-yearly review cycle.

Under the Microscope – The Chair’s Statement

New regulations affect trustees of pension schemes with DC benefits that are required to produce a chair’s statement. For scheme years ending after 6 April 2018, trustees must include information in the chair’s statement about charges and transaction costs for the default fund and **all other funds** in which members can invest. It is no longer acceptable to quote a broad range of figures, although narrow ranges may be appropriate for funds adopting “lifestyle” strategies. If trustees are unable to obtain the charges and transaction costs information, they should acknowledge this and explain what steps are being taken to rectify this in the future. Trustees must also include an illustrative example of the cumulative effect over time of the costs and charges on members’ pension pots for each fund.

Additionally, trustees are required to publish some of the information included in the chair’s statement on the internet, in a place where the information can be found via a search engine. This includes information relating to the default fund, costs and charges information for all funds, and the illustrative examples of the effect of costs and charges on members’ pension pots. Members should be provided with the appropriate web address when their annual benefit statement is issued.

It is worth remembering that TPR fines for failure to meet the requirements for the chair’s statement are mandatory, although TPR has been reviewing its approach in this area and some fines are being reversed.

8. Action. Trustees should ensure that the chair’s statement contains all of the information required by legislation and that the requirements for publishing information online are observed. Trustees should take account of statutory [guidance](#) issued by the DWP when preparing the new costs and charges material.



First Swimming Certificate – Pooled Funds

From 6 April 2019, trustees of schemes that are required to produce a chair's statement must provide information about pooled fund investments within two months of a request from a member or a member's recognised trade union. The new investment disclosures are designed to give "engaged members" and trade unions enough information to be able to find out more about the funds in which they are invested so that questions can be raised with trustees.

9. Action. Trustees should make sure that they have the required fund information available.

Comprehension Test – Safeguarded-flexible Benefits

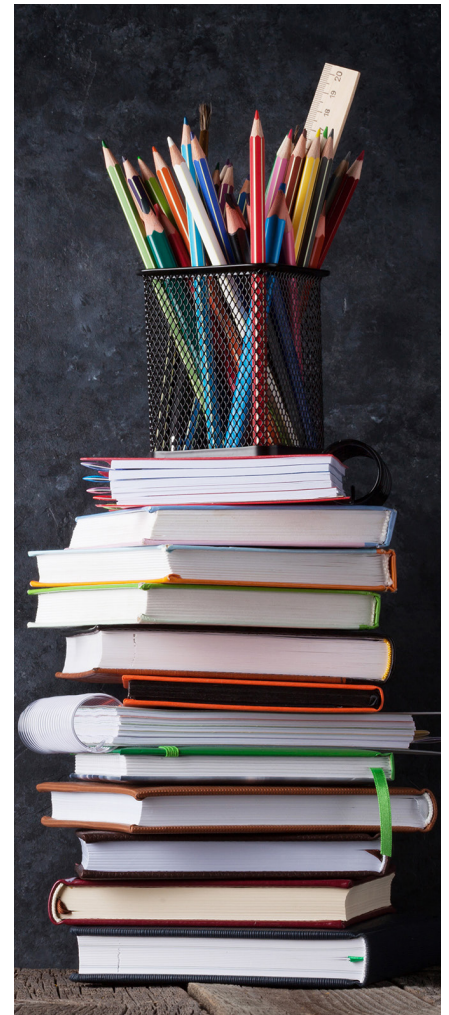
From 6 April 2018, new legislation has required trustees of schemes with safeguarded-flexible benefits to issue risk warnings to members before carrying out transactions such as a transfer or conversion of benefits, or the payment of an uncrystallised funds pension lump sum. The valuation of a safeguarded-flexible benefit for the purposes of assessing whether appropriate independent advice is required also changed from this date. Broadly, a safeguarded-flexible benefit has the characteristics of a money purchase or cash balance benefit but does not fall within the legal definitions of these benefits, because there is an underlying promise or guarantee relating to the rate of pension.

10. Action. Trustees should be clear on the categorisation of benefits provided by the scheme and ensure that the risk warnings are issued if necessary.

A Missing Page in the Textbook – Complaint Handling

The dispute resolution function of The Pensions Advisory Service has moved to The Pensions Ombudsman. This is intended to simplify the position for complainants.

11. Action. The disclosure of information regulations have not yet been updated to reflect the current position, but trustees should consider updating member booklets/websites and Internal Dispute Resolution Procedures, to reflect reality.



School Memories of the 1990s and 2000s

School life changed forever with the introduction of the national curriculum. Teachers bemoaned their fate, as they could no longer bore pupils with their own favourite topic. Who hated SATs the most – teachers, pupils or parents? As the years progressed, the Teletubbies graduates turned each school into Hogwarts, with every class having several Harry Potters and Hermione Grangers (at least in the playground). Hats off to the last generation who had to copy paragraphs out of textbooks and commit them to memory (before “copy and paste” changed the world)!

A Real Turkey Twizzler of a Case – Amendment Powers

In the *British Airways plc v Airways Pension Scheme Trustee Ltd* case, the Court of Appeal considered the validity of a trustee decision to exercise a unilateral power of amendment in the scheme rules to enable the trustees to award discretionary pension increases. Although the relevant rules were drafted widely enough to allow the changes, the Court of Appeal ruled (by a majority of two to one) that the trustees had acted in a way that was inconsistent with the “proper purpose” of the power of amendment and the award of pension increases was, therefore, invalid. In deciding what the proper purpose of the power was, the court examined the purpose of the scheme as a whole and the balance of powers between the trustee and the employer. It was relevant that the trust deed specified that the role of the trustees was to administer and manage the scheme – it was held that the trustees had overstepped the mark by exercising the power of amendment to design the benefits to be paid from it. As one judge pointed out, “the trustees effectively added the role of paymaster to their existing responsibilities as managers and administrators.”

Assuming that this decision stands the test of time (we are awaiting confirmation of whether there will be an appeal to the Supreme Court), this case provides useful guidance regarding when the courts will intervene if trustees exercise amendment powers (and potentially other powers under scheme rules) to award additional benefits.

12. Action. Trustees should consider carefully the wider issue of whether the exercise of a power under the scheme rules (especially a unilateral power) is consistent with the proper purpose of the power and the scheme as a whole.

Gather Round the Class Computer for the Outcome – The Final Salary Link

DB pension schemes that have closed to accrual but have retained a final salary link should note the recent decision in the *G4S Plc v G4S Trustees Ltd* case, when the court confirmed that, for employer debt purposes, the scheme was a “frozen” scheme despite the final salary link.

13. Action. Affected schemes should check whether this impacts on any previous assumptions or advice about debts owed by employers to the pension scheme.

The Writing on the Whiteboard – Pension Overpayments

The outcome of the *Burgess v BIC* case opens up a potential avenue for trustees who thought that they were barred by limitation from recouping pension overpayments. In this case, the judge considered whether the trustees could have recovered overpayments to pensions in payment, if the payments had not been paid correctly. The judge considered the principles of equitable recoupment (i.e. a reduction in future payments to reflect past overpayments). It was agreed that the trustees had a duty to seek to recover overpaid sums from future payments, but this was subject to section 91(6) of the Pensions Act 1995, which says that, where there is a dispute as to the amount, the set-off must not be exercised unless the obligation has become enforceable under an order of a competent court (or an arbitrator, in Scotland). The judge considered that the six-year limitation period, in line with section 5 of the Limitation Act 1980, did not apply to equitable recoupment.

It is worth noting that the “order of a competent court” does not include a determination by The Pensions Ombudsman. Therefore, if The Pensions Ombudsman makes a determination that the trustees of a scheme can recover an amount by virtue of equitable recoupment, but a member is unwilling to accept the consequences of exercising the right of recoupment, the trustees would have to apply to court to enforce the determination.

The judgment also addressed the validity of scheme amendments that took place in times of more informal recording keeping and contains some interesting thoughts as to when it is permissible to re-write history. See our [blog](#) for more thoughts on this case.

14. Action. Trustees considering equitable recoupment need to reflect carefully on the timing and merits of obtaining a court order (either before or after The Pensions Ombudsman becomes involved) alongside the costs that would be incurred (potentially recoverable from the member) and the possibility of individual members claiming a defence of estoppel or laches (i.e. that the delay in applying a remedy bars it from being granted).



School of Today

“Do not trust everything that you read on the internet – a lot of it is not true.” Many of today’s pupils understand cybersecurity long before they can spell it and have a distinct technological advantage over the older generations. However, their knowledge is not always put to good use. Pity the teacher who has to ask several times a day, “Do you have a smartphone? Is it smart enough to turn itself off in class?” And here is an interesting thought: where did the armies of teaching assistants come from, and how did schools (or “academies”) ever function without them? And how on earth did previous generations cope without a leavers “prom”?

Top Tips for Trustees – We’ll Give This a Lot of “Likes”

The rush to meet the GDPR 25 May 2018 deadline may now seem like a distant memory, but it is important that pension scheme trustees recognise that GDPR compliance is an ongoing responsibility. We examine below a number of GDPR-related tasks many of our clients have on their to-do lists for the coming months.

1. Data Breach Response Plans

The risk of a data breach event should be taken seriously. Trustees who have adopted a data breach response plan will be better placed to limit the damage caused by a data breach, meet the tight reporting deadlines and ensure that the pension scheme can quickly resume operations. TPR, in its recent guidance “Cyber security principles for pension schemes” (see below), states that it expects trustees to adopt an incident response plan as part of their cybersecurity measures.

2. Expression of Wish Forms

We have been helping many pension scheme trustees to update their scheme’s expression of wish forms to better fit with the new data protection legislation. Trustees will be gathering information about the individuals named on those forms and need to consider how data protection obligations will be met in respect of that data.

3. Privacy Notices

“On-the-ball” trustees will have issued privacy notices to members and beneficiaries in advance of 25 May 2018, but the generic notices are unlikely to be suitable for children, and special arrangements may also need to be made for those who have difficulties accessing the information within the notices, such as the visually impaired. We have advised a number of trustees on how to adapt privacy notices to ensure that all data subjects receive the required information about how the trustees handle their personal data.

4. Data Subject Access Requests

Many of our clients have seen a marked increase in data subject access requests due to increased awareness of data protection rights and member concerns. It makes sense to review processes for responding to such requests (by liaising with administrators and scheme lawyers) and to collate the generic information that can be supplied to multiple members about the processing that is overseen by the pension scheme trustees. This will help to save time and cost in the long term and avoid GDPR deadlines being missed.

5. Documentation Requesting Health Information

Extra precautions and obligations apply to the processing of data concerning an individual’s health. Pension scheme trustees will be subject to these requirements when assessing an individual’s eligibility for ill-health benefits. The documentation used to gather this information (including obtaining the individual’s consent to the processing) will almost certainly have to be updated to be GDPR-compliant.

15. Action. Pension scheme trustees should build on the GDPR compliance measures adopted to date, and review and update their existing documentation and procedures.



Preparing for a “Snow Day” – Cybersecurity

TPR has published [guidance](#) for pensions trustees, setting out good practice in addressing cyber risk and building cyber resilience.

Although “hacking” is a very real threat, this is only part of TPR’s definition of cyber risk, which is broadly defined as “the risk of loss, disruption or damage to a scheme or its members as a result of the failure of its information technology systems and processes. It includes risks to information (data security) as well as assets, and both internal risks (e.g. from staff) and external risks (e.g. hacking).”

Amongst other things, trustees are expected to develop an awareness of the scheme’s “cyber footprint” (i.e. the digital presence of all parties involved in the scheme) and maintain an incident response plan. Most trustee boards will require expert assistance.

16. Action. We recommend that trustees read TPR’s guidance, have an action plan in place to address cyber risk and ensure that cyber risk appears on the pension scheme’s risk register.

OFSTED Rating 3: Record Keeping May Require Improvement

Accuracy of member data is a vital part of pension scheme administration. If pension records require improvement, trustees may be able to capitalise on their recent GDPR compliance work, Guaranteed Minimum Pensions (GMP) reconciliation activity and their knowledge of member data held by third parties. TPR’s [guidance](#) on record-keeping standards was published in 2010, and from this year, the annual scheme return contains questions about scheme data.

17. Action. We recommend that trustees routinely take steps to review and improve data quality.



It's Playtime!

School life has certainly changed since the 1950s. Health and safety issues may have intervened to stop children from playing games of conkers in the autumn and creating ice-slides in the winter, but many other playground games have stood the test of time. Anyone for hide and seek? And who will admit to enjoying kiss-chase?

Simon Says, "Re-execute Your Contingent Assets"

From 29 March 2019, all Pension Protection Fund (PPF) standard guarantees and charges, which have either (1) a cap of a fixed monetary amount or (2) a cap of the lower of a fixed monetary amount and a fluctuating cap, must be put into the PPF's new standard format in order for a pension scheme to continue to benefit from a PPF levy reduction. This can be achieved by either entering into a brand-new contingent asset agreement or (in the case of a guarantee only) by entering into a deed of amendment of the existing guarantee. The PPF plans to consult on the new requirements towards the end of the year and is still developing its thinking regarding how the documents should be certified/re-certified on Exchange.

18. Action. Trustees should make plans to re-execute relevant contingent asset agreements in advance of the deadline.

"What's the Time, Mr. Wolf?" "It's GMP Time!"

Trustees of pension schemes with contracted-out benefits are approaching the deadline for reconciling GMPs with HMRC's own records. It is likely that some queries will still be outstanding by HMRC's deadline this December.

19. Action. There may be a need to revisit benefit amounts and calculate underpayments and overpayments.

By the end of the year, there should be a decision in the Lloyds Banking Group pension schemes case concerning equalising for GMPs. It remains to be seen whether this will provide further clarity for other pension schemes that have not reached an equalisation solution.

20. Action. Trustees of affected schemes are advised to look out for the judgment and assess the need for further action.

As a result of reconciliation and equalisation activity, interest in the little-used statutory process for converting GMPs to ordinary scheme benefits may be rekindled.

Playing Tig – Transfers Without Consent

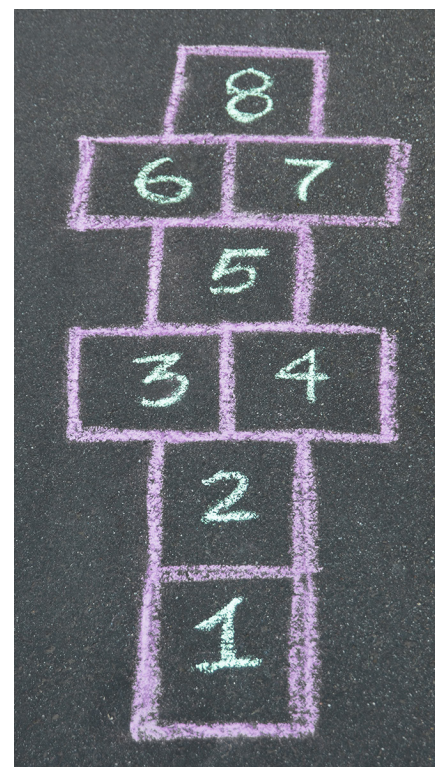
There have been some long-awaited developments in bulk transfer legislation.

Trustees are now able to undertake a bulk transfer of DC benefits to another DC arrangement without member consent and without the need to obtain an actuarial certificate. Trustees must obtain independent (defined in legislation) professional advice before a transfer is made that is not intra-group or to an authorised master trust. Note, however, the DWP [guidance](#) that expects trustees to take independent professional advice regardless of whether there is a statutory requirement to do so.

21. Action. Trustees considering a bulk transfer of DC benefits should take appropriate independent advice, whatever type of receiving scheme is under contemplation.

From 6 April 2018, a glitch in legislation has been remedied – it is now possible to transfer members without consent from a formerly contracted-out scheme to a salary-related scheme that has never been contracted-out. Some mergers, which had been on hold, can now complete.

22. Action. Consider the additional options where a scheme merger has not completed.



Don't Leapfrog the Master Trust Requirements

Trustees operating a DC "master trust" have six months from 1 October 2018 to submit their application to TPR. Trustees should not underestimate the volume of work required for the application. It is clear that TPR anticipates a hands-on approach to supervision, especially at the outset, and expects collaboration with those involved in running the master trust.

23. Action. Trustees of master trusts should look out for the final supervision and enforcement policy, the further guidance on reporting requirements and the guidance on the supervisory return.

TPR has issued a statement warning trustees to take care when amending scheme benefit structures, as this could inadvertently cause a scheme to become a master trust scheme.

24. Action. Trustees should seek advice on this issue especially if admitting new employers to a scheme with DC benefits or if introducing DC benefits to a DB scheme (where, in either case, the scheme's employers are not "connected" as defined in the legislation applying to master trusts).



I Spy, With My Little Eye ...

- **Something beginning with "A" – Anti-money laundering.** The Fifth Money Laundering Directive strengthens EU rules about collating information on the beneficial ownership of trusts. The directive will need to be reflected in the national laws of member states by 10 January 2020. We will monitor developments.
- **Something beginning with "B" – Brexit.** Pensions law and practice have been heavily influenced by the EU, particularly in matters related to equality, discrimination and funding. Many provisions are enshrined in national law and will not be affected by Brexit. Future pensions decisions made in the European Court of Justice will no longer have direct application, but we may find that UK legislation is influenced by key decisions.
- **Something beginning with "C" – Collective defined contribution (CDC).** The relevant provisions of the Pension Schemes Act 2015 allowing for a new category of "shared risk" pension scheme have not yet been implemented, but the UK's first CDC pension scheme now looks like a distinct possibility. The Work and Pensions Committee considers CDC to be a good option for pension provision – these schemes operate in Denmark and the Netherlands and offer a "target benefit" to members (rather than a guaranteed level of benefit).
- **Something beginning with "D" – Dashboard.** The pensions industry has been working with the government to facilitate prototype pensions dashboards, which will allow savers to see all of their private pension pots and their state pension together online. This project is due to be launched in 2019. We hope that the government continues its support for the dashboard.
- **Something beginning with "I" – Income tax.** From April 2019, the Welsh government has the power to set its own rates of income tax that differ from England and Northern Ireland. This affects pensions tax relief for Welsh residents who are members of pension schemes.
- **Something beginning with "S" – State pension.** In November 2018, the state pension age will finally equalise at age 65 for men and women. The state pension age for both men and women will then start to increase, to reach 66 by October 2020.
- **Something beginning with "W" – White paper.** In its white paper on protecting DB pension schemes, the DWP explored the potential benefits of commercial consolidator vehicles. There are arguments for and against such vehicles and we await with interest the government's consultation later this year.

After School

We hope you have enjoyed our skip through school life throughout the decades. Our checklist of action points should help trustees to keep track of the actions identified for their scheme.

We would, of course, be happy to discuss any of the topics raised in this publication.



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