



Pinsent Masons



Pensions and chocolate

The state of pensions regulation in 2017



Preface

This is the first of what is hoped to be an annual survey of the state of pensions regulation as it develops over the years.

Pensions regulation has become generally recognised as excessive and counter-productive in the United Kingdom – yet there are presently pressures to increase it even further in quantity and complexity. This survey is intended to be a review of present legislation, regulation and court decisions, and maybe as a guide to the future. It is designed to be read by clients, customers and colleagues in the field – and by MPs, regulators and policymakers.

It has been prepared by:

Pinsent Masons, the international law firm with perhaps the largest pensions law practice in the world, with experience in all forms and sizes of pensions systems, advising individuals, small and large corporates, public bodies and government and plan trustees;

The Pensions Institute, the academic research think tank, part of Cass Business School, which in turn is part of the University of London; and with the assistance of, and data supplied by:

Pendragon, the industry-standard publisher of pensions regulatory materials with its perspective service now available on the web and with over 20 years' experience in the field, and the publisher of The Guide for Pension Trustees.

We hope you find it a useful summary.

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Contents

1	Preface
3	Pensions and chocolate
4	Introduction
6	Background
8	Where are we now: legislation
11	Where are we now: regulation
14	Where are we now: pensions in the Courts
17	Where are we now: political pressures
18	Conclusion
22	Appendices
28	Appendix 1
24	Appendix 2
28	Appendix 3
38	Appendix 4

Pensions and chocolate

The state of pensions regulation in 2017

Executive summary

- The DWP Select Committee has called for more pensions legislation, but there is no evidence that such legislation is needed for member protection ¹.
- Current intervention levels by the Pensions Regulator are adding to unnecessary costs for many schemes. At the same time, the Regulator seems to be offering constructive assistance in a few cases. It is clear the role of the Regulator needs to be rethought and perhaps diminished.
- The complexity of the legislative and regulatory system is creating more disputes than necessary. At the same time, the Courts are moving towards more pragmatic and cost-effective solutions.
- The 160,000 pages of pensions regulation need to be radically cut back, and there should be a codification exercise.

Government and regulators should jointly set a stable and long-term policy for pensions regulation and avoid incessant tinkering, which is causing immense damage to people's pension expectations.

¹ Defined benefit pension schemes: Sixth report of Session 2016-17, House of Commons Work and Pensions Committee, HC 55, 21 December 2016.

Introduction

Pensions legislation and regulation is intended to protect the interests of both the Treasury and the consumer – and to encourage financial provision for old age. It is clearly, in principle, a good thing. The size of the sums involved, the numbers of people affected and the importance of pensions in the lives of most people mean that there need to be rules. Failings of the system over the years (the Maxwell Affair, the Equitable Life case, personal pensions mis-selling, pensions liberation) have understandably led to calls for more rules to prevent such scandals being repeated.

But, rather like chocolate, while rules might indeed be a good thing, too much might be bad for us; and the field is replete with instances indicating the limits to, and anomalies of, regulation. Whilst the regulator fines decent trustees for failing to sign forms, it is unable to do anything other than issue brochures in relation to the tens, if not hundreds, of millions being stolen through pensions liberation.

The diagnosis of excessive regulation has been accepted by government in areas other than pensions. For example it has adopted:

- a Red Tape Challenge programme²;
- an OITO ('one in two out', now 'one in three out') policy³ which requires any department putting forward new regulations to remove three existing ones; and even
- the principle of the creation of a specific sub-committee of the Cabinet⁴, each dedicated to rolling back excesses in rule-making.

But, so far, little if any of this deregulatory policy seems to have been applied to pensions. The provision of pensions, which is an inherently simple idea, has become complex through the introduction of large numbers of well-intentioned rules. It is now so complicated that it is not only the public who are bemused by the whole subject, but also the professionals⁵. Pensions regulation continues nonetheless to expand, despite the deregulatory pressures;⁶ and, following the call by the House of Commons Department of Work and Pensions Select Committee for further legislation following the BHS inquiry in mid-2016, it seems probable that there will be even more⁷.

The justification is that the public, or rather scheme members, need additional protection. It is not, however, settled that the growth of legislation and regulation has led to a better experience and outcome for the citizen. Such indications as there are seem to suggest that the imposition of regulation has been a material factor in the reduction in pension provision, with significant public policy implications as the population ages and the demand and need for income in retirement increases. Furthermore, in most cases, the regulatory framework would not have prevented the failure that it was introduced to prevent⁸. Alan Pickering, a former Chairman of what is now the Pensions and Lifetime Savings Association was commissioned by government some years ago to shrink the pensions lawbook but was in practice rebuffed⁹.

This discontent, and the forthcoming parliamentary proposals, made it seem a propitious time to prepare a summary of the legislative and regulatory state of pensions in the UK. It has been prepared jointly by Pendragon, the publisher of Perspective, the electronic industry standard compendium of pensions regulation, Pinsent Masons, an international law firm with possibly the largest team of pensions lawyers in the world, and the Pensions Institute, the Cass Business School research body.

² Now renamed *Cutting Red Tape*, see <https://cutting-red-tape.cabinetoffice.gov.uk/>. Child care providers now need to look at 33 pages instead of 1100 pages of government regulations.

³ Sajid Javid, Business Secretary, *Getting government off your back: our commitment to cutting red tape*, speech to the British Chambers of Commerce 3 March 2016.

⁴ *Economic Affairs (Reducing Regulation) Cabinet sub-committee* renamed in 2016, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515673/2016-04-11_Cabinet_Committees_final_arp.pdf.

⁵ Andy Haldane, Chief Economist, Bank of England, has said: "To give a personal example, I consider myself moderately financially literate. Yet I confess to not being able to make the remotest sense of pensions. Conversations with countless experts and independent financial advisors have confirmed for me only one thing – that they have no clue either. That is a desperately poor basis for sound financial planning." *The Great Divide*, speech to the New City Agenda Annual Dinner, 18 May 2016.

⁶ Around 2000 pages a year (source: Pendragon).

⁷ James Fernyhough, *Frank Field plans pensions 'mega bill' on DB schemes*, FT Adviser, 19 May 2016; <http://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2015/pension-protection-fund-15-16/>.

⁸ Alan Pickering, *A simpler way to better pensions*, DWP, 2002.

⁹ Alan Pickering recommended that s67 of the Pensions Act 1995 (which controlled scheme amendments) be simplified – which was accepted by the Government which simplified it from 3,400 words to 300 words.

The review has prompted a number of preliminary conclusions, including that:

- it might be a better environment for pensions were government to issue a **holistic statement of its pensions policies**, affecting tax and consumer protection and the scope of regulation, rather than issuing ad hoc proposals¹⁰;
- any **additional regulation or legislation should be evidence-based**, ie. based on evidence that there is a harm that needs to be controlled; that the proposed rules are proportional to the harm; and that they are highly likely to be effective to remedy it, and any possible or probable unintended consequences, including cost implications, should be outlined;
- there should then be a **deregulation exercise** for all pensions regulation; and then
- there should be a **consolidation exercise**, so that there would be a legal pensions code, which the majority of those concerned could easily understand.

The present system is considered by most observers as dysfunctional and sub-optimal. It leads to confusion, expense and a reduction in pension provision by employers. Whilst auto-enrolment is creating an additional £2.5bn in additional savings for old age, in individual terms the sums will be modest and subject to the vagaries of interest rates. For most of the population there is a reduction in the amount being set aside for retirement at a time when the population is ageing and the savings ratios should be higher. Regulation may not be the sole reason for the decline, but it seems to be a major contributory factor – and one that could be fixed.

¹⁰ Cf Superannuation (Objective) Bill 2016, Parliament of the Commonwealth of Australia, House of Representatives, 2016.

Background

Complexity of regulation, and complaining about it, is nothing new. Governments in particular have recognised for many years that excessive regulation is a bad thing. Harold Wilson sought a "further bonfire of controls" in 1948¹¹, and almost all governments since then have sought deregulation through publications such as *Burdens on business* in 1985¹² and through legislation, such as the Deregulation Act 2015. Even further back, James I was unhappy at the state of the statute book:

“ *As the Princely care and continually watch, which Wee have over the good of Our loving Subjects, may in part appeared, by the course which Wee have taken, for a review and consideration of many of our Statute Lawes: wherein Wee were desirous, that in stead of the multiplicities of the same, and doubtfulness that may arise in the interpretation of them, (whereof some are worn out with time, some unfit for execution by the change of times, and of others, some branches only standing in force, and the rest repealed) some such new Lawes may be made, as shall be most necessary for the good of Us, and our people, and the same more clear and plain to their understanding whom it may concern, then they have benefit or are in some cases; For the better preparation whereof (being a work of so great labour) we have already caused our Privie Council, to make choice of some discreet persons learned in the Law, not onely to make collections of them as they stand now in force, but to digest them into some such orderly Method...* ”

But even James I would have been astonished at the fact there are now around 160,000 pages (the Pendragon methodology is described below) of rules, regulations, codes, case law and guidance notes relating to the governance of pensions alone.

This vast corpus of law, with more to come, suggests that it may be time for a rethink on the way in which we protect the interests of the Treasury and the public, whilst maintaining the health of the goose. It is no secret that defined benefit pension schemes are rapidly declining, that defined contribution schemes are struggling to make up the deficit in pensions provision and that auto-enrolment may provide wider coverage but at low benefit levels. In the meantime, companies with legacy DB schemes are continuing to endeavour to meet deficits which are partly an artificial construct, being measured according to government-mandated interest rates.

These 160,000 pages are rules which advisers (and consumers) are required to comply with. The calculation is an imperfect estimate; it not only includes immediately relevant laws but also some repealed legislation (which may still apply in some circumstances, eg. relating to contracting-out or tax reliefs) and some of which are relevant only to specific schemes. But even with the caveats it is an astonishing volume of material – much of which (especially in the tax field) is virtually incomprehensible¹³:

¹¹ *New 'bonfire of controls*, Guardian, 1 November 1948 (see also http://www.regulation.org.uk/deregulation-1948_to_2006.html)

¹² *Burdens on business: report of a scrutiny of administrative and legislative requirements*, HMSO, 1985.

¹³ See eg. Finance Act 2014: inserting Schedule 36 paragraph 20(4)(c) of the Finance Act 2004.



(c) in the case of an arrangement to which section 165(3A) never applied but only if the time falls after the member's drawdown pension fund in respect of the arrangement is converted into the member's flexible access drawdown fund in respect of the arrangement of paragraph 8B or 8C of Schedule 28, 80% of the maximum amount that could have been paid in accordance with pension rule 5 in the drawdown pension year in which the conversion occurs had no conversion happened in that year by the operation of either of paragraphs 8B and 8C of Schedule 28.



The Taxation of Pensions Act 2014 displays a similar impenetrable style of drafting. The then Chief Parliamentary Counsel inveighed some years ago against complex drafting¹⁴ but his advice has largely been ignored. The 'pension freedoms', ie. the ability to take the pension in cash as introduced by the then Chancellor of the Exchequer, are profoundly complicated to understand and advise on. Although the pension freedoms themselves are expressed in only two clauses, there are a further five schedules covering 37 pages. The Act introduces, in what was intended as a simplifying reform, a host of new jargon and rules, including 'Dependant's flexi-access drawdown fund', 'the alternative chargeable amount' and the 'money-purchase input sub-total'. Pension scheme members are required to compare "F/PIP x APIA" with "F/PIP x AAIAA" to determine their rights and expectations. Also, because it omitted necessary checks and balances to protect consumers, those had to be introduced through regulation over the following years, including further rules in 2016 – all adding up to considerable complexity. Consumer-friendly the rules are not.

¹⁴ Richard Heaton, Chief Parliamentary Counsel, *When laws become too complex*, Office of the Parliamentary Counsel, March 2013.

Where are we now: legislation

Introduction

2016 has been a relatively good (ie. quiet) year, certainly compared with 2015, for additional regulation. The table in Appendix 2 shows the comparative performance (less is usually better), both in primary legislation (statutes) and secondary legislation (statutory instruments). Both volume and complexity for the moment seem to be on the wane.

This minor breather, however, is about to come to an end, and while there may have been a short-term reduction in growth (not an actual reduction) the issues of excessive complexity and uncertainty in tax and pensions policy, together with regulatory creep, remain a serious concern.

Tax

The complexity of the tax code in relation to pensions is now notorious. Most of the complexity has derived from frequent changes to taxation policy (sometimes three times in one year). It may be instructive to reflect that the Finance Act 2004 was intended to set pensions taxation for the next generation, based on a policy intention to allow private individuals and companies to make decent provision for old age. But the long-term stability that was promised in exchange for the pensions cap (£1.5m in 2006) hardly lasted a year. The taxation policy is now clearly incoherent, with the following Acts having made changes since the 2004 Act that was intended to be the final word on pensions taxation for the next 30 years¹⁵:

Finance Act 2005	Finance Act 2009	Finance Act 2012
Finance (No 2) Act 2005	Finance Act 2010	Finance Act 2013
Finance Act 2006	Finance (No 2) Act 2010	Finance Act 2014
Finance Act 2007	Finance (No 3) Act 2010	Taxation of Pensions Act 2014
Finance Act 2008	Finance Act 2011	Finance Act 2015

The pensionable allowances, which were again intended to be set for a generation subject to indexation, have also confused the public by being redrawn annually (numbers in £'000). Retirement income planning has not been easy – and not just for the very highly paid. A pension pot of £1m gives a pension of roughly £30,000 pa, thus affecting people earning around £45,000 pa.

Fiscal year	06/07	07/08	08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17
Annual allowance	215	225	235	245	255	50	50	50	40	80	40
Lifetime allowance	1,500	1,600	1,650	1,750	1,800	1,500	1,500	1,500	1,250	1,250	1,000

Coupling the annual and lifetime cap changes with the various forms of cap protections, it is hardly surprising that the Chief Economist of the Bank of England concluded he needed some help¹⁶.

There is probably more complexity to come as and when the Lifetime ISA is introduced. All these changes reflect a lack of long-term thinking in pensions taxation policy. It appears, moreover, that HM Treasury and HMRC no longer see private provision for pensions as a policy objective¹⁷.

¹⁵ Ian Neale, *Complication of pensions legislation – a timeline*, PMI Technical News, 2015.

¹⁶ See Note 5.

¹⁷ See Katie Morley, Pensions no longer included in official Government advice on ways to save, as former minister warns they are in 'mortal danger', Daily Telegraph, 4 January 2017; HM Treasury, Infographic on savings, January 2017.

The change in tax policy from supporting 'pensions' to 'savings' has been reflected in the change of name of the trade body¹⁸, and in the so far uncoordinated regulations designed to cope with the unexpected consequences of the pension freedoms, ie. the ability to take cash instead of pension, as introduced in 2015. This change has resulted in reams of additional TPR and FCA guidance and regulation, which is complicated, uncoordinated, and still unsettled. The tax freedoms have also led to a significant rise in cases of fraud against pension scheme members, with regulators struggling to respond and build in consumer protection.

Consumer protection

Consumer protection has concentrated on attempting to reduce administrative and investment management costs, on the giving of advice and on the provision of risk warnings.

On costs, the intention is benign for members, but the concentration on visible costs, rather than on quality, or invisible costs, may in the end have a deleterious impact on pension outcomes, even for the lower paid. Costs are only one element of the pensions equation (and a relatively minor one at that, compared, for example, with a 25 basis point change in interest rates), and the non-measurable impacts on industry practice may actually make things worse¹⁹. The costs involved with governance committees, chairmen's statements and value-for-money exercises anecdotally seem disproportionate to any possible benefit. The best may appear to be the enemy of the good.

Good news (contracting-out)

2016 saw the end of contracting-out, the system which provided state top-up pensions. We now have a single State Pension. The change also coincided with complaints from a cohort of women who felt they had not been adequately informed of the State Pension age changes, and who were therefore unable to make preparations. Meanwhile the remnants of contracting-out remain a sometimes intractable problem for administrators because of difficulties in reconciling private with state records. Reductions in HMRC staffing seem to have exacerbated these difficulties.

Brexit

It is, of course, too early to appreciate the consequence of Brexit on the pension regulatory framework. Experience suggests that life will become more complicated rather than less. Much depends on the arrangements for exit, which will not be clear for some time. Any changes are unlikely to repeal, say, equal treatment requirements. But additional requirements from EIOPA in relation to funding are likely to fall by the wayside²⁰. More concerning are investment regulations. The counterparty requirements for pension funds investing in derivatives managed through clearing-houses have been causing serious concern.

¹⁸ Formerly The National Association of Pension Funds, now the Pensions and Lifetime Savings Association.

¹⁹ The Financial Conduct Authority is also suggesting yet further changes to the rules, see *Transaction cost disclosure in workplace pensions*, Consultation paper CP16/30, FCA, October 2016. And see also *Asset Management Market Study, Interim Report*, MS15/2.2, FCA, November 2016. Both recommendations are based on assumptions of a perfect market, and on non-evidence-based conclusions that the market in pensions investment managers has failed, which is curious given the intense competition amongst asset managers (much greater than in previous years) and the availability of ultra-low-cost products offered by managers such as Fidelity and Vanguard.

²⁰ See eg. European Insurance and Occupational Pensions Authority, *EIOPA publishes its peer review on the statement of investment policy principles for institutions for occupational retirement provisions (IORPs)*, Frankfurt, 21 October 2016.

²¹ Jonathan Hill, *Keynote speech on the call for evidence on the impact of the EU regulatory framework for financial services*, EU Commission, Bruegel 12 July 2016.

Rather ironically, the European Union prior to the UK referendum on EU membership was in a deregulatory mood. A resignation speech by an EU Commissioner stated the problem succinctly²¹:

“ I joined a Commission which was dedicated to legislating less and legislating better... It is natural that when a micro-prudential regulator or supervisor has to assess risk, they take a highly cautious approach, especially where there has been a crisis caused in part by a lack of regulation or a failure of oversight. No-one wants to be accused of being asleep on the job... the problem comes if a number of different regulators or supervisors are all taking an equally risk-averse approach. Then the cumulative impact of a series of micro-prudential judgments can itself become a source of macro-prudential risk... what lessons have I learned?... legislation is not a science. It is not. It is a series of judgments. Clever people can make it sound as though there is only one answer. But it's not true... Be brave enough not to regulate... As a regulator you cannot expect to win popularity prizes with the businesses you regulate. But you should seek to avoid unnecessary conflict between the regulator and the regulated.

Conclusion

Whilst the quantity of new legislation has diminished, the list in Appendix 2 suggests it is still material – and for most participants, unmanageable. The political pressures for even more seem irresistible, certainly for politicians and civil servants. But for the benefit of members they need to be firmly resisted. There were over 2,000 new pages in 2016 and the amount of law, together with the stream of consultations on new ones, has become a burden too heavy to bear for most.

²¹ Jonathan Hill, *Keynote speech on the call for evidence on the impact of the EU regulatory framework for financial services*, EU Commission, Bruegel 12 July 2016.

Where are we now: regulation

Introduction

As can be seen from Appendix 2, while the flood of regulation seems to have diminished, it has by no means reduced to a trickle; and additional burdens have been imposed by both the Financial Conduct Authority and the Pensions Regulator during 2016. It may be time for both organisations to take a step back and see if they can devise a stable and holistic regulatory framework that avoids the need for incessant tinkering – and the concomitant costs for employers and employees.

Growth in DC regulation (costs and 'market failures')

There have been particular increases in the regulation of defined contribution schemes, with only modest consumer benefits discernable. The Pensions Regulator was established to preside over the closure of defined benefit schemes. Defined contribution schemes were already governed by trust or insurance law, and had little need of a regulator. Over the last few years the policy on leaving defined contribution schemes to be governed by trust and contract has changed – and during 2016 the Regulator also started its punitive imposition of fines for technical breaches.

DC schemes are now part of the Pensions Regulator's remit, which has developed an increasingly burdensome regulatory framework. Every year additional superstructure has been created (costs, governance etc), and one of the latest is the requirement for the chairman of a DC scheme to prepare (not necessarily produce) an annual statement. The Regulator after consultation published an Enforcement Policy, setting out the penalties for breach of the requirements including that of failure to produce a statement. The statement is to outline, amongst other things, what has been done to ensure the members enjoy the optimum terms and that the trustees have taken efforts to check the market. The statutory obligation was almost certainly unpoliceable or enforceable, and almost certainly unnecessary – trustees already had a fiduciary obligation. In particular, the penalties in the legislation are not for failing to achieve the best deal for members; the penalties are for not producing a piece of paper discussing it. It is an example of a regulation being enforced because it can be, not because it should be – and it is not evidence-based. The law of the chairman's statement is a particularly bureaucratic and pointless law. If it exists at all, it should perhaps be part of a code, not a regulation. It is again a classic case of the best being the enemy of the good.

In August 2016, the Regulator announced it had issued its first major set of fines for breach of the law, totalling £6,000. There are some curious features of the incident, apart from the fact that applying it involves the sin of scrupulosity. First, the person fined was not an inexperienced and uncaring trustee. It had made a mistake in relation to a new law – and had whistle-blown on itself. In a sensible world, the regulator would have noted the incident, had a coffee with the trustee and encouraged it to do better next time. Instead it chose to issue a fine in accordance with its 'enforcement guidance'. Meanwhile, it appeared to decline to enforce similar breaches against people who failed to confess (presumably because they are hard to find) or those who completed a formal statement which may have breached the policy objectives but which were technically compliant. It is a curious policy that attempts to publicly shame those who confess rather than those who do not.

There are some other troubling issues with the episode. First, the level of the fine related to a minimum imposed by the statutory instrument. However, no minimum however is prescribed by the Act, merely a maximum. There must be a serious doubt about whether the statutory instrument is valid, and it is possible that the fine itself was illegal.

Second, the fact that the fine is mandatory under the law has led the Regulator to state it has no discretion but to apply it. But the enforcement guidance does not preclude discretion as to whether to enforce at all, or on how to enforce. A tea and an iced bun, or the raising of an eyebrow, rather than a fine, is still permissible. Keith Starmer, the former DPP and present MP, gave himself discretion as to whether to prosecute where assisted suicide was involved. It seems reasonable that such discretion could be employed in the case of technical administrative breaches.

Next, the Regulator imposes higher fines where professional trustees are involved, although in law there is (with caveats) little distinction between one kind of trustee and another. The unintended consequence of this policy is for trustees to reflect twice on the wisdom of appointing a professional to help them, since by doing to it increases their group regulatory exposure²².

The Pensions Regulator and the press

Similarly, the issue of misleading press releases has affected the Regulator's reputation for balance and neutrality; some of them clearly involve grandstanding. The media notice in the case of Fleet Marine, where it issued a compliance notice requiring the employer to provide auto-enrolment pensions for its overseas employees, was announced as a success for the Regulator. However, its compliance notice was in fact quashed by the Court – a fact not mentioned in the release²³.

Market forces and trustee decisions making: a referee or a player?

Clients have reported interference in decision making where trustees have taken copious advice and behaved with caution and reflection. And the Regulator's conclusions on market developments in master trusts, a developing method of providing DC benefits, although seemingly justified in the name of consumer protection, seems to be dangerously close to interfering in competitive forces²⁴.

Transparency and neutrality

The Pensions Regulator has not merely been neutral in applying regulations: it has called for more, and for more resources to enforce them. To its credit it has also resisted external political pressures, and concluded, for example, that the position of trusteeship is not one that should be disturbed.

In recent years the Regulator has become more transparent, but contact details of its senior officials are still not available on its website. This needs to change.

Costs

The costs of the Regulator have increased eightfold since its establishment. Although costs are likely to fall once auto-enrolment has settled down, there needs to be increased stakeholder involvement in managing regulatory overheads, not simply a budget agreed between the Department of Work and Pensions and the Regulator, which is then paid for by employers.

²² Crown Prosecution Service, *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, https://www.cps.gov.uk/publications/prosecution/assisted_suicide.html; Dangerous Dogs Act 1991; Etsy.com (Chicken sweater); Omlet.co.uk (hi-vis chicken jacket); Ontario Ministry of Finance, Review of Ontario's solvency funding framework for defined benefit pension plans: a consultation paper, July 2016; Pensions Act 2014 Schedule 18, para 3(3) and 3(4) '(3) The regulations may make provision for determining the amount, or the maximum amount, of a penalty in respect of a failure or contravention. (4) But the amount of a penalty imposed under the regulations in respect of a failure or contravention must not exceed- (a) £5,000, in the case of an individual, and (b) £50,000, in any other case.' Note there is only power to impose a maximum, but not a minimum (para 3(3)). And note also there is no need for the statutory instrument to state the maximum at the maximum; it could prescribe a lower amount; Samuel Bowles, *The moral economy: why good incentives are no substitute for good citizens*, Yale University Press, 2016; Sexual Offences Act 2003 2003 as amended by the Anti-Social Behaviour, Crime and Policing Act 2014, s103(c); Mark Lowery, *Scrupulosity: the occupational hazard of the Catholic moral life*, [2006] 17(9) Catholic Answers Magazine; Terrorism Act 2000; The Occupational Pension Schemes (Charges and Governance) Regulations 2015 2015 No 0879; The Pensions Regulator, Compliance and enforcement policy for occupational schemes providing money purchase benefits, July 2016; The Pensions Regulator, Prosecution Policy. June 2016; The Pensions Regulator, *Regulatory intervention report issued under s89 of the Pensions Act 2004 in relation to the trustee of Precision Carbide Tools Limited Pension and Life Assurance Scheme, the Comshare Retirement and Death Benefits Plan and the EBC Pension Scheme*, August 2016; The Pensions Regulator, *TPR issues maximum chair's statement fine for professional trustees*, PN16-44, Press release, 17 August 2016

²³ *Fleet Maritime Services (Bermuda) v The Pensions Regulator* [2016] 020 PBLR (028) [2015] EWHC 3744 (Admin) (United Kingdom: England and Wales: High Court: Queens Bench Division: Administrative Court) 2015 December 21 (Non-UK employer – Seamen – Auto-enrolment – Whether UK compulsory auto-enrolment into workplace pension schemes applied – the Pensions Regulator – Compliance notice – Whether valid – Judicial review). The recent list of press releases reflects an increasingly minatory and hectoring tone.

²⁴ *The Pensions Regulator is successful in legal challenge*, The Pensions Regulator, Ref: PN16-02, Tuesday 12 January 2016.

Conclusion

Regulation and regulatory intervention appears excessive and the regulatory tone unhelpful. The level of regulatory activity exceeds what is necessary to achieve reasonable protection for scheme members. It might be preferable that before agreeing or proposing new rules, the Regulator may need to:

- provide evidence to explain why existing rules are inadequate;
- apply a regulatory cost assessment, by an external advisor;
- list any anticipated unintended consequences and side effects;
- apply the principles of OITO, and specify the regulations to be withdrawn;
- ensure that staff have qualifications in regulation;
- establish a competitor regulator, to ensure efficiency in regulation;
- undertake to argue strongly against populist pressures;
- insist on political independence from DWP or government;
- establish a user group;
- give itself a regulatory budget of no more than say 20 pages a year;
- reduce its budget by 15% a year for the next three years;
- undertake training on risk and the behavioural consequences of penalties; and
- suggest alternatives to regulation as a response to market or consumer concerns.

Consultation on regulation has become an expensive and wearying exercise for most respondents. The PLSA has around a dozen policy advisers, and still finds itself unable to respond to all consultative requests, and few other organisations are as fully equipped. In practice, it is not possible for most of the affected parties, including the professional and trade bodies, to respond properly to proposals for new rules and regulations simply because of capacity. A recent consultation by the Pension Protection Fund on levy proposals ran to 360 pages. There are consultations by HM Treasury, HMRC, the DWP, the FCA, the Pensions Regulator, the accounting and actuarial governing bodies, the Law Commission, EIOPA and many other organisations in the past year alone. None of this is holistic.

There is some hope for a change in regulatory policy and tone. The Pensions Regulator has recently appointed some new and distinguished members to its Board, and they may now seize the opportunity to encourage discussion of, say, its enforcement policy, how the Regulator is responding to the Red Tape Challenge, and whether it is seemly for a Regulator to issue triumphalist and minatory press releases. At the moment, the redacted monthly board minutes published on the Regulator's website indicate that the board focuses more on management than on policy. It might also want to review its declaration that the Regulator views the preparation of chairmen's statements as a high priority – not many in the industry think it should be. The recent imposition of a fine has not brought the affected professional trustee into disrepute or affected its reputation; it remains a highly regarded and experienced trustee. The episode recalls a similar incident some years ago: a former regulator was forced to drop criminal sanctions for a failure to pay contributions on time because its enforcement brought the system itself into disrepute. Regulatory priorities might be better allocated to limiting fraud on pension scheme members by third parties. The recent paper from the Cabinet Office on the conduct of regulators, and which seeks to encourage regulators to look at outcomes rather than process, will no doubt better inform board discussions²⁵.

²⁵ See *Regulatory Futures Review*, Cabinet Office, January 2017.

Where are we now: pensions in the Courts

It has been a busy year in the courts. Around 120 court cases have been reported on the Perspective system, not to mention several hundred decisions by the Pensions Ombudsman.

Some decisions point to developing trends. Several of the cases reflect how DB schemes have been struggling to cope with increased liabilities. Other judgments show the Courts struggling to deal with mistakes made by trustees, administrators and lawyers as a result of trying to comply with complex legislation. Others arise from an attempt to understand how EU law applies to pension schemes, especially since much of that law was written with general employment benefits, rather than occupational pension schemes, in mind; and yet others reflect the fall-out from HM Treasury's introduction of pensions flexibility in April 2015.

Meanwhile access to the courts remains expensive and time-consuming. In relation to court procedures generally Lord Justice Munby in 2016 said²⁶:

“ *The... Rules of today would be all too familiar in their archaic and sometimes impenetrable language to my distinguished Victorian predecessors... the Rules, like their civil counterparts, are a masterpiece of traditional, if absurdly over-elaborate, drafting. But they are unreadable by litigants in person and, truth be told, largely unread by lawyers. They are simply not fit for purpose. The Red Book [Family Court procedure rules], like the White Book [civil procedure rules], is a remarkable monument of legal publishing, but, I fear, fit only for the bonfire. Rules, to the extent that we still need them, must be short and written in simple, plain English.* ”

Pensions Ombudsman appearances

Decisions by the Pensions Ombudsman are influential rather than precedential, so are not explored further, other than to note that the Pensions Ombudsman has increased the dignity of his office by refraining from grandstanding, as had happened with some of his predecessors. There is one policy he has adopted which may raise an eyebrow, however. He has decided, after a decade of abstention, to be represented in certain appeals to the High Court from his own determinations. The policy is understandable. A decision in *Royal London*²⁷ where the company declined to pay a transfer to a pension scheme which they considered not bona fide was upheld by the Pensions Ombudsman, and then overturned by the High Court on appeal. But it has its unwelcome side effects. It is inconceivable to imagine, for example, a High Court judge turning up at the Court of Appeal to defend his earlier decision in his own court.

Sorting out pension mistakes

Rectification

Pension schemes are highly complex. Many schemes have been around for decades. They have become heavy with legislative encrustations which, though ancient, have solidified. To calculate the benefits of members with long service, you need to understand not just current pensions law, but all the legislative changes and tax regimes that have applied since they joined the scheme. That complexity means that mistakes are made. Courts have struggled to decide how to approach those mistakes. Should members be allowed to keep rights and entitlements that were never intended? Or should struggling employers be given the benefit of the doubt and relieved of some of the deficit that could never have been foreseen?

²⁶ Address of the President of the Family Division at the annual dinner of the Family Law Bar Association in Middle Temple Hall on 26 February 2016.

²⁷ *Hughes v Royal London* [2016] 014 PBLR (010); [2016] EWHC 319 (Ch) (United Kingdom: England and Wales: High Court: Chancery Division) 2016 February 19 (Pensions liberation – Transfers – Right to transfer – whether transfer to occupational pension scheme involves need to be employed by new plan sponsor – Pensions Ombudsman – Appeal).

Unfortunately, no clear trend is discernible. In one Scottish case²⁸, the judge refused to uphold an attempt by the scheme to comply with the European requirement to equalise normal retirement dates between men and women. Although the trustees had operated the scheme since 1992 as if it had been effectively equalised, the lack of a document showing the trustees' consent to the amendment at the time was enough to overturn what everyone thought – and give members a windfall. But in another Scottish case²⁹ the Court held more pragmatically that a number of deeds of amendment were valid even though there was no evidence to suggest that the correct procedure for amending the scheme had been followed. The Scottish Court is still allowed to use legal Latin, and it did so: it held '*omnia præsumentur rite esse acta*' (all things are presumed to have been done in due form) – a neat way for the court to ensure no windfalls.

However, even where courts are willing to sort out mistakes in a sensible way, they are pushing to impose more procedural requirements. The judge in *Saga*³⁰ allowed scheme rules to be rectified (so that they read in the way everyone had intended them to be read) but held that future similar proceedings should be heard in public with all relevant information freely available. This additional transparency sounds fine at first blush. In practice, scheme members who have no legal points to raise, but a well-filled green-ink pen to hand, will have a field day.

Coping with DB liabilities

The Halcrow³¹ case was one of those minor tragedies where the Regulator, acting in a positive and constructive way, was all but defeated by a technocratic court. The trustees of the Halcrow Pension Scheme, with a solvency deficit of £600 million, asked the Court to approve an approach that would avoid members ending up in the Pension Protection Fund. The scheme sponsor's American parent was no longer willing to provide adequate support, meaning that the scheme was expected to fall into the PPF. The trustees wished to give members a better deal than under the PPF. They proposed transferring members' benefits to a new scheme that would provide lower benefits than under the old scheme, but at least as good as under the PPF. In return, the employer's parent would provide a capped funding guarantee. Unfortunately, the judge felt unable to approve the proposal. Where benefits are transferred from one occupational pension scheme to another without consent, the actuary must provide a certificate that the benefits under the new scheme will be broadly no less favourable than those provided under the old scheme. The judge ruled that, in deciding whether to provide a certificate, the actuary could not allow benefits to be reduced in return for additional security. The Court's technical approach destroyed a creative way of saving a scheme in difficulty without further burdening the PPF. The Regulator and the PPF later agreed to an alternative approach by which consenting members transferred to another scheme with less generous benefits, and the remaining members ended up in the PPF.

RPI v CPI

One option open to some pension schemes for reducing liabilities is to switch the index used for revaluation and indexation from the Retail Prices Index, which has become increasingly inappropriate, to the Consumer Prices Index. Unfortunately, there is no overriding legislation allowing all DB pension schemes to make the switch. The switch can only be made if the scheme rules allow this. The wording in many scheme rules provides that a switch can only be made where CPI is a 'replacement' for RPI. In the *Barnardo* case,³² the Court of Appeal ruled that trustees can only act on this wording if a government body replaces RPI with CPI – a replacement by the trustees is not enough. There is still some hope for employers, though. The Court of Appeal decision was by majority only, and the dissenting judge was a senior figure. And a pensions Green Paper, expected in 2017, will deal with DB funding, and schemes may be given the option to reduce deficits by decreasing inflation protection for members.

Sex equality

There has always been a problem squaring pensions law with EU anti-discrimination law. The reason is quite simple: unlike most employee benefits, where the benefit is paid as the worker earns it, pensions are built up over a long time. The problem then arises whether unequal benefits can be paid now because of discrimination that applied at the time the benefit was built up. This is why it has taken the courts and lawyers such a long time to grapple with equal normal retirement dates for men and women following the Barber judgment in 1990. Although the law relating to sex discrimination between men and women is now pretty much settled, we are still struggling to apply laws dealing with sexual orientation and gender-transitioning to pension schemes.

²⁸ *Bett Homes Ltd v Wood and others* [2016] CSIH 26. A similar judgment was handed down in the English case of *Safeway Ltd v Newton* [2016] EWHC 377 (Ch).

²⁹ *Alexander and others v Pattison & Sim* [2015] CSIH 96.

³⁰ *Saga Group Ltd v Paul* (unreported, 28 July 2016); it followed the suggestion made in *The Girls' Day School Trust v GDST Pension Trustees Ltd* [2016] EWHC 1254 (Ch).

³¹ *Pollock v Reed (Halcrow Pension Scheme)* [2016] 041 PBLR (043) [2015] EWHC 3685 (Ch).

³² *Barnardo's v Buckinghamshire* [2016] EWCA Civ 1064

There have been two cases where members have complained about discrimination resulting from their inability to enter a same-sex marriage earlier. In the case of *Aldeguer Tomás v Spain* [2016] ECHR 202, death benefits were only payable to spouses, but at the time, same-sex marriage was unlawful. The court found against the individual on the basis that some heterosexual couples at that time also could not have married, since they could not have divorced a previous spouse. In the case of *Dr David L Parris v Trinity College Dublin* (Case C-443/15), the individual was unable to marry his same-sex partner until he was 63, because same-sex marriage was not then possible. The scheme rules, however, only recognised marriages contracted before the member's 60th birthday. The ECJ ruled that the age 60 restriction did not amount to indirect discrimination on the grounds of sexual orientation or age. The EU could not determine how member states chose to recognise marriage or civil partnerships, and EU law allowed pension benefits to be made conditional upon a person reaching a certain age.

Conclusions

The Courts and the judiciary have delivered a broadly improved service to members, trustees and employers in the last 12 months, with a series of pragmatic and cost-effective solutions. The leading judges have commented on the complexity of court rules, which is apparently being looked at, but the removal in many cases of the need to have expensively represented 'representative beneficiaries' acting as a form of devil's advocate, is reducing costs.

Where are we now: political pressures

The BHS affair v the Maxwell affair

The House of Commons Work and Pensions Select Committee in mid-2016 created headlines, and concluded with an *ad hominem* attack on Sir Philip Green for the mismanagement of the scheme³³. It also provoked intemperate and populist public criticism, even amongst the more sober commentators³⁴.

On reflection, such conclusions, which are being used to suggest the need for yet further legislation, seem misplaced. It is always possible with hindsight to determine that commercial decisions should have been different. But in relation to the management of the pension scheme, there were genuinely independent trustees; the scheme had been properly invested; the dividends to the shareholders had been paid out of profits when there were profits; there was proper governance; and the company was subsidised to keep it going when to more commercial eyes it should have been closed several years earlier. Even when closed, the scheme, in nominal deficit, might have been run adequately in zombie state if invested for growth. It also paid annual premiums to the Pension Protection Fund to protect the interests of members. But the regulatory framework, encouraging low yielding assets, and the financial depression, artificially creating a surplus because the liabilities were measured according to interest rates, created a problem where there might not have been one. The suggestion that the company should have paid higher contributions was clearly impractical if not impossible.

The furore recalls, that following the Maxwell episode a quarter of a century earlier, the report that followed that episode led to the creation of an immense body of law, partly, if not wholly, based on a misapprehension³⁵. The Maxwell pensions failure had not been due to a failure of pension fund governance, but of a regulatory framework which had just been introduced and which gave false comfort to investors. When the investment manager failed, so did the pension funds. The inappropriate legal framework that emerged did great damage to pension fund arrangements for employees.

It might be a double tragedy if a similar, false, premise leads to yet further damage to scheme members.

TATA

The BHS case can be contrasted neatly with the British Steel/Tata case, where government attempted to intervene by seeking to change the law to reduce pension liabilities of a plan sponsor. If similar public intervention had been applied to the BHS case, the outcome would no doubt have been rather different. In the end it was concluded that such intervention was probably not possible, and that even if possible, the unintended consequences for pension liabilities as a whole would have disadvantaged many members. It is clearly not possible to disentangle pensions from politics, but in many cases political intervention does not always have a beneficial conclusion for scheme members³⁶.

³³ *Defined benefit pension schemes*, Sixth report of Session 2016-17, House of Commons Work and Pensions Committee, HC 55, 21 December 2016.

³⁴ See eg. *Beyond dreams of avarice*, leading article, [2016] (August 30) *The Times*

³⁵ *Pension Law Reform: Report of the Pension Law Review Committee* (The Goode Report), CM 2342, HMSO, September 1993; Pensions Act 1995. Also see David Pannick, *BHS Opinion*, [2016] 103 PBLR (052).

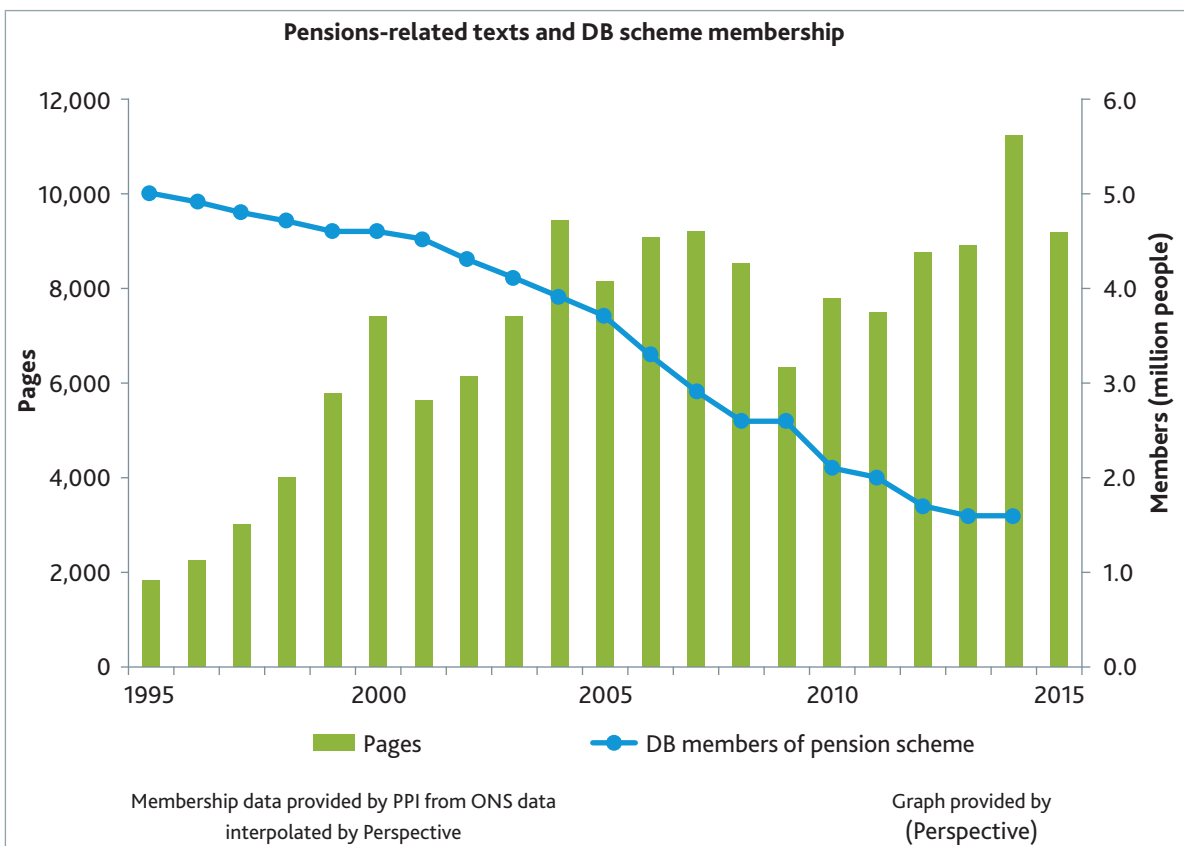
³⁶ *British Steel Pension Scheme: Public Consultation*, Department for Work and Pensions, 26 May 2016. To date no government response to the consultation has been made, see *Hansard, Written question No 51468* by Stephen Kinnock made on 1 November 2016, answered on 9 November 2016.

Conclusion

The current position of pension law is in a state of flux.

It is clear that yet further **legislation** appears to be on the way following recommendations from the Work and Pensions Select Committee, the forthcoming Pension Schemes Act 2017, the forthcoming Finance Act 2017, the Savings (Government Contributions) Act 2017, and proposals from the Department for Work and Pensions and the Treasury. The industry will need to respond robustly if it concludes, as no doubt it will, that there is no proven or evidence-based case for more legislation. Table 1 below shows the immense quantity of legislation increasing (to now around 160,000 pages) at a time when the membership of defined benefit schemes (to which most legislation relates) is declining.

Table 1



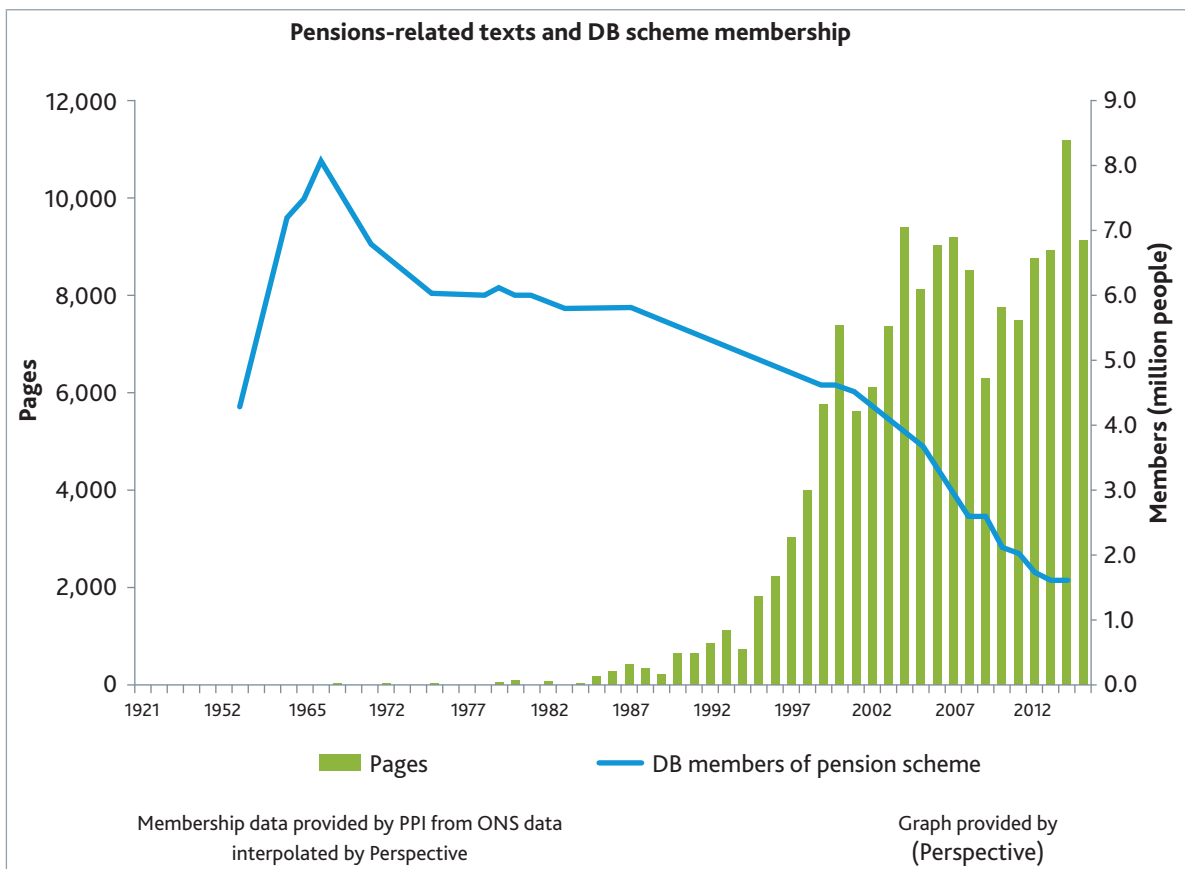
The position of the **Courts** is a complex story. Senior judges are uncomfortable with the procedural excesses, the length of the rulebook, and the costs of coming before the courts. On the other hand, in relation to pensions, the length of judgments seems to be decreasing, and there appears to be a welcome trend towards simplification of procedures and approving pragmatic solutions to otherwise intractable problems.

In relation to **regulation**, the picture is unsatisfactory. The Financial Conduct Authority appears to be creating a material and excessive layer of regulation (though not protection) following the introduction of pension freedoms, designed to control costs and improve competitive forces. It is, however, broadly ad hoc, and lacks integration with other regulatory initiatives. It is also unlikely to improve outcomes for members and others, given the inevitable unintended consequences.

Meanwhile, the Pensions Regulator is currently undertaking its own internal review, possibly prompted by bruising encounters in 2016 with the select committees looking at the BHS story.

Table 2 similarly indicates the extraordinary growth in regulation since the mid-80s, indicating that pension schemes flourished under a light touch self-regulatory system. It must be hoped that the Pensions Regulator's review will conclude, amongst other things, that there needs to be radical reduction in regulatory overheads to improve outcomes for members. Possible reforms expected from that review might include:

Table 2

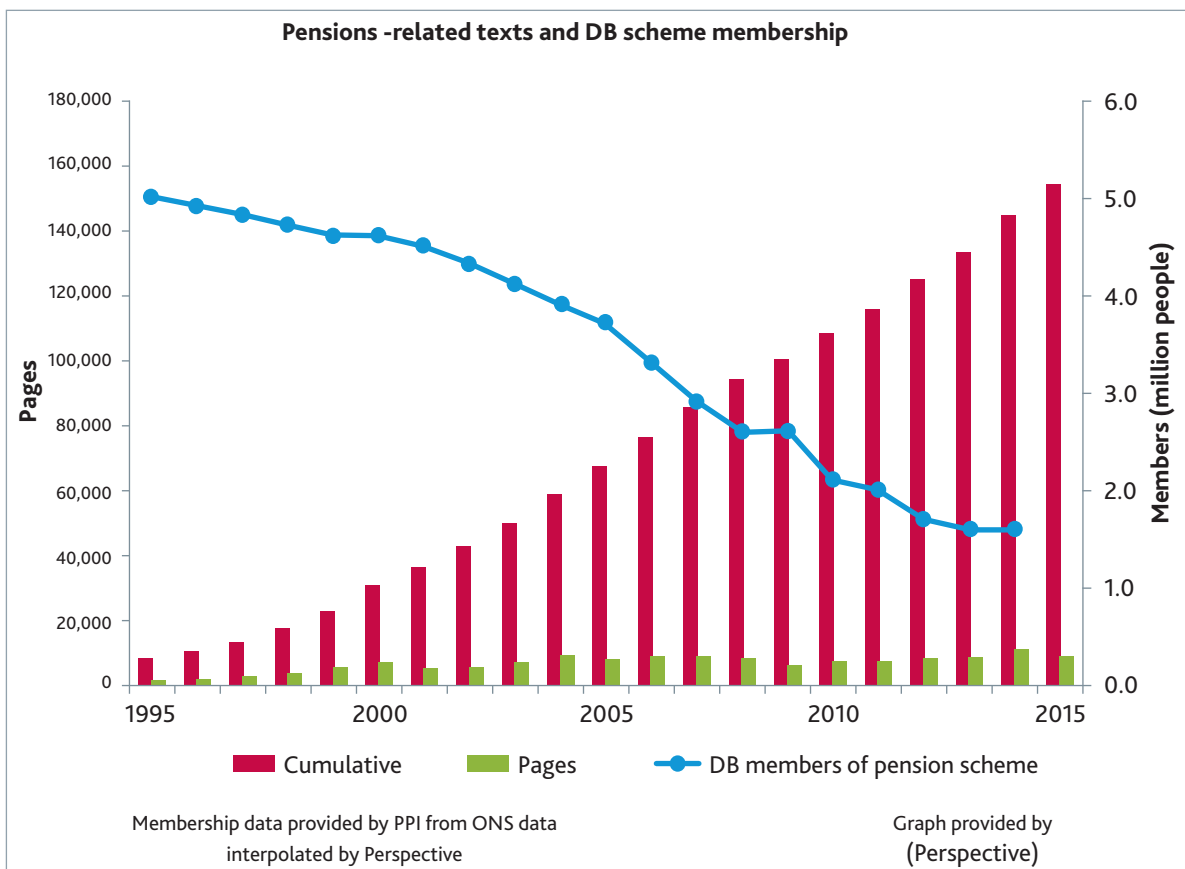


Reviewing its brief: most regulators are there as a way of allowing government to transfer liability for failure away from central government. The Pensions Regulator (and its predecessors) were established as a political response to some perceived failures in the past, and its major constituency is the consumer, ie. the member. But it also protects the PPF, which may give rise to conflicts of interest, and it has to maintain the commercial survival of the plan sponsor. There is no point in having a strong pension scheme if its members lose their jobs. There is therefore rarely an ideal solution to consumer protection. A regulator has to make value judgments, which with hindsight will invariably be found to have been sub-optimal. Experience suggests that a regulator can make judgments little better than trustees or sponsors can – and probably rather worse, and certainly more expensively. The Pensions Regulator was created as a response to political circumstances of a quarter of a century ago, and it may now be past its sell-by date. The further responsibilities imposed on it over the years might be transferred elsewhere or even discontinued. It may be time, therefore, to conclude that the normal checks and balances imposed by the constitutions of the scheme, and with the admixture of trust law, criminal law, company law and tort law, are sufficient. The Regulator might find a more useful role as a branch of the Courts, but operating much more quickly and cheaply.

Drawing back from imposing fresh liabilities on trustees: the Pensions Regulator has become concerned about the quality and experience of pension scheme trustees. Some commentators claim that some trustees are not as capable as they might be. What is almost certainly true is that trustee training is better done by commercial providers, or internally by advisers, that bad trustees are not going to be improved by nagging them, and that there are in any area of human activity bad lawyers, bad doctors, bad cricketers and, dare it be said, bad regulators. In fact trustees are subject to the law of trusts which imposes a greater personal liability than applies to regulators and their board members, who are predominantly immune from personal liability. It is probably best if trustees were left alone to be governed by existing fiduciary obligations.

Drawing back from forcing schemes to consolidate: consolidation of schemes seems to be a current regulatory obsession. In principle, it is clearly inefficient to have thousands of schemes, with the costs of administration, investment management and the fees of lawyers, accountants, actuaries, investment consultants, covenant reviewers and other advisers as well as all the compliance and governance costs. The public sector is moving gradually towards consolidation, and the Netherlands has shrunk several thousand schemes into a few hundred. But the Dutch experience has not been a happy one, and anyone who has had to deal with the oligopoly of banks, or accountants, or broadband providers or HMRC, knows that the customer experience of dealing with large organisations can be worse than dealing with small ones. While having fewer schemes to manage sounds good for a regulator, it is almost certainly beyond its remit to interfere with the commercial realities of life.

Table 3



Reforming its press management: recent press releases of the FCA and TPR sound more like those of the incoming President of the United States than the balanced, neutral, professional responses of a quasi-judicial operation. Judges, for example, do not proclaim (in public at least) that they have been upheld by the Court of Appeal; it would be undignified if nothing else. The only exception seems to be that of the Pensions Ombudsman who will (very rarely) intervene to explain why it has come to a particular decision in a particular case. It might be time to repurpose the press office, and give it an ethical code of practice.

Virtual abandonment of penalties: in theory, penalising people for failure might improve the behaviour of trustees and employers and send a message to others. Recent moral philosophers have shown, however, that imposing penalties usually has a counter-productive outcome, although it may serve a function of a supervisor being seen to do something. It is almost certainly time to review policy on penalties, especially in relation to technical breaches of auto-enrolment, which risk criminalising a large number of very small employers,

Improved internal training: most in the professional world benefit from, or are compelled, to take training. Training of regulators often involves being trained in the mechanics of the field they are operating in – but less often involves the softer skills, such as dealing with the public or clients or their regulated subjects. Even rarer is training in the philosophy and techniques of regulation, which is a craft *sui generis*. If even voluntary trustees need training, it seems not unreasonable that officials with significant powers in the FCA and TPR should be professionalised.

Reduction in size: it is now costing around £80m a year to run the Pensions Regulator. Some of that may fall once auto-enrolment is settled, but it is still a great deal. It is hard to prove that it is cost-effective; it clearly involves over-engineering and it costs the industry perhaps several times that in responding to regulatory demands. If the Pensions Regulator reduced its operation, for example, to a third of its size (HMRC has taken a 40% cut in manpower over the last few years), it is unlikely that would result in reduced consumer protection. Many of its publications and much of its information gathering could be dispensed with.

Improving relationships with the industry: both main regulators concentrate more on process than outcomes, not unreasonably, given their brief and public and political pressures. The FCA deals mostly with commercial organisations, and does not see relations with its industry as a priority. The Pensions Regulator is, however, dealing with pensions that have been established on a not-for-profit basis, and while its relationships with the industry have fluctuated, they are not now at their best. Much of the reason is tone (which varies at different managerial levels). The HMRC charter, for example, states that HMRC will regard its taxpayers as innocent until proven guilty, and that it will be proportionate in its dealings with citizens. All partners make mistakes and, provided the errors are not malign in intent, a regulator should apply industrial quantities of mercy. The sanctimonious and admonitory tone often expressed in recent press releases by the Pensions Regulator simply irritates the law-abiding.

Improving transparency and user groups: corporates, especially corporates with a monopoly, know that unless they organise proper feedback, they will not survive in their current form. They take soundings, use mystery shoppers, and organise user groups. Regulators, with a parallel monopoly, face similar challenges. The current sampling of user experience which informs the board of the Regulator is flawed, since most of it involves people who in practice have little day-to-day strategic involvement. The Regulator has already started to reach out to the regulated community, which is clearly to be welcomed.

Extending discretions and delegation: all regulators are subject to intense political pressures, but they need to have sufficient self-confidence not to grandstand, nor to become involved in areas outside their core remit (eg. in advising on investments). There is now a great deal of extra trustee governance and paperwork demanded, but it is hard to see whether there is any added benefit for members from all that governance.

Revising its role: finally, if it is to downsize, the Regulator could find a role in providing a quick and easy rectification service. There have been two examples of positive help by TPR in the Halcrow and the DCT Civil Engineering Staff Pension Fund cases. Meanwhile, legal expenses seem high, perhaps because there is not enough mediation or alternative dispute resolution. In the meantime, helping pension schemes resolve their problems by providing safe harbours would be a more useful and cost-effective service to the entire industry.

Reducing paperwork: the Government is committed to OITO in rule-making and the Pensions Regulator and the Financial Conduct Authority should comply with government policy³⁷.

³⁷ 30percentclub.org; C Parker, *The compliance trap: the moral message in responsive regulatory enforcement*, [2006] 49(3) Law & Society Review 591; David Hume, *Essays: Moral, Political and Literary*, 1742, cited in Samuel Bowles, *The Moral Economy*, Yale, University Press, 2016: Political writers have established it as a maxim, that in contriving any system of government... every man ought to be supposed to be a knave and to have no other end, in all his actions, than his private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, cooperate to public good... It is, therefore, a just political maxim, that every man must be supposed a knave, though at the same time, it appears somewhat strange that a maxim should be true in politics, which is false in fact; Deregulation Act 2015; *Getting government off your back: our commitment to cutting red tape*, speech by Sajid Javid, Secretary of State, Department for Business, Innovation & Skills, 3 March 2016 at BCC annual conference, Q&A conference centre, London; HMRC, Charter; Legislative and Regulatory Reform Act 2006 s21; National Audit Office, *Controls on regulation*, 28 September 2012; National Audit Office, *Regulatory Reform*, 15 October 2010; National Audit Office, *Using alternatives to regulation to achieve policy objectives*, 30 June 2014; Samuel Bowles, *The Moral Economy: Why Good Incentives Are No Substitute for Good Citizens*, Yale University Press, 2016; The Regulators' Code, Department for Business Innovation and Skills, April 2014.

Appendices

1. Note on Pendragon's methodology
2. Regulations in 2016 (excluding scheme specific regulations)
3. Pensions legal developments
4. Cases reported in 2016



Appendix 1

Note on Pendragon's methodology

The number of pages of texts quoted in this paper and shown in its charts was calculated by Pendragon, from the archive created to produce Perspective, the electronic repository of legal and regulatory texts published for the benefit of the UK pensions industry, the Government and the regulators.

All the content is held and published in electronic format. Pendragon calculated the number of pages by electronically counting the number of words in each document as at the date the document was published and then dividing that number by the typical number of words on a page of legislation. The number of words used is the number of words appearing on a typical page of the Queens' Printer copy of legislation, which number was found by averaging over a number of pages.

The page numbers for each year is the total for that year of the pages of texts in the following Perspective collections: Acts and Bills, Statutory Instruments and Drafts, Law Reports, Pensions Ombudsman's determinations, Regulatory Texts published by regulators, government departments and others, Reports and Consultation Documents. Not all the documents on Perspective are included; for example, Pendragon has not included materials issuing from the Houses of Parliament or EU legislation.

Work on Perspective started in 1996, so in relation to the period before then the system covered all that was still in force and that which, while not being in force, was still relevant. About 8,200 pages were published before Pendragon started operating, about one twentieth of the total today.

Appendix 2

Compiled from information supplied by Pendragon

Legislation: primary

2016	2015
Bank of England and Financial Services Act 201	Finance Act 2015
Bankruptcy (Scotland) Act 2016	Finance (No 2) Act 2015
Enterprise Act 2016	Pension Schemes Act 2015
Finance Act	Small Business, Enterprise and Employment Act 2015

Legislation: secondary

2016
SI 2016/1241 – The Local Government Pension Scheme (Wandsworth and Richmond Fund Merger) Regulations 2016
SI 2016/1141 – The State Pension Revaluation for Transitional Pensions Order 2016
SI 2016/1102 – The Occupational Pensions (Revaluation) Order 2016
SI 2016/1079 – The Financial Services and Markets Act 2000 (Early Exit Pension Charges) Regulations 2016
SI 2016/1036 – The Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) (Amendment) Regulations 2016
SI 2016/1005 – The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016
SI 2016/946 – The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016
SI 2016/931 – The Pensions Act 2014 (Consequential Amendments) Order 2016
SI 2016/878 – The Firefighters' Pension Scheme (Amendment and Transitional Provisions) (England) Order 2016
SI 2016/776 – The Pensions Act 2004 (Code of Practice) (Governance and administration of occupational trust-based schemes providing money purchase benefits) Appointed Day Order 2016
SI 2016/719 – The Employers' Duties (Implementation) (Amendment) Regulations 2016
SI 2016/627 – The Bank of England and Financial Services Act 2016 (Commencement No 3) Regulations 2016
SI 2016/590 – The Financial Services and Markets Act 2000 (Pensions Guidance) Regulations 2016
SI 2016/579 – The Bank of England and Financial Services Act 2016 (Commencement No 2) Regulations 2016
SI 2016/438 – The Public Service Pensions Revaluation (Prices) Order 2016
SI 2016/435 – The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2016
SI 2016/427 – The Occupational Pension Schemes (Scheme Administration) (Amendment) Regulations 2016
SI 2016/408 – The Pensions Act 2014 (Transitional and Transitory Provisions) Order 2016
SI 2016/343 – The Social Security (Contributions) (Limits and Thresholds Amendments and National Insurance Funds Payments) Regulations 2016
SI 2016/326 – The Civil Service (Other Crown Servants) Pension Scheme Regulations 2016
SI 2016/311 – The Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendments) Regulations 2016
SI 2016/308 – The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2016

2016

- SI 2016/304 – The Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2016
- SI 2016/294 – The Pension Protection Fund and Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2016
- SI 2016/289 – The Pension Sharing (Miscellaneous Amendments) Regulations 2016
- SI 2016/252 – The Pensions Act 2014 (Contributions Equivalent Premium) (Consequential Provision) and (Savings) (Amendment) Order 2016
- SI 2016/245 – The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2016
- SI 2016/240 – The State Pension (Amendment) (No 2) Regulations 2016
- SI 2016/231 – The Occupational and Personal Pension Schemes (Modification of Schemes – Miscellaneous Amendments) Regulations 2016
- SI 2016/229 – The Occupational Pension Schemes (Requirement to Obtain Audited Accounts and a Statement from the Auditor) (Amendment) Regulations 2016
- SI 2016/227 – The State Pension (Amendment) Regulations 2016
- SI 2016/224 – The Pensions Act 2014 (Consequential and Supplementary Amendments) Order 2016
- SI 2016/205 – The Social Security Revaluation of Earnings Factors Order 2016
- SI 2016/203 – The Pensions Act 2014 (Commencement No 8) Order 2016
- SI 2016/200 – The Pensions Act 2014 (Abolition of Contracting-out for Salary Related Pension Schemes) (Consequential Amendments and Savings) Order 2016
- SI 2016/199 – The State Pension and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2016
- SI 2016/95 – The Public Service Pensions Revaluation (Earnings) Order 2016
- SI 2016/82 – The Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling and Compensation Cap) Order 2016
- SI 2016/39 – The Pensions Act 2014 (Pension Sharing on Divorce etc.) (Transitional Provision) Order 2016

2015

- SI 2015/2058 – The Pensions Act 2014 (Commencement No 7) and (Savings) (Amendment) Order 2015
- SI 2015/2057 – The Police Pensions and Police (Injury Benefit) (Amendment) Regulations 2015
- SI 2015/2013 – The Transfer of Functions (Pensions Guidance) Order 2015
- SI 2015/1985 – The Pensions Act 2014 (Consequential, Supplementary and Incidental Amendments) Order 2015
- SI 2015/1916 – The Occupational Pensions (Revaluation) Order 2015
- SI 2015/1851 – The Pension Schemes Act 2015 (Commencement No 1) Regulations 2015
- SI 2015/1810 – The Scottish Rate of Income Tax (Consequential Amendments) Order 2015
- SI 2015/1677 – The Occupational Pension Schemes (Schemes that were Contracted-out) (No 2) Regulations 2015
- SI 2015/1670 – The Pensions Act 2014 (Commencement No 6) Order 2015
- SI 2015/1614 – The Unfunded Public Service Defined Benefits Schemes (Transfers) Regulations 2015
- SI 2015/1529 – The State Pension Credit (Amendment) Regulations 2015
- SI 2015/1518 – The Registered Pension Schemes (Audited Accounts) (Specified Persons) (Amendment) Regulations 2015
- SI 2015/1502 – The Pensions Act 2014 (Savings) Order 2015
- SI 2015/1483 – The Public Service Pensions Act 2013 (Judicial Offices) (Amendment) Order 2015
- SI 2015/1475 – The Pensions Act 2014 (Commencement No 5) Order 2015

2015

SI 2015/1455 – The Registered Pension Schemes (Provision of Information) (Amendment No 2) Regulations 2015

SI 2015/1454 – The Registered Pension Schemes (Transfer of Sums and Assets) (Amendment No 2) Regulations 2015

SI 2015/1452 – The Occupational Pension Schemes (Schemes that were Contracted-out) Regulations 2015

SI 2015/1016 – The Firefighters’ Pension Scheme (Wales) (Transitional and Consequential Provisions) Regulations 2015

SI 2015/1013 – The Firefighters’ Compensation Scheme and Pension Scheme (Wales) (Amendment) Order 2015

SI 2015/892 – The Funded Public Service Pension Schemes (Reduction of Cash Equivalents) Regulations 2015

SI 2015/889 – The Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2015

SI 2015/879 – The Occupational Pension Schemes (Charges and Governance) Regulations 2015

SI 2015/871 – The Firefighters’ Pension Scheme (England) (Amendment) Regulations 2015

SI 2015/848 – The Firefighters’ Pension Scheme (Wales) (Consequential Provisions) Regulations 2015

SI 2015/769 – The Public Service Pensions Revaluation Order 2015

SI 2015/755 – The Local Government Pension Scheme (Amendment) Regulations 2015

SI 2015/742 – The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015

SI 2015/732 – The Financial Services and Markets Act 2000 (Regulated Activities) (Transitional Provisions) Order 2015

SI 2015/731 – The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2015

SI 2015/676 – The Pensions Act 2011 (Commencement No 6) Order 2015

SI 2015/673 – The Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2015

SI 2015/671 – The Pensions Increase (Review) Order 2015

SI 2015/667 – The Registered Pension Schemes (Splitting of Schemes) (Amendment) Regulations 2015

SI 2015/633 – The Registered Pension Schemes (Transfer of Sums and Assets) (Amendment) Regulations 2015

SI 2015/622 – The Firefighters’ Pension Scheme (Wales) Regulations 2015

SI 2015/606 – The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2015

SI 2015/602 – The Public Service (Civil Servants and Others) Pensions (Amendment) Regulations 2015

SI 2015/602 – The Public Service (Civil Servants and Others) Pensions (Amendment) Regulations 2015

SI 2015/594 – The Teachers’ Superannuation (Additional Voluntary Contributions) (Amendment) Regulations 2015

SI 2015/592 – The Teachers’ Pension Scheme (Amendment) Regulations 2015

SI 2015/590 – The Firefighters’ Compensation Scheme and Pension Scheme (England) (Amendment) Order 2015

SI 2015/589 – The Firefighters’ Pension Scheme (England) (Transitional and Consequential Provisions) Regulations 2015

SI 2015/581 – The National Health Service Pension Scheme (Amendment) Regulations 2015

SI 2015/580 – The Public Service Pensions Act 2013 (Judicial Offices) Order 2015

SI 2015/579 – The Firefighters’ Pension Scheme (Amendment) (England) Order 2015

SI 2015/577 – The Social Security (Contributions) (Limits and Thresholds) (Amendment) Regulations 2015

SI 2015/547 – The Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015

SI 2015/543 – The Social Security (Contributions) (Amendment) Regulations 2015

SI 2015/501 – The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2015

SI 2015/501 – The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2015

SI 2015/493 – The Occupational Pension Schemes (Consequential and Miscellaneous Amendments) Regulations 2015

2015

- SI 2015/489 – The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (Pensions Guidance Exclusions) Order 2015
- SI 2015/482 – The Occupational and Personal Pension Schemes (Disclosure of Information) (Amendment) Regulations 2015
- SI 2015/470 – The Guaranteed Minimum Pensions Increase Order 2015
- SI 2015/468 – The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2015
- SI 2015/466 – The Armed Forces Pension Scheme and Early Departure Payments Scheme (Amendment) Regulations 2015
- SI 2015/465 – The Firefighters' Pension Scheme (Amendment) (Governance) Regulations 2015
- SI 2015/456 – The Pensions Act 2004 (Code of Practice) (Governance and Administration of Public Service Pension Schemes) Appointed Day Order 2015
- SI 2015/445 – The Police Pensions Regulations 2015
- SI 2015/436 – The Teachers' Pension Scheme (Consequential Provisions) Regulations 2015
- SI 2015/432 – The National Health Service Pension Scheme (Consequential Provisions) Regulations 2015
- SI 2015/390 – The Armed Forces Pension (Consequential Provisions) Regulations 2015
- SI 2015/372 – The Public Service (Civil Servants and Others) Pensions (Consequential and Amendment) Regulations 2015
- SI 2015/370 – The Police Pensions (Consequential Provisions) Regulations 2015
- SI 2015/319 – The Firefighters' Pension Scheme (England) (Consequential Provisions) Regulations 2015
- SI 2015/187 – The Social Security Revaluation of Earnings Factors Order 2015
- SI 2015/186 – The Social Security Pensions (Low Earnings Threshold) Order 2015
- SI 2015/185 – The Social Security Pensions (Flat Rate Accrual Amount) Order 2015
- SI 2015/178 – The National Employment Savings Trust (Amendment) Order 2015
- SI 2015/173 – The State Pension Regulations 2015
- SI 2015/134 – The Pensions Act 2014 (Commencement No 4) Order 2015
- SI 2015/118 – The Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations 2015
- SI 2015/96 – The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015
- SI 2015/95 – The National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015
- SI 2015/94 – The National Health Service Pension Scheme Regulations 2015
- SI 2015/84 – The Occupational Pension Schemes (Levies) (Amendment) Regulations 2015
- SI 2015/80 – The Finance Act 2004 (Registered Pension Schemes and Annual Allowance Charge) (Amendment) Order 2015
- SI 2015/66 – The Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling) Order 2015 (revoked)
- SI 2015/57 – The Local Government Pension Scheme (Amendment) (Governance) Regulations 2015
- SI 2015/4 – The Public Service Pensions Act 2013 (Commencement No 6, Saving Provision and Amendment) Order 2015

Appendix 3

Pensions legal developments in 2016

This document reflects the position in December 2016

Part A: final position is clear

Development	Ban on member-borne commission charges
Details	Regulations ban new member-borne commission in occupational schemes that provide DC benefits and are qualifying schemes for auto-enrolment. The ban also covers AVCs where these are used to provide money purchase benefits, as well as decumulation products offered by qualifying schemes. The DWP has issued guidance for service providers and trustees. The Pension Schemes Bill will ban existing commission arrangements.
Timing	These new rules apply from April 2016 for new commission arrangements.
Potential impact	<i>Providers will need to check which of their schemes are used as qualifying schemes for auto-enrolment and ensure they do not set up any new member-borne commission arrangements.</i>
Development	Financial Services Compensation Scheme eligibility
Details	The FCA has changed the rules relating to the ability of trustees to claim under the FSCS. Trustees may have a claim if, for example, a financial services firm holds scheme money or assets which it is unable to return. The change means that trustees of schemes with large employers would become able to claim on the FSCS where the benefits are money purchase benefits – so consumers would have the same protection irrespective of the employer's size.
Timing	FCA rules changed with effect from June 2016.
Potential impact	<i>This change will benefit master trusts where it can be difficult or impossible to ascertain which parts of a member's fund relate to which employer.</i>
Development	Corporate trustees – 'significant control' register
Details	Companies, including corporate trustees, will need to disclose publicly the individuals and entities which have 'significant control' over them. In the case of pension trustees, this is likely to be the principal employer, participating employers or the trustee directors themselves.
Timing	Requirements apply from 6 April 2016.
Potential impact	<i>Detailed guidance from the Department for Business, Innovation and Skills is available on how to comply.</i>
Development	High earners – tapered annual allowance
Details	From April 2016, the standard annual allowance will be tapered for those with adjusted annual incomes in excess of £150,000. Anti-avoidance measures will apply. For defined benefit schemes, pension input periods will be aligned with the tax year.
Timing	Requirements apply from 6 April 2016.
Potential impact	<i>Transitional arrangements for the realignment of pension input periods apply to existing schemes.</i>

Development	Scheme accounts
Details	Regulations have been amended to simplify the rules on investment disclosure. Also, multi-employer schemes with at least 20 employers will not have to obtain an auditor's statement in respect of payment of scheme contributions.
Timing	Amended rules apply from 6 April 2016.
Potential impact	<i>Most of the detailed investment disclosure information previously set out in the regulations has been removed by these changes.</i>

Part B: Position still subject to

Development	Quality standards in workplace pension schemes
Details	<p>Regulations intended to simplify the governance requirements for occupational DC schemes were brought into force in April 2016. Multi-employer group schemes were excluded from additional governance requirements applying to master trusts and industry-wide schemes. The Pensions Regulator's new DC final Code, which is now in force, alongside supporting 'how to' guidance. Trustees need to report on compliance with new DC governance requirements (for scheme years ending on/after 6 July 2015).</p> <p>The Regulator has also been calling for evidence on how to raise standards of scheme trusteeship – in particular whether there should be qualifications or minimum standards or a CPD framework for professional trustees/trustee chairs.</p> <p>The FCA has been consulting on transaction cost disclosure in DC schemes. Asset managers will have new disclosure duties in respect of both occupational and personal pension schemes.</p>
Timing	<p>The Pensions Regulator's DC Code (and relevant supporting guidance) came into force in July 2016. The DWP is aiming to set out the next steps for its future work on deregulation and member protection "in the coming months".</p> <p>The deadline for responses to the FCA's transaction cost disclosure consultation is 4 January 2017.</p>
Potential impact	<i>The Regulator's DC Code sets out its general expectations for trust-based schemes, but its general approach is not prescriptive. The supporting guidance gives practical examples of how schemes can meet the Code's standards.</i>

Development	Regulation of master trusts
Details	The Pension Schemes Bill contains provisions to regulate master trusts, which will need to be authorised and regulated by the Pensions Regulator. Master trusts will also need a continuity strategy to protect members if their scheme fails. Much of the detail is expected to be set out in (as yet unpublished) regulations.
Timing	Once the provisions of the Pension Schemes Bill which regulate master trusts come into law, existing master trusts will have a six-month grace period to comply.
Potential impact	<i>For master trusts, there is still a lot of detail on the new regulatory regime yet to come, but employers looking to sign up to a master trust now are likely to start asking potential providers what they are doing to comply with the new measures.</i>

Development	PPF long-service compensation cap
Details	The DWP is consulting on changes to implement the long-service compensation cap which will give higher Pension Protection Fund (PPF) compensation to members with over 20 years' service.
Timing	The long-awaited cap (first announced in 2012) is due to take effect in April 2017.
Potential impact	<i>The cap will not be backdated – those currently receiving compensation will get an increase from the date the legislation takes effect.</i>

Development	Access to defined contribution pensions
Details	<p>Guidance and advice</p> <p>The Treasury intends to consult on setting up a single body to give the public guidance on debt, money and pension saving. This replaces its original plan to combine the Pensions Advisory Service and Pension Wise, whilst preserving a separate money guidance service. The Government is also consulting on allowing savers to withdraw cash tax-free from DC pots to pay for advice on retirement options. The tax exemption for employer-funded financial advice will increase from £150 to £500 in 2017. The Government is also seeking evidence on the advice requirement for members with safeguarded benefits wishing to transfer to a scheme overseas.</p> <p>Risk warnings</p> <p>Amended Regulations require trustees to issue risk warnings in respect of the potential transfer of safeguarded flexible benefits. New FCA rules regulate these pension transfers from personal pensions. The Pensions Regulator has published guidance to help providers identify whether pension benefits with a guarantee fall under the scope of the advice requirement. Regulations simplifying the valuation process for guaranteed annuity rates were issued for consultation in September 2016. The FCA has confirmed it will introduce some flexibility in respect of retirement risk warnings.</p> <p>Cap on early exit charges</p> <p>The FCA and the DWP are consulting on implementing a cap on early exit charges for those looking to access pension freedoms. The FCA is working to implement this for contract-based schemes by March 2017 and a cap for trust-based schemes will be included in the new Pension Schemes Bill.</p> <p>New money purchase annual allowance</p> <p>The Government is consulting on reducing the annual tax-free allowance on new contributions to pension schemes for members who have already accessed their benefits flexibly. It proposes to reduce the allowance from £10,000 to £4,000 from April 2017 in order to prevent "inappropriate double tax relief". At the same time the, maximum that can be saved into ISAs in any one tax year will be increased from £15,240 to £20,000.</p> <p>Secondary annuity market</p> <p>HM Treasury has announced it will not take forward plans to introduce a secondary annuities market, which was due to open in April 2017. The plans would have enabled individuals to sell annuities in order to take advantage of the new pension flexibilities, subject to agreement from their annuity provider. The Treasury claims that the consumer protections required could undermine the development of the market and believes that there are insufficient purchasers to create a competitive market – it could not guarantee that consumers would get good value for money.</p> <p>DC transfers without consent</p> <p>In 2017, the DWP will formally consult on new legislation for transfers of defined contribution benefits without consent.</p>
Timing	<p>Some of the FCA's new pensions rules will not take effect until April 2017 to give firms more time to implement them.</p> <p>DWP and FCA consultations on an early exit charge cap closed August 2016. The cap is expected to take effect March 2017.</p> <p>Legislation covering DC transfers without consent is expected to take effect in April 2018.</p>
Potential impact	<i>Wide ranging in terms of product development, administration systems and processes and procedures.</i>

Development	Reforming pensions tax relief
Details	<p>Lifetime ISA</p> <p>Savers under 40 will be able to invest up to £4,000 each year up to age 50 in a new flexible Lifetime ISA (LISA) and receive an additional 25% bonus from the Government. Funds can be used to buy a first home or withdrawn if the saver is terminally ill or from age 60 for use in retirement without losing the bonus element.</p> <p>Bridging pensions</p> <p>New regulations (which apply retrospectively) will align tax legislation with pensions law and the new single-tier State Pension, to enable bridging pensions to be reduced once a member starts to receive his State Pension without breaching HMRC rules.</p> <p>Information requirements for lump sum death benefits paid to trusts</p> <p>HMRC has been consulting on new regulations requiring administrators and trustees to pass on information needed by the beneficiary of taxable lump sum death benefits in order to claim tax refunds – where the death benefits are paid to trusts.</p>
Timing	<p>The new Lifetime ISA is expected to be available from 6 April 2017. The framework Bill and updated LISA design note were issued in September 2016 although the detail will be in regulations (not yet published). The FCA is consulting (until January 2017) on changes to its handbook to reflect the LISA, and intends to publish final rules and guidance in March 2017.</p> <p>Bridging pensions provisions will apply retrospectively from 6 April 2016.</p>
Potential impact	<i>The flexibility of the Lifetime ISA will appeal to many – and will bring forward some tax receipts for the Treasury. This is effectively a voluntary change to the pensions tax system which avoids (for now at least) the disadvantages of radical, compulsory reform.</i>

Development	VAT on pension fund management services
Details	<p>HMRC has revised its policy on the circumstances when pension fund management services qualify for VAT exemption. It has also amended its policy on when employers may deduct input VAT incurred on pension fund administration and investment management costs, subject to a transitional period. HMRC's policies, set out in Briefings 43 and 44, were followed by further guidance. However, HMRC has more recently delayed publication of further guidance as it struggles to resolve some uncertainties.</p>
Timing	<p>HMRC's new policies are now in effect, subject to the transitional period which has been extended for a second time to 31 December 2017.</p>
Potential impact	<i>Respond to requests from employers and trustees to restructure contractual arrangements for VAT reclaim reasons.</i>

Development	Pension scams
Details	<p>Government agencies are leading a campaign against pension scams which try to entice savers to transfer workplace pensions so they can release cash before age 55. As announced in the 2016 Autumn statement, the Government is consulting on its latest proposals to tackle pension scams:</p> <ul style="list-style-type: none"> • A ban on cold-calling in relation to pensions, including offers of free pensions reviews, promotions of retirement products or inducements to transfer or release funds and introductions to firms who deal in pensions investments. • Limiting the statutory right to transfer pension benefits – it would only apply where the receiving scheme is a personal pension run by an FCA-registered firm, or an authorised master trust, or where there is a genuine employment link to a receiving occupational scheme. • Making it harder for fraudsters to open small pension schemes, by only allowing active (non-dormant) companies to register new pension schemes. The Government is considering whether to take further action against small self-administered schemes.
Timing	Legislation giving HMRC new powers in respect of scheme registration is now in force. The consultation on new measures to combat scams is open until 13 February 2017.
Potential impact	<i>Bear these new requirements in mind in the context of setting up new pension schemes and transfer requests.</i>

Development	Financial Advice Market Review (FAMR) – final report published Financial Advice Working Group (FAWG) to take forward recommendations over 12 months from June 2016
Details	On 14 March 2016, HM Treasury and the FCA published the final report on the financial advice market review (FAMR). The FAMR has produced 28 recommendations to improve the accessibility and affordability of financial advice and guidance.
Timing	A Working Group was established in June 2016 to take forward recommendations of the FAMR over the next 12 months. It will report to the FCA Board and the Economic Secretary on the progress of its work after 12 months.
Potential impact	<i>The FAMR report does not itself establish a framework that helps ‘mass-market’ investors to decide what action to take or even whether fuller advice is needed. However, some important elements are addressed and, if these are developed appropriately, they may contribute to a more helpful environment for investors seeking direction in investing for retirement.</i>

Development	Treasury consultation: amending the definition of financial advice
Details	The Treasury is consulting on a new definition. The Financial Services and Markets Act 2000 Regulated Activities Order (RAO), which sets out activities that are regulated, includes the regulated activity of ‘advising on investments’. The consultation proposes amending the wording so that consumers would only be receiving regulated advice on investments if they are getting a personal recommendation.
Timing	The consultation closes on 15 November 2016.
Potential impact	<i>The proposal will go some way towards bringing the legislation into line with the reality created by developments in technology in recent years. If the MiFID definition is adopted, it could provide a genuine distinction between more traditional advice and fully automated advice models on the one hand, and the higher level objective guidance that online providers have increasingly been developing on the other.</i>

Development	UK/Regulation: FCA consultation on smarter consumer communications – ongoing
Details	On 11 October, the FCA published a feedback statement on smarter consumer communications and confirmed that financial services firms will be issued with new guidelines on “digital disclosures” in 2017. The FCA has now called on firms to “work together in developing consistent terminology and reducing the complexity of language and jargon”. The regulator also confirmed that social media promotions for investments can include positive messaging about the “aspects of a product or service” so long as the “negative aspects” are also outlined in the same promotion.
Timing	The FCA plans to produce and consult on guides on effective disclosure and digital disclosure in 2017 saying a fundamental change in mindset is required from firms over the way they communicate with consumers.
Potential impact	<i>The regulator will be publishing new guidelines on ‘digital disclosures’ in 2017.</i>

Development	UK/REGULATION: FCA Asset Management Market Study
Details	In November 2016, the FCA published its interim report in its market study of the asset management industry. Its research shows that there is weak price competition in a number of areas of the asset management industry, as well as misleading performance reporting and high costs for switching between funds and managers. Amongst the FCA’s current proposals is a single all-in fee model so that investors can easily see what is being taken from the fund. The FCA also found that the investment consultancy market is concentrated, with three firms accounting for 60% of the market, and is considering a referral to the Competition and Markets Authority for fuller investigation. The FCA is concerned that trustees are not equipped to assess and monitor the advice they receive.
Timing	The FCA is consulting on its conclusions until 20 February 2017, and intends to publish a final report in the spring.
Potential impact	<i>The final outcome will affect the whole pensions market (DB and DC) as the FCA seeks to ensure that consumers get value for money.</i>

Development	Solvency II applies in the UK since 1 January 2016
Details	The EU’s Solvency II Directive applies in the UK from 1 January 2016. The directive provides a framework for a new, harmonised solvency and supervisory regime for the insurance sector. Solvency II applies to all EU insurers and reinsurers, including firms in run-off, with some exceptions. More recently, the European Commission has asked EIOPA for technical advice (by 31 October 2017) on some aspects of Solvency II. The PRA has issued a number of statements and consultations on the new framework.
Timing	The Solvency II Directive came into force on 6 January 2010. It had to be transposed into national law by 31 March 2015 and firms were required to implement it from 1 January 2016.
Potential impact	<i>Solvency II is a wholesale root and branch reform. New prudential requirements are designed to make firms hold more capital to support their business, whilst insurers will have to govern to prioritise the protection of policyholders and beneficiaries. While there are evidently many benefits to be met for everyone including insurers there will be some tricky judgments required by firms, particularly with regard to how the more stringent requirements of Solvency II are to be met.</i>

Development	PRIIPs Regulation: Key Information Documents (KIDs) required from 31 December 2016
Details	Those producing or selling packaged retail investment and insurance-based investment products (PRIIPs) will have to provide key information documents (KIDs). KIDs will be uniform disclosure documents giving standardised information about products that are designed to give retail investors sufficient clear information on the range of PRIIPs to compare them for suitability and value. On 18 July, the FCA published a consultation paper (CP16/18) on changes to its disclosure rules to reflect the direct application of the PRIIPs Regulation. On 14 September, the European Parliament rejected the draft Regulatory Technical Standards (RTS) as "so flawed and misleading" that it is likely to cost investors money.
Timing	The General Secretariat of the Council of the EU has recommended that the Council agree to delay the application of the PRIIPs reform by one year, to 1 January 2018. (Currently, the deadline for implementation is 1 January 2017.) The FCA has confirmed that it will publish its policy statement on changes to its disclosure rules in the first half of 2017
Potential impact	<i>The European Commission hopes the introduction of KIDs will increase competition, as well as boost transparency for investors. The downside is that the production of KIDs for each PRIIP will be a time-consuming and costly process, although it could provide firms with an opportunity to stand out from the crowd for the right reasons by allowing the products which offer the best deal to customers to be more clearly identifiable.</i>
Development	Insurance Distribution Directive (IDD) will apply from 23 February 2018
Details	The Insurance Distribution Directive (IDD) will update the 2002 Insurance Mediation Directive (IMD), which sets out the current framework for regulating EU insurance brokers, agents and other intermediaries. The IDD is intended to raise significantly the minimum standards of the IMD. To support the implementation of the IDD, the European Commission and EIOPA are empowered to draft technical rules to supplement the Directive in a number of areas.
Timing	The IDD entered into force on 22 February 2016. The deadline for member states to transpose the IDD into their national laws and regulations is 23 February 2018.
Potential impact	<i>The new directive will apply to all sellers of insurance products, including insurance undertakings that sell directly to customers; therefore businesses to whom the directive will apply will need to be familiar with its requirements.</i>
Development	Markets in Financial Instruments Directive II (MiFID II) – to apply from 3 January 2018
Details	The Markets in Financial Instruments Directive (MiFID) is the EU legislation that regulates firms who provide services to clients linked to 'financial instruments' (shares, bonds, units in collective investment schemes and derivatives), and the venues where those instruments are traded. The Revised Market in Financial Instruments Directive (MiFID II) revises and expands the existing directive and, through the Markets in Financial Instruments Regulation (MiFIR -2014/600/EU), seeks to harmonise across the EU key provisions linked to the trading of financial instruments. The FCA is consulting on a second set of proposals for implementing MiFID II and related changes to its Handbook. The FCA said that a third consultation paper will cover the MiFID II rules covering the conduct of business, which will be of most concern to consumers. Comments were sought by 28 October 2016. Meanwhile, the European Securities and Markets Association (ESMA) has been consulting on product governance guidelines under MiFID II.
Timing	The MiFID II regime will apply in EU member states from 3 January 2018.
Potential impact	<i>MiFID II is a wide-ranging piece of legislation and, depending on the firm's business model, could affect a wide range of functions – from trading, transaction reporting and client services to IT and HR systems. Firms will need to start planning for the MiFID II changes ahead of the finalisation of the EU implementing legislation and changes to the FCA and PRA Handbooks.</i>

Part C: Heads up

Development	Equalisation of guaranteed minimum pensions
Details	The Government has issued a draft methodology for equalising guaranteed minimum pensions (GMPs). The new method involves carrying out a one-off conversion of GMPs into ordinary scheme benefits, making use of legislation which is already in place. This method removes some of the technical difficulties relating to GMPs and should be simpler and cheaper than the previous proposed method which was abandoned after widespread criticism.
Timing	The consultation runs until 15 January 2017. Revised legislation and the new method are unlikely to be finalised before spring 2018.
Potential impact	<i>Providers may have occupational DC schemes contracted out on a GMP basis, in which case they should await the final legislation and equalisation method.</i>
Development	Pensions dashboard
Details	The Government pledged in Budget 2016 to ensure that the pensions industry designs, funds and launches a pensions dashboard by 2019. Latest reports suggest a prototype dashboard and trial service could go public in 2017.
Timing	Target date for launch: 2019.
Potential impact	<i>Await further details.</i>
Development	Possible EU single market for personal pension products
Details	The European Commission has asked the European Insurance and Occupational Pensions Authority (EIOPA) to advise on the regulations and consumer protection measures necessary to create an EU single market for personal pension products. EIOPA wants to see a harmonised legal framework for EU Pan-European Personal Pensions (PEPPs).
Timing	EIOPA's final report published July 2016; no clear timetable going forward. The European Commission is now consulting with savers and providers on the feasibility of a European personal pensions market. Consultation ended 31 October 2016.
Potential impact	<i>These are early stage proposals and it is unclear whether, or how, they will progress. It is important to remember that EIOPA's advice relates to a new personal pensions product, and does not affect existing personal pensions in the UK. It is uncertain how firms' ability to participate in any PEPP market would be affected by the Brexit vote and the negotiations which are expected to follow.</i>
Development	Technical problems following abolition of contracting-out
Details	Contracting-out for defined benefit schemes was abolished in April 2016. The DWP has confirmed it is aware of a number of technical problems with current contracting-out legislation. It is looking at a couple of these – actuarial certificates for changes to contracted-out benefits, and transfers of contracted-out benefits to new schemes that were never contracted-out. However, the DWP considers both areas require further development and any changes will not be implemented before autumn 2017.
Timing	No changes expected before autumn 2017 (earliest).
Potential impact	<i>Await further details.</i>

Development	Law Commission review of barriers to social investment
Details	The Law Commission is reviewing whether pensions law and regulation allow for social investment. The focus is primarily on DC schemes (where investments are chosen by the individual saver). It is seeking views on whether default investment strategies, or rules governing how advisers recommend investments, tend to inhibit social investment.
Timing	Call for evidence closes 15 December 2016.
Potential Impact	<i>Await further details.</i>

Development	Review of consumer price statistics
Details	The Office for National Statistics is working on a report about the future development of UK consumer inflation statistics. Interim findings suggest that CPIH will become the preferred consumer inflation measure. RPIJ is likely to be discontinued.
Timing	Further information on timescales expected later in 2016.
Potential impact	<i>Await further details.</i>

Development	Small pension pots
Details	The Government has delayed plans to introduce a system for transferring small pension pots to a new employer's scheme when workers change jobs.
Timing	Framework legislation included in the Pensions Act 2014, with detail to be set out in regulations. However, the Pensions Minister announced in October 2015 that automatic transfers are among a number of reforms which will be delayed until the Government and the pensions industry have worked through changes to the State Pension, new retirement flexibilities and the rollout of auto-enrolment.
Potential impact	<i>Await further developments.</i>

Development	Collective DC schemes
Details	The Government has delayed plans to enable new "collective schemes that pool risk between members and potentially allow for greater stability around pension outcomes". The Pension Schemes Act 2015 includes the legislative framework, with the detail to be set out in regulations, but tax rules would need amending separately.
Timing	The Pensions Minister announced in October 2015 that this is among those reforms which being delayed until the Government and the pensions industry have worked through changes to the State Pension, new retirement flexibilities and the rollout of auto-enrolment.
Potential impact	<i>Await further developments.</i>

Development	Publication of EU Green Paper on retail financial services
Details	The EC has published its Green Paper on retail financial services and insurance. The stated aim of the Green Paper is to consult stakeholders on the obstacles that providers and consumers face when offering or purchasing financial services across the EU. The European Parliament has published a list of short-term and long-term priorities in this area.
Timing	The Commission is working on a follow-up initiative, which may take the form of an action plan.
Potential Impact	<i>Await further developments.</i>

Appendix 4

Cases reported in 2016

- *Amgen v Harris*
- *Askew v R L Reppert*
- *Barnardo's v Buckinghamshire*
- *Barton v ADT Security Services Pension Plan*
- *Bett Homes v Wood*
- *BHS Opinion*
- *British Gurkha Welfare Society v United Kingdom*
- *Browne v HMRC*
- *Capita ATL Pension Trustees v Sedgwick Financial Services*
- *CECO Concrete Construction v Centennial State Carpenters Pension Trust*
- *Daniel v Tee*
- *Dansk Industri v Rasmussen*
- *Danvers v HMRC*
- *European Commission v Cyprus*
- *European Commission v Republic of Malta*
- *Feldstein v 364 Northern Development Corporation*
- *First State Investment Management v HMRC*
- *Fry v City of Los Angeles*
- *Girls Day School Trust v GDST Pension Trustees*
- *Gleeson v Lee, Independent Contractor Services (No 2)*
- *Goyal v Goyal*
- *Goyal v Goyal (CA)*
- *Hampshire v Pension Protection Fund*
- *Heis v MF Global UK*
- *Hill v The Pensions Regulator*
- *Hinton v Wotherspoon*
- *Hogg Robinson v Harvey*
- *Horton v Henry*
- *Hughes v Royal London*
- *Ian Gray and Associates v Investments Ltd*
- *In re JPMorgan Chase*
- *Jones v Municipal Employees Annuity and Benefit Fund of Chicago*
- *Kemp-DeLisser v St Francis Hospital*
- *MB v Secretary of State for Work and Pensions*
- *McCaffree Financial Corp v Principal Life*
- *McGrevey v HMRC*
- *McShee v MMC UK Pension Fund Trustees*
- *Miller v Ministry of Justice*
- *Montanile v National Elevator Industry Health Benefit Plan*
- *Moyle v Liberty Mutual Retirement Benefit Plan*
- *Patterson v Chrysler*
- *Pensioneer Trustees v HMRC*
- *Prometric v Cunliffe*
- *Rinehart v Lehman Brothers Holdings*
- *Safeway v Newton*
- *Saga Group v Paul*
- *Shannan v Viavi Solutions UK (Wandel & Goltermann Retirement Benefits Scheme)*
- *Sippchoice v HMRC*
- *St Modwen Properties v Herbert*
- *Sun Capital Partners v New England Teamsters Pension Fund*
- *Tal Life v Shuetrim*
- *Tatum v RJ Reynolds Tobacco*
- *Tomas v Spain*
- *Walker v Merrill Lynch*
- *Webber v Department of Education*

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