

# Extra protection

## ✓ Martin Kellaway explains why trustees may need extra protection, beyond the trust deeds' exoneration and indemnity clauses

The Pensions Regulator (TPR) has recently replied to the responses to its consultation on the Future of Trusteeship and Governance. The consultation asked a range of questions about how governance could be improved. TPR's response strikes a sensible balance between emphasising the duty of trustees and enabling schemes to respond flexibly as each scheme requires.

Nevertheless, a pensions trustee's job grows ever more onerous. Another lengthy pensions bill, which will increase scrutiny and responsibility further, including increased regulatory powers, is before parliament and, as the Minister for Pensions said recently, it is likely that there will be a further bill in this parliamentary session.

Yet there are more new issues to be faced: The move towards consolidation and mergers of pension schemes; the need to show value for money; the move to de-risk schemes through buyouts and buy-ins; and the need to incorporate ESG and climate change matters into schemes' investment decisions.

All of these issues provide challenges for trustees in the present: To balance acting in the best interests of their members and working constructively with the scheme sponsor. However, they also risk creating potential issues in the future, if scheme members, regulators and other stakeholders use hindsight to allege negligence and non-compliance by trustees. These issues are especially troublesome for ESG and climate change, where the current data available is limited and ESG investments may not produce returns for the fund that are better than

non-ESG investments.

Of course, virtually all trustees have personal protection under their scheme's trust deeds via the exoneration and indemnity clauses. However, reliance on an indemnity is effectively relying on the sponsor and its willingness and ability to pay, which may be challenged in the current exceptional conditions. Reliance on an exoneration clause will mean proving that the trustee is entitled to be exonerated and that statutory exclusions do not apply to the conduct in question. Where an exoneration applies, the scheme itself will nevertheless face the prospect of a depletion of assets, which may not be welcome.

This is where the role of a good Pension Trustee Liability (PTL) insurance policy should step in. It should stand in front of a scheme's indemnity and exoneration clauses, protecting scheme assets and the sponsor's balance sheet. It can also be seen as a form of legal expenses insurance. Defence costs are usually the biggest, and often the only, part of any loss.

Care needs to be taken to ensure that insurance is fit for purpose and provides good cover. The following areas should be taken into account: The policy should

- Stand in front of the scheme's exoneration and indemnity clauses
- Cover a wide range of Wrongful Acts, including, negligence, omission, maladministration and overpayments
- Cover the cost of responding to TPR investigations
- Cover PR, reputation and mitigation costs
- Cover the pursuit of third party advisers and administrators in the event



of their negligence

- Provide run-off cover for trustees when they retire in normal circumstances
- Be capable of being converted into a scheme run-off policy when it is wound up
- Not include an auto-cancellation clause in the event of a corporate transaction or event, because this could leave trustees exposed in the event of a merger or takeover, if their policy is automatically terminated as a result.

It is desirable to have a separate PTL policy rather than one joined on to a sponsor's Directors & Officers policy. In that way, trustees have standalone protection they can call on, which is preferable to sharing a limit with the sponsor that could be eroded in the event of claims and regulatory action elsewhere in the company.

Finally, careful independent scrutiny of a PTL policy wording is essential, to ensure that the trustees are fully aware of the scope of cover and policy T&Cs. This is particularly so when switching insurer or taking out insurance for the first time, as policies which, at first sight may look the same, can provide radically different coverage.



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