Clearing a path

Summary

• New laws, regulations and guidance coming into force now or due to be implemented during the next few years have created some contradictions and confusion.

• This could reduce these reforms and may also compromise trustees' ability to fulfil their fiduciary duties.

• Examples include some of the details, timing and a lack of fully detailed guidance linked to the guided retirement and targeted support initiatives; and the value for money framework.

• Further statutory and non-statutory guidance helping to clarify the details of new legislation and regulation, alongside some revision of timings for their implementation, are likely to be helpful.

Attempts by legislators and regulators to improve the UK's pensions system add to its complexity and may also create new problems. David Adams reports on some of the most significant gaps and contradictions in an ever-more complex system

The pensions system, with its multi-layered system of ever-shifting legislation, regulation and regulatory guidance, is getting more complicated all the time. The addition of new laws, regulations and guidance coming into force now or due to be implemented during the next few years has created some contradictions and confusion, which could undermine these well-intentioned reforms, and might also compromise trustees' ability to fulfil their fiduciary duties.

For example, alongside ongoing work on preparations for the dashboards and value for money (VFM) assessments, there may be work for trustees or scheme managers to do on guided retirement

or targeted support, small pots, or the possible release of DB scheme surpluses.

"We're in a period of unprecedented regulatory activity," says Pensions Management Institute (PMI) chief strategy officer, Helen Forrest Hall. "While each individual reform has merits, trustees and pension practitioners are having to navigate a patchwork of overlapping requirements that don't always align."

Trustees and scheme managers are also being asked to work towards legal or regulatory objectives before all the details have been agreed.

"Schemes are being expected to prepare for legal or regulatory requirements without full guidance about what those requirements entail; and *[policymakers have]* started putting requirements on schemes that directly interfere with fiduciary duty," says pensions researcher, Daniela Silcock. "That could apply to investment requirements, consolidation requirements and the DB surplus requirements."

The fact that laws and regulations are drafted by government departments and regulators with very different aims also creates problems.

"There are always unintended consequences," says Muse Advisory CEO and Pensions Administration Standards Association (PASA) non-executive director, Ian McQuade. "Things are drafted to try to address a particular problem, but the people drafting the legislation don't always think about what else might happen as a result."

"We're in a period of unprecedented regulatory activity"

Seeking guidance

One example of this can be seen in the work DC trustees are being asked to do around creating guided retirement default pension benefit solutions. The Pension Schemes Act provides a broad outline of what trustees should do, with secondary legislation due to follow later this year. The DWP's *2025 Workplace Pensions Roadmap* suggests that master trusts would need to be in full compliance from 2027, with single employer trusts and group personal pensions to follow in 2028.

"Trustees are going to need to design an offer of one or more default solutions that take into account members' needs and circumstances, but regulators have yet to set out what that means," says Burges Salmon director, Jack Gillons. "Everyone's circumstances are different. You can offer more than one solution, but how many will you create? How much will you tailor them for different member cohorts?" A further complication is that while trust-based schemes are regulated by TPR, contract-based schemes are regulated by the FCA, creating the potential for a mismatch.

Sackers partner, Andy Lewis, highlights another potential problem: The government has said it wants to bring forward legislation to enable retirement CDC schemes, but the legal obligation to provide guided retirement is likely to be in force before we see a framework available to create retirement CDC arrangements.

"We think there is going to be an appetite among some trustees to use retirement CDC as their guided retirement solution," Lewis points out. However, the government is believed to be actively addressing this issue.

Meanwhile, the FCA's targeted support framework is intended to provide personalised guidance to members of FCA-regulated schemes, delivered by FCA-regulated financial providers. If an individual had a pension in this sort of scheme access to such a service could help them decide how to use other savings, including pension pots in trust-based schemes, but as things stand there would be no direct coordination with guided retirement provision.

The good news is that both regulators are aware of this issue. In June FCA director of cross-cutting policy and strategy, Charlotte Clark, told an audience at the PMI's Annual Conference that the FCA and TPR are actively discussing better alignment of guided retirement and targeted support.

Trustees will also soon need to complete VFM assessments, using a framework that includes both forward-looking metrics on expected investment returns, as well as backward-looking metrics covering previous investment performance, costs, fees and service. Schemes and other pension arrangements that receive a poor rating are likely to be required to close, transferring members into alternative pension vehicles. The framework will enable contractual overrides for contract-based schemes, allowing transfers without members' consent.

Again, there are fears that the fact two different regulators will oversee VFM could create problems.

"The framework relies on alignment between the regulators, because otherwise you get the risk of regulatory arbitrage," says Arc Pensions Law partner, Sonya Fraser.

There are also concerns that the influence of VFM assessments may encourage 'herding' around predictable investment choices, discouraging innovation, possibly increasing concentration risks and ultimately leading to worse outcomes for scheme members, because of the fear of a scheme receiving a poor rating. There is potential for this to effectively undermine trustees' fiduciary duties.

Fiduciary duties fulfilled

A similar worry was at the heart of opposition to the element of the Pension Schemes Act that almost prevented its passage into law: Reserve powers that could be used to mandate schemes' investing in certain UK-based assets.

For Burges Salmon director, Andy Prater, the arguments in parliament about mandation, only resolved by a last-minute compromise in April, were another example of a lack of detail in legislation creating problems. He wonders if the inclusion of statutory guidance on fiduciary duty within the Pension Schemes Act might have been helpful. A proposal to include such guidance was removed from the bill as a concession offered to peers in the House of Lords fiercely opposed to mandation.

Non-statutory guidance on fiduciary duty is now expected to be published by the government at some stage. Arc Pensions Law partner, Matthew Swynnerton, is a member of the technical group helping to draft it. He says he expects the guidance "to carry significant weight and to be widely adopted".

It is possible this will also help trustees of DB schemes making decisions regarding the possible release of scheme surpluses will also need to be able to reconcile those decisions with their fiduciary duties.

"The government's been fairly clear about how it would like to see these surpluses being used, but the government and The Pensions Regulator have also emphasised the importance of safeguarding member benefits and outcomes," says Swynnerton. "Trustees have to balance those two things. They aren't necessarily inconsistent, but don't always point in the same direction. The guidance must provide clarity around the decision-making process."

One common factor in many of these problems is the planned timing of implementation or enforcement of legal or regulatory requirements. There is general agreement that publication of a revised workplace pensions roadmap would be very helpful. In June, Pensions Minister, Torsten Bell, said this would be published "shortly" – but he added that this document would be focused on the timetable for reforms that are already being implemented, so would not take into account further changes that may be proposed following publication of the Pensions Commission's final report in 2027.

Once that report is published, Pensions UK head of DC and master trusts, Phil Brown notes, it would be reasonable to assume more legislation might be drafted with the aim of addressing the issue of savings adequacy.

"That's the one thing that was missing from the Pension Schemes Act – rightly, because they wouldn't want to second-guess the Pensions Commission," he says. "So, there will be more change coming."

But that really shouldn't be either a surprise, or any cause for panic among trustees or scheme managers, says Lewis.

"What really matters is how the board responds to these issues while still acting in the interests of the scheme's members," he says. "The starting point is to have these things on the radar, and taking time to think about them strategically."

Written by Dave Adams, a freelance journalist