Consultation Response

Defined benefit pension scheme consolidation

February 2019

Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Pensions Law Sub-committee welcomes the opportunity to consider and respond to the consultation on *Define benefit pension scheme consolidation*.[1] We have the following comments to put forward for consideration.

Response to questions

Question 1: Are these characteristics wide enough to define a superfund? If not, how could superfunds be defined for the purposes of a future regulatory regime?

To protect the members, there is an argument for confining the definition to the first bullet point but extending it so that states that the schemes being consolidated are those schemes for non-associated employers. This would mean that all superfunds require to be registered. The necessary flexibility to allow for different models can be contained in the regulations/guidance.

On the characteristics, the changes to legislation would be required to extend the definition of statutory employer (as section 125(3) of the Pensions Act 1995 isn't a wide enough power), to allow that statutory employer to set up a scheme (as section 1 of the PSA93 and Pension Schemes (Categories) Regulations 2005 (SI 2005/2401) assume that employers contribute which will not be the case here) and to sever the link to the previous employers. The liability for a section 75 debt under the DB master trust would also need careful consideration (as accepted in section 6). The providers of the capital buffer should not be caught beyond the money that they have invested but the statutory employer should be liable for such a debt. If the statutory employer severs its relationship to the whole scheme, any money recovered would also need to be distributed fairly to the sections in a sectionalised scheme.

[1] https://www.gov.uk/government/consultations/defined-benefit-pension-scheme-consolidation

Question 2: Given the differences of superfunds and traditional DB occupational pension schemes, what are the additional risks and challenges associated with TPR regulating superfunds?

We have no further comments.

Question 3: Are the proposed authorisation criteria the right ones for the superfund regulatory regime?

One of the authorisation criteria should be that the superfund entity does not conduct any other business apart from the superfund. We believe that authorisation criteria are accurate. They need to be robust for initial the authorisation and ongoing reviews.

Question 4: Are there any circumstances in which it would be advantageous, or necessary, that the authorisation criteria are not applied to the whole superfund but instead to individual segregated sections when the superfund scheme is sectionalised?

No - the authorisation regime must be robust and effective at all stages. Whilst there can be no cross-funding in sectionalisation, the criteria must be consistent and strong enough for all.

Question 5: Are these restrictions the right ones to ensure that superfund corporate structures are transparent and compatible with regulatory supervision? Are there any other measures that would aid TPR's ability to supervise superfunds?

Superfund corporate structures should be standalone with ring-fenced financial assets.

Question 6: Should the corporate entities of superfunds be permitted to be established as partnerships or should they be required to be set up as a UK limited company?

We believe that these entities should be UK Limited company only with sufficient asset backing.

Question 7: Should TPR have a discretionary power to require evidence that

individuals outside the superfund structure meet the fit and proper persons requirement?

Yes. This would be an important element to support the proper security of members' benefits.

Question 8: Would these requirements be sufficient to allow TPR to identify those subject to a mandatory fit and proper persons requirement?

Yes, along with individual authorisation and regular updating requirements for personnel and structural changes.

Question 9: Should TPR have the power to interview individuals for the purposes of the fit and proper persons test?

Agreed. This should be available as a discretionary power for TPR to use on occasion, but no more than that as otherwise could become unworkable.

Question 10: Are there other areas that should be included as part of the mandatory fit and proper persons requirement?

It is important to ensure that the general areas covered will encompass that benefit provision and regulatory compliance.

Question 11: Would introducing a set of standards of conduct for the superfund's corporate board be proportionate?

Whilst a high standard of conduct should be expected, the Trustees have their own conduct standards and care should be taken not to have, in essence, duplicated trustees.

Question 12: What in your view should form the basis of any standards of conduct?

We believe that these should be standards appropriate for a scheme sponsor coupled with requirements to ensure that the board works to satisfy regulatory and prudent funding for the superfund. This could be linked to any proposed new funding powers/requirements to be included in the 2019 Pensions Bill.

Question 13: In your view, are there any other elements that should form part of a potential integrity test, conduct requirement or competency test?

The FCA tests are founded on:

- honesty, integrity and reputation;
- competence and capability; and
- financial soundness

whilst also looking at the particular functions the person concerned is to perform. Looking at the nature, scale and complexity of the role and the superfund, and whether the candidate or person has the knowledge, skills and experience to perform the specific role that the candidate or person is intended to perform is crucial.

Question 14: Should there be a minimum requirement on the proportion of independent NEDs on the superfund's corporate board or should this be left to TPR discretion? If so, what would be a suitable proportion?

We would suggest that it be prescribed that a majority of the directors be NEDs.

Question 15: Should superfund trustee boards consist entirely of independent trustees?

We agree.

Question 16: Should there be a non-affiliation requirement for the appointment of trustees to a superfund's trustee board?

We agree.

Question 17: Should superfund trustee boards be subject to the MNT/MND requirement?

As we agree that all of the directors should be independent, the superfund should be exempt.

Question 18: Should superfunds be required to establish member panels? Would such panels be an effective and proportionate way of ensuring that members' views are represented?

We agree that member panel should be established (as has been done with NEST and section 69 of the Pensions Act 2008).

Question 19: In your view, would the areas outlined in this section enable TPR to assess the effectiveness of a superfund's systems and processes? If not, what alternatives would you propose?

We agree.

Question 20: Are there other areas that should be included as part of the systems and processes requirement for superfunds?

We have not identified any other areas.

Question 21: Should superfund financial adequacy be regulated through a pensions based funding requirement approach with an added test of probability of success or an insurance based approach using a Solvency II type balance sheet?

A pensions based funding requirement with added success probabilities would seem most appropriate, as not all superfunds will have a target to fully secure benefits with an insurance company. The added success probabilities will need to be suitably high, but not as high as insurer requirements. Insisting on an insurance-style capital adequacy requirement is more likely to stifle innovation and growth in the superfund market; if the direction of travel is to allow these vehicles to develop there is a strong argument for not going as far as insurance requirements.

Essentially, the Solvency II approach is set up to deliver a probability of success. However, on the grounds that superfunds will be covered by the occupational pension regime, the Solvency II approach would not be appropriate and would introduce inconsistencies.

There are several ways in which the probability of success would be measured. Rather than focussing on the funding level, we suggest the more appropriate measure would be to look at the outcome for members.

Question 22: Which of the suggested models would best ensure appropriate financial adequacy, and balance the interests of the various parties? Are there elements of other options that you think should be combined with your preferred option?

Option (iii) appears to provide the right balance between more stringent requirements than standard scheme funding but not going as far as insurance requirements. The additional requirement of the capital buffer plus scheme assets being at least 100% funded on the authorisation basis appears a sensible approach.

The consultation proposes the use of the superfunds' own internal models. However, we are concerned that regulation to ensure that the models used are credible and robust could be costly to implement maintain.

Question 23: Does a 99% probability of paying or securing members' benefits over the lifetime of the scheme adequately protect members' benefits, and effectively balance the competing priorities of employer affordability and member security? If not, what would an appropriate probability be, and why?

The 99% probability will be highly dependent on the underlying modelling carried out by the superfund, which in turn will be highly dependent on the assumptions put into the model.

In addition, a probability of 99% will require a high level of funding, which will undoubtedly require additional funds at the outset - ie on entry to the superfund. This could inadvertently reduce the number of schemes for which entry to a superfund is an option.

Question 24: Should a superfund have a long term objective to secure benefits with an insurance company?

No. Some superfunds will have an objective to run schemes on indefinitely rather than aim to buyout so this long-term objective would not be appropriate for them.

Question 25: Is the proposed authorisation basis suitable for this purpose? If not, what basis, if any, would you propose for this purpose?

The proposed authorisation basis at paragraphs 102-104 look reasonable, but may not be appropriate for all types of superfund.

Question 26: Is a 97.5% probability of being 100% funded on an authorisation basis by the earlier of 2040 and the date the scheme reaches its estimated peak cash outflows consistent with the principle of a superfund having a 99% probability of paying or securing members' benefits at all times?

This depends on the stochastic models being used but the principles seem reasonable. The probability of being 100% funded on the authorisation basis should increase as the superfund gets closer to 2040/estimated peak cash outflows rather than being fixed over time.

We also note that there is a distinction in the wording used here compared to that in question 23: "99% probability of paying or securing members' benefits at all times" is a different measure to "99% probability of paying or securing members' benefits over the lifetime of the scheme". The requirement needs to be consistent as a minimum.

Question 27: Is the earlier of 2040 and the independently assessed point at which the superfund's membership reaches peak maturity a reasonable target date?

The principle of peak maturity makes sense but it is not clear why 2040 has been chosen. We would expect most schemes to reach peak maturity before then anyway. In light of this we consider that shorter time horizons may be more appropriate - for example 5-10 years to show security perhaps with a plan for longer terms.

Question 28: Are the additional minimum standards in (iii) needed, in order to ensure a high level of protection for member benefits? In particular, are the additional minimum standards (that the superfund scheme itself is funded to 87.5% on the authorisation basis) required for every scheme entering a superfund?

We agree that the additional minimum standards are required to enhance member protection. However, we do not consider that it is necessary for every scheme entering the superfund to meet those standards as each superfund will have a different model. It should be for the superfunds themselves to set the terms for entry, whilst being required to adhere to the minimum standards across the superfund as a whole. Sectionalised superfunds are more likely to apply this on a scheme by scheme basis, but if the capital buffer requirements are strong enough it should not be a requirement.

Question 29: Should superfunds be required to publish an annual balance sheet using market valuations and including liabilities valued on a buyout basis together with a buffer fund based on the Solvency II approach?

An annual balance sheet disclosure sounds reasonable, but not necessarily on a Solvency II basis for reasons set out in our response to question 21 above.

Question 30: Should superfunds be required to secure benefits with an insurance company as soon as practicable, once the scheme assets reach the buyout level of liabilities?

There may be some superfunds which are established with the specific aim of securing benefits with an insurer at the first opportunity and may use this as a selling point for interested schemes. In such cases they should be required to secure such benefits.

However, that is not the model that other superfunds will look to operate (and if one of the objectives of the new is to allow innovation in this market this should not be a requirement). There will be other ways to ensure benefits are protected in superfunds that reach this level of funding, for example through investment strategy restrictions.

Question 31: Should superfunds be required to maintain a minimum level of scheme funding regardless of approach to financial adequacy? This could include a separate long term objective for the superfund scheme itself to reach a buyout level of funding but to a lower level of probability than the superfund as a whole?

It is not clear how much protection this would add on top of the requirements discussed above, particularly if there is to be no requirement on superfunds to buyout. It may be of greater importance to take steps to ensure the superfund does not need to call on the PPF, therefore a minimum level of funding may be appropriate.

Question 32: Is the failure test in relation to the PPF funding level proportionate and what probability of failure is acceptable?

Due to the very long nature of the measure proposed, it is not entirely clear how this would be meaningfully defined. The measure would not prevent failure in any case. The financial sustainability measures discussed above should be sufficient to ensure superfunds are adequately protected.

Question 33: What powers should TPR have to intervene should a funding level trigger be breached?

TPR should have a power to stop new business being written unless the superfund can demonstrate that they can do so on terms that would materially improve the superfund's funding level. TPR should also be required to consent to profit distributions being made while funding level triggers have been breached, and should have the power to direct superfunds to reduce risk in the investment strategy if appropriate.

Question 34: At what level above fully funded on the S179 basis should the winding up trigger be set?

We would suggest a series of triggers to prompt actions - for example, there could be a requirement to initiate discussions with TPR at predefined levels on a particular basis, with automatic wind up trigger at a lower funding level on that basis

We are not persuaded that the S179 basis is the correct measure to use in these circumstance as it does not adequately reflect movements in buy-out pricing, which may be more appropriate e.g. PPF benefits, buy-out basis. Another option would be to consider PPF benefits on a Technical Provisions basis.

Question 35: Is three months an appropriate period of grace to allow for any volatility in investments to recover before triggering a wind up?

We would suggest an approach whereby wind-up is triggered within a reasonable timeframe unless an acceptable plan of action is put in place and agreed with TPR. Under our suggested approach set out in question 34, TPR would already be aware of the case (other than in extreme cases where funding plummets almost over a short time period).

Question 36: Is this minimum funding level trigger sufficient to provide adequate protection for the PPF while mitigating the risk that short term volatility might force a superfund into the PPF when it still might have a very good chance of meeting the long term objective?

We are concerned that this minimum funding level trigger as currently proposed would not provide adequate protection but with the use of suitable early warning triggers it should be.

Question 37: Do you agree that there should be a Tier 1 funding level trigger to protect members' benefits at this level?

Yes although there is the risk that too many tiers will over-complicate the management of superfunds and stifle innovation in the market.

Question 38: What would be the best way of expressing this trigger?

We would recommend a combination of 90% of authorisation basis and x% of the PPF S179 basis, with a breach of either trigger prompting action.

Question 39: Is three months an appropriate period of grace to allow for any volatility in investments to recover before allowing trustees access to the capital buffer?

If measuring against two different triggers then this should be reasonable. We note that action should have been taken earlier by the superfund at an earlier point to minimise investment volatility.

Question 40: should TPR have the power to intervene and require wind up or transfer if they believe the trigger has not been acted on in the best interests of members?

Yes, subject to comments in response to question 35 above.

Question 41: is this a reasonable basis on which to prevent new business being written, or should this be left to the discretion of the superfund trustees on the basis they should not be accepting new business if it would have a detrimental effect on existing superfund members?

Yes there should be a hard trigger for this. The superfund trustees should then be responsible for demonstrating to TPR that new business can resume if doing so would be on terms that improve the funding level, or that additional capital has been raised to improve member security. TPR could then have the power to allow new business to be written even if the superfunds funding level has not yet recovered, or to require that the funding level must be restored first.

At the same time, we recognise that this may simply lead to added complexity and impose an additional burden on the superfund. It might be helpful to consider whether this could be self-monitored via Guidance and clearance.

Question 42: Is it reasonable to only allow investors to take a profit after they exceed the requirements for authorisation and if so on what basis?

Yes it is reasonable to restrict profit taking until funding is at a margin above the authorisation level, and 105% seems a reasonable trigger.

Given the different superfund models that could develop in the market, further consideration may need to be given to the possibility of different superfunds having different limits at which point they can draw profit. This would, of course, need to be consistent with the finalised regulation, but there could be different ways to pay out profit so some level of flexibility might be needed.

Question 43: Is it reasonable to retain investor profits for a period to mitigate against profits being taken from market volatility rather than genuine outperformance?

It seems reasonable to do so.

Question 44: Should superfunds be restricted from taking profit until the funding level is above that required to secure a buyout?

We do not consider that superfunds should necessarily be restricted in this was as not all superfund models will have an objective of buying out. Those that do have this objective may have restrict profits until buyouts have been completed anyway.

Enforcing this requirement is also likely to be a disincentive for potential investors to enter this market.

Question 45: Is it reasonable to allow a sectionalised superfund to take profit or write new business if one or more sections are inadequately funded?

We anticipate that in most cases it would probably not be reasonable but that would depend on the scale of underfunding. For example, it would seem reasonable to take profit and/or write new business if one small section of a superfund was slightly underfunded, but less so if multiple and/or large sections were poorly funded. It will be difficult to tightly define this as it will depend on the profile of each sectionalised superfund. However, consideration could be given to setting an additional trigger that profits may not be taken if more than x number of sections are less than y% funded at any one time. This together with the overall funding level triggers and actions described earlier should be for sufficient sectionalised schemes.

Consideration should also be given to sectionalising the buffer requirements depending on the superfunds own model.

Question 46: In relation to the criteria for financial adequacy and funding level triggers discussed above, should each segregated section within a sectionalised scheme:

a) be considered separately for financial adequacy purposes and also considered separately for the funding level triggers;

No.

b) be aggregated together (along with the capital buffer) for assessing financial adequacy but each section is considered separately in relation to funding level triggers;

This seems to strike the right balance if the sectionalised funding level triggers can be adequately defined.

c) be considered separately for assessing financial adequacy but be considered together as a whole when assessing whether the collective scheme funding position meets any of the funding level triggers; or

be aggregated together (along with the capital buffer) for assessing financial adequacy and considered together as a whole when assessing whether the collective scheme funding position meets any of the funding level triggers?

If we sectionalise the buffer part, then the sections could be looked at in isolation. If it is not fully segregated – surplus / buffer etc can be reallocated – then it should be considered in the whole.

Question 47: Does this approach provide adequate protection for members, while effectively balancing the interests of the investors?

Option 2 would appear to do so, although this will depend on the detail of the mechanics for transferring assets into and out of the ring-fenced account.

Question 48: What are the minimum requirements on a buffer fund in order for the scheme to be able to rely upon the assets being available in the event they are needed?

The buffer is owned by the superfund entity and will therefore be outside the scheme. We would expect that the trustees of the scheme will be granted a floating charge over the buffer so that they have access to it if the entity becomes insolvent. As there will be occasions where the buffer (or part of it) could have to go down into the scheme, some consideration has also to be given to whether or not that buffer is returned if the funding improves and the tax implications of doing so.

There must be a certain degree of liquidity so the funds can be accessed when needed. We also consider that there should be an element of diversification between the superfund assets and the buffer fund, so that both do not suffer to the same extent in market downturns.

Question 49: Should there be minimum standards on the capital buffer to ensure it can be relied upon in stressed situations?

Yes, otherwise it would not offer an effective buffer. It would be possible to consider funding requirements and investor requirements separately within the buffer fund as no-one would invest if there was not some form of return expected.

Question 50: Is it reasonable and proportionate to require superfunds to provide detailed fund guidelines, and does this provide the regulator with sufficient information?

Yes, this is reasonable and we agree that TPR should reserve the power to request further information if required. Whether this is proportionate depends on TPR's available resources to adequately review this level of detail.

Question 51: Should superfunds be required to submit their modelling for TPR to review, or should TPR develop a model against which they can assess all superfund proposals?

Superfunds should be required to submit their own modelling to TPR, but this will rely heavily on TPR having sufficient and appropriate resources to adequately scrutinise a potentially wide range of models for different superfund structures.

If the superfunds have a Scheme Actuary then the superfund trustees could rely on the Scheme Actuary's professionalism and competency to do the modelling and certify it accordingly.

Question 52: Should TPR have a 'fall back' model for cases when the modelling provided by superfunds is not adequate?

No, the onus should be on the superfunds to demonstrate their models are suitable, and if found not to be by TPR it should be up to the superfund to address this themselves.

Question 53: Should there be any other reporting requirements of either the corporate entity or pension scheme to ensure effective supervision?

If the scheme is sectionalised, some of the reporting requirements may have to operate at a section rather than scheme level.

Question 54: Should the corporate entity and pension scheme have to disclose their strategic asset allocation and investment risk limits so that TPR can effectively supervise the investment strategy?

We agree.

Question 55: Should superfunds be required to regularly publish publicly available material on their financial position and operations?

We agree.

Question 56: Would the proposed events outlined in Table 1 meet the aims of the significant events framework?

We agree but see comments in response to question 57.

Question 57: How could we define 'significant deterioration' in relation to investment performance and funding level?

A deterioration in investment performance is not necessarily a concern if the liabilities have also decreased. Given that it is intended to require quarterly reports (paragraph 173), these two events are not required unless they are re-written as a material change inter-quarter.

Question 58: Should TPR's executive arm have the power to unilaterally commission a skilled persons report in relation to superfunds with TPR acting as the end user?

We agree

Question 59: Would an enforceable Code of Practice be sufficient to allow TPR to respond quickly and proactively to emerging market risks and supervise effectively?

Given the range of existing powers and proposed powers, we do not believe that the case has been made for an enforceable Code of Practice. The advantages of a non-enforceable code are that the principles can be applied to different models in a pragmatic way. An enforceable code would of necessity have to be drafted in different language and be more rigid.

Question 60: In your view, what areas of a future code should be enforceable?

See response to question 59.

Question 61: Would the proposals outlined in Chapter 4 allow for the effective regulation of superfunds? Are there any other powers needed for TPR to intervene where necessary to effectively regulate superfunds?

The proposals are sufficient.

Question 62: Should superfunds be subject to a bespoke levy to fund their ongoing regulation?

We agree that there should be a bespoke levy but consideration also has to be given to the extra costs in supervising a struggling superfund when the number of such funds may be small.

Question 63: Do these principles achieve the policy aim?

The principles achieve the aim of ensuring that consolidation cannot be used as an alternative to insurance buy out. While they may also achieve the aim of offering an option for a segment of pension schemes to improve security for members, a concern is that they will restrict the number of schemes in that “segment” to a smaller number than will be required to achieve the proposed economies of scale.

Paragraph 206 seems to suggest that trustees receiving covenant advice that the employer can support the scheme for the foreseeable future should not seek to transfer. It may be that covenant advice concludes that buy out within that period (defined as five years) is not an option but the employer is still likely to be able to support the scheme over a longer term. If these factors are to be included in legislation or guidance, and consolidation is intended to be an option for such schemes, this should be made clearer.

Question 64: Is five years a reasonable timeframe to assess a scheme’s potential to reach buyout in the foreseeable future?

It appears to be a reasonable timeframe for that purpose but is likely to exclude a large number of schemes.

Question 65: Are there any other important factors that trustees should take into consideration as part of the transfer to a superfund?

We have not identified any other factors.

Question 66: Should a scheme looking to join a superfund be required to meet a specific minimum funding level at the point of transfer, for example 87.5% funded on the authorisation basis?

A minimum level of funding would be a sensible measure to protect members already in the superfund.

Question 67: If you think there should be a minimum scheme funding level for entry to a superfund, should it be based on the authorisation basis or a buyout basis? What percentage minimum funding threshold do you think would be appropriate?

The basis and level should be based on an assessment of what level of funding at point of transfer will provide benefits which are appropriately secure. Without that context suggesting a minimum percentage would seem arbitrary.

Question 68: Should external covenant advice be a mandatory requirement of the superfund transaction process? In what circumstances would covenant advice not be required?

One of the gateway principles set out in paragraph 205 is that a move to a superfund must be based on evidence that it enhances the likelihood of members receiving full benefits. It is difficult to imagine trustees being able to produce the evidence required to justify a transfer without external covenant advice.

Question 69: Should it be a requirement for those providing covenant advice to be regulated by either the Financial Conduct Authority or the Financial Reporting Council?

We agree.

Question 70: Do you agree that the current legislation regarding bulk transfers should apply to transfers to a superfund? Please give an explanation for any changes you recommend to the legislation.

The principle seem appropriate - ie a requirement for an actuarial assessment of the benefits in each scheme. However, the 1991 Regulations require such a transfer to be as the result of a financial transaction between the employers and therefore changes would be required to extend the application of the legislation.

Question 71: Should TPR decide whether each scheme transfer to a superfund can proceed or only have the power to prevent a scheme entering a superfund if they judge that the principles set out in the gateways are not being met.

We believe that the trustees should make the decisions to transfer to the superfund and that TPR should therefore only have the power to prevent the transfer if there are grounds to do so.

Question 72: What checks should TPR do on a proportionate and objective basis to satisfy itself a transfer to a superfund is likely to be in the best interests of members?

TPR will have both the information outlined in paragraph 220 and information on the superfund itself through the authorisation process and the subsequent reporting. We believe that this should be sufficient to enable TPR to identify whether or not they should halt the transfer.

Question 73: What further powers should TPR be given to allow it to regulate effectively both superfunds and transfers to superfunds? Please provide reasons for any additional powers suggested.

The TPR powers with the additions flagged in the consultation paper like adequate. The TPR would have the power to wind-up sections within the superfund but care will need to be taken with a fair split of the buffer to avoid the members of the remaining sections being prejudiced.

Question 74: Should these schemes continue to be known as “defined benefit master trusts” or is there a more suitable name that can be used to distinguish them from DC master trusts?

As there will be other ‘defined benefit master trusts’ that are not consolidators, it would be sensible to add the word ‘consolidator’ to the defined term. The word ‘superfund’ should be avoided.

Law Society of Scotland

For further information, please contact:
Carolyn Thurston Smith
Policy Team
Law Society of Scotland
DD: 0131 476 8205
carolynthurstonsmith@lawscot.org.uk