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## Using discretionary powers as a pension trustee

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Pension trustees are responsible for ensuring members' benefits are secure and that the scheme is running as it should.

In a recent consultation, the UK government proposed new pension scheme rules that will allow for trustees to decide whether schemes should sell shares in oil, gas and coal companies in favour of long-term investments in greener alternatives.

The proposals will give trustees the confidence to move away from fossil fuel investments and consider more environmentally friendly options. Investments in fossil fuels have the potential to become stranded assets as the world becomes more environmentally conscious.

The Department for Work and Pensions (DWP) [stated that the proposed regulations are intended to reassure trustees](https://www.gov.uk/government/consultations/pension-trustees-clarifying-and-strengthening-investment-duties) (<https://www.gov.uk/government/consultations/pension-trustees-clarifying-and-strengthening-investment-duties>) that they are able to take action against financial risks to be able to deliver the best return to members. Trustees should be able to take into account any financial risks, whether these are from internal financial reporting or non-financial reporting from elsewhere.

Part of a trustee's role is to act as a **guardian** for the pension scheme to ensure that everything is as it should be. It is important that a trustee has the confidence to take action when needed to act in the best interest of the beneficiaries. In the case of divesting in fossil fuels, the trustee would need to determine the best course of action to benefit the members of the scheme.

Often trustees have to make decisions regarding the benefits involved in a pension scheme. If the rules of a pension scheme state that a trustee **may** do something or that a benefit can only be paid with **trustee consent** then this is where a trustee exercises their discretionary powers. Discretionary powers are decisions that trustees can choose to make but are not obliged to do so.

### What do pension trustees need to consider when using discretionary powers?

When a trustee uses their discretionary powers, they need to ensure that they follow a careful process. The courts and the Pensions Ombudsman will not interfere with any decisions made using discretion, yet they will look at the steps taken to come to that decision.

Discretionary powers are commonly used by trustees to decide the benefits that are received by members. Trustees may need to decide who can receive a death benefit lump sum or how benefits can be paid before retirement age. The issue with these kinds of decisions is that they are often contentious and lead to challenges in front of the Pensions Ombudsman, which is why it is important to be aware of the process of how decisions have been made.

## What process should be used when exercising discretionary powers as a pension trustee?

When making decisions using discretion, it is best practice to keep a record of the process that has been taken. Trustees must leave out any irrelevant matters while ensuring that all relevant matters are considered to reach a decision. The process should also involve consulting with relevant professional advisers such as lawyers or administrators.

The first step in the process of using discretion should always be to ascertain that it is a discretion that should be used. If the rules of the pension scheme use phrases such as **‘If the Trustee may’** or **‘With the Trustee’s agreement’** then it is a discretion. It should also be ascertained who has the power to exercise the discretion; it may be the trustee, the employer or a joint power. It’s also advisable to check for any legislation that may be in place. The pension scheme rules may have stipulations regarding certain legislation that will change the actions that need to be taken.

When using discretionary powers, it’s important to make sure that all the facts and information are available that might be relevant to the decision. It’s advisable to ask questions and ensure that all responses have been received before assessing the case. The Pensions Ombudsman may ask to see the information used in the process of making the decision, as well as any records of meetings where decisions were made.

When a reasonable decision has been made it will need to be recorded, it is recommended that careful consideration is taken regarding what is specifically recorded and the level of detail.

## Using discretion with confidence as a pension trustee

Pension trustees must act impartially within their role and ensure they act fairly when considering the interests of an individual against the interests of all members. When using discretionary powers, trustees should be careful to keep a full record of the process and ensure that the relevant parties have been consulted.

Our Insights and Resources are recommended for businesses seeking information regarding pension law. We will update you regularly with information from our legal experts on pensions, as well as other sectors and services you may be interested in.

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