De Saulles's Chapter 4 on the "Unanticipated Consequences of Civil Justice Reform" should be compulsory reading for all judges. One crucial element he identified was the failure of the Ministry of Justice to provide the necessary resources needed to implement the reforms which Woolf, to his credit, had optimistically tried to make a precondition to the introduction of the reforms. De Saulles's conclusion to this chapter is a very accurate reflection of the history of these reforms.

Chapter 5 on sanctions reflects the failure of the judiciary to understand the need for sanctions. Sadly, the problems of enforcing case management decisions will always be with us. Few judges are likely to strike out a case or refuse the recovery of costs for trivial breeches of case management directions, but how far ought the court to allow persistent breeches of the Rules? Somehow the management directions have to be observed, with penalties for failure to do so.

De Saulles's concluding chapter is an excellent review and reflection on the tasks set by first and second appeals. Perhaps this chapter should also be compulsory reading for all involved in the Court of Appeal. Sadly, the author's remit did not allow him to express a view on the work of the Supreme Court – it might have made interesting reading!

CPR will be with us for many years; we must endeavour to make them work for the benefit of all. This is a well-researched account of the efforts of all who have endeavoured to reform the civil process, whereby justice is made available to all who seek the same through our civil courts.

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Pensions and Legal Policy: Lessons on the Shift from Public to Private. By Amanda Cooke. [Oxford: Hart Publishing, 2021. xiii + 229 pp. Hardback £70.00. ISBN 978-1-50992-937-5.]

The essence of *Pensions and Legal Policy* is a critique by Amanda Cooke of the automatic enrolment (AE) regime legislated for by the Pensions Act 2008, the policy behind it and some of the lessons to be learned from the way that policy has been implemented. In particular, the author challenges the legitimacy of the success claimed for AE measured by reference to the operation of active free choice rather than as a result of the inertia predicted by behavioural economics.

In brief, the Pensions Act 2008 impacts on the finances and retirement savings of millions of workers in the UK. The legislation imposes statutory obligations on employers to ensure that eligible workers are in, or automatically enrolled in, a qualifying or AE occupational or personal pension scheme. UK university employed readers of this review may well be auto-enrolled in the Universities Superannuation Scheme.

The scheme of the legislation is compulsion on employers to enrol eligible workers, and to make the minimum level of employer contribution to a money purchase (or defined contribution (DC)) scheme for such a worker or to make sure such a worker is provided with defined benefit (DB) benefits which meet the AE quality test under a DB occupational pension scheme.

To deliver the policy objective of individuals accumulating a higher level of retirement savings in AE compliant schemes, a key element of the AE legislation was (and is) reliance on inertia of the individual, once enrolled by the employer, to remain a member and to continue to contribute to the scheme. There is no

statutory compulsion on an individual to remain a member. He or she has a statutory right to opt out at anytime from making contributions in the future (and a limited window to opt out when first enrolled retroactive to date of enrolment and to be treated as if the member had never been auto-enrolled).

Pensions and Legal Policy focuses predominantly on AE in DC personal pension schemes. However, a number of the chapters have application to the AE policy and legislation as applied to DB and DC trust based occupational pension schemes as does the author's challenge of legitimacy if the decision to stay enrolled is not as a result of active free choice by the individual.

If a DC scheme is to be used to satisfy the employer's AE duties, the legislation now requires a minimum level of contributions, under the standard AE compliance test, equal to 8 per cent of the enrolled employee's qualifying earnings. In the tax year starting 6 April 2021, those qualifying earnings are earnings of more than £6,240 and but no more than £50,270 a year. The employer is only required to contribute 2 per cent of those qualifying earnings. If that is all the employer contributes, the employee on initial enrolment in the scheme is required to contribute the balance (but with tax relief on the employee contributions being counted). However, the eligible worker (who would, at the minimum level, be required to contribute 6 per cent of qualifying earnings) has, as mentioned above, the statutory right, at any time, to opt out of contributing. This was a deliberate policy choice by the Government. The alternative would have been to make membership compulsory, which did not fit with the political optics.

Chapter 1 of *Pensions and Legal Policy* contains a clear and succinct overview of public and private pensions in the UK. It includes the historical context to those UK pension arrangements and identifies the main factors leading to the changes over time in the UK pensions landscape. These include the decline of DB occupational pension schemes and a reminder of a recurring key feature of the UK pensions landscape – periodic fraud and mis-selling, and the associated political, regulatory and legislative response. This chapter also includes a helpful summary of the demographic background and some of the key policy considerations. It identifies the influence of experience in other jurisdictions, such as Australia and New Zealand, on the development of the UK's auto-enrolment regime.

Chapter 2 contains a concise explanation of the introduction of AE in the UK from a policy perspective and the way the policy was implemented by the AE legislation. It also looks at some of the post-implementation and ongoing adjustments to the regulatory and legislative AE framework, drawing out key themes which include value for money, costs and charges, scheme governance and the fundamental change to the way in which members may draw their DC retirement savings announced by the Chancellor of the Exchequer, George Osborne, in his 2014 budget (the so called "pension freedoms" which took effect from 6 April 2015).

Chapter 3 looks at the AE policy from a legal philosophy perspective. The chapter contains a discussion of autonomy and legal paternalism and the move from compulsion – it is in your best interests to be compelled to take this course of action – to soft paternalism where the individual may still choose to do something other than accept the default AE position. In the author's words, "this softness may lie in the fact that the individual welcomes the nudge in a particular direction but retains choice or in the fact that it is not clear that all will benefit so the law is imposed with exceptions" (p. 48).

The chapter contains an interesting review of the competing views and arguments on this approach. Inevitably these clash with the practical politics. If you have the right to opt out of AE, that is your free choice (but not necessarily, in the view of the author, an active free choice) and the state is not imposing compulsion or a tax on

you. The discussion in this chapter could have usefully contrasted this legislative approach with the legislative intervention made by section 15 of the Social Security Act 1986 in the employment contract as it applied to pension scheme membership. Before section 15 (now s. 160 of the Pension Schemes Act 1993) came into force in 1988, an employer could include in the employment contract a requirement that the employee join the employer's personal or occupational pension scheme, pay contributions to that scheme and continue to do so while employed by that employer. From a freedom of contract (or autonomy) perspective, the employee's choice was either to accept the terms or to look elsewhere unless the employee's bargaining position was sufficient to negotiate changes to the terms of the contract. Section 15 made, with some limited exceptions, such a requirement void. It expanded the choice or autonomy of the employee. But it was also the legislative enabler to facilitate the £10 billion plus personal pension mis-selling referred to in Chapter 1 (p. 9).

Chapter 4 contains a valuable review of some of the insights into human behaviour identified by behavioural economists and their application, in the words of the author, in influencing "policy and law making both in the UK and abroad" (p. 64). It provides an interesting contrast with the discussion on autonomy and freedom of contract in Chapter 3.

In Chapter 5, the author describes her research methodology and sets out her views on whether the low opt out rates by employees who have been auto-enrolled should be the measure of success in the way auto-enrolment has been implemented in the UK. She argues that a low opt out rate is an insufficient measure of success as it does not "get to the root of whether inertia or active choice is a reason for current [low] rates" (p. 92). The author makes clear that her empirical research does not claim to be a population representative sample. She explains that "examples of the relationships between information, understanding and decision making are explored in my work. To obtain this information, qualitative rather than quantitive research was most appropriate 'to identify the perspectives of the research participants'" (p. 94). The author conducted 38 semi-structured interviews of a qualitative nature mainly in 2014 and 2015. The interviewees included employees, employer representatives, providers and advisers.

It would have been helpful to make explicit that the pension schemes involved were all DC personal pension schemes provided by insurance companies (or other financial services providers) and to identify the AE staging dates of the medium sized employers involved (and to have a definition of medium sized). It would also have been helpful if this chapter had included a table showing the interviewees broken down into their various categories (employees, employers, HR professionals, financial and legal advisers, and employees), the employer's AE staging date and, in relation to the auto-enrolled employees, their breakdown by job category, age and gender and whether they had then opted out of AE.

The author's research shows that a number of the behavioural economics biases discussed in Chapter 4 are demonstrated in the actions (or lack of them) of her interviewees and that there is, as predicted by behavioural economics, a lack of what the author identifies as active free choices. From her empirical research and the data it has provided, the author draws out what she sees as the real costs to individuals which arise as a result of the auto-enrolment policy. These include individuals failing to make decisions, individuals ignoring pensions, individuals being completely unaware of contribution levels and their effects, and individuals not seeking financial advice (p. 137). It would be interesting, if this were feasible, for the author to repeat the research interviews with the same individuals to see how views had

changed over time and whether the subsequent legislative interventions identified in Chapter 3, Part III, had addressed some of the issues she had identified.

Chapter 6 contains a useful discussion of the potential grounds for claim against the employer, the adviser and the product provider that may be brought by an employee who has been automatically enrolled and who has suffered loss. This chapter does not analyse, although it refers briefly to them, the additional claims that could arise where there is a trust based DC occupational pension scheme and where the scheme trustee has powers to exercise to choose, periodically review and change the default investment option. But, understandably, this reflects the author's focus on AE DC personal pension schemes.

In the context of legal risk management, Chapter 4 read with Chapter 6, sparked the question in the reviewer's mind as to whether, in designing choice architecture for trust based DC scheme member investment options, a trustee's prudent person duty would require analysis and management of the choice architecture to avoid behavioural biases which were not in the member's best interests. Such a point is one for consideration by those looking at legal risk management for the master trusts referred to in Chapter 2, Part III.D.

In Chapter 7, the author identifies a number of changes to the AE regime to improve outcomes; in particular to improve the active free choice option she advocates for individuals who are auto-enrolled.

In summary this book contains much interesting research and analysis on a number of different strands of legal and economic thought as applied to the complex field of AE pension provision. The author correctly identifies aspects of the AE regime, particularly for AE DC personal pension schemes, which would benefit from further consideration. However, the critique of the success of the AE regime would, perhaps, have been more powerful in its advocacy if not so firmly anchored to the author's benchmark of conscious free choice.

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The End of Law: How Law's Claims Relate to Law's Aims. By DAVID MCILROY. [Cheltenham: Edward Elgar Publishing, 2019. viii + 189 pp. Hardback £70.00. ISBN 978-1-78811-399-1.]

Georg Wilhelm Friedrich Hegel famously declared that "[t]he owl of Minerva spreads its wings only with the coming of the dusk" – meaning that a civilisation only acquires the ability to make sense of itself to itself when it is on the verge of decline. Hegel's claim came strongly to mind while reading, and re-reading, David McIlroy's amazingly rich and erudite discussion of the nature of law. When McIlroy entitled his discussion "The End of Law", he meant to refer to law's aim or aims. However, his discussion may also portend the end of the particular view of law that he so wonderfully expounds in his book.

McIlroy's view of law is aligned with that of thinkers such as Robert Alexy and Joseph Raz (and, following Raz, John Gardner). All see law as, of its very nature, making moral claims for itself. McIlroy argues that law, of its nature, claims to be just "a legal system that does not claim to be just is no legal system at all" (p. 12). Law's claims to be just are made at two levels. First, it claims to be just at a shallow level. This shallow justice involves "our rulers governing in accordance with the rules which have been laid down" (p. 23), with the result that rules are applied