

First Briefing, October 2021 – The Pensions Regulator's new criminal powers

The Pensions Regulator (TPR) has published a policy¹ on how it will use its new criminal powers to prosecute those risking savers' Defined Benefit pensions.

The two new offences added in the Pension Schemes Act 2021 (PSA21) are

- Avoidance of employer debt
- Conduct risking accrued benefits.

These new offences only apply to conduct on or after 1 October 2021, although TPR has made it clear that it may consider evidence from before that date as part of any investigation.

Neither offence will apply if an individual, or a 'legal person' such as a company or board of trustees has a reasonable excuse for their act or failure to act. The person's intent will also need to be proved.

TPR has also published a consultation on three other policies covering other new powers introduced in PSA21².

The new offences

The two new offences added in the Pension Schemes Act 2021 (PSA21) are:

- Avoidance of employer debt
- Conduct risking accrued benefits.

These offences apply only to occupational pension schemes that provided some form of defined benefit, where funding deficits may ultimately mean that members' pensions are not paid in full.

Avoidance of employer debt refers to avoidance of the potential obligation of employers under section 75 of the Pensions Act 1995 to top up the funding of the scheme so that full benefits can be secured with an insurance company.



Conduct risking accrued benefits is any act that materially reduces the likelihood of pensions earned to date being paid in full. One example given in the policy is a scheme changing their *current appropriate investment strategy to one that significantly increases downside risk with little corresponding upside*.

There are three elements to both offences:

1. The act element – what someone did or didn't do
2. The mental element – what they intended by the act of avoidance, or knew or should have known about the impact of conduct risking benefits
3. Lack of reasonable excuse – that there was no other justification for what they did or didn't do.

All three legs of this test must be met for a criminal offence to have taken place.

When does the law apply?

The *act element* must have taken place on or after 1 October 2021. Note, however, that testing the *mental element* (what those involved knew or intended) may involve assessing evidence from before that date.

Who might be in the firing line?

The short answer is pretty much anyone involved, other than someone appointed and acting as an insolvency practitioner, i.e.:

- The employer and its staff
- Scheme trustees

- Both corporate and trustee advisers.

The policy states that offences can apply to both principal and secondary offenders. The primary offender is the person who carries out the act. A secondary offender is someone who helps or encourages that person to commit either of the new offences – for example *a legal adviser who helps an employer to lay a trail of false evidence designed to hide the employer's true intention for their actions and/or form the basis of a reasonable excuse defence*.

What might constitute a reasonable excuse?

Many concerns have been raised about legitimate everyday corporate and trustee activity being judged as criminal, if it later turns out to have unexpected consequences for scheme funding or members' benefits. In an attempt by TPR to provide some reassurance, without giving carte blanche to potential offenders, the guidance on what might constitute a *reasonable excuse* is the longest section of the policy.

TPR explains what it will consider before determining whether they believe an offence has taken place:

- Each person's reasons for behaving in the way they did
- The circumstances in which the act took place
- The person's own circumstances, including their duties, skills and experience.

The policy includes detailed guidance on three factors TPR will consider, together with example scenarios for each:

- The extent to which any damage to the scheme was only an incidental consequence of the conduct
- The adequacy of any mitigation provided, and if that mitigation was absent or inadequate
- Whether there was a viable alternative that would have reduced the impact.

Criminal courts will ultimately decide these matters. While the burden of proof will be on the prosecution, TPR will not be expected to identify and disprove every possible excuse that might be offered in defence. Instead, those investigated will be expected to explain why they believe their conduct was reasonable and provide contemporaneous records such as meeting notes in support.

In appendix 2 to the policy, TPR sets out some situations that it thinks will generally constitute a reasonable excuse. Many of these boil down to demonstrating compliance with legislative requirements, acting professionally and in good faith, and being open and timely in sharing information appropriately with stakeholders including trustees, TPR and the PPF.

Clearance

Clearance is the process by which approval is sought from TPR for any sort of corporate activity with the potential to increase the risk to scheme funding and member benefits. If TPR grants clearance, it is unlikely that a Contribution Notice on the applicant (an enforceable demand to fund the scheme) would be issued to the applicant. Non-payment of a Contribution Notice is also now a criminal offence under PSA21.

Clearance cannot be sought in respect of the new criminal offences – but obtaining clearance for a course of action may assist as part of any reasonable excuse defence.

What will TPR investigate?

"These new powers will give us more options to punish wrong doers, but we hope their existence will be a deterrent in themselves."

If TPR becomes concerned about any activity, it will make a 'risk-based' assessment as to whether (and then how) to use its powers based on factors such as:

- Any features or behaviour of particular concern highlighted in any reports made to TPR. These might be also identified by its own intelligence function, or have appeared in the press or other public media
- The funding level of the scheme
- TPR's available resources.

TPR is likely to start by using its information-gathering powers. It may then focus on using its criminal or financial penalty powers when:

- There may be serious harm or other unfairness to the scheme and members
- The person had extensive involvement or influence in the harm caused
- Significant financial gains have been made to the detriment of the scheme
- Trustees, TPR or the PPF were misled, had information withheld from them, or were not responded to in an open and timely way.

Applying the new policy in practice

Appendix 3 of the policy is a fictional case study involving an employer in a declining industry with

- A DB scheme with significant deficits on both an ongoing and a buy-out basis
- A parent company from which it has received significant unsecured loans, repayable on demand, and whose shareholders are impatient for the resumption of dividends
- a bank with which it has all but maximised use of secured loans and overdraft facilities
- A significant customer who seems unlikely to renew its contract.

The details of the scenario are too long and complex to cover within this briefing. If, however, any aspect seems relevant to trustees or scheme sponsors, we do recommend that they work through it with their advisers.

Consultation on other policies

A consultation has been published on three other policies on related TPR powers:

- **Overlapping powers** – where TPR could use either its regulatory or criminal powers in respect of the same activity
- **Monetary penalty powers** – the new powers TPR has to impose high fines, e.g. for failure to comply with its information-gathering powers
- **Information gathering powers** – The use of section 72 notices, interviews and inspections, including the use of fixed and escalating penalties.

A separate briefing will follow on these issues.

Further information and references

For further information, please contact your usual First Actuarial consultant.

¹ <https://www.thepensionsregulator.gov.uk/en/document-library/strategy-and-policy/criminal-offences-policy>

² <https://www.thepensionsregulator.gov.uk/en/document-library/consultations/new-enforcement-policies-consultation>