

NEW PENSIONS REGULATOR POWERS ANNOUNCED

Criminal offence - conduct risking accrued scheme benefits

The Pension Schemes [Bill](#) as introduced by the Queen's Speech on 14 October 2019 covers a wide range of changes including a framework for collective defined contribution schemes and pensions dashboards; provisions requiring trustees to review and revise their strategy for ensuring benefits can be provided over the long term (with further requirements to be provided in regulations); a criminal fine for failure to comply with a Contribution Notice (CN) and new circumstances in which CNs can be issued; and increased information gathering powers for the Pensions Regulator (which includes a new requirement for persons associated and connected with scheme employers to give notice of certain events).

Of key interest, however, is likely to be the proposed criminal offence for engaging in conduct that "*detrimentally affects in a material way the likelihood of accrued scheme benefits being received*", which carries with it a maximum custodial sentence of up to 7 years and which, rather surprisingly, goes beyond the criminal sanction that has previously been trailed by the Government.

In press releases, the Government's consultation documents and its impact assessment, the new offence was consistently presented as an offence to punish "*wilful or reckless behaviour in relation to a pension scheme*", aimed at more extreme scenarios and targeted at employers and their associates and connected persons. However, on its face, the language in the Bill could operate at a much lower level; potentially criminalise the existing material detriment test which forms part of the current CN regime; and extend beyond employers and their associates and connected persons. In short, the bar may not be nearly as high as the Government had suggested and the new offence could concern a much broader range of persons than previously anticipated.

As currently drafted, a person, if prosecuted, will be guilty of an offence where (on a criminal burden of proof) they: (a) do an act or engage in a course of conduct (including a failure to act) that detrimentally affects in a material way the "*likelihood*" of accrued scheme benefits being received; (b) they knew or ought to have known that the course of conduct "*would*" have that effect; and (c) they did not have a "*reasonable excuse*" for engaging in such conduct.

Although the above wording is uncomfortably wide, in practice its application will depend on the particular circumstances at issue and whether or not a person is in scope will, we suspect, largely depend on the role they play in relation to the pension scheme. Comfort can be drawn from the fact that the person must have known or ought to have known that their course of conduct "*would*" (rather than "*could*") have the relevant effect and we expect that many persons involved with occupational defined benefit pension schemes will be able to build a "*reasonable excuse*" defence for their conduct (although we expect getting comfortable with this defence is likely to involve even greater reliance on advice from covenant, legal and actuarial advisers).

That said, there remain some key concerns with the draft legislation.

KEY CONCERNS AT A GLANCE

- As noted above, the scope of the offence is not limited to employers and/or associates of employers – it applies simply to "*persons*" who, theoretically at least, could be anyone involved with an occupational defined benefit pension scheme, including trustees, advisers and investment counterparties.
- As also noted above, the threshold for meeting the test may not be as high as intended given that in theory there are many circumstances in which an act may detrimentally affect the "*likelihood*" of scheme benefits being received (e.g. taking on additional company debt, speculative/poor investment decisions) and the

reference to detriment could itself be interpreted widely as meaning forms of detriment other than financial detriment (e.g. administrative failures).

- The Pensions Regulator, Secretary of State or the Director of Public Prosecutions may institute proceedings for an offence without the preliminary warnings or regulatory appeal process that apply in the existing CN regime, and there is no suggestion that the offence will be linked to a Pensions Regulator Code of Practice to more clearly define the parameters within which the offence would be prosecuted (though at the very least we would expect the Pensions Regulator to apply or update its existing prosecution policy in relation to other pensions related criminal offences (e.g. in the context of auto-enrolment), pursuant to which it has regard to the Code for Crown Prosecutors and which in turn requires certain evidential and public interest tests to be satisfied).
- It will be for the Courts to determine on the basis of an objective test whether the offender had a reasonable excuse for engaging in such conduct – this could be viewed as useful where persons are able to evidence that they had a justification for their actions and regard might be had to other criminal offences which include the concept of acting "without reasonable excuse" but, given the criminal sanction, it remains to be seen how confident parties will be relying on this.

The [Explanatory Notes](#) provide no further explanation/guidance as to the change in direction for the offence of conduct risking accrued scheme benefits.

Where criminal proceedings are not instituted, a person may still be exposed to the risk of a financial penalty of up to £1 million. The penalty is similarly wide in scope and also applies to any person who knowingly assists in the act or failure to act that has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (albeit it is likely to be a less daunting prospect than a custodial sentence).

Unlike certain provisions of the Pensions Act 2004, the Bill once in force will not be retrospective. There is therefore hopefully time for the regime to be made more workable before it becomes law.

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