

## PENSIONS REGULATOR CONSULTS ON PROSECUTION POLICY FOR CRIMINAL SANCTIONS POWERS

### 1. CONTEXT IS KEY

On 11 March 2021, the Pensions Regulator ("TPR") launched a [consultation](#) on a [draft policy](#) (the "**Policy**") setting out the approach it will take in the investigation and prosecution of the new criminal offences introduced by the Pension Schemes Act 2021.<sup>1</sup> Given the breadth of the offences, this consultation is likely to be of interest to anyone who deals with employers or their pension schemes (in any capacity).

Overall, the Policy appears quite helpful. In particular, it is clear upfront that TPR's approach to prosecuting the new criminal offences will be guided by its understanding of the Government's policy intent – enabling TPR to address "*the more serious intentional or reckless conduct*" already in scope of its existing Contribution Notice ("**CN**") powers. It recognises that only the most serious cases ought to be treated criminally and this is more consistent with the policy intent as originally trailed in the Government's 2018 White Paper (contrasting with the legislation, which has been drafted much more broadly).

**"the introduction of the offences is not expected to change the kind of behaviour we investigate"**

TPR's Policy

There are, however, areas where the Policy leaves real uncertainty (which we discuss further in this briefing) and a notable gap is that the Policy doesn't contain any specific reference to, or comfort given in respect of, pension scheme trustees. There is no doubt that the consultation is likely to generate much interest from a wide range of stakeholders across all of industry. It is also important to note that the Policy is non-binding, and anyone who deals with employers or their schemes should consider how much comfort they can take from it.

The consultation runs until 22 April 2021 and the Policy itself indicates a commencement date for the criminal offences of 1 October 2021 (consistent with previous comments made in a Ministerial Statement of 2 March 2021, which stated the Government's intention to commence the criminal offences measures in the autumn).

For further information on the detail of the criminal offences see our [October 2019](#) and [February 2021](#) Special Editions.

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<sup>1</sup> The policy focuses on the two offences inserted into the Pensions Act 2004 as sections 58A and 58B by the Pension Schemes Act 2021.

## 2. STATUS

While overall the Policy may be quite useful as a guide to TPR's proposed policy for prosecution (to be read in conjunction with TPR's Prosecution Policy), its status is to be non-binding guidance only, noting that TPR will update the Policy over time to reflect court decisions in relation to the offences. It remains to be seen how much comfort parties will take from non-binding guidance as regards criminal offences.

As the Policy notes, prosecution of the new offences can be instituted not only by TPR, but also by the Secretary of State, or by or with the consent of the Director of Public Prosecutions. The Policy expressly notes that it may not reflect the interpretation of the new offences by these other parties. It is not clear when either of those parties might be expected to pursue a prosecution (particularly if TPR has decided not to do so). It had been hoped that common guidance would be provided but that appears not to be the case.

## 3. THE OFFENCES

<b>Engaging in conduct that "detrimentally affects in a material way the likelihood of accrued scheme benefits being received"</b>
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.
<b>Avoidance of employer debt</b>
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 (i) prevents the recovery of the whole or any part of a Section 75 Debt, (ii) prevents such debt becoming due, (iii) compromises or otherwise settles such debt, or (iv) reduces the amount of such debt which would otherwise become due; (b) they intended the act or course of conduct to have such effect; and (c) they did not have a "reasonable excuse" for the act or for engaging in the conduct.

## 4. CLARITY PROVIDED OR IMPROVEMENT REQUIRED?

### ***Reasonable Excuse***

The scope of the criminal offences is extremely wide – many activities will cause a "material detriment" to a pension scheme (whether the parties intended that or not) and the avoidance offence could, in principle, capture lots of common activity for managing section 75 debts. The only real defence is where parties have a "reasonable excuse" for their actions.

The Policy sets out some of TPR's views as to where a reasonable excuse is likely to exist. In some respects those views are helpful, in others less so (it is also of course important to bear in mind that this is non-binding guidance, and the determination as to whether a reasonable excuse existed would be made by a Court).

The Policy expresses a clear intention that potential targets of the new offences will be given the opportunity to put forward evidence of matters that might amount to a reasonable excuse (and the Policy states that TPR cannot foresee circumstances in which it would not be possible and appropriate to give a suspect the opportunity to put forward their side of the story before taking a prosecution decision). However there is also a clear expectation that a reasonable excuse will be backed up by a paper trail / contemporaneous records (e.g. minutes of meetings, correspondence and written advice).

The Policy sets out three factors which will in TPR's view be significant in determining whether a person has a reasonable excuse for their conduct:

<p><b>Was the impact on the scheme "incidental" to the act/omission?</b></p>	<ul style="list-style-type: none"> <li>• TPR suggests that a reasonable excuse is more likely to exist where the detrimental impact on the pension scheme was incidental rather than "<i>a fundamentally necessary step to achieve the person's purpose</i>".</li> <li>• For example, industrial action by a trade union could detrimentally impact a scheme, as a result of affecting an employer's business, but this would likely be seen as an incidental consequence.</li> <li>• There is also a helpful example noting that ordinary business activity conducted on arm's length terms by an unrelated party, such as a supplier or customer terminating a business relationship, or a lender refusing, revising or terminating a lending arrangement should not be caught. This example does though require that "<i>the purpose of the act was unrelated to the scheme</i>". It is hoped this will be clarified in the consultation - the commercial reality is that, for example, lenders, acting properly, should be able to take account of the risks posed by a pension scheme when deciding whether to continue to lend.</li> </ul>
<p><b>Was adequate mitigation provided?</b></p>	<ul style="list-style-type: none"> <li>• The Policy suggests that a reasonable excuse is likely to exist where a detrimental act is adequately mitigated, but the examples given here are not particularly comforting. Assessing whether adequate mitigation has been provided seems a rather fine, and subjective, test, given the severity of the penalties for these offences (a test of "very substantial inadequacy" would perhaps have been more reasonable).</li> <li>• In addition, TPR emphasises its expectation that the pension scheme should be treated fairly as compared with other parties. Again, given the severity of the penalties, a test based around "substantial unfairness" might have been more reasonable. There is also no recognition that other parties may be (reasonably) in a stronger position than the scheme (for example, lenders who have security). The Policy refers to recognising the relative positions of the scheme and person under investigation, but not other parties.</li> </ul>
<p><b>Was there a viable alternative?</b></p>	<ul style="list-style-type: none"> <li>• The third factor is whether there is any viable alternative to the conduct in question. This suggests an unrealistic burden - given how wide the criminal offences are, it would seem unreasonable (or at the very least impractical) for persons to have to investigate every option available and establish (and we assume document) the lack of any viable alternative. The Policy does not seem to recognise that there could be a range of reasonable options, from which it is legitimate to select.</li> <li>• The Policy does helpfully say that it would not generally expect parties to follow an alternative option that means "<i>unreasonably disregarding their own interests</i>". It gives an example in relation to a syndicate of banks refusing to lend further sums which triggers an employer insolvency. The Policy indicates in this regard that a lender is entitled to decide that it is in its own interests to refuse to lend and/or seek recovery, even if continuing to lend would be better for the scheme. However, the word "<i>unreasonably</i>" is inherently broad and open to interpretation.</li> </ul>

### **Retrospectivity**

The Government has previously stated that the new criminal sanctions will only apply where the act occurs, or in the case of a series of acts, commences, after the offences come into force (which the Policy indicates will be 1 October 2021). Whilst there is no express confirmation of this in the Policy, the Policy does state that when considering whether a person knew or

ought to have known that their actions would cause material detriment, TPR will consider the circumstances "*at the time of the act and not with the benefit of hindsight*" (albeit note there is no equivalent statement in the section addressing whether a person had a reasonable excuse for their conduct).

The Policy also indicates that TPR may consider evidence pre-dating the commencement of the powers in relation to the investigation and prosecution of actions taken after that date where such evidence "*is indicative of someone's intentions*".

The Policy also notes that there is no limitation period applicable to the criminal offences. In contrast, TPR has six years following an act to take steps to impose a CN.

### ***Identification of cases for prosecution***

The Policy contains guidance as to how TPR will select cases for prosecution, some of which helpfully is at the more extreme end of the scale (e.g. where steps are taken for the purposes of abandoning a scheme or where steps are taken to mislead the trustees). However, other criteria are much more vague and less likely to provide comfort, for example the suggestion that TPR will consider whether there has been "*some unfairness*" in the treatment of the pension scheme or whether a party has made significant financial gains to the detriment of the scheme.

### ***Material Detriment***

TPR confirms that, when assessing material detriment for the purposes of the applicable criminal offence, it will consider the same factors as it would consider when looking at a CN issued on the grounds of material detriment. Of particular use here is the fact that TPR's Code of Practice on the material detriment test (which it says it will take into account) uses the term "substantial detriment" to employer covenant rather than just "material detriment". TPR also states that it would not normally expect to use the applicable criminal sanction power where a person could establish a statutory defence to a CN issued on material detriment grounds.

### ***Secondary Liability - Advisers***

The Policy draws out the potential liability for those found to be aiding, abetting, counselling or procuring another person to commit the offence, drawing focus to the particular exposure of professional advisers who do not have a reasonable excuse for their behaviour. Comfortingly, the Policy states that professional persons acting in accordance with their professional duties, obligations and ethical standards are likely to have a reasonable excuse for their behaviour and the examples given of potentially criminal conduct by advisers illustrate extreme and unusual conduct. This supports the thinking (albeit on a non-binding basis) that 'business as usual' professional support is not intended to be captured.

## **5. CAN CLEARANCE BE OBTAINED?**

One disappointing element of the Policy is the statement that the clearance process under the Pensions Act 2004 does not apply to the criminal offences. While factually correct, some recognition that TPR is likely to be called upon to provide some level of practical comfort going forward (at least in the near term, until parties get comfortable managing and documenting compliance with the new provisions) would have been helpful.

## CONTACTS



**Hywel Robinson**  
Partner

**T** +44 20 7006 8387  
**E** [hywel.robinson@cliffordchance.com](mailto:hywel.robinson@cliffordchance.com)



**Clare Hoxey**  
Partner

**T** +44 20 7006 8899  
**E** [clare.hoxey@cliffordchance.com](mailto:clare.hoxey@cliffordchance.com)



**Sarah McAleer**  
Partner

**T** +44 20 7006 8808  
**E** [sarah.mcaleer@cliffordchance.com](mailto:sarah.mcaleer@cliffordchance.com)

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London, E14 5JJ

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