

Pension Schemes Act 2021 – TPR consults on use of its new criminal sanctions



What you need to know

- The Pensions Regulator (TPR) has issued draft guidance on its proposed approach to investigation and prosecution under two of the new criminal offences introduced by the Pension Schemes Act 2021. These are the avoidance of an employer debt and conduct risking members' accrued scheme benefits, with penalties up to 7 years' imprisonment or unlimited fines.
- TPR sets out that the powers are not intended to change commercial norms or accepted standards of corporate behaviour, but to tackle the more serious examples of intentional or reckless conduct. The powers are, however, wide reaching in scope and who they apply to.
- To use the criminal powers TPR must prove the absence of a 'reasonable excuse', and targets will be expected to explain and evidence their actions. The guidance sets out considerations in determining a reasonable excuse.
- The guidance gives examples of when TPR would select a case for prosecution and considerations as to whether to prosecute an individual. It notes that the type of behaviours targeted are likely to be carried out by people with significant decision-making power, but this does not exclude the possibility of this behaviour being carried out, helped or encouraged by others who could also be prosecuted.
- The DWP is also consulting on two sets of regulations which cover the information gathering powers and the 'employer resource test' that forms part of the new contribution notice tests.



Actions you can take

- **Carry out training on the detail of the new powers** and the consultation and consider whether you wish to respond by the deadline of 22 April 2021. XPS will be issuing a response.
- **Review governance processes, including conflicts management and decision-making processes**, to ensure events that may be covered by the new powers are identified, managed and notified (if relevant).
- **Review or put in place information sharing agreements** between trustees and employers to ensure any relevant event is identified and managed in a timely and proportionate manner.

Areas of concern that remain

Area	Description	Implications
Range of targets	The offences can be committed by a wide range of parties	Whilst the guidance and most of the examples featured are employer-focussed, actions of trustees and other parties could still be caught
Scope of guidance	The guidance is limited to the criminal element of two new sanctions	This leaves uncertainty around the civil penalties that could apply, covered by a separate sanctions policy
Authority	The guidance only applies to TPR's approach to these criminal offences	Other bodies are able to prosecute under these powers
Retrospectivity	Evidence pre-dating the powers coming into force may be taken into account (e.g. if it signals extent)	Even though the offences are not yet in place, trustees and sponsors should ensure their governance and decision-making processes are robust
Comfort	No clearance process is available for these offences	It is not possible to get sign-off for actions which could be subject to investigation in the future
Limitation period	No limitation period for use of the powers	Events could be considered a number of years in the future through a different lens

The finer detail: key parts of draft guidance

Policy intent

Recap

The guidance covers two of the new criminal offences, namely the avoidance of employer debt and conduct risking members' accrued scheme benefits. The potential penalty for both is up to 7 years' imprisonment and an unlimited fine. The guidance does not appear to cover any of the other new criminal offences introduced by the Pension Schemes Act 2021, but TPR points to an existing prosecution policy from June 2016. The policy also does not cover any of the new civil offences, including the new fine of up to £1m.

TPR refers to strengthening the deterrent and punishment for deliberate or reckless conduct that puts members' savings at risk.

What is a reasonable excuse?

Three significant factors in determining a reasonable excuse for an act or failure to act

1. Was the detrimental impact an incidental consequence as opposed to a fundamental necessary step to achieve the purpose?
2. How adequate was any mitigation provided to offset the detrimental impact?
3. Was there a viable alternative route which would have avoided/reduced the detrimental impact (in the absence of sufficient mitigation)? The guidance sets out that TPR would not expect someone to follow an alternative which means unreasonably disregarding their own interests.

Other potentially relevant factors include, the extent of communication/consultation with the trustees before the act took place, whether the notification requirements were met and the openness and timeliness of any communication with TPR.

Considerations for prosecution

Examples of when TPR would select a case for prosecution

The draft policy states that TPR will select cases for prosecution being mindful of the policy intent behind the new offences. The following examples are given:

- Primary purpose of the conduct is the abandonment of the scheme without provision of appropriate mitigation.
- Significant financial gains have been unreasonably made to the detriment of the scheme or some other unfairness in treatment.
- The trustees, TPR and/or the PPF have been misled or not appropriately informed.

Considerations in deciding whether to prosecute an individual

- Their relationship, duties, and proximity to the employer, the scheme and the act or failure to act.
- The extent of their involvement or influence.
- Any direct/indirect benefit(s) to the individual by reason of the act/failure to act.
- Likely a person with significant making power but this does not exclude the possibility of the behaviour being carried out, helped or encouraged by others.

Material detriment

Link to existing contribution notice approach

In deciding whether there is material detriment in relation to conduct risking members' benefits, the guidance sets out that TPR will take the same approach as when considering issuing a material detriment contribution notice. This includes taking account of existing code of practice 12 which sets out the circumstances of material detriment that TPR believes would warrant use of the powers. These are more detailed actions which may result in the outcomes example above (e.g. transferring a scheme or employer support outside of TPR's jurisdiction).

For further information, please get in touch with **Rob Wallace** or speak to your usual XPS Pensions contact.



 0118 313 0789

 robert.wallace@xpsgroup.com

 @xpsgroup

 xpsspensionsgroup