



## Introduction

This note is aimed at all those involved with a defined benefit pension scheme, be they employer, trustee or adviser. However, it should be acknowledged that the employer is the one most in The Pension Regulator's (TPR) eye line. The new laws in force from 1 October 2021 have been designed to deal, primarily, with employers that undertake actions which damage the position of the defined benefit scheme that they are supporting.

These rules were drafted in 2019 in response to cases like BHS and Carillion, where it was perceived that owners had taken value from the business and then, when the business failed, there were ultimately insufficient assets to secure the members' accrued rights.

## Executive summary

The new powers are wide ranging and can technically be used against employers and trustees - in relation to the actions they take, or don't take - and their advisers for aiding or abetting such actions.

For serious transgressions there could be prison sentences of up to seven years or unlimited fines. In addition:

- Employers will soon have to provide information to Trustees and TPR in relation to some (potential) corporate activities at a very early stage as part of a review of the Notifiable Events framework.
- Financial penalties can also be levied for not complying with the above and other requests or Contribution Notices from TPR.

Employers and Trustees need to understand these new powers and how to not fall foul of them inadvertently. TPR is at pains to point out that normal commercial activities will not be in scope for punishment.

## TPR's response

TPR has provided a policy document which describes in some detail how they intend to use their powers. It is well worth a read. They also have a discussion paper which looks at how and

where their powers can be used in different ways. You can access these documents [here](#).

## The new criminal offences – an overview

Primarily there are two new key offences from 1 October 2021.

1. An employer debt to a scheme is not paid in full, e.g. intentionally avoided or reduced.
2. Accrued rights in the scheme may not be paid in full and the person who undertook an action that contributed to this either knew or should have known this would be the result.

The prosecution must also demonstrate that the person did not have a reasonable excuse for the actions they took, or did not take.

TPR note that they will need to meet the required legal tests before prosecuting under these criminal offences and so would need to meet the criminal standards of proof (i.e. beyond reasonable doubt) and the various prosecutor tests in the different courts in the UK, which broadly require sufficient evidence and a public interest purpose. This suggests that the number of such cases prosecuted will be limited.

However, to reiterate, punishment under these criminal powers brings with it the possibility of an unlimited fine and up to seven years in prison.

## Potential penalties and other offences

Similar actions/offences could result in a different response from TPR, if going through the criminal court and seeking a custodial sentence seems too difficult. As an alternative, TPR could issue a Contribution Notice or levy a fine of up to £1m.

TPR's policy outlines the similarities and differences between these approaches via criminal or regulatory/civil proceedings. Broadly speaking, it is far easier for TPR to issue a Contribution Notice or issue a fine as the burden of proof is lower; they would not need to meet the standards necessary to bring a prosecution to court. They also then don't have to go through the action of proving their case to a jury.

The key differences when issuing a Contribution Notice are:

- For a contribution notice the power rests with the Determinations Panel (not a court).
- Where there is a reduction in the likelihood of benefits being received (offence 2), the burden is with the “target” to prove they considered the material impact of the act.
- Reasonableness is decided by the opinion of the Determinations Panel, whereas for criminal action it must be proven.
- The Contribution Notice has a limitation period of 6 years, whereas there is no limitation for the criminal powers.

The key differences when issuing a Financial Penalty are:

- The power to levy a fine rests with the Determinations Panel.
- The proof is on the balance of probabilities, not to the court standard of evidence.

## Overlapping powers

TPR has also acknowledged that in some circumstances different powers will be open to them, be those regulatory, civil or criminal. These would also include other criminal offences (e.g. fraud).

TPR has also published a discussion paper which considers the monetary fines they can levy. In summary,

A fine of up to £1m for:

- Failure to comply with a Contribution Notice;
- Avoiding section 75 debt; or
- Reducing the likelihood of benefits being paid.

A higher fine of £1m+ for

- Failure to comply with the Notifiable Events framework (without reasonable excuse); or
- Knowingly or recklessly providing false or misleading information to trustees or TPR.

## Notifiable events

Further to the Pension Schemes Act 2021 provisions the DWP are consulting on the introduction of two new Notifiable Events:

- A decision in principle by an employer to sell a material proportion of its business or assets, and
- A decision in principle by an employer to grant or extend certain security over its assets which will be ranked above the pension scheme in the event of insolvency.

A material proportion of the business or assets is defined in the consultation as one that accounts for more than 25% of the employer's annual revenue or gross value of its assets (as appropriate) either on its own or taken together with any other sales decided upon within the previous 12 months.

Once implemented, Employers will need to advise the Trustees and TPR via a Declaration of Intent, with the new requirements due to come into force in April 2022.

These new rules will clearly have more impact on employers and there currently remains a great deal of uncertainty about when a “decision in principle” is actually made and how notifying TPR and Trustees will help this process. It is clearly desirable to have employers considering the scheme early but the definition of this needs work and real consideration.

## Actions

Employers should take the time to understand these new rules and powers and how they may impact future business planning. How and when you take advice on any restructure, borrowing or investment is crucial. What will also be crucial is recording your decisions, the reasons and how you considered the impact on the pension scheme.

Employers may also find that Trustees expect a greater flow of information between the two parties. Clearly this information can be sensitive but employers are under pressure to be more open with Trustees, who have a duty of confidentiality. You may want to consider introducing an information sharing agreement to provide some structure to what is expected and when.

Trustees will also need to understand these new rules. It is highly likely that your Scheme Actuary will refer to them during funding and investment



conversations or in cases where a Section 75 debt is expected to arise.

Trustees should consider proactively raising the new rules with their sponsor, if they're not already aware, and suggesting they look to address together the issues that the powers raise.

### Broadstone view

The clear concern for these new powers exists in the grey areas they create around business restructuring, and it is employers and their advisers that have most to fear. The Notifiable Events framework currently being consulted on will also give TPR a better early warning for changes and the potential for Trustees to be included at an earlier stage during discussions around potential corporate activity.

We expect to see TPR reminding employers and Trustees of these powers in future correspondence during valuations and annual funding statements.

However, while the actuality of court cases will be few and far between, we would anticipate TPR looking to issue fines for transgressions as they are quicker and easier to pass down.

Employers may find themselves advised to use TPR's clearance process to give some comfort for those wishing to demonstrate they have remained within the rules and reduce the chance of cases being reassessed with the benefit of hindsight. Whilst clearance would not absolve criminal actions, so by its very nature would not protect the worst offenders, it could be useful when demonstrating reasonable excuse.

For Notifiable Events, the key concerns for employers will be when to issue their Declaration of Intent and how much they have to spend on advisers. We hope that the consultation will help address some of the current uncertainties but where there is a DB scheme we expect employers will be treading far more carefully.

The audit trail of scheme mitigation will be an important part of the process. However, it is important to note that there are already expectations that corporate activity which affects the employer covenant would be considered by the Trustees and mitigation sought if appropriate.

The new rules are therefore largely about earlier engagement and escalation with TPR in specific scenarios.

We will all need to work together, especially during these early stages under the new regulations, to ensure you are being correctly advised and the audit trail of decision making and reasoning is clear. This would also need to be retained forever (there is no time limitation on criminal offences) and be able to subsequently withstand review. This could increase the use of dedicated or professional Scheme Secretaries when recording discussions and decisions and it is likely to be in everyone's interest to ensure these and other papers accurately record the processes that have been followed.

As your advisers we are here to support you in this. If you would like to discuss any of the areas raised in this note please get in touch with your usual Broadstone contact.

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