



# Briefing note – TPR new powers - a consultation everyone should be interested in

## TPR new powers

### Introduction

The Pension Scheme Act 2021 will be remembered for many things in the future. However, one area that may well have a lasting impact is the way the Pensions Regulator (TPR) regulates the pensions industry after being given dominion over two key new offences. These new offences are significantly important and signal a stepped change to TPR's existing anti-avoidance powers, mainly due to the size of the potential penalties that can be handed out. They are, if criminally prosecuted, up to 7 years in prison and/or an unlimited fine. They are expected to come into force during Autumn 2021 and will not have a retrospective effect, as confirmed by the Pensions Minister in January 2021.

TPR has launched a consultation into the operation of these new powers and how they will work in practice. The consultation closes on 22 April 2021.

### What are the new offences?

The new offences are defined as follows: "Under section 58A(2), someone commits the offence of avoidance of employer debt if they:

- a. do an act or engage in a course of conduct that:
  - (i) prevents the scheme from recovering all or any part of the debt that is due from the employer under section 75 of the Pensions Act 1995
  - (ii) prevents that debt becoming due
  - (iii) compromises or otherwise settles that debt, or
  - (iv) reduces the amount of that debt which would otherwise become due,
- b. they intended their actions to have this effect, and
- c. they didn't have a reasonable excuse for doing the act or engaging in the course of conduct."

"Under section 58B(2), someone commits the offence if:

1. they act or engage in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received (whether or not the benefits are to be received under the scheme),
  - (i) they knew or ought to have known that what they were doing would have that effect, and
  - (ii) they did not have a reasonable excuse

In addition to these quotes TPR confirm that they only apply to activity regarding a defined benefit scheme and will extend to where someone counsels, aids, abets or helps and encourages someone without a reasonable excuse for their actions or for helping someone commit the act.

### Operation of the new powers

For those in the industry concerned about the scope and operation of these new powers, their concerns may not be lessened by one of the first statements made in the draft policy document:

*"... when we refer to "someone" in this guidance, it includes any legal person, which can be a company as well as an individual. When we refer to an "act", it also includes the failure to act, or a series of acts."*

TPRs use of the power to prosecute under the new offences will be closely linked to the power TPR has to issue a Contribution Notice. However, the emphasis and the burden of proof will not always be the same. As such, an offence under the new powers may not necessarily lead to a Contribution Notice and vice versa. TPR note that the use of these powers will be made in a proportionate manner and where the goal of acting as a deterrent can be achieved.

### Material detriment – what is the damage done?

While acknowledging some differences between the new offences and the conditions for a Contribution Notice to be issued, TPR also note some similarities.

In particular, their determination as to whether material detriment has occurred will be considered in the same way as determining whether a Contribution Notice should be issued.

This means it would be very unlikely that a prosecution would be made under 58b above where a defence to the application of a Contribution Notice could be made. Based on this and where material detriment has been demonstrated, a Contribution Notice and prosecution would happen together.

## Secondary liability – advisers beware

The area of most concern within the wider industry of advisers and consultants is the principle that a person who helps or encourages an offence to be committed has the same liability under the law as the offender. TPR has clarified that even if someone is prosecuted, the adviser whose advice led to the crime, may not be prosecuted if they have a reasonable excuse. This statement from the regulator may also provide some welcome comfort,

*“a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of the advice being given, is likely to have a reasonable excuse.”*

TPR have provided some examples of actions that would give cause for prosecution. These involve:

- Misleading others involved in a transaction.
- Taking steps to profit from investments without disclosing conflicts of interest.
- Professionals acting outside of their professional remit in technical areas.
- Misstatements in accounts.

It should be noted that TPR and other bodies already have the powers to prosecute these offences as they appear to contravene existing laws. We believe TPR will need to provide further detail to better clarify what actions are intended to be caught by the new powers.

## What does reasonable excuse mean?

Helpfully, TPR devotes more time on what is feared to be the more spurious area of the new rules, outlining the three factors they will consider when assessing whether someone has a reasonable excuse:

- Whether the detrimental impact on the scheme/likelihood of full scheme benefits being received was an incidental consequence of the act or omission, as opposed to a fundamentally necessary step to achieve the person's purpose.
- The adequacy of any mitigation provided to offset the detrimental impact.
- Where no, or inadequate, mitigation was provided, whether there was a viable alternative that would have avoided or reduced the detrimental impact.

The penalties that will be applied in these cases are likely to be criminal and so it is incumbent on those prosecuting to prove there is no reasonable excuse. However, TPR expects the grounds for reasonable excuse to be clear from the records relating to the case.

## Who will they be pursuing?

TPR has also provided some overarching criteria that they will consider when making their decision on whether or not to prosecute:

- The 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.
- There has been some other unfairness in the treatment of the scheme.
- The trustees, TPR and/or the PPF have been misled or not appropriately informed.

Importantly, it is not only TPR that needs to be satisfied. The Secretary of State and the Director of Public Prosecutions could also bring prosecutions and these need not necessarily follow TPR's rules.

## Impact on advice

The rules are likely to influence the giving and receiving of advice in many ways, some of which may not immediately be obvious. Some examples might be:

- Concern over the aim of “deterrent”. Will TPR be looking for a target to be used as an example? Why have the power if you're not going to use it?



No-one wants to run a risk that could result in a court case so “deterrent” could lead to an increase in advice with the commensurate increase in compliance, time and cost.

- Many advisers will need to consider their advice and how it could be interpreted, not just now but also in many years down the line. We expect various professional bodies to respond to the consultation providing their views on how professional services provided in the future may change some of the ways that advice is given now.
- Trustees will also need to consider how they instruct and receive advice to ensure there are no grey areas. Trustee bodies may also respond and Trustees may wish to discuss this with their advisers as the policy and new rules come into force.
- An anticipated key impact area will be corporate activity and their advisers, with an expectation of increased scrutiny of board discussions and records, where any decisions have an impact on the funding risks of a pension scheme. It is expected that pension schemes will be moved higher up in corporate decision making at an earlier stage.

### Broadstone view

The powers being introduced in the Act are there to protect members’ benefits and to stop reckless actions which will put their benefit security at risk. Whilst the aims are to be applauded, we are concerned about the potential for an overly wide application of the powers. The attitude of TPR when considering whether to bring a prosecution will be important and will clearly influence the balance they strike with the rules as they are drafted.

There is no doubt that the rules are widely drawn and will be open to interpretation in various cases. The central theme of TPR’s draft policy is that a combination of things will need to happen before prosecutions can be made. Has the scheme been disadvantaged? Were the actions taken intended to cause this? Were there mitigating circumstances that mean the acts were inevitably going to lead to the outcome or part of wider events? Trustees will be concerned and may wish to seek further clarification when making funding and investment decisions.

Sponsors will perhaps be the most interested in these new offences as their decisions are more

likely to have the largest impact. Employers will need to take more advice when taking corporate actions such as re-structuring, re-organisation, payment of dividends and re-financing. It is possible these actions could be seen to have significant consequences on the security of pension scheme funding and, if so, the potential for prosecution, therefore a strong defence would be required.

However, TPR is not the final word in these matters. In England and Wales, prosecution of these new offences can be instituted by TPR or the Secretary of State, or by (or with the consent of) the Director of Public Prosecutions. In Scotland, public prosecutions are brought by the Crown Office and Procurator Fiscal Service, and in Northern Ireland by the Public Prosecution Service. TPR expects to be consulted but this policy only applies to prosecutions brought by TPR. Other bodies may yet take other, different, interpretations and applications.

The consultation closes in April with TPR working towards providing a final policy towards the end of the year.

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