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Proposed changes to pension law that will challenge restructuring

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The Pension Schemes Bill 2019 is causing a marked degree of consternation in the restructuring community. The proposed legislation introduces new offences that can be prosecuted in the criminal courts and further moral hazard powers that are likely to significantly reduce the directors' and insolvency practitioners' ability to provide commercial and creative solutions to creditors of financially stressed companies.

At clause 107, the Bill introduces two new criminal offences and below we address the concerns these cause:

- ***Risking accrued scheme benefits*** is an offence which applies when any person engages in *an act or conduct that they knew or ought to have known would have a* ***materially detrimental effect*** *on a defined benefit pension scheme.*

This unhelpful wording takes directors and their advisors straight into a minefield replete with criminal sanctions. As a matter of course, directors of financially stressed companies need to decide whether or not to continue trading. More often than not continued trading, at least in the short term, will produce a better result for creditors. However, in circumstances where continued trade was not successful, under the proposed legislation the directors may be found, with the benefit of a subsequent investigator's hindsight, to have fallen foul of this clause. The Bill states there is no offence if there was "reasonable excuse" for the act but as matters stand this will be cold comfort for directors who are already in a stressful position and will be more likely to push them towards closing the business rather than run the risk of a fine or up to seven years in prison.

- If a person commits an act that ***prevents the recovery of a section 75 debt*** **or otherwise** ***compromises or settles such a debt*** he can be found guilty of a criminal offence.

This broad wording would impugn statutory arrangements such as regulated apportionments, company voluntary arrangements and compromises outside the pension protection fund where there are benefits above the PPF levels. Not only could this offence apply to financially stressed employers, it could also apply to trustees of pension schemes. All of the aforementioned are currently legitimate restructuring avenues used by insolvency practitioners and directors to produce better outcomes for scheme beneficiaries than would otherwise be the case. Again, “reasonable excuse” is a defence, but there is no granularity as to how this defence would work in practice in what might be a reasonable excuse.

Worryingly the offences above capture **any persons** who ***knowingly assist in the act of failure*** creating potential criminal liability for third parties commonly involved in supporting a restructuring.

Apart from directors and insolvency practitioners being negatively affected by the above lawyers and other professional advisors e.g agents and valuers are also, at first blush, exposed to potential claims. Those involved in financing a restructuring may also be discouraged from doing so, given the wide reach of the provisions. This outcome cannot be good for creditors as the opportunities to preserve value for their benefit diminish.

Whilst there is an exemption that protects formerly insolvency practitioners, it only applies once the practitioner is formerly appointed. This is unlikely to provide any comfort to a practitioner engaged pre-appointment to provide advice.

The well-publicised case of BHS’s collapse and the subsequent and ongoing prosecution of Dominic Chappell has given fuel to the fire of restructuring going badly wrong – it is high profile and there is more to come. No doubt cases like BHS become conflated in the public psyche with the restructuring landscape generally and continue to markedly reduce the desire to think creatively and produce positive results for all stakeholders.

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