

# Pension Schemes Act 2021 Under the Microscope – TPR Consultation on the new Criminal Sanction Powers

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*Will The Pensions Regulator (TPR) take a similar approach to the Financial Conduct Authority (FCA) when initiating criminal proceedings?*

## Background

The long-awaited Pension Schemes Act 2021 (the Act) received Royal Assent on 11 February 2021. Within the Act, new offences have been inserted into the Pensions Act 2004 (PA04) which include Section 58A (avoidance of employer debt) and Section 58B (conduct risking accrued scheme benefits), both carrying a risk of imprisonment for up to seven years.

On 11 March 2021, TPR published a [draft policy](#) outlining its approach on how it will use its new criminal powers to investigate and prosecute those who avoid employer debts or put member benefits at risk.

The approach will be subject to the [consultation](#) it has also published and the final policy will be issued later in the year. The criminal sanctions will not come into force until the autumn of 2021 and are not expected to have retrospective effect, although TPR has said that evidence pre-dating the implementation date may be taken into account, as regards the intent of the parties.

This blog covers some of the practical points that are worthy of note.

## TPR's use of the new Offences

TPR has confirmed that the new offences are “*not intended to fundamentally change the standards of corporate behaviour*” in the UK. The offences are simply there to assist TPR in addressing some of the more serious and intentional or reckless conduct, which already forms part of its contribution notice (CN) powers. However, fear around how TPR will interpret the grey areas may well lead to a cultural change in terms of how scheme sponsors engage with trustees.

Although the draft policy states that the new offences are there to act as a deterrent to warn against bad behaviour, the Act's impact assessment includes forecasts that there will be up to five criminal convictions per year and up to two custodial sentences.

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TPR confirms that, in some instances, it will consider prosecution in the same circumstances where it would consider seeking a CN. However, it appears that there will be times where TPR will not consider a CN when it would consider prosecution if it is in the public interest, and vice versa.

Other regulatory bodies, such as the FCA, have historically tended to avoid using their powers to initiate criminal proceedings in favour of their civil sanctioning powers, mainly due to the high costs involved and length of time it takes to pursue criminal cases. For the [2019/20 period](#), the FCA closed no criminal cases and only 12 of the 288 cases closed were criminal for the [2018/2019 period](#). Although TPR has new criminal powers, we anticipate that TPR will take a similar approach to the FCA in using these powers rarely.

## Similarities and Differences

The draft policy document briefly outlines the similarities and differences between TPR's CN and prosecution powers.

Notable differences include:

- Under Sections 58A and 58B, it is for the “prosecution to prove that the person knew or ought to have known that their actions would cause material detriment to the likelihood of members receiving their benefits”. This differs from CNs where the burden is on the person to prove any statutory defence under section 38B and that reasonable steps were taken to eliminate or at least minimise the material detriment.
- CNs can be issued where the main purpose of the act was to prevent recovery of a debt which might become due under section 75. Section 58A does not apply where the debt was not due at the time of the act.
- TPR has a six-year statutory limitation period attached to its CN power. It can only issue a CN when someone was issued with a warning notice within six years of the date of the act. No limitation period applies to TPR's criminal powers.
- The criminal sanctions come with the normal secondary charges of “aiding and abetting”, which could impact upon advisers as well as the parties themselves.

Similarities include:

- Both offences can be committed by, and a CN can be issued to, a person who acts or engages in a course of conduct and by anyone who helps, encourages or agrees with another to commit the offence.
- Anyone who is found to have intended their act to have the effect of avoiding the employer's section 75 debt can commit an offence under Section 58A. A CN can similarly be issued to someone if the main purpose or one of their main purposes was to avoid the section 75 debt.
- The material detriment test is the same for both issuing CNs and committing the new offences.

## What is a “Reasonable Excuse”?

TPR concludes that the burden is on the prosecution to prove the absence of a reasonable excuse.

However, anyone who is investigated will be given the opportunity to explain the reason for their actions and provide sufficient evidence to prove their conduct was reasonable – *this includes meeting minutes, correspondence and written advice received*. We recommend that trustees continue to record their decisions effectively, to ensure an audit trail is in place relating to key actions agreed and implemented.

TPR confirms that reasonableness will largely depend on the facts of each case, and it will focus on the following three factors in making its decision:

1. Whether the detrimental impact on the scheme/likelihood of full scheme benefits being received is an incidental consequence of the act/omission.
2. The adequacy of any mitigation provided to offset the detrimental impact.
3. Where no or inadequate mitigation was provided, whether there were any viable alternatives which would avoid or reduce the detrimental impact.

TPR has provided some helpful examples of situations where TPR may consider that the above factors apply. Although specific, the examples highlight the detailed level of assessment TPR will carry out when making its decision to pursue a criminal investigation with eventual prosecution.

The consultation closes on 22 April 2021, following which TPR will consider all comments in advance of publishing the final policy later this year.

Until then, if you have not seen our detailed communication on the Act you can find it [here](#).

This post was written by *Bethany Darragh*.

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