

Pensions Law technical bites:  
New Crimes, Fines and Penalties  
under PSA 2021

(1) Overview and TPR choices

[David Pollard, Wilberforce Chambers](#)

30 March 2021

# Crimes, Fines and Penalties

- New powers for **the Pensions Regulator** (TPR)
- under the **Pension Schemes Act 2021** (PSA 2021)
- amending the **Pensions Act 2004** (PA 2004)
  
- Series of short webcasts
- focusing on particular aspects of the new provisions
  - Will be under 10 minutes each
  - This webcast will cover:
    - (1) **Overview and TPR choices**
  
  - Later technical bite webcasts:
    - What acts/intent and purpose
    - Reasonable excuse
    - Non-connected persons
    - Role of advice/issues for advisers
    - Time limits/retrospection
    - Standard of proof
    - Overseas issues

Follow us:



# Crimes, Fines and Penalties

## Caution!

- These webcasts are just discussions
- Intended for professional advisers
  - If you are not a solicitor, you should get legal advice from a solicitor
  - If you are a solicitor, you should consider formally instructing a barrister
- This is new legislation – not yet in force
- Much will depend on the facts of each situation
- Risk of action being taken by TPR may depend on its policy

Follow us:



# Crimes, Fines and Penalties

- TPR and new teeth
- Wide ambit
- May need to be a constant check:
  - Could the pension scheme or support for the pension scheme be affected? – now or in the future?
  - Does what is happening look to have a “reasonable excuse”
    - Will it still look reasonable in the future?
    - Will a jury decide that?
- What is likely to be TPR’s likely reaction?
  - now and in the future?

Follow us:



# Crimes and penalties

## Widely framed

- Not just employers or trustees (or associates)
  - Could apply to any person
  - NB potential to extend to directors and managers of corporate
- Not limited to “wilful or reckless” acts (compare Govt responses)
- Potentially catches many acts or omissions that affect pension schemes
- Major defence – reasonable excuse

Follow us:



# PSA 2021: potential new liabilities

## **New criminal offences**

- very widely framed (deliberate)
- Unlimited fine/ 7 years max sentence
- Not limited to persons connected or associated - can apply to any person
- If company guilty, potential for directors/managers/officers of corporate offender to be guilty too

## **New Financial Penalty power for Pensions Regulator (TPR)**

- Up to £1m penalty
- Can apply to any person
- If company liable, potential for directors/managers/officers of corporate offender to be guilty too

## **Wider CN powers**

- Target must still be “connected or associated” with a scheme employer

Follow us:



# New crimes and penalties

## **Failing to comply with CN**

s40A Offence/ s40B: Financial penalty

## **Avoidance of employer debt**

s58A Offence/ s58C: Financial penalty / New CN ground

## **Conduct risking accrued scheme benefits**

s58B Offence/ s58D: Financial penalty / New CN ground

Follow us:



# New crimes and penalties

## ss69/69A: **Financial Penalty**

for failure to comply with notifiable event obligations

## s80A: **Financial penalty**

for knowingly or recklessly providing false or misleading information to Regulator

s80B: **Financial penalty** for knowingly or recklessly providing false or misleading information to trustees or managers

Follow us:





# TPR

- TPR as prosecutor/ penalty decider (DP)
- Wide net of potential targets
- Challenging role for TPR

Follow us:



# Crimes and Fin Pens – dealing with risk?

3 main stages:

1. TPR investigation

- Impact of declaration of intent?
- s72 notices (NB not overseas? - *R (KBR, Inc) v SFO* [2021] UKSC 2)

2. TPR decision to prosecute (or refer to CPS) or seek financial penalty (warning notice)

3. Actual criminal trial or hearing before DP

Follow us:



# Crimes and Fin Pens – dealing with risk?

Advisers give risk warnings?

How will principals react to risk?

- Seek safe harbour?
- Seek advice?

Follow us:



# TPR policy?

- TPR policy on investigation/action?
- Increased discussion with TPR
- Look for clearance from the Pensions Regulator (TPR)?
  - “TPR will not clear crimes”
- Informal consent?
- Silence?

Follow us:



# Comparison table: Avoiding s75 debt or risking accrued benefits: CN vs Fin Pen vs Criminal

	CN	Financial penalty	Crime
<b>Prosecutor</b>	TPR	TPR	TPR or DPP or SofS Consent needed
<b>Tribunal</b>	DP, with reference to UT	DP, with reference to UT	Court (Magistrates or Crown Court)
<b>Def/target needs to be connected or associated with an employer?</b>	Yes	No	No
<b>IP liable as def/target?</b>	No provided TPR is of the opinion that act/failure is “in accordance with his functions as an [IP] in relation to another person”	No provided TPR is of the opinion that act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”	No provided act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”
<b>Time limit</b>	Gateway act needs to be within 6 years period before warning notice issued. Seemingly reasonableness test can look at acts etc before gateway act (eg Box Clever – an FSD case)	No	Trial by indictment (Crown Court) – no time limit  Summary trial (magistrate court) – 6 months for issue of summons: MCA 1980, s 127
<b>Penal?</b>	FSD – positive obligation (Bonas) CN – No – (Bonas)	Yes	Yes
<b>Criminal</b>	No	No	Yes
<b>Burden of proof on TPR</b>	Balance of probability	[Not clear]	Beyond reasonable doubt
<b>Is limit overall or for each def (so can exceed cap in aggregate)?</b>	For each target: <i>Re Storm Funding</i>	For each def: <i>Sutton v Norwich CC</i>	N/A

Follow us:



# Comparison table (2):

	CN	Financial penalty	Crime
Third party liability: directors and officers	No	Yes (if consent or connive) (NB claim against director/officer not available if already a claim for same act against co)	Yes (if consent or connive or due to neglect)
Third party liability: Liable if aid or abet/counsel or procure (or encourage)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	Yes: Accessories and Abettors Act 1861 or Serious Crime Act 2007
Reasonable excuse defence?	TPR must consider CN reasonable: Some specific defences	Must not be reasonable to act/fail to act	Yes
Limit on monetary liability	£75 debt amount (NB timing to change (under PSA 2021) to end of scheme year before date of determination notice)	£1m (can be raised by SofS by regs)	No limit
Is limit overall or for each def (so can exceed cap in aggregate)?	For each target: <i>Re Storm Funding</i>	For each def: <i>Sutton v Norwich CC</i>	N/A
Act/failure can support claim on one of the other heads as well?	Yes	Yes (but not if criminal proceedings for same act)	Yes
Who gets any amount paid?	The scheme	The Crown	The Crown (potential for confiscation order under POCA)

Follow us:



30 March 2021

[David Pollard](#)

Wilberforce Chambers, Lincoln's Inn, London  
WC2A 3QP

[dpollard@wilberforce.co.uk](mailto:dpollard@wilberforce.co.uk)

This material is for general information only and is not intended to provide legal advice.

© David Pollard 2021

Follow us:



Pensions Law technical bites:  
New Crimes, Fines and Penalties  
under PSA 2021

(1) Overview and TPR choices

[David Pollard, Wilberforce Chambers](#)

30 March 2021