Consultation document

Our approach to the new powers introduced by the Pension Schemes Act 2021 and their interaction with our existing powers

September 2021

Contents

Scope of the consultation exercise

The Pension Schemes Act 2021 has introduced a number of new powers, namely:

1. New criminal offences:
   a. The offence of avoidance of employer debt
   b. The offence of conduct risking accrued scheme benefits
   c. The offence of failure to pay a Contribution Notice (CN) – issued under section 38 of the Pensions Act 2004
2. New penalty powers to impose high fines of up to £1m for:
   a. Failure to comply with the new notifiable events requirements
   b. Failure to comply with the accompanying statements in relation to some notifiable events
   c. Providing false/misleading information to The Pensions Regulator
   d. Providing false/misleading information to trustees
   e. Avoidance of employer debt
   f. Conduct risking accrued scheme benefits
   g. Failure to pay a CN – issued under section 38 of the Pensions Act 2004
3. New information gathering powers to conduct interviews and inspections
4. New fixed and escalating penalties for failure to comply with our information gathering powers

We have previously consulted on and have published our policy on our approach to the investigation and prosecution of the new criminal offences listed at 1 (a) and (b) above.

This consultation contains three draft policies which explain our approach to the following:

- Overlapping powers – where we have the options to pursue both criminal and/or regulatory powers in respect of the same set of circumstances.
- Monetary penalty powers – high fines.
- Information gathering powers – the use of section 72 notices, interviews and inspections in the context of our enforcement cases, including our approach to the new fixed and escalating penalty powers for non-compliance.

In addition to seeking general views, we have provided questions on areas where we are particularly interested in feedback. We will consider all comments before publishing the final policies early in 2022.

Who this consultation is for

This consultation is for anyone seeking to understand our approach to the use of these new powers and how they interact with our existing powers.

Government consultation principles

This consultation paper following the government's consultation principles at: **https://www.gov.uk/government/publications/consultation-principles-guidance.** The key principles state that consultations should:

- be clear and concise
- have a purpose
- be informative
- be only part of a process of engagement
- last for a proportionate amount of time
- be targeted
- take account of the groups being consulted
- be agreed before publication
- facilitate scrutiny
- be responded to in a timely fashion, and
- not be launched during local or national election periods

Consultation context

The government policy intent is to strengthen the regulatory framework so that we will be able to gather information more efficiently and be notified of information that may affect defined benefit schemes, while also introducing a number of deterrents against conduct that may put members' pensions at risk.

In response to the recent consultation on our approach to the investigation and prosecution of two of the new criminal offences, we received a number of comments seeking further clarification on our approach to these other powers and how they interact where more than one power may be available to us.

Overlapping powers policy

Many of the new powers introduced have given us the option to use different powers in relation to the same set of circumstances – those options may be regulatory, including both anti-avoidance powers and financial penalties, and/or criminal.

Before the Pension Schemes Act 2021 we already had some powers where there was a choice between regulatory and criminal action – for example breaches of the employer-related investment provisions. This policy seeks to consolidate our approach to the variety of different powers where there is a potential for overlap and provide guidance on our approach where this overlap occurs.

Monetary penalty powers – high fines policies

The new penalty powers to impose high fines available cover two types of scenario:

1. Information requirements
2. Avoidance related scenarios

In the policies we have set out our proposed penalty bands and the factors we will take into account when determining which band will apply to a particular set of facts and how we will then determine the penalty amount within the chosen band.

Information gathering policy

The expansion of our information gathering powers will enable us to use a wider variety of tools to gather evidence which may lead to enforcement action. We will be able to:

- Compel individuals to attend an interview with us, and
- Carry out inspections of relevant premises to gather information relevant to our anti-avoidance powers

The draft policy outlines the tools available to us and how we will engage with those involved. It also set out the options for enforcement action for failure to comply, including our approach to the new fixed and escalating penalty powers.

Consultation on our approach to the new powers introduced by the Pension Schemes Act 2021 and their interaction with our existing powers

Please fill in your response to the questions below, save this whole consultation form to your computer, and return the completed attachment by **22 December 2021** to: **PSA21policies@tpr.gov.uk**

When responding, please confirm if you are responding as an individual or on behalf of an organisation and, if on behalf of an organisation, whether only the views of the organisation are expressed in the response.

Your details

Your name:	Christine Scott
Organisation (if applicable):	ICAS
Responding as an individual or on behalf of an organisation:	Organisation
If on behalf of an organisation, are only the views of the organisation expressed in this response?:	Yes
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Your details continued...

Please select the category that best describes you or your organisation.
If you have multiple roles, please select all that apply.

- [ ] Adviser (Actuarial)
- [ ] Adviser (Covenant)
- [ ] Adviser (Investment)
- [ ] Adviser (Legal)
- [ ] Adviser (Other)
- [ ] Administrator
- [ ] Investment manager
- [x] Professional body
- [ ] Provider
- [ ] Scheme sponsoring employer
- [ ] Trustee
- [ ] Other (Please describe in the box below)

Confidentiality (Please complete as applicable)

Please confirm whether you would like us to include your name on our list of respondents to this consultation:

- [ ] Yes, I wish my name to be included on the list of respondents
- [x] No, I do not wish my name to be included on the list of respondents

and/or:

Please confirm whether you would like us to list your organisation on our list of respondents to this consultation:

- [x] Yes, I wish my organisation to be included on the list of respondents
- [ ] No, I do not wish my organisation to be included on the list of respondents

As this is a public consultation, we may need to share the feedback you send us within our own organisation or with other government bodies or in response to a request under the Freedom of Information Act 2000. In the interests of transparency and effective scrutiny, we may also publish this feedback as part of our response to the consultation. If you wish your response, in whole or in part, to remain confidential, please tick the box below and give your reasons and we will consider whether we can reasonably meet your request:

- [ ] Yes, I wish my response to remain confidential

If 'Yes', please specify which part of your response you wish to remain confidential and why:

Consultation questions

1. Is the complete package of policies clear sufficiently on regarding explanatory about our overall approach to the new powers? If not, is there any additional policy/guidance that you would find useful?

☐ Yes ☐ No

Please give your reasons below:

Overlapping powers

2. Is the policy clear on the factors we will take into account when we have a choice of which power to use?

☐ Yes ☐ No

Please give your reasons below:

3. Are the examples useful in illustrating what we will take into account when considering which power to use? Are there any other examples that you would find useful?

☐ Yes ☐ No

Please give your reasons below:

4. Do you have any other feedback about the overlapping powers policy?

In the section on 'Breaches of a direction or restriction imposed by TPR', we would like to highlight and comment on the following material:

"We view the breach of any requirement set by us (e.g.to provide documents or information or to attend an interview) as unacceptable, particularly if this results in delaying or obstructing our investigations. In these instances, we may immediately seek to impose fixed and escalating financial penalties to secure compliance or, in the most serious cases of deliberate wilful conduct, begin criminal proceedings.

…….However, where the offender is a professional who is subject to rules of conduct that emphasise the importance of compliance with the law, or the breach continues to cause harm, we would typically consider criminal proceedings."

These paragraphs indicate that being a professional could mean criminal proceedings may be considered in the first instance rather than financial penalties.

We question whether as a matter of policy it is reasonable or even tenable to treat an action or inaction by a professional as a potentially criminal matter in circumstances where someone who is not a professional would instead be subject to a civil action. Such an approach in itself may be subject to legal challenge on the grounds that the proposed approach could be considered unfair.

Considering the policy in more detail, we do not believe that the draft policy is sufficiently clear on what this could mean for members of a profession who may be considered to have breached a direction or restriction imposed by TPR. It is vital that TPR's position is clear given the potentially serious consequences for any professional facing criminal charges.

This means that the policy needs to articulate more clearly the point at which the conduct of a professional would become subject to criminal proceedings rather than civil penalties. We recognise that if a person's behaviour is particularly egregious or blatant then criminal sanctions may be appropriate.

Members of the accountancy profession who could fall within the scope of this policy could be involved in one of a variety of roles, for example, they could be the finance director of the sponsoring employer or the pension scheme, providing the employer with advice on restructuring, an employer covenant adviser, a pension trustee (professional or lay), the auditor of the scheme or the employer, or an insolvency practitioner advising the employer or the scheme.

A professionally qualified accountant may be subject to rules specific to their role, particularly if acting as an adviser. For example, insolvency practitioners and auditors have to be licensed or registered to act in that capacity. Also, if a person who is a pension trustee

High fines

5. Is the policy clear on the approach we will use when calculating the fine amount?

☐ Yes ☐ No

Please give your reasons below:

6. Have we identified the relevant factors for assessing culpability and harm as well as the aggravating and mitigating factors? If not, what other factors do you think might be relevant?

☐ Yes ☑ No

Please give your reasons below:

There is an imbalance between the number of examples given of aggravating factors relative to mitigating factors, with fewer examples of standalone mitigating factors. The majority of examples which could be considered to be mitigating are highlighted as having the potential to be either aggravating or mitigating.

We recommend that further consideration is given to the addition of further standalone mitigating factors to create a better balance between aggravating factors and mitigating factors, if additional clear examples of mitigating factors can be identified.

With an emphasis in the draft policy on distinguishing between aggravating factors and mitigating factors, it may also be helpful in terms of understanding the policy, if it included some specific wording around the link between what could be considered to be a 'reasonable excuse' and mitigating factors.

7. Do you have any other feedback about the high fines policy?

The policy on Monetary penalty powers policy - high fines (avoidance) states that:

"Examples of culpability include: holding a position of trust or subject to professional duties"

However, in the policy on Monetary penalty powers policy - high fines (information gathering) no equivalent mention is made of 'holding a position of trust or subject to professional duties' in relation to culpability. However, in the Overlapping powers policy under the heading 'Breaches of a direction or restriction imposed by TPR' the consequences of a breach of a requirement to provide documents or information or to attend an interview are directly linked to the status of an individual as a professional.

While we recognise the stance in the Overlapping powers policy on the proposed approach towards commencing criminal proceedings where there is evidence that a professional may have breached TPR requirements, we are flagging up this point in case it is an oversight.

Information gathering

8. Is the policy clear on the options available to us and in which circumstances they may be used?

☐ Yes ☐ No

Please give your reasons below:

9. Is the policy clear on the consequences for non-compliance with our information gathering powers?

☐ Yes ☐ No

Please give your reasons below:

10. Do you have any other feedback about the information gathering policy?

☐ Yes ☐ No

Please give your reasons below:

How to contact us

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https://www.thepensionsregulator.gov.uk/

https://trusteetoolkit.thepensionsregulator.gov.uk/
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