

PROTECTING DEFINED BENEFIT PENSION SCHEMES – A STRONGER PENSIONS REGULATOR

21 AUGUST 2018

A RESPONSE TO DWP'S CONSULTATION PAPER



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Our mission is to help everyone to achieve a better income in retirement. We work to get more people and money into retirement savings, to get more value out of those savings, and to build the confidence and understanding of savers.

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EXECUTIVE SUMMARY

- ▶ The PLSA welcomes the Department for Work and Pensions' (DWP's) consultation on expanding and enhancing The Pensions Regulator's (TPR's) powers; the broad range of measures to strengthen the sector, outlined in the Government's White Paper in March 2018, are important to helping TPR do its job effectively.
- ▶ While the PLSA is supportive of the underlying principles of the proposals set out in the consultation document overall, much more detail will need to be provided to ensure that the new TPR powers work and are proportionate. We provide additional views in this response on the plans to strengthen TPR and suggestions on additional issues the Government should consider.
- ▶ Ensuring that the right information on company transactions is being flagged sooner to TPR, and potentially to trustees, is crucial. As such, the PLSA is encouraged by the additions to the Notifiable Events Framework as well as to the introduction of a Declaration of Intent.
- ▶ However, the list of transactions that should bring the notification time forward is a short one; there are likely to be additional transactions that should require TPR's attention earlier. Similarly, the trigger events for a Declaration of Intent outlined in the consultation document are broadly correct, though likely not to be complete.
- ▶ We are concerned whether there are currently sufficient resources available to TPR to execute the new proposals regarding the enhanced Notifiable Events Framework, in order to efficiently obtain the outcomes DWP are seeking, and, whether these resourcing efforts are both proportionate and can be sustained over time. There is a real risk that TPR may be faced with "information overload", which may also mean that TPR may not be able to take timely and meaningful action, and in a way that does not impede normal corporate behaviour.
- ▶ While the information gathering powers proposed are important, scheme trustees should also be given the tools they need to act as a first line of defence, which may also help to reduce the administrative burden of TPR over time as well. The PLSA recommends that (a) employers must be required by law to disclose information to trustees in relation to any transaction which they believe will materially impact on scheme funding, which also places greater responsibility onto employers to safeguard pension schemes and (b) trustees must be given additional powers to request for information throughout the process of corporate transaction negotiations. Enforcement powers should also be established to ensure compliance for both proposals.
- ▶ Trustees must also be granted powers to be able to act on the information gathered, including being able to negotiate or renegotiate a funding package, without having to wait for the next valuation or for the company to make a clearance application. However, consideration must be

given to ensure that any new trustee powers to act will also not impede regular corporate transactions.

- ▶ The PLSA is supportive of the underlying principles of the new range of offence categories and penalties available to TPR to use – as proposed by the Government’s manifesto to strengthen the regulatory framework and the regulator’s powers – to both punish and deter poor practice and criminal behaviour to protect scheme members.
- ▶ However, it is at this time unclear how often the new civil and criminal sanctions powers are intended to be used. While the need for these regulatory powers around poor behaviour is presented in the consultation document, TPR should remain flexible in its approach and not seek to apply any civil or criminal sanctions automatically.
- ▶ It is also important to consider where TPR and the new suggested criminal powers will sit in the current justice framework; as such, the PLSA recommends a joined up approach with the Crown Prosecution Service, the police, the Ministry of Justice and other criminal justice agencies. Criminal convictions may also be difficult to achieve, as it can be difficult to prove that behaviour was reckless. Additionally, as the burden of proof lies with TPR, criminal proceedings – which are likely to be contested vigorously – can be time consuming and costly.
- ▶ The PLSA recommends that further clarity about the formal stages leading to enforcement action is provided in draft legislation or guidance. For example, there should be guidance on whether or not individuals or companies will be given warnings before penalties are issued, and if so, DWP should also set out the number of warnings that will be issued, alongside how long individuals or companies would be given to correct their behaviour before charges are brought.
- ▶ The consultation document also does not set out where the money collected from the new fines would go to. Given the potentially large sums of money involved, this question needs to be addressed properly.
- ▶ The PLSA agrees with the implication in the consultation document that the current Contribution Notice regime, which is capped at the crystallisation of the scheme’s section 75 deficit “at the time of the act”, is not fit for purpose. There can be many years between an “act” and actual recovery under a Contribution Notice, and in that time, a scheme’s deficit will likely have increased substantially before payment. Additionally, the current Contribution Notice power does not provide a specific mechanism to reflect the range of consequences arising from a delay of payment. The new proposals all strengthen the Contribution Notice regime and help to ensure that the contributions made are fairer and a more accurate reflection of the “act’s” impact on the scheme.
- ▶ The suggestion of enhancing the “material detriment” test, by referencing the weakening of an employer, rather than the prospect of scheme benefits being paid many years into the future, could provide important information for companies and TPR on when and how a Contribution Notice might be issued. However, this is a very broad definition and the PLSA urges DWP to

provide greater clarity, for instance, by providing examples or a range of scenarios in which this material detriment test would work in practice.

- ▶ Clarity on how the “reasonableness test” will be altered, for both Contribution Notices and the Financial Support Directions, is needed. Further details should be shared for consultation to ensure that the tests are reasonable and proportionate.

- ▶ The PLSA recognises that there is a benefit to extending the lookback period, as it would allow TPR and trustees additional time to instigate actions in the event of concerns. However, it is unclear how far back DWP is proposing the lookback period go. It will thus be important to model and reflect the potential implications increasing the two-year lookback period may have for employer solvencies, which may include negative knock-on effects on both the local and macro economy, as well as on members’ benefits in the longer term. Additionally, any large employer changes and transactions that may have occurred, such as restructuring or the sale of the company, may have practical implications as well on how far the lookback period can go.

BACKGROUND

1. The PLSA welcomes the opportunity to respond to the Department for Work and Pensions' (DWP's) consultation *Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator*. As stated in our [written evidence to the Work and Pensions Select Committee \(W&PSC\) Inquiry](#) on the Future of Defined Benefit (DB) Pensions, we are supportive of the broad range of measures to strengthen the sector as outlined in the Government's White Paper in March 2018.
2. In particular, the PLSA understands the importance of giving The Pensions Regulator (TPR) the appropriate range of tools it needs to be able to do its job effectively, including the White Paper's proposals to strengthen TPR's powers to act against 'reckless' behaviours that put pension funds and savers at risk.
3. The difficulties facing DB schemes today¹ require bold action. As such, the PLSA is supportive of the proposals set out in the consultation document; in this response, we provide additional views on the plans to strengthen TPR and suggestions on issues to consider when the Government is ready to operationalise the new powers.

Corporate Transaction Oversight – Notifiable Events Framework and Declaration of Intent

4. Ensuring that the right information on company transactions is being flagged sooner to TPR, and potentially to trustees, is crucial; it would potentially allow for early intervention in scenarios where schemes or sponsoring employers are heading towards financial situations that could directly contribute to poor outcomes for scheme members. Earlier intervention may also lead to an increased probability in the long-term sustainability of schemes and thus member benefits.
5. As such, the PLSA supports the principle of the proposed changes to expand and to add to the Notifiable Events Framework, as well as with the suggestion to remove an item from the existing system.² However, Proposals 2, 3 and 4³ will require additional clarity before the new

¹ The DB landscape is much more complex than it was 20 years ago, driven in part by the growth of the size of assets under management, significant changes in domestic and international regulation, increased scheme maturity, changes in longevity, and uncertainty and volatility in the macro economy. The threat to employer covenant is also growing, as many industries face challenges relating to globalisation, demographic shifts and increasing automation. Of 5,800 schemes, 3,600 are currently in deficit, despite significant levels of employer contributions, totally nearly £400 billion in the last decade. For further information, please see the PLSA's [written evidence](#) to the W&PSC.

² DWP (2018) *Protecting Defined Benefit Pension Schemes – A Stronger Pensions regulator*, p. 10-12.

regime can be put into practice.⁴ In addition, confirmation is needed as to whether these new additions to the framework will apply retrospectively. For instance, if an employer has already granted security on a debt to another party, it would be helpful to know if the employer would then be required to notify the regulator. Providing timescales for reporting the new scheme events would also be useful guidance.

6. The plan to bring the notification timing forward to when a Heads of Terms agreement is first put in place, for the transactions listed,⁵ is also a sensible one, as it also aligns the notification period to TPR to that of trustees of such events. However, as it stands, the Heads of Terms as a phrase is still very vague, so requiring notification of the new events when Heads of Terms are put in place is likely to lead to disagreements as to whether or not Heads of Terms have actually been agreed. There is concern that unscrupulous employers will be able to manipulate the term to avoid responsibilities in reporting as well. As such, the PLSA recommends that DWP specify the timeframe for notifications and clarifies what is meant by Heads of Terms, so that the new regime will minimise doubt of employer responsibilities in this area.
7. The list of transactions⁶ that should bring the notification time forward is a short one, and as the consultation's question 3 implies, there are likely to be additional transactions that should require TPR's attention sooner. For instance, it may be that early reporting of the sale of the controlling interest in a sponsoring employer or scheme is not enough – that reporting a takeover, or the sale of a parent company to the sponsoring or scheme employer, are likely to be

³ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 10-11.

⁴ Additional details are needed for the following proposals for the enhanced Notifiable Events Framework:

- (a) **Proposal 2:** The second event listed, “Granting of security on a debt to give it priority over debt to the scheme”, needs to be clarified further to potentially accommodate scenarios where, for example, an employer participates in more than one DB scheme, and one scheme itself is given priority over a debt that disadvantages the other scheme.
- (b) **Proposal 3:** The third event listed, “Significant restructuring of the employer’s board of directors and certain senior management appointments”, will not be straightforward to include. Restructuring the board is open to interpretation and so this suggestion needs to be specified, or else it will be open to avoidance actions.
- (c) **Proposal 4:** The fourth event listed, “Sponsoring employer taking independent pre-appointment insolvency/restructuring advice (such as an independent business review), does not distinguish clearly between insolvency and restructuring. Additionally, restructuring could happen when a company is in good financial health. It could still have impacts on the pension scheme as well, so it may be appropriate to include “positive” restructuring activity onto the list. However, these distinctions and clarifications need to be made so that the right events are being reported promptly.
- (d) For **Proposals 2 and 4**, a materiality threshold would be practical as a proportion of scheme liabilities for multi-employer schemes, but it should most likely not be as high as 20%, which is the figure suggested in **Proposal 1**, “Sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme’s liabilities.” The PLSA and its members would welcome the opportunity to work with TPR to discuss how a materiality threshold could be best applied.
- (e) For **Proposal 1**, there should also be clarification as to what “funding responsibility” entails.

⁵ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 12.

⁶ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 12.

of equal or greater importance, but these are not yet reflected in the list of transactions that should be pushed up the timetable. The sale of a parent company is of interest due to its ability to take up assets and to take dividends if it has direct control of the participating employer.

8. In addition to the new proposals for the Notifiable Events Framework, the PLSA requests that TPR review the Exchange website for notifying the regulator of events, as well as the overall process of notification. The website is outdated and not straight forward to use. Furthermore, once information is submitted online, it is not uncommon for the regulator to then email the reporter to ask for the same information to be provided via email. This step in the process seems unnecessary.
9. The PLSA is also supportive of the proposed *Declaration of Intent*, a requirement for sponsoring employers or parent companies (usually the Board of a company) to make a statement of intent, in consultation with trustees, for “relevant business transactions”. The declaration would be addressed to trustees and shared with the regulator. The trigger events outlined in the document⁷ are broadly correct, though not complete.
10. Similar to the notifiable events that are listed to be moved forward in its reporting timetable, it is likely not enough to note the sale of a controlling interest in a sponsoring or scheme employer – that reporting a takeover, or the sale of a parent company to the sponsoring or scheme employer are likely to be of equal or greater importance, but these are not yet reflected in that list of trigger transactions. The sale of a parent company is of interest, as mentioned elsewhere, due to its ability to take up assets and to take dividends if it has direct control of the participating employer.
11. Additionally, trigger event 2 for a Declaration of Intent⁸ – “sale of the business or assets of a scheme employer” – should be expanded to include the phrase “all or substantially all”, to ensure that it is material and not triggered on a small part sale that is not cash generative or key to covenant.
12. Trigger event 3 for a Declaration of Intent – “granting of security in priority to scheme debt” – may need to have a de minimis threshold built in to ensure that a declaration is not triggered unnecessarily, as employers grant banks security for loans regularly. A commercial reality needs to be factored into that trigger. It is only when a significant security is granted priority over and above the scheme debt is there a reduction of the likelihood of the scheme getting its debt paid, and thus a need to have a declaration of intent.
13. The timing of the declaration is intended to be “at a later point in a corporate transaction than a notifiable event notification, where there is greater certainty as to whether the transaction is

⁷ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 14.

⁸ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 14.

going ahead, its nature and the implications for the scheme”. The PLSA supports this suggested timeframe, as it is logical to confirm important corporate transactions and its likely impact on schemes once the detailed negotiations are coming to a close.

14. A material threshold for declarations of intent is not mentioned in the consultation, but it could be useful to establish it so that trustees of multi-employer schemes are not overwhelmed by requests that may in the end hold little interest or value to TPR’s assessments.
15. While the declaration is intended to be produced “in consultation with trustees”, there are no details provided on the trustees’ duties, which are necessary to properly assess how a trustee needs to plan for this area of work. Appropriate timescales for trustees will also need to be set out, to give trustees enough time to review and agree to any proposals set out in any declarations received. The PLSA thus recommends that DWP clarify the expectations on trustees in relation to the declaration of intent.
16. It is also important to note that scheme trustees, as well as TPR, may need additional information from employers, which they do not necessarily receive automatically, and may not know that they need until after an important transaction has occurred. It is important that trustees are given the tools to act as a first line of defence, which may help to reduce the administrative burden on TPR over time as well.
17. As such, the PLSA is recommending that (a) employers must be required by law to disclose information to trustees in relation to any transaction which they believe will materially impact on the willingness and ability of the company to provide the required funding for its scheme, thus placing greater responsibilities onto the employers to safeguard pension scheme sustainability; (b) that trustees be given additional powers to request for information throughout the process of corporate transaction negotiations, and, that enforcement powers should be established to ensure compliance for both proposals (please see our response to the “Improved Regulatory Powers” section). If DWP accepts this recommendation, the appropriate safeguards can be put in place to protect sensitive financial information that may be passed on to trustees.
18. In addition, trustees must be granted powers to be able to act once information is in hand. Legislation must detail what trustees would be allowed to do with the acquired corporate transaction knowledge. The PLSA recommends that trustees must be given leverage to negotiate or to renegotiate a funding package without having to wait for the next valuation or for the company to make a clearance application. However, consideration must be given to ensure that any new trustee powers to act will also not impede regular corporate transactions.
19. With all of the proposals for the Notifiable Events Framework and the Declaration of Intent, there is an educational piece that should be considered for both employers and trustees on the changes proposed in the DB White Paper and this consultation. This is particularly important for smaller employers and schemes, which may not have the same resources or experiences as

larger entities to know how to proceed in a given scenario, or, to stay on top of the sometimes nuanced changes being proposed. The PLSA recommends that TPR produce guidance for employer and trustee compliance – once TPR’s new powers have been finalised – especially for small to medium sized employers to help them navigate through and comply with their new obligations.⁹

20. The PLSA recognises that TPR’s need for more information gathering powers within the Notifiable Events Framework is sensible. However, given the lack of detail provided in the consultation document, it is difficult to ascertain how the requested powers would work in practice. There is concern whether there are currently enough resources available to TPR to execute the new proposals regarding the enhanced Notifiable Events Framework, in order to efficiently obtain the outcomes DWP is seeking, and, whether these efforts can be sustained over time.¹⁰
21. With approximately 6,000 schemes and employers operating within the DB landscape, there is a real risk that TPR may be faced with “information overload”.¹¹ There may be the possibility that TPR may not be able to process all of the information quickly enough to take action that is timely and meaningful, or to enable normal corporate behaviour to proceed unhindered. This

⁹ A PLSA member is considering a process where participating employers will notify the scheme of relevant events and would value the opportunity to speak with TPR on this project, with the view to help relieve any potential reporting burden on employers.

¹⁰ There is concern that the new information gathering powers may detract from TPR’s efforts in ensuring that all schemes complete their annual scheme return. The data from returns could be a part of an important benchmark for pension scheme health, with a member recommending that the scheme data collected could in theory be used to publish a comprehensive “regulator rating” on all schemes, helping to monitor the DB pension landscape.

¹¹ Information overload may occur in the following ways:

- (a) **Proposal 6** suggests extending the existing notifiable event, “breach of banking covenant”, to include deferral, amendment or waiver of banking covenants. This is likely to result in a significant volume of notifications, many of which may have no relevance to the pension scheme or TPR.
- (b) **Proposal 3** suggests that significant restructuring of the employer’s board of directors and certain senior management appointments should go on the Notifiable Events Framework. However, it is not uncommon for a new Chair to result in a new CEO and/or CFO, which may have no impact on the pension fund, so unnecessary notifications would have to be made under the proposed new regime. It is also common practice for significant shareholders to appoint a representative to the board of the investee company, and this is typically part of the company’s normal operation of its business, rather than the first stage in a series of decisions that could have significant implications for the pension scheme. So, notification in these circumstances seems disproportionate.
- (c) **Proposal 4** suggests a sponsoring employer taking independent pre-appointment insolvency/restructuring advice (such as an independent business review) should be reported as a notifiable event. However, many companies conduct business reviews in circumstances where there is no concern about potential insolvency. Thus, a broad requirement to notify when seeking restructuring advice or when conducting an independent business review, in non-specific circumstances, would be disproportionate and would result in unnecessary notifications.

Please see DWP’s Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 10-11.

Additional details on how regular corporate transactions may cause information overload for TPR can be made available upon request.

in turn may leave scheme members' benefits vulnerable in the long-term if administration of all Notifiable Events Framework information obfuscates the more concerning corporate transactions that need TPR's attention. DWP must ensure that the Notifiable Events Framework can be used and function day to day in a way that works for schemes, employers and the regulator. Otherwise, the enhanced and broadened framework will have failed in the objectives set out in the consultation document.

22. As such, the PLSA urges DWP and TPR to give further consideration to how to operationalise the proposals for an expansion of the Notifiable Events Framework, to ensure that TPR will have the right resources to support its corporate plan objectives of being clearer, quicker and tougher, while also having proportionate powers to achieve the objectives in the consultation.

Improved Regulatory Powers – Punishing Reckless Behaviour

23. The PLSA is supportive of the underlying principles of the new range of offences categories and penalties available to TPR to use – as proposed by the Government's manifesto to strengthen the regulatory framework and the regulator's powers – to both punish and deter poor practice and criminal behaviour to protect scheme members.¹²
24. The proposals provide TPR with additional enforcement tools – a clearer hierarchy of TPR actions proposed – to be tougher on the kinds of reckless behaviour that may be seen in a “number of high-profile cases” in the last few years, as highlighted in the White Paper.¹³ TPR's quarterly compliance and enforcement statistics show that the regulator used its current frontline regulation powers 214 times from January 2018 to March 2018, and a total of 3,237 times from April 2014 to March 2018.¹⁴ So, there is evidence that TPR will use its new powers when it deems it necessary to do so, and, the Government has deemed it important for TPR to have them.
25. As discussed in the previous section, under paragraph 17, it is important that (a) employers should be required by law to disclose pertinent transactional information to trustees – as trustees will not know to ask about something they are not aware of – and (b) trustees should have enhanced information gathering powers as well. For these additional powers to be successful, there should be meaningful enforcement action against employers who fail to disclose the relevant information either proactively or when asked to do so. The PLSA recommends that DWP considers introducing amongst its new sanctions powers enforcement

¹² DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 19-20.

¹³ DWP (2018) Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator, p. 17.

¹⁴ TPR (2018) Compliance and enforcement, Quarterly bulletin (January to March 2018)
<http://www.thepensionsregulator.gov.uk/doc-library/enforcement-bulletins.aspx>

action against employers which do not comply by proactive disclosure or to trustee requests for more information.

26. It is at this time unclear how often the new criminal sanctions powers are intended to be used. While the need for these regulatory powers around criminal behaviour is presented in the consultation document, TPR should remain flexible in its approach and not seek to apply any sanctions automatically. As we have seen through the issuance of fines on DC schemes – which were later rescinded – overly rigid rules can create unnecessary regulatory burdens. We therefore recommend TPR should be able to issue fines on a flexible case by case basis.
27. It is also important to consider where TPR and the new criminal powers to impose a custodial offence will sit in the current justice framework – how the new powers will be executed in practice.¹⁵ Where a criminal offence is declared, there would be the need for an appeals process. As such, being granted the right to issue larger fines by primary legislation – to widen the circumstances in which fines and criminal proceedings can be used – may not be enough to utilise the new suggested criminal sanctions powers. Existing powers for other entities, such as prosecuting authority powers granted to the Serious Fraud Office¹⁶ and the civil fraud investigation procedures and criminal investigation powers HRMC¹⁷ has, could serve as examples on how TPR might want to codify its new powers in legislation and in practice. A joined up approach with the Crown Prosecution Service, the police, the Ministry of Justice and other agencies in the criminal justice system is therefore advisable for bringing the new criminal sanctions into a useable structure.¹⁸
28. While it is logical that the fine cap for TPR should align with that of the Financial Conduct Authority (FCA), and, it is also sensible for common powers to be applied across TPR regimes for both DB and DC schemes, it is important to note that criminal convictions may be difficult to achieve, as it can be difficult to prove that behaviour was reckless. Additionally, as the burden of proof lies with TPR, criminal proceedings – which are likely to be contested vigorously – can be time consuming and costly.
29. It is unclear what timeline would sit alongside the new framework of criminal sanctions. The consultation document helpfully outlines who might be penalised and how, but it does not yet provide the nuanced picture that some of these situations may require. As the new TPR powers will work in tandem with one another, it would be reasonable to assume that through the

¹⁵ The PLSA is aware of existing legislation that allows TPR to issue a limited civil fine of up to £5,000 for individuals and up to £50,000 for corporate entities to penalise them for non-compliance (section 10 of the 1995 Pensions Act). TPR can also impose fixed and escalating penalty notices for non-compliance (2008 Pensions Act). Criminal proceedings can be commenced by TPR under a range of powers, including obstructing investigations (section 77 of the 2004 Pensions Act) and for providing false or misleading information (section 80 of the 2004 Pensions Act).

¹⁶ <https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/>

¹⁷ <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy>

¹⁸ <https://www.cps.gov.uk/criminal-justice-system>

Notifiable Events Framework and the new Declaration of Intent, poor practice and bad behaviour will be revealed sooner to TPR than is currently the case. The PLSA recommends that further clarity about the formal stages leading to enforcement action is provided in draft legislation or guidance. For example, there should be guidance on whether or not individuals or companies will be given warnings before penalties are issued, and if so, DWP should also set out the number of warnings that will be issued, alongside how long individuals or companies would be given to correct their behaviour before charges are brought.

30. The consultation document does not set out where the money collected from the new fines would go to. There is an assumption that any fines will go directly to HM Treasury, but it is possible to imagine a wide range of options, including putting the money towards the scheme's deficit, the PPF (if the scheme has entered into assessment or has been transferred) or paying for TPR's legal costs. Given the potentially large sums of money involved, this question needs to be addressed properly.
31. As previously mentioned, the PLSA is supportive of the underlying principles of the proposed offence categories and penalties. However, greater effort must now be put into the drawing out the detail required to make the new sanctions functional, as how the powers will be used in practice may, through necessity, fundamentally alter the defining elements of the powers themselves.

Anti-Avoidance Powers – Contribution Notices & Financial Support Directions

32. The PLSA agrees with the implication in the consultation document that the current Contribution Notice regime, which is capped at the crystallisation of the scheme's section 75 deficit "at the time of the act", is not fit for purpose. There can be many years between an "act" and actual recovery under a Contribution Notice, and in that time, a scheme's deficit will likely have increased substantially before payment. Additionally, the current Contribution Notice power does not provide a specific mechanism to reflect the range of consequences arising from a delay of payment.
33. Amending the "reasonableness" test, so that there is a stronger focus on the loss or risk caused to a scheme by the "act" when assessing the amount to be demanded under a contribution notice; providing a mechanism by which impacts of the delay in payment will be reflected in the Contribution Notice sum;¹⁹ and changing the date of the cap on the level of a Contribution Notice is calculated (so that the date is closer to the final determination, rather than the date of

¹⁹ There is the view that an actuarial measure of an increase based on a scheme's funding position is likely to be preferable to an inflation based adjustment. Another position argues that a prescribed inflation index may be a better approach to uprating, though it may be difficult to agree on an inflation index because of competing opinions on what factors should be prioritised (i.e. RPI v. CPI). This is not within the PLSA's expertise to take a position on, but we would recommend modelling how the different uprating approaches would ultimately impact scheme members and take action from there.

the “act”) – these new proposals all strengthen the Contribution Notice regime and help to ensure that the contributions made are fairer and a more accurate reflection of the “act’s” impact on the scheme.

34. The suggestion of enhancing the “material detriment” test, by referencing the weakening of an employer, rather than the prospect of scheme benefits being paid many years into the future, could provide important information for companies and TPR on when and how a Contribution Notice might be issued. However, this is a very broad definition and the PLSA urges DWP to provide greater clarity, for instance, by providing examples or a range of scenarios in which this material detriment test would work in practice. A potential danger to this proposal is that the regulator might end up focusing more on “the act” rather than on the impact on scheme members. It is possible that even though an “act” might open up potential contribution notice liability, it may be inappropriate for the regulator to seek to impose a contribution notice if members remain likely to receive their benefits in full in the future.
35. The proposals to strengthen and improve the way Financial Support Directions function go a long way to help streamline the current process, to allow for TPR to act more nimbly in response to a troubled scheme, but also, allows the regulator to hold to account a broader range of individuals who are associated or connected to the sponsoring employers, mirroring the scope of the Contribution Notices.
36. One of the proposals suggests amending the “reasonableness test” to make clear that the actions of a target in creating or increasing risk are a relevant factor. Clarity on how this “reasonableness test” will be altered, for both Contribution Notices and the Financial Support Directions, is needed. Further details should be shared for additional consultation on this to ensure that the tests are indeed reasonable and proportionate.
37. The “lookback period” highlighted in the consultation response – which is the length of time in which the regulator can commence a case on an act – is being proposed to be possibly increased beyond the current two years. The PLSA recognises that there is a benefit to extending the lookback period, as it would allow TPR and trustees additional time to instigate actions in the event of concerns. However, it is unclear how far back DWP is proposing the lookback period go. It will thus be important to model and reflect the potential implications this extension may have for employer solvencies and its negative knock-on effects on both the local and macro economy, as well as on members’ benefits in the longer term. Additionally, any large employer changes and transactions that may have occurred, such as restructuring or the sale of the company, may have practical implications as well on how far the lookback period can go.

If you would like further information, please contact [Tiffany Tsang](#), Policy Lead for LGPS & DB.