PENSIONS AND LIFETIME SAVINGS ASSOCIATION

TPR CONSULTATION:
APPROACH TO THE INVESTIGATION AND PROSECUTION OF THE NEW CRIMINAL OFFENCES

APRIL 2021

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EXECUTIVE SUMMARY

- The PLSA is supportive of the underlying principles of the criminal sanctions regime. However, the current wording of the policy intent is still too vague, which we strongly believe will create very problematic consequences for the pensions community.
- We continue to be concerned that these criminal offences powers will not necessarily enable TPR to take timely and meaningful action, nor in such a way that does not also impede normal corporate behaviours and transactions.
- The draft policy wording is not sufficiently clear about the formal stages and factors for consideration that would lead to enforcement action. As such, we call on TPR to review and adopt some, or all, of the principles used by the FCA in their approach to prosecution of criminal cases. In particular, we believe that it is fundamental that the following be considered for integration into a principles-based approach for the Regulator: Principle 1 (seriousness of misconduct); Principle 3 (extent and nature of the loss suffered); Principle 8 (the extent to which redress has been provided); Principle 10 (cooperation); Principle 11 (dishonesty or abuse of position of authority or trust); Principle 13 (personal circumstances).
- The PLSA is aware that TPR's draft policy on criminal offences refers to the Regulator's general prosecutions policy, which does consider the Code for Crown Prosecutors, but it may also be helpful to explicitly incorporate some of the Code's principles into the Regulator's policy on criminal offences.
- We call on TPR to explicitly outline how public interest factors will be weighted when making prosecution decisions, so as to safeguard against pressure to prosecute based on media or select committee scrutiny alone. Related to this, the guidance should include a statement making it clear that decisions to prosecute should be free of political interference.
- We ask that there is clarity on whether it is reasonable to assume that once clearance has been granted from contribution notices, the Regulator will not, or cannot, prosecute individuals linked to the scheme for criminal offences.
- As drafted, even when a situation's detrimental impact has been fully mitigated, this still does not necessarily safeguard against regulatory investigations and prosecutions. In our view, this undermines the message that these offences are targeted at the most serious conduct. As such, the PLSA calls on TPR to go further in providing reassurance that an entity will not be prosecuted where it has fully mitigated any detriment that may be caused to a DB scheme. Case studies showing how the Regulator will approach making judgments in some of the "grey areas" – for example, by providing middle-ground scenarios – will help enable individuals working with pension schemes to fulfil their duties with confidence.
- We ask for clarity over how the criminal offences will interact with the new civil sanctions (under new section 88A Pensions Act 2004) and over TPR's extended contribution notice

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powers including: clarity over which powers will be considered and/or used in different circumstances; and clarity on whether civil cases can become criminal cases.

- We ask for safe harbours to be outlined for trustees.
- We continue to call for wider transparency and clarity on TPR's use of resources, and as such would like to better understand how money collected from the new financial sanctions will directly lead to a more robust pensions system.
- We would like to see evidence of further coordination between TPR and other criminal justice agencies, such as the Crown Prosecution Service, the police and the Ministry of Justice.

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INTRODUCTION

Throughout the development of The Pensions Regulator's (TPR's) new criminal offences powers – from DWP's 2018 consultation on, "Protecting DB Pension Schemes: A Stronger Pensions Regulator", to the Pension Schemes Bill process – the PLSA has maintained that while we support the provision of enhanced powers to the Regulator to tackle incidents of reckless behaviour by employers, the final wording in the Act, and in the draft policy, risks inhibiting normal corporate activities by giving TPR very broad powers.

The Act and the draft policy gives TPR the ability to target a much broader range of behaviours and individuals than previously indicated by the Department for Work and Pensions (DWP). Instead of focusing, as set out in the DWP White Paper, on the rare cases of rogue directors intentionally or recklessly damaging DB pension schemes and savers, the new criminal offences could apply to an extremely wide range of parties and actions. Including, for instance: trustees; banks that lend to employers; investors; advisers; insurers and investment counterparties.

This is likely to have damaging unintended consequences for the day-to-day running of pension schemes, inhibit legitimate corporate activity, stifle investment in and lending to some companies with DB schemes, reduce the scope for the successful restructuring of businesses and create additional unnecessary costs for employers and schemes – costs which would be potentially significant.

We still would like to see greater clarity from TPR on the specific and practical circumstances that they are intended to be used – in particular through case studies showing how situations can be better mitigated to the Regulator's expectations – and guidance that narrows down the types of individuals whom the new powers could and should affect.

The PLSA's membership continues to operate in the best interests of its scheme members. In order for all affected parties to have certainty and to be able to continue normal and essential pensions and business activities with confidence – and for the larger good of the pensions community, the schemes' members that it serves, and the wider economy – it is vital that the clarity that is missing in the legislation is now addressed in this policy and any associated guidance. How and where we think this can be done is detailed in the responses to the consultation questions.

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CONSULTATION QUESTIONS

(1) Given that the offences have now been set in law, is our overall approach consistent with the policy intent?

<u>Limiting Normal Corporate Behaviour and Transactions</u>

1. The PLSA supports the policy intent behind the new criminal offences – to strengthen the deterrent and punishment for intentional or reckless conduct which causes significant harm. However, the draft policy does not give enough due respect to how severe criminal offences are in the judicial system, and does not go far enough in making it clear that these offences will be reserved for only the most serious acts or omissions.

   - On the one hand, the guidance indicates that the new offences are aimed at "the more serious intentional or reckless conduct" and that they are not intended to "achieve a fundamental change in commercial norms or accepted standards of commercial behaviour in the UK". However at the same time:

     - when citing an example of an entity that has "fully mitigated" the detriment to a scheme, the guidance only goes as far as saying that it is "more likely" to have a reasonable excuse (please also see paragraphs 15 and 16 on mitigation and reasonable excuse), and

     - the guidance gives no comfort to employers that have obtained clearance in respect of a transaction or particular corporate activity that they will not be prosecuted (please also see paragraphs 13 and 14 on clearance).

     It would support the Government's policy intention, and the overarching message that these new offences are aimed at the most serious conduct, if the guidance could be strengthened, for example, to say that where the detriment to a scheme has been fully mitigated, "we would not expect there to be grounds for prosecution". It would provide a higher degree of reassurance to schemes. Similarly, whilst we recognise that clearance does not technically cover the criminal offences, presumably where an employer has obtained clearance for a transaction/particular activity, the chances of prosecution would be very remote. It would be helpful if the guidance could make this clear.

   - The current wording of the criminal offences powers are too vague. Terms like "risking accrued members' benefits" are unhelpfully broad, capturing under its umbrella normal business activity, such as employers who may seek future gains by reducing net assets in the present day.

   - There should be a distinctly higher bar established in determining what constitutes criminal offences, with clear differences outlined between what conduct will and will not be pursued for prosecution. In particular, it would be helpful if the guidance

contained more "middle -ground" examples to help persons in scope and their advisers understand how TPR will make judgments in the grey areas.

- Without these clarifications, the current wording is likely to negatively alter or restrict some normal corporate behaviour, due to an overabundance of caution. There is anecdotal evidence that this is already starting to happen, where corporate sponsors are concerned about even openly raising concerns and potential solutions in scheme funding, which could be interpreted as being unsupportive of efforts to appropriately manage pension liabilities.
- The criminal offences policy will likely drive scheme advisers, trustees and employers to seek additional reassurances with what would normally be considered standard transactions, which could create costly and unnecessary delays in the funding and administration of pension schemes.
- TPR's approach to enforcement should not discourage schemes from being open about their decision making. If individuals are concerned about the risk of criminal prosecution, it may dissuade them from being as open about their decision-making, in case it is later used against them.

2. We also ask that a specific set of principles be adopted by TPR to help further determine what conduct should be investigated and prosecuted, and how it will be done (see paragraphs 4 to 7, 11 and 12).
3. We would also ask that TPR set out a 'look-back' period in when they would consider criminal sanctions, as an indefinite time horizon to face prosecution is not reasonable. A period of 6 years, to match contribution notices would seem appropriate. Schemes should also be protected from the retrospective application of standards where guidance is updated in the future. To support this, TPR should keep a clear log of when and how guidance changes. Individual's actions should be evaluated against expected behaviour at the given time within the given guidance.

(2) Is the policy clear on our overall approach to the new offences? If not, how could we make it clearer, without constricting the powers?

<u>Principles-based Approach</u>

4. The draft policy does not provide as much certainty as we would like in terms of who and what kinds of conduct – direct or contributory – will be investigated and prosecuted. As discussed in Q1's response, as it is written, the draft policy wording is very vague.
5. We believe a principles-based approach, like the one utilised by the Financial Conduct Authority (FCA), would help to provide the clarity the industry seeks on what factors TPR

will consider when deciding whether to commence with a criminal prosecution (please refer to the FCA's handbook, Enforcement Guidance, Section 12.3). [1]

6. The PLSA asks that TPR review the principles used by the FCA and consider including them in its policy (where appropriate). In particular, we call for the final policy to make clear that TPR will consider the following principles when deciding whether or not to prosecute, as set out in the FCA handbook, Section 12.3 of "Criminal prosecutions in cases of market abuse":
    - (Principle 1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
    - (Principle 3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
    - (Principle 8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;
    - (Principle 10) whether the *person* is being or has been voluntarily cooperative with the *FCA* in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;
    - (Principle 11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;
    - (Principle 13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.
7. We believe that all of the FCA's 14 principles may be applicable, though some of the wording would need to be adjusted for TPR's purposes. For instance, there would need to be a removal of references to market abuse.

[1] The FCA Handbook, Section 12.3, "Criminal prosecutions in cases of market abuse". Please see: https://www.handbook.fca.org.uk/handbook/EG/12/3.html

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(3) Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer?

Prosecuting Based on Public Interest

8. The guidance should include a statement making it clear that decisions to prosecute will be free of political interference. The PLSA is concerned about draft policy wording in the introduction that refers to prosecuting in the public interest:

    - "However, there may be circumstances where we won't pursue a CN (for example, where the target's resources mean the amount of recovery would be low) but would still consider prosecution as its deterrent effect might be in the public interest."

9. The PLSA supports that considering the public interest is a relevant factor, but there must be safeguards against pressure to prosecute based on media demands, or, against cases due to a particular issue being highlighted by a select committee as being of interest or importance. These factors should not be the driving forces for investigation and prosecution.

10. Pursuing cases based on public interest even in circumstances where there is a low likelihood of success, in order for it to be used as a deterrent, would be a clear breach of the Code for Crown Prosecutors, which details in its "Full Code Test" (section 4) that tests for prosecution fall into two distinct and separate phases: the evidential stage, followed by the public interest stage.[2] Section 4.4 states, "In most cases prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute." We would ask TPR to confirm whether prosecuting in the public interest will be considered in the same way – that the likelihood of conviction, based on evidence, will be considered first.

11. The PLSA is aware that TPR's draft policy on criminal offences refers to the Regulator's general prosecutions policy,[3] which does consider the Code for Crown Prosecutors. However, given how serious a decision to investigate and/or prosecute would be, we consider that some of the principles in the Code should be explicitly incorporated into the Regulator's policy on criminal offences, specifically around when and how public interest factors are weighed into prosecution decisions.

12. In particular, we think that the policy should, as a minimum, make express reference to the following points contained in the Crown Code:

    - the Regulator will make any decisions about whether or not to investigate and/or prosecute without political interference and will not be affected by improper or undue pressure or influence from any source.

[2] https://www.cps.gov.uk/publication/code-crown-prosecutors
[3] https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/prosecution-policy.ashx

- recognition that the decision to prosecute or to recommend an out-of-court disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.
- recognition that prosecutors have a duty to protect the rights of suspects and defendants, while providing the best possible service to victims, and
- the Regulator must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998.

13. While we recognise that clearance does not cover the new criminal offences, we presume that it would be exceptional for the Regulator to prosecute a party that has obtained clearance in relation to the same actions or corporate activity, unless the facts have been materially misrepresented. Therefore, the PLSA seeks clarity on whether it is reasonable to assume that the Regulator will not prosecute a party (and any related parties) that have obtained clearance in respect of the same acts (or at least that the risk is very remote).
14. It may be beneficial for TPR to set-up a new assurance mechanism to provide reassurance to schemes and businesses. In the absence of a formal structure, schemes may rely on receiving clearance for contribution notices to mitigate risk. Therefore, the number of schemes seeking clearance may increase, putting additional pressure on TPR resources.

(4) Are the examples useful in illustrating the factors that we will take into account when considering whether a potential defendant has a reasonable excuse to act or fail to act? Are there any other examples you would consider helpful?

Reasonable Excuse

15. More details are needed for what constitutes a "reasonable excuse" and how it is interpreted by TPR. There are of course details given through TPR's examples, but these do not go far enough; especially where a "reasonable excuse" is the only protection from prosecution. The current examples provided are extreme scenarios – either clearly in scope or clearly out of scope; middle-ground examples of a kind that are more likely to be encountered in practice would be more helpful to schemes and employers. Anecdotally, normal corporate behaviour currently feels restricted; the more cautious approach to decisions relating to legitimate corporate transactions, re-financing, investing and restructuring in some circumstances, will add costly and unnecessary delays to normal business activities.

16. The PLSA would like TPR to provide further case studies showing how the Regulator will approach making judgments in some of the grey areas to ensure that individuals working with pension schemes can fulfil their duties with confidence. Current examples given on mitigation are not helpful, as even when a situation's detrimental impact has been fully

mitigated, in the current draft policy wording, this still does not necessarily safeguard against regulatory investigations and prosecutions.

17. As such, more detailed case studies must be provided for industry, for example:

    - A company granting security for new and existing finance which ranks above its DB scheme.
    - The circumstances where it may be appropriate for trustees to agree to a scheme apportionment arrangement to transfer a section 75 debt to a different group company.
    - A trustee approves an easement and the employer subsequently, within a short timeframe, ends up insolvent. Professional advice was taken, which indicated the covenant would not be materially detrimentally impacted by approving the easement.
    - Use of the new moratorium by a company with a DB scheme that is in financial distress.
    - Payment of a dividend by a company that is in financial difficulties.
    - Payment of a special dividend where a corresponding payment is not made into the scheme.

18. Specific to multi-employer schemes, it would also be helpful if there could be clarity on whether scenarios like this would face criminal liability:

    - An employer realises it has only one member in the Scheme and asks about the potential ramifications if that member transfers out. In a multi-employer scheme, this would lead to a debt subsequently triggered to the one member transferring out their benefits being equal to £nil. If the employer learned this and the member transferred their benefits out, could the employer/trustee be liable for acknowledging this?

<u>Safe Harbours for Trustees</u>

19. The PLSA asks that TPR be specific and deliberate on safe harbours for trustees. For example, where a trustee acts on legal advice and covenant assessment advice from a recognised source, would this be sufficient to show that he/she has taken the necessary steps to protect their scheme and that any mitigation put in place is appropriate, meaning that relevant trustee should not be subject to civil sanctions or criminal prosecution?

20. In determining whether there is a reasonable excuse for an act or omission, there are specific concerns that the “omission” part of the offence in effect creates new obligations by the back door. For example, if benefits are underpaid due to data or benefit errors, are the trustees exposed to an allegation that they failed to carry out a comprehensive check against data and legal entitlements, and that failure was conduct risking accrued benefits? As such,

does this now mean that trustees will need an excuse for any error in order not to risk imprisonment? We realise the Regulator is intending to be proportionate in its approach but this example illustrates the surprising breadth of the new provisions.

21. It would also be helpful to have clarity on whether trustees and employers will be protected from prosecution for discussing the facts of an easement or situations where the outcome leads to a worse outcome for the scheme.

22. We have seen a rise in our members finding it difficult to find affordable trustee indemnity insurance. Schemes have struggled to renew insurance with their existing providers and are facing significantly higher premiums. There are various reasons for this but some have pointed to the new section 107 powers and increased uncertainty in this area as an explanation.

(5) Do you have any other feedback?

Civil versus criminal offences

23. We note that the draft policy only covers the new criminal offences and it does not extend to the Regulator's new financial penalties (under new section 88A Pensions Act 2004) or the new contribution notice triggers. It is generally anticipated that the Regulator will be more likely, in practice, to impose civil penalties than criminal ones. Therefore, in order to give the reassurance that sponsors, trustees and other parties require, we ask that TPR produce corresponding guidance on the use of new powers under section 88A and the new contribution notice triggers alongside the final policy.

24. We also ask for greater clarity over how the criminal and civil regimes will interact. In particular:

    - How will the Regulator decide which powers to use in any particular set of circumstances?
    - At what point in an investigation will the Regulator make clear which powers it is intending to use?
    - Can a civil case switch to a criminal investigation later on in the process?
    - Could evidence gathered as part of a civil investigation be used in a subsequent criminal prosecution?
    - Can a settlement in respect of the Regulator's civil powers provide comfort that an individual or party will not be subject to criminal prosecution?

25. Evidence gathered in FCA compelled interviews cannot be used as part of a criminal case against the interviewee, as individuals have the right against self-incrimination. Clarity on when interviews under caution will be conducted would be welcome.

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26. The PLSA asks that TPR consider and produce guidance on all their prosecution powers – for both civil and criminal offences – in this same round of policy and legal analysis, to ensure consistency and the necessary links across both areas of work.

Application of Fines

27. We find that it continues to be unclear exactly what any fines imposed and gathered will be used to do. We believe that any fines imposed under the new powers should be used to improve the pensions industry as a whole. We previously noted that it was plausible that fines could be put towards the scheme's deficit, the PPF or paying TPR's legal costs – in addition to the assumed direct collection by HM Treasury.

Joined-up Approach

28. It is still unclear where TPR's new criminal powers will sit in the current justice framework. The PLSA continues to encourage a joined-up approach with the Crown Prosecution Service, the police, the Ministry of Justice and other agencies in the criminal justice system, particularly those that are also able to prosecute these same offences.

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