

TPR NEW ENFORCEMENT POLICIES: PLSA RESPONSE

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ABOUT THE PLSA

We're the Pensions and Lifetime Savings Association; we bring together the pensions industry and other parties to raise standards, share best practice, and support our members. We represent over 1,300 pension schemes with 20 million members and £1 trillion in assets, across master trusts and defined benefit, defined contribution, and local government schemes. Our members also include some 400 businesses which provide essential services and advice to UK pensions providers.

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

- “ We are supportive of The Pensions Regulator (TPR) and the use of powers to take action against poor behaviour, such as dishonesty or misconduct that impacts negatively on schemes, or wilful neglect of responsibilities, including disregarding meaningful engagement with regulatory processes and compliance. However, we believe that TPR should remain flexible in its approach and its application of powers. We would also ask that TPR consolidate the guidance in this area as much as possible to help trustees.

- “ We agree with the principles behind the approach set out and the policies are reasonable and sensible, however, there are certain areas that could benefit from further clarity. Specifically, more clarity could be given over whether both criminal and regulatory proceedings will be taken on the same act(s), including anti-avoidance powers and financial penalties.

- “ We also ask that further clarity about the formal stages leading to enforcement action is provided. For example, there should be guidance on whether or not individuals or companies will be given warnings before penalties are issued, and if so, TPR 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 factors that will be taken into account within the Overlapping Powers policy could be laid out more clearly. The policy is clear in showing which acts are subject to which powers, however it is not clear what factors will be taken into account or how decisions will be made and at what point in the process.

- “ The Monetary Penalties policy is clear on the approach to calculating the fine amount. However, it would be beneficial to have clarity over whether fines escalate if not paid and whether there is a time-frame for payments to be made. Additionally, we understand that any penalties will be paid into the Consolidated Fund, but would ask for further clarity over how the money collected from the fines will be used – specifically will it be ring-fenced for TPR (within the Consolidated Fund). 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 be used (i.e. whether it will be used to support TPR finances generally or ring-fenced for other purposes).

- “ The Information Gathering Policy is clear on the options available to TPR and which circumstances they may be used. However, we ask that TPR consider the proportionality and reasonableness of their information requests and the time given to schemes to comply. Schemes appreciate dialogue with TPR when information requests are made as well as flexibility over requests that are circumstance specific.

CONSULTATION QUESTIONS

IS THE COMPLETE PACKAGE OF POLICIES SUFFICIENTLY CLEAR REGARDING OUR OVERALL APPROACH TO THE NEW POWERS? IF NOT, IS THERE ANY ADDITIONAL POLICY/GUIDANCE THAT YOU WOULD FIND USEFUL?

1. We are supportive of TPR and the use of powers to take action against poor behaviour. However, we believe that TPR should remain flexible in its approach and not seek to apply any civil or criminal sanctions automatically, before it has exhausted other routes of outreach and communication with schemes. We would also ask that TPR consolidate the guidance in this area as much as possible to help trustees.
2. At a high level, the policies are reasonable and sensible, however, there are certain areas that could benefit from further clarity. We have a number of questions prompted by the policies as drafted:
 - “ Will TPR carry out “dual track” investigations (i.e. investigate with both criminal and civil fine options both on the table) and 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 during the process?
 - “ If a Criminal proceeding is unsuccessful, might TPR undertake a regulatory proceeding for the same act?
 - “ How and when will the same evidence be used against different defendants – for example against one party in criminal proceedings and another in civil proceedings for the same conduct?
 - “ Can there be an explicit assurance that TPR will never use one form of proceedings to influence outcomes in other forms of proceedings – for example that TPR will never say “we will be minded to discontinue criminal proceedings only if you agree to not oppose a civil penalty”?
 - “ How will section 72 information gathering notices be issued in the context of proceedings - will TPR make clear whether they are issued for the purposes of criminal or civil proceedings?
 - “ Will TPR accept that there are different reasonable grounds for not providing information sought under section 72 in relation to potential criminal proceedings compared to civil proceedings?
 - “ Will TPR set out a clear policy with regards to the multiple issuing of Section 72 notices and the grounds for doing so in criminal and civil proceedings?
3. The guidance is not always clear on what the process will look like for subjects. Additional information on when the Regulator will pursue individuals versus corporates - given that

both could potentially be targets for both the criminal penalties and the high fines – would be helpful.

4. Specifically, more clarity could be given over whether both criminal and regulatory proceedings will be taken on the same act(s), including anti-avoidance powers and financial penalties. It is stated in one place of the guidance that TPR will not pursue criminal and penalty proceedings for the same act(s)¹. However, it is not clear if that is the case for specific breaches or for all acts.
5. The examples suggest that different individuals can be prosecuted for the same act but at different levels i.e. a professional trustee may have criminal proceedings brought against them but a lay trustees for the same act may only have regulatory proceedings brought against them. If this is the case, it would be helpful for this to be made clear in the policy and not only through the example provided to supplement the policy.
6. We also ask that further clarity about the formal stages leading to enforcement
7. action is provided. For example, there should be guidance on whether or not individuals or companies will be given warnings in relation to criminal penalties and high fines before penalties are issued, and if so, TPR 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.
8. Furthermore, if it is not already planned, additional procedural training for TPR staff would be beneficial to ensure they are suitably equipped to carry out proceedings as they relate to criminal investigations (particularly around the use of interview, inspection, and warrant powers).

IS THE OVERLAPPING POWERS POLICY CLEAR ON THE FACTORS WE WILL TAKE INTO ACCOUNT WHEN WE HAVE A CHOICE OF WHICH POWER TO USE?

9. The factors that will be taken into account could be laid out more clearly. The policy is clear in showing which acts are subject to which powers, however it is not clear what factors will be taken into account or how decisions will be made and at what point in the process. Currently the factors are stated in the examples but are not expressly called out in other areas of the policy. For example, will the same factors be used when considering the monetary penalties i.e. amount of harm and culpability and aggravating and mitigating circumstances.

¹ <https://www.thepensionsregulator.gov.uk/en/document-library/consultations/new-enforcement-policies-consultation/proposed-approach-to-our-new-powers>; Overlapping powers policy; Breaches of legislation (excluding employer-related investments).

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?

10. The examples given in the policy are helpful to highlight which powers may be applicable and what will be taken into account. Examples that may be helpful to include or signposted to in other guidance, on whether criminal proceedings will be pursued, include the following:

- ▶ 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 special dividend where a corresponding payment is not made into the scheme.

IS THE POLICY CLEAR ON THE APPROACH WE WILL USE WHEN CALCULATING THE FINE AMOUNT?

11. The Policy is clear on the approach to calculating the fine amount. However, it would be beneficial to have clarity over whether fines (i.e. the new £1m fine) escalate if not paid and whether there is a time-frame for payments to be made.
12. We understand that any penalties will be paid into the Consolidated Fund, but would ask for further clarity over how the money collected from the fines will be used – specifically will it be ring-fenced for TPR (within the Consolidated Fund). Given the potentially large sums of money involved, this question needs to be addressed properly. 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 will be used (i.e. whether it will be used to support TPR finances generally or ring-fenced for other purposes).

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?

13. We believe the factors given for assessing culpability and harm and aggravating and mitigating factors are relevant and helpful. However, we would question one of the examples of harm given - ‘whether the act may undermine public confidence in pensions’ – and whether that is a reasonable factor to consider when deciding fines for schemes. There

is an issue over how this could be fairly measured and what the evaluation of public harm would be based on. There is also an issue over whether it is right that trustees should be punished for actions that impact on individuals outside of the scheme.

IS THE INFORMATION GATHERING POLICY CLEAR ON THE OPTIONS AVAILABLE TO US AND IN WHICH CIRCUMSTANCES THEY MAY BE USED?

14. The Policy is clear on the options available to TPR and which circumstances they may be used. However, we ask that TPR consider the proportionality and reasonableness of their information requests and the time given to schemes to comply. Schemes appreciate dialogue with TPR when information requests are made as well as flexibility over requests that are circumstance specific.
15. We would also ask that TPR be transparent when using these powers and be as clear as possible on why certain powers are being used and, if things have escalated, why that is the case.
16. When requesting information from schemes, we ask that TPR consider when they will review the materials and for what purpose. There are cases where TPR has requested a large amount of information from schemes, including our members, within a short time period (i.e. two weeks) and then have not acted on that information or seemingly reviewed it for several months.
17. Similarly, on time frames for requesting interviews, we ask that TPR consider who they are asking to attend when deciding on the timeframe. For example, if a meeting is requested with the whole trustee board, that may take longer to arrange. We also ask that advance notice is given to schemes if TPR's lawyers will be present at interviews.

IS THE POLICY CLEAR ON THE CONSEQUENCES FOR NON-COMPLIANCE WITH OUR INFORMATION GATHERING POWERS?

18. The Policy is clear on the consequences for non-compliance with TPR's Information Gathering Powers.

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