

# The Pensions Regulator and criminal action

## 🔗 The regulator's new tougher powers and what they mean for those investigated

The Pension Schemes Act 2021, attracted a slew of interest when it came into force last year, most notably in respect of s107, which inserted two new criminal offences into the Pensions Act 2004 (PA04) – one for ‘avoidance of an employer debt’ (s58A PA04) and the other for ‘conduct risking accrued scheme benefits’ (s58B PA04). Both offences carry a maximum penalty of seven years imprisonment – a substantial increase from the two years imprisonment that previously had represented the maximum sentence available for other PA04 criminal offences.

Whilst the conduct the two new offences relates to could previously have been dealt with by means of regulatory action, namely through the imposition of a Contribution Notice under s38 PA04, such action was limited in its scope. A Contribution Notice could only be issued to a person that was, or was connected with, a scheme’s sponsoring employer. The new offences are not so limited and could, for example, cast its net wider to capture sponsors, trustees and/or advisers.

The broadening of The Pensions Regulator’s (TPR) powers in this way clearly indicates that both government (in passing the bill that contained the powers) and TPR desire a tougher stance to be taken in respect of reckless or intentional conduct that puts pension savings at risk. Although TPR will undoubtedly hope that the mere existence of the new offences will, of themselves, have a deterrent effect, the regulator will almost certainly, of its own

volition, start look for conduct that might fall foul of them. Although the offences will, by their very nature be complex to investigate, TPR will be keen to flex its new powers. Why would government gift it these new offences if it did not expect them to be used? TPR will also be mindful that if criminal action fails to materialise any deterrence effect will inevitably melt away.

### TPR and criminal offences

Prosecuting pension related crime is not new ground for TPR; the regulator’s criminal powers are not solely limited to offences created by pensions legislation. Indeed (unless otherwise restricted to a different specific prosecuting authority) TPR can investigate and prosecute any offence, provided that it would help TPR carry out its statutory functions or is incidental to carrying them out. For example, TPR has prosecuted conduct relating to misusing or misappropriating scheme assets as a fraud under the Fraud Act 2006.

### Interview powers

TPR has a number of investigatory powers available to it. These include compelling people to attend an interview, to answer questions, and to give an account of their actions to the regulator. However, in circumstances in which TPR does use its compelled interview powers, any responses given cannot be used against the interviewee in any subsequent criminal proceedings. For this reason, it is anticipated that in criminal cases, these powers will usually only be used in respect of evidence gathering from



witnesses.

Where TPR wish to speak to a suspect in a criminal case, then they must follow the relevant legislation and Codes of Practice issued under the Police and Criminal Evidence Act 1984 (PACE). Most importantly this means that any interview must take place under caution and that the individual can decide whether to answer questions or not.

### Interview tips

So, what should you do if you find yourself becoming entangled in a TPR criminal investigation and called to attend an interview? There are a number of steps that apply to all interviews regardless of the individual’s status. First ascertain on what basis you are being interviewed. Are you a witness or a suspect? Second, take steps to discover the scope that your interview will cover – what period of time? What actions? Third, prepare thoroughly. Review any pre-interview disclosure fully.

Ultimately, the best advice in preparing for an interview is to get early legal advice. Informed legal advice will allow you to prepare properly and therefore perform at your best in a TPR interview. A legal representative in attendance at an interview will be looking out for your interests, will provide continuing legal advice, and will ensure the interviewers act appropriately and do not stray outside of the remit of the interview.

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