Summary
• HMRC previously said that it would look to work on the Work and Pensions Committee's recommendations around the tax treatment of pension scam victims, yet industry experts have seen little to no change in HMRC's approach.
• Whilst primarily a legacy issue, the cost-of-living crisis has meant that the risk of savers falling victim to a pension scam, and in turn potentially facing large and unexpected tax bills, has grown.
• The recent Dalriada-led tax tribunal has been highlighted as a key example of the unfairness of HMRC's approach, with experts suggesting that a tax amnesty in this case could have saved significant costs, both to the schemes and HMRC itself.

Breaking the impasse

Two years on from the Work and Pensions Committee's recommendations around HMRC's tax treatment of pension scam victims, Sophie Smith looks at the slow progress made and renewed calls for action

Pension scams are often devastating for savers, but to add insult to injury, the Work and Pensions Committee's (WPC) 2020 inquiry found savers can also face unexpected and large tax bills.

WPC's inquiry heard that HMRC was "unrelenting and uncompromising" in the pursuit of unauthorised payment charges, with various concerns raised around the tax treatment of scam victims, whether in relation to the direct impact on savers, or the potential reluctance to report for fear of further tax charges.

Given this, the committee urged HM Treasury to recognise that, in some clearly defined circumstances, where the saver has been the victim of a crime and made no financial gain from the early access, it may not be in the public interest to demand payment of tax due.

It also encouraged HMRC to make greater use of its discretion to support victims owing large tax bills and do its utmost to provide them certainty.

The government response in July 2022 said that HMRC was "happy" to work with pension schemes to improve the clarity and accessibility of guidance. And further progress has since been made, with HMRC reviewing and updating its guidance, for instance Transferring to a UK Pension Scheme, to increase awareness and understanding around the purpose of pension scheme registration. In line with WPC's recommendation, HMRC has also since re-joined Project Bloom, now known as Pension Scam Action Group.

Yet whilst WPC had made recommendations around the potential for a withholding approach to tax, HMRC has since found that the overwhelming view from industry was that such an approach would be punitive and was not viable.

And concerns remain, as Pension Scams Industry Group (PSIG) chair, Margaret Snowdon, says there has been no concession from HMRC or Treasury on this issue so far.

The push for progress

Dalriada Trustees accredited professional trustee, Sean Browes, echoes this, stating that there has been no meaningful change in either legislation or HMRC's approach.

This is not an isolated view, as People's Partnership director of policy, Phil Brown, says that while significant steps have been taken to improve protections for savers against fraud, it's very clear that a lot more focus must be given to ensuring that victims of some pension scams are not liable for tax penalties.

Despite the widespread industry calls for change, Snowdon says that while officials at HMRC are prepared to listen, they refuse to budge from their position.

"They see themselves as mere tax collectors and consider that victims broke the law in transferring to a scheme that practiced pension liberation, regardless of the lack of members' knowledge or understanding on pensions or that they had been misled by advisers," she says.

Adding to this, Transparency Task Force founder, Andy Agathangelou, argues that "HMRC has shown itself to be morally bankrupt by the way it is handling the tax treatment of pension scam victims".

"And that's despite the tireless efforts of campaigners," he continues, emphasising that his own efforts with then Prime Minister, Boris Johnson, amounted to "absolutely nothing; zilch; diddly squat. It's as if HMRC just will not be moved – it is being bloody-minded about the whole thing".

Making allowances

The level of discretion that HMRC has to waive tax charges lies at the heart of this issue, as while the WPC's inquiry into pension scams acknowledged that the position taken by HMRC is legally correct, it argued that the department often lacked empathy or understanding of the impact of its demands on victims, and could exercise greater discretion.

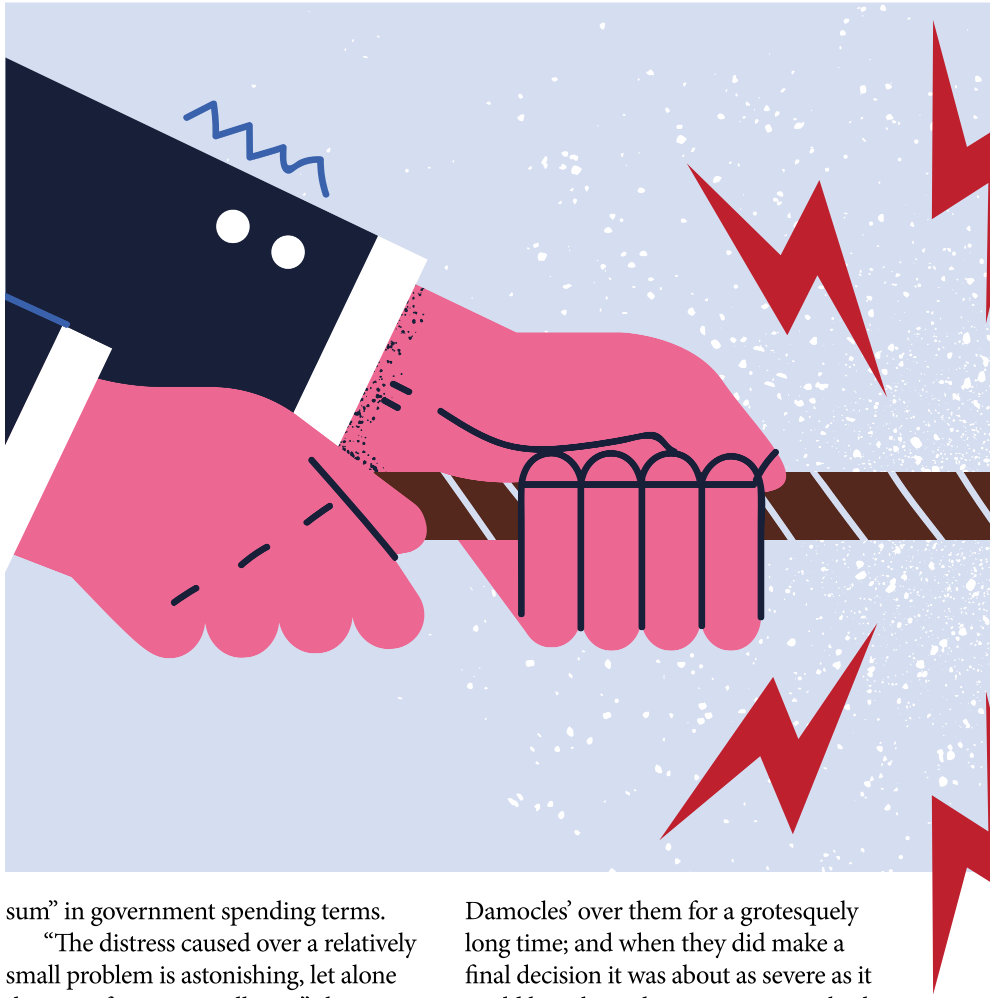
The government's response later clarified that HMRC's discretionary powers are limited, with a commissioner, advised by a Pensions Governance Group, considering exercising these powers when they apply.

Yet confusion on this issue persists, as Snowdon notes that while HMRC says it has no discretion in applying tax penalties, at other times it claims to apply discretion to waive charges under certain conditions, like financial hardship.

Given this, Browes says that greater clarity on where and when HMRC can (and ought to) exercise discretion is needed, emphasising that legislation is there to prevent abuse of the advantages enjoyed by legitimate schemes, so "there is no need to water that down".

However, Snowdon warns that fair use of discretion is not a viable solution, arguing that legislative change, albeit small, may be needed, in particular, a small change to the Finance Act 2004, as previously proposed in PSIG's 2019 paper to the Economic Affairs Committee, which specifically limited the change to victims up to 2014, "so would not be open-ended as government is determined to claim".

Snowdon also argues that cost should not be a barrier, with the same 2019 paper estimating a £20 million cost to dis-apply the tax penalty, a figure that Snowdon describes as a "pocket money sum" in government spending terms.



"The distress caused over a relatively small problem is astonishing, let alone the cost of trying to collect it," she says. "The finite population subject to the tax penalty and eligible for the potential 'amnesty' is small and declining – some have committed suicide, others have sold their property to pay the tax and many have suffered bullying tactics to force them to pay up. This treatment is against HMRC's own charter."

Indeed, Agathangelou says HMRC's charter is "empty rhetoric as far as its treatment of pension scam victims is concerned", arguing that HMRC is acting "grossly and uncaringly unfair".

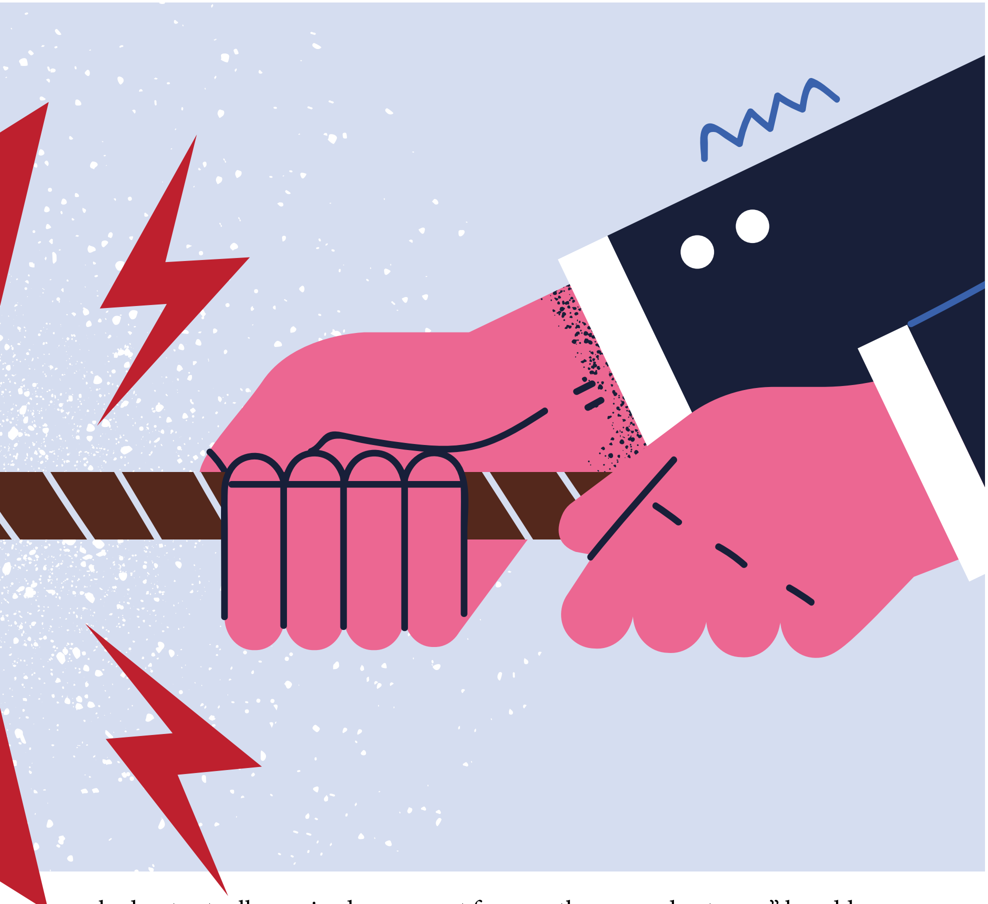
"A good example of that unfairness is how HMRC has treated victims of the Ark scheme," Agathangelou continues. "HMRC has taken over 10 years to make a decision about what the tax treatment would be, meaning that victims have been waiting with 'the sword of Damocles' over them for a grotesquely long time; and when they did make a final decision it was about as severe as it could have been, leaving victims in both financial and emotional shock."

Missed opportunities

In particular, the recent Ark case sought to clarify whether the loan arrangements under those schemes were unauthorised payments, with the tribunal concluding that the payments were unauthorised, whether or not a loan was received.

Speaking to *Pensions Age*, WPC chair, Stephen Timms, points out that the tax tribunal itself acknowledged that applying the law could result in unfavourable and, in some cases unfair, outcomes for members, yet members, who were victims of a scam, may still be liable for significant tax charges.

"It appears that one potential outcome may be that an individual could be liable to a tax charge even though they



had not actually received a payment from their scheme (on grounds that a payment is judged to have been made from their pension scheme to another one)," he continues. "The government should look again at giving HMRC discretion not to pursue tax charges in such cases."

Browes agrees, arguing that, in this, and similar situations, HMRC should be able to exercise discretion not to apply the 'strict letter of the law' nor be obliged to pursue payment of any tax due to the fullest extent possible.

If HMRC had been able, and willing, to consider an amnesty, Browes says that this could have saved the Ark schemes and members up to £12 million in tax charges between them, and could have saved significant costs, both to the schemes and HMRC, in running the appeal to the tribunal.

"Perhaps most significantly, it could have saved the members 10 years of stress and uncertainty as to the amount of tax they were due to pay," he adds.

However, Sackers partner, James Bingham, notes that this case has taken a long time to work through the system, and is therefore dealing with a historic issue that in some ways is quite far removed from where the industry is now.

"The past decade has seen a lot of change, in terms of the regulation and expectations on administrators, as well as the expectations placed on members when they're transferring benefits," he says. "We've seen the regime enhanced to provide protection to members and avoid these sorts of situations arising, so I think we all would hope that these issues will be less likely to occur in the future."

Browes agrees, pointing out some significant industry developments since the Ark schemes were set up, including TPR's Scorpion campaign in 2013, the change in the transfer regulations last year and the recently issued updated PSIG guidance.

"There is now much greater awareness of the risk of pension scams and that any attempt to 'liberate' your pension will result is significant tax charges," he says. However, Browes warns that scammers and scams will evolve, arguing that the emphasis should be on promoting regular messaging around the risk of scams.

The fight continues

And Snowdon stresses that while this particular issue is primarily historical, the current cost-of-living crisis may tempt people to transfer their pensions into 'dodgy' arrangements so that they can get access to pension cash.

Bingham agrees that the risk is greater amid the cost-of-living crisis, acknowledging that whilst the pensions industry is in a better position that in the past, scammers have continued to evolve to stay one step ahead.

In the meantime, the fight for change continues, as Snowdon says "now that government appears more stable, I will again be raising the issue with parliamentarians and peers to see if we can get it on to the agenda again. I am considering raising a petition to help highlight the issues and if enough interest, could prompt a debate in Westminster. PSIG is also working with the Pension Scams Action Group's Victim Support stream and we hope to apply pressure via that."

Agathangelou also pledges to continue work in this area and to work with others to find answers as to why changes haven't yet been seen.

Commenting in response to the concerns, an HMRC spokesperson said: "We recognise that individuals may have lost money by entering these types of arrangements. We do not tax pension savings lost to fraud. However, we will tax amounts that individuals release, or attempt to release, from their pensions where this is not authorised in law."

Written by Sophie Smith