

Consultation document

# Our approach to the investigation and prosecution of the new criminal offences

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## Scope of the consultation exercise

The Pension Schemes Act 2021 has introduced two new criminal offences: the offence of avoidance of employer debt, and the offence of conduct risking accrued scheme benefits, under new sections 58A and 58B respectively of the Pensions Act 2004.

The draft policy sets out how we expect to investigate and prosecute these new criminal sanctions (although please note that we are not the only prosecuting authority for these offences).

In addition to seeking general views, we have provided questions on areas where we are particularly interested in feedback. We will consider all comments before publishing the final policy later in the year.

## Who this consultation is for

This consultation is for anyone seeking to understand our approach to investigating and prosecuting the new criminal offences of avoidance of employer debt to the scheme or risking accrued members' benefits.

## Government consultation principles

This consultation paper follows the government's consultation principles at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

The key principles state that consultations should:

- be clear and concise
- have a purpose
- be informative
- be only part of a process of engagement
- last for a proportionate amount of time
- be targeted
- take account of the groups being consulted
- be agreed before publication
- facilitate scrutiny
- be responded to in a timely fashion, and
- not be launched during local or national election periods

## Consultation context

The government's policy intent in introducing these new offences is to strengthen the deterrent and punishment for the more serious intentional or reckless conduct that was already within the scope of our Contribution Notice (CN) powers, or would be in scope if the person was connected with the scheme employer. However, the intent is not to fundamentally change commercial norms or accepted standards of corporate behaviour in the UK (as at the date of their enactment). Our approach is intended to be consistent with our understanding of the government's policy intent.

The new offences have been drafted using similar language to the existing provisions in section 38 of the Pensions Act 2004 with regard to our power to issue a Contribution Notice (CN). However, there are some differences, our views on which are outlined in the policy. In the case of the offence of avoidance of employer debt, the offence can apply to someone who does an act or engages in a course of conduct which:

- prevents the recovery of the whole or any part of a debt due to the scheme under section 75 of the Pensions Act 1995
- prevents that debt becoming due
- compromises or otherwise settles that debt, or
- reduces the amount of that debt which would otherwise become due

In the case of the offence of conduct risking accrued scheme benefits, the offence can apply to someone<sup>1</sup> who does an act or engages in a course of conduct that detrimentally affects in a material way the likelihood of members receiving their accrued scheme benefits.

The offences are committed if the person acted with the relevant intention, and did not have a reasonable excuse to act in the way they did. This means that the onus is on the prosecution to prove that the target did not have a reasonable excuse.

We understand that some of our stakeholders are concerned about the potential breadth of these powers. With this in mind, the draft policy sets out the factors we consider significant in relation to what constitutes a reasonable excuse, illustrated with examples. What constitutes a reasonable excuse will be case-specific and ultimately determined by the courts.

In keeping with the government's policy approach in introducing these offences and better regulation principles, we will act proportionately and always seek to understand and gather evidence from potential defendants to explain their reasons to act. We note that we are not the only prosecuting authority in respect of these offences, so this policy only applies to our actions, unless it is adopted by the other prosecuting authorities (who may choose to approach the investigation and prosecution of these offences in a different way from us). The overall intention is that use of the offences helps to deter conduct that could put pension schemes at risk.

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<sup>1</sup> Please note that for the purposes of readability we use "someone" to mean either an individual or a company, and "act" to mean a single or series of acts, or a failure to act

# Consultation on our approach to the investigation and prosecution of the new criminal offences

Please fill in your response to the questions below, save this whole consultation form to your computer, and return the completed attachment by **22 April 2021** to: [criminaloffencesconsultation@tpr.gov.uk](mailto:criminaloffencesconsultation@tpr.gov.uk)

When responding, please confirm if you are responding as an individual or on behalf of an organisation and, if on behalf of an organisation, whether only the views of the organisation are expressed in the response.

## Your details

Your name:

Organisation (if applicable):

Responding as an individual or on behalf of an organisation:

If on behalf of an organisation, are only the views of the organisation expressed in this response?:

Job title (if applicable):

Postal address:

Telephone:

Email:

Your details continued...

Please select the category that best describes you or your organisation.  
If you have multiple roles, please select all that apply.

- |  |                    |                      |
|--|--------------------|----------------------|
| Adviser (Actuarial)                      | Adviser (Covenant) | Adviser (Investment) |
| Adviser (Legal)                          | Adviser (Other)    | Administrator        |
| Investment manager                       | Professional body  | Provider             |
| Scheme sponsoring employer               |                    | Trustee              |
| Other (Please describe in the box below) |                    |                      |

### Confidentiality (Please complete as applicable)

Please confirm whether you would like us to list your name on our list of respondents to this consultation:

Yes, I wish my name to be included on the list of respondents

No, I do not wish my name to be included on the list of respondents

#### and/or:

Please confirm whether you would like us to list your organisation on our list of respondents to this consultation:

Yes, I wish my organisation to be included on the list of respondents

No, I do not wish my organisation to be included on the list of respondents

As this is a public consultation, we may need to share the feedback you send us within our own organisation or with other government bodies or in response to a request under the Freedom of Information Act 2000. In the interests of transparency and effective scrutiny, we may also publish this feedback as part of our response to the consultation. If you wish your response, in whole or in part, to remain confidential, please tick the box below and give your reasons and we will consider whether we can reasonably meet your request:

Yes, I wish my response to remain confidential

If 'Yes', please specify which part of your response you wish to remain confidential and why:

## Consultation questions

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

Yes

No

Please give your reasons below:

**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?**

Yes

No

Please give your reasons below:



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

Yes

No

Please give your reasons below:

- 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?**

Yes

No

Please give your reasons below:

## 5. Do you have any other feedback?

## How to contact us

Napier House  
Trafalgar Place  
Brighton  
BN1 4DW

<https://www.thepensionsregulator.gov.uk/>

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