The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to The Pension Regulator’s consultation on its approach to the investigation and prosecution of the new criminal powers stemming from the Pensions Schemes Act 2021. Below are the key points we wish to make.

**Key Points**

* The main objective of the policy should be to help trustees, employers, advisers and other parties to continue with normal business activities, accepted standards of corporate behaviour and the proper running of pension schemes by setting clear boundaries within which TPR believes parties can safely operate. This would enable TPR to focus on preventing or punishing the activities of unscrupulous parties, in line with the policy intent.
* To achieve this, the examples in the policy must be wider and should explore areas of uncertainty. It is also essential that the policy should not introduce uncertainty where it did not previously exist.
* There are a number of common activities carried out by trustees with professional advice that could helpfully be excluded from the new powers (or deemed to be with reasonable excuse), in order to avoid a paralysis of decision-making and to enable a focus on deterring inappropriate conduct. For example, where in accordance with legal requirements, the management of section 75 debts and scheme funding decisions should be definitively excluded.
* We would welcome more clarity regarding the selection of cases for investigation, and warn against selecting cases primarily for the deterrence effect. The costs, time and reputational damage resulting from a TPR criminal investigation could be significant and damaging to business, even where no criminal penalties result.
* In general, we would encourage TPR to be bold when finalising the policy, to ensure it achieves its objectives and complements the legislation.

Should you wish to discuss any of the points raised in this submission in more detail please contact Caolan Ward, Policy Manager, ([caolan.ward@actuaries.org.uk](mailto:caolan.ward@actuaries.org.uk)) in the first instance.

The Pensions Regulator

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BN1 4DW 22 April 2021

**Consultation on TPR’s approach to the investigation and prosecution of the new criminal offences**

The Institute and Faculty of Actuaries (IFoA) is pleased to submit feedback for TPR’s consultation on its approach to the investigation and prosecution of the new criminal offences stemming from the Pensions Schemes Act 2021. Within the actuarial profession we have experts in the technical detail, we have executives in small and large financial institutions, and we have experts working with the financial system itself. Our outlook is rooted in our Royal Charter (dating back to 1884) and our long history of working with policymakers to effect change, and it is focused forwards on how actuaries will contribute to solving the problems of the 21st century.

Please find the IFoA Pension Board and Pensions Consultation Committee’s response to each of the questions in the consultation below.

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

Yes/no: No

Comment:

* The IFoA is fully supportive of the Government’s stated policy intent to punish wilful or reckless actions of employers, and we are very happy to work with the Government and TPR to achieve this.
* However, the Government has also indicated that the new powers are not intended to fundamentally change commercial norms or accepted standards of corporate behaviour. Unfortunately, the legislation is considerably wider than the policy intent both in the scope of activity and the categories of persons who could be affected, and we are aware that this effectively presents a challenge for TPR to address in its draft policy.
* We understood the objective of the draft policy to be to help those who fall under the new powers to understand where they might and might not be affected and to help bridge the gap between the policy intent and the legislation. Our view is that the draft policy does not sufficiently narrow down the application of a very broad piece of legislation, and therefore does not provide sufficient comfort to those who have no intention of wilful or reckless conduct and who pose no risk to scheme benefits.
* In some areas, the draft policy appears broader than the policy intent, and creates further uncertainty. For example, it indicates that TPR would not “usually” seek to use its powers in cases where we would expect there to be no concern at all about the conduct (such as where full mitigation is in place), and where behaviour appears to us to be far from wilful or reckless. The introduction of uncertainty where certainty should exist is unhelpful.
* Our overriding concern is that the policy does not do enough to help the parties to whom it is addressed understand where TPR might seek to draw the line between acceptable conduct and conduct which could lead to a prosecution. Particularly in difficult situations, this could result in employers, trustees, advisers and other parties being reluctant to take actions that are ultimately intended to protect the scheme, due to the risk of such actions being perceived to avoid debt or risk accrued benefits, with the consequent risk of a prosecution.
* We would urge TPR to clarify the policy, with a view to being more definitive about when it would seek to use its powers, particularly in circumstances that might appear to be borderline. The aim should be to eliminate uncertainty where it is not necessary, and to set clear boundaries around the areas that the Government did not seek (and TPR should not seek) to include in the new powers. The policy should also help parties to understand the situations where TPR would be concerned and the actions it might expect them to take to stay on the right side of the new powers.
* The policy will not be legally binding, so we do not think it necessary for TPR to be concerned about constricting its powers, or for it to avoid discussing borderline examples. Unless the policy is made clearer, we believe there is the potential for a significant increase in clearance applications, with associated costs and delays to corporate activity, and the risk of paralysis around actions to protect schemes.

1. **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: No (partially)

Comment:

* TPR’s concerns that the policy may constrict its powers has led to a draft policy which gives insufficient help on the areas where there are concerns.
* Whilst we have sympathy with the difficult task faced by TPR, and sympathy with its concerns about constricting its powers, we believe there are areas and examples where it could have been more definitive, and opportunities to provide comfort that some activities are simply not viewed as in scope (or, if necessary, would be viewed as a reasonable excuse). Whilst not a complete list, the following are examples from an actuarial perspective:
  + Advising on and deciding on the management of section 75 debts in accordance with legislation.
  + Advising on and making scheme funding decisions in accordance with legislative requirements.
  + Advising and deciding on bulk transfers in accordance with legislative requirements.
  + Advising and deciding on scheme strategy, for example buy-ins, buy-outs and winding up.
  + Advising on actuarial factors, including where the actuary has the power to set factors under the scheme rules.
* Generally, where professional advisers advise in good faith on options open to trustees and employers, and trustees and employers make decisions in the light of that advice in good faith and in accordance with fiduciary duties and duties to the scheme under trust law, we see no reason why they should fall within the scope of the new powers. If TPR believes actions in accordance with legal requirements are nevertheless potentially subject to a criminal prosecution, we believe it would be appropriate to (a) work with DWP to amend the legislation, and (b) elaborate in the policy concerning the areas of concern, so trustees, employers and advisers are fully aware of any particular issues.
* It is notable that the latest TPR blog is more definitive about TPR’s rationale for using its powers. We would encourage TPR to reflect its comments in the policy itself.
* Given the policy is not legally enforceable and that other parties may also use the powers in the legislation, we believe TPR could be clearer with examples where it would not seek to use its powers. It could also provide reassurance that lawful actions would not fall in scope (including those we mention in the previous paragraph).

1. **Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer?**  
   Yes/no: No

Comment:

* We do not believe it would be appropriate for TPR to select cases purely in order to set an example, unless those cases are clearly in scope and have a very good chance of resulting in a criminal prosecution.
* We would encourage TPR to include both smaller and larger schemes in any actions, to avoid the perception of many smaller schemes that TPR is unlikely ever to intervene in their affairs. Whilst risk to the PPF is clearly a factor in favour of selecting larger schemes, TPR also has a duty to individual members, whose personal risk is the same regardless of the size of their scheme.
* It would be helpful if TPR were able to confirm definitively that a statutory defence in relation to material detriment would also rule out the use of criminal powers under s58B (rather than that it “would usually” do this). If the caveat cannot be removed, an example of a case where the exception might apply would be helpful.
* It is unhelpful for TPR’s policy to sit in isolation when other parties may also exercise the new powers. We would welcome some assurances (in the policy) that TPR is working with those other parties to reach a common understanding.
* We suggest that TPR should consider the severity of an act in deciding whether to use the new criminal powers or its moral hazard powers. There is a sense, which we assume is not intended, that the criminal and moral hazard powers are interchangeable, and that the criminal powers might be used to deter others, rather than because they match the scale of the offence.
* Given the considerable costs and time required to satisfy an investigation by TPR, and the risks of reputational damage to all those involved, we believe it is essential that TPR proceeds with caution and with absolute justification, and that cases are not selected speculatively or with undue weight on the ability to deter others.

1. **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: Yes

Comment:

* We encourage TPR to provide more extensive examples that could help all parties to understand when well-meaning actions to protect schemes and employers might cross the line and be seen by TPR as actions to avoid debt or risking accrued benefits.
* The examples given largely cover areas where there is little uncertainly about whether they would be in scope. It is, in our view, important that examples also include situations (case studies, in effect) where TPR (and all the parties involved in a decision) might need to use professional judgement and some indications on how TPR might exercise its judgement would be particularly helpful. The aim should be to help all those involved with an action (or inaction) to have a good understanding of the boundaries between, in effect, right and wrong. It would be helpful if the examples could ensure that those who have good intentions (with regard to the scheme) and are well advised, with a sufficient level of knowledge and understanding, will not inadvertently find themselves on the wrong side of the law. Neither, for that matter, should they find themselves being publicly investigated for potentially being on the wrong side of an unclear law.
* It would be helpful to clarify that reasonable excuse exists where a scheme is very well-funded (on an appropriate basis) before and after the activity (or inactivity) in question. We do not believe TPR’s efforts would be well focussed on cases where the actions are clearly not risking scheme benefits and where there is no risk to the PPF and/or minimal section 75 debt.
* We suggest including some examples relating to inaction, which in some cases may be more likely than positive actions to be judged with hindsight. How does TPR envisage using its new powers with regard to a failure to take an appropriate action, and can it give an example close to the wire and illustrate the factors that might result in it concluding one way or another whether there was reasonable excuse?

1. **Do you have any other feedback?**

Comment:

* Given professional advisers are clearly in scope of the new powers, we would encourage TPR to work with industry bodies to ensure they fully understand TPR’s concerns and to ensure that professional guidance is consistent with TPR’s expectations. This would avoid the situation where TPR could seek to prosecute actions which were deemed to be in line with professional and ethical guidance from a person’s professional body.
* We note the suggestion in the draft policy that a professional person acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of advice being given would only have a reasonable excuse “in most circumstances”. This is an area where an example would be helpful to illustrate where TPR believes such a person and actions could be in scope of the new powers.

Yours Sincerely,

**Mark Williams**

Chair, IFoA Pensions Board

**Jane Biggerstaff**

Chair, IFoA Pensions Consultation Committee