

The Pension Schemes Act 2021 (PSA21) was an ambitious piece of legislation covering a wide variety of topics including pensions dashboards, defined benefit scheme funding, collective defined contribution schemes, pension transfers (scam prevention) and climate change. In this quick guide, we take a look at the powers of The Pensions Regulator (TPR) that were introduced by PSA21. For more about the other measures introduced by PSA21, please see our [February 2021 publication](#), and our [pensions thought leadership library](#).

How Did PSA21 Enhance TPR's Powers?

The publicity in recent years around two large corporate failures shone a spotlight on the actions that TPR had taken and the powers that TPR had available to it, in order to protect the defined benefit pension schemes attaching to those corporates. Before PSA21, the amount that TPR could fine an individual or entity for failing to comply with pensions legislation was broadly capped at £5,000 and £50,000 respectively and other powers, such as the ability to issue a contribution notice, were not straight forward to use. The early warning system that should have given TPR advance notice of potential problems was designed so that it would not be triggered until after an event had occurred, and even TPR's powers to investigate were not without difficulties. The government launched a white paper and invited views on how TPR's powers should be extended, which culminated in the new and enhanced powers given to TPR by PSA21.

TPR's powers have been increased in five key areas.

Contribution Notices

Two additional contribution notice tests were introduced, which sit alongside the material detriment test. These tests are called the "employer insolvency test" and the "employer resources test". The main point to note with these tests is that they make it easier for TPR to take action. TPR is able to look at a snapshot in time and the impact on the employer, rather than being required to predict the likely impact of an event on the future funding levels of a defined benefit scheme.

When deciding how much to demand under a contribution notice, TPR will look at the shortfall in the scheme's funding position. TPR can demand an amount equal to the full section 75 deficit in the scheme. Previously, the relevant time for calculating the shortfall was the point in time at which the event occurred. This has now changed. TPR will consider the shortfall in the scheme at the year-end immediately before making the determination. This is so that TPR is able to capture any increase in the scheme deficit since the event occurred.

Criminal Offences

The PSA21 introduced two criminal offences of "avoidance of an employer debt" and "conduct risking accrued scheme benefits".

The offence of "avoidance of an employer debt" includes any act or failure to act intended to prevent the recovery of the whole or any part of a section 75 debt. This includes preventing such a debt from becoming due, compromising the amount of the debt or reducing the amount of a debt that would otherwise become due. The reference to a section 75 debt includes any contingent amount.

The offence of "conduct risking accrued scheme benefits" includes any act or failure to act that detrimentally affects in a material way the likelihood of accrued scheme benefits being received. This applies where the person knew or ought to have known that such a course of action would be likely to have that effect.

The key points to note about these two offences are that:

- Anybody who is involved with the running of a defined benefit pension scheme or a scheme employer can be caught by these offences. There is no requirement to be "connected" or "associated" with a scheme employer in the same way that there is for contribution notices.
- In relation to the offence of "conduct risking accrued scheme benefits", it is not necessary for there to have been any intention to risk accrued scheme benefits, the person just had to know, or ought to have known, that the action they took would have had the prohibited result.

Interview and Inspection Powers

TPR has been granted enhanced inspection and interview powers to support its existing information gathering powers under section 72 of the Pensions Act 2004. It is now easier for TPR to require anyone connected with the running of a pension scheme, or a scheme employer, to attend for interview.

Provision of False or Misleading Information

TPR has the power to issue a financial penalty of up to £1 million to anyone who knowingly or recklessly provides information to TPR that is false or misleading, where the information is provided in certain specified circumstances, including the pension scheme return and notifiable events regime. The penalty will also be available where the person providing the information intends, or could be reasonably expected to know, that TPR would use the information for the purpose of carrying out its functions.

There is a similar financial penalty available to TPR in relation to the provision of false or misleading information to the pension scheme trustees, including any information that a person could be reasonably expected to know that the trustees would rely on for the purposes of carrying out trustee business.

Are All of the Powers for TPR That Were Introduced by PSA21 Now in Force?

In September 2021, the government consulted on draft regulations that would make changes to the existing notifiable events regime. Those regulations were expected to come into force from April 2022, but the final form of the regulations is still awaited.

Once in force, the regulations will provide a better form of early warning system for TPR than currently exists in relation to corporate activity that might have a detrimental impact on a defined benefit pension scheme. There will be an obligation on the employer or connected party to notify TPR and the pension trustees of certain types of corporate activity before a transaction completes. Broadly, the notifiable event requirement will be triggered where a “decision in principle” has been taken to either dispose of a specified proportion of the business and assets or share capital of a scheme employer, and/or grant security that would result in the secured creditor ranking above the pension scheme on an insolvency. Once there is a firm intention to proceed with a disposal or the granting of security, a statement will be required to be provided to TPR and the pension trustees. The statement will need to set out the proposal, the likely impact on the pension scheme and details of any mitigation offered to the pension scheme.

The exact timing of the notifiable event submission and the accompanying statement is likely to require the input of legal advice.

Does TPR Provide Guidance on Its Powers?

TPR has consulted on and published various policies to assist trustees, employers, directors and advisers understand the powers introduced by PSA21. These include:

- A [criminal offences policy](#), which provides guidance on TPR’s approach to investigating and prosecuting the criminal offences of “avoidance of an employer debt” and “conduct risking accrued scheme benefits”
- A [high fines policy in relation to TPR’s avoidance powers](#). This sets out TPR’s approach in relation to the financial penalties of up to £1 million that could be imposed for “avoidance of an employer debt” and “conduct risking accrued scheme benefits” (rather than the fines that could be imposed when avoidance is treated as a criminal offence). The policy also covers TPR’s approach to financial penalties on a failure to comply with a contribution notice.
- A [high fines policy in relation to TPR’s information powers](#). This sets out TPR’s approach in relation to its power to levy a financial penalty of up to £1 million for failure to comply with the notifiable events regime, and/or knowingly or recklessly providing false or misleading information to TPR or pension trustees.
- An [overlapping powers policy](#), which sets out the approach that TPR will take when more than one penalty option is available to it.
- An [information gathering powers policy](#) describing TPR’s approach to how it will investigate an issue and gather information.
- An [enforcement policy](#) and an [updated prosecutions policy](#).

What Else Should You Be Aware of?

It is worth noting that PSA21 allows for further regulations to be implemented that would increase the maximum financial penalty from the current figure of £1 million.

Where the circumstances exist that would allow TPR to impose a financial penalty on a company, TPR could instead impose the penalty on a director, secretary or other officer involved in the decision-making process. This provision is another way in which TPR will be able to pierce the corporate veil.

Some Practical Points

Do	Don't
Do update risk registers for both corporates and trustees	Don't forget to take specialist pensions legal advice if you are entering into a corporate transaction resulting in the disposal of business or shares of a sponsoring employer, or where security is granted and the employer operates a defined benefit pension scheme.
Do remember to make a notifiable event submission to TPR in a timely manner, where required. The new financial penalties of up to £1 million also apply in relation to failure to comply with any part of the notifiable events regime, not just the provisions introduced by PSA21.	Don't ignore the pension trustees – keep them up to speed on any proposed transactions that might have an impact on the pension scheme and make sure that any information provided to the trustees is accurate and not misleading.
Do consider training on the PSA21 requirements for the boards of both corporates and trustees, and all officers who make decisions on behalf of an employer.	Don't forget about insurance. Will trustee liability insurance, company insurance and/or officers and directors indemnity insurance cover the criminal sanctions (unlikely) and/or the financial penalties? What procedural steps does the policy require?
Do consider putting in place an information sharing agreement between trustees and employer (or updating an existing one) to facilitate greater compliance with PSA21 requirements.	Don't leave considering the criminal offences until the last minute. Consider at the outset of any action or transaction whether it might constitute “avoidance of an employer debt”, or “conduct risking accrued scheme benefits”. Likewise, employers should consider whether any action might be caught by the additional contribution notice tests.
Do make sure that any person likely to take receipt of a section 72 notice or any other communication from TPR understands the importance of passing on the request to the appropriate person in a timely manner and take advice.	Don't neglect to put in place a peer review system, so that any information provided to TPR, or pension trustees is sense checked by a second person to make sure it is accurate.

What Are the Consequences of Failing to Comply?

Failure to comply with a contribution notice is now a criminal offence, carrying an unlimited fine. Alternatively, TPR is able to levy a financial penalty up to a maximum amount of £1 million.

The two criminal offences of “avoidance of an employer debt” and “conduct risking accrued scheme benefits” both carry the risk of a criminal penalty of an unlimited fine and/or imprisonment of up to seven years. Alternatively, TPR could use its financial penalties powers and levy a penalty of up to £1 million.

Failure to attend for interview is a criminal offence carrying a maximum penalty of up to £5,000. TPR could, instead, issue a fixed penalty notice of up to £50,000 or an escalating penalty notice with a daily rate of up to £10,000.

The provision of false or misleading information to TPR and/or pension trustees could result in a financial penalty of up to £1 million.

Failure to comply with the notifiable events requirements and/or the new accompanying statement requirement (once it has been introduced) without reasonable excuse could incur a financial penalty of up to £1 million.

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