Pension Schemes Act 2021: the criminalisation of pension misconduct

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The Pension Schemes Act 2021 **('the Act')** addresses a number of critical areas concerning pensions, and importantly brings about a number of significant changes. Broadly distilled, the Act:

- establishes a new framework for the formation and administration of collective money purchase **('CMP')** pension schemes;
- creates three new criminal offences;
- introduces a new power to impose civil penalties of up to £1m;
- expands the scope of the existing contribution notice **('CN')** power under section 38 of the Pensions Act 2004 ('**PA04**');
- expands the Pension Regulator's **('TPR')** interview and inspection powers;
- introduces pension dashboards; and
- includes provisions on climate risk governance and reporting.

Whilst the Act received Royal Assent on 11 February 2021, many of the provisions require secondary legislation to be brought into force. In addition, trustees and others will be eagerly waiting to see TPR's guidance in relation to its new civil powers and the new criminal offences.

Scheme funding: The Act includes a new requirement for trustees of defined benefit **('DB')** pension schemes to determine and set out in writing a funding and investment strategy. A scheme's technical provisions will have to be calculated in accordance with this strategy. Other changes in relation to scheme funding include: a new requirement for trustees to send a copy of any actuarial valuation to TPR as soon as reasonably practicable after receiving it; and a power for regulations to make provision as to the matters to be taken into account in determining whether a recovery plan is appropriate.

CMP pension schemes: the notion of CMP pension schemes has been mooted for some

time, but the Act makes them a welcomed reality, introducing more flexibility in occupational pension provision. A CMP will operate in a similar manner to conventional defined contribution schemes, albeit that the member will own a proportionate share of the collective scheme assets, rather than an individual share.

Contribution Notices – Prior to the Act, TPR could issue a CN if either the material detriment test or the main purpose of an act or failure test were met. However the Act introduces two new grounds for issuing a CN: (1) the employer insolvency test; and (2) the employer resources test.

TPR's expansion of powers – the Act includes provisions which expand TPR's interview and inspection powers. It also provides TPR with increased criminal and civil enforcement options.

Three New Criminal Offences – Notwithstanding that there are already some 14 criminal offences which may be committed in the occupational pension scheme context, the Act creates three new pension offences:

- Failing to comply with a s.38 contribution notice (s.42A PA 2004);
- Avoidance of employer debt (s.58A PA 2004);
- Conduct risking accrued scheme benefits (s.58B PA 2004).

Each of these apply to DB schemes and the s.58A and s.58B offences carry maximum penalties of seven years imprisonment or a fine or both.

New Civil offences – the Act sees an expansion of the TPR's civil enforcement regime, with a number of new offences being introduced, coupled with a new financial civil penalty regime:

- Failure to comply with the Notifiable Events Framework (up to a max of £1m fine);
- Failure to comply with requirements for a Declaration of Intent (up to a max of £1m fine);
- Knowingly or recklessly providing false information to trustees up to a max of £1m fine);
- Knowingly or recklessly providing false information to TPR (up to a max of £1m fine);
- Non-compliance with information requests or delay in providing information (fixed and escalating fine, the level of which will be fixed in secondary legislation).

Restriction on statutory transfers – the Act permits members' statutory right to a transfer to be restricted in order to combat pension scams.

Climate risk governance and reporting – the Act introduces a requirement for prescribed pension schemes to manage and report annually on their exposure to climate-related risks and opportunities.

Pension dashboards – The suggestion of a pensions dashboard has been canvassed in the pensions sector for a number of years. The implementation of a pension dashboards will allow members to see pension savings on a single online platform. This infrastructure for pensions dashboards will be designed by Pensions Dashboards Industry Delivery Group. Whilst widely regarded as a positive from the Act, given the volume of date, the implementation is likely to be challenging and costly for pension providers.

The Authors

In the field of pensions law, **Andrew Spink QC** is rated as one of the leading silks by the legal directories having appeared in some of the biggest and most significant CPR Part 8 pensions claims of the last two decades, as well as hostile CPR Part 7 claims for damages and other relief in the context of pensions and other commercial trusts and many professional negligence claims (acting for both claimants and defendants). In addition, he is a recognised specialist in dealing with cases involving the exercise by the Pensions

Regulator of its "moral hazard" powers under PA04 including some of the leading cases on the application of the s.38A PA04 "material detriment test".

Oliver Powell is ranked in both Chambers & Partners (UK) and The Legal 500. He undertakes instructions that involve the regulation of business activity and commerce. His practice encompasses: asset forfeiture & civil recovery; business crime; commercial fraud; corporate investigations; and financial wrongdoing. He is a contributor to both *Millington and Sutherland Williams on the Proceeds of Crime* and *Lissack and Horlick on Bribery*, the seminal texts on POCA and Bribery & Corruption respectively.

OTC's market leading Pensions practitioners are highly sought after for their expertise in all aspects of pensions law including the existing forms of regulatory intervention by TPR, and its Business Crime and Financial Services Regulatory practitioners are internationally renowned**.** Together, members of these two teams are uniquely placed to provide advice to; pension scheme trustees, sponsoring employers, their directors and officers, and other professional advisers on:

- the implications of the expansion of the financial civil penalties regime and the scope of the existing s.38 regulatory regime;
- how to deal with investigations by TPR in light of its new powers, as well as internal investigations;
- how the new criminal offences will operate – burden and standard of proof, possible defences, what is *"avoidance of employer debt"* or *"risking accrued scheme benefits",* and how it may be proved;
- preparing for and attending criminal interviews (i.e. interviews under caution pursuant to PACE 1984).

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