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**The Pensions Regulator (TPR)**

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**Not a terribly inspiring heading I know. But I have it on good authority that this is what the "New Kind of Regulator", to which Mr Pickering referred, will be known as. The trickier question is what will TPR's powers be?**

**The White Paper - 11 June 2003**

The Government has made it clear that it considers the current Pensions Regulator, the Occupational Pensions Regulatory Authority ("OPRA") is too reactive. In particular, the Government considers OPRA have not sufficiently focused on the real risks to pension scheme members. This was very clear from some statistics published in the Government's Quinquennial review of OPRA in December 2002. In the five years to March 2002, OPRA received more than 56,000 reports, of which 64% related to late payment of contributions. Of that 64%, 50% were overdue by 10 days or less. Ireland's pensions regulator, where a similar occupational pensions regime is in operation, received 48 reports in a six year period. This begs the question of what the Irish regulator was up to for the rest of the time, but that is not the subject of this article.

The Government has proposed bringing in new legislation which will provide a "clear framework" for TPR. The focus will be on "tackling fraud, bad governance and poor administration" and it is proposed that TPR also be given the power to issue "Codes of Practice" reducing the need to set out the detail in the legislation. More on that later.

**Clear framework to do what?**

OPRA in April 2003 (ie between the Green and White papers) issued a revised draft of Note 1 for consultation. Note 1 addresses the whistleblower's (ie Scheme Auditor's and Scheme Actuary's) obligations pursuant to s48(1) Pensions Act 1995. In this draft, OPRA highlight four areas which it considers critical to protecting members' interests: firstly, matters which may have a significant detrimental impact on members' benefits, secondly, breaches that carry a criminal penalty, thirdly, matters that indicate potential dishonesty, and finally matters that strongly indicate a poor standard of stewardship by trustees.

These concepts are arguably what the Government will be focusing on when considering the powers with which to provide TPR. Note 1 is aimed at making it clear what OPRA, at least, and presumably TPR when it follows, consider are the real risks which need to be reported to it. Note 1 introduces the "traffic light" framework. "Red" reporting scenarios involve breaches or circumstances which OPRA regards as materially significant and they would expect to receive a report on a "red" issue. "Amber" issues involve less clear cut situations and the auditor or actuary will need to make a judgement call as to whether the matter is likely to be of material significance to OPRA. "Green" reporting scenarios involve breaches or other matters about which OPRA do not expect to receive a report. Of course, s48(1) has always referred to a report being made to OPRA by the Scheme Auditor or Actuary where the failure to comply with the duty is likely to be of "material significance" to OPRA. Clearly, this has not been followed to the letter by the Auditor or Actuary (although they are not necessarily to blame given the potential for claims against them if they get it wrong).

There appears to currently be an interesting (relatively!) distinction between what the Auditor or Actuary has a duty to report to OPRA under s48(1) Pensions Act 1995 and OPRA's powers to do anything about the report. Auditors and actuaries are under an obligation to make a report to OPRA if they have reasonable cause to believe "that any duty relevant to the administration of the scheme imposed by any enactment or rule of law on the trustees or managers, employer, any professional adviser or any prescribed person acting in connection with the scheme has not been or is not being complied with ...". It is not only Pensions Act breaches which the auditor or actuary should report but essentially any breach of any duty (as long as it is materially significant). But OPRA's powers against trustees are limited. It may fine or penalise trustees for breaches of the Pensions Act only, not breaches of any duty. OPRA also have no power to do anything about professional advisers (although it can make a complaint to the relevant professional body). OPRA have expressed a desire (in its response to the Green Paper) for TPR to have reserve powers to sanction professional advisers. I understand that although this was not specifically mentioned in the White Paper, the Government is considering this point.

The example scenarios provided by OPRA in the draft of Note 1 suggest far wider issues than breaches of the Pensions Act, e.g. where benefit enhancements have been granted against the advice of the Scheme Actuary in an underfunded scheme or where there is a forthcoming retirement of a senior executive in an underfunded scheme which is about to go into wind-up. If TPR are to have any real teeth, it will need to be given appropriate powers to sanction trustees for such potential breaches over and above OPRA's current powers, which essentially concern suspension/removal of the relevant trustees, or appointment of an additional trustee to the scheme.

But if TPR are given wider powers, how will this work in relation to the Pensions Ombudsman? Trustees could potentially be facing a double whammy, i.e. complaint to TPR and complaint to the Pensions Ombudsman. It will be important for the Pensions Ombudsman's office and TPR to work together to avoid any possible injustice to trustees. If TPR's powers are extended, trustees will need to be aware that it is likely they will continue to be personally liable for fines and penalties (unless there is an appropriate indemnity available from the employer)..

### **Codes of Practice**

Codes of Practice, which essentially appear to be guidance notes to trustees issued by TPR will not apparently represent the law, but the Government intends they should have evidential value in proceedings where it will be determined whether a breach of the legislative provision has occurred. This includes decisions by the Pensions Ombudsman. The Codes of Practice are also referred to in the White Paper in the context of the proposed higher standard of care. This states that trustees will be expected to be "familiar with the issues or have relevant knowledge across the full range of their responsibilities". The Government has proposed that the Codes of Practice will provide guidance on how this legal requirement could be satisfied.

As the Codes of Practice will be issued by TPR they presumably will relate solely to issues which concern TPR. It is not clear how the Codes of Practice will assist trustees in providing guidance on issues which fall outside those with which TPR are concerned. Again, it will also be important to ensure consistency between TPR and the Pensions Ombudsman regarding the Codes. It will not do if the Pensions Ombudsman makes a finding of maladministration where trustees have complied with the Code.

OPRA intend to issue a final Note 1 very shortly. The Government intend to introduce TPR by Spring 2005. Watch this space!