

Published in the OPDU Report (Issue 18) May 2005

The Pensions Regulator – Any more Teeth?

By Carole Smith, Associate

This article is intended as an update to my article In OPDU Report Issue 15 published in November 2003. In that article, I made an (educated?) guess about some of the powers the Pensions Regulator ("TPR") may be given. Now we know what the powers will be the next question is whether TPR will achieve what OPRA failed to.

Framework for TPR

TPR took over from OPRA on 6 April 2005. The main objectives of TPR are threefold: to protect members' benefits, to reduce the risk of situations arising which may lead to compensation being payable from the PPF, and to promote and improve understanding of the good administration of schemes.

All of OPRA's functions have been transferred to it. It has also been provided with a number of additional powers such as "improvement notices" to which I will refer again below.

A priority for TPR, in achieving its objectives, is to ensure that all significant breaches of law are reported to it and that more minor/insignificant breaches are not reported.

Duty to report breaches of law

I mentioned in November 2003 that OPRA had issued a revised draft Note 1 ("ON1") for consultation (ON1 sets out the "traffic light" whistleblowing guidance for scheme auditors and actuaries to assist them on whether to make a report to OPRA pursuant to s48(1) PA 1995). OPRA also produced a revised Note 6 ("ON6") in May 2004 which provided similar guidance for trustees and others who have the power pursuant to s48 PA 1995 to report breaches to OPRA rather than a duty.

From 6 April 2005 s70 PA 2004 replaced s48 PA 1995. This provides that trustees, employers, persons involved with the administration of the scheme, and advisers (not just professional advisers) have a duty to make a written report to TPR. This applies where they have reasonable cause to believe that any duty has not been complied with, and that the failure to comply is likely to be of material significance. Although the duty itself remains the same, the categories of people on whom the duty falls is much wider.

Will this TPR achieve the priority referred to above?

The traffic light framework greatly assisted OPRA in reducing the number of reports made to it. Following the publication of ON1 and ON6 according to OPRA the number of reports of breaches apparently fell from around 12,000 a year to 2,000.

Section 90 PA 2004 states it is mandatory for TPR to produce a Code of Practice ("COP") relating to the discharge of the duty imposed by s70. In an effort to restrict the reports to materially significant breaches, the COP draws heavily on the traffic light framework, although this forms part of the guidance to the COP and does not form part of the COP itself. The COP, when defining what will be materially significant to it, asks those with a duty to

report to consider the impact of the breach on the three statutory objectives referred to above.

What can TPR do to those who fail to report breaches?

If s70 is not complied with, s10 PA 1995 (the penalties section) applies if there is no reasonable excuse for the failure to report. This will apply to all those with a duty to report i.e. trustees, employers, persons involved with the administration of the scheme, and advisers (not just professional advisers).

As mentioned above, a COP is available to assist those with a duty to report. Although a failure to observe the COP does not, of itself, render the person liable to legal proceedings, TPR can issue an improvement notice to direct that person to comply with the COP, and civil penalties can be issued for failing to comply with the improvement notice.

Furthermore, the COP is admissible in evidence in any legal proceedings (which specifically includes the Pensions Ombudsman's office) and must be taken into account if relevant. Therefore, TPR's powers, especially from a trustee's perspective, will be significantly greater than OPRA's.

But what about TPR's powers to sanction trustees who have had a report made against them?

TPR's powers against trustees who are the subject of a report

In November 2003 I said that OPRA's powers against trustees who are the subject of a report are limited and that it may fine or penalise trustees for breaches of the Pensions Act 1995 only, not breaches of any duty.

Trustees are still subject to fines and penalties for breaches of the relevant remaining parts of PA 1995, and certain new provisions in PA 2004. But, in addition, TPR has the power to issue an improvement notice where it considers the pensions legislation is being contravened. As mentioned above, s10 PA 1995 will apply if there is failure to comply with the improvement notice. Although improvement notices are limited to "pensions legislation" (so that any reports made to TPR which concern breaches of trust, for example, will not be subject to improvement notices or penalties) "pensions legislation" does of course include PA 2004. This imposes a number of new duties on trustees, including new knowledge and understanding requirements. Failure to comply with these requirements could see fines and penalties being imposed.

Any more teeth?

The short answer is yes. Whether they will bite in the right places remains to be seen. At the time of writing, the guidance examples had not been finalised but the final version is expected to be substantially the same as the examples attached to the draft COP.

At the time of writing, the guidance examples had not been finalised but the final version is expected to be substantially the same as the examples attached to the draft COP.