

## Pensions & investment litigation briefing

April 2021

Sackers' pensions & investment litigation team reviews recent case law and developments, examining the practical lessons for trustees and employers



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## Abbreviations

**CETV:** Cash Equivalent Transfer Value

**DB:** Defined Benefit

**DC:** Defined Contribution

**DSAR:** Data Subject Access Request

**FCA:** Financial Conduct Authority

**ICO:** Information Commissioner's Office

**IDRP:** Internal Dispute Resolution Procedure

**TPO:** The Pensions Ombudsman

**TPR:** The Pensions Regulator

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## Overview

“Whilst 2021 didn't quite mark the fresh start we'd hoped, as ever, there's plenty of change in the pensions world.

On pages 3 and 4, we look at the new Pension Schemes Act 2021, which finally received Royal Assent, and its additions and changes to TPR's arsenal of powers.

On page 5, we cover a couple of determinations from TPO on the perennially hot topic of transfers, whilst looking forward to changes that the Pension Schemes Act will bring in this sphere later in the year.

And on pages 6 and 7 we pick up the highlights from our recent webinar on data risks, where we looked at how data breaches can impact pension schemes, the tactics used to obtain information from schemes, and what trustees can do to protect themselves from liability.

Finally, on a personal note, we are looking forward with relish to meeting up with all our clients and contacts in the not too distant future and hoping not only for a long and beautiful summer but also for a return to more normal opportunities to see you all in person.”



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# Pension Schemes Act 2021 – TPR’s new powers

The most significant piece of pensions legislation in over a decade has finally hit the statute books. Several years in the making, the [Pension Schemes Act 2021](#) (the Act) will bolster TPR’s supervision and enforcement powers, reinforcing its mantra of being “clearer, quicker and tougher”. Greater transparency of corporate events will be enforced against a backdrop of potentially onerous penalties and criminal offences. The beefed-up powers, including in relation to interview and inspection (see more on page 4), are expected to come into force this autumn, although much of the detail is awaited in regulations.

## TPR’s new sanctions

### Criminal offences:

- avoidance of a statutory employer debt – punishable by an unlimited fine and/or up to seven years in prison
- conduct risking accrued DB scheme benefits – punishable by an unlimited fine and/or up to seven years in prison
- failure to comply with a contribution notice – punishable by an unlimited fine
- failure to attend or respond to an interview (see page 4) – punishable by a fine.

### Civil penalty of up to £1 million:

- as an alternative to the above criminal sanctions
- where a person knowingly or recklessly provides false or misleading information to the trustees (capturing existing information requirements applicable to sponsoring employers and their advisers) or to TPR (the latter already being a criminal offence punishable by an unlimited fine and/or up to two years in prison)
- for breach of the new notifiable events requirements.

See overleaf for TPR’s other new powers of note.

## Spotlight: new criminal sanctions policy

Two of the new criminal offences, avoidance of a statutory employer debt and conduct risking accrued DB scheme benefits, were hotly debated during the Act’s passage through Parliament. With the potential to capture a wide range of corporate activity, as well as a broad spectrum of people (including directors of sponsoring employers, shareholders, trustees and advisers), the two new powers have set alarm bells ringing throughout the pensions industry.

Closing on 22 April 2021, TPR is currently consulting on its [proposed policy approach](#) towards investigating and prosecuting the two new criminal offences. Reassuringly, TPR’s proposed approach is guided by its understanding that the new offences are aimed at enabling it to “address the more serious intentional or reckless conduct” that is already within the scope of its contribution notice powers, or would be in scope if the person was connected with the sponsoring employer. But its overall intention is that the offences will help “to deter conduct that could put pension schemes at risk”.

Whilst the examples of behaviour set out in the draft policy might help allay some industry fears, many shades of grey remain. As a result, we may well witness a more cautious approach to corporate behaviour until the legal position becomes clearer.

### Action

- ✓ Employers should take advice before commencing corporate activity, including M&A, financing and refinancing, granting of security and/or paying dividends.
- ✓ Trustees should consider where the new powers may give them additional leverage in negotiations with employers in such scenarios, and engage responsibly.
- ✓ As ever, governance is vital: good communication, record keeping, and decision-making will be key.
- ✓ Schemes should take advice on engaging appropriately with TPR, should the need arise.

**NB** Although the new offences will not apply retrospectively, TPR has said that evidence pre-dating their commencement may be relevant to its investigation or prosecution if, for example, it indicates someone’s intention and/or knowledge.

# Pension Schemes Act 2021 – TPR’s new powers cont.

## Other new powers of note

### New notifiable events

Further detail will be set out in regulations. However, the new events are expected to include a requirement to notify TPR on the sale of a material proportion of a sponsoring employer’s business or assets (where that employer has funding responsibility for at least 20% of the scheme’s liabilities), or where security on a debt is granted giving it priority over the scheme

### Contribution notices

Broadening the circumstances in which contribution notices can be imposed, including introducing a snapshot test focusing on the potential weakening of a sponsoring employer’s resources resulting from an act or course of conduct (including a failure to act)

### Information gathering

TPR’s existing powers will be extended, with wider powers to inspect premises

### Interviews

In future, rather like the FCA, TPR will be able to call to an interview sponsoring employers, trustees, professional advisers or any other person whenever it believes its regulatory functions might be in play

A consultation covering contribution notices and information gathering was published on 18 March (see [7 Days](#)), and runs until 29 April 2021.

### Action – interviews

The Act broadens TPR’s power to require people to attend an interview, from its current restriction to enquiries in relation to auto-enrolment and master trust authorisation, to all schemes. Our recent blog on [TPR’s new interview powers](#) looks at the extensions in this area, and how schemes should prepare for and react to such requests. Employers and trustees invited to interview should take advice on what to expect from the process, and how best to engage with TPR.

## Survey



Our [survey](#), carried out as part of a [webinar](#) on the Act, showed that 43% of respondents had no concerns over TPR’s new powers. Trustees and employers alike, however, should keep a close eye on the various regulations, codes and guidance as they develop over the next few months, and think about the steps that they might want to take in getting to grips with the practicalities of this new legal and regulatory landscape.

## Timing



In March, the Government set out a timetable for the secondary legislation made under the Act (see [7 Days](#)). The majority of draft regulations on TPR’s new powers will be consulted on this spring, in order to commence these powers and the criminal offences measures in the autumn.

- The draft criminal sanctions policy (see page 3) is the first in a series of consultations expected from TPR as it takes forward the Government’s plans outlined in the Act. It states that the two offences covered should come into force “by Autumn 2021”, with the final policy expected to be published “later this year”.
- The additional information gathering powers are due to come into force on 1 October 2021. While the powers will enable TPR to ask for relevant information or documents from any time in the past during an interview or inspection, how it uses the material obtained will be subject to admissibility of evidence provisions and, where relevant, the date that legislative provisions or offences came into force. On the duty to give notices and statements to TPR in respect of certain events, the Government will consult on draft regulations later this year, for commencement “as soon as practical thereafter”.

## TPO: spotlight on transfers

The Act will also usher in changes in the transfers sphere later this year, aimed amongst other things at helping prevent scams. The expected new conditions for being able to implement a statutory transfer right will increase due diligence in this area, as well as place a greater focus on trustee decision-making when faced with non-statutory requests. In the meantime, transfers remain a prolific source of complaints:

### TPO rejects complaint regarding new CETV basis post-transfer



Mr S complained to TPO about the disparity between a CETV he received, and those paid later to other members of his scheme, due to a change in the scheme's CETV calculation basis. Mr S had taken a transfer from the old British Steel Pension Scheme, which completed in September 2016. He argued that the trustee had "scaremongered" by suggesting that a new scheme might not come into effect, with the result that he chose to transfer out. The trustee had subsequently decided to amend the CETV calculation basis in 8 March 2017, resulting in higher CETVs.

TPO found no maladministration in the payment, as Mr S was paid in accordance with the scheme's CETV calculation basis at the time. Mr S argued that he should have been warned of the forthcoming change in the calculation basis. However, it was clear from the records that Mr S's transfer completed before the trustee's decision to alter the basis. Furthermore, there is no requirement for trustees to consult with members or inform them of changes made to a scheme's CETV calculation basis. The decision to increase the basis was taken having obtained and considered actuarial advice, was made in line with TPR's guidance on transfers and was carefully minuted.

Of wider interest, TPO also investigated Mr S's complaint that some trustee directors had a conflict of interest in adopting the new CETV basis as they would stand to benefit from higher CETVs themselves. However, TPO was satisfied that the trustee had taken the necessary steps, both in line with TPR's guidance, in considering and dealing with conflicts (including by declaring, minuting and monitoring potential conflicts), and with their own conflicts policy.

#### Action

Schemes should ensure decisions are made following due process, including necessary declarations and minuting of potential conflicts, and taken in line with relevant guidance.

### Incorrect quotations: member could not rely on CETV after guarantee date



Mr Y raised a complaint against the trustee and administrator of his scheme, arguing that he had been given an incorrect CETV quotation (taking financial decisions in reliance on this quotation, and incurring significant costs), and that he experienced delays and poor customer service and received incorrect and contradictory information about his benefit options.

While the stated CETV had been incorrect, inaccurate quotes are not binding (a member is only entitled to receive the benefits provided for under the scheme's rules). TPO held that it was unreasonable for Mr Y to rely on a quotation that was seven months past its guarantee date to move house, and also found evidence of additional factors in his decision-making. There was no proof that he relied to his detriment on the incorrect quotation. Further, the CETV communications had been clear that the guarantee period was limited, and that a CETV was subject to change.

The trustee accepted that there had been maladministration, and that the error had caused a loss of expectation. It agreed to pay £1,000 for the non-financial injustice, serious distress and inconvenience caused.

#### Action

Schemes should ensure communications are always clear about guarantee periods and their expiry, as well as notifying members that they should not rely on the value if the guarantee period has lapsed.

We offer training on DB to DC transfers, covering the latest developments in this area, and dealing with member complaints, based on what we see as risk areas, and on real-life TPO and IDRPs cases. Communicating well with members – which includes explaining processes, providing all necessary information, and managing expectations – is key. **See also** our podcast on [DB to DC transfers](#), where we discuss what can be done to minimise their risks.

# PIL Webinar 2021 – highlights

Pension scheme trustees and administrators have important duties around handling personal data. And in this digital age, increasingly at risk of data breaches and cyber attacks, they are also subject to greater scrutiny from members, industry bodies, and claims management companies.

The information held by schemes – in volume, scope and value – make them an extremely attractive target. And data breaches in the industry catch the attention of not only the pensions press, but also the mainstream media, resulting in some alarming headlines over recent years.

The pensions and investment litigation team recently hosted a [webinar](#) looking at the risks facing pension schemes and approaches that may help mitigate those risks. We run through some of the highlights from the session here.



## Guarding against breaches

Planning ahead will pay dividends. Ask yourself the questions claims management companies would ask:

- do you have appropriate technical measures and secure systems in place, and regularly test them in order to evaluate effectiveness?
- do you have a cyber incident / data breach response plan, and did you follow it?
- can you restore access to data, and in a timely manner to limit adverse impact on business-as-usual activity?
- do you have up-to-date records in your breaches logs and staff training programmes in place?
- what incident support do you have in place in contracts with third party service providers such as investment managers and administrators?
- what protections do you have in place? (see page 7)



## Responding to breaches

What should a scheme do when a breach has been identified? Speedy sharing of information to help make important decisions is crucial. Some thoughts around this include:

- is your scheme's breaches policy and incident response plan readily to hand and are the key decision-makers immediately contactable?
- who will investigate / gather details of the breach, its implications and remedial steps?
- who will contact the ICO or TPR if a decision to notify is made?
- what will you tell members, which members, and how?
- who will address PR issues arising from adverse publicity?
- who will implement lessons learned, better defences or training needs?

A risk analysis will help identify a response strategy, including limiting the spread of the breach, removing further risks, and communicating appropriately with members and authorities.



## Reporting and complaints

We can advise on making the relevant reports to the ICO or to TPR, but considerations include:

- understanding the difference between ICO and TPR reporting duties and processes
- timescales (for example, the ICO generally requires a report to be submitted within 72 hours)
- level of detail of required for the report, and whether these require updating
- informing individuals where there is a potential risk to their rights and freedoms
- being prepared for members to ask questions, both specific to them and scheme-wide
- mitigation strategies to deal with costs of remedying the breach, potential fines and member loss claims.

Individuals can refer complaints to TPO and there is a growing body of potential class actions in the courts, looking at bigger picture damages across all affected members.

# PIL Webinar 2021 – highlights cont.



## Lessons

After remedying a breach, schemes should assess the strengths and weakness of their response plan and have a strategy to address potential claims or complaints – even if there has been no discernible loss caused to a member or the scheme, and even if no immediate claims are made, as members have up to three years to bring a complaint to TPO.

Steps to consider include:

- ensure that the risk of a similar error arising has been mitigated. Take the opportunity to sensibly test other security aspects
- consider your breaches log – there's value in spotting trends involved in breaches
- identify further training needs, plus any wider governance concerns, and take action on these
- identify where responsibility for the breach lies
- can the scheme share or allocate responsibility for the financial fallout from the breach? Review or update service agreements where appropriate
- communicate with members for reassurance.



## Protections

Whilst prevention is better than cure, mistakes and sophisticated attack mean that schemes should also consider their protections.

- Schemes should take advice on what their trust deed and rules give in terms of exoneration and indemnity protections, and what fines or penalties are likely to be covered by these.
- How have liabilities and risks been agreed in service providers' contract terms? Caps, indemnities, time limits and dispute resolution processes will be important considerations. Key terms could be included in the trustee's breaches policy so they can easily be identified and any notifications made straight away.
- Bespoke cyber-related insurance may be included in trustee third party insurance cover, and if not, would be worth considering at the next renewal.
- Whilst a breach may be unavoidable, an inadequate response can compound the issue.



## Beyond breaches: DSARs

The webinar also addressed DSARs. The purpose of these is to allow individuals to access and understand what personal data is held about them. However, increasingly we are seeing DSARs being used for collateral purposes – exercised by members in the context of other disputes, and recently (and assertively) by claims management companies.

The ICO has confirmed that, even if a DSAR is being used for collateral purpose – i.e. to fuel a complaint – a scheme is still obliged to respond. And a DSAR request can give rise to IDRPs and TPO complaints on the content of the response, and/or a separate complaint to the ICO about how the DSAR was handled. Managing these requests should therefore also form a key element of a scheme's data management strategy. Schemes should:

- review how they respond to DSARs
- manage the early stages, to help with the efficient processing of complaints
- take advice on the level of data to provide in response to a DSAR, balancing all risks
- consider tracking the DSARs received, and their origin. This may be a good indication of the volume of complaints to come and help in preparing for them.

For further information on DSARs, listen to our recent [podcast](#).

## Contact

Our market leading pensions & investment litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Our “respected team of pension litigators” (Chambers UK 2020) is experienced in handling cases before TPR, the High Court and TPO, and acts for both claimants and respondents in all forms of pensions and investment litigation.

Sackers is the UK’s leading commercial law firm for pension scheme trustees, employers and providers. Over 60 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Peter or any of the team below, or your usual Sackers’ contact.



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**They have shown the greatest readiness to engage closely with the client’s concerns and have been masters of their brief**

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## Recent publications



Our 2021 guide on [ESG and climate change for pension funds](#) covers developments on trustee duties in this area

The [DC briefing – March 2021](#) highlights topical news on DC pensions from a legal viewpoint

Sackers [Quarterly briefing – March 2021](#) highlights significant developments in pensions, covering key areas such as pensions reform, regulatory developments, new legislation and cases