



THE SOCIETY OF PENSION
PROFESSIONALS

making pensions work

Submitted via [TPR form](#) to PSA21policies@tpr.gov.uk

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SPP RESPONSE TO TPR's ENFORCEMENT AND PROSECUTION POLICIES CONSULTATION

1. Does the policy provide clarity on our overall approach to enforcement activity, our decisions and options and use of our enforcement powers?

Yes

While we consider that overall the policy does provide clarity on the Regulator's approach on enforcement activity, there are a few areas where further clarity could be provided.

Under the section "Enforcement outcomes, Prevention", paragraph 6 deals with cases involving scams and the misappropriation of scheme assets. It refers to replacing trustees in the context of pension scams where trustee actions or inaction leads to the loss of pension savings. We assume that this is likely to be in the context of schemes established for the purpose of receiving transfer values from other schemes for subsequent investment in 'highly risky' assets or, indeed, for the misappropriation of funds. In our view, it would be worth spelling this out rather than unduly worrying trustees of generally well-run pension schemes who inadvertently end up transferring a member's pension rights to an arrangement that later proves to be, at best, poorly managed or, at worst, a scam vehicle. That is not to absolve the trustees of transferring schemes of the responsibility of carrying out adequate due diligence, it is merely recognising that there are likely still to be some incidents of members transferring to schemes set up for the purpose of scams and confirming that the enforcement action will be directed at the trustees of the scheme set up for scam purposes.

Under the section "Enforcement outcomes, Remedy", paragraph 2 states: "*We may also seek to improve a scheme's security or financial position, even where there has been no contravention of any obligations under pensions legislation*". It is not clear what sort of situations TPR has in mind here and so further clarity on when TPR might seek to do this would be helpful. We recognise TPR could issue an FSD or CN in circumstances where there is no contravention of legislation and so it would be helpful to reference this, as well as to give any other examples of when TPR might seek to take such action.

Under the section "Enforcement outcomes, Deterrence", we question whether paragraph 4 is consistent with the updated Prosecution Policy. In particular, paragraph 4 states that

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TPR's prosecution powers are generally reserved for "dishonest, wilful or fraudulent" behaviour, whereas paragraph 7 of the Prosecution Policy refers to an offence being "committed by [a person's] neglect" as also being in scope. We accept that in both policies the descriptions of the types of behaviour are not exhaustive, but it may be better to have greater consistency across the two policies.

Paragraph 5 of this section draws the distinction between the standards of proof for criminal and financial penalty powers. It would be helpful if the different standards of proof were explained in more detail within the policy, as not all readers will be familiar with them. One option would be to include this in the Enforcement Options section, where the different types of enforcement powers are discussed.

2. Does the policy give sufficient guidance to those who are the subject of our enforcement action about what to expect from us and what procedures apply?

Yes

Again, overall we consider the policy does give sufficient guidance, but there are a few areas where we consider further clarity could be provided.

Under the section on "Assessment of risk and harm", it sets out a non-exhaustive list of the factors that TPR will take into account before deciding on a course of action. It then states that the weight given to these factors will depend on TPR's strategic priorities. Given these priorities will change over time, it makes it harder to assess whether enforcement action will be taken in a particular case. The section should clearly explain where to find information on the Regulator's current strategic priorities. It is also not beyond possibility that you could have two similar cases that took place at different times and enforcement action is taken in relation to one case but not the other because strategic priorities have changed. In light of this, it would be helpful to understand how TPR will ensure a fair and consistent approach is taken.

Under the section on "Enforcement options", paragraph 1 refers to TPR being able to impose a fine on a person who has breached legislation "or done anything else where a financial penalty applies". It might be helpful to cite one or two examples of the latter – ie where there is a fining power associated with an act, or failure to act, that does not involve a breach of legislation or, for example, the fact that financial penalties can apply for failure to comply with an improvement notice. We presume that this covers, for example, matters in paragraphs 5b and 6b and c of the "High fines policy (avoidance)". Therefore, a link to this could be included by way of an example. An alternative might be to cross refer to paragraph 23.

Under the section on "Enforcement options", paragraph 11 we would note that the description of types of support under an FSD appears to be an exhaustive list and does not match the much broader range of possibilities under s.45 PA04 and the FSD Regulations. It would be worth making it clear that this is not an exhaustive list.

3. Does the policy give sufficient guidance on what procedures apply and how to challenge enforcement decisions?

Yes

We do, however, consider that when an applicant is informed of the outcome of a review, the review officer should give reasons for their decision (paragraphs 15 and 27 of the "Challenging enforcement action" section).

4. Is the proposed layout easy to follow and can you easily find the information you are looking for?

Yes

While the layout is easy to follow, it is very difficult to track when a policy on the TPR website has been updated and what amendments have been made. This is a point that has been raised previously with TPR and it is something that we consider could still be improved on. Given that it is very difficult to print off/take a pdf of the enforcement policy, this problem will be even more acute here.

In this case as there are a number of different sections that you click on links to access, perhaps at the top of each section it could state the date of any update and the paragraphs that have been amended. Even more helpful would be if TPR could have a dedicated web page that lists any updates or changes made to other pages on its website, especially guidance. That way we could monitor one page to pick up all changes rather than having to monitor hundreds.

5. Do you have any other feedback on the enforcement policy?

No

6. Does the updated policy provide clarity on our approach to the investigation and prosecution of criminal offences?

Yes

We consider that overall it does provide clarity, but there are a few areas where further clarity could be provided.

Paragraph 15 states that "consideration of our available resources" is a factor in determining whether or not to investigate alleged offending. It would be helpful to understand exactly what TPR means by this as it seems, potentially, to lead to a conclusion that an investigation might otherwise have been undertaken had it not been for the fact that TPR did not have sufficient personnel or other resources to take it forward. We are not sure, if this is what is meant in the policy, that this should be a factor in determining whether or not to investigate. We consider that stakeholders' confidence might be undermined were this indeed to be the case. We note, however, that the final bullet in paragraph 4 of the "Assessment of risk and harm" in the Enforcement Policy gives a more reasoned explanation and it might be useful to carry this forward here – assuming that the point is the same.

7. Do you have any other feedback on the prosecution policy?

Paragraph 18 states that the presence of one or more factors may indicate that TPR is more likely to focus its investigation on the potential use of its criminal powers. One of those factors is non-compliance with its guidance. Given that the guidance is not legally binding on trustees and employers and TPR's website states that there is no penalty for failing to comply with Codes of Practice, we consider that it is completely inappropriate for non-compliance with TPR guidance to be a factor in determining whether TPR should use its criminal powers.

Response ends