

Pensions Law technical bites:  
New Crimes, Fines and Penalties  
under PSA 2021

**(4) Financial Penalties**

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# Crimes, Fines and Penalties

- New powers for **the Pensions Regulator** (TPR)
- under the **Pension Schemes Act 2021** (PSA 2021)
- amending the **Pensions Act 2004** (PA 2004)
  
- Series of short webcasts
- focusing on particular aspects of the new provisions
  - Under 10 minutes each
  - Already had:
    - (1) Overview and TPR Choices (30 March 2021)
    - (2) Elements of a Crime: Intent and Purpose (6 April 2021)
    - (3) “reasonable excuse” – focusing on the new crimes (21 April 2021)
  
- This webcast will cover:
  - (4) Financial penalties
  - Possible later technical bite webcasts:
    - Non-connected persons
    - Role of advice/issues for advisers
    - Time limits/retrospection
    - Standard of proof
    - Overseas issues

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# Crimes, Fines and Penalties

## Caution!

- These webcasts are just discussions
- Intended for professional advisers
  - If you are not a solicitor, you should get legal advice from a solicitor
  - If you are a solicitor, you should consider formally instructing a barrister
- This is new legislation – enacted, but **not yet in force**
- Much will depend on the facts of each situation
- Risk of action being taken by TPR may depend on its policy

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# s88A – Financial Penalties

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# PA 2004, s88A – Financial Penalties

(1) Where the Regulator is satisfied that by reason of an act [or omission] this section applies to a person, the Regulator may issue a notice to the person requiring the person to pay a **penalty** in respect of that act [or omission] of an amount specified in the notice within a period specified in the notice.

(2) The amount of the penalty is to be an amount, not exceeding **£1 million** determined by the Regulator.

(3) Regulations may amend subsection (2) by substituting a higher amount for the amount for the time being specified in subsection (2).

(4) The date on which the period specified in the notice ends must be at least 28 days after the date on which the notice is issued.

(12) In this section “act” includes omission.

Cf ss58A to 58D, referring to “failures to act” or “deliberate failures to act”

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# New Crimes and penalties under PSA 2021

3 sets of crimes and penalties inserted into PA 2004:

s42A: **Offence** of failing to comply with s38 CN

s42B: **Financial penalty** of failing to comply with s38 CN

s58A: **Offence** of avoidance of employer debt

s58C: **Financial penalty** for avoidance of employer debt

s58B: **Offence** of conduct risking accrued scheme benefits

s58D: **Financial penalty** for conduct risking accrued scheme benefits

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# New Crimes and penalties under PSA 2021

Broadly similar constituents for the offence and the financial penalty

Failing to comply with s38 CN:

- offence and FP pretty much the same.
- Limited to person named in CN

Avoidance of employer debt/ risking accrued scheme benefits:

- Acts broadly the same in Crim and FP
  - Acts include failures to act (crim) or **deliberate** failures to act (FP)
- Can apply to any person
  - not limited to a person connected or associated with an employer
- Otherwise similar but not identical

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# New Crimes and penalties under PSA 2021

Avoidance of employer debt/ risking accrued scheme benefits:

- FP and Crim similar but not identical

Eg

FP (s58C/s58D) = need to be “party to” relevant act. Party to includes “knowingly assist” -ss58C(6) and 58D(8)

Crim (s58A/58B) = “do” act or engage in course of conduct

FP (s58C) “main purpose” and “not reasonable”

Crim (s58A): “intended” act and “did not have a reasonable excuse”

See chart at end of slides below

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# New Financial penalties under PA 2004 (as added by PSA 2021)

s80A:

**Financial penalty** for knowingly or recklessly providing false or misleading information to **Regulator**

Tracks existing criminal offence under s80

s80B:

**Financial penalty** for knowingly or recklessly providing false or misleading information to **trustees or managers**

S69:

**Financial penalty** for failure to comply with notifiable events obligation to TPR in s69:

- (trustee) failed to take all reasonable steps to secure compliance
- (other person) without reasonable excuse fails to comply with obligations

(replaces existing civil penalty under PA 1995, s10)

s69A:

New duty on employer (and associates) to give notices and statements to the Regulator in respect of certain events - “Statement of intent”

**Financial penalty** if fail to comply “without reasonable excuse” - s69A(13)

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# PA 2004, s88A – Financial Penalties

So s88A applied in 7 cases, by:

s42B: failing to comply with s38 CN

s58C: avoidance of employer debt

s58D: conduct risking accrued scheme benefits

s80A: provision of false or misleading information to Regulator

s80B: providing false or misleading information to trustees or managers

S69: notifiable events (added by PSA 2021, s108)

– instead of civil penalty under PA 1995, s10

s69A: Duty to give notices and statements to the Regulator in respect of certain events

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# s88A – Financial Penalties – directors etc

## 88A(6) Where—

- (a) a penalty under this section may, apart from this subsection, be imposed on a body corporate, and
- (b) the act in question was done with the **consent** or **connivance** of a director, manager, secretary or other similar officer of the body or a person purporting to act in any such capacity,

this section applies to that person.

## NB – does not say “neglect”

- cf s309 (criminal extension)

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# s88A – Financial Penalties – third parties?

Likely that statutory extensions to third parties for criminal offences, do not apply to financial penalties

As extensions limited to an “offence”.

Eg:

aiders and abettors under Accessories and Abettors Act 1861, s8;  
or

encouragers or assisters under Serious Crime Act 2007, Part 2.

But some of the FP provisions apply to persons “party to” or who “knowingly assist” in relevant act

eg s58C (Financial penalty for avoidance of employer debt) and s58D (Financial penalty for conduct risking accrued scheme benefits)

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# Financial Penalties – overlap

S88A penalties not applicable if  
been convicted of same act; or  
PA 1995, s10 penalty required - s88A(10) and (11)

s88B:

complex provisions on inter-relation of Financial  
Penalties under ss58C or 58D (avoidance of employer  
debt etc) with s38 contribution notices on same person

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# Financial Penalties – payment

s88C – Financial Penalties enforceable as if an order of the County Court

- Recoverable by the Regulator – s88C(1)

- If CC orders, can be enforced as if an order of the County Court – s88C(2)

- Penalty recovered must be paid into the Consolidated Fund – s88C(4)

- Ie to the Crown
- Cf civil penalties under PA 1995, s10 – paid to the SofS – PA 1995, s10(9)

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# Financial Penalties – payment

PA 2004, s256 (no payment out of scheme assets for fines or civil penalties)

amended to cover s88A penalties (PSA 2021, Sch 7, para 10)

Penalty could be covered by third party indemnity or from insurance?

Insurance terms likely to exclude such penalties

- ? Impact on defence costs
- – perhaps covered, but only if defendant wins?

Public policy that criminal fines not covered by indemnities? – eg *Lancashire CC v Municipal Mutual* [1997] QB 897, CA

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## s88A – Process

Similar to that for existing civil penalties:

TPR issues a warning notice

Case heard by Determinations Panel

- Interested parties? Trustees?

Case can be referred for re-hearing by UT (a re-hearing, not an appeal)

- Can interested party/Trustee refer too?
- Presumably not TPR

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## s88A – penal but not criminal

Not a “civil penalty” (contrast PA 1995, s10)

But probably not criminal:

Process is separate

Some sections contrast criminal with FPs – eg PA 2004, s310

Protected communications provision (s311) excludes communications “with the intention of furthering a criminal purpose”

Burden of proof?

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# Criminal or civil?

Penal provision

Probably not criminal

- So impact on legal privilege – eg s311?

Onus of proof:

- beyond reasonable doubt or
- on balance of probabilities?

Only two standards of proof

Beyond reasonable doubt not limited to criminal cases:

- see *International Transport v SofS* [2002] EWCA Civ 158
- (fixed penalty for having illegal immigrant in vehicle)

Some penalty statutes refer to onus of proof

No clue in the name? Not called a “civil” penalty

Other potential consequences? eg director or professional disqualification etc?

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# Amount of Financial Penalty

Penal provision

– amount must relate to seriousness

Maximum penalty = £1,000,000

- Can be raised by regulations (SofS)

Presumably can be penalty for each breach

Continuing breach – eg:

- fail to pay s38 CN – penalised
- still fail to pay – further penalty?

£1m maximum is probably per defendant (not an aggregate).

- So if two persons breach, then can be penalized up to £1m each?
- Looks likely by analogy with *Sutton v Norwich CC* [2021] EWCA Civ 20 (penalty on a director and co under Housing Act 2004)

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# Three main risk stages

Three main risk stages:

1. TPR decides to investigate  
(may be prompted by trustees or by notifications from employer)
2. TPR decides to prosecute/institute financial penalty process
3. Court convicts or financial penalty issued.

Target is likely to incur significant costs at all three stages.

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# TPR Criminal Prosecution policy

TPR intends to issue a prosecution policy for criminal offences

- a draft was issued in March 2021
  - Will give some guidance – mainly helpful as to stages 1 and 2
  - But unlikely to be binding or give rise to a “reasonable expectation” at stage 3
  - Only a policy - TPR may change its mind later

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# TPR Financial Penalty policy

TPR already has a Monetary Penalties policy – from August 2017

- Mentioned at end of draft criminal policy (from March 2021)
  - Refers to seriousness bands 1, 2 and 3 – but based on civil penalty regime (max £50k)
  - gives some guidance – mainly helpful as to stages 1 and 2
  - But unlikely to be binding or give rise to a “reasonable expectation” at stage 3
  - Only a policy - TPR may change its mind later

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# PSA 2021: Financial penalties (up to £1m) (1)

s88A Financial Penalty	Nature of failure?	Persons Liable?	IP exempt?	S88A Penalty
<b>s42B: Failing to comply with a s38 CN</b>	Fail to pay <b>without reasonable excuse</b>	<ul style="list-style-type: none"> <li>• CN Target</li> <li>• Directors/ secretary/ manager/ similar officers of CN Target if consent/ connive - s88A(6)(b)</li> </ul>	No express exclusion	Penalty fixed by TPR (Max £1m)
<b>s58C: Avoidance of employer debt</b>	<p>Person was a party to (includes those who knowingly assist) act/deliberate failure to act with <b>main purpose (or one of main purposes)</b> to:</p> <ul style="list-style-type: none"> <li>• Prevent recovery of s75 debt due from the employer /prevent s75 debt becoming due/compromise such a debt/reduce the amount of such a debt; and</li> <li>• <b>Not reasonable for person to act or fail to act in way the person did</b></li> </ul>	<ul style="list-style-type: none"> <li>• Any person party to act/deliberate failure to act</li> <li>• Person who knowingly assists in act or failure</li> <li>• Directors/ secretary/ manager/ similar officers of company if consent/ connive – s88A(6)(b)</li> </ul>	<p>Yes</p> <ul style="list-style-type: none"> <li>• TPR must be “of the opinion” that IP is acting in accordance with functions</li> <li>• (? Does not cover s88A(6) extension?)</li> </ul>	Penalty fixed by TPR (Max £1m)
<b>s58D: Conduct risking scheme benefits</b>	<ul style="list-style-type: none"> <li>• Person was a party to (includes those who knowingly assist) act/deliberate failure to act that detrimentally affected in a material way the likelihood of scheme benefits being received</li> <li>• Person <b>knew (or ought to have known) intended act</b> (or failure to act or course of conduct) <b>would</b> have that effect; and</li> <li>• <b>Not reasonable for person to act or fail to act in way the person did</b></li> </ul>	<ul style="list-style-type: none"> <li>• person party to act/deliberate failure to act</li> <li>• Directors/ secretary/ manager/ similar officers of party if consent/ connive – s88A(6)(b)</li> </ul>	<p>Yes</p> <ul style="list-style-type: none"> <li>• TPR must be “of the opinion” that IP is acting in accordance with functions</li> <li>• (? Does not cover s88A(6) extension?)</li> </ul>	Penalty fixed by TPR (Max £1m)

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# PSA 2021: Financial penalties (up to £1m) (2)

s88A Financial Penalty	Nature of failure?	Persons Liable?	IP exempt?	S88A Penalty
<b>s80A: providing false or misleading information to TPR</b>	<ul style="list-style-type: none"> <li>Knowingly or recklessly providing false or misleading (in a material particular) information to TPR</li> <li>Save for info under some sections, person must intend or could reasonably be expected to know would be used by TPR for purpose of functions under PA 2004 or PA 1995 etc</li> </ul>	<ul style="list-style-type: none"> <li>Any person</li> <li>Directors/ secretary/ manager/ similar officers of company if consent/ connive/ – s88A(6)(b)</li> </ul>	No	Penalty fixed by TPR (Max £1m)
<b>s80B: providing false or misleading information to trustees</b>	<ul style="list-style-type: none"> <li>Knowingly or recklessly providing false or misleading (in a material particular) information to trustee or manager</li> <li>Save for info under some sections, person must intend or could reasonably be expected to know would be used by trustee or manager in that person’s capacity as a trustee or manager</li> </ul>	<ul style="list-style-type: none"> <li>Any person</li> <li>Directors/ secretary/ manager/ similar officers of company if consent/ connive – PA 2004, ss88A(6)(b)</li> </ul>	No <ul style="list-style-type: none"> <li>Specified sections include PA 1995, s26 (IP to give info to trustees)</li> </ul>	Penalty fixed by TPR (Max £1m)
<b>S69/69A: failure to notify TPR</b>	<ul style="list-style-type: none"> <li>Failure to notify TPR under notifiable events provisions in s69</li> <li>Failed “to take all reasonable steps” (trustee) or “without reasonable excuse” (others)</li> <li>Failure to comply with obligations under new s69A</li> <li>Without reasonable excuse</li> </ul>	<ul style="list-style-type: none"> <li>Person under obligation</li> <li>Under s69A includes employer and “associates” (IA 1986, s435) of employer</li> </ul>	No	Penalty fixed by TPR (Max £1m)

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# New crimes

Offence	Nature of offence?	Persons Liable?	IP exempt?	Penalty
<b>s42A: Failing to comply with a s38 CN</b>	Fail to pay <b>without reasonable excuse</b>	<ul style="list-style-type: none"> <li>• CN Target</li> <li>• Directors/ secretary/ manager/ similar officers of CN Target if consent/ connive/ neglect – PA 2004, s309</li> </ul>	No express exclusion	Fine (E&W: unlimited)
<b>s58A: Avoidance of employer debt</b>	Act/failure/course of conduct: <ul style="list-style-type: none"> <li>• Prevents recovery of s75 debt due from the employer /prevents s75 debt becoming due/compromises such a debt/reduces the amount of such a debt</li> <li>• Person <b>intended</b> act (or failure to act or course of conduct) to have that effect; and</li> <li>• <b>No reasonable excuse</b></li> </ul>	<ul style="list-style-type: none"> <li>• Any person</li> <li>• Directors/ secretary/ manager/ similar officers of company if consent/ connive/ neglect – PA 2004, s309</li> </ul>	Yes (? Does not cover s309 extension?)	Fine (E&W: unlimited) Prison up to 7 years (conviction on indictment)
<b>s58B: Conduct risking scheme benefits</b>	<ul style="list-style-type: none"> <li>• Act/failure/course of conduct that detrimentally affects in a material way the likelihood of scheme benefits being received</li> <li>• Person <b>knew (or ought to have known) intended</b> act (or failure to act or course of conduct) <b>would</b> have that effect; and</li> <li>• <b>No reasonable excuse</b></li> </ul>	<ul style="list-style-type: none"> <li>• Person doing act/failure to act/course of conduct</li> <li>• Directors/ secretary/ manager/ similar officers of party if consent/ connive/ neglect – PA 2004, s309</li> </ul>	Yes (? Does not cover s309 extension?)	Fine (E&W: unlimited) Prison up to 7 years (conviction on indictment)
<b>s80: providing false or misleading information to TPR</b> [EXISTING SECTION]	<ul style="list-style-type: none"> <li>• Knowingly or recklessly providing false or misleading information to TPR</li> <li>• Save for info under some sections, person must intend or could reasonably be expected to know would be used by TPR for purpose of functions under PA 2004 or PA 1995</li> </ul>	<ul style="list-style-type: none"> <li>• Any person</li> <li>• Directors/ secretary/ manager/ similar officers of company if consent/ connive/ neglect – PA 2004, s309</li> </ul>	No	Fine (E&W: unlimited) Prison up to 2 years (conviction on indictment)

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# Comparison table: Avoiding s75 debt or risking accrued benefits: CN vs Fin Pen vs Criminal

	CN	Financial penalty	Crime
Prosecutor / Issuer of WN	TPR	TPR	TPR or DPP or SofS Consent needed
Tribunal	DP, directly affected parties can make reference to UT	DP, parties can make reference to UT	Court (Magistrates or Crown Court)
Def/target needs to be connected or associated with an employer?	Yes	No	No
IP liable as def/target?	No provided TPR is of the opinion that act/failure is “in accordance with his functions as an [IP] in relation to another person”	No provided TPR is of the opinion that act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”	No provided act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”
Time limit	Gateway act needs to be within 6 years period before warning notice issued. Seemingly reasonableness test can look at acts etc before gateway act (eg Box Clever – an FSD case)	No	Trial by indictment (Crown Court) – no time limit  Summary trial (magistrate court) – 6 months for issue of summons: MCA 1980, s 127
Penal?	FSD – positive obligation (Bonas) CN – prob No – (Bonas)	Yes	Yes
Criminal	No	No	Yes
Burden of proof on TPR	Balance of probability	[Not clear] Cf <i>International Transport v SofS</i> [2002] EWCA Civ 158	Beyond reasonable doubt

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## Comparison table (2): Avoiding s75 debt or risking accrued benefits: CN vs Fin Pen vs Criminal

	CN	Financial penalty	Crime
Third party liability: directors and officers	No	Yes (if consent or connive) - s88A(6)(b) (NB claim against director/officer not available if already a claim for same act against co)	Yes (if consent or connive or due to neglect) - s309
Third party liability: Liable if aid or abet/counsel or procure (or encourage)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	Yes: Accessories and Abettors Act 1861 or Serious Crime Act 2007
Reasonable excuse defence?	TPR must consider CN reasonable: Some specific defences	Must not be reasonable to act/fail to act	Did not have “a reasonable excuse”
Limit on monetary liability	S75 debt amount (NB timing to change (under PSA 2021) to end of scheme year before date of determination notice)	£1m (can be raised by SofS by regs)	No limit (in E&W)
Is limit overall or for each def (so can exceed cap in aggregate)?	For each target: <i>Re Storm Funding</i> [2013] EWHC 4019 (Ch)	For each def: by analogy with <i>Sutton v Norwich CC</i> [2021] EWCA Civ 20	N/A
Act/failure can support claim on one of the other heads as well?	Yes	Yes (but not if criminal proceedings for same act)	Yes
Who gets any amount paid?	The scheme	The Crown	The Crown (potential for confiscation order under POCA)

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