

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

(5) Information to Trustees

David Pollard, Wilberforce Chambers

5 August 2021

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)
 - (4) Financial penalties (28 May 2021)

- This webcast will cover:
 - (5) Information to trustees

Follow us:



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

Follow us:



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”

Follow us:



PA 2004, s88A – Financial Penalties

s88A applied in 7 cases, by:

1. s42B: failing to comply with s38 CN
2. s58C: avoidance of employer debt
3. s58D: conduct risking accrued scheme benefits
4. s80A: provision of false or misleading information to Regulator
5. s80B: providing false or misleading information to trustees or managers
6. S69: notifiable events (added by PSA 2021, s108)
– instead of civil penalty under PA 1995, s10
7. s69A: Duty to give notices and statements to the Regulator in respect of certain events

1-4 also criminal. 5-7 only financial penalty

Follow us:



ss80A & 80B:
Misleading the
Regulator or
a Trustee

Follow us:



False or misleading information to trustee

Does not apply to a money purchase scheme (or as prescribed) – s80B(1)

S80B(2): Section 88A (financial penalties) applies to a person where—

- “the person has **knowingly or recklessly** provided **a trustee or manager** of the scheme with information which is **false or misleading** in a material particular”, if

“the information was provided to the trustee or manager in the circumstances mentioned in subs (3)(a) or (b).”

(a) [specific provisions]; or

“(b) that the information was provided ... in circumstances in which the person providing the information **intends**, or **could reasonably be expected to know**, that it would be used by the trustee or manager who receives it in that person’s capacity as a trustee or manager of the scheme.”

Follow us:



s80B: FP: providing false or misleading information to trustees

Specific provisions under s80B(3)(a) include:

IPs giving notices and information under PA 1995, ss22 and 26; and

employers, auditors and actuaries disclosing information under regs under PA 1995, s47(9) [currently s10 penalty?]

- See eg Scheme Administration Regulations

Trustees of a transferring scheme giving prescribed information to receiving OPS – PSA 1993, s113A

Follow us:



Similar provisions in PA 2004:

Providing false or misleading information

	Knowingly or recklessly [providing] information which is false or misleading in a material particular	
Recipient of information:	Criminal offence	Financial penalty (under PA 2004, s 88A)
TPR	PA 2004, s 80	PA 2004, s 80A
PPF	PA 2004, s 195	None
Trustee of an OPS	None	PA 2004, s 80B

Follow us:



Providing false or misleading information

Similar provisions in other statutes. Eg:

- FSMA 2000:
 - ss 122F, s131L, 177(4), 254(1)(c), 261U(1)(c), 279, 281, 346, 399
- Charities Act 2011, s60
- Competition Act 1998: s44

Search for:

- “information which is false or misleading in a material particular”
- Gives 154 hits on Westlaw legislation

Follow us:



Providing false or misleading information

Similar provisions in other statutes. Eg:

Competition Act 1998: s44— False or misleading information

- (1) If information is provided by a person to the CMA in connection with any function of the CMA under this Part, that person is guilty of an offence if—
- (a) the information is false or misleading in a material particular, and
 - (b) he knows that it is or is reckless as to whether it is.

Note: express extension in Competition Act 1998, s44(2) to third party even where does not give information direct to the CMA (no such express extension under PA):

44 (2) A person who—

- (a) provides any information to another person, knowing the information to be false or misleading in a material particular, or
- (b) recklessly provides any information to another person which is false or misleading in a material particular, knowing that the information is to be used for the purpose of providing information to the CMA in connection with any of its functions under this Part, is guilty of an offence.

Follow us:



s80B: FP: providing false or misleading information to trustees

- s80B(1)- Does not apply to a trustee of a money purchase scheme or a prescribed scheme
- Otherwise applies to **anyone** providing information to a trustee to be used by it in its capacity as a trustee of the scheme.
 - Must intend such use or “could reasonably be expected to know” – s80B(3)(b)
- Who is the provider who may be liable?
 - Principal liable for information provided by an agent or third party?
 - Knowledge or recklessness attributed to company/principal?
- How does this work if information is provided to the trustee’s agent/adviser?

Follow us:



s80B: FP: providing false or misleading information to trustees

Knowingly or Recklessly provided ... information which is
..... **misleading** in a material particular

Knowledge? – whose knowledge? Corporation?

Recklessly?

Easier to prove than “knowingly” or “wilful”

Follow us:



s80B: Financial penalty for providing false or misleading information to trustees

Recklessly provided information which is **misleading** in a material particular

Blackstone's Criminal Practice 2021:

relationship intention and recklessness (in relation to consequences):

(a) Consequence aimed at (i.e. D acts in order to cause that consequence):
intention.

(b) Consequence foreseen as virtually certain: intention may be found.

(c) Consequence foreseen as probable: typically (if risk unreasonable)
recklessness (subjective).

(d) Consequence foreseen as possible: typically (if risk unreasonable) recklessness
(subjective).

(e) Consequence not foreseen but ought to have been: negligence (objective
recklessness).

(f) Consequence not foreseen which even a reasonable person would not
foresee: not reckless - strict liability.

Follow us:



s80B: FP: providing false or misleading information to trustees

Recklessly provided information which is **misleading** in a material particular

R v G [2003] UKHL 50, [2004] 1 AC 1034 (criminal damage):

Lord Bingham adopted the Law Commission's Draft Criminal Code (Law Com. No. 177):

A person acts recklessly ... with respect to—

- (i) a circumstance when he is aware of a risk that it exists or will exist;
- (ii) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take the risk.

Examples in Blackstone's Criminal Practice 2021:

Reasonable risk? Eg driving a car, lighting a bonfire on own land

Unreasonable risk? – offering box of chocolates with one poisoned, driver speeding?, breaking window while demonstrating martial arts skills (*Chief Constable of Avon and Somerset Constabulary v Shimmen* (1986) 84 Cr App R 7)

Follow us:



s80B: FP: providing false or misleading information to trustees

Misleading?

Silence as misleading?

See generally '*Misleading Silence*' (Elise Bant and Jeannie Marie Paterson eds, Hart Publishing, 2020)

Silence if duty to say?

Follow us:



s80B: FP: providing false or misleading information to trustees

Material?

Cases on other statutes:

material facts can include D's present intention

- *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), at [34].

Follow us:



s80B: FP for providing false or misleading information to trustees

Who provides information to a trustee? – list (1)

Could include:

- Employer
- Parent co
- Advisers: Actuary, auditor, lawyer
- Member
- Member's advisers – eg doctor on ill-health claim

Follow us:



s80B: FP for providing false or misleading information to trustees

Who provides information to a trustee? – list (2)

Could include:

- Contracting party (eg insurer, fund manager)
- Company in which the trustee has invested/ landlord of a property rented by the trustee
- Transferee schemes/PPs
- Public bodies – hopefully not!
 - Tax authority
 - The government
 - The Regulator
 - The PPF
- Journalists?
 - But intend that will be used by a trustee?

Follow us:



s80B: FP for providing false or misleading information to trustees

Impact on provision of financial information to trustee?

Provider may suspect (=reckless?) that information could be wrong in some respects. Perhaps/hopefully not material?

- Eg employer providing interim figures
- Even audited accounts can be wrong

Could have chilling effect on provision of information to trustees?

Is the context in which information provided relevant?

- Eg if expressly stated only an estimate?
- Or only applies if really pension related (implied limitation on scope, because of nature of TPR as penaliser)

Follow us:



5 August 2021

David Pollard

Wilberforce Chambers, Lincoln's Inn, London
WC2A 3QP

dpollard@wilberforce.co.uk

This material is for general information only and is not intended to provide legal advice.

© David Pollard 2021

Follow us:



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

(5) Information to Trustees

David Pollard, Wilberforce Chambers

5 August 2021