



The Pensions Bill 2004

The Pensions Regulator



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For further information
please contact

David Pollard
65 Fleet Street
London EC4Y 1HS

T+ 44 20 7832 7060
F+ 44 20 7832 7001
E david.pollard@freshfields.com
W freshfields.com

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Introduction

The Pensions Bill was published on 12 February 2004. It sets out the detailed government proposals for significant changes to the regulation of pension schemes in the UK. These include:

- new proactive Pensions Regulator to replace the Occupational Pensions Regulatory Authority (Opra);
- Pension Protection Fund (PPF) to be established to provide members with a certain level of protection in the event of scheme insolvencies;
- abolition of the minimum funding requirement and replacement with a new scheme-specific funding requirement, to be agreed in respect of each individual scheme between the trustees and the employers; and
- simplifications in numerous areas, including member-nominated trustees and contracting out.

This guide summarises the provisions relating to the Pensions Regulator, including amendments made during the earlier Standing Committee debates (up to 22 April 2004)¹. Two other guides are available, on the Pension Protection Fund and on other provisions of the Bill (trustees, funding, simplification and employment etc). This guide looks at:

- the establishment of and formalities regarding the Pensions Regulator;
- information issues; and
- the powers of the Regulator.

¹ Clauses 1-80, 167-176, 210, 224 and schedules 1-4.

Pensions Regulator: establishment and formalities

Pensions Regulator to replace Opra

Clause 1 of the Pensions Bill establishes the Pensions Regulator (the Regulator) to replace Opra from 6 April 2005, the proposed date for the Bill to come into force. The main objectives of the Regulator will be to protect the benefits of members of work-based pension schemes², to reduce the risk of situations arising which may lead to calls for compensation from the PPF and to promote the good administration of the schemes it regulates.

The Regulator will be funded indirectly through a levy on pension schemes (as Opra is currently) and its running costs are estimated at about £23m a year. This compares with a projected £17m for Opra's final year.

The government considers that Opra has laid good foundations for the regulation of work-based pensions but recognises that Opra's effectiveness has been restricted by the current legislative framework, which often obliges it to take action in respect of many minor breaches of the law. The proposals for the new Regulator are intended to remove such restrictions and make the Regulator more flexible and responsive and able to target its resources on the cases in which members' benefits are at greatest risk.

Clause 224 provides for the immediate dissolution of Opra and the transfer of all its property, rights and liabilities either to the Regulator or to the Secretary of State. It is not clear how pending Opra proceedings will be affected.

All Opra employees will transfer to the Regulator under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (Tupe), except that their occupational pension rights will be protected (ie Regulation 7 of Tupe will not apply). This Tupe transfer has obviously prompted concerns that the new culture that the Bill is trying to engender will not be achieved by simply transferring the same employees to a new, differently named entity. What this will provide, however, is for a certain amount of continuity between the old and the new regimes.

Membership of the Regulator

Opra is required to have at least seven members, including a chairman and five representatives of certain groups (employer and employee representatives and members knowledgeable about life

² Occupational pension schemes/personal pension schemes where direct payment arrangements exist in respect of one or more members of the scheme who are employees/stakeholder pension schemes.

assurance and occupational pension schemes and their management and administration). The Regulator will consist of the following.

Title/description	Executive/ non-executive	Restrictions
Chairman	Non-executive	Not from staff of Regulator Not chairman of PPF Not from staff of Board of the PPF
Chief executive	Executive	Not from staff of Board of the PPF
At least five others:		
• at least two from staff of Regulator; plus	Executive	Not from staff of Board of the PPF
• others.	Non-executive	Not from staff of Board of the PPF Not from staff of Regulator

As can be seen from the table, the provisions distinguish between *executive and non-executive* members, in line with the Higgs recommendations of January 2003 for the board of a public company. The inclusion of non-executive members is intended to enhance transparency and accountability in the regulation process. The majority of members must be non-executives. Detailed provisions are contained in schedule 1 to the Bill. A further transparency provision is clause 12, which requires the Regulator to produce and send to the Secretary of State a report for each financial year dealing with the activities of the Regulator during that period.

Regulator's functions

The Regulator has both functions transferred to it from Opra under the Pension Schemes Act 1993 (PSA93), the Pensions Act 1995 (PA95) and the Welfare Reform and Pensions Act 1999 (WRPA99), and other functions conferred by the Bill and any other legislation. It has the same powers as Opra currently has under the PA95, namely to do anything (except borrow money) which is calculated to facilitate the discharge of its functions, or is incidental or conducive to their discharge. Certain of the Regulator's regulatory functions are reserved only for the Determinations Panel (see below).

The non-executive committee

Clause 8 establishes the non-executive committee, comprising the chairman and the other non-executive members of the Regulator.

The non-executive committee may establish sub-committees; members may not include executive members.

The functions of the non-executive committee (non-executive functions) include:

- to keep under review the strategic direction of the Regulator and monitor the extent to which the Regulator is meeting its objectives and targets;
- to scrutinise the performance of the chief executive in securing that the functions of the Regulator are exercised effectively and efficiently; and
- to keep under review the Regulator's internal financial controls and ensure they secure proper control of its finances.

The Determinations Panel

Clause 10 provides for the Regulator to establish and maintain the Determinations Panel (the Panel). This is entirely new. This Panel consists of a chairman and at least six other members.

For the purposes of transparency and separation of functions, the Panel is to be entirely separate from the Regulator and from the Board of the PPF. For this reason, members, or members of staff, of the Regulator or of the Board of the PPF are not eligible for appointment to the Panel.

The circumstances in which the Panel is to undertake determinations on behalf of the Regulator (reserved regulatory functions) include:

- orders validating action taken in contravention of a freezing order (see below); and
- certain procedures under PA95 (revocation of prohibition order or suspension order, appointment of a trustee, waiver of disqualification, modification orders and winding-up orders).

These provisions ensure that the Panel is effectively independent from other parts of the Regulator. It separates the decision makers from the investigatory staff, but of itself does not make the Regulator's processes fully compliant with the Human Rights Act 1998; that comes from the right to refer any of the Regulator's determinations to the Pensions Regulator Tribunal (see page 6).

Various questions are left unanswered by the new Panel provisions. Details are given in the Bill as to who will *not* be on the Panel, and what the Panel will *not* be, but it is unclear how the Panel will operate in practice, whether it will be physically separate from the Regulator, whether there will be any kind of Chinese Wall mechanism set up and what sort of people will be on the Panel etc. It was stated in the House of Commons Standing Committee considering the Bill (Standing Committee) that members of the Panel are likely to be legal and pensions experts.

Regulator's procedure in relation to its regulatory functions

The Regulator must determine the procedures it will follow in discharging its regulatory functions. The Panel will determine its own procedures.

There will be a standard procedure and a special procedure. The *standard procedure* must be followed by the Regulator when it proposes to exercise its regulatory functions and where there is no immediate risk to the scheme assets or interests of members. The procedure must provide for:

- a warning notice to be given to persons directly affected by the regulatory action under consideration;
- representations by those persons, to be considered by the Regulator before determining whether to take regulatory action;
- a determination notice to be given to all those directly affected by the determination, to include details of the right of referral to the Pensions Regulator Tribunal; and
- form and content of further notices and details of time limits.

The *special procedure* applies where the Regulator considers that it must exercise a regulatory function immediately because it considers there to be an immediate risk to the interests of members under an occupational or personal pension scheme, or to the assets of such scheme. Under the special procedure, no warning notice is normally given to those directly affected, and there is no opportunity for those people to make representations as under the standard procedure. Once the determination notice has been given, it must be reviewed by the Regulator, and the persons affected will have an opportunity to make representations before the determination is reviewed. The final notice of determination of review will then be given.

The Pensions Regulator Tribunal

Clauses 76-80 and schedule 4 set out details of the Pensions Regulator Tribunal. There will be a panel of chairmen who are at least seven years' legally qualified and a lay panel. Every tribunal must have at least one chairman. A tribunal may confirm, vary or revoke a determination of the Regulator or substitute its own. It may hear new evidence but it is not clear whether this would be a complete retrial. An order of the Tribunal may be enforced as though it were an order of the County Court or Court of Session. A party may appeal only on a point of law or with leave of the Tribunal (or of the Court of Appeal or Court of Session if the Tribunal refuses leave). Detailed provisions on tribunal procedure are not yet available.

Information issues

Register of schemes

Under clauses 34-40 the Registrar must compile and maintain a register of registrable occupational and personal schemes. Regulations will prescribe which schemes are registrable.

Use of information

The Regulator may use information contained in the register or otherwise held by it in the exercise of any of its functions for any purpose connected with or incidental to the exercise of its functions.

Collection of information relevant to the PPF

The Regulator is given power to collect any information which appears to it to be relevant to the exercise of the functions of the Board of the PPF. The information collected by the Regulator will assist it in its function of limiting calls on the PPF.

Duty to notify the Regulator of certain events

Except where the Regulator otherwise directs, the 'appropriate person' must give notice of any 'notifiable event' to the Regulator. These terms are explained below.

Appropriate person	Notifiable event = prescribed event in respect of
Trustees or managers of scheme/ prescribed person	An eligible scheme (excludes money purchase schemes, prescribed schemes and schemes being wound up immediately before a date to be appointed)
The employer in relation to scheme/ prescribed person	The employer in relation to an eligible scheme

During Standing Committee debates the Minister for Pensions, Malcolm Wicks MP, stated that the government is working with the US Pension Benefit Guaranty Corporation and the UK pensions industry to determine precisely what the notifiable events should be. The events will be specified in regulations and will include corporate restructuring affecting an occupational pension scheme or a significant payment becoming due to an individual scheme member in certain circumstances (eg early retirement). Clause 64 requires the Regulator to issue a code of practice giving guidance on this topic.

A notice must be in writing³, and given as soon as reasonably practicable after the person making it becomes aware of the notifiable event (or, if regulations so require, before the beginning of the prescribed period ending with the notifiable event).

Penalties for non-compliance

Section 10 PA95 (civil penalties) applies in relation to *anyone* who has failed to take all reasonable steps to comply with the requirement to notify a notifiable event. The maximum fine which can be imposed under section 10 is £5,000 for an individual and £50,000 in all other cases.

Reporting breaches of the law

Clause 45(1) lists the persons who are subject to a reporting requirement:

- a trustee or manager of an occupational or personal pension scheme;
- a person who is otherwise involved in the administration of such a scheme;
- the employer in relation to an occupational pension scheme;
- a professional adviser in relation to such a scheme; and
- a person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme.

‘Professional adviser’ has the same meaning as in section 47 PA95 and will include the scheme actuary, the scheme auditor, actuarial advisers, legal advisers, fund managers and custodian.

Under clause 45(2), any of these persons must give a written report of the matter to the Regulator as soon as reasonably practicable where the person has reasonable cause to believe that a duty relevant to the administration of the scheme which is ‘imposed by or by virtue of an enactment or rule of law’ has not been or is not being complied with, and the failure to comply is likely to be of *material significance* to the Regulator in the exercise of any of its functions.

Note that this is an obligation to notify. Contrast the existing whistleblowing *duty* in section 48 PA95 (to be repealed), which imposes a duty only on auditors and actuaries (others involved can, but need not, whistleblow).

³ It may be possible to give these notices electronically if the Regulator has said it will accept them in this way: clause 228.

What duties count?

It is not very clear what duties are relevant for this purpose. Anything laid down in legislation (eg the disclosure regulations) is relevant but note that the obligation is not limited to pensions legislation and so could include, for example, the Data Protection Act, the Trustee Act, the employment legislation, the discrimination legislation, and perhaps even the Human Rights Act.

The term 'rule of law' is more vague. Presumably it will include fiduciary duties imposed by law on trustees. Whether the implied duty of mutual trust and confidence will be covered is less clear. It seems unlikely that contractual duties will be included – is it a 'rule of law' that a contracting party must comply with its obligations? General tort duties may fit in more readily.

What is relevant to the Regulator?

The breach of duty must be 'likely' to be of material significance to the Regulator. The Regulator has some fairly general functions (see below), so the ambit of this duty may be pretty wide.

The Regulator must issue a code of practice, giving guidance as to who must be a whistleblower and in what circumstances ie what 'material significance' means in this context. The Regulator will need to be pretty clear about what it wants to see; otherwise it risks being inundated with reports, as was Opra. In Standing Committee Malcolm Wicks gave a likely example: an account that was one week late would not need to be reported by a whistleblower, but if accounts were two months late and no schedule of contributions had been made, that would be materially significant.

Penalties for non-compliance

Again, section 10 PA95 (civil penalties) applies for failure without reasonable excuse to report breaches of the law.

Trustees will want to ensure that they do not indemnify their advisers in relation to breaches of this duty!

Other reports to the Regulator

Various other provisions in the Bill envisage reports being given to the Regulator (and others). These include the following.

Clause	Obligation	Regulator	PPF	Trustees	Employer
94	Insolvency practitioner (IP) report of insolvency	✓	✓	✓	
96(2)	IP report about status of scheme	✓	✓	✓	
96(4)	IP report about scheme rescue	✓	✓	✓	
97	Notice by Board of the PPF instead of IP	✓		✓	
101(2)	Notice by PPF of trustee application to PPF	✓			✓
102(4)	Notice by PPF following application	✓		✓	✓
108(2)	Notice by PPF of whether or not to validate action	✓		✓	✓
115(2), 116(2), 117(5), 117(6)	Notice by PPF of withdrawal notice	✓		✓	✓
122(4)	Issue of transfer notice by PPF	✓			✓
145(2)	PPF notice about scheme rescue in relation to fraud compensation	✓		✓	✓
147(5)	PPF determination of fraud compensation	✓		✓	✓
185(2), 185(3)	Notice by trustees, actuary and auditor of employer failure to make contributions under schedule of contributions	✓			
186(4)	Notice by trustees of failure to reach agreement with employer on schedule of contributions, funding plan etc	✓			

The PPF Board is also able to disclose information to the Regulator (clause 161).

Gathering information

Provision of information

The Regulator may, by notice in writing, require quite a wide range of persons to produce any document, or provide any other information, which is of a description specified in the notice, and relevant to the exercise of the Regulator's functions. The notice may specify the time, manner and place of compliance.

The persons are:

- a trustee or manager of an occupational or personal pension scheme;
- a professional adviser in relation to an occupational pension scheme;
- the employer in relation to an occupational pension scheme or a personal pension scheme where direct payment arrangements exist; and
- any other person appearing to the Regulator to be a person who holds, or is likely to hold, information relevant to the exercise of the Regulator's functions.

Inspection of premises

An inspector (appointed by the Regulator) may, for the purposes of investigating whether, in the case of any occupational scheme, the 'occupational scheme provisions' are being, or have been, complied with, at any reasonable time enter 'premises liable to inspection'. (This replicates a power of Opra.) If the Regulator requires a scheme or other person to supply a document or piece of information, it will in the first instance request it under its power in clause 6. If that information is not forthcoming, the Regulator may resort to its powers to enter and inspect premises.

The occupational scheme provisions means provisions contained in or made by virtue of the following provisions:

- any of the following provisions of the Bill:
 - part 1 (Pensions Regulator);
 - part 3 (scheme funding);
 - sections 196 to 198 (member-nominated trustees and directors);
 - sections 200 to 202 (requirement for knowledge and familiarity); and
 - part 7 (miscellaneous and supplementary); and
- specified provisions of part 1 (occupational pension schemes) of PA95, PSA93 and WRPA99.

Similar powers are conferred on an inspector to investigate compliance with employers' obligations under the WRPA99 to

facilitate access to stakeholder pension schemes and to make payments to personal pension schemes.

In the case of occupational schemes, 'premises liable to inspection' are premises (other than a private dwelling house not used for business purposes) at which the inspector has reasonable grounds to believe:

- members of the scheme are employed;
- documents relevant to scheme administration are kept; or
- scheme administration is being carried out.

In the case of stakeholder and personal pension schemes, premises liable to inspection relates instead to employees and to the administration of the employer's business and, in the case of direct payment arrangements relating to a personal pension scheme, to those arrangements and their administration.

Powers of inspectors

While on the premises, the inspector, on production of his certificate of appointment and accompanied by such persons as he considers appropriate, may:

- make any examination and inquiry;
- require the production of any relevant document, and take copies of any such document (and require any document in electronic form to be produced in portable, legible form);
- take possession of any apparently relevant document or take any other steps which appear necessary for preserving it or preventing interference with it; and
- examine, or require to be examined, either alone or in the presence of another person, any person on the premises he has reasonable cause to believe can give information relevant to that matter.

Clause 49 expands the powers of inspectors when inspecting premises that are contained in section 99 PA95. An inspector can seize only documents relevant to the purposes of his visit. Irrelevant material may not be seized. If seized in error, it will be returned as soon as practicable. This is not specified in the Bill, but it is an overriding requirement of the Data Protection Act 1998 that information may be retained only if it is relevant to the purposes for which it is gathered.

Retention period

Any document of which possession is taken under clause 49 may be retained:

- if the document is relevant to proceedings against any person for any offence which are commenced before the end of the retention period, until the conclusion of those proceedings; and
- otherwise, until the end of the retention period.

The retention period means the period of 12 months beginning with the date on which possession was taken of the document and any extension of that period. Extensions may be for a maximum of 12 months, but there is no limit to the number of consecutive extensions.

Offences and penalties relating to clauses 46 to 49

Offence	Penalty
Without reasonable excuse, neglecting or refusing to provide information or produce a document when required to do so under clause 46 (provision of information to Regulator).	Summary conviction: fine not exceeding level 5 on standard scale. Further convictions possible for later time period in event of persistent breach.
Without reasonable excuse: a intentionally delaying or obstructing an inspector exercising any power under clause 47, 48 or 49; b non-production of any document required under clause 49; or c failure to answer a question or to provide information when so required.	Summary conviction: fine not exceeding level 5 on standard scale. For (b) and (c): further convictions possible for later time period in event of persistent breach.
Intentionally and without reasonable excuse altering, suppressing, concealing or destroying any document the production of which is liable to be required under clause 46 or 49.	Summary conviction: fine not exceeding the statutory maximum. Indictment: fine and/or imprisonment for maximum two years.

When questioned in Standing Committee, the government confirmed that seeking legal advice before answering questions would be considered a reasonable excuse.

Warrants

Clause 52 replicates the powers in section 100 PA95, which allow the Regulator to apply to the court for a warrant to be issued. A warrant may be issued (valid for one month) for various reasons, including:

- production of a document⁴ which has not been produced or which is likely to be removed or tampered with; and
- the need for access to documents on the premises which evidence the likely misuse or misappropriation of scheme assets or a person's liability to be prohibited from being a trustee.

A warrant authorises an inspector to enter and search the premises, using such force as is reasonably necessary, and take possession of any such document, take copies, require any person named in the warrant to provide an explanation of any such document or give details of its whereabouts. The retention period for such documents is the same as before.

It was noted during Standing Committee debate that the powers of inspectors to search premises, and of the Regulator to apply for a warrant (to be executed with force if necessary), are regarded as vital: they ensure compliance with the power to request information, which schemes could otherwise wilfully ignore, possibly putting members' benefits at risk.

However, it is expected that the Regulator will apply for a warrant only in the most severe of cases, where there is evidence to suggest that there is a considerable risk of documents being altered or destroyed. It is recognised that in the vast majority of cases, schemes will send the Regulator the information requested. It was noted that Opra applies for an average of only five warrants a year. None of its applications for a warrant has been refused.

Provision of false or misleading information

Offences of providing false or misleading information

Under clause 54, it is an offence knowingly or recklessly to provide the Regulator with information which is false or misleading in a material particular if the information is provided in purported compliance with various requirements (or if the provider of the information could reasonably be expected to know that it would be used by the Regulator). The requirements include duties of trustees in relation to the register and scheme returns (clauses 37 and 39), provision of information (clause 46) and powers of inspectors (clause 49).

⁴ Again, any document in electronic form may be required to be produced in a form in which it can be taken away, and in which it is legible or from which it can readily be produced in a legible form.

Disclosure of information

Restricted information

Clause 56 replicates section 104 PA95 in providing that, with certain exceptions, 'restricted information' must not be disclosed by the Regulator, or by any person who receives the information directly or indirectly from the Regulator, except with the consent of the person to whom it relates and (if different) the person from whom the Regulator obtained it.

Restricted information means any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except for information already in the public domain or which has been anonymised.

Disclosure for facilitating exercise of functions by the Regulator

Restricted information may be disclosed in limited circumstances, including:

- to enable the Regulator to exercise its functions;
- where a professional adviser engaged by the Regulator on any matter of law, accountancy, valuation or other matter requiring the exercise of professional skill discloses such information as appears to the Regulator to be necessary;
- to enable or help the Board of the PPF to exercise its functions;
- where disclosure is by the Regulator to any person specified in schedule 3 for the purposes of the exercise of the functions specified there;
- where disclosure is by the Regulator to specified bodies if the disclosure appears to the Regulator to be desirable or expedient in the interests of pension scheme members or in the public interest – these bodies include the Department for Work and Pensions, the Inland Revenue and the Director of Public Prosecutions;
- disclosure is to a Regulator-appointed trustee for the purpose of his functions;
- for the institution, or otherwise for the purposes, of certain proceedings; and
- for the purposes of any disciplinary proceedings relating to the exercise of his professional duties by a solicitor, an actuary, an accountant or an insolvency practitioner.

Reports and codes of practice

Reports

The Regulator may publish a report of the consideration given by it to the exercise of its functions in relation to that case and the results of that consideration. For the purposes of the law of defamation, the report will be absolutely privileged.

Codes of practice

The Regulator is given a new power to issue codes of practice. Some it has to issue; others it has a discretion to issue. Guidance on the exercise of functions under the pensions legislation and standards of conduct and practice is optional. Compulsory codes comprise:

- the definition of ‘reasonable period’ for the discharge of certain duties under the pensions legislation; and
- discharge of various duties under the legislation, including:
 - requirements for knowledge and understanding by trustees and other duties of trustees;
 - the duties under clauses 44 (duty to notify the Regulator of certain events) and 45 (duty to report breaches of the law);
 - the duties regarding statements of funding principles, schedule of contributions and reporting of failures to pay employer contributions on time;
 - the duties under clauses 196 and 197 (member-nominated trustees and directors); and
 - the duties under clauses 200 and 201 (requirements for knowledge and understanding – individual and corporate trustees).

Codes of practice will be admissible in evidence in any legal proceedings, including proceedings of the Pensions Ombudsman.

According to Malcolm Wicks in Standing Committee, one purpose of enabling the Regulator to issue codes of practice is to move from a ‘one-size-fits-all’ approach on compliance with legislation to a flexible approach. The best route to compliance with the law may vary according to, for example, the size and member profile of the scheme. What may be right for some types of scheme may not be right for others, even where the legal requirements are the same for both. Codes of practice should ensure both that the Regulator can operate in an efficient and targeted fashion and that trustees and managers are clear about what the Regulator and the law expect of them.

An example given is the code of practice on trustees’ knowledge and understanding: trustees are required to have an understanding of investment matters. However, the knowledge required for a defined benefit scheme would be different from that required for a defined

contribution scheme. In addition, a trustee who performs a more specialist function, such as sitting on an investment sub-committee, should have a deeper understanding. The code of practice may reflect those distinctions.

Codes of practice are intended to augment the proportionate and targeted regulatory approach. They are also a direct response to the recommendations of the Pickering Report, which said that a new kind of regulator should:

‘sponsor and monitor the operation of Codes of Practice... However, care must be taken to avoid... Codes that are even more prescriptive and potentially inhibiting than the statutory regulations that we are trying to avoid’.

In addition to publishing codes, the Regulator will be able to revise all or part of any code or to ask the Secretary of State to revoke it. The procedures for the production, publication, revision and revocation of codes will be subject both to advance consultation and to parliamentary scrutiny (which will include consideration of any related costs). The Regulator’s responsibility would be to consider those views and balance them against its aim of providing protection for members.

Any failure to comply with a code of practice does not, in itself, mean that a person has failed to comply with the law. Rather, if a person has failed to comply with any provision about which the Regulator has issued a code of practice, the Regulator may refer to that code when asking the person to take the action necessary to achieve compliance. It does not mean that the codes of practice can effectively become law through the back door.

The flexibility that the code of practice system allows is designed to help minimise the costs of compliance on all types of schemes. If a scheme finds a more cost-effective way of complying with the law than a code suggests, it may use it.

In summary, codes of practice aim to allow a flexible, proportionate and targeted regulatory approach. They provide practical guidance on how to comply with the law yet allow different schemes to take a different approach, if that is more appropriate to their circumstances.

Powers of the Regulator

New powers of the Regulator

The Bill confers several new powers on the Regulator, as follows.

Improvement notices

Clause 14 grants the Regulator the power to issue an improvement notice if it is of the opinion that a person is breaching, or has breached and is likely to do so again, the pensions legislation (the PSA 1993, part 1 of PA95 (other than the equal treatment provisions of sections 62 to 66A), part 1 of WRPA99 and the new Bill)⁵.

An improvement notice is a direction within not less than 21 days to take specific steps to remedy or prevent a recurrence of the contravention.

The Regulator can impose civil penalties under section 10 PA95 on trustees or managers who, without reasonable excuse, fail to comply with an improvement notice issued to them. Reasonable excuse in this context is not defined, and will probably be left to interpretation by the courts. There are several cases on the interpretation of the phrase in other contexts eg in health and safety at work cases, and in VAT cases such as *Galliers (Frank) Ltd v Customs and Excise Comrs* [1993] STC 284, in which it was held that simple human error did not amount to a reasonable excuse for the making of a misdeclaration in relation to VAT liability. It remains to be seen whether such precedents will be followed.

An improvement notice may refer to a code of practice issued under clause 64 and may also allow the person to whom the notice is issued to have a choice of ways to remedy or prevent the recurrence of the breach. An improvement notice may also be made dependent on compliance by a third party with a third party notice issued under clause 15.

Third party notices

Where a person has contravened pensions legislation and the contravention was caused by a third party but that person has not contravened pensions legislation, Clause 15 provides that the Regulator can issue a third party notice, which will direct that third party to take specified measures to remedy or prevent recurrence of the contravention of the pensions legislation. Again, non-compliance can lead to a penalty under section 10 PA95.

Duties imposed under a third party notice override any contrary duty, but are subject to legal professional privilege (clause 234).

⁵ Note that 'pensions legislation' does not include discrimination provisions or sexual orientation regulations.

This is a significant new power which allows the Regulator to take action against a person who is not itself in contravention of the pensions legislation. Currently Opra has the power to act only against trustees or employers. The new power is presumably intended to catch those who are relied upon by the trustees/employer ie those who have an express duty to do something in relation to a scheme such as the directors of a corporate trustee. It is unclear whether or not a breach of an existing duty will be necessary to show the required causal link between the failure to act and the contravention, but as it stands the clause is drafted very widely and it seems it could apply to almost any third party.

It is unclear why the power applies only to failures to act by third parties and not also to actions by third parties that give rise to contraventions of the legislation.

Power to recover unpaid contributions

Clause 18 allows the Regulator to act on behalf of the trustees or managers of a scheme by exercising on their behalf powers under the relevant scheme to recover any assets or enforce any debts due to the scheme, for example under the schedule of contributions or section 75 PA95. This will presumably increase the prospect of recovery in circumstances where the trustees are not taking appropriate action and will reduce potential claims on the PPF.

Under clause 185, trustees or managers have an obligation to inform the Regulator of any failure to make contributions.

Freezing orders

Clause 20 grants the Regulator the power to make a freezing order where it is satisfied that there is, or is likely to be, an immediate risk to members' interests or to the assets of an occupational scheme which is not a money purchase scheme and that a freezing order is necessary to protect the interests of the generality of the members.

A freezing order can be made only pending consideration being given to the making of an order to wind up the scheme under section 11(1)(c) PA95.

This new power seems fairly draconian, but in reality it gives the Regulator an opportunity to move in and assess the situation before taking the even more drastic action of winding up a scheme. If a winding-up order under section 11 PA95 (as amended by the new Bill – see below) is made during the period of a freezing order, the winding-up is taken to have started on the date that the freezing order took effect and the freezing order immediately ceases to have effect.

A freezing order imposed on a scheme will mean that, for the period for which it is in place (initially not more than three months, but extendible by the Regulator to not more than six months), no benefits may accrue to, or in respect of, members and that no winding-up of the scheme may begin other than by an order of the Regulator. A freezing order cannot be imposed during an assessment period (clause 107(7))⁶.

Further directions may also be included in a freezing order, for example:

- no new members, or specified class of member, are to be admitted to the scheme;
- no contributions are to be paid into the scheme;
- specified amounts are to be repaid to members;
- no benefits, or specified benefits, are to be paid to any member (clause 20(4)); and
- the trustees or managers of a scheme must obtain an actuarial valuation within a specified period.

A freezing order may not contain a direction reducing the benefits payable under the scheme to a level lower than that to which the trustees or managers of the scheme would have the power to reduce them on a winding-up.

Any action taken in contravention of a freezing order is prima facie void, although it may be validated by order of the Regulator. The trustees or managers, as well as any person directly affected by the action in question, can apply to the Regulator for an order validating the action. Section 10 PA95 applies to non-compliance with a freezing order.

A freezing order does not prevent an increase in benefits from accruing which would accrue apart from the order, unless the order expressly so provides, nor does it prevent pension sharing orders and pension earmarking orders from being complied with even though the freezing order prevents transfers.

⁶ After the Board of the PPF becomes involved, there is an assessment period during which it will determine whether to assume responsibility for the scheme, order the trustees to wind up the scheme or take no action. See our guide on the PPF.

If a freezing order ceases to have effect and no winding-up order has been made under section 11 PA95, the Regulator has the power to make directions regarding the scheme. It may order that, if certain conditions are met, benefits specified in the order are to accrue under the scheme to specified members of the scheme for the period when the freezing order was in effect or for part of that period. Conditions to be met may include a requirement that specified benefits do not accrue to or in respect of specified members unless a contribution is made by or on behalf of that member.

In Standing Committee it was clarified that members who reach retirement during the period will still receive their pension, but at the level that they would have received if they had retired as deferred members. Other situations, such as a member reaching retirement age just before the freezing order is imposed, will be dealt with by the Regulator on a case by case basis using its power to validate actions under clause 23.

Right to apply under section 423 Insolvency Act 1986

Clause 33 grants the Regulator the power to apply to the court for an order under section 423 of the Insolvency Act 1986.

Section 423 allows the court to make any order it sees fit, where it is of the opinion that a person has entered into a transaction defrauding creditors (usually at an undervalue) to restore the position to what it would have been had the transaction not been entered into and to protect the interests of persons who are victims of the transaction in question.

The Regulator may apply for such an order against the employer if either:

- the PPF has obtained an actuarial valuation of the fund in question and has found that the assets of the fund are not sufficient to meet the protected liabilities of the scheme; or
- the trustees or managers of the scheme have obtained an actuarial valuation and the statutory funding objective of the scheme (clause 179) is not being met.

This clause essentially gives the Regulator the same standing as an IP to allow it to pursue debts due to the scheme. This should make the process of pursuing these debts quicker and more efficient.

The explanatory notes to the Bill state that the employer must owe money to the scheme in order for this power to be exercised, but there is no such requirement in section 423 itself.

There is no time limit for bringing an action under this section, nor does the employer (debtor) need to be insolvent for the power to be exercised (though leave of the court is required to make the application if the employer is insolvent).

Powers in relation to scheme funding

Under Clause 188, the Regulator is granted powers to act to resolve difficulties that may arise in the operation of the scheme funding provisions under the Bill.

Essentially, where it appears to the Regulator that the trustees or managers have failed successfully to operate the scheme funding in accordance with the provisions (eg failure to obtain an actuarial valuation or to prepare a schedule of contributions), the Regulator may make an order to attempt to rectify the situation.

Provision of information, education and assistance

Clause 13 enables the Regulator to provide information, education and assistance to various individuals, including those involved in the administration of work-based pension schemes and to those advising trustees, managers, employers or employees in the operation of those schemes.

It will be interesting to see how this provision sits with the new provision under clauses 200-202 which require trustees to be 'conversant with' certain scheme documents and pensions law. Clause 13 allows the Regulator to educate those who are in charge of 'advising' trustees to the extent that it considers appropriate. However, it is unclear who such advisers might be, and how the Regulator will go about educating them in practice.

It will also be interesting to see where the responsibility will lie in cases where a trustee is found to be lacking the requisite degree of knowledge to perform his role appropriately⁷. It is likely that under the new regime, pension schemes/companies will have to consider the need for better training of trustees, but it would seem from clause 13 that the duty to oversee education of those educating trustees lies with the Regulator in the first place.

Extension of existing powers

In addition to granting new powers, the Bill has extended some of the powers that Opra already had under the old regime. The principal powers are set out below.

⁷ Clause 64 of the Bill provides for a code of practice detailing the kinds of knowledge, training, experience or qualifications necessary to fulfil the requirements of clauses 200-202.

Injunctions

Clause 16 (replacing section 13 PA95, which will be repealed) extends to both personal pension and occupational pension schemes the Regulator's power to apply to the court for an injunction or (in Scotland) an interdict restraining a particular person from committing any act that constitutes a misuse or misappropriation of any of the assets of a personal pension scheme or an occupational pension scheme⁸.

Although this is a useful new power, its application is relatively limited. There are a number of ways in which the interests of members of a pension scheme or the funding level of a pension scheme can be materially prejudiced where the action would not amount to misuse or misappropriation of assets which would not be able to be prevented through the exercise of this power.

Restitution

Under clause 17 of the Bill, the Regulator may apply to the High Court for a restitution order directing *any* person who appears to the court to have been knowingly concerned in the misuse or misappropriation of pension scheme assets to take specified steps to restore the parties concerned to their original position.

This is a wider power than that of Opra under section 14 PA95, and, again, it applies to both occupational and personal pension schemes.

Note that 'misuse' and 'misappropriation' are not defined in the Bill. It is unclear whether they constitute freestanding claims or whether this power is simply an enforcement mechanism to back up some other duty.

Power to wind up occupational pension schemes

Under clause 19, section 11(3) PA95 is repealed so that the Regulator has the power to make a winding-up order even without an application from trustees or employers. It may also make an order to wind up a scheme during an assessment period where this will minimise the claims on the PPF. This is not a significant new power, as Opra already has power to order that a scheme be wound up where it is satisfied that it is necessary and reasonable.

Note that the Regulator is not given power to prevent the winding-up of a scheme, other than in the context of the PPF provisions. The power may be useful in order further to protect the interests of scheme members, or in order to resolve a disagreement between trustees or employer on whether a scheme should be wound up or continued.

⁸ Opra has apparently used its injunctive power only once, but the government sees this as a useful power for the Regulator.

Prohibition orders

The power to prohibit a person from being a trustee of a scheme under section 3 PA95 has been widened considerably. Previously Opra could prohibit a person from being a trustee if that person had been in persistent or serious breach of specified duties under the pensions legislation. The new Regulator will have the power to prohibit a person from being a trustee of a particular scheme, a particular type of scheme or trust schemes in general if it is satisfied that he is not a 'fit and proper' person to be a trustee. The Regulator will issue guidance on how it will interpret the term fit and proper.

Opra has apparently prohibited only 11 persons from being trustees under the existing powers in PA95. The new powers are more widely drawn, but the government is not expecting huge numbers to be prohibited.

We must await the issue of a code of practice to ascertain whether this provision will interact with the whistleblowing provisions in clause 45 of the Bill ie whether it will impose a requirement on those involved in the administration of a scheme to report any behaviour by a trustee which is not considered fit and proper.

Suspension orders

The power to make suspension orders in relation to trustees under section 4 PA95 has similarly been extended by clause 30. The Regulator now has the power to suspend a trustee where consideration is being given to proceedings against him, rather than merely when those proceedings have been started.

Disqualification orders

Under clause 32, section 30(1) PA95 is amended so that when a trustee is disqualified under section 29 PA95 he will be automatically removed from office. This brings the disqualification provisions into line with the prohibition provisions.

Duty to have regard for the interests of members etc

In addition to the objectives of the Regulator set out in clause 5, clause 74 provides that, when determining whether or not to exercise one of its regulatory functions and when exercising that function, the Regulator must always have regard for:

- the interests of the generality of the members of the scheme who will be affected by the actions of the Regulator; and
- the interests of any other persons the Regulator considers will be directly affected by its actions.

It was confirmed in Standing Committee that the latter category will often include sponsoring employers.

<p>AMSTERDAM Apollolaan 151 1077 AR Amsterdam T + 31 20 485 7000 F + 31 20 485 7001</p>	<p>BUDAPEST Oppenheim és Társai Freshfields Bruckhaus Deringer Károlyi Mihály u. 12. 1053 Budapest T + 36 1 486 22 00 F + 36 1 486 22 01</p>	<p>HONG KONG 11th floor Two Exchange Square Hong Kong T + 852 2846 3400 F + 852 2810 6192</p>	<p>ROME Piazza di Monte Citorio 115 00186 Rome T + 39 06 695 331 F + 39 06 695 33800</p>
<p>BANGKOK 10th floor Sathorn City Tower 175 South Sathorn Road Khet Sathorn Bangkok 10120 T + 66 2344 9200 F + 66 2344 9300</p>	<p>COLOGNE Heumarkt 14 50667 Cologne T + 49 221 20 50 70 F + 49 221 20 50 79 0</p>	<p>LONDON 65 Fleet Street London EC4Y 1HS T + 44 20 7936 4000 F + 44 20 7832 7001</p>	<p>SHANGHAI 34th floor Jinmao Tower 88 Century Boulevard Shanghai 200121 T + 8621 5049 1118 F + 8621 3878 0099</p>
<p>BARCELONA Mestre Nicolau 19 08021 Barcelona T + 34 93 363 7400 F + 34 93 419 7799</p>	<p>DÜSSELDORF Freiligrathstraße 1 40479 Düsseldorf T + 49 211 49 79 0 F + 49 211 49 79 10 3</p>	<p>MADRID Fortuny 6 28010 Madrid T + 34 91 319 1024 F + 34 91 308 4636</p>	<p>SINGAPORE Freshfields Drew & Napier 20 Raffles Place #18-00 Ocean Towers Singapore 048620 T + 65 6535 6211 F + 65 6533 5007/8007/9007</p>
<p>BEIJING 3705 China World Tower Two 1 Jianguomenwai Avenue Beijing 100004 T + 8610 6505 3448 F + 8610 6505 7783</p>	<p>Mailing address: Postfach 10 17 43 40008 Düsseldorf</p>	<p>MILAN Via dei Giardini 7 20121 Milan T + 39 02 625 301 F + 39 02 625 30800</p>	<p>TOKYO Freshfields Law Office Freshfields Foreign Law Office Ark Mori Building 18th floor 1-12-32 Akasaka Minato-ku Tokyo 107-6018 T + 81 3 3584 8500 F + 81 3 3584 8501</p>
<p>BERLIN Potsdamer Platz 1 10785 Berlin T + 49 30 20 28 36 F + 49 30 20 28 37 66</p>	<p>FRANKFURT AM MAIN Taunusanlage 11 60329 Frankfurt am Main T + 49 69 27 30 80 F + 49 69 23 26 64</p>	<p>MOSCOW Kadashevskaya nab 14/2 119017 Moscow T + 7 501 (or +7 095) 785 3000 F + 7 501 (or +7 095) 785 3001</p>	
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<p>BRUSSELS Bastion Tower Place du Champ de Mars/Marsveldplein 5 1050 Brussels T + 32 2 504 7000 F + 32 2 504 7200</p>	<p>Mailing address: Postfach 30 52 70 20316 Hamburg</p>	<p>NEW YORK Freshfields Bruckhaus Deringer LLP 520 Madison Avenue 34th floor New York, NY 10022 T + 1 212 277 4000 F + 1 212 277 4001</p>	<p>WASHINGTON Freshfields Bruckhaus Deringer LLP 701 Pennsylvania Avenue, NW Suite 600 Washington, DC 20004-2692 T + 1 202 777 4500 F + 1 202 777 4555</p>
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	<p>HO CHI MINH CITY #1108 Saigon Tower 29 Le Duan Boulevard District 1 Ho Chi Minh City T + 84 8 8226 680 F + 84 8 8226 690</p>		

