

Prosecution Policy

June 2016

The Pensions
Regulator

Introduction

1. There are a number of criminal offences concerned specifically with workplace pensions. These are listed as an annex to this policy. The Pensions Regulator has the power to prosecute these offences, as well as other offences that form part of the same facts or events or are otherwise connected to our enforcement functions. This policy explains how we will use our prosecution powers.
2. Our regulatory remit extends across the three legal jurisdictions of England and Wales, Scotland and Northern Ireland. Paragraphs 3 to 20 of this policy are applicable to all three jurisdictions. References in those sections to legislation and guidance applicable in England and Wales should be read as including references to the equivalents for Scotland and Northern Ireland. Paragraphs 21 to 28 are specific to England and Wales, paragraphs 29 to 31 are specific to Scotland and paragraphs 32 to 33 are specific to Northern Ireland.

Prosecution of criminal offences: general approach

3. We will apply our risk-based approach to prosecution decisions and consider each case on its particular facts.
4. Fair and effective prosecution is essential to the maintenance of law and good practice – prosecution punishes wrongdoing, deters repetition and acts as a warning to others. Where appropriate however, the administration of a caution or a warning can be considered as alternatives to prosecution – see paragraphs 12 to 18.
5. In exercising our power to prosecute, we are acting not only pursuant to our statutory objectives¹, but also in the interests of justice and the public at large. Our objective in prosecuting is not to seek a conviction at all costs; rather we will approach each stage of the process in a fair, balanced and impartial manner. Each case will be reviewed and, where appropriate, prosecuted, ensuring that the law is properly applied, that all relevant evidence is put before the court, and that all obligations of disclosure are complied with.
6. Workplace pension offences may be committed by individuals and by businesses or other organisations. Where an offence is committed by an individual who is senior enough to be regarded as the directing mind and will of an organisation, the organisation can also be prosecuted. Where an offence is committed by an organisation, senior staff can also be prosecuted if they consented to or connived in the commission of the offence, or caused it to be committed by their neglect. In these cases we will consider whether the interests of justice will best be served by a prosecution of the individual, the organisation or both. This includes seeking to maximise the deterrent effect of the prosecution.

¹
As set out in section 5 of the Pensions Act 2004.

7. Where there are identifiable victims such as workers who have not been automatically enrolled into a pension scheme or who have had contributions deducted from their earnings and fraudulently withheld from the scheme, we will take into account the impact of the offending on them when deciding whether to prosecute. Where practicable, we will inform victims if a charge is withdrawn, discontinued or substantially altered, seek their views if considering the acceptability of a guilty plea to a lesser charge, and inform them of the progress of any appeal.
8. Where a victim has to attend court to give evidence, we will give them assistance and support including allowing them to refresh their memory from their written statement prior to giving evidence, answering any questions on court procedure and explaining the progress of the case. Although unlikely to arise in the type of case prosecuted by us, we will challenge any unwarranted attack on the character of victims made by the defence in evidence or in mitigation.

Investigation

9. If a criminal offence is being investigated, any interviews will be carried out in line with the Police and Criminal Evidence Act 1984 and the relevant Codes of Practice. We will also abide by the Regulation of Investigatory Powers Act 2000, where relevant, when gathering information.
10. Investigations will be conducted in accordance with the Criminal Procedure and Investigations Act 1996. We will pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. We will record all relevant information, and retain all relevant material. We will disclose to the defence material that does not form part of our case and might reasonably be considered capable of undermining our case or assisting the case for the defence. All personal data will be held securely and disposed of in accordance with the Data Protection Act 1998. We will conduct investigations in line with the Human Rights Act 1998 and the Equality Act 2010.

Civil regulatory action

11. In cases where criminal proceedings have commenced or will be commenced, it may also be appropriate for us to use our civil regulatory powers simultaneously. Our approach to this falls outside the scope of this policy.

Cautions

12. In certain circumstances we may choose to refer a case to the police and recommend that they consider issuing a formal caution. In these cases we will follow the government guidance on the cautioning of offenders, currently contained in the Ministry of Justice publication 'Simple cautions for adult offenders'.²
13. A caution is an administrative sanction that we may consider as an alternative to prosecution as long as specific criteria are met, and the case is one we could take to court if the caution was refused.
14. Cautions are usually aimed at less serious breaches of the law and provide an additional measure for us to use in those cases where the deterrent effect is considered a sufficient and suitable alternative to prosecution.
15. The offender must make a clear and reliable admission of the offence verbally or in writing and there must be a realistic prospect of conviction if the offender were to be prosecuted.
16. If the offender is subsequently prosecuted for another pension offence the caution may be cited in court.
17. A record of the caution will be kept by us and on the Police National Computer in accordance with the Rehabilitation of Offenders Act 1974. The issue of a caution may influence us and other prosecutors in their decision whether or not to prosecute the offender if they offend again.
18. The ultimate decision whether to issue a caution is for the police to take.

Proceeds of crime

19. We aim to prevent offenders from benefiting financially from their criminal activity. Wherever it is appropriate to do so, and working with other agencies where necessary, we will seek to ensure that criminal assets are restrained during an investigation and prosecution and confiscated in the event of a conviction, using powers under the Proceeds of Crime Act 2002.

Other agencies

20. We will liaise and co-operate in cases where another regulatory or law enforcement authority has an interest in prosecuting any aspect of a matter that we are considering for investigation, investigating or considering for prosecution.

²
<http://bit.ly/simplecautions>

Prosecutions in England and Wales

21. When we decide whether to bring criminal proceedings in England and Wales, or to refer the matter to another prosecuting authority (see paragraph 20), we will consider and apply the basic principles set out in the Code for Crown Prosecutors³ ('the Code').
22. The commencement of a prosecution is an important part of enforcement. The purpose is to secure a conviction and ensure the defendant may be punished by a court as well as to act as a deterrent to the defendant and others. In order to decide if a case should progress to criminal court, we will apply the Code which sets out the general principles Crown Prosecutors should follow when they make the decision concerning cases.
23. The Code contains a two-stage test to be applied when deciding whether to prosecute (the 'full code test'):

The evidential stage

24. We must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. We will consider what the defence case may be, and how it is likely to affect the prospects of a conviction. We will also consider whether the evidence can be used in court and whether it is reliable and credible. A case which does not pass the evidential stage must not proceed no matter how serious or sensitive it may be.

The public interest stage

25. In every case where there is sufficient evidence to justify a prosecution, we will go on to consider whether a prosecution is required in the public interest.
26. It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless we are satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases we may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution.
27. When deciding the public interest, we will consider various questions set out in the Code so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors should enable us to form an overall assessment of the public interest. The Code contains explanatory text providing guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution.

3
[www.cps.gov.uk/
publication/code-
crown-prosecutors](http://www.cps.gov.uk/publication/code-crown-prosecutors)

28. In addition, we will consider aggravating or mitigating factors specific to the regulatory offences under consideration.

Prosecutions in Scotland

29. We are a designated specialist reporting agency and will liaise with The Crown Office and Procurator Fiscal Service for offences that take place in the Scottish jurisdiction.

30. The decision whether or not to prosecute is one entirely for the Procurator Fiscal. Before proceeding with a case, the Procurator Fiscal must be satisfied by way of corroborated evidence that:

- ▶ the case is within the jurisdiction of the court
- ▶ an offence has been committed
- ▶ the alleged offender committed that offence and is therefore liable to prosecution
- ▶ there is sufficient evidence to prove beyond reasonable doubt both that the offence was committed, and by whom

31. The criteria that the Procurator Fiscal will consider are explained in the Crown Office and Procurator Fiscal Service Prosecution Code⁴. This also sets out the range of options available to prosecutors dealing with reports of crime.

Prosecutions in Northern Ireland

32. We will liaise with the Public Prosecution Service (PPS) for offences that take place in the jurisdiction of Northern Ireland.

33. In deciding what action to take, we will consider and apply the basic principles set out in Chapter 4 of the PPS Code for Prosecutors.⁵ These accord broadly with the principles in the Code for Crown Prosecutors, in that they require consideration of an evidential and public interest test.

4
<http://bit.ly/ProsPolG>

5
<http://bit.ly/ProsecCode>

Annex

Criminal offences under workplace pensions legislation

Offence	Legislation (England, Wales and Scotland)	Legislation (Northern Ireland)	Subject
Failing to comply with automatic enrolment duties	s45(1) Pensions Act 2008	s45(1) Pensions (No.2) Act (Northern Ireland) 2008	Automatic enrolment
Neglecting or refusing to provide information or produce document required in information notice	s77(1) Pensions Act 2004 (PA04)	Art72(1) Pensions (Northern Ireland) Order 2005 (PNIO05)	Automatic enrolment or scheme regulation
Delaying or obstructing inspector	s77(2)(a) PA04	Art72(2)(a) PNIO05	Automatic enrolment or scheme regulation
Neglecting or refusing to produce document required in inspection	s77(2)(b) PA04	Art72(2)(b) PNIO05	Automatic enrolment or scheme regulation
Neglecting or refusing to answer question or provide information	s77(2)(c) PA04	Art72(2)(c) PNIO05	Automatic enrolment or scheme regulation
Altering, suppressing, concealing or destroying document required in information notice or inspection	s77(5) PA04	Art72(5) PNIO05	Automatic enrolment or scheme regulation
Providing false or misleading information	s80(1) PA04	Art75(1) PNIO05	Automatic enrolment or scheme regulation
Disclosing restricted information	s82(5) PA04	Art77(5) PNIO05	Automatic enrolment or scheme regulation

continued...

Offence	Legislation (England, Wales and Scotland)	Legislation (Northern Ireland)	Subject
Acting as trustee while prohibited or suspended	s6(1) Pensions Act 1995 (PA95)	Art6(1) Pensions (Northern Ireland) Order 1995 (PNIO95)	Scheme regulation
Acting as auditor or actuary of trust scheme while ineligible	s28(1) PA95	Art28(1) PNIO95	Scheme regulation
Acting as trustee while disqualified	s30(3) PA95	Art30(3) PNIO95	Scheme regulation
Exceeding permitted level of employer-related investment	s40(5) PA95	Art40(5) PNIO95	Scheme regulation
Fraudulent evasion of duty to pass on employee contributions	s49(11) PA95	Art49(11) PNIO95	Automatic enrolment or scheme regulation
Fraudulent evasion of direct payment arrangements	s111A(12) Pension Schemes Act 1993	S107A(12) Pension Schemes (Northern Ireland) Act 1993	Automatic enrolment or scheme regulation

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Free online learning for trustees

www.pensionseducationportal.com

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