Actuaries and the Law
Conflicts and Confidentiality

Whistleblowing – Why, where, when and when not to!

1 Introduction

1.1 All professional advisers in relation to a pension scheme[1] have a duty to whistleblow i.e. report breaches of the law to the Pensions Regulator. As well as professional advisers, the duty extends to trustees/managers, people involved in the administration of a scheme and the employer.

1.2 The actuary should take this duty very seriously:

1.2.1 It is wide-ranging and civil penalties apply to any person who without "reasonable excuse" fails to comply with the duty.[2]

1.2.2 The duty to report falls on the professional adviser. If a firm is appointed, rather than an individual, then it is the firm's duty to report. However when an individual is appointed, as in the case of the scheme actuary, the duty to report applies to the individual.

1.2.3 The Regulator may also make a complaint to the Institute.

1.2.4 Moreover, if a beneficiary has suffered a loss as a result of the actuary's failure to whistleblow, it would raise the interesting question of whether they have a civil claim against the actuary for the tort of breach of statutory duty.

1.3 This is not a new duty. It has existed since 1997 under the Pensions Act 1995.[3]

1.4 Whistleblowing reports are a key source of information used by the Regulator in fulfilling its statutory responsibilities. During the first year of its operation, the Regulator has been dealing with up to 90 whistleblowing reports per month.

1.5 The Regulator has general powers under sections 71 to 73 of the Pensions Act 2004 to gather information through its own initiative either requiring a report to be produced, information produced or allowing premises to be inspected. This may be used as a follow-up to a whistle-blowing report.

1.6 This note addresses:

1.6.1 the statutory framework - the relevant provisions and what they cover;

1.6.2 The Regulator's Code of Practice and its status and relevance;

1.6.3 the key issues to be identified by the actuary in deciding whether to report;

1.6.4 the first test to be satisfied - whether there is reasonable cause to believe there has been a breach of law;

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[1] This applies to all occupational and personal pension schemes.

[2] Under Section 10 of the Pensions Act 1995.

[3] Section 48(1) which came into force on 6 April 1997.

1.6.5 the second test to be satisfied - whether the breach is likely to be of material significance to the Regulator in the exercise of any of its functions;

1.6.6 the practical issues over reporting; and

1.6.7 Other issues that arise for the actuary – confidentiality, cost, privilege and resignation.

2 The statutory framework

2.1 The duty to report breaches of the law is now found in Section 70 of the Pensions Act 2004.

2.2 Section 70 imposes the duty to whistleblow on the actuary appointed by the trustees or managers of the scheme. The duty does not extend to an actuary who is engaged to provide advice or services only to the employer of a scheme.

2.3 The actuary should whistle-blow in a written report *"as soon as reasonably practicable"* where the actuary has *"reasonable cause"* to believe two things:

2.3.1 a duty which is relevant to the administration of the scheme imposed by law, has not been or is not being complied with, and

2.3.2 the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions.

2.4 In relation to the first limb, the Act is silent over whose breach the breach of duty may be. In fact, the breach of duty may be by anyone - the trustees, the employer, other advisers or the investment managers or administrators.

2.5 In relation to the second limb, it is important to appreciate that there is no blanket obligation on the actuary to report every breach of duty which is relevant to the administration of the scheme. It has to be a materially significant breach. This is a question of judgement for the actuary in each case.

2.6 The source of the duty is Section 70. However, the Regulator has issued A Code of Practice[4] and guidance on this matter.

3 The status of the Code of Practice

3.1 The Regulator has exercised its statutory power to issue the Code of Practice to provide guidance on reporting breaches of the law.

3.2 The Code of Practice sets out the standards of conduct and practice expected. However, as the Code makes clear;

- it is not a statement of the law and there is no penalty in failing to comply with it; and
- the Code does not need to be followed in every circumstance i.e. it should not be followed slavishly.

3.3 Of course, if the actuary departs from the Code, they must be confident that any alternative approach still meet the legal requirements. Actuarial Guidance Note 29 states that the scheme actuary should "normally" comply with the Code of Practice and the guidance.[5]

[4] Code of Practice 01 - Reporting breaches of the law.

3.4 If a court or tribunal are deciding whether legal requirements have been met, then they must take codes of practice into account.

3.5 In addition to the Code of Practice, the Regulator has issued guidance. Its main purpose is to give examples of hypothetical breach situations and to act as a yardstick to help those who might have to make a report. The Code makes clear that the guidance is illustrative and does not form part of the Code.[6]

4 The key issues to be identified and considered by the actuary

4.1 There are three key questions for the actuary under the Act, Code and guidance:

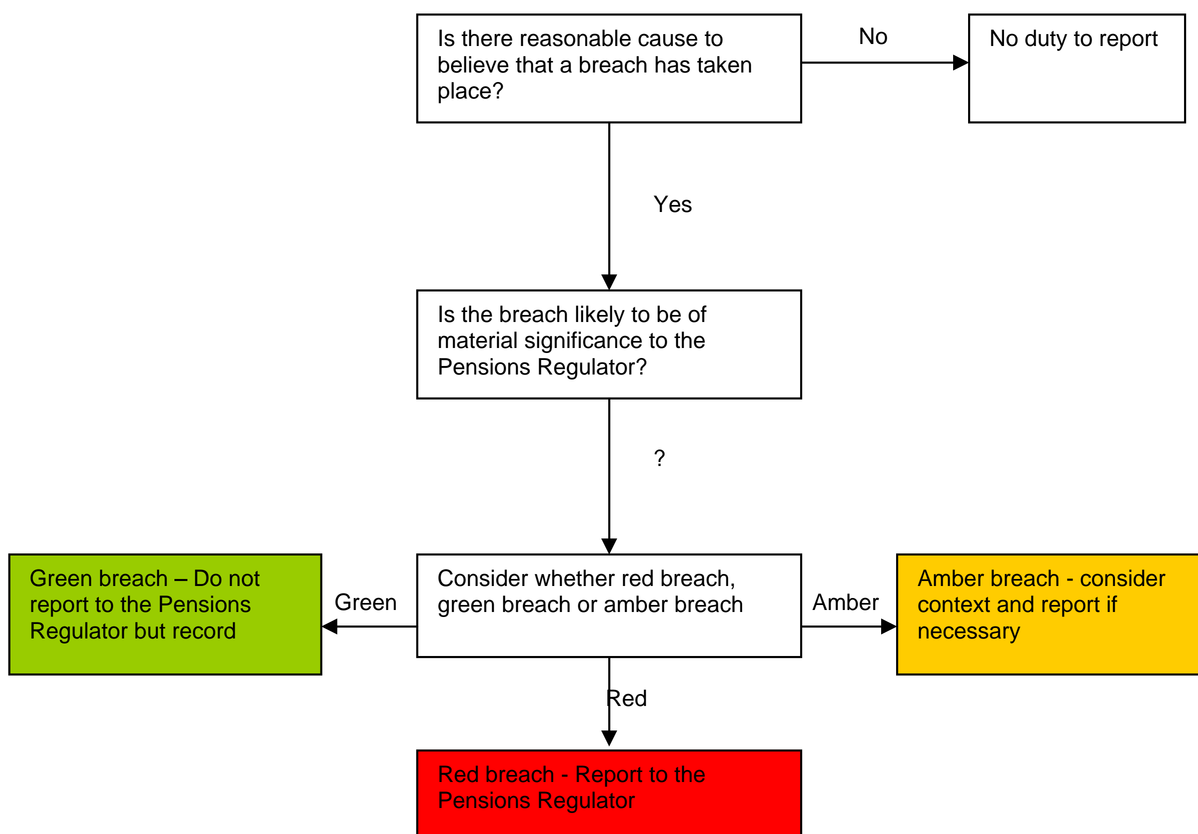
(i) is there reasonable cause to believe that there has been a breach of a legal duty relevant to the administration of the scheme;

(ii) if so, is the breach likely to be of material significance to the Pensions Regulator; and

(iii) in working out 2, is this a red, amber or green breach?

4.2 A red breach should be reported. A green breach does not have to be reported (but should be recorded). An amber breach is less clear-cut. The reporter must take into account the context of the breach in order to decide whether it is of material significance and should be reported.

4.3 The Regulator expects that everyone who has a duty to report - this includes actuaries, to have an understanding of the requirements of the law, the Code and supporting guidance.



[5] Para 6.1.

[6] Footnote 9 of the Code.

5 First test - reasonable cause to believe that there has been a breach of a legal duty relevant to the administration of the scheme

What is a breach of the law?

5.1 Section 70 refers to a duty imposed "*by or by virtue of an enactment or rule of law*". Enactment covers Acts of Parliament and regulations or statutory instruments. Rule of law covers law laid down by decisions of the court, including trust law. Given that the determinations of the Pensions Ombudsman are not of binding precedent, it probably does not include them.

5.2 When considering a breach of trust law, the Regulator suggests that a basic way of deciding if a breach of trust may have taken place is if the trustees have acted in a way which would appear unfair or wrong to a reasonable and objective person. A specific example in relation to this is acting contrary to professional advice without having a sound reason for doing so.

Relevant to the administration of the scheme

5.3 The Code makes clear that the Regulator interprets "administration" widely in the context of the need to report breaches.

5.4 It is much wider than just those tasks normally associated with administrative functions such as keeping records, calculating benefits etc. It extends to consideration of funding in defined benefit schemes and the custody of assets and investment policy and management; indeed anything which could potentially affect members' benefits or the ability of members and others to access information to which they are entitled.

"reasonable cause to believe" - constructive knowledge?

5.5 The Regulator considers that having a reasonable cause to believe that a breach has occurred means more than merely having a suspicion that cannot be sustained.

5.6 There are two issues which arise here which are not clear from the Code or guidance:

5.6.1 to what extent to which the actuary should pro-actively investigate matters where a suspicion exists; and

5.6.2 the standard against which the actuary's assessment of "reasonable cause" should be judged.

5.7 Phrases such as "reasonable cause to believe" in the definition of criminal offences usually import a degree of knowledge.[7] Liability is, in effect, incurred where the accused had the means of knowledge, had he made the enquiries which a reasonable and prudent person would make or applied his mind to the situation in the way in which a reasonable person would have done. This suggests a more pro-active duty on the actuary and an objective standard.

[7] For example, *IRC v Rossminster* [1980] AC 952, which concerned search warrants obtained by a tax official. During the search, Revenue officers had the right to seize anything which they had reasonable cause to believe might be required as evidence in proceedings in respect of a tax fraud. The Court said "*These words appearing in a statute do not make conclusive the officer's own honest opinion, that he has reasonable cause for the prescribed belief. The grounds on which the officer acted must be sufficient to induce in a reasonable person the required belief before he can validly seize and remove anything…*"

5.8 In addition, the actuary should have the means at his disposal to investigate. In accordance with GN29,[8] the appointed actuary should have obtained the trustees written agreement to allow them access at all reasonable times and in all reasonable circumstances, on request, to such information and explanation as may be required to carry out his or her duties as the appointed actuary. As GN29 notes, there may be occasions when the actuary will need to insist that specific information is provided without delay in order to assist in assessing whether circumstances which come to the actuary's attention may be of material significance to the Regulator.

5.9 The Code suggests that there is no requirement or expectation that reporters should search for breaches, although if they have a suspicion, they should investigate. It is unclear from the Code to what extent the actuary should investigate the suspicion. The Code provides that where the reporter does not know the facts or events around the suspected breach, it *"will usually be appropriate to check with the trustees or manager or with others who are in a position to confirm what has happened."*[9] It also makes the unsurprising statement that it is not necessary for a reporter to gather all the evidence which the Pensions Regulator would require before taking legal action. However, there will no doubt be quite a gulf between checking with those who are in a position to confirm what has happened and preparing a case for trial.

5.10 GN29 is consistent with the Code. It states that the scheme actuary is not expected to search for circumstances which would be reportable; he or she merely has a duty to report circumstances which come to his or her attention. In addition, GN29 states that the actuary is not expected to ask for any information from the trustees above that which the scheme actuary would need if they did not have a duty to report to the Regulator, unless the actuary considers that a trustee, employer or adviser may have relevant information about circumstances which may need to be reported to the Regulator.

5.11 My suggestion is that in practice the actuary should be protected if they have not searched for breaches. However, if a possible breach is identified or suspicions are raised then they should made the enquiries which a reasonable and prudent actuary would make. The nature of those enquiries will depend on the precise circumstances but they should be entitled to rely on statements as to the position by the scheme unless there is some reason not to (for example it does no accord with other information the actuary has). In that case, they should press further.

6 Second test - likely to be of material significance to the Regulator in the exercise of any of its functions

The objectives of the Regulator and assessment of materiality

6.1 The objectives of the Regulatory are:

6.1.1 To protect the benefits of pension scheme members;

6.1.2 To reduce the risk of calls on the PPF; and

6.1.3 to promote the good administration of work-based pension schemes.[10]

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[8] Para 2.7 and 2.8.

[9] Para 32. Clearly it would not be appropriate to do so if it might tip-off those involved in a fraud or other serious offence or impede the actions of the police or a regulator.

[10] Section 5 Pensions Act 2004.

It is only breaches which are likely to be of material significance to the Regulator in carrying out its functions to achieve these main objectives that need to be reported.

6.2 Under the Code, what makes the breach of material significance depends on:

- **6.2.1** the cause of the breach;
- **6.2.2** the effect of the breach;
- **6.2.3** the reaction to the breach; and
- **6.2.4** the wider implications of the breach.

6.3 When reaching a decision on whether to report, the actuary should consider these points together. It is a judgment call.

The cause of the breach

6.4 Where the breach was caused by:

- **6.4.1** dishonesty;
- **6.4.2** poor governance, inadequate controls resulting in deficient administration, or slow or inappropriate decision-making practices;
- **6.4.3** incomplete or inaccurate advice; or
- **6.4.4** acting (or failing to act) in a deliberate contravention of the law;

these are likely to be of material significance.

6.5 Reporters should consider other reported and unreported breaches of which they are aware - but use that information with care, particularly if changes have been made to address those historical problems

6.6 It should be noted that isolated incidents, for example, resulting from teething problems with a new system or procedure or from an unusual or unpredictable combination of circumstances may not be materially significant.

The effect of the breach

6.7 This is where the Regulator’s objectives should be particularly considered. Important matters which are likely to be of material significance to the Regulator are:

- **6.7.1** in relation to protecting members’ benefits - for example, that contributions are paid on time, assets are safeguarded and invested properly and benefits being paid properly;
- **6.7.2** in relation to reducing the risk of calls on the PPF - that the Regulator is informed of notifiable events and the trustees comply with PPF requirements during a PPF assessment period; and
- **6.7.3** in relation to promoting good administration - that appropriate records are maintained and information provided to members.

The reaction to the breach

6.8 The Regulator does not normally regard a breach as materially significant where the trustees or managers (or their advisers and service providers) take prompt and effective

action to investigate and correct the breach and its causes, and, where appropriate, to notify any members whose benefits have been affected.

6.9 This is an important point to consider. In most cases where a problem is identified, responsible clients will take this action. Where they do, the actuary should consider carefully whether a report does need to be made or at least whether the matter requires further investigation. However, the Regulator does not expect a reporter to wait until a problem has been fully corrected before reaching a decision on whether to report.

6.10 A reporter may accept assurances given by the person concerned that corrective action is being taken. However, the reporter should monitor the situation and if the action is not taken, the timetable for taking it slips or the action proves to be ineffective, the reporter should consider whether to report.

6.11 The Regulator considers that even where only a few members are not receiving benefits due to them, the breach is likely to be materially significant unless prompt and robust action is being taken to remedy the situation.

The wider implications of the breach

6.12 These should be taken into account when assessing which breaches are materially significant to the exercise of the Regulator's functions. They include such general risk factors as the level of funding (in a defined benefit scheme) or how well run the scheme appears to be.

6.13 This approach is consistent with the risk-focussed approach to regulation adopted by the Regulator.

Material significance under the Guidance - the traffic light system

6.14 In addition to the Code, the Regulator has put forward a traffic light framework to help reporters decide whether a breach is likely to be of material significance. The Regulator gives examples of red, green and amber breach situations which provide benchmarks against which reporters can judge breaches they come across.

Red breach

6.15 Red breach situations are always of material significance and should always be reported. A breach is in the red category because:

6.15.1 it was caused by dishonesty, poor scheme governance, poor advice or by deliberate contravention of the law;

6.15.2 its effect is significant;

6.15.3 inadequate steps are being taken to put matters right; or

6.15.4 it has wider implications.

6.16 Examples of a red breach situations are:

6.16.1 the failure of the trustees to appoint or replace professional advisers where required to do so, for example where the scheme actuary was dismissed or resigned more than three months ago and the trustees have not made a new appointment nor is one imminent; and

6.16.2 trustees taking decisions on matters which require professional advice, for example regarding scheme investments or augmentation of pensions, without obtaining it from the appropriate, properly appointed adviser.

Green breach

6.17 Green breach situations are not of material significance and do not have to be reported. Please note that the Regulator still states that these should be recorded.

6.18 GN29 also states that the scheme actuary must maintain a cumulative record containing full details of any breaches which do not need to be reported but which may, in aggregate, indicate a matter which does need to be reported. This list must be reviewed with every new entry.

6.19 A breach is in the green category because:

6.19.1 it was not caused by dishonesty, poor scheme governance, poor advice or by a deliberate contravention of the law;

6.19.2 its effect is not significant;

6.19.3 proper steps are being taken to put matters right; and

6.19.4 it does not have wider implications.

6.20 An example given of a green breach situation is a failure to invest a month's contributions promptly, in accordance with the scheme's procedures.

Amber breach

6.21 Amber breach situations are less clear-cut; a reporter must take into account the context of the breach in order to decide whether it is of material significance and should be reported.

6.22 This is a breach which does not fall obviously into red or green classification. A judgement needs to be made as whether to report having regard to the breach's cause, its effect, the reaction of the trustees and others to it and any wider implications it may have. Previous reported and unreported breaches will be relevant here.

6.23 Examples of amber breach situations are several green breaches within a short period of time.

7 Practical steps over reporting

Failure to report or report adequately

7.1 If there is a failure to report the breach without a "reasonable excuse" then it is a civil offence.

7.2 The Regulator will look at a number of factors to decide whether there is a reasonable excuse, these are:

7.2.1 legislation, case law, the Code and guidance;

7.2.2 the role of the reporter in relation to the scheme;

7.2.3 the training provided and the level of knowledge it would be reasonable to expect that individual to have;

7.2.4 the procedures in place to identify and evaluate breaches and whether they have been followed;

7.2.5 the seriousness of the breach;

7.2.6 any reasons for the delay in reporting; and

7.2.7 any other relevant considerations.

7.3 As well as the civil penalty, the Regulator may make a complaint to the reporter's professional or other governing body.

7.4 Care should be taken over what is said in the report. There are criminal sanctions available to the Regulator in the event of a deliberate or reckless misrepresentation of any circumstances.[11] GN29 also emphasis the need to take care to properly represent all the circumstances of the case in question - particularly in discussions with the Regulator.

Making a report

7.5 Reports must be submitted in writing. There is a breach of law report form on the Regulator's website.

7.6 In serious cases, reporters should consider contacting the Regulator by the quickest means possible to alert the Regulator to the breach.

How to work with the trustees

7.7 The Regulator recognises that collective reports may be made. From a client relationship perspective, this is often the most sensitive way to proceed.

7.8 The trustees may have set up their own reporting procedure with a designated person to deal with reporting breaches to the Regulator.

7.9 It is advisable for the actuary to be informed what procedures the trustees have in place to report breaches to the Regulator. This could be included in the terms of engagement. Trustees are likely to require that, other than in exceptional circumstances, their advisers are to discuss possible reports with them before making a report.

7.10 The duty to report on the actuary is not automatically discharged by another party reporting the breach. However, in practice, the Regulator sees no point in duplicate reports which carry a cost. Therefore, once aware of a particular breach, the Regulator does not require further reports unless another reporter has additional or different information.

7.11 This should not be relied on, however, unless the actuary has received the original report and its acknowledgement from the Regulator.

7.12 A reporter should ensure that they receive an acknowledgement to the report from the Regulator. Only then can they be confident that the regulator has received the report.

7.13 The Regulator should acknowledge all reports within 5 working days.

Reporting procedures within the actuarial firm

7.14 The Code suggests that all reporters should have effective arrangements in place to meet their duty to report breaches of the law and that reliance should not be placed on waiting for others to report.

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[11] Section 80 Pensions Act 2004.

7.15 The Regulator expects firms to ensure that staff are adequately trained. Firms should put adequate systems in place to ensure that staff are aware of their responsibilities and that they are familiar with reporting procedures.

7.16 It would be advisable to document the training and the process put in place to be able to demonstrate that the firm has discharged this expectation of the Regulator.

7.17 The Code suggests that the procedures put in place are a matter for the reporter but they should be conducive to staff raising concerns and to the objective consideration of those concerns.

7.18 The Code sets out the elements of what the Regulator considers a satisfactory procedure is likely to cover for a firm such as an actuarial consultancy. This includes a clear referral process and an established procedure for dealing with difficult cases such as a "Regulator Committee" of experienced persons and a system of recording breaches.

7.19 Under GN29, the actuary must maintain a cumulative record containing full details of any breaches which were not reported and review the accumulated list on each new entry. Entries may be removed from the list if, in the actuary's opinion they could no longer in any circumstances be relevant to any future decision on reporting to the Regulator.

"As soon as reasonably practicable"

7.20 The report must be made "as soon as reasonably practicable".

7.21 This is a softening from the position under Section 48 of the Pensions Act 1995, where the report had to be made *"immediately"*.

7.22 The Code states that what is reasonably practicable depends on the circumstances. The time taken should reflect the seriousness of the suspected breach. In cases of immediate risk to scheme assets, the payment of members' benefits or where there is any indication of dishonesty, the Regulator does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies but only to make such immediate checks as are necessary.

7.23 The more serious the potential breach and its consequences, the more urgently these necessary checks should be made

7.24 In contract law, phrases such as "as soon as reasonably practical" have been said to imply an obligation to perform the act as someone in the same position and the necessary ability to would have done.[12] This suggests that an objective standard is to be met. The obligation has been held to mean "as soon as it can reasonably be done" and not just "within a reasonable time".[13]

7.25 It is important that procedures are in place to allow reported to make a judgement within an appropriate timescale as to whether a breach must be reported.

7.26 The Code of Practice No. 2 - Notifiable events expands upon what the Regulator considers to be "as soon as reasonably practicable". In this Code, the Regulator considers that it is important that events are notified quickly in order to act as an effective early warning of calls on the Pension Protection Fund. However, it is then said that what is reasonably practicable depends on the circumstances. In all cases, it implies urgency. The example

[12] *Hydraulic Engineering Company Limited v McHaffie Gosiett* (1878-79) LR 4 QBD

[13] *Bulman v Lakin* [1981] R.T.R.I

used by the Regulator is where a trustee is made aware of a notifiable event on a Sunday, the Regulator should be notified on Monday.

8 Other issues that arise for the actuary – confidentiality, cost, privilege and resignation

Confidentiality

8.1 The Regulator does not guarantee that it will protect the identity of reporters. It may also be obvious to the trustees/employer that it has been the actuary who has blown the whistle.

8.2 The actuary owes a duty of confidentiality to their client. This is in conflict with the duty under Section 70 to blow the whistle. To avoid the risk that the actuary will be sued for breaching that duty by whistleblowing, there is express protection for the actuary in Section 70. This provides that any duty the actuary is subject to (which will include a duty of confidentiality) is not to *"be regarded as contravened merely because of any information or opinion contained in a written report under"* Section 70.

8.3 A further reason for the actuary to take care over the report is that if information or opinion not required for the purposes of the report is disclosed, then the actuary could be exposed to a risk that this protection would not cover that material.

8.4 To avoid risks in this respect, it is suggested that the terms of engagement, make clear that the duty of confidentiality is not breached if an actuary goes beyond the strict duty to report and that the client consents to the disclosure of any matters in the report that the actuary considers should be included.

8.5 In addition, the "professional adviser" who has a duty to report under Section 70 does not include an adviser who is solely advising the employer within the pension scheme. If that adviser alerts the employer to a potential breach, then the employer must consider reporting it. If that adviser were to report the breach, then they would not be afforded the statutory protection under Section 70.

The cost of investigating and reports

8.6 There is considerable scope for the actuary to incur costs in investigating and reporting breaches. These costs can include:

8.6.1 taking legal advice if the reporter is unclear about the relevant legal position. The Regulator's guidance and the Code suggests that in this situation the reporter should clarify their understanding of the law to the extent necessary to form a view.[14]

8.6.2 investigating a breach where the actuary has suspicions.

8.7 The client may also be reluctant to pay for this – particularly if they do not accept that he actuary should have whistleblown in the circumstances.

8.8 It is therefore advisable to address this at the outset before a breach situation has arisen and have a clear agreement in the terms and conditions over what responsibility the client has for these costs.

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[14] The Regulator does state in its guidance that reporters are expected to take their own legal advice if required, but they are not expected to incur significant legal costs and if an initial legal opinion indicates that a breach might have occurred, the reporter is expected to move to the next stage and make the decision on material significance assuming reasonable cause to believe the breach has occurred has been established.

Privilege

8.9 Section 48(5) of the Pensions Act 1995 exempted from whistleblowing obligations under that Act communications covered by "legal professional privilege" – thereby incorporating common law principles of what that that concept covered.

8.10 Section 70 exempts from disclosure "protected items" under Section 311 of the Pensions Act 2004. This section sets out a statutory definition of "protected items". There is nothing in the legislative history of Section 311 that gives a clear indication why Parliament departed from the language used in section 48(5) of the Pensions Act 1995[15] – which expressly refers to *"legal professional privilege"* – in favour of a statutory definition of *"protected items"*.[16]

8.11 In essence, protected items are items covered by "legal privilege", but the drafting leaves some uncertainty. The wording of Section 311 leaves open a number of important questions: who is the "client" under Section 311; what constitutes legal advice? We suspect that the Regulator or any Court called upon to consider Section 311 would turn to the common law of legal professional privilege as an aid to construing it and the scope of its protections unless precluded from doing so by the express language of section 311. This appears to have been the approach of Opra in relation to section 48(5) of the Pensions Act 1995.[17]

8.12 As a general matter, it should be safe to assume that, where a trustee client contacts the trustees' legal adviser to notify them of a breach and to seek legal advice as to the grounds for remedying that breach, that communication falls squarely within the definition of *"protected item"* and does not give rise to whistleblowing by the lawyer (although the circumstances may give rise to an obligation on the trustee to whistleblow and the lawyer should consider whether to advise the client to do so).

8.13 There are two types of legal privilege covered by Section 311 – legal professional privilege and litigation privilege. Legal professional privilege covers communications between a lawyer and a client for the purposes of legal advice.[18] Litigation privilege however, covers all communications between a lawyer, the client and third parties (which can include an actuary) in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings. The practical relevance of protected items for the actuary is demonstrated by the two example situations below.

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[15] What is known is that the Parliamentary draftsmen copied Section 311 from Section 413 of the Financial Services and Markets Act 2000 ("FSMA"), which provides a means by which a person can withhold from an FSA investigation or information-gathering exercise documents and communications which constitute "*protected items*". There would appear to be no policy reasons for the FSA to have provided protections under Section 413 which were different from the common law doctrine of privilege and research into the legislative history has not revealed discussions suggesting that this was the intention. It would appear that Section 413 itself was taken from section 10 of the Police and Criminal Evidence Act 1984 entitled "*Meaning of 'items subject to legal privilege'*".

[16] Compare also Section 102 of the Pensions Act 1995 (repealed) (which provided that documents that would otherwise be protected by "*legal professional privilege*" need not be disclosed to Opra in response to a notice under section 98) with Sections 72 and 311 of the Pensions Act 2004 (exempting from disclosure "*protected items*").

[17] See, e.g., Opra Note 6, page 15 at footnote 2 ("*When considering whether information falls within the scope of legal professional privilege, legal advisers should bear in mind recent decisions from the Court of Appeal imposing limits on when legal professional privilege can be claimed").*

[18] Note that Section 311(3)(a) includes within the definition of "*protected items*" a communication between a lawyer and his client made "*in connection with the giving of legal advice to the client.*" Under the common law, legal advice privilege attaches to communications made "*for the purposes*" of legal advice. Therefore, where the client sends to his lawyer wide background documentation, Section 311 would appear to strengthen the argument that all such documentation would be privileged.

Example 1 – legal advice privilege

"The trustees' lawyer advises the trustees by e-mail on their legal obligations over non-payment of substantial employer contributions and copies the e-mail containing the legal advice to the scheme actuary."

8.14 The email communication between the lawyer and the trustees is a protected item. But what about the copy e-mailed to the actuary? Should he whistleblow?

8.15 The authorities on legal advice privilege suggest that a communication between a client and a lawyer which occurs in the presence of a third-party who owes a duty of confidentiality to the client will not necessarily result in a loss of confidence and consequently privilege in respect of the rest of the world. The "waiver" of privilege is therefore limited to the third party in question and will mean in practice that the client cannot claim privilege in respect of that communication (in this example, as between the trustee and the scheme actuary) if the trustees were subsequently to commence proceedings against the actuary (and this communication was relevant in those proceedings).[19] The communication is still privileged, however, in respect of other third parties.

8.16 In addition, Section 311 is silent on the issue of waiver. It seems to suggest that once a communication qualifies as a protected item, it does not lose its status as such if it is subsequently shared with a third party. Therefore, if the actuary is copied in on advice from the trustee's lawyer or is at a trustee meeting at which advice is given, that advice should be a *"protected item"*.

Example 2 – litigation privilege

"The pensions manager has discovered an error in the scheme rules that affects significant benefits paid under the scheme and consideration is being given to proceedings for rectification. The trustees and administrators have consistently administered the scheme under the rules as they thought them to be with lower benefits and not as actually worded (with the error). The trustees want to determine the cost implications of the error and the proceedings and provide details of the problem to the scheme actuary and commission a costing from him."

8.17 Legal proceedings are contemplated. The communications between the trustees and the actuary are for the purpose of those proceedings and should therefore be a protected item. Scheme actuaries are frequently involved in performing costings for litigation purposes and will be privy to privileged communications in carrying out that work. Section 311 is clear that those communications will be protected items and there is no obligation to report under Section 70.

8.18 One issue which may be unclear is whether the advice is sought is for the purposes of Section 311(3)(b) as a communication *"in connection with, or in contemplation of, legal proceedings"*.[20] If so, it is advisable for the actuary to obtain clarification of the purpose of the advice sought to establish whether it is indeed a protected item.

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[19] See, e.g., *NRG v Bacon & Woodrow* [1995] 1 All ER 976, Coleman J; *City of Gotha v. Sotheby's* [1998] 1 W.L.R. 114.

[20] The Pensions Act 2004 contains a definition of legal proceedings in the context of section 90, but not section 311. There is therefore some scope to argue that non-adversarial legal proceedings, such as fact-gathering proceedings by the Regulator, would also be covered (although they would most likely not be deemed "*litigation*" for litigation advice purposes under the common law).

8.19 *USA v Philip Morris and BAT & Others*,[21] considered the stage at which litigation privilege arises. The Court of Appeal concluded that there had to exist a *"real likelihood"* that litigation would ensue; a *"mere possibility"* was insufficient.

8.20 Although it needs to be considered on a case-by-case basis, there may be grounds for arguing that communications prompted by a claim made under the scheme's internal dispute resolution procedure ("IDRP") would be protected, particularly where it was apparent that the member concerned would pursue the claim further if the outcome of the IDRP was unfavourable. On the other hand, it is unlikely that, pre-IDRP, communication over a member's request for reasons why his benefits are at a particular level, for example, would be protected on this basis (although depending on what it is, it could fall within legal advice privilege - see above).

Resignation or removal

8.21 Under GN 29, if the appointed actuary resigns or is removed by the trustees, he/she must consider whether the circumstances of the resignation or removal give rise to any duty to notify the Regulator of the circumstances of the scheme.

8.22 The actuary's resignation or removal statement or declaration must include a statement of any circumstances connected with his or her resignation which in their opinion might significantly affect the interests of members or prospective members or beneficiaries.[22]

8.23 The outgoing actuary must provide the incoming actuary with the list of non-reported breaches or confirmation that no non-reported breaches have been recorded or confirmation that none of the non-reported breaches are still relevant to any future decision on reporting to the Regulator.

8.24 The outgoing actuary must also provide the incoming actuary with copies of any reports made to the Regulator or Opra and advise of any other reports of which they are aware and whether the trustees and their other advisers have been informed of any report.

Mark Blyth
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Linklaters

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[21] [2004] EWCA Civ 330.

[22] Para 3.1.