

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

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Staple Inn Hall, London  
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### Introduction

- A duty to whistleblow since April 1997
- Why should you care?
- Key source of information for Regulator

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### Areas to cover

- statutory/regulatory framework
- key issues for actuary to identify
- practical issues over reporting
- confidentiality, cost, privilege and resignation

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## The statutory/regulatory framework

- Section 70 – legal duty to whistleblow
- Code of Practice 01
  - not statement of law/no penalty
  - not follow slavishly
- Regulator's guidance – to “compliment” the Code
- Actuarial Guidance Note 29 – should “normally” comply with Code and Guidance
- Regulator expects all reporters to understand the minimum requirements of the law, Code and guidance.

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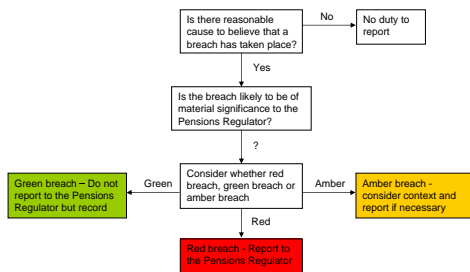
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## The key issues to be identified and considered by the actuary



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## 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?**
- covers case law/trust law
- probably not PO determination
- have trustees “acted in a way which would appear unfair or wrong to a reasonable and objective person”?

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### First test cont'd

- **Relevant to the administration of the scheme**
- is reported widely
- not just administrative functions
- anything which could potentially affect members benefits or ability to access information entitled to

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### First test cont'd

- **“reasonable cause to believe” - constructive knowledge?**
- more than a suspicion
- should the actuary pro-actively investigate?
- against what standard is “reasonable cause” judged?

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### First test cont'd

- criminal law – suggest pro-active duty and objective standard
- GN29 – actuary should have means to investigate
- Code suggests no requirement to search unless suspicion – then should investigate
- How far should actuary go?

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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**

- Objectives
  - protect benefits of members
  - reduce risk of calls on PPF
  - promote good scheme administration



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Second test cont'd

▪ **What makes the breach material?**

- Judgement call for Actuary:
  - cause of breach
  - effect of breach
  - reaction to breach
  - wider implications of breach



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Second test cont'd

▪ **The cause of the breach**

- likely to be of material significance:
  - dishonesty
  - poor governance/controls
  - inaccurate advice
  - deliberate contravention of the law
- consider other previous reported/unreported breaches
- is it an isolated incident?



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**Second test cont'd**

- **The effect of the breach**
  
- Regulator objectives particularly relevant
- Likely to be of material significance:
  - benefits/contribution not paid/invested properly
  - failure to comply with PPF requirements (in PPF assessment period)
  - proper records not maintained/info provided to members



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**Second test cont'd**

- **The reaction to the breach**
  
- Not normally of material significance:
  - where prompt and effective action to investigate/correct breach and its causes
  - important point to consider
  - can accept assurances but duty to monitor



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**Second test cont'd**

- **The wider implications of the breach**
  
- include:
  - level of funding (DB)
  - how well run scheme is



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## Second test cont'd

- **Material significance expanded under guidance - the traffic light system**
- **Red** – always should be reported
- **Green** – not reported
- **Amber** – consider the context and decide whether to report – judgement call

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## Practical steps over reporting

- **Failure to report or report adequately**
- without “reasonable excuse” – civil offence
- Regulator will consider
  - legislation, case law, the Code, guidance
  - role of reporter
  - training provided and knowledge reasonable to expect individual should have
  - procedures in place
  - seriousness of breach/reason for delay

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## Practical steps over reporting cont'd

- **Making a report**
- must be in writing (form on web-site)
- serious cases – contact by quickest means
- care over what is said in report and any discussion with Regulator
- criminal sanction for deliberate/reckless misrepresentation

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## Practical steps over reporting cont'd

### ▪ How to work with the trustees

- joint report
- be appraised of trustee's own procedures
- duplicate reports not required
- but only rely on Regulator acknowledgement

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## Practical steps over reporting cont'd

### ▪ Reporting procedures within the actuarial firm

- firms should have effective procedures in place
- adequate training expected
- advisable to document training process
- suggested procedure for actuarial consultancy in Code (including a "Regulator Committee")
- GN29 – maintain cumulative record

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## Practical steps over reporting cont'd

### ▪ "As soon as reasonably practicable"

- relaxation from s48 "immediately"
- depends on circumstances – reflect seriousness of breach
- probably faster than "within a reasonable time"
- Code (No 2) suggests Monday after Sunday

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

▪ **Confidentiality**

- owe duty to client
- express protection in Section 70 to whistleblow
- risk if report goes much further than it should?
- address in terms and conditions
- NB no protection if actuary advising only employer “whistleblows”



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Other issues cont'd

▪ **The cost of investigating and reports**

- considerable scope for incurring cost – investigating/report/legal advice
- advisable to address costs in terms of engagement



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Other issues cont'd

▪ **Privilege**

- Section 70 exempt “protected items”
- broadly analogous to legal professional privilege
- two types
  - legal advice privilege
  - litigation privilege
- why is this relevant to an actuary?



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Other issues cont'd

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.”*



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Other issues cont'd

- should the actuary whistleblow?
- authority that privilege is not waived in communication as actuary owes duty of confidentiality to client
- not privileged vis a vis actuary but should be in respect of Regulator
- remains a “protected item”



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Other issues cont'd

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.”*



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### Other issues cont'd

- legal proceedings contemplated
- communications for purpose of proceedings – protected items
- may be issue over whether proceedings sufficiently in contemplation
- “real likelihood” needed “mere possibility” insufficient
- claims under IDR?P?

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### Other issues cont'd

- **Resignation or removal**
- automatic duty to consider whether need to notify
- resignation statement should include circumstances which might significantly affect members interests
- provide incoming actuary with list of non-reported breaches/reports made

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