

Whistleblowing – Reporting breaches of the law

Who must report (RTT003)

Certain people (reporters) are required to report breaches of the law to us where they have a reasonable cause to believe that:^{WH1}

- a legal duty which is relevant to the administration of a scheme has not been, or is not being, complied with
- the failure to comply is likely to be of material significance to us in the exercise of any of our functions

We interpret ‘administration’ widely in the context of the duty to report breaches of law. Our interpretation is broader than day-to-day administrative tasks such as record-keeping, dealing with membership movements, calculating benefits and preparing accounts. It also includes considering investment policy and investment management, and the custody of invested assets in all schemes and scheme funding in defined benefit schemes. Broadly, our interpretation covers anything that could affect members’ benefits or the ability of members and others to access information they are entitled to.

WH1 Section 70 Pensions Act 2004 [Article 65 Pensions Order (Northern Ireland) 2005]

Who has the duty to report?

Trustees

Each trustee. If the trustee is a corporate body, the requirement to report falls on the directors.

Public service scheme pension boards

Each member of the pension board of a public service pension scheme.

Scheme manager

This includes managers of public service pension schemes and personal pension schemes where a direct payment arrangement exists.

Service providers

Those who provide administrative services to occupational and personal pension schemes, including:

- insurance companies and third-party administrators who carry out administrative tasks relating to a scheme
- participating employers who provide staff to carry out administration tasks in-house (this includes performing payroll and similar functions, as well as carrying out or helping with direct administration of the pension scheme)
- financial advisers and consultants who provide services to trustees such as record-keeping or acting as intermediaries receiving and forwarding scheme documents

Employers

All employers. In a multi-employer scheme, this includes any employer who becomes aware of a breach, regardless of whether the breach relates to or affects, members who are its employees or those of other employers.

Professional advisers

This includes advisers appointed by the governing body such as scheme actuaries, scheme auditors, reporting accountants, legal advisers,^{WH2} and fund managers. Where an individual is appointed to provide the relevant service, the duty to report applies to that individual. Where a firm is appointed to provide services, the duty to report applies to the firm and not just the member of staff providing the services.

A scheme strategist or scheme funder of master trust schemes

This is defined in Part 1 of the Pension Schemes Act 2017 (see section 39 of that Act)

WH2 Subject to the exceptions set out in Section 311 Pensions Act 2004 [Article 283Pensions Order (Northern Ireland) 2005]

Governing bodies should be satisfied that those responsible for reporting breaches are aware of the legal requirements and this code. Training should be provided for the governing body and any in-house administrators.

A person's responsibility to report breaches is not limited to those that relate to their specific role in a scheme. Irrespective of the activities being undertaken, we expect material breaches to be reported as they are identified.

Whistleblowing protection and confidentiality

The Pensions Act 2004 makes clear that the duty to report overrides any other duties a reporter may have (such as confidentiality), and that any such duty is not breached by making a report. We understand the potential impact of a report on the relationship between a reporter and their client or, in the case of an employee, their employer.

The duty to report does not override legal privilege.^{WH3} Communications (oral and written) between a professional legal adviser and their client, or a person representing that client, while obtaining legal advice, do not have to be disclosed.

The Employment Rights Act 1996 (ERA) provides protection for employees making a whistleblowing report to us. Where individuals employed by firms having a duty to report disagree with a decision not to report, they may have protection under the ERA if they make an individual report in good faith.

We will take all reasonable steps to protect a reporter's identity and maintain confidentiality where a report is made in confidence. We will not disclose any information except where lawfully allowed to do so.

In all cases, we expect reporters to act conscientiously and honestly, and to take account of expert or professional advice where appropriate.

WH3 Section 311 Pensions Act 2004 [Article 283 Pensions Order (Northern Ireland) 2005]

Decision to report (RTT044)

There are two key judgements required to make the decision to report a breach of the law:^{DC1}

1. Is there reasonable cause to believe there has been a breach of the law?
2. Is the breach likely to be of material significance to TPR?

‘Reasonable cause’ to believe

Having a reasonable cause to believe that a breach has occurred means more than merely having a suspicion that cannot be proved.

Where a breach is suspected, reporters should carry out checks to establish whether a breach has occurred.

Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to check with members of the governing body or with others who are able to confirm what has happened. However, it would not be appropriate to alert those implicated in potential serious offences, such as theft or fraud. In such cases, it may be appropriate to bypass the usual checks with the governing body.

Likely to be of ‘material significance’

The legal requirement is that breaches likely to be of ‘material significance’ to us in carrying out any of our functions must be reported. Whether a breach is of ‘material significance’ depends on a number of factors:

1. The cause of the breach

A breach is likely to be of material significance to us where it was caused by:

- dishonesty, negligence or reckless behaviour
- poor governance, ineffective controls resulting in deficient administration, or slow or inappropriate decision-making practices
- incomplete or inaccurate advice
- a deliberate act or failure to act

DC1 Section 70 of the Pensions Act 2004 & Article 65 of the Pensions (Northern Ireland) Order 2005

2. The effect of the breach

We consider a breach to be significant where the effects are as follows:

- A significant proportion of members, or a significant proportion of members of a particular category of membership, are affected by the breach.
- The breach has a significant effect on the benefits being paid, to be paid, or being advised to members.
- The breach – or series of unrelated breaches – have a pattern of recurrence in relation to participating employers, certain members or groups of members.
- Governing bodies do not have the appropriate degree of knowledge and understanding, preventing them from fulfilling their roles and resulting in the scheme not being properly governed and administered and/or breaching other legal requirements.
- There are unmanaged conflict of interests within the governing body, resulting in: it being prejudiced in the way it carries out the role; ineffective governance and administration of the scheme, and/or breaches of legal requirements.
- Systems of governance (where applicable) and/or internal controls are not established or operated, leading to schemes not being run in accordance with their governing documents and other legal requirements.
- Risks are not properly identified and managed and/or the right money is not being paid to or by the scheme at the right time.
- Accurate information about benefits and scheme administration is not being provided to scheme members and others, so members are unable to effectively plan or make decisions about their retirement.
- Appropriate records, including those for the dashboard, are not being maintained, resulting in member benefits being calculated incorrectly and/or not being paid to the right person at the right time.
- Governing bodies or anyone associated with the scheme misappropriate scheme assets or are likely to do so.
- Trustees of defined benefit schemes do not comply with requirements of the Pension Protection Fund during an assessment period.

3. Reaction to the breach

We will not normally consider a breach to be materially significant if prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, all affected scheme members have been notified.

A breach is likely to be of concern and material significance to us where a breach has been identified that:

- does not receive prompt and effective action to remedy the breach and identify and tackle its cause to minimise risk of recurrence
- is not being given appropriate priority by the governing body or relevant service providers
- has not been communicated to affected scheme members where it would have been appropriate to do so
- where it forms part of a series of breaches indicating poor governance

4. The wider implications of the breach

The wider implications of a breach should be considered when assessing whether it is likely to be materially significant to us. For example, a breach is likely to be of material significance where:

- the fact that the breach has occurred makes it appear more likely that other breaches will emerge in the future (the reason could be that the governing body lacks the appropriate knowledge and understanding to fulfil their responsibilities)
- other schemes may be affected, for example schemes administered by the same organisation where a system failure has caused the breach

Those reporting a breach should consider general risk factors such as the level of funding (in a defined benefit scheme) or how well-run the scheme appears to be. Some breaches that arise in a poorly funded and/or poorly administered scheme will be more significant to us than if they arose in a well-funded, well-administered scheme.

Reporters should consider other reported and unreported breaches they are aware of. However, reporters should use historical information with care, particularly where changes have been made to address previously identified breaches.

We will not usually regard a breach arising from an isolated incident as materially significant, for example breaches resulting from teething problems with a new system or from an unpredictable combination of circumstances. However, in such circumstances reporters should consider other aspects of the breach such as the severity of the effect it has had that may make it materially significant.

Glossary

Internal controls

- Arrangements and procedures to be followed in the administration and management of the scheme
- Systems and arrangements for monitoring that administration and management, and
- Arrangements and procedures to be followed for the safe custody and security of the assets of the scheme (Section 249A of the Pensions Act 2004)

Reporter

Any person who has a duty to report a breach of law or notifiable event

How to report (RTT005)

Making a report

Reporters should make a report using our online web form, email or by post. We do not accept reports by telephone, but if a reporter discovers a serious breach, they should notify us by telephone (www.tpr.gov.uk/en/contact-us/whistleblowing-contact-us) before submitting their report in writing.

Reporters should also mark urgent reports as such and highlight any matters they believe are particularly serious.

Breach of law reports must be made to us in writing as soon as reasonably practicable^{HO1} and in most cases, this should be within 10 working days of the breach being identified. However, reporters may use their judgement as to the application of ‘reasonably practicable’ in their specific circumstances.

The report should include the:

- full name of the scheme
- description of the breach or breaches, including any relevant dates
- name of the employer (in the case of an occupational scheme) or scheme manager (in the case of public service and personal pension schemes)
- name, position and contact details of the reporter
- role of the reporter in relation to the scheme

The report should also include:

- reason the reporter believes breach is of material significance to us
- address of the scheme
- type of scheme – whether occupational (defined benefit, defined contribution or hybrid), personal or public service
- name and contact details of the governing body (if different to the scheme address)
- pension scheme registration (PSR) number
- address of employer

HO1 Section 70 of the Pensions Act 2004 [Article 65 of the Pensions (Northern Ireland) Order 2005]

There are other requirements placed on those running pension schemes to report to other bodies. Where the duty to report to another body coincides with the duty to report to us, the report to us should include details of the other bodies the matter has been reported to.

We will acknowledge all reports within five working days of receipt. If reporters have not received an acknowledgement from us within five days, they should contact us.

Due to legal restrictions^{HO2} on the information we can disclose, we will not keep reporters informed of the steps we are taking to deal with the report, but we may contact a reporter to ask for more information.

If a scheme or an individual is at risk, for example where there has been dishonesty, they should not take any actions that may alert those implicated that a report has been made. Similarly reporters should not delay their report to us, to check whether any proposed solutions will be effective.

Multiple reporters

More than one person may be responsible for reporting the same breach. Those who have a duty to report should be aware this is not automatically discharged by another party reporting the breach.

Where multiple reporters wish to submit a collective report, the reporting procedure must allow for the evaluation of breaches as described in this code of practice and for a report to be made as soon as reasonably practicable.

Where a report has already been made by another party, but as a reporter you hold additional relevant information about the breach, you must submit a further report.

HO2 Section 82 Pensions Act 2004 and Data Protection Act 2018 and the Retained Regulation (EU) 2016/679) (UK General Data Protection Regulation)

Reporting procedures

Those responsible for reporting breaches, including the governing body, should establish and operate procedures to ensure they are able to meet their legal obligations. Reporters should not rely on waiting for others to report.

We expect the governing body to have:

- a process for obtaining clarification of the law around the suspected breach where needed
- a process for clarifying the facts around the suspected breach where they are not known
- a process for considering the material significance of the breach to us by taking into account its cause, effect, the reaction to it, and its wider implications, including dialogue within the governing body where appropriate (see also [Decision to report](#))
- a clear process for referral to a person at the appropriate level of seniority, so decisions can be made about whether to report to us
- an established procedure for dealing with difficult cases
- a timeframe for the procedure to take place that is appropriate to the breach and allows the report to be made as soon as reasonably practicable
- a system to record breaches even if they are not reported to us (the record of past breaches may be relevant in deciding whether to report future breaches, for example it may reveal an ongoing issue)
- a process for reviewing reporting procedures following any significant changes to the scheme's governance arrangements

Glossary

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