

Appendix 1:

The legal requirement to report a breach

Breaches of the law which affect pension schemes should be considered for reporting to the Pensions Regulator.

The decision whether to report requires two key judgements:

- Is there reasonable cause to believe there has been a breach of the law.
- If so, is the breach likely to be of material significance to the Pensions Regulator?

The requirement to report breaches of the law arises when a duty which is:

- Imposed by or by virtue of an enactment or rule of law; and
- Relevant to the administration of a scheme.

Imposed by or by virtue of an enactment or rule of law

‘Enactment’ covers Acts of Parliament and regulations or statutory instruments. For example, the Pensions Act 2004 is an enactment as are regulations made under that Act:

Pensions Act 2004 (70 (2)):

“(2) Where the person has reasonable cause to believe that –

- (a) A duty which is relevant to the administration of the scheme in question, and is imposed by or virtue of an enactment or rule of law, has not been or is not being complied with, and
- (b) The failure to comply is likely to be of material significance to the Regulator in the exercise of its functions,

he/she must give a written report of the matter to the Regulator as soon as reasonably practicable.”

Breaches of criminal law, such as an offence of dishonesty under the Theft Act, would also come within the term enactment.

‘Rule of law’ covers law laid down by decisions of the courts. It would, for example, include trust law and common law.

When considering breaches of trust law, *Reporters* should bear in mind the basic principle that the Pension Fund is holding assets on behalf of others. The Pension Fund should act in good faith and within the terms of the LGPS Regulations for the benefit of all the beneficiaries of the scheme. If they fail to do so, they are in breach of law. A very basic rule of thumb in considering whether an action or failure to act is, or may be, a breach is if the Pension Fund has acted in a way which would appear unfair or wrong to a reasonable and objective person.

‘Relevant to the administration of the scheme’

In view of its statutory objectives, the Pensions Regulator interprets ‘administration’ widely in the context of the need to report breaches. It is much wider than just those tasks normally associated with the administrative function such as keeping records, dealing with membership movements, calculating benefits and preparing accounts, though all these are included within it. The Pensions Regulator interprets administration to include such matters as the consideration of funding in defined benefit schemes, investment policy and investment management, as well as the custody of invested assets,

indeed, anything which could potentially affect members' benefits or the ability of members and others to access information to which they are entitled. There are two key judgements required:

- First, does the *Reporter* have reasonable cause to believe there has been a breach of the law?
- If so, then, secondly, does the *Reporter* believe the breach is likely to be of material significance to the Pensions Regulator?

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 substantiated.

Where the *Reporter* does not know the facts or events around the suspected breach, it will usually be appropriate to check with the *Responsible Officer*, or with others who are in a position to confirm what has happened. However, it would not be appropriate to check with the *Responsible Officer* or others in cases of theft, or if the *Reporter* is concerned that a fraud or other serious offence might have been committed and discussion with those persons might alert those implicated or impede the actions of the police or a regulatory authority.

If the *Reporter* is unclear about the relevant legal provision, they should clarify their understanding of the law to the extent necessary to form a view.

In establishing that there is reasonable cause to believe that a breach has occurred, it is not necessary for a *Reporter* to gather all the evidence which tPR would require before taking legal action.