

# **Policy for Reporting Breaches of the Law**

**London Borough of Harrow Pension Fund**

**March 2017**

## Background

The London Borough of Harrow Pension Fund (“the Fund”) has prepared this document setting out its policy and procedures on identifying, managing and, where necessary, reporting breaches of the law as covered in paragraphs 241 to 275 of the Pensions Regulator’s Code of Practice no 14: Governance and administration of public service pension schemes (“the Code of Practice”).

This policy sets out the responsibility of elected members, officers of The London Borough of Harrow (“the Council”), and the Harrow Pension Board in identifying, managing and, where necessary, reporting breaches of the law as they apply to the management and administration of the Fund. This policy does not cover the responsibility of other “reporters” (described later in this policy) in relation to their obligation to report breaches in accordance with the Code of Practice where they relate to the management and administration of the Fund. Where a breach of the law is identified all parties will take the necessary steps to consider the breach and report to the Regulator, rather than having the breach solely reported by any of the other “reporters”.

This policy will be reviewed and approved by the Council at least annually. The Council will monitor all breaches and will ensure that adequate resources are allocated to managing and administering this process.

The monitoring officer for the Council will be responsible for the management and execution of this breaches policy.

The section 151 officer will ensure that training on breaches of the law and this policy is conducted for all relevant officers and elected members, as well as members of the Pension Board at induction and on an ongoing basis.

## Overview

The identification, management and reporting of breaches is important. It is a requirement of the Code of Practice; failure to report a material breach is a civil offence that can result in civil penalties.

At the same time, in addition to identifying, rectifying and, where necessary, reporting a particular breach, such breaches provide an opportunity to learn from mistakes and review and improve processes in the areas where the breach occurred.

All staff involved in the administration and management of the Fund are expected, indeed required, to take a pro-active approach to the identification, management and reporting of all breaches that have occurred, or are likely to occur.

The Council, as the scheme manager for the Harrow Pension Fund, will maintain a log of all breaches of the law as applicable to the management and administration of the Fund.

Where a breach has occurred it should be identified and logged as either an area of non-compliance under the LGPS Regulation, a breach under Pension Law as defined within section 13 of the 2004 Pension Act or the Pension Regulator’s Code of Practice 14.

The Council, officers and the Pension Board cannot rely on waiting for other reporters to report a breach where it has occurred. Where a breach has occurred and has been identified by the Council, officers or Pension Board it should be recorded, assessed and where necessary reported as soon as reasonably practicable.

## What is a breach of the law?

A breach of the law is “*an act of breaking or failing to observe a law, agreement, or code of conduct.*” In the context of the Local Government Pension Scheme (“LGPS”) it can encompass many aspects of the management and administration of the scheme, including, for example, failure:

- to do anything required under the LGPS Regulations;
- to do anything required under overriding legislation, applicable statutory guidance or codes of practice;
- to maintain accurate records;
- to act on any fraudulent act or omission that is identified;
- of an employer to pay over member and employer contributions on time;
- to pay member benefits either accurately or in a timely manner;
- to issue annual benefit statements on time.

## What is non-compliance under the LGPS Regulations?

Non-compliance with the LGPS regulations can cover many aspects of the management and administration of the scheme, including failure:

- to do anything required under the LGPS Regulations
- to comply with policies and procedures (e.g. the Fund’s Investment Strategy Statement, Funding Strategy Statement, discretionary policies, etc.);

## Responsibilities in relation to breaches

Responsibility to report identified breaches of the law in relation to the Code of Practice falls on the following (known as “reporters”):

- Elected members and officers of the Council (the Scheme Manager);
- Members of the Pension Board;
- Scheme employers;
- Professional advisers (including the Fund actuary, benefit consultant, investment advisers, legal advisers); and
- Third party providers (where so employed).

This policy applies only to elected members and officers of the Council, and members of the Pension Board. It is for the other reporters to ensure adequate procedures and policies are put in place in order to identify, assess and where necessary report breaches. Both the Council and the Pension Board will take all necessary steps to consider the breach and report to the Regulator, rather than having the breach solely reported by any of the other “reporters”.

## Requirement to report a breach of the Law

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

The decision whether to report an identified breach depends on whether:

- there is reasonable cause to believe there has been a breach of the law;

- and if so, is the breach likely to be of material significance to the Regulator?

It is important to understand that not every breach that is identified needs to be reported to the Regulator. For example, where it can be demonstrated that appropriate action is being taken to rectify the breach, or the breach has occurred due to teething problems with new or revised systems or processes, it may not be necessary to report the incident to the Regulator. It is still necessary that all incidents of breaches identified are recorded in the Council's breaches log. This log will be reviewed on an on-going basis to determine any trends in the breaches log that might indicate any serious failings or fraudulent behaviour.

Where such failings or fraudulent behaviour are identified immediate action will be taken to agree and put in place a plan of action to rectify the matter and prevent such an occurrence in the future.

### **When is a breach required to be reported to the Regulator?**

The Code of Practice requires that a breach should be notified to the Regulator as soon as is reasonably practicable once there is reasonable cause to believe that a breach has occurred and that it is of material significance to the Regulator. In any event, where a breach is considered to be of material significance it must be reported to the Regulator no later than one month after becoming aware of the breach or likely breach.

Where it is considered that a breach is of such significance that the Regulator is required to intervene as a matter of urgency (for example, serious fraud) the matter should be brought to the attention of the Regulator immediately (e.g. by calling them direct). A formal report should then be submitted to the Regulator, marked as "urgent" in order to draw the Regulator's attention to it

### **Assessing "reasonable cause"**

It is important that the Council and the Pension Board are satisfied that a breach has actually occurred, rather than acting on a suspicion of such an event.

It will be necessary, therefore, for robust checks to be made by officers and elected members when acting on any suspicion of a breach having occurred. Where necessary this will involve taking legal advice from Legal Services (who may recommend specialist external legal advice if necessary) as well as other advisers (e.g. auditors or the Fund actuary, benefit consultant or investment advisers).

### **Deciding if a breach is "materially significant" and should be reported to the Regulator**

The Regulator has produced a decision tree to assist schemes in identifying the severity of a breach and whether it should then be reported. When determining materiality of any breach or likely breach the Council, officers and Pension Board will in all cases consider the following:

- cause – e.g. dishonesty, poor governance, incomplete or inaccurate information, acting or failing to act in contravention of the law;
- effect – does the nature of the breach lead to an increased likelihood of further material breaches. Is it likely to cause, for example; ineffective internal controls, lack of knowledge and understanding, inaccurate records, potential for further breaches occurring;
- reaction – e.g. taking prompt and effective action to resolve a breach, notifying scheme members where appropriate; and

- wider implications – e.g. where a breach has occurred due to lack of knowledge or poor systems and processes making it more likely that other breaches will emerge in the future.

The decision tree provides a “traffic light” system of categorising an identified breach:

**Green** – not caused by dishonesty, poor governance or a deliberate contravention of the law and its effect is not significant and a plan is in place to rectify the situation. In such cases the breach may not be reported to the Regulator, but should be recorded in the Council’s breaches log;

**Amber** – does not fall easily into either green or red and requires further investigation in order to determine what action to take. Consideration of other recorded breaches may also be relevant in determining the most appropriate course of action. The Council will need to decide whether to informally alert the Regulator of the breach or likely breach, formally reporting the breach if it is subsequently decided to categorise the breach as red;

**Red** - caused by dishonesty, poor governance or a deliberate contravention of the law and having a significant impact, even where a plan is in place to rectify the situation. The Council must report all such breaches to the Regulator in all cases;

It should be noted that failure to report a significant breach or likely breach is likely, in itself, to be a significant breach.

The Council will use the Regulator’s decision tree as a means of identifying whether any breach is to be considered as materially significant and so reported to the Regulator.

Any failure of a scheme employer to pass over employee contributions that are considered to be of material significance must be reported to the Regulator immediately.

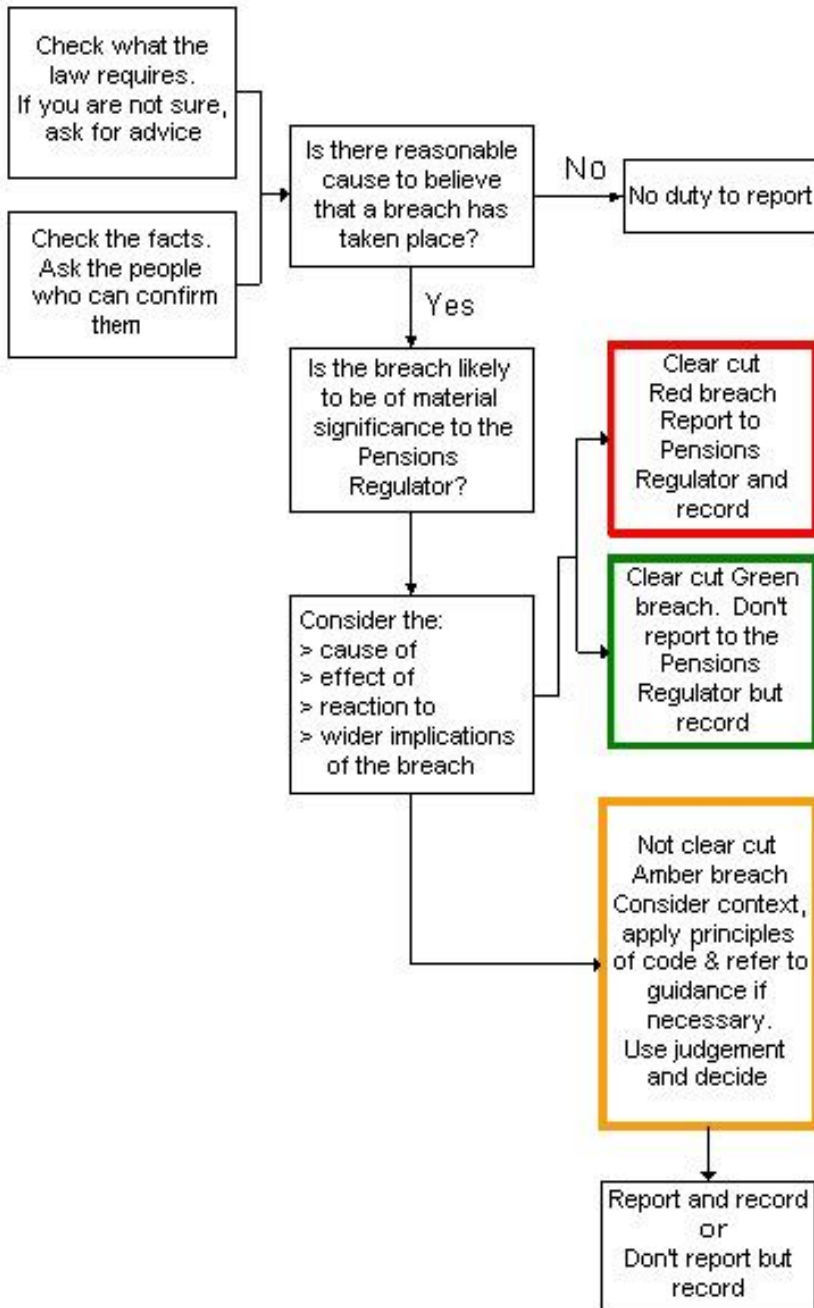
In order to determine whether failure to pay over employee contributions is materially significant or not the Council will seek from the employer:

- the cause and circumstances of the payment failure
- what action the employer has taken as a result of the payment failure, and
- the wider implications or impact of the payment failure.

Where a payment plan is agreed with the employer to recover outstanding contributions and it is being adhered to or there are circumstances of infrequent one-off late payments or administrative failures the late payment will not be considered to be of material significance.

All incidences resulting from the unwillingness or inability of the employer to pay over the employee contributions, dishonesty, fraudulent behaviour or misuse of employee contributions, poor administrative procedures or the failure to pay over employee contributions within 90 days from the due date will be considered to be of material significance and reported to the Regulator.

Once a breach or likely breach has been identified, regardless of whether it needs to be reported to the Regulator, the relevant manager, in consultation with the monitoring officer must review the circumstances of the breach in order to understand why it occurred, the consequences of the breach and agree the corrective measures required to prevent re-occurrence, including an action plan where necessary. All breaches must be recorded in the Council’s breaches log.



## Process for reporting breaches

All relevant officers and elected members of the Council, as well as all members of the Pension Board have a responsibility to:

- identify and assess the severity of any breach or likely breach;
- report all breaches or likely breaches to the monitoring officer and section 151 officer;
- in conjunction with relevant colleagues agree a proposed course of action to rectify the breach and put in place measures to ensure the breach does not re-occur, obtaining appropriate legal or other advice where necessary;
- ensure that the appropriate corrective action has been taken to rectify the breach or likely breach and to prevent it from recurring; and
- co-operate with, and assist in, the reporting of breaches and likely breaches to the Pension Fund Committee, Pension Board and, where necessary, the Regulator.

## Responsibilities of the responsible officer

The Council's monitoring officer will be responsible for the management and execution of this breaches policy.

The monitoring officer will be responsible for recording and reporting breaches and likely breaches as follows:

- record all identified breaches and likely breaches of which they are aware in the Council's breaches log;
- investigate the circumstances of all reported breaches and likely breaches;
- ensure, where necessary, that an action plan is put in place and acted on to correct the identified breach and also ensure further breaches of a similar nature do not recur;
- report to the Pension Fund Committee and Pension Board:
  - all materially significant breaches or likely breaches that will require reporting to the Regulator as soon as practicable, but no later than one month after becoming aware of the breach or likely breach; and
  - all other breaches at least quarterly as part of the Committee cycle.
- report all materially significant breaches to the Regulator as soon as practicable but not later than one month after becoming aware of the breach.

The monitoring officer will determine whether any breach or likely breach is materially significant, having regard to the guidance set out in the Code of Practice and after consultation with parties they deem appropriate. Such parties might include the Head of Legal Services, the Pension Fund Committee and Pension Board.

If appropriate, the matter will be referred to an external party to obtain any necessary legal or other advice before deciding if the breach is considered to be of material significance to the Regulator. Where uncertainty exists as to the materiality of any identified breach the Council, officers or Pension Board will be required to informally notify the Regulator of the issue and the steps being taken to resolve the issue.

## How should a breach be reported to the Regulator?

All materially significant breaches must be reported to the Regulator in writing. This can be via post or electronically. The Regulator encourages the use of its standard reporting facility via its Exchange on-line service.

The Council will report all material breaches to the Regulator via Exchange.

## How are records of breaches maintained?

All breaches and likely breaches identified are to be reported to the monitoring officer as soon as they are identified. The monitoring officer will log all breaches on the Council's breaches log, including the following information:

- date the breach or likely breach was identified;
- name of the scheme;
- name of the employer (where appropriate);
- any relevant dates;

- a description of the breach, its cause and effect, including the reasons it is, or is not, believed to be of material significance;
- whether the breach is considered to be red, amber or green.
- a description of the actions taken to rectify the breach;
- a brief descriptions of any longer term implications and actions required to prevent similar types of breaches recurring in the future.

The monitoring officer will be responsible for ensuring the effective management and rectification of any breach identified, including submission of any report to the Regulator. Any documentation supporting the breach will also be retained.

## **Whistleblowing**

It is a statutory duty to report breaches of the law. In rare cases this may involve a duty to whistleblow on the part of an employee of the Council, officers or a member of the Pension Board. The duty to report does not override any other duties a “reporter” may have, such as confidentiality. Any such duty is not breached by reporting to the Regulator. Given the statutory duty that exists, in exercising this breaches policy the Council will ensure it adheres to the requirements of the Employment Rights Act 1996 in protecting an employee making a whistleblowing disclosure to the Regulator.

The duty to report, however, does not override ‘legal privilege’, so certain oral and written communications between the Council or Pension Board and a professional legal adviser do not have to be disclosed if they meet the principles of legal privilege.

## **Training**

The section 151 officer will ensure that all relevant officers and elected members, as well as members of the local pension board receive appropriate training on this policy at the commencement of their employment or appointment to the local pension board as appropriate and on an ongoing basis.



# Appendix A

## Example scenarios

### 1. Failure to enter employee into the scheme

#### Scenario

It is discovered that a scheme employer has not entered an eligible employee into the LGPS on joining

#### Steps that might be taken

On the face of it a breach will have occurred, as the scheme employer has failed to do something they are required to do under the rule of the LGPS. Before deciding to report to the Pensions Regulator it is necessary to consider why this has happened and the steps that are being taken to either rectify the situation and/or ensure it is not repeated. This will include:

- Assessing whether failure relates to a specific employee or is it something more widespread
- Remediating this particular situation immediately
- Understanding if there have been personnel changes at the employer; has this resulted in teething problems during any hand-over?
- If necessary the Fund could provide training to the employer on its responsibilities to ensure there is no repeated failure

#### Materiality

When considering if the delay/failure is likely to be of “material significance” you could consider;

- Has the member been denied access to the scheme completely?
- Has the employer failed to respond to the Fund’s enquiries?
- Has the member not been given the opportunity to backdate entry to the scheme and pay arrears?
- Has the employer failed to put in place an immediate plan to remedy any further failures?
- Are more members affected, or is this a one-off?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**

### 2. Late payment over of contributions

#### Scenario

A scheme employer is late in paying over employee and employer contributions

#### Steps that might be taken

The reasons for the delayed payment could many, so while a breach has clearly occurred it is important to understand the reasons behind the delay. To do this:

- Contact the employer to assess the reason for the delay
- Investigate what went wrong

- Ensure steps are put in place so as to avoid a repeat in future months
- Record the outcome of your investigation
- Make sure processes are assessed to ensure they pick up any potential fraud

### **Materiality**

While the reason for the delay in paying over contributions might be entirely innocent, it is also possible something more sinister is at play and could be “materially significant”. Consider;

- Is the employer unwilling or unable to pay? e.g. due to insolvency
- Is any dishonesty involved on the part of the employer? e.g. using non-payment to ease cash-flow
- Is the employer seeking to avoid paying contributions?
- Does the employer have inadequate processes in place to recover contributions?
- Have contributions been outstanding for over 90 days since being identified?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**

## **3. Late Submission of year-end data**

### **Scenario**

A scheme employer is late in submitting year-end pay and contribution return in respect of active scheme members

### **Steps that might be taken**

On the face of it this is a breach, but the employer may not necessarily appreciate the significance. Things you might consider doing include:

- Contacting the employer to assess the reason for the non-submission
- Investigating with the employer what went wrong
- Putting in place steps to ensure no repeat
- Recording your investigations

### **Materiality**

Is the delay/failure likely to be of “material significance”? Consider;

- Is the employer unwilling or unable to provide the required data? e.g. are its systems adequate
- Has the employer failed to respond to the Fund’s enquiries?
- Will the delay impact the issue of annual benefit statements?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**

## 4. Late issue of annual benefit statements

### Scenario

The Fund is late/fails to issue annual benefit statements to active and/or deferred scheme members within the statutory time limits.

### Steps that might be taken

Failure to issue annual benefit statements or delaying their issue is a clear breach. Before reporting to the Pensions Regulator:

- Assess whether failure relates to a specific employer or wider issues
- If there have been system or scheme rule changes, determine whether teething problems have contributed to the delay/failure
- Put in place steps to ensure statements are issued within a reasonable timescale
- Put in place steps to ensure no repeat
- Record the investigations

### Materiality

Is the delay/failure likely to be of “material significance”? Consider;

- Is the breach resulting from employer failure to provide year-end data?
- Has the employer failed to respond to the Fund’s enquiries?
- Has there been a failure on the part of the Fund to have a proper plan in place for the ABS project?
- Has the Fund failed to put in place an immediate plan to remedy any delay/failure?
- Will the delay impact on the member’s actual benefits?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**

## 5. Late notification of leaver/retirement details

### Scenario

A scheme employer fails to provide the Fund with the necessary leaver/retirement notifications

### Steps that might be taken

On the face of it a breach will have occurred, as the scheme employer has failed to do something they are required to do under the LGPS Regulations. Before deciding to report to the Pensions Regulator it is necessary to consider why this has happened and the steps that are being taken to either rectify the situation and/or ensure it is not repeated.

- Assess whether failure relates to a specific employee or is it something more widespread
- Remedy this particular situation immediately
- If there have been personnel changes at the employer, has this resulted in teething problems during any hand-over
- If necessary the Fund could provide training to the employer on its responsibilities to ensure there is no repeated failure

**Materiality**

Is the delay/failure likely to be of “material significance”? Consider;

- Has the employer failed to respond to the Fund’s enquiries?
- Has the failure delayed the assessment and notification/payment of retirement benefits?
- Has the scheme member been denied access to investment opportunities due to the failure?
- Has the failure led to financial hardship for the member?
- Has the Fund failed to put in place an immediate plan to remedy any delay/failure?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**

**6. Failure to declare potential conflict****Scenario**

A Pension Committee or Pension Board member fails to declare a potential conflict of interest in relation to an issue for discussion or decision, which has later come to light

**Steps that might be taken**

It is a requirement to declare conflicts of interest, so a breach will have occurred. Before deciding whether to report to the Pensions Regulator:

- Determine why the conflict of interest was not reported at the outset
- Consider what impact it had on the eventual discussions or decision
- Draw attention of all Committee and Board members to the Council’s conflicts of interest policy
- Consider revisiting the discussion or decision, excluding the individual concerned
- Remove the individual from the Pension Committee or Pension Board if considered their omission was of such significance as to lead to a loss of confidence in the public office

**Materiality**

Is the non-disclosure likely to be of “material significance”? Consider;

- Has the individual used the situation to their advantage?
- Has the individual had their judgement swayed by the apparent conflict of interest?
- Would the removal of the individual from the discussions/decision have altered the eventual outcome?
- Would the non-disclosure in this situation lead to a loss of confidence in the public office?

**If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.**