

Draft Breaches Policy

London Borough of Harrow Pension Fund

March 2022

Background

1. The London Borough of Harrow Pension Fund (“the Fund”) has prepared this document in 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”).
2. This policy sets out the responsibility of elected members, officers of The London Borough of Harrow Council (“the Council”), and the London Borough of Harrow Pension Fund local 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”.
3. This policy will be reviewed and approved by the Pension Fund Committee at least annually. The Council will monitor all breaches and will ensure that adequate resources are allocated to managing and administering this process
4. The monitoring officer for the Council will be responsible for the management and execution of this breaches policy.
5. The Director of Finance and Assurance 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 local pension board at induction and on an ongoing basis.

Overview

6. 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.
7. 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.
8. 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.
9. The Council, as the administering authority (scheme manager) for the London Borough of Harrow Pension Fund, will maintain a log of all breaches of the law as applicable to the management and administration of the Fund.
10. Where a breach has occurred, it should be identified and logged as either an area of non-compliance under the LGPS Regulations, a breach under Pension Law as defined

within section 13 of the 2004 Pension Act, or of the Pension Regulator's Code of Practice 14.

11. The Council, officers and the local 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 local Pension Board it should be recorded, assessed and where necessary reported as soon as reasonably practicable.

What is a breach of the law?

12. 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?

13. 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

14. 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 local Pension Board;
- Scheme employers;
- Professional advisers (including the Fund actuary, benefit consultant, investment advisers, legal advisers); and
- Third party providers (where so employed).

15. This policy applies only to elected members and officers of the Council, and members of the local 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 local 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

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

17. 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?

18. 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.

19. 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?

20. 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.

21. 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”

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

23. 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 the Council's Legal team (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

24. 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 local 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.

25. 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;

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

27. 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.

28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. The Regulator's decision tree is shown in annex1.

Process for reporting breaches

34. All relevant officers and elected members of the Council, as well as all members of the local 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 the Director of Finance and Assurance;
 - 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, local Pension Board and where necessary the Regulator.

Responsibilities of the responsible officer

35. The Council's monitoring officer will be responsible for the management and execution of this breaches policy.
36. 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 reoccur;
 - report to the Pension Fund Committee and local 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.
37. 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 Director of Finance and Assurance, the Pension Fund Committee and local Pension Board.
38. 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 local 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?

39. All materially significant breaches must be reported to the Regulator through its online reporting facility called Exchange.

How are records of breaches maintained?

40. 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 description of any longer term implications and actions required to prevent similar types of breaches recurring in the future.

41. 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

42. 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 local 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.

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

Training

44. The Director of Finance and Assurance 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.

Pension Regulator's Decision Tree

