

## Report of the Section 151 Officer

Local Pension Board – 23 March 2017

### BREACHES POLICY

<b>Purpose:</b>	To enable Local Pension Board to note the attached report which was considered at the previous Pension Fund Committee.
<b>Consultation:</b>	Legal, Finance and Access to Services.
<b>Report Author:</b>	Jeffrey Dong
<b>Finance Officer:</b>	Mike Hawes
<b>Legal Officer:</b>	S Williams
<b>Access to Services Officer:</b>	N/A

#### FOR INFORMATION

## 1 Background

1.1 The attached report at Appendix A was considered by Pension Fund Committee at its previous meeting.

**Background Papers:** None

**Appendices:** Appendix A – Breaches Policy Report to Pension Fund Committee

Report of the Section 151 Officer  
Pension Fund Committee – 9 March 2017

**BREACHES POLICY**

<b>Purpose:</b>	The report requests the Committee to approve policy for reporting breaches
<b>Reason for Decision:</b>	Breaches of the law are required to be reported to the Pensions Regulator under 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”.
<b>Consultation:</b>	Legal, Finance and Access to Services.
<b>Recommendation(s):</b> 1)	It is recommended that: The Pension Fund Committee approve the policy
<b>Report Author:</b>	Lynne Miller – Principal Pensions Manager
<b>Finance Officer:</b>	Jeff Dong – Chief Treasury & Technical Officer
<b>Legal Officer:</b>	Stephanie Williams
<b>Access to Services Officer:</b>	N/A

**1.0 Introduction**

1.1 Breaches can occur in relation to a wide variety of the tasks normally associated with the administrative function of a pension scheme such as keeping records, internal controls, calculating benefits and making investment or investment-related decisions.

1.2 This document sets out the procedures to be adopted by the City and County of Swansea Pension Fund in respect of the Local Government Pension Scheme (LGPS) managed and administered by the City and County of Swansea, in relation to reporting breaches of the law to the Pensions Regulator (tPR).

**2. Legal Requirements**

2.1 Breaches of the law are required to be reported to the Pensions Regulator where there is reasonable cause to believe that:

- A legal duty which is relevant to the administration of the scheme has not been, or is not being, complied with

- The failure to comply is likely to be of material significance to the regulator in the exercise of any of its functions

2.2 Those subject to this reporting requirement for public service pension schemes include:

- The Scheme manager
- Members of the Pension Board
- Any person who is otherwise involved in the administration of the scheme
- Employers
- Professional advisers

2.3 Reference to regulations and guidance may need to be made when considering whether or not to report a possible breach. Some of the key legal provisions are included at Appendix A.

### **3. Recording of Breaches**

3.1 Breaches can occur in relation to a wide variety of the tasks normally associated with the administrative function of a pension scheme.

3.2 The City and County of Swansea Pension Fund will maintain a record of all breaches identified so that an assessment against historic breaches, whether reported or unreported can be made. An example of a breach register is included at Appendix B.

3.3 A report will be presented to the Pension Board and Pension Fund Committee on a quarterly basis setting out:

- all breaches, including those reported to The Pensions Regulator and those unreported, with the associated dates
- in relation to each breach, details of what action was taken and the result of any action (where not confidential)
- any future actions for the prevention of the breach in question being repeated

The report will highlight any new breaches which have arisen since the previous meeting.

### **4. Reporting Breaches procedure**

4.1 In order to ensure that individuals responsible are able to meet their legal obligations, and avoid placing any reliance on others to report, it is important to make sure appropriate procedures are established

4.2 An extract from TPR Code of Practice No. 14 Reporting Breaches of Law, paragraph 245, provides that the procedures established should include the following features:

- 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 consideration of the material significance of the breach by taking into account its cause, effect, the reaction to it, and its wider implications, including (where appropriate) dialogue with the scheme manager or pension board
- a clear process for referral to the appropriate level of seniority at which decisions can be made on whether to report to the regulator
- 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 the regulator (the record of past breaches may be relevant in deciding whether to report future breaches, for example it may reveal a systemic issue), and
- a process for identifying promptly any breaches that are so serious they must always be reported.

4.3 Establishing appropriate procedures will also assist in providing an early warning of possible malpractice and reduce risk.

4.4 Where a breach is suspected, further checks should be undertaken to confirm if a breach has occurred.

4.5 It will usually be appropriate to check relevant legal provision as well as with the, Scheme Manager or appropriate Senior Officers to confirm what has happened; however, there are some instances where it would not be appropriate to make further checks, for example, where carrying out further checks would alert those involved or hinder any investigation by the police and/or regulatory authority. In these cases the Regulator should be contacted without delay and the Pension Fund Committee/ Local Pension Board notified.

The City and County of Swansea has a designated Monitoring Officer to ensure it acts and operates within the law. They are considered to have appropriate experience to help investigate whether there is reasonable cause to believe a breach has occurred and to assist if reporting to The Pensions Regulator is appropriate.

It should be noted, however, that the involvement of any Senior Officer is to help clarify the potential reporter's thought process and to ensure this procedure is followed. The reporter remains responsible for the final decision as to whether a matter should be reported to The Pensions Regulator.

4.6 If breaches relate to late or incorrect payment of contributions or pension benefits, the matter should be highlighted to the Head of Finance or Chief

Treasury and Technical Officer at the earliest opportunity to ensure the matter is resolved as a matter of urgency.

4.7 Where a breach or possible breach is identified, a discussion with the Chair and other Committee and Local Pension Board members should be raised as soon as is reasonably practicable as delay in reporting may exacerbate or increase the risk of the breach.

## 5. **Determining whether the breach is likely to be of material significance**

5.1 The breach is likely to be of material significance to the regulator where it was caused by:

- Dishonesty
- Poor governance or administration
- Slow or inappropriate decision making practices
- Incomplete or inaccurate advice
- Acting (or failing to act) in deliberate contravention of the law

5.2 To decide whether a breach is likely to be of material significance the following should be considered, both separately and collectively:

- Cause of the breach (what made it happen);
- Effect of the breach (the consequence(s) of the breach);
- Reaction to the breach; and
- Wider implications of the breach

5.3 The Pension Regulator has designed a traffic light framework to help decide whether a breach is likely to be of material significance and should be reported:

**Red** – where the cause, effect, reaction and wider implications when considered together are **likely** to be of material significance

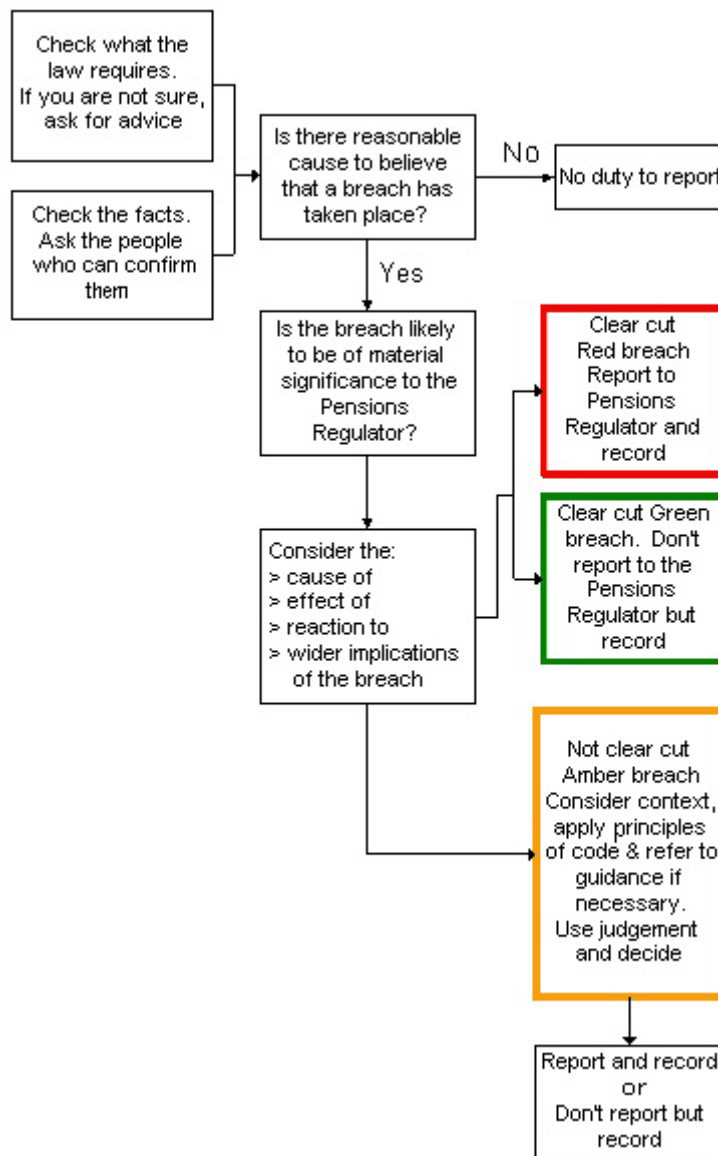
**Amber** – where the cause effect, reaction and wider implications of a breach when considered together **may** be of material significance

**Green** – where the cause, effect, reaction and wider implication of a breach when considered together are **not likely** to be of material significance

The traffic light framework should be used to help assess the material significance of each breach and to formally support and document the decision and additional guidance is provided at Appendix C.

5.4 A decision tree is provided below to show the process for deciding whether or not a breach has taken place and whether it is materially significant and therefore requires to be reported.

## Decision-tree: deciding whether to report



<http://www.thepensionsregulator.gov.uk/codes/code-related-report-breaches.aspx#decision>

- 5.5 When deciding if a breach is of material significance, other reported and unreported breaches should also be considered, although any changes to address previously identified problems should also be taken into account.
- 5.6 A breach will not normally be materially significant if it has arisen from an isolated incident, although persistent isolated breaches could be indicative of wider issues.
6. **Process for submitting a Report to the Regulator**
  - 6.1 Where a breach is considered material, a report must be made in writing to the Pensions Regulator as soon as reasonably practicable.

The time taken to reach the judgements on “reasonable cause to believe” and on “material significance” should be consistent with the speed implied by ‘as soon as reasonably practicable’. In particular, the time taken should reflect the seriousness of the suspected breach.

- 6.2 Reports should be in writing, either by post or electronically, and wherever possible reporters should use the standard format available on the Exchange On-line service on the Pensions Regulator’s website.

The report should be dated and include:

- Details of the scheme/scheme manager such as full name and address
- Details of the employer if relevant
- Description of the breach(es) with any relevant dates and whether the concern has been reported before
- The reason the breach is thought to be of material significance to the regulator
- Name, position and contact details of the reporter, and their role in relation to the scheme

Reporters may precede a written report with a telephone call, if appropriate.

## **7. Whistleblowing Protection and Confidentiality**

- 7.1 The Pension Act 2004 makes clear that the statutory 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. The statutory duty does not however override “legal privilege” which means that oral and written communications between a professional legal adviser and their client does not have to be disclosed.

- 7.2 The regulator will take all reasonable steps to maintain confidentiality and protect the identity of the reporter, and will not disclose the information except where lawfully required to do so.

- 7.3 The Employment Rights Act 1996 provides protection for employees making a whistleblowing disclosure to the regulator.

## **8.0 General Issues**

- 8.1 There are no other variations proposed.

## **9.0 Equality and Engagement Implications**

None

## **10.0 Financial Implications**

- 10.1 Additional payments maybe be incurred by the Pension Fund

## **11.0 Legal Implications**

11.1 The legal implications are outlined in Code of Practice no.14.

**Background Papers:** None

### **Appendices:**

Appendix A – Key regulations and guidance when considering whether or not to report a possible breach

Appendix B - Example of Breach Register

Appendix C – Guidance to traffic light framework



### **Key regulations and guidance when considering whether or not to report a possible breach**

Section 70(1) and 70(2) of the Pensions Act 2004:  
[www.legislation.gov.uk/ukpga/2004/35/contents](http://www.legislation.gov.uk/ukpga/2004/35/contents)

Employment Rights Act 1996:  
[www.legislation.gov.uk/ukpga/1996/18/contents](http://www.legislation.gov.uk/ukpga/1996/18/contents)

Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (Disclosure Regulations):  
[www.legislation.gov.uk/uksi/2013/2734/contents/made](http://www.legislation.gov.uk/uksi/2013/2734/contents/made)

Public Service Pension Schemes Act 2013:  
[www.legislation.gov.uk/ukpga/2013/25/contents](http://www.legislation.gov.uk/ukpga/2013/25/contents)

Local Government Pension Scheme Regulations (various):  
<http://www.lgpsregs.org/timelineregs/Default.html> (pre 2014 schemes)  
<http://www.lgpsregs.org/index.php/regs-legislation> (2014 scheme)

The Pensions Regulator's Code of Practice:  
<http://www.thepensionsregulator.gov.uk/codes/code-governance-administration-publicservice-pension-schemes.aspx>

## Example of Breach Register

Date	Category (e.g. administration, contributions, funding, investment, criminal activity)	Description and cause of breach	Possible effect of breach and wider implications	Reaction of relevant parties to breach	Reported / Not reported (with justification if not reported and dates)	Outcome of report and/or investigations
	Administration	A pension overpayment is discovered. Figures transposed	The administering authority has failed to pay the right amounts to the right person at the right time	Isolated incident - the pensioner could not have known that (s)he was being overpaid	Not reported - The breach is not material to The Pensions Regulator and need not be reported but it will be recorded.	Satisfied that it is an isolated incident. Satisfactory procedures and training in place
	Contributions	Employer doesn't pay contributions within required timescale and AVCs to AVC provider	Loss of investment returns	Previous breaches have occurred with no sign of employer improving	Material significance – report to tPR	Meet with employer to discuss matter to consider a way forward

\*New breaches since the previous meeting should be highlighted

### Guidance to traffic light framework

Certain people involved with the governance and administration of a public service pension scheme must report certain breaches of the law to The Pensions Regulator. These people include scheme managers, members of pension boards, employers, professional advisers and anyone involved in administration of the scheme or advising managers. You should use the traffic light framework when you decide whether to report to us. This is defined as follows:

- **Red** breaches must be reported.

Example: Several members' benefits have been calculated incorrectly. The errors have not been recognised and no action has been taken to identify and tackle the cause or to correct the errors.

- **Amber** breaches are less clear cut: you should use your judgement to decide whether it needs to be reported.

Example: Several members' benefits have been calculated incorrectly. The errors have been corrected, with no financial detriment to the members. However the breach was caused by a system error which may have wider implications for other public service schemes using the same system.

- **Green** breaches do not need to be reported.

Example: A member's benefits have been calculated incorrectly. This was an isolated incident, which has been promptly identified and corrected, with no financial detriment to the member. Procedures have been put in place to mitigate against this happening again.

All breaches should be recorded by the scheme even if the decision is not to report.

When using the traffic light framework you should consider the content of the red, amber and green sections for each of the cause, effect, reaction and wider implications of the breach, before you consider the four together.

As each breach of law will have a unique set of circumstances, there may be elements which apply from one or more of the red, amber and green sections. You should use your judgement to determine which overall reporting traffic light the breach falls into. By carrying out this thought process, you can obtain a greater understanding of whether or not a breach of the law is likely to be of material significance and needs to be reported.

You should not take these examples as a substitute for using your own judgement based on the principles set out in the code of practice as supported by relevant pensions' legislation. They are not exhaustive and are illustrative.