

# Breaches of the Law Policy Guidelines for Wiltshire Council Officers, Councillors and Members of the Wiltshire Pension Fund Local Pension Board

## Status of this document

This document contains the Committee's policy guidelines on identifying, managing and where necessary reporting breaches of the law in relation to the management and administration of the Fund. The guidelines apply to Councillors, Council officers and Board members. The guidelines do not cover the responsibility of any other person required by law to report such breaches.

Please note that Board members must comply with the Reporting Policy set out at paragraphs 89 to 98 of the Terms of Reference. These guidelines complement the Reporting Policy in respect of Board members.

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

The Council's Section 151 Officer will be responsible for the management and execution of these guidelines.

## Definitions used in this document

<b>"Board"</b>	The Wiltshire Pension Fund Local Pension Board
<b>"Code"</b>	The Pensions Regulator's Code of Practice no. 14: Governance and administration of public service pension schemes (as amended from time to time)
<b>"Committee"</b>	The Wiltshire Pension Fund Committee
<b>"Council"</b>	Wiltshire Council
<b>"Councillor"</b>	An elected or co-opted member of the Council
<b>"Fund"</b>	The Wiltshire Pension Fund within the LGPS
<b>"Regulations"</b>	The Local Government Pension Scheme Regulations 2013 (as amended from time to time)
<b>"Reporting Policy"</b>	The Council's policy on reporting matters including breaches of the law set out in the Terms of Reference (as amended from time to time)

## Objectives of this document

1. To set out the principles and procedures that all Councillors, Council officers and Board members are expected to follow in order to comply with the Terms of Reference, relevant legislation, codes of practice and government guidance.
2. To ensure that all Councillors, Council officers and Board members are aware of their duty to report relevant breaches of the law to the Pensions Regulator.
3. To set out procedures for identifying, assessing, recording and reporting relevant breaches within appropriate timescales (including processes for clarifying the facts and applicable law where needed, referral to Council

staff of appropriate seniority, dealing with difficult cases and identifying promptly any breaches that are so serious that they must always be reported to the Pensions Regulator).

4. To ensure that a breaches log is kept and reviewed.

### Relevant Legislation

Section 70 of the Pensions Act 2004 sets out the legal duty to report breaches of the law:

#### 70. Duty to report breaches of the law

- (1) Subsection (2) imposes a reporting requirement on the following persons—
  - (a) a trustee or manager of an occupational or personal pension scheme;
  - [(aa) a member of the pension board of a public service pension scheme;]
  - (b) a person who is otherwise involved in the administration of [an occupational or personal pension scheme];
  - (c) the employer in relation to an occupational pension scheme;
  - (d) a professional adviser in relation to such a scheme;
  - (e) a person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme.
- (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 by 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 any of its functions,
 he must give a written report of the matter to the Regulator as soon as reasonably practicable.
- (3) No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a written report under this section. [*i.e. Duty to report overrides other obligations like duty of confidentiality, except where legal professional privilege applies*]  
 This is subject to section 311 (protected items). [*Deals with exemption for legal professional privilege*]
- (4) Section 10 of the Pensions Act 1995 (c 26) (civil penalties) applies to any person who, without reasonable excuse, fails to comply with an obligation imposed on him by this section.

### The Pensions Regulator's Code: Reporting breaches of the Law

The Pensions Regulator has responsibility for regulatory oversight of the governance and administration of public service pension schemes, including the LGPS. The Pensions Regulator has published guidance in the Code. Paragraphs 241 to 275 of the Code deal with reporting breaches of the law.

#### Overview

The identification, management and reporting of breaches is important. It is a requirement of the Pensions Act 2004 and the Code; failure to report a breach without “reasonable excuse” 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, the process provides an opportunity to learn from mistakes and review and improve processes in the areas where the breach occurred.

All Councillors, Council officers and Board members 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 Head of Pensions will maintain a log of all breaches of the law as applicable to the management and administration of the Fund.

The Council, as Scheme Manager, and the 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 or 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 LGPS, including failure:

- to do anything required under the 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;
- to comply with policies and procedures (e.g. the Fund’s statement of investment principles, funding strategy, discretionary policies, etc.);
- 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 or non-compliance with the Code.

### **Responsibilities in relation to breaches**

Responsibility to report identified breaches of the law falls on the following reporters:

- Councillors and Council officers (on behalf of the Council as Scheme Manager);
- Board members;
- Scheme employers;
- Professional advisers (including the Fund actuary, investment advisers, legal advisers); and
- Third party providers (where so employed).

These guidelines only apply to Councillors, Council officers and Board members. It is for the other reporters to ensure their own adequate procedures and policies are put in place in order to identify, assess and where necessary report breaches. Both the Council and the Board will take all necessary steps to consider the breach and report to the Pensions 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 in accordance with the Code.

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 Pensions Regulator?

It is important to understand that not every breach that is identified needs to be reported to the Pensions 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 Pensions 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 Pensions Regulator?**

The Code requires that a breach should be notified to the Pensions 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 Pensions Regulator. The time taken should reflect the seriousness of the breach. In any event, where a breach is considered to be of material significance it must be reported to the Pensions 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 Pensions Regulator is required to intervene as a matter of urgency (for example, serious fraud) the matter should be brought to the attention of the Pensions Regulator immediately (e.g. by calling them direct). A formal report should then be submitted to the Pensions Regulator, marked as "urgent" in order to draw the Pensions Regulator's attention to it.

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

It is important that the Council and the 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 Councillors, Council officers and Board members when acting on any suspicion of a breach having occurred. Where necessary this will involve taking legal advice from the Head of Legal Services (who may recommend specialist external legal advice if necessary) as well as other advisers (e.g. auditors or the Fund actuary or investment advisers).

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

The Pensions 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 following aspects are considered in all cases:

- cause – e.g. dishonesty, poor governance, incomplete or inaccurate information, acting or failing to act in contravention of the law;
- effect – e.g. 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 Pensions 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 or Board will need to decide whether to informally alert the Pensions

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 or Board must report all such breaches to the Pensions Regulator in all cases;

Where a Councillor, Council officer or Board member is satisfied that a breach has actually occurred and it is significant, he or she must as soon as reasonably practicable report it to the Head of Pensions and the Chairman of the Board.

If it is unclear as to whether the breach or likely breach is significant, in the first instance full details should always be reported to the Board (through its Chairman) to determine the appropriate course of action. The Board will then report full details to the Committee as soon as reasonably practicable and otherwise in accordance with the Reporting Policy, including escalation under paragraph 95 of the Terms of Reference where necessary.

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

The Committee will use the Pensions Regulator's decision tree as a means of identifying whether any breach is to be considered as materially significant and so reported to the Section 151 Officer for reporting to the Pensions 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 Pensions Regulator immediately.

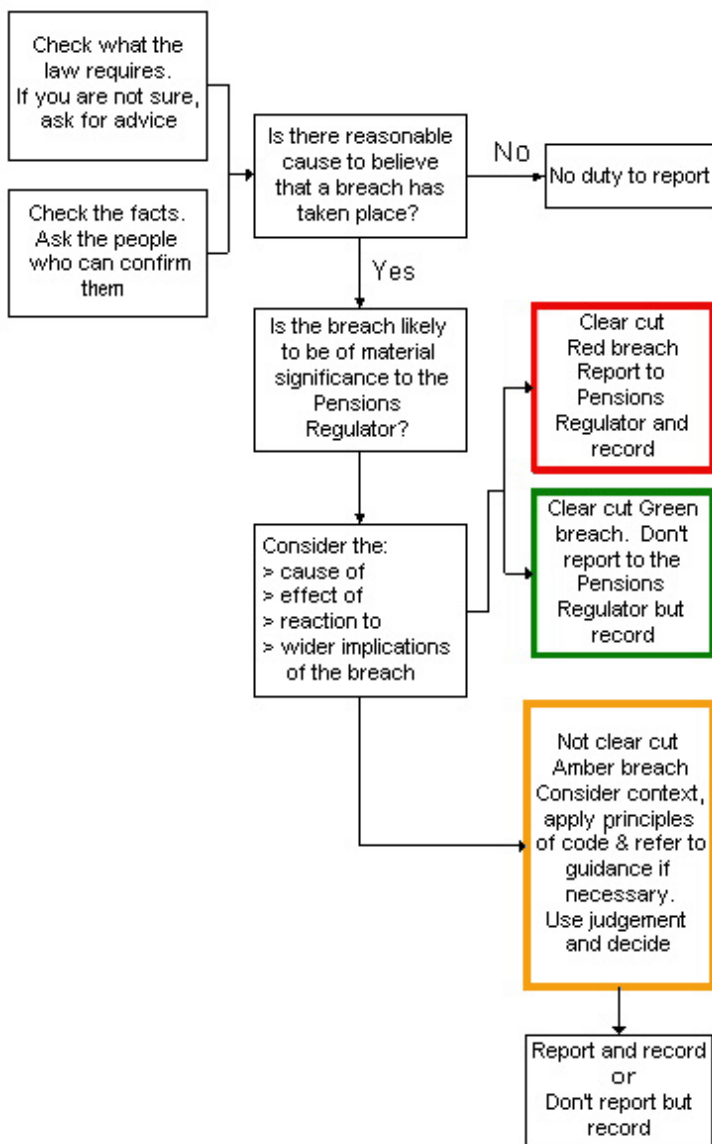
In order to determine whether failure to pay over employee contributions is materially significant or not the Committee will seek from the employer:

- 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 Pensions Regulator.

As soon as a breach or likely breach has been identified to the Committee, regardless of whether it needs to be reported to the Pensions Regulator, the relevant manager, in consultation with the Head of Pensions, 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 Councillors, Council officers and Board members have a responsibility to:

- identify and assess the severity of any breach or likely breach;
- report all breaches or likely breaches to the Head of Pensions and Chairman of the Board, and in the case of Board members, escalate to the Section 151 officer where required under the Reporting Policy;
- 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 re-occurring; and
- co-operate with, and assist in, the reporting of breaches and likely breaches to the Board, Committee, Section 151 Officer and where necessary the Pensions Regulator.

### **Responsibilities of the responsible officer**

The Council will appoint one of its senior officers to be responsible for the management and execution of these guidelines. That officer will be the Section 151 Officer.

The Section 151 Officer will be responsible for ensuring that breaches and likely breaches are recorded and reported as follows:

- ensure that all identified breaches and likely breaches are recorded by the Head of Pensions in the Council's breaches log;
- ensure investigation of 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 re-occur;
- ensure reporting to the Committee and Board of:
  - all materially significant breaches or likely breaches that will require reporting to the Pensions 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 Pensions Regulator as soon as practicable but not later than one month after becoming aware of the breach.

The Section 151 Officer will make the final determination of whether any breach or likely breach is materially significant, having regard to the guidance set out in the Code and after consultation with the Head of Legal Services and where considered appropriate the Committee and 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 Pensions Regulator. Where uncertainty exists as to the materiality of any identified breach the Section 151 Officer may informally notify the Pensions Regulator of the issue and the steps being taken to resolve the issue.

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

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

The Section 151 Officer will report all material breaches to the Pensions Regulator via Exchange.

### **How are records of breaches maintained?**

All breaches and likely breaches identified are to be reported to the Head of Pensions as soon as they are identified. The Head of Pensions 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 re-occurring in the future.

The Section 151 Officer will be responsible for ensuring the effective management and rectification of any breach identified, including submission of any report to the Pensions Regulator. Any documentation supporting the breach will be maintained by the Section 151 Officer.

### **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 or a member of the Board. The duty to report overrides any other duties a reporter may have, such as confidentiality. Any such duty is not breached by reporting to the Pensions Regulator. Given the statutory duty that exists, in exercising these guidelines 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 Pensions Regulator. The provisions of the Council's whistleblowing policy apply.

The duty to report, however, does not override 'legal professional privilege', so oral and written communications between the Council, Committee or Board and a professional legal adviser must not be disclosed.

### **Training**

The Head of Pensions will ensure that all Councillors, Council officers and Board members receive appropriate training on reporting breaches of the law and these guidelines at the commencement of their office, employment or appointment to the Board as appropriate and on an ongoing basis.