

## **APPENDIX A**

# **Durham County Council Pension Fund**

## **Reporting Breaches Procedure**

### **1. Introduction**

- 1.1 This document sets out the procedure to be followed by certain persons involved with the Durham County Council Pension Fund ('the Pension Fund'), the Local Government Pension Scheme managed and administered by Durham County Council ('the Council') in relation to reporting breaches of the law to the Pensions Regulator.
- 1.2 Breaches can occur in relation to a range of tasks associated with the administrative function of a pension scheme such as keeping records, internal controls, calculating benefits and making investment or investment-related decisions.
- 1.3 This procedure applies to:
  - The scheme manager (the Council in its role as administering authority to the Pension Fund)
  - all members of the Council's Local Pension Board;
  - all members of the Council's Pension Fund Committee
  - all Council officers involved in the administration or management of the Pension Fund;
  - any professional advisers including auditors, actuaries, legal advisers and fund managers;
  - officers of employers participating Pension Fund who are responsible for pension matters; and
  - any person otherwise involved in advising the Council in relation to the Pension Fund.

### **2. Requirements**

- 2.1 This section clarifies the full extent of the legal requirements and to whom they apply.

#### **2.2 Pensions Act 2004**

Section 70 of the Pensions Act 2004 (the Act) imposes a requirement on the following persons:

- a trustee or manager of an occupational or personal pension scheme;
- a person who is otherwise involved in the administration of such a scheme;
- the employer in relation to an occupational pension scheme;
- a professional adviser in relation to such a scheme;

- a person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme

to report a matter to The Pensions Regulator as soon as reasonably practicable where that person has reason to believe that:

- a legal duty relating to the administration of the scheme has not been or is not being complied with, and
- the failure to comply is likely to be of material significance to The Pensions Regulator.

The Act states that a person can be subject to a civil penalty if he or she fails to comply with this requirement without a reasonable excuse. The duty to report breaches under the Act overrides any other duties the individuals listed above may have. However the duty to report does not override 'legal privilege'. This means that, generally, communications between a professional legal adviser and their client, or a person representing their client, in connection with legal advice being given to the client, do not have to be disclosed.

### **2.3 The Pension Regulator's Code of Practice**

Practical guidance in relation to this legal requirement is included in The Pension Regulator's Code of Practice including in the following areas:

- implementing adequate procedures.
- judging whether a breach must be reported.
- submitting a report to The Pensions Regulator.
- whistleblowing protection and confidentiality.

## **3 Reporting Breaches Procedure**

The following procedure details how individuals responsible for reporting and whistleblowing can identify, assess and report (or record if not reported) a breach of law relating to the Pension Fund. It aims to ensure individuals responsible are able to meet their legal obligations, avoid placing any reliance on others to report. The procedure will also assist in providing an early warning of possible malpractice and reduce risk.

### **3.1 Clarification of the law**

Individuals may need to refer to regulations and guidance when considering whether or not to report a possible breach. Some of the key provisions are shown below:

- Section 70(1) and 70(2) of the Pensions Act 2004:  
<http://www.legislation.gov.uk/ukpga/2004/35/section/70>
- 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/ksi/2013/2734/contents/made](http://www.legislation.gov.uk/ksi/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/timelineregulations/Default.html> (pre 2014 schemes)  
<http://www.lgpsregs.org/index.php/regulations-legislation> (2014 scheme)
- The Pensions Regulator's Code of Practice:  
<http://www.thepensionsregulator.gov.uk/codes/code-governance-administration-public-service-pension-schemes.aspx>

In particular, individuals should refer to the section on 'Reporting breaches of the law', and for information about reporting late payments of employee or employer contributions, the section of the code on 'Maintaining contributions'.

Further guidance and assistance can be provided by the Council's Pensions Manager provided that requesting this assistance will not result in alerting those responsible for any serious offence (where the breach is in relation to such an offence).

### **3.2 Clarification when a breach is suspected**

Individuals need to have reasonable cause to believe that a breach has occurred, not just a suspicion. Where a breach is suspected the individual should carry out further checks to confirm the breach has occurred. Where the individual does not know the facts or events, it will usually be appropriate to check with the Council's Corporate Director of Resources or Pensions Manager, a member of the Pension Fund Committee or Local Pension Board or others who are able to explain what has happened. However there are some instances where it would not be appropriate to make further checks, for example, if the individual has become aware of theft, suspected fraud or another serious offence and they are also aware that by making further checks there is a risk of either alerting those involved or hampering the actions of the police or a regulatory authority. In these cases The Pensions Regulator should be contacted without delay.

If the suspected breach relates to potential fraud within an organisation, individuals should also be aware of any procedures relating to fraud that they should follow within their organisation and consider whether the breach should also be reported under those procedures. If the suspected breach relates to a possible data breach within an organisation, individuals should consider whether they also need to follow the data breach policy within their organisation.

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

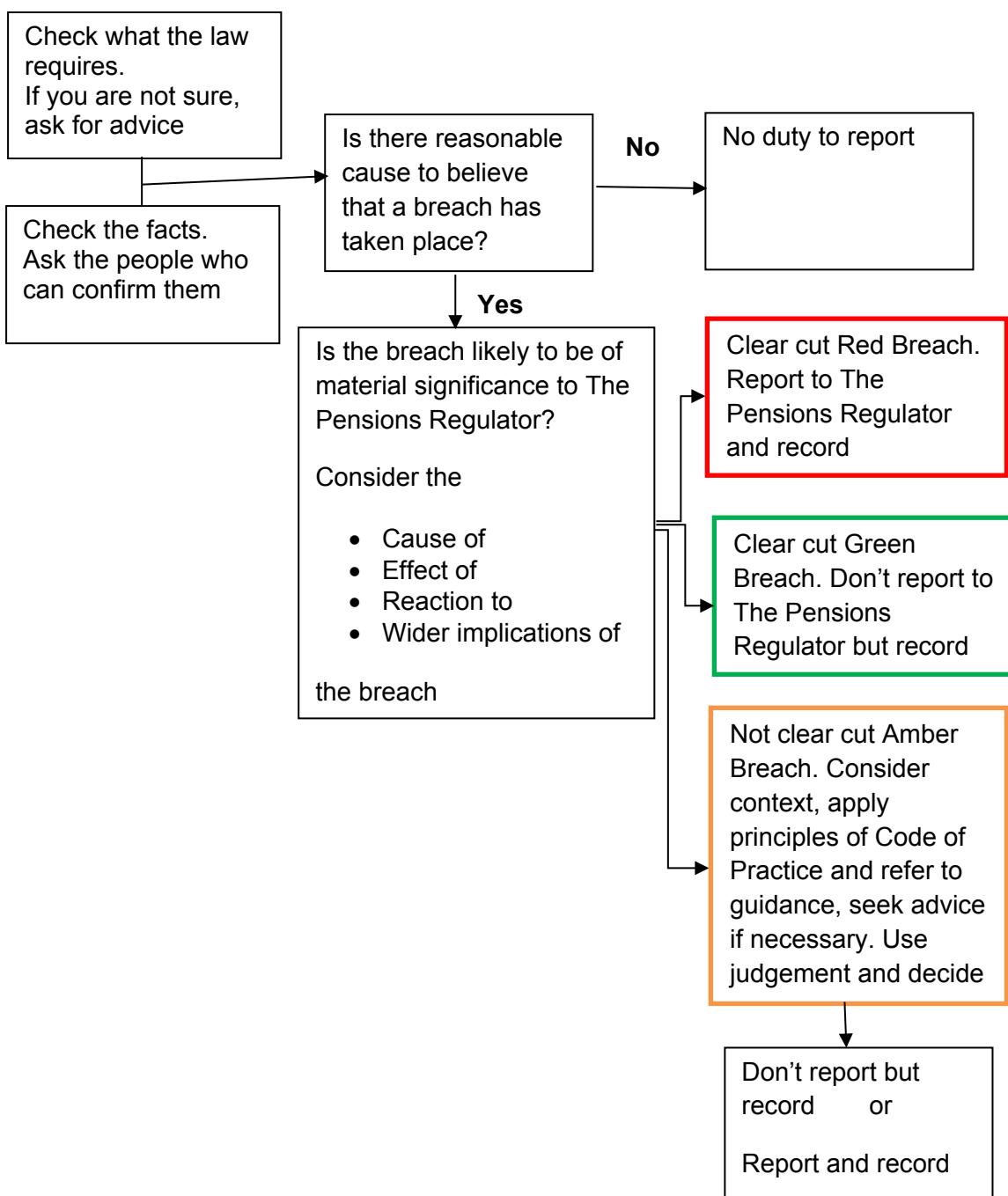
To decide whether a breach is likely to be of material significance an individual should consider the following, both separately and collectively:

- 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.

Further details on the above four considerations are provided in Appendix A to this procedure. Individuals should use the traffic light framework described in Appendix B to help assess the material significance of each breach and to formally support and document their decision.

- 3.4 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.



### **3.5 Referral to a level of seniority for a decision to be made on whether to report**

The Council's Pensions Manager is designated to ensure this procedure is appropriately followed as they have appropriate experience to help investigate whether there is reasonable cause to believe a breach has occurred, to check the law and facts of the case, to maintain records of all breaches and to assist in any reporting to The Pensions Regulator, where appropriate. If breaches relate to late or incorrect payment of contributions or pension benefits, the matter should be highlighted to the Pensions Manager at the earliest opportunity to ensure the matter is resolved as a matter of urgency. Individuals must bear in mind, however, that the involvement of the Pensions Manager 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.

The matter should not be referred to any officer if doing so will alert any person responsible for a possible serious offence to the investigation (as highlighted in section 2). If that is the case, the individual should report the matter to The Pensions Regulator setting out the reasons for reporting, including any uncertainty – a telephone call to the Regulator before the submission may be appropriate, particularly in more serious breaches.

### **3.6 Dealing with complex cases**

The Council's Corporate Director of Resources or Monitoring Officer may be able to provide guidance on particularly complex cases. Information may also be available from national resources such as the Scheme Advisory Board or the LGPC Secretariat (part of the LG Group - <http://www.lgpsregs.org/>). If timescales allow, legal advice or other professional advice can be sought and the case can be discussed at the next Resources Management Team, Local Pension Board or Pension Fund Committee meeting.

### **3.7 Timescales for reporting**

The Pensions Act and Pension Regulator's Code of Practice require that if an individual decides to report a breach, the report must be made in writing as soon as reasonably practicable. Individuals should not rely on waiting for others to report, nor is it necessary for a reporter to gather all the evidence which The Pensions Regulator may require before taking action. A delay in reporting may exacerbate or increase the risk of the breach. 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.

### **3.8 Early identification of very serious breaches**

In cases of immediate risk to the scheme, for instance, where there is any indication of dishonesty, The Pensions Regulator does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies. They should only make such immediate checks as are necessary. The more serious the potential breach and its consequences, the more urgently reporters should make these necessary checks. In cases of potential dishonesty the reporter should avoid, where possible, checks which might alert those implicated. In serious cases, reporters should use the quickest means possible to alert The Pensions Regulator to the breach.

### **3.9 Recording all breaches even if they are not reported**

The record of past breaches may be relevant in deciding whether to report a breach (for example it may reveal a systemic issue). The Council will maintain a record of all breaches identified by individuals and reporters should therefore provide copies of reports to the Pensions Manager. Records of unreported breaches should also be provided as soon as reasonably practicable and certainly no later than within 20 working days of the decision made not to report. These will be recorded alongside all reported breaches. The record of all breaches (reported or otherwise) reported to the next Local Pension Board and Pension Fund Committee meeting.

### **3.10 Reporting a breach**

Reports must be submitted in writing via The Pensions Regulator's online system at [www.tpr.gov.uk/exchange](http://www.tpr.gov.uk/exchange), or by post (The Information Team, The Pensions Regulator, Napier House, Trafalgar Place, Brighton, BN1 4DW) or email [wb@tpr.gov.uk](mailto:wb@tpr.gov.uk) and should be marked urgent if appropriate. If necessary, a written report can be preceded by a telephone call. Reporters should ensure they receive an acknowledgement for any report they send to The Pensions Regulator. The Pensions Regulator will acknowledge receipt of all reports within five working days and may contact reporters to request further information. Reporters will not usually be informed of any actions taken by The Pensions Regulator due to restrictions on the disclosure of information.

As a minimum, individuals reporting should provide:

- full scheme name (Durham County Council Pension Fund);
- description of breach(es);
- any relevant dates;
- name, position and contact details;
- role in connection to the scheme; and
- employer name or name of scheme manager (the scheme manager is Durham County Council)

If possible, reporters should also indicate:

- the reason why the breach is thought to be of material significance to The Pensions Regulator;
- scheme address (Durham County Council Pension Fund, County Hall, Durham, DH1 5UE)
- scheme manager contact details (postal address as above, telephone 03000 269798, email: [pensions@durham.gov.uk](mailto:pensions@durham.gov.uk) )
- pension scheme registry number (10079166) and
- whether the breach has been reported before.

The reporter should provide further information or reports of further breaches if this may help The Pensions Regulator in the exercise of its functions. The Pensions Regulator may make contact to request further information.

### **3.11 Confidentiality**

If requested, The Pensions Regulator will do its best to protect a reporter's identity and will not disclose information except where it is lawfully required to do so. If an individual's employer decides not to report and the individual employed by them disagrees with this and decides to report a breach themselves, they may have protection under the Employment Rights Act 1996 if they make an individual report in good faith.

### **3.12 Reporting to the Pension Fund Committee and Local Pension Board**

A report will be presented to the Pension Fund Committee and Local Pension Board 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; and
- highlighting new breaches which have arisen in the last year/since the previous meeting.

This information will also be provided upon request by any other individual or organisation (excluding sensitive/confidential cases or ongoing cases where discussion may influence the proceedings). An example of the information to be included in the quarterly reports is provided in Appendix C to this procedure.

### **3.13 Review**

This Reporting Breaches Procedure will be kept under review and updated as considered appropriate. It may be changed as a result of legal or regulatory changes, evolving best practice and ongoing review of the effectiveness of the procedure.

## **Appendix A**

### **1. Determining whether a breach is likely to be of material significance**

1.1 To decide whether a breach is likely to be of material significance individuals should consider the following elements, 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.

### **2. The cause of the breach**

2.1 Examples of causes which are likely to be of concern to The Pensions Regulator are provided below:

- acting, or failing to act, in deliberate contravention of the law;
- dishonesty;
- incomplete or inaccurate advice;
- poor administration, i.e. failure to implement adequate administration procedures;
- poor governance; or
- slow or inappropriate decision-making practices.

2.2 When deciding whether a cause is likely to be of material significance individuals should also consider:

- whether the breach has been caused by an isolated incident such as a power outage, fire, flood or a genuine one-off mistake.
- whether there have been any other breaches (reported to The Pensions Regulator or not) which when taken together may become materially significant.

### **3. The effect of the breach**

3.1 Examples of the possible effects (with possible causes) of breaches which are considered likely to be of material significance to The Pensions Regulator in the context of the LGPS are given below:

- Pension Fund Committee or Local Pension Board members not having enough knowledge and understanding, resulting in pension boards not fulfilling their roles, the scheme not being properly governed and administered and/or scheme managers breaching other legal requirements.
- Conflicts of interest of Pension Fund Committee or Local Pension Board members, resulting in them being prejudiced in the way in which they

- carry out their role and/or the ineffective governance and administration of the scheme and/or scheme managers breaching legal requirements.
- Poor internal controls, leading to schemes not being run in accordance with their scheme regulations and other legal requirements, risks not being properly identified and managed and/or the right money not being paid to or by the scheme at the right time.
- Inaccurate or incomplete information about benefits and scheme information provided to members, resulting in members not being able to effectively plan or make decisions about their retirement.
- Poor member records held, resulting in member benefits being calculated incorrectly and/or not being paid to the right person at the right time.
- Misappropriation of assets, resulting in scheme assets not being safeguarded.
- Other breaches which result in the scheme being poorly governed, managed or administered.

#### **4. The reaction to the breach**

- 4.1 A breach is likely to be of concern and material significance to The Pensions Regulator where a breach has been identified and those involved:
- do not take prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of recurrence;
  - are not pursuing corrective action to a proper conclusion; or
  - fail to notify affected scheme members where it would have been appropriate to do so.

#### **5. The wider implications of the breach**

- 5.1 Reporters should also consider the wider implications when deciding whether a breach must be reported. The breach is likely to be of material significance to The Pensions Regulator where the fact that a breach has occurred makes it more likely that further breaches will occur within the Fund or, if due to maladministration by a third party, further breaches will occur in other pension schemes.

#### **6. Examples of breaches**

##### Example 1

An employer is late in paying over employee and employer contributions, and so late that the employer is in breach of the statutory period for making such payments. The employer is contacted by officers from the administering authority, and immediately makes the payment that is overdue, as well as improving its procedures so that in future contributions are paid over on time. In this instance there has been a breach but members have not been adversely affected and the employer has put its house in order regarding future payments.

The breach is therefore not material to The Pensions Regulator and need not be reported but it will be recorded.

Example 2

An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. The employer is also late in paying Additional Voluntary Contributions (AVCs) to the AVC provider (Prudential or Standard Life). The employer is contacted by officers from the administering authority, and it eventually pays the moneys that are overdue, including AVCs. This has happened before, with there being no evidence that the employer is putting its house in order. In this instance there has been a breach that is relevant to The Pensions Regulator, in part because of the employer's repeated failures, and also because those members paying AVCs will typically be adversely affected by the delay in the investing of their AVCs.

The breach is therefore material to The Pensions Regulator and needs to be reported and recorded.

Example 3

An employer is late in submitting its statutory year end return of pay and contributions in respect of each of its active members and as such it is in breach. Despite repeated reminders the employer still does not supply its year end return. Because the administering authority does not have the year end data it is unable to supply, by 31 August, annual benefit statements to the employer's members. In this instance there has been a breach which is relevant to The Pensions Regulator, in part because of the employer's failures, in part because of the enforced breach by the administering authority, and also because members are being denied their annual benefits statements.

The breach is therefore material to The Pensions Regulator and needs to be reported and recorded.

Example 4

A member of the Pension Fund Committee owns a property. A report is made to the Pension Fund Committee about a possible investment by the Fund, in the same area in which the member's property is situated. The member supports the investment but does not declare an interest and is later found to have materially benefitted when the Fund's investment proceeds. In this case a material breach has arisen, not because of the conflict of interest, but rather because the conflict was not reported.

The breach is therefore material to The Pensions Regulator and needs to be reported and recorded.

Example 5

A pension overpayment is discovered and thus the administering authority has failed to pay the right amounts to the right person at the right time. A

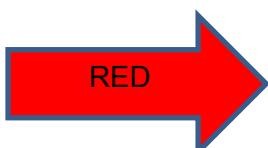
breach has therefore occurred. The overpayment is however for a modest amount and the pensioner could not have known that (s)he was being overpaid. The overpayment is therefore waived. In this case there is no need to report the breach as it is not material.

The breach is therefore not material to The Pensions Regulator and need not be reported but it will be recorded.

## Appendix B

### Traffic light framework for deciding whether or not to report

It is recommended that those responsible for reporting use the traffic light framework when deciding whether to report to The Pensions Regulator. This is illustrated below:



Where the cause, effect, reaction and wider implications of a breach, when considered together, are likely to be of material significance.

These must be reported to The Pensions Regulator.

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.



Where the cause, effect, reaction and wider implications of a breach, when considered together, may be of material significance. They might consist of several failures of administration that, although not significant in themselves, have a cumulative significance because steps have not been taken to put things right. You will need to exercise your own judgement to determine whether the breach is likely to be of material significance and should 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.



Where the cause, effect, reaction and wider implications of a breach, when considered together, are not likely to be of material significance. These should be recorded but 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 even if the decision is not to report.

When using the traffic light framework individuals 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. Some useful examples of this is framework is provided by The Pensions Regulator at the following link:

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

## Appendix C

## **Example Record of Breaches**