

REPORTING BREACHES OF THE LAW



The Pensions Regulator

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1 INTRODUCTION

The Local Government Pension Scheme (LGPS) is a public service pension scheme which is highly regulated not only by scheme regulation but also by wider-reaching legislation.

In Berkshire the LGPS is governed by the Royal Borough of Windsor & Maidenhead as the administering authority (scheme manager) to the Royal County of Berkshire Pension Fund. The general powers and duties of the administering authority lie with the Pension Fund Panel as set out in Part 6 Section D of the Council's Constitution. The Pension Fund Panel is assisted by the Pension Fund Advisory Panel and also the Pension Board established in accordance with the Public Service Pensions Act 2013 and Regulation 106 of the Local Government Pension Scheme Regulations 2013 (as amended).

A Local Government Pension Fund has a different legal status when compared to trust based schemes in the private sector and so the Royal County of Berkshire Pension Fund does not have, in the strictest meaning, trustees. However, those making decisions on behalf of the administering authority are required, in many ways, to act as if they were trustees in terms of their duty of care.

Following a review of public service pension provision by Lord Hutton of Furness in 2011, a number of recommendations were made to the Government on how to ensure that public service pension schemes remain sustainable and affordable in the future. These recommendations were carried forward into the Public Service Pensions Act 2013 resulting in changes to the LGPS regulations with effect from 1 April 2014.



The result of all of this is that the LGPS, and public service pension schemes in general, are now under greater scrutiny than ever before. The Public Service Pensions Act 2013 introduced the framework for the governance and administration of public service pension schemes and provided an extended regulatory oversight to the Pensions Regulator.

2 THE REQUIREMENT TO REPORT BREACHES OF THE LAW

Under Section 70 of the Pensions Act 2004 (see below), certain people are required to report breaches of the law to the Pensions Regulator where they consider that they have a 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 and that failure to comply is likely to be of material significance to the Pensions Regulator in the exercise of its functions.

Not all breaches need to be reported to the Pensions Regulator, only those where there is likely to be a material significance, but all breaches should be recorded and retained for future reference.

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.

3 WHO IS REQUIRED TO REPORT BREACHES OF THE LAW?

Those people who are subject to the reporting requirement ('reporters') for public service pension schemes is set out in Section 70 of the Pensions Act 2004 but in practical terms it is necessary for a senior officer of the administering authority to have responsibility for the management and execution of these procedures. Whilst any suspected breach should, where appropriate, be reported to a Senior Officer of the Pension Fund for escalation, the designated officer with overall responsibility for reporting breaches to the Pensions Regulator is the s.151 Officer for the administering authority or where the s.151 Officer is unavailable (or in the unlikely event of being implicated in the breach) the Monitoring Officer for the administering authority.

All reporters need to take due consideration as to who could be implicated in the perceived breach of the law when reporting their findings and ensure that the perceived breach is not worsened by making any individual or individuals who may be implicated in the breach of the law aware that a report is to be made.

4 WHAT MUST BE REPORTED?

Those responsible for reporting breaches of the law to the Pensions Regulator will need to consider when they have reasonable cause to believe there has been a breach that is likely to be of material significance to the Pensions Regulator.

Reasonable Cause

Having reasonable cause means more than merely having a suspicion that cannot be substantiated. For example, a suspicion that scheme assets may have been misappropriated may in fact be a direct result of something out of the Fund manager's control such as drop in the stock market leading to investment returns being lower than anticipated.

Any reporter must ensure that they know the full facts of the suspected breach and may need to check with members of the Pension Board, the Scheme Manager or anyone else they consider to be in a position to confirm the events leading up to the suspected breach of the law. However, reporters need to take care as to who they discuss their suspicions with where they have a cause to believe that theft, fraud or other serious offences may have occurred as they would not want to alert those potentially implicated or hinder the actions of the police or a regulatory authority. In such cases the Pensions Regulator should be contacted without delay.

Whilst a reporter should endeavour to fully understand the legal position regarding a suspected breach, they do not have to gather all of the evidence that the Pensions Regulator may require before taking legal action especially where a delay in reporting the breach could exacerbate or increase the risk of the breach.

Material significance

What is of material significance can be considered from four aspects:

1. Cause – dishonesty, poor governance or administration, poor advice, acting (or failing to act) in deliberate contravention of the law;
2. Effect – if the matter appears to be the effect of non-compliance with the Public Service Pensions Act 2013, the Local Government Pension Scheme Regulations, poor administration, inaccurate payments or theft;
3. Reaction to the breach – if no prompt and effective action has been taken to deal with the breach and to identify and tackle the causes so as to minimise the risk of recurrence;
4. Wider implications – if the breach suggests wider undetected problems.

To be able to consider these aspects all people who have a legal requirement to report breaches of the law, as set out in section 3, will need to ensure that they have sufficient knowledge and understanding of the pension law and regulations that govern the LGPS.

In forming a view as to whether or not the breach is of material significance reporters will need to consider other breaches of which they are aware but be careful to ensure that any such breaches have not already been addressed and resolved.

The aim of the Pensions Regulator is to protect the benefits of pension scheme members, reduce calls upon the Pension Protection Fund and to promote good administration of work-based pension schemes. Therefore, the following are important elements that the Pensions Regulator may consider to be of material significance:

- The right money is paid into the Scheme at the right time;
- Assets are appropriately safeguarded;
- Payments out of the Scheme are legitimate, accurate and paid at the right time to the right person(s);
- The Scheme Manager is complying with the legal requirements of Scheme funding;
- The Scheme Manager is properly considering their investment policies and investing in accordance with them;
- The Scheme is being administered properly in accordance with Scheme regulations;
- Appropriate records are maintained and are accurate;
- Scheme members receive accurate, clear and impartial information without delay.

The Pensions Regulator will not normally regard a breach as material if the Scheme Manager has taken prompt and effective action to investigate and resolve a breach and put in place the necessary procedure to ensure that such a breach will not reoccur.

However, the Pensions Regulator will be concerned where the Scheme Manager has failed to act promptly and effectively to identify, resolve and remedy the causes for the breach. If the proper corrective action has not been taken the Pensions Regulator is likely to deem the impact as material.

The wider implications of a breach are the concern of the Pensions Regulator where the fact that the breach has occurred in the first place will make it more likely that future breaches will arise because the Scheme Manager lacks the appropriate skills and knowledge needed to fulfil the requirements of their role.

A traffic light framework, as supplied by the Pensions Regulator, has been set up as a reference tool for reporters considering whether breaches of the law have a material significance and so should be reported to the Pensions Regulator. This framework document should be used by all reporters and continually updated as breaches are identified. It provides possible investigation outcomes and requires the reporter to consider the content of the red, amber and green sections for each of the cause, effect, reaction and wider implications of the breach being considered. This document will be made available to all persons responsible for reporting breaches of the law as part of Pension Board meetings.

A breach will be in the red category and therefore must always be reported to the Pensions Regulator, because one or more of the following apply:

- It was caused by dishonesty, poor scheme governance, poor advice or by deliberate contravention of the law;
- Its effect is considered to be significant;
- Inadequate steps have been taken to put matters right;
- It has wider implications.

A breach will be in the green category, and will not need to be reported to the Pensions Regulator but should be recorded, because one or more of the following apply:

- It was not caused by dishonesty, poor scheme governance, poor advice or by deliberate contravention of the law;
- Its effect is NOT significant;
- Proper steps are being taken to put matters right;
- It does NOT have wider implications.

A breach will be in the amber category when it is not obviously either red or green. The decision whether or not to report will require a balanced judgement based on the cause, effect, reaction and wider implication of the case under consideration. Other previous reported or unreported cases may be relevant when coming to a decision whether to report or not and consideration needs to be given to the adequate oversight and controls adopted by the scheme manager.

Examples of red, amber and green breaches are set out in the traffic light framework and must be referred to each time a breach of the law is suspected.

5 PROCEDURES FOR REPORTING BREACHES OF THE LAW

Anyone who has a responsibility to report breaches of the law during the course of their association with the Scheme should be alert to the potential for breaches to occur and to have properly established procedures in place to enable them to evaluate any potential breaches and the need to report them.

The Pension Fund keeps a 'register of breaches of the law' in which all breaches must be recorded regardless of whether or not they are or ever have been reported to the Pensions Regulator. This register is available to all responsible persons and forms part of the agenda for meetings of the Pension Board.

The flowchart at Annex 1 to this guide sets out the steps to be taken when considering breaches of the law but the details are also described in this section of the guide.

The following steps should be taken:

1. If the person suspecting the breach is not designated to deal with breaches they should inform a designated person immediately taking due consideration of who could be implicated in the case. The designated person is the s.151 officer for the administering

authority or in the event that the s.151 is not available or indeed is implicated in the breach, the Monitoring Officer for the administering authority.

2. A designated person should investigate if there is a reasonable cause to believe a breach has occurred by firstly checking the register and the traffic light framework by contacting a Senior Officer of the Pension Fund.
3. If the designated person has no reasonable cause to believe that a breach has occurred there is no duty to report the case to the Pensions Regulator.
4. The designated person should clarify the facts around the suspected breach and obtain any clarification of the law that may be required, liaising with other appropriate people as considered necessary with due regard to who could be implicated in the case.
5. Consider whether the breach is likely to be of material significance to the Pensions Regulator. If it is considered to be very serious it must be reported immediately to the Pensions Regulator. If this is the case a written report can be preceded by a telephone call to the Pensions Regulator on 0870 6063636. Any breach that is so serious that it must always be reported to the Pensions Regulator will always be recorded as a red category breach in the register. If the breach is considered not to be of material significance to the Pensions Regulator and is a clear cut green breach then it does need to be reported to the Pensions Regulator but should be recorded as a green category breach in the register.
6. If the breach is considered to be red, but not so serious that it needs to be notified to the Pensions Regulator immediately, a report should be sent to the Pensions Regulator as soon as is reasonably practicable ensuring that any delay will not result in the breach becoming more serious thereby incurring the risk of the Pensions Regulator issuing a civil penalty (see section 7 of this guide). Good practice would provide that such a case is reported within 10 working days.
7. If the breach is considered to be an amber breach (not a clear cut red or green breach) further consideration needs to be given to the case by further considering the context of the case and how it relates to the principles of cause, effect, reaction and wider implication. Good practice would provide that such a case is dealt with within 20 working days.
8. It may be that the breach needs to be referred to the appropriate level of seniority at which decisions can be made on whether to report to the Pensions Regulator but consider who may be implicated in the breach of the law when discussing your suspicions with other individuals.
9. If the breach is a particularly difficult case seek input from relevant experts. This may require a sub-committee of the Pension Board to be appointed to discuss the events leading up to the reporter's suspicion that a breach of the law may have occurred.
10. Keep in mind the appropriate timeframe for submitting a report to the Pensions Regulator (i.e. green cases do not need reporting, red cases should be reported immediately or if not within 10 working days and amber cases should be considered and acted upon within 20 working days and where ultimately deemed to be in the red category, reported immediately or within 10 working days, at the point within that timeframe, that a decision has been made).
11. Once the decision has been made that the breach falls into the red category, submit a report on the breach to the Pensions Regulator in accordance with the guidance provided in section 6.

12. If it is decided that the breach is not of material significance and so should not be reported to the Pensions Regulator update the register and close the case.
13. Where a report has been submitted to the Pensions Regulator, the reporter must ensure that they receive an acknowledgement from the Pensions Regulator within 5 working days of submitting the report. If not, the reporter should contact the Pensions Regulator to ensure that the report has been received.
14. Ensure that the register is updated at each stage of the process so that the case can be monitored and dealt with effectively and efficiently.

NOTE: The register is held by the Pension Fund. All updates to the register should be made by the reporting officer in conjunction with a Senior Officer of the Pension Fund taking into account who may be implicated in the breach.

6 HOW SHOULD REPORTS BE MADE?

All reports of material breaches must be made in writing to the Pensions Regulator as soon as is reasonably practicable. They should be sent preferably to the Pensions Regulator via its online system, 'Exchange' at www.tpr.gov.uk/exchange, but can be sent by post to The Pensions Regulator, Napier House, Trafalgar Place, Brighton, BN1 4DW, or electronically to customersupport@thepensionsregulator.gov.uk or by fax to 0870 2411144.

The report should be dated and include as a minimum the following details:

- Full name of the scheme;
- Description of the breach or breaches;
- Any relevant dates;
- Name of the Scheme employer and/or Scheme Manager (where known);
- Name, position and contact details of the person reporting the breach;
- The role of the person reporting the breach in relation to the Scheme.

Further information should be supplied wherever possible including for example:

- The reason the breach is thought to be of material significance;
- The address of the Scheme;
- The contact details of the Scheme Manager (The Royal Borough of Windsor & Maidenhead);
- Whether the concern has been reported before.

If the matter of concern is considered to be particularly serious a phone call (0870 6063636) can be made to the Pensions Regulator prior to the submission of a written report.

7 FAILURE TO REPORT A BREACH OF THE LAW

Failure by any person to comply with their obligation to report breaches of the law to the Pension Regulator is a 'civil offence' unless a 'reasonable excuse' can be given.

To decide if a report has a reasonable excuse for not reporting a breach, or reporting a breach later than would be expected, The Pensions Regulator may consider the following:

- The legislation, case law and codes of practice issued by the Pensions Regulator;
- The role of the reporter in relation to the Scheme;
- The training provided to the reporter and the level of knowledge that the reporter could reasonably be expected to have;

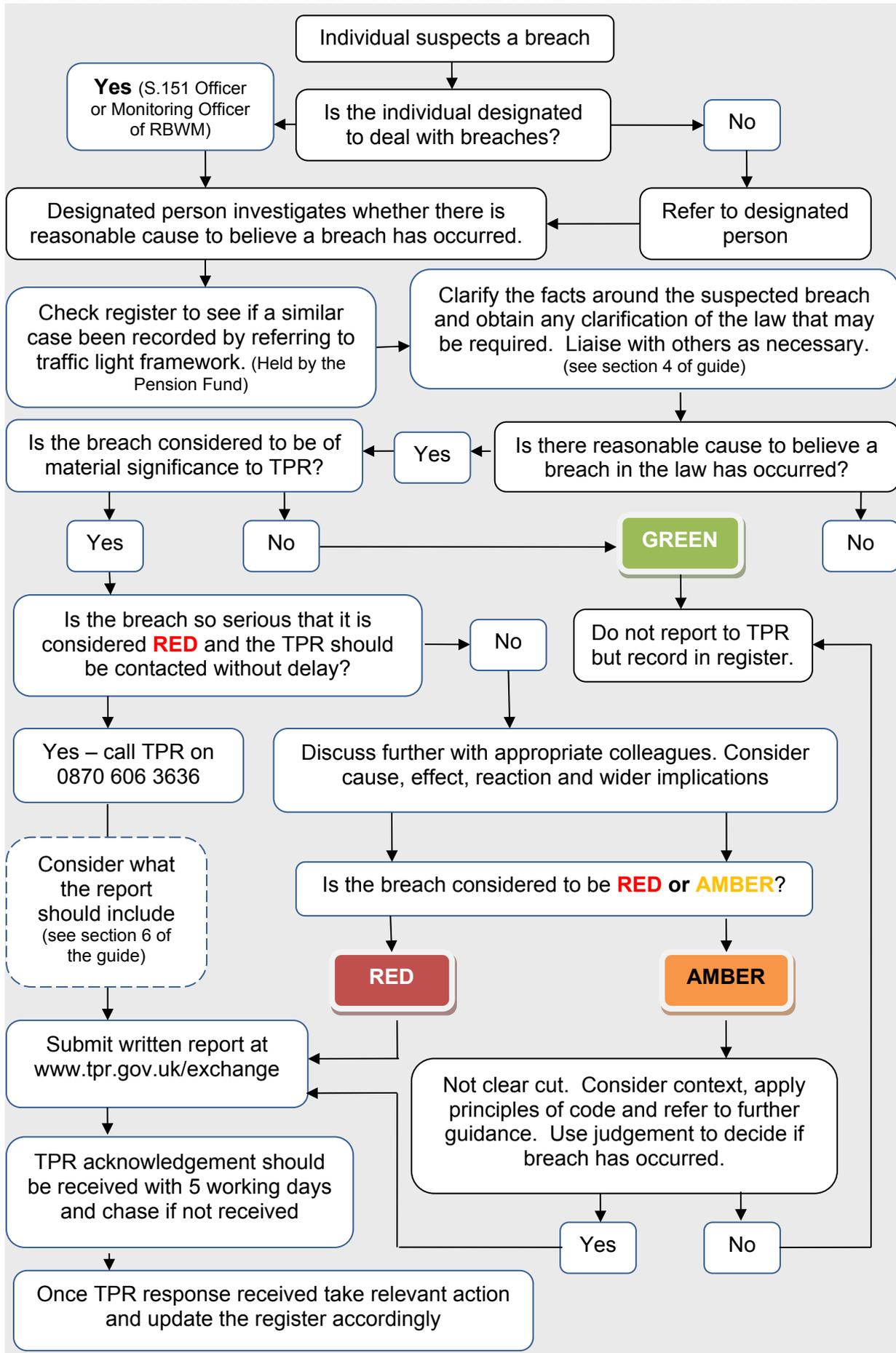
- The procedures put in place to identify and evaluate breaches and whether those procedures have been followed;
- The seriousness of the breach and whether or not the breach should have been reported immediately;
- Any reasons given for a delay in the report;
- Any other relevant considerations relating to the case in question.

If the Pensions Regulator considers issuing a civil penalty a warning notice will be sent to the affected party or parties identifying the alleged breach. In addition the Pensions Regulator may consider it appropriate to make a complaint to the reporters professional or other governing body.

Approved by the Pension Panel: 12 November 2018

Next Review Date: October 2019

ANNEX 1 – FLOWCHART - REPORTING BREACHES OF THE LAW TO TPR



ANNEX 2 – TEMPLATE BREACHES REGISTER

POTENTIAL INVESTIGATION OUTCOMES				
	CAUSE	EFFECT	REACTION	WIDER IMPLICATIONS
BREACH DETAILS				
DATE IDENTIFIED				
RED				
AMBER				
GREEN				
DATE REVIEWED BY RESPONSIBLE PERSON				
OUTCOME AND ACTION TAKEN				
NAME OF REPORTER AND DATE REPORTED TO TPR				
TPR RESPONSE				
ACTION TAKEN				