



South Tyneside Council

Local Pension Board

Date: 27th March 2024

Breaches of the Law Policy (for information and discussion)

Report of the Head of Pensions

Purpose of Report

1. Whilst the Fund always tries to ensure regulatory compliance, it is somewhat inevitable that there will be some breaches of the law. It is therefore important to make sure that there are robust processes and procedures in place for investigating, documenting and reporting breaches when they do occur.
2. A Breaches of the Law Policy has been produced which encapsulates recent industry developments such as the Pensions Regulator's General Code, and also documents the procedures adopted by the Fund.
3. The Board is asked to review and comment on the draft Breaches of the Law Policy, including the procedure for individuals reporting breaches.

Contact Officer: Paul McCann, Head of Pensions

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Background

4. The Fund recognises the importance of having in place robust policies and procedures as an essential part of good governance. They are a key component in ensuring regulatory compliance.
5. The Public Services Pension Act 2013 introduced the framework for the governance and administration of public service pension schemes and provides extended regulatory oversight by the Pensions Regulator. The most relevant Code of Practice for the LGPS has been Code of Practice 14, although it will be superseded by the new General Code as of 27 March. Further information on the General Code can be found elsewhere in the agenda pack.
6. Breaches of the law is an area of significant importance to the Fund, and the Fund has applied the regulatory framework and Code of Practice 14 in the approach taken.
7. Fund Officers have recently reviewed and updated the procedures in place, particularly in the context of the new General Code. It has also been decided to document the procedures in a new policy document.

Procedure for Investigating Breaches of the Law

8. The Fund is required to have in place a robust procedure for investigating, documenting and, where appropriate, reporting breaches of the law to the Pensions Regulator.
9. The Fund's procedure on reporting breaches of the law to the Pensions Regulator was originally developed in 2015 and was set out in a report to Committee. This procedure covered all of the relevant requirements of Code of Practice 14.
10. During the most recent assessment of the Fund's compliance against the Code, the Fund was fully compliant in this area. There was however a recommendation that the Fund's procedure should be reviewed at least every three years.
11. Whilst reviewing the procedure, it was also decided that governance would be enhanced by documenting our procedures into a formal policy document. This policy can then be shared with all officers, Committee and Board members.
12. A draft Breaches of the Law Policy has now been produced which sets out the approach for investigating, recording and reporting breaches of the law. The new policy has been drafted to be compliant with the General Code. Key aspects of the policy include:

- a process for clarifying the law and / or facts around a suspected breach, where needed;
 - a process to consider the material significance of a breach, taking into account its cause, effect, the reaction to it, and its wider implications, including dialogue within the governing body where appropriate;
 - a clear referral process at the right level of seniority, so decisions can be made about 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; and
 - a process for reviewing reporting procedures following any important changes to the scheme's governance arrangements.
13. By law, any breaches must be reported to the Regulator if they are likely to be of 'material significance'. Further details of what should be considered in deciding whether a breach is likely to be of material significance to the Regulator are provided in Appendix A of the policy.
14. It is recommended that those responsible for reporting breaches of the law use the Pension Regulator's traffic light framework when deciding whether to report to the Regulator. The Regulator has provided a document as a guide to decide whether a breach needs to be reported. Which can be accessed at <https://www.thepensionsregulator.gov.uk/en/public-service-pension-schemes/scheme-management/reporting-breaches-of-the-law> An illustrated example of the traffic light framework is also provided in Appendix B of the policy.
15. All breaches of the law must be recorded, even if the decision is not to report (where it has been determined the breach is not likely to be of material significance to the Regulator). All breaches will be recorded in the Fund's Record of Breaches Log, as shown in Appendix C of the policy.
16. We would welcome the Board's comments on the revised draft of the Procedure for reporting breaches of law to the Pensions Regulator.
17. It is planned to take the policy to Pensions Committee for approval in June.

Recommendation

18. The Board's views are sought on the draft Breaches of the Law policy.

Reason for Recommendation

19. To ensure the Fund has robust governance arrangements, and compliance with regulatory requirements.



Breaches of the Law Policy

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PART 1: INTRODUCTION

1. Background

This document sets out the procedures to be followed in relation to reporting breaches of the law internally and, where appropriate, to the Pensions Regulator ('the Regulator'). This Policy does not apply to data breaches which are governed by a separate regulatory and policy framework.

This Policy is primarily intended for use by the Fund's officers, although it can and should be used as a reference point for members of Pensions Committee and the Local Pension Board. Should any member(s) of the Committee or Board have concerns in respect of a breach of the law, they are requested to contact the Head of Pensions as a matter of urgency.

The Regulator's General Code of Practice ('the Code') provides guidelines on the requirements of pensions legislation and sets out standards of conduct and practice expected, including duties on certain individuals to report breaches of the law to the Regulator.

South Tyneside Council, in its capacity as the Administering Authority of the Tyne and Wear Pension Fund ('the Fund'), must be satisfied that those responsible for reporting breaches of the law are made aware of the Code and its legal requirements.

The Fund has prepared this document to detail its policy and procedures on identifying, managing and reporting (or recording if not reporting) a breach of law as set out in the Code. It aims to ensure individuals responsible can understand and meet their legal obligations. This Policy should also assist in providing an early warning of areas of concern and thereby help to reduce risk.

This Policy should be read in conjunction with the Code. If you have any queries about this Policy or the Code, please contact the Principal Governance and Funding Manager or the Head of Pensions.

2. Legal Requirements

Certain people ('reporters') are required to report breaches of the law to the Regulator where they have 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
- the failure to comply is likely to be of 'material significance' to the Regulator in the exercise of any of its functions.

Guidance in relation to the application of this legal requirement is included in the Code.

People who are subject to the reporting requirement for public service pension schemes are:

- the Scheme Manager;
- members of the Local Pension Board;
- members of the Pensions Committee;
- any person who is otherwise involved in the administration of the Fund;
- participating Scheme employers;
- professional advisors including auditors, actuaries, legal advisors and fund managers; and
- any person who is otherwise involved in advising the managers of the Scheme.

PART 2: ASSESSING POTENTIAL BREACHES OF THE LAW

1. What is a Breach of the Law?

A breach of the law can occur in relation to a wide variety of 'administrative' tasks that could affect members' benefits or members and others ability to access the information they are entitled to. This would include a failure to do anything required under legislation, applicable statutory guidance, or codes of practice. This could include a failure to pay member benefits either accurately or in a timely manner, failure to maintain accurate records, failure to issue annual benefit statements on time, making investment or investment-related decisions or non-compliance with the Code.

2. Clarification when a breach of the law is suspected

Reporters need to have 'reasonable cause' to believe that a breach has occurred, not just a suspicion. Where a breach is suspected, the reporter should carry out further checks to investigate whether a breach has occurred.

Where the reporter does not know the full facts or events around the suspected breach, or is unclear about the relevant legal provision, they should clarify their understanding to the extent necessary to form a view.

It will usually be appropriate to check with the relevant team manager in the first instance to obtain clarification of the facts and of the law around the suspected breach. The manager should be able to assist with understanding what has happened and help you to consider whether there has been a breach of the law. If the case is difficult, the manager will seek advice from the Fund's Head of Pensions or the Principal Governance and Funding Manager, as required. Information may also be available from national resources such as the Scheme Advisory Board or the Local Government Association.

If there are any concerns about a team manager's involvement in the suspected breach of the law, then the matter should be reported directly to either the Head of Pensions or the Principal Governance and Funding Manager. The matter should not be reported to either of these officers if doing so will alert any person responsible for a possible serious offence to the investigation.

In establishing whether there is reasonable cause to believe that a breach has occurred, it is not necessary for a reporter to gather all the evidence which the Regulator may require before taking legal action, particularly where a delay in reporting may exacerbate or increase the risk of the breach.

In the event of any cases of suspected theft, fraud or other serious offences where discussions might alert those implicated or impede the actions of the police or a regulatory authority, contact the Head of Pensions without delay. If there are any reasonable grounds for concern relating to the Head of Pensions, contact the Director, Business and Resources and / or the Council's Monitoring Officer.

At all times, relevant persons need to be aware of the duty to whistleblow (see Part 3, Section 5 below).

3. Determining whether the breach is likely to be of ‘material significance’

Where it has been determined that a breach of the law likely occurred, the next step is to assess whether the breach is of ‘material significance’. This can be difficult to judge, especially for those new to the LGPS.

In deciding whether a breach is likely to be of *material significance* to the Regulator, it would be advisable to consider the:

- cause of the breach (what made it happen);
- effect of the breach (the consequence(s) of the breach);
- reaction to the breach; and
- the wider implications of the breach.

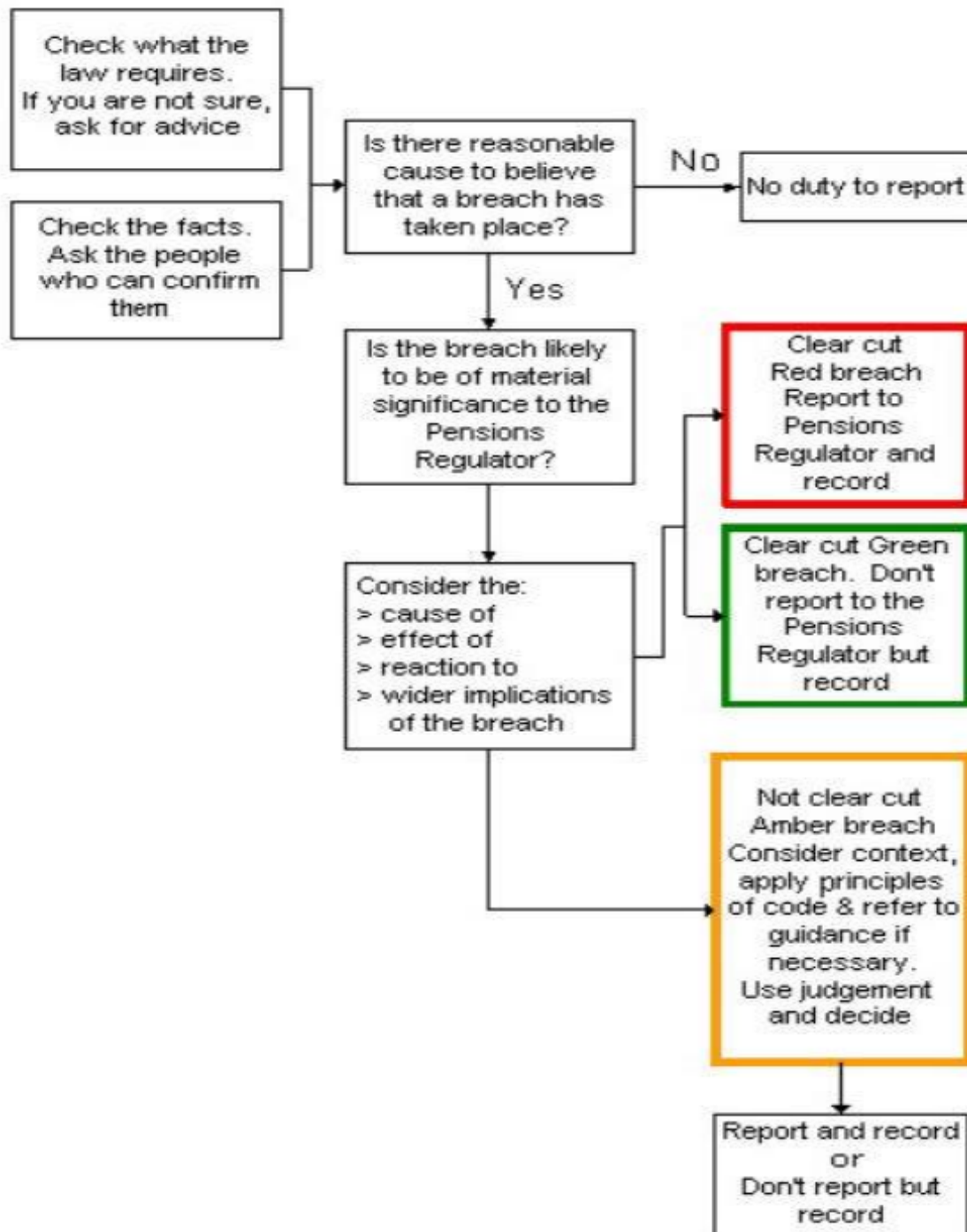
Further details on the above four considerations are provided in Appendix A. Guidance and assistance can be provided by the Fund’s Head of Pensions and / or the Principal Governance and Funding Manager where needed.

It is recommended that those responsible for reporting breaches of the law use the Regulator’s traffic light framework when deciding whether to report to the Regulator. The Regulator has provided a document as a guide to decide whether a breach needs to be reported. Which can be accessed at <https://www.thepensionsregulator.gov.uk/en/public-service-pension-schemes/scheme-management/reporting-breaches-of-the-law>

An illustrated example of the traffic light framework is also provided at Appendix B of this Policy for information purposes.

The decision tree below shows the process for deciding whether or not a breach has taken place and whether it is materially significant and therefore is likely to be required to be reported. Please see Part 3 for further information on reporting breaches.

Decision Tree: deciding whether to report



4. Timescale for Assessing Breaches of the Law

The investigation into a potential breach of the law must be completed in a time-efficient manner and in accordance with the Code.

The time taken to reach the judgements on 'reasonable cause to believe' and 'material significance' will depend on the circumstances. The time taken to undertake the investigation should reflect the seriousness of the suspected breach.

Any actual or potential breaches of the law that are considered to be particularly serious, or for any cases of suspected criminality (including theft and fraud), must be referred to the Head of Pensions as a matter of urgency.

5. Referral to the Head of Pensions

Where it is considered that any breach of the law may be reportable to the Regulator or any other body (including the Police), the matter must be referred to the Head of Pensions for consideration as a matter of urgency.

Part 3: Reporting and Documenting Breaches of the Law

1. Determination of whether a breach is reportable to the Regulator

Except for any cases where an individual feels the need to whistleblow (see below for further information), it will be for the Head of Pensions to determine whether any matter is reportable to the Regulator. In making this determination, the Head of Pensions shall be required to consider and apply all relevant legislation, the Code and this Policy.

2. Timescale for reporting breaches of the law

Where the Head of Pensions has determined that a breach of the law is reportable to the Regulator, the report must be made as soon as reasonably practicable.

3. Process for reporting to the Regulator

Reporters should make a report using the Regulator's online web form, email, or by post. The Regulator does not usually accept reports by telephone. If a reporter discovers an urgent breach which is likely to have an immediate and damaging effect for scheme members, they should notify the Regulator by telephone before submitting their report in writing (after first discussing and agreeing with the Head of Pensions).

Reporters should also mark urgent reports as such and highlight any matters they believe are particularly serious.

The report should include the:

- full name of the Fund;
- description of the breach or breaches, including any relevant dates;
- name of the scheme manager;
- name, position, and contact details of the reporter;
- role of the reporter in the scheme;
- reason the reporter believes the breach is of material significance;
- address of the Fund;
- type of scheme – defined benefit, public service;
- pension scheme registration (PSR) number (10051260)

In addition, where the duty to report to another body coincides with the duty to report to the Regulator, the report to the Regulator should include details of the other bodies the matter has been reported to.

The Regulator will acknowledge all reports within five working days of receipt. If reporters have not received an acknowledgement within five days, they should contact the Regulator.

Due to legal restrictions on the information the Regulator can disclose, the Regulator will not keep reporters informed of the steps they are taking to deal with the report, but it may contact a reporter to ask for more information.

If a scheme or an individual is at risk, for example where there has been dishonesty, the reporter should not take any actions that may alert those implicated that a report has been made. Similarly, reporters should not delay their report to the Regulator, to check whether any proposed solutions will be effective.

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

Breaches that are reported to the Regulator, should also be advised, where practicably possible, to the Principal Governance and Funding Manager for inclusion in the Record of Breaches Log, as shown at Appendix C. Records of reported breaches should be provided as soon as reasonably practicable and certainly no later than within 20 working days of the report being made. These will be recorded alongside all un-reported breaches.

4. Recording breaches that have not been reported to the Regulator

Where it is concluded that a breach of the law would not be of material significance to the Regulator, and accordingly a report is not made, the breach must still be recorded in the Record of Breaches Log. The record of past breaches may be relevant in deciding whether to report a breach, for example, if similar breaches continue, then this may reveal a systemic issue. Recording all breaches also highlights where improvements are required, to try and prevent similar breaches in the future.

Breaches that are not considered to be materially significant, and are therefore not reported to the Regulator, should be advised to the Principal Governance and Funding Manager for inclusion in the Record of Breaches Log. Records of unreported breaches should be provided as soon as reasonably practicable and certainly no later than within 10 working days of the decision made not to report. These will be recorded alongside all reported breaches.

5. Whistleblowing protection and confidentiality

The Pensions 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 to report does not, however, override '*legal privilege*'. This means that oral and written communications between a professional legal adviser and their client, or a person representing that client, while obtaining legal advice, do not have to be disclosed. Where necessary, the Fund's Principal Governance and Funding Manager will be able to provide further information on this.

The Regulator will do its best to protect a reporter's identity (if desired) and will not disclose the information except where lawfully required to do so. It will take all reasonable steps to maintain confidentiality, but it cannot give any categorical assurances as the circumstances may mean that disclosure of the reporter's identity becomes unavoidable in law. This includes circumstances where the Regulator is ordered by a court to disclose it.

The Employment Rights Act 1996 provides protection for employees making a whistleblowing disclosure to the Regulator. Consequently, where individuals employed by firms or another organisation have a statutory duty to report a disagreement with a decision not to report to the regulator, they may have protection under the Employment Rights Act if they make an individual report in good faith.

6. Reporting to Pensions Committee and the Local Pension Board

The Record of Breaches Log (showing reported and non-reported breaches of the law) will be reported to the Local Pension Board on a quarterly basis and annually to the Pensions Committee.

PART 4: REVIEW OF POLICY

1. Review

This Policy will be kept under ongoing review and updated as and when considered appropriate. In the absence of any reviews / updates in the interim, this document will be subject to full review once every three years.

Determining 'material significance' of a breach of the law

Reporters should take into account expert or professional advice, where appropriate, when deciding whether the breach is likely to be of material significance to the Regulator.

The cause of the breach

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

- dishonesty, negligence, or reckless behaviour;
- poor governance, ineffective controls resulting in deficient administration, or slow or inappropriate decision-making practices;
- incomplete or inaccurate advice;
- a deliberate act or failure to act.

A breach will not normally be materially significant if it has arisen from an isolated incident, for example resulting from teething problems with a new system or procedure, or from an unusual or unpredictable combination of circumstances. But in such a situation, it is also important to consider other aspects of the breach such as the effect it has had and to be aware that persistent isolated breaches could be indicative of wider Scheme issues.

The effect of the breach

Reporters need to consider the effects of any breach, but with the Regulator's role in relation to public service pension schemes and its statutory objectives in mind, the following matters in particular should be considered likely to be of material significance to the Regulator:

- A significant proportion of members, or a significant proportion of members of a particular category of membership, are affected by the breach.
- The breach has a significant effect on the benefits being paid, to be paid, or being notified to members.
- The breach, or a series of unrelated breaches have a pattern of recurrence in relation to participating employers, certain members, or groups of members.
- Local Board members not having the appropriate degree of knowledge and understanding, which may result in the Board not fulfilling its role, the Fund not being properly governed and administered and/or the Pensions Committee breaching other legal requirements.
- Local Board members having a conflict of interest, which may result in them being prejudiced in the way that they carry out their role, ineffective

governance and administration of the Scheme and/or the Pensions Committee breaching legal requirements.

- Adequate internal controls not being established and operated, which may lead to the Fund not being run in accordance with LGPS Regulations and other legal requirements.
- Risks not being properly identified and managed and/or the right money not being paid to or by the Fund at the right time.
- Accurate information about benefits and Scheme administration not being provided to Scheme members and others, which may result in members not being able to effectively plan or make decisions about their retirement.
- Records not being maintained, which may result in member benefits being calculated incorrectly and/or not being paid to the right person at the right time.
- Anyone involved with the administration or management of the Fund misappropriating any of its assets, or being likely to do so.
- Any other breach which may result in the Fund being poorly governed, managed or administered.

Reporters need to take care to consider the effects of the breach, including any other breaches occurring as a result of the initial breach and the effects of those resulting breaches.

The reaction to the breach

Where prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, notify any affected members, the Regulator will not normally consider this to be materially significant.

A breach is likely to be of concern and material significance to the Regulator where a breach has been identified that:

- does not receive prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of recurrence;
- is not given the right priority in pursuing corrective action to a proper conclusion;
- has not been communicated to affected scheme members where it would have been appropriate to do so;
- forms part of a series of breaches indicating poor governance;
- was caused dishonestly, even when action has been taken to resolve the matter quickly and effectively.

The wider the implications of the breach?

Reporters should consider the wider implications of a breach when they assess which breaches are likely to be materially significant to the Regulator. For example, a breach is likely to be of material significance where the fact that the breach has occurred makes it appear more likely that other breaches will emerge in the future. This may be due to the Pensions Committee or Local Board members having a lack of appropriate knowledge and understanding to fulfil their responsibilities.

Those reporting a breach should consider general risk factors, such as the level of funding or how well-run the scheme appears to be. Some breaches that occur in a poorly funded and/or poorly administered scheme will be more significant to the Regulator than if they occurred in a well-funded, well-administered scheme.

Reporters should consider other reported and unreported breaches that they are aware of. However, reporters should use historical information with care, particularly where changes have been made to address breaches already identified.

The Regulator will not usually regard a breach arising from an isolated incident as materially significant. For example, breaches resulting from teething problems with a new system, or from an unpredictable combination of circumstances. However, in such circumstances reporters should consider other aspects of the breach, such as the severity of the effect it has had that may make it materially significant.

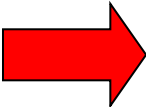
Traffic light framework for deciding whether or not to report


It is recommended that those responsible for reporting breaches of the law use the traffic light framework when deciding whether to report to the Regulator.


All breaches must be documented in the Record of Breaches Log even if the decision is not to report.

When using the traffic light framework individuals should consider the each of the cause, effect, reaction and wider implications of the breach in the context of the red, amber and green system before considering the four together.

This is illustrated in the example below:

	Material significance	Cause	Effect	Reaction	Wider implications
	Where the cause, effect, reaction and wider implications of a breach, when considered together, are likely to be of material significance. These must be recorded and reported to the Regulator.	Pension board members have failed to take steps to acquire and retain the appropriate degree of knowledge and understanding about the scheme's administration policies.	A pension board member does not have knowledge and understanding of the scheme's administration policy about conflicts of interest. The pension board member fails to disclose a potential conflict, which results in the member acting improperly.	Pension board members do not accept responsibility for their failure to have the appropriate knowledge and understanding or demonstrate negative/non-compliant entrenched behaviours. The scheme manager does not take appropriate action to address the failing in relation to conflicts.	It is highly likely that the scheme will be in breach of other legal requirements. The pension board do not have an appropriate level of knowledge and understanding and in turn are in breach of their legal requirement. Therefore, they are not fulfilling their role to assist the scheme manager and the scheme is not being properly governed.

	Material significance	Cause	Effect	Reaction	Wider implications
	<p>May be of material significance. 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. The reporter will need to exercise their own judgement to determine whether the breach is likely to be of material significance and should be reported.</p> <p>The breach must still be recorded regardless of whether or not the breach is reported to the Regulator.</p>	<p>Pension board members have gaps in their knowledge and understanding about some areas of the scheme's administration policies and have not assisted the scheme manager in securing compliance with internal dispute resolution requirements.</p>	<p>Some members who have raised issues have not had their complaints treated in accordance with the scheme's internal dispute resolution procedure (IDRP) and the law.</p>	<p>The scheme manager has failed to adhere precisely to the detail of the legislation where the breach is unlikely to result in an error or misunderstanding or affect member benefits.</p>	<p>It is possible that the scheme will be in breach of other legal requirements. It is possible that the pension board will not be properly fulfilling their role in assisting the scheme manager.</p>

	Material significance	Cause	Effect	Reaction	Wider implications
	<p>Where the cause, effect, reaction and wider implications of a breach, when considered together, are not likely to be of material significance.</p> <p>These should be recorded but do not need to be reported.</p>	Pension board members have isolated gaps in their knowledge and understanding.	The scheme manager has failed to adhere precisely to the detail of the legislation where the breach is unlikely to result in an error or misunderstanding or affect member benefits.	Pension board members take action to review and improve their knowledge and understanding to enable them to properly exercise their functions and they are making quick progress to address gaps in their knowledge and understanding. They assist the scheme manager to take prompt and effective action to remedy the breach.	It is unlikely that the scheme will be in breach of other legal requirements. It is unlikely that the pension board is not fulfilling their role in assisting the scheme manager.

Record of Breaches Log

Date	Category (e.g. Administration, contributions, funding, investment, criminal activity)	Description and cause of breach	Possible effect of breach	Reaction and wider implications of breach	Reported / Not reported (with explanation of decision reached)	Actions taken and outcome of actions	Future actions

Breaches of the Law Policy

The following is a list of the background papers (excluding exempt papers) relied upon in the preparation of the above report:

Background Paper	File Ref:	File Location
Policies & Procedures Files	N/a	Pensions Office, South Shields Town Hall