

BREACHES POLICY

December 2022

Hertfordshire Pension Fund

Local Government Pension Scheme

1 Introduction

The Pensions Act 2004 (“the Act”) requires that certain people must report breaches of the law relating to the administration of pension schemes in writing to The Pensions Regulator (“the Regulator”). Practical guidance on this legal requirement is included in The Regulator’s Code of Practice (“the Code”) “Reporting breaches of the law”. The Code also sets out the duties that apply to those who are subject to the legal requirements to report breaches of the law and how these duties should be exercised.

Those subject to the duty to report breaches of the law are referred to in the Code as “reporters” and this term is used in this Policy. Reporters include those involved in the running of occupational pension schemes. Hertfordshire County Council as the Scheme Manager of the Local Government Pension Scheme in Hertfordshire (“the LGPS”) is a reporter.

This document sets out the Hertfordshire Pension Fund’s Policy for Recording and Reporting Breaches of the Law to the Pensions Regulator (“the Policy”).

This policy is expected to be appropriate for the long-term but to ensure good governance it will be formally reviewed by the Hertfordshire Pensions Committee at least annually to ensure that it remains accurate and relevant. It may be changed as a result of legal or regulatory changes, evolving best practice and ongoing review of the effectiveness of the policy.

This policy is effective from December 2022. It will be kept under review and revised to keep abreast of legislative changes applicable to the LGPS and changes to the Code.

The Responsible Officer, as set out in section 3.4, will be tasked with the management and execution of this breaches policy.

The section 151 officer will ensure that training on breaches of the law and this policy is conducted for all relevant officers and elected members, as well as members of the local pension board at induction and on an ongoing basis.

1.1 Aims of this Policy

The Hertfordshire Pension Fund is committed to high quality standards in the management and governance of the LGPS.

The aim of the Policy is to describe how the Hertfordshire Pension Fund meets its duty to record and report breaches and will strive to achieve best practice through formal reporting procedures.

Additionally, the Policy aims to enable reporters to raise concerns and facilitates the objective consideration of those matters. The Policy will assist reporters of breaches to decide, within an appropriate timescale, whether to report a breach.

The policy covers the following areas:

- What is a breach?
- Responsibility for reporting a breach
- When to report a breach, and the use of judgement to assess a breach
- The role of the Regulator
- How breaches will be reported to Committee and the Regulator
- The process of recording breaches
- The role of the responsible officer
- Whistleblowing
- Further training

1.2 What is a breach?

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 LGPS, this could encompass a failure to do anything required under the Regulations, Framework or overriding legislation, as well as potentially extending to the provision of incorrect information to members.

1.3 Who has responsibility for reporting a breach?

Responsibility to report identified breaches of the law in relation to the **Code** of Practice falls on the following (known as “reporters”), including:

- The Hertfordshire Pension Fund as Scheme Manager of the LGPS;
- A Pension Board member;
- A Pension Committee member;
- A Scheme employer (regardless of whether the breach relates to, or affects, members who are its employees or those of other employers);
- A professional adviser, including auditors, actuaries, investment advisers, Investment Fund Managers, the custodian, legal advisers and any other advisers who advise the Scheme Manager (or the Scheme Manager’s employees) in relation to the LGPS;
- A person involved in the administration of the LGPS, including employees of the Local Pensions Partnership Administration (LPPA) who provide the pensions administration service to the Hertfordshire Pension Fund, and Hertfordshire Pension Fund officers who are involved in the administration of the LGPS;

It is for the other reporters to ensure adequate procedures and policies are put in place in order to identify, assess and where necessary report breaches.

Both the Hertfordshire Pension Fund and the local pension board will take all necessary steps to consider the breach and report to the Regulator and will offer assistance to any other “reporters” if there is a breach to be reported to the Regulator.

We would expect that the Fund’s administrator will have its own breaches policy in place, and that they would be responsible for reporting and recording breaches in line with that policy. We would however expect that the administrator would liaise with the administering authority/Responsible Officer in the event of a breach, to keep them informed.

1.4 Regulatory Framework

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

Pensions Act 2004

Section 70 of the Pensions Act 2004 (“the Act”) requires that certain people must report breaches of the law in writing to The Pensions’ Regulator as soon as reasonably practicable and where they have reasonable cause to believe that:

- a) a legal duty which is relevant to the administration of the scheme has not been, or is not being, complied with: this could relate for instance to keeping records, internal controls, calculating benefits and investment governance and administration matters; and
- b) 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, imposed by the Pensions Regulator, 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.

The requirement applies to the following persons:

- A trustee or manager of an occupational or personal pension scheme;
- A member of the pension board of a public service pension scheme;
- A person who is otherwise involved in the administration of such an occupational or personal pension scheme;
- The employer in relation to an occupational pension scheme;
- A professional adviser in relation to such a scheme; and
- A person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme.

The Pensions Regulator's Code of Practice

Practical guidance in relation to this legal requirement is included in The Pensions 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; and
- Whistleblowing protection and confidentiality.

2 The Policy

2.1 When to consider reporting

Breaches can occur in relation to a wide variety of tasks normally associated with the administration of the LGPS such as keeping records, internal controls, calculating benefits and, for funded schemes such as the LGPS, making investment or investment-related decisions.

Under the Act a reporter is required to give a written report to the Regulator as soon as reasonably practicable where the reporter has reasonable cause to believe that:

- a) a duty which is relevant to the administration of the LGPS, and is imposed by or by virtue of a statutory provision 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.

There are, therefore, two elements of the duty and both are subject to the test of "reasonable cause."

The first is whether the reporter has reasonable cause to suspect a breach and the second is whether the reporter believes the breach is likely to be of material significance to the Regulator. In any event, where a breach is considered to be of material significance it must be reported to The Regulator no later than one month after becoming aware of the breach or likely breach.

2.2 Judging whether there is "reasonable cause"

Having "reasonable cause" to believe that a breach has occurred does not mean that a breach must actually have occurred, provided that the reporter reasonably believes it has. However, "reasonable cause" means more than having a suspicion that cannot be substantiated. To establish whether there is "reasonable cause", the reporter should ensure that where a breach is suspected, then checks are carried

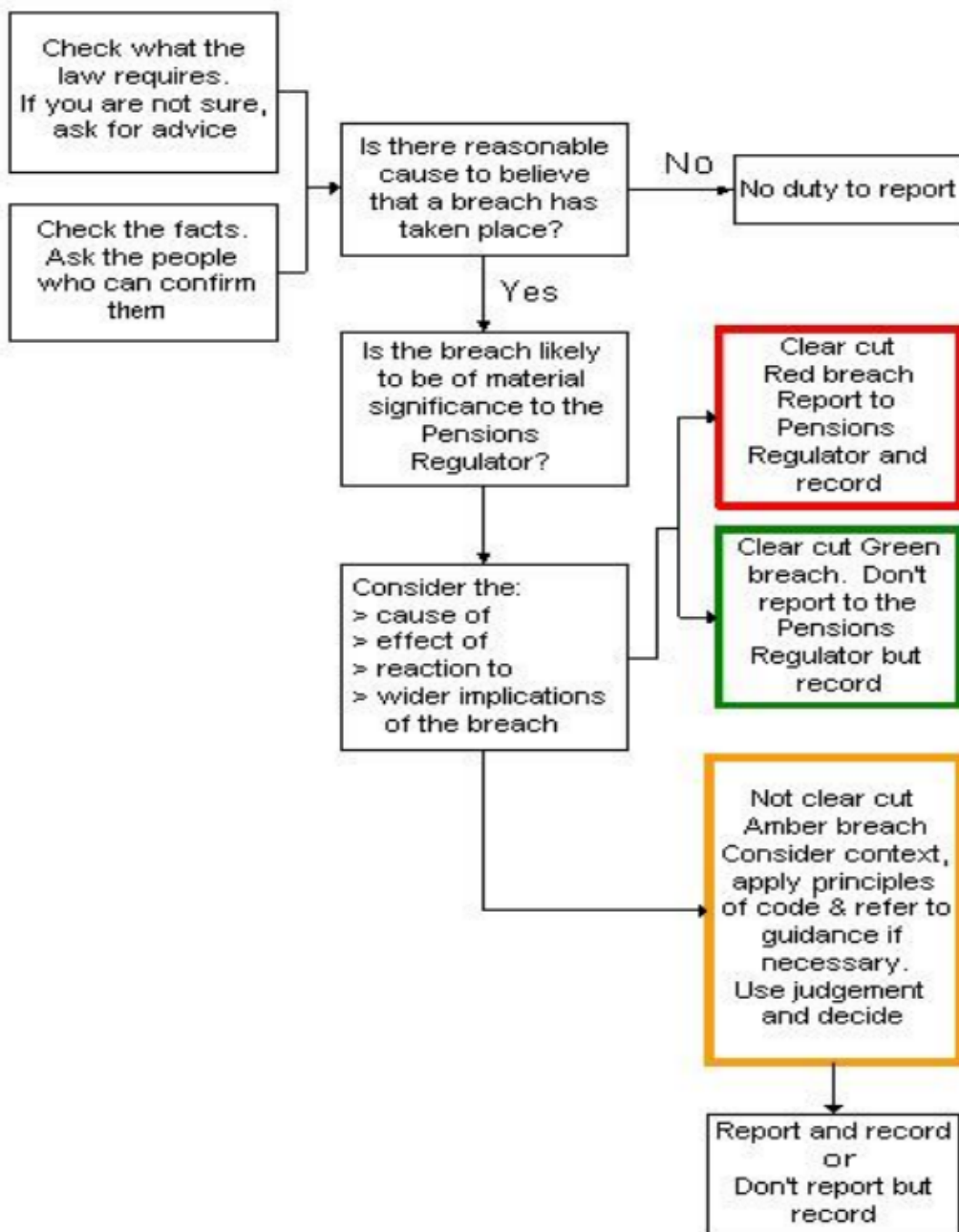
out to establish whether there is evidence to support the suspected breach, or equally if there is evidence which rules out the breach having occurred.

However, the reporter is not required to gather evidence to the standard that would be required by the Regulator to take action. It is important that the reporter considers the impact of any delay in reporting a potential breach, which may exacerbate or increase the risk of the breach. It may be appropriate to report directly to the Regulator any breaches relating to theft, suspected fraud or other serious offences where discussions may impede investigations by the police or other regulatory authority, or alert those implicated leading to potential concealment of evidence.

2.3 Judging “material significance”

When deciding whether a breach is likely to be of “material significance” to the Regulator, the cause, effect, and reaction to the wider implications of the breach should be considered. The Regulator has provided a “Traffic Light” framework to assist in this decision.

Using the Traffic Light framework, each factor should be rated to determine the category that the breach falls into (red, amber or green).



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 Regulator, but should be recorded in the Hertfordshire Pension Fund’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 Hertfordshire Pension Fund, administrators or local pension board will need to decide whether to informally alert the 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 Hertfordshire Pension Fund, administrators or local pension board must report all such breaches to the Regulator in all cases;

When determining materiality of any breach or likely breach the **Council**, officers and local pension board will in all cases consider the following:

Cause

A breach could be caused by any single instance or combinations of the reasons below.

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

The cause will help determine the severity of the breach, in line with the traffic light framework.

Effect of the breach

The decision to report a breach might rest on the impact the breach has. Some of the considerations which the reporter might take into account when assessing a breach are set out below:

- A lack of adequate internal controls not having been established and operated
- Failure of the LGPS administration to provide accurate information about benefits
- Failure to maintain appropriate records
- Pension Board members not having the appropriate degree of knowledge and/or understanding in order to fulfil their role
- Pension Board members having a conflict of interest
- Any other breaches that may result in poor governance of the Pension Fund

Reaction to the breach

While reacting to a breach to mitigate its impact does not remove the requirement for the breach to be reported, failure to act, could result in the implications of the

breach worsening, and could in itself contribute to the seriousness of the breach. Some examples of an improper response are below:

- Lack of prompt and effective action to remedy the breach and identify and resolve the cause
- Lack of action to carry out corrective action to a proper conclusion
- Failure to notify an affected scheme member(s) where appropriate

A breach will not normally be materially significant if it has arisen from an isolated incident or where there has been prompt and effective action to investigate and correct the breach and its causes.

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.

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 may not be considered to be of material significance.

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

The Hertfordshire Pension Fund and its administrators will use the Regulator's traffic light system as a means of assessing whether any breach is to be considered as materially significant and so reported to the Regulator.

2.4 Reporting breaches to the Regulator

As soon as a breach or likely breach has been identified regardless of whether it needs to be reported to the Pensions Regulator, the relevant manager, in consultation with the Responsible Officer, must review the circumstances of the breach. This is 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. In the case of serious offences that require investigation by the police or the Regulator, then the reporter should report these directly to the Regulator immediately.

Reports must be submitted in writing and can be sent by post or electronically by email. Wherever possible, reporters should use the standard format available via the [Pension Regulator's Exchange online service](#).

Any report submitted to the Regulator should include sufficient background information. This should include:

- The name of the Pension Fund
- A full descriptions of the breach/suspected breach
- The name of the employer in question (if appropriate) and Scheme Manager
- Contact details for the reporter of the breach
- Any relevant dates relating the breach
- The role of the reporter in the Fund.

Any further information which can be provide to the Regulator to help them assess the breach should also be provided. This might include, but is not limited to the following areas:

- Details of why the breach is thought to be materially significant for the Regulator
- Contact details for the Scheme Manager
- Whether there has been a similar concern reported previously

A copy of any report of a suspected breach made to the Regulator should be sent to the Responsible Officer.

The Regulator will acknowledge all reports within 5 working days of receipt and will be in contact in the event that clarifications or further information is required.

3 Process for reporting breaches

All relevant officers, administrators and elected members of the Council and administrators, as well as all members of the local pension board have a responsibility to:

- Identify and assess the severity of any breach or likely breach;
- Report all breaches or likely breaches to the Responsible Officer and Section 151 officer;
- 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 recurring; and
- co-operate with, and assist in, the reporting of breaches and likely breaches to the Pension Committee, local pension board and where necessary the Regulator.

3.1 Recording of Breaches

All breaches and likely breaches identified are to be reported to the Responsible Officer as soon as they are identified. They will log all breaches on the Hertfordshire Pension Fund's breaches log, (an example of the log is attached as Appendix A) 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. Any documentation supporting the breach will be maintained by the Responsible Officer.

3.2 Reporting to the Pension Committee

The quarterly Employer Risk and Governance report presented to the Pension Committee and Pension Board will detail:

- All recorded breaches, including confirmation of those reported to the Regulator;
- For each recorded breach, details of the action taken and result of any action (where not confidential); and
- Any future action to mitigate or eliminate the risk of any future breaches of a similar nature.

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).

3.3 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 Hertfordshire Pension Fund, administrators or a member of the local pension board. The duty to report does not override any other duties a “reporter” may have, such as confidentiality. Any such duty is not breached by reporting to the Regulator. Given the statutory duty that exists, in exercising this breaches policy 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 Regulator.

The duty to report, however, does not override ‘legal privilege’, so certain oral and written communications between the Council or local pension board and a professional legal adviser do not have to be disclosed if they meet the principles of legal privilege.

3.4 Responsible Officer

The Hertfordshire Pension Fund has appointed the Head of Pensions to be responsible for the management and execution of these guidelines (the “Responsible officer”. This 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 Responsible Officer in the Hertfordshire Pension Fund’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 Pensions 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.

3.5 Training

The Responsible Officer will ensure that all relevant officers and elected members, as well as members of the local pension board receive appropriate training on this policy at the commencement of their employment or appointment to the local pension board as appropriate and on an ongoing basis.

The administrators will be responsible for ensuring that all staff responsible for the administration of the Fund receive appropriate training with regard to this policy and their obligations under it.

4. Contact Us

If you have any breaches to report in line with this Policy or any queries in regard to this Policy, please do not hesitate to contact the Fund from the contact details provided below:

Email – Pensions.Team@hertfordshire.gov.uk

Appendix A

Breaches Log

Date	Who is responsible for the breach	Employer Number	Scheme Employer	Open/Closed	Category <i>(e.g. administration, contributions, funding, investment, criminal activity)</i>	Breach Rating <i>(red, amber, green)</i>	Description and cause of breach	Possible effect of breach and wider implications	Response of relevant parties to breach	Reported / Not reported <i>(with justification if not reported and dates)</i>	Outcome of report and/or investigations	Outstanding actions

Appendix B - Example breaches

The Pensions Regulator has prepared a [Public Service Toolkit](#) which highlights examples of breaches of the law. We have also illustrated two examples below.

Failure to enter employee into the scheme

Scenario

It is discovered that a scheme employer has not entered an eligible employee into the LGPS on joining

Steps that might be taken

On the face of it a breach will have occurred, as the scheme employer has failed to do something they are required to do under the rule of the LGPS. Before deciding to report to the Pensions Regulator it is necessary to consider why this has happened and the steps that are being taken to either rectify the situation and/or ensure it is not repeated. This will include:

- Assessing whether failure relates to a specific employee or is it something more widespread
- Remediating this particular situation immediately
- Understanding if there have been personnel changes at the employer; has this resulted in teething problems during any hand-over?
- If necessary, the Fund could provide training to the employer on its responsibilities to ensure there is no repeated failure

Materiality

When considering if the delay/failure is likely to be of “material significance” you could consider;

- Has the member been denied access to the scheme completely?
- Has the employer failed to respond to the Fund’s enquiries?
- Has the member not been given the opportunity to backdate entry to the scheme and pay arrears?
- Has the employer failed to put in place an immediate plan to remedy any further failures?

- Are more members affected, or is this a one-off?

If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches log.

Late payment over of contributions

Scenario

A scheme employer is late in paying over employee and employer contributions

Steps that might be taken

The reasons for the delayed payment could many, so while a breach has clearly occurred it is important to understand the reasons behind the delay. To do this:

- Contact the employer to assess the reason for the delay
- Investigate what went wrong
- Ensure steps are put in place so as to avoid a repeat in future months
- Record the outcome of your investigation
- Make sure processes are assessed to ensure they pick up any potential fraud

Materiality

While the reason for the delay in paying over contributions might be entirely innocent, it is also possible something more sinister is at play and could be “materially significant”. Consider;

- Is the employer unwilling or unable to pay? e.g. due to insolvency
- Is any dishonesty involved on the part of the employer? e.g. using non-payment to ease cash-flow
- Is the employer seeking to avoid paying contributions?
- Does the employer have inadequate processes in place to recover contributions?
- Have contributions been outstanding for over 90 days since being identified?

If the answer to any of the above is “yes” this may imply materiality and may warrant reporting to the Pensions Regulator. In any event the issue should be added to the Council’s breaches lo