

Cumbria Pension Fund – Fund Policy Document

POLICY & PROCEDURE ON REPORTING BREACHES OF THE LAW

1. Introduction

- 1.1. This document sets out the procedures to be followed by persons involved with the Cumbria LGPS ('the Fund'), the Local Government Pension Scheme managed and administered by Westmorland and Furness Council (also known as the 'Scheme Manager' or 'Administering Authority'), in relation to reporting breaches of the law.
- 1.2. Under the Pensions Act 2004 certain persons have a duty to report breaches of the law when there is reasonable cause to believe that:
 - A legal duty 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.
- 1.3. Breaches can occur in relation to a wide variety of the tasks normally associated with the administrative function of a scheme such as keeping records, internal controls, calculating benefits and making investment or investment-related decisions.
- 1.4. The duty to report overrides any other duties however it does not override 'legal privilege'. This means that, generally, communications between a professional legal advisor 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.
- 1.5. This document applies, in the main, to:
 - all Members of the Cumbria Local Pension Board;
 - all Members of the Cumbria Pensions Committee;
 - all officers involved in the management of the Fund;
 - personnel of the shared service pensions administrator providing day to day administration services to the Fund;
 - any professional advisors including independent advisors, auditors, actuaries, legal advisors and fund investment managers of the Fund;
 - officers of employers participating in the Fund who are responsible for pension matters; and
 - any other person involved in the administration of the Fund and/or in advising the Administering Authority in relation to the 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 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 (TPR).

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 advisor 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 a scheme an occupational or personal pension scheme;
- the employer in relation to an occupational pension scheme;
- a professional advisor 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.

2.3. The Pensions Regulator's General Code of Practice

Practical guidance in relation to this legal requirement is included in The Pensions Regulator's General Code of Practice under the section "Reporting to TPR: Whistleblowing – reporting breaches of the law". This includes the following areas:

- who must report;
- decision to report;
- how to report; and
- reporting payment failures.

2.4. Application to Cumbria LGPS ('the Fund')

This policy and procedure has been developed to reflect the guidance contained in The Pensions Regulator's General Code of Practice in relation to the Fund and this document sets out how the Fund will strive to achieve best practice through use of a formal reporting breaches procedure.

3. The Fund Reporting Breaches Procedure

3.1. Introduction

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 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.

3.2. 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:
www.legislation.gov.uk/ukpga/2004/35/contents
- Employment Rights Act 1996:
www.legislation.gov.uk/ukpga/1996/18/contents
- Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (Disclosure Regulations):
www.legislation.gov.uk/uksi/2013/2734/contents/made
- Public Service Pension Schemes Act 2013:
www.legislation.gov.uk/ukpga/2013/25/contents
- Local Government Pension Scheme Regulations (various):
<http://www.lgpsregs.org/timelineregs/Default.html> (pre 2014 schemes)
<http://www.lgpsregs.org/index.php/regs-legislation> (2014 scheme)
- The Pensions Regulator's General Code of Practice, specifically individuals should refer to the section on 'Reporting to TPR: Whistleblowing – reporting breaches of the law'.

Further guidance and assistance can be provided by the Director of Resources (S151 Officer); Senior Manager – Cumbria Pension Fund and the Chief Legal Officer (Monitoring Officer) (see 3.3 for further details), 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).

3.3. Clarification when a breach is suspected

Individuals need to have reasonable cause to believe that a breach has occurred, not just a suspicion. Having 'reasonable cause' to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated. 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 Administering Authority or The Pensions Regulator may require before taking legal action.

It is also important that a reporter is aware that any delay in reporting any potential breach may exacerbate or increase the risk of the breach causing further and more significant issues.

Subject to paragraph 3.5 where a breach is suspected it will usually be appropriate for the individual to report reasonable suspicions to one of the following who will undertake appropriate checks to determine whether a breach has occurred:

- Director of Resources (S151 Officer);
- Senior Manager: Cumbria Pension Fund (Deputy S151 Officer-LGPS);
- Chief Legal Officer (Monitoring Officer);
- Senior Manager – Legal & Democratic Services;
- a member of the Pensions Committee or Local Pension Board (details of the members of the Committee and Board can be found at <https://www.westmorlandandfurness.gov.uk/> & respectively); or
- a member of the Pensions Team (pensions@westmorlandandfurness.gov.uk).

There are some instances where it would not be appropriate to report reasonable suspicions to the above individuals or 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.

3.4. 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 Annex A to this procedure.

The individual should use the traffic light framework described in Annex B to help assess the material significance of each breach and to formally support and document their decision.

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

Subject to paragraph 3.3 before you submit a report to The Pensions Regulator you should refer the suspected breach to the appropriate level of authority to assist in determining whether a report needs to be made. Westmorland and Furness Council has determined that the appropriate persons are the Director of Resources (S151 Officer) (or in their absence the Senior Manager – Cumbria Pension Fund (Deputy S151 Officer– LGPS)) and/or the Chief Legal Officer (Monitoring Officer) (their deputy) and/or External Audit. They are considered to 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 TPR, where appropriate.

Information may also be available from national resources such as the Scheme Advisory Board or the Local Government Pensions Committee (LGPC) Secretariat (part of the LG Group- <http://www.lgpsregs.org/>). If timescales allow, legal advice or other professional advice can be sought.

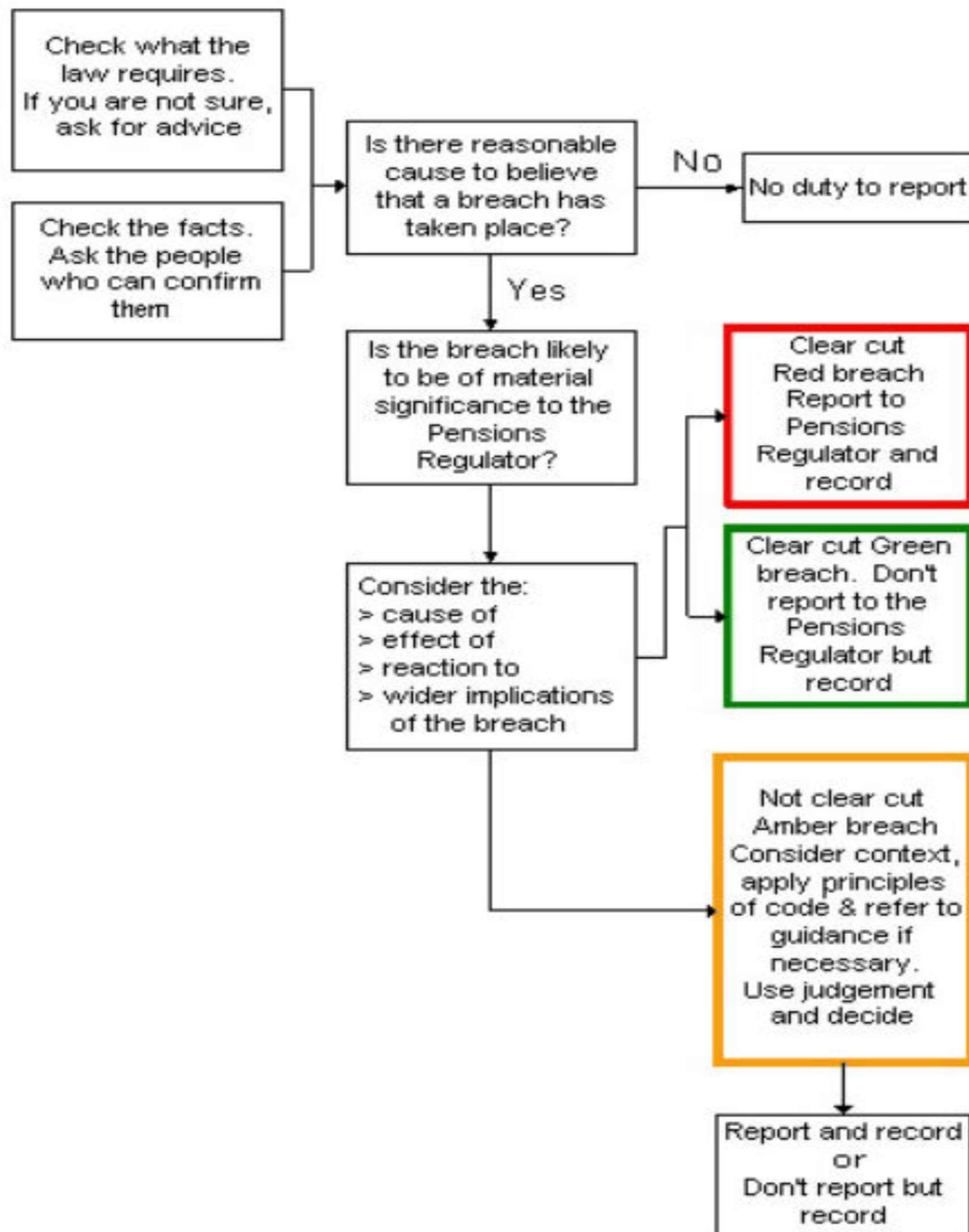
The matter should not be referred to any of these officers if doing so will alert any person responsible for a possible serious offence to the investigation. If that is the case, the individual should report the matter to The Pensions Regulator setting out the reasons for reporting, including any uncertainty – a telephone call to the Regulator before the submission may be appropriate, particularly in more serious breaches. Before referring to The Pensions Regulator the individual may prefer to approach External Audit for their opinion.

Individuals must bear in mind that the involvement of the Senior Manager – Cumbria Pension Fund (Deputy S151 Officer- LGPS) and/or the Monitoring Officer 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 TPR.

3.6. Decision Tree: deciding whether or not to report:

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.

Decision-tree: deciding whether to report



3.7. Timescales for reporting

The Pensions Act and The Pensions Regulator's Code 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 and nor is it necessary for a reporter to gather all the evidence which TPR 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.

Early identification of very serious breaches: In cases of immediate risk to the scheme, for instance, where there is any indication of dishonesty, TPR 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 TPR to the breach.

3.8. 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). Westmorland and Furness Council will maintain a record of all breaches identified by individuals and reporters should therefore provide copies of reports to the Senior Manager – Cumbria Pension Fund (Deputy S151 Officer- LGPS) or the Monitoring Officer. 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) will be included in the quarterly Monitoring Report at each Pensions Committee, and this will also be shared with the Local Pension Board.

3.9. Reporting a breach

Reports must be submitted in writing via TPR's online system at **www.tpr.gov.uk/exchange** 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 TPR. TPR 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 TPR due to restrictions on the disclosure of information.

As a minimum, individuals reporting should provide:

- full fund name (Cumbria Local Government Pension Scheme);

- description of breach(es);
- any relevant dates;
- name, position and contact details;
- role in connection to the fund; and
- employer name or name of Administering Authority (the latter is Westmorland and Furness Council).

If possible, reporters should also indicate:

- the reason why the breach is thought to be of material significance to TPR;
- fund address (provided at the end of this procedures document);
- Administering Authority contact details (provided at the end of this procedures document);
- pension scheme registry number (PSR – 10079082); 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.

3.10. Confidentiality

If requested, TPR 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.

3.11. Reporting to Pensions Committee and Pension Board

The monitoring report presented to the Pensions Committee and available to the Local Pension Board on a quarterly basis will include details of:

- 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 report is provided in Annex C to this procedure.

3.12. Review and maintenance of 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 Cumbria 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.

Determining whether a breach is likely to be of material significance

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. Where appropriate expert or professional advice should be taken into account when deciding whether the breach is likely to be of material significance to The Pensions Regulator.

3. The cause of the breach

- 3.1. Examples of causes which are likely to be of concern to The Pensions Regulator are provided below:
 - dishonesty;
 - poor governance or poor administration, i.e. failure to implement adequate administration procedures;
 - slow or inappropriate decision-making practices;
 - incomplete or inaccurate advice; or
 - acting, or failing to act, in deliberate contravention of the law.
- 3.2. 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 N.B. historical information should be considered with care, particularly if changes have been made to address previously identified problems.

4. The effect of the breach

- 4.1. 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:
 - Committee/Board members not having the appropriate degree of knowledge and understanding, which may result in them not fulfilling their roles, the Fund not being properly governed and administered and/or the Administering Authority breaching other legal requirements;
 - Conflicts of interest of Committee or Board members, which may result in them being prejudiced in the way in which they carry out their role and/or the

ineffective governance and administration of the Fund and/or the Administering Authority breaching legal requirements;

- Inadequate internal controls, which may lead to the Fund not being run in accordance with 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 Fund at the right time;
- Inaccurate or incomplete information about benefits and scheme information provided to members, which may result in members not being able to effectively plan or make decisions about their retirement;
- Appropriate 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;
- Misappropriation of assets, resulting in scheme assets not being safeguarded; and
- Any other breaches which may result in the scheme being poorly governed, managed or administered.

5. The reaction to the breach

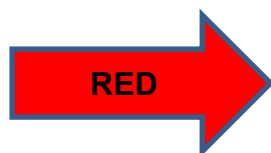
- 5.1. Where prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, notify any affected members The Pensions Regulator will not normally consider this to be materially significant.
- 5.2. A breach is likely to be of concern and material significance 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.

6. The wider implications of the breach

- 6.1. 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.

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.

Annex B

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 framework is provided by The Pensions Regulator at the following link:

<https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/communications-and-reporting-detailed-guidance/complying-with-the-duty-to-report-breaches-of-the-law>

Annex C

Example Record of Breaches

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