



# Whistleblowing – Reporting Breaches of the Law Policy

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# Introduction

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This policy has been prepared on behalf of Fife Council, as the administering authority for the Fife Pension Fund (the Fund). The policy sets out the arrangements for identifying, managing and reporting breaches of the law, as covered in the Pensions Regulator (tPR) General Code of Practice.

The policy identifies the responsibilities of officers of Fife Council, the Pension Committee and the Fife Pension Board in identifying, managing and where necessary reporting breaches of the law as they apply to the management and administration of the Fund.

Breaches can occur in relation to a variety of tasks associated with the administrative function of a pension scheme, for example record keeping; internal controls; calculation and payment of benefits and investment related decisions.

This policy will be reviewed annually, or more regularly if deemed appropriate by the fund's officers. Fund officers will monitor all breaches and will ensure that adequate resources are allocated to managing and administering this process.

The Council's Executive Director, Finance and Corporate Services, will be the Monitoring Officer responsible for the management and execution of this policy.

## Overview

Identifying and assessing a breach of law is important in reducing risk and providing an opportunity to review and improve processes in areas where the breach occurred. Furthermore, failure to report a material breach without 'reasonable excuse' is a civil offence that can result in civil penalties.

The Fund will maintain a log of all breaches relating to the management and administration of the Fund.

Where a breach has occurred, it should be identified as either an area of non-compliance under the LGPS regulations or a breach under Pension Law as defined within the Pensions Act 2004 and the Pensions Regulator's General Code of Practice.

## What is a breach of the law?

A breach of the law is 'an act of breaking or failing to observe a law, agreement or code of conduct'. It can cover many aspects of the management and administration of the LGPS, including failure:

- to carry out the requirements of the LGPS regulations, overriding legislation, statutory guidance and codes of practice.
- to maintain accurate records.
- to act on any fraudulent act or omission of an employer to pay contributions to the Fund on time.
- to pay benefits accurately or in a timely manner.
- to issue annual benefit statements or non-compliance with the Regulator's General Code of Practice.

The Code states broadly, our interpretation covers anything that could affect members' benefits, or members and others' ability to access the information they are entitled to.

The definition of Pension Law under the jurisdiction of the Pensions Regulator is any enactment contained in or made by virtue of:

- the Pension Schemes Act 1993.
- the Pensions Act 1995.
- the Welfare Reform and Pensions Act 1999.

- the Pensions Act 2004.
- the Public Service Pensions Act 2013.
- the Pensions Act 2014.
- the Pensions Schemes Acts
- Public Service Pensions and Judicial Offices Act 2022.

## **Responsibilities in relation to breaches**

In accordance with the General Code of Practice, the following (known as ‘reporters’) are subject to the reporting requirements:

- Members of the Fund.
- Fife Council officers.
- Pension Committee members.
- Fife Pension Board.
- Scheme employers.
- Third party providers (where so employed).
- Professional advisers (including the Fund Actuary, investment advisers, legal advisers)

This policy applies only to members, Fife Council officers, the Committee and the Fife Pension Board. Other reporters should ensure policies are put in place to identify, assess and where necessary report breaches. Both Fife Council and the Pension Board will take all necessary steps to consider and report a breach rather relying on it being reported by another ‘reporter’.

## **Requirement to report a breach of the law**

The Code states that ‘there are two key judgements required when deciding to report a breach of the law’:

- Is there is reasonable cause to believe there has been a breach of the law?
- Is the breach likely to be of material significance to us?

It should be noted that not every breach that is identified needs to be reported to the Regulator. For example, where it can be demonstrated that appropriate action is in place to rectify the breach, it may not be necessary to report to the Regulator. However, all incidences of breaches should be recorded in the breaches log to determine if there any trends that might indicate procedural failings or mismanagement. Action must then be taken to rectify the situation and prevent re-occurrences.

## **When is a breach required to be reported to the Regulator?**

The General Code of Practice requires that a report must be made in writing as soon as reasonably practicable once there is reasonable cause to believe a breach has occurred and that it is of material significance to the Regulator. The Code states that in most cases this should be within 10 days of the breach being discovered.

Where it is considered to be a matter of urgency (for example the breach is a result of fraud) the matter should be brought to the Regulator’s attention immediately. A reporter should mark urgent reports as such and draw attention to matters considered particularly serious. If a reporter discovers

an urgent breach which is likely to have an immediate effect for scheme members, they should notify the tPR by telephone before submitting their report in writing.

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

However, a breach is likely to be of material significance if 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 the risk or recurrence.
- Are not pursuing corrective action to a proper conclusion, or
- Fail to notify affected members where it would have been appropriate to do so.

## **Judging whether there is ‘reasonable cause’**

As stated in the General Code of Practice, having reasonable cause means more than merely having a suspicion that cannot be substantiated.

Therefore, it will be necessary for robust checks to be carried out to establish whether or not a breach has actually occurred. Where necessary this will necessitate taking legal advice from Legal Services as well as other advisers (e.g. auditors, the Fund Actuary or investment advisers).

It would not be appropriate to carry out checks in cases of fraud, suspected fraud or other serious offences where discussions might alert those implicated or impede the actions of the police or a regulatory authority. Under these circumstances the reporter should alert the Regulator without delay.

## **Judging what is of ‘material significance’ to the Regulator**

The Regulator’s General Code of Practice assists schemes in assessing the severity of a breach and whether it should then be reported. When determining materiality of the breach, members, officers, the Pension Committee and Pension Board will consider in all cases the:

Cause of the breach:

- 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

Effect of the breach:

- 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 series of unrelated breaches, have a pattern of recurrence in relation to participating employers, certain members, or groups of members.
- Governing bodies that do not have the appropriate degree of knowledge and understanding, preventing them from fulfilling their roles and resulting in the scheme not being properly governed and administered and/or breaching other legal requirements.

- Unmanaged conflicts of interest within the governing body, making it prejudiced in the way it carries out the role, ineffective governance and scheme administration, and/or breaches of legal requirements.
- Systems of governance (where applicable) and/or internal controls are not established or operated. This leads to schemes not being run in line with their governing documents and other legal requirements.
- Risks are not properly identified and managed and/or the right money is not being paid to or by the scheme at the right time.
- Accurate information about benefits and scheme administration is not being provided to scheme members and others meaning members are unable to effectively plan or make decisions about their retirement.
- Records are not being maintained. This results in member benefits being calculated incorrectly and/or not being paid to the right person at the right time.
- Governing bodies or anyone associated with the scheme misappropriate scheme assets or are likely to do so.
- Trustees of defined benefit schemes not complying with requirements of the Pension Protection Fund during an assessment period.

#### Reaction to the breach:

If 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 if a breach has been identified that:

- does not receive prompt and effective action to remedy the breach and identify and tackle its cause to minimise risk of recurrence
- is not being given the right priority by the governing body or relevant service providers
- 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
- it was caused by dishonesty, even when action has been taken to resolve the matter quickly and effectively

#### Wider implications of the breach:

These should be considered when assessing whether it is 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 (the reason could be that the governing body lacks the appropriate knowledge and understanding to fulfil their responsibilities)

Those reporting a breach should consider general risk factors, such as 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.

## **Submitting a report to the Regulator**

Reports must be submitted in writing using the tPR online web form, or email or by post. The tPR does not usually accept reports by telephone. However, if a reporter discovers a breach which is likely to have an immediate and damaging effect for scheme members, they should telephone the tPR before submitting their report in writing.

A report should be dated and include as a minimum:

- full name of the scheme.
- description of the breach or breaches.
- any relevant dates.
- name of the employer.
- name, position and contact details of the reporter.
- role of the reporter in relation to the scheme.

Additional information that would help the Regulator includes:

- the reason why the breach is considered to be of material significance.
- scheme address.
- scheme manager contact details.
- description of actions taken to rectify the breach.
- whether the breach has been reported before.

The Monitoring Officer will be responsible for ensuring the effective management of the breach identified including submission of any report to the Regulator. Any documentation supporting the breach will also be retained.

## **Whistleblowing protection and confidentiality**

It is a statutory duty to report breaches of the law. The Regulator will do its best to protect a reporter's identity and will not disclose the information except where lawfully required to do so. Given the statutory duty that exists in exercising this breaches policy, the Council will ensure that it adheres to the Employment Rights Act 1996, amended by the Public Interest Disclosure Act 1998, which provides protection for employees making a whistleblowing disclosure to the Regulator.

The duty to report however does not override 'legal privilege' so oral and written communications between the Council or Pension Board and a professional legal adviser do not have to be disclosed.

## **Reporting to the Pensions Committee and Pension Board**

When a breach is identified, it will be reported immediately to the Chairs of the Pension Committee and the Pension Board.

# Appendix A

## Examples of Breaches

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### Example 1

An employer is late in paying over employee and employer contributions and so late it is in breach of the statutory period for making such payments. The Pension Team contacts the employer. The employer immediately pays the contributions that are overdue, and it improves its procedures so that in future contributions are paid over on time. In this instance there has been a breach but members have not been adversely affected and the employer has put its house in order regarding future payments. The breach is therefore not material to the Regulator and need not be reported.

### Example 2

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

### Example 3

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

### Example 4

A pension overpayment is discovered and thus the Pensions Team has failed to pay the right amounts to the right person at the right time. A breach has therefore occurred. The overpayment is however for a modest amount and the pensioner could not have known that (s)he was being overpaid. The overpayment is therefore waived. In this case there is no need to report the breach.

## Alternative Formats

This information can be made available in large print, braille, audio CD/tape and Gaelic on request by calling **03451 55 55 00**.

**British Sign Language** – please text (SMS) 07781 480 185



**BT Text Direct – 18001 01592 55 11 91**

**Language Lines**

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Arabic خط هاتف اللغة العربية: 03451 55 55 77

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Bengali বাংলায় আলাপ করার জন্য টেলিফোন লাইন: 03451 55 55 99

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Cantonese 中文語言熱線電話: 03451 55 55 88

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Polish Polskojęzyczna linia telefoniczna: 03451 55 55 44

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Urdu اُردو زبان کے لیے ٹیلیفون نمبر 03451 55 55 66

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**Review Date**  
May 2024

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**Next Review Date**  
May 2025