

BREACHES POLICY

Report of the County Treasurer

Please note that the following recommendation is subject to consideration and determination by the Board before taking effect.

Recommendation: that the Board considers the draft Breaches policy and notes the current breaches log.

1. Introduction

- 1.1. The Pensions Act 2004 imposes a requirement to report a breach of the law to The Pensions Regulator as soon as is reasonably practicable.
- 1.2. This requirement applies to all individuals with a role in the LGPS (including members of the Committee, members of the Local Pension Board and officers) who have a duty to report breaches of the Law when they have reasonable cause to believe that a breach has occurred.

2. Breaches Policy

- 2.1. The Pensions Regulator became responsible for the oversight of public sector pension schemes in 2015. Codes of Practice issued by The Pensions Regulator include practical guidance and expected standards (i.e. best practice) in relation to reporting material breaches.
- 2.2. A breach is likely to be of material significance to the Regulator where it was caused by:
 - acting, or failing to act, in deliberate contravention of the law;
 - dishonesty;
 - incomplete or inaccurate advice;
 - poor administration;
 - poor governance;
 - slow or inappropriate decision-making practices.
- 2.3. Breaches that are determined not to be of material significance to the Regulator will not be reported, but must still be recorded in the Breaches log.
- 2.4. The Breaches policy and procedures have been designed to comply with the guidance provided by the Pensions Regulator and to ensure that Devon Pension Fund follows best practice in this area.
- 2.5. The draft Breaches Policy and the Breaches Log for 2017/18 are attached as Appendices 1 and 2 to this report. Members should note that the 3 breaches recorded for 2017/18 are considered not to be of material significance to The Pensions Regulator and therefore were not reported.

3. Conclusion

- 3.1. The Board is asked to consider the draft Breaches Policy and to note the Breaches Log for 2017/18.

Mary Davis

Electoral Divisions: All

Local Government Act 1972

List of Background Papers - Nil

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**Procedure for Reporting Breaches of the Law to the
Pensions Regulator**

Devon Pension Fund

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RECORD OF AMENDMENTS

Amendment number	Date	Paragraphs/Pages Amended	Initials
1			
2			
3			
4			
5			

DISTRIBUTION

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1. Introduction

In April 2015 the Pensions Regulator (the Regulator) published its Code of Practice no 14 (the Code) *Governance and administration of public service pension schemes*.

There are various regulations relating directly to the Local Government Pension Scheme, and overriding regulations relating to Public Sector Pension Schemes in general. There are many people having a statutory duty to report material breaches of the law to the Regulator. To assist, the Code states that a procedure should be established to ensure that those with a responsibility to make reports are able to meet their legal obligations. This document is that procedure for the Devon Pension Fund, which relates to all of the Fund's areas of operation.

Where the text below has been drawn from the Code itself, the Regulator's copyright applies.

2. Legal requirements

Certain people 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.

People who are subject to the reporting requirement ('reporters') for public service pension schemes are:

- the scheme manager
- a pension board member
- an employer - any participating employer who becomes aware of a breach should consider their statutory duty to report, regardless of whether the breach relates to, or affects, members who are its employees or those of other employers
- a professional adviser, e.g. auditor, actuary, legal adviser, fund manager
- any person who is otherwise involved in the administration of the Fund (and thus members of the pension board and all of the Fund's officers)
- any person who is otherwise involved in advising the manager of the scheme in relation to the scheme

This policy applies only to elected members and officers of the Council, those carrying out administration or management functions and members of the local pension board. 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 Council and the local pension board will take all necessary steps to consider the breach and report to the Regulator, rather than having the breach solely reported by any of the other reporters.

3. Reasonable cause

Having 'reasonable cause' to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated.

It is important that the Council, administrators or the local pension board is/are satisfied that a breach has actually occurred, rather than acting on a suspicion of such an event.

It will be necessary therefore, for robust checks to be made by officers, administrators, and elected members when acting on any suspicion of a breach having occurred.

For example, a member of a funded pension scheme may allege that there has been a misappropriation of scheme assets where they have seen in the annual accounts that the scheme's assets have fallen. However, the real reason for the apparent loss in value of scheme assets may be due to the behaviour of the stock market over the period. This would mean that there is not reasonable cause to believe that a breach has occurred.

Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to check with the pension board, scheme manager, or others who are able explain what has happened. It would not be appropriate to check in cases of theft, 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.

If the reporter is unclear about the relevant legal provision, they should clarify their understanding of the law to the extent necessary to form a view.

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. A delay in reporting may exacerbate or increase the risk of the breach.

4. Material significance

In deciding whether a breach is likely to be of material significance to the Regulator, it would be advisable for the reporter 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
- wider implications of the breach

When deciding whether to report, those responsible should consider these points together. 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 breach is likely to be of material significance to the Regulator where it was caused by:

- Acting, or failing to act, in deliberate contravention of the law.
- Dishonesty.
- Incomplete or inaccurate advice.
- Poor administration, i.e. failure to implement adequate administration procedures.
- Poor governance.
- Slow or inappropriate decision-making practices.

When deciding whether a breach is of material significance, those responsible should consider other reported and unreported breaches of which they are aware. However, historical information should be considered with care, particularly if changes have been made to address previously identified problems.

A breach will not normally be materially significant if it has arisen from an isolated incident, such as a power outage, fire, flood, or a genuine one-off mistake. 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.

5. 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:

Cause	Effect
Pension board members not having the appropriate degree of knowledge and understanding	Resulting in pension boards not fulfilling their roles, the scheme not being properly governed and administered and/or scheme managers breaching other legal requirements
Pension board members having a conflict of interest	Resulting in them being prejudiced in the way in which they carry out their role and/or the ineffective governance and administration of the scheme and/or scheme managers breaching legal requirements
Adequate internal controls not being established and operated	Leading to schemes not being run in accordance with their 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 scheme at the right time
Accurate information about benefits and scheme administration not being provided to scheme members and others	Resulting in members not being able to effectively plan or make decisions about their retirement
Appropriate records not being maintained	Resulting in member benefits being calculated incorrectly and/or not being paid to the right person at the right time
Pension board members having misappropriated any assets of the scheme or being likely to do so	Resulting in scheme assets not being safeguarded
Any other breach	Resulting in the scheme 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.

6. 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 and those involved:

- a. do not take prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of recurrence;
- b. are not pursuing corrective action to a proper conclusion;
- c. fail to notify affected scheme members where it would have been appropriate to do so.

7. Wider 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 scheme manager or pension board members having a lack of appropriate knowledge and understanding to fulfil their responsibilities or where other pension schemes may be affected. For instance, public service pension schemes administered by the same organisation may be detrimentally affected where a system failure has caused the breach to occur.

***Please refer to Appendix 1 for a flowchart summary of the above areas**

8. Examples of breaches

Example 1

An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is contacted by officers from the administering authority, it immediately pays the monies 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 employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is also late in paying AVCs to the Prudential. It is contacted by officers from the administering authority, and it eventually pays the monies that are overdue, including AVCs to the Prudential. 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 that is 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

An employer is late in submitting its statutory year-end return of pay and contributions in respect of each of its active members and as such it is in breach. Despite repeated reminders it still does not supply its year-end return. Because the administering authority does not have the year-end data it is unable to supply, by 31 August, annual benefit statements to the employer's members. In this instance there has been a breach which is relevant to the Regulator, in part because of the employer's failures, in part because of the enforced breach by the administering authority, and also because members are being denied their annual benefits statements.

Example 4

A pension overpayment is discovered and thus the administering authority 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 as it is not material.

Example 5

Members of the Local Pension Board, the Local Pension Committee and key Officers have a responsibility to declare if they have a material interest in any decision that they are involved in. This may, for example, be a family member that is employed by an investment management firm that is being considered for appointment or an individual investment decision that may have potential benefit for them or a close friend/family member. This

interest should be declared prior to any decision being taken, and the interested party should be excluded from the decision.

If it is subsequently found that a notification of material interest was not made, this would be considered a material breach and should be reported to the Regulator. Non-disclosure of the material interest is also likely to lead to disciplinary action against the individual.

9. Submitting a report to the Regulator / timescales for reporting (see Appendix 3)

Before you submit a report you should obtain clarification of the law around the suspected breach. You should contact the Head of Peninsula Pensions in the first instance by completing the appropriate form (Appendix 2).

The Pensions Manager will consider whether the Regulator would regard the breach as being material. (S)he will also clarify any facts, if required. If the case requires input from others, including a Legal view, (s)he will seek advice, as required.

Some matters could be urgent, if for example a fraud is imminent, whilst others will be less so. Non-urgent but material breaches should be reported to the Regulator within 30 working days of them being confirmed, and in the same time breaches that are not material should be recorded (see later).

Some breaches could be so serious that they must always be reported, for example a theft of funds by anyone involved with the administration or management of the Fund. It is difficult to be definitive about what constitutes a breach that must always be reported, but one test is: might it reasonably lead to a criminal prosecution or a serious loss in public confidence? In serious cases, reporters should use the quickest means possible to alert The Pensions Regulator to the breach.

Reports must be submitted in writing via the regulator's online system called Exchange at www.tpr.gov.uk/exchange, or by post, email or fax, and it should be marked urgent if appropriate. If necessary a written report can be preceded by a telephone call.

The regulator will acknowledge receipt of all reports within five working days and may contact you to request further information. Reporters will not usually be informed of any actions taken by the regulator due to restrictions on the disclosure of information.

As a minimum, schemes should provide:

- full scheme name
- description of breach(es)
- any relevant dates
- your name, position and contact details

- your role in connection to the scheme
- employer name or name of scheme manager (if known)

It would also be useful to include:

- the reason why the breach is thought to be of material significance to the regulator
- scheme address
- scheme manager contact details
- pension scheme registry number (PSR)
- whether the breach has been reported before

Reporters should ensure they receive an acknowledgement for any report they send to the Regulator. Only when they receive an acknowledgement can the reporter be confident that the Regulator has received their report.

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

Breaches should be reported as soon as reasonably practicable, which will depend on the circumstances. In particular, the time taken should reflect the seriousness of the suspected breach.

In cases of immediate risk to the Fund, for instance, where there is any indication of dishonesty, the Regulator 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 the Regulator to the breach.

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

Breaches that are found not to be material to the Regulator must still be recorded. This is so that if similar breaches continue, then they are recognised as having become material. Recording all breaches also highlights where improvements are required, to try and prevent similar breaches. You should contact the Head of Peninsula Pensions in the first instance by completing the appropriate form (Appendix 2).

All breaches will be recorded by Peninsula Pensions on SharePoint via: <https://devoncc.sharepoint.com/sites/HR/Pensions/Shared%20Documents/Forms/AllItems.aspx?id=%2Fsites%2FHR%2FPensions%2FShared%20Documents%2FCode%20of%20Practice> (link to in-house spreadsheet)

11. 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 Regulator understands the potential impact of a report on relationships, for example, between an employee and their employer.

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 appropriate a legal adviser 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 (ERA) provides protection for employees making a whistleblowing disclosure to the regulator. Consequently, where individuals employed by firms or another organisation having a statutory duty to report disagree with a decision not to report to the regulator, they may have protection under the ERA if they make an individual report in good faith. The Regulator expects such individual reports to be rare and confined to the most serious cases.

12. Reporting to Pensions Committee and Pension Board

A report will be presented to the Pensions Committee and the Pension Board on a quarterly basis setting out:

- 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 proceedings).

13. Training

The section 151 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 Head of Peninsula Pensions 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.

14. Review

This Reporting Breaches Procedure was originally developed in November 2017. Prior to the procedure being in place, breaches have been recorded on the internal breaches log and considered in line with The Pension Regulator guidance (included in this document) with reference to 'the traffic light system'. This Procedure will be kept under review and updated as considered appropriate by the Head of Peninsula Pensions. It may be changed as a result of legal or regulatory changes, evolving best practice and ongoing review of the effectiveness of the procedure.

Further information:

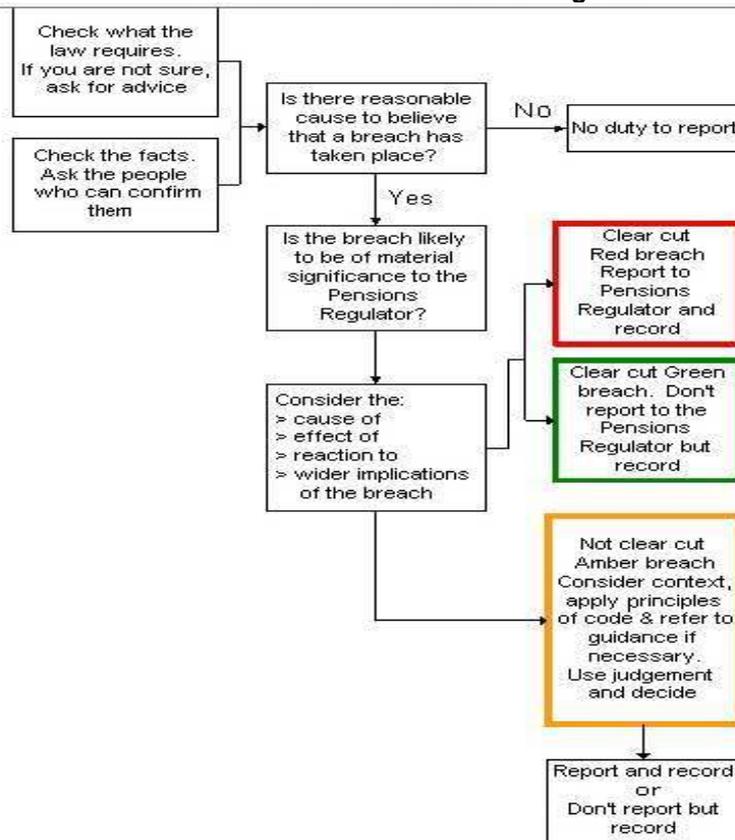
If you require further information about reporting breaches or this procedure, please contact:

Charlotte Thompson – Head of Peninsula Pensions

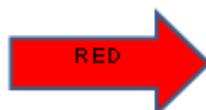
Email: Charlotte.thompson@devon.gov.uk

Telephone: 01392 383000

APPENDIX 1 – Guidance from The Pensions Regulator – whether to report



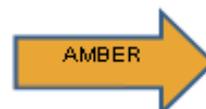
Transcript of Decision tree: deciding whether to report (PDF)



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.

APPENDIX 2 (Form to be completed to advise breach to Head of Peninsula Pensions)**Breach of the law**

Breach details	
Date of breach	
What type of disclosure has been breached?	
Please provide details of the breach	
Rectifying the breach	
Has this breach been rectified?	
If yes, what steps were taken to rectify the breach?	
If no, what steps are being taken to rectify the breach?	
If the breach has not been rectified, what are the timescales for completion?	
Additional breaches or any other information	
Please provide details of additional breaches or any other information that you think is relevant	
Decision to report	
Name and position of reporter	
Decision on whether or not to report (Yes or No with reasons)	
Date reported	
Date acknowledged by The Pensions Regulator	

APPENDIX 3 – Process for reporting material and non-material breaches

Type of Breach	Timescale for reporting	Internal actions	Further actions
Urgent and Material	Responsible officer informs Head of Peninsula Pensions and governance team, the breach is reported immediately to The Pensions Regulator	Governance team to keep record of the breach and investigate options to prevent further occurrence	Report urgent and material breaches to Section 151 officer, Chairman and Vice Chairman of Committee and Local Pension Board. Full report to be submitted at the next available meeting
Non urgent and material	Responsible officer informs Head of Peninsula Pensions and governance team, the breach is reported within 30 days to the Pensions Regulator	Governance team to keep record of the breach and investigate options to prevent further occurrence	Report non urgent and material breach at next Pensions Committee and Local Pension Board meeting
Immaterial	Responsible officer informs Head of Peninsula Pensions and governance team within 30 days	Governance team to keep record of the breach and investigate options to prevent further occurrence	Report immaterial breach at next Pensions Committee and Local Pension Board meeting

Record of Breaches

Appendix 2

Date	Category	Description and cause of breach	Possible effect of breach and wider implications	Reaction of relevant parties to breach	Reported/Not reported (with justification if not reported and dates)	Traffic light system colour	Outcome of report and/or investigations	Outstanding actions	Comments
Oct-2017	Administration	LGPS Annual Benefit Statements for active members - some statements were issued to Employers for distribution (IRO 11000 (6731 Devon / 4659 Somerset) members) - there was a delay with printers being able to issue them as they did not have all addresses to do so - not posted to employers until 7th September 2017 for subsequent issue to members	20% of Active members received statement - at least 1.5 weeks later than other scheme members	Data issue relating to employer addresses held	Not reported - only 1.5 weeks late and one off occurrence, amended for next year	A small number of members affected when compared with total statements issued. Action has been taken to correct the breach, identify and tackle its cause, to minimise the risk of reoccurrence (members not contacted as only small delay in receiving statements) It is unlikely that the scheme will be in breach of other legal requirements	All future statements to be issued direct to members and not via employers in future - encourage MSS	Encourage MSS use - contact all employers for up to date addresses for scheme members and advise to be kept current going forwards	

Date	Category	Description and cause of breach	Possible effect of breach and wider implications	Reaction of relevant parties to breach	Reported/Not reported (with justification if not reported and dates)	Traffic light system colour	Outcome of report and/or investigations	Outstanding actions	Comments
Oct-2017	Administration	<p>LGPS Annual Benefit Statements</p> <p>- ACTIVE MEMBERS Total due for issue: 55510 (Devon – 36019, Somerset - 19491) Total issued: 54201 Devon – 35155 (of which 13494 had paper copies) Somerset – 19046 (of which 9655 had paper copies) Total not issued: 1309 (address not known 722/ No care data 509 / No Benefit calc indicator 78)</p> <p>- DEFERRED MEMBERS - Total due for issue :61152 status 4 - Devon – 37969, Somerset - 23183 Total due for issue: 9286 status 2 Devon – 5876, Somerset -3410 Total not issued: (5984 status 4, 9286 status 2) where further information/clarification needed from employer.</p>	<p>The member has been unable to check:</p> <ul style="list-style-type: none"> • personal data is complete and accurate • correct contributions have been credited • what their pension may be at retirement 	<p>All members that ABS could not be produced for due to missing data received a notification letter prior to 31st August 2017 including reasons below: Regrettably your statement will be delayed for one of the following reasons:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Your employer has been late or has still not supplied us with the payroll information that is required to produce your annual statement <input type="checkbox"/> Your employer has supplied the payroll information that is required but there is a query with some information which is being investigated / we need to calculate benefits due to you <input type="checkbox"/> You did not contribute to the pension scheme or left service during 2016/17 	<p>Not reported. Less than 1% not issued/contacting within timescales for active members. Deferred members not covered by Pensions Regulator.</p>	<p>A failure by some – but not all – participating employers to act in accordance with scheme procedures, indicating variable standards of implementing those procedures.</p>	<p>Employer Liaison Team looking at End of Year Queries highlighted (both old and new) - they can then see if there is a pattern with same employer - and if any additional training/support required to improve going forwards.</p> <p>Monthly reports on status 2 members to pick up and address quicker</p>	<p>Encourage employers to use monthly CARE interface so that Leavers / problems highlighted sooner.</p> <p>Annual trace on addresses</p>	
Oct-17	Administration	<p>Annual Allowance pension savings notices for both Devon & Somerset LGPS not issued before 6/10/2017 for all those that potentially have breached - 99 members</p>	<p>The member is unable to take account of all pension savings across other schemes they may have - may cause delay in arranging self assessment</p>	<p>99 affected members received a 'holding' letter pending final calculations/notification prior to 6th October 2018</p>	<p>Not reported - only small percentage affected compared to total membership of both Funds</p>	<p>A small number of members affected when compared with total statements issued. Action has been taken to correct the breach, identify and tackle its cause, to minimise the risk of reoccurrence. It is unlikely that the scheme will be in breach of other legal requirements.</p>	<p>Improvements in place to obtain exact pay details from employers earlier next year</p>	<p>Date to be confirmed when 99 members expect to receive notifications by - also, pending confirmation from AA team re levels of pay to be automatically reported (annual rate and amount of increase in pay) to assist with next year's improvement plan</p>	<p>Total 41 members breached the limit out of the 99 given a 'holding letter' Devon LGPS Fund - 23 members breached the limit Somerset LGPS Fund 18 breached the limit Confirmed / assessed limits to request for higher earners/jump in salary - letter to EERS due May 2018 once EOY scheme returns have been received to avoid confusion with EERS</p>