



CORPORATE PROSECUTION POLICY

SUMMARY

- 1.1 The Chartered Institute of Public Finance and Accountancy (CIPFA) recommends that local authorities should have in place a corporate prosecutions policy that sets out how authorities will react to instances of fraud/criminal activity that they may be victims of.
- 1.2 The Department for Communities and Local Government (CLG) has also issued guidance to local authorities recommending that each has in place a prosecutions policy that sets out in broad terms the operational principles within which they will undertake their regulatory enforcement work.
- 1.3 In line with committee's term of reference to "*...consider the council's compliance with its own and other published standards and controls*", committee identified the absence of a corporate prosecution policy as a risk to operational effectiveness and tasked officers, through the Legal Services Division, to produce a document that addresses both of the aims identified in the two preceding paragraphs.

RECOMMENDATION

- 2.1 To recommend to Council for adoption, the 'Derby City Council – Corporate Prosecution Policy', annexed to this report at Appendix 2.

REASONS FOR RECOMMENDATION

- 3.1 The recommendation addresses the weakness identified by committee in paragraph 1.3, and ensures that the Council can demonstrate compliance with CIPFA and CLG guidance in appropriate proceedings.

SUPPORTING INFORMATION

4 Consultation Process

- 4.1 Officers began a consultation exercise on 19 July 2011 for one month, ending on 19 August 2011.
- 4.2 All Chief Officers were consulted in order to inform specifically of the proposals relating to the principles to be applied where the Council may be the victim of crime.
- 4.3 All Service Directors within the Council whose services' remits include statutory enforcement responsibilities were also consulted, to inform of the broad principles to be applied where the Council proposes to undertake its own prosecutions.
- 4.4 Responses were received from Chief Executive's, Resources, Neighbourhoods and Adults, Health and Housing Directorate's. Particularly noteworthy representations were made by both Environment and Regulatory Services and Housing Benefits, both of which taken together account for the significant proportion of statutory and regulatory enforcement prosecutions undertaken by the Council.

5 Policy Scope

- 5.1 Paragraph 4 of the policy, dealing with instances where the Council may be the victim of crime, applies to all staff, elected members, contractors, agents and the public at large.
- 5.2 Paragraph 5 of the policy, dealing with those instances when the Council undertakes prosecutions of its own as an enforcing authority for statutory or regulatory crime, applies to the public at large. The 'public' in this context is wider than that in the preceding paragraph, and may include any or some of the other groups highlighted in that paragraph, in so far as they may form part of the population of the city.
- 5.3 All directorates within the Council will be expected to have regard to this policy.

6 Next Steps

- 6.1 The introduction of the policy will be publicised in corporate policy briefings, and on DerbyNet.
- 6.2 The policy is scheduled to be reviewed at least once every three years by the Head of Internal Audit and Risk Management and the Head of Legal Services (General).

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| OTHER OPTIONS CONSIDERED |
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7.1 No other options have been considered.

This report has been approved by the following officers:

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| Legal officer | Joanne Groom, Barrister/Team Leader, Criminal & Regulatory Legal Services Team |
| Financial officer | N/A |
| Human Resources officer | N/A |
| Service Director(s) | Stuart Leslie, Director of Legal and Democratic Services |
| Other(s) | Richard Boneham, Head of Governance and Assurance |

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| Background papers: | None |
| List of appendices: | Appendix 1 – Implications Appendix 2 – Derby City Council Corporate Prosecution Policy |

IMPLICATIONS**Financial and Value for Money**

- 1.1 There are no related implications arising from the proposed adoption of this policy.

Legal

- 2.1 Applying to situations both when the Council is the victim of crime as well as when it is the prosecuting authority for criminal/regulatory breaches, adoption and application of this policy across all directorates will enable the Council to demonstrate consistency, transparency, proportionality and accountability in decisions that inform its involvement in criminal prosecutions.

Personnel

- 3.1 There are no personnel implications arising from the proposed adoption of this policy.

Equalities Impact

- 4.1 The proposed policy acknowledges the Council's obligations under the Equality Act 2010, and secures that any applicable equality strands are taken into account in deciding whether or not to prosecute offenders.

Health and Safety

- 5.1 There are no health and safety implications arising from the proposed adoption of this policy.

Environmental Sustainability

- 6.1 Not applicable in the context of this report.

Asset Management

- 7.1 Not applicable in the context of this report.

Risk Management

- 8.1 The effective management of risk is a core principle of good governance.

Corporate objectives and priorities for change

- 9.1 The functions of the Committee have been established to support delivery of corporate objectives by enhancing scrutiny of various aspects of the Council's controls and governance arrangements.

DERBY CITY COUNCIL
CORPORATE PROSECUTION POLICY

1. BACKGROUND

- 1.1 The Council has an Anti-Fraud and Anti-Corruption Policy, the mission statement of which sets out that the Council is committed to protecting the public funds it administers through its actions in respect of the detection and investigation of suspected fraudulent activities.
- 1.2 Alongside this commitment, the Council has a variety of statutory and regulatory functions for which, within its administrative area, it is the relevant enforcing authority.
- 1.3 This policy sets out broad principles that will guide a corporate approach to assisting the police/Crown Prosecution Service in prosecuting those who perpetuate theft, fraud or other corrupt practices against the Council. It also seeks to provide consistent guidelines for making decisions to prosecute, and administering sanctions. It is not intended to be prescriptive or exhaustive. The Council will exercise its discretion when appropriate, about the extent of involvement or action (as applicable) required, looking at each case individually.
- 1.4 This policy is intended to provide broad guidance to officers involved in the detection and investigation of fraud, corruption or theft. It also acts as a guide for those officers involved in the detection, investigation and prosecution of regulatory offences. In either case, it enables officers to determine the appropriate course of action to take where criminal activity is involved.

2. POLICY STATEMENT

- 2.1 Derby City Council is committed to the highest possible standards of probity and accountability. It is wholly opposed to all forms of fraud, corruption and theft. It is equally committed to defending the public purse, and the public at large. As part of these commitments, but subject to consideration of the factors set out in sections 4 - 6 of this policy, the Council adopts a presumption in favour of prosecution against perpetrators of criminal conduct, if there is sufficient evidence to initiate a prosecution and taking such action is in the public interest.
- 2.2 The Council's Anti-Fraud and Corruption Policy and Strategy outlines the approach that will be adopted to create an anti-fraud culture throughout the Council in order to prevent, detect and investigate fraud, corruption and theft, and to seek appropriate sanctions against perpetrators of regulatory crime.
- 2.3 It states that:

“Derby City Council is committed to the prevention, detection and investigation of all forms of fraud and corruption. The Council aims to prevent theft, fraud and corruption by:

- *developing an anti-fraud and corruption culture among staff and the public to deter such acts;*
- *encouraging the reporting of reasonably held suspicions;*
- *designing and operating systems, procedures and policies which minimise the risk of fraud, theft, corruption, misappropriation and misuse of assets; and*
- *assisting other government bodies, where appropriate, in their investigations into theft, fraud and corruption”.*

2.4 It also outlines that the Council will treat each case on its own merits, but where appropriate, the Council will seek to prosecute persons who:

- operate corrupt practices against the Council; or
- steal from the Council; or
- defraud the Council;

and will seek to recover the proceeds of any such activity from identified offenders.

2.5 The same broad principles apply equally to those matters for which the Council has a statutory or regulatory mandate to protect the interests of the wider public.

3. SCOPE OF THE POLICY

3.1 This policy documents the Council's intentions in respect of fraud, corruption and theft perpetrated against it, and criminal or regulatory crime falling within the scope of its statutory remit. It applies equally to conduct of or offences by members of the public, Council officers, contractors and elected members.

Link to Other Local Policies

3.2 A number of services within the Council with statutory regulatory or other enforcement powers have in place their own 'local' policies that focus on service specific operational considerations. Examples include Environment and Regulatory Services 'Enforcement and Prosecutions Policy', and Housing Benefits 'Prosecution Policy', to name a few. These local policies are based on the principles of good enforcement set out in the Cabinet Office 1998 Enforcement Concordat. It is not anticipated that these local policies will conflict with this policy. They complement this policy, providing detailed operational context specific to the enforcement remit of the relevant service(s) to which they relate. In the event however that a conflict may arise, clarification should be sought from the Director of Legal & Democratic Services, the Council's Chief Legal Officer.

3.3 This policy is therefore written with two perspectives in mind i.e.:

(1) where the Council is the victim of criminal conduct, and how it will respond to such situations;

(2) where the Council itself undertakes statutory or regulatory prosecutions.

4. PART ONE: THE COUNCIL AS THE VICTIM OF CRIME

4.1 The Council will not accept abuse of either its services or resources. Fraud, corruption and theft whether committed by staff, elected members, contractors, agents or other third parties will not be tolerated.

4.2 The Council will invite a criminal investigation in every case where criminality is perpetrated against it, by reporting all offences or suspected offences to the Police. Ultimately, the aim will be to assist the police investigations so as to enable a comprehensive file of evidence to be built up for submission to the Crown Prosecution Service, who will decide whether or not to initiate a criminal prosecution. Where any part of the evidence involves the provision of statements or other forms of evidence from Council staff, they will be supported to facilitate the provision of relevant information that may assist ongoing investigations.

- 4.3 The Council will pursue the recovery of financial gain from those found guilty of defrauding its systems or services. Following a relevant criminal conviction, the Council will actively encourage the Crown Prosecution Service to pursue both compensation and confiscation of illegally acquired gains in accordance with the Proceeds of Crime Act 2002.
- 4.4 The decision to act will be assessed on its own merit.
- 4.5 All persons under suspicion will be treated fairly. This means that so far as it may be reasonable and/or appropriate to do so, the Council will look to strike the right balance between the preservation of personal rights and freedoms and the public interest need to see that justice is done in any given case.
- 4.6 Theft against an employer is unacceptable, and will be actively discouraged. Local authority officers and elected members are expected to demonstrate the highest levels of probity because of the expectation of trust and confidence that their office creates in the public who they serve. All suspicions of fraudulent activity against the Council by officers and members will be reported to the police for investigation.
- 4.7 Disciplinary action will be taken against employees, where appropriate, and may be initiated independently of any decision to prosecution. The decision to initiate disciplinary action, prior to prosecution, or vice-versa as the case may be, will not preclude action in relation to the other being considered or started at a later date if the circumstances are deemed appropriate to do so.
- 4.8 The decision to proceed with disciplinary action rests with the Strategic Director of the relevant Directorate.
- 4.9 In the event of member involvement in theft, fraud or corruption, irrespective of a referral in accordance with paragraph 4.2, the member should expect the intervention of the Council's Monitoring Officer and/or the Standards Committee.

5. PART TWO: UNDERTAKING OUR OWN PROSECUTIONS

- 5.1 These arise from statutory or regulatory powers vested in the Council, as enforcing authority for specific statutory or regulatory crime within the administrative area of Derby. These powers will either arise by way of a 'power' or a 'duty' to act.
- 5.2 A power provides the Council with discretion over whether or not to investigate the commission of an offence. Whatever decision is arrived at must be capable of objective justification. In practice, this translates into assessing what the most appropriate action and/or sanction should be in the circumstances under consideration. These broad principles are now enshrined in statute, in the Regulatory Enforcement and Sanctions Act 2008. Not every case would therefore result in an investigation, or prosecution.
- 5.3 A duty in the event of breach of regulatory or statutory provisions invariably means that there is no discretion afforded the Council whether or not to investigate the commission of an offence.
- 5.4 Following an investigation, a two-stage test will be undertaken prior to a decision to prosecute being made. Firstly, an assessment of the sufficiency of the available evidence ("the evidential test") to determine whether or not there is enough to secure

a realistic prospect of conviction. This part of the two-stage process is a professional assessment and in all cases will be undertaken by Legal Services personnel.

- 5.5 The second part of the test is an assessment of the interests of justice (“the public interest test”) i.e. understanding the extent of the public interest need to see that justice is [seen to be] done. This assessment will typically be undertaken jointly between Legal Services personnel and relevant case officers from the service area involved in the investigation of the offence.
- 5.6 Only where there both the evidential and public interest tests are satisfied will a prosecution ever ensue.

6. SANCTIONS

- 6.1 There are a range of sanctions to be considered in deciding the action to take in relation to Part Two. For each of the sanctions identified below, non-exhaustive examples are provided of the sort of considerations that may result in their being triggered:

Take No Action

- 6.2 The Council may consider taking no action in the following circumstances:
- the value of the fraud/criminality is minimal/not significant;
 - it is a first offence;
 - there was voluntary disclosure by the perpetrator;
 - the age of the offender (at the date on which action is being considered);
 - there are significant physical, mental or other welfare considerations;
 - there has been undue delay between the date of the offence and the date on which a decision on sanction is being made, unless the:
 - * seriousness of the offence is significant
 - * delay is caused wholly or partly by the offender
 - * discovery of the offence is recent
 - * investigation of the offence has, out of necessity, been lengthy and complex
- 6.3 The relevant test is determining whether the public interest would be best served by proceeding with a prosecution in the circumstances. Each case is to be determined on its own unique facts;

Issue a Local Authority Caution

- 6.4 The Council may consider issuing a caution in the following circumstances:
- it is a first offence;
 - the offence is minor;
 - The offence was committed as a result of a genuine mistake or misunderstanding, balanced against the seriousness of the offence;
 - there was no planning involved/criminality was opportunistic;
 - the value of the fraud/extent of the criminality is minimal;
 - the offence was admitted during an interview under caution;
 - genuine expression of remorse/regret by the perpetrator;

- the public interest merit in prosecution is questionable e.g. there might be social, medical or other welfare factors which ordinarily militate against a decision to prosecute;
- penalty action is not appropriate (housing benefit cases only);
- the fraud has taken place over a relatively short period of time (housing benefit cases only);
- the offender has put right the loss¹ or harm caused (but care should be taken to ensure offenders do not avoid prosecution solely because they make recompense).

6.5 Although across relevant services, cautions may be administered by third tier officers or higher, they should only ever be offered where there is prior assessment by Legal Services that there is sufficient evidence available to secure a conviction. This is because where a caution is offered, and the perpetrator refuses to accept the caution, the case must proceed to prosecution.

6.6 A central register of cautions administered by the Council is held by the Director of Legal & Democratic Services. A copy of every caution issued must be forwarded on to the Director for inclusion in the record within 7 days of issue.

Prosecution

6.7 A decision to prosecute will be made where there is sufficient admissible evidence, which has been properly obtained and which demonstrates:

- a significant degree of criminality e.g. it was premeditated, there was collusion with others (whether or not those others are also prosecuted), there is evidence of previous criminality, the duration of the criminality, etc;
- a breach of trust e.g. the perpetrator is an employee, member, contractor, or has close links to one or more of such class of persons, or otherwise is likely to be perceived by the ordinary public as occupying a position of trust;
- a loss to public funds. For the purposes of this policy and in light of the transparency agenda, any loss to the value of £500² or more will be deemed significant. However, and for the avoidance of doubt, merely because loss is less than £500 will not preclude consideration of action if there are other factors available to influence a decision to prosecute;
- lack of cooperation by the perpetrator at investigative stage;
- the nature of the offence is widespread, or is a manifestation of a local trend;
- there is significant danger to the health, safety or well-being of persons, or the environment;
- the offence involves or is directed at victims from vulnerable groups such as children, the elderly or infirm, and/or impacts upon the Council's statutory equality obligations;
- an overwhelming public interest need to secure that justice is [seen to be] done³.

¹ e.g. housing benefit overpayment has been voluntarily repaid, or unsolicited remediation of an environmental breach has taken place

² A higher threshold figure applies to Housing Benefit fraud cases as these are agreed together with the Department for Work & Pensions

³ e.g. undutied tobacco (loss of taxation revenue) and illicit alcohol (the potential for harm to the consumer)

Other Options

- 6.8 Administrative Penalties: This is a sanction available in housing benefit fraud cases, provided for by Section 115A of the Social Security Administration Act 1992, as amended by section 15 of the Social Security (Fraud) Act 1997. It enables benefit administering authorities to levy a penalty of up to 30% of the value of benefit overpaid. As with cautions, where an offer of an administrative penalty is refused, the case will proceed to prosecution.
- 6.9 Informal Warnings, Fixed Penalties, Improvement or other Enforcement Notices: In appropriate circumstances, these may be suitable methods of disposal following an investigation. The local policies referred to in paragraph 3.2 will detail which alternative options are available to individual services within the Council. Their application in service specific contexts should not be construed as being inconsistent with this policy.
- 6.10 Appendix A contains a suggested checklist for use in assessing the appropriate sanction in any given case.

7. LIAISON & COOPERATION WITH OTHER AGENCIES

- 7.1 The Council may liaise with other agencies as necessary (e.g. the Police, Crown Prosecution Service, Department of Works and Pensions, Her Majesty's Revenue & Customs) concerning a potential prosecution.
- 7.2 There will be occasions when it is necessary to undertake multi-agency investigations and/or prosecutions because criminal activity or statutory/regulatory breaches cut across the remit of other agencies in addition to the Council. Examples include operations involving the Council in-house Housing Benefits team and the Department of Work & Pensions (DWP), and cross-authority trading standards operations.
- 7.3 Between the Council service or directorate involved in such initiative and the external organisation, formalised arrangements exist to identify which authority will be the lead within the operation. Where the Council service is the lead, this prosecution policy will apply (subject to paragraph 3.2, if applicable) to the prosecution of offenders resulting from the operation.

8. MONITORING OF POLICY STATEMENT & GUIDANCE

- 8.1 This policy and guidance will be reviewed every three years by the Head of Governance and Assurance and the Head of Legal Services (General).

Procedural Guidance

Introduction

The Council's Fraud Response Plan sets out how Council staff and others should report suspicions or allegations of fraud, corruption and theft and how the Council will handle such reports. This table below explains the rationale to be used in assessing whether or not to refer a matter for prosecution or, as may be the case, whether or not to prosecute.

| Issue | Points to consider | Yes/No ⁴ |
|-----------------------|---|---------------------|
| Evidence | Is there sufficient evidence to secure a realistic prospect of conviction | |
| | Is all the evidence admissible? | |
| | Has all the evidence been obtained appropriately? | |
| | Has the evidence been reviewed by Legal Services? | |
| Degree of criminality | How was the fraud perpetrated? | |
| | Was it opportunist? | |
| | How much planning went into the fraud? | |
| | Was there deliberate misrepresentation? | |
| | Was there collusion? | |
| Persistent offender | Has the perpetrator previously been convicted of a similar or other relevant offence? | |
| | Has the perpetrator previously committed a similar or other relevant offence, for which they received a sanction (other than conviction following a prosecution)? | |
| Position of Trust | Is the perpetrator a council employee, agent or contractor? | |
| | Is the perpetrator an elected member of the council? | |
| | Did the perpetrator occupy a position of trust at the time of the offence? | |

⁴ Not applicable to all questions – where this is the case, attach supplementary narrative in a separate schedule

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| Duration | How long did the offence continue? | |
| Loss to Public Funds | Has the offence resulted in direct ⁵ or indirect ⁶ loss to the council of more than £500 ? | |
| Voluntary disclosure | How did the offence come to the attention of the council? | |
| | Was the offence admitted at the earliest opportunity? | |
| | Did the perpetrator lie? | |
| Widespread offence | Is the offence part of a local trend? | |
| Social/Medical factors | Are there any mitigating personal circumstances? | |
| | Are there any mental or physical disabilities? (Evidence must be provided by a medical professional) | |
| | Is the perpetrator fit to stand trial? (Evidence will be required from a medical professional and may ultimately be a question for the court to determine) | |
| | Would sanction significantly impact on children or other vulnerable person(s)? | |
| Equality considerations | Do the factual circumstances impact on one or more of the equality strands in the Equality Act 2010? | |
| Public Interest | What value is there for the Council and/or the general public for a prosecution to proceed? | |

⁵ e.g. in fraud or corruption cases

⁶ This could include the cost of investigation