



West Lothian
Council

WEST LoTHIAN COUNCIL

Prosecution & Sanction Policy

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West Lothian Council
Finance & Estates Services
Revenues Unit

| Contents | Page |
|-----------------------------------|------|
| 1. Introduction | 3 |
| 2. Policy | 3 |
| 3. Forms of Sanctions | 3/4 |
| 4. Review | 4 |
| 5. Cases suitable for prosecution | 5 |
| 6. Administrative Penalty | 6/7 |
| 7. Administrative Caution | 7 |
| 8. Mitigating Factors | 8/10 |

1. Introduction

- 1.1 The intention of any prosecution policy should be to provide an appropriate punishment for those persons who commit benefit fraud and act as a deterrent.
- 1.2 The policy should also provide guidelines, which will achieve a consistency of approach to dealing with benefit fraud so that potential fraudsters are aware of the likely outcome of committing a fraud.
- 1.3 Only by deterring fraud, by prosecuting or, where appropriate, applying sanctions as an alternative to prosecution, can we hope to convey the message to the public that West Lothian Council will not tolerate abuse of the benefits scheme and the Council is prepared to prosecute, or ask others to prosecute, appropriate cases throughout the full range of benefit fraud.
- 1.4 Sanctions can be in the form of either an Administrative Caution, or as an Administrative Penalty .

2. Policy

- 2.1 The Council's policy on fraud is to:
 - prevent and deter fraud
 - detect it quickly;
 - investigate it efficiently by the use of a formal risk analysis matrix to ensure concentration on high and medium risk cases.
 - prosecute offenders, or impose sanctions where appropriate.
- 2.2 Ultimately, the desired effect of regular prosecutions and sanctions is to deter potential offenders.

3. Forms of Sanctions

- 3.1 In cases where benefit has been paid as a result of a fraudulent claim, any overpayment will be recovered and the following sanctions may be considered:
 - the offender may be prosecuted
 - the offender may be offered an Administrative Penalty as an alternative to prosecution
 - the offender may be offered an Administrative Caution as an alternative to prosecution.
- 3.2 Individual circumstances will be taken into account when considering the appropriate sanction to apply.
- 3.3 Decisions regarding the use of administrative sanctions are the responsibility of the Fraud Team Leader, Assistant Team Leader or the Revenues and Benefits manager. They will consider which, if any, sanction should be applied and make their decision in accordance with this policy.
- 3.4 Officers employed on investigative duties will be responsible for delivering administrative sanctions.

- 3.5 Prosecution will be considered where an offender has declined to accept an Administrative Caution or an Administrative Penalty.
- 3.6 Investigators will refer cases for possible prosecution to the Fraud Team Leader, who will discuss the case with the Revenues and Benefits Manager and/or a Revenues Unit Team Leader (excluding Benefits Team Leader).

Where prosecution is considered appropriate, the Revenues and Benefits Manager will discuss the case with the Head of Finance who will decide whether to proceed

- a) Where the offender is an employee of the council or an elected member, the decision to refer to the Police will be taken by the Chief Executive.
- 3.7 There are three options available in preparing the files for prosecution:
- a) Legal Services help prepare the summary of charge before submission to the Procurator Fiscal.
- b) Department for Work and Pensions (DWP) Fraud Proceedings Unit [FPU], vet files prior to being submitted to the Procurator Fiscal.
- c) Dealing directly with the Procurator Fiscal.
- 3.8 A combination of all three options may be followed in order to obtain the best available advice.
- 3.9 In cases that have been jointly investigated by West Lothian Council and DWP Fraud Investigation Service, the decision to impose a sanction will be made in accordance with the Partnership Agreement that is in place at the time between the two organisations and with reference to current legislative guidance.

4. Review

- 4.1 This policy will be reviewed in line with DWP guidance and or on the direction of the Procurator Fiscal.

5. Cases Suitable for Prosecution

5.1 West Lothian Council proposes that prosecutions will be sought where there is clear evidence of fraud and either the amount of the fraud exceeds £5,000 or other factors apply which make the consideration of prosecution the first option.

Other factors may include cases where:

- the fraud has continued over a long period of time.
- the fraud was calculated and deliberate.
- the fraud was committed by a person employed by West Lothian Council.

However, automatic consideration for prosecution will be where the following factors apply;

- the person has previously been convicted of benefit fraud
- forged or counterfeit documents have been used
- the offer of an Administrative Caution or Administrative penalty is refused by the person who committed the fraud.
- the person has repeatedly failed to attend pre-arranged interviews under caution.

5.2 In considering whether prosecution is appropriate, consideration should be given to other factors, which might weigh against this course of action. These include cases where:

- the person suffers from poor physical or mental health
- the person is elderly or infirm
- there are exceptional mitigating circumstances.

6. Administrative Penalty

- 6.1 The Council will consider financial penalties as an alternative to a criminal prosecution, in cases where the criteria for prosecution have been fulfilled but the offender's personal circumstances indicate that a financial penalty would be a suitable solution.
- 6.2 In considering a case for offering a penalty, due regard will be given to any exceptional circumstances of the offender (eg, age, health, finances) and or any mitigating circumstances , as well as the type and nature of the fraud committed.
- 6.3 Legislation surrounding the use of Administrative Penalties is contained in Section 115A (2) of the Social Security Administration Act 1992, as amended by the Social Security Administration (Fraud) Act 1997.
- 6.4 A person may be offered the option of agreeing to pay an administrative penalty, if they have, by act or omission, caused benefit to be overpaid to them.
- 6.5 The amount of the penalty is 30% of the value of the overpaid benefit.
- 6.6 There must be grounds for instituting criminal proceedings against the person for an offence relating to the overpayment on which the penalty is based.
- 6.7 The decision to offer an administrative penalty is made by the local authority. There is no right of review against the decision to offer or not offer a penalty nor can the person ask the local authority to review the amount of the penalty, which is prescribed in the legislation. However, normal rights of review apply in respect of the overpayment determination.
- 6.8 West Lothian Council will offer administrative penalties as an alternative to prosecution where there is clear evidence of fraud and the amount of the overpayment is less than £5,000
- 6.9 The following conditions must be satisfied before a person is offered the choice of agreeing to pay an administrative penalty: -
- the case is not so serious that the first option should be prosecution
 - there are grounds to institute criminal proceedings.
 - there has been no inordinate or inexcusable delay in the investigation or administration of the case, which may lead to the case being time-barred, or breaching the defendant's right to a fair trial under Article 6 of the Human Rights Act.
 - the person has been notified of the decision and appeal rights on the amount and recoverability of the overpayment
 - the administrative penalty can only be offered on any part of a recoverable overpayment that has accrued since 18/12/97
- 6.10 There is no requirement for the person to admit to the offence before an administrative penalty can be offered.
- 6.11 Where a person agrees to pay the penalty, no proceedings will be instituted against them relating to the overpayment on which the penalty is based.
- 6.12 Any agreed administrative penalty will be recovered using the methods that are used to recover overpayments.

- 6.13 Administrative Penalties have no standing for the purposes of Court proceedings. Because of this, the fact that a person has previously agreed to pay an administrative penalty for an earlier overpayment cannot be mentioned in Court.
- 6.14 Where a person declines to accept an Administrative Penalty, criminal proceedings will be considered.
- 6.15 Whilst the penalty cannot be cited in Court, the Council can inform the Procurator Fiscal that the defendant declined to accept the offer of an Administrative Penalty.

7. Administrative Caution

- 7.1 An Administrative Caution is a warning given in certain circumstances as an alternative to prosecution to a person who has committed an offence. An administrative caution can only be considered when there is sufficient evidence to justify instituting criminal proceedings and the person has admitted the offence during an 'interview under caution'.
- 7.2 In considering a case for offering a caution, due regard will be given to any exceptional circumstances of the offender (eg, age, health, finances) and or any mitigating circumstances of the claimant, as well as the type and nature of the fraud committed.,.
- 7.3 The use of cautions is purely administrative and there is no legislation covering their use.
- 7.4 West Lothian Council will offer an Administrative Caution as an alternative to prosecution where there is clear evidence of fraud and the amount of the overpayment is less than £5,000.
- 7.5 The following conditions must be satisfied before a person is offered a caution: -
- the person has admitted the offence during an interview under caution
 - the person is 18 or over
 - the offence is minor
 - the person has not offended before
 - the person's attitude towards their offence indicates that a caution would be an appropriate punishment
- 7.6 Where a person declines to accept an Administrative Caution, criminal proceedings will be considered.
- 7.7 Where criminal proceedings are taken, the Court will be informed that the case has been taken because the person refused the offer of an Administrative Caution. Whilst the caution cannot be cited in Court, the council can refer to it when submitting the case to the Procurator Fiscal (PF).

8. Mitigating Factors

8.1 When considering whether criminal proceedings are appropriate, the following circumstances are taken into account:

- any distressing domestic or family circumstances
- any exceptional financial difficulties
- the age of the customer
- the mental and / or physical health of the customer or partner

Prosecution may not be appropriate if the customer or partner is affected by any of the above.

8.2 Voluntary Disclosure

Criminal proceedings will not be appropriate if the customer or partner makes a full and complete voluntary disclosure.

Voluntary disclosure occurs when an offender voluntarily reveals a fraud that the Council is previously unaware of. If this happens, the Council will continue to investigate the fraud but will not pursue a prosecution.

A disclosure is **not** voluntary if the:

- admission is not a complete disclosure of the fraud;
- admission of the fraud is only made because discovery of the fraud is likely, for example;
 - one of the offender's friends or neighbours is also caught defrauding the Council; or
 - the offender knows the Council is questioning their employer in the course of a survey or fraud drive;
 - the offender was already the subject of a criminal investigation and detection is likely.
- disclosure comes to light in some other way, for example, by the issue of a review form;
- offender admits all the facts as soon as challenged;
- offender supplies the correct facts when making a claim to Legal Aid.

8.3 Mental or Physical Condition of Offender or Partner

Criminal proceedings will not be appropriate if the mental or physical condition of the offender or partner means that prosecution is not desirable. The strain of an interview under caution or an appearance in Court might have serious consequences on a customer or partner who is not mentally or physically strong.

Points to consider:

- the offender suffers from a serious mental or physical condition e.g.,
 - nervous trouble, particularly if they have contemplated suicide;
- the offender suffers from a mental illness such that the Court might be more sympathetic towards them than towards the Council;
- the offender is pregnant and confinement is either due within three months or she is not in good health. If the offence is serious take proceedings but consider deferring them until after the confinement;
- the physical condition of the offender is such that the Court might be more sympathetic towards them than the Council. Weigh this possibility against the gravity of the offence;
- the health of the offender's partner may suffer. This would normally only apply if the partner suffers from a serious condition that may worsen if proceedings are taken.

Medical evidence would be required before finalising the decision.

8.4 Social Factors

Social factors can make criminal proceedings undesirable, for example when:

- the Court and / or the public would think a prosecution inappropriate, for example, when the customer is driven to an offence by a tragic domestic circumstance;
- prosecution is highly undesirable because of the possibility of trauma to an innocent third party, e.g. an illegitimate, adopted or foster child would become aware of their true status;
- the offender has served a prison sentence after committing their offence against the Council. The Court's view is that it is preferable that a person sentenced to imprisonment knows that when they have served their term they come out with a clean sheet. This is not an absolute rule and does not apply when the:
 - prison sentence is short; or
 - offence against the Council is serious; or
 - sentence was for non-payment of a fine;
- the offender is young and immature and would appear to the Court as someone who could be dealt with effectively without proceedings.

Being a young offender does not automatically prevent proceedings from going ahead. For example, prosecution may be desirable when;

- the offender has already been involved with the police;

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- the offence shows an adult degree of sophistication; or
- parents cannot control or deal with the young offender effectively.

8.5 Technical Factors

Technical factors that can affect a decision to prosecute or not are:

- inadequate evidence
- flawed investigation
- lax administration

8.6 Inadequate Evidence

Criminal proceedings are not appropriate, if there is insufficient evidence to justify proceedings, or the evidence cannot be obtained, e.g. because of unreliable witnesses.

8.7 Flawed Investigation

Criminal proceedings are not appropriate if an investigation is deficient and fails to provide all the necessary evidence to take proceedings, closure is appropriate. A flawed investigation might occur if a customer plausibly asserts that the Investigating Officer behaved improperly, for example by deceiving or intimidating them.

8.8 Lax Administration

Lax administration can allow a fraud to succeed. If the Council plays a significant part in allowing an offence to occur because of lax administration, in such circumstances criminal proceedings are not appropriate.

Lax administration can occur when:

- despite having incomplete information, benefit is still paid
- the interviewing officer completes the claim form badly
- obvious flaws in a statement or document are missed

8.9 Delay

Criminal proceedings are not appropriate if any case is subject to unjustifiable delays.

Courts look very critically at the:

- time it takes to bring offences to Court; or
- length of time the customer has been left, possibly in anxiety with the case unresolved.