

## Civil Penalties Policy 2018

This policy explains how the Council will use Civil Penalties provided for by the Housing and Planning Act 2016

### 1. Introduction

- 1.1 The Housing and Planning Act 2016 enables local housing authorities to impose civil penalties, as an alternative to prosecution, for certain offences under the Housing Act 2004.
- 1.2 This policy takes account of statutory guidance issued by the Government and sets out those circumstances in which the Council may use the powers and the factors that it will take into account when setting the level of the penalty.
- 1.3 The civil penalty powers complement the existing enforcement tools that local authorities have under the Housing Act 2004, that is, prosecution and/or carrying out works in default in some cases. This policy should be read in conjunction with the current versions of the following policies:
  - *Joint Enforcement Policy – SNC & CDC*
  - *House Condition Enforcement Policy - CDC*
  - *Housing Health and Safety Rating System Policy – CDC*
  - *Private Sector Housing Enforcement Policy - SNC*

### 2. Background

- 2.1 The power to issue a civil penalty as an alternative to prosecution was introduced by s.126 and Schedule 9 of The Housing and Planning Act 2016. Local Authorities may issue penalties of up to £30,000 in respect of the following offences:
  - Failure to comply with an Improvement Notice (under s.30 of the Housing Act 2004)
  - Failure to comply with management regulations in respect of Houses in Multiple Occupation (HMOs) (s.234 Housing Act 2004).
  - Offences in relation to licensing of HMOs (s.72 Housing Act 2004)
  - Breaching of an overcrowding notice (s.139 Housing Act 2004)
  - Breach of a banning order (s.21 Housing and Planning Act 2016)
- 2.2 Statutory guidance has been issued by the Secretary of State and Local Authorities must have regard to it when exercising their powers in respect of civil penalties.
- 2.3 The maximum penalty per offence is £30,000; no minimum amount has been set and the appropriate amount of penalty must be determined by the Council as Local Housing Authority (LHA). Only one penalty can be imposed per offence although multiple offences can result in multiple penalties.
- 2.4 The income received from a civil penalty can be retained by the Council provided it is used to further its statutory functions, as LHA, in relation to its enforcement activities covering the private rented sector.

### 3. Decision making

- 3.1 A Local Authority cannot issue a Civil Penalty and prosecute for the same offence. In general, the Council will continue to seek prosecution for the worst offences.

3.2 Prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past<sup>1</sup>; however, that does not mean that civil penalties should not, and will not, be used in cases where serious offences have been committed if a significant financial penalty, rather than prosecution, is considered the most appropriate and effective sanction in a particular case.

3.3 The same criminal standard of proof is required for a civil penalty as for a prosecution. Before proceeding with a civil penalty, the Council will satisfy itself that, were the case to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction.

#### **4. Factors taken into account when deciding the level of Civil Penalty**

4.1 The penalty levied in any particular case will reflect the severity of the offence and take account of the landlord's previous record of offending. The maximum civil penalties will be reserved for the very worst offenders.

4.2 In order to ensure that the civil penalty is set at an appropriate level, the Council will consider the following factors that the Government has identified as being relevant in its statutory guidance:

- **Severity of the offence.** The more serious the offence, the higher the penalty should be.
- **Culpability and track record of the offender.** A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.
- **The harm caused to the tenant.** This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.

4.3 The Council will use the financial penalty matrix included as Appendix A to this policy in its determination of the level of penalty<sup>2</sup>.

4.4 The financial penalty matrix takes account of relevant factors including:

- **Punishment of the offender.** A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.
- **Deter the offender from repeating the offence.** The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set

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<sup>1</sup> In the event of a conviction the Council would then be able to apply for a Banning Order in appropriate circumstances. This power is subject to a separate policy.

<sup>2</sup> This matrix was developed by Oxford City Council and is used with their consent.

at a high enough level such that it is likely to deter the offender from repeating the offence.

- **Deter others from committing similar offences.** While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.
- **Remove any financial benefit the offender may have obtained as a result of committing the offence.** The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

4.5 The penalty may be increased or decreased by aggravating or mitigating factors relevant to the case. Below is a list which will be considered as part of the determination. This is not an exhaustive list and other factors may be considered depending on the circumstances of the case:

***Aggravating Factors***

- Previous convictions (having regard to nature of offences and time elapsed)
- Motivated by financial gain
- Obstruction of the investigation
- Deliberate concealment of the activity/evidence
- Number of items of non-compliance
- Record of non-compliance
- Record of letting substandard accommodation
- Record of poor management/inadequate management provision
- Lack of a tenancy agreement/rent paid in cash
- Already a member of an accreditation scheme (should know better)

***Mitigating Factors:***

- Co-operation with the investigation
- Voluntary steps taken to address issues
- Willingness to undertake training
- Evidence of health reasons preventing reasonable compliance
- No previous convictions
- Vulnerable individual (where the vulnerability is linked to the commission of the offence)
- Good character and/or exemplary conduct

4.6 When considering aggravating or mitigating factors, the Council will seek to ensure that the Civil Penalty imposed remains proportionate to the offence.

4.7 Reference will be made to the *Magistrates Court Sentencing Guidelines* when considering relevant aggravating and mitigating factors.

**5. Multiple offences**

5.1 Where the Council is satisfied that more than one offence has been committed concurrently (in respect of a single property) it may issue multiple civil penalty notices, e.g. where there are multiple breaches of the HMO Management Regulations.

5.2 Where the Council considers that issuing multiple penalties at the same time would result in an excessive cumulative penalty, nothing in this policy shall require it to do so. The Council may take action in respect of one or some of the offences and warn the offender that future action in respect of the remaining offences will be taken if they continue.

**6. Recording the decision**

6.1 The justification for the decision to issue a Civil Penalty (rather than prosecute) and for the level of penalty set will be fully recorded at each stage. This approach will ensure transparency and aid consistency in the enforcement process and will assist in defending appeals against decisions to impose civil penalties and/or the penalty amount.

6.2 Civil penalties are subject to appeal in the First Tier Tribunal (FtT). The Council will set penalties it believes reasonable and can successfully defend in the event of an appeal.

**7. Representations and imposition of penalties**

7.1 In the event that the Council receives properly made representations<sup>3</sup> in response to a notice of intent, those representations will be considered by the Assistant Director Housing who will determine whether to impose a penalty and, if so, the amount of the penalty.

7.2 If the Council decides to impose a financial penalty, it will give the person a notice ('final notice') requiring that the penalty is paid within 28 days.

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<sup>3</sup> Representations must be made within 28 days from the date the notice was given.

## Civil Penalties Policy 2018 – Appendix A

### Determining the level of Civil Penalty:

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#### Introduction

The statutory guidance makes it clear that officers should have regard to the following factors when determining the level of fine:

- Severity of the offence
- Culpability and track record
- Harm caused to the tenant
- Punishment of the offender
- Deter offender from repeating the offence
- Deter others from committing similar offences
- Remove financial benefit the offender may have obtained by committing the offence

The Financial penalty matrix incorporates the above factors and whether there are any aggravating or mitigating offences. The initial starting point for setting the fine is based on the severity of the offence (assessed by looking at the *culpability x harm*). This gives an assumed starting point (ASP) for the penalty; this figure is further adjusted up or down by consideration of the other factors and presence of aggravating and/or mitigating factors.

#### 1. Severity

Severity of the offence is established by combining culpability and harm. This will give the Band level and assumed starting point (ASP) of the fine.

Band 1: £0 to £4999 ASP of £2500	Low culpability / low harm
Band 2: £5000 to £9999 ASP of £7500	Medium culpability / low harm
Band 3: £10000 to £14999 ASP of £12500	Low culpability / medium harm or High culpability / low harm
Band 4: £15000 to £19999 ASP of £17500	Low culpability / high harm or Medium culpability / medium harm
Band 5: £20000 to £24999 ASP of £22500	Medium culpability / high harm or High culpability / medium harm
Band 6: £25000 to £30000 ASP of £27500	High

## 2. Culpability

The Authority will have regard to three levels of culpability – high, medium and low. Examples of what constitutes high, medium or low culpability are given below.

High: deliberate or reckless act	<p>Intentional breach by offender</p> <p>Disregard of law</p> <p>Knew of a problem/risk but no action taken to correct it, e.g. failure to comply with correctly served Improvement Notice or failure to comply with management regulations</p>
Medium: negligent act	<p>Failure to take reasonable care to avoid serious offence, e.g. partly complied with an Improvement Notice</p> <p>Failure to make themselves aware of legal responsibilities</p>
Low	<p>Little fault of the offender, e.g. damage caused by tenant, let down by contractor or has full management agreement with agent to oversee the property</p>

## 3. Harm

The Authority will have regard to the harm caused to the individual, to the community (e.g. economic loss) and other types of harm (e.g. public concern over the impact of poor housing on the neighbourhood).

The nature of the harm will depend on the circumstances of the victim (tenant).

Where there is no actual harm, the Authority will consider the relative danger the person was exposed to as a result of the offence (i.e. the likelihood of harm occurring and the seriousness that could have resulted).

High	<p>Defect gives rise to possibility of extreme or severe harm outcomes to occupants and visitors, e.g. electrocution or serious fire safety risk giving rise to class I or II harm outcomes</p> <p>Overcrowding (risk to occupants and high impact on community from issues with overcrowding, e.g. noise, car parking)</p> <p>Especially serious or psychological effect on victim</p> <p>Vulnerable victim(s)</p> <p>Multiple victims</p>
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Medium	Defect gives rise to serious harm outcomes to occupants and visitors, e.g. burns to hand/fingers, serious sprains, gastroenteritis giving rise to class III harm outcomes
Low	Defect giving rise to moderate harm outcomes to occupants and visitors, e.g. discomfort, bruising.  Property fully compliant with management regulations/licensing standards but no licence in place

#### 4. Aggravating and mitigating factors

Aggravating factors will increase the fine while mitigating factors will decrease it. Examples of each factor are given below (but regard will be given to the full list of such factors given in the Sentencing Council Guidance).

Aggravating Factors	Previous informal or formal action  Lack of cooperation  Financial gain
Mitigating Factors	Quickly put issue right  Offender is vulnerable themselves  No previous action

#### 5. Punishment and deterrence of offender - asset assessment

An assessment of the offender's assets will be made to ensure a commensurate level of fine that will act as a punishment, deter the offender and to ensure the offender did not profit from the offence. An assessment will look at the following:

- Value of the property in question and whether this is above or below the average for that type of property and location (consider using Rightmove, Zoopla or similar websites)
- Value of other properties the offender owns
- Rental income
- Other monthly income (e.g. salary)
- Whether the property is mortgaged or owned outright (Land Registry, s.16 information)

#### 6. Deterrence of other offenders

Unlike a successful prosecution, the fact that someone has received a financial penalty is not in the public domain (unless they choose to appeal); however, it is likely that other landlords in the local area will become aware through informal channels. Setting penalties at a level appropriate to the severity, harm and culpability and taking the circumstances of each case into account, will act as a

deterrent to other landlords. The Council is likely to publish the number and financial value of any civil penalties recovered.