

## **APPENDIX 1**

### **CIVIL PENALTIES**

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This forms part of the Council's Intervention and Enforcement Policy, and should be read in conjunction with that document.

It also reflects current guidance issued by the Department of Communities and Local Government (DCLG).

#### **1. About Civil Penalties**

- 1.1 Parts of the Housing Act 2004 were amended by the Housing and Planning Act 2016. Civil penalties were incorporated into Section 249A of the Housing Act 2004 as an alternative to prosecution for a number of offences under that Act.
- 1.2 Issuing financial penalties in relation to the failure of a letting or managing agent to join a government approved redress scheme, is included in a separate policy, and the penalties will be imposed according to that policy.
- 1.3 A civil penalty is a serious matter. Imposing a financial penalty highlights a failure to comply with the relevant legislation. It is a factor we can take into account when deciding whether to instigate criminal proceedings in future cases.
- 1.4 In addition, we may also take it into consideration when we are required to consider whether a person is a fit and proper person, and has satisfactory management arrangements in place. This may be where we are assessing a licence application under the Housing Act 2004 – or any other scheme where Fit and Proper and satisfactory management arrangements must be considered.
- 1.5 The Government has laid out statutory guidance as to the process and the criteria it advises should be considered when determining civil penalties.
- 1.6 The criteria are:
  - Severity of the offence
  - Culpability and track record of the offender
  - The harm caused to the tenant
  - Punishment of the offender
  - Deter the offender from repeating the offence

- Deter others from committing similar offences
  - Remove any financial benefit the offender may have obtained as a result of committing the offence
- 1.7 The statutory guidance advises that we (the Council) should make sure the civil penalty acts as a punishment, takes into account any previous patterns of offending and that no offender should benefit as a result of committing the offence.
- 1.8 The same criminal standard of proof is required for a civil penalty as for prosecution. So we will have regard to the Crown Prosecution Service Code for Crown Prosecutors, when establishing whether there is sufficient evidence to secure a conviction.

## 2. Issuing a Notice of Intent for a civil penalty

- 2.1 The first thing we must do, is determine whether the offence committed is one where a Civil Penalty can be imposed, under the Housing Act 2004.
- 2.2 These are;
- Section 30 – failure to comply with an improvement notice
  - Section 72 – licensing of Houses of Multiple Occupation (HMO)
  - Section 95 – licensing under Part 3 of the Housing Act 2004
  - Section 139 – failure to comply with an overcrowding notice
  - Section 234 – breach of management regulations in respect of HMOs
- 2.3 We will issue civil penalties where we consider it is appropriate to the circumstances of that particular case.
- 2.4 In deciding whether to impose a financial penalty or prosecute, we will look at each case to determine which course of action is most likely to achieve the aims of a sanction with regard to:
- punishment of the offender
  - deterring the offender from repeating the offence or other housing offences
  - deterring others from committing similar offences
  - removing any financial benefit arising from having committed the offence
- 2.5 In considering the likely merits of a punishment in relation to these aims we will have regard to considerations such as:
- the likelihood of being able to recover a financial penalty
  - the effect had by any previous sanctions imposed on that offender
  - the likely impact of a criminal sanction on the offender
  - the conduct of the offender, and anything else which is known about

them which may be relevant to the aims above

- 2.6 Our considerations of what level of civil penalty will include, but not be limited to, factors such as:
- the severity of the offence
  - the financial circumstances of the offender
  - any previous action taken against the offender
  - whether they ought to have known that they were in breach of their legal responsibilities
  - the harm or potential for harm to the occupier
  - the deterrence of further offending by the offender in question
  - the deterrent value to others (whilst civil penalties will not generally be in the public domain, unlike prosecutions, it is recognised that other landlords may become aware through informal channels)
  - the removal of any financial benefit the offender may have obtained as a result of committing the offence
  - any other aggravating factors including the reaction of the offender to our intervention.
- 2.7 If we decide to impose a civil penalty then a “Notice of Intent” will be served on the person suspected of committing the offence. The Notice will specify:
- a. The amount of any proposed financial penalty
  - b. The reasons for proposing the financial penalty
  - c. Information about the right to make representation to the Council.

### 3. Consideration of offender’s financial assets and income

- 3.1 In setting a financial penalty, we may conclude that the landlord is able to pay any financial penalty imposed - unless they have supplied us with any evidence to the contrary.
- 3.2 It is up to the landlord to disclose to us any information which is relevant to his financial position as this will enable us to assess and determine what they can reasonably afford to pay.
- 3.3 If we do not receive sufficient reliable information, we may make reasonable assumptions about what the landlord can afford from the information and evidence we may have. This may include the assumption that they can pay any financial penalty.

### 4. Representations in response to a Notice of Intent

- 4.1 The landlord, or person to whom the Notice relates, will be given 28 days to make written representations to us about the Notice.

- 4.2 Representations can be made against any element of the proposed action. Only the people named on the Notice of Intention have an automatic right to make representations. In some circumstances we may accept submissions from others, but this will depend on the individual case.
- 4.3 The onus will be on the landlord to provide appropriate and satisfactory documentary evidence to support their written representations. If they fail to provide such evidence, this is likely to affect the weight we attach to their representations.
- 4.4 Where representations are received, the decision to impose a penalty and the value of any penalty shall be reviewed by an officer at Legal and Policy Officer level or above (or equivalent), who may confirm or revise the decision.

## 5. Issuing the Final Notice of a Civil penalty

- 5.1 Following the 28 day period we will decide, whether we receive representation or not:
  - A) Whether to go ahead and impose the financial penalty on the person, and
  - B) the value of any such penalty imposed.
- 5.2 If we decide to impose a financial penalty, a **final notice** will be issued. The final notice will specify:
  - A) the amount of the financial penalty
  - B) the reasons for imposing the penalty
  - C) information about how to pay the penalty
  - D) the period for payment of the penalty
  - E) information about rights of appeal to the First Tier Tribunal
  - F) the consequences of failure to comply with the notice.
- 5.3 We can withdraw the Notice of Intent or the Final Notice at any time. We can also reduce the level of penalty imposed. If we do this – we will write to the people named on the original Notices.
- 5.4 Payment of the civil penalty must be paid within 28 days of the date of the Final Notice.
- 5.5 Landlords have the right to appeal a Final Notice. This appeal is to the First Tier Tribunal and details of how to make this appeal will be included with the Final Notice.
- 5.6 In the event of an appeal against the council decision, the penalty would be suspended until the decision has been determined.

- 5.7 Where a Tribunal agrees with the landlord (the appellant) – they may decide to vary the amount of the penalty and how long they have to pay it - or cancel it.
- 5.8 If we decide to withdraw a Notice of a civil penalty, we may pursue a prosecution against the landlord for the original offence for which it was imposed. Each case will be considered on its merits and according to the public interest.

## 6. Chasing payment of the penalty

- 6.1 If the financial penalty is not paid within the appropriate time period we will usually commence proceedings to recover the debt owed. The time period will be either 28 days from the date of the Final Notice, or within such time as determined by the First Tier Tribunal.
- 6.2 If we have to chase recovery of the debt we will include the additional costs associated with it. If needed, we will pursue this through the Courts.
- 6.3 A certificate signed by the Council's Chief Finance Officer stating the outstanding amount due will be accepted by the courts as conclusive proof of any outstanding payment due to us.

## 7. Ongoing implications of a Civil Penalty

- 7.1 We must not underestimate the level of seriousness of a Civil Penalty. Although having a penalty imposed will not automatically deem a landlord not 'fit and proper' or not competent to fulfil their management functions, it will be taken into account in the same way as a prosecution for that offence would have. This may therefore prevent the landlord from being issued with a licence, for example for a House in Multiple Occupation, or where an area has been designated for Selective or Additional Licensing (Part 2 or 3 of the Housing Act 2004)
- 7.2 Unless the penalty is withdrawn, a landlord cannot be prosecuted for the same offence once the penalty has been paid and the matter concluded.
- 7.3 Where a landlord or agent has received two financial penalties under this legislation in any 12 month period, irrespective of the locality to which the offences were committed, we will consider making an entry onto the national database of rogue landlords and property agents. When considering making an entry, we will have regard to any guidance issued by the Secretary of State.

## 8. Recording the decision

- 8.1 We will record each decision and the reasons for the financial penalty along with how the amount of the penalty was obtained and the reasons for imposing it.

## 9. Determining the Level of the Civil Penalties

- 9.1 In order to set the level of the penalty that appears in the Notices, we will take the following steps;

### Step 1

We will assess;

- the culpability and track record of an offender and
- the level of harm, or potential harm, to the occupiers

### Step 2

We will then make adjustments taking the following into account;

- any aggravating or mitigating circumstances

### Step 3

We will then make any final adjustments to make sure;

- the level is fair and proportionate but in all instances act as punishment, a deterrent and removes any benefit of the offence

## 10. More information about setting the initial level (Step 1)

### 10.1 Culpability and track record of an offender

- 10.1.1 The level of culpability of a person will depend upon a number of factors:

#### High level of culpability

A person will be deemed to be highly culpable where we are satisfied that they intentionally or recklessly breach or wilfully disregard the law. Factors that may lead to that conclusion include the following :

- They have a history of non-compliance
- Despite a number of opportunities to comply they have failed to comply
- Have been obstructive as part of the investigation
- Are an experienced landlord/agent with a portfolio of properties who would be expected to have known of their responsibilities
- Serious and/or systematic failure to comply with their legal duties

### Medium level of culpability

Where a landlord commits an offence through an act or omission which we consider a person exercising reasonable care would not commit. Factors that may lead to that conclusion include the following:

- It is a first offence – with no high level culpability criteria being met
- The landlord/agent had systems in place to manage risk or comply with their legal duties but they weren't sufficient or complied with on this particular occasion

### Low level of culpability

Where a person fails to comply, or commits an offence where;

- no or minimal warning given to offender
- the breaches are minor
- the offence is an isolated occurrence
- a significant effort has been made to comply but was inadequate in achieving compliance

The above is not intended to be an exhaustive list of matters taken into account, when considering the level of culpability and other factors may be taken into account.

## **10.2 Level of harm or effect to the occupier**

**10.2.1** When considering the level of harm we will have regard to actual harm, the potential of harm and the likelihood of harm:

### High

- actual harm to an individual
- high risk of harm to an individual
- serious level of overcrowding
- serious effect on individual(s) or widespread impact

### Medium

- adverse effect on an individual
- moderate risk of harm to an individual (s) or broader impact

### Low

- minimal adverse effect on individual(s)
- low risk of harm to an individual
- limited impact or effect on occupiers

**10.2.2** The above is not intended to be an exhaustive list of matters to be taken into account when considering the level of harm and other factors may be taken into account.

10.2.3 The table below sets out the initial level of fine determination to be applied in respect of an individual case, having regard to the Council determinations as to that individual's level of culpability and level of harm to the occupier.

DETERMINATION OF CIVIL PENALTY LEVEL			
LEVEL OF CULPABILITY	LEVEL OF HARM/EFFECT		
	HIGH	MED	LOW
HIGH	25,000	15,000	7,500
MED	15,000	10,000	5,000
LOW	7,500	5,000	2,500

## 11. Making adjustments to the initial level (Step 2)

11.1 We will consider whether there are aggravating factors and mitigating factors in each case. This might affect the level of fine reached in Step 1 so that it is adjusted.

11.2 The types of factors we will consider are in the list below. The lists are not exhaustive and other factors may be considered depending on the individual circumstances of each case.

11.3 **Aggravating** factors may include but are not limited to:

- Previous convictions having regard to the offence to which it relates and the time elapsed since that offence
- Landlord motivated by financial gain
- Obstruction of the investigation
- Deliberate concealment of the activity/evidence
- Number of items of non-compliance – greater the number the greater the potential aggravating factor
- A record of letting substandard accommodation
- A record of poor management/ inadequate management provision
- Lack of a tenancy agreement/rent paid in cash

11.4 The **Mitigating** factors could include, but are not limited to:

- Co - operation with the investigation e.g. attends the PACE<sup>1</sup> interview
- Any voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt and remorse for the offence(s)
- Willingness to undertake training
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns

<sup>1</sup> Police and Criminal Evidence Act 1984

- Has no previous convictions
- Vulnerable individual(s) where there vulnerability is linked to the commission of the offence
- Previous good character and/or exemplary conduct.

11.5 For each aggravating or mitigating factor which applies to each specific case the level of fine will be adjusted accordingly based on the circumstances, up to the maximum fine of £30k.

## 12. Reaching the final determination of the level of penalty (Step 3)

12.1 The statutory guidance advises that a guiding principle of civil penalties is that they should remove any financial benefit that the landlord may have obtained as a result of committing the offence. This means that the amount of the civil penalty imposed will normally not be less than what it would have cost the landlord to comply with the legislation in the first place.

12.2 The final consideration when setting the level of penalty is therefore, making sure that any financial benefit to the offender of committing the offence is removed, and that as well as being fair and proportionate, the level of penalty acts as an effective deterrent.

12.3 When determining any gain as a result of the offence the Council will take into account the following issues.

- Cost of the works required to comply with the legislation
- Any licence fees avoided
- Any other factors resulting in financial benefit