

Civil Penalties Policy

Produced by *Private Sector Housing*

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This policy should be read in conjunction with the Harrogate Borough Councils (Council) Private Sector Housing Enforcement Policy (the Enforcement Policy) published by the Council and the Civil Penalties under the Housing and Planning Act 2016, Guidance for Local Authorities published by the Department of Communities and Local Government (DCLG).

The policy is divided in to two sections:

- 1) Introduction and the civil penalty notice procedure
- 2) The steps that the Council will take to determine the level of civil penalty

1 Section 1 Introduction and Procedure

Background

The Housing and Planning Act 2016 introduces a number of amendments to the Housing Act 2004. Section 249A of the Housing Act 2004 establishes the legal basis for imposing civil penalties as an alternative to prosecution for specific offences under the 2004 Act.

Civil penalties are an alternative when a landlord fails to comply with:

- Section 30 – failure to comply with an improvement notice
- Section 72 – mandatory licensing of 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 HMO
- Section 21 - breach of a banning order

The Government has laid out statutory guidance as to the process and the criteria that needs to be considered when determining civil penalties. These are:

- The culpability and track record of the offender
- The level of harm caused to the tenant
- The severity of the offence
- Aggravating Factors
- Mitigating Factors
- Penalty to be fair and reasonable but should remove any financial benefit the offender may have obtained as a result of committing the offence
- Whether it will deter the offender from repeating the offence
- Whether it will deter others from committing similar offences

The statutory guidance indicates that a Council should ensure that the civil penalty acts as a punishment, takes into account any previous patterns of offending and no offender should benefit as a result of committing the offence.

The law allows a maximum financial penalty of £30k per offence. In determining the level of any penalty a Council will have regard to local circumstances, the relevant local enforcement policy and the relevant Government guidance detailing the factors to take into account, as shown above.

The overriding principle of when considering civil penalties is that the landlord (as defined by the Housing Act 2004 as the owner, person having control or the licence holder) should not make any financial gain as a result of their failure to comply with the relevant legislation.

What is the burden of proof for a civil penalty?

The proof is the same as set out previously for the offences under the Housing Act 2004. For a criminal prosecution the Council must satisfy itself that it can show beyond reasonable doubt that the landlord has committed the offence and that if heard in a magistrates' court there would be realistic prospect of conviction.

The Council will have consideration of the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions when considering the evidence.

The Council will consider:

- Does it have sufficient evidence to prove beyond reasonable doubt that an offence has been committed by the landlord? – see Evidentiary Stage of the Full Code Test in the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions
- Is there a public interest in imposing a Civil Penalty on the landlord in respect of the offence? – Public Interest Stage of the Full Code Test in the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions
- Has the Council taken into account its own Enforcement Policy when deciding to impose the civil penalty including the alternative option of prosecuting for the offence?

All decisions as to determining whether or not to pursue a civil penalty will be in accordance with the Enforcement Policy covering Private Sector Housing furthermore before deciding whether or not to issue a CPN the case will first be referred to legal services to ensure, if the case was prosecuted there would be a realistic prospect of conviction. Only if Legal Officers advise that this threshold is met will there be an option to issue a CPN.

Process for Imposing a Civil Penalty

Where it has been determined by the Council that a financial penalty is the most appropriate action as an alternative to prosecution, the Council will follow the process set out below.

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.

The person to whom the notice relates will be given 28 days to make written representation to the Council about the proposal to impose a financial penalty. Representations can be made against an element of the proposed action. If the landlord challenges the level of the civil penalty it will be for them to provide appropriate and satisfactory documentary evidence to support their submission. Failure to provide such evidence will mean that the Council will not be able to consider any representation against the level of penalty imposed.

Representations can only be made by the recipients served with a Notice of Intention. No other parties have an automatic right to make representations; the Council will consider any such information on a case by case basis.

Following the 28 day period the Council will decide whether it receives representation or not:

- a. Whether to impose a financial penalty on the person, and
- b. The value of any such penalty imposed.

If a Council decides to impose a financial penalty, a final notice will be issued imposing that penalty. 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 (28 days from the date of the final notice)
- e. information about rights of appeal to the First Tier Tribunal
- f. the consequences of failure to comply with the notice.

The Council can at any time withdraw either the Notice of Intent or Final Notice or reduce the level of penalty imposed. This will be in the form of a written notice to the person on whom the notice has been served.

If the Council decides to withdraw a civil penalty, it has the right to pursue a prosecution against the landlord for the original offence for which it was imposed. Each case will be considered on its merits and be in the public interest.

The person who has been served a Final Notice has the right of appeal to a First Tier Tribunal. In the event of an appeal against the council decision the penalty would be suspended until the decision has been determined.

Payment of the civil penalty will be within 28 days of the date of the Final Notice, unless appealed. Where appealed and the decision to serve the Notice upheld it will be for the Tribunal to specify the period in which the landlord is to pay any fine imposed.

There is a reduction of a third of the penalty if at the first opportunity the landlord admits guilt for the offence and immediately remedies any outstanding issues. This is in line with the Sentencing Guidelines and will only be available for the first offence and will not be less than the minimum level of penalty. Any subsequent offence will not be subject to any reduction.

The discount will only be applied to the landlord when the Council serves the Notice of Intent and the following criteria are met:

- The payment is made within the 28 days of the date of the Notice of Intent
- The payment is made in full

At any point after 28 days of service of the Notice of Intent there will be no further offer of any reduction in the level of penalty.

This reduction will only be implemented if the level of gain is below the civil penalty. If the level of gain is above the reduction but less than the calculated penalty the reduction will be the level of gain plus £2k or 10% whichever is the greater.

If the financial penalty imposed is not paid within the appropriate time period, either 28 days from the date of the Final Notice or within such time as determined by the First Tier Tribunal the Council will commence proceedings to recover the debt owed. This will include the

recovery of any additional costs to the Council from having to undertake such action. This process will be the Council's existing recovery policy and procedures for the collection of such debt including pursuance of the debt via the county courts if appropriate.

In setting a financial penalty, the Council may conclude that the offender is able to pay any financial penalty imposed unless the offender has supplied any financial information to the contrary.

It is for the offender to disclose to a Council such data relevant to his financial position as this will enable it to assess and determine what they can reasonably afford to pay.

Where the Council is not satisfied that it has been given sufficient reliable information, the Council will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. This may include the inference that the offender can pay any financial penalty.

However when considering the level of any financial penalty the final determining factor will always be the level of financial gain as a result of the landlord's failure to comply with the relevant legislation.

The penalties imposed will be in line with Government guidance, and any penalty income received will be ring-fenced and used to improve the authority's statutory functions in relation to enforcement of the PRS.

Consequences of a Civil Penalty

Financial Penalties are an alternative to criminal proceedings and unless withdrawn and the Council determines that in the public interest a prosecution for the ordinal offence is the preferred option, then a landlord cannot be prosecuted for the same offence once the penalty has been paid and the matter concluded.

Should a civil penalty has been imposed on a landlord it will not automatically prevent the Council from granting a licence under Part 2 or 3 of the Housing Act 2004. The Council will consider each case on its merits including the reasons for the penalty and the extent of the person's involvement in any property under consideration.

Where a person has received two financial penalties under this legislation in any 12 month period, irrespective of the locality to which the offences were committed, a Council will consider making an entry on the national database of rogue landlords and property agents. When considering making an entry, a Council will have regard to any guidance issued by the Secretary of State and best practise available.

2 Section 2 -Determining the Level of the Civil Penalties

When considering the severity of any offence Section 143(1) Criminal Justice Act 2003 states “In considering the seriousness of any offence the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably caused” It also considers harm as encompassing those offences where harm is caused but also those where neither individuals nor the community suffer harm but a risk of harm is present.

In order to set the level of the penalty the following steps will be considered by the Council:

Step 1– the Council will determine the level of penalty based on:

- the culpability and track record of an offender and
- the level of harm to the tenants

Step 2- the Council will make adjustments to the initial determination of that level of penalty having regard to:

- any aggravating or mitigating circumstances (severity
- the totality of that level
- that the level is fair and proportionate but in all instances act as a deterrent and removes any gain

Step 3 – the Council will make adjustments to the final determination should the offender provide written information/proof to demonstrate the impact of the level fine would be unfair and disproportionate.

Step 1 Setting the initial determination

1) Culpability and track record of an offender

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 when they intentionally or recklessly breach or wilfully disregard the law:

- They have a history of non-compliance
- Despite a number of opportunities to comply they have failed to do so
- Have been obstructive as part of the investigation
- Failure to comply results in significant risk to individuals
- Are a member of a recognised landlord/letting agency association or accreditation scheme
- Are a public figure who should have been aware of their actions
- Are an experienced landlord/agent with a portfolio of properties failing to comply with their obligations
- Serious and/or systematic failure to comply with their legal duties

Medium level of culpability

A person commits an offence through an act or omission a person exercising reasonable care would not commit.

- It is a first offence – with no high level culpability criteria being met i.e. a member of an accreditation scheme
- Failure is not a significant risk to individuals
- The landlord/agent had systems in place to manage risk or comply with their legal duties but these were not sufficient or adhered to or implemented.

Low level of culpability

A person fails to comply or commit an offence with little fault:

- No or minimal warning of circumstances/risk
- Minor breaches
- Isolated occurrence
- A significant effort has been made to comply but was inadequate in achieving compliance

The above examples are not exclusive and other factors may be taken into account when considering the level of culpability.

2) Level of harm to the tenant

When considering the level of harm both the actual, potential and likelihood of the harm will be considered.

High

A high level of harm could constitute:

- Serious effect on individual(s) or widespread impact
- Harm to a vulnerable individual
- High risk of an adverse effect on an individual
- Serious level of overcrowding

Medium

A medium level of harm could constitute:

- Adverse effect on an individual – not high level of harm
- Medium risk of harm to an individual
- Low risk of a serious effect
- The Council's work as a regulator to address risks to health is inhibited
- Consumer/tenant misled

Low

A low level of harm could constitute:

- Low risk of harm or potential harm
- Little risk of an adverse effect on individual(s)

The above examples are not exclusive and other factors may be taken into account when considering the level of harm.

What is meant by a vulnerable individual?

The statutory guidance states that the harm caused and vulnerability of the individual are important factors in determining the level of penalty.

The Housing Act 2004 defines a vulnerable individual(s) as one who is at greater harm and therefore the penalty should be greater when vulnerability is an issue.

The statutory guidance makes it clear that it is for each Council to determine the level of fine imposed under the Housing and Planning Act. The table below shows the initial level of fine for each level of culpability and harm, including the minimum level of fine which will be imposed for each classification

DETERMINATION OF CIVIL PENALTY LEVEL				
LEVEL OF CULPABILITY	LEVEL OF HARM			MINIMUM FINE LEVEL (when considering mitigating factors)
	HIGH	MED	LOW	
HIGH	25000	15000	7500	6000
MED	15000	10000	5000	4000
LOW	7500	5000	2500	2000

Step 2 Adjustments to the Initial Determination

In order to determine the final penalty the Council will consider both aggravating and mitigating factors in each case. These will adjust the initial level of the penalty based on these factors.

Below is a list of both aggravating and mitigation factors which will be considered as part of the determination. The list is not exhaustive and other factors may be considered depending on the circumstances of each case.

Aggravating factors could include:

- Previous convictions having regard to the offence to which that action applies and time elapsed since the offence
- 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
- Record of letting substandard accommodation
- Record of poor management/ inadequate management provision
- Lack of a tenancy agreement/rent paid in cash

When considering previous offences regard should be given to the guidance on Banning Orders as well as any relevant offence such as trafficking etc.

Mitigating factors could include:

- Cooperation with the investigation e.g. turns up for the PACE interview
- Voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt for the offence(s)
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
- No previous convictions
- Vulnerable individual(s) where there vulnerability is linked to the commission of the offence
- Good character and/or exemplary conduct

For each aggravating or mitigating factor which applies to each specific case the level of fine will be adjusted by 5% of the initial fine, up to the maximum £30k or to the minimum fine for each determined level of culpability and harm as shown in the table above.

The only exception to this principle will be for the number of items of non compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of non compliance with items on any notice which has not been complied with.

Totality Principle

If issuing a financial penalty for more than one offence, or where the offender has already been issued with a financial penalty, consider whether the total penalties are just and proportionate to the offending behaviour.

Where the offender is issued with more than one financial penalty, the Council will consider the following guidance from the definitive guideline on Offences Taken into Consideration and Totality.

The total financial penalty is inevitably cumulative.

The Council will determine the financial penalty for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the Council.

The Council should add up the financial penalties for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the Council should consider how to reach a just and proportionate financial penalty. There are a number of ways in which this can be achieved.

For example:

- Where an offender is to be penalised for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a financial penalty. This should reflect the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;

- Where an offender is to be penalised for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate financial penalties for each of the offences. The Council should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the Council should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be passed.

Where separate financial penalties are passed, the Council must be careful to ensure that there is no 'double-counting'.

Fair and Proportionate

A third determinate of any civil penalty MUST be the general principle:

THE CIVIL PENALTY SHOULD BE FAIR AND PROPORTIONATE BUT IN ALL INSTANCES SHOULD ACT AS A DETERRENT AND REMOVE ANY GAIN AS A RESULT OF THE OFFENCE

The statutory guidance states 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 must never be less than what it would have cost the landlord to comply with the legislation in the first place.

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
- Rent for the full period of the non-compliance – reviewed in conjunction with any
- Any other factors resulting in a financial benefit – potential cost of re-housing any tenants by the Council
- As penalty to act as a deterrent the cost to the Council of their investigation.

If the level of gain is less than the calculated penalty the reduction will be the level of gain plus £2k or 10% whichever is the greater to the maximum of £30k.

Step 3 Final determination of the level of any civil penalty

On appeal to the initial notice the person may advise that the impact

- of the financial penalty on the offender's ability to comply with the law
- of the penalty on third party – employment of staff, customers etc.
- on the offender – is it proportionate to their means – loss of home etc.

However it must be remembered that as property owners if they claim the inability to pay and show their income is small then there can always be consideration to the property/properties they own which can be sold or refinanced.

Recording of the decision

A record of each decision and the reasons for the financial penalty will to be made by an officer and how the amount of the penalty was obtained and the reasons for imposing it.

Works in Default

The powers and penalties provided by the Housing and Planning Act 2016 do not affect the powers contained within the Housing Act 2004 relating to undertaking works in default, therefore this option is left open for the LHA to pursue.

EXAMPLE: Civil Penalty Decision Record and Calculation

Landlord - Mr Example

Landlords Address - Anywhere Street

Property Address – Example Street

Offence - Breach of section 72(2) - permitted over occupation of a licenced HMO

Officer-

Date -

Initial Level of Civil Penalty

Level of Culpability

Medium - The reasons for this decision is because it is a first offence, the failure is not a significant risk, but the landlord is experienced and has a number of rented properties.

Level of Harm

Low – The reasons for this decision is because there is a low risk of harm/potential harm to occupants, and little risk of adverse effect to individuals.

DETERMINATION OF CIVIL PENALTY LEVEL				
LEVEL OF CULPABILITY	LEVEL OF HARM			MINIMUM FINE LEVEL (when considering mitigating factors)
	HIGH	MED	LOW	
HIGH	25000	15000	7500	6000
MED	15000	10000	5000	4000
LOW	7500	5000	2500	2000

Initial fine level = £5,000.00

Factors affecting the Civil Penalty

Aggravating factors + 5% for each:

- Motivated by financial gain. Rent was received for letting the extra room for 6 months.

Total of aggravating factors = +5% = + £250.00

Fine level = £5,250.00

Mitigating Factors -5% for each:

- Cooperated with investigation.
- No previous convictions.

Total of mitigating factors = - 10% = - £500.00

Fine level = £4,750.00

Financial Gain

- 6 months rental income at £2,500.00
- Cost of investigation was 5 hours of officer time at £50 per hour = £250.00

Total Financial Gain = £2,750.00

If the level of gain is less than the calculated penalty the reduction will be the level of gain plus £2k or 10% whichever is the greater to the maximum of £30k.

The level of gain is less than the CP therefore reduction can be applied. 3rd reduction would be £1583.

Level of gain (2,750) + 10% (£275.00) = £3025

Level of gain (2,750) + 2k = £ 4750

Civil Penalty Level Determination

Calculated fine Level (Initial Fine + Aggravating - Mitigating Factors) = £4,750.00

Minimum Fine Level for initial determination = £4000.00

Calculated Financial gain + £2k or 10% whichever is greater = £4,750.00

Civil Penalty = £4,750.00

Case Officer -

Approved by -