

**Housing Regulation Policy and Protocol for issuing Civil Penalties under the
Housing and Planning Act 2016**

1. Introduction

- 1.1.** The Government has made it clear that they wish to support good landlords who provide decent well maintained homes. However they also wish to clamp down on those landlords that rent out unsafe and substandard accommodation and to tackle Rogue Landlords; disrupting their activities and their business model.
- 1.2.** The power to impose civil penalties of up to £30,000 as an alternative to prosecution for certain offences under the Housing Act 2004 was introduced by Section 126 and Schedule 9 of the Housing and Planning Act 2016 which came into force on 1st April 2017.
- 1.3.** The Department for Communities and Local Government (DCLG) has published Statutory Guidance for Local Housing Authorities in implementing the legislation. The Guidance requires Local Housing Authorities develop and document their own policy on when to prosecute and when to issue a civil penalty.
- 1.4.** This policy describes how the Council will decide on the most appropriate sanction for relevant offences under the Housing Act 2004. It includes a protocol for determining the level of financial penalty to be imposed, as well as a summary of the procedure to be followed in issuing a financial penalty.

2. Housing Offences Covered by Civil Penalties

- 2.1.** Where evidence is obtained that an offence has been committed which falls within the powers under the Housing and Planning Act 2016 to issue civil penalties , the Council will consider whether this is an appropriate alternative to prosecution through the Courts. The following offences under the Housing Act 2004 can be considered for a civil penalty:
- I. Failure to Comply with an Improvement Notice under Section 30 of the Housing Act 2004
 - II. Offences relating to Licensing of HMOs under Section 72 of the Housing Act 2004;
 - Section 72 (1) being in control or managing an HMO which is required to be licensed but is not so licensed;
 - Section 72 (2) being in control or managing an HMO which is licensed but knowingly permitting occupation over and above the number authorised by the licence;

- Section 72 (3) being a licence holder who fails to comply with any condition of a licence.
- III. Offences in relation to Licensing of Houses under Part 3 of the Act (Selective Licensing);
 - Section 95 (1) being in control or managing a house which is required to be licensed but is not so licensed;
 - Section 95 (2) being a licence holder who fails to comply with any condition of a licence.
- IV. Offence of contravention of an overcrowding notice under Section 139 of the Housing Act 2004;
- V. Failure to comply with management regulations in respect of HMOs under Section 234 of the Housing Act 2004.

3. General approach to issuing civil penalties for Housing Act offences

- 3.1.** All of the Housing Regulation Team's enforcement activity will be consistent with the general principles of regulation and enforcement outlined in the Regulators' Code <https://www.gov.uk/government/publications/regulators-code> and reiterated in the Council's general corporate Enforcement Policy.
- 3.2.** A civil penalty can only be imposed as an alternative to prosecution. The legislation does not permit the Council to impose a civil penalty and prosecute for the same offence. If a person has been convicted or is currently being prosecuted, the Council cannot impose a civil penalty in respect of the same offence. Similarly, if a civil penalty has been imposed, a person cannot then be convicted of an offence for the same conduct.
- 3.3.** A civil penalty can be issued as an alternative to prosecution for each separate breach of the House in Multiple Occupation management regulations. Section 234(3) of the Housing Act 2004 provides that a person commits an offence if he fails to comply with a regulation. Hence, each failure to comply with the regulations constitutes a separate offence for which a civil penalty can be imposed.
- 3.4.** Where both a landlord and a letting/managing agent have committed the same offence, a civil penalty can be imposed on both as an alternative to prosecution. The amount of the penalty may differ depending on the circumstances of the case.
- 3.5.** Where both the letting agent and landlord can be prosecuted for failing to obtain a licence for a licensable property, then a civil penalty can also be imposed on both the landlord and agent as an alternative to prosecution. The amount of the civil penalty may differ depending on the individual circumstances of the case.

4. Determining whether to take action when offence is committed

- 4.1.** The same criminal standard of proof is required for a civil penalty as for prosecution. This means that before taking formal action, the Council should satisfy itself that if the case were to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction.
- 4.2.** In order to actually achieve a conviction in the magistrates' court, the Council would need to be able to demonstrate beyond reasonable doubt that the offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the First-tier Tribunal, the Council would need to be able to demonstrate beyond reasonable doubt that the offence had been committed.
- 4.3.** In determining whether there is a realistic prospect of conviction the Council will have regard to Crown Prosecution Service 'Code for Crown Prosecutors'.
- 4.4.** The Code requires that a test is applied to each case being considered for prosecution. The Council will apply the test to all cases where offences are alleged to have been committed. The test comprises two stages.
- I. The evidential test- this involves an objective assessment of all available evidence taking into consideration the admissibility, reliability and credibility of the evidence.
 - II. The public interest test- this involves an examination of the seriousness of the offences, the level of culpability of the offender, the impact of the offence on victims and the community, the age of the offender and whether a prosecution is a proportionate response.
- 4.5.** The case officer will present an investigation file for each case to the Housing Regulation Manager for review. The case will not be considered for *either* prosecution or a civil penalty unless the Housing Regulation Manager is satisfied that both stages of the Code for Crown Prosecutors, have been satisfactorily met:

5. Deciding on the appropriate sanction

- 5.1.** If the Council believes that it has a reasonable prospect of securing a conviction in a particular case, it will always consider a civil penalty in the first instance.
- 5.2.** In general, prosecution will be the most appropriate option for cases deemed particularly serious or where the offender has committed a similar offence in the past. This approach sends out a strong message that the Council will take a robust approach

in dealing with rogue landlords and publicising convictions acts as a deterrent to other potential offenders.

5.3. However, this does not preclude the use of civil penalties for serious offences if the Local Authority believes that a financial penalty will be the most effective sanction for an offence.

5.4. In deciding whether prosecution or a civil penalty is an appropriate sanction the Council will consider the following and document their decision:

- I. The seriousness of the offence- will the Council consider applying for a banning order?
- II. The track record of the offender- Has the offender committed similar offences in the past?
- III. Will a financial penalty remove any financial gain achieved from the commission of the offence?
- IV. Would a financial penalty be an adequate deterrent to future offending?
- V. Would prosecution be a fair and proportionate response?

6. Determining the level of financial penalty

6.1. In circumstances where the Council has determined that it would be appropriate to issue a civil penalty as an alternative to prosecution the DCLG's statutory guidance requires the following factors are considered:

- I. **Severity of the offence.** The more serious the offence, the higher the penalty should be.
- II. **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.
- III. **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.
- IV. **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.

- V. **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 at a high enough level such that it is likely to deter the offender from repeating the offence.
- VI. **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.
- VII. **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.

6.2. The Council has developed a protocol (**Appendix 1**) for determining the level of civil penalty that should be imposed. The protocol takes into account all of the factors listed in the DCLG's Statutory Guidance and its application should ensure that as far as practicable, the Council's approach to the use of civil penalties for Housing Act offences is consistent and transparent.

7. Procedure for issuing civil penalties

- 7.1.** The procedure for issuing civil penalties is prescribed by Schedule 9 to the Housing and Planning Act 2016. The Council's procedure will mirror this process.
- 7.2.** Before imposing a civil penalty the Local Authority will issue a **Notice of Intent**. This will be issued before the end of 6 months beginning with the first day on which the Council has sufficient evidence of the commission of the offence.
- 7.3.** If the conduct is continuing, then the **Notice of Intent** can be issued on any day the conduct is continuing or the end of 6 months, beginning on the last day on which the conduct occurs.
- 7.4.** The **Notice of Intent** will set out:

- I. The amount of the proposed financial penalty
- II. The reasons for proposing the imposition of the financial penalty
- III. Information about the right to make representations within 28 days

7.5. Any representations must be made to the Neighbourhood Services Lead within a 28-day period. The recipient of the **Notice of Intent** will be advised that any representations they make should be accompanied by supporting evidence, including information on their financial circumstances.

7.6. After the end of the period for representations the Neighbourhood Services Lead will:

- I. Decide whether to impose the financial penalty
- II. If it is decided to impose the penalty, decide the level of the penalty

7.7. If it is decided to impose the penalty, the Council will issue a **Final Notice**. The final Notice will set out:

- I. the amount of the financial penalty
- II. the reasons for imposing the penalty
- III. information about how to pay the penalty
- IV. the period for payment of the penalty
- V. information about rights of appeal
- VI. the consequences of failure to comply with the notice

7.8. The Council will apply a 10% reduction on the penalty if the offender ceases their offending behaviour within the 28 day representation period e.g. by addressing the breach or breaches of the HMO Management Regulations, or making a FULL Licensing application accompanied by payment of the Licensing fee.

7.9. The Council may withdraw the **Notice of Intent** or **Final Notice**, or reduce the amount of the penalty at any time.

8. Appeals

8.1. Any person issued with a **Final Notice** may appeal to the First Tier Tribunal against the decision to impose the penalty or the amount of the penalty. The **Final Notice** is suspended until the appeal is determined or withdrawn.

8.2. On appeal the Tribunal may vary, cancel or confirm the final notice.

9. Recovering the Financial Penalty

- 9.1.** Where the recipient of a Final Notice fails to pay the civil penalty the Council will refer the matter to the County Court for an order of that court. The DCLG Statutory Guidance states that if necessary, the Local Authority should use County Court Bailiffs to enforce the order. The Housing Regulation Team will liaise with Slough Borough Council Legal Services before commencing any claim through the County Court.
- 9.2.** A certificate signed by the Chief Finance officer of the Council will be required to prove to the Court that the recipient of the civil penalty has failed to pay.

10. Other consequences of receiving a Civil Penalty

- 10.1.** The Council will take into account any civil penalties issued when considering whether a person is fit and proper to hold an HMO Licence or any other Licence issued under the Housing Act 2004.

11. Income from Civil Penalties

- 11.1.** All income received from financial penalties will be utilised to enhance the enforcement activities of the Housing Regulation Team in line with The Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017 which specify that income received from civil Penalties can be retained by the Local Housing Authority, provided that it is used to further the Local Housing Authority's statutory functions in relation to their enforcement activities covering the private rented sector.

Appendix 1

Protocol for determining level of civil penalty

This protocol was devised with reference to the following documents:

- Department for communities and Local Government (DCLG) (April 2017) 'Civil Penalties under the Housing and Planning Act 2016- Guidance for Local Authorities'
- Sentencing Council (2015) Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences- Definitive Guidelines
- Sentencing Council (2014) Environmental Offences- Definitive Guidelines

The Council will determine the level of penalty to be imposed based on the following 4 stages. The Council will document its decisions at each stage of the protocol.

No Financial Penalty shall be determined or issued until it has been reviewed and agreed in writing by the Lead for Neighbourhood Services.

Stage 1 – Determining the offence category

Culpability

When deciding the level of culpability of the offender the Council will have regard to the following:

Very High (Deliberate)	Flagrant disregard or deliberate breach Offender is portfolio landlord (>5 properties) or professional letting agents History of non-compliance Offender has been given advice assistance or warnings which have been ignored. Example offence: Failure to comply with an Improvement Notice, Failure to Licence an HMO which is required to be Licensed
High (reckless)	Actual foresight or wilful blindness to risks that would be obvious to the average person, but risk nonetheless taken. Example offence: failure to comply with HMO Management Regulations
Medium (negligent)	Offender has or could reasonably be expected to have knowledge of risks Some effort made to comply but insufficient for full compliance Failure to implement systems to control risk Example offence: partial compliance with an Improvement Notice
Low (little or no fault)	Non-compliance was an isolated incident Reasonable attempts made to comply Example offence: Overcrowding or breach resulting from behaviour of occupants

Harm

When deciding the level of harm whether actual or potential, resulting from the commission of the offence the Council will have regard to the following:

Category 1- high risk	Serious adverse effect (potential or actual) on individuals or the wider community Risk of serious injury or fatality, risk of long term significant adverse impact on health or wellbeing Actual or potential for harm to particularly vulnerable groups.
Category 2- medium risk	Significant adverse effect (actual or potential) not amounting to category 1 harm. Relatively low risk of very serious harm or fatality
Category 3- low risk	Adverse effect (actual or potential) but low risk of long term serious harm No impact on wider community

The relationship between the level of culpability and harm will then be used to determine which civil penalty band the offence falls into:

		Culpability			
		V High	High	Medium	Low
Harm	Category 1	6	6	5	4
	Category 2	5	5	4	3
	Category 3	3	3	2	1

As the maximum fine is £30,000 6 bands have been created. The middle of the band will be chosen as a starting point for determining the Civil Penalty. This will then be adjusted according to factors included in **Stage 2** of the protocol.

Band	Civil Penalty Range (£)	Starting point (£)
1	1 to 5000	2500
2	5001 to 10000	7500
3	10001 to 15000	12500
4	15001 to 20000	17500
5	20001 to 25000	22500
6	25001 to 30000	27500

Stage 2 – Assets and Income

The Statutory guidance published by DCLG states that the penalty should not be regarded as an easy or lesser option compared to prosecution and must therefore be set at a high enough level to ensure it has an economic impact on the offender while being proportionate to the severity of the offence.

The Council will use all of its current powers to establish as far as reasonably practicable, the offender's financial means. The Council's investigations will not be limited to the offender's income from rental properties but will examine all of the offender's income and assets.

The Council may adjust the penalty upwards, to the maximum penalty allowed by the band to reflect the value of the offender's assets. The Council may also adjust the penalty downwards, but this will not automatically be the case simply because an offender has, or claims to have a low income.

Stage 3 – Aggravating and Mitigating factors

The Council will consider a range of mitigating and aggravating factors in determining the level of penalty to be imposed. It will generally be the case that a 10% adjustment will be made for each aggravating or mitigating factor. However the Council reserves the right to deviate from this if the circumstances warrant a greater level of adjustment.

A 10% adjustment will automatically be applied in all cases where the offender fully addresses their non-compliance within the 28 day representation period following the issue of a Notice of Intent.

The following factors will be considered in determining the level of penalty. Please note this is not an exhaustive list:

Mitigating factors:

- The level of cooperation with the investigation
- The health/ age of the offender
- Readiness to attend training or become accredited

Aggravating factors:

- Previous convictions/fines for relevant offences
- Motivated by financial gain
- Breach of any court order
- Wider community impact e.g. anti-social behaviour or nuisance arising from failures in management
- Obstruction of investigation or deliberately providing false information

Stage 4- Proportionality and ‘the totality principle’

The Council will ‘step back’ and review the determined penalty to ensure that it fulfils the objectives of the sanction and adequately considers all the factors listed in Statutory Guidance (listed on page 3 and 4 of this policy).

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

In cases where multiple offences have been committed the Council will apply the ‘totality principle’. The council will determine a penalty for each offence based on the above stages and impose a single combined penalty up to a maximum of £30,000.

If the combined total of all the penalties exceeds £30,000 then the decision to issue a Civil Penalty will be reviewed by the Housing Regulation Manager and Service Lead for Neighbourhoods and reconsidered for prosecution.