

WEST OXFORDSHIRE DISTRICT COUNCIL
ECONOMIC AND SOCIAL OVERVIEW AND SCRUTINY COMMITTEE
THURSDAY 22 NOVEMBER 2018

POLICY TO IMPLEMENT NEW ENFORCEMENT POWERS IN THE
HOUSING AND PLANNING ACT 2016

REPORT OF THE GROUP MANAGER, PROFESSIONAL SERVICES

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I. PURPOSE

This report sets out how the Council plans to implement new enforcement powers contained in the Housing and Planning Act 2016, (Part 2: Rogue landlords and property agents in England), including the use of civil penalties for private housing offences and other regulatory functions, and provides an opportunity for the Committee to comment on the proposals.

2. RECOMMENDATIONS

That the Committee considers the proposed policy and comments to Cabinet on the following recommendations:

- (a) That the policy for imposing Civil Penalties, as detailed in the [Appendix](#), be adopted with immediate effect;
- (b) That the Group Manager for Professional Services be granted delegated powers to deal with the matters specified in the Section 3 of this report and the Policy in question;
- (c) That the Council be recommended to incorporate the approved powers to deal with the matters specified in Section 3 of this report into the Officer Delegations in Part 4 of the Constitution.

3. BACKGROUND

3.1. The Housing and Planning Act 2016 (The Act) introduced a range of measures to enforce against non-compliant landlords -

- Civil penalties of up to £30,000 as an alternative to prosecution for certain specified offences (came into force on 6 April 2017),
- Extension of rent repayment orders to cover illegal eviction, breach of a banning order and certain other specified offences,
- Database of rogue landlords and property agents who have been convicted of certain offences or received multiple civil penalties,
- The introduction of Banning Orders for the most serious and prolific offenders under The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018

3.2. The civil penalty powers contained in the Housing and Planning Act 2016 complement the existing enforcement tools that local authorities have under the Housing Act 2004, i.e. to prosecute, issue Simple Cautions and/or carry out Works in Default where landlords fail to comply with housing legislation. It offers a simpler and quicker outcome with the added benefit that the local authority can retain the fines to resource continual improvements in private rented sector work. However, in order for local authorities to apply Civil Penalties, they must first adopt a policy and the proposed policy is set out in

the [Appendix](#) (page 4). Civil penalties are then available as an alternative to prosecution for certain specified housing offences as follows -

- Failing to comply with an improvement notice (section 30).
 - Failure to comply with management regulations in respect to Houses in Multiple Occupation (HMO) (sec 234).
 - Offences in relation to licensing an HMO (Part 3 of the Act).
 - Breaching of an overcrowding notice (section 139).
 - Breaching a Banning Order
- 3.3. The Policy on Civil Penalties has been determined in liaison with local authorities in Gloucestershire and Oxfordshire. An enforcement matrix to assess the circumstances of the offence has been created to use as a guideline to determine the most appropriate penalty to be imposed. This is important because Civil Penalties can be appealed to the First Tier Property Tribunal (FTPT). This matrix will therefore be used to offer transparency and aid consistency in the enforcement process and will assist in defending any appeals made. This Policy may be amended by the Group Manager, for example, in light of any further regulations or guidance released by the Secretary of State.
- 3.4. Enforcement officers will assess each case carefully to decide whether to issue a civil penalty or undertake other enforcement interventions in line with the Council's enforcement policy. If a civil penalty is chosen, a prosecution cannot be sought. Banning orders(see paragraph 3.7 below) would be reserved for the worst offenders, therefore civil penalties would potentially form the bulk of the enforcement action for any relevant breaches of The Housing Act 2004.

Rent Repayment Orders

- 3.5. The Act extends the application of Rent Repayment Orders (RRO). Tenants who live in unsafe rented accommodation resulting in the prosecution of their landlord should be able to be compensated by having their rent payments returned to them through a Rent Repayment Order. RROs cover the following situations:
- Failure to comply with an Improvement Notice under section 30 of the Housing Act 2004;
 - Failure to comply with a Prohibition Order under section 32 of the Housing Act 2004;
 - Breach of a banning order made under section 21 of the Housing and Planning Act 2016;
 - Using violence to secure entry to a property under section 6 of the Criminal Law Act 1977;
 - Illegal eviction or harassment of the occupiers of a property under section 1 of the Protection from Eviction Act 1977.
- 3.6. Where a landlord has been convicted of an offence as detailed in paragraph 3.5, the local housing authority must consider applying for an RRO as detailed in Guidance issued by the Department of Communities and Local Government (DCLG). In these circumstances the First-tier Tribunal must order that the maximum amount of rent is repaid (capped at 12 months). The Act provides local housing authorities with an option to apply for a rent repayment order where the landlord has not been convicted of the offence for which the rent repayment order application is being made. In these circumstances the First-tier Tribunal will need to be satisfied beyond reasonable doubt that the landlord has committed the offence.

Banning Orders

3.7. The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 introduces the use of new 'Banning Orders' and the use of DCLG's "Rogue Landlord Database". The legislation is aimed at "rogue landlords" who flout their legal obligations and rent out accommodation which is substandard. The regulations describe the offences to which a banning order can be applied and local housing authorities have the power to apply to the First-tier Tribunal for a banning order against a person who has been convicted of a banning order offence. A local housing authority must make an entry on the Rogue Landlord's database where a landlord or property agent has received a banning order. They have the discretion to make entries where a landlord or property agent has been convicted of a banning order offence or has received two or more civil penalties within a 12 month period.

4. ALTERNATIVES/OPTIONS

The additional enforcement options to issue Civil Penalties are a power and not a duty. It is therefore an option for this council not to use them; however, failure to do so will reduce the council's ability to protect tenants and improve landlord behaviour.

5. FINANCIAL IMPLICATIONS

The Government has now published regulations which state that the income from Civil Penalties can be retained by the Local Authority. The income must be used to cover the administration and legal costs and the expenses incurred in carrying out its private rented sector enforcement function. Any amount outside of that has to be paid over to central government.

6. RISKS

There will be a reputational risk from a failure to adopt and delegate these powers and engage with partner agencies to ensure its effective implementation.

7. REASONS

7.1. To protect the environment whilst supporting the local economy.

7.2. To provide efficient and value for money services, whilst delivering quality front line services.

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Background Papers:

None

Policy on Civil Penalties under the Housing and Planning Act 2016

Introduction

1. The power to impose a Civil Penalty as an alternative to prosecution for certain offences was introduced by section 126 and Schedule 9 of the Housing and Planning Act 2016.
2. In determining the Civil Penalty amount, the Local Housing Authority will have regard to the statutory guidance issued under schedule 9 of the Housing and Planning Act 2016.
3. The approach to issuing a Civil Penalty is fundamentally made up of two stages, firstly determining the appropriate sanction and secondly (if appropriate) the level of Civil Penalty charged.
4. When determining the appropriate sanction the Council should satisfy itself that if the case were to be prosecuted there would be a 'realistic prospect of a conviction'. This is currently determined by consulting the Crown Prosecution Service "Code for Crown Prosecutors" which provides two tests: (i) the evidential test and (ii) the public interest test.

Background

5. Civil Penalties were introduced by the Housing and Planning Act 2016 under Section 126 and Schedule 9 of that Act. The powers enable Local Authorities to impose Civil Penalties of up to £30,000 in respect of the following offences:
 - a) Failure to Comply with an Improvement Notice under Section 30 of the Housing Act 2004;
 - b) Offences relating to Licensing of HMOs under Section 72 of the Housing Act 2004;
 - i Section 72 (1) being in control or managing an HMO which is required to be licensed but is not so licensed;
 - ii 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;
 - iii Section 72 (3) being a licence holder who fails to comply with any condition of a licence.
 - c) Offences in relation to Licensing of Houses under Part 3 of the Act (Selective Licensing);
 - i Section 95 (1) being in control or managing a house which is required to be licensed but is not so licensed;
 - d) Section 95 (2) being a licence holder who fails to comply with any condition of a licence. Contravention of an overcrowding notice under Section 139 of the Housing Act 2004;
 - e) Failure to comply with management regulations in respect of HMOs under Section 234 of the Housing Act 2004.
6. Statutory guidance has been issued by the Secretary of State under Schedule 9 (12) of the Housing and Planning Act 2016 and Local Authorities must have regard to this when exercising their functions in respect of civil penalties.

7. The maximum penalty that can be set is £30,000. A minimum penalty level has not been set and the appropriate amount of penalty is to be determined by the Local Housing Authority. Only one penalty can be imposed in respect of the same offence.

Decision making

8. The Council will decide which option it wishes to pursue but as a general principle, the Council should normally prosecute where an offence is particularly serious or where the offender has committed similar offences in the past. Due regard should be made to the Enforcement Policy.
9. Prosecution in serious cases demonstrates that the Council will not hesitate to take formal action where needed and is likely to act as a strong deterrent both to the offender and other rogue landlords. A prosecution also enables the Council to apply for a banning order following a successful conviction.
10. This policy adopts an enforcement matrix which is used to determine the most appropriate course of action in enforcement cases. The principle of the enforcement matrix is to provide a score based on a number of factors, both negative and positive. Bands are provided to reflect the score produced and the appropriate courses of action for dealing with the identified situation.

Bands	Score	Recommended Action
1	Plus to minus 10	Advisory letters Invitation to Landlord events Charge confidence in management renewal fee
2	Minus 11 to minus 30	Revoke accreditation where applicable Informal letter Refer to HMO licence fee Policy
3	Minus 31 to minus 40	Commence investigation Serve Section 16 and 235 notices Revoke accreditation Consider revoking licence Formal action
4	Minus 41 or lower	Formal action

11. The enforcement matrix provides guidance to officers carrying out investigations and ensures that enforcement is being carried out in a fair, proportionate and consistent way.

Factors in determining penalty levels

12. Clearly, a single level penalty will not be appropriate in all cases and when assessing the level of penalty to be imposed it is expected that the maximum amount would be reserved for the worst offenders. The actual amount levied should reflect the severity of the case and the Council should have regard to the following.
 - a) The seriousness of the offence
 - i The more serious the offence, the more likely it is that prosecution will be the more appropriate course of action
 - b) Culpability of the landlord – Factors to take into account when determining the culpability include where the offender –
 - i has the **intention** to cause harm, the highest culpability where an offence is planned.

- ii is **reckless** as to whether harm is caused, i.e. the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences, even though the extent of the risk would be obvious to most people.
- iii has **knowledge** of the specific risks entailed by his actions even though he does not intend to cause the harm that results.
- iv is **negligent in their actions**.

Examples of Culpability

High (Deliberate Act)	Intentional breach by landlord or property agent or flagrant disregard for the law, i.e. failure to comply with a correctly served improvement notice
High (Reckless Act)	Actual foresight of, or willful blindness to, risk of offending but risks nevertheless taken by the landlord or property agent; for example, failure to comply with HMO Management Regulations
Medium (Negligent Act)	Failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence; for example, part compliance with a schedule of works, but failure to fully complete all schedule items within notice timescale.
Low (Low or no culpability)	Offence committed with little or no fault on the part of the landlord or property agent; for example, obstruction by tenant to allow contractor access, damage caused by tenants

- c) Harm or potential for harm
 - In determining the level of harm the Local Housing Authority will have regard to:
 - i The person: i.e. physical injury, damage to health, psychological distress
 - ii To the community; i.e. economic loss, harm to public health
 - iii Other types of harm; i.e. public concern/feeling over the impact of poor housing condition on the local neighbourhood
- 13. The nature of the harm will depend on the personal characteristics and circumstances of the victim, e.g. tenant.
- 14. Where no actual harm has resulted from the offence, the Council will consider the relative danger that persons have been exposed to as a result of the offender’s conduct, the likelihood of harm occurring and the gravity of harm that could have resulted.
- 15. Factors that indicate a higher degree of harm include:
 - i Multiple victims
 - ii Especially serious or psychological effect on the victim
 - iii Victim is particularly vulnerable

Examples of Harm Categories

High	Defect(s) giving rise to the offence poses a serious and substantial risk of harm to the occupants and/or visitors; for example, danger of electrocution, carbon monoxide poisoning or serious fire safety risk.
Medium	Defect(s) giving rise to the offence poses a serious risk of harm to the occupants and/or visitors; for example, falls between levels, excess cold, asbestos exposure.
Low	Defect(s) giving rise to the offence poses a risk of harm to the occupants and/or visitors; for example, localised damp and mould, entry by intruders.

Rationale for Action

16. Punishment of the offender

- a) A Civil Penalty should not be regarded as an easy or lesser option compared to prosecution.
- b) The penalty should be proportionate and reflect the severity of the offence.
- c) The penalty should be set high enough to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.

17. Deter the offender from repeating the offence

- a) The ultimate goal is to prevent further offending and help ensure the landlord fully complies with all their legal responsibilities in future.
- b) The level of penalty should be set at a high enough level to deter repeat offending.

18. Deter others from committing similar offences

- a) Important part of deterrence is the realisation that the Council is proactive in levying Civil Penalties where the need exists and that the level of Civil Penalty will be set high enough to punish the offender and deter repeat offending.

19. Remove any financial benefit the offender may have obtained as a result of committing the offence.

- b) 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 managed.

Determining the amount of Civil Penalty

20. The enforcement matrix is used to assess the level of Civil Penalty that should be charged when offences have been committed.

21. The table below sets out the relationship between harm and culpability as a determinant of the Civil Penalty banding.

Low Culpability/High Harm Band 4	Medium Culpability/High Harm Band 5	High Culpability/High Harm Band 6
Low Culpability/Medium Harm Band 3	Medium Culpability/Medium Harm Band 4	High Culpability/Medium Harm Band 5
Low Culpability/Low Harm Band 1	Medium Culpability/Low Harm Band 2	High Culpability/Low Harm Band 3

22. The assumed starting point (ASP) in each band will be the mid-point, i.e. for Band 3 the mid-point will be £12,500.

Band 1 = £0 to £4,999 Assumed Starting Point of £2,500	Low Culpability/Low Harm
Band 2 = £5,000 to £9,999 Assumed Starting Point of £7,500	Medium Culpability/Low Harm
Band 3 = £10,000 to £14,999 Assumed Starting Point of £12,500	Low Culpability/Medium Harm OR High Culpability/Low Harm
Band 4 = £15,000 to £19,999 Assumed Starting Point of £17,500	Low Culpability/High Harm OR Medium Culpability/Medium Harm
Band 5 = £20,000 to £24,999 Assumed Starting Point of £22,500	Medium Culpability/High Harm OR High Culpability/Medium Harm
Band 6 = £25,000 to £30,000 Assumed Starting Point of £27,500	High Culpability/High Harm

23. This approach ensures that the assessment of the level of Civil Penalty reflects the factors to be considered in the statutory guidance provided by the Secretary of State and takes into account the requirement to determine the appropriate sanction by using the score produced by the enforcement matrix as a guiding principle.

Aggravating Factors

24. The penalty may be increased by £1,000 for each aggravating factor up to a maximum of the top of the band level determined above.
25. In order to determine the final penalty the Council will consider any aggravating factors relevant to the case.
26. 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 each case.
- Previous convictions having regard to the offence to which 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 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 or letting standard – so should know better

Mitigating Factors

27. The penalty may be decreased by £1,000 for each mitigating factor to a minimum of the bottom of the band level determined above.
28. In order to determine the final penalty the Council will consider any mitigating factors relevant to the case.
29. 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 each case.
 - Co-operation with the investigation
 - Voluntary steps taken to address issues e.g. submits a licence application
 - Willingness to undertake training
 - Evidence of 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
30. When considering aggravating and mitigating factors the Civil Penalty imposed must remain proportionate to the offence.
31. Reference will be made to Magistrates Court Sentencing Council guidelines when considering relevant aggravating and mitigating factors.
32. An offender will be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise.

Civil Penalties – Multiple Offences

33. Where the Council is satisfied that more than one offence is being committed concurrently in respect of a single property, Civil Penalty notices can be issued, (for example, where there are multiple breaches of the HMO Management Regulations).
34. However, where satisfied on the merits of the case and/or where the authority considers that issuing multiple penalties at the same time would result in an excessive cumulative penalty, nothing in this policy shall require the authority to do that. The authority 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.

Maximum Levels

35. The Council takes the enforcement of housing conditions in the Private Rented Sector extremely seriously and proactively pursues enforcement action where it is considered to be necessary and appropriate.
36. There may be circumstances when the Council is dealing with offences that it considers will warrant a maximum penalty.

Recording of the decision

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