

Appendix A - Civil Penalty Policy and Guidance Matrix

Policy and Matrix for the use of Civil Penalties

Introduction

The Housing and Planning Act 2016 introduces Civil Penalties of up to £30,000 as an alternative to prosecution for certain Housing Act 2004 offences from 6th April 2017.

The power to impose a civil penalty as an alternative to prosecution for these offences was introduced by section 126 and Schedule 9 of the Housing and Planning Act 2016.

These are:

- Section 30 failure to comply with an Improvement Notice
- Section 72 offences in relation to licensing of Houses in Multiple Occupation (HMO)
- Section 95 offences in relation to licensing of houses under part 3 (Selective Licensing)
- Section 139(7) failure to comply with an overcrowding notice
- Section 123 failure to comply with a Remedial Notice in relation to electrical safety standards
- Section 234 Management Regulations in respect of HMOs

Furthermore:

- Breach of Duty under Regulation 3 of Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020
- Breach of Duty in relation to Smoke and Carbon Monoxide Alarm (Amendment) Regulations 2022

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 and the Civil Penalty Matrix developed by the Department for Communities and Local Government.

Burden of Proof

The criminal burden of proof, beyond all reasonable doubt, must be satisfied before a Civil Penalty can be issued as an alternative to prosecution. The Local Housing Authority must satisfy itself that there would be a realistic prospect of conviction, applied objectively, to the evidence available.

In assessing the evidence regard must be given to the Code for Crown Prosecutors and when deciding whether there is sufficient evidence to prosecute consideration must be given as to whether the evidence can be used and is reliable.

Due regard must be given to any potential defences available and in certain circumstances the Local Housing Authority may decide to conduct an interview under caution in accordance with PACE codes of practice to assist in determining whether the issue of a Civil Penalty is appropriate or not.

Factors to consider when determining to prosecute or issue a civil penalty

Each case will be determined on its own merits taking into account all available evidence.

Prosecution is likely to be the most appropriate action where the offence is particularly serious and/or where the landlord has a history of non-compliance in relation to property condition or property management.

The following factors, whilst not exhaustive, are examples of where it would be appropriate to consider the issuing of a Civil Penalty:

- The offender has no evidence of previous non-compliance with appropriate legislation
- The offender has no previous convictions recorded
- The offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence)
- The offender's co-operation is beyond what would be expected
- The offender took prompt action to remedy the deficiency i.e. excessive follow up not required.

Factors to consider when determining the level of civil penalty

The actual amount levied in each individual case should reflect the severity of the offence, as well as the landlord's previous record of offending.

The Council should consider the following factors to help ensure the civil penalty is set at an appropriate level:

- Severity of the offence, determined by harm caused and culpability of the offender
- The history of compliance of the offender
- Punishment of the offender for the offence
- The deterrent from repeating the offence
- The deterrent for others committing similar offences
- Removing any financial benefit obtained from committing the offence

These factors are reflected in the financial penalty matrix which helps officers to determine the level of fine that should be imposed by creating a score and band for each case.

Financial Penalty Matrix

Officers should first determine the severity of the offence by consulting and determining the harm and culpability categories.

Examples of Harm Categories

The table below contains factors relating to both actual harm and risk of harm.

| | |
|--------------------------------|---|
| <p>Category 1 - High</p> | <p>Serious adverse effect on individuals and/or having a widespread impact.</p> <p>High risk of an adverse effect on individuals including where persons are vulnerable.</p> <p>Housing defect giving rise to the offence poses an imminent or serious and substantial risk of harm to the occupants and/or visitors, for example Housing Health and Safety Rating System (HHSRS) imminent category 1 hazards such as danger of electrocution, carbon monoxide poisoning, serious fire safety risk or excess cold with vulnerable resident.</p> |
| <p>Category 2 - Medium</p> | <p>Adverse effect on individuals</p> <p>Medium risk of an adverse effect on individuals including where persons are vulnerable.</p> <p>Tenant misled/disadvantaged by the failing.</p> <p>The housing defect giving rise to the offence poses a serious risk of harm to the occupants and/or visitors, for example HHSRS category 1 hazards, multiple high category 2 hazards such as falls between levels, excess cold, asbestos exposure.</p> |
| <p>Category 3 - Low</p> | <p>Low risk of an adverse effect on individuals</p> <p>The housing defect giving rise to the offence poses a risk of harm to the occupants and/or visitors, for example low category 2 hazards under the HHSRS, localised damp and mould.</p> |

Examples of Culpability Categories

| | |
|---------------------------------------|--|
| <p>Very High (Deliberate Act)</p> | <p>Where the offender intentionally breached, or flagrantly disregarded, the law.</p> <p>For example, the offender has ignored reminders to apply for a property or HMO licence. Failure to comply with a correctly served improvement notice. No attempt made to contact the local authority to discuss breaches.</p> |
| <p>High (Reckless Act)</p> | <p>Actual foresight of or wilful blindness to the risk of offending but risks nevertheless taken by the landlord or property agent, for example failure to comply with HMO Management Regulations.</p> |
| <p>Medium (Negligent Act)</p> | <p>Failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems that prevent the offence being committed, for example part compliance with a schedule of works but failure to fully complete all schedule items within notice timescale, Another example would be partially completed licensing application forms.</p> |
| <p>Low (Low or no culpability)</p> | <p>Offence committed with little or no fault on the part of the landlord or property agent, for example significant efforts were made to address the risk but they were obstructed by the tenant to allow contractor access or damage caused by tenants. Failings were minor and occurred as an isolated incident such as low category 2 hazards under the HHSRS found in one property from a large portfolio.</p> |

Having determined the category, the Officers should refer to the following starting points to reach a penalty band. Officers should then consider whether further adjustments should be made for aggravating and mitigating features.

Starting points

| Culpability | Harm category 1 | Harm category 2 | Harm category 3 |
|-------------|-----------------|-----------------|-----------------|
| Very high | 6 | 5 | 4 |
| High | 5 | 4 | 3 |
| Medium | 4 | 3 | 2 |
| Low | 3 | 2 | 1 |

Banding Levels

| | |
|--------|--------------------|
| Band 1 | £0 to £4,999 |
| Band 2 | £5,000 to £9,999 |
| Band 3 | £10,000 to £14,999 |
| Band 4 | £15,000 to £19,999 |
| Band 5 | £20,000 to £24,999 |
| Band 6 | £25,000 to £30,000 |

The starting point for each band will be the mid-point e.g. for Band 1 the mid-point will be £2,500.

An offender will be assumed to be able to pay any financial penalty imposed unless they can demonstrate otherwise.

Aggravating Factors

The penalty can be increased by £1000 for each aggravating factor up to a maximum of £5000.

The factors listed below are a non-exhaustive list of factual elements that should result in an upward adjustment from the starting point:

- Relevant previous conviction/civil penalties
- Motivated by financial gain
- Failure to respond to warning
- Deliberate concealment of illegal nature of activity
- Obstruction of investigation
- Falsification of documentation
- Targeting vulnerable groups
- Poor housing record

Mitigating Factors

The penalty can be decreased by £1000 for each mitigating factor up to a maximum of £5000.

The factors listed below are a non-exhaustive list of factual elements that should result in a downward adjustment from the starting point:

- No previous relevant convictions or no relevant housing enforcement history.
- Evidence of steps taken voluntarily to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected.
- Good housing record
- Self-reporting, co-operation and acceptance of responsibility.