

KIRKLEES COUNCIL

CIVIL PENALTY POLICY

(HOUSING & PLANNING ACT 2016)

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This policy is intended to work in accordance with Kirklees Council's Enforcement Policy 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).

1. Introduction

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.

The specified housing offences are:

- Failure to comply with an Improvement Notice (section 30)
- Offences in relation to mandatory licensing of Houses in Multiple Occupation (HMO) (section 72)
- Offences in relation to licensing under Part 3 of the Housing Act 2004 (section 95)
- Failure to comply with an overcrowding notice (section 139)
- Failure to comply with management regulations in respect of HMO (section 234)

The Housing Solutions Service has been working at a regional level with other West Yorkshire authorities in order to ensure consistency in policies and procedures.

2. Enforcement

The same criminal standard of proof is required in order to impose a civil penalty as is required to prosecute, therefore the Housing Solutions Service will follow the same investigative procedure. This procedure includes inviting the landlord(s) for an interview under the Police and Criminal Evidence Act 1984 (PACE) (in this policy the term "landlord" also includes property agents and letting agents, unless specified otherwise). The Housing Solutions Service will liaise with the legal team to ensure that it can be demonstrated beyond reasonable doubt that the offence has been committed. The legal team will have consideration of the Crown Prosecution Service Code for Crown Prosecutors, the Criminal Justice Act 2003 and the Offences Taken into Consideration and Totality. As a prerequisite, the council will satisfy itself that if the case were to be presented to the Magistrates' court, there would be a realistic prospect of conviction before deciding whether to impose a civil penalty.

3. Deciding on the most appropriate course of action

The legislation does not allow the council to impose a civil penalty and prosecute for the same offence, therefore it must be decided which is the most appropriate sanction. In deciding whether to prosecute or impose a civil penalty, the Housing Solutions Service will refer to the Guidance for Local Authorities, which states "Prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past".

a) Investigation

The council must be satisfied that a person has failed to comply with the specific sections of the Housing Act 2004 listed in Schedule 9 of the Housing and Planning Act 2016 and that there is a realistic prospect of conviction before progressing to the next stage.

An investigation will be carried out by a Housing Solutions Officer (HSO), Senior Housing Solutions Officer (SHSO) and/or Team Manager. The investigation may include consulting relevant public records, liaising with other enforcing authorities, checking the Rogue Landlord database, liaising with Customer and Exchequer, having regard to previous communications with the person and other lawful investigation activity that the investigating officer considers appropriate.

An integral part of the investigation will be an interview with the person under the Police and Criminal Evidence Act 1984 (PACE).

On completion of the investigation the Housing Solutions Service will decide, after consulting the legal team, whether there is a realistic prospect of conviction. Where the Housing Solutions Service has decided that there has been non-compliance with a realistic prospect of conviction, they will progress to the next stage.

b) Decision to prosecute or serve a Civil Penalty Notice

The decision regarding whether to pursue a prosecution or serve a Civil Penalty Notice (CPN) will be made on a case-by-case basis in line with this policy. Prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past. However, that does not mean civil penalties will not be used in cases where serious offences have been committed. A civil penalty of up to £30,000 can be imposed where a serious offence has been committed and the council may decide that a significant financial penalty (or penalties if there have been several breaches), rather than prosecution, is the most appropriate and effective sanction in a particular case.

The HSO will discuss the case with a SHSO and/or Team Manager and propose a decision. Authorisation to proceed with imposing a financial penalty will be authorised by an Operations Manager.

4. Procedure for imposing a civil penalty

a) Notice of Intent

When the most effective sanction is deemed to be the service of a CPN then a Notice of Intent (NOI) will be served first. This will be served no later than 6 months after it is decided that there is sufficient evidence of the conduct to which the penalty relates, or at any time when the conduct is continuing. The NOI will be served by the officer who was involved in the investigation and in making the decision.

Included in the NOI will be the proposed financial penalty, therefore this must be agreed prior to the NOI being served. Details on how this will be calculated can be found within

Section 5 - Determining the level of Civil Penalty. Authorisation of the level of financial penalty will be given by an Operations Manager.

b) Representations

A person on whom the NOI is served has 28 days from the day after the date on which the notice was served to make written representations in relation to the proposed financial penalty.

If written representations are received within this 28 day period the decision to impose a penalty will be reviewed by the Team Manager. Taking into account the representations the Team Manager will decide whether to impose a penalty and, if so, the amount.

If it is decided to proceed with a financial penalty a CPN must be served.

c) Civil Penalty Notice

The CPN will be served on the recipient of the NOI. The CPN will be prepared by the HSO and will be signed off by a Team Manager or Operations Manager. The recipient is required to pay the penalty within 28 days.

d) Withdrawing or Amending a NOI or CPN

The council may withdraw either notice or reduce the amount specified in the notices at any time by giving notice in writing.

e) First Tier Tribunal Appeal

Where the council receives notice that a recipient of a CPN has made an appeal the matter will be referred to the Team Manager to decide how the council will respond. Where a person has appealed to the First Tier Tribunal the CPN is suspended until the appeal is finally determined or withdrawn.

f) Recovering the Monetary Penalty

The monies will be recovered by using the council's existing debt recovery processes.

If the penalty imposed is not paid within the appropriate time period, either 28 days from the date of the CPN 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.

A certificate signed by the Chief Finance Officer for the council, including the outstanding amount due, will be accepted by the courts as conclusive proof of any outstanding payment due to the council.

g) Recording the decision

A record of each decision and the reasons for the financial penalty will be made by the HSO. How the amount of the penalty was obtained and the calculations will also be recorded.

5. Determining the level of Civil Penalty

a) Factors

The statutory guidance makes it clear that the level of civil penalty is to be determined by each council on a case-by-case basis, with a maximum penalty of £30,000. The maximum level of civil penalty is reserved for the very worst offenders.

In setting the level of civil 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 the council such data relevant to his/her financial position as this will enable it to assess and determine what they can reasonably afford to pay.

The factors that will be taken into account when determining an appropriate level of civil penalty are:

- Severity of the offence – the more serious the offence, the higher the penalty will be.
- Culpability and track record of the offender – a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or should have known, that they were in breach of their legal responsibilities.
- The harm caused to the tenant – the greater the harm or potential for harm, the higher the amount will be when imposing a civil penalty.
- Punishment of the offender – while the penalty should be proportionate and reflect both the severity of the offence and any 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.
- 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 will therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.
- 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 likely 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 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.

b) Initial Civil Penalty Levels

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. These are the levels agreed at regional level.

Determination of Initial Civil Penalty Level				
Level of Culpability	Level of Harm			Minimum Fine Level
	High	Medium	Low	
High	£25,000	£15,000	£7,500	£6,000
Medium	£15,000	£10,000	£5,000	£4,000
Low	£7,500	£5,000	£2,500	£2,000

c) Level of Culpability

The level of culpability will be decided taking account the following factors:

High level

A landlord will be deemed to be highly culpable when they intentionally or recklessly breach or wilfully disregard the law. For example:

- They have a history of non-compliance
- Despite a number of opportunities to comply, 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 association or accreditation scheme
- Are a public figure who should have been aware of their actions
- Are an experienced landlord with a portfolio of properties failing to comply with their obligations
- Serious and/or systematic failure to comply with their legal duties

Medium level

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

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

Low level

A landlord fails to comply or commits an offence with little fault. For example:

- No or minimal warning or 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 exhaustive and other factors may be taken into account when considering the level of culpability.

d) Level of Harm

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

High level

A high level of harm could constitute:

- Serious effect on individual(s) or widespread impact
- Provides a serious market advantage over rivals – deliberately avoided works or regulations or committed the offence to gain additional income
- Harm to a vulnerable individual (see section 7. Definition)
- High risk of an adverse effect on an individual
- Serious level of overcrowding

Medium level

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 level

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 exhaustive and other factors may be taken into account when considering the level of harm.

e) 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 mitigating 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 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)
- Willingness to undertake training
- Willingness to join recognised landlord accreditation scheme
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
- No previous convictions
- Vulnerable individual(s) where their 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 £30,000 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 none compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of none compliance with items on any notice which has not been complied with.

The Council will take into account a reduction in the level of the penalty for an admission of guilt.

There is a one off third reduction in 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. Any subsequent offences will not be subject to any reduction.

The discount will only be provided to the landlord when the council serves the NOI and the following criteria is met:

- The payment is made within the 28 days of the date of the NOI
- The payment is made in full.

At any point after 28 days of service of the notice of the NOI 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 £2,000 or 10% whichever is the greater.

f) Final determinate of the level of any civil penalty

The final 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 facts which may be deemed as obtaining a financial gain. These could include 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 Rent Repayment Order
- Any other factors resulting in a financial benefit – potential cost of rehousing 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 £2,000 or 10% whichever is the greater to the maximum of £30,000.

When determining whether a penalty is fair and proportionate then the following issues will be considered:

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

If it is claimed that they are unable to pay and show their income is small then there will be consideration given to whether the property they own can be sold or refinanced.

g) Owner's ability to pay

An owner has the right to make representations and/or appeal regarding the level of penalty including their ability to pay.

As part of the process there will be a need to undertake an investigation into a landlord's ability to pay any fine. As part of the investigation the following needs to be considered:

- Company House records if a limited company
- Credit checks – these will should outstanding debts and commitments on properties they own
- Size of portfolio – sell a property to finance the penalty
- Refinance – ability to raise money against their asset base
- Rental income on their portfolio not the property to which the offence relates

- Personal income including their own home

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.

6. Consequences of imposing a Civil Penalty

Financial penalties are an alternative to criminal proceedings. 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.

Where 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, the council will have regard to any guidance issued by the Secretary of State and best practise available.

7. Definition

a) 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 as one who is at greater harm and therefore the penalty should be greater when vulnerability is an issue.

The following are considered vulnerable individuals:

- Elderly person
- Children
- Pregnant women
- Receives domiciliary care
- Has health needs – mental health, drug dependency, alcohol dependency, terminally ill etc.
- Requires assistance in conducting their own affairs

- Has payments made to him/her or to an accepted representative in pursuance of arrangements under the Health and Social legislation.
- Receives a service or participates in any activity provided specifically for persons who have particular needs because of age, has any form of disability or has a prescribed physical or mental problem.
- Those who have difficulty in understanding, speaking or reading English
- An individual in a difficult situation such as bereavement or threat of deportation etc.

The above list is not exclusive and other factors may affect vulnerability when considering the level of any penalty.

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