

Report to	-	Cabinet
Date	-	9 April 2018
Report of the	-	Executive Director of Business Operations
Subject	-	Civil Penalties and Rent Repayment Orders

Recommendation to COUNCIL: That the Civil Penalties and Rent Repayment Orders Policy be approved and adopted;

AND

It be **RESOLVED:** The Executive Directors and the Service Manager – Environmental Services and Licensing be authorised to issue Civil Penalties and Rent Repayment Orders in accordance with the policy.

Service Manager: Richard Parker-Harding
Lead Cabinet Member: Councillor Mrs Hughes

Introduction

1. The Council has powers under various housing and public health legislation but principally the Housing Act (2004), to require the improvement of privately rented properties and make them safe and fit to live in. The Council seeks to work with landlords to achieve these improvements. The Council has adopted a private sector housing enforcement policy (Minute CB15/70) which sets out the authority's approach to enforcement. Recent legislation has given the Council the power to issue civil penalties (similar to fixed penalty notices) in lieu of prosecuting landlords for offences committed.
2. Section 126 and schedule 9 of the Housing and Planning Act 2016 came into force on the 6 April 2017. These provisions give the Council the power to issue a financial penalty for certain Housing Act 2004 offences after the 6 April 2017 as an alternative to prosecution.

The offences include:

- Failing to comply with an Improvement Notice (section 30)
- Offences in relation to licensing of Houses in Multiple Occupation (section 72)
- Offences in relation to licensing of houses under part 3 of the Act (selective Licensing) (section 95)
- Offences in relation to the contravention of an overcrowding notice (section 139)
- Failure to comply with management regulations in respect of Houses in Multiple Occupation (section 234)

3. 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.
4. There is a right of appeal against the imposition of a civil penalty for the amount of the civil penalty to a First Tier Property Tribunal. The costs are met by each party unless the Tribunal fines the Council for acting irrationally.

Policy approach and decision-making

5. Before issuing a civil penalty the Council must have adopted a policy, as set out in Appendix A.
6. A civil penalty of up to £30,000 can be imposed where a serious offence has been committed (such as cited in Appendix A part 6) 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.
7. The decision on whether to use civil penalty powers (and to what extent) or to seek a prosecution will be made by the Executive Director or the Service Manager - Environmental Services and Licensing.
8. Overall, each case will be considered on an individual basis, however the principles in determining the form of action will be:
 - What outcome are we trying to achieve – e.g. set an example, get the works done or a deterrent to committing future offences (a civil penalty will not be in the public domain, unlike a prosecution).
 - Severity of the offence – is prosecution a better option based on the significance of the offence and the impact it has had.
 - Type of property and its occupiers – are the occupiers particularly vulnerable.
9. Where the civil penalty is considered the most appropriate course of action the Council must provide guidance, in the form of a policy, on how the fine levels will be set.

Burden of proof

10. The same criminal burden of proof is required for a civil penalty as for a prosecution. This means that before formal action is taken the Council must be satisfied that if there was a prosecution, there would be a realistic prospect of conviction.
11. The Council must determine beyond reasonable doubt that the offence has been committed and this evidence would be required if an appeal is made against the civil penalty.

12. As also outlined in the Enforcement Policy, the local authority will have regard to the Code for Crown Prosecutors when determining whether to take action. There are two stages to this code:
- The evidential stage, and
 - The public interest stage.

Procedure and appeals

13. The procedure for imposing a civil penalty is set out in Schedule 13A of the Housing Act 2004 and summarised in the Ministry of Housing, Communities & Local Government (MHCLG) guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606653/Civil_Penalties_guidance.pdf.
14. At any time, if circumstances dictate, the Council may withdraw a notice or reduce the amount specified in a notice in relation to a civil penalty.
15. A landlord receiving the final notice of a civil penalty may appeal to the First Tier Tribunal against the decision to impose a penalty or the penalty amount. The appeal has the effect of suspending the notice and requirement to pay until determined.

Enforcement and other consequences

16. Where the landlord or property agent fails to pay a civil penalty, the Council will refer the case to the county court for an Order of that Court. If necessary, the Council will use county court bailiffs to enforce the order and recover the debt.
17. The Council's powers to carry out works in default under the Housing Act 2004 are unaffected by the civil penalty provisions.
18. If a landlord receives a civil penalty, that fact can be taken into account if considering whether the landlord is a fit and proper person to be the licence holder for a House in Multiple Occupation (HMO) or any other property subject to licensing.
19. Where a landlord receives two or more civil penalties over a 12 month period, the Council will include that person's details in the database of rogue landlords and property agents that will be publicised by the MHCLG. While it is not a compulsory requirement, under the MHCLG guidance, Councils are strongly encouraged to do so. This will help ensure that other Councils are made aware that formal action has been taken against the landlord.

Proposed Civil Penalties

20. In setting a civil penalty level the Council should consider the following factors:
- Severity of the offence
 - Culpability and track record of the offender
 - The harm caused to the tenant

- Proportionate punishment of the offender
 - Deter the offender from repeating the offence
 - Deter others from committing similar offences
 - Remove any financial benefit the offender may have obtained as a result of committing the offence
 - Assessment of assets and income
21. Income received from a civil penalty can be retained by the Environmental Health Service 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'.

Conclusion

22. The Council now has the power to issue civil penalties and rent repayment orders as an alternative to prosecuting landlords for certain offences. Issuing civil penalties is more cost effective for the Council than prosecuting and should act as a deterrent against rogue landlords. The Council has to adopt a policy, as set out in Appendix A.

Dr Anthony Leonard
Executive Director of Business Operations

Risk Assessment Statement

If the Council does not adopt a policy and impose civil penalties and rent repayment orders it may be criticised for failing to use all the legal powers available to tackle rogue landlords.

Rother District Council
Housing and Planning Act 2016
Civil Penalties and Rent Repayment Orders Policy
April 2018

This policy sets out the criteria for using a civil penalty as an alternative to prosecution, the use of Rent Repayment Orders and the methodology to be used in setting civil penalty fines. It takes into account the statutory guidance that has been issued by the Government under Schedule 9 and Section 41 of the Housing and Planning Act 2016, and should be read in conjunction with the Council's Private Sector Housing Enforcement Policy (Minute CB15/70).

1. Introduction

Section 126 and schedule 9 of the Housing and Planning Act 2016 came into force on the 6 April 2017. These provisions give the Council as the local housing authority the power to issue a financial penalty for certain Housing Act 2004 offences after the 6 April 2017 as an alternative to prosecution.

The offences include:

- Failing to comply with an Improvement Notice (section 30)
- Offences in relation to licensing of Houses in Multiple Occupation (section 72)
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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.

2. Policy approach and decision-making

As set out below, 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 decision on whether to use civil penalty powers (and to what extent) or to seek a prosecution will be made by the Executive Director or the Service Manager – Environmental Services and Licensing.

Overall, each case will be considered on an individual basis, however the principles in determining the form of action will be:

- What outcome are we trying to achieve – e.g. set an example, get the works done or a deterrent to committing future offences (a civil penalty will not be in the public domain unlike a prosecution).
- Severity of the offence – is prosecution a better option based on the significance of the offence and the impact it has had.
- Type of property and its occupiers – are the occupiers particularly vulnerable.

Where the civil penalty is considered the most appropriate course of action the Council must provide guidance on how the fine levels will be set. Section 6 of this policy provides a proposed fine setting methodology; each case will need to be assessed on an individual basis using this framework as a guide.

3. Burden of proof

The same criminal burden of proof is required for a civil penalty as for a prosecution. This means that before formal action is taken the Council must be satisfied that if there was a prosecution there would be a realistic prospect of conviction.

The Council must determine beyond reasonable doubt that the offence has been committed and this evidence would be required if an appeal is made against the civil penalty.

As also outlined in the Enforcement Policy, the local authority will have regard to the Code for Crown Prosecutors when determining whether to take action. There are two stages to this code:

- The evidential stage, and
- The public interest stage.

4. Procedure and appeals

The procedure for imposing a civil penalty is set out in Schedule 13A of the Housing Act 2004 and summarised in the MHCLG guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606653/Civil_Penalties_guidance.pdf.

There is no scope for the Council to deviate from this procedure.

At any time, if circumstances dictate, the Council may withdraw a notice or reduce the amount specified in a notice in relation to a civil penalty.

A landlord receiving the final notice of a civil penalty may appeal to the First Tier Tribunal against the decision to impose a penalty or the penalty amount. The appeal has the effect of suspending the notice and requirement to pay until determined.

5. Enforcement and other consequences

Where the landlord or property agent fails to pay a civil penalty, the Council will refer the case to the county court for an Order of that Court. If necessary, the Council will use county court bailiffs to enforce the order and recover the debt.

The Council's powers to carry out works in default under the Housing Act 2004 are unaffected by the civil penalty provisions.

If a landlord receives a civil penalty, that fact can be taken into account if considering whether the landlord is a fit and proper person to be the licence holder for a House in Multiple Occupation (HMO) or any other property subject to licensing.

Where a landlord receives two or more civil penalties over a 12 month period, the Council will include that person's details in the database of rogue landlords and property agents. While it is not a compulsory requirement, under the MHCLG guidance, Councils are strongly encouraged to do so. This will help ensure that other Councils are made aware that formal action has been taken against the landlord.

6. Proposed Civil Penalties

In setting a civil penalty level the Council should consider the following factors:

- Severity of the offence
- Culpability and track record of the offender
- The harm caused to the tenant
- Proportionate punishment of the offender
- Deter the offender from repeating the offence
- Deter others from committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence
- Assessment of assets and income

Determining the offence category – Harm

In determining the level of harm the Council will have regard to:

- The person i.e. physical injury, damage to health, psychological distress
- To the community i.e. economic loss, harm to public health
- Other types of harm i.e. public concern/feeling over the impact of poor housing conditions on the local neighbourhood

The nature of harm will depend on the personal characteristics and circumstances of the victim e.g. tenant.

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.

Factors that indicate a higher degree of harm include:

- Multiple victims
- Especially serious or psychological effect on the victim
- Victim is particularly vulnerable

Examples of Harm Categories

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

Determining the offence category – Culpability

In determining culpability the Council will have regard to 4 levels of culpability. Where the offender –

- Has the **intention** to cause harm, the highest culpability where an offence is planned.
- 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.
- Has **knowledge** of the specific risks entailed by their actions even though they do not intend to cause the harm that results.
- Is **negligent** in their actions.

Examples of culpability

High (Deliberate Act)	An intentional breach by a landlord or property agent or flagrant disregard for the law. For example, by failing to comply with a notice or regulations.
High (Reckless Act)	An actual foresight of, or wilful blindness to the risk of offending, but decides to take the risk nevertheless. For example, failing to comply with a strict liability in the HMO regulations.
Medium (Negligent Act)	The failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding the offence. For example, partial compliance with a schedule of work to an enforcement notice but failure to fully comply with all schedule items.
Low (Low or no culpability)	The offence committed has some fault on the part of the landlord or property agent but there are other circumstances for example obstruction by the tenant to allow a contractor access for repairs, or damage caused by tenant negligence.

Determining the Civil Penalty Amount

The table below provides an indication of the level of fine that is likely to be appropriate taking into account both culpability and harm.

Level	Culpability	Harm	Maximum Civil Penalty
1	Low or more	Low	£2,500
2	Low	Medium	£5,000
3	Low	High	£10,000
4	Medium or High	Medium	£20,000
5	Medium	High	£25,000
6	High	High	£30,000

Mitigating Factors

Landlords will be notified of the intended civil penalty and given the opportunity to explain any mitigating circumstances. The penalty may then be decreased by up to fifty percent, if a similar offence has not been committed by the same landlord in the last 3 years.

7. Civil Penalties - Multiple Offences

Where the Council is satisfied that more than one offence is being committed concurrently in respect of a single property, they may issue multiple Civil Penalty Notices, (for example, where there are multiple breaches of the HMO management regulations).

However, where satisfied on the merits of the case and/or where the Council consider that issuing multiple penalties at the same time would result in an excessive cumulative penalty, nothing in this policy shall require the Council to do that. The Council 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.

8. Rent Repayment Orders

Section 40 of the Housing and Planning Act 2016 came into force on the 6 April 2017. This confers a power on the First Tier Tribunal to make a rent repayment order where a landlord has committed one of a number of offences.

The Housing Act 2004 initially introduced rent repayment orders to cover situations where the landlord of a property had failed to obtain a licence for a property that was required to be licensed, specifically offences in relation to licensing of HMOs. The Housing and Planning Act 2016 extended this to include Rent repayment Orders for a much wider range of offences including:

- 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 (due to be enacted in November 2017)

- 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).

Rent repayment orders can be granted to either the tenant or the local housing authority. If the tenant paid their rent themselves, then the rent must be repaid to the tenant. If rent was paid through Housing Benefit or through the housing element of Universal Credit, then the rent must be repaid to the local housing authority. If the rent was paid partially by the tenant with the remainder paid through Housing Benefit/Universal Credit, then the rent should be repaid on an equivalent basis.

A rent repayment order can be made against a landlord who has received a civil penalty in respect of an offence, but only at a time when there is no prospect of the landlord appealing against that penalty.

The Council must consider a rent repayment order after a person is the subject of a successful civil penalty and in most cases the Council will subsequently make an application for a rent repayment order to recover monies paid through Housing Benefit or through the housing element of Universal Credit.

The Council will also offer advice, guidance and support to assist tenants to apply for a rent repayment order if the tenant has paid the rent themselves.