

# **Housing and Planning Act 2016 Enforcement Powers Policy 2022 - 2027**

**Civil Penalties Policy and Matrix**

**Rent Repayment Orders Policy**

**Banning Orders Policy**

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## **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 234 Management Regulations in respect of HMOs

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.

### **Electrical Safety**

On 1st June 2020, the Electrical Safety Standards in The Private Rented Sector (England) Regulations 2020 came into force for new tenancies and existing tenancies since 1st April 2021. Civil penalties can be imposed under regulation 11 of the Electrical Safety standards in the Private Rented Sector (England) regulations 2020 where the Council is satisfied beyond reasonable doubt that a landlord has breached a duty under regulation 3 (failing to meet any duty as a private landlord) Although it is for the Council to determine the size of the financial penalty imposed, the penalty must not exceed £30,000. More than one penalty can be imposed in the event of a continuing failure. Any financial penalty is in addition to the costs that the Council is entitled to recover in relation to the remedial action it has carried out.

## **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.

In determining whether the issue of a civil penalty is appropriate or not, due regard must be given to any potential defences available and, where available any interview under caution in accordance with PACE (Police & Criminal Evidence Act) codes of practice.

## **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.

In this policy the term 'landlord' also includes property agents, letting agents and property managers defined under Chapter 6 of Part 2 of the Housing and Planning Act 2016.

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

- The offender had no evidence of previous non-compliance with appropriate legislation
- The offender had 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 offenders co-operation is beyond what would be expected
- The offender does not need continuous chasing to rectify the offence

## **Factors to consider when determining the level of civil penalty**

The actual amount levied in any particular 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 from others committing similar offences
- Removing any financial benefit obtained from committing the offence

These factors are contained 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 looking at the harm and culpability categories.

#### **Examples of Harm Categories**

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

High	<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>
Medium	<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</p>

	HHSRS category 1 hazards, multiple high category 2 hazards such as falls between levels, excess cold, asbestos exposure.
Low	Low risk of an adverse effect on individuals.  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.

### Examples of Culpability Categories

Very High (Deliberate Act)	Where the offender intentionally breached, or flagrantly disregarded, the law.  For example repeatedly 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.
High (Reckless)	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.
Medium (Negligent Act)	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. Partially completed licensing application forms.
Low (Low or no culpability)	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.

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 £2,450.

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

### **Aggravating Factors**

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 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

## **Rent Repayment Orders**

### **Introduction**

The Housing Act 2004 introduced rent repayment orders to cover situations where the responsible person for a property had failed to obtain a licence for a property that was required to be licensed.

These orders can be imposed for offences specifically relating to:

- licensing of HMO (section 72(1))
- houses under part 3 of the act (section 95(1))

Rent repayment orders have now been extended through the Housing and Planning Act 2016 to cover these additional offences:

- Section 30 Housing Act 2004 - Failure to comply with an improvement notice
- Section 32 Housing Act 2004 - Failing to comply with a Prohibition Order
- Section 21 Housing and Planning Act 2016 - Breach of a banning order made by the First-Tier Tribunal (Property Chamber)
- Section 6 Criminal Law Act 1977 - Using violence, or threatening to use violence, to secure entry to a property
- Section 1 Protection from Eviction Act 1977 - Illegal eviction or harassment of the occupiers of a property

Applications for an order must be made to the First-tier Tribunal. An order can be applied for when one of the above offences has been committed, whether or not the landlord has been convicted. Where the landlord has not been convicted of the relevant offence, the First-tier Tribunal will need to be satisfied beyond reasonable doubt that the landlord has committed the offence.

If all of the rent is paid through either housing benefit or universal credit, any rent recovered must be repaid to the Council. If the tenant paid the rent in full (no HB or UC) any amount recovered must be paid to the tenant. If the rent was paid partly through HB/UC and by the tenant, the amount recovered must be repaid on an equivalent basis to each party. If there are multiple tenants in the property, each must apply for a RRO to recover the rent they have paid.

The maximum amount of rent that can be recovered is capped at 12 months. Any income received from a RRO can be retained by the Council provided it is used towards private sector housing enforcement activities.

### **When to Apply for a RRO**

The Council will apply for a RRO in all cases where the landlord has been convicted of a relevant offence and some or all of the rent was paid through housing benefit/universal credit. Where a landlord has not been convicted, the Council will take the following factors into account in deciding whether a RRO is appropriate and how much should be recovered:

- **Punishment of the offender** – RROs should have a real economic impact on the offender. The Council will consider the conduct of the landlord and tenant, the financial circumstances of the landlord and whether the landlord has been convicted of similar offences
- **Deter the offender from repeating the offence** – the level of the penalty should be set at a high enough level to deter the offender from repeating the offence
- **Dissuade others from committing similar offences** – the issue of a RRO will be in the public domain therefore robust and proportionate use of the orders is likely to help others comply with their responsibilities
- **Remove any financial benefit the offender may have obtained as a result of committing the offence**

### **Civil Penalty and RRO**

The council can impose a civil penalty and apply for a RRO for the following offences:

- Section 30 failure to comply with an Improvement Notice
- Section 72 offences in relation to licensing of Houses in Multiple Occupation
- Section 95 offences in relation to licensing of houses under part 3 (Selective Licensing)

### **Prosecution and RRO**

The Council can prosecute a landlord and seek a RRO for the same offence.

## **Banning Orders**

### **Introduction**

Chapter 2 of the Housing and Planning Act 2016 enables Local Authorities to apply to the First Tier Tribunal to impose a banning order on a landlord following conviction for a banning order offence. This policy takes account of the non-statutory guidance issued by the Government which makes clear that banning orders are aimed at rogue landlords who flout their legal obligations and rent out accommodation which is substandard, and which also confirms the Government's expectation that banning orders will be used for the most serious offenders.

### **Effect of a banning order**

A landlord subject to a banning order is prevented from

- Letting houses in England
- Engaging in English letting agency work
- Engaging in English property management work
- Doing two or more of those things

Where a banning order is made, the individual will be determined not to be 'fit and proper' to hold a licence under Part 2 or 3 of the Housing Act 2004 and any licences in force under those parts will be revoked.

It is a Criminal Offence to breach a banning order.

### **A banning order offence**

A 'relevant housing offence' is a conviction for any of the following offences:

- Illegally evicting or harassing a residential occupier in contravention of the Protection from Eviction Act 1977 or the Criminal Law Act 1977 or;
- Any of the following offences under the Housing Act 2004:
  - i) Offences in relation to licensing of Houses in Multiple Occupation (HMOs) (section 72)
  - ii) Offences in relation to licensing of houses under Part 3 of the Act (section 95)
  - iii) Allowing a HMO that is not subject to licensing to become overcrowded (section 139)

iv) Failure to comply with management regulations in respect of HMOs (section 234)

v) Failure to comply with a Prohibition or Emergency Prohibition Order under sections 20, 21 and 43 of the Housing Act 2004;

- If a person has committed a serious criminal offence they must have been sentenced in the Crown court to be regarded as a banning order offence
- Spent Convictions should not be taken into account
- If a landlord receives an absolute/conditional discharge for a relevant housing offence then that offence cannot be regarded as a banning order offence.

### **Length of a banning order**

The Council is not able to determine the length of a banning order but can make a recommendation to the First-tier Tribunal as to how long the banning order should be imposed for. A banning order must be for a minimum period of 12 months. There is no statutory maximum period

### **Decision making**

As recommended by the Government's guidance, the council will consider the following factors when deciding whether to apply for a banning order and when recommending the length of any banning order:

- **The Seriousness of the Offence** - All banning order offences are serious. When considering whether to apply for a banning order the local housing authority should consider the sentence imposed by the Court in respect of the banning order offence itself.
- **Previous convictions/rogue landlord database** - A local housing authority should check the rogue landlord database in order to establish whether a landlord has committed other banning order offences or has received any civil penalties in relation to banning order offences. A longer ban may 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.

The Council will also consider the likely effect of the banning order on the person and anyone else that may be affected by the order and will take into account the following:

- **The harm caused to the tenant** - This is a very important factor when determining whether to apply for a banning order. The greater the harm or the potential for harm (this may be as perceived by the tenant), the longer the ban should be. Banning order offences include a wide range of offences, some of which are more directly related to the health and safety of tenants, and could therefore be considered more harmful than other offences (such as fraud)
- **Punishment of the offender** - A banning order is a severe sanction. The length of the ban should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending. It is, therefore, important that it is set at a high enough level to remove the worst offenders from the sector. It should ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.
- **Deterring the offender from repeating the offence** - The ultimate goal is to prevent any further offending. The length of the ban should prevent the most serious offenders from operating in the sector again or, in certain circumstances; help ensure that the landlord fully complies with all of their legal responsibilities in future. The length of ban should therefore be set at a long enough period such that it is likely to deter the offender from repeating the offence
- **Deterring others from committing similar offences** - An important part of deterrence is the realisation that (a) the local authority is proactive in applying for banning orders where the need to do so exists and (b) that the length of a banning order will be set at a high enough level to both punish the offender and deter repeat offending.

## **Process for imposing a civil penalty**

### **Stage 1 – serve a notice of intent**

The notice must set out:

- The amount of the proposed financial penalty
- The reasons for proposing to impose the penalty
- Information about the right of the landlord to make representations

The notice must be served no later than 6 months after the council has sufficient evidence of the conduct to which the penalty relates or at any time when the conduct is continuing.

### **Stage 2 – right to submit written representations**

The person served with the notice of intent may make written representations to the Housing Services Team about the intention to impose a financial penalty. Any representations must be made within 28 days from when the notice was given.

### **Stage 3 – end of written representation period**

Once the 28 day period for receiving written representations has expired, the Corporate Director of Communities must decide whether to impose a penalty in conjunction with the council's S151 Officer, and if so, the amount of the penalty. If a financial penalty is to be imposed, a final notice must be served.

### **Stage 4 – final notice**

The final notice must set out:

- The amount of the financial penalty
- The reasons for imposing the penalty
- Information about how to pay the penalty
- The period for payment of the penalty (28 days)
- Information about rights of appeal
- The consequences of failure to comply with the notice

### **Stage 5 – right of appeal**

A person who receives a final notice may appeal to the First-tier Tribunal against:

- The decision to impose a penalty
- The amount of the penalty

If the person appeals, the final notice is suspended until the appeal is determined or withdrawn.

### **Withdrawing or varying a Notice of Intent or Final Notice**

The Council can at any time:

- Withdraw a notice of intent or final notice; or
- Reduce the amount specified in a notice of intent or final notice

### **Refusal to pay**

Where the person refuses or fails to pay a civil penalty, the Council should refer the case to the county court for an official Order of that court. If necessary, county court bailiff's can be used to enforce the order and recover the debt. A certificate signed by the S151 Officer stating that the amount due has not been paid by a specified date will be treated by the courts as conclusive evidence of that fact.

### **Works in default**

The Council can still carry out works in default, s.31 and Schedule 3 of the Housing Act 2004 are not affected by the Housing and Planning Act 2016.

### **Rogue landlords database**

The rogue landlords' database was introduced in October 2017. Where a person receives two or more civil penalties over a 12-month period, the Council may include their details in the database. It is not compulsory to do so but it is encouraged to ensure all local authorities are aware of any enforcement action that has been taken.

### **Fit and proper person test**

The issuing of a civil penalty can be taken into account when deciding whether someone is a fit and proper person to be a licence holder for a HMO.

## **Process for applying for a RRO**

### **Stage 1 – serve a notice of intent**

Before applying for a RRO, the landlord must be served with a Notice of Intent. The notice must be served within 12 months of the date on which the landlord committed the offence to which it relates.

The notice must:

- Inform the landlord the council is proposing to apply for a RRO and the reasons why
- State the amount the council is seeking to recover
- Invite the landlord to make representations within a period specified in the notice which must be at least 28 days

A RRO can only be applied for in the name of the landlord of the property.

### **Stage 2 – right to submit written representations**

The landlord may make written representations to Housing Services Team about the intention to apply for a RRO. Any representations must be made within 28 days from when the notice was given. The Council cannot apply for a RRO during this period.

### **Stage 3 – end of written representation period**

Once the 28 day period for receiving written representations has expired, the Corporate Director of Communities must decide whether to proceed with the application for a RRO in conjunction with the S151 Officer.

### **Stage 4 – right of appeal**

The landlord can appeal against the decision of the First-tier Tribunal to the Upper Tribunal provided permission to appeal has been given by either the First-tier or Upper Tribunal.

### **Refusal to Pay**

Where the landlord fails to pay the RRO, the Council or tenant can refer the case to the County Court for an Order of that Court. County Court bailiffs can be used to enforce the Order and recover the debt.

## Tenants and RROs

Tenants can apply directly for a RRO providing that:

- The offence relates to housing that was occupied by the tenant at the time of the offence; and
- The application for a RRO is made within 12 months of the date that the offence has been committed

The tenant does not have to go through the same process as the Council. The tenant only needs to submit a claim form to the First-tier Tribunal which sets out the reasons for the claim and the dates to which it relates.

There is no statutory obligation on the Council to support the tenant in making a claim, however, where the Council has evidence in support of the tenant's case, it will make this available to the tenant for the purposes of the claim.

## RROs and Universal Credit

The Council will not have access to UC data, therefore, where the Council wishes to apply for an RRO and some or all of the rent has been paid via UC, the tenant will need to provide the information from their benefit statements or request the information required direct from the DWP.

The following formula should be used to calculate the amount of rent that should be repaid to the tenant and the amount to the local authority. This information should be on the tenant's benefit statement.

$$a/c*d = x (y=x-b)$$

a = rent liability

b = rent allowance

c = maximum UC award

d = net UC award

x = amount to be retained by Council

y = amount to be paid to tenant (x-b)

## **Process for applying for a Banning Order**

### **Stage 1 – serve a notice of intent**

Before applying for a Banning Order, the landlord must be served with a Notice of Intent. The notice must be served within 6 months of the landlord being convicted of the offence.

The notice must:

- inform the landlord that the Council is proposing to apply for a banning order and explaining why
- stating the length of each proposed ban
- invite the person to make representations within a period specified in the notice which must be at least 28 days.

### **Stage 2 – right to submit written representations**

The landlord may make written representations to Housing Services Team about the intention to apply for a Banning Order. Any representations must be made within 28 days from when the notice was given. The Council cannot apply for a Banning Order during this period.

### **Stage 3 – end of written representation period**

Once the 28 day period for receiving written representations has expired, the Corporate Director of Communities must decide whether to proceed with the application for a Banning Order in conjunction with the S151 Officer.

### **Stage 4 – right of appeal**

The landlord can appeal against the decision of the First-tier Tribunal to the Upper Tribunal provided permission to appeal has been given by either the First-tier or Upper Tribunal.

## **Requests for Information**

Section 19 of the Housing and Planning Act 2016 provides that a local housing authority (the Council) can require a landlord to provide information for the purpose of enabling the Council to decide whether to apply for a banning order. This can include requiring the landlord to provide information on all the properties that the landlord owns.

It is an offence to ignore a request for further information unless the landlord can provide a reasonable excuse.

It is also an offence to provide false and misleading information

Failure to provide information or providing false or misleading information is punishable on summary conviction to a fine

### **Publicity following a banning order**

Subject to the Governments guidance and guidance provided by the Ministry of Justice details of all banning order offences will be published and held on a national register. Also subject to legal advice, the Council will consider publishing details of successful banning orders including the names of individual landlords/ any business (managing or lettings agency). The Council will also consider making information on banned landlords available on request by a tenant.