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Oxford City Council

Civil Penalty Protocol

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Introduction

A civil penalty is a financial penalty imposed by a Local Authority as an alternative to prosecution. Financial 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 financial 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;
 - ii. Section 95 (2) being a licence holder who fails to comply with any condition of a licence.
- d) Offences of 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.

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 its functions in respect of financial penalties.

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.

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.

In developing this protocol the Council have considered the statutory guidance <https://www.gov.uk/government/publications/civil-penalties-under-the-housing-and-planning-act-2016> and guidelines published by the Sentencing Council <https://www.sentencingcouncil.org.uk/the-magistrates-court-sentencing-guidelines/>

Determination of most appropriate course of action in Enforcement cases

The Council has to determine the most appropriate course of action in enforcement cases. The Council will consider a number of factors, both negative and positive and each case is considered on its own merits. . Bands are provided to reflect the appropriate courses of action for dealing with the identified situation. It is essential that enforcement is being carried out in a fair, proportionate and consistent way.

Table 1 – Determination of appropriate course of action	
Band	Examples of recommended Action
1	Charge higher licence fee Advisory letters Invitation to Landlord events Charge confidence in management renewal fee Revoke Accreditation Carry conditions forward on renewal
2	Revoke accreditation Informal letter Charge confidence in management renewal fee
3	Commence investigation Serve Section16 and 235 notices Revoke accreditation Consider revoking licence Consider Financial Penalty Refuse to licence as not fit and proper RRO if LA pays housing Benefit
4	Consider prosecution as opposed to financial penalty

Determining the amount of financial penalty

The following section sets out how the Council will determine the appropriate level of financial penalty in each particular case. The determination is undertaken in line with the statutory guidance produced by Ministry of Housing, Communities and Local government (MHCLG). A Financial Penalty should not be regarded as an easy or lesser option compared to prosecution. The penalty should be proportionate and reflect the severity of the offence, and 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. The offender's income and track record will be taken into account in each case.

When determining the financial penalty the Council will take a staged approach as below:

Stage 1 – Three factors are considered, the culpability of the offender, the potential for tenant harm and the severity of risk.. Collectively these factors identify the seriousness of the offence. The seriousness is then categorised, which then will be used to determine the amount of penalty. .

Stage 2 – This stage determines the offender's history of legal compliance

Stage 3 - Consideration of any financial elements of the penalty including any benefit that the offender may have obtained from committing the offence. It also checks if the penalty is proportionate to the overall means of the offender and if there are multiple offences the Council will take the totality principle into account.

Stage 1 – Determining the Category of the offence

This stage will determine the category of the offence, the Council will assess the culpability and harm as well as the severity or risk from the offence.

1.1 - Culpability Assessment:

The Council, when assessing the culpability of the offender will consider it against three levels, each level having accompanying examples of behaviours that could result in the particular level. The Council will assess the evidence obtained in the investigation and use Table 2 to determine the appropriate level of culpability for the offence; this will be repeated for each offence as the level of culpability may vary. A higher penalty will be awarded where their actions were deliberate. The statutory guidance makes a clear statement: landlords are running a business and are expected to be aware of their legal obligations.

Table 2 – Culpability Assessment	
Level of culpability	Example of behaviour
High (Deliberate or Reckless Act)-	<p>Intentional breach by the offender or flagrant disregard for the law, e.g.</p> <ul style="list-style-type: none"> • Failure to comply with all or significant requirements of an Improvement Notice Failure to comply with all or significant HMO licence conditions • Ignoring warnings/ information raised by Council, tenants or others • Allowing risks, breaches or offences to continue giving no thought to the consequences even though the risks would be obvious • Allowing breaches or offences to continue over a long period of time • Deliberate exploitation of vulnerable tenants, e.g. migrant workers, elderly, mentally ill. • Obstructive during investigation • High level of profit made from the offence • Repeat offending behaviours • Obstruction of the investigation e.g. failure to respond to statutory notices requesting information • Deliberate concealment of the activity/evidence • Record of non-compliance e.g. notices/enforcement action/work on previous licences • Record of letting substandard accommodation • Record of poor management/ inadequate management provision • Lack of a tenancy agreement/rent paid in cash • Evidence of threatening behaviour/ harassment of the tenant • Already a member of an accreditation scheme or letting standard – so should know better

Level of culpability	Example of behaviour
Medium (Negligent Act)	Failure of the offender to take reasonable care to put in place and to enforce proper systems to avoid breaches and offences e.g. <ul style="list-style-type: none"> • HMO licence application not submitted or renewed • Part compliance with improvement notice schedule of works or part compliance with HMO licence conditions within the set timescale • A property professional, portfolio landlord or letting agent who should have known better • Previous warning or advice issued • Unwillingness to spend money to address the issue
Low (Low or no culpability)	Offence committed with little or no fault on the part of the landlord or property agent; e.g. <ul style="list-style-type: none"> • Significant efforts were made to address the harm although they were inadequate • Where the landlord can demonstrate they made arrangements to address the problems within a reasonable timescale and has been prevented from doing so (such as obstruction by tenant to allow contractor access), • Damage caused by tenants • Failings were minor or occurred as an isolated incident • Disability or immaturity • Co-operation with the investigation • Voluntary steps taken to address issues e.g. submits a licence application • Evidence of health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns • Vulnerable individual(s) where there vulnerability is linked to the commission of the offence.

The Council will consider all the evidence gathered as part of the investigation into an offence including any mitigating and aggravating factors which may be relevant to the culpability assessment.

1.2 - Determining the Level or Seriousness of Harm

When determining the level of harm the Council will have regard to both the person who could have, or has, suffered the harm: i.e. physical injury, damage to health, psychological distress and the community; i.e. economic loss, harm to public health Other types of harm will also be considered in assessing the level of harm; i.e. public concern/feeling over the impact of poor housing condition on the local neighbourhood.

The nature of the 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, serious or psychological effect on the victim/s and whether the victim/s is particularly vulnerable.

The Council will determine the level of harm which is separated into 3 levels; Table 3 gives examples of the levels which is not an exhaustive list

Table 3 – Harm assessment	
Level of Harm/risked	Description/example
High	<p>Lack of compliance giving rise to the offence poses a serious and substantial risk of likelihood of harm to the occupants and/or visitors; for example, danger of electrocution, carbon monoxide poisoning or serious fire safety risk. Examples, could include</p> <ul style="list-style-type: none"> • The seriousness or potential seriousness would be considered a Class I or Class II harm outcome in the Housing Health and Safety Rating System (see Appendix 1) • In the case of an HMO, the property did not comply with the prescribed standards for HMO amenity and facilities (would need four or more conditions to make suitable as HMO) and / or property was overcrowded by three or more persons above the number the house is suitable for. • Multiple category 1 hazards • Multiple breaches of the management regulations associated with safety, especially regulation 4 that cumulatively put the occupiers at risk of serious and substantial harm.
Medium	<p>Lack of compliance giving rise to the offence poses a serious risk of a likelihood of harm to the occupants and/or visitors; for example, falls between levels, excess cold. The seriousness or potential seriousness would be considered as a Class III harm outcome in the Housing Health and Safety Rating System</p> <p>Examples, could include</p> <ul style="list-style-type: none"> • In the case of an HMO, the property was in reasonable condition (would have only needed up to three conditions to make suitable as an HMO) and / or property was overcrowded by two or less persons above the number the house is suitable for. • One category 1 hazard • Multiple category 2 hazards • Breaches of Management Regulations e.g. Failure to take safety measures; obstructed fire escape routes; failure to maintain fixtures fittings and appliances important to tenant wellbeing and health such as cookers and toilets and showers

Level of Harm/risked	Description/example
Low	<p>Lack of compliance giving rise to the offence causes little or no likelihood of harm to occupants and/or visitors; for example, cleanliness of carpets, localised damp, Class IV harm outcome in the Housing Health and Safety Rating System</p> <p>Examples, could include</p> <ul style="list-style-type: none"> • In the case of an HMO, the property was not overcrowded given the room sizes / facilities available. • A category 2 hazard • Breaches of management regulations e.g. poor decorative repair, untidy garden, failure to provide information, damaged outbuilding, defective ventilation. • The lack of a HMO licence – only where there are no issues of safety identified

NB –The examples of Harm outcomes in Table 3 are those in the HHSRS guidance; a full HHSRS assessment does not need to be carried out to determine the harm outcome unless there are Cat 1 and 2 hazards.

The level of harm determined will vary depending on the likelihood of occurrence and harm outcomes e.g. some excess cold defects may lead to a high or low harm and should not be restricted to a medium level of harm

1.3 - Determination of the level of Penalty

The level of penalty is divided into bands as it would be inappropriate to issue a single level of penalty in all cases, and it is expected that the maximum amount is reserved for the worse offenders.

The band is determined by the interrelationship between the harm and the culpability, determined as above, however for each penalty band the severity and risk posed by the offence will be assessed as low, medium and high with a monetary value applied for each level awarded. Examples of factors effecting the severity and risk posed by the offence could include the vulnerability of the tenants, the location of the defect or the offence and the likelihood of harm occurring. See Table 4 for examples of severity and risk.

Table 4- Severity / risk assessment	
Level of severity / risk	Description/example
A (low)	There were one to four items of work listed on the notice / licence that were not completed / one to four defects identified under Management Regulations; and / or the non-compliance affected one individual.
B (med)	There were five to eight items of work listed on the notice / licence that were not completed / five to eight defects identified under Management Regulations; and / or the non-compliance affected two to four individuals.
C (high)	<p>The tenants were vulnerable (e.g. the occupants in the property were in the identified HHSRS vulnerable group or occupied by children or pregnant women or elderly persons or otherwise considered vulnerable (e.g. lifestyle or health issues)</p> <p>e.g. if the only item not completed is guarding to stairs and the property has a child in occupation then this is a higher risk than if the property is occupied by students. This factor overrides the number of items in other categories.</p> <p>There were nine or more items of work listed on the notice / licence that were not completed / nine or more defects identified under Management Regulations; and / or the non-compliance identified affected five or more individuals.</p>

1.4 - Determination of penalty level and starting point

Table 5 indicates the bands that determine the level of penalty.

Table 5 – Determination of penalty level and starting point				
Penalty Level	Level of culpability and harm	Range of Fine	Starting point of fine	
Band 1	Low Culpability/Low Harm	£0 to £4,999	A	£499
			B	£2,500
			C	£4,999
Band 2	Medium Culpability/Low Harm	£5,000 to £9,999	A	£5,000
			B	£7,500
			C	£9,999
Band 3	Low Culpability/Medium Harm OR High Culpability/Low Harm	£10,000 to £14,999	A	£10,000
			B	£12,500
			C	£14,999
Band 4	Low Culpability/High Harm OR Medium Culpability/Medium Harm	£15,000 to £19,999	A	£15,000
			B	£17,500
			C	£19,999
Band 5	Medium Culpability/High Harm OR High Culpability/Medium Harm	£20,000 to £24,999	A	£20,000
			B	£22,500
			C	£24,999
Band 6	High Culpability/High Harm	£25,000 to £30,000	A	£25,000
			B	£27,500
			C	£30,000

Stage 2 - Determination of the compliance history of the offender

This stage of the process reviews the offender's track record as this will affect the amount of penalty. Someone with a pattern of previous offending who continues with the same behaviour will receive a higher penalty than someone with a good previous history of compliance, the level should be set high enough to help ensure that it has a real economic impact on the offender and shows the consequences of non-compliance with their responsibilities and deter them from repeating the offence is likely. Where appropriate, searches of relevant websites will be undertaken to determine this information

The stage 2 assessment must be undertaken even if the penalty level determined in stage 1 is £30,000 or more.

2.1 - The Compliance History of the offender

There are a number of questions which should be asked of the offender in each case – these can then be scored and weighted in accordance with their seriousness – ranging from 1 to 20 for the most serious. Table 6 illustrates this assessment.

Table 6 – Compliance history assessment		
	Weighting for a “yes” answer	Multiplication factor for number of occasions
Has the offender had any relevant notices, under Part 1 of the Housing Act 2004, not including a hazard awareness notice, served on them in the last 2 years?	1	Yes
Has the offender had any financial penalties imposed on them in the last 2 years?	10	Yes
Has the offender accepted any cautions for relevant offences in the last 2 years?	10	Yes
Has the offender breached any relevant notices, which resulted in works in default being carried out, in the last 2 years?	10	Yes
Has the offender owned or managed a property where a licence for the property, under the Housing Act 2004, was revoked due to enforcement action or significant concerns, in the last 2 years?	10	No
Has the offender been prosecuted for any relevant offences in the last 2 years?	20	Yes
Has the offender owned or managed a property which was subject to an interim or final management order under the Housing Act 2004 in the last 2 years?	20	No
Has the offender been the subject of a banning order under the Housing and Planning Act 2016 in the last 2 years?	20	No
Is the offender entered onto the Rogue landlord’s database?	20	No

A score is generated from the answers and a percentage increase to be added to the penalty at the end of stage 1 is calculated as shown in Table 7.

Table 7 - Scoring	
Score	%
0	0%
1 – 15	30%
16 – 20	45%
21 - 30	50%
30-39	75%
40+	100%

Stage 3 – Consideration of Financial elements of the penalty

This stage in the process assesses the financial benefit obtained from committing the offence. One of the guiding principles of the financial penalty regime is that the penalty should remove any financial benefit that may have been obtained as a result of committing the offence. The penalty should never be less than what it would have reasonably cost the landlord to comply in the first place. It should not be cheaper to offend than to take the appropriate precautions. A final check should also be undertaken to ensure that the penalty is proportionate to the overall means of the offender and if there are multiple offences the Council will take the totality principle into account

The stage 3 assessment must be undertaken even if the penalty level determined in stage 2 is £30,000 or more

3.1 - The Landlord's finances

The Statutory Guidance makes it clear that:

Local housing authorities should use their existing powers to, as far as possible, make an assessment of a landlord's assets and any income they receive (not just rental income) when determining an appropriate penalty.

However in most cases the relevant income of the landlord that will be considered is the rental income from the property where the offence has occurred. This will normally be the weekly income as declared on the tenancy agreement. If the landlord does not provide rental or financial information as requested an estimate of the average weekly income will be determined. Representations against estimated incomes will only be accepted where the landlord provides sufficient evidence to support the claims.

The Council can make a full financial assessment of a landlord's assets and any income they receive, not just from rental income, when calculating an appropriate financial penalty. The Council will consider carrying out a full financial investigation where it considers that it is reasonable and proportionate to do so in the

circumstances. Full financial investigations will normally only be considered for the more serious cases.

Calculation in relation to landlord's income

Relevant weekly income – for all cases where the financial penalty level is below Band 6 the relevant weekly income will normally be the gross rental income for the property plus any other income as above.

For those in Band 6 the relevant weekly income will be all the income for the offender and a full financial assessment will normally be undertaken.

The percentage increase ensures that where a serious offence has occurred the offender is penalised by losing more income. This is shown in Table 8.

Table 8 – Percentage of relevant weekly income to be added to penalty	
Penalty level	% of Relevant weekly income to be added to the penalty.
Band 1	50% of relevant weekly income
Band 2	100% of relevant weekly income
Band 3	150% of relevant weekly income
Band 4	250% of relevant weekly income
Band 5	400% of relevant weekly income
Band 6	600% of relevant weekly income

3.2 Determining the financial benefit

Each case will be determined on its own merits and examples of potential financial benefits are shown in Table 9. The Council will need to prove the amount of financial benefit the offender has obtained, however if the offender does not provide sufficient information an estimate of the benefit can be made. . Once determined this amount will be added to the penalty so as to remove any financial benefit gained through offending this will be added at this stage irrespective of whether the issues have been rectified.

Table 9 – Examples of potential financial benefit	
Offence	Examples of financial benefit
Failure to comply with an Improvement Notice (section 30)	The cost of any works that were required to comply with the improvement notice but which have not been removed by works in default.
Offences in relation to licensing of HMOs (section 72)	Rental income whilst the HMO was operating unlicensed or where it was occupied by more than the number of persons authorised by the licence; the cost of complying with any works conditions on the licence; the cost of the licence application fees back dated to when the property became a HMO .
Offence of contravention of an overcrowding notice (section 139)	Rental income whilst the property is being occupied in contravention of the overcrowding notice.
Failure to comply with management regulations in respect of HMOs (section 234)	The cost of any works that are required to avoid breaching the regulations.

Review of the penalty

The Council must check whether the level of penalty at the end of stage 3 is proportionate to the overall means of the defendant,. If necessary the initial amount may be amended to ensure it fulfils the general principles outlined above and within the statutory guidance.

Reductions

The Council must consider any factors which indicate a reduction in the penalty, and should consider the following factors relating to the wider implications of the financial penalty on innocent third parties for example the impact of the offender's ability to comply with the law or to make restitution to the victims/tenants

Reduction for admission of guilt

The Council will take into account a potential reduction in the penalty for an admission of guilt and/or with the cooperation with the investigation. The level of reduction will be decided upon the following factors

- When the offender admits guilt in the course of the investigation or thereafter
- The circumstances in which they admitted guilt
- The degree of cooperation with the investigation

In accordance with the Sentencing Council 'Reduction in Sentence for a guilty Plea' the maximum level of reduction in a penalty for an admission of guilt will be one third.

However in some cases there will be a lesser reduction or no reduction, eg where there is a pattern of criminal behaviour

Totality Principle

The Council will, when issuing a financial penalty for more than one offence, or where an offender has also been issued with another financial penalty, consider the total penalties are just and appropriate to the offending behaviour and make adjustments accordingly. The Council will consider the guidance in the definitive guideline on Offences Taken into Consideration and Totality.

Service of a Financial Penalty – procedure

Once the Council have agreed a level for the financial penalty, the offender will be served a “Notice of Intention to serve a Financial Penalty” – this will outline the reasons for the financial penalty and will allow the offender to make representations to the Council.

Representations must be made within the timescales as set out in the notice of intention. The Council will consider the representations and will adjust the amount of penalty notice if appropriate.

The Council will then serve a Final Notice. If the offender does not agree with the service of the notice they can appeal to the First Tier Tribunal, the details of which will be contained within the notice. This appeal must be made within the timescales as set out in the notice. The Council will also issue an invoice for the amount specified on the notice

Payment of the Financial Penalty

The offender must pay the penalty within 28 days from the date the final notice is served. The Council may consider, in exceptional circumstances, a payment plan, If payment is not made; or if a payment plan is not adhered to, the Council will seek to recover the amount owed through the County Court. If an appeal is made, payment will be suspended until the outcome of the appeal.

Additional Actions

In all cases the Council must consider whether to take additional action following service of a financial penalty notice including

- In the case of HMOs appropriate action under Housing Act 2004 Part 1,
- Interim Management Orders,
- works in default,
- inclusion in the national rogue landlords database
- Rent Repayment Orders.
- Refusal to grant a licence
- Revocation of licence

A prosecution case cannot be taken for the same conduct as is the subject of a financial penalty notice

Appendix 1 - Classes of Harm – as prescribed in the HHSRS Operating Guidance

Class I This Class covers the most extreme harm outcomes including:

Death from any cause;
Lung cancer;
Mesothelioma and other malignant lung tumours;
Permanent paralysis below the neck;
Regular severe pneumonia;
Permanent loss of consciousness;
80% burn injuries.

Class II This Class covers severe harm outcomes, including:

Cardio-respiratory disease;
Asthma;
Non-malignant respiratory diseases;
Lead poisoning;
Anaphylactic shock;
Cryptosporidiosis;
Legionnaire's disease;
Myocardial infarction
Mild stroke;
Chronic confusion
Regular severe fever;
Loss of a hand or foot;
Serious fractures;
Serious burns;
Loss of consciousness for days.

Class III This Class covers serious harm outcomes, including:

Eye disorders;
Rhinitis;
Hypertension;
Sleep disturbance;
Neuro-psychological impairment;
Sick building syndrome
Regular and persistent dermatitis, including contact dermatitis;
Allergy;
Gastro-enteritis;
Diarrhoea; Vomiting;
Chronic severe stress;
Mild heart attack;
Malignant but treatable skin cancer;
Loss of a finger;
Fractured skull and severe concussion;
Serious puncture wounds to head or body;
Severe burns to hands;
Serious strain or sprain injuries;
Regular and severe migraine.