

Civil penalty as an alternative to prosecution under the Housing Act 2004

Bristol City Council policy on deciding on a financial penalty amount

Introduction

The Housing and Planning Act 2016 ('the 2016 Act') amends the Housing Act 2004 ('the 2004 Act') to allow financial penalties, up to a maximum of £30,000, to be imposed as an alternative to prosecution for certain relevant housing offences.

Marcus Jones MP (Parliamentary Under Secretary of State at the Department for Communities and Local Government) has stated that:

'[it is necessary to] clamp down on rogue landlords, so the civil penalty [has been increased] up to a maximum of £30,000...It is important [to] raise the level of civil penalty to £30,000, because a smaller fine may not be significant enough for landlords who flout the law to think seriously about their behaviour and provide good quality, private sector rented accommodation for their tenants.'

This policy sets out guidance as to how Bristol City Council will determine the level of financial penalty in individual cases, once the decision to impose a financial penalty has been made.

Consultation

Views were sought from landlords, agents and tenants and were taken into consideration when finalising this guidance. See appendix 1 for a list of the consultees.

Legal reference

Schedule 9 of the 2016 Act has introduced amendments to the 2004 Act that allow local housing authorities to impose financial penalties as an alternative to prosecution for the following relevant housing offences under the 2004 Act:

- section 30 (failure to comply with improvement notice),
- section 72 (licensing of Houses in multiple occupation (HMOs)),
- section 95 (licensing of houses under Part 3),
- section 139(7) (failure to comply with overcrowding notice), or
- section 234 (management regulations in respect of HMOs).

A new Schedule 13A has also been inserted into the 2004 Act which prescribes the procedures that a local housing authority must follow before imposing a financial penalty, for imposing the penalty, the appeal process and the procedure for recovery of the penalty.

Government Guidance

The Government's Department for Communities and Local Government (DCLG) have published the following document: "[Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities](#)". This is statutory guidance to which local housing authorities must have regard. This statutory guidance recommends certain factors a local authority should take into account when deciding on the level of civil financial penalty and further recommends that local authorities develop and document their own policy on determining the appropriate level of financial penalty in a particular case.

The purpose of this policy

This is Bristol City Council's published policy in line with DCLG's recommendation that it should have a policy on determining the appropriate level of financial penalty in a particular case.

Local Government Association guidance

Bristol City Council worked with the Local Government Association in the compilation of their policy on Civil Penalty Notices.

Basis of this policy

In accordance with the new section 249A(4) of the 2004 Act the amount of a financial penalty is to be determined by the local housing authority. Although the statutory guidance recommends factors a local authority should take into account when deciding on the level of penalty, it does not go into any level of detail in this regard. The Council therefore has a wide discretion in determining the appropriate level of civil penalty in a particular case and seeks to set out further guidance through this policy as to how it will do so.

The Council has decided to largely base this policy on the principles set out in the [Sentencing Council Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline which this Council considers to be the most relevant sentencing guidance issued by the Sentencing Council](#). The Sentencing Council have set out a range of fines which are linked to the culpability of the offender and the actual and potential harm resulting from the offence.

The range of financial penalties in this guidance use similar ratios to those that are used by the Sentencing Council because these ensure that penalty levels are fair, appropriate and reasonable for the seriousness of the offence.

Guidance for officers.

Appendix 2 of this policy gives guidance to officers on how to make these decisions on the level of financial penalty under the 2016 Act.

Appendix 1 – List of Consultees

Acorn

Association of Local Landlords (Wessex) Ltd

Association of Residential Letting Agents

Bristol Association of Lettings and Managing Agents

Bristol Student Union Lettings

Bristol Mediation Services

Considerate/ National Accreditation Scheme

Chartered Institute of Environmental Health

Citizens Advice Bureaux

National Landlord Association

National Approved Letting Scheme

Residential Landlord Association

Royal Institutions of Chartered Surveyors

SARI

Shelter

South West Landlord Association

West Country Landlords Association

Local Government Association

Unseen

Local Authorities :

Bath and North East Somerset

North Somerset

Leeds

Oxford

South Gloucestershire

Appendix 2 - Bristol City Council process for determining the level of penalty to set -

Schedule 9, Housing and Planning Act 2016

STEP ONE – Determining the offence category

The Council will determine the offence category using only the **culpability** and **harm** factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment.

Culpability

Very high

Where the offender intentionally breached, or flagrantly disregarded, the law or
Who has a high public profile and knew their actions were unlawful

High

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Medium

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk
- failings were minor and occurred as an isolated incident

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Category 1 – High Likelihood of Harm

- Serious adverse effect(s) on individual(s) and/or having a widespread impact
- High risk of an adverse effect on individual(s) – including where persons are vulnerable¹

Category 2 – Medium Likelihood of Harm

- Adverse effect on individual(s) (not amounting to Category 1)
- Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect
- The Council and/or legitimate landlords or agents substantially undermined by offender's activities
- The Council's work as a regulator to address risks to health is inhibited
- Consumer/tenant misled

Category 3- Low Likelihood of Harm

- Low risk of an adverse effect on individual(s)
- Public misled but little or no risk of actual adverse effect on individual(s)

We will use the following definition of harm taken from the statutory guidance on hazard rating under the Housing Act 2004, 'Harm is an adverse physical or mental effect on the health of a person. It includes, for

¹ A wide definition of vulnerability will be used. See appendix 3 for a non-exhaustive list.

example, physical injury, and illness, condition, or symptom whether physical or mental. It also includes both permanent and temporary harm.²

STEP TWO - Starting point and category range

Having determined the **category**, the LA should refer to the following **starting points** to reach an appropriate level of civil penalty within the category range. The LA should then consider further adjustment within the category range for aggravating and mitigating features.

Obtaining financial information

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

In setting a financial penalty, the Council may conclude that the offender is able to pay any financial penalty imposed unless the Council has obtained or the offender has supplied any financial information to the contrary. An offender will be expected to disclose to the Council such data relevant to his financial position to enable the Council to assess what an offender can reasonably afford to pay. 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 received and from all the circumstances of the case **which may include the inference that the offender can pay any financial penalty.**

A Bristol specific example.

As many offenders will be owners of one or more properties in Bristol, they are likely to have assets that they can sell or borrow against. Property values in Bristol are high, and have consistently increased so even those offenders with mortgaged properties are likely to have value in the property that can be released. Therefore, if an offender claims that they are unable to pay a financial penalty and shows that their income is small, consideration should be given to properties owned that can be sold or refinanced.

The remainder of this page is intentionally left blank, and the **Starting points and ranges** section is on the next page.

² [Housing Health and Safety Rating System Operating Guidance, February 2006](#), Para 2.09-2.10 page 11.

Starting points and ranges

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability.

	Starting point	Range	
		Min	Max
Low culpability			
Harm category 3	£50	£25	£175
Harm category 2	£125	£50	£350
Harm category 1	£300	£125	£750
Medium culpability			
Harm category 3	£350	£175	£750
Harm category 2	£1,000	£350	£2,000
Harm category 1	£2,500	£750	£4,500
High culpability			
Harm category 3	£1,000	£500	£2,250
Harm category 2	£3,000	£1,000	£5,500
Harm category 1	£6,250	£2,500	£12,500
Very high culpability			
Harm category 3	£2,500	£1,250	£4,500
Harm category 2	£6,250	£2,500	£12,500
Harm category 1	£15,000	£6,250	£30,000

Context

Below is a list of some, but not all factual elements that provide the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. ***In particular, relevant recent convictions³ are likely to result in a substantial upward adjustment.*** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to
 - a) the nature of the offence to which the conviction relates and its relevance to the current offence; and
 - b) the time that has elapsed since the conviction

Other aggravating factors include:

- Motivated by financial gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact

³ See appendix 4 for a non-exhaustive list of relevant convictions.

- Obstruction of justice
- Record of providing substandard accommodation
- Record of poor management or not meeting legal requirements.
- Refusal of free advice or training
- member of Accreditation scheme

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of maintaining property
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Mental disorder or learning disability, where linked to the commission of the offence
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

STEP THREE - Review any financial element of the penalty

Check whether the proposed level of financial penalty is proportionate to the overall means of the offender. The Council may increase or reduce the proposed fine reached at step two, if necessary moving outside of the range in the table above.

Full regard should be given to the totality principle at step seven where multiple offences are involved.

General principles to follow in setting a penalty

The Council should finalise the appropriate level of penalty so that it reflects the seriousness of the offence and the Council must take into account the financial circumstances of the offender.

The level of financial penalty should reflect the extent to which the offender fell below the required standard. **The financial penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence;** it should not be cheaper to offend than to take the appropriate precautions.

The principle behind issuing civil penalty notices is that there is no financial gain to the alleged perpetrator of the relevant offences and that funds from the financial penalties should fund private rented sector teams in the Council. To cover the costs of the work put into the serving any financial penalty notice the costs of serving the notice will be added to the overall penalty. This will also act as a deterrent to non-compliant landlords as it is clear that landlords or agents who do not apply will know that they will have to pay for the cost of any enforcement action (where that has not been recovered under other powers).

The Council has calculated that the average cost of serving a financial penalty notice is (£1100) and this will be added to the penalty as a deterrent to non-compliant landlords or agents. This may be reduced or increased where a case is either very straightforward or alternatively takes longer than normal.

Review of the penalty

The Council should review the penalty and, if necessary adjust the initial amount reached at step two to ensure that it fulfils the general principles set out above.

Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total financial penalty arrived at in step two. Where this is not readily available, the Council may draw on information available from enforcing authorities and others about the general costs of operating within the law. Whether the penalty will have the effect of putting the offender out of business will be relevant but in some serious cases this might be an acceptable outcome.

STEP FOUR - Reductions

Consider any factors which indicate a reduction in the penalty and in so doing the LA should have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):

- impact of the financial penalty on offender's ability to comply with the law or make restitution to victims;
- impact of the financial penalty on employment of staff, service users, customers and local economy.

STEP FIVE – Reduction for early admission of guilt

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

The following factors will be considered in setting the level of reduction. When deciding on any reduction in a financial penalty, consideration will be given to:

- The stage in the investigation or thereafter when the offender admitted guilt
- The circumstances in which they admitted guilt
- The degree of co-operation with the investigation

The maximum level of reduction in a penalty for an admission of guilt will be one-third. In some circumstances there will be a reduced or no level of discount. For example where the evidence of the offence is overwhelming or there is a pattern of criminal behaviour.

Any reduction should not result in a penalty which is less than the amount of gain from the commission of the offence itself.

STEP SIX - Additional actions

In all cases the Council must consider whether to take additional action. These may include works in default, Interim Management Orders or Rent Repayment Orders. The Council cannot however take a prosecution case for the same conduct as is the subject of a financial penalty notice.

STEP SEVEN - Totality principle

If issuing a financial penalty for more than one offence, or where the offender has already been issued with a financial penalty, consider whether the total penalties are just and proportionate to the offending behaviour.

Where the offender is issued with more than one financial penalty, the Council should consider the following guidance from the definitive guideline on [Offences Taken into Consideration and Totality](#).

'The total financial penalty is inevitably cumulative.

The Council should determine the financial penalty for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the LA.

The Council should add up the financial penalties for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the Council should consider how to reach a just and proportionate financial penalties. There are a number of ways in which this can be achieved.

For example:

- where an offender is to be penalised for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a financial penalty which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;
- where an offender is to be penalised for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate financial penalties for each of the offences. The Council should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the Council should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be passed.

Where separate financial penalties are passed, the Council must be careful to ensure that there is no double-counting.'

STEP EIGHT – Recording the decision

The officer making a decision about a financial penalty will record their decision giving reasons for coming to the amount of financial penalty that will be imposed.

Appendix 3 – Non exhaustive list of vulnerable people

Young adults and children
Disabled persons
People on a low income
Persons with a Drug or alcohol addiction
Victims of domestic abuse
Looked after children
People with complex health conditions
People exploited where English is not their first language.
Victims of Trafficking or sexual exploitation
Refugees
Asylum seekers
People at risk of harassment or eviction
People at risk of homelessness.

Appendix 4 – Non exhaustive list of relevant offences

Housing law or landlord and tenant

Offences under:

- The Public Health Acts of 1936 and 1961
- The Building Act 1984
- The Environmental Protection Act 1990
- The Town and Country Planning Act 1990
- The Prevention of Damage by Pests Act 1949
- The Protection from Eviction Act 1977
- The Local Government (Miscellaneous Provisions) Acts of 1982 and 1976
- The Housing Grants, Construction and Regeneration Act 1996
- The Local Government and Housing Act 1989
- The Housing Act 2004

Offences involving fraud

Offences in which the victim has been deprived of money, property or other benefit by misrepresentation/deception on the part of the offender including:

- Theft
- Burglary
- Fraud
- Benefit fraud (particularly where tenants are in receipt Housing Benefit)
- Conspiracy to defraud
- Obtaining money or property by deception
- People trafficking
- Being struck off as the company director

Offences involving violence

A conviction for the offence of:

- Murder
- Manslaughter

- Arson
- Malicious wounding or grievous bodily harm
- Grievous bodily harm with intent
- Actual bodily harm
- Grievous bodily harm
- Robbery
- Racially aggravated criminal damage
- Common assault
- Common assault which is racially aggravated
- Assault occasioning actual bodily harm
- Possession of an offensive weapon
- Possession of a firearm

Offences involving drugs

- Consideration should be given to the nature of the offence and what bearing it could have on the management of a private rented property. The nature, quantity and class of drugs should be taken into account.

Offences involving sexual offences

- An offence contained in schedule 3 of the Sexual Offences Act 2003.

Unlawful discrimination

- Unlawful discrimination can include findings of an Industrial Tribunal on unlawful employment practice such as discrimination under the Disability Discrimination Act. Consideration should be given to the nature of the unlawful discrimination and what bearing it could have on the management of a licensable property.