

Oldham Council Policy: Civil (Financial) Penalties as an Alternative to Prosecution under the Housing and Planning Act 2016

Burden of Proof

The criminal burden of proof, i.e. 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, given 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.

Due regard must be given to any potential defences available, and, in certain circumstances, the Local Housing Authority may decide to conduct an interview under caution in accordance with PACE codes of practice to assist in determining whether the issue of a Civil Penalty is appropriate or not.

Factors in deciding whether to Prosecute or issue a Civil Penalty

Each case will be decided upon its own merits taking into account all the evidence available.

Where the Local Housing Authority considers that a Housing Act offence has been committed, it must decide whether to prosecute or to issue a civil penalty as an alternative to prosecution. The following factors, whilst not exhaustive, are examples of where it would usually be appropriate to consider prosecution:

- The seriousness of the offence; for example. breach of a Prohibition Order would be an offence only suitable for prosecution.
- The antecedents of an individual; for example. a landlord indicates that he / she has been regularly prosecuted for Housing Act or similar offences.

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

- No evidence of previous non-compliance with appropriate legislation.
- No previous convictions recorded
- Not in the public interest to prosecute
- Offence was committed as a result of a genuine mistake or misunderstanding, (these factors must be balanced against the seriousness of the offence)

- Prosecution is likely to have a serious adverse effect upon an individual's well-being; e.g. a landlord's physical or mental health, but always bearing in mind the seriousness of the offence.

Factors in determining the level of Civil Penalty

In order to ensure that the civil penalty is set at an appropriate level the following factors will be considered:

- The seriousness of the offence, determined by the harm caused and the culpability of the offender
- The history of compliance by the offender
- The punishment of the offender for the offence
- The deterrent value to prevent the offender from repeating the offence
- The deterrent value to prevent others from committing similar offences
- Removing any financial benefit obtained from committing the offence

1) Harm Caused

In determining the level of harm, the Local Housing Authority will have regard to:

- The victim, (if any): 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 condition on the local neighbourhood

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

Where no actual harm has resulted from the offence, the Local Housing Authority 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; for example, 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; for example, 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; for example, localised damp and mould, entry by intruders.

2) Culpability

In determining culpability, the Local Housing Authority 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 his actions even though he does not intend to cause the harm that results.
- Is **negligent** in their actions.

Examples of Culpability

High (Deliberate Act)	Intentional breach by landlord or property agent or flagrant disregard for the law e.g. where an unregistered gas fitter is allowed to carry out gas work and the landlord/property agent knows that he is not registered.
High (Reckless Act)	Serious or systemic failings, actual foresight of or wilful blindness to risk of offending but risks nevertheless taken by the landlord or property agent; e.g. 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 for avoiding commission of the offence; e.g. part compliance with a schedule of works, but failure to fully complete all schedule items within notice timescale.
Low (Low or no culpability)	Offence committed with little or no fault on the part of the landlord or property agent; e.g. obstruction by tenant to allow contractor access, damage caused by tenants

Determining the Civil Penalty Amount

In assessing the seriousness there is a need to consider both culpability and harm. The table below sets out the interrelation between harm and culpability as a determinant of the appropriate Civil Penalty banding

Low Culpability High Harm Band 4	Medium Culpability High Harm Band 5	High Culpability High Harm Band 6
Low Culpability /Medium Harm Band 3	Medium Culpability Medium Harm Band 4	High Culpability Medium Harm Band 5
Low Culpability Low Harm Band 1	Medium Culpability Low Harm Band 2	High Culpability Low Harm Band 3

Banding Levels

Band 1	£0 - 4,999
Band 2	£5,000 - £9,999
Band 3	£10,000 – 14,999
Band 4	£15,000 – 19,999
Band 5	£20,000 – 24,999
Band 6	£25,000 - £30,000

The starting point in each band will be the mid-point, i.e. for Band 3 the mid-point will be £12,500.

Aggravating Factors

The penalty may be increased by £1,000 for each aggravating factor up to the maximum of the band level determined above.

Mitigating Factors

The penalty may be decreased by £1000 for each mitigating factor to the minimum of the band level determined above.

When considering aggravating and mitigating factors, the civil penalty imposed must remain proportionate to the offence.

Reference will be made to Magistrates Court Sentencing Guidelines when considering relevant aggravating and mitigating factors.

An offender will be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise.

Civil Penalties – Multiple Offences

Where the Local Housing Authority are satisfied that more than one offence has been committed concurrently in respect of a single property, they may issue multiple Civil Penalty Notices for each offence (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 authority considers 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.

Process for Imposing Penalty Charges

Where it has been determined that a financial penalty may be appropriate to impose as an alternative to prosecution, the Council will follow the following process:

- A “Notice of Intent” shall be served on the person suspected of committing the offence. The Notice shall specify:
 - a) The amount of any proposed financial penalty
 - b) The reasons for proposing the financial penalty
 - c) Information about the right to make representation to the Council
- The person to which the notice relates will be given 28 days to make written representation to the Council about the proposal to impose a financial penalty. The representation may be via any legible written format, but to aid respondents, a form will be included with the Notice of Intent
- Following the 28 day period the Council will decide:

- a) Whether to impose a financial penalty on the person, and
 - b) The value of any such penalty imposed.
- If the Council decides to impose a financial penalty, a final notice shall be issued imposing that penalty. The final notice will specify:
 - a) the amount of the financial penalty,
 - b) the reasons for imposing the penalty,
 - c) information about how to pay the penalty,
 - d) the period for payment of the penalty, (28 days),
 - e) information about rights of appeal to the First tier Tribunal
 - f) the consequences of failure to comply with the notice.

Consequences of Non-Compliance and Miscellaneous Provisions

If, after any appeal has been finally determined or withdrawn, a person receiving a financial penalty does not pay all or part of the penalty charge, the Council will recover the penalty by order from a County Court. Where appropriate, the Council will also seek to recover the costs incurred in taking this action from the person to which the financial penalty relates.

Financial Penalties are an alternative to criminal proceedings and as such if a penalty is imposed, no criminal proceedings will be initiated for the same offence.

The Council may, at any time:

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

Where the Council decides to take either action, it will write to the person to whom the notice was given.

Database of Rogue Landlords and Letting Agents

Upon commencement of the statutory provisions relating to the national Rogue Landlord and Letting Agents Database, where a person has received two financial penalties under this legislation in any 12 month period for offences occurring within their Local Housing Authority area, the Council will make an entry on the national database. When considering making an entry, the Council will have regard to any guidance issued by the Secretary of State.