

REPORT FOR DECISION

DECISION OF:	The Cabinet
DATE:	29 July 2020
SUBJECT:	Civil Financial Penalty Policy
REPORT FROM:	Cabinet Member for Housing Services
CONTACT OFFICER:	Danielle McGhee, Unit Manager, Private Rented Sector Housing
TYPE OF DECISION:	Key decision
FREEDOM OF INFORMATION/STATUS:	This paper is within the public domain
SUMMARY:	<p>The Housing and Planning Act 2016, introduced amendments to the Housing Act 2004, to allow local authorities to impose a financial penalty, also known as a fine, for certain offences under The Housing Act as an alternative to criminal prosecution. The powers came into force in April, 2017 and as of yet, the powers have not been adopted by Bury Council.</p> <p>The report introduces the Civil Penalty Policy and provides an overview of the process and procedure the council will adopt when considering issuing a civil penalty to ensure the decision is fair and accountable.</p> <p>The aim of adopting the civil penalties policy is to increase the range of measures open to the Council in tackling housing offences and to increase the Council's capacity to undertake enforcement where there is clear evidence that offences have been committed</p>
OPTIONS & RECOMMENDED OPTION	<p><u>Recommended option:</u> To approve and implement the civil financial penalty policy, to allow officers to impose strong fines to rogue landlords and letting agents.</p> <p>Implementing the policy allows the Council a further opportunity to increase funding, due to the monies being returned to the department to continue enforcement activities within the private rented sector.</p> <p><u>Other options available:</u></p> <p>1 - Reject the civil penalty policy – As a piece of legislation, we have a duty to adopt and utilise the powers contained within. Not adopting the policy also misses the opportunity to generate additional</p>

	income. 2 - Implement the policy and change the banding level of fines. This would mean Bury Council is not consistent with other GM authorities.
IMPLICATIONS:	
Corporate Framework:	Aims/Policy Do the proposals accord with the Policy Framework? Yes
Statement by the S151 Officer: Financial Implications and Risk Considerations:	There are no financial costs resulting from the proposal. Any income received will be ring fenced according to the legislation.
Equality/Diversity implications:	No
Considered by Monitoring Officer:	The legal implications are set out in the report and as stated, the legislation requires adoption before implementation and operation.
Wards Affected:	All
Scrutiny Interest:	No.

1.0 LEGISLATIVE FRAMEWORK

- 1.1** Schedule 9 of The Housing and Planning Act 2016 amends the Housing Act 2004 to allow financial penalties, up to a maximum of £30,000, to be imposed as an alternative to prosecution for certain relevant housing offences.
- 1.2** Prior to the introduction of this legislation, options to the local authority where housing act offences had been committed, were rather limited. Options consisted of carrying out works in default, (where appropriate) issuing a formal caution or pursuing the matter through the Court system for criminal prosecution. There has not been an option for a local authority to impose a financial penalty for the offences listed in the Act.
- 1.3** A prosecution through the Court system can take a significant amount of time and financial resource to draw to a conclusion and impose a sentence. Alongside having evidence beyond all reasonable doubt, any case that enters the Court system must be in the public interest to pursue. Previously, where an offence had been committed and deemed not in the public interest to pursue any further, the council could only consider a formal caution as a realistic sanction. The introduction of civil penalties allows, in those circumstances, officers to consider the option to impose a penalty.
- 1.4** The relevant offences under the Housing Act for which a local authority can issue a civil penalty are:
- Failing to comply with an improvement notice

- Offences in relation to the licensing of HMOs (*Houses in Multiple Occupation*)
- Offences in relation to selective licensing
- Failing to comply with an overcrowding notice
- Breach of Management regulations in respect of HMOs.

1.5 The power to issue a penalty only apply to offences committed after April 2017. Section 249A (4) inserted into the Housing Act 2004 enables the amount of the financial penalty to be determined by the local housing authority and schedule 13A inserted into the Housing Act 2004 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.

1.6 Statutory guidance has been produced by the MHCLG (Ministry of Housing, Communities and Local Government) which serves a guide to local authorities to help them understand how to use their powers and impose a civil penalty as an alternative to a prosecution. It makes it quite clear that local authorities must have regard to the guidance in the exercise of their functions in respect of civil penalties. In developing the policy, the Council has had regard to the guidance.

2.0 LOCAL AUTHORITY POLICY

In accordance with Government guidance the Council has developed a policy for the imposition of civil penalties for offences under The Housing Act 2004. This is set out at Appendix 1. The approach to the level of fines and subsequent policy has been developed in conjunction with other local authorities across Greater Manchester to ensure consistency, this has unfortunately led to a delay between the legislation passing and Bury Council adopting and implementing it.

2.1 The policy (appendix 1) describes in detail how Bury Council comes to the decision to issue a financial penalty, the level of fine it will impose and the process it will follow to issue the penalty, including the service of legal notices.

In summary, the policy details:

2.2 The Burden of proof required to issue a penalty; There must enough evidence to prove the offence in the Magistrates Court, beyond all reasonable doubt with a realistic prospect of conviction.

2.3 Most appropriate course of action; civil penalty or prosecution - Each case will be judged on its own merit, taking into account the evidence available. A financial penalty will be considered for cases where this is no previous history of non-compliance for example.

2.4 The level of fine to issue - As detailed in the policy, the following factors will be considered when decided the level of fine to be issued:

- The seriousness of the offence, determined by the harm caused and the culpability of the offender (further detailed within the policy)
- 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

- 2.5** The Council has engaged with other GM authorities through the GMPRSHG (Greater Manchester Private Rented Sector Housing Group) in developing the levels of harm, culpability and fine banding levels, as mentioned above and the maximum level of penalty imposed per offence is £30,000. The financial penalty banding levels across GM are:

Band 1	£0 - 4999
Band 2	£5000 - 9999
Band 3	£10000 - 14999
Band 4	£15000 - 17999
Band 5	£18000 - 20999
Band 6	£21000 - 23999
Band 7	£24000 - 26999
Band 8	£27000 - 30000

The starting point in each band is the mid-point.

- 2.6** Where the Council has considered the offence and decided that the most appropriate course of action is to issue a financial penalty, they will do so by following the legal process detailed within the policy, which includes serving legal notices. The Council's legal department has been consulted on this process and the working of the notices.
- 2.7** Where financial penalties imposed are not paid, the monies are recoverable through an order made in the County Court.
- 2.8** All money generated through the issuing of financial penalties provides a small income stream for the Council which is directly ring fenced to come back into the Urban Renewal department to continue with their enforcement activities in the private rented sector.

3.0 EQUALITY AND DIVERSITY

There is no perceived impact of this decision on equality and diversity as Government legislation, providing extra enforcement tools to tackle rogue landlords and letting agents, we have a statutory obligation to implement it.

4.0 FINANCIAL IMPLICATIONS

There are no financial implications to adopting and implementing the policy.

List of Background Papers:- Statutory MHCLG Guidance: Civil Penalties

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697644/Civil_penalty_guidance.pdf

Housing and Planning Act 2016

<http://www.legislation.gov.uk/ukpga/2016/22/contents/enacted>

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Appendix 1

POLICY ON CIVIL (FINANCIAL) PENALTIES AS AN ALTERNATIVE TO PROSECUTION UNDER THE HOUSING AND PLANNING ACT 2016

1. Introduction

The Housing and Planning Act 2016 introduced Civil Penalties of up to £30,000 from 6th April 2017 as an alternative to prosecution for certain offences under the Housing Act 2004.

These are:

- **Section 30 (failure to comply with an Improvement Notice)**
- **Section 72 (offences in relation to licensing of HMOs)**
- **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 (breach of Management Regulations in respect of an HMO)**

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.

In determining the Civil Penalty amount, Bury Council will have regard to the statutory guidance issued under schedule 9 of the Housing and Planning Act 2016 and also to the Government's Department of Communities and Local Government (DCLG) developed Civil Penalty Matrix.

2. 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. Bury Council 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, Bury Council 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.

3. 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 Bury Council 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; e.g. breach of a Prohibition Order would be an offence only suitable for prosecution.
- Forms part of a wider prosecution; e.g. Health and Safety Inspection
- The antecedents of an individual; e.g. 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.
- 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.

4. 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

4.1 Harm Caused

In determining the level of harm Bury 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 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, Bury 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

4.1.1 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.

4.2 Culpability

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

4.2.1 Examples of Culpability

Very 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

4.3 Correlation between Harm and Culpability in 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 level to be applied.

Low Culpability/High Harm Band 4	Medium Culpability/High Harm Band 5	High Culpability/High Harm Band 6	Very High Culpability/High Harm Band 8
Low Culpability/Medium Harm Band 3	Medium Culpability/Medium Harm Band 4	High Culpability/Medium Harm Band 5	Very High Culpability/Medium Harm Band 7
Low Culpability/Low Harm Band 1	Medium Culpability/Low Harm Band 2	High Culpability/Low Harm Band 3	Very High Culpability/Low Harm Band 4

5. Level of Civil Penalty to be imposed

In determining the financial value of an imposed penalty, subject to a maximum of £30,000, Bury Council shall have regard to the Banding Levels referred to in Appendix 1. Where there is more than one offence each offence will be given a banding level based upon the criteria identified in this Policy. Each of those offences may have a different banding level dependent upon the circumstances of the offence.

The Civil Penalty should be fair and proportionate given the circumstances of the case but in all instances should act as a deterrent and remove any gain as a result of the offence.

The starting point for the Civil Penalty will be the mid –point of the relevant band level and is based upon the assumption that no aggravating / mitigating factors apply to the offence. An offender will be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise.

5.1 Aggravating Factors

The penalty may be increased by £1000 for each aggravating factor up to the maximum of the band level determined in Appendix 1.

5.2 Mitigating Factors

The penalty may be decreased by £1000 for each mitigating factor to the minimum of the band level determined in Appendix 1.

5.3 Sentencing Guidelines

When considering any relevant aggravating and mitigating factors due regard should, inter alia, be given to the Sentencing Council Guidelines.

5.4 Assessment of Assets and Income

Where Bury Council is satisfied that the assets and income (not just rental income) of the offender are such that it is just and appropriate to increase or reduce the penalty then the penalty may be increased or reduced on a sliding scale, dependent upon the financial circumstances of the offender, up to the maximum or minimum point of the banding level identified for the offence.

5.5 Reduction in Penalty Imposed

Bury Council may reduce the penalty imposed where corrective action is taken in respect of the offence committed in a timely and appropriate manner in circumstances where Bury Council have assessed the category of culpability as being low or medium.

Such reduction will only be applied where the corrective action has been taken prior to the service of the Final Notice.

The maximum level of reduction to be applied will be 30% of the penalty amount and each case will be considered on its own merits.

6. Civil Penalties

6.1 Multiple Offences

Where Bury Council is 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 (e.g. where there are multiple breaches of the HMO Management Regulations).

6.2 Multiple Penalties

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

7. Process for Imposing Penalty Charges

Where it has been determined that a Financial Penalty may be appropriate to impose as an alternative to prosecution, Bury Council will apply the following process:-

7.1 Notice of Intent

- 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 Bury Council
- The person to which the notice relates will be given 28 days to make written representation to Bury Council about the proposal to impose a financial penalty.

- Following the 28 day period Bury Council will decide:
 - a. Whether to impose a financial penalty on the person, and
 - b. The value of any such penalty imposed.

7.2 Final Notice

- If Bury 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,
 - e. information about rights of appeal to the First tier Tribunal
 - f. the consequences of failure to comply with the notice.

8. 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, Bury Council will recover the penalty by order from a County Court. Where appropriate, Bury 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.

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

9. Record of the Decision

A record of each decision and the reasons for the financial penalty will be made by an appropriate officer and how the amount of the penalty was obtained and the reasons for imposing it.

10. 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 the borough of Bury, the Council may make an entry on the national database. When considering making an entry, the authority will have regard to any guidance issued by the Secretary of State.

APPENDIX 1

Banding Levels of Financial Penalties imposed under the Housing Act 2004 (the Act)

Band 1	£0 - 4999
Band 2	£5000 - 9999
Band 3	£10000 – 14999
Band 4	£15000 - 17999
Band 5	£18000 - 20999
Band 6	£21000 - 23999
Band 7	£24000 - 26999
Band 8	£27000 - 30000

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