

Housing Enforcement - Civil Penalty and Rent Repayment Order Policy

This policy document is an addendum to Teignbridge Council Housing Enforcement policy and sets out how Teignbridge Council will deliver section 249a of The Housing Act 2004 (as implemented by section 126 of the Housing and Planning Act 2016) in order to issue civil penalties as an alternative to prosecution.

It also sets out when Teignbridge Council will seek a Rent Repayment Order under Chapter 4 of Part 2 of the Housing and Planning Act 2016.

Civil Penalties

Section 126 and schedule 9 of the Housing and Planning Act 2016 came into force on the 6th April 2017.

These provisions give the local housing authority the power to issue a financial penalty for certain Housing Act 2004 offences as an alternative to prosecution.

The civil penalties option can be used for the following Housing Act 2004 offences:

- Failure to comply with an improvement notice
- Offences in relation to HMO licensing
- Offences relating to the contravention of an overcrowding notice
- Failure to comply with the HMO management regulations

The council is required to have a policy in place that details when to prosecute and when to consider a civil penalty.

The council must also provide guidance on how the fine levels will be set.

The guidance document issued by the Department of Communities and Local Government (DCLG) provides details on the considerations that must be taken into account as part of the fine setting process. It places particular emphasis upon the severity of the offence and the landlord's previous record of offending. A scoring mechanism has been devised to reflect the considerations set out in the DCLG guidance. This scoring mechanism is set out below.

When to prosecute and when to consider a civil penalty

The same criminal standard of proof is required for a civil penalty as for prosecution.

Teignbridge Council will firstly satisfy itself that if the case were to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction.

In order to do so Teignbridge Council will consider its own enforcement policy and consult the legal department who will advise, taking into consideration the Code for Crown Prosecutors.

Once satisfied that there would be a realistic prospect of conviction a decision will be taken as to whether to prosecute or to issue a civil penalty. All decisions will be taken on a case-by-case basis.

The guidance document issued by DCLG suggests that prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past.

It is likely that a civil penalty will be considered as the most appropriate course of action except in the aforementioned circumstances.

Levels of fine to be set

The guidance document issued by DCLG provides the following considerations when determining the level of a civil penalty;

1. Severity of the offence - *The more serious the offence, the higher the penalty should be.*

In order to measure the severity of the offence the following criteria will be used;

- a. **Level one – Major impact** – serious and substantial risk to the health and safety of the occupiers and/or community as a result of the offence, with potentially life threatening results or loss of major limbs.

For each Level 1 issue considered a score of **5** will be added.

- b. **Level two - Serious Impact** – serious risk to the health and safety of the occupiers and/or immediate neighbours, potentially leading to serious injury or disease requiring prolonged treatment and/or hospital admission.

For each Level 2 issue considered a score of **3** will be added.

- c. **Level three – Minor impact** – Risk of injury or disease to the occupiers potentially resulting in treatment at the doctors.

For each Level 3 issue considered a score of **1** will be added.

A one-off premium of 10 points will be added where any hazard or issue would affect more than 1 household i.e. whole building issues or common parts issues in HMO's. This is to ensure that the scope of the hazard or issue is considered in addition to its ability to harm.

2. Culpability and track record of the offender

Landlords are running a business and should be expected to be aware of their legal obligations. A higher penalty will 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..

In order to measure the culpability of the perpetrator the following criteria will be used;

Culpability

- a. **Deliberate**– An intentional breach by a landlord or property agent or flagrant disregard for the law for example by failing to comply with a notice or regulations.

For Deliberate acts a score of 20 will be added

- b. **Reckless**– An actual foresight of, or wilful blindness to the risk of offending but decides to take the risk nevertheless for example failing to comply with a strict liability in the HMO regulations.

For Reckless acts a score of 15 will be added

- c. **Negligent**– The failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding the offence, for example partial compliance with a schedule of work to an enforcement notice but failure to fully comply with all schedule items.

For Negligent acts a score of 10 will be added

- d. **Low or no culpability**– The offence committed has some fault on the part of the landlord or property agent but there are other circumstances for example obstruction by the tenant to allow a contractor access for repairs, or damage caused by tenant negligence.

For Low culpability acts a score of 5 will be added

A premium of 15 will be added where the requirement to licence a property under Parts 2 or 3 of the Housing Act 2004 has not been complied with.

Where a landlord or person managing fails to obtain a licence without direct contact by Teignbridge Council requiring them to do so a score of 5 will be added.

Where a landlord or person managing fails to obtain a licence despite direct contact by Teignbridge Council requiring them to do so a score of 15 will be added.

Track record

- a. **1st offence** – no previous conviction or civil penalty imposition for the same type of offence in the previous four years irrespective of the locality to which the offence relates.

For 1st offences a score of 10 will be added

- b. **2nd subsequent offence by same person/company** – any conviction or civil penalty imposition for the same type of offence within four years of the 1st offence, irrespective of the locality to which the initial offence relates.

For 2nd offences a score of 20 will be added

- c. **Ongoing non-compliance** - any conviction or civil penalty imposition for the same type of offence within four years of the previous instance (at least 3rd occurrence) irrespective of the locality to which the initial offence relates.

For ongoing offences a score of 30 will be added

c) The harm caused to the tenant – *This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.*

The severity of harm calculation above reflects the types of issues encountered however a premium score will be added for actual harm having occurred and the vulnerability of the tenant as set out in the Housing Health and Safety Rating System and in the table below;

Hazard	Vulnerable age group (age of occupant)
Damp and mould growth	14 and under
Excess Cold	65 or over
Excess Heat	65 or over
Carbon Monoxide	65 or over
Lead	under 3 years
Personal Hygiene, Sanitation and Drainage	under 5 years
Falls associated with baths etc.	60 or over
Falling on level surfaces etc.	60 or over
Falling on stairs etc.	60 or over
falling between levels	under 5 years
Electrical hazards	under 5 years
Fire	60 or over
Flames, hot surfaces etc.	under 5 years
Collision and entrapment	under 5 years
Collision and entrapment - low headroom	16 or over
Position and operability of amenities etc.	60 or over

A score of 10 will be added where the occupiers have suffered harm due to the defects noted.

A score of 3 will be added for each hazard or issue noted where the vulnerable age group are present

d) Punishment of the offender – A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.

Following the initial scoring calculation consideration will be given as to whether or not this element has been suitably met. If there is a decision to increase the fine level the reasoning behind the decision will be clearly set out in the Notice of Intent and any Final Notice.

e) Deter the offender from repeating the offence – The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

Following the initial scoring calculation consideration will be given as to whether or not this element has been suitably met. If there is a decision to increase the fine level the reasoning behind the decision will be clearly set out in the Notice of Intent and any Final Notice.

f) Deter others from committing similar offences – While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.

Following the initial scoring calculation consideration will be given as to whether or not this element has been suitably met. If there is a decision to increase the fine level the reasoning behind the decision will be clearly set out in the Notice of Intent and any Final Notice.

g) Remove any financial benefit the offender may have obtained as a result of committing the offence – The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

Following the initial scoring calculation consideration will be given as to whether or not this element has been suitably met. In particular the fine level must not be less than it would cost to undertake any necessary works contributing to the initial offence. The inspecting officer will evaluate the cost of rectifying the deficiencies based upon their knowledge and experience of the local building industry. A costing sheet will be produced and any fine must be at least 50% greater than this total up to a limit of £30K. If there is a decision to increase the fine level the reasoning behind the decision will be clearly set out in the Notice of Intent and any Final Notice.

Reductions

- a. **Level of compliance by perpetrator, their attitude in doing so and early payment**
- Where the decision has been taken that a prosecution is appropriate or subsequently a civil penalty notice should be issued, it is unlikely that the perpetrator could be deemed compliant however if there is a clear behavioural change and a will to ensure

future compliance, followed by a payment within the prescribed 28 days a reduction of 10% may be attributed to the total.

- b. **Financial hardship** - Local housing authorities should make an assessment of a landlord's assets and any income (not just rental income) they receive when determining an appropriate penalty. The perpetrator will have the opportunity to make representations following the service of the Notice of Intent and may decide to set out any financial hardship in those representations. It will be for the perpetrator to provide sufficient documented evidence of income when relying upon such representations. The Council reserves the right to request further information to support any financial claim, and where this is incomplete, appears to be inaccurate or is not sufficiently evidenced may determine that the representation should not be considered. It should be noted that due to the average value of property in the Teignbridge area and the upper limit of £30K associated with any civil penalty action, it is unlikely that perpetrators with multiple properties will be able to demonstrate financial hardship.

Examples

Person A has failed to comply with an improvement notice containing 6 hazards; Excess Cold, Fire Safety, Falls on Stairs, Electrical hazards, Damp and Mould and Entry by Intruders (2 at level 1, 2 at level 2 and 2 at level 3). They were prosecuted for failing to comply with an improvement notice 3 years ago at a different address. The occupant is a 67 year old lady who has recently been in hospital with pneumonia.

Scoring;

Severity of the offence = $2 \times 5 + 2 \times 3 + 2 \times 1 = 18$

Multiple households affected = 0

Culpability - Deliberate as failed to comply with notice = 20

Premium added for Licensable HMO = 0

Track record – 2nd offence in 4 years = 20

Harm – Pneumonia (excess cold) = 10

Vulnerability – excess cold, falls on stairs & fire $3 \times 3 = 9$

Total = 77

Penalty charge = £20K

Once the Notice of intent is served the perpetrator engages positively with the LA. They accept the charge and pay within 28 days.

Reductions = Compliance, attitude, acceptance and early payment –10%

Subtotal = £18K

Person B is the person managing a poorly converted HMO. During an inspection 8 contraventions of the HMO Management Regulations are noted. The most serious relate to fire safety provisions and the electrical installation. There are 3 at level 1, 2 at level 2 and 3 at level 3. The landlord was written to recently at another HMO to remind him of the need to comply with the management regulations at all of his properties.

Scoring;

Severity of the offence = $3 \times 5 + 2 \times 3 + 3 \times 1 = 24$

Multiple households affected = 10

Culpability - Reckless as failed to comply with HMO Management Regs = 15

Premium added for Licensable HMO = 0

Track record – 1st offence despite recent advice = 10

Harm – non demonstrated = 0

Vulnerability – 3 x over 60's living in the property (fire) $1 \times 3 = 3$

Total = 62

Penalty charge = £15K

Person C has failed to comply with an improvement notice requiring an excess cold hazard to be addressed. This is the 1st time the LA has had any engagement with the landlady who

claims that she has had difficulty organising the works and gaining access. A young family occupy the property.

Scoring;

Severity of the offence = $1 \times 3 = 3$

Multiple households affected = 0

Culpability - Deliberate unless evidence to the contrary = 20

Premium added for Licensable HMO = 0

Track record – 1st offence = 10

Harm – non demonstrated = 0

Vulnerability = 0

Total = 33

Penalty charge = £5K

Once the Notice of Intent is served Landlady makes representations suggesting that she would suffer financial hardship. She has 3 properties and the income is her only income. The cost of the works is estimated to be £3K

Person C has assets in the form of property from which she would be able to derive funds to pay the charge. No reduction is made.

In order not to undermine consideration g (above) the charge should be a minimum of £4500

Person D has failed to licence a licensable HMO. She was written to following an initial visit 1 month ago advising that a licence was necessary. The property needs some attention however no notices have been served and it is not considered that the HMO management regulations have been breached. There is no history of non-compliance in the past.

Scoring;

Severity of the offence = 0

Multiple households affected = 0 (despite housing multiple households, there is no hazard or issue affecting health or wellbeing)

Culpability - Reckless = 15

Premium added for failure to licence = 15

Track record – 1st offence = 10

Harm – non demonstrated = 0

Vulnerability = 0

Total = 40

Penalty charge = £5K

Person E has failed to licence a licensable HMO. During the initial inspection 8 contraventions of the HMO management Regulations are noted. The most serious relate to fire safety provisions and the electrical installation. There are 3 at level 1, 2 at level 2 and 3 at level 3. Despite being written to no action has been taken to rectify the issues or licence the property. There are elderly occupants who are the most vulnerable to hazards relating to fire safety. In the past 8 years, Person E has been prosecuted on 2 other occasions for a similar offences at neighbouring local authorities, the most recent within the last 4 years.

Scoring;

Severity of the offence = $3 \times 5 + 2 \times 3 + 3 \times 1 = 24$

Multiple households affected = 10

Culpability - Reckless for failing to comply with HMO Management Regulations and

Deliberate for failure to licence = 20

Premium added for failure to licence = 15

Track record – 3rd offence = 30

Harm – non demonstrated = 0

Vulnerability 2 x over 60's living in the property (fire) $1 \times 3 = 3$

Total = 102

Penalty charge = £30K

Scoring Chart

Score	Penalty Charge
1-10	£1,000
11-20	£2,000
21-30	£3,000
31-40	£5,000
41-50	£7,500
51-60	£10,000
61-70	£15,000
71-80	£20,000
81-90	£25,000
91-100+	£30,000

Rent Repayment Orders

The Housing Act 2004 introduced rent repayment orders to cover situations where the landlord of a property had failed to obtain a licence for a property that was required to be licensed, specifically offences in relation to licensing of Houses in Multiple Occupation. Rent repayment orders have now been extended through the Housing and Planning Act 2016 to cover a much wider range of offences.

In deciding whether to apply for a RRO, the Council must have regard to guidance issued by the Secretary of

State. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606654/Rent_Repayment_Orders_guidance.pdf

A rent repayment order is defined as an order requiring a landlord under a tenancy of housing to:-

- repay an amount of rent paid by a tenant, or
- pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy. (This also include housing benefit)

Rent repayment orders have been extended to cover the following situations:

- Failure to comply with an Improvement Notice under section 30 of the Housing Act 2004;
- Failure to comply with a Prohibition Order under section 32 of the Hosing Act 2004;
- Breach of a banning order made under section 21 of the Housing and Planning Act 2016;3
- Using violence to secure entry to a property under section 6 of the Criminal Law Act 1977; and
- Illegal eviction or harassment of the occupiers of a property under section 1 of the Protection from Eviction Act 1977.
- Breach of a banning order (not yet in force)

An application for a rent repayment order to the First Tier Tribunal can be made when the landlord has committed an offence, whether or not they have been convicted of one of the offences. Where the landlord has not been convicted of an offence the first tier tribunal must be satisfied beyond reasonable doubt that the landlord has committed an offence. The tenant may also make an application to the First Tier tribunal for a Rent repayment order.

Where a landlord has been convicted of an offence to which the rent repayment order relates, the First-tier Tribunal **must** order that the maximum amount of rent is repaid (capped at a maximum of 12 months). In all cases where a criminal prosecution has been secured Teignbridge Council will make an application to the First Tier Tribunal for a Rent Repayment order (subject to the availability of the relevant rental information)

Where a landlord has not been convicted of the offence to which the rent repayment order application relates, the following factors will be taken into account when considering if and how much rent a local housing authority should seek to recover:

- a. **Punishment of the offender.** Rent repayment orders should have a real economic impact on the offender and demonstrate the consequences of not complying with

their responsibilities. Factors that will be considered will include the conduct of the landlord and tenant, the financial circumstances of the landlord and whether the landlord has previously been convicted of similar offences;

- b. **Deter the offender from repeating the offence.** The level of the penalty will be set at a high enough level such that it is likely to deter the offender from repeating the offence;
- c. **Dissuade others from committing similar offences.** Rent repayment orders are imposed by the First-tier Tribunal and so the fact someone has received a rent repayment order will be in the public domain. Robust and proportionate use of rent repayment orders is likely to help ensure others comply with their responsibilities.
- d. **Remove any financial benefit the offender may have obtained as a result of committing the offence.** This is an important element of rent repayment orders: the landlord is forced to repay rent, and thereby loses much, if not all, of the benefit that accrued to them by not complying with their responsibilities.

Before applying for a rent repayment order, the local housing authority must give the landlord a notice of intended proceedings; State the amount that the local housing authority is seeking to recover; and invite the landlord to make representations within a period specified in the notice which must be at least 28 days. The local authority must consider any representations made within the notice period.

When seeking to recover rent through an application for a Rent Repayment Order, the Council will always seek to recover the maximum amount to be repaid (capped at 12 months). Where the conduct or the financial circumstances of the landlord provides mitigating factors, in which case the Rent Repayment Order may be for a lesser amount.

Where a landlord fails to comply with an improvement notice or offences in relation to the licensing of houses in multiple occupation, a civil penalty and a rent repayment order can be imposed.