

APPENDIX 1

Housing and Planning Act 2016 and Housing Act 2004

Determining the Penalty for Offences under the Housing Act 2004

The authority to issue a Financial Penalty and Rent Repayment Order came into force on April 6 2017 following the making of the ‘The Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017’ (SI 2017 No. 367) and ‘The Housing and Planning Act 2016 (Commencement No. 5, Transitional Provisions and Savings) Regulations 2017’. These provisions are contained in Part 2 Chapter 4 and Part 5 of the Housing and Planning Act 2016.

Introduction

Financial Penalty (FP)

The new powers to issue a Financial Penalty came into force on April 6 2017 under Chapter 4 and schedule 9 of the Housing and Planning Act 2016 (“2016 Act”). A FP can be issued to a landlord (includes other responsible persons) who commits one of the following Housing Act 2004 (“2004 Act”) offences.

- Section 30 – not comply with an improvement notice
- Section 72 (1) – not licence a house in multiple occupation
- Section 72 (2) – licensed HMO that is overcrowded
- Section 72 (3) – not comply with HMO licence conditions
- Section 95 (1) – not licence a private rented property (non-mandatory HMO)
- Section 95 (2) – not comply with a private rented property licence condition.

- Section 139 – overcrowding notice for HMO
- Section 234 – non-compliance a HMO Management Regulation

A new offence is created by section 21(1) of the 2016 Act; the breach of a Banning Order. The option to issue a FP is available. This power will not be available until later in 2017 with the current proposed commencement date; 1st October 2017.

The new section 249A of the Housing Act 2004 (“2004 Act”) allows the Local Housing Authority (LHA) to issue a FP limiting the maximum penalty at £30,000.

Rent Repayment Orders (RRO)

Rent Repayment Orders can already be applied for by a LHA or tenant under sections 73 and 96 of the 2004 Act for the following offences;

- Offence of failing to license an HMO under section 72 (1) of the 2004 Act;
- Offence of failing to license a licensable house under section 95(1), Part 3 of the 2004 Act.

A tenant can only make an application where the LHA had either secured a conviction *or* following a successful RRO award.

Part 2, Chapter 4 of the 2016 Act widened the option to make an application to the First Tier Tribunal (FTT) for a RRO. This came into force on April 6 2017. An application for a RRO can be made, within 12 month period, by a LHA or tenant against a landlord who commits one of the following Housing Act 2004 (“2004 Act”) offences (whether or not convicted) (*application for RRO - in addition to issuing a FP).

- Failure to comply with an Improvement Notice under section 30*,
- Failure to comply with a Prohibition Order under section 32(1),
- Offence of failing to license an HMO under section 72 (1)*,
- Offence of failing to license a licensable house under section 95(1) Part 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

A new offence is created by section 21(1) of the 2016 Act; the breach of Banning Order. The option to apply for a RRO is available. This power will not be available until later in 2017 with the current proposed commencement date; 1st October 2017.

Financial Penalties as an alternative to taking a prosecution.

The Government have introduced the FP as part of its campaign to clamp down heavily on criminal landlords; Ministers have made it very clear that they expected this power to be used robustly and they are not a lighter option to a prosecution. LHA have been given the authority to both determine whether to prosecute and the level of FP to impose; at up to £30,000. The level of penalty in the Magistrates Court is now unlimited for all offences where a FP could also be issued. All monies collected following the issue of a FP can be retained by the LHA to further its statutory functions in relation to private housing enforcement work.

The 2016 Act has also introduced the “Landlord Banning Order” (LBO) for the most serious and prolific offenders and the “Rogue Landlord Database” (RLD) of rogue landlords and property agents convicted of certain offences. Both elements are scheduled to come into force on 1 October 2017. Whilst a landlord issued with a FP* can be placed on the RLD (* requiring two FP within a 12 month period) a FP will not be a “Banning Order Offence” and so the issuing of a FP will preclude a LHA from seeking to apply to a FTT for a LBO.

The legislation does not permit LHA to both issue a FP and prosecute for the same offence. If a person has been convicted or is currently being prosecuted, the LHA cannot also impose a FP in respect of the same offence. Similarly, if a FP has been imposed, a person cannot then be prosecuted of an offence for the same conduct. A LHA must determine which route to follow

The Statutory Guidance says that a prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past. The first of five stages of ‘Setting the Penalty’ offers a means of Banding the Offence based on the seriousness of the offence, culpability of the landlord and impact on tenant and community. The five stages allow a wide consideration of the appropriateness of the penalty chosen including the means, and the table below acts as a guide. As part of reviewing whether to prosecute the LHA should consider the scope for working together with other LHA where a landlord has committed breaches in more than one local authority area.

The decision whether to prosecute will be considered for each offence, but the Council will regard prosecution as the preferred option for the higher banded offences and offences that the LHA determine fall at the threshold where it is proportionate to look to seek further redress, ultimately through the RLD and BO procedures. This approach will meet the Government’s aim of clamping down heavily on a criminal landlord or letting agents.

Banding the Offence to Determining the Action (using scoring matrix)

Band 1				Band 2				Band 3				Band 4			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Caution															
Financial Penalty – Rent Repayment Order optional															
				Financial Penalty and Rent Repayment Order Register on Rogue Landlord Database (2 FP within 12M period)											
								Prosecution and Rent Repayment Order Banning Order Offence – register on Database							
										Consider -application to Ban Landlord					

Setting the Financial Penalty (FP) for a Landlord.

A Local Authority must determine the level of FP that can be awarded against a landlord. Dover District Council has agreed this five stage process to provide a framework to assist with “*determining the level of fine*” which will ensure consistency, transparency and a fair assessment for all parties.

The process has taken into account the following documents;

- The statutory guidance issued by the Secretary of State under;
 - Section 41 (4) of the 2016 Act relating to making applications for Rent Repayment Orders.
 - Article 12 of the new schedule 13A in the 2004 Act.
- The Code for Crown Prosecutors which gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions.

3. Dover Districts Council Enforcement Policy (incorporating the Private Sector Housing Enforcement Policy)

Principles in the Statutory Guidance for Financial Penalties.

This explains that the FP should; reflect the severity of the offence, the culpability and track record of the offender, the harm caused to the tenant, the punishment of the offender, to deter the offender from repeating the offence, to deter others from committing similar offences and to remove any financial benefit the offender has from offending.

The five Stages in ‘Determining the Level of Financial Penalty’.

Stage 1: Banding the offence. The initial FP band is decided following the assessment of two factors. The scores are multiplied to give a penalty score which sits in one of four penalty bands;

- Culpability of the landlord; and
- The level of harm that the offence has had.

Stage 2: Amending the penalty band based on aggravating factors.

Stage 3: Amending the penalty band based on mitigating factors.

Stage 4: A Penalty Review. To review the penalty to ensure it is proportionate and reflects the landlord’s ability to pay.

Stage 5: Totality Principle. A consideration of whether the enforcement action is against one or multiple offences, whether recent related offences have been committed and ensuring the total penalties are just and proportionate to the offending behaviour

Stage1: Banding the level of Offence, (there are two factors to assess)

Banding the Offence

Banding the Offence	
<p>Factor 1. Culpability of Landlord (seriousness of offence and culpability)</p> <p>To consider as part of assessment</p> <ul style="list-style-type: none"> • the scale and scope of the offences, • what length of time did the offence continue for or repeat over? • what was the legislation being breached? • to what extent was the offence premeditated or planned, • whether the landlord knew, or ought to have known, that they were not complying with the law, • the steps taken to ensure compliance. • whether the landlord has previous relevant unspent housing offence related convictions (source National Landlord database), • the likelihood of the offence being continued, repeated or escalated. • the responsibilities the landlord had with ensuring compliance in comparison with other parties 	<p>Assessment: The landlord is to be assessed against four levels (low, moderate, high or significant) of culpability:</p>
	<p>Significant - Where the offender deliberately or intentionally breached, or flagrantly disregarded, the law.</p>
	<p>High – Landlord had actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken.</p>
	<p>Moderate - Offence committed through act or omission which a landlord exercising reasonable care would not commit</p>
	<p>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</p>
<p>Factor 2 Level of Harm (for tenant, community)</p> <p>To consider as part of assessment</p> <ul style="list-style-type: none"> • Circumstances or vulnerabilities or actual discrimination against the tenant or tenants. (age, illness, language, ability to communicate, young children, disabilities or in relation to any protected characteristic (Equalities Act 2010) • Tenant’s views about the impact that the offence has had on them. • The extent to which other people in the community have been affected, for 	<p>Assessment: The landlord is to be assessed against four levels (low, moderate, high or significant) of harm or consequence:</p>
	<p align="center">Significant.</p> <ul style="list-style-type: none"> ▪ Serious adverse effect(s) on individual(s) and/or having a widespread impact ▪ Significant risk of an adverse effect on individual(s) – including where persons are vulnerable ▪ Significant disregard of Regulator or legitimate industry role with significant deceit

<p>example, because of anti-social behaviour, excessive noise and damage to adjoining properties.</p> <ul style="list-style-type: none"> • was more than one other household affected, • The level of actual or potential physiological or physical impact on tenant(s) and third parties? • What regulation, legislation, statutory guidance or industry practice governed the circumstances of the offence? • has the level of trust been breached and have landlord actions impacted on sector? 	<p style="text-align: center;">High</p> <ul style="list-style-type: none"> ▪ Adverse effect on individual(s) (not amounting to significant) ▪ High risk of an adverse effect on individual(s) or high risk of serious adverse effect, some vulnerabilities. ▪ Regulator and/or legitimate industry substantially undermined by offender's activities ▪ Consumer/tenant misled
	<p style="text-align: center;">Moderate</p> <ul style="list-style-type: none"> ▪ Moderate risk of an adverse effect on individual(s) (not amounting to low risk) ▪ Public misled but little or no risk of actual adverse effect on individual(s)
	<p style="text-align: center;">Low</p> <ul style="list-style-type: none"> ▪ Low risk of an adverse effect on individual(s) ▪ Public misled but little or no risk of actual adverse effect on individual(s)

Scoring matrix to determine the level of fine.

Scoring Matrix for Financial Penalty					
FACTORS					
Level of Culpability (seriousness of offence)	Significant	4	8	12	16
	High	3	6	9	12
	Moderate	2	4	6	8
	Low	1	2	3	4
Level of Harm		Low	Moderate	High	Significant

Financial Penalty Banding and Penalty Scores

Penalty Band	Band 1				Band 2				Band 3				Band 4			
Penalty Score	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Financial Penalty	£250	£500	£750	£1000	£2000	£4000	£6000	£8000	£10,000	£12,000	£15,000	£18,000	£20,000	£23,000	£26,000	£30,000

Stage 2: Amending the penalty band based on aggravating factors.

Objective: to consider aggravating factors of the offence that may influence the FP. A significant aggravating factor may allow the FP to be increased by a FP point.

Example 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 (is conviction spent)?
- Motivated by financial gain, profited from activities.
- Deliberate planned concealment of activity resulting in offence and obstructive nature of landlord towards investigation
- Established evidence of longer term impact on the (wider) community as a consequence of activities.
- Role within the private rented sector and familiarity with responsibilities and current level of responsibility with managing and letting private rented properties.
- Refusal to accept offer of, or respond to LHA advice regarding responsibilities, warnings of breach or learned experience from past action or involvement of LHA or other Regulatory Body.
- Any further factor that can be deemed of sufficiently aggravating nature that is not covered above or within the culpability and harm banding factors.

Stage 3: Amending the penalty band based on mitigating factors

Objective: to consider any mitigating factors and whether they are relevant to the offence. A significant mitigating factor may allow the FP to be decreased by a FP point.

Example mitigating factors:

- No evidence of previous convictions or no relevant/recent convictions
- Voluntarily steps taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of maintaining property and compliance with legislation, statutory standards and industry standards
- Self-reporting, co-operation and acceptance of responsibility
- Mental disorder or learning disability, where linked to the commission of the offence
- Serious medical conditions requiring urgent, intensive or long-term treatment where linked to the commission of the offence.
- Age and/or lack of maturity where it affects the responsibility of the offender
- Any further factor that can be deemed of sufficiently mitigating nature that is not covered above or within the culpability and harm banding factors.

Stage 4: A review of the financial penalty to ensure that the case can be made and that the chosen approach is proportionate:

Step 1: to check that the provisional assessment of the proposed FP meets the aims of the Crown Prosecutions sentencing code:

- Punishment of offender
- Reduction of/stopping crime
- Deterrent offender or for other potential offenders
- Reform of offender
- Protection of public
- Reparation by offender to victim(s)
- Reparation by offender to community
- Remove any financial benefit the offender may have obtained as a result of committing the offence.

Step 2: to check that the proposed FP is proportionate and will have an appropriate impact.

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 by making an adjustment to the financial penalty band. The general presumption should be that a FP should not be revised downwards simply because an offender has (or claims to have) a low income. Similarly, if a landlord with a large portfolio was assessed to warrant a low FP, the FP might require adjustment to have sufficient impact, and to conform to sentencing principles.

Part 6, Schedule 16 of the Crime and Courts Act 2013 permits the value of any assets owned by the landlords, e.g. rental property portfolio, to be taken into account when making an assessment and setting the level of penalty. The FP is meant to have an economic impact on the landlord, removing reward for criminal activities and acting as a deterrent to bad practice.

In setting a financial penalty, the LHA may conclude that the offender is able to pay any financial penalty imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the LHA such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. Where the LHA is not satisfied that it has been given sufficient reliable information, the LHA will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case which may include the inference that the offender can pay any financial penalty.

Process: The offender will be asked to submit relevant information as part of the process and the request for financial information will be incorporated into the notes on the "notice of intended action", the first step with issuing a FP notice.

Stage Five: Totality principle

Objective: Where the offender is being considered to be issued with more than one financial penalty, the LHA should consider the Sentencing Council guidance “Offences Taken into Consideration and Totality - Definitive Guideline”. Where separate financial penalties are imposed the LHA must be careful to ensure that there is no double-counting. Section 249A of the 2004 Act (amended) states that ‘only one financial penalty under this section may be imposed on a person in respect of the same conduct’. The 2016 Act does permit the LHA to issue a FP and also apply for a RRO. Where the FP is issued the FTT must award the maximum RRO.

“The total financial penalty is inevitably cumulative”. The LHA 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 LHA. The LHA 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 LHA should consider how to reach just and proportionate financial penalties. There are a number of ways in which this can be achieved.

Examples:

- 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 (management offences or breach of conditions), 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 LHA 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 LHA should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be passed.
- Where a LHA has determined that it will apply for a RRO within the 12 month deadline the FP should be reviewed to ensure the total penalty is proportionate as guided by Stage 4. The FP may be adjusted accordingly knowing that, *if successful*, the RRO award will be the maximum.

Setting the Rent Repayment Order (RRO) for a Landlord.

A tenant or a LHA may individually apply to a FTT for a RRO award in respect of their rent payments within 12 months of an offence. Under section 73 (7)(iii) and section 96 (7)(iii) of the 2004 Act and section 42 (2)(b) of the 2016 Act; the LHA is required to stipulate, in the notice of intended proceedings, how much the order for repayment of rent is. The level of rent relates to a defined period of 12 months in the period leading up to the offence or during the 12 month period whilst the offence was being committed. The local investigation will determine the levels of rent paid. A LHA has no control over the level of rent a tenant may apply for.

The Government have advised that the RRO should ensure it addresses the following factors; punishment of the offender, the recipient of any recovered rent, deter the offender from repeating the offence, deter others from committing similar offences and remove any financial benefit the offender may have obtained as a result of committing the offence. LHA must have regard to the statutory guidance issued under section 41(4) of the 2016 Act when exercising their functions in respect of RRO.

Where a conviction has been achieved the LHA will apply to the FTT for the maximum rent repayment, within a 12 month period. Section 46 of the 2016 Act states this is the level that must be awarded to either a tenant (except for section 72(1) or 95(1) offences) or a LHA where the landlord has been convicted or a FP issued in relation to that offence. In these cases there is no discretion within "Determining the Penalty".

If there is no conviction or a FP is not issued then the Council will apply to the FTT for the maximum rent repayment when a RRO is applied for. . If a FP is to be issued, the penalty point/ banding first determined will be reviewed under Stage 5 to ensure that the Totality Principle is met. This aims to ensure that the total penalties are just and proportionate to the offending behaviour.

The legislation places the ultimate decision for determining the financial award under a Rent Repayment Order with the FTT in line with section 74 and 97 of the 2004 Act and sections 44 and 45 of the 2016 Act. The FTT must take into account; the conduct of the landlord, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of an offence to which this Chapter (Part 2 Chapter 4 of the 2016 Act) applies. It is felt that not making the application for the maximum award would undermine the discretion of the FTT.

Appeals

A person issued with a FP has a right of appeal to the First Tier Tribunal (Para 10 of Schedule 13A of the 2016 Act)

A person placed on the DRL has a right of appeal to the First Tier Tribunal (Section 32 of the 2016 Act).

A person aggrieved by the decision of the FTT in relation to the making of a rent repayment order may appeal under the provisions of Part 2 Chapter 5 of the 2016 Act.

NOTE

Financial Penalty Process and Right for Person to make Representations..

Before imposing a financial penalty on a person under section 249A of the 2004 Act the LHA must, within 6 months of the date of the offence, give the person notice of the authority's proposal to do so (a "notice of intent"); incorporating why and the level of fine. A person in receipt of the notice of intent can make written representations within 28 days. Subsequently the LHA must decide whether to issue a financial penalty and the amount and to do so must issue a final notice.

Similarly, section 42 of the 2016 Act requires that the LHA must first serve a notice of intended proceedings on the landlord. He can then make written representations within 28 days of the date of service to the LHA about the proposed RRO

The landlord has the right to make representations and any representation must be duly considered. The LHA will provide a response within 21 days (no statutory time period) with a decision notice stating whether the penalty will be withdrawn, varied or upheld.

All communications for representations made against the intended FP or RRO are to be written and sent to:

**Private Sector Housing Manager
Dover District Council
White Cliffs Business Park
Dover
CT16 3PJ**

Telephone: 01304 872397

email to: privatehousing@dover.gov.uk