

APPENDIX 1

LONDON BOROUGH OF MERTON

HOUSING AND PLANNING ACT 2016

CIVIL PENALTIES AND RENT REPAYMENT ORDERS

DRAFT (Ver May 2019)

Civil Penalties Policy 2018 and Rent Repayment Orders (RROs)

1. Introduction

Merton Council is committed to improving standards in the private rented sector, ensuring that Landlords are aware of the standard of property they should be offering, and that all properties are well managed, properly maintained, habitable and safe.

Merton Council recognises that the Government is committed to tackling rogue Landlords, having introduced measures under the Housing and Planning Act 2016. Merton Council is committed to utilising all available powers including Civil Penalties to improve standards across the private rented sector.

Merton Council acknowledges the importance of good landlord performance, i.e. those who do provide decent, habitable and safe homes for our residents.

Local Housing Authorities have the option to use these new powers alongside existing powers contained in the Housing Act 2004.

Since 6th April 2017 Local Housing Authorities have had the power to impose civil penalties of up to £30,000 on individuals and organisations acting for or on behalf of private sector landlords as an alternative to prosecution for certain offences under the Housing Act 2004.

This policy contains information about civil penalties and how Merton Council intends to use them. It takes into account the statutory guidance that has been issued by Government under Schedule 9 to the Housing and Planning Act 2016.

2. Purpose of the Policy

Local Housing Authorities are expected to develop and enforce their own policy on when to prosecute and when to issue a civil penalty, and how they will decide on the size of each penalty.

The policy will outline the circumstances in which Merton Council will consider the use of a civil penalty as opposed to prosecution, and how it will determine the size of each civil penalty.

This policy is designed to ensure that Merton Council adopts a transparent, consistent and fair approach to how the new powers will be used. It is the view of officers that having such a policy will play a significant role in assisting the Council in tackling poor standards within the private rented sector, by robustly dealing with rogue landlords.

Offenders who are issued with a civil penalty have a right of written representations to the Council, and then if still dissatisfied, the right of appeal to the First-tier Tribunal (Property Chamber) where the soundness of the decision to impose a fixed penalty can be rigorously scrutinised.

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 can consider whether to prosecute or issue a civil penalty as opposed to prosecution.

London Borough of Merton

3. Housing and Planning Act 2016

The purpose of this policy is to set out the framework within which decisions will normally be made with regard to applying for a rent repayment order (RRO) and to issuing civil penalties in relevant cases. The policy may be departed from where the circumstances so justify. Each case will be dealt with on its own merits.

4. RRO's

ARRO is defined in section 40(2) of the Housing and Planning Act 2016 as an order requiring the landlord under a tenancy of housing to:

- a) Repay an amount of rent paid by a tenant, or
- b) Pay a local housing authority an amount in respect of a relevant award of Universal Credit (UC) (to any person) in respect of rent under the tenancy.

Please note: The reference to Universal Credit (UC) includes Housing Benefit (HB) under Part 7 of the Social Security Contributions and Benefits Act 1992 pending its abolition. The Council as the local housing authority has a duty under section 48 of the Housing and Planning Act 2016 to consider applying to the First-tier Tribunal for a Rent Repayment Order in cases where an offence from the list below has been committed.

Offences for which a RRO can be obtained.

- Failure to comply with an improvement notice, contrary to section 30(1) of the Housing Act 2004.
- Failure to comply with a prohibition order contrary to section 32(1) of the Housing Act 2004.
- Being a person having control of or managing a House in Multiple Occupation (HMO) which is required to be licensed under Part 2 of the Housing Act 2004 but which is not so licensed, contrary to section 72(1) of the Housing Act 2004.
- Being a person having control of or managing a house which is required to be licensed under Part 3 of the Housing Act 2004 but is not so licensed, contrary to section 95(1) of the Housing Act 2004.
- Using violence to secure entry to a property, contrary to section 6 (1) of the Criminal Law Act 1977.
- Illegal eviction or harassment of the occupiers of a property, contrary to Section 1(2), (3) or (3A) of the Protection from Eviction Act 1977.
- Breach of a banning order made under Section 21 of the Housing and Planning Act 2016.

The offences under the Housing Act 2004 must relate to hazards within occupied premises and not common parts only. The offence must have been committed on or

after 6th April 2017. A RRO can applied for whether or not the landlord has been convicted.

5. Evidence of conviction.

Where there has been a conviction, a certificate of conviction will suffice to establish commission of the specified offense. In the absence of a conviction, the First-tier Tribunal will need to be satisfied, beyond reasonable doubt, that the landlord committed the specified offence (see section 4 above. Officers shall have regard to the Crown Prosecution Service Code for Crown Prosecutors in order to establish whether there is likely to be sufficient evidence to secure a conviction and therefore to establish the necessary burden of proof to the First-tier Tribunal.

6. Statutory Guidance

In deciding whether to apply for a RRO, the council must under section 41(4) of the Act have regard to any guidance issued by the Secretary of State.

7. Assistance

Council officers may offer advice to tenants who are eligible to claim an RRO in respect of rent paid themselves.

8. Considerations for decisions as to whether to apply for a RRO.

Council officers are granted powers and duties to deliver proportionate and targeted enforcement. It is vital that regulatory resource is used consistently and to best effect by ensuring that resources are targeted on addressing the highest risks.

The objective of an application for a RRO is not only to issue a punishment as a consequence of non-compliance with the law, but also to deter the offender and others in a similar position for repeat offences.

If a conviction for the offence has been obtained then it is normally expected that a RRO will be pursued where the Council have paid Housing Benefit, or the housing element of Universal Credit. The Tribunal must, in these cases, order that the maximum amount (12 months) of rent be repaid in these circumstances.

The following matrix should be followed to help determine whether to pursue a RRO and the amount of rent to reclaim.

No.	Question	Yes or No
1.	Has the offender been prosecuted and convicted of a relevant offence in Court?	If yes, make an RRO application. If no go to step 2.
2.	Has evidence been obtained from Housing or Benefits systems and/or Universal Credit to confirm that Housing Costs has been paid by LBM/DWP over the 12 months?	If no – no case for RRO. If yes, proceed to step 3.
3.	Does the LA have sufficient evidence to prove ‘beyond reasonable doubt’ that a relevant offence has been committed? Is the evidence reliable? Is there no credible defence?	If no – case closed, do not pursue. If yes, proceed to step 4.

4.	Is it in the public interest to proceed to apply for an RRO? (consider the level of harm that has been caused).	If no case closed, do not pursue. If yes, proceed to step 5.
5.	Is pursuing an RRO proportionate to the offence?	If no – case closed, do not pursue. If yes, proceed to step 6.
6.	Does the offender have any previous convictions?	If yes – proceed to RRO. If no, proceed to step 7.
7.	Where no previous offence – is the issuing of a RRO likely to deter from future offences?	If yes – proceed to RRO. If no, consider closing and not pursuing.
8.	<u>RRO</u> Would the issuing of a RRO cause substantial hardship to the offender, and are there mitigating circumstances to suggest the LA should not proceed?	If Yes, complete notes to justify reason not to pursue. If no, proceed to RRO application.
9.	Are there any other factors that would indicate the Council should not proceed with the issuing of the RRO.	If Yes, complete notes to justify reason not to pursue. If no, proceed to RRO application.

9. Housing Offences Covered by Civil Penalties

Sections 23 and 126 and Schedule 9 to the Housing and Planning Act 2016 gives powers to local housing authorities to impose a civil penalty as an alternative to prosecution for certain housing offences.

The specified housing offences where a civil penalty can be issued are detailed below:

- Section 30 of the Housing Act 2004 – Failure to comply with an improvement notice.
- Section 72 of the Housing Act 2004 – Offences in relation to licensing of Houses in Multiple Occupation
- Section 95 of the Housing Act 2004 – Offences in relation to licensing of houses under Part 3 of the Act.
- Section 139 of the Housing Act 2004 – Offences of contravention of an overcrowding notice.
- Section 234 of the Housing Act 2004 – Failure to comply with management regulations in respect of Houses in Multiple Occupation.
- Section 21 of the Housing and Planning Act 2016 – Breach of a banning order.

10. Principles of Civil Penalties

Although the maximum civil penalty can be issued is £30,000, it is for the Council to determine the level, having regard to individual circumstances.

Civil penalties can only be issued as an alternative to prosecution. Where a landlord or letting agents has been prosecuted for any offence, a civil penalty cannot be issued for that offence, and conversely if a civil penalty has already been issued a prosecution for the same conduct cannot follow.

Although only one civil penalty can be issued for each of the four offences listed under Section 9 above, this is not the case for section 234 of the Housing Act 2004 as here a civil penalty can be issued for each separate breach of the HMO management regulations.

Where a letting agent and landlord have committed the same offence the Council is able to impose a civil penalty on both parties as an alternative to prosecution, although the level of penalty imposed may differ dependant on individual circumstances.

11. Determination of Civil Penalty Fines and Burden of Proof.

The same standard of proof is required for a civil penalty as that of a prosecution. The Council must be able to demonstrate beyond reasonable doubt that an offence has been committed by the alleged person before a civil penalty can be issued as an alternative to prosecution. The Council must satisfy itself that there would be a realistic prospect of conviction given the evidence available.

Due regard must be given to any potential offences available, and in certain circumstances, the Council may decide to conduct an interview under caution in accordance with the Police and Criminal Evidence 1984 Codes of Practice to assist in determining whether the issue of a civil penalty is appropriate or not.

A civil penalty should not be seen as a lesser option in comparison to prosecution. The level of fine should be set sufficiently high as to have a real impact economically upon the offender, whilst also clearly demonstrating the consequences of not complying with their responsibilities.

The Council will consider civil penalties for all landlords/lettings agents that are in breach of one or more of the sections of the Housing Act 2004, listed in section 9 above. Enforcement action will be considered on a case by case basis.

This section sets out how the Council will determine the appropriate level of fine in each case. The agreed fine should take into consideration the severity of the offence, the offenders income, and any previous history.

Factors taken into account when deciding the level of penalty are detailed below. The factors detailed below are taken from Statutory Guidance.

- The severity of the offence.
- The culpability and track record of the offender.
- The harm caused to the tenant.

- The punishment of the offender.
- Whether it will deter the offender from repeating its offence.
- Whether it will deter others from committing the offence.
- Whether it will remove any financial benefit the offender may have obtained as a result of committing the offence.

12. Process for determining the level of penalty issued.

The Local Housing Authority must consider the Code for Crown Prosecution when determining what action will be most appropriate to take. The Code has two stages: the evidential stage and the public interest stage.

12.1 Determining value of civil penalties to be imposed

Failure to comply with an Improvement Notice (Section 30) (note 1)	£
1 st offence	5,000
2 nd offence by same person/company	15,000
Subsequent offences by same person/company (note 2)	25,000
Premiums (use all that apply)	
Large housing portfolio (10+ properties) (note 3)	+2,500
Multiple Category 1 or high Category 2 Hazards (note 4)	+2,500
Vulnerable occupant and/or significant harm occurred as result of housing conditions (note 5)	+2,500
Perpetrator demonstrates Income to be less than £440/week (note 6)	-50%

Offences in relation to licensing of HMOs under Part 2 of the Act (Section 72) (note 1)	£
Failure to obtain property Licence (section 72)	10,000
Subsequent offence by same person/company (note 2)	20,000
Premiums (use all that apply)	
Breach of licence conditions – Section 72(2) and (3) – Per licence breach	5,000
Large housing portfolio (10+ properties) (note 3)	+2,500
Vulnerable occupant and/or significant harm occurred as result of housing conditions (note 5)	+2,500

Perpetrator demonstrates Income to be less than £440/week (note 6)	-50%
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Offences in relation to overcrowding notices (section 139) (note 1)	£
1 st relevant offences	2,500
Subsequent offence by same person/company (note 2)	10,000
Premiums (use all that apply)	
Large housing portfolio (10+ properties) (note 3)	+2,500
Vulnerable occupant and/or significant harm occurred as result of overcrowding (note 5)	+2,500
Perpetrator demonstrates income to be less than £440/week (note 6)	-50%
Knowingly breach of notice (note 7)	+2,500

Failure to comply with management regulations in respect of HMOs (Section 234) (note 1)	£
Relevant offences (per regulation)	1,000
Subsequent offences by same person/company (note 2)	+2,500
Premiums (use all that apply)	
Large housing portfolio (10+ properties) (note 3)	+2,500
Vulnerable occupant and/or significant harm occurred as result of housing conditions (note 5)	+2,500
Perpetrator demonstrates income to be less than £440/week (note 6)	-50%

Note 1 – Offences that may be dealt with by way of imposing a financial penalty

The starting point for a financial penalty is based on the number of previous convictions or imposition of a financial penalties for the same type of offence in the previous four years.

After the starting point has been determined, relevant Premiums are added to the starting amount to determine the full financial penalty to be imposed.

No single financial penalty may be over £30,000. Where the addition of all relevant premiums would put the penalty above the maximum, it shall be capped at £30,000.

Note 2- 2nd and subsequent offence by same person/company

The council will take into account any such convictions or financial penalties irrespective of the locality to which the offence relates.

Note 3 – Large housing portfolio (10+ properties)

The premium is applied where the perpetrator has control or manages 10 or more residential properties. It is considered appropriate to set a higher penalty for landlords who operate a large number of properties as they are effectively operating a business and in failing to comply with statutory provisions are gaining a competitive advantage over law-abiding landlords.

For the purpose of this premium, the definition of a person having control and person managing are as defined by Housing Act 2004 Section 263.

Note 4 – Multiple Category 1 or high Category 2 Hazards

This premium will apply where the failure to comply with the Improvement Notice relates to three or more Category 1 or D or E Category 2 Hazards associated with different building deficiencies. Where two hazards are present but relate to the same property defect, they are counted as one hazard for purposes of this calculation.

The purpose of this premium is to reflect the severity of the offence, in that several defects have not been addressed, and to ensure there is no financial benefit in not complying with a notice with multiple works.

Note 5 – Vulnerable occupant and/or significant harm occurred as result of housing

This premium will be applied if the property is occupied by a vulnerable person or if significant harm has occurred as a result of the housing conditions. A statement may be obtained from the tenant relating to harm caused.

A vulnerable person is someone who forms part of the identified vulnerable group for each hazard under the Housing Health and Safety Rating System. Or an occupant or group of occupants considered by the Council to be at particular risk of harm that the perpetrator ought to have had regard to. The table below identifies the vulnerable group for each hazard.

Significant harm is defined as physical or mental illness or injury that corresponds to one of the four classes of harm under the Housing Health and Safety Rating System Operating Guidance.

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

Note 6 – Perpetrator demonstrates income to be less than £440/week

This premium will be applied after all other relevant premiums have been included and if applicable will reduce the overall financial penalty by 50%.

To be applicable, the person served by the Notice of Intent must provide sufficient documented evidence of income.

The figure of £440/week is to be calculated after omission of income tax and national insurance. The threshold for such a reduction was determined by reference to the Magistrates Court sentencing guidelines and could be amended as necessary to take into account inflation etc.

The Council reserves the right to request further information to support any financial claim, and where this is incomplete or not sufficiently evidenced may determine that the premium should not be applied.

Note 7 – Knowingly breach of notice

This premium will be applied where, the person to which the financial penalty applies, acted in a reckless manner in not complying with the overcrowding notice.

12.2 Factors to be considered when deciding whether to pursue a civil penalty

Questions	Yes/No
1. Does the seriousness of the offence warrant prosecution? Is a banning order required? Does the Landlord have a history of previous convictions?	If yes to any or all of these, prosecutions should be considered.
2. Does the Council have sufficient evidence to prove “beyond reasonable doubt” that a relevant offence has been committed. Is the evidence reliable? Is there credible defence?	If no, case closed. If yes, proceed to step 3.
3. Is it in the public interest to proceed to apply for a civil penalty? Consider the level of harm that has been caused.	If not, case closed. If yes, proceed to step 4.

4. Is pursuing the civil penalty proportionate to the offence?	If no, case closed. If yes, proceed.
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