CITY OF WESTMINSTER

Private Sector Housing & Lettings Enforcement Policy

Safety, Standards & Lettings

AUGUST 2021

Contents

Private Housing & Lettings Enforcement Policy

Safety, Standards & Compliance

1.0 POLICY OVERVIEW

The Council is committed to ensuring that all our homes in Westminster are safe, in good condition, are let fairly and are well managed. It is further committed to protecting tenants and landlords by ensuring that all Property Agents in Westminster are compliant with all relevant regulatory requirements. This policy sets out how we will work with our owner-occupiers, lettings agents, landlords, property managers and housing providers to ensure they are compliant with the law, the decision-making process for sanctions and the level of penalty we may impose on those who breach their responsibilities and risk resident's safety. When considering the culpability of letting agents, attention is drawn to the professional status of the sector, as well as the extensive guidance provided by and available from industry bodies, and requirements for compliance from statutory redress schemes.

This policy includes:

- A summary of Landlord, Letting Agent & Property Management Agent's Responsibilities
- Our Enforcement approach and how we determine a level of financial penalty for non-compliance
- Our commitment to the National and London Rogue Landlord and Agent database

If you are a tenant and wish to discuss concerns you may have about the standards or compliance of your landlord, please contact our Tenancy Relations Team on 0207 641 1000 (Option 4) or email HSSTenancyRelations@wcchss.org.uk. Alternatively, tenants and landlords with concerns about your property agent should contact the National Consumer Advice Helpline on 0808 223 1133.

2.0 INTRODUCTION

2.1 The expansion of the Private Housing Market and need for enforcement

London's population has grown rapidly over the last decade to a record 9.0 million people by mid-2019. The proportion of households renting privately has also increased significantly from around 15% at the turn of the century to 27% by 2019 and of London's 3.6 million households almost a million are now renting privately, representing more than a fifth of all privately rented households in England.

London has a higher rate of population "churn" than other areas due to its higher levels of outward and inward migration, and more transient population. The high influx of working age population means that London has a younger population than England as a whole.

Occupancy levels are also particularly high in the private rented sector, with average floor area per person falling from 31m^2 to 25m^2 over the past 25 years and is now less than for any other tenure. At the same time, average private rents in London have risen by 43% since 2005, by far the largest increase of any English region.[1] In the year to March 2020, the median rent for a privately rented home in London was £1,425 per calendar month, more than twice as high as the median in England as a whole (£700).

Westminster has the largest private rented sector in England with an estimated 52,700 properties[2] making up 43% of all housing. It has grown over the last decade, both in numbers and as a proportion of all housing in the city – making up 40% of the stock in 2011, with 41,900 properties. Rents in Westminster are some of the highest in London, behind only Kensington and Chelsea and the City of London. The cheapest room in a shared house can cost around £160 per week and a median rent for a one-bedroom home is 41% higher than the London average – rising to 65% higher for a two-bedroom home. The way in which people rent accommodation has also changed significantly with both regulated and unregulated online platforms offering easy access to rooms in multiple occupancy properties.

Modelling predicts that there are close to 10,000 properties defined as Houses in Multiple Occupation (HMO's) in Westminster. HMO's have historically provided valuable cheaper accommodation for those whose housing options are limited, often for vulnerable residents. However, a growing number of professionals and migrant workers now rely upon this type of accommodation. The appeal of social living has increased in recent years with a substantial increase in the number of people in their 30's and 40's living in shared accommodation.

We recognise that the majority of this housing is in good condition, let fairly and are well managed, however conditions in the private housing market tend to be less satisfactory than any other occupancy type. There are landlords and agents who exploit tenants and rent sub-standard, overcrowded and potentially dangerous accommodation. This can have an impact on not just the tenants but also neighbours and the local community. The risk of overcrowding and fire can also be greater, with many converted buildings not originally designed for multiple occupation.

With the expansion of the private rented sector, a large letting agent industry has also grown in the Capital which accounts for around 40% of all letting agents in England. It is estimated that there are 10,000 such agents, now operating in London. There is also evidence of widespread non-compliance with legal requirements in the sector. Recent (2018-19) enforcement data from the London boroughs suggests that only around a half (54%) of London letting agents were fully compliant with the law when inspected by Trading Standards Officers.

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[1] *Office for National Statistics ("ONS") Experimental Index of Private Housing Rental prices*

[2] *MHCLG estimate*

2.2 Legal and Policy Context

This policy is not statutory guidance. It has been prepared by reference to:

- Applicable legislation
- Statutory and non-statutory guidance
- Regulators' Code
- Code for Crown Prosecutors
- Westminster City Council's Corporate City for All Strategy
- Westminster City Council's Corporate Enforcement Policy
- Westminster City Council's Private Rented Sector Strategy 2020-24
- Westminster City Council's Homelessness Strategy
- Westminster City Council's Houses in Multiple Occupation Licensing Policy

The Council sets out below how we will determine when to issue a civil penalty and how we will determine the penalty amount. To do this, we have had regard to statutory guidance issued by the Ministry of Housing, Communities and Local Government (MHCLG).

- Civil penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities
- Improving the Private Rented Sector and Tackling Bad Practice: A Guide for Local Authorities
- Tenant Fees Act Guidance
- Client Money Protection Guidance

This guidance sets out the factors that we must consider as part of the financial penalty setting process. In preparing this policy the authority has also considered the extensive body of First and Upper Tier Tribunal rulings.

2.3 Review of the policy

The policy will be kept under continual review and updated and amended as required, including revised updates to legislation and any review of enforcement approach and penalty charges.

3.0 LANDLORD AND LETTING AGENT RESPONSIBILITIES

Landlords and letting agents must be aware of, understand, and fulfil their respective rights and responsibilities in order to maintain and improve housing and trading standards. Responsibilities are wide ranging and are covered across an array of relevant legislation. It is for the landlord and letting agent to ensure they are familiar with them. In support of this the government has outlined rights, responsibilities and consequences for Landlord and tenants into a single guide:

- Landlord and tenant rights and responsibilities in the private rented sector (MHCLG .gov.uk)

In short, a summary of responsibilities include (not an exhaustive list):

- most repairs within the property
- ensuring the property is safe and free from any hazards
- carrying out any work within a reasonable timeframe
- ensuring the property is fit for human habitation throughout the tenancy term (unless tenants have a fixed term tenancy which began before 20 March 2019)
- complying with any planning or building controls
- licensing HMOs and complying with the conditions of their licence
- ensuring any charges and fees are transparent
- ensuring fees and other relevant information relating to redress and Client Money Protection are displayed on websites and in offices as required
- ensuring no prohibited tenant fees are required
- registering with relevant redress and client money protection schemes if required
- Avoid the use of misleading statements or actions and avoid making false representations
- Ensuring that all relevant material information is disclosed at the earliest appropriate stage

4.0 ENFORCEMENT APPROACH

The Council aims to foster and encourage compliance with responsibilities, and to empower landlords and letting agents to maintain the high standards that most already uphold. However, some landlords and letting agents rent out unsafe and substandard accommodation to their tenants, and some do so knowingly and with criminal intent.

Complaints about standards, safety and compliance will be prioritised on the presenting level of risk to residents.

In line with the Corporate Enforcement Policy, the Council in most cases will take a stepped approach to enforcement. **This means where there is a lower risk of harm and minor breaches of responsibilities, the Council will in most circumstances notify the landlord, letting agent, or property manager of the breach through advisory or warning letters or notices and provide a reasonable time period to comply.** The council may also sign post to other routes for resolution where appropriate. However, the type of enforcement taken will vary according to the legislation being applied - in some cases, **taking enforcement action is a statutory duty, provided certain criteria are met.**

Where these approaches fail, or if there is a persistent or deliberate failure to comply, act unreasonably or where breaches are likely to cause significant harm, our officers will use the full range of enforcement options available to them under the relevant legislation to achieve compliance to protect those at risk. In the most serious contraventions possible action will include prosecution.

The type of enforcement action pursued is always considered on a case-by-case basis, based on its own merits and having regard to specific government guidance where applicable. Following consideration of the specific circumstances of the particular case the most appropriate enforcement option will be applied accordingly. In every case enforcement seeks to:

- Promote and achieve sustained compliance with the law
- **Ensure that landlords and letting agents take action to deal immediately with serious risks or harm or potential consumer harm**
- Ensure that landlords and letting agents who breach legislative requirements are held to account and fair and effective penalties are imposed where appropriate

The Council may become aware of the need to investigate, or take enforcement action in the following ways:

- in response to a request for service or complaint
- through carrying out a programmed inspection
- analysis of intelligence - this may involve scrutinising Council tax information, tenancy deposit information and intelligence shared between other local authorities and organisations such as HMRC, Police, GLA and London Fire Brigade.
- through web searches and observations made by Council Officers when conducting routine visits.

Enforcement Action in respect of Private Housing and Lettings related work will be carried out by Housing, Environmental Health or Trading Standards teams. - Officers carrying out enforcement will be qualified to do so through relevant qualifications and/or relevant training.

5.0 FINANCIAL PENALTIES

5.1 Offences subject to a Financial Penalty

The Council may choose to impose a financial penalty on a landlord or property manager, up to a maximum of £30,000, as an alternative to prosecution for the following housing offences:

- failure to comply with an improvement notice (section 30 Housing Act 2004)
- offences in relation to licensing of houses in multiple occupation, commonly referred to as HMOs (section 72 Housing Act 2004)
- offences in relation to licensing of houses under Part 3 of the Act (section 95 Housing Act 2004)
- offences of contravention of an overcrowding notice (section 139 Housing Act 2004)
- failure to comply with Management Regulations in respect of houses in multiple occupation (section 234 Housing Act 2004)
- breach of a banning order (section 21 of the Housing and Planning Act 2016)
- failure to comply with the requirements of a Remedial Notice (Smoke and Carbon Monoxide Alarm Regulations 2015)
- failure to comply with the Electrical Safety Standards Regulations 2020
- failure to comply with Minimum Energy Efficiency Standards Regulations 20202

The Council may also choose to impose a financial penalty on a letting agent or property management business for the following offences:

- failure to be a member of a government approved redress scheme (Redress Schemes Order 2014)
- failure to publicise details of their relevant fees and other required information (section 83-88 Consumer Rights Act 2015)
- Letting Agents (or Landlords) requiring a person to make a '*prohibited payment*' in relation to a tenancy agreement (Tenant Fees Act 2019)
- failure to be a member of a Government approved or designated Client Money Protection Scheme.[3] (The Client Money Protection Schemes for Property Agents Regulations 2019)
- failure to comply with transparency requirements of Client Money Protection Scheme The Client Money Protection Schemes for Property Agents Regulations 2019)

5.2 Decision making process

We will assess each case carefully to identify and apply the appropriate sanction dependent on the severity of the breach or offence and any other relevant circumstances. **The same criminal standard of proof is required for certain civil penalties as for the prosecution of a criminal offence in a Criminal Court, and in such cases, we need to be satisfied and able to demonstrate beyond reasonable doubt that an offence has been committed. To assist us to do this, we will refer to the Code for Crown Prosecutors.** The Code has two stages:

(1) acquiring enough evidence against the defendant
(2) considering whether it is in the public interest to bring the case to court

Once satisfied that the conduct amounts to a relevant 'offence', we will decide on a case-by-case basis whether to prosecute or issue a civil penalty notice as appropriate. Our policy is to use the civil penalty route as the principal way to apply a sanction and to deter re-offending. However, prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past.

A civil penalty matrix for housing offences and breaches of electrical regulations to assist us to determine the most appropriate level of penalty is attached as Appendix A

A statement of principles for determining the appropriate level of penalty under the Smoke and Carbon Monoxide Alarm Regulations is attached as Appendix B

A statement of principles for determining the appropriate level of penalty under the Minimum Energy Efficiency Standards (MEES) Regulations is attached as Appendix C

Considerations and the determination by Trading Standards of the appropriate level of penalty for letting agent, property management and certain landlord breaches/offences is attached as Appendix D

[3] *CMP Regulations, Regulation 3(1)*

We will broadly consider the following factors where appropriate to help ensure that the penalty is set at an appropriate level:

- severity of the breach / offence
- culpability and track record
- the harm caused to the tenant (this may be actual harm or potential harm)
- punishment of the offender
- deterring the offender from repeating the breach/offence
- deter others from committing the breach/offence
- removing any financial benefit the offender may have obtained from committing the breach/offence

The appended matrix or processes for determining the level of penalty provides further detail on considerations and how we impose financial penalties. This ensures transparency in our decision making, aids consistency in the enforcement process and assists in the responding to appeals in the First-tier Tribunal (General Regulatory Chamber and Property Chamber).

Our policy is to issue the maximum penalty in serious cases and when proportionate and appropriate to do so in line with government guidance and other factors. It is intended this will help to achieve the maximum deterrent to bad practice and criminal behaviour and drive behaviour change and standards up.

5.3 Procedure for imposing a civil penalty notice

When it has been determined that a financial penalty is appropriate, we will give the person notice of our proposal by issuing a notice of intent. This will be issued within six months from the date when we have sufficient evidence of the breach/offence to which the financial penalty relates or at any time when the conduct is continuing. The notice of intent will specify:

- the amount of any proposed financial penalty
- the reasons for proposing the financial penalty
- information about the right to make representations to the Council

The person who is given a notice of intent may make written representations about the intention to impose a financial penalty. Following the 28-day period for representations, we will consider the representations and decide:

- whether to impose a financial penalty
- the amount of any such penalty

If we decide to impose a financial penalty, we must issue a final notice requiring that the penalty is paid within 28 days, beginning with the day after that on which the notice was given. The final notice will specify:

- the amount of the financial penalty
- the reasons for imposing the penalty
- information about how to pay the penalty the period for payment of the penalty (28 days from the day after the notice was sent)
- information about the right of appeal to the First-tier Tribunal
- the consequences of failure to comply with the notice

We may at any time, by giving written notice;

- withdraw a notice of intent or final notice or
- reduce the amount specified in the notice of intent or final notice

5.4 Other considerations

Multiple Breaches/Offences: When the Council are satisfied that more than one breach/offence is being committed concurrently, we may issue multiple civil penalty notices. Where satisfied on the merits of a case and/or where we consider that issuing multiple penalties at the same time would result in an excessive cumulative penalty, we may decide to take action in respect of one or some of the breaches/offences, and warn the offender that future action in respect of the remaining breaches/offences will be taken if they continue.

Reduction in penalty: If the person on whom a notice of intent has been served carries out the required works, rectifies their obligations expeditiously and without delay, or pays the financial penalty early we may at our discretion consider a reduction of up to 20%. Any reduction will not result in a financial penalty being less than any financial gain received from committing the breach/offence.

Financial hardship: We will make an assessment of a landlord's assets and all income, and not just rental income, when determining an appropriate penalty. Where appropriate a similar assessment will be made in relation to a lettings agents or property managers means as described in Appendix C below. There will be an opportunity to make representations following the service of the notice of intent and any financial hardship may be set out in those representations. The onus is placed firmly on the landlord or letting agent to provide sufficient documented evidence of income. We reserve the right to request further information to support any mitigation on affordability grounds and where this is incomplete, appears to be inaccurate, or is deliberately misleading, we may reject the representations made on this basis.

5.5 Enforcement

Failure to Pay: Where a landlord or property agent fails to pay the whole or any part of a civil penalty including after any appeal has been finally determined or withdrawn, we will recover the penalty by order from the County or High Court. If necessary, we will use County court bailiffs or High Court

Enforcement Officers to enforce the order and recover the debt. We will also seek to recover the costs incurred in taking this action.

Works in Default: Our powers to carry out works in default under the Housing Act 2004 are unaffected by the civil penalty provisions.

Houses in Multiple Occupation: If a landlord or property agent receives a civil penalty notice, it can be considered when considering whether the person is a fit and proper person to be the licence holder for a house in multiple occupation, or any other property subject to licensing.

5.6 Appeals

On receipt of the final notice imposing a financial penalty, the recipient may appeal to the First-tier Tribunal within 28 days, against the decision to impose the penalty or the amount of the penalty. The final notice is suspended until the appeal is determined or withdrawn. The First-tier Tribunal has the power to confirm, vary (increase or reduce) the size of the civil penalty, or cancel it.

6.0 DATABASE OF ROGUE LANDLORD AND PROPERTY AGENTS

The Government maintains a national database of Landlords and Managing Agents given a Banning Order or convicted of certain breaches/offences. Landlord/Agents details entered on the database is a statutory duty where a Banning Order has been given and is at the discretion of the Local Authority in other circumstances. We will apply to have details entered on the database where there is a duty to do so, and in other cases where the law allows discretion when it is in the public interest to do so.

The Mayor of London maintains a London-wide database of landlord or property agents who have received a civil penalty or have been prosecuted. While it is not a compulsory requirement to publicise details of landlords and agents who are prosecuted or who are issued with a financial penalty under any of the above legislation on the Mayor of London's Landlords and Agent Checker, the government's civil penalty guidance strongly encourage Councils to do so. We will apply to have details entered on the database when it is in the public interest to do so.

If a landlord or letting agent is issued with multiple penalties, these will be publicised as separate entries.

Appendices

APPENDIX A – HOUSING OFFENCES CIVIL PENALTIES MATRIX

- Only one option will be scored for each row with supporting reasons recorded separately
- Each row will be scored
- Each calculated score will be justified via evidence
- The scoring matrix will result in a minimum of £300 and a maximum of £30,000 in penalties
- Full payment within 28 days of the 'Notice of Intention' shall attract a 20% discount the overall penalty charge

	Score 1-2	Score 3-4	Score 5	Total
Culpability	• *Significant efforts were made to address offences/breaches/risk.* • *A reasonable defence for non-compliance provides a level of mitigation.* • *Failing to comply with recently introduced requirements*	• *Offender fell far short of the appropriate standard* • *Failing to put in place measures that are recognised standards / legal requirements* • *Failing to apply for an HMO licence.* • *Partial compliance that falls short or the expected standard.* • *Less serious breach of licence conditions*	• *Deliberate breach & flagrant disregard for the law* • *Failing to comply with Housing Act Notice* • *Failing to rectify management breaches after warning.* • *Failing to apply for HMO licence following warning or prior knowledge.* • *Breach of banning order.* • *Significant and wilful failure to comply with licence conditions.* • *Offender likely to be aware their actions were unlawful*	
	Score 0-1	**Score 2-3**	**Score 4-5**	
Track record & deterrent from committing further offences	• *No known previous offences.* • *High confidence that penalty will deter from committing further offences*	• *Previous history of noncompliance.* • *Track record of poor management.* • *Housing related convictions.* • *Medium confidence that a financial penalty will deter further offences*	• *Repeated history of serious housing related offences and noncompliance.* • *Low confidence financial penalty will deter from further offences*	
	Score 1-2	**Score 2-3**	**Score 4-5**	
Removal of financial incentive	• *No significant assets / turnover.* • *Single property landlord limited financial gain*	• *Small portfolio landlord (up to 5 properties).* • *Managing agents (less than 100k turnover).* • *Some financial gain from committing offence*	• *Professional portfolio landlord (5+ properties).* • *Professional Agents with significant portfolio (100k turnover).* • *Significant financial gain from committing the offence*	
	Score 1-2	**Score 3-6**	**Score 7-10**	
Weight of Harm	• *low level harm or inconvenience caused*	• *Risk posed to tenants from multiple hazards* • *Multiple category 2 hazards.* • *Less serious Class III & IV harm outcomes.* • *Significant distress.* • *Medium impact.* • *Vulnerable group(s) affected*	• *One of more category 1 hazards.* • *Risk of significant Class I & II harm outcomes.* • *High impact.* • *Vulnerable group(s) affected*	
	Score 0-1	**Score 2-3**	**Score 4-5**	
Exposure to risk	• *Single family dwelling or limited duration and exposure to risk as a result of offence*	• *HMO 3-5 people* *Small block of flats/S257 (6+ flats).* • *Moderate duration and exposure*	• *Large HMO 5+ people* • *Large block of flats/S257 (6+ flats).* • *Prolonged duration and exposure.* • *Unreasonable exposure to risk / prolonged duration*	
			Total	

	Points	Penalty
Minor	1	£1000
	2	£2000
	3	£3000
	4	£4000
	5	£5000
	6	£6000
	7	£7000
Moderate	8	£8000
	9	£9000
	10	£10000
	11	£11000
	12	£12000
	13	£13000
	14	£14000
	15	£15000
Significant	16	£16000
	17	£17000
	18	£18000
	19	£19000
	20	£20000
	21	£21000
	22	£22000
	23	£23000
	24	£24000
Severe	25	£25000
	26	£26000
	27	£27000
	28	£28000
	29	£29000
	30	£30000

Guide to applying the Penalty Matrix to Electrical Safety Regulations

- **Failure to obtain current EICR:** A similar penalty for Cat 1 offences would be imposed. Weight of harm & exposure to risk would rate high.
- **Failure to meet electrical safety standard, Report has cat 1 observations:** As Cat 1 observations indicate that danger is present, weight of harm & exposure to risk would rate high.
- **Failure to meet electrical safety standard, Report has cat 2 observations:** As Cat 2 observations indicate that the installation is potentially dangerous, weight of harm & exposure to risk would rate moderate.
- **Report not copied to tenants:** Weight of harm & exposure to risk would rate low to medium.
- **Report not copied to housing authority on request:** Weight of harm would rate medium, and exposure to risk low.
- **Failure to confirm execution of remedial work/further investigation to tenant or housing authority:** Weight of harm would rate medium, and if we were aware of Cat 1 observations on the original EICR could be increased to upper medium/high. Exposure to risk would be determined by the delay, category, and whether the works had been done & just not notified, or just not done at all. Note: failure to undertake remedial work/further investigation within timescale considered as aggravating factor to original breach and would increase culpability score. Failure to comply with remedial notice considered as aggravating factor to original breach and would increase culpability score.

APPENDIX B: STATEMENT OF PRINCIPLES FOR DETERMINING THE PENALTY CHARGE UNDER THE SMOKE AND CARBON MONOXIDE ALARM REGULATIONS 2015

Criteria for the imposition of a penalty charge

In deciding whether it would be appropriate to impose a penalty charge, we will take full account of the particular facts and circumstances of the regulation breach under consideration. Factors which we will take into consideration include, but are not limited to:

- The extent to which the circumstances giving rise to the contravention were within the control of the landlord.
- The presence or absence, of internal controls or procedures on the landlord's part which were intended to prevent the breach.
- The steps that the landlord has taken since being served with the remedial notice,
- Whether the landlord has been obstructed in his duty, or if tenant removal of alarms has occurred.
- Evidence provided that supports compliance with a Remedial Notice, (this may include a signed inventory at the start of a tenancy, or photographic evidence showing alarms installed, with a date & time stamp).

Determining the level of penalty

The Regulations set a maximum penalty charge of £5,000. A penalty charge will be set at a level which the Council considers is proportional to the breach and will consider all the other circumstances of the case, which may include (the list is not exclusive):

- The charge will include the costs incurred by the Council in taking remedial action following non-compliance, including officer time and the cost of contractor supervision.
- Whether or not the breach under consideration is a first-time breach.
- Where justified representations have been made to the Council to formally review the penalty charge imposed, under Regulation 10.

First-time breach **£2,500**. An early payment of the penalty charge, within 14 days from penalty charge notice service, will attract a discount of 50%. (To **£1,250**)

Subsequent breaches by the same landlord **£5,000**. No early payment discount will be available in this case.

We will exercise discretion, and may not make, or may reduce, any penalty charge where the Landlord is a housing charity providing housing services for vulnerable persons.

We will enforce penalty charges, to include obtaining a Court Order for payment, where necessary.

APPENDIX C: MINIMUM ENERGY EFFICIENCY STANDARDS (MEES) ENFORCEMENT AND PENALTY CHARGES

In all cases we will seek to apply the 'publication penalty' (entering details of the breach on the public Energy Performance Certificate [EPC] register), together with a financial penalty.

The penalty applied will be the maximum available for the breach(es), that is:

- Where the landlord (L) has breached regulation 23 and, at the time the penalty notice is served has, or had, been in breach for less than three months, the penalty is a financial penalty of £2,000.
- Where L has breached regulation 23 and, at the time the penalty notice is served has, or had, been in breach for three months or more, the penalty is a financial penalty of £4,000.
- Where L has registered false or misleading information under regulation 36(2), the penalty is a financial penalty of £1,000.
- Where L has failed to comply with a compliance notice in breach of regulation 37(4)(a), the penalty is a financial penalty of £2,000.
- Where financial penalties are imposed for breaches of regulation 23 together with breaches of regulation 36(2) or regulation 37(4)(a) in relation to a property the aggregate financial penalty is capped at £5,000.

APPENDIX D – LETTINGS BREACHES / OFFENCES PENALTY DETERMINATION

Redress Schemes

Legislation

- The Enterprise and Regulatory Reform Act 2013 sections 83-88
- The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 ("the Redress Schemes Order 2014").

Requirement

It has been a requirement since 1 October 2014 for lettings and property management agents to be a member of a government approved redress scheme.[4] This provides clients of these businesses, both tenants and landlords, with an independent form of redress to resolve complaints. There are currently two schemes approved by the government:

a. The Property Ombudsman ("TPO"); and
b. The Property Redress Scheme ("PRS").

Sanction

A failure to join a scheme is enforced by a civil penalty process with a **maximum penalty of £5,000.**

The breach must be proved on "the balance of probabilities", i.e. to the civil standard of proof.[5]

[4] *The Redress Schemes Order 2014, Part 2*
[5] *Ibid. Article 8*

For both tenants and landlords, the consequence of a business not being a member of a redress scheme can be significant in that they lose an important method of resolving complaints without having to take recourse to legal action (which can be both time consuming and expensive). This is true even if a business later joins a scheme as the membership is not retrospective and clients who contracted with an agent prior to the date of membership are still not covered.

Westminster Trading Standards consider this an important access to justice issue and a very serious breach because of the potential collective harm to both tenants and landlords. It is also an indicator of poor professional standards within the sector.

Determining the level of financial penalty

The Ministry for Housing Communities and Local Government ("MHCLG")[6] has issued guidance for local authority housing officers on *Improving the Private Rented Sector and Tackling Bad Practice - A Guide for Local Authorities.*[7] Annex C - *Letting Agents Redress Scheme Guidance* provides:

The expectation is that a £5,000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances".[8]

The guidance also makes clear that it will be up to the enforcement authority to decide what such circumstances might be.

In having regard to the guidance issued by MHCLG, the expectation is that a £5,000 penalty should be considered the norm. Due to the serious detriment associated with lack of membership of a redress scheme, the lack of professional standards it indicates and the particulars of the London Lettings market, the authority is adopting the policy that when issuing an initial notice (notice of intent) against an agent, **the monetary penalty will usually start at £5,000**.

The notice of intent provides the agent with the option to submit representations to the authority within 28 days. The authority shall consider the representations and may reduce the monetary penalty if appropriate.

This approach has been accepted by Judges in the First Tier Tribunal.

In considering whether to vary, withdraw or confirm a monetary penalty after the notice of intent has been served, the authority will take into account any representations provided by the agent. The following non-exhaustive list of factors will be considered in either mitigation or aggravation, as appropriate in each case:

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[6] *Formerly the Department for Communities and Local Government*

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/412921/Improving_private_rented_sector.pdf, published March 2015,

[8] *Ibid. pp.53-54*

- The severity of the breach (i.e. the length of breach, has membership just lapsed or has the agent never been a member of a redress scheme?)
- The financial impact of the breach on tenants and landlords (this may be difficult to assess)
- How long the legislation and requirements have been in force
- The agent's history of compliance and/ or non-compliance
- Any complaints against the agent
- The attitude of the agent and/ or co-operation with the authority in its investigation
- Whether the breach was rectified promptly
- Steps that the agent has or has not taken to ensure compliance
- Personal or health issues that may have had or be having an effect on the agent's business (e.g. impacting on the period of breach or ability to pay)
- Any other factors that could amount to extenuating circumstances.

Where applicable the authority shall consider the affordability of the proposed penalty, including the financial status of the agent and/ or the agent's ability to pay.

Simply correcting a breach after receiving a notice will not nullify the proposed penalty and if an agent would like a reduction to be considered, in the first instance, representations/ objections should be made to the Council in the 28 days allowed.

Publicise relevant fees and required information

Legislation
Consumer Rights Act 2015 ("CRA") sections 83-88.

The requirement
Section 83 CRA makes it a requirement for all letting agents in England to publicise details of their relevant fees and other required information. Sections 83 to 88 CRA contain detailed disclosure requirements.

Sanction
Where the authority is satisfied on the balance of probabilities that a letting agent has breached the above duty it may impose a penalty under section 87 CRA.

The amount of the financial penalty may be determined by the local authority but **must not exceed £5,000.**[9]

Determining the level of financial penalty
In line with the statutory guidance issued by the MHCLG: *Improving the private rented sector and tackling bad practice: a guide for local authorities. Annex D – Guidance on Letting Agent Fees,* the

[9] *CRA, s. 87(7)*

authority will normally issue the financial penalty for the maximum of £5,000 and a lower penalty will only be considered if the authority is satisfied that there are extenuating circumstances.[10]

In considering whether to vary, withdraw or confirm a monetary penalty after a notice of intent has been issued the authority will take into account any representations provided by the agent.

Each of the following non-exhaustive factors will be considered, as possible mitigation, in the authority's decision of whether to vary, withdraw or confirm a penalty:

- The severity of the breach
- The financial impact of the breach on tenants and landlords
- How long the legislation and requirements have been in force
- Whether a letting agent was in breach of some but not all aspects of the requirements (with respect to displaying fees, client money protection and redress scheme information).
- The period of non-compliance (e.g. was a technical error on a website causing a breach for a matter of hours or was there an extended period of non-compliance?)
- Whether the breach was rectified promptly
- Steps that the agent has or has not taken to ensure compliance
- The attitude of the agent and/ or co-operation with the authority in its investigation
- Personal or health issues that may have had or be having an effect on the letting agent's business (e.g. impacting on the period of breach or ability to pay)
- Any other factors that could amount to extenuating circumstances.

Where applicable the authority shall consider the affordability of the proposed fine, including the financial status of the agent and/ or the agent's ability to pay.

Mitigating factors advanced by the agent in representations shall be weighed up against all of the facts of the case as well as wider factors where relevant, including the following points:

- How long the legislation and/ or requirements have been in force
- The agent's history of compliance and/or non-compliance
- Whether an agent was in breach of other lettings requirements (e.g. client money protection or redress scheme membership)
- Steps the agent has or has not taken to ensure compliance
- The size of the business and number of staff
- Any other relevant factors

The authority can issue a penalty ***per breach***, therefore if an agent is in breach on their website **and** in their office, this would amount to two separate breaches. If an agent has multiple branches, then a penalty of up to £5,000 may be imposed separately against each non-compliant branch.

[10] *https://www.gov.uk/government/publications/improving-the-private-rented-sector-and-tackling-bad-practice-a-guide-for-local-authorities, published 13 March 2015, p.60*

For continued non-compliance further penalties of up to £5,000 can be issued for the same breach over a different period.[11] It is therefore of utmost importance that breaches are corrected by the agent as soon as possible after notification to avoid further penalties. There is no limit to the number of penalties that can be imposed for a continued breach. However, no further penalties can be issued if the letting agent appeals to the Tribunal until the end of 28 days beginning the day after the day on which the appeal is finally determined, withdrawn or abandoned.

Simply correcting a breach after receiving a notice will not nullify the proposed penalty and if an agent would like a reduction to be considered, in the first instance, representations/ objections should be made to the Council in the 28 days allowed.

Prohibited payments

Legislation
Tenant Fees Act 2019 ("TFA")

Requirement
Under the TFA it is now unlawful for a landlord or letting agent to require a relevant person to make a '*prohibited payment*' in relation to a tenancy agreement. Tenancy Agreements include Assured Shorthold Tenancies ("ASTs"), student accommodation and licences to occupy housing (with limited exception). All payments are prohibited unless they are one of the permitted payments listed in Schedule 1 TFA. Sections 1, 2 and 3 TFA give further details on the specific breaches by a landlord or letting agent.

Sanctions
Section 8 TFA provides local authorities with the power to impose a civil penalty in situations where a breach of the TFA has been identified.

Each separate '*prohibited payment*' represents a separate breach of the TFA.

The TFA sets out maximum penalties that the Council may impose on agents and landlords that breach the above prohibition[12], namely:

- £5,000 where a landlord or agent has required a tenant or landlord to make a 'prohibited payment';
- £30,000 where a landlord or agent has required a tenant or landlord to make a 'prohibited payment' within 5 years of a previous conviction or imposition of a Civil Penalty [as an alternative to instigating prosecution proceedings];
- £5,000 where a landlord or agent is in breach of the requirement to repay the holding deposit.

[11] *CRA s.87(6A)*
[12] *Tenant Fees Act 2019, s. 8*

If a further breach is committed within five years of the imposition of a financial penalty or conviction for a previous breach, this will be a criminal offence under section 12 TFA. Upon conviction, the penalty is an unlimited fine. This offence is also a banning order offence.[13]

Accordingly, if an offence is committed contrary to section 12 TFA, the Council may either impose a financial penalty of up to £30,000 **or** prosecute the landlord or letting agent. For the avoidance of doubt where a financial penalty is imposed this does not amount to a criminal conviction.

Schedule 3 TFA sets out the procedure in relation to notices, appeals and the recovery of prohibited payments.

The Government has issued statutory guidance: *Tenant Fees Act 2019 Statutory Guidance for Enforcement Authorities.*[14] Westminster City Council has regard to this guidance in the exercise of its functions in respect of civil penalties and other enforcement action.

Decision to Prosecute

A decision to prosecute for an offence under section 12 (and/or section 13) will be made, subject to the above-mentioned statutory guidance, the Code for Crown Prosecutors, and our enforcement policy.

We will consider the following general principles when deciding whether to prosecute a landlord or agent:

- whether there is sufficient admissible and reliable evidence that the offence has been committed;
- whether there is a realistic prospect of conviction;
- whether the enforcement authority believes that it is in the public interest to do so.

Additionally, the following non-exhaustive list of factors will be considered when deciding whether to prosecute:

- The agent and/ or landlord's history of compliance/non-compliance
- Whether the first or previous penalties were paid
- The severity of the breach
- Deliberate concealment of the activity and/or evidence
- Knowingly or recklessly supplying false or misleading evidence
- The intent of the landlord/agent, individual and/or corporate body
- The attitude and level of cooperation of the landlord/agent
- The deterrent effect of a prosecution on the landlord/agent and others
- The extent of any financial gain as a result of the breach

[13] *Housing and Planning Act 2016, s. 14*

[14] *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819633/TFA_Statutory_Enforcement_Guidance_190722.pdf*

Simply correcting a breach after receiving a notice will not nullify the proposed penalty and if an agent would like a reduction to be considered, in the first instance, representations/ objections should be made to the Council in the 28 days allowed.

Determining the level of financial penalty

In accordance with section 8 TFA the financial penalty may be of such amount as the authority determines, subject to the maximum figures stated above.

Below is a list of some, but not all factual elements that provide the context of the breach and factors relating to the Landlord or Agent that may be considered as a part of the Council's decision-making process. The Council will identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment when determining the level of penalty.

Aggravating factors

- Previous breaches of the TFA
- Previous convictions, having regard to the nature of the offence to which the conviction relates and its relevance to the current breach and the time that has elapsed since the conviction
- A landlord or agent with 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
- Level of harm caused to the tenant
- Established evidence of wider/community impact
- Motivated by or evidence of financial gain
- Deliberate concealment of illegal nature of activity
- Obstruction of the investigation
- Refusal of advice or training or to become a member of an Accreditation scheme
- Failure to act quickly in rectifying breach once notified by enforcement authority
- Failure to act quickly in rectifying breach once notified by another person such as a tenant or someone acting on their behalf

Mitigating factors

- No previous or no relevant/recent breaches or complaints
- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of relationship with tenants
- Self-reporting
- Acceptance of responsibility and/ or admission of guilt
- Good character and/or exemplary conduct
- Mental disorder or learning disability, where linked to the commission of the breach
- Serious medical conditions requiring urgent, intensive or long-term treatment and supported by medical evidence (affecting reasonable compliance and affecting someone integral to the business such as a Director or manager and particularly relevant in small businesses where there may not be the resources to put alternative arrangements easily in place)

- Prompt repayment of prohibited charge to tenant
- Whether landlords or agent's primary trade or income is connected with the private rented sector

The final determination of any financial penalty will be considered alongside the general principle that a penalty should be fair and proportionate and, in all instances, act as a deterrent and remove any gain as a result of the breach.

Other factors to be considered

- Totality principle – if issuing a financial penalty for more than one breach, or where the landlord or agent has already been issued with a penalty, we will consider whether the total financial penalties are just and proportionate to the breaches.
- Affordability issues – impact of the financial penalty on the landlord or agent's ability to comply with the law and whether the penalty is proportionate to their means
- Impact of the financial penalty on the business – if the penalty would be disproportionate to the turnover/scale of the business or would lead to the agent going out of business

A record of each decision and the reason for determining the financial penalty will be kept.

Client money protection

Legislation

The Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 ("CMP Regulations")

Requirement

From 1 April 2019 property agents in the private rented sector in England that hold client money must obtain membership from a Government approved or designated Client Money Protection Scheme.[15]

Property agents must also comply with the "transparency requirements" in regulation 4 of the CMP Regulations, for example, they must display, publish and produce the certificate of membership (if the scheme administrator provides a certificate) and give notice to clients if the agents membership of the scheme is revoked.[16]

Mandatory client money protection is intended to give landlords and tenants confidence that their money is safe when it is being handled by an agent. Where an agent is a member of a Government approved Client Money Protection Scheme, it enables a tenant, landlord or both to be compensated if all or part of their money is not repaid.

"Client money" means money received by a property agent held on behalf of another person in the course of English letting agency work within the meaning of section 54 of the Housing and Planning Act

[15] *CMP Regulations, Regulation 3(1)*
[16] *Ibid. Regulation 4(2) & 4(3)*

2016 or English property management work within the meaning of section 55 of that Act. This does not include money held in accordance with an authorised tenancy deposit scheme within the meaning of Chapter 4 of Part 6 Housing Act 2004.[17] However, "Client Money" includes deposits paid to a letting agent before they are protected and unprotected deposits at the end of a tenancy, before they are returned/paid to the tenant or landlord.

Sanctions

The CMP Regulations provide that enforcement authorities may impose a financial penalty at such a level as the Council determines but **not exceeding £30,000** where it is satisfied beyond reasonable doubt that a property agent is engaging in letting agency or property management work and is required to be a member of an approved client money protection scheme but has failed to join one.[18]

Trading Standards considers this a very serious breach because of the potential for extreme harm with potentially devastating consequences to both tenants and landlords. It is also an indicator of poor professional standards within the sector.

A full list of client money protection schemes can be found at the link below. The list of schemes is kept up to date by the MHCLG: https://www.gov.uk/client-money-protection-scheme-property-agents

The CMP Regulations provide that enforcement authorities may impose a financial penalty at such level as the Council determines **but not exceeding £5,000,** where it is satisfied beyond all reasonable doubt that a regulated property agent has failed to:

- Display a certificate of its membership of an approved Client Money Protection Scheme prominently in their office(s) (where the scheme administrator of the approved scheme provides a certificate);
- Publish a copy of the certificate on their website (if any); and
- Produce a copy of the certificate to any person who may reasonably require it, free of charge.[19]

The right to impose a financial penalty in respect of the transparency requirements does not apply if the agent has taken all reasonable steps to obtain a copy of a certificate confirming the agent's membership of the approved or designated client money protection scheme and the scheme administrator has not provided it.[20]

A financial penalty may also be imposed at such level as the Council determines **but not exceeding £5,000**, where it is satisfied beyond reasonable doubt that a regulated property agent has failed to notify each client in writing within 14 days of:

[17] *Ibid. Regulation 2*
[18] *Ibid. Regulation 6*
[19] *Ibid. Regulation 4 & 7*
[20] *Ibid. Regulation 7(3)*

- the agent's membership of an approved or designated client money protection scheme being revoked; or
- the agent ceasing to be a member of a particular approved or designated client money protection scheme and becoming a member of a different approved or designated client money protection scheme.[21]

In such circumstances the notification must give the name and address of the new scheme which the agent joins.[22]

A breach of each of the transparency requirements above would account for a separate breach.[23] Therefore, where an agent has breached more than one of these requirements, they will be liable for a separate financial penalty in respect of each breach. For example, in the event that an agent fails to display their membership certificate and also fails to provide a copy of these certificates free of charge to anyone who reasonably asks these are two individual breaches with two separate potential financial penalties.

Simply correcting a breach after receiving a notice will not nullify the proposed penalty and if an agent would like a reduction to be considered, representations/objections should be made in the 28 days allowed (as detailed on the back of the notice of intent).

Determining the level of financial penalty

Although the Council has a wide discretion in determining the appropriate level of financial penalty in any particular case in creating this policy regard has been given to the statutory guidance and non-statutory guidance, Westminster City Council's corporate enforcement policy, Westminster Council's Private Rented Sector Strategy, the Regulators code and where applicable the code for Crown Prosecutors. This policy has been made in consultation with the Lead Enforcement Authority.

Step1: Determine the starting point

In determining the appropriate financial penalty where an agent is not a member of a client money protection scheme the authority will start by taking into account the size of the company and apply a penalty as follows:

- Property Agent Business turnover below £75,000: penalty starting point £10,000
- Property Agent Business turnover between £75,000 - £150,000: penalty starting point £20,000
- Property Agent Business turnover over £150,000: penalty starting point £30,000

The above figures will be applied before serving the notice of intent. The company's turnover shall be assessed by reference to the turnover of the company stated in the most recent accounts submitted to Companies House. If the business is not a company or no accounts indicating turnover have been

[21] *Ibid. Regulation 4(2) & 7*
[22] *Ibid. Regulation 4(3)*
[23] See MHCLG statutory guidance, Mandatory client money protection for property agents , Enforcement guidance for local authorities https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800548/CMP_enforcement_guidance.pdf, p. 10

submitted to Companies House or the accounts are more than 18 months old, then the maximum of £30,000 may be applied until the Council has a better indication of the business' financial status, in practice this may be after the notice of intent is served and financial documents have been supplied by the agent.

Step 2 – Adjust the starting point to reflect the aggravating and mitigating features

Having selected the appropriate starting point for determining the financial penalty, the authority will then adjust the financial penalty imposed up and down in light of the following aggravating and mitigating factors:

Aggravating factors

- Extended period of breach
- Previous civil penalties being issued against the agent and/ or a record of non-compliance with relevant legislation
- Agent has made no reasonable attempts to comply with the Regulations
- Failure to act quickly in rectifying any breach once notified by the authority (or to take reasonable steps to do so)
- The agent has previously received advice and guidance from the authority in relation to joining a CMP scheme
- Actual Harm caused to tenants or landlord (or evidence of a loss of client money in respect of previous tenants or landlords)
- Potential harm caused to tenants or landlords
- Complaints received relating to client money or otherwise
- Where an agent has been expelled from an approved scheme and has not taken immediate action to join another scheme or ensure it is not holding client money
- Lack of co-operation / obstruction of the investigation

Mitigating factors

- Co-operation with the investigation
- The agent has a good reputation with no previous breaches or complaints
- Early admission of the breach and taking all reasonable steps to quickly join a scheme
- Evidence that the agent has made every reasonable effort to join an approved client money protection scheme but is unable to do so for issues outside of their control
- Production of up to date full accounts showing for example that the agent's turnover is significantly less than that stipulated on the most recent companies house accounts or that the fine would cause severe financial hardship or would be likely to put the agent out of business
- Mental disorder or learning disability, where linked to the commission of the breach
- Serious medical conditions requiring urgent, intensive or long-term treatment and supported by medical evidence (affecting reasonable compliance and affecting someone integral to the business such as a Director or manager and particularly relevant in small businesses where there may not be the resources to put alternative arrangements easily in place)

Step3- *Other Factors to be considered*

- Deterrence - In order to deter agents from breaching the CMP regulations and to deter other agents from committing similar breaches the penalty should be such as to have a real financial impact on the business.
- Totality principle - If issuing a financial penalty for more than one breach, or where the agent has already been issued with a penalty, the authority will consider whether the total financial penalties are just and proportionate to the breaches.
- Affordability issues - Impact of the financial penalty on the agent's ability to comply with the law and whether it is proportionate to their means. Impact of the financial penalty on the business, the penalty should not be disproportionate to the turnover and scale of the business and/ or would lead to the agent going out of business.

The final determination of any financial penalty will be considered alongside the general principle that a penalty should be fair and proportionate but, in all instances, act as a deterrent and remove any gain as a result of the breach.

In practice, step2 and 3 are likely to take place after the Council has issued a notice of intent and the agent has made representations or objections.

A record of each decision and the reason for determining the financial penalty will be kept.

A breach of the CMP Regulations does not give rise to a criminal offence under the CMP Regulations, however in the event that an agent is displaying a client money protection certificate to a scheme to which they do not belong (or have been expelled from) the authority will consider taking criminal enforcement action against the agent under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008.