



Cabinet
11 September 2017

**Report from the Strategic Director
of Community Wellbeing**

Wards affected: All Wards

Implementation of Financial Penalties as alternatives to prosecutions under Housing Act 2004 introduced under Part 2 Housing and Planning Act 2016

1. Summary

1.1 This report set out the powers and obligations introduced by the Housing and Planning Act 2016 relating to the Government's response to tackling rogue landlords and improving the private rental sector.

1.2 The Housing and Planning Act 2016 received royal assent on the 12 May 2016.

Part two of the Act is concerned with rogue landlords and property agents and introduces;

- Civil penalties of up to £30,000
- Extension of Rent Repayment Orders (RROs)
- Banning orders for the most prolific offenders
- Database of rogue landlords/property agents

1.3 The most significant and radical of those listed above is the introduction of civil penalties. Unlike fines issued by the Courts when criminal prosecutions are taken, income received from a civil penalty can be retained by the local housing authority provided that it is used to further the local housing authority's statutory functions in relation to their enforcement activities covering the private rented sector. This means that any income received from civil penalties issued can be reinvested into carrying out more enforcement work to bring about further improvements within the private rented sector (PRS).

1.4 Brent's PRS currently represents over 1/3rd of the housing stock, somewhere in the region of 36,000 properties and our research indicates that it is still growing. There are more PRS properties in Brent than the combined social housing stock. The corporate vision is that "*Brent will be a thriving, vibrant place, where our diverse community lives in an environment that is safe, sustainable and well maintained*", yet we know that there are still many tenants

that are being exploited by rogue and criminal landlords who let out substandard, poorly managed and sometimes dangerous accommodation.

- 1.5 Since the introduction of property licensing in Brent in January 2015, PHS has made great strides to tackle many of these criminal activities, prosecuting more landlords, agents and lead tenants in the past eighteen months than the previous eighteen years added together, but despite this there is still much more to do. By agreeing to adopt these new enforcement powers, the Cabinet will be arming PHS with additional tools to combat those criminals who flout the law but more importantly the income generated by the fines will be reinvested to provide additional resources to see further improvements with the PRS with increased enforcement activities.

2. Recommendations

2.1. Cabinet is recommended to:

2.1.1 Agree that the Council adopts the new enforcement powers against rogue landlords and letting agents contained within the Housing Act 2004 as amended by the Housing and Planning Act 2016.

2.1.2 Note that the enforcement powers once in force, enable the Council to serve notices imposing Civil Penalties of up to a maximum of £30,000 in respect of the following offences:

- Failure to comply with an Improvement Notice
- Failure to licence or be licensed in respect of Houses in Multiple Occupation (HMOs)
- Failure to licence or be licensed in respect of the Landlords Selective Licensing Scheme
- Failure to comply with licensing conditions
- Failure to comply with an Overcrowding Notice
- Failure to comply with a regulation in respect of an HMO
- Breaching a Banning Order

2.1.3 Note that the enforcement powers once in force, enable the Council to apply a Rent Repayment Order in respect of the following offences:

- Failure to comply with an Improvement Notice
- Failure to comply with a Prohibition Order
- Breaching of a Banning Order
- Using violence to secure entry to a property
- Illegal eviction or harassment of the occupiers of a property

2.1.4 Agree the Housing Enforcement Policy at Appendix 1 which has been amended to include reference to the issuing of civil penalties as an alternative to prosecution for relevant offences under the Housing Act 2004.

2.1.5 Authorise the Strategic Director of Community Wellbeing to authorise other council officers, including but not limited to the Head of Private Housing Services (PHS), PHS Managers, PHS Enforcement Officers and PHS Licensing Officers, to discharge those powers listed above.

3. Introduction

- 3.1 As stated above The Housing and Planning Act 2016 received royal assent on the 12 May 2016 and whilst it introduced a plethora of legislation this report focuses on four elements those being;
- Civil penalties of up to £30,000
 - Extension of Rent Repayment Orders (RROs)
 - Banning orders for the most prolific offenders
 - Database of rogue landlords/property agents
- 3.2 It was the government's intention to have all four of these proposals in force during 2017 but unfortunately due to other pressures on parliamentary time, has only been able to introduce two, those being Civil Penalties and the extension of Rent Repayment Orders. Nevertheless, indications are that the other two powers are expected to be introduced in the Spring of 2018.
- 3.3 Through this report we hope to explain what these powers mean and how they will be used by PHS to continue its mission to see improvements in the conditions of houses within the PRS.
- 3.4 Attached to this report, for the sake of clarity, is PHS' Enforcement Policy which has been updated to include those new powers listed above. In addition to the Enforcement Policy is the Civil Penalty Notice Matrix which has been developed using the government's guidelines. This matrix will be used to assess the level of fines that will be issued for various breaches of legislation.
- 3.5 The introduction of these powers is a significant step in allowing Councils to deal with rogue landlords and in particular with the introduction of civil penalties only those landlords who commit offences will be fined. It therefore means that the income received from civil penalties will be reinvested in to further enforcement activities funded by those landlords who commit the offences and not the majority of good law abiding landlords who provide a good quality of much needed accommodation.

4. Key Considerations

4.1. Civil Penalty Charges

- 4.1.1 The Housing and Planning Act 2016 contains several provisions relating to licensing of privately rented homes and housing enforcement related to this type of tenure. They include such measures as the ability for housing authorities to impose a civil penalty in lieu of prosecution, as a means of dealing with rogue landlords.
- 4.1.2 The use of these new powers will support and complement the current borough wide HMO Licensing Schemes, the current Selective Licence Scheme covering three wards since 1st January 2015 and also the new Selective Scheme Designations once approved.
- 4.1.3 Brent's Private Housing Services Enforcement Team is well placed to put these new powers to use, given its strong enforcement record and ability to make

increasingly large numbers of enforcement led interventions. With over £0.6m in court fines more than 100 prosecutions for housing related offences over the past year, a refocus towards civil penalties should generate significant funding for regulating the private rented sector. Civil penalty charges are retained for this purpose, whereas prosecution fines stay with the Crown.

- 4.1.4 A civil penalty can only be imposed as an alternative to prosecution. The legislation does not permit a Local Authority to impose a civil penalty and prosecute for the same offence. Similarly if a civil penalty has been imposed, a person cannot then be convicted of an offence for the same conduct. Before issuing a civil penalty, PHS will need to consider the responsiveness of the offender(s) to taking remedial action, as well as the repetition, severity, or overall impact of an offence on the tenants and/or wider community.
- 4.1.5 The decision on when to prosecute and when to issue a civil penalty shall be decided initially on a case by case basis, in accordance with the Housing Enforcement Policy at Appendix 1 which has been amended to include reference to the issuing of civil penalties as an alternative to prosecution for relevant offences under the Housing Act 2004. Where a civil penalty is imposed, an appeal can be lodged at the First Tier Property Tribunal (FTPT). A Local Authority will then need to demonstrate 'beyond reasonable doubt' that an offence has been committed.
- 4.1.6 The use of civil penalties will not reduce the amount of investigation work for Enforcement Officers and each case must be prepared to 'prosecution standards'. With the option of appealing for a nominal application fee, there is likely to be a significant volume of such appeals being heard by the FTPT. Enforcement officers will serve the required statutory notices (at least 2 to be served), deal with defendant representations and work jointly with Brent Legal Services to defend any appeals at the FTPT. Nevertheless, the opportunities involved in extending the enforcement reach without recourse to the Council's General Fund, far outweighs the threat posed by a comparative increase in Enforcement Team and Legal Team activities.

4.2. Rent Repayment Orders

- 4.2.1 The Housing Act 2004 introduced Rent Repayment Orders (RROs) allowing Local Authorities to recover up to 12 months Housing Benefit/Universal credit paid in connection with private sector tenancies. Similarly, tenants paying their own rent could also apply to the FTPT for an RRO, once a conviction was secured by the Local Authority.
- 4.2.2 RROs have now been extended through the Housing and Planning Act 2016 to cover a much wider range of offences. Under the new legislation an RRO can be applied for when the landlord has committed one of the offences listed in paragraph 2.1.3 above even without a conviction. However, where an application for an RRO is made and the landlord has not been convicted for the relevant offence, the FTPT will need to be satisfied beyond reasonable doubt that the landlord has committed the offence.

- 4.2.3 As a conviction via the courts can only be secured on proving an offence beyond reasonable doubt, the safest way to secure an RRO is to apply after an offence has been successfully prosecuted. Essentially, where an offence has been prosecuted and hence a civil penalty cannot be imposed, a Rent Repayment Order will still then be applied for in appropriate cases.
- 4.2.4 If rent was paid through Housing Benefit or through the housing element of Universal Credit, then the rent must be re-paid to the Local Authority. If the tenant paid the rent themselves, then the rent must be repaid to the tenant. If the rent was paid partially through Housing Benefit/Universal credit then an RRO award is repaid proportionally on an equivalent basis. Where an RRO award is at least partially claimable by the Council, an application shall be made via the Council to the FTPT. If the rent was paid in full by a tenant, then an RRO application has to be made by the tenant.
- 4.2.5 Whilst there is no statutory obligation on local housing authorities to support a tenant's RRO application, there is potential scope for providing such support either directly or via partner organisations on a 'no win no fee' basis. At present, only a small proportion of tenants qualified to make an RRO application after a landlord has been convicted do follow through on this. Providing adequate support for such tenants will not only be beneficial to this [at times] exploited clientele, but also ease the potential burden on the Council's limited housing supply/financial support for private tenancy deposits etc.
- 4.2.6 Where a landlord has been sanctioned for an illegal eviction/harassment etc offence via an RRO as well as a prosecution, this sends a message to any prolific offenders within the borough, that there will be no benefit in taking advantage of vulnerable tenants.
- 4.2.7 At the time of writing, the Enforcement Team is working in tandem with the Housing Needs unit, to robustly challenge a number of 'rent to rent' rogue landlords who are seeking to evict tenants unlawfully at the first sign of dissent from these tenants that their living standards are unacceptable. There will be a determined focus towards ensuring that the rights of the tenants and the obligations of those collecting rent in these circumstances are reinforced by using the extended RRO powers now being introduced.

4.3. Banning Orders & and National Database of Rogue Landlords

- 4.3.1 Chapter 3 of the Housing and Planning Act 2016 introduces provisions for the Secretary of state to create a central database of landlords and agents who are fined or convicted of an offence. Local Authorities will be responsible for entering names on the database and maintaining the contents which includes adding details if a banning order has been imposed. All local authorities will have access to the database for the purposes of identifying landlords, agents and owners with properties in more than one borough. If implemented by the DCLG, this national database was planned to be available by October 2017, but has now been deferred due to other ministerial priorities.
- 4.3.2 Section 15(1) of the Act provides the power to a Local Authority in England to apply for a banning order against a person who has been convicted of a banning order offence. It is not yet known what will constitute a banning order

offence and it is envisaged that this will be defined in further Secretary of State Guidance imminently. A banning order under section 14(1) of the Act will prevent a person from:

- letting any dwelling
- engaging in letting agency work
- engaging in property management work
- doing two or more of these activities.

An Order is limited to England and must specify the duration of the order and it must last for at least 12 months.

4.3.3 Under the auspices of the Mayor of London, The Greater London Authority has introduced a criminal landlord database steering group. The group with members from Brent, Camden, Kingston, Newham, Southwark and Sutton, are tasked with developing a London wide rogue landlord register, to be adopted by all London boroughs in October 2017. It is anticipated that the London wide database to be administered via the GLA, should then feed into the DCLG's national database, as and when Local Authorities are required to make their inputs.

4.3.4 The purpose of the rogue landlord database is to enable local housing authorities to record information about and target enforcement action against any landlord who has:

- received a banning order under the Housing and Planning Act 2016
- been convicted of a banning order offence; or
- received 2 or more civil penalties over a 12 month period

It is not uncommon for rogue landlords/agents operating in Brent to be active within other London boroughs, as well as in some cases further afield within England.

4.3.5 The impact of these recommendations will re-enforce the Council's strong enforcement stance on landlords who do not comply with their statutory obligations and enables the Council to penalise the worst landlords by direct economic sanctions. The intention is that this will rebalance the private rental sector away from rogue landlord exploitation, towards a fairer and more equitable deal for their tenants, without a net increase in cost for the Council.

4.4. Tenancy Protection

4.4.1 The 2014 Licensing Scheme reports to Cabinet noted that there was potential for a negative impact of landlords being regulated via licensing enforcement provisions on tenants. This might arise from landlords deciding to leave the rental market rather than engage with licensing enforcement, or from evictions (potentially including illegal evictions) following or in anticipation of enforcement action. There is little evidence that landlords have withdrawn from renting in response to such interventions.

4.4.2 Although Housing and Planning Act 2016 provisions allow for an extension of PHS enforcement activities, it is crucial to note that good landlords will not be adversely affected. On the contrary rogue landlords will be relieved of the proceeds of their crimes, be driven out of the market and better compensation

will now be available for their victims, i.e. tenants at the exploited end of the market.

4.4.3 Although there is little evidence that enforcement has led to homelessness applications, there is evidence that tenants have at times moved on to other homes within Brent or elsewhere. To establish a clearer picture of on this, Future of London (FoL) undertook a study, the findings of which will be taken into account in shaping the council's tenancy engagement approach.

4.4.4 The FoL study, looked specifically at the effect of unannounced inspections by PHS Enforcement Officers on tenants. The research, which comprised field work, data analysis and interviews with a number of stakeholders (including tenants themselves), painted a mixed picture. Some tenants' situations have improved as a result of an inspection, while others have deteriorated. Information on eviction and displacement has produced a complex range of tenant pathways, with dependent factors including awareness of rights and support structures, and level of tenant vulnerability.

4.4.5 Despite data and information limitations, the research had some clear actions for Private Housing Services to take forward:

- Do more to raise private tenant awareness of their rights before, during and after the inspections.
- Whilst the council's concern must be housing decently its vulnerable communities in priority need, people living in poor-quality HMOs are vulnerable in a different way – from poor conditions and exploitative landlords. A closer and more cooperative relationship between PHS, Housing Needs and the plethora of voluntary sector groups embedded in communities will help to protect all of Brent's communities.

4.4.6 As a result of this research an action plan has been developed which will see all of the recommendations made being implemented.

4.4.7 At the time of writing, a number of unlawful eviction cases are being addressed via PHS Enforcement, Housing Needs and SSP Law working together in order to attend to the various homelessness emergencies, address the living standards concerns and collate evidence for civil and criminal litigation proceedings. The extended reach of civil penalties, rent repayment orders and banning orders in such circumstances will allow for much greater efficiency and effectiveness in meeting the overall objective of seeking to ensure that private tenants live in a premises that are "...*safe, sustainable and well maintained*...". Of particular note, is that private sector tenants will become increasingly aware of their rights through publicity on evictions thwarted and rent repayment orders awarded to rogue landlord victims.

5. Financial Implications

5.1 Since January 2016, the Crown prosecution has charged landlords £0.6m in fines. The Council is not currently awarded any of the proceeds of these fines

and can only claim back the costs associated in bringing the case to court (£0.15m to date).

- 5.2 The Council currently spends £0.7m on enforcement and although the extension of the Selective License Scheme designations across the borough will generate further revenue, the costs of the scheme partially exclude the costs of any enforcement action. Wider licensing coverage however, will inevitably uncover a greater demand for enforcement interventions and would therefore mean that additional general funding would be required to support the Council's statutory enforcement role, unless the new Civil Penalty powers are activated.
- 5.3 The government has indicated that the income from civil penalties can be retained by the Local Authority to be used to fund its statutory functions in relation to the private rented sector.
- 5.4 The level of projected income generated by imposing Civil penalties cannot accurately be forecast as the decision on when to prosecute and when to issue a civil penalty shall be decided initially on a case by case basis.
- 5.5 However, it is necessary to make some reasonable assumptions for budgeting purposes. Taking the gross fines income imposed by the Crown as a benchmark, the council could generate £0.32m pa of gross fines income if 80% of cases were assessed for Civil penalties rather than prosecution (based on pro rata gross Crown prosecutions to date). When accounting for any new fees/charges/fines, consideration needs to be taken on the likelihood of collection of these debts and an appropriate level of funding set aside to accommodate any bad debts. Lacking any collection experience data in this area at present, a ratio of 25% is initially proposed, leaving net income of £0.24m.
- 5.6 Civil penalty charges are not directly enforceable, meaning that where the landlord or property agent fails to pay a Civil penalty, the council would need to secure a County Court Judgement. This may be costly and time consuming, thereby creating resources implications for the Brent Legal and Debt Collection teams. To recognise this likely cost £0.04m of the net income is proposed to be set aside to meet the cost of employing another officer, if necessary, leaving £0.2m of additional income that could be attributed directly to front-line enforcement activity.
- 5.7. These assumptions will be reviewed after the new service has operated for long enough to provide realistic data on activity levels.

6 Equalities Implications

- 6.1 It is anticipated that an extended PHS Enforcement reach, will have positive outcomes for tenants across all protected characteristics, particularly those who are currently over-represented in the PRS.
- 6.2 The findings of recent equality analysis show that various groups such as the Other White ethnic group, are over-represented in the private rental sector. However, once the new enforcement powers are adopted, all equality groups are likely to benefit from improvements in engagement, communication and

signposting information between the council, landlords and tenants, as well as greater protection from or compensation for unlawful eviction.

- 6.3 The Equality Analysis, has also identified some potential negative consequences for over-represented equality groups, namely Black, Asian and minority ethnic (BAME) landlords that are overrepresented in Brent. Nevertheless, it is anticipated that poor landlords of all equality groups will be sanctioned for the benefit of vulnerable tenants of all representations.

7. Staffing and Accommodation Implications

- 7.1 With the introduction of Selective and Additional licensing in January 2015 Private Housing Services already has a dedicated and experienced team of officers employed to carry out enforcement activities. The service will seek to develop a growth strategy, once the new processes are embedded and it becomes financially viable to increase the number of Enforcement Officers and other supporting services needed to have a more defining impact on the private rental sector.
- 7.2 As stated above, all staffing and other required activities will be funded from the income generated by the licence fee and civil penalty notices.

8. Risk Management

- 8.1 The main risk from the adoption of these new powers will be successful appeals from landlords. This risk will be mitigated by taking legal expert advice on the enforcement processes, legal vetting of potential appeal defences and a comparison of best practice with other local authorities. As the programme unfolds, Enforcement Officers will receive the necessary training, be guided by regularly reviewed procedures updated to reflect the sway of relevant appeals either upheld or dismissed.
- 8.2 A further risk will be an inability to collect the income from some civil penalties that are imposed. This risk will be mitigated by a focus on a prosecution-rent repayment order strategy for 'rent to rent' landlords/agents with unestablished status. In these circumstances, the chasing of financial payments are best left with the courts with their own sanctions for a failure to comply with an issued Judgement.
- 8.3 Furthermore, the Proceeds of Crime Act (POCA) 2002 allows the courts to deprive perpetrators of criminal offences of any proceeds they have accrued as a result of their criminal activity. POCA proceeds are retained by the Council and then used for carrying out the relevant enforcement duties. With one high profile POCA case already in process, it is anticipated that this area of PHS Enforcement intervention will steadily increase in future.
- 8.4 Where civil penalties are levied and outstanding payments are to be collected, the Council will be required to allocate specialist legal and financial expertise for necessary enforcement. The options here could include applying for county court judgements, a charging order to secure debt and an enforced sale to recover the debt.

8.5 The Council's reputation could be at risk if the public perceive that the new powers are being implemented for financial gain rather than for necessary enforcement. This risk will be mitigated by a communication strategy emphasising the aims of tenancy protection and support, targeting of the worst offenders and clarification that raised income is ring fenced to support statutory functions in support of the private rental sector.

9. Consultation

9.1 There has been extensive national consultation by the DCLG on measures to crack down on rogue landlords who rent out unsafe, overcrowded, badly managed properties and the Council has engaged extensively on this.

10. Legal Implications

10.1 - Discussed within the body of the report

11. Background Papers

11.1 - As attached

12. Contact Officer

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