



<u>Committee and Date</u>
Cabinet
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<u>Item</u>
<u>Public</u>

Consultation on a Draft Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements

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1. Synopsis

- 1.1 A proposal to consult on a policy that will set out Shropshire Council's approach to the enforcement and determination of financial (civil) penalties in circumstances where persons engaged in letting agency work and property management business fail to comply with legislative requirements.

2. Executive Summary

- 2.1. The Council, in its capacity as the local weights and measures authority, has a statutory responsibility to regulate specific aspects of the letting agency and property management market through ensuring that tenants are only charged permitted fees, that letting agents, where necessary, are members of a redress scheme and a client money protection scheme and that letting agents' fees and charges are transparent and displayed/publicised appropriately.
- 2.2. The Tenant Fees Act 2019 ('the 2019 Act') was introduced to make renting fairer and more affordable for tenants by reducing the costs at the outset of a tenancy by introducing a ban on certain fees payable by the tenant and also creating a 'permitted payment' regime.
- 2.3. The 2019 Act also amended other legislation referred to as 'relevant letting agency legislation' requiring, where necessary, membership

of client money protection and redress schemes as well as provisions concerning the prominent display/publication of

information about such membership together with information about relevant fees.

- 2.4. Where evidence of infringements under the 2019 Act or 'relevant letting agency legislation' is identified, the Council may, in certain circumstances, consider issuing a financial penalty for a civil breach or, as an alternative to prosecution, in respect of a criminal offence. The level of the financial penalty varies depending on the actual infringement; however, it can be as much as £30,000 in certain circumstances.
- 2.5. Where the Council wishes to utilise financial penalties for breaches for any of these infringements, statutory guidance accompanying the legislative controls clearly states that the Council is expected to develop, document and publish a policy, which sets out how it will determine the appropriate level of any financial penalty.
- 2.6. In line with the statutory guidance, a draft policy setting out the Council's approach to enforcement and the determination of any financial penalty has been produced for consultation and is set out at Appendix A.

3. Recommendations

- 3.1. That Cabinet approves for consultation, with any necessary amendments, the draft Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements, as set out at Appendix A.
- 3.2. That Cabinet instructs the Head of Business and Consumer Protection to undertake a six-week period of consultation and to bring the draft Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements, together with all feedback received from the consultation, back to Cabinet for further consideration and final approval.

REPORT

4. Risk Assessment and Opportunities Appraisal

- 4.1. The preparation and publishing of the Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements ('the Policy') is not in itself a legal requirement; however, the statutory guidance listed below, which has been published by the Ministry of Housing, Communities & Local Government ('MHCLG')¹, makes it clear that the Council must have due regard to this guidance when considering enforcement action and whether to impose a financial penalty:
- Tenant Fees Act 2019: statutory guidance for enforcement authorities
 - Mandatory Client money protection: enforcement guidance for local authorities
- 4.2. This statutory guidance recommends certain factors that the Council should take into account when deciding on the level of financial penalty to impose and further requires that the Council develops, documents and publishes a policy on how it will determine the appropriate level of any financial penalty. The Council should also decide each matter on a case-by-case basis, in line with that policy.
- 4.3. The National Trading Standards Estate and Letting Agency Team (NTSELAT) is the Lead Enforcement Authority as arranged by the Secretary of State under section 24 of the 2019 Act. The NTSELAT is responsible for, amongst other duties, overseeing the enforcement of relevant letting agency legislation in England.
- 4.4. The NTSELAT has developed a best practice policy which it has made available to all Councils. The draft policy set out at Appendix A follows the provisions and processes set out in the NTSELAT policy.
- 4.5. Utilising the NTSELAT policy as the basis for the Council's policy means the Council can demonstrate that it has followed best practice and has had due regard to the requirements of the statutory guidance, whilst also ensuring enforcement action is considered and applied in a manner consistent with other councils across England.
- 4.6. The Council could impose financial penalties in relation to infringements of relevant letting agency legislation without a policy in place. However, by choosing to develop, document and publish a policy, this provides a framework for the Council to enable reasonable decisions to be made and to mitigate the reputational and financial risks that may result from any legal challenge.

¹ Now the Department for Levelling Up, Housing & Communities (DLUHC)

- 4.7. A failure to adopt a policy may also limit the ability of the Council to protect tenants from unscrupulous letting agents and property management businesses.
- 4.8. There is also a risk that having no policy in place will increase the likelihood of legal challenge to any financial penalty that is imposed and ultimately may lead to decisions to impose penalties being overturned on appeal at a First-tier Tribunal. Whilst the Tribunal is an informal body, it nevertheless has the power to confirm, vary or quash a decision made by the Council, including increasing or reducing the level of any financial penalty imposed by the Council.
- 4.9. The Government has made it clear that offenders must not derive any financial benefit from their offending and Tribunals have been briefed on what is expected of them in relation to the use of financial penalties. Whilst the Council's use of these powers remains untried and untested, there is growing evidence that other councils are successfully using the powers where it is appropriate to do so.
- 4.10. In the event that there is a legal challenge against the imposition of a financial penalty, the Policy will increase the likelihood that the Council will be able to successfully defend such a challenge. However, it is impossible to entirely eliminate the legal risks associated with the use of financial penalties; nevertheless, the Policy will assist the Council to mitigate the risks associated with any adverse outcome.
- 4.11. The Policy does not stand alone; it is intended to be read and considered alongside the Council's Better Regulation and Enforcement Policy, which was itself formally agreed by Council on 25 July 2018. The implementation of the Policy, together with the Council's Better Regulation and Enforcement Policy, will provide a framework that will better enable the Council to ensure the protections available to tenants, who can often be considered vulnerable due to their circumstances, are being met.
- 4.12. There is a risk that any substantial increase in the number of investigations into infringements of 'relevant letting agency requirements', where financial penalties are an option, is likely to give rise to a corresponding pressure on existing and limited staffing resources, including resources within Legal Services.
- 4.13. Whilst there are 'relevant letting agency requirements' that may result in a civil breach and a financial penalty being imposed based on the balance of probability standard of proof, where financial penalties are being considered as an alternative to prosecution, the Council will still have to be satisfied that if the case were to be prosecuted in the Magistrates' Court, there would be a realistic prospect of conviction, i.e., the standard of proof remains the same

as if the decision had been taken to institute legal proceedings. In such cases, the Council needs to demonstrate, beyond reasonable doubt, that the offence has been committed before imposing a financial penalty. For this purpose, officers involved in cases will consult the Crown Prosecution Service Code for Crown Prosecutors and liaise with Legal Services before any decision is made to impose a financial penalty.

- 4.14. Together with human rights considerations, an Equality, Health and Social Inclusion Impact Assessment (EHSIA) is currently being undertaken. It is anticipated that the outcome will demonstrate an increased positive impact on health, equality, and social inclusion, and no unjustified adverse impact on human rights. The conclusions from these considerations and the formal assessment will be brought before Cabinet, together with the feedback from the consultation, and the outcome of these will inform the final content of the Policy.
- 4.15. The consultation will be made available on the Council's website and will be open to the public and all stakeholders to put forward their comments. Any key stakeholders will be contacted directly and signposted to the consultation details on the Council's website.

5. Financial Implications

- 5.1. The costs associated with the investigation of any criminal matter can be significant, particularly where the matter is contested in the courts. The introduction of financial penalties will, to some extent, reduce the financial burden on the Council insofar as it relates to undertaking legal action in the criminal courts. However, where a civil penalty is imposed, the recipient has the right of appeal to a First-tier Tribunal and any unfavourable outcome may adversely affect the Council's income.
- 5.2. Proceeds of any financial penalty imposed under the 2019 Act or the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 can be retained by the Council to meet the costs incurred in, or associated with, carrying out any of its enforcement functions under the Act/Regulations or otherwise in relation to the private rented sector. Any proceeds of a financial penalty recovered which are not applied in this way must be paid to the Secretary of State/into the Consolidated Fund.
- 5.3. Proceeds of any financial penalty imposed under the Consumer Rights Act 2015 or the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 can be retained by the Council for the purposes of any of its functions.

- 5.4. The fact that proceeds of financial penalties can be retained by the Council will not result in those services that can use these powers becoming self-financing. There are reputational and financial risks associated with funding the relevant statutory services from financial penalties as the penalties are an enforcement, not income generating, tool and consequently must be used in a reasonable and proportionate manner, in line with the principles of good regulation, to secure compliance and long-standing behaviour change.
- 5.5. Furthermore, non-payment of a financial penalty becomes a civil debt and must be pursued through the Council's debt recovery process, which, in itself, incurs additional costs both in terms of officer time and financial payments.

6. Climate Change Appraisal

- 6.1. It is acknowledged that the Policy is expected to have a 'no effect' outcome on the climate change impacts listed below:
- energy and fuel consumption (buildings and/or travel)
 - renewable energy generation;
 - carbon offsetting or mitigation; and
 - climate change adaptation.
- 6.2. There are no other anticipated environmental impacts associated with the recommendations in this report.

7. Background

- 7.1. The legal framework underpinning the private rented sector aims to build a fair and robust sector that protects tenants, supports landlords and empowers councils. The Government wants a fair private rental market where services are paid for by the person that contracts them; this is what the 2019 Act helps to achieve.
- 7.2. Shropshire has a wide range of good letting agents and property management businesses who take their legal and social responsibilities seriously. However, there are also a number of rogue, criminal and irresponsible agents and businesses who operate poor practices and/or knowingly flout their legal obligations. These practices and behaviours increase financial detriment and impact on the health and wellbeing of the most vulnerable in our communities, as well as creating an unfair trading environment that undermines the operation of legitimate and law-abiding businesses.
- 7.3. The Council, as the Local Weights and Measures Authority, has a statutory duty to enforce specified provisions under the 2019 Act, which was introduced to restrict the charges and fees that landlords

and estate agents may impose on tenants by introducing a 'permitted payment' only regime.

- 7.4. In addition to the 2019 Act, other legislative controls referred to as 'relevant lettings agency legislation' also exist, which provide powers to the Council to protect tenants. These are listed in paragraphs 7.5 to 7.7 below.
- 7.5. Under the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019, letting agents and property managers who hold client money must belong to a government approved Client Money Protection scheme ('CMP scheme') and comply with transparency requirements concerning the displaying and providing of copies of their membership certificates.
- 7.6. Under the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014, a person who engages in lettings agency or property management work must be a member of an approved 'redress scheme'. A redress scheme is a scheme which provides for complaints against members of the scheme to be investigated and determined by an independent person.
- 7.7. Under the Consumer Rights Act 2015, letting agents must publish:
- a list of relevant fees they charge landlords and tenants; and
 - together with the list of fees, details of both the CMP scheme and the redress scheme they belong to.

8. Additional Information

- 8.1. Trading Standards Officers, based in the Business and Consumer Protection Service, are already authorised to enforce the 2019 Act and 'relevant letting agency legislation'.
- 8.2. The 2019 Act and 'relevant letting agency legislation' is considered alongside other legislation that gives the Council the power to protect tenants and tackle poor practice by landlords and letting agents. This includes the Housing Act 2004; the Enterprise and Regulatory Reform Act 2013; the Consumer Rights Act 2015 and the Housing and Planning Act 2016.
- 8.3. The 2019 Act applies to Assured Shorthold Tenancies, student accommodation and to lodgers or tenants in houses of multiple occupation (HMO). In addition, the 2019 Act applies to housing associations and local authorities, i.e. including the Council, where

they are letting an assured shorthold tenancy in the private rented sector.

- 8.4. The 2019 Act does not apply to long leases or shared ownership leases where the tenant's total share is 100%; specific definitions apply in relation to these types of leases.
- 8.5. The Council, as the local housing authority, together with Shropshire Towns and Rural Housing (STARH), who act on the Council's behalf, are not 'relevant persons' under the 2019 Act. They can continue to make payments in connection with a tenancy when acting on behalf of a tenant or guaranteeing their rent.
- 8.6. Certain charities, usually a registered Homeshare organisation, that help facilitate home sharing arrangements in the private rented sector, which have a social benefit, are also excluded from the requirements of the 2019 Act.

9. Conclusions

- 9.1. In order to ensure that the Council can utilise financial penalties as an effective enforcement tool and to promote compliance with the Tenant Fees Act 2019 and the 'relevant letting agency legislation', it is best practice and in line with statutory guidance for the Council to develop and publish a policy determining how it will administer financial penalties for breaches of relevant letting agency requirements.
- 9.2. A draft policy for the enforcement and determination of financial penalties for breaches of relevant letting agency requirements has now been produced and is ready for formal consultation. Cabinet members are being asked to agree to and approve the consultation process for the draft policy.

List of Background Papers (This MUST be completed for all reports, but does not include items containing exempt or confidential information)

Shropshire Council's Better Regulation and Enforcement Policy (approved by Council, July 2018)

Statutory guidance published by the Ministry of Housing, Communities and Local Government (now Department for Levelling Up, Housing and Communities):

Cabinet - 6 April 2022 – Policy for the enforcement and determination of financial penalties for breaches of relevant letting agency requirements.

- Tenants Fees Act 2019: statutory guidance for enforcement authorities (first published May 2019)
- Mandatory client money protection: enforcement guidance for local authorities (first published May 2019)

Cabinet Member (Portfolio Holder)

Cllr Ed Potter, Portfolio Holder for Economic Growth, Regeneration & Planning

Local Member

The report has county wide application

Appendices

Appendix A – Draft Policy for the enforcement and determination of financial penalties for breaches of relevant letting agency requirements