



Committee and Date

Cabinet

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Item

Public

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 implement a policy that will set out the 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 by ensuring that tenants are only charged permitted fees, that where appropriate letting agents are members of a redress scheme and a client money protection scheme and that letting agents' fees and charges are transparent/publicised appropriately.
- 2.2. The Tenants 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 schemes and redress schemes as well as provisions concerning the 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. A draft policy was brought before Cabinet on the 6 April 2022 in order to seek approval to undertake a public consultation. This consultation took place for a period of 6 weeks between 9 May 2022 and 20 June 2022 with direct notification provided to key stakeholders. No comments have been received in response to the consultation and, as a result, no changes are proposed to the original draft of the policy.
- 2.7. In line with statutory guidance, a draft policy setting out the Council's approach to enforcement and the determination of any financial penalty has been produced and is set out at Appendix A.

3. Recommendations

- 3.1. That Cabinet approves, with any necessary amendments, the Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements as set out at Appendix A.

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

¹ **Now the Department for Levelling Up, Housing and Communities (DLHUC)**

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. The above 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 (Department for Levelling Up, Housing and Communities) 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. It has developed a best practice policy, which it has made available to all Councils.
- 4.4. In order to ensure financial penalties are used fairly and are set at an appropriate level, the Council's Policy follows the provisions and processes set out in the NTSELAT policy. This means that culpability and harm will be considered, together with the following factors, when determining the level of penalty to impose for a breach of any relevant letting agency legislation:
- Severity of the breach
 - Punishment of the landlord or agent
 - Aggravating and mitigating factors
 - Fairness and proportionality
- 4.5. The Policy sets out the process that Council officers will follow to determine the amount of any financial penalty and provides a series of tables to ensure, as far as reasonably practicable, consistency and transparency when determining the actual level of a financial penalty.
- 4.6. 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.

- 4.7. 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.
- 4.8. 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.
- 4.9. 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.
- 4.10. 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 the 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. 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.

- 4.13. 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.
- 4.14. Those who face a financial penalty issued by the Council have the right, subject to specific statutory time limits, to make representations to the Council against the intention to impose the penalty and ultimately, they have a right of appeal to a First-Tier Tribunal. If an appeal is lodged, this suspends the penalty process until the appeal is heard.
- 4.15. 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.
- 4.16. Following the decision by Cabinet to approve the consultation in respect of the draft Policy, details of which can be found in the report presented to Cabinet on the 6 April 2022 at Agenda Item 7 ([Agenda for Cabinet on Wednesday, 6th April, 2022, 10.30 am – Shropshire Council](#)), a public consultation was undertaken over a six-week period from 9 May 2022 to 20 June 2022. The consultation was made generally available to all interested parties, including letting agents/property management businesses and tenants, through the Council's Get Involved pages of its website. In addition, direct notification of the consultation was provided to seven key stakeholders including relevant trade bodies and organisations representing tenants' interests.
- 4.17. An Equality, Health and Social Inclusion Impact Assessment (EHSIA) has been prepared and is available at Appendix B.
- 4.18. The EHSIA has indicated that the Policy should have a low to medium positive impact for all communities and groupings within communities, principally by deterring or removing rogue letting agents and property management businesses from the Private Rented Sector in Shropshire. Effective enforcement in relation to private rented accommodation, including the use of financial penalties, is likely to improve the life chances of the population generally and particularly those with Protected Characteristics such as older people, those with disabilities and families with children. It

will also include households in the tenth category, social inclusion, that we think about in Shropshire, in addition to the nine Protected Characteristics set out in the Equality Act 2010. The social inclusion category includes people in rural areas and people or households that we may describe as vulnerable. Examples could be households on low incomes or people for whom there are safeguarding concerns, as well as people in fuel poverty.

- 4.19. As no feedback, either positive or negative, was received as a result of the public consultation, which was organised to further inform the proposed Policy, it has not, at this time, been necessary to make any adjustments to the Policy, including those that relate to equality impacts. Work will, however, continue with all those who may be impacted by the Policy, in particular, those target groupings, e.g., older people and households on low incomes, in order to seek to ensure that the positive impacts are enhanced.
- 4.20. Housing is a key determinant of health and wellbeing, and this Policy should ensure tenants are not subjected to unnecessary financial burdens such as overtly high deposit costs or front-loading rent. This should make it more affordable for tenants to rent or move between rental properties should circumstances change. This could be especially important for low-income vulnerable groups, such as young people, single parent families and people with disabilities, who already face challenges in finding affordable homes and have limited alternative housing available to them.
- 4.21. This Policy also gives tenants a level of agency and redress to positively challenge landlords, should they be subject to fees that are not publicised or are unlawful. Evidence shows that tenants can feel vulnerable to raise issues with landlords for fear of repercussions and this affects their wellbeing significantly. By having the Policy in place, this may support and empower tenants to raise relevant issues. In turn, this will provide security and potentially improved mental health and wellbeing.
- 4.22. The fundamental principles enshrined in the policy are aimed at ensuring the protection of human rights, particularly those that relate to the right to a fair trial, no punishment without law, right to respect for private and family life, prohibition of discrimination and protection of property. As a result, implementation of the Policy is unlikely to be at variance with the Human Rights Act 1998 and is unlikely to result in any adverse human rights implications.

5. Financial Implications

- 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 However, indirectly, those letting agents and property management businesses who are failing to comply with the legal requirements that this Policy seeks to address are more likely to be failing to address other legal requirements which can affect the properties they rent out; this could include provisions within the Energy Performance Regulations and the Electrical Safety Standards Regulations. Energy performance of properties and the amount of energy required to heat and keep homes adequately heated have a direct impact on the climate.
- 6.3 Addressing non-compliance through a joined-up enforcement approach with other regulators may address a wider scale of problems beyond those issues that are identified in relation to letting agents and property management businesses. In this way, it may be possible to create a positive climate outcome through forcing those agents/businesses to improve the energy efficiency of their properties or to drive out those from the marketplace who are only concerned with making profits and are not investing in their properties. This would be with the intention that such properties could be taken on by more responsible agents/businesses who are

prepared to undertake the required energy efficiency improvement works.

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 Tenant Fees Act 2019, 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 provides 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 presented for formal approval.

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):

[Tenant Fees Act 2019: Statutory Guidance for enforcement authorities \(first published May 2019\)](#)

[Mandatory Client money protection for property agents: 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 - Policy for the Enforcement and Determination of Financial Penalties for Breaches of Relevant Letting Agency Requirements

Appendix B - Equality, Health and Social Inclusion Impact Assessment