

# Private Sector Housing Civil Penalties Guidance

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## Introduction

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This policy has been created in accordance with the 'Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities' ("the DCLG Guidance"), published by the Department for Communities and Local Government.

This policy is to supplement the Private Sector Housing Enforcement Policy.

A Civil Penalty will be calculated using an excel calculator to ensure a consistent approach, however a paper version is available in Appendix 1.

In this document, the term "landlord" will be used to refer to the "owner", "person having control", "person managing" or "licence holder", as defined under the Housing Act 2004 ("the 2004 Act"). The term "Landlord" will also be used to refer to tenants of houses in multiple occupation who have committed offences under section 234 of the Housing Act 2004. The term "the Council" will be used to refer to Newcastle City Council in its capacity as a Local Housing Authority.

## Housing offences covered by civil penalties

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The power given to local authorities to impose a civil penalty as an alternative to prosecution for certain specified housing offences was introduced by section 126 and Schedule 9 of the Housing and Planning Act 2016.

Civil penalties are intended to be used against landlords who are in breach of one or more of the sections of the Housing Act 2004 listed below:

- Section 30 – Failure to comply with an Improvement Notice
- Section 72 – Offences in relation to licensing of Houses in Multiple Occupation
- Section 95 – Offences in relation to licensing of houses under Part 3 of the Act
- Section 139 – Offences of contravention of an overcrowding notice
- Section 234 – Failure to comply with management regulations in respect of Houses in Multiple Occupation

## Determining the Civil Penalty Amount

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The Council has the power to impose a civil penalty of up to £30,000; this section sets out how the Council will determine the appropriate level of civil penalty in each case. The actual amount levied in each case should reflect the severity of the offence and consider the landlord's income and track record.

The civil penalty is made up of two distinct components.

1. The penalty calculation; Consideration of the severity of the offence, the landlord's track record and the landlord's income.
2. Financial Benefit: The amount, if any, which the landlord obtained from committing the offence.

These two components are added together to determine the final penalty amount that will be imposed on the landlord.

The process to determine a Civil Penalty is broken down into four main stages:

**Stage 1** determines the penalty band for the offence. Each penalty band has a starting amount and an upper and lower limit.

**Stage 2** determines how much will be added to the penalty amount as a result of the landlord's income. The landlords track record will be taken into account including aggravating and mitigating factors.

**Stage 3** is where the figures from stage 2 are added to the penalty band from stage 1.

**Stage 4** considers any financial benefit the landlord obtained from committing the offence. This amount will be added to the figure from stage 3.

### Stage 1 - Determining the Penalty Band

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This stage considers the landlord's culpability for the offence, and the seriousness of harm risked to the tenants or visitors to the property.

#### Assessing a landlord's culpability

Table 1 sets out the four levels of culpability to be considered. The behaviour of the landlord should be compared to this table to determine the appropriate level of culpability.

This exercise will be repeated for each offence that is being considered as the landlord's culpability may vary between offences.

**Table 1 - Levels of Culpability**

<b>Very high</b>	Deliberate breach of or flagrant disregard for the law
<b>High</b>	<p>Offender fell far short of their legal duties; for example, by:</p> <p>failing to put in place measures that are recognised legal requirements or regulations.</p> <p>ignoring warnings raised by the local Council, tenants or others.</p> <p>failing to make appropriate changes after being made aware of risks, breaches or offences.</p> <p>allowing risks, breaches or offences to continue over a long period of time.</p> <p>Serious and/or systemic failure by the person or organisation to comply with legal duties.</p>
<b>Medium</b>	<p>Offender fell short of their legal duties in a manner that falls between descriptions in 'high' and 'low' culpability categories.</p> <p>Systems were in place to manage risk or comply with legal duties, but these were not sufficiently adhered to or implemented.</p>
<b>Low</b>	<p>Offender did not fall far short of their legal duties, for example, because:</p> <p>significant efforts were made to address the risk, breaches or offences, although they were inadequate on this occasion.</p> <p>they have offered a reasonable defence for why they were unaware of the risk, breach or offence.</p> <p>Failings were minor and occurred as an isolated incident</p>

When assessing culpability, consideration will be given to each category of culpability to identify the one that the landlord's behaviour falls within; where a landlord's behaviour could meet more than one of the categories, the highest one is selected.

**Seriousness of harm risked**

Table 2 separates the seriousness of harm risked into three levels with an accompanying description. The harm risked by the offence should be compared to the table to determine the appropriate level. This exercise will be repeated for each offence that is being considered as the seriousness of harm risked can vary between offences.

When using the table to determine the appropriate level, consideration should be given to the worst possible harm outcomes that could reasonably occur as a result of the landlord committing the offence. This means that even if some harm has already come

to tenants or visitors to the property, consideration should still be given to whether there was the potential for greater harm to have occurred.

**Table 2 - Seriousness of Harm Risked**

<b>Level A</b>	The seriousness of harm risked would meet the guidance for Class I and Class II harm outcomes in the Housing Health and Safety Rating System <sup>1</sup> .
<b>Level B</b>	The seriousness of harm risked would meet the guidance for Class III and Class IV harm outcomes in the 'Housing Health and Safety Rating System' <sup>3</sup> .
<b>Level C</b>	All other cases not falling within Level A or Level B (e.g. where an offence occurred but the level of harm to the tenants or visitors does not meet the descriptions for Level A or Level B).

### **Penalty levels and bands**

Using the determined level of culpability and the seriousness of harm risked, the appropriate penalty level (1 – 5+) is determined as demonstrated in Table 3. Using the penalty level,

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<sup>1</sup> Office of the Deputy Prime Minister: London (2006), *Housing Health and Safety Rating System Operating Guidance*, page 47

Table 4 will then give the penalty band for the offence. This penalty band determines the starting amount and the lower and upper limit for the penalty calculation.

If the penalty band is 5 / 5+ consideration should be given if prosecution is a more appropriate course of action.

**Table 3 - Penalty Levels**

Seriousness of Harm Risked	Culpability			
	Very high	High	Medium	Low
Level A	5+	5	4	3
Level B	5	4	3	2
Level C	4	3	2	1

**Table 4 - Penalty Bands**

Penalty Level	Penalty band Lowest	Starting Point	Penalty Band Highest
1	£600	£900	£1200
2	£1200	£2,100	£3000
3	£3000	£4,500	£6000
4	£6000	£10,500	£15,000
5 / 5+	£15,000	£22,500	£30,000

## **Stage 2 - Considering the landlord's income and track record**

This stage considers the landlord's income and the landlord's track record. Each of these will affect the penalty calculation.

### **The landlord's Income**

For penalties that fall within bands 1 to 4, the landlord's income will be considered but the 'relevant income' will normally be limited to the income that the landlord received in relation to the property where the offence occurred.

Although the Council is permitted to consider all of a landlord's income and assets when calculating a civil penalty, full financial investigations will normally only be considered for the more serious offences (penalties that fall within bands 5 and 5+). Where the offence falls within penalty bands 1 to 4, the Council reserves the right to do so where it considers it reasonable and proportionate to the circumstances.

All sources of income received by the landlord can be considered as 'relevant income' for the purpose of calculating the civil penalty. Specifically, the average weekly income of the landlord for the 12 months preceding the date of the offence will be used.

Tenancy agreements and property management contracts can be requested using the Council's existing powers. This should be done where copies are not already available.

- For property owners, this will be the weekly rental income, as declared on the tenancy agreements, for the property where offence occurred and at the time the offence occurred.
- For property agents, the relevant income will be any fees they received for the management of the property, as stated on the management contract between the agent and the other parties to the contract. Where the fees include VAT or any other charges, the gross amount of the fees will be used.



### **Calculation of Increase in Penalty as a result of the landlord's income**

To determine what percentage of the relevant weekly income should be added to the penalty amount the penalty band determined in

Table 4 will be compared to Table 5. This will give the percentage of the landlord's relevant weekly income to be added to the civil penalty.

**Table 5 - % of relevant weekly income**

Penalty Level	% of Relevant Weekly Income
1	50% of relevant weekly income
2	100% of relevant weekly income
3	150% of relevant weekly income
4	250% of relevant weekly income
5	400% of relevant weekly income
5+	600% of relevant weekly income

In cases where the landlord is not forthcoming with this information or documentation, an estimate of the average weekly income will be used, and it will be for the landlord to make representations against this estimated figure if they deem it to be too high.

Estimates of average weekly income will be calculated on a case by case basis but will generally be based on an assessment of similar sized rental properties in the same area as the property to which the offence relates.

#### **Calculation of an increase or decrease as a result of the Landlord's track record**

The track record of the landlord will be an important factor in determining the final amount of the civil penalty imposed. A higher penalty will be appropriate where the landlord has a history of non-compliance

A set of questions must be asked for each landlord. Each of the questions will be categorised based on the seriousness of the offence or enforcement action to which the question refers.

Aggravating factors could include:

- Previous convictions having regard to the offence to which applies, and time elapsed since the offence.
- Offence continued over a prolonged period of time.
- Lack of insight into their failings.
- Motivated by financial gain.
- Obstruction of the investigation.
- Deliberate concealment of the activity/evidence.
- Number of items of non-compliance – greater the number the greater the potential aggravating factor.
- Retaliation against tenants or others for complaining/reporting concerns.

- Record of letting substandard accommodation.
- Record of poor management/ inadequate management provision.
- Lack of a tenancy agreement.
- in the last 2 years has the landlord owned or managed a property where the term of a licence under the Housing Act 2004, was reduced due to enforcement action or significant concerns?
- How many relevant notices, under Part 1 of the Housing Act 2004, has the landlord had served on them in the last 2 years? (Including any notices relevant to this offence)
- How many civil penalties has the landlord had imposed on them in the last 2 years?
- How many times has the landlord breached relevant notices, which resulted in works in default being carried out, in the last 2 years?
- Has the Landlord been the subject of a banning order under the Housing and Planning Act 2016 in the last 2 years?
- Has the landlord owned or managed a property where a licence for the property, under the Housing Act 2004, was revoked due to enforcement action or significant concerns, in the last 2 years?
- Has the landlord owned or managed a property which was subject to an interim or final management order under the Housing Act 2004 in the last 2 years?
- How many cautions for relevant offences has the landlord accepted in the last 2 years?
- How many convictions for relevant offences has the landlord had in the last 2 years?

Mitigating factors could include one or more of the following:

- Cooperation with the investigation
- Good record of maintaining the property.
- Voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt for the offence(s)
- Willingness to undertake training
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
- No previous convictions
- Vulnerable individual(s) where their vulnerability is linked to the commission of the offence.
- No history of non-compliance.

In order to determine the final penalty level, the council will consider both aggravating and mitigating factors in each case. This will increase or reduce the initial penalty level

by 5% for each factor identified.

### **Stage 3 - Adding Income and Track Records Amounts to the Penalty Band**

To get the amount of the penalty calculation, the two figures from Stage 2 are added to the starting amount for the penalty band. For example, if the increase for income is £500 and the increase due to the landlord's track record is £1000, these two figures are added to the starting amount for the penalty to get the penalty calculation amount.

If the amount calculated, by adding the figures for the landlord's income and track record, is less than the upper limit for the penalty band, then this is the amount that will be used. However, if the amount calculated is greater than the upper limit for the penalty band, then the upper limit will be used instead.

### **Stage 4 - Calculating financial benefit from the offence**

A guiding principle of civil penalties is that they should remove any financial benefit that the landlord may have obtained as a result of committing the offence. This means that the amount of the civil penalty imposed should never be less than it would have reasonably cost the landlord to comply in the first place.

Where the landlord has obtained financial benefit in the form of rental income and this full amount has been added to the total penalty, it will be appropriate to take this into consideration when deciding whether to pursue a Rent Repayment Order.

If work in default has been carried out, any debt not yet recovered, this can be taken into account as financial benefit from the offence.

Calculating the amount of financial benefit obtained will need to be done on a case-by-case basis but examples are found in Table 6.

**Table 6 – examples of financial benefit**

Offence	Examples of potential financial benefit
Failure to comply with an Improvement Notice (section 30)	The cost of any works that were required to comply with the improvement notice but which have not been removed by works in default.
Offences in relation to licensing of HMOs (section 72)	Additional rental income where an HMO is occupied by more than the number of persons authorised by the licence; the cost of complying with any works conditions on the licence; the cost of the licence application fee.
Offences in relation to licensing of houses under Part 3 of the Act (section 95)	Additional rental income where an HMO is occupied by more than the number of persons authorised by the licence; the cost of complying with any works conditions on the licence; the cost of the licence application fee.

Offence of contravention of an overcrowding notice (section 139)	Rental income whilst the property is being occupied in contravention of the overcrowding notice.
Failure to comply with management regulations in respect of HMOs (section 234)	The cost of any works that are required to avoid breaching the regulations.

## Imposing the financial penalty

Schedule 9 of the Housing and Planning Act 2016 sets out the process which must be followed when imposing a civil penalty.

### Notice of Intent

Before imposing a civil penalty on a landlord, the Council must serve a 'notice of intent' on the landlord in question. This notice must be served within 6 months of the last day on which the Council has evidence of the offence occurring. This notice must contain the following information:

- The amount of the proposed civil penalty;
- The reasons for proposing to impose a civil penalty, and;
- Information about the Landlord's right to make representations to the Council.

### Representations

Any landlord who is in receipt of a notice of intent has the right to make representations against that notice within 28 days of the date on which the notice was given. Representations can be against any part of the proposed course of action. All representations from landlords will be considered by the local authority.

Where a landlord challenges the amount of the civil penalty, it will be for the landlord to provide documentary evidence (e.g. tenancy agreements etc.) to show that the calculation of the penalty amount is incorrect. Where no such supporting evidence is provided, the representation against the amount will not be accepted.

Written responses will be provided to all representations made by the recipients of a notice of intent. No other parties have an automatic right to make representations but if any are received, they will be considered on a case by case basis and responded to where the Council considers it necessary.

Once the representation period has ended, the Council must decide, taking into consideration any representations that were made, whether to impose a civil penalty and the final amount of the civil penalty.

The final amount of a civil penalty can be a lower amount than was proposed in the notice of intent, but it cannot be a greater amount.

## **Final Notice**

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The imposing of a civil penalty involves serving a final notice and this notice must contain the following information:

- 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;
- Information about rights of appeal, and;
- The consequences of failure to comply with the notice.

The period of payment for the civil penalty must be 28 days beginning with the day after that on which the notice was given.

## **Withdrawing or Amending Notices**

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At any time, the Council may withdraw a notice of intent or a final notice or reduce the amount of a civil penalty. This is done by giving notice in writing to the person on whom the notice was served.

Where a civil penalty has been withdrawn, and there is a public interest in doing so, the Council can still pursue a prosecution against the landlord for the conduct for which the penalty was originally imposed. Each case will be considered on a case by case basis.

## **Appeals to the Tribunal**

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If a civil penalty is imposed on a landlord, that Landlord can appeal to the First-tier Tribunal (“the Tribunal”) against the decision to impose a penalty or the amount of the penalty. The Tribunal has the power to confirm, vary (increase or reduce) the size of the civil penalty imposed by the Council, or to cancel the civil penalty. Where an appeal has been made, this suspends the civil penalty until the appeal is determined or withdrawn.

## **Payment of a Civil Penalty**

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A civil penalty must be paid within 28 days, beginning with the day after that on which the final notice was given (“the 28-day payment period”), unless that notice is suspended due to an appeal. Details of how to pay the penalty will be provided on the final notice.

## **Other consequences of having a Civil Penalty imposed**

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Where a civil penalty has been imposed on a landlord, this will form a part of our consideration when reviewing licence applications for properties in which they have

some involvement. This includes licences under Part 2 or Part 3 of the Housing Act 2004.

Whilst a civil penalty will not automatically preclude us from granting a licence where such persons are involved, the reasons for imposing the penalty and the extent of the person's involvement in the property will be considered.

Where a landlord has two civil penalties imposed on them in a 12-month period, each for a banning order offence, the Council may include the landlords details on the Database of Rogue Landlords and Property Agents.

### **Recovering an unpaid Civil Penalty**

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It is the policy of the Council to consider all legal options available for the collection of unpaid civil penalties and to pursue unpaid penalties in all cases through the county courts. Some of the orders available to the Council through the county courts are as follows:

- A Warrant of Control for amounts up to £5000;
- A Third Party Debt Order;
- A Charging Order, and;
- Bankruptcy or insolvency.

A certificate, signed by the Chief Finance Officer for the Council and stating that the amount due has not been received by the date of the certificate, will be accepted by the courts as conclusive evidence of the payment due.

Where a Charging Order has been made, and the amount of the order is over £1000, the Council can consider applying for an Order for Sale against the property or asset in question. When considering which properties to apply for a Charging Order against, the Council can consider all properties owned by the Landlord and not just the property to which the offence relates.

Where the civil penalty was appealed and the Council has a tribunal decision, confirming or varying the penalty, the decision will be automatically registered on the Register of Judgments, Orders and Fines, once accepted by the county court. Inclusion on this Register may make it more difficult for the Landlord to get financial credit.

### **Income from Civil Penalties**

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Any income from Civil Penalties is retained by the Local Housing Council which imposed the penalty. The Council must spend any income from Civil Penalties on its enforcement functions in relation to the private rented sector.

## Appendix 1 - Paper Calculator

### Calculator for a Civil Penalty

#### Stage 1 of 4

Culpability of Offender	Low	Medium	High	Very High

Seriousness of Harm	Level A (High)	Level B (Medium)	Level C (Low)

Seriousness of Harm Risked	Culpability			
	Very high	High	Medium	Low
Level A	5+	5	4	3
Level B	5	4	3	2
Level C	4	3	2	1

Penalty level	Lower Limit	Starting Amount	Upper limits
1	£600	£900	£1200
2	£1200	£2,100	£3000
3	£3000	£4,500	£6000
4	£6000	£10,500	£15,000
5/5 +	£15,000	£22,500	£30,000

Lower limit	£
Starting amount	£
Upper limit	£



## **Stage 2 of 4**

Relevant Income Type & Amount

Type of relevant income	
Rental Income	£
Management Fees	£
All Income	£

Amount of Relevant weekly income	£
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Penalty Level	1	2	3	4	5	5+
% of income	50%	100%	150%	250%	400%	600%
Amount to be added to the penalty calculation weekly income					£	

Multiply the amount of relevant weekly income by the relevant % from the table above

## **Stage 3 of 4**

The Offenders Track Record

Aggravating Factors	Amount to be added (5% for each factor)
1.	£
2.	£
3.	£

4.	£
5.	£
6.	£
7.	£
8.	£
9.	£
10.	£

Mitigating factors Minus 5% for each factor	Amount to be deducted (5% for each factor)
1.	£
2.	£
3.	£
4.	£

5.	£
6.	£
7.	£
8.	£
9.	£
10.	£

Penalty amount Starting point	£
Mitigation Factor amount	£
Aggravating Factor amount	£
Penalty amount total	£

**Stage 4 of 4 Calculating the penalty amount**

Box 1

Starting amount (Determined in stage 1)	£
Increase due to income (Determined in stage 2)	£
Increase due to Mitigating factors	£
Decrease due to Aggravating factors	£

Add the amounts in the above boxes	£
Is the amount in the box between the penalty bands	

Box 2

Did the offender obtain financial benefit from committing crime?	
Yes – how	Amount £

Add the amounts from Box 1 and Box 2	£
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<b>Final Penalty amount</b>	£
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Ensure that the amount in box above is not higher than £30,000