



**LANCASTER CITY COUNCIL**

**DIRECTORATE FOR COMMUNITIES AND THE ENVIRONMENT**

**Housing Standards, Civil Penalties Enforcement Policy**

**Agreed by Cabinet: December 2018**

## **Civil Penalties Enforcement Policy**

### **1.0 Introduction**

The Housing and Planning Act 2016 gave local housing authorities the power to impose civil penalties of up to £30,000 on individuals and organisations, as an alternative to prosecution, for certain offences under the Housing Act 2004.

This policy contains information about civil penalties and how the Local Authority is planning to use them. It takes into account the statutory guidance that has been issued by the Government under Schedule 9 of the Housing and Planning Act 2016, and should be read in conjunction with Lancaster City Council's (the local authority) Private Sector Housing Enforcement Policy.

### **2.0 Housing Offences Covered by Civil Penalties**

The Power 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. This inserted section 249A into the Housing Act 2004 Act. Section 249A establishes the legal basis for the imposing of civil penalties as an alternative to prosecution for specific housing offences under the Housing Act 2004.

Civil Penalties can be imposed by the local authority as an alternative to prosecution for the following offences under the Housing Act 2004:

- Failure to comply with an Improvement Notice (section 30);
- Offences in relation to licensing of Houses in Multiple Occupation (section 72);
- Offences in relation to licensing of houses under Part 3 of the Act (section 95);
- Offences of contravention of an overcrowding notice (section 139);
- Failure to comply with management regulations in respect of Houses in Multiple Occupation (section 234)
- Offences subject to Banning Orders (subject to implementation)
- Regulations made under The Housing and Planning Act 2016

### **3.0 Purpose of Civil Penalties Policy**

Local housing authorities have the power to impose civil penalties for up to £30,000 on individuals and companies (for certain specified offences under the Housing Act 2004) as an alternative to prosecution.

In accordance with s249A of the 2004 Act, the amount of the financial penalty is to be determined by the local housing authority, taking account of the statutory guidance. The local authority therefore has a wide discretion in determining the appropriate level of civil penalty in a particular case and seeks to set out further guidance in this Policy of how it will do so.

The local authority has had regard to the principles set out in the Sentencing Council Health and Safety Offences and Food Safety and Hygiene Offences Definitive Guidelines, which the authority considers to be the most relevant sentencing guidance issued by the Sentencing Council.

This Policy will complement the Private Sector Housing Enforcement Policy to ensure that a level playing field is created for all landlords by dealing robustly with irresponsible landlords who fail to comply with their legal obligations.

## **4.0 Principles of Civil Penalties**

### **General Considerations**

A civil penalty can only be imposed as an alternative to prosecution. The legislation does not permit local housing authorities to impose a civil penalty and prosecute for the same offence. This means that if a person has been convicted or is currently being prosecuted, the local authority cannot impose a civil penalty in respect of the same offence. The same applies if a civil penalty has been imposed, a person cannot then be convicted of the same conduct. A civil penalty can be issued as an alternative to prosecution for each separate offence which falls within the specified housing offences listed in paragraph 2 above.

Where the local authority is in a position to prosecute a landlord and a letting agent for an offence, then a civil penalty can be imposed as an alternative to prosecution of either party or both. The amount of the civil penalty may differ for both depending on individual circumstances.

Although only one civil penalty can be imposed for a single offence, if a landlord fails to comply with an Improvement Notice and subsequently receives a civil penalty as a result, a further Improvement Notice could then be issued if the work still hasn't been carried out.

### **What must be done before a Civil Penalty can be considered:**

The local authority must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the landlord and that the public interest will be properly served by imposing a civil penalty. The following questions should be considered:

- Does the local authority have sufficient evidence to prove beyond reasonable doubt that the offence was committed by the landlord in question?
- Is the public interest properly served by imposing a Civil Penalty on the landlord in respect of the offence?
- Are there any reasons why a prosecution may be more appropriate than a civil penalty? I.e. the offence is particularly serious and the landlord has committed similar offences in the past and/or a banning order should be considered.

### **Factors to be Taken into Account when Deciding the Level of Civil Penalty**

The Government has stated in its statutory guidance that generally they expect the maximum amount for a civil penalty (£30,000) to be reserved for the 'very worst offenders' and it recommends that the actual amount imposed in any particular case should reflect the severity of the offence, as well as taking account of the landlord's previous record of offending.

The Government has set out factors which a local authority should take into account when setting a civil penalty to ensure that it is set at an appropriate level:

- a) Severity of the offence.** The more serious the offence, the higher the penalty should be.
- b) Culpability and track record of the offender.** A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and therefore are expected to be aware of their legal obligations.
- c) The harm caused to the tenant.** This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm, the higher the amount should be when imposing a civil penalty.
- d) Punishment of the offender.** A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a

high enough level to help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.

**e) Deter the offender from repeating the offence.** The ultimate goal is to prevent any further offending and help to ensure that the landlord fully complies with all of their legal responsibilities in future. The level of penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

**f) Deter others from committing similar offences.** While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of the deterrence is the realisation that (a) the local authority is proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.

**g) Remove any financial benefit the offender may have obtained as a result of committing the offence.** The guiding principle here should be to ensure that the offender does not benefit as a result of committing the offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

## **5. Process for Determining the Level of Civil Penalty**

In order to ensure that a civil penalty is set at the appropriate level, the local authority will consider the factors described above.

The final factor [4 (g)] is an overreaching one and after all other factors have been considered and applied, the local authority will need to consider whether the civil penalty set removes any financial benefit that has been gained by the commission of the offence.

### **5.1 Step One - Determining the offence category**

The local authority will determine the offence category using only the culpability and harm factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment.

Table 1 below breaks down the landlord’s culpability for the offence into four categories and each category has an accompanying description of what would constitute that level of culpability. The behaviour of the landlord should be compared to the 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 – Culpability

Very High	Where the offender intentionally breached, or flagrantly disregarded the law
High	Actual foresight of, or willful blindness to, risk of offending but risk nevertheless taken; Serious and or systematic failure by the person or organization to comply with legal duties
Medium	Offence committed through act or omission which a person exercising reasonable care would not commit
Low	Offence committed with little fault, for example because:

	<ul style="list-style-type: none"> <li>• Significant efforts were made to address the risk but were inadequate on this occasion</li> <li>• There was no or little warning of risk/circumstances of offence</li> <li>• Failings were minor and occurred as a an isolated incident.</li> </ul>
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Once the local authority has determined the level of culpability (using Table 1 above) in relation to an offence, then the level of harm will need to be determined. The local authority will use the following definition of harm taken from the statutory guidance on hazard rating under the Housing Act 2004, 'Harm is an adverse physical or mental effect on the health of a person. It includes, for example, physical injury, and illness, condition, or symptom whether physical or mental. It also includes both permanent and temporary harm'

Table 2 below separates the seriousness of harm risked into three categories and each category has an accompanying description of what would constitute that level of harm risked. The harm risked by the offence should be compared to the table to determine the appropriate level and this exercise will be repeated for each offence that is being considered as the seriousness of harm risked may vary between offences.

When using Table 2 to determine the appropriate level of harm, consideration should be given to the worst possible harm outcomes that could reasonably occur as a result of the landlord committing the specific offence that is being considered. 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 even greater harm to have occurred. The vulnerability of the tenant or any visitors to a property will be taken into account when determining the seriousness of the harm risked. This will be determined on a case by case basis.

Table 2 – Seriousness of Harm Risked

High	<ul style="list-style-type: none"> <li>• Serious adverse effect on individual(s) and/or a widespread impact</li> <li>• High risk of serious adverse effect on individual(s)</li> <li>• Provides a serious market advantage over rivals</li> <li>• Harm to a vulnerable individual</li> <li>• Serious level of overcrowding</li> </ul>
Medium	<ul style="list-style-type: none"> <li>• Adverse effect on individual(s) (not amounting to High Harm)</li> <li>• Medium risk of adverse harm to an individual or low risk of a serious adverse effect</li> <li>• The local authority's work as a regulator is undermined by the offenders behaviour</li> <li>• Consumer/tenant mislead</li> </ul>
Low	<ul style="list-style-type: none"> <li>• Low risk of adverse effect on individual(s)</li> <li>• Low adverse effect on individual(s)</li> </ul>

When determining the seriousness of harm risked in relation to an offence, consideration may be given to the guidance in relation to Class I, II, III and IV harm outcomes in the 'Housing Health and Safety Rating System - Operating Guidance'.

## **5.2 Step two - The penalty starting point and range**

Once the offence category has been determined (using culpability and harm), the local authority should then refer to the starting points to reach an appropriate level of civil penalty within the range for that category of offence. The local authority should then consider further adjustment within the category range for aggravating and mitigating features.

Table 4 – Penalty Bands

<b>Low Culpability</b>	<b>Starting Point</b>	<b>Penalty Band Range</b>
Low Harm	£1,500	£750 - £2,250
Medium Harm	£3,000	£2,250 - £3,750
High Harm	£4,500	£3,750 - £5,250
<b>Medium Culpability</b>		
Low Harm	£4,500	£3,750 - £5,250
Medium Harm	£7,500	£5,250 - £12,000
High Harm	£12,000	£9,000 - £15,000
<b>High Culpability</b>		
Low Harm	£7,500	£5,250 - £12,000
Medium Harm	£12,000	£9,000 - £15,000
High Harm	£16,500	£15,000 - £20,000
<b>Very High Culpability</b>		
Low Harm	£12,000	£9,000 - £15,000
Medium Harm	£16,500	£15,000 - £20,000
High Harm	£25,500	£20,000 - £30,000

Table 5 below contains a non-exhaustive list of factual elements providing the context of the offence and factors relating to the landlord. The local authority will identify whether any combination of these, or other relevant factors should result in an upward or downward adjustment from the starting point. In particular relevant recent previous convictions, recent cautions and/or civil penalties are likely to result in a substantial upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Table 5 – Aggravating and mitigating factors

<b>Aggravating Factors</b>	<b>Mitigating Factors</b>
Relevant previous convictions having regard to (a) the nature of the offence to which the conviction relates and its relevance to this offence and (b) the time that has elapsed since the conviction	No relevant unspent previous convictions/good character
Relevant previous cautions within the last two years having regard to (a) the nature of the offence to which the caution relates and its relevance to this offence	No relevant cautions within the last two years

Relevant previous civil penalties within the last two years having regard to (a) the nature of the offence to which the caution relates and its relevance to this offence	No relevant civil penalties within the last two years
The offence has been committed whilst the landlord is on bail/on summons for other relevant proceedings at court	Mental disorder or learning disability, where directly linked to the commission of the offence
Established evidence of wider/community impact	Serious medical conditions requiring urgent, intensive or long term treatment
Record of providing substandard accommodation	One off event, not commercially motivated
Record of poor management or not meeting legal requirements	Good record of maintaining property
Evidence of harassment of tenant and/or illegal eviction (actual or attempted) in this case	Tenants behavior a contributing factor to the offence
Motivated by financial gain	Steps taken voluntarily to remedy problem
Obstruction of justice, for example failing to comply with a request for information or documents or other behavior amounting to an obstruction	High level of co-operation with the investigation, beyond that which will always be expected
Offending happened over a prolonged period of time	
Property management is/was their only or main business.	

*Includes civil penalties imposed for offences under the Housing Act 2004, The Smoke and Carbon Monoxide Alarm (England) Regulations 2015 or the Redress Schemes for Letting Agency Work and Property Management Work (Requirement to Belong to a Scheme etc)(England) Order 2014. Also includes civil penalties imposed by other regulatory agencies and Council's.*

### **5.3 Step three - Review the civil penalty amount**

Once the civil penalty has been calculated, the local authority should review the penalty amount to determine whether the civil penalty amount meets the objectives of civil penalties as set out in the statutory guidance.

#### **General principles to follow when setting the financial penalty**

The local authority should finalise the appropriate level of penalty so that it reflects the seriousness of the offence and the local authority must take into account the financial circumstances of the offender (as far as they are known).

The level of civil penalty should reflect the extent to which the offender fell below the required standard. **The civil penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence;** it should not be cheaper to offend than to comply with the law.

## **Review of the civil penalty**

The local authority should review the civil penalty and, if necessary adjust the initial amount arrived at in step two to ensure that it fulfils the general principles set out above.

The penalty amount as calculated at step 2, should be considered against any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings. If the economic benefit is in excess of the penalty amount as calculated at step 2, then the penalty amount should be adjusted to ensure that the penalty is set at an amount which removes the financial benefit (as a minimum).

The local authority may draw on information from enforcing authorities and others about the general costs of operating within the law, if this information is not available. Whether the penalty will have the effect of putting the offender out of business will be relevant, but in some cases this might be an acceptable outcome.

In finalising the penalty amount, the local authority will have regard to evidence of the following factors relating to the wider impact of the civil penalty on innocent third parties; such as (but not limited to);

- Impact of the civil penalty on the offender's ability to comply with the law or make restitution to victims;
- Impact of the civil penalty on employment of staff, service users, customers and the local economy.

### **5.4 Step four - Reduction for early admission of guilt**

The local authority will take into account a potential reduction in penalty for an admission of guilt.

The following factors will be considered in setting the level of reduction:

- The stage in the investigation or thereafter when the offender admitted guilt;
- The circumstances in which they admitted guilt;
- The degree of co-operation with the investigation.

The maximum level of reduction for an admission of guilt will be one-third of the penalty amount. In some circumstances there will be a reduced or no level of discount. For example where the evidence is overwhelming or there is a pattern of behaviour.

Any reduction should not result in a civil penalty which is less than the amount of gain from the commission of the offence itself.

### **5.5 Step five - Additional actions**

In all cases the local authority will consider whether to take additional action. These may include works in default, Interim Management Orders or rent repayment orders. The local authority cannot however prosecute for the same conduct which has led to the civil penalty being imposed.

### **5.6 Step six - Totality principle**

If issuing a civil penalty for more than one offence, or where the offender has already been issued with a civil penalty (within the previous 28 days), the local authority will consider whether the total penalties are just and proportionate to the offending behaviour.

Where the offender is issued with more than one civil penalty, the local authority should consider the following guidance from the definitive guideline on Offences Taken into Consideration and Totality.



*“The total financial penalty is inevitably cumulative.*

*The court should determine the financial penalty for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.*

*The court should add up the financial penalties for each offence and consider if they are just and proportionate.*

*If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate financial penalties. There are a number of ways in which this can be achieved.*

*For example:*

- *Where an offender is to be penalised for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a financial penalty which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;*
- *Where an offender is to be penalised for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate financial penalties for each of the offences. The court should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be passed.*

*Where separate financial penalties are passed, the court must be careful to ensure that there is no double-counting”.*

*Ultimately, the civil penalty imposed must remove any financial gain the landlord has obtained by the commission of the offence.*

## **5.7 Step seven - Recording the decision**

The officer making a decision about a civil penalty will record their decision giving reasons for coming to the amount of civil penalty to be imposed.

## **6.0 An offender’s ability to pay**

In setting a civil penalty, the local authority may conclude that an offender is able to pay any civil penalty imposed unless the offender has supplied sufficient financial information or evidence to the contrary.

It is for the offender to disclose to the local authority such data relevant to his or her financial position as this will enable the local authority to assess and determine what they can reasonably afford to pay.

Where the local authority is not satisfied that it has been given sufficient reliable information, the local authority will be entitled to draw reasonable inferences as to the offender’s means from the evidence it has obtained and from all the circumstances of the case, including accessing information via appropriate credit referencing agencies. **This may include the inference that the offender can pay the civil penalty.**

As many landlords will own one or more properties, it is likely that they will be able to sell or borrow against these assets to pay a civil penalty. After taking into account any mortgages on the property, the local authority will determine the amount of equity that could be released from the property. If the landlord claims they are unable to pay a civil penalty and show that they have a low income, consideration will be given to whether any of the properties can be sold or refinanced when assessing their ability to pay.

## **7.0 . Procedure for the Imposition of a Civil Penalty**

Schedule 13A of the Housing Act 2004, as amended by the Housing and Planning Act 2016, sets out the process that must be followed when imposing a civil penalty.

### **Notice of Intent**

Before imposing a civil penalty on a landlord, the local authority must serve a 'Notice of Intent' on the landlord who has committed the offence. The notice must be given before the end of the period of 6 months, beginning with the first day on which the local authority has sufficient evidence of the conduct to which the civil penalty relates. In the case of conduct which is continuing, the notice can be given at any stage if the conduct is continuing or within 6 months beginning with the day on which the conduct ends. The notice of intent must set out:

- 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 local authority.

### **Representations**

Any landlord who is in receipt of a 'Notice of Intent' has the right to make written representations about the proposal to impose a civil penalty within 28 days beginning with the day after the date on which the notice was given ('Representation Period'). Representations can be against any part of the proposed course of action, for example the imposition of the civil penalty in its entirety or the amount of the civil penalty. All representations from landlords will be considered by an appropriate senior officer and never by the officer who served the 'Notice of Intent'.

Where a landlord challenges the amount of the civil penalty, it will be for the landlord to provide documentary evidence (e.g. tenancy agreements, bank statements, mortgage account statements, business accounts, etc.) to show that the penalty amount should be reviewed. Where no such supporting evidence is provided, the representation against the amount will be likely to carry less weight.

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 local authority considers it necessary.

### **Final Notice**

Once the 'Representation Period' has ended, the local authority must decide whether to impose a civil penalty and if so, the final amount of the civil penalty. Consideration will be given to any representations made during the 'representation period' if applicable. The final amount of a financial penalty can be a lower amount than was proposed in the 'Notice of Intent' but it cannot be a greater amount.

If the local authority decides to impose a civil penalty on a landlord, then the landlord must be given a notice imposing that penalty ('Final Notice'). The notice must contain the following information:

- The amount of the Civil 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 to the First-Tier Tribunal (Property Chamber), 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.

### **8.0 Withdrawing or Amending the Notice**

At any time, the local authority may withdraw a 'Notice of Intent' or a 'Final Notice' or reduce the amount of a civil penalty as stated in the 'Notice of Intent' or 'Final Notice'. This is done by giving notice in writing to the person on whom the notice was served. The amount of the civil penalty in the 'Notice of Intent' or 'Final Notice' cannot be increased.

Where a civil penalty has been withdrawn, and there is a public interest in doing so, the local authority 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. Civil penalties are an alternative to prosecution however, and as such, if a civil penalty has been imposed and not withdrawn, the local authority cannot initiate a prosecution for the same offence.

### **9.0 Payment of a Civil Penalty**

Where a civil penalty has been properly imposed, in accordance with the provisions of the Housing Act 2004 and this policy, it 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.

Where a civil penalty has been appealed to the First-Tier Tribunal (Property Chamber) and ultimately confirmed, the penalty amount will become due.

### **10.0 Other Consequences of Having a Civil Penalty Imposed**

Where a civil penalty has been imposed on a landlord, this will form a part of the local authority's 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 the local authority 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 to determine whether they are fit and proper to hold such a licence and/or be involved in the management of the property. The same considerations will apply to the potential revocation of property licences.

### **11.0 Appeals and the Role of the First-Tier Tribunal (Property) Chamber**

If a civil penalty is imposed on a landlord, the landlord can appeal to the First-Tier Tribunal (Property Chamber) against the decision. The appeal is a re-hearing of the local authority's decision but can have regard to matters that the local authority was unaware of at the time the decision was made. Where an appeal has been made, this suspends the civil penalty until the

appeal is determined or withdrawn. On appeal the First-Tier Tribunal (Property Chamber) may confirm, vary (increase or decrease) or cancel the civil penalty.

The First-Tier Tribunal (Property Chamber) can dismiss an appeal if it is satisfied that the appeal is frivolous, vexatious or an abuse of process, or has no reasonable prospect of success. The local authority will make applications for such dismissal to the First-Tier Tribunal (Property Chamber) when appropriate to do so.

A civil penalty will only be imposed where the local authority is satisfied there is sufficient evidence to prove beyond reasonable doubt that the offence occurred and the penalty amount is determined in line with this Policy and the relevant statutory guidance.

Generally in appeals to the First-Tier Tribunal (Property Chamber) each party bears their own costs. However the Tribunal may award costs when one party has acted unreasonably in bringing, defending or conducting proceedings. The local authority will be likely to apply for costs in such cases.

## **12. Enforcement of Civil Penalties**

Where a landlord fails to pay the whole or part of a civil penalty, it is the policy of the local authority to consider all legal options available, including pursuing the unpaid amount through the County Courts. The local authority may recover the civil penalty or part of it, on application to the County Court as if it was an order of that Court

Where appropriate, the Council will seek to recover the costs incurred in taking this action from the person to which the civil penalty relates.

## **13. Income Recovered from Civil Penalties**

Any income from civil penalties is retained by the local authority which imposed the penalty. The local authority must use any income from civil penalties to further its statutory functions in relation to enforcement activity covering the private rented sector

## **14.0 Appeals and Complaints Procedure**

The local authority's complaints procedure is available for complaints relating to the application of this policy where there is not an appeal procedure otherwise available. Any appeals against a formal notice should be through the statutory appeal provisions.