

Agenda Item No: 7
Report To: Cabinet
Date of Meeting: 24 June 2021



Report Title: Electrical Safety Standards Regulations 2020 – Implementing financial penalties

Report Author & Job Title: Julian Watts Senior EHO

Portfolio Holder: Cllr. Bill Barrett

Portfolio Holder for: Housing

Summary: The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 – require electrical installations in the private rented properties to be safe. Landlords who fail to comply can be fined up to £30,000. To be able to implement such fines the council is required to have a fees policy. This report sets out to seek approval for Cabinet members to adopt our existing financial fee policy

Key Decision: NO

Significantly Affected Wards: All Wards

Recommendations: **The Cabinet is recommended to:-**

- i. Members to agree to adopt our existing financial penalty policy. See appendix 2

Policy Overview: Policy to set level of fines for breaches of the Electrical Safety Regulations 2020

Financial Implications: Officers within Private Sector Housing will be delegated to issue civil penalties in accordance with the proposed policy. Landlords have the right to appeal the level of the fine. Appeals would be heard in a First Tier Property Tribunal. Any representations resulting from imposing financial penalties will be dealt with by the Manager of Private Sector Housing.

Successful fines would be brought to the attention of our finance department to pursue for payment.

Legal Implications: The council is permitted to retain any revenue from the

financial penalty charges in relation to private rented sector enforcement activities. Any amount that is not used for such activities, must be paid back to the Government. It is difficult to predict how many fines would be issued, as it is unlikely that many landlords would fail to comply with any remedial notice works issued by the council, within 28 days. Not complying could have significant financial implications in the form of fines and the council could also carry out works and recover their costs. Most landlords tend to comply with enforcement action, but are able to appeal against any remedial action. However, having such powers to issue fines and carry out works in default, would hopefully be a deterrent to ensure that landlords comply with their duties under the new regulations. Therefore, potential income for the council may be low.

The primary aims of the civil penalties will be to:

- Ensure that landlords/agents comply with the law
- Aim to deter future non-compliance
- Clamp down on rogue landlords
- Provide additional enforcement options

The level of fine would be based on the severity of the offence as well as taking into account the landlord's previous record on offending.

Equalities Impact Assessment:

See Attached – appendix 1

Data Protection Impact Assessment:

N/A

Risk Assessment (Risk Appetite Statement):

N/A

Sustainability Implications:

N/A

Other Material Implications:

None

Exempt from Publication:

NO

Background Papers:

<https://www.gov.uk/government/publications/electrical-safety-standards-in-the-private-rented-sector-guidance-for-landlords-tenants-and-local-authorities>

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Introduction and Background

1. The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 – from 1 July 2020, all new private tenancies in England will need to ensure that electrical installations are inspected and tested by a qualified person before the tenancy begins. The landlord will then need to ensure that the installation is inspected and tested at least every five years – and more often if the most recent safety report requires it. For existing tenancies, an electrical safety test will need to be carried out by 1 April 2021, with regular tests as outlined above.
2. Implementing the Regulations will allow the council to require landlords to carry out remedial works or even arrange for repairs to be done and recover the cost from the landlord. For those who fail to comply the council can issue a penalty fine of up to £30,000 and the proceeds can be used to drive up standards within the private rented sector.
3. Further information and guidance on the new electrical safety standards can be found at the following link:

<https://www.gov.uk/government/publications/electrical-safety-standards-in-the-private-rented-sector-guidance-for-landlords-tenants-and-local-authorities>

Proposal

4. Local authorities can develop and document their own policy on how to determine the financial penalty levels and may choose to consider adopting previously developed policies.
5. This report is to seek agreement to adopt the council's existing financial penalty policy, previously approved by Cabinet (2018) in regards to issuing civil penalties under the Housing and Planning Act 2016. Once agreed, the council will be able to issue similar fines of up to £30,000, for certain offences relating to the Electrical Standards Regulations 2020. **See Appendix 2** for existing penalty policy to be adopted.

Equalities Impact Assessment

6. Members are referred to the attached Assessment. **Appendix 1**

Consultation Planned or Undertaken

7. N/A. No requirement under the legislation to undertake consultation.

Other Options Considered

8. No other options were considered. Not to adopt the financial fee policy could potentially place tenants at risk and allow landlords to flout the law and go unpunished.

Reasons for Supporting Option Recommended

9. Without adopting the council's existing financial penalties policy no fines can be considered for breaches of the Electrical Safety Regulations.
10. The Regulations allow the council to adopt their existing policy. As the council already has a financial fee policy, which was approved by Members in 2018, it is considered appropriate to adopt it. To draft a new policy was deemed unnecessary as the existing was fit for purpose.

Next Steps in Process

11. Members agree to adopt our existing financial penalty policy - See appendix 2
Once agreed the council has the option to fine landlords up to £30,000 for failing to comply to The Electrical Safety Regulations 2020.

Conclusion

12. It is the Council's intention to encourage landlords to meet their obligations without the need to impose a financial penalty. However, the ability to impose such fines is likely to be a deterrent and encourage compliance.
13. Adopting the new enforcement powers will assist with dealing with rogue landlords, who blatantly break the rules.

Portfolio Holder's Views

14. I fully support adopting our existing fee policy to ensure the council has the appropriate powers to deal with landlords who fail to ensure their properties are safe to live in. Being able to issue fines for non-compliance will act as a deterrent.

Contact and Email

15. Julian Watts Senior EHO – Private Sector Housing
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Appendix 1

Equality Impact Assessment

Lead officer:	Julian Watts Senior EHO Private Sector Housing
Decision maker:	Cabinet
Decision: <ul style="list-style-type: none"> • Policy, project, service, contract • Review, change, new, stop 	Members to agree to adopt existing Civil Penalties Policy Statement to allow the council to consider issuing civil penalties for breached of the Electrical Safety Standard Regulations 2020
Date of decision: The date when the final decision is made. The EIA must be complete before this point and inform the final decision.	1 June 2021
Summary of the proposed decision: <ul style="list-style-type: none"> • Aims and objectives • Key actions • Expected outcomes • Who will be affected and how? • How many people will be affected? 	<p>The Housing & Planning Act 2016 introduced civil penalties as an alternative to prosecution offences on individuals and organisations under the Housing Act 2004. The penalty is a financial penalty, which can be imposed by a local authority as an alternative to prosecuting for certain offences, up to £30,000.</p> <p>It is the Council's intention to encourage landlords to meet their obligations without the need to impose a Penalty Charge. However, the ability to impose such Charges is likely to be a deterrent and encourage compliance.</p> <p>The council is required under the Electrical Safety Standards Regulations 2020 to prepare and publish a civil penalty policy setting out how the Council will determine the level of the fines and the right to appeal. Without a policy, the Council is unable to issue any civil penalty up to a maximum £30,000.</p> <p>The penalties can be issued on landlords and letting agents.</p>
Information and research: <ul style="list-style-type: none"> • Outline the information and research that has informed the decision. • Include sources and key findings. 	<ul style="list-style-type: none"> • The Housing and Planning Act 2016 • Guidance for Local Housing Authorities -Civil penalties under the Housing Planning Act 2016 • The Electrical Safety Standards in private rented sector guidance for landlords, tenants and local authorities.
Consultation: <ul style="list-style-type: none"> • What specific consultation has occurred on this decision? 	The wording of the Policy Statement has been discussed and agreed with by Housing Managers, Portfolio Holder (Cllr Barrett) and Legal Services (Samantha Clarke)

<ul style="list-style-type: none"> • What were the results of the consultation? • Did the consultation analysis reveal any difference in views across the protected characteristics? • What conclusions can be drawn from the analysis on how the decision will affect people with different protected characteristics? 	
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Assess the relevance of the decision to people with different protected characteristics and assess the impact of the decision on people with different protected characteristics.

When assessing relevance and impact, make it clear who the assessment applies to within the protected characteristic category. For example, a decision may have high relevance for young people but low relevance for older people; it may have a positive impact on women but a neutral impact on men.

Protected characteristic	Relevance to Decision High/Medium/Low/None	Impact of Decision Positive (Major/Minor) Negative (Major/Minor) Neutral
<u>AGE</u> Elderly	Medium	Positive (Minor)
Middle age	Low	Positive (Minor)
Young adult	Low	Positive (Minor)
Children	Medium	Positive (Minor)
<u>DISABILITY</u> Physical	Medium	Positive (Minor)
Mental	Low	Neutral
Sensory	Low	Neutral
<u>GENDER RE- ASSIGNMENT</u>	Low	Neutral
<u>MARRIAGE/CIVIL PARTNERSHIP</u>	Low	Neutral
<u>PREGNANCY/MATERNITY</u>	Low	Neutral
<u>RACE</u>	None	Neutral
<u>RELIGION OR BELIEF</u>	None	Neutral
<u>SEX</u> Men	None	Neutral

Women	None	Neutral
<u>SEXUAL ORIENTATION</u>	None	Neutral

Mitigating negative impact: Where any negative impact has been identified, outline the measures taken to mitigate against it.	
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Is the decision relevant to the aims of the equality duty?	
Guidance on the aims can be found in the EHRC's Essential Guide , alongside fuller PSED Technical Guidance .	
Aim	Yes / No / N/A
1) Eliminate discrimination, harassment and victimisation	N/A
2) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it	N/A
3) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it	N/A

Conclusion:	
<ul style="list-style-type: none"> Consider how due regard has been had to the equality duty, from start to finish. There should be no unlawful discrimination arising from the decision (see guidance above). Advise on whether the proposal meets the aims of the equality duty or whether adjustments have been made or need to be made or whether any residual impacts are justified. How will monitoring of the policy, procedure or decision and its 	<p>Implementing the Policy will not discriminate against any disadvantage or vulnerable people.</p> <p>The Policy will provide the council with additional enforcement powers to deal with landlords who fail to keep their properties up to standard.</p>

implementation be undertaken and reported?	
EIA completion date:	1 June 2021

Appendix 2

Ashford Borough Council Civil Penalties Policy

Housing and Planning Act 2016 – Civil Penalties

This statement sets out the principles that Ashford Borough Council (the Council) will apply in exercising its powers to require a relevant landlord to pay a civil penalty

The Housing & Planning Act 2016 introduced changes to the Housing Act 2004 to allow the Council to issue civil penalties of up to £30,000.

The Council will be able to impose such penalties as an alternative to prosecution for the following offences under the Housing Act 2004 and Housing and Planning Act 2016:

- Failure to comply with an Improvement Notice (section 30 of the Housing Act 2004)2;
- Offences in relation to licensing of Houses in Multiple Occupation (section 72 of the Housing Act 2004)3;
- Offences in relation to licensing of houses under Part 3 of the Act (section 95 of the Housing Act 2004)4;
- Offences of contravention of an overcrowding notice (section 139 of the Housing Act 2004)5;
- Failure to comply with management regulations in respect of Houses in Multiple Occupation (section 234 of the Housing Act 2004)
- Breach of a banning order (section 21 of the Housing and Planning Act 2016)
- Failure to comply with a Remedial Notice (Part 3 of The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

The council will determine, on a case-by-case basis, whether to instigate prosecution proceedings or to serve a civil penalty in respect of any offences listed above.

In addition to the above offences, section 23 of the Housing and Planning Act 2016 provides that a civil penalty may be imposed in respect of a breach of a Banning Order.

Banning orders prohibit landlords and agents from letting or managing residential properties. An order can prohibit a person from:

- Renting out a residential accommodation
- Engaging in letting agency work
- Engaging in property management work.

Guidance on Banning Orders document “Banning orders for landlords and property agents can be found under the Housing and Planning Act 2016” see link:

<https://www.gov.uk/government/publications/banning-orders-for-landlords-and-property-agents-under-the-housing-and-planning-act-2016>

Where a letting/managing agent and landlord have committed the same offence the Council can impose a civil penalty on both of them as an alternative to prosecution. The level of the civil penalty imposed on each offender may differ, depending on the circumstances of the case. The Council cannot prosecute as well as impose a financial penalty, but must be satisfied, to the criminal standard of proof, i.e. beyond reasonable doubt, that an offence has been committed, which could justify a prosecution, before it imposes a financial penalty.

Determining whether to prosecute or issue a civil penalty.

Where the legislation allows a civil penalty to be issued this will normally be the first choice rather than prosecution unless the landlord has breached housing legislation in the past and continues to be considered such a poor landlord that a banning order is considered necessary. In this case a prosecution will be the first choice with an aim to proceed for a banning order.

When issuing a civil penalty the procedures set out between pages 4 & 6 of this policy in this appendix will be followed in determining the level of the fine.

When determining whether to prosecute for an offence, officers will follow the guidance in this enforcement policy.

The Council has the power to impose a civil penalty of up to £30,000, with a level of civil penalty imposed in each case in line with its policy. The financial penalty will be based on the seriousness of the offence and taking into account the circumstances of the case. This would include the financial circumstances of the offender..

Statutory Guidance

The Government has issued statutory guidance under Schedule 9 of the Housing & Planning Act 2016 Local authorities must have regard to this guidance (see link below) in the exercise of their functions in respect of civil penalties

Civil Penalties under the Housing and Planning Act 2016 Guidance- link: <https://www.gov.uk/government/publications/civil-penalties-under-the-housing-and-planning-act-2016>

Paragraph 3.5 of the statutory guidance states that ‘The actual amount levied 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 same paragraph sets out several factors that should be taken into account to ensure that the civil penalty is set at an appropriate level in each case:

- 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 should be 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 (this may be as perceived by the tenant), 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 demonstrate 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 ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the 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 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 an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

Deciding on an appropriate level of penalty

STEP 1 – Determining the offence category

The Council will determine the offence category using only the **culpability** and **harm** factors in the tables below. The severity of the offence based on the culpability levels below, would be determined in conjunction with the statutory guidance on page two.

Culpability

Very high

- Where the offender intentionally breached, or flagrantly disregarded, the law or
- Who has a high public profile and knew their actions were unlawful

High

- Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

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:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk
- failings were minor and occurred as an isolated incident

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Category 1 – High Likelihood of Harm

- Serious adverse effect(s) on individual(s) and/or having a widespread impact
- High risk of an adverse effect on individual(s) – including where persons are vulnerable

Category 2 – Medium Likelihood of Harm

- Adverse effect on individual(s) (not amounting to Category 1)
- Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect
- The Council and/or legitimate landlords or agents substantially undermined by offender's activities
- The Council's work as a regulator to address risks to health is inhibited
- Consumer/tenant misled

Category 3- Low Likelihood of Harm

- Low risk of an adverse effect on individual(s)
- Public misled but little or no risk of actual adverse effect on individual(s)

We 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.

STEP TWO - Starting point and category range

Having determined the **category**, the Council would refer to the following **starting points** to reach an appropriate level of civil penalty within the category range. The Council will then consider further adjustment within the category range for aggravating and mitigating features.

Starting points and ranges The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability

Range	Starting Point	Min	Max
Low culpability			
Harm category 3	£50	£25	£175
Harm category 2	£125	£50	£350
Harm category 1	£300	£125	£750
Medium culpability			
Harm category 3	£350	£175	£750
Harm category 2	£1,000	£350	£2,000
Harm category 1	£2,500	£750	£4,500
High culpability			
Harm category 3	£1,000	£500	£2,250
Harm category 2	£3,000	£1,000	£5,500
Harm category 1	£6,250	£2,500	£12,500
Very high culpability			
Harm category 3	£2,500	£1,250	£4,500
Harm category 2	£6,250	£2,500	£12,500
Harm category 1	£15,000	£6,250	£30,000

Factors, which the Council will consider in reducing the penalty

The Council will consider any factors, which indicate a reduction in the penalty and in so doing will have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):

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

Reduction for early admission of guilt

The Council 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. When deciding on any reduction in a financial penalty, consideration will be given to:

- 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 in a penalty for an admission of guilt will be one-third. In some circumstances, there will be a reduced or no level of discount. For example where the evidence of the offence is overwhelming or there is a pattern of criminal behaviour.

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

Obtaining financial information

The statutory guidance advises that local authorities should use their existing powers to, as far as possible, make an assessment of a landlord's assets and any income (not just rental income) they receive when determining an appropriate penalty.

In setting a financial penalty, the Council may conclude that the offender is able to pay any financial penalty imposed unless the Council has obtained or the offender has supplied any financial information to the contrary. An offender will be expected to disclose to the Council such data relevant to his financial position to enable the Council to assess what an offender can reasonably afford to pay. Where the Council is not satisfied that it has been given sufficient reliable information, the Council will be entitled to draw reasonable inferences as to the offender's means from evidence it has received and from all the circumstances of the case, which ***may include the inference that the offender can pay any financial penalty.***

Penalties for Failure to Comply with a Banning Order

The court can impose an unlimited maximum fine for failure to comply with a Banning Order. In addition, the court can also impose a prison sentence

The Housing and Planning Act 2016 includes provisions and processes for a person to be banned from being involved, for a specified period, in one or more of the following activities:

- Letting housing
- Engaging in letting agency work
- Engaging in property management work

Banning Orders are reserved for what are recognised as being the most serious housing related offences. If the Council was satisfied that a breach of a Banning Order

had occurred, the Council would normally start prosecution proceedings. In the event that the Council believed that a civil penalty would be appropriate for a breach of a Banning Order, the council would normally impose a penalty up to a maximum amount of £30,000 to reflect the severity of the offence.

Procedures

Financial Penalty Process and Right for Person to make Representations.

Before imposing a financial penalty on a person the Council will, within 6 months of the date of the offence, give the person notice of its proposal to do so (a “notice of intent”); setting out the Council’s reasons for doing so and the level of fine. A person in receipt of the notice of intent can make written representations to the following within 28 days:

**The Manager
Private Sector Housing
Ashford Borough Council
Civic Centre
Tannery Lane
Ashford
TN23 1PL**

Subsequently the Council will decide whether to issue a financial penalty and the amount. Before doing so the Council will issue a final notice requiring that the penalty be paid.

The final notice will set out:

- the amount of the financial penalty
- the reason for imposing the penalty
- information about how to pay the penalty
- the period for payment of the penalty (28 days)
- information about rights of appeal; and
- the consequences of failure to comply with the notice.

The officer determining the level of the financial penalty will record his/her decision, giving reasons for the amount of the penalty.

The landlord has the right to make representations against the decision and the Council will consider any representation. The Council will provide a response within 21 days, with a decision notice stating whether the penalty will be withdrawn, varied or upheld.

A person who receives a final notice may appeal to the First-tier Tribunal against:

- the decision to impose a penalty: or
- the amount of the penalty

If a person appeals, the final notice is suspended until the appeal is determined or withdrawn.