



Department
for Environment
Food & Rural Affairs



Llywodraeth Cymru
Welsh Government

Consultation on the household waste duty of care

Summary of responses

November 2018



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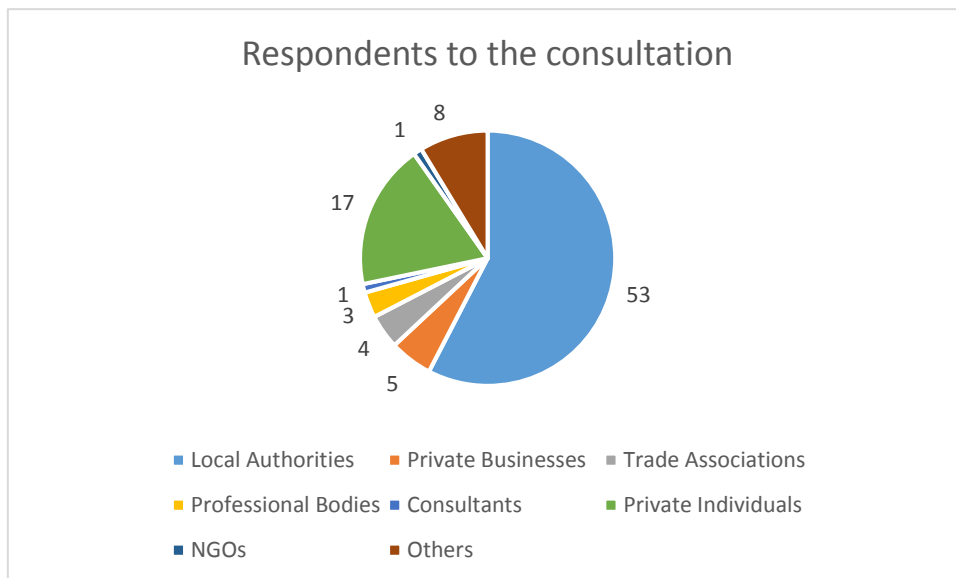
Introduction

This document contains a summary of the responses to the “Consultation on the household waste duty of care”, which sought views on updates to the waste duty of care code of practice and new guidance for local authorities in England on issuing proposed fixed penalty notices.

This consultation was held between 3 July and 27 August 2018
(<https://consult.defra.gov.uk/waste/consultation-household-waste-duty-of-care/>)

This consultation followed on from a wider consultation on proposals to tackle crime and poor performance in the waste sector & introduce a new fixed penalty for the waste duty of care. This summary of responses should be read alongside the final Government response which covers both consultations including introduction of the fixed penalty notice.
(<https://consult.defra.gov.uk/waste/crime-and-poor-performance-in-the-waste-sector/>)

We received a total of 92 separate responses to this consultation, with the majority from local authorities.



77 of the respondents were based in England, 4 in Wales, 10 across both England and Wales and 1 located elsewhere. Of the 17 private individuals that responded, 7 worked for a business or organisation in the waste sector.

For each question asked, the majority of respondents either supported the code of practice and English LA guidance in their proposed forms, or with some amendments. The response below in relation to the Waste Duty of Care Code of Practice is on behalf of both Defra and the Welsh Government. The response in relation to the guidance for local authorities in England is on behalf of Defra only.

Part A: Update to the Waste Duty of Care Code of Practice (England and Wales)

The code of practice for the waste duty of care has been updated to provide greater clarity on the household waste duty of care, and also reflect the introduction of the FPN. The household waste section has also been moved to the end of the document to better separate it from the parts of the code of practice aimed at commercial operators.

Greater detail has been provided on what waste is covered by the duty of care, in particular where household waste is generated by a tradesperson working on the property. As the tradesperson is producing the waste, they are responsible for its transport and disposal and their own duty of care applies. As the occupier is not transferring waste to the tradesperson, the occupier's duty of care for the transfer of domestic waste does not apply. This differs from the previous code of practice which incorrectly implied the duty of care would apply to someone arranging for a tradesperson to carry out work on their property.

The code of practice also now clarifies that waste coming from a property or part of a property mainly used for commercial business is regarded as commercial waste which the wider Section 34(1) duty of care applies to, rather than coming under the household waste duty of care.

More detail is provided on the reasonable measures an individual should take when transferring their waste, making it easier for them to comply with their duty of care. Examples of steps that can be taken to show that the duty of care has been met are provided. It should be noted, however, that meeting the household waste duty of care does not require the keeping of records or evidence.

Q8. Does the guidance clearly set out the duty of care requirements for householders?

81 responses

59% said yes

30% said yes with conditions

11% said no

The majority of respondents felt the duty of care guidance was clearly set out. A common suggested amendment was to further clarify the change to the interpretation of the duty of care in relation to waste produced by tradespersons working on a domestic property, and this has been reflected in the final version of the code of practice. Other clarifications of the waste covered by the duty of care have been added based on suggestions received.

The final code of practice also incorporates the suggestion to clarify the difference between upper and lower tier waste carrier registrations, and that upper tier is typically required for a business transporting someone else's waste.

A number of respondents wanted to include the need to comply with waste collectors segregation requirements. While important, meeting a local authority's household waste collection requirements is a separate issue not covered by this duty of care.

There were calls to make the registers on the Environment Agency and Natural Resources Wales websites more accessible and used friendly. In England, this will be considered as part of wider work on the Carrier Broker Dealer regime. In Wales changes are currently being made to the existing register.

There was concern at the current lack of awareness of the duty of care. It was noted that the current form of the code of practice was not something that local authorities would disseminate to households. The intention of the code of practice is to provide a reference source that can be used to understand the details of the duty of care. Separate Defra funded research, referred to in the analysis for question 16 below, has looked at the best means of engaging households directly. In Wales, the Welsh Government is working with Fly-tipping Action Wales and local authorities to identify how best to convey the duty of care message to householders.

Further minor suggestions for clarification were received and these have been reflected in the final drafting.

Q9. Does the guidance provide sufficient detail on the reasonable steps householders should be expected to take to ensure that waste is transferred appropriately?

82 responses

56% said yes 35% said yes with conditions 9% said no

The majority of respondents supported the detail provided on reasonable steps to ensure waste is transferred appropriately. Many respondents stressed the need for extra caution around cold callers and waste removal services offered on social media.

A few respondents, including the National Association of Waste Disposal Officers suggested banning cash-in-hand transactions for all waste collections as these were often indicative of illegal activity. This approach has already been taken for scrap metal, however, it is not in scope for the current update of the code of practice which reflects the existing law and the new FPN. Nevertheless, when disposing of waste it is advisable to give extra caution where cash is the only accepted form of payment, of offers to take your waste at a price significantly lower than other offers, where a service can only be found informally through social media or where the offer has been made there and then on the doorstep.

Suggestions were also made for extending the duty of care to the providers of rental accommodation alongside the producers of waste, and a duty to make full use of available recycling services. We are considering the case for wider reform of waste regulation

including the duty of care while the Welsh Government is committed to identifying areas where further action can be targeted to lessen the impacts of waste crime in Wales, further proposals for legislation will be considered as necessary.

Some respondents suggested putting a greater onus on waste collectors to show their registration details before starting a job. However, others noted that for sectors such as skip hire, the skip can often be delivered and collected without the customer present making such a proposal impractical.

It was suggested that the householder should also check that the carrier is taking their waste to a permitted site as their duty of care does not stop once the waste has been passed onto the waste carrier. While this is the case for the main duty of care, occupiers of domestic property disposing of their household waste are exempt from that and it is not the case for the household waste duty of care.

Q10. Does the guidance provide sufficient detail on how a householder can demonstrate they have met their duty of care?

79 responses

57% said yes 33% said yes with conditions 10% said no

Several respondents felt an individual should be required to undertake all record keeping options provided in order to justify not paying a fixed penalty notice, or that other requirements should be placed for record keeping. This is not the intention for how the fixed penalty notices should be used. The code of practice has been further revised to clarify that there is no requirement to keep records under the duty of care, nor to produce written evidence to avoid enforcement action. Other respondents did agree that requiring record keeping would go beyond what is reasonable to expect when people are disposing of household waste.

Other suggestions included taking a photo of the waste prior to its removal, requiring full cooperation with regulators to provide information of the person or business who took the waste, and to require asking where the waste is going. While these can be helpful for tackling waste crime, they are not directly applicable to meeting the duty of care and so have been left out of the code of practice to avoid confusion.

Q11. Is the guidance clear enough on a householder's right to reject a fixed penalty notice, and to provide evidence to the local authority to deter prosecution?

77 responses

49% said yes 34% said yes with conditions 17% said no

While the majority of respondents still supported this aspect of the guidance, a slightly higher proportion felt it was unclear. Amendments have been made to section 5.7 of the guidance to clarify this further based on comments received. This includes greater clarity that there is no obligation to pay the FPN, but doing so provides an opportunity to avoid prosecution that would otherwise occur.

Next steps

The updated Code of Practice will be published, alongside the introduction of the England FPN legislation in parliament. It should be used from the date on which it's published. References to the FPN will not apply in England and Wales until the respective FPNs are in force.

Part B: New guidance for Local Authorities in England on the use of the FPN

Alongside the updated code of practice, Defra will also provide guidance for local authorities in England on use of the FPNs. This includes when the FPN should and should not be used, proportionate enforcement of the household waste duty of care, the practicalities of issuing the FPNs, the need for awareness raising and reporting requirements.

The guidance also clarifies the position on local authority waste collections, tradespersons and household waste cleared by landlords.

The Welsh Government undertook a separate process in developing guidance for local authorities in Wales and this will be published once the new legislation comes into force. The guidance will broadly follow the same principles and advice as the English local authority document.

Q12. Does the guidance provide sufficient detail for local authorities to use the fixed penalty notices effectively?

80 responses

63% said yes

33% said yes with conditions

4% said no

The majority of respondents supported the new guidance. Several local authorities requested a greater focus on whether enforcement in any form was appropriate, rather than the decision of whether to offer an FPN or go straight to prosecution. The guidance has been amended to reflect this.

Several authorities welcomed the guidance including the possibility of a registered carrier nevertheless fly-tipping waste and the approach to take in those circumstances.

A number of authorities suggested including waste left out alongside public bins and similar. This is not typically within scope of the household waste duty of care offence and so not appropriate for the FPN or other household waste duty of care enforcement.

Q13. Does the guidance provide sufficient detail on how the new fixed penalty notices should be used proportionately?

79 responses

72% said yes 23% said yes with conditions 5% said no

The majority of respondents agreed sufficient detail was given on proportionate use. One particular area of confusion related to language around enforcement being appropriate when environmental harm has been caused, and the means by which environmental harm was judged. The intent is that an FPN or (prosecution) is not appropriate where the household waste duty of care is breached, but waste is nevertheless disposed of appropriately. This could be where a householder has let their neighbour take their waste to the local household waste recycling centre, and so while they haven't checked and used an authorised carrier, the waste is still appropriately disposed of as if they'd taken it themselves. If the neighbour took their waste but fly-tipped it instead of disposing of it at the recycling centre, an FPN or prosecution would be appropriate. The language in the guidance has been refined to reflect this. Local Authorities should also have regard to the WRAP Household Waste Recycling Centre (HWRC) Guide in relation to promoting responsible behaviour by local residents through not charging residents for waste from small scale DIY activities.

There was also a recommendation to consider updating the guidance after the FPN has been put into practice and experience gained.

Authorities also noted that decisions to enforce the duty of care could impact enforcement against the associated fly-tipper. The guidance reflects that when deciding on enforcement of the household waste duty of care, authorities should give consideration to the impact it would have on the investigation and prosecution of the fly-tipper.

Some respondents rightly noted that age itself is not a reason to classify someone as vulnerable. For this reason the guidance refers to vulnerability which may be caused by age, physical or mental disability or divergence, or other factors.

Q14. Is the guidance clear on how duty of care offences happening across local authority borders or the England and Wales border should be handled?

78 responses

77% said yes 8% said yes with conditions 15% said no

Several respondents requested greater clarity on issuing FPNs to householders outside administrative areas, for instance where waste is discovered fly-tipped in one area, but traced back to a transfer in breach of the household waste duty of care in a different area.

The guidance now makes clear that any enforcement authority in England can issue an FPN where it appears to them that a person has failed to comply with the duty of care in England. In order to avoid overlapping FPNs, the legislation also sets out that no authority may begin proceedings until after the 14 day payment period for that FPN has ended and that an FPN cannot be given to someone if one has already been given to them by the same or another authority. To support this in practice, if an authority issues an FPN for a breach of the duty of care that took place in the area of another authority, they must give that other authority a copy of the FPN at the time of issuing. They must also provide the Environment Agency with a copy of the FPN, as the Environment Agency can issue FPNs for anywhere in England.

The National Association of Waste Disposal Officers highlighted the benefit of FPN regimes in two-tier areas being aligned, and Defra agrees with this.

Respondents were content with the level of detail provided for enforcement across the English and Welsh border, with an FPN introduced available to English authorities for breaches of the duty of care which take place in England only, and one available to Welsh authorities limited to breaches taking place in Wales. Scotland and Northern Ireland are not covered by either FPN.

Q15. Is the right for a householder not to pay an FPN, and to provide evidence to justify a case not being taken to prosecution, clear in the guidance?

77 responses

82% said yes 13% said yes with conditions 5% said no

Overall, respondents felt it was clear that the FPN and potential for prosecution should be withdrawn if compelling evidence is provided that the individual complied with their duty of care or that prosecution would otherwise not be appropriate. The need to inform the individual that prosecution will not be taken in those circumstances has been strengthened in the guidance.

As with comments on the code of practice, several authorities felt householder waste transfer record keeping requirements should be increased, while others highlighted requiring households to produce written records or waste transfer notes would go beyond what is required in law. The legal position remains unchanged and the guidance reflects this. The absence of written records is not evidence of a failure to comply and does not prevent an individual from making the case that they met their duty of care.

Some authorities raised concerns that individuals may be encouraged to contend the FPN without good reason which would divert officer time. However, as the FPN is offered as a means to discharge liability, an individual is already able to choose not to pay the FPN and the officer time is instead in relation to the decision of whether to prosecute. Considering evidence at this stage can save time and costs overall compared to an unsuccessful prosecution.

It was also noted that people need to be able to fully understand their options, and the requirements for information to be included when issuing an FPN have been modified to reflect this.

Q16. If you are a local authority that would make use of the FPN, would you carry out awareness raising activity alongside it as recommended in the guidance?

69 responses

71% said yes 28% said yes with conditions 1% said no

The majority of local authorities would carry out awareness raising activity and many already do so or have done so. Some would also relaunch campaigns if the FPN is introduced. A number of existing awareness raising campaigns were referenced including the Lesswaste #IfOnly campaign in Leicestershire, the Tip-Off campaign in Suffolk, NFU Countryside's fly-tipping poster, collaborative work with Dorset police, use of the SCRAP campaign by multiple authorities and Keep Britain Tidy's #CrimeNotToCare campaign.

Some respondents suggested a national level campaign should be introduced alongside local awareness raising activity. Funding constraints for awareness raising activity were also raised. Defra will publish a research project which investigated how behavioural insights techniques could be used to more effectively raise awareness of the household waste duty of care and engage local residents in complying with it. As part of the project, a framework has been produced providing straightforward information on how local authorities can put the project's findings into practice for communicating the waste duty of care to their residents.

Several suggestions were made for introducing a 'Waste Safe' platform similar to the 'Gas Safe' scheme. Defra will consider this proposal further as part of wider work on the waste duty of care and carrier, broker dealer regime.

Q17. What resource requirement would you expect the good practice reporting guidance to place on local authorities?

65 responses

Responding Local Authorities were mixed. Some expected resource requirements to be negligible or already covered by their internal reporting activities and that responsible local

authorities would already expect to report. A smaller number raised resourcing concerns, linking back to already stretched resources. It was noted that the more simple a reporting system, the more resources can be focussed on frontline activity. One suggested that resources were better allocated to raising awareness of the duty of care than reporting enforcement action, however, In Defra's view, reporting and publicising successful enforcement activity can be an effective way of increasing awareness and compliance.

Many authorities referred to WasteDataFlow reporting as the logical place for information to be captured, and for reporting requirements to be consistent with other FPNs reported on there.

One local authority suggested reporting should be extended from the FPN to cover other enforcement activity including prosecutions, arrests and vehicle seizures.

Non-local authority respondents asked for a central online point where LA reported data could be found, with several identifying WasteDataFlow as the logical place.

Q18. What, if anything, should be added to or removed from the list of recommended reporting requirements?

54 responses

Multiple local authorities identified the total spend on enforcement activity as being very difficult to report in practice. This was particularly in terms of a robust and consistent methodology for extracting it from other related spend.

The need to report unpaid FPNs and cancellations was also questioned, with concerns it could lead to increased numbers of recipients ignoring the FPN. While there is no requirement to pay the FPN, this would prevent the intended consequence of reducing the number of cases requiring prosecution.

One respondent questioned how the number of discounted FPNs would be reported if a discounted rate is not offered, and others felt there was limited benefit in reporting this.

Based on the responses received for questions 17 and 18 an additional reporting module will be added to WasteDataFlow or Local Authorities to record the number of household waste duty of care FPNs issued. This will minimise the burden of reporting requirements while ensuring consistent and comparable results for different FPNs.

Next steps

The updated Local Authority guidance will be published alongside the introduction of the England FPN legislation in parliament. Local Authority Guidance for Welsh Local Authorities will be published following the FPN legislation being introduced in Wales. They should be used from the respective dates on which they're published in relation to wider

household waste duty of care enforcement. Material specifically on the FPN will not apply in England and Wales until the respective FPNs are in force.