



Department
for Environment
Food & Rural Affairs



Llywodraeth Cymru
Welsh Government

Consultation on the household waste duty of care

**Updated guidance for householders on meeting
the duty of care and new guidance for English
local authorities on issuing proposed fixed
penalty notices**

July 2018



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Any enquiries regarding this publication should be sent to us at

Wastecrime.Consultation@defra.gsi.gov.uk

www.gov.uk/defra

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Introduction and purpose of the consultation

At the start of 2018 the Department for the Environment, Food and Rural Affairs (Defra) and the Welsh Government published a consultation on proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty notice (FPN) for the householder waste Duty of Care.

The summary of responses to that consultation has been published alongside this consultation, and further consideration is ongoing ahead of a final decision on how we will proceed.

This further consultation document focuses on the proposal to introduce a new FPN for household Duty of Care offences related to fly-tipping.

Householders already have a duty of care to take reasonable steps to ensure their waste is passed to an authorised person. Currently the only option for the regulator (usually the local authority in this case) to address breaches of the duty of care is to take the offender to court.

In the previous consultation, we sought views on providing guidance for householders on the reasonable measures that can be taken to meet their duty of care, and guidance for regulators on the use of the proposed FPN.

If a decision is taken to introduce a fixed penalty notice to provide a more proportionate response to breaches of this Duty of Care, we propose to issue non-statutory guidance to local authorities on how the FPN should be used, and update existing guidance in the waste Duty of Care Code of Practice, which sets out the waste duty of care requirements for householders, to provide greater detail on how to meet the duty of care. This guidance is being consulted on ahead of a final decision being taken on the proposed FPN, in order to allow for timely introduction if such a decision is taken.

Drafts of the updated guidance to householders and English local authorities are included as annexes to this consultation. Please note guidance for Welsh local authorities will be issued separately by the Welsh Government. Minor amendments have also been made to other parts of the Code of Practice to better reflect existing legislation.

We are seeking views on the proposed guidance and invite comments by 27 August 2018.

This consultation and descriptions of law relate to England and Wales only. The Code of Practice in Part A: Guidance for householders covers England and Wales. The guidance in Part B: Guidance for local authorities is aimed only at English authorities.

Audience

This consultation is primarily (but not exclusively) aimed at:

- Householders, who are required to follow the duty of care
- Local authorities, who will be issuing the FPNs
- Waste carriers, who householders may use under the duty of care

It will also be of interest to others in the waste industry, including:

- Waste brokers and dealers
- Operators of waste facilities
- Relevant professional and membership organisations
- Consultants operating in the waste and resources sector

Responding to this consultation

Please respond to this consultation using the citizen space consultation system.

<https://consult.defra.gov.uk/waste/consultation-household-waste-duty-of-care-guidance/>

Alternatively, responses can be submitted by e-mail to

Wastecrime.Consultation@defra.gsi.gov.uk, or in writing to:

Waste Regulation and Crime
Department for Environment, Food and Rural Affairs
Ground Floor, Seacole Building
2 Marsham Street
London, SW1P 4DF

Responses for Wales can be submitted by e-mail to EQR@gov.wales or in writing to:

Environment Quality & Regulation Branch
Environment & Communities Division
Department for Natural Resources
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Duration

This consultation will run for 8 weeks from 3 July 2018 to 27 August 2018. This is in line with the Cabinet Office's 'Consultation Principles' which advises government departments to adopt proportionate consultation procedures.

After the consultation

A summary of responses to this consultation will be published on the government website at: www.gov.uk/defra and www.gov.wales. An annex to the consultation summary will list all organisations that responded **but will not include** personal names, addresses or other contact details.

Defra may publish the content of your response to this consultation to make it available to the public without your personal name and private contact details (e.g. home address, email address, etc).

If you click on 'Yes' in response to the question asking if you would like anything in your response to be kept confidential, you are asked to state clearly what information you would like to be kept as confidential and explain your reasons for confidentiality. The reason for this is that information in responses to this consultation may be subject to release to the public or other parties in accordance with the access to information law (these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 2018 (DPA)). We have obligations, mainly under the EIRs, FOIA and DPA, to disclose information to particular recipients or to the public in certain circumstances. In view of this, your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance these obligations for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.

If you click on 'No' in response to the question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won't make your personal name and private contact details publicly available.

There may be occasions when Defra will share the information you provide in response to the consultation, including any personal data with external analysts. This is for the purposes of consultation response analysis and provision of a report of the summary of responses only.

This consultation is being conducted in line with the Cabinet Office "Consultation Principles" and be found at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

If you have any comments or complaints about the consultation process, please address them to:

Consultation Coordinator, Area 1C, 1st Floor, Nobel House, 17 Smith Square, London, SW1P 3JR.

Or email: consultation.coordinator@defra.gsi.gov.uk

About you

A wide range of businesses, organisations and individuals are involved with or take an interest in the waste sector. The questions below are intended to put your responses in perspective with those of other respondents.

1. What is your name?

2. What is your e-mail address?

3. Would you like anything in your response to be confidential? If you answered Yes to this question please give the reason why you are requesting anything within your response to be confidential.

4. Are you responding as or on behalf of:

- a. an individual
 - b. a local authority
 - c. a business
 - d. a trade association
 - e. a professional body
 - f. an NGO
 - g. a consultant
 - h. another type of organisation
- If you answered h. please specify

5. If you are replying as an individual, do you:

- a. run your own waste business
- b. work for a business or organisation in the waste sector
- c. neither of the above

6. If you are not replying as an individual, what is your business or organisation?

7. If you are responding as a business or part of an organisation, where is it established, or if you are responding as a householder, where do you live?

- a. England
- b. Wales
- c. England and Wales
- d. Located elsewhere

Background

Section 34 of the Environmental Protection Act¹ places a duty on occupiers of domestic property (householders) to take all measures reasonable in the circumstances to ensure they only transfer their household waste to an 'authorised person'. This is defined further in legislation, but is normally either the local authority collection service, a registered waste carrier or an operator of a registered site.

While two-thirds of fly-tipping incidents involve household waste, this is often fly-tipped not by the householder but by the person the householder has allowed to take it away.

The previous consultation² set out in detail the rationale for introducing a fixed penalty notice to allow a more proportionate approach than prosecution for householders who breach their duty of care.

If a householder fails to meet their duty of care the only options are for the regulator (usually the local authority) to offer a warning or caution or take the offender to court. Each year there are a number of successful prosecutions against householders. However, these prosecutions are costly for the regulators and for the court, and also result in householders being left with a criminal record. Having the option of an FPN can avoid unnecessary criminal prosecutions, reduce costs, and be more effective at changing behaviour.

The proposed fixed penalty notice is intended to be mainly used:

- Where fly-tipped waste can be traced back to a householder who is found to have failed to take reasonable steps to ensure that they transferred the waste to an authorised person.
- Where an unauthorised carrier is found to be carrying waste that was directly transferred to them by a householder.
- Where a householder is found to be transferring their waste to an unauthorised person at a site that does not have a permit or exemption.

The fixed penalty notice would be usable in place of prosecution where it appears to the enforcement authority (the Environment Agency, Natural Resources Wales or the Waste Collection Authority) that the occupier of a domestic property has failed to comply with their duty of care. Paying the fixed penalty within a specified period would preclude the householder from being convicted for failing to meet their duty of care.

¹ <http://www.legislation.gov.uk/ukpga/1990/43/section/34>

² <https://www.gov.uk/government/consultations/reducing-crime-at-sites-handling-waste-and-introducing-fixed-penalties-for-waste-duty-of-care>

Part A: Guidance for householders

This section seeks views on the guidance for householders on meeting their duty of care, as set out in the updated Waste Duty of Care Code of Practice in Annex A.

To support householders in meeting their duty of care, alongside introducing the proposed FPN, government would issue updated non-statutory guidance for householders within the existing Waste Duty of Care Code of Practice.

Section 3 of the Code of Practice sets out the duty of care requirement placed on householders, and the steps householders can take to meet it.

The intention of the law is to prevent improper management of waste by ensuring householder's waste is transferred to authorised operators who dispose of the waste appropriately.

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

9. Does the guidance provide sufficient detail on the reasonable steps householders should be expected to take to ensure that waste is transferred appropriately, and what other reasonable steps, if any, should be included?

The proposed fixed penalty notice can be issued where it appears to the enforcement authority that a householder has failed to meet their duty of care to transfer waste to an authorised person. However, an authorised person may still fly-tip waste so tracing fly-tipped waste to a household does not in itself demonstrate a breach of the duty of care.

The guidance sets out the evidence a householder can use to show they met their duty of care.

10. Does the guidance provide sufficient detail on how a householder can demonstrate they have met their duty of care and what other reasonable means of demonstrating this should be included, if any?

This fixed penalty notice can be offered as an invitation to discharge liability for an offence, avoiding the risk of prosecution. A person can decide not to pay the penalty if they do not believe themselves to be guilty of a breach of the duty of care. They can also provide evidence to the local authority to justify not being prosecuted, for example a receipt for the waste from an authorised carrier.

11. 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?

Respondents to the previous consultation highlighted that along with appropriate guidance on how to meet the duty of care, greater awareness was needed amongst householders of the existence of the duty of care itself. Options for awareness raising are being considered as part of the analysis of the previous consultation. This consultation is not focussed on awareness raising activity.

Part B: Guidance for local authorities in England

This section relates to the guidance for local authorities in England on the use of the proposed new fixed penalty notice, set out in Annex B. Welsh guidance will take a similar form and be informed by responses to this consultation.

If a decision is taken to introduce the proposed new fixed penalty notice, the government would also issue guidance for local authorities on its use. This is intended to support local authorities in using the fixed penalty notices as a proportionate alternative to prosecution, and also provide householders with an expectation of how fixed penalties should be used.

12. Does the guidance provide sufficient detail for local authorities to use the fixed penalty notices effectively and what other guidance, if any, should be included to ensure effective use of fixed penalty notices?

Enforcement action has to comply with statutory enforcement principles, including on proportionality. Under general principles of public law, authorities have a duty to act fairly and proportionately and are encouraged to exercise discretion sensibly and reasonably and with due regard to the public interest. Fixed penalty notices should be used in line with these principles.

Disproportionate enforcement, either where using a fixed penalty notice is too severe for the particular case, or conversely not severe enough, undermines the enforcement process and the purpose of the duty of care in reducing the transfer of waste to those that are then likely to illegally or inappropriately dispose of it.

13. Does the guidance provide sufficient detail on how the new fixed penalty notices should be used proportionately and what other guidance, if any, should be included on proportionate use of fixed penalty notices?

If introduced, the fixed penalty notice will be implemented through separate legislation for England and Wales. The English legislation would allow the penalty to be issued where it appears a householder has failed to comply with their duty of care in England. The Welsh legislation would take the same approach for failures to comply with the duty of care in Wales.

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

There is no proposed right to appeal the fixed penalty notice as they are offered as an opportunity to discharge liability for an offence, and a householder can choose not to pay it if they do not accept guilt for the breach of the duty of care. They can also provide evidence to justify a case not being taken to prosecution. The authority is required to take such evidence into account in any subsequent consideration of whether or not to start criminal proceedings.

15. 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?

Awareness raising of the householder duty of care can reduce breaches of the duty of care, the need to issue FPNs or prosecute and ultimately reduce incidents of fly-tipping.

16. 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?

Reporting is an important part of accountability. Regular and consistent reporting can help the public understand the council's approach to enforcement. In addition it provides management information for internal performance evaluation and comparison with other councils. Monitoring also helps the authority to identify where it needs to improve.

The government believes that in principle all data held and managed by local authorities should be made available to local people unless there are specific sensitivities to doing so (e.g. protecting vulnerable people or commercial and operational considerations), and expects local authorities to be transparent about the services they deliver. Local authorities are expected to follow the reporting principles for environmental offences set out in the updated effective enforcement guidance in the Code of Practice on Litter and Refuse, the consultation for which closed on 8th June.³

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

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

³ <https://consult.defra.gov.uk/environment/reducing-litter-proportionate-enforcement/>