

Household Waste duty of care Fixed Penalty Notices (FPN)

CMT Meeting

Report Author **Trevor Kennett, Head of Operational Services**

Portfolio Holder **Councillor Savage**

Status **for Decision**

Classification: **Unrestricted**

Key Decision **No**

Ward: **All Wards**

Executive Summary:

On 26 November 2018 a new Waste Duty of Care Code of Practice was presented to Parliament and to the National Assembly for Wales pursuant to Section 34(9) of the Environmental Protection Act (EPA) 1990.

From 7 January 2019 the new code of practice came into force and allows for a fixed penalty notice (FPN) to be issued for the offence of Duty of Care, a contravention under section 34A (2) of the Environmental Protection Act 1990. The new fine has to be set by the Council at a level not less than £150 and not more than £400 with a default of £200 if no amount is set by the authority.

Recommendation(s):

The Council introduce fixed penalty notices in accordance with section 34A (2) of the EPA 1990 for Households who fail their duty of care obligations for the safe disposal of domestic waste and the level of the fine is £400 with a reduced early payment of £300 if paid within 10 days.

CORPORATE IMPLICATIONS

Financial and Value for Money	There is small income generation possibility and cost saving in taking cases to court for prosecution and allowing officer time to be redirected to further enforcement action.
Legal	<p>We are required to stay within the recommended fine levels being no lower than £150 and no higher than £400. There will also be less reliance on the legal team for prosecutions of duty of care offences if we are able to issue FPNs for them instead, unless unpaid.</p> <p>The regulations are inserted as an amendment into the Environmental Protection Act 1990 as section 34(2). The section allows for giving FPNs</p>

	for contravention of section 33(1)(a). Officers authorised to investigate fly tipping under section 33(1)(a) are authorised to give FPNs under section 34A(2).								
Corporate	<p>The priorities that have impact on the enforcement activities of Operational Services are:</p> <p>Priority 1, Clean and welcoming environment - Maintaining zero tolerance to encourage positive behaviour to help improve our environment</p> <p>Priority 2, Supporting neighbourhoods - Continuing to work with partners to improve community safety</p>								
Equalities Act 2010 & Public Sector Equality Duty	<p>Members are reminded of the requirement, under the Public Sector Equality Duty (section 149 of the Equality Act 2010) to have due regard to the aims of the Duty at the time the decision is taken. The aims of the Duty are: (i) eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, (ii) advance equality of opportunity between people who share a protected characteristic and people who do not share it, and (iii) foster good relations between people who share a protected characteristic and people who do not share it.</p> <p>Protected characteristics: age, gender, disability, race, sexual orientation, gender reassignment, religion or belief and pregnancy & maternity. Only aim (i) of the Duty applies to Marriage & civil partnership.</p> <table border="1" data-bbox="432 1126 1406 1388"> <tr> <td colspan="2">Please indicate which aim is relevant to the report.</td> </tr> <tr> <td>Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act,</td> <td></td> </tr> <tr> <td>Advance equality of opportunity between people who share a protected characteristic and people who do not share it</td> <td></td> </tr> <tr> <td>Foster good relations between people who share a protected characteristic and people who do not share it.</td> <td></td> </tr> </table> <p>It is the author's opinion that the Public Sector Equality Duty (PSED) is not engaged by the subject matter. In accordance with the continuing nature of the duty the council will keep the matter under review.</p> <p>Use of FPNs for duty of care offences will give staff more flexibility and to be better able and equipped to address unlawful disposal of household waste. All officers will receive training and be monitored.</p>	Please indicate which aim is relevant to the report.		Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act,		Advance equality of opportunity between people who share a protected characteristic and people who do not share it		Foster good relations between people who share a protected characteristic and people who do not share it.	
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CORPORATE PRIORITIES (tick those relevant) ✓	
A clean and welcoming Environment	✓
Promoting inward investment and job creation	
Supporting neighbourhoods	✓

CORPORATE VALUES (tick those relevant) ✓	
Delivering value for money	✓
Supporting the Workforce	✓
Promoting open communications	

1.0 Introduction

The fixed penalty notice (FPN) for breaches of the household waste duty of care provides an alternative to prosecution. It allows an individual to discharge liability for the duty of care offence by payment of a financial penalty. There is no obligation for authorities to offer an alleged offender the option to discharge liability through an FPN. However, it can be more proportionate than prosecution through the courts.

The duty of care requires occupiers of domestic property to take all reasonable measures available to them in the circumstances to ensure that they only transfer household waste produced on that property to an authorised person. This reduces the chance of waste ending up in the hands of those who would fly-tip it.

Authorities may give the FPN when an individual appears to have failed to comply with their duty of care under section 34(2A) of the Environmental Protection Act 1990 in England. For example:

- where fly-tipped waste can be traced back to an individual 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 household waste that was directly transferred to them by the occupier of a domestic property;
- where an individual is found to have transferred their household waste to an unauthorised person at a site that does not have a permit or exemption.

An authorised person may still fly-tip waste so tracing fly-tipped waste to a household does not necessarily demonstrate a breach of the duty of care. An individual should be given an opportunity to demonstrate that they took reasonable steps to determine the person that took their waste was authorised to do so. If fly-tipped waste is traced to an individual and they are unable to identify who took their waste, or the carrier they identify is unauthorised, then it is reasonable to believe their duty of care was not met.

3.0 Use of the new FPNs

Our Enforcement team focus on those who, as a result of not meeting their duty of care, enable their waste to be fly-tipped or otherwise inappropriately disposed of.

Individuals will not be penalised for minor breaches which do not lead to waste being inappropriately disposed of. This includes where an individual uses an authorised carrier that disposes of their waste appropriately but doesn't check that they are authorised.

The Council's established approach to effective environmental offences enforcement regime is one that is proportionate, consistent, targeted, transparent and accountable. Under the Legislative and Regulatory Reform Act 2006, we have a duty to carry out regulatory activities in a way which is transparent, accountable, proportionate and consistent, and for them to be targeted only at cases in which action is needed.

If an individual is considered to be a vulnerable person (for example due to age related ill-health or a mental or physical disability or divergence), we will give close

consideration as to whether it is proportionate and in the public interest to proceed with enforcement, on a case-by-case basis.

An individual giving their waste to a friend or family member to dispose of would breach the duty of care. However, it would only be appropriate and in the public interest to enforce in this and similar circumstances where there is evidence the friend or family member has disposed of the waste inappropriately.

This FPN is not applicable where an individual intends for waste to be collected by the local authority collection service, for instance where this is put out in household waste or recycling bins. It is reasonable to believe the local authority or any contracted provider working on their behalf is an authorised person and so in putting the waste out for collection by a local authority, the individual has taken all reasonable steps to ensure the person they transfer it to is authorised.

As per section 5.2 of the Waste Duty of Care Code of Practice, where a tradesperson is working on a property, they are responsible for the waste they produce. As the occupier is not producing the waste, they are not transferring it to the tradesperson and so the duty of care does not apply.

FPNs will not be given where prosecution through the courts is more appropriate, for example the deliberate transfer of waste to an unauthorised person in the knowledge that it would be fly-tipped, or when someone is a persistent offender with a record of not paying fixed penalties for environmental offences.

4.0 Setting the fine level

The fixed penalty notice level must not be set lower than £150 and not more than £400. If no amount is specified by that authority, the level will be automatically set at £200. The fine must be paid within 10 days, if not it could be referred to the Magistrates Court.

Small scale fly tipping and the dumping of rubbish is an increasing problem in the District, with over 3,000 reported cases per year. These FPNs will give greater powers to deal with low level offences, while concentrating our efforts on prosecuting major fly-tipping across the district.

It should be also noted that; monies paid for FPNs comes to the Council, whilst fines imposed at court go to HM Court service.

5.0 Options

Option 1: Introduce this FPN for small fly-tips using the default level of fine of £200 with an early reduced payment of £150 if paid before the end of the period of 10 days following the date of the notice.

Option 2: Introduce this FPN for small fly-tips at the maximum level of the fine of £400 with or without an early payment discount. There is a risk of some not paying the fine because it is at the highest level which would result in court process.

Option 3: Introduce this FPN for small fly-tips setting the level of the fine at £400 with a reduced early payment of £300 if paid within 10 days. This would provide the

incentive towards early payment and more likelihood of offenders paying and therefore less resorting to the court.

6.0 Recommendations

That Option 3 is implemented because the issuing of Fixed Penalty Notices for failure of households to exercise their duty of care will be a more effective power to stop the dumping of rubbish. The Council's existing powers only allow for us to issue a warning enforcement notice to stop placing their controlled waste other than in the receptacles provided by the authority or for us to prosecute them for this offence.

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Reporting to:	Gavin Waite, Director of Operational & Commercial Services

Corporate Consultation

Finance	Sharon Westbrook, Interim Financial Services Manager
Legal	Sophia Nartey, Interim Head of Legal Services