



Llywodraeth Cymru
Welsh Government

Guidance for Welsh Local Authorities on Household Waste Duty of Care Fixed Penalty Notices

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Introduction

The waste duty of care requires occupiers of domestic property to take all measures available to them as are reasonable in the circumstances to ensure that any transfer by them of household waste produced on their property is to an authorised person. This requirement aims to reduce the chances of this waste ending up in the hands of those who could potentially dispose of it illegally. More detail on this duty of care is set out in section 5 of the Waste Duty of Care Code of Practice¹.

The fixed penalty notice (FPN) for breaches of the household waste duty of care provides authorities with an alternative enforcement option to prosecuting offenders through the courts. It allows an individual to discharge liability for the duty of care offence by payment of a fixed penalty. They can be a more proportionate enforcement response to certain offences. They can also act as an effective deterrent and even encourage behavioural change.

You should follow this guidance when issuing FPNs for breaches of this waste duty of care. Consideration should also be given to the Welsh Government's wider guidance on the use of fixed penalty notices for environmental offences².

When you can issue FPNs

You may issue a FPN where it appears to you that an occupier of a domestic property has failed to comply with their duty of care under section **34(2A) of the Environmental Protection Act 1990** in Wales. Examples of this include:

► Fly-tipping

Where fly-tipped waste can be traced back to an occupier of a domestic property who is found to have failed to take such measures as were reasonable in the circumstances to ensure that they transferred the waste to an authorised person.

► Unauthorised carrier

Where an unauthorised carrier is found to be carrying waste that was directly transferred to them by the occupier of a domestic property who is found to have failed to take such measures as were reasonable in the circumstances to ensure that they transferred the waste to an authorised person.

► Occupier of a domestic property is found

Where an occupier of a domestic property is found to be transferring their waste to a site that does not have a permit or exemption, and the occupier is found to have failed to take such measures as were reasonable in the circumstances to ensure that the operator of the site in question was an authorised person.

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 they took such measures as were reasonable in the circumstances to determine the person that took their waste was authorised to do so.

When you cannot or should not issue FPNs

This FPN is not applicable where a householder intends for waste to be collected by the local authority, for instance where this is put out in household waste or recycling bins correctly. The local authority is an authorised person and so in putting the waste out for collection by a local authority within the correct receptacles, the householder has taken all measures as are reasonable in the circumstances to ensure the person they transfer it to is authorised. Alternative enforcement action should be considered if there is a need to deal with other household waste issues, for example if a householder has committed a separate waste offence.

► Fly-tipping

The Welsh Government wishes to encourage a balanced approach to enforcement. You should only issue an FPN when you are satisfied the evidence gathered indicates an offence has been committed and it is in the public interest to do so.

An effective environmental offences enforcement regime is one that is proportionate, consistent, targeted, transparent and accountable. Under general principles of public law, you 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. In no circumstances should enforcement be used as a means to generate income.

If an individual is considered to be a vulnerable person (for example due to age related ill-health or a mental or physical disability), close consideration should be given as to whether it would be proportionate and in the public interest to issue a fixed penalty notice, on a case-by-case basis.

► Tradespersons

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.

► Household waste cleared by landlords

Where a landlord is arranging the clearance of premises after a tenancy has ended, the resulting waste is not household waste as they are not the occupier of the domestic property. This means the duty of care under Section 34(1) of the Environmental Protection Act applies instead and this FPN cannot be used.

► Opting for prosecution

FPNs should not be used where the evidence gathered suggests prosecution through the courts is more appropriate. Examples of this could include the deliberate transfer of waste to an unauthorised person in the knowledge that it would be fly-tipped (potentially an offence of “knowingly causing or knowingly permitting” an unauthorised deposit, treatment or disposal etc. of waste – under s33 of the Environmental Protection Act 1990), or when someone is a persistent offender or has a record of not paying fixed penalties for environmental offences.

How to issue FPNs

Given the potential for illegally deposited waste offences to cross local authority borders, it is recommended you consider the benefits of consistent, and possibly collaborative, approaches to enforcement with neighbouring authorities.

The fixed penalty notice can be given as an offer for an individual to discharge any liability to conviction for failing to meet their household waste duty of care. Instead of proceeding to prosecute, you may first offer the opportunity to pay the fixed penalty.

Opportunity to demonstrate duty of care

An individual's household waste can still be deposited illegally or in the possession of an unauthorised carrier, even if they meet their duty of care (e.g. the "authorised person" to whom the householder transferred the waste to may have subsequently transferred this to an unauthorised person). Before you decide to enforce, either directly through prosecution or by first giving a FPN, the case should be investigated. You should give individuals an opportunity to demonstrate they met their duty of care.

This could include one or more (depending on what is reasonable in the individual circumstances of each case) of the following:

- ▶ Details of the business and of any vehicle used which can be linked to an authorised operator;
- ▶ A record of the checks made, including the operators registration, permit or exemption number;
- ▶ A receipt for the transaction which includes the business details of a registered operator;
- ▶ A copy or photograph of the carrier's waste license or site's permit.

However, it should be emphasised there is no duty on an individual to keep a waste transfer note or any other written records when transferring their household waste. The absence of written records does not prevent an individual from making the case they met their duty of care.

When giving the individual the opportunity to demonstrate they met their duty of care, you should inform them:

- ▶ of the evidence gathered, e.g. if their waste has been found fly-tipped by an unauthorised person
- ▶ they may face prosecution, and why
- ▶ whether a FPN may be offered to discharge liability for the offence.

If there is sufficient evidence an individual householder has complied with their duty of care you cannot issue an FPN, or if a convincing case is made after an FPN has been issued, the FPN should be withdrawn.

Issuing the fixed penalty notice

When issuing an FPN, the notice must name the householder and tell them:

- ▶ why they have been given a fixed penalty, i.e. the circumstances alleged to constitute the offence;
- ▶ that the FPN is offered as an option to discharge liability for a criminal offence without prosecution. However, should they decide not to pay, this may lead to a prosecution;
- ▶ that they can provide evidence to the local authority at any time to justify the case not being taken to prosecution, even if the FPN is not paid;
- ▶ how much they must pay and how they can pay it, including to whom it should be paid and the address to do so;
- ▶ the deadline for the payment (14 days from the date of the notice, not including the date of the notice);
- ▶ that proceedings will not be taken for the offence during the payment period;
- ▶ what happens if they pay the penalty early, for example if there is a discount
- ▶ any other ways in which the fixed penalty may be paid.

The level of penalty is set out in the legislation; which is as follows:

- ▶ Fixed penalty: £300
- ▶ Discounted penalty for early payment (if offered): £150

Where waste comes from multiple individuals in the household

The duty of care applies to the individual occupier of the property who is arranging the transfer of household waste produced in that property. You will need to consider who in the household is responsible for the breach of the duty of care before issuing the FPN against them. There must be clear evidence directly linking the individual issued with the FPN and the breach of duty of care.

Cross-boundary approach

The FPN can be used when an individual appears to have failed to comply with their duty of care in Wales only. This relates to the point where the transfer of waste took place, not the final disposal point of the waste. This would typically be if they took their waste to an unauthorised site in Wales, or if they transfer their waste to an unauthorised carrier in Wales, even if the waste is ultimately taken out of Wales. If the offence has occurred in England, Welsh local authorities may wish to coordinate any enforcement response with the English local authority in whose area the offence took place.

Given the potential for fly-tipping to cross local authority borders, it is recommended you consider the benefits of consistent, possibly collaborative approaches to enforcement with neighbouring authorities. This approach is consistent with the cross-cutting theme of partnership working in the Welsh Government's strategy "*A Fly-tipping Free Wales*"³.

For cases that cross authority boundaries in Wales, any enforcement authority in Wales can issue an FPN where it appears to them a person has failed to comply with the duty of care. This will typically be as a result of investigating fly-tipped waste in their area and tracing it back to an individual, even if that individual originally transferred the waste outside that area. It is recommended information concerning cross boundary cases is shared between neighboring authorities to help coordinate enforcement action.

Once an FPN has been issued, no authority can begin proceedings until after the 14 day payment period for that FPN has ended. Additionally, a FPN cannot be given to someone if one has already been given to them by the same authority or another authority.

To avoid duplication of FPNs, if you issue an FPN for a breach of the duty of care that took place in the area of another authority, you must give that other authority a copy of the FPN at the time of issuing.

Non-payment of fixed penalties

As the FPN is offered as an option to discharge liability for the offence, an alleged offender may choose not to accept or pay a fixed penalty. They may also provide evidence at any time that they did not commit the offence.

Where an individual does not pay an FPN you are expected to take the case to prosecution unless they have given a convincing reason for you not to do so. Detailed evidence gathering should be carried out at the start of the investigation before an FPN is offered to ensure prosecution can take place if needed. Failure to follow up an unpaid FPN with prosecution for the original offence will discredit the use of fixed penalties and the duty of care itself.

The need to follow up unpaid fixed penalty notices with prosecution for the original offence must be considered in the development of an enforcement strategy and the necessary resources made available. It is not acceptable for an authority to decide after a FPN has been issued that it does not have the resources to prosecute if the notice is unpaid.

Informal Review Process

There is no right of appeal against an FPN as they are offered as an optional means of discharging liability for an offence. However, liability for that alleged offence can be disputed or the appropriateness of enforcement challenged. If after the FPN is issued you receive a convincing case that they should not be prosecuted, you should withdraw the FPN and promptly inform the recipient of the decision.

The grounds of such a case might include, but are not limited to:

- ▶ if the person issued with the penalty was not the person that committed the offence, for instance where someone else arranged for the disposal of the waste
- ▶ if the person issued with the FPN brings forward evidence that could undermine any later prosecution
- ▶ if evidence is provided that the person issued with an FPN is in some way vulnerable and enforcement would not be in the public interest
- ▶ if evidence is provided that enforcement would, for any other reason, not be considered to be in the public interest

You should consider any information provided when deciding whether or not to start criminal proceedings against the person if the FPN goes unpaid.

Awareness Raising

You should not view your enforcement regime in isolation. In addition to taking enforcement action, you should aim to reduce breaches of the household waste duty of care through clear, well-designed communications. Raising awareness of successful enforcement action can help deter others from committing offences. Where enforcement is deemed not appropriate, there may still be an opportunity to educate people on the household waste duty of care to prevent future breaches.

You should communicate to the community your reasons for the use of the FPN and make it clear that enforcement is about preventing waste crime and protecting the environment.

The Welsh Government and Fly-tipping Action Wales have developed communication materials to help support awareness raising activity and this will be shared with local authorities.

Reporting

You should report regularly and consistently on your use of the FPN to help the public understand the approach to enforcement.

WasteDataFlow includes a category for reporting the Duty of care FPN.

References

- ¹ Waste Duty of Care: Code of Practice (England and Wales):
www.gov.uk/government/publications/waste-duty-of-care-code-of-practice/waste-duty-of-care-code-of-practice
- ² Welsh Government Guidance on Fixed Penalty Notices
gov.wales/topics/environmentcountryside/epq/cleanneighbour/fixedpenalty/?lang=en
- ³ The Welsh Government's "A Fly-tipping Free Wales" Strategy:
gov.wales/topics/environmentcountryside/epq/cleanneighbour/flytipping/?lang=en