

## **BIRMINGHAM CITY COUNCIL**

### **REPORT OF THE ACTING DIRECTOR OF REGULATION AND ENFORCEMENT TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE**

**16 January 2019**  
**ALL WARDS**

#### **The Environmental Protection (Miscellaneous Amendments) England and Wales) Regulations 2018**

##### **1. Summary**

- 1.1 The Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018 – amendments relating to household waste transfer: penalty notices in England comes in to force on 7<sup>th</sup> January 2019.
- 1.2 These Regulations introduce a new fixed penalty notice for householder duty of care offences under Section 34(2) of the Environmental Protection Act 1990.
- 1.3 This report seeks to inform and update the committee of the legislative changes as well as the options available in respect of the new fixed penalty for householder duty of care.
- 1.4 This reports requests that the committee set the fee to be utilised for the fixed penalty notice householder duty of care.

##### **2. Recommendations**

- 2.1 That Committee determines a fixed penalty amount between £150 and £400 for Section 34(2) (A) Environmental Protection Act 1990 offences. It is recommended that the default figure of £200 is utilised.
- 2.2 That Committee determines if it wishes to set a reduced fixed penalty amount for payment of the fixed penalty notice within 10 days of its issue. It is recommended that Committee do not set any reduced fixed penalty amount and if the case progresses to Court the Council will seek to recover full costs.
- 2.3 If Committee determines at 2.2 to allow a reduced fixed penalty amount then it must be set between the statutory minimum and maximum early re-payment levels of £120 and £150. If Committee do determine to set a reduced fixed penalty amount then it is recommended this be set at £150.

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### 3. Background

3.1 Section 34 (2) of the Environmental Protection Act 1990 (the Act) deals with household duty of care. The duty of care requires occupiers of domestic properties 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.

3.2 Householders (occupiers of domestic properties) should check whether a person or business is authorised to take waste before they transfer their waste to them. An authorised person is one of the following:

1. someone who has a valid registration as a carrier, broker or dealer of waste issued by the Environment Agency
2. a waste management operator who has an environmental permit or registered exemption to accept such waste issue by the Environment Agency

3.3 The duty of care requirement equates to the householder asking the person or business they transfer their waste to or who arranges the transfer for evidence of their authorisation, such as a copy of their waste carriers registration or proof of their exemption registration.

Householders can also use the Environment Agency public register to check any evidence of registration provided to them either online (<https://www.gov.uk/guidance/access-the-public-register-for-environmental-information>) or by telephone (03708 506 506).

3.4 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 council authorised officers to offer an alleged offender the option to discharge liability through payment of a FPN. However, issuing a FPN can be more proportionate than prosecution through the courts in appropriate circumstances.

3.5 The fixed penalty notice provisions are made under the Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018 and come into force on 7<sup>th</sup> January 2019. The provisions are intended to allow a person who would potentially be subject to prosecution to discharge their liability to court action where they have failed in their duty of care to dispose of their rubbish by way of an authorised collector.

3.6 For individual “household duty of care” offences the legal requirement to consider whether issuing a fixed penalty notice or another disposal option is the most appropriate course of action will continue to be determined on a case by case basis taking in to account all of the circumstances including the amount, type, and deposit of the controlled waste as well as any relevant information available at the time regarding the offender and the offending.

The determination is made against the Crown Prosecution Service *Code for Crown Prosecutors* and the Enforcement Policy.

4. Environmental Protection Act 1990, Section 34 (2A) - Fixed Penalty Notices

- 4.1 Government has extended the non-court sanctions available to local authorities through the introduction of a FPN for this offence. The FPN for “household duty of care” is an alternative to prosecution of offenders and is aimed at allowing householders to discharge their liability through payment of a fixed penalty amount.
- 4.2 Fixed penalties, however, can only be used if there is evidence that a named individual (a person) has committed a criminal offence of failing in their duty to present their waste to an authorised waste carrier etc.
- 4.3 This means you cannot issue this type of fixed penalty or take action against an “occupier” of a household unless they were responsible for the “transfer” of waste to an unauthorised individual.
- 4.4 A person issued with a FPN does not commit an offence if they chose not to pay the fixed penalty amount. As with other types of FPNs related to the Act, failure to pay renders a person liable to prosecution for the original offence for which the FPN was issued. On conviction the maximum penalty for this offence is an unlimited fine.
- 4.5 The Secretary of State for Environment, Food and Rural Affairs has issued statutory guidance with the Regulations. Principal areas are highlighted in the following extracts from the guidance:

2. *When you Can Give Fixed Penalties*

*You 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.*

### **3.1 Proportionate Use**

*The government wishes to encourage a balanced approach to enforcement. The principles of the Regulators Code apply to the enforcement of the household waste duty of care. An effective environmental offences enforcement regime is one that is proportionate, consistent, targeted, transparent and accountable. Under the Legislative and Regulatory Reform Act 2006, you 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. 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 or divergence), you should 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. For example enforcement would not be appropriate if a neighbour takes their waste to the local household waste recycling centre.*

*To help reduce the potential for breaches of the Duty of Care, Local Authorities should 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.*

### **3.2 Local Authority Waste Collections**

*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. Other penalties are already available for individuals not complying with waste receptacle requirements and this FPN does not provide a substitute or supplementary penalty for it.*

### 3.3 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.*

### 3.4 Household Waste Cleared by Landlords

*Where a landlord is arranging the clearance of premises after a tenancy has ended, the resulting waste is not considered to be household waste, nor are they the occupier. This means the duty of care under Section 34(1) of the Environmental Protection Act applies instead and this FPN cannot be used.*

### 3.5 Investigating the Fly-tipper

*You should give consideration to whether the evidence provided by an individual investigated for breach of the household waste duty of care enables investigation or prosecution of the fly-tipper, and whether enforcement against that individual would have a positive or negative impact on that investigation or prosecution.*

### 3.6 Opting for Prosecution

*FPNs should 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.*

- 4.6 Merely finding documents in waste is not sufficient evidence to identify who transferred the waste and whether the persons depositing the waste was un-authorised and would not meet the required standard of proof to issue a FPN.
- 4.7 The Standard of proof remains at “beyond a reasonable doubt” which is the same threshold as that required in the criminal court to secure a conviction. As with all criminal matters the burden of proof remains with the prosecutor prove that an offence was committed. This means that these FPN can only be used if there is credible evidence that a named occupier (a person) has committed a criminal offence.
- 4.8 It should be recognised that the fixed penalties are a way of reducing magistrates’ court service workload reducing the need for prosecution for smaller scale offences, but they cannot be used if there is insufficient evidence.

- 4.9 The same amount of investigative input is required whether a fixed penalty notice is being issued or a full prosecution is being pursued.

5. The New Fixed Penalty Notice

- 5.1 Local authorities can set the level of the fixed penalty amount locally and where this is done the level must be set within the prescribed statutory range which is between £150 and £400. Where no local level is set the Regulations require the default level to be £200.
- 5.2 Fixed penalties are payable within 14 days of issuing. Local authorities can set locally a reduced fixed penalty amount for early payment (made within 10 days of issuing). Where this is done the level must be set within the prescribed statutory range which is between £120 and £399.
- 5.3 As with other types of fixed penalty notices related to the Act, failure to pay the fixed penalty amount renders a person liable to prosecution for the original offence for which the fixed penalty notice was issued.

6. Matters for Consideration

- 6.1 In determination of any fixed penalty amount, Officers would ask Committee to consider the following matters:

a) Existing fixed penalty amounts	Currently, all of FPNs for which local levels can be applied by your Committee have been set at the maximum tariff amount. (The primary reason for this is that although FPNs potentially enable court proceedings to be avoided, Officers are still required to gather evidence and investigate offences to the full criminal burden of proof which is resource intensive). However, in this instance the household duty of care should be considered in the context of the existing maximum tariff for FPNs relating to non-compliance by businesses with duty of care, which is £300. There is a greater expectation on businesses to have made adequate due diligence checks regarding their legal duties relating to trade waste disposal (see (d) below).
b) Existing early payment reductions	Currently, no "early payment" reduction is applied to any FPN for which your Committee has the statutory discretion to offer a reduction. (This is primarily because analysis for littering FPNs showed that offering a reduced amount showed no significant increase in payment rates or allied reduction in administrative or court related processing costs).
c) Investigation and regulatory cost	The FPN regime is intended to reduce burdens relating to the court process. Without court proceedings local authorities have no ability to recover investigatory or legal costs and the regulator carries the full financial burden.

	<p>FPNs are not intended as a cost recovery tool; however the investigation of small scale fly-tipping requires full evidence to be gathered to enable potential court proceedings to be mounted in the event that a FPN was not paid.</p> <p>Fly-tipping investigations that may lead to household duty of care failures, irrespective of size, invariably require Officers to conduct formal interviews under caution with suspects and may require witness statements to be gathered or police support to facilitate enquiries. The FPN amount must take account of the investigatory and regulatory input required for this type of offence.</p>
d) Fixed penalty levels and payment rates – Allied offences	<p>Under the Act the offence of failing to provide written Duty of Care details relating to the disposal arrangement for commercial waste from business premises carries a £300 FPN level.</p> <p>Around a third of Duty of Care FPNs issued to businesses are paid, which requires the remainder to be considered for court proceedings. A high FPN amount may dissuade payments by offenders who hope for a lesser amount at a court trial.</p>
e) Impact on the Environment	<p>No-one fly-tips or abandons their waste by accident. The FPN is a tool to target a 'deliberate act' which continues to be a national problem. The City has arrangements in place for collection of waste through both free and chargeable services.</p>

## 7. Consultation

- 7.1 The draft Regulations have been through consultation, however, the setting of local FPN tariffs is a matter for individual local authorities and their respective democratic processes. Your Committee reviews FPN amounts annually through the fees and charges process.

## 8. Implications for Resources

- 8.1 FPNs issued appropriately will not reduce implications for resources due to the level of investigation required prior to service of any potential fixed penalty notice, however, it may reduce time in court or the necessity of court proceedings.

## 9. Implications for Policy Priorities

- 9.1 The issuing of FPNs is another application Regulation and Enforcement officers, in particular, the Waste Enforcement Unit can utilise for tackling

environmental offences and improving the cleanliness of the city and supporting the operations of legitimate waste collection operators.

10. Public Sector Equality Duty

10.1 There are no specific implications identified.

**ACTING DIRECTOR OF REGULATION AND ENFORCEMENT**

Background Papers: Birmingham City Council: Corporate Charging Policy

Guidance for local authorities on household waste duty of care fixed penalty notices.