Supplementary Committee Agenda

SCRUTINY

Epping Forest District Council

Safer, Cleaner, Greener Scrutiny Standing Panel
Tuesday, 21st February, 2012

Place: Committee Room 1, Civic Offices, High Street, Epping

Time: 7.30 pm

Committee Secretary: Adrian Hendry, Office of the Chief Executive
email: democraticservices@eppingforestdc.gov.uk Tel: 01992 564246

6.a Defra Consultation on Waste Related Penalties (Pages 3 - 24)

(Director Environment and Street Scene) To Consider the attached Government Consultation documents.

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Report to Safer Cleaner Greener Standing Panel
Date of meeting: 21 February 2012

SCRUTINY

Epping Forest District Council

Portfolio: Environment

Subject: Defra consultation on waste related penalties

Officer contact for further information: J Gilbert

Committee Secretary: A Hendry

Recommendations/Decisions Required:

To consider the attached responses to the Defra consultation

Report:

Background

1. When the new government came to power, it stated that it intended to review waste related law on the premise that too many local authorities were unnecessarily penalising residents for what were seen as trivial offences resulting in those residents receiving a criminal record. Furthermore, government took the view that the threat of a criminal record was being utilised to cajole residents to comply with draconian waste related powers.

2. This all made for some interesting newspaper headlines, with stories of penalties, convictions and threats for offences such as failing to close the lid of a wheeled bin to putting out side waste. This, alongside the move towards alternate weekly collections has been seen as councils not serving their public and being unnecessarily heavy handed rather than attempting to convince and educate.

3. Government has now come forward with its proposals for changing the law. It is presenting two main options:

(1) the creation of mainly civil sanctions, but with the retention of some criminal sanctions; and
(2) the removal of all criminal sanctions.

The consultation is appended to this report. The deadline for response is the 9th of March 2012.

This Council's position

4. There is no doubt that some councils take and have taken a more robust line with their residents in respect of relatively minor waste offences. Such offences include, amongst others, lids not fully closed, bins not placed out in correct location, side waste etc. This Council has always taken a different view. Firstly, the Council provides a weekly collection of food and garden waste. This enables residents to dispose of putrescible waste on a weekly basis. Secondly, the Council's adopted enforcement policy makes it clear that, prosecution (or its equivalent), should be seen as the last resort and only applied for the most serious breaches or in circumstances where all other avenues of advice and persuasion have failed

to deliver reasonable behaviour.

5. This approach has worked and the Council has both a high level of overall recycling (around 60%) and has not issued many fixed penalty notices or taken other legal action for offences relating to household waste. That said, officers are of the view that some form of sanction is required to deal with residents who won't meet reasonable requests to change their approach or actually commit what are considered to be serious offences. Offences and the action taken are regularly reported to the Safer, Cleaner, Greener Standing Scrutiny Panel and via the Members' Bulletin.

6. In attempting to answer the consultation questions posed, it has been difficult to advise Members unequivocally in favour of one of the options. It would have been easier to favour option 1, which is effectively the status quo with additional protections built in. However, option 2, the decriminalised approach, is being suggested as the preferred option, because, irrespective of whether there has been over zealousness by some councils, it is questionable whether a resident should be at risk of being tarnished with a criminal record because they did not close a wheeled bin lid or accidently placed the wrong waste into the wrong container.

7. If option 2 is seen as a preferred way forward, then the questions are whether civil enforcement is sufficient to deal with the problems which arise and whether it is practical and/or financially viable for councils to pursue civil debts. It can be argued that it works for parking offences, although adverse publicity on this matter far exceeds anything which has arisen from waste. However, provided that fixed penalty notices are only issued when they should be, and councils do not see the income stream from civil penalties as a key source of guaranteed income, then there is no reason why this should not work.

8. It will be important however to ensure that the criminal powers which remain are fit for purpose and do enable councils to take action where appropriate through the Courts. It will be equally important for councils not to find themselves under criticism for seeking to recover those civil debts which arise from the issue of a fixed penalty notice. The Council pursues its parking debts assiduously and should behave similarly with waste related civil debts.

The proposed response

9. The proposed answers to the consultation questions are set out in the attached table. For the reasons set out above, the answers are not always as unambiguous as would be wished for. However, it is hoped that the Council's general approach is properly stated.

Reason for decision:
To respond to the Defra questionnaire before the deadline date of the 9th of March 2012.

Options considered and rejected:
(1) To select option 1 as the Council's preferred option. This is a perfectly valid approach, but not recommended for the reasons set out in the above report;

(2) To amend, add or delete the answers suggested in the attached table.

Consultation undertaken:
None

Resource implications:

Budget provision:	Within existing resources and suggested response will not have a budgetary impact
Personnel:	Within existing
Land:	Nil

Community Plan/BVPP reference:
Relevant statutory powers:

Background papers:
Environmental/Human Rights Act/Crime and Disorder Act Implications:
Key Decision reference: (if required)

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Response to Defra consultation on penalties for non compliance with waste legislation etc.

Defra consultation question	Proposed response
1. Which option do you consider to be the best? Provide evidence to support your views.	On balance option 2 is preferred, although the Council still believes that there are circumstances where a criminal sanction is required to deter the most intransigent. The Council recognises that there may be other existing powers which might be used. The retention of a criminal offence for failure to comply could be seen as extreme, given that in most cases residents will comply through being given advice and guidance, and the effects of a criminal record can be unfortunate (e.g. failure to obtain Visas etc.). In accepting that option 2 is the Council's preferred option, it does not believe that the "harm to local amenity" test is appropriate. This test assumes that failure to handle waste correctly is just about the effect upon the local community from an amenity perspective. In reality it is more than that. The 'contamination' of recycled waste with residual waste for example, can lead to whole loads being rejected at the recycling processors. This means that recyclate ends up at landfill, at a cost, plus the income from the recyclate is also lost to the authority. As more sophisticated plants come on line (e.g. MBT, AD), the requirements for correctly configured and uncontaminated waste to be delivered to the plant will become ever more stringent. It is also important to be able to reassure the vast majority of our communities who recognise the need to recycle and are enthusiastic about it (as witnessed by this Council's current rate of recycling at 62%), that the Council will endeavour to deal with those who cannot be bothered to engage and are prepared to see others' hard work lost through contamination or a broad failure to engage in the recycling process. This Council recognises that sanctions (whether civil or criminal) should only be applied in extreme circumstances and when all other avenues of persuasion have been exhausted. That is currently our policy, and as be seen from our response to question 9, we have issued very few FPNs yet still have a high level of recycling.
2. Do you think there should still be an underpinning criminal offence (and possibility of criminal conviction) for failure to comply with a section 46 notice?	Probably, in order to deal with those where education, advice and assistance has failed to get them to amend their approach to handing waste. However, the Council has concerns regarding dealing with issues through a mix of criminal and civil sanctions. Care should also be exercised in respect of similar offences attracting differing sanctions, for example household flytipping receiving a civil sanction but littering a criminal one. Is there an intention to seek to 'decriminalise' waste offences along the lines of parking offences? If so, and given public antipathy to parking offences, there is certainly no

Defra consultation question	Proposed response
	guarantee that this will solve the perceived problems of over zealousness which is alleged to exist with the current system of controls.
3. Do you think LAs should write to householders before taking section 46 action? Is there anything they should do before issuing a FPN?	Yes. We already do this if we are unable to secure changes in behaviour in other ways. The Council does not believe in, and has never issued, 'blanket coverage' letters to residents regarding the penalties associated with section 46. The issue of a FPN should be treated in the same way as any other offence, and issued as a procedure of last resort. This Council does not for example, set a budget which anticipates income from FPNs. In the same way as the Traffic Management Act 2004 precludes the use of targets for Penalty Charge Notices, targets should not be set for FPN income either.
4. What kinds of action would you consider to cause sufficient nuisance to trigger the "harm to local amenity" test and a financial penalty?	Please see answer to Question 1 in respect of the application of this test. Furthermore, the proposals seem to major on 'visible' waste rather than some of the other effects that mishandled waste or waste containers can give rise to. These include for example: • fire hazards • obstruction to those with sight or mobility disabilities • obstruction to families using pushchairs/prams etc • leaking or overflowing bins causing potential issues with rats, foxes, odour and flies
5. What level of financial penalty would you consider to be appropriate for failing the "harm to local amenity" test?	We have no clear view on this other than it should be consistent with other offences dealt with via FPNs or PCNs (e.g. Level 3 on standard scale = £1,000 (max))
6. Currently, LAs retain all FPN income. What are your views on retaining this or just retaining "processing costs" with the surplus going back to the centre?	This seems an unnecessary change in arrangements and is presumably predicated on some belief that authorities are taking action in support of an income stream rather than due to the problem being caused. If government has this concern perhaps it could best be dealt with as with the Traffic Management Act through not enabling targets for FPN issued to be set nor setting presumed budgets for levels of income. There have always been difficulties in establishing processing costs, which do, for a number of reasons, vary between authorities. If they are set centrally, (e.g. as for centrally set entertainment licences etc.), they will not properly reflect local circumstances. Furthermore, it is likely that civil debts will be too expensive to pursue through the courts and therefore there is merit in councils being able to retain all income in order to ensure that those tax payers

Defra consultation question	Proposed response
	who have not been subject to action are not sharing in the costs of non payment.
7. What would be the right level of fine for a criminal offence (if retained) for failure to comply with a section 46 notice (currently up to £1,000)?	Whilst we have no clear view on this other than it should be consistent with other similar offences dealt with via the Courts, we can see no reason to change it from the current £1,000 maximum.
8. Do you think householders should be able to appeal against section 46 penalties?	This question appears a little confusing and is presumably asking if householders should be able to appeal against a council's decision to prosecute and deal with this by offer of a FPN as there is already a right of appeal against a fine imposed by magistrates? We do not think that there needs to be any appeal process regarding a council's decision to prosecute/FPN (at a pre-determined level set by Councillors) because under the existing procedure the alleged offender is entitled not to accept the offer of a FPN and can choose to have the case heard in court, which is therefore akin to an appeal process. Adding another level of appeal would just add a further level of administration., However, if introducing an official right of appeal against the offer an FPN (actually an appeal against the prosecution decision) is required to satisfy concerns re overzealous councils, we would favour that if this enables the existing FPN route and criminal sanction to be retained.
9. Do you use your current powers to impose fixed penalties under section 46? If so how many per annum?	Yes –1/1/2011 to 31/12/11 (1 year) 2 for section 46 breaches, (6 for section 47)
10. What do you think the impact of these options will be on your waste management budgets?	Very little, since as set out above, we serve very few notices under section 46.
11. Anything else you wish to add?	Although the Council is stating that, if a change is to be implemented, then its preference is for option 2, it is also of the view that government is "using a sledgehammer to crack a nut" with these proposed changes. There is very little (if any) empirical evidence to support the view that such wholesale changes are necessary, other than newspaper headlines and editorials setting out what they believe to be councils acting unreasonably. This is then taken forward by government as a matter of widespread concern which needs to be dealt with nationally. Government must guard against over reacting and preventing reasonable authorities such as our own from taking appropriate

Defra consultation question	Proposed response
	action when it is absolutely necessary and safeguarding the interests of the vast majority of residents who behave responsibly and indeed are keen to ensure that those who do not can have appropriate sanctions applied to them If the move is to be towards civil rather than criminal sanction, then the impact on councils and offenders when recovering small civil debts should not be underestimated. For example, to take action in the small claims court to recover £60 - £80, the court will charge £30 to issue and the Council is only allowed to reclaim £50 legal fees. In reality the costs of recovery will be higher than the Council is allowed to claim leaving the Council with the option of waiting until a householder receives more than one penalty notice or taking action to recover the money which will be an additional cost on the Council's scarce resources. It is therefore unlikely that councils will find it cost effective to pursue small civil debts, so these may not be collected and will instead be written off, thereby losing the control that the legislation seeks to impose. Alternatively, the debt may be passed to a private recovery company incurring additional costs, adding further burden on the offender, in conflict with what the proposed changes appear to be seeking to achieve, as well as bringing with it, we suspect, another raft of press criticism of councils being considered to be acting unreasonably in collecting debts. Whilst some members of the public will be concerned about whether or not they have committed a criminal offence, how much money it will cost them may be more important. Adding costs on chasing civil debts may result in initial fines being pushed way above the fine that was appropriate for the initial offence and result in much higher monetary penalties than the initial civil penalty or existing FPN levels. Government is asked to consider most carefully whether these proposals properly strike the balance they seek to achieve. If the conclusion is that a civil sanction is more appropriate, then local authorities should not be hampered through the imposition of the "harm to local amenity" test which in the Council's view would prevent the Council taking action in many compelling instances. Furthermore, if the intention is that waste related offences should be decriminalised, as with parking, then government should ensure that councils who behave reasonably should not find themselves unreasonably criticised for then seeking to recover those civil penalties, using the courts or other agencies as appropriate.
A1. Do you consider that the First-tier Tribunal is an appropriate destination for appeals?	No comment

Defra consultation question	Proposed response
A2. Do you consider that the general Regulatory Chamber Rules will suit the handling of these appeals against decisions by the Local Authority? If not, why not?	No comment

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Consultation on amending the powers of Local Authorities regarding presentation of household waste for collection

January 2012

defra
Department for Environment Food and Rural Affairs

This document/publication is also available on our website at:
www.defra.gov.uk/consult/2012/01/16/household-waste-1201/

Any enquiries regarding this document/publication should be sent to us at:

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Section 1: About this consultation

Purpose of the document

1.1. The purpose of this consultation is to seek your views on proposed amendments to Section 46 of the Environmental Protection Act 1990, which sets out the penalties which local authorities may apply to householders who present their waste incorrectly for collection. These amendments will form the main part of a series of measures to ensure a fairer system of penalties that respects individuals' civil liberties while dealing effectively with behaviours that have a negative impact on residents' local neighbourhoods.

1.2. These amendments will abolish the criminal offence provided for in section 46, together with the £1,000 fine. A new, civil sanction will be put in place instead. This will mean that householders will no longer face the threat of a £1,000 fine and a criminal conviction because they have failed to comply with a Section 46 notice from their council.

1.3. However, local authorities will continue to be able to issue fixed penalties to those householders whose failure to present their waste properly is harming the quality of the local area for their neighbours. Secondary legislation sets these penalties for offences under section 46 at between £75 and £110: the amendments will introduce a new form of fixed monetary penalty set at a lower level, more proportionate with other offences such as parking fines and shoplifting.

1.4. "Harm to local amenity" will be introduced as a test before a civil penalty can be imposed. This test fundamentally changes the basis under which local authorities can issue fixed penalties. The test aims to ensure that penalties are targeted at those who behave in a way which reduces the quality of their neighbours' surroundings. In other words, penalties might be appropriate when bin bags are left on the street for days on end, for example, but not when someone does not close their bin lid properly, leaves it out for an hour too long, or mistakenly puts something in the wrong bin.

1.5. The maximum level of penalties (and their range) applying under the current fixed penalty regime will be reduced as an interim measure within the next six months. This consultation is about the changes which will be made in the longer term.

Who will be affected by these proposals?

1.6. Members of the public will be affected, because they will no longer face the threat of £1,000 fines or criminal conviction for genuine mistakes in putting their rubbish out for collection.

1.7. Local Authorities will also be affected, because the penalties which they can apply to householders will change.

Timing and duration of this consultation

1.8. This consultation lasts for eight weeks and ends on 9 March 2012.

1.9. A list of stakeholders who have been asked to give their views has been published with this consultation. Other interested parties are welcome to make comments.

Section 2: Policy context: the Waste Review

2.1 Under Section 46 of the Environmental Protection Act 1990, Local Authorities may instruct householders how to present their rubbish for collection. Where these instructions are not followed, Local Authorities may prosecute and apply a fine of up to £1000. As an alternative, they may apply a fixed monetary penalty of £75 to £110. While we understand that few local authorities use their current powers to bring a criminal prosecution, we do know that many write to householders pointing out that they face criminal conviction and a fine of £1,000 if they fail to comply.

2.2 The Government believes that this is inappropriate, particularly as there is no differentiation made between genuine mistakes and those who persistently cause problems for their neighbours. They would like to see local authority powers in this area to be made more proportionate, and better targeted, with fixed penalties no higher than those for shoplifting or parking offences.

2.3 The Government, in its Waste Policy Review, published on 14 June 2011, said "we have decided that:

1. We will remove the prospect of criminal sanctions applying to householders who present their waste for collection incorrectly.
2. We intend to replace these with civil sanctions. We will ensure that level of fines are appropriate, and are in line with penalties for similar offences."

2.4 The Waste Review Action Plan goes on to say that the Government will bring forward legislative changes to remove disproportionate local authority enforcement powers against householders by spring 2013. To ensure local authorities use enforcement powers appropriately the Review proposed to set a "harm to local amenity" as a test before a civil penalty can be imposed. This would mean that enforcement is targeted at the small number of people who spoil the local area by the way they put out their waste, rather than applied to those who accidentally put their bins out wrongly.

2.5 This consultation is about the Government's proposal to replace the criminal sanctions with civil sanctions, to put in place a "harm to local amenity test", and to set an appropriate level of fixed penalties. Because these will involve changes to primary legislation (the Environmental Protection Act 1990), consultation and further primary legislation is required. In the meantime, the Government plans to make interim changes to the levels of fixed penalties to make them more proportionate.

2.6 The changes proposed in this consultation will apply in England only. Questions in the document ask for views on various options for change.

Section 3: Options for Change

3.1 If the legislation remains unchanged, waste collection authorities (WCAs) in England will still have the power to serve notices under section 46 of the Environmental Protection Act 1990 (EPA) setting out requirements related to household waste collection. Section 46(6) currently provides that a person who fails to comply with requirements is liable on summary conviction, i.e. prosecution in the magistrate's court, to a fine not exceeding £1000. Local authorities need to issue a notice explaining how an individual has failed to meet S46 EPA requirements, giving the opportunity for individuals to change their behaviour before pursuing any sanctions. Alternatively, an authorised officer of a WCA can issue a fixed penalty notice of £75 – £110[1] if they believe an individual has committed an offence under section 46. Early payment discounts are possible, but the payment cannot be less than £60. There is no right of appeal, but if an individual does not pay the financial penalty then they may be prosecuted under Section 46 (6) and go to court. WCAs are entitled to keep receipts from the fixed penalties. The Government believes that the level of fines and fixed penalties is disproportionate and would like to see penalties brought more into line with other offences such as shoplifting and parking offences.

3.2 Currently, the London Local Authorities Act (LLAA) 2007 gives London local authorities parallel powers to issue penalty charges (£110)[2] to householders presenting their waste for collection incorrectly. These powers are in addition to (not instead of) the powers outlined above. Criminal sanctions are not available here, so a person who fails to comply cannot be prosecuted under the LLAA, but can appeal to the local authority if they think that the notice should not have been issued.

3.3 This document considers two options for changing the current enforcement regime:

1. Replace the current system with a new system of civil sanctions, but leaving in place an underpinning criminal offence; those who fail to comply with local authority requirements would still receive a notice of intent to pursue further action (Section 46 Notice[3]), but the level of financial penalties would be brought in line with comparable offences; there

[1] These amounts are set out in the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) Regulations 2007 (made under section 47ZB EPA).

[2] Section 20 of the LLAA provides that London borough councils who have a duty by virtue of section 45(1)(a) of the EPA 1990 to arrange for the collection of household waste from any premises, may make regulations requiring occupiers of such premises to place household waste for collection in receptacles of a kind and number specified. Section 20(1) expressly provides that nothing in that section affects the ability of a London borough council to serve notices under section 46 of the EPA 1990. Unlike the EPA, non-compliance with any regulations made under s20 is not an offence. Instead, s23 provides that a penalty charge is payable for non-compliance, and ss 61-67 provide further detail about penalty charges. Section 66 deals with levels of penalties, which are set by the borough councils. In London Councils' letter of 1 September 2009, this penalty is set at £110.

[3] Section 46 allows local authorities to specify how residents present their waste for collection. A local authority may serve notice on a person directing them to use specific receptacles for household waste, directing the types of substances/articles that can be placed in certain receptacles, and/or in relation to the placement of the receptacles for collection. Residents who fail to comply with a Section 46 notice are liable to a criminal conviction and fine of up to £1000. Alternatively the provision exists to issue a fixed penalty notice, at a much lower level (between £75 and £110).

would be a route to appeal through a First Tier Tribunal (or other appellate body). The concept of the "harm to local amenity" test would apply here.

2. Move to a system relying exclusively on civil penalties with no underpinning criminal offence, while also keeping the notice of intent, introducing appeals and the "harm to local amenity" test and reducing the level of financial penalties as under option 2.

3.4 These options are considered in more detail below, including how well they

- reduce intrusion into individuals' lives through inappropriate local authority practices;
- balance the need to respect civil liberties with the need to deal effectively with behaviours harming the local amenity; and
- target enforcement at the small minority who make life difficult for others.

Option 1: Civil penalties with an underpinning criminal offence

3.5 What does this option include?

- *Those who put out their rubbish incorrectly receive a Section 46 Notice: the vast majority of those who do not comply with that notice will face civil penalties*
- *Councils must apply a "harm to local amenity test" to ensure that penalties and criminal sanctions are targeted at the worst offenders*
- *Criminal conviction would be available only in the most extreme cases*

3.6 The Government is concerned that under the current arrangements, householders are receiving letters, called Section 46 Notices, from their councils, which threaten the possibility of a £1,000 fine and criminal conviction, even if they have made genuine mistakes or this is the first time they have got this wrong. We do not believe that convictions are often pursued – the letter from the council, sometimes followed by a visit or telephone call, is usually sufficient to change behaviours – but consider the threat to be unnecessarily severe. On the other hand, some WCAs may feel that removing their ability to threaten more severe action may restrict their capacity for changing behaviours.

3.7 Under this first option, householders who fail to present their waste for collection in line with their councils' S46 requirements would face civil monetary penalties, but not usually face criminal conviction. However, an underpinning criminal offence would be retained in addition to civil sanctions, to allow for prosecution to tackle the most extreme behaviour. This is in line with the kind of sanctions applied under the Regulatory Enforcement and Sanctions (RES) Act 2008.

3.8 This option reflects the Government's desire to support people in their efforts to do the right thing rather than impose penalties, except as a last resort. Any financial penalties would be at a lower level than currently apply.

3.9 The Government does not want to see penalties applied indiscriminately. Under this option, they would be better targeted. Financial penalties and criminal sanctions would be imposed only if a householder fails the "harm to local amenity" test, meaning that the quality of other people's lives has been affected: we would like your views on this idea, which aims to ensure that enforcement activities are targeted at those who behave in a way which reduces the quality of their neighbours' surroundings. In other words, penalties might be appropriate when bin bags are left on the street for days on end, for example, but not when someone simply does not close their bin lid properly, leaves it out for an hour too long, or mistakenly puts something in the wrong bin. The introduction of this test should encourage consistent and proportionate use of the penalties and sanctions available. We expect that fewer penalties and fines will be issued than under the current regime due to the introduction of this test, which reduces the circumstances in which they can be applied.

3.10 As with the current regime, local authorities would need to issue a notice explaining how an individual had failed to meet S46 EPA requirements, giving the opportunity for individuals to change their behaviour before pursuing civil or criminal sanctions. In effect, this acts as a non-monetary option to encourage compliance before monetary penalties are considered.

3.11 In considering this option we would also like your views on the right level of financial penalties, which the Government would like to change. The Government Waste Policy Review states that "It cannot be right ... for an individual to risk receiving a higher fine for not closing a bin lid than that levied on a convicted shoplifter for theft." Based on advice from the Ministry of Justice, an £80 Penalty Notice for Disorder is issued for shoplifting (first offence). £80 is also the penalty charged by at least some local authorities for less serious parking offences, such as overstaying in a pay and display bay. We expect to propose a penalty of £60 - £80, with reductions available for early payment, as this would represent a reduction while potentially providing a deterrent, but would like your views before we make a decision on this. Under the current regime, these penalty receipts go to the local authorities who impose the penalties. We would like your views about whether local authorities should be able to keep only enough to cover their processing costs, with the remainder of the receipts going to central funds.

3.12 We would expect the threat of criminal sanctions to be used to deal with the small minority who cause the worst breaches of the "local amenity" test. Under this approach, individuals would have a right to appeal against the civil sanction (probably but not necessarily to the First Tier Tribunal). Cases would go to court only if prosecuted under the underpinning criminal offence.

3.13 If this Option is taken forward, we would look to make similar changes to the LLAA, i.e. financial penalties would only be imposed if a householder failed the "local amenity" test, and the level of any penalties would be the same as under the EPA. We would not look to introduce criminal sanctions under the LLAA. We would also look to retain the existing system of appeals under the LLAA.

Option 2: Civil penalties with no underpinning criminal offence

3.14 What does this option include?

- *Those who put out their rubbish incorrectly receive a Section 46 Notice: those who do not comply with that notice will face civil penalties*
- *Councils must apply a "harm to local amenity test" to ensure that penalties are targeted at the worst offenders*
- *Householders do not face the prospect of prosecution because there is no criminal offence: failure to pay a fixed penalty may mean being pursued for a civil debt.*

3.15 This approach best meets the Government's policy objective as set out in the Waste Review. It removes the threat of criminal sanctions applying to householders who present their waste for collection incorrectly, and seeks to achieve a balance between the need to respect individuals' civil liberties and the need to deal effectively with behaviours which have a negative impact on residents' local neighbourhoods. As in option 2 (above), householders who fail to conform with Section 46 will face penalties, at a lower level than now; the big difference with this option is that at no stage would they be told that they may face criminal conviction or a high level fine. The only possible sanction is the civil monetary penalty. Again, as with Option 1, we would be interested in your views about whether local authorities should be able to keep only enough of the receipts from these penalties to cover their processing costs. The "harm to local amenity test" must be applied, so that enforcement is targeted on those householders whose behaviour reduces the quality of life for their neighbours. As with option 2, we expect that fewer penalties will be issued than under the current regime due to the introduction of the "local amenity" test, which reduces the circumstances in which penalties can be applied.

3.16 Some local authorities may be concerned that the removal of criminal penalties may make it more difficult for them to deter the worst kind of breaches of S46 EPA requirements, although some stakeholders have told us that their other powers could also be used to deal with the worst offenders. These include litter enforcement powers in S87 and S92A of the Act, and the possibility of prosecution for flytipping. The Government believes that the quality of life of householders is adversely affected by the threat of criminal conviction and feels this change will redress the balance.

3.17 Appeals would be heard by the First Tier Tribunal (or other appellate body). The key difference is that there would be no underpinning criminal offence. Again, we are testing the level of financial penalties as part of the consultation.

3.18 If this Option is taken forward, we would look to make similar changes to the LLAA, i.e. financial penalties would only be imposed if a householder failed the "local amenity" test, and the level of any penalties would be the same as under the EPA. We would not need to remove an underpinning criminal offence as this section of the LLAA does not include criminal sanctions. We would look to retain the existing system of appeals under the LLAA.

Question 1: Which Option do you consider to be the best? Please provide evidence to support your views.

Question 2: Do you think there should still be an underpinning criminal offence (and the possibility of a criminal conviction) for failing to comply with a Section 46 Notice?

Question 3: Do you think local authorities should write to householders before taking action under Section 46? Is there anything else they should do before issuing a fixed penalty notice?

Question 4: What kinds of actions would you consider to cause sufficient nuisance to others (the "harm to local amenity test") to warrant a financial penalty?

Question 5: What level of financial penalty would you consider to be correct for failing the "harm to local amenity test" – the current fixed penalty (£75 - £110)? £60 - £80? A lower amount?

Question 6: Under current arrangements, local authorities retain the receipts from any Fixed Penalty Notices issued. What are your views on local authorities only keeping their processing costs, rather than the full amount of the penalty, under a new civil sanction regime?

Question 7: What would be the right level of fine under the underpinning criminal offence (if retained) for failure to comply with a Section 46 Notice (currently this is up to £1000)?

Question 8: Do you think householders should be able to appeal against penalties under Section 46?

Question 9 (for local authorities): Do you use your current powers to impose fixed penalties under Section 46? If so, how many penalties do you issue a year?

Question 10 (for local authorities): What do you think the impacts of these Options would be for you in your waste management and budget-holding roles?

Question 11: Are there any other points you would like us to consider related to these two Options?

Section 4: Appeals Procedures

4.1 The First-tier Tribunal is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interest of justice and minimising parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.

4.2 If the First-tier Tribunal is selected as the appropriate body to hear appeals in these matters then it is likely that they would be made to the General Regulatory Chamber which hears appeals in various matters.

4.3 The General Regulatory Chamber operates under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives

4.4 Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Appeals Question A1: Do you consider that the First-tier Tribunal is an appropriate destination for these appeals?

Appeals Question A2: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals against decisions by the Local Authority? If not, why not? (The General Regulatory Chamber Rules may be found at: *http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm****)***