

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

Defra consultation question	Proposed response
<p>1. Which option do you consider to be the best? Provide evidence to support your views.</p>	<p>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.</p> <p>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.</p>
<p>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?</p>	<p>Probably, in order to deal with those where education, advice and assistance has failed to get them to amend their approach to handling 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</p>

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	guarantee that this will solve the perceived problems of over zealousness which is alleged to exist with the current system of controls.
<p>3. Do you think LAs should write to householders before taking section 46 action? Is there anything they should do before issuing a FPN?</p>	<p>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.</p>
<p>4. What kinds of action would you consider to cause sufficient nuisance to trigger the "harm to local amenity" test and a financial penalty?</p>	<p>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:</p> <ul style="list-style-type: none"> • 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
<p>5. What level of financial penalty would you consider to be appropriate for failing the "harm to local amenity" test?</p>	<p>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))</p>
<p>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?</p>	<p>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</p>

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	who have not been subject to action are not sharing in the costs of non payment.
<p>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)?</p>	<p>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.</p>
<p>8. Do you think householders should be able to appeal against section 46 penalties?</p>	<p>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?</p> <p>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.,</p> <p>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.</p>
<p>9. Do you use your current powers to impose fixed penalties under section 46? If so how many per annum?</p>	<p>Yes –1/1/2011 to 31/12/11 (1 year) 2 for section 46 breaches, (6 for section 47)</p>
<p>10. What do you think the impact of these options will be on your waste management budgets?</p>	<p>Very little, since as set out above, we serve very few notices under section 46.</p>
<p>11. Anything else you wish to add?</p>	<p>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</p>

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	<p>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</p> <p>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.</p> <p>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.</p>
<p>A1. Do you consider that the First-tier Tribunal is an appropriate destination for appeals?</p>	<p>No comment</p>

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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