

Review of legislation to identify powers to promote the diversion of recyclable materials (including food waste) from residual waste containers at domestic properties

Welsh Local Government Association

1 Introduction

This report forms part of a package of works commissioned by the Welsh Local Government Association (WLGA) to inform a Behaviour Change Programme aimed at persuading occupiers of domestic properties to put recyclable materials in containers for recycling. The focus of this report is to identify legislation that may be used by Welsh local authorities to promote the diversion of recyclable materials (including food waste) from residual waste containers, with a particular emphasis on enforcement powers.

The package of works comprises assimilation of different sources of information and preparation of a range of documentation including guidance, step by step procedures and pro forma documents for Welsh local authorities, enabling them to make effective use of enforcement powers as a tool to help decrease the amount of recyclate present in the residual waste stream.

The recyclable materials covered by the package of works are those that:

- Are collected by or on behalf of Welsh waste collection authorities from domestic premises; and
- Are recyclable household waste, comprising paper, plastic, metal, glass and any other recyclable material the waste collection authority may from time to time collect from domestic premises; and
- For which no collection charge is made because each article is less than 25kg in weight and fits into the receptacle for household waste provided by a Welsh waste collection authority under Section 46 of the Environmental Protection Act 1990 or, where no such receptacle is provided, a cylindrical container 750mm in diameter and 1m in length.

2 Approach

The methodology for reviewing the relevant legislation has been to conduct a desktop study of all potentially relevant waste law legislation in Wales and to evaluate this under the following headings:

- Overview of sources of waste law in Wales;
- Review of legislation under which the Welsh Government has powers to make waste law;
- Review of legislation that imposes obligations on the producers of household waste.

The report below presents the findings of each stage of evaluation, in each case identifying the relevant law, describing its requirements and, where relevant, summarising the penalties that may be applicable where a breach takes place.

A table of legislation is presented at the end of the report in which the legislation, powers and penalties are summarised.

3 Overview of sources of waste law in Wales

Waste law in Wales derives from the European Union, the UK Government and from the Welsh Government.

3.1 Sources of Waste Law in Wales: European Union

A great deal of waste law in Wales is derived from the European Union. The most recent of the framework directives on waste, Directive 2008/98/EC, set out basic concepts and definitions relevant to waste management and introduced the waste management hierarchy that member states are required to apply through law and policy: prevention, re-use, recycling, recovery and disposal. The recycling target relevant to household waste is that by 2020, the preparing for re-use and the recycling of waste materials from households and waste streams similar to waste from households but from other origins shall be increased to a minimum of overall 50% by weight.

As part of the EU Circular Economy Package, which was agreed by the European Council on 22 May 2018, Directive 2008/98/EC was amended by Directive 2018/851 on 14 July 2018 with member states required to transpose the provisions by 14 July 2020. The Directive provides for a range of tools to promote the circular economy through waste management, including increasing targets for preparing for re-use and recycling of waste, introducing new definitions e.g. for food waste, encouraging the use of economic instruments and other measures to incentivise the application of the waste hierarchy and providing for extended producer responsibility.

Owing to uncertainties regarding the UK's withdrawal from the EU it is not yet known whether the UK will be required to implement the provisions of Directive 2018/851.

Within the UK, waste is largely a devolved function. As recorded in the House of Commons Briefing "Household recycling in the UK" (September 2018), household recycling rates in Wales for 2016/17 were 64% against a UK-wide household recycling rate of 44.6%. Whilst divergence in waste strategies may increase between the UK administrations following withdrawal of the UK from the EU, the UK's own internal market for trade means that some waste standards that are currently set at EU level are likely to need co-ordination between all four UK jurisdictions, for example on product standards, producer responsibility and waste trade. Changes to standards between UK jurisdictions, as between the EU and the UK, for example in packaging standards and animal by-products, as well as changes in the nature of trade in goods and wastes could affect the availability of recycling infrastructure and markets, and so impact on the ability to deliver recycling targets in the future.

3.2 Sources of Waste Law in Wales: National

The waste law framework in Wales is provided by legislation such as the Environmental Protection Act 1990 that covers Great Britain, legislation such as the Waste (England and Wales) Regulations 2011 that applies to England and Wales, and legislation such as the Environment (Wales) Act 2006 that the Welsh Government makes for Wales alone. Where legislation transposes EU law it is expected that the Government will have in place, prior to the UK's withdrawal from the EU, legislation to retain existing waste management law and to transfer to the relevant person or administration the competencies that are currently undertaken by the European Commission.

4 Review of legislation under which the Welsh Government has powers to make waste law

A high-level review of the waste law-making powers of the Welsh Government has been undertaken to identify any particular powers that are relevant to the regulation of waste separation activities by households.

4.1 Environment Act 1995

The Environment Act 1995 applies to Wales, England and Scotland. [Part V, section 92](#) gives to the Secretary of State (and now, under devolution, the Welsh Government) the power to make a National waste strategy. [Sections 93 – 95](#) concern producer responsibility.

[S93 \(1\) of the Environment Act](#) provides that the Welsh Government may impose obligations on waste producers, materials and products in order to increase the re-use, recovery or recycling of products or materials. Regulations may make provision for a person who contravenes a prescribed requirement of a producer responsibility obligation to be guilty of an offence and liable to a fine.

No producer responsibility obligations have been made that impose requirements on householders.

4.2 Government of Wales Act 2006

The powers devolved to the Welsh Government in 2006 (then the National Assembly for Wales) include [s.79 of the Government of Wales Act 2006](#), which requires Welsh Ministers to make a scheme setting out how they propose, in the exercise of their functions, to promote sustainable development. The Welsh Government has published *One Wales: One Planet the Sustainable Development Scheme for Wales*, which records the targets set out in the Achieving Zero Waste Scheme: aiming for recovery to be an option for a maximum of 30% of municipal waste by 2025, along with a maximum level of residual household waste per inhabitant of 150kg per year, and a maximum level of municipal waste going to landfill of 5%. In addition, the Scheme aims to phase out landfill site waste from all other sectors.

By 2050, they want to see zero residual waste, so products and services will need to be designed so that they reduce or reuse waste as far as possible.

4.3 Well-Being of Future Generations (Wales) Act 2015

[The Well-being of Future Generations Act 2015](#) puts in place seven well-being goals for Wales. These are for a more equal, prosperous, resilient, healthier and globally responsible Wales, with cohesive communities and a vibrant culture and thriving Welsh language. [Under section \(10\)\(1\) of the Act](#), the Welsh Ministers must (a) publish indicators that must be applied for the purpose of measuring progress towards the achievement of the Well-being goals; and (b) lay a copy of the national indicators before the National Assembly. The 46 national indicators were laid in March 2016.

One national indicator relates to waste, namely 'Amount of waste generated that is not recycled, per person'. This indicator covers the total amount (kg) of residual waste (i.e. waste that is not reused, recycled or composted) in Wales by all sectors, on a per person basis.

Information included within this release is used to calculate the 'Local Authority residual household waste' component of the national indicator. Information on waste from the industrial and commercial sector and

the construction and demolition sector are not reported in this statistical release. The Act does not contain provisions that relate to the regulation of waste activities by households.

4.4 Environment (Wales) Act 2016

[Section 65 of the Environment \(Wales\) Act 2016](#) amended Part II of the Environmental Protection Act 1990 to provide for new arrangements in relation to the separate collection of waste (considered at 5.1.3 below) and introduced at Section 45AB a power for the Welsh Ministers to issue codes of practice to give practical guidance about how to comply with the requirements imposed by or under Section 45AA.

5 Review of legislation that imposes obligations on the producers of household waste

The definition of household waste is set out in the [Environmental Protection Act 1990, Section 75\(5\)](#) (EPA) as waste from:

- A domestic property (a building, or a self-contained part of a building, used wholly for the purposes of living accommodation);
- A caravan on a caravan site;
- A residential home;
- Premises forming part of a university, school or other educational establishment; and
- Premises forming part of a hospital or nursing home.

Further classification of waste is set out in [The Controlled Waste \(England and Wales\) Regulations 2012](#) which in [Schedule 1](#) describe waste that is to be treated as household, industrial or commercial waste because of the place where it is produced, its nature or the activity which produces it. At Schedule 1 paragraph 4 the Regulations describe household waste for which local authorities may make a charge for collection and/or disposal under section 45(3) of the Environmental Protection Act 1990. This includes a charge for the collection (but not disposal) of any article of waste from a domestic property that:

- exceeds 25kg in weight; or
- does not fit or cannot be fitted into a receptacle for household waste provided by a Welsh waste collection authority under Section 46 of the Environmental Protection Act 1990 or, where no such receptacle is provided, a cylindrical container 750mm in diameter and 1m in length
- is garden waste.

The enforcement powers available to local authorities in respect of household waste produced by residential homes, educational establishments and hospitals are greater than those available in respect of occupiers of domestic premises. For example, the duty of care under the [EPA Section 34\(1\)](#) applies to these establishments but not to occupiers of domestic premises in respect of household waste.

Household waste can include waste that is categorised as ‘animal by-products’: *“Entire bodies or parts of animals, products of animal origin or other products obtained from animals that are not intended for human consumption.”*

Animal By-Products include catering waste, used cooking oil, former foodstuffs, butcher waste and blood¹.

¹ Article 3 - [Regulation \(EC\) No 1069/2009](#)

Where animal by-products and catering waste are composted or anaerobically digested this must be done in a plant that meets the specified plant hygiene standards and treatment requirements. However, an [exemption](#) under Regulation (EC) 1069/2009 and accompanying implementing Regulation (EC) 142/2011, enforced in Wales by [The Animal By-Products \(Enforcement\) \(No 2\) Regulations 2011](#) permits the composting of catering waste and anaerobic digestion on the premises of origin and in certain off-site areas where there is no risk of access by livestock, without the need for these to be approved facilities. The exemption covers composting and anaerobic digestion by the occupiers of domestic premises, by community groups and by other producers of household waste such as educational establishments and hospitals. Therefore, though occupiers of domestic properties may choose to use home or community composting schemes for some food wastes, the exemption means that it is not relevant to consider within this report the powers for local authorities to take enforcement action using [The Animal By-Products \(Enforcement\) \(Wales\) Regulations 2014](#).

5.1 Environmental Protection Act 1990 section 33

[Section 33\(1\)\(a\)](#) of the EPA 1990 states that "a person shall not deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless an environmental permit authorising deposit is in force and the deposit is in accordance with the licence".

It is an offence to breach Section 33(1)(a). Local authorities in Wales can prosecute any person who breaches Section 33(1)(a). In sentencing following a conviction, the Magistrates Court or Crown Court will apply the sentencing guidelines issued by the Sentencing Council for England and Wales, in particular:

- <https://www.sentencingcouncil.org.uk/offences/> (in the Magistrates Court)
- <https://www.sentencingcouncil.org.uk/crown-court/> (in the Crown Court) and
- <https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline/> (for specific environmental offences, including breaches of Section 33).

An additional enforcement option is provided by the [Unauthorised Deposit of Waste \(Fixed Penalties\)\(Wales\) Regulations 2017](#), which came into force on 25 October 2017, and amended Part 2 of the EPA 1990 to insert [section 33ZB](#). This gives the authorised officer of a waste collection authority in Wales the power to issue a fixed penalty notice to a person where that authorised officer has reason to believe that they have committed a waste deposit offence in the area of the waste collection authority. The fixed penalty notice must include sufficient particulars of the circumstances alleged to constitute the offence as are necessary for giving reasonable information about the offence and must state:

- a) the period during which proceedings will not be taken for the offence under section 33(1)(a);
- b) the amount of the fixed penalty;
- c) the person to whom and the address at which the fixed penalty may be paid.

It is an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale to fail to give a name or address when required to do so by the authorised officer or to give a false or inaccurate name or address.

The fixed penalty payable will be either an amount specified by the Welsh waste collection authority whose authorised officer gave the notice, being an amount not less than £150 and not more than £400, or if no amount is specified by that waste collection authority, the sum of £200.

This provision would not apply to a householder who had placed waste for collection by a waste collection authority or other authorised undertaking. However, it would apply to a householder who had either deposited their own household waste unlawfully or who had knowingly caused or knowingly permitted another person to do so.

5.2 Environmental Protection Act 1990 section 34

[Section 34](#) of the Environmental Protection Act 1990 provides that *"it shall be the duty of any person who imports, produces, carries, keeps, treats or disposes of controlled waste or has control of such waste to take all such measures applicable to him in that capacity as are reasonable in the circumstances –*

- a) to prevent any contravention by any other person of section 33;*
- b) to prevent any contravention by any other person of Regulation 12 of the Environmental Permitting Regulations;*
- c) to prevent the escape of the waste from his control or that of any other person; and*
- d) on the transfer of the waste, to secure –*
 - i) that the transfer is only to an authorised person or to a person for authorised transport purposes; and*
 - ii) that there is transferred such a written description of the waste as will enable other persons to avoid a contravention of that section or Regulation 12 of the Environmental Permitting Regulations or a contravention of an environmental permit, and to comply with a duty under this sub-section as regards the escape of waste".*

As noted above, this duty applies to producers of household waste, such as education establishments and households. A local authority can prosecute any person who has a duty of care for waste where that person has committed a breach of that duty. Although the Sentencing Council's Definitive Guideline does not directly apply to the Environmental Protection Act 1990, Section 34, it is used by sentencing courts to inform sentencing judgements.

The duty of care set out in Section 34(1) does not apply to an occupier of domestic property with respect to the household waste produced on the property. Instead, a more limited duty of care is imposed on the occupier of any domestic property in Wales under section [34\(2A\)](#), being *"to take all such measures available to him as are reasonable in the circumstances to secure that any transfer by him of household waste produced on the property is only to an authorised person or to a person for authorised transport purposes"*.

Recognising that prosecution of a householder for a breach of the householder duty of care may often be a disproportionate response, a joint Defra and Welsh Government [Consultation on the Household Waste Duty of Care](#) was undertaken in 2018 to consider the introduction of a fixed penalty notice as an alternative enforcement option to prosecution where a breach of the household duty of care is identified. DEFRA and the Welsh Government [responded to the representations submitted](#) in November 2018. With effect from 21 February 2019 [The Household Waste Duty of Care \(Fixed Penalties\)\(Wales\) Regulations 2019](#) amended Section 34ZB of the Environmental Protection Act 1990. Where it appears to Natural Resources Wales or a waste collection authority in Wales that a person has failed to take all reasonable measures to ensure that a transfer of household waste is made to an authorised person the authority may issue a fixed penalty notice (FPN) of £300. A discount of £150 may be offered for early payment of an FPN. The [Waste Duty of](#)

[Care Code of Practice](#) was updated by Defra and the Welsh Government in November 2018. Section 5 provides guidance to occupiers of domestic property on their waste duty of care requirements.

In summary, it is a criminal offence for a householder not to take all reasonable measures available to meet the duty of care. A local authority has discretion as to the enforcement action to take where a breach is identified. This may be prosecution and, on conviction, a fine and criminal record. Alternatively, the convicted householder may be given a fixed penalty notice for breaching the duty of care in which case, provided the fine is paid within the time specified, the householder cannot be prosecuted for the offence. The Welsh Government will publish guidance for local authorities on the Household Waste Duty of Care Fixed Penalty Notices.

5.3 Environmental Protection Act 1990 Section 45

[Section 45 of the EPA](#) sets out the basic duty for a waste collection authority to arrange for the collection of household waste in its area, and to arrange for the collection of any commercial waste or any dry recyclable waste or food waste where requested by the occupier of premises in its area. It should be noted that dry recyclable waste and food waste do not include household waste or food waste from premises in a rural area. A waste collection authority can make a charge for the collection and/or disposal of waste described at Schedule 1, paragraph 4 of The Controlled Waste (England and Wales) Regulations 2012, including the collection from domestic premises of household waste exceeding 25kg in weight and/or specified size dimensions.

By virtue of [Section 45B](#) of the EPA, a WCA in Wales, where it has a duty to arrange for the collection of household waste from any premises, shall ensure that the arrangements it makes includes the collection of at least two types of recyclable waste together or individually separated from the rest of the household waste. For this purpose, "*recyclable waste*" means household waste which is capable of being recycled or composted, and therefore includes food waste.

5.4 Environmental Protection Act 1990 Section 46

[Section 46](#) of the EPA 1990 allows the waste collection authority to serve a notice on the occupier of a household requiring the occupier to present waste for collection in receptacles of a kind and number specified. The notice served on an occupier can also make provision in respect of:

- a. the type and size of containers used and how many there are;
- b. when they are placed out for collection;
- c. what items or substances may or may not be placed in each container; and
- d. the precautions to be taken where particular substances or articles are put into them.

Any person who fails, without reasonable excuse, to comply with any requirements imposed by a waste collection authority in Wales shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale. The right of appeal against any notice served by a waste collection authority exists for 21 days. A waste collection authority is not obliged to collect household waste that it placed for collection in contravention of a requirement under section 46. An alternative enforcement option to prosecution is provided in Sections 47ZA and 47ZB.

5.5 Environmental Protection Act 1990 Sections 47ZA and 47ZB

[Section 47ZA](#) and [47ZB](#) provide that where an authorised officer of a waste collection authority in Wales has reason to believe that a person has committed an offence under section 46 then the authorised officer may give that person a fixed penalty notice, which has the effect of offering the person the opportunity to discharge any liability to conviction by payment of the fixed penalty to the waste collection authority. A fixed penalty notice shall include sufficient particulars of the circumstances alleged to constitute the offence are necessary for giving reasonable information of the offence, together with the following information:

- a. the amount of fixed penalty;
- b. the period for which no proceedings will be taken for the offence; and
- c. the name and address to which the penalty must be paid.

[Section 47ZB\(2\)](#) specifies that the amount of the fixed penalty is specified by the WCA in their local area or if no amount specified, the FPN is £100.00.

[Section 47ZA](#) provides that a WCA shall not issue proceedings for an offence before the expiration of the period of fourteen days following the date of the FPN and a person cannot be convicted of an offence if the FPN is paid². Section 47ZA of the EPA was introduced as an amendment to the Environmental Protection Act 1990, made by the Clean Neighbourhoods and Environment Act 2005 (CNEA), which also made the amendments to Section 46 that give authorities the power to administer fixed penalty notices for breaches of Section 46 of the EPA.

5.6 Waste (England and Wales) Regulations 2011

[The Waste \(England and Wales\) Regulations 2011, Regulation 13](#) provide that "(1) from 1st January 2015, (2) Subject to paragraph (4), an establishment or undertaking which collects waste paper, metal, plastic or glass must do so by way of separate collection

(3) Subject to paragraph (4), every waste collection authority must, when making arrangements for the collection of waste paper, metal, plastic or glass, ensure that those arrangements are by way of separate collection.

(4) The duties in this regulation apply where separate collection—

(a) is necessary to ensure that waste undergoes recovery operations in accordance with Articles 4 and 13 of the Waste Framework Directive and to facilitate or improve recovery; and

(b) is technically, environmentally and economically practicable"

An obligation is placed on WCAs to provide the occupiers of households with the containers for separate collections.

[Statutory Guidance](#) has been published for Welsh WCAs to advise on carrying out an assessment along with other [UK guidance](#) on the topic. Each WCA should keep records and audit trails in order to evidence the basis of their decision making. If the WCA undertakes separate collections for each Specified Material, it is able to compel householders to present the Specified Waste accordingly.

² Subsection (3a) of Section 47ZA of the EPA, Part II

Note that the Waste (England and Wales) Regulations 2011 will be amended by [The Waste \(Miscellaneous Amendments\) \(EU Exit\) \(No. 2\) Regulations 2019](#) on the UK's exit from the EU. In the context of Regulation 13, the Waste Framework Directive is transposed into English and Welsh Law and its principles continue to be enforceable. [The Waste \(Wales\) \(Miscellaneous Amendments\)\(EU Exit\) Regulations 2019](#), which were made on 28 February 2019, will come into force on the day on which the UK leaves the EU (exit day) and seek to amend retained EU waste law in Wales to enable the current waste regime, including [The Recycling, Preparation for Reuse and Composting Targets \(Monitoring and Penalties\)\(Wales\) Regulations 2011](#), to continue to operate.

6 Table of Primary Legislation – Quick Reference Guide

Legislation	Powers	Penalties for Householders
S93 (1) Environment Act 1995	The Secretary of State can impose obligations on waste producers, to increase the re-use, recovery or recycling of products or materials. Does not extend to Households	N/A
s.79 Government of Wales Act 2006	Requires Welsh Ministers make a scheme setting out how they propose to promote sustainable development.	N/A
s. (10)(1) Well-Being of Future Generations (Wales) Act 2015	Welsh Ministers must; <ul style="list-style-type: none"> a. publish indicators that must be applied for the purpose of measuring progress towards the achievement of the Well-being goals; and b. lay a copy of the national indicators before the National Assembly. 	N/A
R.13 Waste (England and Wales) Regulations 2011	WCAs must collect waste paper, metal, plastic and glass separately from other household waste where this is: <ul style="list-style-type: none"> a. Necessary to ensure that waste is recovered in accordance with Article 4 and Article 13 Waste Framework Directive and to facilitate and improve recovery; and b. Technically, environmentally and economically practicable.³ 	N/A

³ [Regulation 13\(1\) Waste \(England and Wales\) Regulations 2011](#)

<p>Environmental Protection Act 1990</p> <p>33(1)(a)</p>	<p>Are either to deposit controlled waste or extractive waste or to knowingly cause or knowingly permit controlled waste or extractive waste to be deposited in or on any land unless:</p> <ul style="list-style-type: none"> • an environmental permit authorising the deposit is in force, and • the deposit is in accordance with the permit. 	<p>S.33(8)</p> <p>A person who commits an offence under <i>section 33(1)</i> is liable for:</p> <ul style="list-style-type: none"> • A magistrates' court for an offence: <ul style="list-style-type: none"> ○ committed before 12 March 2015, to imprisonment for a term not exceeding six months, a fine not exceeding £50,000 or both; and ○ committed on or after 12 March 2015, to imprisonment for a term not exceeding six months, an unlimited fine or both. • The Crown Court, to imprisonment for a term not exceeding five years, an unlimited fine or both.
<p>Environmental Protection Act 1990</p> <p>S.34</p> <p>S34 (2)</p>	<p>A duty of care is imposed on anyone handling controlled waste to take all reasonable steps to ensure that the waste:</p> <ul style="list-style-type: none"> • Is not disposed of unlawfully, without a permit or in breach of any permit, or treated, kept or disposed of in a way that causes pollution or harm. • Does not escape from a person's control. • Is only transferred to an authorised person and with a written description that enables the transferee to know enough about it to deal with it properly and avoid breaching their permit or section 33(1). <p>Householders must take reasonable measures to ensure that they only transfer their household waste to authorised persons (principally, a waste collection authority or a registered carrier).</p>	<p>s.34 (6) It is an offence not to comply with the requirements of section 34. A person committing an offence under is liable on conviction in either the magistrates' court or the Crown Court, to an unlimited fine.</p> <p>From early 2019 – once the Welsh Government has introduced regulations to amend Section 33 – a Fixed Penalty Notice in respect of breaches of Section 34(2)</p>

<p>Environmental Protection Act 1990, Part 2 S.45</p>	<p>The basic duty for waste collection authority to arrange for the collection of household waste.</p>	<p>N/A</p>
<p>Environmental Protection Act 1990, Part 2 S.46</p>	<p>The waste collection authority to compel householders to present their waste according to pre-stipulated rules.</p>	<p>S. 47ZA – the authorised officer of a WCA can issue a Fixed Penalty Notice, which must state (a)the period during which proceedings will not be taken for the offence; (b)the amount of the fixed penalty; and (c)the person to whom and the address at which the fixed penalty may be paid.</p>

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