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Your Ref: FTG-SC-02

By email to: duncan.jones@hertfordshire.gov.uk

15 October 2021

Dear Mr Jones,

Review of the Environmental Offences Definitive Guideline (2014)

Further to my letter of 3 August, the Sentencing Council met on 24 September and discussed the contents of the letter from Councillor Buckmaster and I am now in a position to respond more fully.

The Council considered the representations in the letter in detail and while it was accepted that fly tipping can be a serious problem, the Council was not convinced that making changes to sentencing guidelines would be the solution to the problem. In addition, the Council noted that some of the suggestions made would potentially be contrary to law.

I provide below a summary of the Council's view in response to each of the points raised in your letter:

Court imposed fines and costs versus Fixed Penalty Notices

The letter suggests that where a fixed penalty notice (FPN) has been offered and a defendant opts to go to court and is convicted, the fine should exceed the maximum FPN available (currently £400). The Council noted the argument in the letter that fines lower than the FPN undermine the purposes of FPNs which are said to include reducing costs for prosecutors and alleviating pressure on courts. The Council was unable to agree with this argument. Guidance to [magistrates on fixed penalty notices](#) contained in the explanatory materials to the magistrates courts sentencing guidelines states:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate

sentence must be determined in accordance with the sentencing principles set out in this guidance (including the amount of any fine, which must take an offender's financial circumstances into account), disregarding the availability of the penalty.

Section 125 of the Sentencing Act 2020 requires that the "court must take into account the circumstances of the case including, *in particular* (our italics), the financial circumstances of the offender so far as they are known, or appear, to the court" and this guidance reflects that. The Council considers that it would be unlawful and arbitrary to impose a higher fine than would normally be justified for offences simply because an FPN has been offered. The availability of an FPN does not deprive a person of the right to put the prosecution to proof of its case or to have their sentence determined by a court in accordance with the normal principles.

The Council also noted that, in practice, taking into account costs and the surcharge, the overall amount that an offender convicted in court is required to pay is unlikely to be lower than the FPN in the vast majority of cases. It is also relevant to note that where loss or damage has been caused an application can be made for compensation (indeed this is the first step in the guideline).

Introduce stronger means testing, and Court Fine "maximum payment periods"

The Council noted the suggestion that means declaration forms are not adequately tested by courts and that consequently fines are often being set on the basis of inaccurate information. As quoted in the letter, the guideline does contain guidance on obtaining financial information. If the suggestion is that courts routinely lack the time or resources to test some declarations as fully as they may wish, this is something that is outside the remit of the Council.

The Council also noted the assertion that the problem is exacerbated by the failure of courts to collect the financial penalties imposed. While the Council has provided some [guidance](#) about payment of fines, the way in which fines are enforced after the sentence hearing is, again, outside the Council's remit.

The letter proposes "that fly tipping offences should be looked at as *the offence* in the *first* instance, not the person who committed it, or their ability to pay". As constructed, the guideline does require the court to look at the seriousness of the offence before taking into account matters such as previous convictions, and then deciding on the appropriate penalty. It is only at that point, if the penalty is to be a fine, that the offender's financial circumstances become relevant. As outlined above it would be contrary to legislation to disregard those circumstances and therefore the Council could not adopt such a proposal.

Community Based Sentences

The letter suggests that: "If a defendant cannot pay the fine in full, or in part, then we would ask that consideration is given to changing to the Guideline to allow for a much wider use of community based sentences as a matter of

redress". The guideline *does* provide for community orders as an alternative to band D or F fines. This is because offences that fall into those categories are deemed to be serious enough for a community order. It is a matter for the court (where appropriate with input from the National Probation Service in the form of a pre-sentence report) to determine whether a fine or a community sentence would best meet the purposes of sentencing. These are set out in legislation.

Section 57 of the Sentencing Act 2021 states:

- 1) This section applies where—
 - a) a court is dealing with an offender for an offence, and
 - b) the offender is aged 18 or over when convicted.

- 2) The court must have regard to the following purposes of sentencing—
 - a) the punishment of offenders,
 - b) the reduction of crime (including its reduction by deterrence),
 - c) the reform and rehabilitation of offenders,
 - d) the protection of the public, and
 - e) the making of reparation by offenders to persons affected by their offences.

What it is not open to the court to do is to impose a more severe sentence simply because of an offender's inability to pay a fine, nor (in effect) to allow an offender to escape a more severe sentence by virtue of their better ability to meet any financial penalty imposed by way of a fine.

The Council noted the suggestion that community orders should contain an element of reparation focussing on clearing fly tips and litter. Community orders consist of one or more requirements which are specified by the court imposing the order. One such requirement which is often imposed is unpaid work, which may involve various activities including clearing litter. However, the exact activity will depend on the arrangements that the National Probation Service make and is not possible for guidelines – or courts – to specify the precise nature of the activity to be undertaken in a particular case.

Use of More Suspended Sentences

The letter suggests the greater use of suspended sentence orders to deter offenders from further offending. It is important to be clear that a suspended sentence is still a sentence of imprisonment. As such, it *must not* be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified. This is important because if the offender re-offends during the currency of the order, or fails to comply with any of the requirements attached to the order, the default position is that the sentence will be activated and they will be sent to prison – and that can only be justified if the elements of the original offence were such that a custodial sentence was justified.

For the most serious offending the guideline does contain custodial sentences and, if appropriate, the court can suspend such a sentence with requirements (such as those that are attached to community orders)

Information on the court's duties and options in imposing community and custodial sentences is set out in the [Imposition of community and custodial sentences](#) guideline.

In conclusion

The Environmental offences guideline contains a total of 12 steps that require the court to consider the seriousness of the offending (including the harm caused by the offending) and the circumstances offender in arriving at the appropriate sentence. In addition to fines, community orders, and custodial sentences, the guideline also provides for compensation and various ancillary orders which may be appropriate, depending on the circumstances of each individual case. The Council is of the view that the guideline is sufficiently able to allow Courts to deal adequately with the full range of such cases before them. It is also worth noting that the guideline applies to a range of environmental offending, not just to fly tipping, and any review of that guideline would have to take into account the full range of offending that it covers and ensure offences are dealt with consistently and proportionately across that full range.

As such, the Council is not yet persuaded that the evidence suggests that the current environmental offences guidelines are not operating effectively, or that their amendment is the solution to the issue of fly tipping. Consequently, and given the Council's limited resources, it did not agree that it should devote significant time and resources to reviewing the guideline. The Council will of course consider any further evidence that you wish to provide.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Steve Wade', written over a horizontal line.

Steve Wade

Head of Office of the Sentencing Council