

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**22 July 2022**  
**SC(22)JUL07 – Environmental Offences**  
**n/a**  
**Ruth Pope**  
**Ruth.pope@sentencngcouncil.gov.uk**

## **1 ISSUE**

1.1 In September 2021 the Council discussed a letter from the Herts Fly Tipping Group (attached at Annex A) requesting that the Council consider making changes to the Environmental offences guideline specifically in relation to the way it operates in sentencing fly tipping cases.

1.2 A response was sent in October 2021 (see Annex B) explaining in detail why the Council would not be reviewing the guideline as requested. In March this year a further letter was received (see Annex C) requesting further consideration of issues and we agreed to raise these points with the Council at the next opportunity.

1.3 Separately the Environmental Audit Committee Report has produced the [Water quality in rivers report](#) which makes a recommendation directed at the Council.

## **2 RECOMMENDATION**

2.1 That the Council considers if further work should be done to:

- establish if there are any ways in which the environmental guideline for individuals could be revised to ensure that it operates effectively in fly-tipping cases.
- investigate if any changes could usefully be made to the environmental guideline for organisations to ensure that sentences for very large organisations are proportionate.

## **3 CONSIDERATION**

### *Background*

3.1 The Environmental offences guidelines came into force on 1 July 2014. There are two guidelines: one for [individuals](#) and one for [organisations](#). The guidelines apply to offences covered by section 33, Environmental Protection Act 1990 (EPA 1990); and Regulations 12 and 38(1), (2) and (3) of the Environmental Permitting (England and Wales) Regulations 2010 (EPR 2010). The statutory maximum sentence for an individual is five years' custody and the guideline offence range is a discharge to three years' custody. The

statutory maximum sentence for an organisation is an unlimited fine and the guideline offence range is £100 fine – £3 million fine.

3.2 The correspondence regarding fly-tipping cases follows on from various representations since 2016 including from Defra suggesting that the fines imposed on individuals are deemed to be too low to reflect both the costs avoided by the offender and the costs of clearing up; as well as being inadequate as a deterrent.

3.3 In response, we have drawn attention to the fact that the guideline does require sentencers consider awarding compensation and to take account of costs avoided and that the law requires courts to take into account the financial circumstances of the offender in setting the amount of a financial penalty.

3.4 Recently the [National Fly-Tipping Prevention Group](#) (NFTPG) has published a document: '[Fly-tipping toolkit: How to present robust cases to the courts](#)' which may go some way to ensure that prosecutors provide courts with the necessary information to assist them to apply the guideline effectively to the cases before them. We had sight of this document when it was being developed and took the opportunity to provide feedback on the elements relating to guidelines (without endorsing it).

#### *Issues raised relating to fly-tipping*

3.5 In their most recent letter the Herts Fly Tipping Group state:

- a) Whilst we appreciate the SC drawing to our attention to the guidance to magistrates on fixed penalty notices which appears in essence to require magistrates to ignore the availability of an FPN [fixed penalty notice], we note this is guidance. Therefore this suggests that guidance can be updated to take into account current realities in relation to fly tipping and the lack of deterrent impact court judgements are having.

3.6 The [guidance to magistrates on fixed penalty notices](#) contained in the explanatory materials to the MCSG 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

3.7 While it is certainly true that the Council *could* review this guidance – it is difficult to see what grounds there would be for treating an offender who was offered an FPN but did not accept it, more severely (or in any other way differently) than one who was not offered an

FPN. Any change to the guidance could not alter the fact that the court is bound by legislation ([s124 Sentencing Code](#)) to take into account the offender's financial circumstances in setting a fine.

3.8 As noted when this was considered previously, although the fine imposed may in some cases be lower than the FPN, when costs and the surcharge (now 40% of any fine) are added, the overall amount is still likely to be as high or higher than an FPN for most of those who go to court.

3.9 The next point raised is:

- b) Linked to point a) we note in your letter of the 15th October 2021 reference to Section 57 of the Sentencing Council Act 2021(sic). Section 2b explicitly refers to reducing crime including by deterrence. In contrast however, given our consultations with those that represent the majority of frontline enforcement capability across the country, it would be difficult to find anyone that thinks typical court judgements in response to successful prosecutions represent any form of effective deterrent; and on that basis it would appear advisable to revisit this to ensure that the intention is matched by the reality.

3.10 There is very little evidence that sentencing in general is an effective deterrent – though there are occasions when it can be. Where fly-tipping is carried out for commercial gain, there is an argument that substantial financial penalties would make unlawful disposal less attractive compared to lawful disposal.

3.11 If it is accepted that in some cases more severe penalties could be effective as a deterrent in fly-tipping cases, the question remains of what more the guideline could do to achieve that. Simply imposing higher fines that an offender cannot or will not pay would not be effective and would not comply with the legal requirement to take into account the offender's financial circumstances. The guideline already provides steps that require the court to consider compensation, confiscation, and removing economic benefit from the offending. It may be that the guidance issued to prosecutors in the tool-kit will encourage more challenges to assertions of limited means and more information being provided to the court of the costs avoided by the offending and the costs incurred in cleaning up afterwards, which in turn may lead to higher financial penalties in appropriate cases.

3.12 The third point raised is:

- c) Community Orders. We note the SC's reference to community orders being available for offences in band D and F fines. However, the point raised in our letter was for more use of such powers based on making such orders available across more bands. Stakeholders do not feel this issue has been addressed and therefore urge you to revisit this to help ensure that the optimum (sic) across bands is evident to all.

3.13 It could be argued that the guideline steers sentencers away from community sentences. Wording above the sentence table states:

### Starting points and ranges

Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

**However, even where the community order threshold has been passed, a fine will normally be the most appropriate disposal.** Where confiscation is not applied for, consider, if wishing to remove any economic benefit derived through the commission of the offence, combining a fine with a community order.

3.14 It is likely that most fly-tipping cases would be assessed as ‘deliberate’ culpability and category 3 harm. As can be seen from the table below, a community order is available for all levels of harm where the culpability is deliberate:

Offence category	Starting Point	Range
Category 1	18 months’ custody	1 – 3 years’ custody
Category 2	1 year’s custody	26 weeks’ – 18 months’ custody
Category 3	Band F fine	Band E fine or medium level community order – 26 weeks’ custody
Category 4	Band E fine	Band D fine or low level community order – Band E fine

3.15 One difficulty is that it is not clear whether an increased use of community orders would be more effective than financial penalties in deterring offending or how that could be measured. In September 2021, the Council rejected a suggestion that consideration could be given to removing the reference to Band D, E and F fines from the face of the guideline and replacing them with community orders.

3.16 Perhaps though there could be some merit in reconsidering the emphasis that the guideline puts on fines over community penalties. This guideline was developed before the

Imposition guideline existed and perhaps the inclusion of the text quoted at 3.13 above over-emphasises fines at the expense of other disposals. Fines have been imposed in around three-quarters of cases since the guideline came into force. Prior to that the proportion of fines was slightly lower and the proportion of discharges higher.<sup>1</sup>

**Question 1: Does the Council wish to investigate further whether any aspects of the environmental guideline for individuals should be reviewed?**

*Issues raised by the Environmental Audit Committee Report*

3.17 The [Water quality in rivers report](#) makes the following recommendation relating to enforcement and prosecution:

206. We further recommend that, in the interests of promoting public confidence in the criminal justice system and reducing the likelihood of reoffending, the Sentencing Council review the sentencing guidelines for water pollution offences. In our view, penalties for such offences should be set at a level that will ensure that the relevant risk assessments are routinely on the agenda of the boards of each water company.

3.18 The report (at para 194) reports on the prosecution of Southern Water in 2021 which resulted in a £90 million fine. It refers to the sentencing remarks in that case which stated that despite having been fined substantial amounts for offences in 2013 - 2015 there was 'no evidence that the Defendant took any notice of the penalty imposed or the court's remarks. Its offending simply continued'. The report quotes Sir James Bevan (Chief Executive of the Environment Agency), speaking a month **before** Southern Water was sentenced, saying:

... the fines are not big enough. Even the biggest one, which we secured against Thames Water of about £20 million, is peanuts compared with the daily turnover of a company like Thames Water. We don't control the amount fined, which is a matter for the sentencing guidelines. It is good that courts have started to impose higher fines than they were a few years ago, but we would still like to see, frankly, eye-watering fines for water companies. Until they are big enough to concentrate the minds of boards, we will not have the effect that we want.

3.19 The Southern Water case illustrates that application of the guideline *does* result in very substantial fines (the fine was £135 million before guilty plea reduction which amounted to 10% of its net assets and compared to an annual pre-tax profit of £213 million).

3.20 The environmental guideline for organisations (and those for health and safety and food safety) have sentence tables for 4 sizes of organisation (micro, small medium and large) and above them the following rubric:

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<sup>1</sup> This relates to all adult offenders sentenced for offences covered by the guideline – not all of which will be fly-tipping offences.

## Very large organisations

Where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

3.21 The Court of Appeal in [R v Thames Water Utilities Ltd](#) [2015] EWCA Crim 960 in upholding a £20 million fine, set out (at para 40) the approach to be adopted when sentencing very large organisations for these offences stating:

there must not be a mechanistic extrapolation from the levels of fine suggested at step 4 of the guideline for large companies. This is made clear by (1) the fact that by definition a very large commercial organisation's turnover very greatly exceeds the threshold for a large company, and (2) the requirement at step 6 of the guideline to examine the financial circumstances of the organisation in the round.

3.22 Reflecting the wording in the guideline, the court went on to say (at para 42):

Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations.

3.23 The impression from these cases is that by applying the guideline courts are imposing very large fines and that these fines are being upheld on appeal. There is, however, some anecdotal evidence from our road-testing of guidelines that some sentencers are unused to and uncomfortable with imposing very large fines. The Court of Appeal in the *Thames* case noted that the Recorder at first instance had faced a difficult sentencing exercise and 'we would have had no hesitation in upholding a very substantially higher fine'.

3.24 The concluding observation was:

Sentencing very large organisations involves complex issues as is clear from this judgment. It is for that reason that special provision is made for such cases in Crim PD XIII, listing and classification. Such cases are categorised as class 2 C cases and must therefore be tried either by a High Court Judge or by another judge only where either the Presiding Judge has released the case or the Resident judge has allocated the case to that judge. It is essential that the terms of this Practice Direction are strictly observed.

3.25 The Council may feel that the guideline for organisations provides the sentencing court with all the tools and guidance required to impose appropriate sentences in serious

cases involving very large offending organisations and that nothing would be gained by re-visiting the guideline.

**Question 2: Does the Council agree that the guideline for organisations does not need to be reviewed?**

#### **4 IMPACT AND RISKS**

4.1 There is clearly a risk of the Council appearing unresponsive if nothing is done to address the matters raised in this paper. However, even if the Council felt some of the points raised had merit and were minded to consider making appropriate amendments the Council has many competing demands and limited resources and will want also to ensure that its resources are directed where they can have most benefit.

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Mr Steve Wade  
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My Ref: FTG-SC-02  
Your Ref:  
Date: 2<sup>nd</sup> August 2021

Dear Mr Wade,

#### **Review of the Environmental Offences Definitive Guideline (2014)**

We are writing to you as the Executive Members responsible for waste and fly tipping issues in our respective resource and waste partnerships covering Bedfordshire, Buckinghamshire, Cambridgeshire, Devon, Hampshire, Hertfordshire, Kent, Lancashire, Lincolnshire, Merseyside, Norfolk, Oxfordshire, Somerset, Staffordshire, Suffolk and Warwickshire. Together with a number of other local authorities and other organisations who have co-signed this letter (see pages 6 – 13) we are experiencing significant challenges in relation to sentences handed down by the courts for offences under Section 33 of the Environmental Protection Act ('fly tipping offences') resulting in a lack of any serious deterrent arising from the justice system.

Between us we cover 158 local authorities and 10 professional bodies working in partnership to reduce the menace of fly tipping including its associated significant costs and damage to the environment. Our partnerships have been working with various stakeholders including the National Fly Tipping Prevention Group for some time to identify potential changes to the legislative framework to better address fly tipping. Part of this work has considered the penalties given to those found guilty of fly tipping; a matter which is also a concern for both the National Farmers' Union and the CLA, whose members are often directly affected by the illegal depositing of waste on their land and with whom we continue to work closely on this issue.

Whilst the Environmental Offences Definitive Guideline gives consideration to the culpability of the defendant and the harm caused by the offence, it is widely agreed that sentences handed down do not always match the severity of the offence committed; fairly reflect the costs incurred by the public purse; or therefore act as a suitable deterrent. This has become particularly noticeable following a surge in fly tipping and littering during the pandemic combined with a much wider use and appreciation of outdoor spaces. The media and public reaction to this has seriously questioned the existing level of deterrence. It seems that fly tipping has become a far more attractive option for criminals.

Under this context we would like to highlight the following areas for the Sentencing Council to consider with a view to reviewing and possibly updating the Definitive Guideline (2014) as needed.

## **Court imposed fines and costs versus Fixed Penalty Notices**

Recent experience in the local authorities who have contributed to this letter indicates a propensity for courts to issue fines for fly tipping below the level of a fixed penalty notice (FPN) for the same offence. For example in Hertfordshire during 2018/19, 2019/20 and 2020/21 the average fine for fly tipping issued by the courts was £341, £365 and £297 respectively versus a potential maximum FPN of £400. Linked to this at the other end of the scale in Buckinghamshire from 56 cases successfully prosecuted for fly tipping and duty of care offences (March 2020-Feb 2021) the average fine imposed was £738, with the highest fine imposed being £3500.

Further analysis demonstrates it is usual for fly tipping offences to be designated to incur 'minor' or risk of 'minor' environmental harm. Yet the Guideline for such an offence is a fine with starting point of Band F, which is 600% of weekly earnings. If we take the average UK earnings (£514 a week), then a Band F fine would be £3,084; anecdotally much larger than most of the fines issued by the courts. This would be a very welcome fine in our experience, and we believe it would go some way to restoring public confidence.

As you will be aware FPNs were introduced partly to alleviate pressure on the courts. However, current practice is having the opposite effect. This appears to be due to the current Guideline which instructs magistrates to ignore the availability of an FPN compounded by anecdotal evidence which suggests solicitors are aware that courts regularly render fines less than the FPN and therefore advise clients to go to court rather than pay the FPN.

It must be considered that the purpose of an FPN is to discharge the defendant's liability to prosecution, as well as the prospect of a higher financial penalty through a correctly functioning court system. As such, if a defendant chooses to go to court as is their right, then we believe it is only reasonable that the potential consequences of such a choice are considered.

As such the signatories to this letter believe it is vital that the Guideline allows for a strong deterrence factor to be built into court judgements where cases for fly tipping are successfully prosecuted. With deterrent sentencing FPN levels should be less of an issue as paying the FPN would be seen as the better option. Linked to this whilst we appreciate FPNs may be an issue for local authorities to deal with, our suggestions are based on the reasonable assumption that we agree the need to work together to ensure that fly tipping offences are dealt with fairly, consistently and as efficiently as possible by the justice system.

Taking the above into account we suggest that in cases where a defendant opts to go to court and loses, it seems logical that in order to encourage the use of FPNs and reduce pressure on the courts, court fines should exceed the maximum FPN available currently set in legislation at £400. Such an approach should also take into account costs incurred by the public purse in bringing the case to court including local authority related costs, as well as any costs incurred by the police especially where warrants for arrest have had to be issued for previous no shows. In addition we would suggest that when relevant aggravating factors related to fly tipping on private land are present including costs related to clear up and restoration these should be included as a default and therefore reflected in any such judgements.

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

Whilst we understand the role that means testing has to play, it would appear that its primary purpose is to determine the level of fine. However, we would submit that there is little evidence to suggest whether means declarations are being adequately tested by the courts. A number of local authorities have found in practice that little is done by the courts to test means declarations beyond the defendant's sworn assurance and this is despite the Guideline stating:

*“Obtaining financial information. In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender’s financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender’s means from evidence it has heard and from all the circumstances of the case.”*

Much more needs to be done to reinforce the need for courts to undertake robust checks of means declarations in line with the existing guidance above.

A number of local authorities have also observed that around 80% of people prosecuted for fly tipping offences already have previous varied court convictions underlining that their assumed integrity should not be taken for granted. The issue is further compounded by some defendants declaring low official income levels but often benefitting from large undeclared sums of the type that can be gained through fly tipping.

If someone does not have the ability to pay a fine in full then ‘payment plans’ should not be used to tacitly discharge their liability to the extent that the defendant incurs no practical significant inconvenience or penalty that would hopefully motivate correct behaviours in the future.

At the moment such plans often have the practical consequence of relieving defendants of their responsibility for the negative impacts of their actions. A situation which is then exacerbated when defendants choose to stop paying, with the ‘court system’ unwilling to pursue such matters when the costs of doing so quickly outweigh the level of fine(s) and cost(s) involved. As a result the courts often look ‘soft’ on fly tipping, which can only encourage more defendants to opt for the court route as opposed to accepting an FPN.

We suggest 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. Arguably, all fines could be set like this i.e. in line with the Guideline but before a means test. Based on this approach we would suggest means testing should therefore be used to ascertain what *type* of fine(s) to give, and never how much.

Under this context we also suggest that a review of the Definitive Guideline needs to consider how can a Section 33 (fly tipping) offence be anything but deliberate? A person may refer to “previous good character” in the Court, but they clearly did not act as such when the offence was committed so why should there be an option to reduce the fine? To this end it also needs to be considered that much of the time people also have “better character” when they are on trial as they are presenting themselves in Court and need to come across as well as possible – this underlines the need to go back to the principle suggested above – fly tipping offences should be looked at as *the offence* in the *first* instance.

## **Community Based Sentences**

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; such as the recent example in April of this year from Basingstoke where a defendant was ordered to pay £784 in costs and was also given a community punishment order requiring 80 hours of community service (*case brought by Basingstoke and Deane Borough Council*).

Whilst we appreciate the Guideline has the practical consequence of creating bespoke judgements for individual cases, logic suggests that the Guideline could be updated in a way that community orders become available in all offence categories and penalty ranges. We would therefore urge the Sentencing Council to review the Guideline to support much wider use of community sentences in circumstances where the defendant claims a lack of means.

To this end a review may also conclude there is opportunity to align any revisions to the Guideline with wider anti-social behaviour legislation including specifically the use of criminal behaviour orders. When considering fly tipping and similar offences under such a context the courts are required to take into account the inherent distress arising from fly tipping to landowners and the public alike. Such an alignment would also support police and local authority duties and strategies under section 6 Crime and Disorder Act which places an emphasis upon harm to environment as matter of crime and disorder.

We believe such an approach would do three things.

- Firstly it would send a clear message about the willingness of the courts to seek redress from defendants who claim a lack of means likely leading to a greater willingness to settle financial penalties as opposed to the longer term 'inconvenience' of a community based sentence.
- Secondly from a practical standpoint using money and time as sanctions should in turn lead to a perception that going to court is unlikely to be seen as the better option leading to a greater willingness on the part of defendants to pay an FPN if available, therefore relieving pressure on the courts as originally intended.
- Thirdly, properly executed, community based sentences should relieve the courts and other agencies from getting involved in ensuring 'payment plans' for fines are paid or chased up when payments are not made as agreed.

Under this context we further believe that the application of community sentences could be enhanced by introducing the principle of reparation where activities arising from community sentences are focused on clearing fly tips and litter as part of an overall rehabilitation strategy. Such an approach would likely be widely supported by the general public leading to greater recognition of the issue. Parallel discussions with Defra and the Ministry of Justice note that both departments support the use of community sentences especially where they involve training and rehabilitation for those carrying out unpaid work on probation, potentially further reducing the likelihood of reoffending.

Additionally, community based sentences address the issue of higher earners receiving greater fines, and vice versa. As we are suggesting sentencing based on the gravity of the offence, combining monetary fines and community sentences could enable the Courts to sentence more fairly. Just because someone has more money does not mean they should necessarily receive a greater punishment. Individuals should not be treated as businesses, where fine levels based on turnover makes sense; as the larger a company becomes, the more there is a reasonable expectation that responsibility and experience will encourage correct behaviours.

However, clearly individuals do not work like this and therefore the Guideline and the sentences arising from them should reflect this. Individuals should be dealt with on a level playing field, with all that separates them being the offence they may have committed, and the seriousness of that offence.

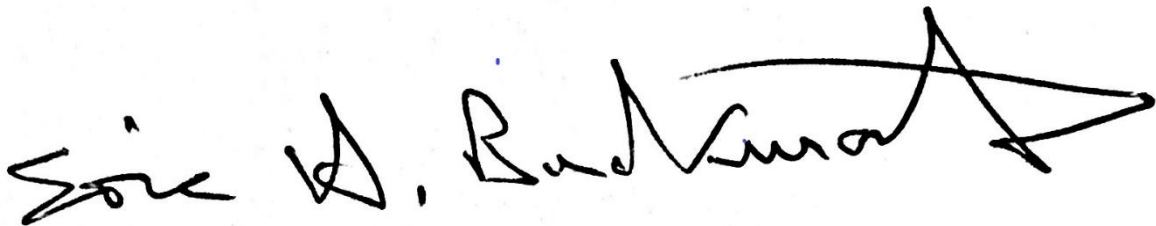
## Use of More Suspended Sentences

Evidence arising from 793 convictions secured in Buckinghamshire suggests the single most effective deterrent to reoffending by even the most aggressive serial fly-tippers has been a suspended prison sentence with Buckinghamshire suggesting that such an approach has prevented 20 case offenders from reoffending.

More specifically it is suggested that whilst a 24 month suspension is preferable to 12 months, the prospect of possible incarceration works as a worthwhile deterrent. As such we suggest that anyone convicted of a fly tipping offence for a second time is not given another suspended sentence.

Thank you for taking the time to consider the views expressed above. The local authorities and other organisations who have contributed to this letter stand ready to assist with any further queries you may have in preparation for responding to our suggestions as noted.

Yours sincerely,

A handwritten signature in black ink, reading "Eric W. Buckmaster". The signature is written in a cursive style with a large, sweeping flourish at the end.


Cllr Eric Buckmaster  
**Chair – Hertfordshire Waste Partnership**

*Please see overleaf for a list of signatories:*

CC: DEFRA – Under Secretary of State Rebecca Pow MP  
DEFRA – National Fly Tipping Prevention Group (Thomas Parrot / Pippa Harper)  
Chartered Institution of Wastes Management (Ray Parmenter / Tina Benfield)  
Environment Agency (Peter Kellet / Lee Rawlinson / Simon Hawkins / Alex Chown)  
HM Courts & Tribunals Service (South East) (Suzanne Gadd)  
Keep Britain Tidy (Rachel Scarisbrick)  
London Councils (Katharina Winbeck)  
Magistrates Association (Tom Franklin)  
National Farmers Union (Philippa Arnold / Rosalind David)  
Members of Parliament (as determined by each co-signing local authority / organisation)  
Natural Resources Wales  
Welsh Government – Environment Quality Department

On behalf of:


Waste Partnerships & Authorities

	<p>Cambridge City Council          East Cambridgeshire DC          Fenland District Council          Huntingdonshire DC          Peterborough City Council          South Cambridgeshire DC          Cambridgeshire CC</p>	 <p>Cllr Peter Murphy          RECAP Partnership</p>
<p>Devon Authorities          Strategic Waste Committee          (DASWC)</p>	<p>East Devon District Council          Exeter City Council          Mid Devon District Council          North Devon District Council          South Hams District Council          Teignbridge District Council          Torbay Council          Torridge District Council          West Devon Borough Council          Devon County Council</p>	 <p>Councillor Geoff Jung          Chairman DASWC</p>
	<p>Broxbourne Borough Council          Dacorum Borough Council          East Hertfordshire DC          Hertsmere Borough Council          North Hertfordshire DC          St Albans District Council          Stevenage Borough Council          Three Rivers District Council          Watford Borough Council          Welwyn Hatfield BC          Hertfordshire County Council</p>	 <p>Cllr Eric Buckmaster          Chair - Hertfordshire Waste          Partnership</p>
	<p>Ashford Borough Council          Canterbury City Council          Dartford Borough Council          Dover District Council          Folkestone &amp; Hythe DC          Gravesham Borough Council          Maidstone Borough Council          Sevenoaks District Council          Swale Borough Council          Thanet District Council          Tonbridge &amp; Malling BC          Tunbridge Wells BC          Kent County Council</p>	 <p>Cllr Nick Kenton          Chair – Kent Resource          Partnership</p>

 <p>LANCASHIRE WASTE PARTNERSHIP</p>	<p>Blackpool Council          Blackburn with Darwen BC          Burnley Borough Council          Chorley Council          Fylde Council          Hyndburn Borough Council          Lancaster City Council          Pendle Borough Council          Preston City Council          Ribble Valley BC          Rossendale Borough Council          South Ribble Borough Council          West Lancashire BC          Wyre Council          Lancaster County Council</p>	 <p>Cllr Shaun Turner          Cabinet Member for Environment          and Climate Change          Chair of the Lancashire Waste          Partnership.</p>
 <p>CLEANER GREENER          today tomorrow  <small>Lincolnshire Waste Partnership Tackling waste together</small></p>	<p>Boston Borough Council          City of Lincoln Council          East Lindsey District Council          North Kesteven DC          North East Lincolnshire          Council          North Lincolnshire Council          South Holland District Council          South Kesteven DC          West Lindsey District Council          Lincolnshire County Council</p>	 <p>Cllr Danny McNally          Chair Lincolnshire Waste          Partnership</p>
 <p>MRWA          MERSEYSIDE RECYCLING &amp; WASTE AUTHORITY</p>	<p>Merseyside and Halton Waste          Partnership:</p> <p>Liverpool City Council          Halton Council          Knowsley Council          Sefton Council          St Helens Council          Wirral Council          Halton Council</p>	 <p>Carl Beer - Chief Executive          Merseyside Recycling and Waste          Authority</p>
 <p>Norfolk          Waste          Partnership</p>	<p>Breckland District Council          Broadland District Council          Great Yarmouth BC          Kings Lynn &amp; West Norfolk DC          Norwich City Council          North Norfolk District Council          South Norfolk District Council          Norfolk County Council</p>	 <p>Cllr Andy Grant          Chair – Norfolk Waste          Partnership</p>
<p>Oxfordshire          Resources &amp; Waste          Partnership</p>	<p>Cherwell District Council          Oxford City Council          South Oxfordshire DC          Vale of White Horse DC          West Oxfordshire DC          Oxfordshire County Council</p>	<p>Cllr Lubna Arshad, Chair –          Oxfordshire Resources &amp; Waste          Partnership</p>

 	<p>Basingstoke &amp; Deane BC  East Hampshire DC  Eastleigh Borough Council  Fareham Borough Council  Gosport Borough Council  Hart District Council  Havant Borough Council  New Forest District Council  Portsmouth City Council  Rushmoor Borough Council  Southampton City Council  Test Valley Borough Council  Winchester City Council  Hampshire County Council</p>	<p>Cllr Eachus  Chair – Project Integra</p>  <p>Cllr Rob Humby  Deputy Leader of Hampshire  County Council, Executive Lead  Member for Economy, Transport  and Environment</p>
	<p>Mendip District Council  Sedgemoor District Council  Somerset West &amp; Taunton  South Somerset DC  Somerset County Council</p>	 <p>Cllr Sarah Dyke – Chair  Somerset Waste Partnership</p>
	<p>Cannock Chase DC  East Staffordshire BC  Lichfield District Council  Newcastle under Lyme BC  Stafford Borough Council  Staffordshire Moorland DC  South Staffordshire DC  Tamworth Borough Council  Stoke on Trent City Council  Staffordshire County Council</p>	 <p>Cllr Jonathan Price – Chair  Joint Waste Management Board  Somerset Waste Partnership</p>
	<p>Babergh District Council  East Suffolk Council  Ipswich Borough Council  Mid Suffolk District Council  West Suffolk Council  Suffolk County Council</p>	 <p>Cllr James Mallinder  Chair - Suffolk Waste Partnership</p>
	<p>Elmbridge Borough Council  Epsom &amp; Ewell BC  Guildford Borough Council  Mole Valley District Council  Reigate &amp; Banstead BC  Runnymede Borough Council  Spelthorne Borough Council  Surrey Heath BC  Tandridge District Council  Waverley Borough Council  Woking Borough Council  Surrey County Council</p>	 <p>Cllr Neil Dallen  Chair – Surrey Environment  Partnership</p>



	<p>North Warwickshire BC Nuneaton &amp; Bedworth BC Rugby Borough Council Stratford District Council Warwick District Council Warwickshire County Council</p>	<p><i>Heather Timms</i></p> <p>Cllr Heather Timms Chair – Warwickshire Waste Partnership</p>
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**On behalf of:**

**Individual local authorities:**

	<p><i>C. Lamb</i></p> <p><i>J. Platts</i></p> <p>Cllr Chris Lamb / Cllr Jenny Platts Barnsley Council</p>
	<p><i>Charles Royden</i></p> <p>Cllr Charles Royden Deputy Mayor &amp; Portfolio Holder for Environment, Highways and Transport</p>
	<p><i>W. Schmitt</i></p> <p>Cabinet Member, Environment Braintree District Council</p>
	<p><i>Maria Pearson</i></p> <p>Cllr Maria Pearson Chair of Environment, Enforcement and Housing Committee</p>
	<p>Cllr Peter Strachan – Portfolio Holder for Environment &amp; Climate Change Buckinghamshire Council</p>

 <p>Central Bedfordshire</p>	 <p>Cllr Ian Dalgarno Executive Member for Community Services</p>
 <p>Chelmsford City Council</p>	 <p>Councillor Rose Moore Cabinet Member for Greener and Safer Chelmsford</p>
 <p>Devon County Council</p>	 <p>Cllr Roger Croad Devon County Council</p>
 <p>Doncaster Metropolitan Borough Council</p>	 <p>Cllr Joe Blackman Cabinet Member for Highways, Infrastructure and Enforcement Doncaster Borough Council</p>
 <p>Dorset Council</p>	 <p>Cllr Jill Haynes Cabinet Member for Customers Services &amp; Community Dorset Council</p>
 <p>Epping Forest District Council <a href="http://www.eppingforestdc.gov.uk">www.eppingforestdc.gov.uk</a></p>	 <p>James Warwick / Cllr Nigel Avey Service Director – Contracts / Portfolio Holder Environmental and Technical Epping Forest District Council</p>
 <p>Essex County Council</p>	 <p>Cllr Malcolm Buckley (Cabinet Member for Waste Reduction and Recycling)</p>

	 <p>Cllr Abbas Hussain Portfolio Holder – Neighbourhood Services</p>
	 <p>Cllr Sarah Rouse Leader of Malvern Hills District Council</p>
	 <p>Cllr Wendy Stamp Leader – Maldon District Council</p>
	 <p>Cllr Heather Shearer Portfolio holder for Community Health Services</p>
	 <p>Cllr Dominic Beck Portfolio Holder for Transport &amp; Environment Rotherham Metropolitan Borough Council</p>
	 <p>Cllr Paul Wood Executive Member for Housing, Roads and Waste Management</p>
	 <p>Cllr Bradley Thomas Leader of Wychavon District Council</p>

On behalf of:

Professional Bodies

 <p>Association of Directors of Environment, Economy, Planning &amp; Transport</p>	 <p>Steve Palfrey Chair of ADEPT Waste Group</p>
 <p>Association of London Cleansing Officers</p>	 <p>Neil Carret – Chair Association of London Street Cleansing Officers</p>
	 <p>Mark Tufnell CLA Deputy President</p>
	 <p>Jacob Hayler Executive Director Environmental Services Association</p>
 <p><a href="http://www.hertfordshire.gov.uk/flytipping">www.hertfordshire.gov.uk/flytipping</a></p>	 <p>Duncan Jones – Chair Hertfordshire Fly Tipping Group</p>
 <p>Local Authority Recycling Advisory Committee</p>	 <p>Carole Taylor - Chair Local Authority Recycling Advisory Committee</p>
<p>London Environment Directors' Network</p> 	 <p>Chair London Environment Directors Network</p>

<p>LINCOLNSHIRE  <b>Environmental  Crime  Partnership</b></p> 	<p><i>A. Kirkham.</i></p> <p>Ayeisha Kirkham (MCIEH; CEnvH)  Chair – Lincolnshire Environmental  Crime Partnership</p>
 <p><b>Local</b>  <b>Government  Association</b></p>	<p><i>David Renard</i></p> <p>Cllr David Renard  Leader, Swindon Council  Haydon Wick Ward (Conservative)</p> <p>Chairman - Economy, Environment,  Housing and Transport Board  Local Government Association (LGA)</p>
 <p>NATIONAL ASSOCIATION OF WASTE DISPOSAL OFFICERS</p>	<p><i>Emma Beal</i></p> <p>Emma Beal – Chair  National Association of Waste Disposal  Officers</p>

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Your Ref: FTG-SC-02

By email to: [duncan.jones@hertfordshire.gov.uk](mailto: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**



Mr Steve Wade  
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Reply to:  
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My Ref: FTG-SC-03  
Your Ref:  
Date: 22<sup>nd</sup> March 2022

Dear Mr Wade,

### **Review of the Environmental Offences Definitive Guideline (2014)**

Thank you for your letter of the 15<sup>th</sup> October 2021 and the detailed response to the points we raised in our letter of the 2<sup>nd</sup> August 2021.

As you will no doubt appreciate your detailed response required conversations with a range of stakeholders in order to determine whether from our perspective there are grounds for any further dialogue on the matter.

Those deliberations have been completed and as a result we wish to highlight the following points with a view to the Sentencing Council (SC) reconsidering the potential for a review of the Environmental Offences Definitive Guideline (2014):

- a) Whilst we appreciate the SC drawing to our attention to the guidance to magistrates on fixed penalty notices which appears in essence to require magistrates to ignore the availability of an FPN, we note this is guidance. Therefore this suggests that guidance can be updated to take into account current realities in relation to fly tipping and the lack of deterrent impact court judgements are having.
- b) Linked to point a) we note in your letter of the 15<sup>th</sup> October 2021 reference to Section 57 of the Sentencing Council Act 2021. Section 2b explicitly refers to reducing crime including by deterrence. In contrast however, given our consultations with those that represent the majority of frontline enforcement capability across the country, it would be difficult to find anyone that thinks typical court judgements in response to successful prosecutions represent any form of effective deterrent; and on that basis it would appear advisable to revisit this to ensure that the intention is matched by the reality

- c) Community Orders. We note the SC's reference to community orders being available for offences in band D and F fines. However, the point raised in our letter was for more use of such powers based on making such orders available across more bands. Stakeholders do not feel this issue has been addressed and therefore urge you to revisit this to help ensure that the optimum across bands is evident to all.

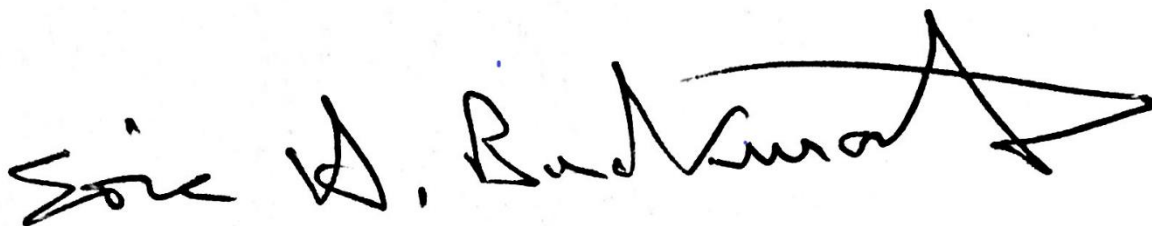
In addition to the above we thank the SC for clarity in relation to means testing as well as the involvement of the National Probation Service with respect to deciding the specifics of work to be undertaken during community service. We will look to advance both issues with the relevant bodies.

In conclusion we are of the view that whilst the SC has addressed the specific points in our letter of the 2<sup>nd</sup> August 2021 we feel that the response does not address the main theme of our efforts, which is that court judgements for fly tipping in no way represent an effective deterrent.

We would further suggest that the SC's response appears not to recognise the strength of feeling in this regard as evidenced by the 158 local authorities, numerous waste partnerships and 10 professional bodies that between them represent both the majority of the enforcement capability in this country as well those stakeholders that continue to have to deal with the scourge of fly tipping.

We look forward to your response.

Yours sincerely,

A handwritten signature in black ink, reading "Eric W. Buckmaster". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Cllr Eric Buckmaster  
**Chair – Hertfordshire Waste Partnership**

CC: DEFRA – Under Secretary of State Jo Churchill MP  
DEFRA – National Fly Tipping Prevention Group (Thomas Parrot / Pippa Harper)  
Environment Agency (Peter Kellet / Lee Rawlinson / Simon Hawkins / Alex Chown)  
HM Courts & Tribunals Service (South East) (Suzanne Gadd)  
Keep Britain Tidy (Rachel Scarisbrick)  
London Councils (Katharina Winbeck)  
Magistrates Association (Tom Franklin)  
National Farmers Union (Philippa Arnold / Josh Redford)  
CLA (Tim Woodward)